No. 15-1088

In The
Supreme Court of the United States

REPUBLIC OF ECUADOR,

Petitioner,

v.

CHEVRON CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE THE PLURINATIONAL STATE OF BOLIVIA IN SUPPORT OF PETITIONER

CHRISTOPHE GUIBERT DE BRUET
Counsel of Record
DAVID GUERRA BONIFACIO
TESSA HAYES
LALIVE
Rue de la Mairie 35
P.O. Box 6569
1211 Geneva 6
Switzerland
www.lalive.ch
Tel +41 58 105 2000
Fax +41 58 105 2060
cguibert@lalive.ch

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the D.C. Circuit erred in holding that there is FSIA jurisdiction over this suit to confirm an arbitral award, upon concluding that: (1) federal courts may not independently determine whether there is an agreement to arbitrate, but rather must defer to foreign arbitrators on this core FSIA jurisdictional fact; and (2) the party invoking federal court jurisdiction bears only a burden of production as to the facts supporting jurisdiction, while the foreign State bears the ultimate burden of persuasion as to the absence of those facts.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

This case touches on a significant issue of sovereign immunity, a core part of comity among fellow nations. More than two hundred years ago, this Court held that foreign States acting in their sovereign capacity could not be haled into U.S. court without their consent. *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812). The United States has thus long recognized that foreign States expect and deserve protection of their sovereign status. Countries around the world will surely be watching now to see how this Court responds to the D.C. Circuit's recent attack on sovereign immunity.

With the passage of the Foreign Sovereign Immunities Act (FSIA), the United States took the lead in codifying this longstanding legal principle. Under the FSIA, Congress confirmed that sovereign immunity is the default rule, and placed its safeguarding in the hands of the judiciary. Once a State has shown that it is a foreign sovereign, there can be no jurisdiction unless the plaintiff can prove that one of the nine enumerated statutory exceptions applies. These

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

exceptions set out the limited situations where a State is deemed to have impliedly consented to federal jurisdiction, including where it has consented to arbitration (the "arbitration exception"). 28 U.S.C. § 1605(a).

In *Chevron v. Ecuador*, the D.C. Circuit has practically made the exception the rule, by placing the ultimate burden of *disproving* jurisdiction on the State. At the same time, it essentially delegates the task of determining whether a State waived its immunity by agreeing to arbitrate under an investment treaty to *ad hoc* arbitrators. In so doing, the D.C. Circuit has effectively eroded the protections of the FSIA. Moreover, the D.C. Circuit's flawed analysis is likely to govern similar future cases involving foreign States, since venue is always proper there, 28 U.S.C. § 1391(f)(4), and plaintiffs will undoubtedly appreciate its investor-slanted approach to the FSIA.

Waiver of sovereign immunity in general is not to be taken lightly. Courts are wary of explicit waivers and "even more reluctant to find implied waivers, requiring strong evidence of the foreign state's intent." David P. Stewart, The Foreign Sovereign Immunities Act: A Guide for Judges 41 (Fed. Judicial Ctr. 2013) (citing *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd.*, No. 11 Civ. 0955 (PGG), 2011 WL 6187077, at *14 (S.D.N.Y. Nov. 28, 2011)).

Waiver based on a dispute resolution clause in a bilateral investment treaty (BIT), as here, deserves heightened scrutiny. Investment treaty arbitration raises particularly sensitive foreign-relations issues. First, it is arbitration without privity, meaning that the State does not choose its individual counterparties but rather exposes itself to potential claims from an entire, unknown investor population. Second, when expressing its consent to arbitrate in an investment treaty, the State is acting in its sovereign – not commercial – capacity. The State's exercise of its sovereign authority within its own territory, the very essence of State action, is at issue. As one commentator put it, "we are not speaking here of landlord-tenant disputes or of the removal of a liquor license or the disciplining of a doctor" but of "adjudicative tribunals that can overrule the legislative, judicial, and broad policy choices of the state and then allocate very large amounts of public funds to private interests," with virtually no court oversight of the merits. Gus van Harten, *Perceived Bias in Investment Treaty Arbitration*, in The Backlash Against Investment Arbitration 448 (Michael Waibel, Asha Kaushal, et al. eds., 2010).

Accordingly, where conclusion of an investment treaty is alleged to imply the State's consent to the jurisdiction of U.S. courts, courts should tread particularly carefully in assuring themselves that consent was truly granted.

As a foreign sovereign which has itself experienced overreaching by international arbitral tribunals, the Plurinational State of Bolivia has a significant interest in supporting the request for certiorari to correct the D.C. Circuit's precedent in *Chevron v. Ecuador*.

Bolivia, like many other countries, joined the international investment regime with optimism. Bolivia signed the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1991 and ratified it in 1995. At the same time, Bolivia also bilaterally codified customary international rules on the protection of aliens and their property, concluding 21 BITs and one free trade agreement with investment protection provisions. Under the BITs and subject to the specific conditions established in each, Bolivia consented to arbitrate certain investment disputes with qualified foreign investors of the other contracting party when disputes arose with respect to measures enacted by Bolivia in the exercise of its sovereign powers. Various BITs concluded by Bolivia contained consent to arbitration in similar terms to the jurisdictional basis for the arbitral award rendered in *Chevron v. Ecuador*.

Consent to arbitration in BITs appeared to present limited risks since (1) consent was narrow and investors bore the burden of proving that jurisdiction for each of their claims was certain, unequivocal and indisputable; and (2) Bolivia expected the presumption of sovereign immunity to protect it from being

haled into court for enforcement of awards based on illegitimate claims. Bolivia expected its consent to arbitration in BITs to be narrowly construed, in a manner consistent with the well-established principle of international law that consent "must be certain. [. . .] [W]hatever the basis of consent, the attitude of the respondent State must be 'capable of being regarded as "an unequivocal indication" of the desire of that State to accept the Court's jurisdiction in a "voluntary and indisputable" manner.'" *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, ¶ 62 (June 4) (citations omitted). Thus, investors would have to rebut the presumption of Bolivia's immunity, as "there is no presumption of jurisdiction – particularly where a sovereign State is involved [. . .] jurisdiction [. . .] exists only insofar as consent thereto has been given by the Parties." *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, ¶ 63 (April 14, 1988), 3 ICSID Rep. 131 (1995).

Bolivia quickly found, however, that it could not rely on arbitral tribunals to respect these principles. In Bolivia's very first BIT arbitration, an ICSID tribunal improperly confirmed jurisdiction where, long after the dispute had arisen, the claimant abusively effected a corporate reorganization to obtain protection under the Netherlands-Bolivia BIT. *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (October 21, 2005), 20 ICSID Rev. – FILJ 450 (2005).

As a result of such jurisdictional abuses, Bolivia was left with no choice but to respond to these attacks on its sovereignty by denouncing the ICSID Convention (in 2007) and terminating its investment treaties. Over the years, Bolivia has continued to defend investment claims brought by alleged foreign investors under its BITs in a total of twelve arbitrations, some of which are still ongoing.

In spite of its negative experiences with the BIT arbitration regime, Bolivia remains committed to the resolution of investor-state disputes, provided that the adjudicatory mechanism operates fairly and the defined scope of jurisdiction is properly respected. To that end, Bolivia is actively involved in the project of developing an alternative investor-state dispute resolution forum within the Union of South American Nations (UNASUR).

Although Bolivia has terminated its BITs, the actions of unchecked tribunals – and resulting enforcement proceedings – remain a topic of concern. The D.C. Circuit precedent may be followed in subsequent enforcement proceedings of awards rendered in Bolivia's pending BIT arbitrations, as well as in possible future arbitrations. Some commentary has suggested that consent to arbitration under BITs may remain in force despite termination of the BITs,[2] so it is not

[2] See Nigel Blackaby, Constantine Partasides, Alan Redfern, and J. Martin Hunter, Redfern and Hunter on International Arbitration ¶ 8.16 n.37 (6th ed. 2015).

impossible that Bolivia will find itself before a new tribunal that accepts jurisdiction in spite of the treaty denunciations. Since arbitral tribunals under BITs have ignored the limits of its consent to arbitration, Bolivia relies on domestic courts of foreign States to make an independent determination as to whether exercise of jurisdiction over Bolivia, as a sovereign, is justified in the context of enforcement proceedings. This added protection has served as a safety net for sovereigns – until now. In undermining this safety net, the D.C. Circuit has given sovereigns cause for even greater concern about the unchecked dominion of arbitrators. Bolivia is therefore troubled by the practical implications of the precedent set by the D.C. Circuit in *Chevron v. Ecuador*.

By shifting to the foreign sovereign the burden of proving its non-consent to arbitration, the D.C. Circuit effectively neuters the FSIA by rendering it impossible for a sovereign like Bolivia to invoke its foreign sovereign immunity in the courts of the United States as a defense against the enforcement of arbitral awards rendered under one of its BITs. The extremely low standard of evidence required by the D.C. Circuit to shift the burden of proof to the foreign sovereign is alarming for Bolivia and any other State that has consented to arbitration in BITs, as there continue to exist cases of highly questionable assertions of jurisdiction by arbitral tribunals operating under BITs. Among other examples, in 2013 one arbitral tribunal established under the ICSID Convention rejected Bolivia's objection that an energy

sector investor's claims against Bolivia were manifestly without legal merit,[3] despite the fact that they were filed in 2010 – three years after Bolivia's valid denunciation of the ICSID Convention under Article 71 of the treaty.[4]

Bolivia's interest in supporting the request for certiorari to correct the D.C. Circuit's interpretation of 28 U.S.C. § 1605(a)(6) mirrors that of many other States worldwide who are increasingly concerned about the erosion of their sovereignty brought about by the disregard of the limits of their consent to arbitration under BITs. At present, more than 120 States are believed to be defending or have defended claims of investors under a BIT or other investment treaties.[5] The D.C. Circuit's decision in *Chevron v.*

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[3] Unpublished decision; see Luke Eric Peterson, *Arbitrators Reject Bolivian Objection That Pan-American's Claims are Manifestly Without Legal Merit; Effects of ICSID Denunciation at Issue in Case*, Investment Arbitration Reporter (April 30, 2013), available at http://www.iareporter.com/articles/arbitrators-reject-bolivian-objection-that-pan-americans-claims-are-manifestly-without-legal-merit-effects-of-icsid-denunciation-at-issue-in-case/.

[4] The effectiveness of Bolivia's denunciation of ICSID in 2007 is acknowledged by ICSID itself. See International Centre for the Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of November 17, 2015), footnote at 4, available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

[5] See United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub, Investment Dispute

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Ecuador affects all States that have concluded BITs and may thereby be subject to recognition or enforcement of arbitral awards before the courts of the United States. The widespread nature of investment treaty provisions like that underlying the *Chevron* dispute weighs in favor of certiorari, as questions of treaty interpretation are "clearly of widespread importance" where "treaty provisions similar to [the provisions being litigated] are in effect with many other countries." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 182 n.7 (1982).

Bolivia is far from alone in its concerns about the jurisdictional excesses of investment treaty tribunals. In Europe, the Czech Republic has terminated twelve BITs,[6] while Italy has also terminated several BITs[7]

Settlement Navigator, available at http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry.

[6] Friedl Weiss and Silke Steiner, *The Investment Regime Under Article 207 of the TFEU – a Legal Conundrum: the Scope of 'Foreign Direct Investment' and the Future of Intra-EU BITs*, in Investment Law Within International Law: Integrationist Perspectives 372 (Freya Baetens ed., 2013); see also, list of Czech Republic's BITs and corresponding statuses, UNCTAD Investment Policy Hub, International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/55.

[7] Karsten Nowrot, *Termination and Renegotiation of International Investment Agreements*, in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified 236 (Steffen Hindelang and Markus Krajewski eds., 2016); see also, list of Italy's BITs and corresponding statuses, UNCTAD Investment Policy Hub, International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/103.

and gave formal notice in 2015 of its intention to withdraw from the Energy Charter Treaty (ECT), one of the most significant multilateral investment treaties worldwide.[8] Prior to this, Russia terminated its provisional application of the ECT in 2009.[9] Additionally, the European Commission has initiated a process of dismantling the network of BITs between members of the European Union,[10] as well as working on instituting a permanent investment court, instead of including consent to the establishment of *ad hoc* investment arbitration tribunals in disputes between non-European investors and European States in the negotiation of new BITs and other investment agreements.[11] In Africa, South Africa has terminated its BITs with some dozen European States.[12] In Oceania, Australia announced in 2011 that it would no longer pursue inclusion of investor-state arbitration provisions in future international economic agreements.[13] In Asia, Indonesia announced in 2014 that it would terminate one BIT and likely implement a scheme of terminating all of its remaining BITs as they

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[8] UNCTAD World Investment Report 2015 108-109, available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

[9] Jeswald W. Salacuse, The Law of Investment Treaties 20 (2d ed. 2015).

[10] Johan Billiet, International Investment Arbitration: A Practical Handbook 77 (2016).

[11] UNCTAD World Investment Report 2015 at 107.

[12] Salacuse at 391.

[13] Maninder Malli, *Minilateral Treaty-Making in International Investment Law*, in Yearbook on International Investment Law & Policy, 2013-2014 527 (Andrea K. Bjorklund ed., 2015).

become due to expire.[14] In Latin America, Bolivia's denunciation of the ICSID Convention in May 2007 was followed by similar denunciations by Ecuador in 2009 and Venezuela in 2012,[15] and Venezuela, Ecuador, Nicaragua, and El Salvador have each terminated several BITs over the past few years.[16]

The state of the law of sovereign immunity in a major jurisdiction like the United States may well affect foreign sovereigns' policies with respect to the renegotiation or termination of BITs providing for arbitration of investment disputes. A great number of States will be closely following U.S. case law developments with regard to sovereign immunity. The *Chevron v. Ecuador* decision therefore carries substantial significance in terms of international relations and foreign policy.

[14] Leon E. Trakman and Kunal Sharma, *Jumping Back and Forth Between Domestic Courts and ISDS: Mixed Signals from the Asia-Pacific Region*, in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified 317 (Steffen Hindelang and Markus Krajewski eds., 2016).

[15] List of Contracting States and Other Signatories of the Convention (as of November 17, 2015), footnote at 4-5.

[16] Lars Markert and Catharine Titi, *States Strike Back – Old and New Ways for Host States to Defend Against Investment Arbitrations*, in Yearbook on International Investment Law & Policy, 2013-2014 428 (Andrea K. Bjorklund ed., 2015); Salacuse at 390-391.

ARGUMENT

The Supreme Court should grant certiorari to settle the question of who bears the ultimate burden of proof as to jurisdictional facts under the FSIA, and what is the proper standard for establishing the arbitration exception under the FSIA in the context of investment treaty arbitration.

Waivers of sovereign immunity should be strictly construed, and the onus should not be placed on the sovereign to prove that it did not agree to arbitrate an investor's claims. Moreover, waiver of sovereign immunity through arbitration is a jurisdictional issue under the FSIA and thus is ultimately a matter that is for the courts, not for arbitrators, to determine.

1. In placing the onus on the State to show that the arbitration exception does *not* apply, the D.C. Circuit opens the court doors to opportunistic investors

The D.C. Circuit erred dangerously in holding that "'the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence.'" Pet. at 7a (citation omitted). When every investor who shows up with a treaty and an award in hand is presumed to be entitled to the benefit of both, and it is the State's responsibility to prove that it has not agreed to arbitrate, the arbitration exception risks swallowing the rule of sovereign immunity.

The allocation of the burden of persuasion is of substantial importance: it is often likely to be outcome-determinative. Certainly, here, the D.C. Circuit created a virtually unrebuttable presumption against sovereign immunity, finding that Ecuador could not meet its burden since it "[did] not dispute the existence of the BIT, Chevron's notice, or the tribunal's arbitration decision." *Id*. This standard vitiates the court's gatekeeping function by presuming the presence of jurisdiction, regardless of whether or not the investor commenced the arbitration in accordance with the consent to arbitrate: under this standard, the court simply does not analyze that threshold question at all. *Chevron v. Ecuador* thus permits a nightmare scenario for a State, in which an overreaching tribunal improperly asserts jurisdiction and issues an award, and the very existence of that illegitimate award automatically opens the doors to U.S. courthouses.

It is undisputed that sovereigns are to enjoy a presumption in favor of sovereign immunity under the FSIA. See, e.g., *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Yet in *Chevron v. Ecuador* the D.C. Circuit has created a presumption in favor of an *exception* to sovereign immunity.

The notion that the foreign State should bear the ultimate burden of persuasion as to jurisdiction is also incompatible with this Court's more general holdings that the burden lies with the party seeking

to establish federal jurisdiction. See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

Burden-shifting is inappropriate with regard to any of the FSIA exceptions, but nowhere is the impropriety more evident than in the context of the arbitration exception. Particularly in investment-treaty arbitration, where States expose themselves extraordinarily to claims from a defined but unknown class of foreign investors, generally in relation to the exercise of sovereign prerogatives to act in the interests of their people, it is imperative to proceed with caution in lifting immunity on the basis of alleged agreements to arbitrate. Investor-state arbitration is extraordinary in terms of "both [. . .] procedure and substance": "'[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation' whose 'uniqueness and power should not be over-looked.'" *BG Group, PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1220 (2014) (Roberts, C.J., dissenting) (citation omitted).

Courts across the globe will exercise jurisdiction over States only under narrow circumstances, and only if there is an express waiver of sovereign immunity. This is reflected in the codification of the law in the United Nations Convention on Jurisdictional Immunities of States and Their Property, which requires "[e]xpress consent to exercise of jurisdiction" (Article 7). As explained by the United

Nations International Law Commission in its commentary to the predecessor of Article 7:

> Consent, the absence of which has thus become an essential element of State immunity, is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or from impleading another sovereign Government is based on the assertion or presumption that such exercise is without consent. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction.
>
> [. . .]
>
> There is [ ] no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner.[17]

Reflective of this consensus, U.S. courts likewise have found that waivers of sovereign immunity must be narrowly construed. See *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."); *Block v.*

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[17] International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, commentary to Article 7 at ¶¶ 4, 8.

North Dakota ex rel. Bd. of University and School Lands, 461 U.S. 273, 287 (1983) ("when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied"). This principle is particularly potent in the investment-treaty arbitration context, where standing consents to arbitrate disputes leave a State vulnerable to unfounded suits by opportunistic investors. Given that the State's consent to arbitrate is subject to compliance with the terms and conditions of the treaty, the investor must always bear the burden of establishing that its claims fall within the scope of the State's consent. Creating a presumption against sovereign immunity by requiring the sovereign to disprove waiver, as the D.C. Circuit has done, is plainly at odds with the principle of narrow construction of exceptions to immunity.

Certiorari is thus merited to clarify that the burden of persuasion must remain with the party seeking to establish jurisdiction under the FSIA's arbitration exception to sovereign immunity.

2. The D.C. Circuit's decision jeopardizes the integrity of the FSIA by improperly delegating the question of sovereign immunity to arbitrators

The D.C. Circuit also set a troubling precedent in holding that a *de novo* review is not necessary under the FSIA. Instead of establishing a rule requiring an

independent examination of whether the foreign State has truly consented in its BIT to arbitrate the claims at issue, the D.C. Circuit held that courts should instead rely on the arbitral tribunal's decision. The court uncritically embraced a strained reading of the Ecuador-U.S. BIT which, contravening the presumption against retroactivity of the law,[18] treated as "investments" lawsuits arising out of an investment that had been terminated years before the treaty took effect.

In holding that federal courts should defer to the tribunal's jurisdictional findings for purposes of the FSIA, the D.C. Circuit effectively ceded the "very delicate and important inquiry"[19] into sovereign immunity to the arbitral tribunal. Waiver of sovereign immunity is simply too important for courts to adopt the conclusion of the arbitrators as to jurisdiction.

One of the key features of the FSIA was that it took responsibility for determining sovereign immunity out of the hands of the State Department and conferred it solely upon the judiciary. Stewart, The Foreign Sovereign Immunities Act: A Guide for Judges at 5. It cannot have been Congress's intention for that responsibility to land instead with *ad hoc* arbitral tribunals, who have no responsibility under U.S. law to interpret or apply the FSIA.

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[18] *Landgraf v. USI Film Prods*., 511 U.S. 244, 264 (1994).

[19] *Schooner Exchange*, 11 U.S. at 135.

Even in the separate context of enforcement of arbitration agreements and awards where the FSIA is not implicated, this Court has consistently held that substantive questions of arbitrability – *whether*, as opposed to *when*, parties agreed to arbitrate particular claims – are presumptively for courts, not arbitrators, unless the parties have clearly agreed otherwise. *BG Group*, 134 S. Ct. at 1207 (2014). Ecuador's objection to arbitral jurisdiction – that Chevron's lawsuits did not meet the criteria of Ecuador's consent to arbitrate in the BIT – went right to the substance of consent. If parties presumptively expect the courts to determine substantive issues of arbitrability *de novo* for purposes of arbitral jurisdiction, then *a fortiori* sovereign States would presumptively expect the courts to determine substantive issues of arbitrability *de novo* for purposes of sovereign immunity under the FSIA.

Moreover, even if reference to the UNCITRAL Rules in a BIT is considered to constitute clear and unmistakable evidence that the parties agreed that the tribunal would decide questions of *arbitral jurisdiction* for purposes of the New York Convention, Pet. at 13a-14a, it emphatically does not show that the parties agreed to have the tribunal decide questions of *sovereign immunity* under the FSIA. As the D.C. Circuit correctly noted, the analyses under the New York Convention and the FSIA are not to be conflated. *Id*. at 8a.

De novo review by the court is also consistent with the principle that exceptions to sovereign immunity are to be narrowly construed. *Lane*, 518 U.S.

at 192; *Block*, 461 U.S. at 287. Arbitrators who are appointed *ad hoc* for each individual case cannot be trusted to always interpret such exceptions with the necessary prudence and reserve, particularly in the context of investment-treaty arbitration, where the arbitrators are often not trained in U.S. law, are not experienced in adjudicating FSIA disputes, and indeed are not mandated by the parties to do so. It is the courts' job to make sure that the arbitration exception remains just that: an exception.

Ad hoc arbitral tribunals must not have the last word as to sovereign immunity. A *de novo* jurisdictional review of the arbitral agreement by the court is required to ensure that the court exercises personal jurisdiction over a foreign sovereign only within the strict limits set out by the FSIA, and to meet the expectations of protection that allowed foreign States to feel secure in entering investment treaties in the first place.

3. The D.C. Circuit's decision has significant implications for U.S. foreign relations

The D.C. Circuit's decision has significant implications for the foreign relations of the United States in the context of investment-treaty arbitration. This Court has acknowledged that the "reciprocal observance of [a treaty], protecting relations with foreign governments, and demonstrating commitment to the role of international law" constitute "plainly compelling interests." *Medellin v. Texas*, 552 U.S. 491, 524

(2008). Such are the interests at play in Ecuador's application for certiorari.

A cavalier approach to foreign sovereign immunity conflicts with international practice favoring a strong presumption of immunity and endangers relations with foreign States that may find themselves improperly haled into U.S. courts. "Actions against foreign sovereigns in [U.S.] courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), as fellow sovereigns are not likely to take kindly to encroachments on their sovereign immunity under the FSIA.

At the same time, the D.C. Circuit's decision risks eroding the United States' own sovereign immunity abroad. The United States has defended, and is currently defending, several claims under investment agreements (in particular under the chapter on investment of the North American Free Trade Agreement),[20] and the United States may wish to rely on sovereign immunity in the context of recognition and enforcement of arbitral awards under those agreements in the courts of foreign States.

Under customary international law, the United States is entitled to expect to benefit from a presumption of immunity before foreign courts, despite the

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[20] See U.S. Department of State list of Cases Filed Against the United States of America, available at http://www.state.gov/s/l/c3741.htm.

conclusion of arbitration agreements in its BITs or other investment treaties. Customary international law on sovereign immunity does not provide for an exception to the rule of immunity in the conclusion of arbitration agreements in a sovereign capacity. An exception exists only for disputes relating to commercial transactions, as recognized in the codification of the relevant rules in the United Nations Convention on Jurisdictional Immunities of States and their Property (Article 17) and previously in the predecessor provision in the Articles on Jurisdictional Immunities of States and Their Property (Article 17), both prepared by the United Nations' International Law Commission:

> *Submission of an investment dispute* to ICSID arbitration, for instance, is not submission to the kind of commercial arbitration envisaged in this draft article *and can in no circumstances be interpreted as a waiver of immunity from the jurisdiction of a court* which is otherwise competent to exercise supervisory jurisdiction in connection with a commercial arbitration.[21]

Furthermore, there is no support under international law for the D.C. Circuit's decision to shift the burden of proof to the foreign sovereign upon nothing more than *prima facie* evidence of an arbitration

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[21] International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, commentary to Article 17 at ¶ 8 (emphasis added).

agreement. Even under the customary international law exception for arbitration involving commercial transactions, there is no basis for shifting the burden to the State.

Yet if foreign courts were to apply the D.C. Circuit's holding as a matter of reciprocity, the United States might well find itself uncomfortably vulnerable to suits abroad. This Court has an interest in ensuring that foreign States respect customary international law on sovereign immunity on the basis of reciprocity with the United States.

CONCLUSION

The D.C. Circuit's decision in *Chevron v. Ecuador* turns the FSIA as a whole, and the arbitration exception in particular, on its head. *Chevron*'s reversal of the burden of proof and deference to arbitral tribunals on the key issue of consent threaten to undermine the sovereign immunity of the many States that have signed investment treaties.

The Supreme Court has never addressed the arbitration exception to the FSIA. Now is the time: the compelling issues of foreign relations at play here merit the Court's attention. The Court should grant certiorari to correct the D.C. Circuit's precedent and protect the sovereign status of fellow nations, as

well as the United States' own sovereign immunity abroad.

Respectfully submitted,

CHRISTOPHE GUIBERT DE BRUET
Counsel of Record
DAVID GUERRA BONIFACIO
TESSA HAYES
LALIVE
Rue de la Mairie 35
P.O. Box 6569
1211 Geneva 6
Switzerland
www.lalive.ch
tel +41 58 105 2000
Fax +41 58 105 2060
cguibert@lalive.ch