UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THAI-LAO LIGNITE (THAILAND) CO., LTD. & HONGSA LIGNITE (LAO PDR) CO., LTD.,

Petitioners,

-against-

GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC ,

Respondent.

---

10 Civ. 5256 (KMW)

OPINION and ORDER

KIMBA M. WOOD, U.S.D.J.:

Thai-Lao Lignite (Thailand) Co., Ltd. ("TLL"), a company organized under the laws of Thailand, and Hongsa Lignite (LAO PDR) Co., Ltd., ("HLL"), a company organized under the laws of the Lao People's Democratic Republic ("Laos") (collectively, "Petitioners"), move for confirmation of an arbitral award (the "Award") issued in Kuala Lumpur, Malaysia, pursuant to the United Nations Convention on the Recognition of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (the "Convention"), as implemented by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 *et seq*. The government of Laos ("Respondent") opposes confirmation, and moves to dismiss the petition on three separate grounds: (1) for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure; (2) under the doctrine of *forum non conveniens*, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and Article III of the Convention; and (3) because the arbitration panel exceeded its jurisdiction.

For the reasons that follow, Respondent's motion to dismiss is DENIED. Petitioners' petition to confirm the Award is GRANTED.

I. Background[1]

A. The Parties

Petitioner TLL is a limited company organized under the laws of Thailand in 1990 "for the purpose of investing in and operating mining and power generation projects." (Memorandum of Law in Support of Respondent's Motion to Dismiss and Objection to Enforcement (hereinafter "Resp. Mem."), Ex. A (hereinafter "Award") ¶ 1.) Its principal and Chief Executive Officer is Mr. Siva Nganthavee ("Mr. Siva"), a Thai national.

Petitioner HLL is a limited company organized under the laws of Laos in 1992 by TLL. TLL owns a 75% interest in HLL. The remaining 25% of HLL is owned by the Agriculture Forestry and Import-Export Development Co., Ltd. of Laos ("AFIED"), an entity owned by the government of Laos.

Respondent is the government of the Laos, a sovereign nation.

B. The Mining Contracts

This case concerns a dispute between TLL, HLL and Respondent arising out of a Project Development Agreement (the "PDA"), signed on July 22, 1994, by TLL and Respondent. The PDA granted TLL the "exclusive mandate and rights" to implement a project to locate and mine lignite coal reserves in the Hongsa region of Laos, and to operate lignite-fired electricity generation plants adjacent to the mines, for sale of electricity to Thailand (the "Hongsa Project"). (Resp. Mem., Ex. B (hereinafter "PDA"), art. 2.2.)

Approximately two years before the PDA was signed, TLL entered into an agreement with Respondent entitled "Agreement of Lignite Survey and Mining in Hongsa District, Udomchai Subdistrict, People's Democratic Republic of Laos" (the "First Mining Contract"),

[1] The following facts are drawn from the parties' respective submissions, including the various agreements at issue, and the Award itself. They are undisputed unless otherwise noted.

which granted TLL the right to conduct lignite survey and mining operations in a 20-square kilometer area in the Hongsa region. The First Mining Contract also required TLL to form another company as a joint enterprise with AFIED, "[i]n order to perform the target and objectives" of the First Mining Contract. TLL formed that company, HLL, in 1992. (Award ¶ 10.) In July 1993, TLL and Respondent entered into an additional agreement that expanded the project area from 20 square kilometers to 60 square kilometers, and that authorized TLL to proceed with feasibility studies for the construction of a lignite-fired power station within the concession area (the "Second Mining Contract"). During these two years, TLL and HLL invested millions of dollars performing geological surveys, purchasing mining equipment and building a road through Thailand and Laos to the mining sites.

The Mining Contracts were governed by Lao law and contained a dispute resolution clause providing that any dispute that could not be settled "shall be preferred [sic] to the Laotian Board of Economic Conciliation or Laotian Court or International Economic Dispute Settlement Organization." (Resp. Mem., Ex. C, First Mining Contract, art. 31.)

During this same time period, Respondent and the government of Thailand were in negotiations for Respondent to sell electrical power to the Electricity Generating Authority of Thailand ("EGAT"), a Thai government agency. In June of 1993 the Respondent and the Thai government entered into a memorandum of understanding pursuant to which approximately a half dozen new Lao power plants would supply electricity to Thailand by selling power to EGAT.

C. The Project Development Agreement

During negotiations for the Second Mining Contract, the parties discussed the need for a comprehensive project development agreement "that would form the integrated basis for

developing the Hongsa site" to mine lignite, and build power plants for the sale of electrical power to EGAT. (Award ¶ 12.) The PDA was negotiated in Laos over nearly eighteen months, from March 1993 until it was signed on July 22, 1994. The PDA granted TLL "an exclusive mandate and rights to implement the Project in accordance with the terms and conditions of this Agreement." (PDA, art. 2.2.) The "Project" was defined as "the development, design, engineering, procurement, financing, construction, completion, insurance, ownership, operation, maintenance, and transfer" of the power plants "and all associated equipment, buildings, and Infrastructure necessary for the ownership, operation and maintenance" of the plants. (*Id.* at 3-4.)

The PDA stated that TLL was to organize an additional company, Thai-Lao Power Co., Ltd. ("TLP"), under Lao law, to implement the PDA and to be the operating company for the Hongsa project. The PDA also stated that the PDA itself was to be assigned by TLL to TLP. The parties agree that this assignment did not take place.

The PDA referenced the two Mining Contracts as "Prior Contracts," and stated that the agreement

> contains the entire agreement between the parties concerning the subject matter hereof, except that both parties acknowledge the existence, and continuing validity of, the Prior Contracts. The rights and benefits of TLL contained in this Agreement may not be limited in any way by any statement made in the Prior Contracts, which are intended to be with [HLL], but may be broadened or made more extensive by the Prior Contracts . . . .

(PDA, art. 19.11.) The PDA further stated that

> [t]he Parties intend that neither this Agreement nor the Prior Contracts shall detract from the other but rather that they reflect two separate but related projects; this Agreement and the Prior contracts should be read and construed so as to maximize the rights and benefits to TLL or [HLL] as the case may be and not to subtract from them in any way. On the other hand, regardless of whether or not this Project is determined to be feasible, or subject to force majeure, termination,

> default, or any other event, happening, or contingency, [HLL's] rights and benefits under the Prior Contracts shall remain intact.

(PDA, art. 19.13.)

The PDA states that it is to be governed by New York law, except that select provisions not relevant here were to be interpreted under Lao law. (*See* PDA, art. 18.1.)

The PDA contained an arbitration clause providing, in relevant part:

> In the event that a dispute arises out of this Agreement including any matter relating to the interpretation of this Agreement, each party shall use its best efforts to settle the dispute amicably through consultation in good faith with the other party or, if both parties agree, through ad hoc non-binding mediation in the Lao People's Democratic Republic to be structured by the parties in order to provide a framework for the Government [Respondent] and TLL to attempt to arrive at a settlement which is acceptable to both of them. Whether amicable consultations, ad hoc non-binding mediation, or neither is used by the parties, if no settlement is reached within thirty days of the date on which such dispute first arises, then either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules; provided, that, this clause shall not be construed to prevent any party from bringing any action in a court of competent jurisdiction for injunctive or other provisional relief.

(PDA, art. 14.1(i).)

> Any award or determination of the arbitral panel shall be final, nonappealable, binding, and conclusive upon the parties, and judgment may be entered in any court of competent jurisdiction. The parties waive to the extent permitted by law any rights to appeal or any review of such award by any court or tribunal of competent jurisdiction.

(PDA, art. 14.1(vi).)

The PDA also contained a termination clause that outlined the remedies available if a party breached or terminated the agreement:

> [I]n the event that either party is in default under this Agreement after having been given notice by the other party and a reasonable opportunity to cure pursuant to Article 13 hereof, if the non-defaulting party wishes to terminate this agreement, it may do so upon the approval of the arbitration panel constituted in accordance with Article 14 hereof.

> In the event of termination of this Agreement compensation shall be paid to TLL or the Government [Respondent], as the case may be, as determined by the arbitration panel constituted in accordance with Article 13 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of a default on the part of the Government [Respondent].

(PDA, art. 15.1.)

D. Operation of the PDA

Between 1994 and 1997, TLL and HLL commissioned a number of studies for the development of the Hongsa Project, performed further road construction, and discussed financing arrangements with various parties. Petitioners provided the funds for these activities from their own resources, and from related entities, chiefly a company called South East Asia Power Co. Ltd. ("SEAP"). SEAP, like TLL, was a Thai company wholly owned by Mr. Siva, which he had formed to raise funds for the Hongsa Project.

In September 1995, TLP and EGAT executed a memorandum of understanding for the purchase of electrical power by EGAT from Hongsa Project power plants. On December 18, 1997, TLP and EGAT initialed a Power Purchase Agreement, which remained subject to the final approval of governmental entities in Thailand and Laos. However, beginning in mid-1997 and continuing through 2000, a financial crisis in Asia severely affected the Thai economy, and as a result, the Thai government suspended further arrangements for the purchase of electrical power from Respondent, and did not complete the agreement to purchase electrical power from TLP.

Nevertheless, in the ensuing seven years, Petitioners continued to fund various aspects of the Hongsa Project. Petitioners asserted at the arbitration that Respondent "gave only faint-hearted support for the Hongsa Project in its communications with the Government of Thailand

during this period . . . ." (Award ¶ 23.) Petitioners alleged that Respondent favored other electricity generation projects in which Respondent had a greater economic interest. *Id.*

As the financial crisis waned, Petitioners began to seek a joint venture partner to help with the financing of the Hongsa Project. In January 2005, SEAP signed a preliminary joint development agreement with Banpu Public Co., Ltd. ("Banpu"), Thailand's largest private energy company. The same parties executed a final Joint Development agreement on April 5, 2005. However, Petitioners' relationship with Banpu eventually soured, and, on July 18, 2006, an attorney for Petitioners and Mr. Siva sent Banpu a notice of termination of the agreement.

Respondent states that "EGAT and [Respondent] were stunned by Mr. Siva's termination of [the] Banpu [agreement]." (Resp. Mem. at 4.) Respondent sent a letter to Mr. Siva expressing displeasure with this turn of events, and called a meeting of all of the parties in Vientiane, Laos. At that meeting, Petitioners stated that they were planning to replace Banpu with Castlepines Finance Pty. Limited ("Castlepines"), an Australian company with whom they had signed a memorandum of understanding two days after the termination of the Banpu agreement.

Respondent remained unsatisfied with this state of affairs, and, on September 4, 2006, sent Petitioners a Notice of Default, demanding that four alleged breaches of the PDA be cured within thirty days; the alleged breaches were failure to produce certain studies and execute certain necessary agreements in connection with the Hongsa Project. Petitioners replied by letter on October 2, 2006, stating that they disagreed with the allegations of default. On the same date, Petitioners wrote to Banpu, stating that they were willing to withdraw the notice of termination. On October 5, 2006, Banpu wrote to Petitioners to reject their overtures, deeming the situation irreconcilable. On that same day, Respondent sent Petitioners a Notice of Termination of the

PDA. On October 11, 2006, Respondent sent Petitioners Notices of Termination of the First and Second Mining Contracts.

E. The Arbitration

On July 26, 2007, Petitioners initiated arbitration in Kuala Lumpur, Malaysia under Article 14 of the PDA. Each side agreed to choose one arbitrator, and to have the two arbitrators select the Chairman. The parties also agreed that the International Chamber of Commerce Court of International Arbitration ("ICC") would replace the Kuala Lumpur Regional Centre for Arbitration as Appointing Authority. The arbitration panel (the "Panel") consisted of three attorneys from law firms in the United States: one from Sullivan & Cromwell LLP, in New York; one from Cravath, Swaine & Moore LLP, in New York; and one from Skadden, Arps, Slate, Meagher & Flom LLP, in Washington, D.C.

An initial conference was held in New York on May 27, 2008, at which time the parties agreed on a schedule for the proceedings. On June 26, 2008, Petitioners filed their Statement of Claim, and on August 29, 2008, Respondent filed their Statement of Defense.[2] An additional procedural conference was held in New York on October 3, 2008. After the parties submitted further briefing during late 2008 and early 2009, the arbitration hearing itself was held on July 13-17, 2009 in Kuala Lumpur, Malaysia. Both sides called witnesses who testified in writing and were subject to oral examination.

The Panel issued its decision on November 4, 2009.

[2] Along with their Statement of Claim, Petitioners also filed a Petition for Interim Relief, seeking an order directing that no transfer of rights in the Hongsa Project be made, and that the PDA remained in effect because Respondent had not complied with the procedures for termination set forth in the PDA. On October 3, 2008, the Panel ruled that it had taken the preliminary view that the PDA had not yet been terminated, but otherwise denied the Petition for Interim Relief. (Award ¶¶ 43-47.) That ruling is not at issue in this action.

F. Parties' Arguments and the Panel's Conclusions

The following two determinations made by the Panel are at issue in this action: (1) the Panel's determination that Petitioners had standing to bring the claims in the arbitration; and (2) the Panel's determination of the damages owed to Petitioner.

1. Standing

Petitioner TLL claimed that it was a party to the PDA; HLL claimed that it was a third party beneficiary of the PDA. Petitioners contended that Respondent violated the PDA by improperly seeking to terminate it without cause, and without following the procedures for termination outlined in the agreement.

At the arbitration, Respondent contended that neither TLL nor HLL had standing to bring the claim. TLL lacked standing, according to Respondent, because under the PDA, "all of TLL's mineral and exploration and other incidental or related rights contained" in the PDA "[had] been fully vested in [HLL]," and that all other rights granted to TLL under the PDA were supposed to have been assigned to TLP. (Award ¶ 59.) Respondent argued that HLL, in turn, lacked standing because it was not a signatory to the PDA.

Petitioners argued that Respondent had waived any objection to their standing to assert rights under the PDA "by dealing with them consistently as the proper parties to that Agreement for a dozen years," and "treat[ing] them, together with TLP and SEAP as the 'Companies'" under the Banpu agreement, which Respondent approved, without distinguishing between the different entities within the group of companies controlled by Mr. Siva. (*Id.* ¶ 64.)

The Panel concluded that both TLL and HLL had standing to bring the claims under the PDA because TLL was a signatory to the PDA, and HLL was an "intended beneficiary" of the PDA. (*Id.* ¶ 65.)

2. Damages

Petitioners claimed that Respondent breached the PDA by terminating the agreement without cause and without following the necessary procedures for doing so. Petitioners also claimed that any inactivity on their part in implementing the Hongsa Project was due to a lack of governmental support from Respondent.

The Panel concluded that Respondent had breached the PDA by improperly terminating it, and thus that Petitioners were entitled, under the PDA, to damages, including "TLL's total investment cost plus a premium and consideration of the Lenders and Investors." (PDA, art. 15.1.) The parties disputed the meaning of these terms, and how the damages should be calculated.

Petitioners argued that "total investment cost" included both out-of-pocket costs and interest and financing costs. Petitioners submitted expert testimony stating that these costs totaled $179 million. Of that total, roughly $135 million consisted of interest and financing costs. Petitioners also argued that the "premium" was intended by the parties to mean the lost profits of the Hongsa Project. Petitioners' expert calculated the present value of the Hongsa Project as between $153.5 million and $387 million, depending upon the assumed power generating capacity of the plants.

Respondent argued that including both Petitioners' actual costs and its lost profits in the damages calculation amounted to "double counting," because Petitioners would obtain both reliance damages and expectation damages. Respondent submitted expert testimony that calculated the costs, based on the records submitted by Petitioners, to be $23.2 million "paid by Claimants or their affiliates to non-affiliated entities for the benefit of the Hongsa Project." (Award ¶ 101.)

The Panel also considered two other pieces of evidence related to Petitioners' costs: First, the Banpu agreement stated that the "existing rights and assets contributed to the Hongsa Project by TLL, HLL and TLP" as of 2005 were "deemed to be in the amount of U.S. $50 million." (*Id.* ¶ 102.) Second, the Castlepines memorandum of understanding states that the "existing sunk costs" of the Hongsa Project as of 2006 were $40 million. (*Id.* ¶ 103.)

The Panel applied New York State legal principles of contract interpretation to determine that "total investment costs" meant "the total amount of money that Claimants together, on behalf of TLL, reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance or in performance up until the date of breach." (*Id.* ¶ 114.) The Panel concluded that "total investment costs" did not include interest and financing costs. The Panel agreed with Respondent that "premium" did not mean "lost profits," and concluded that the term meant an "an allowance for a reasonable return on [Petitioners'] total investment costs to be set by the arbitration panel in its judgment." (*Id.* ¶ 127.) Finally, the Panel concluded that the terms "consideration of the lenders and investors" "do not add anything to the appropriate total compensation in the circumstances of this case." (*Id.* ¶ 129.)

Examining the evidence in the record, the Panel concluded that the total investment cost was $40 million, which was the amount quoted in the Castlepines Memorandum of Understanding as the sunk costs in the Hongsa Project to that point. This amount was close to the amount calculated by Petitioners' expert (less the interest and financing costs). The Panel set the premium at 10% of the investment costs, or $4 million. The Panel also concluded that Petitioners were entitled to pre-and post-award interest in the amount of $12,210,000. Thus, the total damages award that Petitioners seek to confirm is $56,210,000.

B. Procedural History

Petitioners initially filed their petition to confirm the Award in the Supreme Court of the State of New York, New York County, Commercial Division on June 8, 2010. Respondent removed the case to this Court on July 9, 2010.

On October 1, 2010, Respondent filed the instant Motion to Dismiss. Respondent also initially moved for a stay of the proceedings pursuant to Article VI of the Convention, pending the resolution of a motion to set aside the award in the courts of Kuala Lumpur, Malaysia. On October 13, 2010, Respondent withdrew the portion of its motion that sought a stay.

II. Respondent's Motion to Dismiss

Respondent moves to dismiss the petition on three grounds: (1) for lack of personal jurisdiction; (2) under the doctrine of *forum non conveniens*; and (3) because the Panel exceeded its jurisdiction. For the reasons that follow, Respondent's motion to dismiss is DENIED.

A. Personal Jurisdiction

Respondent's motion to dismiss for lack of personal jurisdiction is DENIED.

The Court has jurisdiction over Respondent and this case under 28 U.S.C. § 1330. The Court has subject matter jurisdiction pursuant to § 1330(a), which provides that

> [t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330.

There is no dispute that Respondent is a "foreign state" as defined in 28 U.S.C. § 1603(a), and that it is not entitled to immunity pursuant to sections 1605-1607 of Title 28. First, Respondent affirmatively waived sovereign immunity in the PDA itself, which provided:

> Each of the parties hereto irrevocably waives, to the fullest extent permitted by applicable law, all immunity (whether on the basis of sovereignty or otherwise) from jurisdiction, attachment (both before and after judgment), and execution to which it might otherwise be entitled in any action or proceeding relating in any way to this Agreement in the courts of the Lao People's Democratic Republic or the Kingdom of Thailand or other relevant jurisdictions, and neither party will raise or claim or cause to be pleaded any such immunity at or in respect of any such action or proceeding.

(PDA, art. 14.2.) Second, the case falls under one of the exceptions to immunity in the Foreign Sovereign Immunity Act ("FSIA"). Under section 1605(a)(6), a foreign state "shall not be immune from the jurisdiction of courts of the United States" in an action

> either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . . .

28 U.S.C.A. § 1605(a)(6). Because the Award was rendered pursuant to an arbitration agreement, and is governed by the Convention, to which the United States is a signatory, Respondent cannot claim sovereign immunity to this action.

This Court also has personal jurisdiction over Respondent. Section 1330(b) provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). Respondent expressly consented to service and, in a stipulation filed with the Court, "waive[d] any objections or defenses based upon Petitioners' service of the [petition for confirmation and accompanying papers], including, without limitation, any defenses based on 28 U.S.C. 1608 . . . ." (Stip., Dckt. Entry No. 5, July 23, 2010.)

In addition, as Respondent concedes, it is the law of this circuit that a foreign state (and its instrumentalities) is not entitled to the jurisdictional protections of the Due Process Clause, such as protection against being sued where it lacks minimum contacts. *See Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399-400 (2d Cir. 2009).[3]

Accordingly, this Court has subject matter jurisdiction over this case and personal jurisdiction over Respondent.

B. Forum Non Conveniens

Respondent's motion to dismiss based on the doctrine of *forum non conveniens* is DENIED.

Even where a district court has jurisdiction over the case and the parties, it may still decline to exercise that jurisdiction under the doctrine of *forum non conveniens* if "an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (citation, quotation marks and ellipses removed). The Second Circuit has held that the doctrine of *forum non conveniens* may apply in a proceeding to confirm a foreign arbitration award under the Convention. *See In re Arbitration Between Monegasque de Reassurances*

[3] Respondent concedes the applicability of *Frontera* but grounds its objection in a supposed "split of authority in the Circuit Courts of Appeal" on this issue. (Resp. Mem. at 10.) The existence of a circuit split would not allow this court to depart from binding Second Circuit law, but, in any case, the authority that Respondent cites is inapposite. In both *Glencore Grain-Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002) and *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), the party asserting lack of personal jurisdiction was not a foreign state, as in *Frontera*, but rather a foreign private entity.

S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496-97 (2d Cir. 2002) (rejecting argument that *forum non conveniens* does not apply because it does not appear as a ground for opposing confirmation in the Convention).[4]

The Second Circuit uses a three-step analysis to determine whether dismissal is appropriate under *forum non conveniens*. First, the court determines the degree of deference to be accorded to the petitioner's choice of forum; second, the court considers whether there is an appropriate alternative forum to adjudicate the dispute; and third, the court balances the private and public interests implicated in the choice of forum. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005) (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001)).

1. Degree of Deference

When a plaintiff brings a suit in its home forum, it is entitled to a "strong presumption" in favor of that selection. *See Murray v. British Broadcasting Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). Conversely, "[w]here a foreign plaintiff is concerned . . . its choice of forum is entitled to less deference." *Id.* Nevertheless, "some weight must still be given to a foreign plaintiff's choice of forum." *Id.* ("[T]his reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule."). The Second Circuit has explained that the appropriate level of deference to a plaintiff's choice of forum "moves on a sliding scale." *Iragorri*, 274 F.3d at 71.

[4] Respondent raises its *forum non conveniens* argument under Rule 12(b)(2) of the Federal Rules of Civil Procedure and Article III of the Convention. Article III of the Convention simply provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." Convention, art. III.

Determination of how much deference to grant a plaintiff's choice of forum should be guided by the following considerations:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's *bona fide* connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens* . . . . On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

Id. at 71-72.

Respondent argues that Petitioners' selection of a district court in New York was motivated exclusively by forum shopping, and suggests that Petitioners chose the United States as a forum only to take advantage of the generous discovery procedures available here. (Reply Memorandum of Law of Respondent to Petitioners' Memorandum of Law in Opposition to Motion to Dismiss (hereinafter "Resp. Reply") at 3.) Petitioners state that they chose this forum because they believe that Respondent has attachable assets in New York that will allow Petitioners to enforce a judgment.

The Court finds that it is not apparent that Petitioners were motivated by forum shopping, and thus, although Petitioners are not entitled to the same deference accorded to domestic plaintiffs, Petitioners' choice is entitled to a presumption of validity. The fact that Petitioners have initiated confirmation proceedings in multiple jurisdictions does not itself compel a conclusion that they are engaged in forum shopping. The Convention specifically contemplates

multiple, simultaneous enforcement proceedings. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 114-15 (2d Cir. 2007). Moreover, as discussed more fully *infra*, unlike in *Monegasque*, "the jurisdiction provided by the Convention" is not "the only link between the parties and the United States." 311 F.3d at 499. On the contrary, all three members of the arbitration panel are American, and two are from New York. Two preliminary conferences in the arbitration were held in New York (although the hearing itself took place in Malaysia). New York law governed the PDA (and, indeed, the Award contains extensive citation to New York law). Finally, although the parties are located in Asia, and performance of the PDA took place in Asia, the relevant agreements were written in English, the Award is written in English, and the damages are stated in U.S. dollars.

2. Alternative Forum

The court next considers whether there is an adequate alternative forum. If there is not, "the *forum non conveniens* motion must be denied regardless of the degree of deference accorded plaintiff's forum choice." *Norex Petroleum*, 416 F.3d at 157. "An alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute." *Monegasque*, 311 F.3d at 499 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)).

The parties dispute the adequacy of Respondent's proposed alternative forum, Thailand. Respondent submits an affidavit from a Thai lawyer, Mr. Chumpol Sonchai, stating that Thai courts would have jurisdiction over Petitioners, because both are majority Thai-owned companies. (Resp. Mem. Ex. O.) Respondent also states that it would voluntarily accept service in Thailand. Mr. Sonchai states that service upon Respondent through Thai diplomatic channels could take 180 days and the entire proceeding in Thailand could be completed within 6-12

months. Petitioners responds that Mr. Sonchai is not a barrister in Thailand and thus his opinion is not entitled to much weight.

Petitioners submit a declaration from a Thai barrister, Mr. Jesadapon Watsa, who, Respondent points out, is the personal lawyer of Mr. Siva, the principal of Petitioners. Mr. Watsa contends that service through the letters rogatory process -- which cannot be waived by Respondent – would take at least nine months to effectuate. (*See* Declaration of Jesdapon Watsa, Dckt. Entry No. 14.) Mr. Watsa states that Thai confirmation proceedings for arbitration awards generally involve a full relitigation of the merits of the dispute, and would thus be costly and time consuming. Petitioners would also be required to pay a substantial filing fee and maintain a litigation bond throughout the proceedings, including appeals. Mr. Watsa states that the confirmation order would be subject to three levels of appeal, which can take up to ten years to complete, during which time no assets of the Respondent could be attached.

The Court finds that, notwithstanding Petitioners' objections, Thailand would provide a viable alternative forum for the litigation of this dispute, because the parties are amenable to service of process, and Thailand, as a signatory to the Convention, permits actions to confirm international arbitral awards. *Monegasque*, 311 F.3d at 499. However, Respondent "does not carry the day simply by showing the existence of an adequate alternative forum. The action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Iragorri*, 274 F.3d at 74-75. In balancing the private and public interest factors, the Court takes into account the relative convenience (or lack thereof) of the proposed alternative forum.

3. Balancing the Private and Public Interest Factors

Having found that there is a potential alternative forum, the Court proceeds to the balancing of the two sets of factors identified by the Supreme Court as relevant to determining whether the chosen forum is inconvenient. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The private interest factors pertain to the convenience of the litigants, and include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. In considering these issues, "the court should focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues." *Iragorri,* 274 F.3d at 74.

The court in *Monegasque* acknowledged that "the private interest factors might not ordinarily weigh in favor of *forum non conveniens* dismissal in a summary proceeding to confirm an arbitration award . . . ." 311 F.3d at 500. This is because confirmation of an arbitration award is typically "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (citation omitted). In light of the fact that this Court decides, *infra*, that the independent review of the issues requested by Respondent is inappropriate, there will be little need for witnesses and documents located abroad to adjudicate this matter. *Cf. Monegasque*, 311 F.3d at 500 (holding that private interest factors weighed in favor of dismissal where the case "[did] not lend itself to summary disposition," because the petitioner attempted to implead Ukraine, a sovereign nation that was not a party to the arbitration proceeding). Given that the parties were

able to travel to New York for two preliminary conferences during the arbitration process, and both have retained capable New York counsel, there is little inconvenience to the parties in adjudicating this summary proceeding. Given the inconvenient aspects of litigating this dispute in Thailand, the private interest factors do not favor dismissal.[5]

The public interest factors also do not favor dismissal. The public interest factors "include the administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law." *Monegasque,* 311 F.3d at 500 (citing *Gilbert,* 330 U.S. at 508-09). Generally, "American courts have an interest in enforcing commercial arbitration agreements in international contracts." *Figueiredo Ferraz Consultoria E Engenharia De Projeto Ltda. v. Republic of Peru*, 655 F. Supp. 2d 361, 376-77 (S.D.N.Y. 2009) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974)). Here, although the parties are foreign and the relevant conduct took place outside the United States, the case is connected to the forum. The Award was decided by a panel of three United States lawyers based almost entirely upon New York law, and the parties have not identified any bodies of foreign law that the Court would have to apply in order to decide the case. *Cf. Iragorri*, 274 F.3d at 74 ("There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." (quoting *Gilbert*, 330 U.S. at 509)).

[5] Respondent also argues that litigating this dispute in the United States is more costly because attorney's fees tend to be higher in the United States than in Thailand. This argument is not persuasive, given the fact that most of the costs of litigating the confirmation action have already been expended by both parties. Moreover, given the other costs associated with litigating the dispute in Thailand (including translating the relevant documents into Thai) it is not evident that litigating this case in Thailand would be less costly, even if lawyers' billing rates are lower there.

In short, even if Thailand were an adequate alternative forum, Respondent has not met its burden of showing that Petitioners' choice of forum should not be respected. Accordingly, the motion to dismiss on the basis of *forum non conveniens* is denied.

C. Panel Exceeded Its Jurisdiction

Respondent moves to dismiss the petition to confirm the award on the theory that the Panel exercised jurisdiction beyond the scope of the arbitration agreement, by extending their jurisdiction to other agreements and to parties that are not signatories to the PDA. However, Respondent does not make any arguments applying the specific standards courts use in evaluating motions pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Nor does Respondent cite any authority for the proposition that the appropriate remedy when an arbitration panel exceeds its jurisdiction is the dismissal of the petition for confirmation for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Respondent's arguments, instead, address standards for opposition to the confirmation of an arbitral award. Accordingly, the Court will treat Respondent's motion as an objection to confirmation and consider its arguments in that context.

III. Confirmation of the Arbitration Award

Petitioners have filed a petition to confirm the Award pursuant to the Convention. Respondent opposes the petition on the ground that the Panel exceeded its jurisdiction. The resolution of the parties' dispute depends upon the standard of review that the Court applies to the Panel's determinations, particularly to the Panel's conclusions concerning the scope of its own jurisdiction. The parties disagree as to the appropriate standard of review. Respondent argues that the Court should engage in independent, *de novo* review of the Panel's jurisdiction decisions, while Petitioners argue that the Court must defer to the Panel's conclusions. For the

reasons that follow, the Court concludes that it should defer to the Panel's conclusions on these issues. Thus, the petition to confirm the award is GRANTED.

A. Background Principles for Confirmation of Foreign Arbitral Awards

Because Petitioner seeks to confirm an arbitration award rendered in a foreign state, under an agreement between foreign commercial entities, the action is governed by the framework set forth in the Convention, as implemented by, and reprinted in, the FAA, 9 U.S.C. §§ 201-08. *See* 9 U.S.C. § 202 (providing that "[a]n agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial . . . falls under the Convention" as long as the relationship is not "entirely between citizens of the United States . . . .").

The Second Circuit has acknowledged the "general pro-enforcement bias informing the Convention," and has explained that the Convention's "basic thrust was to liberalize procedures for enforcing foreign arbitral awards." *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 973 (2d Cir. 1974). As the Supreme Court has explained,

> [t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk, 417 U.S. at 520 n.15.

Thus, under the FAA, when a party seeks to confirm an arbitral award pursuant to the Convention, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C.

§ 207. Article V of the Convention contains the seven exclusive grounds upon which courts may refuse to confirm an award. *See* Convention art. V.[6]

The party opposing enforcement of an arbitral award has the burden to prove that one or more of the defenses under the New York Convention applies. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir. 1998)). "The burden is a heavy one, as 'the showing required to avoid summary confirmance is high.'" *Id.* (quoting *Yusuf Ahmed Alghanim*

---

[6] Article V, Section (1) provides that a court may refuse to recognize and enforce an award for five reasons:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Section 2 of Article V provides two additional bases upon which to refuse to confirm an award:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Convention art. V.

& Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997)). "Under the Convention, [a] district court's role in reviewing a foreign arbitral award is strictly limited." *Yusuf Ahmed Alghanim*, 126 F.3d at 19 (internal quotation marks omitted). "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004). *See also Telenor Mobile Commc'ns AS v. Storm, LLC* ("*Telenor I*"), 524 F. Supp. 2d 332, 344 (S.D.N.Y. 2007), *aff'd* 584 F.3d 396 (2d Cir. 2009) ("Only a 'barely colorable justification for the outcome reached' by the arbitrators is necessary to confirm the award." (quoting *Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l Union*, 954 F.2d 794, 797 (2d Cir. 1992))). The high burden to oppose confirmation "is imposed because the public policy in favor of international arbitration is strong." *Compagnie Noga D'Importation et D'Exportation, S.A. v. The Russian Federation*, 361 F.3d 676, 683 (2d Cir. 2004) (quotation marks omitted). *See also Yusuf Ahmed Alghanim,* 126 F.3d at 23 (District Courts are "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." (citation omitted)).

B. Review of the Panel's Determinations of the Scope of its Jurisdiction

Respondent presents its arguments that the Panel exceeded its jurisdiction as follows:

> (i) The arbitrators wrongfully exercised jurisdiction over [Respondent's] disputes with TLL and HLL under the Mining Contracts and were without jurisdiction to award TLL and HLL a return of their investment costs made under the Mining Contracts and (ii) while exercising jurisdiction under the PDA, the arbitrators wrongfully exercised jurisdiction over Siva companies TLP and SEAP that were not signatories to the PDA in amalgamating their costs with TLL's costs in awarding damages under the PDA.

(Resp. Mem. at 11.)

Respondent's jurisdictional arguments go to the "arbitrability" of the dispute resolved by the Panel. The arbitrability of a dispute is the question of whether the parties agreed to arbitrate

the merits of the dispute at issue. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). "A dispute is arbitrable only if the parties contractually bind themselves to arbitrate it. . . . A question of arbitrability is therefore raised when . . . someone asserts that an arbitral award should not be enforced because there was no effective agreement to arbitrate the dispute." *Telenor Mobile Commc'ns AS v. Storm, LLC* ("*Telenor II*"), 584 F.3d 396, 405-06 (2d Cir. 2009). Respondent's arguments that the Panel exceeded its jurisdiction are based on the premise that the Panel resolved disputes that the parties did not agree to have it arbitrate in the applicable arbitration agreement.

Although arbitrability is not listed as a ground for a challenge in Article V of the Convention, United States courts often review the arbitrability when deciding a petition for confirmation of an award. In fact, the Supreme Court has held that, in general, the issue of arbitrability is presumptively to be decided by a court, and not the arbitrator. *First Options*, 514 U.S. at 944.[7] Whether a dispute is arbitrable (and who should decide that question) is important because, as the Supreme Court has repeatedly emphasized, "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, -- U.S. --, 130 S.Ct. 2847, 2857 (2010) (internal citations and quotation marks omitted). *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, -- U.S. --, 130 S.Ct. 1758, 1775 (2010) (explaining that "foundational FAA principle" is "that arbitration is a matter of consent"). Thus, although courts

[7] The Supreme Court explained that the presumption as to who decides arbitrability is the reverse of the general presumption about whether parties agreed to arbitrate the merits of a particular issue. *First Options*, 514 U.S. at 944-45 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 626 (1985) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (citation and quotation marks omitted)). This is because the question of "who (primarily) should decide arbitrability" is "rather arcane," and the parties "often might not focus upon that question or upon the significance of having arbtirators decide the scope of their own powers." *First Options*, 514 U.S. at 945.

have held that "the grounds for relief enumerated in Article V of the convention are the only grounds available for setting aside an arbitral award" issued in a foreign jurisdiction, *Yusuf Ahmed Alghanim*, 126 F.3d at 20, courts have also held that "the absence of any reference to a valid written agreement to arbitrate in Article V does not foreclose a defense to enforcement on the grounds that there never was a valid agreement to arbitrate." *China Minmetals Materials Import and Export Co. Ltd. v. Chi Mei Corporation*, 334 F.3d 274, 286 (3d Cir. 2003).

Respondent contends that the Panel's exceeding their jurisdiction presents an issue of arbitrability that the Court must review independently, without applying the deference ordinarily accorded to an arbitration panel's conclusions. *See First Options*, 514 U.S. at 943 (holding that court should presumptively decide arbitrability question "independently").[8]

The Court finds that an independent review of these issues is inappropriate for two reasons: (1) Respondent's objections do not raise issues of jurisdiction or arbitrability, but rather concern the Panel's interpretation of the PDA and its calculation of damages; and (2) the parties agreed to delegate questions of arbitrability and jurisdiction to the Panel, thus requiring deference to the panel's conclusions on this issue.

[8] Respondent attempts to ground this argument in Article V(1)(a) of the Convention, which provides that a court can refuse to confirm an award where, *inter alia*, the "agreement is not valid under the law to which the parties have subjected it." Respondent's arguments would seem to fit more comfortably under Section (1)(c), which provides that a court can refuse to confirm an award that "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Convention, art. V(1)(c). In any event, given that courts review arbitrability issues even though arbitrability is not specifically mentioned in Article V, the fact that Respondent's jurisdiction objections are not grounded in the text of Article V does not foreclose its arguments.

1. Respondent's Jurisdictional Arguments Are about Contract Interpretation and Calculation of Damages

As an initial matter, the issues raised by Respondent are, at their core, not issues of arbitrability or jurisdiction at all. Respondent's objections to arbitral jurisdiction are ultimately objections to how the Panel calculated damages and interpreted the PDA, both of which are well outside the scope of what the Court may review on a petition to confirm an award under the Convention.

Respondent argues that the damage to it from the Panel's "unlawful expanse of arbitral jurisdiction is that the arbitrators allowed TLL and HLL to submit evidence of 'investment costs' made in performance of the Mining Contracts" and asserts that "[Petitioners'] expert, Grant Thornton, amalgamated all costs of all Siva companies as if there was only one project covered by one contract and the arbitrators awarded Mining Contract costs to TLL and HLL." (Resp. Mem. at 12-13.) Respondent also points out that the Mining Contracts did not have the same remedy provision requiring Respondent to pay "investment costs plus a premium" if the agreement was terminated. (*Id.* at 13.) Finally, Respondent argues that the Panel's inclusion of costs advanced by TLP and SEAP amounted to an "extension of jurisdiction" over these entities. (*Id.* at 17.)

In short, Respondent objects to the Panel's inclusion of costs incurred by separate entities in calculating "TLL's total investment costs" under the PDA. According to Respondent, many of Petitioners' costs that were included in the damage calculation were actually incurred by Petitioners under the Mining Contracts, not the PDA. Respondent points out that the PDA made clear that the Mining Contracts survived as separate agreements, independently of the PDA. (*See* PDA, art. 19.11.) Thus, according to Respondent, the Panel's alleged inclusion of those costs was tantamount to expanding its jurisdiction to cover those Mining Contracts.

Simply labeling these objections as "jurisdictional" does not make them so. In fact, there is no evidence of the Panel's exercising jurisdiction over these other agreements and other entities. The Panel did not arbitrate disputes under the Mining Contracts—it interpreted the scope of the term "TLL's total investment costs" in the PDA. The Panel's interpretation of that term and calculation of those costs was just that – interpreting a contract and calculating damages.

The PDA provided that, in the event of termination of the agreement, the breaching party must pay compensation "which shall include TLL's total investment cost plus a premium . . . ." (PDA, art. 15.1.) The parties vigorously disputed the meaning of these terms, and how the damages should be calculated. The Panel determined, based on New York principles of contract interpretation, that the words meant "the total amount of money that Claimants together, on behalf of TLL, reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance or in performance up until the date of breach." (Award ¶ 114.) Both parties submitted expert testimony to guide the arbitrators in calculating this total amount. The Panel ultimately concluded that the appropriate total was $40 million – considerably less than the $179 million that Petitioners were requesting. The Panel based this calculation in part upon the "existing sunk costs" of the Hongsa Project quoted in the memorandum of understanding with Castlepines, the Australian company with whom Petitioners negotiated after they terminated the Banpu agreement.[9] Even if this total included costs incurred prior to when the parties entered into the PDA, that conclusion simply reflects the Panel's interpretation of the breadth of the term "total investment costs" in the PDA, and not an extension of jurisdiction over other contracts.

[9] The only entity affiliated with Petitioners to sign the Castlepines memorandum of understanding was TLL.

The Court must defer to an arbitrator's conclusions on contract interpretation and calculation of damages. The Supreme Court has emphasized that "courts play only a limited role when asked to review the decision of an arbitrator" and may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). *See also Europcar Italia*, 156 F.3d at 316 ("[A]n arbitration award cannot be avoided solely on the ground that the arbitrator may have made an error of law or fact."). The PDA provided that in the event of termination, "compensation shall be paid . . . as determined by the arbitration panel . . . ." (PDA, art. 15.1.) The Panel thus had wide latitude to calculate damages as it deemed appropriate under the contract. *See Arbitration Between Millicom Int'l V N.V. v. Motorola, Inc. & Proempres Panama, S.A.*, No. 01 Civ. 2668, 2002 WL 472042, at *6 (S.D.N.Y. Mar. 28, 2002) ("Arbitrators ... enjoy broad discretion to create remedies unless the parties' agreement specifically limits this power."). The Court may not substitute its judgment on these issues for that of the Panel simply because Respondent characterizes its objections as "jurisdictional."

This case is strikingly similar to one of the foundational Second Circuit decisions in the area of confirmation of arbitral awards under the Convention, *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969. There, the appellant, Parsons & Whittemore Overseas Co., Inc. ("Overseas") objected to various aspects of an arbitral award rendered against it. Specifically, Overseas argued that the arbitrators exceeded their jurisdiction by granting an award of $185,000 for "loss of production" when the parties' contract provided that "neither party shall have any liability for loss of production." *Id.* at 976. The Second Circuit held that, rather than view the tribunal as having "simply ignor[ed]this

alleged limitation on the subject matter over which its decision-making powers extended," the court would view the tribunal as having "interpreted the provision not to preclude jurisdiction on this matter." *Id.* The court deferred to the arbitral panel, explaining that it would view an arbitrator's decision as being "premised . . . on a construction of the contract" where it was "not apparent that the scope of the submissions to arbitration has been exceeded." *Id.* (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)). Overseas also attempted to characterize the award of $60,000 for start-up expenses as "consequential damages" that were proscribed by the parties' agreement. The court described this as "attempting to secure a reconstruction in th[e] court of the contract – an activity wholly inconsistent with the deference due arbitral decisions on law and fact." *Id.* The Court concluded that,

> [a]lthough the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator's role.

Id. at 977.

That is precisely what Respondent now asks this Court to do. Although Respondent has attempted to characterize its objections as jurisdictional arguments, they are in fact based on its disagreement with the Panel's interpretation of the PDA and the Panel's calculation of damages thereunder. Respondent's demand that the Court independently review these issues is inconsistent with the deference due arbitral decisions on law and fact. *Id.* at 976.

2. The Court Defers to the Panel's Arbitrability Decisions

Respondent's jurisdictional objection is based, in part, on the fact that the Panel ruled that HLL, which was not a signatory to the PDA, had standing as a claimant in the arbitration. To

whatever extent this—and other arguments raised by Respondent—concerns issues of arbitrability, the Court finds that the parties delegated decision on these issues to the Panel. Thus, the Court defers to the Panel's decisions on such issues. The decisions that Respondent cites that supposedly mandate independent review of arbitrability issues are inapposite, and do not mandate independent review in this case.

a. Deference When Parties Agree to Arbitrate Arbitrability

The Supreme Court has held that, where there is "clear and unmistakable evidence" that the parties intended to refer questions of arbitrability to the arbitrators – that is, that they agreed to arbitrate arbitrability – then the Court "should give considerable leeway to the arbitrator[s], setting aside [their] decision only in certain narrow circumstances." *First Options*, 514 U.S. at 943. *See also id.* ("[A] court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."); *T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir. 2010) (holding that where parties' intent to submit arbitrability issues to arbitrator is evident, the court "must afford significant deference" to arbitrator's decision).

The Second Circuit has held that "when . . . the parties explicitly incorporate [into the arbitration agreement] rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as 'clear and unmistakable evidence' of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 209 (2d Cir. 2005). In *Contec*, the arbitration agreement at issue provided that the arbitration would be held in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA"). Those rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* at 208 (quoting AAA Rule R-7(a)). The Court held that the

incorporation of that rule into the arbitration agreement was "clear and unmistakable evidence" that the parties intended to submit questions of arbitrability to the arbitrators. *Id.*

More recently, the Second Circuit held that where, as here, parties to an arbitration agreement incorporate the procedural rules of the United Nations Commission on International Trade Law ("UNCITRAL"), this constitutes "clear and unmistakable evidence" of an intent to arbitrate arbitrability. *See Republic of Ecuador v. Chevron Corp.* ("*Chevron*"), 638 F.3d 384, 394-95 (2d Cir. 2011). Here, the arbitration clause in the PDA is silent as to who should decide arbitrability, but it provides that the arbitration will be governed by UNCITRAL rules. (*See* PDA, art. 14.1.) Those rules provide that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." UNCITRAL Arbitration Rules, art. 21. In *Chevron*, the Second Circuit held that, because the parties' arbitration agreement incorporated this UNCITRAL rule, the party resisting arbitration could not "disown its agreed-to obligation to arbitrate [] questions of arbitrability . . . ." *Chevron*, 638 F.3d at 395 (quoting *Contec*, 398 F.3d at 211).

The cases Respondent cites in support of its argument that the court must independently review the arbitrability issue are distinguishable because in each of those cases, the court expressly found that there was not "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability. *See, e.g., Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) ("The district court was not, as a matter of law, bound by the arbitrators' determination of

arbitrability . . . On the present record, there is no 'clear and unmistakable evidence' that [the party opposing confirmation] submitted the issue of arbitrability to the arbitrators.").[10]

Here, Respondent is a signatory to an arbitration agreement that, through its incorporation of UNCITRAL rules, delegates issues of arbitrability to the arbitrators. Thus, the Court must defer to the arbitration panel's conclusions on issues regarding the scope of its jurisdiction. *See First Options*, 514 U.S. at 943 (holding that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration").

b. Decisions Mandating Independent Review of Arbitrability Are Inapposite Here

Respondent points to a series of decisions to support its assertion that the Court must engage in independent review of the Panel's findings on arbitrability and jurisdiction issues, notwithstanding the fact that the PDA incorporated UNCITRAL rules that delegate arbitrability issues to the arbitrator *See Sarhank Grp.*, 404 F.3d 657; *China Minmetals Materials*, 334 F.3d 274; *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, [2010] 3 W.L.R. 1472 (appeal taken from Eng.). But these decisions are inapposite. The challenges made by Respondent fall outside the scope of "arbitrability" as the issue is construed by these decisions. Specifically, the decisions cited by Respondent deal with situations where there was doubt that the party opposing confirmation was

[10] Respondent also urges this Court to follow the approach taken by the district court in *Telenor I*, 524 F. Supp. 2d 332. In that case, the agreement at issue provided that, as in this case, the arbitration would be governed by UNCITRAL rules. The court, in holding that it must perform an independent review of arbitrability, rather than simply deferring to the arbitrators' conclusion on that issue, held that the relevant language in the UNCITRAL rules was not as explicit as the language in the AAA rules, and thus, incorporation of UNCITRAL rules did not serve as "clear and unmistakable evidence that the parties intended to submit the issue of arbitrability" to the arbitrators. *Id.* at 350. However, this portion of the decision was abrogated by the Second Circuit's subsequent decision in *Chevron*, which specifically held that incorporation of UNCITRAL rules served as "consent[] to sending challenges to the 'validity' of the arbitration agreement to the arbitration panel." *Chevron*, 638 F.3d at 394.

bound by an arbitration agreement at all, and thus could not have agreed to arbitrate arbitrability. That is not the case here. There is no dispute that the PDA's arbitration agreement is valid and that Respondent is a signatory to that agreement. Respondent is thus bound by its agreement to arbitrate arbitrability, whereas the parties in the decisions cited by Respondent were not so bound.

The parties' dispute concerning review of jurisdiction and arbitrability turns in part on application of the doctrine of "competence-competence." This doctrine, recognized in many international jurisdictions, allows arbitrators to decide arbitrability and the scope of their own jurisdiction in the first instance, rather than requiring the parties to adjourn the arbitration and resolve the arbitrability issue in court. *See China Minmetals*, 334 F.3d at 287-88. In other words, the arbitral panel is considered competent to make the initial determination of its own competence to decide the merits of the dispute. However, Respondent argues, "[i]n all countries, including the United States, at the enforcement stage, courts have a duty to determine if in fact the arbitrators made the correct decision on jurisdiction – where the party made the objection to the arbitrators and thus preserved the objection." (Resp. Reply at 5.)

Respondent urges the Court to follow the Third Circuit's approach in *China Minmetals*, 334 F.3d 274, in determining the competence-competence issue. In that case, the appellant opposed confirmation of an arbitral award, issued in China, because it asserted that the underlying agreement containing the arbitration clause was a forgery. The district court confirmed the award without performing any independent review of the validity of the underlying arbitration agreement. The court of appeals reversed and remanded, holding that the district court should have performed an independent review of arbitrability.

The court in *China Minmetals* framed the issue as a question of "who makes the ultimate determination of the validity of the [arbitration] clause at issue." *Id.* at 279. The court held that "a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate . . . ." *Id.* at 286. In explaining that a party opposing enforcement of an award may seek independent review of arbitrability in the district court, the court of appeals was careful to limit its holding to situations "where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed." *Id.* at 288 (emphasis added). *See also id.* ("It therefore seems clear that international law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute, at least where the challenging party claims that the contract on which the tribunal rested its jurisdiction was invalid." (emphasis added)); *id.* at 289 (holding that independent review is appropriate where a party opposes confirmation "on the grounds that the alleged agreement containing the arbitration clause on which the arbitral panel rested its jurisdiction was void *ab initio*" (emphasis added)). Here, however, the validity of the PDA and the arbitration clause are not at issue, and thus, the independent review mandated by *China Minmetals* is not appropriate.

Respondent also argues that the instant action is controlled by the Second Circuit's decision in *Sarhank Group*, 404 F.3d 657. In that case, Sarhank Group ("Sarhank") had entered into a contract containing an arbitration clause with Oracle Systems, Inc. ("Systems"), a wholly owned subsidiary of Oracle Corporation ("Oracle"). Oracle itself did not enter into any agreement with Sarhank. Nevertheless, when a dispute arose with Systems, Sarhank demanded arbitration with both Systems and Oracle. The Egyptian arbitral panel held that Oracle was bound by the arbitration agreement. The district court confirmed the award, holding that the

arbitrators had the power to determine arbitrability.[11] The Second Circuit, reversed, holding that, "[u]nder American law, whether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought." 404 F.3d at 661. Although the arbitrators in *Sarhank* had determined that they possessed jurisdiction over the dispute, the court of appeals held that "[t]he district court was not, as a matter of law, bound by the arbitrators' determination of arbitrability on the part of Oracle on this ground." *Id.* at 662.

The decision in *Sarhank* is inapposite, however, because in that case Oracle had never signed an arbitration agreement.[12] Thus, there was a question whether the party opposing confirmation had "consented to arbitrate" anything, let alone to arbitrate arbitrability. *Id.* at 661. As in *China Minmetals*, the court held that a confirming court is not bound by an arbitrator's decisions concerning an entity that may not have agreed to arbitrate at all.[13]

---

[11] In *Sarhank*, the parties arbitrated before the Cairo Regional Centre for International Commercial Aribtration ("CRCICA"). 404 F.3d at 658. As Respondent points out, this body is governed by a rule providing that "[t]he Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." *See* CRCICA Arbitration Rules, Art. 23.1, *available at* http://www.crcica.org.eg/publication/arbitration_rules/pdf/English/CRCICA_arbitration_rules_en.pdf. Although the Court did not address the effect of this rule, the Court notes that the rule is substantially similar to the comparable provision in the UNCITRAL rules.

[12] The court noted that it had recognized limited instances "in which nonsignatories can be bound to the arbitration agreements of others," but concluded that "[a]n American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law." *Id.* at 662.

[13] Respondent has also urged this Court to seek guidance on these issues from a recent decision by the Supreme Court of the United Kingdom, *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC 46, [2010] 3 W.L.R. 1472. There, the U.K. court surveyed the law of competence-competence in different jurisdictions, including the United States, and concluded that a confirming court must independently determine arbitrability. However, as in *Sarhank* and *China Minmetals* (both of which are cited in the U.K. court's decision), there was a question as to whether the party opposing confirmation was bound by the arbitration agreement at all. In the *Dallah* case, the panel rendered an award against the Government of Pakistan, even though the relevant agreement was with an entity called "Awami Hajj Trust." The arbitrators determined that this was an alter ego of the Government of Pakistan. But the fact remained that, as in *Sarhank*, but unlike here, the party opposing the award was not a signatory to the arbitration

Where, as in the instant case, the party challenging the arbitration is a signatory to a valid arbitration clause, then the issue of whether the party has agreed to submit to arbitration is not presented. And where, as here, a party is indisputably bound by an arbitration agreement, and that agreement incorporates rules that delegate arbitrability questions to the arbitrator, then that party may not "disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability." *Contec*, 398 F.3d at 211. Supreme Court and Second Circuit precedent mandates deference to arbitral decisions, including decisions on arbitrability and jurisdiction. *See First Options*, 514 U.S. at 943; *T.Co Metals*, 592 F.3d at 345.

The Second Circuit has acknowledged the difference between enforcement of an arbitration clause against a non-signatory by a signatory, and enforcement of an arbitration clause against a signatory by a non-signatory. In *Thomson-CSF, S.A. v. American Arbitration Association*, the court acknowledged that some decisions have allowed a nonsignatory to enforce an arbitration clause against a signatory under an estoppel theory, "when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." 64 F.3d 773, 779 (2d Cir. 1995). But in *Thomson-CSF*, the party attempting to avoid arbitration was a non-signatory. The court held that "the nature of arbitration makes [that distinction] important. Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." *Id.* Thus, the

---

agreement. The court held that "[t]he tribunal's own view of its jurisdiction has no legal or evidential value, *when the issue is whether the tribunal had any legitimate authority in relation to the Government at all*." *Id.* at ¶ 30 (emphasis added).

In addition, the U.K. court noted that it was "[l]eaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration . . . ." *Id.* ¶ 25. The court evidently did not consider the effect of decisions from this circuit, such as *Contec* and *Chevron*, which hold that agreements that incorporate certain procedural rules of arbitration constitute agreements to "submit the question of arbitrability itself to arbitration." For this reason also, the *Dallah* decision is inapposite here.

court of appeals reversed the district court's decision compelling arbitration because the district court had not found any of the traditional contractual bases for enforcing an arbitration agreement against a non-signatory. *Id.* at 780.

Conversely, in *Contec*, "the party seeking to avoid arbitration was a signatory to the arbitration agreement." 398 F.3d at 211. The court considered this a relevant distinction because the act of signing an arbitration agreement is "an important indicator of [the signatory's] expectation and intent . . . ." *Id.* In other words, by signing an agreement with an arbitration clause, a party demonstrates its "expectation and intent" to be bound by that agreement and can anticipate submitting disputes concerning that agreement to arbitration. In *Contec*, the party seeking to avoid arbitration objected to arbitration because the party urging arbitration was not a signatory to the agreement. The court acknowledged the line of decisions dealing with enforcement of arbitration clauses by non-signatories under an estoppel theory. *See id.* at 209 (citing *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 404 (2d Cir. 2001)). But the court held that "neither [it] nor the district court must reach [those issues]" when raised by a signatory to an arbitration agreement that delegates arbitrability questions to the arbitrator. *Id.*

Respondent does not point to any authority mandating independent judicial review of arbitrability issues at the enforcement stage for a foreign arbitral award because a non-signatory was granted standing as a claimant in the arbitration. Here, Respondent is indisputably a signatory to a valid arbitration agreement that incorporates UNCITRAL rules. There is thus no dispute that Respondent has agreed to arbitrate disputes arising out of the PDA, including disputes about the scope of the Panel's jurisdiction. Respondent argues that the Panel's finding that HLL had standing as an "intended beneficiary" has no support in the law, and cites to

Second Circuit decisions stating that "it remains an open question in this Circuit whether [a] non-signatory may proceed [in compelling arbitration] upon any theory other than estoppel." *Baker & Taylor, Inc. v. AlphaCraze.com Corp.*, 602 F.3d 486, 491 (2d Cir. 2010) (quoting *Ross v. Am. Express Co.*, 547 F.3d 137, 143 n.3 (2d Cir. 2008)). But as in *Contec*, the Court need not reach that issue.[14] Instead, the Court must defer to the Panel's conclusions.

IV. CONCLUSION

Given the deference that the Court must accord to the Panel's decisions, including its decisions on arbitrability, the Court holds that summary confirmation of the Award is warranted under the Convention and 9 U.S.C. § 207.

[14] Although the Award states that the decision on HLL's standing was based on its status as a "intended beneficiary," Petitioners appear to have implicitly raised an estoppel argument when they argued that Respondent had "waived any objection to [Petitioners'] standing to assert rights under the PDA by dealing with them consistently as the proper parties to that Agreement for a dozen years." (Award ¶ 64.) It could be that based on "the relationship between the parties, the contracts they signed, and the issues that arose between them," the issues that HLL raises are so "intertwined" with the PDA that Respondent is estopped from avoiding arbitration with HLL. *Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279 (2d Cir. 2003). Again, the Court need not engage in this analysis because the parties delegated issues of arbitrability and jurisdiction to the Panel.

For the reasons stated above, the Court (1) DENIES Respondent's motion to dismiss (Dckt. Entry No. 8); (2) GRANTS Petitioners' petition to confirm the Award; and (3) enters a judgment in favor of Petitioners in the amount of $56,210,000, plus interest from November 4, 2009 to the date of satisfaction.

SO ORDERED.

Dated: New York, New York
August ~~July~~ 3, 2011
KMW

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge