

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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	)	
	)	
JSC DTEK KRYMENERGO,	)	
Ukraine, 04119, Kyiv	)	
Sim’i Khokhlovykh Street, 8, Letter 20 D.	)	
	)	
	)	
<i>Petitioner,</i>	)	
	)	Case No. _____
v.	)	
	)	
THE RUSSIAN FEDERATION,	)	
Ministry of Foreign Affairs	)	
32/34 Smolenskaya-Sennaya Ploshchad	)	
Moscow 119200, Russian Federation	)	
	)	
	)	
<i>Respondent.</i>	)	
_____	)	

**PETITION TO CONFIRM FOREIGN ARBITRATION AWARD**

Petitioner JSC DTEK Krymenergo (“DTEK Krymenergo”), by and through its attorneys, Covington & Burling LLP, states as follows:

**NATURE OF THE PROCEEDING**

1. Petitioner is a Ukrainian company seeking confirmation of an arbitral award issued on November 1, 2023 (the “Award”) awarding it compensation for the Russian Federation’s seizure of Petitioner’s assets in Crimea. *See* Declaration of Marney L. Cheek dated November 7, 2023 (“Cheek Decl.”); *see also id.*, Ex. A. The Award was rendered by a three-member tribunal (the “Tribunal”) in an arbitration proceeding seated in The Hague, the Netherlands and administered by the Permanent Court of Arbitration (PCA Case No. 2018-41) and pursuant to the Arbitration Rules of The United Nations Commission on International Trade Law, 1976 (the

“UNCITRAL Arbitration Rules”). The Award issued on November 1, 2023 is attached as Exhibit A to the Declaration of Marney L. Cheek dated November 7, 2023. The Tribunal awarded Petitioner, DTEK Krymenergo, damages in the amount of USD 207,800,000, plus interest over this amount at LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually, from January 22, 2015 until the date of payment. The Tribunal also awarded DTEK Krymenergo Administrative Costs in the amount of USD 1,362,422.88 and Legal Costs in the amount of USD 9,401,644.76.

2. Petitioner DTEK Krymenergo initiated the arbitration against the Russian Federation (“Respondent” or “Russia”) on February 16, 2018 under the 1998 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (the “Ukraine-Russia BIT” or “Treaty”). The arbitration concerned breaches of the Treaty by the Russian Federation in Crimea following Russia’s unlawful occupation and annexation of Crimea in 2014.

3. In its Award, the Tribunal determined that it had jurisdiction under the Ukraine-Russia BIT and dismissed all of Russia’s objections to jurisdiction and admissibility of DTEK Krymenergo’s claims. The Tribunal ruled that Russia’s taking of DTEK Krymenergo’s assets constituted an unlawful expropriation, that Russia breached Articles 2, 3, and 5 of the Treaty, and awarded DTEK Krymenergo damages in the amount of USD 207.8 million plus interest, as well as USD 9,401,644.76 in legal fees and USD 1,362,422.88 in administrative costs of the arbitration.

4. DTEK Krymenergo now seeks to enforce the final and binding Award before this Court. The Award is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the “New York Convention”), as implemented by the Federal Arbitration Act (the “FAA”). 9 U.S.C. §§ 201-208. Under the FAA,

a district court “shall confirm” an award falling under the New York Convention “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. There are no such grounds for refusal or deferral of recognition here. Accordingly, DTEK Krymenergo requests that this Court confirm the Award and enter judgment in its favor in the amount of the Award, with costs and interest as provided therein accruing through the date of this Court’s judgment.

### **PARTIES, JURISDICTION, AND VENUE**

5. Petitioner JSC DTEK Krymenergo is a joint stock company organized under the laws of Ukraine. Petitioner is one of the largest privately-owned electricity distribution companies in Ukraine and prior to Russia’s unlawful occupation and annexation of Crimea, maintained investments in Crimea. DTEK Krymenergo is the Award creditor and was the claimant in the underlying arbitration of the Award that it now seeks to enforce.

6. The Russian Federation is a foreign state and the Award debtor in this case. It was the respondent in the underlying arbitration.

7. This is a proceeding to recognize and enforce a foreign arbitral award governed by the New York Convention. The Arbitration was seated, and the Award was rendered, in The Hague, the Netherlands.

8. This Court has subject matter jurisdiction over this proceeding because it is an action to enforce an international arbitration award under the New York Convention and is therefore “deemed to arise under the laws and treaties of the United States.” 9 U.S.C. § 203. This Court also has subject matter jurisdiction because this action is brought against a foreign state within the meaning of 28 U.S.C. § 1603 and, as explained below, the state does not enjoy immunity from jurisdiction under the FSIA. 28 U.S.C. § 1330(a).

9. The Russian Federation is not immune from the jurisdiction of this Court under at least two sovereign immunity exceptions: (i) 28 U.S.C. § 1605(a)(6), because this action seeks confirmation of an award that is “governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards,” *i.e.*, the New York Convention; and (ii) 28 U.S.C. § 1605(a)(1), because the Russian Federation’s agreement to arbitrate reflects an implied waiver of immunity with respect to actions to enforce the award. *Tatneft v. Ukraine*, 771 F. App’x 9, 10 (D.C. Cir. 2019) (per curiam), cert. denied No. 19-606 (Jan. 13, 2020) (waiver exception applies where sovereign is a party to the New York Convention and the confirmation action is in another state that is a party to the Convention) (citing *Creighton Ltd. v. Gov’t of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (finding it “correct[] that when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states”) (internal quotation omitted); *see also Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 189 (D.D.C. 2016) (finding that Kazakhstan implicitly waived its sovereign immunity because it was party to the New York Convention and the action was to enforce a New York Convention award).

10. This Court has personal jurisdiction over the Russian Federation pursuant to 28 U.S.C. § 1330(b). *See* 28 U.S.C. § 1330(b) (“Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under 1608 of this title.”); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) (“[U]nder the FSIA, subject matter jurisdiction plus service of process equal personal jurisdiction.”) (internal quotation omitted).

11. Venue is proper in this District since “the action is brought against a foreign state or political subdivision thereof.” 28 U.S.C. § 1391(f)(4).

12. This petition was timely filed in accordance with 9 U.S.C. § 207 because the final Award was made less than three years ago, on November 1, 2023.

### **FACTUAL BACKGROUND**

13. DTEK Krymenergo is a subsidiary of DTEK Energy Group (“DTEK”). *See* Cheek Decl. Ex. A (Award), ¶¶ 2, 193. Between 2006 and 2012, DTEK acquired a majority ownership interest in the Ukrainian state-owned electricity distributor in Crimea. By January 2015, DTEK Krymenergo operated the power distribution grid system and distributed electricity in Crimea, maintaining electricity supply and distribution operations across the Crimean peninsula. *Id.*, ¶¶ 191-193.

14. Before Russia’s annexation of Crimea, DTEK Krymenergo serviced a territory of approximately 27,000 square kilometers and provided electricity to more than 780,000 customers across 23 regional electricity networks. DTEK Krymenergo’s assets in Crimea included valuable equipment and moveable property; intangible assets such as license and contract rights; and cash and securities. *Id.*, ¶ 192.

15. In February 2014, the Russian Federation invaded and occupied Crimea. Starting in March 2014, the Russian Federation began integrating Crimea into the Russian legal order, including through formal annexation measures. *Id.*, ¶¶ 194-206.

16. DTEK Krymenergo continued to own and operate its business until January 21, 2015, when Russia formally expropriated DTEK Krymenergo’s assets by transferring its property to the ownership of the Republic of Crimea. That same day, uniformed men took control of DTEK Krymenergo’s premises and thereafter denied the company’s managers re-entry to the premises. *Id.*, ¶ 206. By assuming physical control over and legal title to DTEK Krymenergo’s property in Crimea, the Russian Federation executed a quintessential expropriation. Russia’s taking of DTEK

Krymenergo's assets was one of numerous takings effected against Ukrainian investors and businesses following Russia's annexation of Crimea. Russia has refused to offer any compensation for this taking. *Id.*, ¶¶ 674-679.

### THE UKRAINE-RUSSIA BIT

17. The Ukraine-Russia BIT is concerned with the “encouragement and mutual protection of investments.” Cheek Decl. Ex. B (Treaty). The Treaty applies “to all investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.” *Id.*, Art. 12.

18. Under the terms of the Treaty, each Contracting Party agreed to provide certain standards of protection to investments in its territory made by investors of the other Contracting Party. *See generally id.*, Arts. 2-7. Russia therefore guaranteed Ukrainian investments in the territory of the Russian Federation protection against expropriation without due process of law and prompt, adequate and effective compensation. *See id.*, Art. 5.

19. The Ukraine-Russia BIT contains a standing offer to arbitrate “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments.” *Id.*, Art. 9(1); *see also id.*, Art. 9(2); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 66 (D.D.C. 2013) (explaining that a sovereign's accession to an investment treaty that provides for arbitration “constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the ‘agreement in writing’ to submit the dispute to arbitration”) (quoting *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392-93 (2d Cir. 2011), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015)).

### THE ARBITRATION

20. DTEK Krymenergo initiated the arbitration through its request for arbitration dated February 16, 2018. On September 26, 2018, the Tribunal issued Procedural Orders No. 1 and 2,

governing the conduct of the arbitration. The Tribunal was constituted of Professor Vladimir Pavić, J. William Rowley KC, and chaired by Stanimir A. Alexandrov until his resignation on June 21, 2020. On June 29, 2020, Mr. Rowley and Professor Pavić appointed Professor Juan Fernández-Armesto as presiding arbitrator. Cheek Decl. Ex. A (Award), ¶¶ 8-12, 18-24, 73-106.

21. DTEK Krymenergo submitted its Statement of Claim on December 7, 2018. DTEK Krymenergo alleged that Russia breached its obligations under the Treaty by unlawfully expropriating DTEK Krymenergo's investment, in addition to failing to provide full protection and security, non-discriminatory treatment, and fair and equitable treatment. *Id.*, ¶¶ 2, 25, 618, 827.

22. Following an initial refusal to participate in the proceedings, Russia requested to participate on April 5, 2019, and the Tribunal granted Russia's request on April 23, 2019. Thereafter, both Parties participated actively in the arbitration, which involved multiple rounds of written briefing, a week-long hearing on jurisdiction, merits, and quantum at the Peace Palace in The Hague in September 2021, and two rounds of post-hearing briefs and submissions on costs. *Id.*, ¶¶ 26-134.

23. Since the start of its participation in April 2019 through the end of the written and oral proceedings, the Russian Federation was represented in the arbitration by the Ministry of Justice of the Russian Federation and the Office of the Prosecutor General of the Russian Federation, as well as by attorneys from the Swiss law firm Schellenberg Wittmer Ltd., from the Dutch law firm Houthoff Coöperatief U.A., and from the Russian law firm Ivanyan & Partners. On July 8, 2021, the Russian Federation informed the Tribunal that the Russian Federation had transferred the authority to represent the State in international courts and arbitrations from the Ministry of Justice to the Prosecutor General's Office and that the Russian Federation was now

represented by Schellenberg Wittmer. After the end of the written and oral proceedings in the arbitration, Schellenberg Wittmer resigned as Russia's counsel in April 2022, and thereafter, the Russian Federation was represented by the Office of the Prosecutor General. *Id.*, ¶ 6, n.4.

24. The Tribunal declared the proceeding closed pursuant to Article 29(1) of the UNCITRAL Rules on October 30, 2023. *Id.*, ¶ 146.

### THE AWARD

25. The Tribunal composed of J. William Rowley KC, Professor Vladimir Pavić, and chaired by Professor Juan Fernández-Armesto, issued its Final Award on November 1, 2023. *See* Cheek Decl. Ex. A (Award).

26. The Tribunal rejected all of Russia's objections to jurisdiction and admissibility and ruled that it had jurisdiction to decide the dispute. *See id.*, ¶ 1030. As a preliminary matter, the Tribunal found that the Ukraine-Russia BIT remains in full force and effect, "[n]otwithstanding the existence of an armed conflict between Ukraine and the Russian Federation" (*id.*, ¶ 212), and by a majority determined that the arbitration did not require the Tribunal to impermissibly rule on the legal status of Crimea (*id.*, ¶¶ 217-224). The Tribunal then dismissed all of Russia's jurisdictional objections, finding that (i) for purposes of the Ukraine-Russia BIT, Crimea forms part of the territory of the Russian Federation (*id.*, ¶¶ 291-296); (ii) DTEK Krymenergo's investment in Crimea met the temporal requirements of the Treaty (*id.*, ¶¶ 357-358, 368-371); (iii) DTEK Krymenergo's investment constituted an investment under the Ukraine-Russia BIT (*id.*, ¶¶ 398-407); and (iv) DTEK Krymenergo met the definition of an "investor" under Article 1(2) of the Treaty (*id.*, ¶¶ 451-452). Finally, the Tribunal rejected Russia's allegations that DTEK Krymenergo's investment had been acquired through fraud or corruption (*id.*, ¶¶ 574-582, 612-613).



27. On the merits, the Tribunal determined that Russia's taking of DTEK Krymenergo's assets constituted an unlawful expropriation in breach of Article 5 of the Treaty, as it was not accompanied by compensation, not taken in the public interest, not taken in accordance with due process, and discriminatory. *Id.*, ¶¶ 785-786, 1030. The Tribunal also rejected Russia's defenses under the police powers doctrine (*id.*, ¶¶ 806-810) and the doctrine of exceptional circumstances (*id.*, ¶¶ 817-826). The Tribunal also concluded that Russia breached Article 2 of the Treaty by failing to legally protect DTEK Krymenergo's investment and breached Article 3 of the Treaty by subjecting DTEK Krymenergo to discriminatory treatment. *Id.*, ¶¶ 831-832, 1030.

28. The Tribunal awarded DTEK Krymenergo compensation of USD 207.8 million for Russia's breaches of the Treaty. By a majority, the Tribunal applied a weighted average of the different valuation alternatives put forward by both Parties to arrive at the fair market value of DTEK Krymenergo's expropriated business. *Id.*, ¶¶ 885-886, 950-952. The Tribunal also awarded DTEK Krymenergo pre- and post-award interest on the compensation of USD 207.8 million from January 22, 2015 until the date of payment at the LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually. *Id.*, ¶¶ 981, 1030. Finally, the Tribunal awarded DTEK Krymenergo all of its claimed costs and expenses of the arbitration, including USD 9,401,644.76 incurred in Legal Costs and USD 1,362,422.88 paid as Administrative Costs of the arbitration. *Id.*, ¶¶ 1027-1030.

### LEGAL STANDARDS

29. The Award is subject to the New York Convention, which applies "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, Art. I(1); *see also* 9 U.S.C. § 201 ("The Convention on the Recognition and Enforcement of Foreign

Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”).

30. The Award was made in the Netherlands, a party to the New York Convention. The Russian Federation, Ukraine, and the United States are also parties to the New York Convention. *See* New York Convention, Art. I. The Award is final and binding within the meaning of the New York Convention and Section 207 of the FAA and is therefore binding on the Parties and subject to recognition and enforcement in the United States.

31. “Confirmation proceedings under the Convention are summary in nature, and the court must grant the confirmation unless it finds that the arbitration suffers from one of the defects listed in the Convention.” *Argentine Republic v. National Grid Plc*, 637 F.3d 365, 369 (D.C. Cir. 2011); *see also* 9 U.S.C. § 207 (“The 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.”); *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)) (“Consistent with the ‘emphatic federal policy in favor of arbitral dispute resolution’ recognized by the Supreme Court as ‘appl[ying] with special force in the field of international commerce,’ [] the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards[.]”). “Federal courts in the United States have minimal discretion to refuse to confirm an award under the FAA[.]” *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 184 (D.D.C. 2018); *see also* *Compagnie Sahélienne d’Entreprise v. Republic of Guinea*, No. 20-cv-1536, 2021 WL 2417105, at \*3 (D.D.C. June 14, 2021) (“[T]he Convention is clear that a court may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.”) (citations and internal quotation marks omitted).

32. None of the grounds for “refusal or deferral of recognition or enforcement” of the Award under Article V of the New York Convention is applicable here. The Award was the product of thorough and fair arbitration proceedings in which both Parties had equal and ample opportunities to plead their case. The Tribunal issued a final, binding, reasoned opinion analyzing its jurisdiction, Russia’s liability under the applicable standard, and the appropriate measure of damages to compensate DTEK Krymenergo for the value of its expropriated assets. Russia has no defenses to confirmation and recognition of the Award. Further, if Russia seeks to oppose confirmation, Russia would bear the burden of proof for establishing facts sufficient to deny confirmation, and this Court has held that “[t]he showing required to avoid summary confirmation is high.” *Int’l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011).

### CONCLUSION

33. For the foregoing reasons, Petitioner respectfully requests that this Court confirm the Award in its entirety, together with such other relief as the Court deems just and proper, and enter judgment in Petitioner’s favor accordingly.

WHEREFORE, Petitioner respectfully requests that this Court enter an order:

34. Recognizing and confirming in its entirety the Award issued on November 1, 2023 that is attached as Exhibit A to the accompanying Declaration of Marney L. Cheek;

35. Directing judgment to be entered thereon for the Petitioner for: (a) USD 207,800,000 in damages; (b) interest over this amount at LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually, from January 22, 2015 through the date of this judgment; (c) USD 9,401,644.76 in legal costs; (d) USD 1,362,422.88 in arbitration costs; and (e) post-judgment interest on the total amount

above, calculated at the rate set forth in 28 U.S.C. § 1961, from the date of this Court's judgment until full payment; and

36. Granting such other and further relief as the Court may deem just and proper.

Dated: November 7, 2023

Respectfully Submitted,



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