ORAL ARGUMENT SCHEDULED FOR NOVEMBER 28, 2018
No. 18-7057

In the United States Court of Appeals for the District of Columbia Circuit

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PAO TATNEFT,
PETITIONER - APPELLEE,

V.

UKRAINE,
C/O MR. PAVLO PETRENKO, MINISTER OF JUSTICE,
RESPONDENT - APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NO. 1:17-CV-00582-CKK

REPLY BRIEF FOR APPELLANT

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GLOSSARY OF ABBREVIATIONS

BIT:	Russia-Ukraine Bilateral Investment Treaty
FAA:	Federal Arbitration Act
FSIA:	Foreign Sovereign Immunities Act
New York Convention, or the Convention:	Convention on the Recognition and Enforcement of Foreign Arbitral Awards

INTRODUCTION

This appeal turns largely on the meaning of "private party" under the FSIA—a term that neither Tatneft, nor the arbitrators, nor the district court ever defined. The district court attempted to defer to the arbitrators under *Ecuador*. But the arbitrators were tasked with deciding whether Tatneft was an "investor" under the Ukraine-Russia Bilateral Investment Treaty (or "BIT"), not whether it was a "private party" under the FSIA. Now on appeal, Tatneft concedes that the arbitrators never determined that Tatneft qualifies as a "private party" under the FSIA. Opp. 34. Tatneft also concedes, by not disputing, that the district court failed to construe the term. These concessions alone confirm that this was not a case for deferring to arbitrators under *Ecuador*, and in doing so the district court committed legal error.

To avoid reversal, Tatneft now says "the arbitration exception is satisfied *regardless* of whether Tatneft itself is a private party." Opp. 42. According to Tatneft, "[t]he only arbitration agreement here is the Russia-Ukraine BIT," which was "'for the benefit' of private parties." Opp. 41. Not so. "The BIT includes a standing *offer* … to arbitrate," "which [a petitioner] accept[s] in the manner required by the treaty." *Ecuador*, 795 F.3d at 206 (emphasis added). That is just what Tatneft told the court below: "[A]n arbitration agreement is formed on the terms set forth in the bilateral investment treaty when a national of one state makes a demand for arbitration with

the other state, as Tatneft did here." *Infra* at 4. In other words, the arbitration agreement here is not the BIT between Russia and Ukraine. It is Tatneft's agreement to arbitrate with Ukraine. And that agreement is "with or for the benefit of a private party" only if Tatneft itself is a "private party." It is not.

Tatneft's next backup argument—implied waiver—fares no better. The implied-waiver exception is off limits under the more specific arbitration exception, which includes an implied-waiver requirement *and* requires that the petitioner be a private party. Ukraine Br. 31–32. If showing implied waiver were enough, no petitioner would ever need to show that it was a private party. *Id*. at 33. Tatneft does not dispute this. Instead, it says the argument is waived. But Ukraine made the argument below—expressly. *Infra* 11–12 (quoting brief below and listing authorities cited). The district court overlooked it, as Tatneft does here.

Nor did Ukraine impliedly waive its sovereign immunity, a move that may only be made "unmistakabl[y]" and "unambiguous[ly]" (*Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999)) and with "inten[t]" (*Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376–78 (7th Cir. 1985)). Yet Tatneft can point to nothing in the New York Convention concerning sovereign immunity. So once again, Tatneft adopts a new position—this time pointing to the "Tate Letter," in which the State Department altered the Executive Branch's approach to immunity in 1952. *Infra* at 15–16. But the Tate Letter "had little, if any,

impact on federal courts' approach to immunity." *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004). The approach changed only when the FSIA was enacted in 1976. There was no waiver here.

As to *forum non-conveniens*, Tatneft says "Ukraine does not argue that *TMR Energy* is no longer controlling precedent in this Circuit." Opp. 54. That is *exactly* what Ukraine showed. Ukraine Br. 49–51. The Court should reverse.

ARGUMENT

I. Tatneft cannot say how the FSIA's arbitration exception is satisfied.

As Tatneft does not dispute, Ukraine's sovereign immunity is vulnerable to the FSIA's arbitration exception only if the underlying agreement is "with or for the benefit of a private party." 28 U.S.C. § 1605(a)(6). Tatneft cannot explain how this exception is satisfied here.

A. Tatneft concedes that neither the arbitrators nor the district court held that Tatneft is a "private party" under the FSIA.

Tatneft concedes that the tribunal never determined that Tatneft qualifies under the FSIA as a "private party." Opp. 34 ("[N]o foreign arbitral tribunal would ever need to frame its findings … in terms of the FSIA's arbitration exception."). Rather, as Tatneft stated below, the arbitration was "presented under the rubric of Ukraine's challenge to Tatneft's status as an 'investor' under the Russia-Ukraine BIT." *See* Dkt. 26 at 27. Further, Tatneft does not dispute that the tribunal applied amorphous tests derived from decisions of other international tribunals (JA2548–

54)—tests that bear no similarity to the meaning of "private party" under the FSIA (*see* Ukraine Br. 20–29). Thus, the tribunal never ruled that Tatneft was a "private party." And the district court erred in deferring to this nonexistent ruling.

B. The BIT itself is not the arbitration agreement here, as Tatneft conceded below and as *Ecuador* confirms.

As a fallback, Tatneft contends that, even if it were not a private party, the relevant arbitration agreement here was nevertheless "for the benefit of a private party." Opp. 41 (quoting 28 U.S.C. § 1605(a)(6)). Not so.

Under § 1605(a)(6), the "award" a petitioner seeks "to confirm" must be "made pursuant to" an "agreement made by the foreign state with or for the benefit of a private party." Here, the award was made "pursuant to" an agreement formed when Tatneft served its notice of arbitration to Ukraine, thus accepting Ukraine's standing offer to arbitrate disputes under the BIT. *See* Dkt. 1 at 5. That is the relevant arbitration agreement.

In the court below, Tatneft agreed: "As Ukraine acknowledges, an arbitration agreement is formed on the terms set forth in the bilateral investment treaty when a national of one state makes a demand for arbitration with the other state, as Tatneft did here." Dkt. 26 at 26 n.19 (citation omitted). Thus, the award Tatneft seeks to enforce was made "pursuant to" its demand for arbitration combined with the BIT. 28 U.S.C. § 1605(a)(6). In seeking the benefit of the arbitration exception, that was

the arbitration agreement Tatneft invoked. *See* Dkt. 1 at 5. And that agreement is "for the benefit of a private party" only if Tatneft is itself a private party.

Contrary to what it argued below, Tatneft now asserts that "[t]he only arbitration agreement here is the Russia-Ukraine BIT." Opp. 41. And, says Tatneft, the "BIT is an agreement to arbitrate between two states 'for the benefit' of private parties." *Id*. Not only is that argument waived, it is illogical. Tatneft is not a party to the BIT, and Tatneft does not seek to enforce "only" the BIT. *Id*. It seeks to enforce Ukraine's standing offer to arbitrate in the BIT and Tatneft's acceptance of that offer in the notice of arbitration.

Tatneft's sole case agrees. Opp. 41 (citing *Ecuador*, 795 F.3d at 206–07). *Ecuador* holds that "[t]he BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty." 795 F.3d at 206. That is the agreement to arbitrate. Thus, Chevron "made [its] prima facie showing that there was an arbitration agreement *by producing the BIT and the notice of arbitration*." *Id.* at 205 (emphasis added).

The arbitration agreement here is not Russia's treaty with Ukraine. It is Tatneft's agreement to arbitrate with Ukraine. That agreement is "with or for the benefit of a private party" only if Tatneft is a private party—which it is not. As a result, Tatneft cannot satisfy the FSIA arbitration exception.

C. Whether Tatneft is a "private party" under the FSIA is not subject to deference under *Ecuador*.

Even if the arbitrators had held that Ukraine was a private party (they did not), the district court had an independent obligation to decide this federal statutory issue for itself. This case is different than *Ecuador*, where the question the arbitrators decided was the meaning of an express term of the treaty at issue—something solely within their authority. As this Court explained, "Ecuador … consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had 'investments' within the meaning of the treaty." 795 F.3d at 208. This case, by contrast, presents no "issues of arbitrability." *Id*. The question is what the FSIA term "private party" means. That is a federal question. Ukraine thus does not seek "two bites at the apple." Opp. 26. It seeks its first bite, which the court below had a jurisdictional obligation to provide.

In contrast to the situation in *Ecuador*, the court below had an independent obligation to determine whether Tatneft was a "private party." It failed to do so. The record shows that Tatneft is anything but a private party (Ukraine Br. 20–29), and therefore reversal is warranted. At a minimum, this Court should remand for further proceedings on this issue.

D. Tatneft ignores key facts showing that it is not a private party, and wrongly suggests that private-party status was at issue in France and England.

In describing Ukrtatnafta, Tatneft seeks to portray itself as a purely commercial actor, in a purely commercial enterprise, operating pursuant to a purely commercial agreement. Opp. 5–7. At the same time, Tatneft does not dispute the ordinary meaning of the statutory term "private"—namely, "[n]ot available for public use, control, or participation" and "[b]elonging to a particular person or persons, as opposed to the public or the government." Ukraine Br. 20 (citing American Heritage Dictionary of the English Language 1042 (1981)). Nor does Tatneft dispute key facts showing that it is not a private party:

- Tatarstan officials bypass the Board and direct Tatneft's decision-making (JA996);
- Tatarstan regularly uses Tatneft to obtain bank loans and to finance the Tatar state budget (JA910–911, JA996, JA1013–14);
- Tatarstan owns the controlling Golden Share in Tatneft, and thus is entitled to "elect members of the Board and influence [Tatneft's] current and future operations, including decisions regarding acquisitions and other business opportunities, declaration of dividends and issuance of additional shares and other securities even without recourse to [the controlling] Golden Share" (JA972);
- Tatarstan controls the decision-making of Tatneft by holding numerous key positions on Tatneft's Board of Directors and Supervisory Board (JA974, 1009–11);
- Tatarstan owns controlling or substantial minority stakes in or to exercise significant influence over operations of virtually all of the major enterprises in Tatarstan—including Tatneft (JA910);

- obscure intermediary vehicles are used for control by regional authorities in Tatneft (JA991); and
- Tatarstan appointed Tatneft to act as one of Tatarstan's agents—to stand in the shoes of Tatarstan—under the Ukrtatnafta treaty that gave rise to this very lawsuit (JA441).

At a minimum, any fair reading of this existing, undisputed record shows that remand is needed.

None of the above can be said, after all, about China's 10% ownership in Morgan Stanley. Opp. 37. Nor can it be said that Morgan Stanley has China's president for its chairman, has "China" in its very name, or was created by the Chinese government. Ukraine Br. 5, 20. In short, "giv[ing] the term its ordinary meaning" (*Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012)), Tatneft is not a "private party" because it is available for state use and control and substantially belongs to the state. Ukraine Br. 20.

Looking beyond "ordinary meaning" to the "statutory context" (*Taniguchi*, 566 U.S. at 569), Tatneft would also qualify as an "organ of a foreign state or political subdivision." 28 U.S.C. § 1603(b)(2). To avoid this conclusion, Tatneft emphasizes that Tatarstan does not hold "majority ownership" (Opp. 21, 35–38), yet does not finally dispute that under the FSIA an "organ" need not be state-majority-held (Ukraine Br. 21). Nor does Tatneft dispute that courts look to a host of factors in testing an entity for "organ" status—including its creation, purpose, government supervision, government financial support, employment practices, obligations and

privileges under foreign law, and ownership structure. *See id*. at 21–22 (citing *USX Corp. v. Adriatic Ins. Co*., 345 F.3d 190, 209 (3d Cir. 2003)).

Still further, Tatneft does not dispute that organs may "assume a variety of forms, including … a mining enterprise, a transport organization such as a shipping line or airline, [or] a steel company." H.R. Rep. No. 94-1487, at 15–16 (1976). Thus, it is no answer to say that Tatneft is a "commercial enterprise" that "does not engage in a public activity on behalf of the government." Opp. 38. All of the enterprises on the list naturally operate for their own commercial purposes (making a profit in mining, transport, shipping, flying, or manufacturing steel) and on behalf of their governments. The same is true of the Tatarstan state oil company, Tatneft.

Tatneft cites a Fifth Circuit decision declining to find organ status (Opp. 39), but there, the government did not "actively supervise" the company and "ha[d] never used its power as a shareholder to direct the [company's] management." *Bd. of Regents of Univ. of Texas Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 279–80 (5th Cir. 2007). Here, Tatneft does not dispute that Tatarstan has directed Tatneft's decisions and even uses Tatneft to fund the State budget. This case is more like *Kelly v. Syria Shell Petroleum Development B.V.*, which held that the Syrian government's "appoint[ing] … board members, including the chairman, and that such appointees ha[d] invariably been high-level Syrian government officials, support[ed] a determination of organ status." 213 F.3d 841, 848 (5th Cir. 2000).

Lastly, though of course not dispositive here, Tatneft portrays this federal case as a carbon copy of earlier litigation in France and England. It is not.

As to France, the Paris Court of Appeal found that the text of the BIT does not require that the investor be "private." JA336. The court reasoned that where the text of the BIT does not distinguish between private and non-private investors, no such distinction should be drawn by the adjudicator. *Id*. It held only that Tatneft is not an "emanation of the Republic of Tatarstan." JA336–38. That designation turns on a rigorous test that: (1) requires complete commingling of assets with the State; and (2) forbids the enterprise from having structural and decision-making autonomy. *Id*. at 337. Neither is required under the FSIA. As to England, the UK State Immunity Act does not require that the petitioner be a "private party." That is why Ukraine did not pursue the "private party" argument in England. Opp. 14 n.5.

Tatneft is not a private party.

II. Tatneft's implied-waiver arguments lack merit.

A. As Ukraine demonstrated below, the implied-waiver exception is statutorily off-limits.

Nor can Tatneft use its arbitration agreement to invoke the implied-waiver exception. Under the arbitration exception, a "private party" may enforce an award against a foreign sovereign only "if paragraph (1) of this subsection [i.e., the implied-waiver exception] is otherwise applicable." 28 U.S.C. § 1605(a)(6)(D). If an arbitration agreement itself can *be* the implied waiver, then the arbitration exception is

a dead letter. A party could simply cite the agreement to show an implied waiver and never show that it is a private party. This is what Tatneft attempted here. Not only did it raise the issue too late (Ukraine Br. 30–31), Tatneft cannot explain how it can avoid reading the arbitration exception out of the FSIA. After all, where "a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC*, 566 U.S. at 645.

Contrary to Tatneft's assertion (at 45), Ukraine mounted this defense below. Ukraine stated: "Tatneft … cannot evade the express 'private party' requirement of the specific provision in Section 1605(a)(6) by referring to the general provision in Section 1605(a)(1)." Dkt. 29 at 16–18 (citing, *inter alia*, *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (the canon that "the specific governs the general" is "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"). Of course, Ukraine addressed the issue in reply because Tatneft did not raise implied-waiver until its opposition brief. But in any event, "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

As a matter of statutory construction, Tatneft does not dispute that its reading of the statute would render Section 1605(a)(6)(D) meaningless, breaking the rule that courts "must give effect to every word of a statute wherever possible." *Leocal*

v. Ashcroft, 543 U.S. 1, 12 (2004). Instead, it says "another exception in the same statute" shows that when Congress intended exceptions to be "exclus[ive]," it "said so." Opp. 47–48. Section 1605(a)(5), Tatneft observes, applies "only when 'not otherwise encompassed in paragraph (2) above [the 'commercial activity' exception].'" *Id*. Tatneft misreads the statute.

Paragraph (5) is not an *exclusivity* provision; it is a *priority* provision. It says you only reach (5) if you cannot not satisfy (2). That command ensures that "the exceptions to paragraph (5) do not limit the [paragraph (2)] commercial activity exception." *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000).

That is not the relationship between paragraphs (1) and (6), which *are* exclusive. If you cannot satisfy (6), you *may* not satisfy (1)—as that would collapse (6) *into* (1). Thus, it would have made no sense to add the phrase "only when not encompassed in paragraph (6)" before paragraph (1), as that would have *made* paragraph (6) collapse into (1). By omitting Tatneft's preferred language, Congress preserved the exclusive relationship between paragraphs (1) and (6).

Trying a different tack, Tatneft says "(a)(6) is 'more general' than (a)(1), because it does not require intentionality." Opp. 47 (citing *Creighton*, 181 F.3d at 126). Here, Tatneft seems to be referring to the intentionality of the sovereign waiving its immunity, which *Creighton* broadly contrasted with a sovereign forfeiting its im-

munity by agreeing to arbitrate. *See id*. But (a)(6) *does* have an intentionality requirement in subparagraph (D)—not at issue in *Creighton*—that expressly incorporates the entire implied-waiver provision. A party seeking to satisfy (a)(6) via implied waiver must therefore satisfy (a)(1), as well. Thus, what makes (a)(6) more specific is its added requirement that the petitioner be a "private party."

Next, Tatneft says courts have analyzed (a)(1) and (a)(6) without addressing whether they were mutually exclusive. *See* Opp. 45–47. But that is not surprising. Recall that (a)(6)(D) incorporates (a)(1). Thus, the only difference between (a)(1) and (a)(6) is the private-party requirement. And that only matters when the petitioner is not a private party—*which was not disputed in the cases Tatneft cites*. Thus, it is unremarkable that the courts did not address the issue.

Finally, Tatneft cites "legislative history" by Mark Feldman, an American Bar Association representative. Opp. 48. Mr. Feldman's testimony does not show congressional intent—as "the views expressed by witnesses at congressional hearings are not necessarily the same as those of the legislators ultimately voting on the bill." *Austasia Intermodal Lines, Ltd. v. Fed. Mar. Comm'n*, 580 F.2d 642, 645 (D.C. Cir. 1978). In any event, Mr. Feldman was testifying about the meaning of different language. He was testifying about H.R. 3137, which *lacked* the following italicized language that appeared in the final, enacted version of the statute:

> [a foreign state is not immune in an action] "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 … , or to confirm an award made pursuant to such an agreement to arbitrate, if … (D) *paragraph (1) of this subsection [regarding waiver] is otherwise applicable.*"

28 U.S.C. § 1605(a)(6)(D) (emphasis added); Arbitral Awards: Hearing Before the Subcomm. on Admin. Law and Governmental Relations, 99th Cong. 6, 96 (1986) (statement of Mark B. Feldman, Chairman, Comm. on Foreign Sovereign Immunity, American Bar Association, Section of Int'l Law and Practice, dated May 20, 1986). By adding the italicized language after Mr. Feldman testified, Congress made clear that parties may not separately pursue (a)(1).

In sum, the implied-waiver exception is textually not available here.

B. Tatneft points to nothing showing an "unmistakable" waiver of sovereign immunity.

Even if it were textually available, Tatneft does not dispute that a waiver of sovereign immunity must be "unmistakable" and "unambiguous." Ukraine Br. 30 (quoting *Creighton*, 181 F.3d at 123 (citation omitted)). Nor does it dispute that the Supreme Court instructs that a sovereign does not "waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Argentine Republic v. Amerada Hess Shipping*

Corp., 488 U.S. 428, 442–43 (1989). Still further, nothing in the New York Convention suggests any intent to waive immunity—yet another point Tatneft concedes by not disputing.

Faced with these barriers, Tatneft now says this issue is resolved by what was indisputably dictum in *Creighton*. *See* 181 F.3d at 123 ("when a country becomes a signatory to the [New York] Convention … the signatory state must have contemplated enforcement actions in other signatory states"); Opp. 49–51. But "[b]inding circuit law comes only from the holdings of a prior panel, not from its dicta." *Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) (citation omitted). This Court is therefore not bound by *Creighton*'s signing-is-enough dictum, which directly contradicts *Argentine Republic*. *See* Ukraine Br. 38–40 (suggesting *Irons* footnote to address *Creighton* dictum).

To shore up its position, Tatneft now says what it calls the "Tate Letter" adopted the "restrictive theory" of sovereign immunity before Ukraine signed the Convention; and thus Ukraine waived immunity by signing. Opp. 51. Tatneft has never mentioned the "Tate Letter" before (*see* Dkt. 26 at 37–39), perhaps because waiver requires unmistakable evidence, and the Letter is no such thing.

Before the FSIA, courts generally "deferred to the decisions … of the Executive Branch" on foreign sovereign immunity; and the "so-called Tate Letter" announced a change in Executive Branch policy on when to "*suggest*[] … immunity"

to the courts. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–87 (1983) (emphasis added); *see* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–985 (1952), *and in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (op. of White, J.) (Appx. 2) ("[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity."). But the Tate Letter "had little, if any, impact on federal courts' approach to immunity analyses." *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004) (citing *Verlinden*, 461 U.S. at 487). Its theory of sovereign immunity was not "enacted into law" until the passage of the FSIA (*Verlinden*, 461 U.S. at 487), which "replac[ed] the old executive-driven, factor-intensive, loosely common-law-based immunity regime with … [a] 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (quoting *Verlinden*, 461 U.S. at 488). Until then, Ukraine's pre-FSIA signing of the New York Convention cannot have been an unmistakable waiver because courts were still operating under the "common-law-based immunity regime." *Id*.

There was no waiver here.

III. As to the "fair and equitable treatment" and Amruz/Seagroup claims, Tatneft ignores key differences between this case and *Ecuador*, and fails to show that the award was made "pursuant to" the arbitration agreement.

Tatneft's arguments also fall short of addressing key differences between this case and *Ecuador*, and otherwise explaining how the award upholding the "fair and equitable treatment" claim and the claims of Amruz/Seagroup was made "pursuant to" an "agreement to arbitrate" with Tatneft.

A. Unlike in *Ecuador*, deference as to the "arbitrability" of the "fair and equitable treatment" claim is not warranted because the arbitration agreement lacked this key provision and the arbitrators lacked key evidence.

As shown in our opening brief, in *Ecuador*, the treaty actually contained the provision at issue in the arbitration. Ukraine Br. 13. Thus, "Ecuador … consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had 'investments' within the meaning of the treaty." 795 F.3d at 208. Here, Ukraine did not consent to allow the arbitrators to decide whether Tatneft was provided "fair and equitable treatment" *because the BIT contained no such requirement*. Tatneft does not dispute this; nor does it dispute that *Ecuador* is distinguishable on precisely this ground.

By the same token, Tatneft does not dispute that in *Ecuador* the arbitrators were not missing any evidence needed for their determination. Ukraine Br. 13. In this case, by contrast, key evidence of the Contracting Parties' deliberate exclusion

of the "fair and equitable treatment" provision from the BIT was not discovered until the French annulment proceeding. These are key distinctions, as they show why the arbitrators' "fair and equitable treatment" ruling here deserves no deference.

B. Even under *Ecuador*, deference is not absolute and was not owed to an award imposing a purposely excluded, controversial provision.

Even assuming *Ecuador* deference applied, it is not absolute. *See Ecuador*, 795 F.3d at 204 ("*[i]n most instances*, the existence of an arbitration agreement is a 'purely factual predicate[] independent of the plaintiff's claim'") (emphasis added). And here, any presumptive deference should have been overcome by the parties' purposeful omission of a "fair and equitable treatment" provision.

As shown in our opening brief (at 45), courts "have traditionally considered as [an] aid[] to [treaty] interpretation the negotiating and drafting history (*travaux préparatoires*)." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). Indeed, it is akin to "legislative history," which Tatneft has no qualms citing. *See* Opp. 48. Tatneft does not dispute this. Yet Tatneft has no answer to the drafting history here, which shows that the "fair and equitable treatment" clause was included in an early draft, highlighted for discussion, and later deleted. Ukraine Br. 45 (citing JA1153, JA1167). Tatneft dismisses *travaux préparatoires* as "parol evidence" (Opp. 29 n.10), yet does not dispute that the clause was jettisoned. But omitting the

clause made sense. The "fair and equitable treatment" standard is the most amorphous standard in international-investment law, which States regularly seek to eradicate from their BITs.

Tatneft speculates that the "fair and equitable treatment" clause may have been deleted "because the most-favored-nation clause made it largely superfluous or for some other reason." Opp. 29 n.10. But both Russia and Ukraine regularly include both clauses in their treaties with other countries; nearly every other Russia or Ukraine BIT contains a "fair and equitable treatment" clause along with a "most-favored-nation" clause. *See* UN CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY HUB, INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, MAPPING OF IIA CONTENT (*available at*: https://bit.ly/2dpSVp8 (collecting texts of BITs)).[1] It would make no sense to include a "fair and equitable treatment" clause if a most-favored-nation clause made it "superfluous." Opp. 29 n.10.

[1] To find the relevant treaties, under "Select mapped treaty elements" expand "Standards of Treatment"; under "Most-favored-nation (MFN) treatment" expand "Type of MFN clause" and select "Post-establishment," "Pre- and post-establishment," and "Pre-establishment only"; under "Fair and equitable treatment (FET)" expand "Type of FET clause" and select "FET unqualified" and "FET qualified"; under "Filter by country, type, status, year" expand "Country" and select "Ukraine" and "Russian Federation."

Combined with the *travaux préparatoires*, the Contracting States' treaty practice confirms that the exclusion was no accident. In this context, any *Ecuador* deference should have been overcome because the arbitrators did not consider that the "fair and equitable treatment" clause was deliberately omitted.

Finally, Tatneft faults Ukraine for stating that, at bottom, *Ecuador* was mistaken. Opp. 4, 31. As we have shown, the Court need not reach that issue because the "fair and equitable treatment" provision is not *in* the BIT; it was deliberately omitted. Therefore, no deference as to the arbitrators is due or is overcome. But should this Court disagree, Ukraine reserves its right to challenge *Ecuador* as incorrectly decided when it comes to the district court's determination of *its* jurisdiction.

It is one thing to defer to arbitrators in applying the New York Convention as implemented by the Federal Arbitration Act ("FAA") to confirm an arbitral award, to further the FAA's pro-arbitration policy. There, deference to the arbitrators is due. *E.g.*, No. 18-7047, *Anatolie Stati v. Republic of Kazakhstan* (Br. for Appellant 42) (Oct. 15, 2018) (under "deferential review, an award cannot be confirmed if the arbitrators 'stra[y] from interpretation and application of the agreement or otherwise effectively dispens[e] their own brand of … justice'") (quoting *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1213 (2014)). It is another to defer to non-Article III fact-finders to determine a court's own jurisdiction. There, respectfully,

no deference is due, and the petitioner bears the burden of establishing subject-matter jurisdiction. Ukraine Br. 13, 40–43 (collecting authorities). In *Ecuador*, the Court deferred *both* under the New York Convention *and* the FSIA. Respectfully, that was incorrect. Thus, should the Court disagree that *Ecuador* is distinguishable, Ukraine reserves the right to seek en banc review and certiorari on this issue.

C. Tatneft cannot say how the award upholding the Amruz/Seagroup claims was made "pursuant to" the arbitration agreement.

At a minimum, the court below lacked jurisdiction to confirm the award as to the claims of Amruz and Seagroup, which Tatneft acquired for the sole purpose of upping its damages against Ukraine. *See* Ukraine Br. 46–48. Tatneft does not defend the propriety of its acquisition of the Amruz and Seagroup shares. *See* Opp. 30. In a footnote, Tatneft says courts have rejected "similar arguments" that the "assignability of rights is a jurisdictional issue," but none of the cases involved an abuse of rights. Opp. 30 n.11. Tatneft's acquisition of the shares *was* an abuse of rights, and under international investment law, that made the arbitration agreement a nullity—at least as to the Amruz/Seagroup claims. *See* Ukraine Br. 46–48. At a minimum, the Amruz/Seagroup claims exceeded the scope of the agreement to arbitrate, and the district court lacked jurisdiction as to those claims.

IV. As an alternative ground for reversal, the court below is *forum non conveniens* in this dispute between Tatneft and Ukraine.

A. This Court has pendent appellate jurisdiction.

Tatneft objects to pendent appellate jurisdiction, but offers no argument for why it is improper. *See* Opp. 52. It is proper—and not only because Ukraine's sovereign immunity and interest in a proper forum are "inextricably intertwined." *Id.*; *see Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950–51 (D.C. Cir. 2008) (holding that immunity and *forum non conveniens* rulings were "inextricably intertwined"). This Court exercises pendent appellate jurisdiction over "threshold issues." *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997) (exercising jurisdiction over a statute-of-limitations defense in a FSIA immunity appeal). *Forum non conveniens* is a classic "threshold, nonmerits issue." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 433 (2007).

As a "threshold question," *forum non conveniens* does not require "'reaching the merits.'" *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 513 (D.C. Cir. 2018) (quoting *Sinochem*, 549 U.S. at 431). Thus, it "cannot be mooted or altered by further proceedings in the district court." *Rendall-Speranza*, 107 F.3d at 917. And here, where resolving the issue will "'likely terminate the entire case, sparing both this court and the district court from further proceedings and giving the parties a speedy resolution,'" "the exercise of pendent appellate jurisdiction is favored." *KiSKA Const. Corp.-U.S.A. v. Washington Metro. Area*

Transit Auth., 167 F.3d 608, 611 (D.C. Cir. 1999) (quoting *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996)).

Exercising jurisdiction would also enable the Court to avoid questions of foreign sovereign immunity, which "are both difficult and, because of their implications for the foreign relations of the United States, delicate." *Rendall-Speranza*, 107 F.3d at 917. "If they can be avoided merely by advancing the time at which the court reaches its decision" on a "threshold issue," "then they should be." *Id.* This Court has repeatedly exercised pendent appellate jurisdiction over "non-immunity claims" in FSIA appeals. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *e.g.*, *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 951; *Rendall-Speranza*, 107 F.3d at 917. The Court should do the same here, where immunity is squarely at issue.

B. Tatneft fails to explain why *TMR* was ever good law and, if it were, how it survives *Sinochem*.

Nor can Tatneft escape the merits by pointing to *TMR*. According to *Tatneft*, "Ukraine does not argue that *TMR Energy* is no longer controlling precedent in this Circuit." Opp. 54. In fact, we showed that *TMR* never was controlling precedent and assuredly is no longer controlling today, after the Supreme Court's decision in *Sinochem*. Ukraine Br. 49–51 ("the *TMR* panel had no authority to establish such a rule" given earlier Circuit precedent; "the Supreme Court has recently stated that

forum non conveniens 'has continuing application … in cases where the alternative forum is abroad'" (quoting *Sinochem*, 549 U.S. at 430)).

Yet Tatneft does not even cite *Sinochem*, which came after *TMR* and rejected the United States as a forum even though "no other forum … could reach the [defendant's] property, if any, in the United States." *TMR*, 411 F.3d at 304. In light of *Sinochem*, *TMR*'s categorical language is overruled. "[A] three-judge 'panel may always ... determine ... that a prior holding has been superseded, and hence is no longer valid as precedent' without resorting to en banc endorsement." *In re Sealed Case*, 352 F.3d 409, 412 (D.C. Cir. 2003) (citation omitted). This Court should do so here as to *TMR*'s flawed reasoning.

C. Tatneft fails to explain why the actual Ukrainian forum at issue here would be inadequate.

Turning to the merits, Tatneft and the district court denigrate "certain Ukrainian court orders and judicial actors" (Opp. 55 (quoting JA2648)), but takes aim at the wrong "alternative forum." *Sinochem Int'l Co.*, 549 U.S. at 430. Were Tatneft's action brought in Ukraine, a different court—one with jurisdiction over actions to recognize and enforce foreign arbitral awards—would hear the case. Such an action would be within the jurisdiction of civil courts—in particular, the Court of Appeal of Kiev and The Supreme Court of Ukraine. *See* 1958 NEW YORK CONVENTION GUIDE, JURISDICTIONS, UKRAINE (where "the seat of arbitration is outside Ukraine,"

the "Court of Appeal [of] Kyiv" has jurisdiction over "enforcement of foreign award[s]") (*available at*: https://bit.ly/2CqPX1O).

Moreover, Ukrainian civil courts frequently enforce awards against Ukraine and Ukrainian state entities. *See* Tatyana Slipachuk *et al*., Ukraine, in GETTING THE DEAL THROUGH – INVESTMENT TREATY ARBITRATION 4 (2015) ("The awards in *Alpha Projektholding v Ukraine*, *Inmaris Perestroika v Ukraine* and *Remington Worldwide Limited v Ukraine* were successfully enforced in Ukrainian courts. Ukraine did not appeal against enforcement.") (*available at*: https://bit.ly/2pWKZ5v). And Tatneft does not dispute that other U.S. courts have held Ukraine to be an adequate forum for enforcement proceedings against the State. *See In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002). In short, the relevant courts are more than adequate here.

By contrast, Tatneft attacks the commercial courts that considered the legality of the acquisition of Ukrtatnafta shares by Tatneft, Amruz, and Seagroup (the Commercial Court of Kiev, the Commercial Court of Appeal of Kiev, the Commercial Court of Poltava Region, the Interregional Commercial Court of Kiev, and the High Commercial Court of Ukraine). Opp. 55–57. These courts *lack* jurisdiction to recognize and enforce foreign arbitral awards. They would not hear this case.

Nor does Tatneft dispute that the public and private interest factors support dismissal for *forum non conveniens*. *See* Ukraine Br. 53–54. Here, the underlying dispute has no connection to the United States; the locus is in Ukraine. The dispute involves complex issues of Ukrainian, Russian, and Soviet law. Relevant witnesses and experts are in Ukraine and Russia. Most of Ukraine's assets are in Ukraine. Importantly, Tatneft has not identified *any* non-sovereign Ukrainian assets in the United States. Ukrainian regulations require that payments out of the State budget to satisfy foreign arbitral awards and judgments follow enforcement proceedings in Ukraine. Dkt. 21 at 43 (citing JA2475–80). Any American interest in enforcing international awards is far outweighed by Ukraine's "sovereign prerogative" to regulate payments from the State budget. Such a "significant public factor" overcomes the "normal[]" favor given to "enforcement of [international arbitral] awards" in the United States. *Figueiredo,* 665 F.3d at 392. The Court should reverse.

CONCLUSION

For all these reasons, this Court should reverse and remand for the district court to dismiss with prejudice for lack of subject-matter jurisdiction and *forum non conveniens*.

Respectfully submitted,

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PAO TATNEFT,
PETITIONER - APPELLEE,

V.

UKRAINE,
C/O MR. PAVLO PETRENKO, MINISTER OF JUSTICE,
RESPONDENT - APPELLANT.

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I filed the foregoing BRIEF via the Court's ECF filing system, and caused it to be served electronically to the registered participants as identified on the Notice of Electronic Filing:

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