IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NJSC NAFTOGAZ OF UKRAINE, *et al.*, *Petitioners*, v. THE RUSSIAN FEDERATION, *Respondent*.	Case No. 1:23-cv-01828-JDB

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

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INTRODUCTION

In February 2014, the Russian Federation seized control of Ukraine's Crimean Peninsula, and, effective March 18 of that year, formally asserted sovereignty and annexed Crimea as a matter of Russian law. Treating Crimea as its own territory, Russia assumed obligations under the Russia-Ukraine bilateral investment treaty (the "BIT" or the "Treaty") to protect Ukrainian investors and investments in that territory, including against expropriation. Russia nonetheless expropriated the investments of Ukrainian investors in Crimea, including Petitioners' investments, through a combination of physical interference and formal legislation.

On October 17, 2016, Petitioners NJSC Naftogaz of Ukraine ("NJSC Naftogaz"), National Joint Stock Company Chornomornaftogaz ("CNG"), JSC Ukrtransgaz ("UTG"), JSC Ukrgasvydobuvannya ("UGV"), JSC Ukrtransnafta ("UTN"), and Subsidiary Company Gaz Ukraiiny ("Gaz Ukraiiny") (collectively, the "Petitioners") commenced arbitration under the BIT's arbitration clause and under the Arbitration Rules of the United Nations Commission for International Trade Law 1976 (the "UNCITRAL Rules"). In two separate, carefully considered awards—the first on jurisdiction and liability, dated February 22, 2019 (the "Partial Award"), and the second on the issue of damages, dated April 12, 2023 (the "Final Award")—an arbitral tribunal seated in the Netherlands (the "Tribunal") determined it "ha[d] jurisdiction over the claims," and that Russia had expropriated Petitioners' investments in violation of the Treaty, Pinsky Decl. Ex. C (Partial Award) ¶ 274, ECF No. 1-4, and awarded Petitioners USD 4,222,875,858.81, as well as costs, plus interest on all sums ordered. Pinsky Decl. Ex. A (Final Award) ¶ 716, ECF No. 1-2.

Petitioners bring this action to confirm the Final Award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), a treaty ratified by the United States, the Russian Federation, the Netherlands, and most other nations, and implemented under U.S. law by the Federal Arbitration Act (the "FAA").

9 U.S.C. §§ 201–208. The FAA provides that recognition and enforcement of a foreign arbitral award is mandatory unless the court "finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention" applies. 9 U.S.C. § 207. The FAA "affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012).

In its Motion to Dismiss, the Russian Federation seeks to circumvent the limited grounds to challenge enforcement of the Final Award by reframing its disagreement with the Tribunal as an attack on this Court's subject-matter jurisdiction under the Foreign Sovereign Immunities Act (the "FSIA"). Russia's central argument is that Petitioners did not make their investments in Russian territory, so those investments are not protected by the BIT and are therefore outside the scope of Russia's agreement to arbitrate. Mem. P. & A. Supp. Resp't Mot. Dismiss Pet. Confirm ("RF Br.") 3, ECF No. 16-1. Russia's arguments—considered in detail and rejected by the Tribunal—fail on the merits. But more importantly, they are not for this Court to decide. In determining subject-matter jurisdiction, the only question is whether an exception to Russia's immunity from jurisdiction applies. The D.C. Circuit has consistently rejected attempts—such as Russia's—to smuggle merits questions into the Court's jurisdictional analysis.

This Court has subject-matter jurisdiction under two such exceptions: the arbitration exception and the waiver exception. Under the arbitration exception, a foreign state lacks immunity when the action is "to confirm an award made pursuant to . . . an agreement to arbitrate" "made by the foreign state with or for the benefit of a private party," if the "award is . . . governed by a treaty . . . in force for the United States" that "call[s] for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Because the Russian Federation does not dispute that the BIT exists, that Petitioners noticed an arbitration, or that the Tribunal issued the Final Award,

Petitioners have met their initial burden to demonstrate the existence of an arbitration agreement. *See Chevron Corp. v. Republic of Ecuador,* 795 F.3d 200, 204–205 (D.C. Cir. 2015); *LLC SPC Stileks v. Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). Russia falls far short of its "burden" to "rebut[] the presumption" that it "agree[d] to arbitrate." *Chevron*, 795 F.3d at 205.

None of the Russian Federation's other arguments fare any better. Petitioners are all commercial enterprises that are juridically separate from the Ukrainian state—indeed, five out of six Petitioners do not even qualify as an "agency or instrumentality" of a "foreign state" under the FSIA, which makes them "private parties" even under Russia's interpretation. 28 U.S.C. § 1603(a)–(b). For this and other reasons, this case involves an agreement to arbitrate by Russia "with or for the benefit of a private party" that triggers the arbitration exception. *Id.* § 1605(a)(6). Nor can Russia escape application of the New York Convention by contending that the Final Award does not arise out of a "commercial relationship." The D.C. Circuit and other courts interpret the term "commercial" expansively, and the Treaty alone establishes the requisite commercial relationship. This connection to commerce is further confirmed where—as here—Russia expropriated Petitioners' oil and gas investments and transferred those assets to a newly created state-owned entity for the assets' continued commercial use and exploitation.

This Court independently has subject-matter jurisdiction over the Russian Federation under the waiver exception, based on Russia's ratification of the New York Convention and agreement to arbitrate in signatory states, including in the Netherlands. 28 U.S.C. § 1605(a)(1). The D.C. Circuit has held, in an unpublished but well-reasoned decision, that a foreign state "waives its immunity from arbitration-enforcement actions in other signatory states" by "signing the New York Convention," as Russia indisputably has done. *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam); *see also Creighton Ltd. v. Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999).

For all of these reasons, the Russian Federation's bid to relitigate the Final Award under the guise of the FSIA should be rejected, and its motion to dismiss should be denied.

BACKGROUND

A. Russia Unlawfully Expropriates Petitioners' Investments in Crimea.

Petitioners are Ukrainian companies operating in Ukraine's oil and gas sector. Partial Award, ¶ 1. As of March 2014 (and at the time Petitioners commenced arbitration), Petitioner NJSC Naftogaz was a 100-percent state-owned public joint stock company whose primary business involved importing gas into Ukraine, the wholesale trading of gas, and the supply of gas to consumers. Partial Award, ¶¶ 69–71. NJSC Naftogaz directly owned the other Petitioners: CNG was a wholly owned subsidiary of NJSC Naftogaz and, before the expropriation, was a vertically integrated oil and gas company whose operations focused on Crimea; UTG was a wholly owned subsidiary of NJSC Naftogaz engaged in gas-transmission and storage, and it operated a gas-transportation pipeline in Crimea; UGV was a wholly owned subsidiary of NJSC Naftogaz whose primary activity in Crimea was its participation in a joint activity agreement with CNG to develop offshore-gas-condensate fields in the Black Sea and the Sea of Azov; UTN was also a wholly owned subsidiary of NJSC Naftogaz engaged in gas transmission and storage that owned a resort complex in Crimea; and Gaz Ukraiiny, also a wholly owned subsidiary of NJSC Naftogaz, was engaged in the collection of debts due to NJSC Naftogaz and owned various pieces of equipment in Crimea. Partial Award, ¶¶ 72–80; *see also* Final Award, ¶ 7.[1]

Before the Russian Federation's unlawful expropriation of their investments, Petitioners were the largest participants in natural gas exploration, production, transport, storage, processing,

[1] Likvo LLC, a subsidiary of NJSC Naftogaz that was a claimant in the arbitration until it was terminated and merged into UGV, provided emergency services, such as firefighting, for NJSC Naftogaz's oil and gas operations in Crimea. Partial Award, ¶ 76; Final Award, ¶¶ 7, 120–122.

and distribution in Crimea. Partial Award, ¶ 4. Indeed, Petitioners maintained substantial investments in Crimea, including special permits for subsoil use; equipment and infrastructure for the exploration, development, and production of gas and other natural resources, including a fleet of jack-up drilling rigs and supply vessels; rights to operate gas-transportation pipelines; ownership interests in gas pipelines; rights to operate an underground-gas-storage facility; and over 675-million cubic meters of stored gas. *See id.* ¶¶ 67–80.

In late February 2014, the Russian Federation invaded and occupied the Crimean Peninsula. On March 17, 2014, the Crimean Parliament—having been stripped of its authority under Ukrainian law—took two significant actions. *See* Partial Award, ¶¶ 91, 226. First, it enacted a resolution proclaiming that a so-called Republic of Crimea was an independent state and purporting to strip Ukraine and enterprises owned by Ukraine of their property rights. *Id.* ¶¶ 93, 225–227. Second, the Crimean Parliament issued a resolution targeting by name certain commercial enterprises and their investments, including Petitioners' investments, for nationalization. *See id.* ¶¶ 108–109, 225–227.

On March 18, 2014, the Russian Federation and the so-called Republic of Crimea signed a treaty purporting to formalize Crimea's "admission" to the Russian Federation (the "Annexation Treaty"). Partial Award, ¶ 94. On March 21, 2014, the Russian Parliament formally ratified the Annexation Treaty, and enacted a constitutional law that purported to "admit[] the Republic of Crimea and the Federal City of Sevastopol to the Russian Federation effective 18 March 2014" (the "Law on Admission"). *Id.* ¶¶ 6, 96–97, 226. As of that date, the Republic of Crimea became a constituent entity of the Russian Federation as a matter of Russian law. This Law on Admission "created the necessary constitutional authority to adopt and ratify the seizure which Russia accomplished, incrementally, from and after 18 March 2014." *Id.* ¶ 231. The expropriation of

Petitioners' investments was accomplished "only by force of the Russian legislation which enacted the previously unauthorized laws of the dis-empowered Crimean legislature." *Id.* ¶ 230.

In the months after March 2014, the Crimean Parliament—now operating with the authority conferred upon it under Russian law—adopted a series of additional legislative acts that targeted and nationalized the remainder of Petitioners' investments in Crimea. *See* Partial Award, ¶¶ 123–125, 257–264. Alongside these legislative acts, Petitioners' investments were the subject of physical interference. *See id.* ¶¶ 110–122. Petitioners were never able to regain possession of their businesses, operations, and assets in Crimea and never received any compensation for Russia's unlawful expropriation of their investments.

B. The BIT Affords Protection to Petitioners and Their Investments.

Petitioners' investments in Crimea were protected by the Russia-Ukraine BIT, a bilateral investment treaty concerned with "the encouragement and mutual protection of investments." *See* Pinsky Decl. Ex. B (BIT), ECF No. 1-3. The Treaty protects "'investments' . . . which are invested by an investor of one Contracting Party" (in this case, Petitioners) "in the territory of the other Contracting Party" (in this case, the Russian Federation). *Id.*, Art. 1(1). The Treaty defines "territory" as including "the territory of the Russian Federation . . . as well as [its] respective exclusive economic zone and the continental shelf, defined in accordance with international law." *Id.*, Art. 1(4).

Under the Treaty, the Contracting Parties agreed to provide certain standards of protection to investments in their respective territory, including a protection against expropriation without due process of law and prompt, adequate, and effective compensation. BIT, Art. 5. Each Contracting Party also agreed to arbitrate "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments" under the auspices

of the Arbitration Institute of the Stockholm Chamber of Commerce or an "ad hoc" arbitration under the UNCITRAL Rules, at the choice of the investor. *Id.*, Art. 9.

Petitioners elected to initiate arbitration under the UNICTRAL Rules. The 1976 UNCITRAL Rules provide comprehensive procedural rules for the conduct of the arbitration and expressly direct 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" and "shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part." UNCITRAL Rules 1976, Art. 21(1)–21(2).

C. The Tribunal Upholds Its Jurisdiction and Finds Russia Liable for Expropriating Petitioners' Investments.

Petitioners initiated arbitration by serving a Notice of Arbitration on the Russian Federation on October 17, 2016. Partial Award, ¶ 17; *see also* Second Pinsky Decl. Ex. A (Notice of Arbitration). On January 19, 2017, Russia submitted a letter "objecting to the constitution of an arbitral tribunal to hear the present dispute, the jurisdiction of the Tribunal, and to the admissibility of [Petitioners'] claims." Partial Award, ¶ 22. In its objection, Russia argued that Petitioners' investments (a) were not made "in the territory of the other Contracting Party [*i.e.*, Russia]" at the time when the investments were originally made; (b) were not made "in accordance with the legislation" of Russia on Russian territory, but were Ukrainian; and (c) did not further the purposes of the BIT, in that before March 2014 the investments paid no Russian tax and did not "contribute to the economic development of the Russian Federation." *Id.* ¶ 136.

The Tribunal held a hearing on jurisdiction and liability in May 2018. *See* Partial Award, ¶¶ 50–53. Despite being notified of, and provided an opportunity to comment on, all significant steps in the arbitration, Russia declined to participate in the proceedings until after the issuance of

the Partial Award. *See id.* ¶¶ 18–66; Final Award, ¶ 67. Notwithstanding Russia's initial non-participation, the Tribunal considered its jurisdiction under the Treaty in detail, including with respect to the objections in Russia's letter. *See* Partial Award, ¶¶ 135–239.

On February 22, 2019, the Tribunal issued its Partial Award on jurisdiction and liability, in which it ruled by majority, "that the Tribunal has jurisdiction over the claims," and "that [Petitioners] have established a violation of Article 5 (expropriation) and Article 2(1) (full and unconditional legal protection) and Article 3(1) (most favored nation treatment) of the BIT." Partial Award, ¶ 274. Russia's party-appointed arbitrator was in dissent.

As part of its jurisdictional ruling, the Tribunal held that Petitioners were Ukrainian investors with investments in the territory of the Russian Federation within the meaning of the Treaty, entitled to invoke the protection of the BIT as of March 18, 2014, the effective date of Crimea's incorporation into Russia as a matter of Russian law. *See* Partial Award, ¶¶ 161–182. As the Tribunal explained, on that date, "Crimea had been absorbed into the Russian Federation which, having authorized the seizure became responsible under the BIT for its financial consequences." *Id.* ¶ 230.[2]

The Tribunal also rejected the argument, raised in the Russian Federation's objection letter, that investments qualified for protection only if they were "made" in the territory of the other Contracting Party at the time they were originally invested. *See* Partial Award, ¶¶ 184, 190–202.

[2] The Tribunal's finding that Crimea was within the Russian Federation's "territory" for purposes of the BIT was not predicated upon a finding of which Contracting Party is sovereign over Crimea. As the Tribunal noted, "the plain terms of the BIT can be applied in their ordinary meaning to the situation in Crimea and Sevastopol at the relevant dates without resolving legal issues such as sovereignty extraneous to those stipulated by the Contracting Parties such as the legality or illegality of Russian's [sic] military intervention and subsequent constitutional absorption of Crimea into the Russian Federation." Partial Award, ¶ 161. "If the Contracting Parties had intended to specify 'sovereign' territory they would have said so." *Id.* ¶ 172.

As the Tribunal observed, "the verb 'made' is merely descriptive of an existing state of affairs on the critical dates of asset seizure and commencement of proceedings." *Id.* ¶ 191. For these reasons, the Tribunal declined to read into the BIT "the 'original date of investment' as an additional limitation on BIT protection." *Id.* ¶ 191.

The Tribunal also noted that "[t]he Treaty is not without temporal limitations. Article 12 restricts protection to investments made 'on or after January 1, 1992." Partial Award, ¶ 175. Consistent with this observation, on October 6, 2019, the Tribunal issued an order reaffirming that "subject matter jurisdiction was affirmed only in respect of investments made after that date" and that, accordingly, "[t]he quantification phase will only deal with investments made after that date." Second Pinsky Decl. Ex. B (Procedural Order No. 8) ¶ 4.1.2.

D. Russia Seeks to Set Aside the Partial Award in the Dutch Courts.

On June 21, 2019, the Russian Federation commenced annulment proceedings against the Partial Award before The Hague Court of Appeal. *See* Pinsky Decl. Ex. E (Set-Aside Judgment) ¶ 1.1, ECF No. 1-6. The Dutch court issued a judgment on July 19, 2022 (a) upholding the Tribunal's determination that Petitioners were entitled to invoke the BIT as Ukrainian investors with investments in the territory of Russia, *id.* ¶¶ 5.8.8, 5.9.6; (b) partially setting aside the Partial Award "only insofar as the arbitral tribunal has found that it has jurisdiction over all claims, since it has jurisdiction only to rule on investments made on or after January 1, 1992" under Article 12 of the Treaty, *id.* ¶ 5.7.6; (c) confirming (the existence of) the Tribunal's jurisdiction to determine which assets qualified for protection under Article 12 during the damages phase of the arbitration, *id.* ¶ 5.7.7; and (d) ordering Russia to pay the costs of the proceedings, *id.* ¶ 5.15. Following the judgment of The Hague Court of Appeal, the Tribunal rejected a further request by Russia for a re-hearing of its jurisdictional objections. Final Award, ¶ 274; *see also* Second Pinsky Decl. Ex. C

(Procedural Order No. 21). Appeal proceedings before the Supreme Court of the Netherlands are ongoing. Second Pinsky Decl. ¶ 6.

E. The Tribunal Awards Petitioners More than USD 5 Billion in the Final Award.

The Tribunal issued the Final Award on April 12, 2023, holding Russia liable to Petitioners in the amount of USD 4,222,875,858.81, plus interest, and awarding them costs in the amount of USD 23,889,036.26 and EUR 882,435.90, again plus interest. Final Award, ¶ 716. In determining the compensation due, the Tribunal concluded that all of Petitioners' investments were made after January 1, 1992, and were thus compensable under the Treaty. *See id*. ¶¶ 297–362. In particular, the Tribunal found (i) that Petitioners were created as "new legal entities" in 1998 and onwards and thus "could not have 'made' investments before their creation," *id*. ¶¶ 316–17; and (ii) that Petitioners had "'bought' the Soviet-era assets with [Petitioners'] shares" and had, therefore, made an investment within the scope of Article 1 of the BIT, *id.* ¶ 330. Accordingly, the Tribunal quantified the value of the "assets acquired by the Claimants since their incorporation and with full recognition of the 1 January 1992 'backstop' provided by Article 12." *Id.* ¶ 336.

On July 12, 2023, the Russian Federation commenced set-aside proceedings against the Final Award before The Hague Court of Appeal. Second Pinsky Decl. ¶ 7.

F. Petitioners Seek to Confirm the Final Award in This Court.

Petitioners commenced this proceeding to confirm the Final Award on June 22, 2023. Pet. Confirm Foreign Arbitration Award, ECF No. 1. On July 7, 2023, Petitioners submitted their request for service "through diplomatic channels" under 28 U.S.C. § 1608(a)(4), explaining that service was unavailable under the methods described in 28 U.S.C. §§ 1608(a)(1)–(3). Pet'rs' Letter, ECF No. 5. On October 16, 2023, the State Department sent a letter to the Court Clerk stating that it had delivered the required judicial documents to the Russian Embassy in

Washington, D.C. on October 11, 2023, under cover of a diplomatic note. State Dep't Letter, ECF No. 11.

By diplomatic note dated November 15, 2023, the Russian Federation "returned" the delivered documents "without execution," asserting that documents intended for service on Russia must be transmitted by "notes verbales of diplomatic missions of foreign states accredited in the Russian Federation." Meehan Decl. Ex. 1, ECF No. 16-3. In its Motion to Dismiss, Russia alleged that this Court lacked personal jurisdiction on the grounds that service of process on Russia's Embassy in Washington, D.C., as opposed to Russia's Ministry of Foreign Affairs, was not proper. RF Br. 37–40. Responding to Russia's diplomatic note, "as a courtesy," the U.S. Embassy in Moscow transmitted the judicial documents to the Russian Ministry of Foreign Affairs on March 29, 2024, under cover of a diplomatic note. State Dep't Letter, ECF No. 17. Russia has thus confirmed it "will not object to service in this case" and has withdrawn its objection to service in these proceedings. Notice Withdrawal Resp't Mot. Dismiss Pet., ECF No. 18.

ARGUMENT

In resolving a motion to dismiss under the FSIA, a court must assume "a plaintiff's unchallenged factual allegations . . . to be true." *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 398 (D.C. Cir. 2018) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)). Where a foreign state "contests only the legal sufficiency of plaintiff's jurisdictional claims, the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief." *Id.* (quoting *Price*, 294 F.3d at 93). Since Russia has not introduced evidence contesting the basis for the Court's jurisdiction under the FSIA, the Court "must assume

the truth of [Petitioners'] allegations, make all reasonable inferences in [their] favor, and properly place the ultimate burden of proof with [Respondent]." *Id.* at 401.

I. The Court Has Subject-Matter Jurisdiction Under the FSIA.

The Court's jurisdictional inquiry under the FSIA is "narrow." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 65 (D.D.C. 2013) (quoting *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)), *aff'd,* 795 F.3d 200 (D.C. Cir. 2015). In its motion to dismiss, however, the Russian Federation attempts to improperly expand the scope of the Court's inquiry by conflating the Court's "narrow" *jurisdictional* assessment under the FSIA with a *substantive* challenge to recognition and enforcement of the Final Award under the New York Convention, as implemented by the FAA. In doing so, Russia attempts to circumvent the limited grounds for such challenges under the New York Convention and the FAA, and the "considerable deference" courts afford tribunals when applying those grounds. *See, e.g.*, *Enron Nigeria Power Holding v. Nigeria,* 844 F.3d 281, 289 (D.C. Cir. 2016) (quoting *B.G. Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 41 (2014)).

In determining subject-matter jurisdiction in this case, the *only* question for this Court is whether an exception to the Russian Federation's immunity from jurisdiction applies. The Court need only "satisfy itself that one of the exceptions applies." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983). As explained below, Russia is not immune from this action because either or both of the arbitration exception in 28 U.S.C. § 1605(a)(6) and the waiver exception in 28 U.S.C. § 1605(a)(1) apply.

A. The Court Has Jurisdiction Under the FSIA's Arbitration Exception.

The Court has subject-matter jurisdiction under the FSIA's arbitration exception because this is an action to confirm an award pursuant to an agreement to arbitrate, and it is governed by

the New York Convention, a "treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

The arbitration exception applies where three "jurisdictional facts" are established: (1) "the existence of an arbitration agreement"; (2) there is "an arbitration award"; and (3) "a treaty governing the award," such as the New York Convention. *Stileks*, 985 F.3d at 877; *see also Chevron,* 795 F.3d at 204. Petitioners have satisfied their initial burden of establishing these jurisdictional facts by producing the BIT, Petitioners' notice of arbitration, and the Final Award—which is governed by the New York Convention. *See Chevron,* 795 F.3d at 204–205; *Stileks*, 985 F.3d at 877.

The "burden of persuasion" therefore shifts to the Russian Federation, "which must establish the absence of the factual basis by a preponderance of the evidence." *Chevron,* 795 F.3d at 204–205 (internal citation omitted). For the reasons explained below, Russia cannot discharge its burden to show that the FSIA's arbitration exception is inapplicable here. The FSIA does not provide a basis for Russia to relitigate the issues of arbitrability that it raises in its motion to dismiss (Section 1), and the Court must in any event defer to the Tribunal's determinations of arbitrability (Section 2). Russia's claims that the arbitration agreement did not involve "private parties" for the purposes of the FSIA (Section 3), or that the Final Award is not governed by the New York Convention because a claim involving expropriation of investments under a bilateral investment treaty is supposedly not "commercial" (Section 4), also lack merit.

1. The FSIA Does Not Provide a Basis for Russia to Relitigate the Arbitrability of the Parties' Dispute.

The Russian Federation argues that the FSIA's arbitration exception does not apply because "Russia never agreed to arbitrate with Petitioners." RF Br. 17. According to Russia, because Petitioners "made their investments in Ukrainian territory, not Russian territory," RF Br. 19, they

were "domestic investors" with "domestic investments" falling outside the scope of the BIT's protections, and thus outside the scope of Russia's offer to arbitrate. RF Br. 25. Russia therefore claims that "because there was no valid offer to arbitrate, there is no arbitration agreement." RF Br. 19 (quoting *Blasket Renewable Invs., LLC v. Kingdom of Spain,* 665 F. Supp. 3d 1, 13 (D.D.C. 2023)).

The Russian Federation attempts to frame its complaint as going to the *existence* of its consent to arbitrate. But under binding precedent, Russia's argument goes only to the *scope* of that consent—i.e., which disputes Russia agreed to arbitrate, not whether Russia agreed to arbitrate at all. *See Chevron* 795 F.3d at 205–206; *Stileks*, 985 F.3d at 877–878. Russia does not dispute the existence or validity of the BIT. Nor does Russia dispute that, under the BIT, it agreed to arbitrate investment disputes with Ukrainian investors. Russia also does not dispute the fact of Petitioners' notice of arbitration. Rather, Russia's complaint is that its consent to arbitrate under the BIT does not extend to *the dispute with the Petitioners underlying the Final Award*. RF Br. 22. Russia thus challenges the arbitrability of the dispute, namely, whether the BIT's definition of investment—requiring that "assets" be invested "by an investor of one Contracting Party in the territory of the other Contracting Party"—was satisfied. BIT, Arts. 1(1) –1(2).

The D.C Circuit has consistently held that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Stileks*, 985 F.3d at 878; *Chevron* 795 F.3d at 206; *see also Hulley Enters. Ltd. v. Russian Fed'n*, No. CV 14-1996, 2023 WL 8005099, at *11 (D.D.C. Nov. 17, 2023); *Blasket,* 665 F. Supp. 3d at 10; *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 275 (D.D.C. 2022). At most, Russia's arbitrability objections may bear on "confirmation under the New York Convention," *Stileks*, 985 F.3d at 878; *Chevron* 795 F.3d at 206, as distinct from the question of this Court's *jurisdiction*.

In *Chevron*, for example, Ecuador argued that "if Chevron's claims are not covered by the BIT, then Ecuador never agreed to arbitrate with Chevron, and the District Court consequently lacked jurisdiction." *Chevron* 795 F.3d at 205. In rejecting Ecuador's argument, the D.C. Circuit explained 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. The FSIA therefore allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award." *Chevron*, 795 F.3d at 206. Russia's challenge to the arbitrability of the dispute underlying the Final Award—that is, whether the specific claims at issue in fact were covered by the Treaty—is thus squarely inconsistent with *Chevron*.

The D.C. Circuit reached a similar conclusion in the more recent *Stileks* case—to which Russia notably does not refer in its memorandum. There, Moldova argued that the arbitration claimant was not a qualifying "investor" under the Energy Charter Treaty ("ECT") and therefore could not have properly invoked the ECT's arbitration clause. *Stileks*, 985 F.3d at 877–878. As Russia does here, Moldova thus argued that, even if the applicable treaty established it had agreed to arbitrate certain disputes, "it does not prove that it agreed to arbitrate this *particular* dispute." *Id.* at 878. In rejecting Moldova's argument, the court expressly confirmed that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Stileks*, 985 F.3d at 878.

Even the district court's decision in *Blasket*—on which Russia's argument relies—undermines Russia's position. *See* RF Br. 19 (citing *Blasket,* 665 F. Supp. 3d 1 (D.D.C. 2023)). In *Blasket*, Spain argued "that, under the law applicable to them, the parties were *incapable* of entering into an agreement to arbitrate *anything at all*." *Blasket,* 665 F. Supp. 3d at 10 (second emphasis added). The issue in *Blasket* was whether the agreement to arbitrate reflected in the ECT was "invalid under EU law" and thus void *ab initio*. *Id.* at 11. The court agreed that Spain "lacked

the legal authority to make a standing offer to arbitrate to the Companies under the law that applies to both parties." *Id.* at 12.[3] In reaching this conclusion, the court drew a clear distinction between the case before it, which turned on legal capacity to enter into an agreement to arbitrate, and *Chevron* and *Stileks*, which turned on "questions about the 'scope of arbitrability.'" *Blasket*, 665 F. Supp. 3d at 9. In this case, Russia does not contest the validity of its consent to arbitrate, nor does it argue it was otherwise incapable of giving consent.

Unable to avoid this clear precedent, Russia instead cites to a series of cases—most from outside this Circuit—that have no application here. For example, in *Al-Qarqani v. Saudi Arabian Oil Co.*, the Fifth Circuit held that the FSIA's arbitration exception did not apply where the agreement at issue contained no offer to arbitrate on its face, and in fact said "nothing whatsoever about arbitration." *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021). Unlike here, where Russia's clear consent to arbitrate is found in the Russia-Ukraine BIT, the *Al-Qarqani* court found no evidence that the defendant had agreed to arbitrate anything at all, and thus dismissed for lack of jurisdiction. *See id*.

The remaining cases Russia cites are inapposite because they involved efforts to establish subject-matter jurisdiction on the basis of arbitration agreements to which the sovereign was not a party. In *DRC, Inc. v. Honduras*, for example, the court dismissed for lack of jurisdiction because

[3] The decision in *Blasket* is notably out of step with the weight of authority in this District rejecting identical arguments regarding Spain's agreement to arbitrate under the same treaty. *See Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 213–214 (D.D.C. 2023) (Chutkan, J.); *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, No. 20-CV-1708-EGS-MAU, 2023 WL 2914472, at *10 (D.D.C. Mar. 31, 2023) (Upadhyaya, Mag.); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-CV-01871 (TSC), 2023 WL 2016933, at *6 (D.D.C. Feb. 15, 2023) (Chutkan, J.). The *Blasket* decision, and the decisions in *Next Era* and *9Ren*, are currently on appeal to the D.C. Circuit, which has received full briefing and heard oral argument on February 28, 2024. *See Blasket Renewable Invs, LLC v. Kingdom of Spain*, No. 23-7038; *Nextera Energy Glob. Holdings B.V., et al. v. Kingdom of Spain*, Nos. 23-7031; *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032.

the plaintiff sought enforcement against Honduras rather than against the award debtor, a sub-entity of Honduras, but failed to rebut the presumption of separateness between a state and its instrumentalities. *DRC, Inc. v. Honduras*, 71 F. Supp. 3d 201, 214–219 (D.D.C. 2014); *see also, e.g.*, *Gater Assets Ltd. v. AO Moldovagaz,* 2 F.4th 42, 69–70 (2d Cir. 2021) (holding that Moldova was not a party to the applicable arbitration agreement); *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd*., 703 F.3d 742, 756 (5th Cir. 2012) (holding that the People's Republic of China was not a party to the relevant arbitration agreement); *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul*, No. MISC. A. 08-102, 2010 WL 4027382, at *5–6 (E.D. Pa. Oct. 13, 2010) (finding that sovereign defendant had never been party to the applicable agreement to arbitrate), *aff'd sub nom. Aurum Asset Managers, LLC v. Bradesco Companhia de Seguros*, 441 F. App'x 822 (3d Cir. 2011).

The Russian Federation has accordingly failed to rebut the presumption that the BIT and Petitioners' notice of arbitration constitute an agreement to arbitrate for the purposes of the FSIA's arbitration exception.[4] *Chevron*, 795 F.3d at 205; *see also Deutsche Telekom AG v. Republic of India*, No. 21-1070 (RJL), 2024 WL 1299344, at *4 (D.D.C. Mar. 27, 2024) ("As far as the FSIA is concerned, that ends the Court's inquiry. India's arbitrability arguments are no response to [the petitioner's] evidence of an arbitration agreement, so India is not immune from suit in our courts."). The Court's analysis of Russia's principal argument can and should end here, because Russia's

[4] There are two possible bases on which this Court can reach the conclusion that this is an "action . . . to confirm an award made pursuant to" "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration." 28 U.S.C. § 1605(a)(6). First, as already described, Petitioners have demonstrated that such an agreement plainly exists where—as here—they have produced the BIT and Petitioners' notice of arbitration accepting Russia's standing offer to arbitrate. Second, and in any event, for the purposes of the FSIA's arbitration exception, the BIT alone is properly considered as an agreement to arbitrate "with or for the benefit of a private party," as Petitioners address further below at Section I.5.

scope-related objections fall outside the "narrow" jurisdictional inquiry under the FSIA and—at most—are relevant only to the Court's assessment of the merits of the Petition.

2. The Court Must Defer to the Tribunal's Arbitrability Ruling Because Russia Clearly and Unmistakably Delegated Arbitrability Questions to the Tribunal.

For the reasons outlined above, the Court should not, at this stage, address the Russian Federation's arbitrability objections. But even if the Court were to consider Russia's objections at this stage, the Court *must* defer to the Tribunal's determination that Russia agreed to arbitrate this dispute.

Parties can agree to arbitrate "'gateway' questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). An agreement to arbitrate these threshold issues is an "antecedent agreement" to the arbitration agreement, often referred to as a delegation provision. *Rent-A-Ctr.,* 561 U.S. at 70. Courts find delegation provisions effective where there is "clear and unmistakable evidence" that the parties agreed to arbitrate questions of arbitrability. *First Options*, 514 U.S. at 944 (citing *AT & T Techs, Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)).

The BIT clearly and unmistakably delegates questions of arbitrability to the arbitrators by providing for arbitration under the UNCITRAL Rules. BIT, Art. 9. As the D.C. Circuit held in *Chevron*, Article 21(1) of the UNCITRAL Arbitration Rules—delegating to the arbitral tribunal "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"—constitutes "clear and unmistakable" evidence that the defendant had "consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had 'investments' within the meaning of the treaty." *Chevron*, 795 F.3d at 207–08 (citing UNCITRAL Arbitration Rules 1976, Art. 21(1)); *Stileks*, 985

F.3d 878–879; *see also Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012) ("[A] bilateral investment treaty's incorporation of the . . . UNCITRAL rules [is] clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitral panel in the first instance." (internal quotation marks omitted)); *Earth Sci. Tech, Inc. v. Impact UA, Inc.*, 809 F. App'x 600, 606 (11th Cir. 2020) (same).

Because the parties have clearly and unmistakably agreed to delegate questions of arbitrability to the Tribunal, including whether an agreement to arbitrate existed, "a court must defer to an arbitrator's arbitrability decision." *First Options*, 514 U.S. at 943. "That standard is more than mere deference." *Stileks*, 985 F.3d at 878. Where "an agreement assigns the arbitrability determinations to an arbitrator, 'a court possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'" *Stileks*, 985 F.3d at 878 (quoting *Henry Schein*, 139 S. Ct. at 529); *see also Hulley*, 2023 WL 8005099, at *16 (applying *Stileks* "to the jurisdictional question of whether an arbitration agreement existed here, this Court may not second guess the Tribunal's determination as to that question").

The Russian Federation fails to address the parties' clear delegation of arbitrability and instead cites inapposite cases, offering no precedent where a court reviewed arbitrability *de novo* when that question was clearly and unmistakably delegated to the arbitral tribunal. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 & n.5 (2010) (recognizing that a court may not refer questions to arbitration "[w]here there is no provision validly committing them to an arbitrator," but noting that "there is no need to apply the rule requiring 'clear and unmistakable' evidence of an agreement to arbitrate arbitrability" because "[t]he parties agree[d] that it was proper for the District Court to decide whether their ratification dispute was arbitrable"); *Dist. No. 1, Pac. Coast Dist., Marine Engineers' Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*,

998 F.3d 449, 460 (D.C. Cir. 2021) (finding that "there was no clear and unmistakable agreement by the parties" to assign those issues to the arbitrator); *Nat'l R.R. Passenger Corp. v. Bos. & Maine Corp.*, 850 F.2d 756, 759 (D.C. Cir. 1988) ("The parties agree, as they must, that because they have not clearly and unmistakably provided otherwise, the question of *whether* the parties agreed to arbitrate must be decided by the court, not by the arbitrators." (internal quotation marks omitted)).

The Russian Federation's reliance on numerous other cases concerning the existence of an arbitration agreement is similarly misplaced, because Russia's objections concern only the *scope* of the agreement to arbitrate—not its *existence*. *See, e.g.*, *Bailey v. Fed. Nat. Mortg. Ass'n*, 209 F.3d 740, 744 (D.C. Cir. 2000) ("[T]his is not a case in which the parties disagree over the meaning of an existing agreement. Rather, the legal battle here is over the *existence* of a contract, not its meaning."); *KenAmerican Res., Inc. v. Int'l Union, United Mine Workers of Am.*, 99 F.3d 1161, 1163 (D.C. Cir. 1996) (explaining that the appellants argued that they "never agreed at all to the [agreement containing an arbitration clause] . . . and therefore they did not agree to arbitrate disputes as to its interpretation").

Accordingly, there is no basis for this Court to review *de novo* the Tribunal's arbitrability decisions, as the Russian Federation requests. Rather, if the Court were to reach these issues, it must defer to the Tribunal's determination that Russia agreed to arbitrate.

3. In Any Event, Russia's Arbitrability Challenges Are Meritless.

The Russian Federation's objection to the arbitrability of the parties' dispute rests on three broad contentions: (i) that Crimea was not part of Russia's "territory" for the purposes of the BIT; (ii) that Petitioners did not "make" any investments in Russian territory; and (iii) that Petitioners'

investments fall outside the BIT's temporal scope. Should the Court reach the merits of these objections, it should reject them for the same reasons articulated by the Tribunal.

As the U.S. Government has argued, even where a court must make an independent determination of whether there is an agreement to arbitrate, it should "consider affording respectful consideration to the findings made by the arbitral tribunal," where the contested issue implicates factual questions. Br. for United States as Amicus Curiae, at 13, *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 23-7038 (D.C. Cir. Feb. 2, 2024), ECF No. 2038663. Such respectful consideration is especially warranted here where Russia's objections concern issues of treaty interpretation and international law in which "[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 40 (2014).

a) Crimea Is Part of Russia's "Territory" Under the BIT.

Under the BIT, Russia agreed to protect Ukrainian investments "in the territory" of the Russian Federation. BIT, Art. 1(1). The BIT defines "territory" as "the territory of the Russian Federation or the territory of Ukraine as well as their respective exclusive economic zone and the continental shelf, defined in accordance with international law." BIT, Art. 1(4). In the Partial Award, the Tribunal determined that Crimea is part of Russia's "territory" because, as of March 18, 2014—the effective date of Russia's incorporation of Crimea into the Russian Federation—Russia "exercised physical control and jurisdiction and asserted sovereignty over Crimea." Partial Award, ¶ 179; *see generally id.* ¶¶ 161–182. In every publicly available arbitral award to have considered this question, each tribunal has similarly held that Crimea constitutes part of Russia's "territory" for the purposes of the BIT, because the Russian Federation exercises

effective control over the Crimean Peninsula.[5] Judicial decisions have come to the same conclusion. For example, the Swiss Federal Supreme Court has also rejected Russia's attempts to set aside two arbitral awards, finding that tribunals seated in Switzerland had properly applied the concept of "territory" in the BIT to Crimea.[6]

The Russian Federation argues, however, that the meaning of "territory" must be fixed in time at the moment of the Treaty's conclusion, when both Ukraine and Russia "understood that Crimea was Ukrainian territory and thus did not fall within the definition of Russian territory under [the] BIT." RF Br. 21. Russia also claims that the Treaty cannot apply to "disputed territory, such as Crimea." RF Br. 22. Russia is wrong.

First, neither the ordinary meaning of the Treaty text nor its context supports reading the term "territory" as the territory of each Contracting Party as it stood at the time of the BIT's execution.[7] As the Tribunal rightly concluded, the Russian Federation's proposed interpretation would be "inconsistent with a good faith interpretation of the Treaty terms," because it would "denude the Treaty of effect and . . . create a legal void, a bubble, in the application of the Treaty

[5] *See* Award, ¶ 292, *JSC DTEK Krymenergo v. Russian Fed'n*, 1:23-cv-03330-CJN (D.D.C.), ECF No. 1-2 (finding that Crimea is part of the territory of the Russian Federation under Article 1(4) of the BIT); Award, ¶ 218, *Public Joint Stock Company "State Savings Bank of Ukraine" v. Russian Fed'n*, No. 1:23-cv-00764-ACR (D.D.C.), ECF No. 1-2 (same); Award on Jurisdiction, ¶ 175, *Stabil v. Russian Fed'n*, No. 1:22-cv-00983-TNM (D.D.C.), ECF No. 2-4 (same).

[6] *See, e.g.*, Swiss Federal Supreme Court Judgment ¶ 4.3, *Stabil v. Russian Fed'n*, No. 1:22-cv-00983-TNM (D.D.C.), ECF No. 2-4; *see also* Set-Aside Judgment, ¶¶ 5.5.6–5.5.21, ECF No. 1-6.

[7] The parties appear to agree that treaties should be interpreted consistently with the interpretive principles reflected in the Vienna Convention on the Law of Treaties ("VCLT"). VCLT, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."); *see also* RF Br. 20n.5, 25. As Russia notes, courts apply these principles "'as an authoritative codification of customary international law.'" RF Br. 20 n.5 (quoting *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) and citing *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013)). To the extent Russia suggests otherwise, principles of contractual interpretation lead to no different conclusion in this case. *See* RF Br. 20–21.

in respect of the Crimean Peninsula that was never contemplated and should not be countenanced." Partial Award, ¶¶ 174, 178 (internal citations omitted).

The Russian Federation's subsidiary complaint that applying the BIT to Crimea would be "tantamount to amending the BIT" must also be rejected. RF Br. 21. As the Tribunal explained, "at the time the BIT was concluded, there was one geographic territory shared between two sovereign states, Ukraine and Russia. That is still the situation." Partial Award, ¶ 180. The Tribunal further observed that, at the time Russia seized Petitioners' investments and on the date Petitioners commenced arbitration, i.e., the dates relevant to the Tribunal's jurisdiction, "[n]either party took any action to terminate the BIT. There is no need for a 'renewal' or further 'adoption' of the BIT. Both Russia and Ukraine treated the BIT as subsisting after the occupation and subsequent annexation." *Id.* ¶ 176. The BIT thus remained in force with respect to investments in Crimea.

Second, the fact that "Ukraine disputes Russia's sovereignty over Crimea" is irrelevant, because Article 1(4) does not exclude the BIT's application to "disputed territory." RF Br. 22.[8] "If the Contracting Parties had intended to specify 'sovereign' territory they would have said so." Partial Award, ¶ 172. Russia's claim that the "BIT can only function on the basis of mutually recognized territories" is erroneous, as only Russia is in the position to exercise the Contracting Party's obligations under the Treaty in Crimea. RF Br. 22. As stated in the Partial Award, "[w]hile Ukraine has not surrendered sovereignty [over Crimea], it acknowledges that it is incapable of exercising it." Partial Award, ¶ 180.

[8] Similarly unfounded is the Russian Federation's argument that it "cannot be deemed to have agreed to undertake any obligations to Ukrainian investors in Crimea" where Ukraine "has not agreed to undertake any obligations to Crimean investors who make investments in Ukraine." RF Br. 22. Russia's alleged requirement of reciprocity between the two Contracting Parties cannot be found anywhere in the BIT and certainly not in the arbitration clause of Article 9.

The Russian Federation claims to find support for its interpretation of the Treaty in its diplomatic correspondence related to the application of its BITs with other states. *See* RF Br. 22; Meehan Decl. Exs. 3–24, ECF No. 16-3. Under governing principles of treaty interpretation, the views of third States have no bearing on the interpretation of a *bilateral* investment treaty between Russia and Ukraine. *See* VCLT, Art. 31–32. What this correspondence does demonstrate, however, is that *Russia* plainly interprets its obligations under BITs with those States as applying in the territory of Crimea. *See, e.g.*, Meehan Decl. Ex. 4 (Russia's Ministry of Foreign Affairs "notify[ing]" the British Government that the Russia-UK BIT "shall apply to legal relations arising out of investments made in accordance with the legislation of the Russian Federation" in the territories Russia has purported to annex in eastern Ukraine and "shall apply similarly to the Republic of Crimea and the federal city of Sevastopol"); *see generally id.* Exs. 4–24.

In short, both the law and the facts affirm that Crimea was—and remains—the "territory" of the Russian Federation as defined in Article 1(4) at the time of Russia's breaches of the BIT and when arbitration proceedings were commenced. *See generally* Partial Award, ¶¶ 176–182.

b) Petitioners "Made" Investments in Russian "Territory."

Article 1(1) of the BIT protects "assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party," while Article 12 states that the BIT applies to "all" investments "made by investors of one Contracting Party in the territory of the other Contracting Party" after January 1, 1992. Partial Award, ¶ 160; BIT, Arts. 1(1), 12. Relying primarily on the use of verb "made" in Article 12, the Russian Federation claims that "Russia's offer to arbitrate can only be invoked by Ukrainian investors who made investments in

territory that was part of Russia at the time of investment" and that an "investment . . . can only be made once: at the time of its inception." RF Br. 24.

The Tribunal correctly rejected this argument in the Partial Award. As the Tribunal explained, "the verb 'made' is merely descriptive of an existing state of affairs on the critical dates of asset seizure and commencement of proceedings." Partial Award, ¶ 191. There is nothing in the text of the BIT that "supports adding the 'original date of investment' as an additional limitation on BIT protection." *Id.* ¶ 191. Nor does the BIT's context or its object and purpose suggest otherwise. RF Br. 25. As the Tribunal observed, "to hold that the circumstances of the original investment control the application of the BIT undermines one of the purposes of the Treaty which is not only to *attract* foreign investments but to *protect* existing investments which, at the time of seizure, are 'foreign investments' at the mercy of the state which effects the compulsory acquisition." Partial Award, ¶ 199.

In sum, at the time of expropriation, Petitioners held investments in the territory of the Russian Federation, and thus qualified as protected investors under the BIT. Partial Award, ¶ 182. Russia's reliance on investment treaty cases holding that "domestic investments and domestic investors are not protected under investment treaties" is therefore inapposite. RF Br. 25–26.

c) Petitioners' Investments Were Made After January 1, 1992.

In the Partial Award, the Tribunal acknowledged that "[t]he Treaty is not without temporal limitations," as "Article 12 restricts protection to investments made 'on or after January 1, 1992,' being the date of the break-up of the Soviet Union." Partial Award, ¶ 175. In the Final Award, the Tribunal reiterated that "[t]he quantification phase [would] only deal with investments made after

that date" and affirmed that all of Petitioners' investments had been made after 1992 and were thus eligible for compensation under Article 12. Final Award, ¶¶ 2, 327–336.

The Russian Federation, however, maintains that Petitioners' investments fall outside the temporal scope of the BIT as they "were interests in gas projects that were developed by the Soviet Union and its state-owned enterprises prior to 1992." RF Br. 27. According to Russia, Petitioners were mere "legal successors to all rights and interests in the property of their Soviet predecessor," with "interests in legacy investments of the Soviet Union that were made prior to 1992." RF Br. 27.

The Russian Federation's argument was considered in detail by the Tribunal in its Final Award, and involved an assessment of extensive expert testimony. *See* Final Award, ¶¶ 297–336. Yet Russia deals with this objection in a single paragraph, supported only by reference to the dissenting opinion. *See* RF Br. 26–27. The Tribunal squarely rejected Russia's objection on the basis of the expert evidence before it, holding instead that the "Claimants were constituted as 'new legal entities'" in 1998 and onwards and that "the Naftogaz corporations 'bought' the Soviet-era assets with their shares. The State exchanged ownership rights for shareholder rights. At that stage, and not before, the assets became protected investments within the scope of Article 1 of the BIT." Final Award, ¶¶ 317, 330.

* * *

In sum, there is no basis for this Court to review *de novo* Russia's arbitrability challenges, and Russia falls far short of its "burden" to "rebut[] the presumption" that it "agree[d] to arbitrate." *Chevron*, 795 F.3d at 205.

Should the Court nonetheless reach these issues, it should reject the Russian Federation's arguments as meritless and further conclude that Russia's objections "need not and should not be repeated or relitigated" in the event Russia seeks to challenge "the existence of an arbitration

agreement between the parties and . . . the arbitrability of the underlying dispute" again under the New York Convention. *Hulley*, 2023 WL 8005099, at *29.[9]

4. This Is an Action to Confirm an Award Pursuant to an Agreement by Russia "with or for the Benefit of a Private Party."

The Russian Federation next argues that Petitioners cannot invoke the FSIA's arbitration exception because, Russia claims, they are "Ukrainian state entities, not private parties," and, accordingly, this is not an action to confirm an award made pursuant to "an agreement made by the foreign state with or for the benefit of a *private party*." RF Br. 27 (quoting 28 U.S.C. § 1605(a)(6)). Russia's argument rests on a misreading of the statutory text and construction of a false dichotomy between the FSIA's definition of "foreign state" and the exception's reference to "private parties." Although Russia accepts that the FSIA "does not define the term 'private party,'" it argues that the term should be interpreted in opposition to the FSIA's definition of "foreign state." RF Br. 27. The FSIA defines "foreign state" to include "agenc[ies] or instrumentalit[ies] of a foreign state" that are "separate legal person[s]" and "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(a)–(b). For at least four independent reasons, Russia's argument is both irrelevant and wrong.

First, the Russian Federation's argument has no bearing on the application of the arbitration exception in this case because the Final Award was rendered pursuant to the BIT, which is itself an "agreement made by the foreign state with *or for the benefit of* a private party." 28 U.S.C. § 1605(a)(6). Under the Treaty, Russia agreed to arbitrate disputes with all potential Ukrainian

[9] In the event that Russia is permitted to re-litigate these issues for the purposes of a challenge under the New York Convention, Petitioners reserve their right to advance all responsive arguments, including regarding the preclusive effect of the Dutch court decisions related to Russia's efforts to set aside the Partial and Final Awards, or the decisions of any other court.

investors in Russian territory. *See Chevron* 795 F.3d at 206 (adopting Chief Justice Roberts's interpretation of the Supreme Court majority's opinion in *BG Group*, according to which "in agreeing with the United Kingdom to adopt [the arbitration provision] along with the rest of the [BIT], Argentina thereby formed an agreement with all potential U.K. investors . . . to submit all investment-related disputes to arbitration").

Second, even if the relevant "agreement" is not the BIT but individual investors' acceptance of the BIT's offer to arbitrate, the Final Award was rendered pursuant to an agreement to arbitrate between Russia and private parties—*even* under Russia's interpretation of "private parties." That is because five out of six Petitioners fall outside the FSIA's definition of an "agency or instrumentality of foreign state" and thus constitute "private part[ies]" even on Russia's analysis. The Supreme Court made clear in *Dole Food Co. v. Patrickson* that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" within the definition of an "agency or instrumentality of a foreign state." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). "A subsidiary of an instrumentality is not itself entitled to instrumentality status." *Id.* at 473.

NJSC Naftogaz is the only Petitioner directly owned by Ukraine—Russia concedes that all other Petitioners are "subsidiaries" of NJSC Naftogaz that are "technically owned by [NJSC] Naftogaz." RF Br. 28. Thus, under the binary framework proposed by Russia—that is, an entity is either a "private party" or "foreign state" as defined by the FSIA—five out of six Petitioners are indisputably "private part[ies]." Alongside NJSC Naftogaz, each of these five Petitioners accepted Russia's standing offer to arbitrate in the Russia-Ukraine BIT. This has two important implications. First, since there is no reasonable dispute that the Court has jurisdiction with respect to these five Petitioners, Russia's "private party" argument must at a minimum be rejected as to

those Petitioners. Second, the fact that several Petitioners here are "private parties" means the Court has jurisdiction over *the entire case*. The arbitration exception applies to "*the action* . . . to confirm *an arbitral award* made pursuant to" an arbitration "agreement made by the foreign state with or for the benefit of a private party." 28 U.S.C. § 1605(a)(6) (emphases added). This case—as a whole—is "the action," it is brought to confirm "an . . . award," and that award was "made pursuant" to an agreement to arbitrate between Russia and several entities that are indisputably "private parties." The exception thus applies to this "action" as a whole, whether or not one of the parties to it (NJSC Naftogaz) is a "private party." The Court can end its analysis here.

Third, and in any event, the Russian Federation's argument rests entirely on a misconstruction of the term "private party" as it is used within the arbitration exception. When read in context and in light of the FSIA's purpose, "private parties" includes corporations—even if majority-owned by a foreign state—acting as private or commercial entities, and seeking to confirm an arbitral award rendered under a bilateral investment treaty. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

To start, the Russian Federation's proposed interpretation takes no account of the restrictive theory of sovereign immunity that the FSIA codifies, under which a foreign state is not immune from jurisdiction in respect of its "commercial and private acts." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613 (1992) (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698–705 (1976) (plurality opinion)). The FSIA therefore recognizes plainly that foreign states may "participat[e] in the marketplace in the manner of a private citizen or corporation." *Id.* at 614.

More fundamentally, the Russian Federation's interpretation turns the FSIA on its head. The FSIA codifies the immunities to which a foreign state or its instrumentalities are entitled *as respondents* in U.S. courts. 28 U.S.C. § 1602 ("*Claims of foreign states to immunity* should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." (emphasis added)). There is no basis in the FSIA to conclude that Congress intended the definition of "foreign state" to inform whether or not a *petitioner* seeking to *sue* a "foreign state" in U.S. court is a "private party" for purposes of the arbitration exception.

Were the Russian Federation's proposed interpretation correct, no majority state-owned entity could ever enforce any arbitration award against a state or a majority state-owned entity under the arbitration exception, even where, for example, an arbitration award is rendered in favor of a majority state-owned entity under a purely commercial contract and where each party was acting as a purely commercial market participant.

This conclusion is no less nonsensical where, as here, Russia consented to arbitrate disputes under the Russia-Ukraine BIT with Ukrainian "investors," defined expansively and not limited only to entities without majority state-ownership. BIT, Art. 1(2)(b); *see supra* Section B. Consistent with this definition, the Tribunal found Petitioners were protected investors under the BIT, Partial Award, ¶ 182, and for the reasons Petitioners have already explained, the Tribunal's decision on the arbitrability question must be respected. *See supra* Sections I.1, I.2; *see also Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 195 (D.D.C. 2018) (finding that "Ukraine's request for jurisdictional discovery on the issue of whether Tatneft is a private party is moot" as the "Court . . . will defer to the arbitral tribunal's determination on jurisdiction, which was upheld by the Paris Court of Appeal"), *aff'd on other grounds*, 771 F. App'x 9 (D.C. Cir. 2019).

The Russian Federation's proposed interpretation of the meaning of "private party" thus introduces a significant restriction into the FSIA's arbitration exception that finds no support in the text, context, or purpose of the FSIA. Had Congress intended to introduce such a restriction, it could have done so unambiguously by referring to the statutory definition of "foreign state." It did not. Russia's strained interpretation of "private parties" thus fails, because "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141–42 (2014).

Fourth, Petitioners' relationship to the Ukrainian state was argued at length in the damages phase of the underlying arbitration, with both parties submitting expert evidence on this issue. Rejecting the submissions of Russia's expert, the Tribunal found that "while the State is the regulator of the new corporations, the State neither retains nor enjoys corporate benefits beyond the usual shareholder rights and remedies." Final Award, ¶ 313. As the Tribunal explained, "[t]he most basic principle of corporate law is that the corporation, once established, has a legal personality separate from its shareholders." *Id.* ¶ 314. Here, the Tribunal expressly accepted that each Petitioner, including NJSC Naftogaz, "is truly a separate 'legal entity'" and that "the corporate law sphere . . . grants the state the same rights as it would grant to any other shareholder." *Id.* ¶¶ 313 n.57, 315.[10]

[10] Russia quotes selectively from NJSC Naftogaz's 2021 Annual Report and the opinion of the Tribunal's dissenting member. RF Br. 27–28. It is unclear for what purpose Russia relies on these materials. Petitioners do not understand Russia to argue that it meets the high standards for overcoming the strong "presum[ption]" that a government instrumentality "established as [a] juridical entit[y] distinct and independent from [its] sovereign should normally be treated as such." *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000) (citing *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983)). Should Russia advance such an argument in its responsive brief, Petitioners reserve their right to respond, including through the submission of additional relevant evidence. In any event, as the report itself makes clear, it "is not written in a traditional format but instead describes . . . the disruption in [NJSC Naftogaz's] governance bodies" that began with the dismissal of the (continued…)

5. The Award Is Governed by the New York Convention, a Treaty in Force in the United States.

Where—as here—*Chevron's* first two jurisdictional facts are established, the Court has subject-matter jurisdiction under the arbitration exception so long as the award "is *or may be* governed by a treaty" in force in the United States. *Chevron*, 795 F.3d at 204 n.2 (quoting 28 U.S.C. § 1605(a)(6)); *see also Human, S.E. v. Czech Republic-Ministry of Health*, 824 F.3d 131, 136 (D.C. Cir. 2016). The Final Award is subject to the New York Convention, and it is undisputed that Russia, the United States, and the Netherlands (where the Final Award was made) are all Convention signatories. *See Contracting States*, New York Convention, https://www.newyorkconvention.org/countries.

The Russian Federation nonetheless argues that the Final Award falls outside the scope of the New York Convention, and thus the FSIA's arbitration exception, because it does not "aris[e] out of a commercial relationship between the parties." RF Br. 29. Russia's argument is based on the United States' "commercial reservation" to the New York Convention—as codified in the FAA—which provides that an arbitral award must "arise[] out of a legal relationship, whether contractual or not, which is considered as commercial" to fall under the Convention. 9 U.S.C. § 202.

According to the Russian Federation, the commercial reservation precludes the Convention's application here because "Petitioners and Russia never had any commercial

company's Supervisory Board in April 2021 as a result of "financial losses and decreased production" and "continued following the full-fledged February 24, 2022, Russian military aggression in Ukraine." 2021 Annual Report, 222. Whatever relevance these events might have had to NJSC Naftogaz's status at the time of the 2021 Annual Report, they took place long *after* the parties' agreement to arbitrate and accordingly have no bearing on the Court's assessment of its jurisdiction under the FSIA's arbitration exception. That exception focuses on whether the action seeks to confirm an award made pursuant to "an agreement made by the foreign state with or for the benefit of a private party," and thus the only question that could be relevant is whether an entity was a "private party" at the time of that agreement. 28 U.S.C. § 1605(a)(6).

dealings," "Petitioners have no contracts with Russia," and were instead "complete strangers." RF Br. 29–31. Russia even goes so far as to label the Final Award a "political award" arising out of "a dispute between two sovereign States over the natural resources and infrastructure in Crimea." RF Br. 29–31 (citing Dissent, Partial Award, ¶ 183). Russia's arguments are meritless and should be rejected.

The parties' dispute arose out of Petitioners' oil and gas investments in Crimea, which are activities in connection with commerce and thus "commercial" for purposes of the New York Convention. Although "commercial" is not defined in the New York Convention or the FAA, the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration explains that "'[c]ommercial' matters or relationships are those matters or relationships, whether contractual or not, that affect commerce." Restatement U.S. Law of Int'l Com. and Inv.-State Arb. § 1.1(e) (Am. L. Inst. 2023). The comment to this definition specifies that "investor-State arbitrations and investor-State awards are commercial as defined here." *Id.* § 1.1 cmt. e. That Petitioners had "no contracts" or "commercial dealings" with Russia is beside the point, because the plain statutory text provides that the New York Convention applies to awards that arise out of commercial relationships, "whether contractual or not." 9 U.S.C. § 202.

The D.C. Circuit has applied the Restatement's broad definition of "commercial" under the New York Convention and the FAA, and consistently held that the term should be given an expansive meaning. *See Hulley*, 2023 WL 8005099, at *25 ("The D.C. Circuit invites a broad interpretation of the meaning of commercial in this context . . . ."); *Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria*, No. CV 22-170 (BAH), 2023 WL 417975, at *5 (D.D.C. Jan. 26, 2023) ("The FAA does not define the term 'commercial,' but the D.C. Circuit has interpreted the term expansively."). For example, in *Belize Social Development Ltd. v. Government of Belize*, the

D.C. Circuit observed that "[i]n the context of international arbitration, 'commercial' refers to 'matters or relationships, whether contractual or not, that arise out of or in connection with commerce.'" *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 103–04 (D.C. Cir. 2015) (quoting Restatement (Third) of U.S. Law of Int'l Com. Arb. § 1–1 (2012)); *see also Human*, 824 F.3d at 136 (recognizing that a matter may be commercial even if not contractual, "so long as it has a connection with commerce" (citing *Belize*, 794 F.3d at 104)).

Consistent with the broad definition of "commercial" adopted by the D.C. Circuit, "a dispute or award may be commercial even though one of the parties to it is a sovereign State and even though the dispute arises out of public regulatory acts." Restatement U.S. Law of Int'l Com. & Inv.-State Arb. § 1.1 cmt. e; *see also Belize Soc. Dev.*, 794 F.3d 99 at 104. "Accordingly, investor–State arbitrations and investor–State awards are commercial" for purposes of enforcement under the New York Convention. Restatement U.S. Law of Int'l Com. & Inv.-State Arb. § 1.1 cmt. e; *see also* Restatement (Fourth) of Foreign Relations Law § 458 Reporters' Note 6 (Am. L. Inst. 2018) (explaining that "awards rendered under a BIT are typically considered 'commercial' for purposes of the New York Convention"). And as this Court has observed, a "BIT . . . creates a legal relationship—even if not a contractual one—between the parties." *Zhongshan*, 2023 WL 417975, at *9. The only "commercial" relationship Petitioners are required to establish for purposes of the applicability of the New York Convention is thus the one that results from the Treaty.

Although not required, the commercial nature of the parties' relationship is also demonstrated here because this case arises from Russia's expropriation of Petitioners' investments—which involve oil and gas infrastructure—and in circumstances where Russia transferred those investments to a newly created state-owned entity for the investments' continued

commercial use and exploitation. *See* Partial Award, ¶ 109; *see also Hulley*, 2023 WL 8005099, at *26 (finding that Russia's violations of the BIT in that case "were also undoubtedly commercial in nature because they were aimed at increasing the market share of [a] state-owned oil company and reducing the share held by a competitor").

Courts in this District have found the requisite connection to commerce in a range of circumstances. *See, e.g.*, *Human*, 824 F.3d at 136 (finding the parties' legal relationship was "commercial in nature" as the "provision of healthcare technology and medical services has an obvious connection to commerce"); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 186–87 (D.D.C. 2016) (finding a commercial relationship between the parties to an investment treaty award where, "[i]n the transactions underlying this case, respondent Kazakhstan granted and revoked petitioners' rights to develop oil and gas fields within its borders" (citing *Belize*, 794 F.3d at 104)); *Hulley* 2023 WL 8005099, at *27 (listing "the nature of the assets involved" as evidence "confirm[ing] the commercial relationship underlying the dispute leading to the Final Awards" which arose out of an investment treaty); *Zhongshan*, 2023 WL 417975, at *8 (rejecting Nigeria's "false dichotomy between sovereign and commercial conduct in the context of the New York Convention" and finding "there can be no debate that the multimillion-dollar investment that Petitioner made in Nigeria to develop, manage and operate a free trade zone near Lagos was connected with commerce'").

The Russian Federation's argument that the Final Award is not subject to the New York Convention because it is a "political award" arising out of "a dispute between two sovereign States" similarly fails. RF Br. 29–30. The Final Award arose out of a dispute between Russia and Ukrainian corporate entities with separate legal personality from the state, as Petitioners explained in Section I.4 above. Moreover, the Tribunal explicitly declined to "resolv[e] legal issues such as

sovereignty extraneous to those stipulated by the Contracting Parties such as the legality or illegality of Russian's [sic] military intervention or subsequent constitutional absorption of Crimea into the Russian Federation." Partial Award, ¶ 161. Russia's argument that "Ukraine even appeared in the underlying arbitration in support of Petitioners," RF Br. 30, overstates the limited nature of Ukraine's participation in the arbitration as a "*non-disputing party* which filed written submissions but did not appear at the hearing." Partial Award, ¶ 3 (emphasis added).[11] Russia further ignores that Ukraine filed similar *amicus*-like submissions in proceedings brought by investors with no State ownership.[12] Russia's bare assertion that Ukraine is the "real party in interest" is therefore meritless. RF Br. 30.

The Russian Federation's selective quotation to *dicta* from the S.D.N.Y's decision in *Curacao* does not help it. In *Curacao,* the court upheld enforcement of an arbitration award against Curacao, finding it arose from a contract that was clearly "commercial," and observing that "the full scope of 'commerce' and 'foreign commerce'. . . is available for arbitral agreements and awards." *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13–14 (S.D.N.Y. 1973) *aff'd*, 489 F.2d 1313 (2d Cir. 1973). In passing, the court "speculate[d]" that the purpose of the commercial limitation was "to exclude matrimonial and other domestic relations awards, political awards, and the like," without elaborating upon what a "political award" might be. *Id.* at 13.

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[11] Russia claims wrongly elsewhere in its brief that "[t]he Ukrainian government even appeared *as a party* in the underlying arbitration and made submissions in support of Petitioners' claims." RF Br. 28. "Non-party" submissions by states that are party to a treaty but not party to a specific arbitration—akin to *amicus* briefs—are common in international arbitration. *See, e.g.*, *Bridgestone Licensing Servs., Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Submission of the United States of America (Aug. 28, 2017), https://www.state.gov/wp-content/uploads/2019/05/Submission-of-the-United-States.pdf .

[12] *See, e.g.*, Final Award, ¶ 33, *Stabil LLC v. Russian Fed'n*, No. 1:22-cv-00983-TNM (D.D.C.), ECF No. 2-1.

In sum, the Final Award plainly arises out of a commercial relationship for the purposes of the New York Convention. The parties' dispute relates to Russia's expropriation of Petitioners' oil and gas investments in Crimea in violation of the BIT and thus "arise[s] out of or in connection with commerce." *Human*, 824 F.3d at 136; *see also Belize*, 794 F.3d at 103–04.

* * *

Russia has failed to demonstrate any reason why the FSIA's arbitration exception should not apply in this case. The Court accordingly has subject-matter jurisdiction pursuant to 28 U.S.C. § 1605(a)(6).

B. The Court Has Jurisdiction Under the FSIA's Waiver Exception.

Under the FSIA's waiver exception, a foreign state is subject to jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). The Court has subject-matter jurisdiction under this exception because, as a signatory to the New York Convention that agreed to arbitration in Convention states, including the Netherlands (the place of the arbitration), Russia has impliedly waived its immunity in this case.

The D.C. Circuit explained in *dicta* in *Creighton* that "when a country becomes a signatory to the [New York] Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states," for any adverse arbitral award. *Creighton*, 181 F.3d at 123 (quoting *Seetransport Wiking Trader v. Navimpex Centrala Navala*, 989 F.2d 572, 578–79 (2d Cir. 1993)). Applying this analysis, the D.C. Circuit later held in *Tatneft* that "by signing the New York Convention, [a sovereign] waives its immunity from arbitration-enforcement actions in other signatory states." *Tatneft*, 771 F. App'x at 10 (citing *Creighton*, 181 F.3d at 123).

Courts in this District have consistently found the waiver exception satisfied where a state signatory to the New York Convention agreed to arbitrate in another signatory state.[13] *See Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 192 (D.D.C. 2018), *aff'd*, 771 F. App'x 9 (D.C. Cir. 2019); *Stati v. Kazakhstan*, 199 F. Supp. 3d 179, 189 (D.D.C. 2016); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria ("P&ID")*, 506 F. Supp. 3d 1, 9–11 (D.D.C. 2020), *aff'd on other grounds*, 27 F.4th 771 (D.C. Cir. 2022); *see also ConocoPhillips Petrozuata B.V. v. Venezuela*, 628 F. Supp. 3d 1, 7 (D.D.C. 2022) (finding Venezuela implicitly waived immunity by becoming a contracting state to the ICSID Convention). Courts in the Second Circuit have adopted the same analysis in finding the waiver exception applicable. *Seetransport*, 989 F.2d at 578-79 (New York Convention); *Blue Ridge Invs., L.L.C. v. Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (ICSID Convention).

The Russian Federation is nonetheless critical of Petitioners' reliance on *Tatneft*, dismissing the D.C. Circuit's decision as "unpublished and non-binding." RF Br. 33–34. While it is correct that the D.C. Circuit has noted that "Circuit law on this application of the waiver exception is unsettled," *P&ID*, 27 F.4th 771, 774 (D.C. Cir. 2022), Russia claims wrongly that the D.C. Circuit "refused to apply *Tatneft*." RF Br. 34. The D.C. Circuit merely "*decline[d] to address* the district court's interpretation and application of the waiver exception and instead [found] Nigeria's sovereign immunity abrogated by the arbitration exception." *P&ID*, 27 F.4th at 775 (emphasis added). As a court in this District recently noted, "nothing in that decision purported to abandon

[13] The D.C. Circuit is currently being asked about the scope of the waiver exception. *See supra* note 3. There is no reason for this Court to wait for the D.C. Circuit's decision in *Blasket* given that, here, Petitioners have demonstrated that at least the arbitration exception applies. *See supra* Section I.A.

the Circuit's favorable citations to *Seetransport* in other cases." *Amaplat Mauritius Ltd. v. Zimbabwe Mining Dev. Corp.*, 663 F. Supp. 3d 11, 35 (D.D.C. 2023).

The Russian Federation also paints an incomplete picture of the D.C. Circuit's decision in *Creighton*. RF Br. 32. In *Creighton*, the D.C. Circuit found that "Qatar not having signed the [New York] Convention" had not "demonstrate[d] the requisite intent to waive its sovereign immunity in the United States." *Creighton*, 181 F.3d at 123. In these circumstances, the *Creighton* court rejected Creighton's invitation to conclude that "Qatar's agreement to arbitrate in France should be deemed an implicit waiver of its sovereign immunity in U.S. courts." *Creighton*, 181 F.3d at 122. That is not the situation before this Court. Russia has both acceded to the New York Convention *and* agreed to arbitrate in the Netherlands, a Convention signatory.[14] For the reasons Petitioners have already explained in Section I.1, Russia's arbitrability objections have no bearing on this conclusion.

Russia cites *no* authority from any court that would support its contention that the waiver exception does not apply where—as here—a signatory to the New York Convention has agreed to arbitration in a Convention signatory. Russia's claim that *Tatneft* is inconsistent with the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is simply incorrect. *Amerada Hess* held that a foreign state does not waive its immunity under the FSIA "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*."

[14] Under the terms of the BIT, Russia consented to resolution of disputes by the Arbitration Institute of the Stockholm Chamber of Commerce or under the UNCITRAL Rules. BIT, Art. 9(2)(b)–(c). In accordance with Article 9, Petitioners commenced arbitration under the applicable UNCITRAL Rules, which provide that the tribunal shall determine the place of arbitration if not otherwise agreed by the parties. UNCITRAL Rules 1976, Art. 16(1). As Russia accepts, the Tribunal designated The Hague, the Netherlands, as the place of arbitration. RF Br. 8.

Creighton, 181 F.3d at 123 (emphasis added) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989)). Unlike the international agreements at issue in *Amerada Hess*, however, the New York Convention is "an international treaty obligating member states to recognize and enforce arbitral awards issued in other member states," including the United States. *P&ID*, 27 F.4th at 772.

The Russian Federation's objections to the application of the waiver exception in this case also find no support in the text or legislative history of the FSIA, contrary to Russia's claims. *See* RF Br. 35–36. To start, as Russia acknowledges, the D.C. Circuit in *Tatneft* has already rejected Russia's argument that Petitioners' interpretation of the FSIA's waiver exception would render the arbitration exception "superfluous" and "strip[] the later enacted and more specific arbitration exception of its effectiveness." RF Br. 35–36. As the *Tatneft* court explained, since "the waiver exception requires a foreign sovereign to give up its immunity defense intentionally, whereas the arbitration exception does not," these two exceptions do not completely overlap. *Tatneft*, 771 F. App'x at 10 (citing *Creighton*, 181 F.3d at 126); *see also P&ID*, 506 F. Supp. 3d at 9–10. Further, while Russia insists that "[i]t is hard to imagine a case that would fall within the arbitration exception . . . but not the waiver exception," RF Br. 36, *Creighton* "is precisely the case that [Respondent] claims to have trouble imagining." *P&ID* 506 F. Supp. 3d at 9–10 (explaining that the court in *Creighton* found jurisdiction over a non-signatory to the New York Convention under the FSIA's arbitration exception but not its waiver exception).[15]

A court in this District has also rejected Russia's argument that Congress legislated against this rule of implied waiver when it amended the FSIA to enact the arbitration exception instead of

[15] In any event, superfluity alone is not sufficient to require an interpretation that defies the plain language of the statute. *See Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018) ("We (continued…)

revising the waiver exception. *P&ID*, 506 F. Supp. 3d at 9–10.[16] Russia's argument here conflates "whether an agreement to arbitrate overseas, by itself, constitutes a waiver of immunity under the FSIA," with "whether entering the New York Convention or a similar treaty effects a waiver of immunity in a subsequent proceeding brought in the U.S. to enforce an arbitral award rendered in the territory of a Convention signatory." *P&ID*, 506 F. Supp. 3d at 9–10. Even if "Congress implicitly answered the first question in the negative" by enacting the FSIA's arbitration exception, it "does not follow that Congress expressed any view on the second question, which *Seetransport* answered in the affirmative." *Id.* at 9–10.

For these reasons, whether or not the arbitration exception applies in this case, this Court has subject-matter jurisdiction under the FSIA's waiver exception.

II. The Court Has Personal Jurisdiction Under the FSIA.

The Court has personal jurisdiction over the Russian Federation under the FSIA because an enumerated exception to Russia's jurisdictional immunity applies and because Russia was properly served via diplomatic channels under 28 U.S.C. § 1608(a)(4). 28 U.S.C. § 1330. In its Motion to Dismiss, Russia objected to this Court's personal jurisdiction on the ground that the State Department improperly effected service on Russia's Embassy in Washington, D.C., rather than on the Ministry of Foreign Affairs in Moscow. RF Br. 37-40. But following the State Department's transmission of the judicial documents to the Russian Ministry of Foreign Affairs,

find redundancies that are subtle or pitted against otherwise plain meanings to be feeble interpretative clues.").

[16] As already noted, the D.C. Circuit affirmed *P&ID* on different grounds. *P&ID*, 27 F.4th at 775 & n. 3.

see State Dep't Letter, ECF No. 17, Russia has "withdraw[n] the argument that the Federation was not properly served" in this case. Notice of Withdrawal, ECF. No. 18.[17]

Russia's only remaining objection is that "[t]he application of the FSIA's arbitration exception and exercise of jurisdiction under the FSIA would not comport with due process" because "this case has no connection to the United States." RF BR. 41. Russia's objection turns on the question of whether Russia is a "person" for the purposes of the Fifth Amendment of the U.S. Constitution such that the assertion of personal jurisdiction under the FSIA would not comport with due process. RF Br. 41.

This Court is, however, bound to reject this argument, as Russia concedes. RF Br. 41. Specifically, in the case of *Price v. Socialist People's Libyan Arab Jamahiriya*, the D.C. Circuit held that "foreign states are *not* 'persons' protected by the Fifth Amendment." *Price*, 294 F.3d at 96 (emphasis added). Accordingly, "the Fifth Amendment poses no obstacle" to personal jurisdiction in the federal courts where the FSIA's requirements are met. *Id.* at 99. As the D.C. Circuit later explained in *TMR Energy*, the requirements of the FSIA "clearly express[] the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state . . . coextensive with the [statutory] exceptions to foreign sovereign immunity." *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

Courts in this Circuit have applied this binding precedent in the specific context of actions to enforce arbitral awards under international treaties, including the New York Convention. *See, e.g.*, *TMR Energy Ltd.*, 411 F.3d at 305; *BCB Holdings Ltd. and Belize Bank Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 244 (D.D.C. 2015) (upholding personal jurisdiction in award-enforcement

[17] Petitioners maintain that the Russian Federation was properly served via "diplomatic channels" at its Embassy in Washington D.C. in October 2023, consistent with 28 U.S.C. § 1608(a)(4).

action under the FSIA, despite the foreign state's argument that it lacked minimum contacts required by due process).

Russia maintains that *Price* "was wrongly decided and should be overturned," but correctly recognizes that *Price* is "binding on this Court" and is not asking this Court to overturn it. It cannot. Rather, Russia "objects to the exercise of personal jurisdiction under the FSIA to preserve its right to ask the D.C. Circuit to overturn *Price* on appeal." RF Br. 41. Accordingly, at this stage, Petitioners note only that *Price* was correctly decided and that Russia offers no compelling reasons to overturn this carefully reasoned opinion.[18] Petitioners reserve their right to respond further to Russia's legal arguments at the appropriate time.

CONCLUSION

For the forgoing reasons, Petitioners respectfully request that the Court deny Russia's Motion to Dismiss.

[18] Russia's argument that *Price* "should also be revisited in light of the Supreme Court's recent decision in *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272 (2023)" is at best an argument for resolution by the D.C. Circuit. RF Br. 42. In any event, nothing in that decision, which decided a statutory issue—that "the FSIA does not grant immunity to foreign states or their instrumentalities in criminal proceedings"—has any bearing on the question of whether a foreign sovereign is a "person" within the meaning of the Fifth Amendment. *Turkiye*, 598 U.S. at 272 (2023).

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