IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank), Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. 1:23-cv-00764 (ACR)

RESPONDENT RUSSIAN FEDERATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS THE PETITION TO CONFIRM AN ARBITRATION AWARD OF JOINT STOCK COMPANY STATE SAVINGS BANK OSCHADBANK

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PRELIMINARY STATEMENT

In accord with Fed.R.Civ.P. 12(b)(1) and (2), the Russian Federation ("RF") moves to dismiss the Petition of Joint Stock Company State Savings Bank of Ukraine (JSC Oschadbank) ("Oschadbank"), seeking to confirm an arbitration award for lack subject matter and personal jurisdiction under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§1602-1611.[1]

Oschadbank is the successor to assets of a Soviet state bank located in Ukraine. Prior to 1992, it owned these assets in Crimea. On March 27, 1998, the RF signed a bilateral investment treaty ("BIT"), entitled "Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Reciprocal Protection of Investments," which applied only to investments made (i) by an investor of one state in the territory of the other, (ii) in conformity with the other state's laws, (iii) "starting from" January 1, 1992.[2]

In 2015, Oschadbank filed an arbitration in France under the BIT, claiming its assets in Crimea were expropriated after the March 2014 accession of Crimea into the RF. The RF did not participate, taking the position that it had not offered to arbitrate such claims under the BIT because, *inter alia*, Oschadbank acquired many assets in Crimea before January 1, 1992, and remaining assets were acquired before March 2014, when Crimea was part of Ukraine.

The FSIA provides the sole basis for obtaining subject-matter and personal jurisdiction

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[1] The RF is not required to raise its non-FSIA defenses, including those under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"), implemented under the Federal Arbitration Act, 9 U.S.C. §§201-208, unless its jurisdictional objections are denied. These defenses are reserved, including Oschadbank's failure to file its petition within the three-year jurisdictional period under 9 U.S.C. §207 after the Award was rendered. *See* Petition, ECF 1, ¶40 (admitting petition was filed outside period).

[2] The MTD uses the BIT attached as Petition Exhibit B, ECF 1-3. The phrase "as of 1 January 1992" in Article 12 is incorrect: it should be translated as "starting from 1 January 1992." Ponomarev Translation Report, ¶¶6-8. This distinction implicates an important jurisdictional issue regarding the RF's offer to arbitrate, discussed herein.

over a foreign sovereign. Significantly, Oschadbank must overcome the presumption of immunity by producing evidence that an exception applies to which the RF may respond. The Court must decide for itself if an exception applies. If not, the Court must dismiss for lack of jurisdiction. The Court should dismiss because neither exception to immunity asserted by Oschadbank applies:

(I) The FSIA §1605(a)(6) arbitration exception, which requires an "agreement … for the benefit of a private party to submit to arbitration ... governed by a treaty … calling for [its] recognition," does not apply to the Award because:

(A) the RF did not offer to arbitrate disputes with Oschadbank over its investments in Crimea under the BIT for numerous reasons;

(B) the BIT is not for the benefit of a "private party" under §1605(a)(6) in this case, which excludes Oschadbank because it is a foreign state as it is a 100% owned agency or instrumentality of Ukraine under §1603(b);

(C) there is no international agreement calling for the recognition of the Award under §1605(a)(6), because the NY Convention does not apply, as there was no commercial relationship between the RF and Oschadbank when its investments were made.

(II) The FSIA §1605(a)(1) waiver exception is inapplicable because the RF did not waive immunity merely by signing the NY Convention.

(III) The RF preserves asserting that it is a "person" under the Fifth Amendment to the U.S. Constitution in order to challenge personal jurisdiction.

Following discussion of the background, each argument will be addressed in turn.

BACKGROUND[3]

[3] Unless otherwise stated, all emphases are added, and all citations, quotations marks, footnotes, ellipses and brackets omitted. Exhibits are attached to the Thomas Sullivan Declaration, and exhibits with "YN" are attached to Professor Yves Nouvel's expert declaration.

A. Oschadbank's Crimean Investments Predate The Effective Date Provided By The BIT

According to Oschadbank, it "historically had a strong presence in the Crimean Peninsula. It was created following the independence of Ukraine, when the activity of the Ukrainian branch of Sberbank of the former Soviet Union was transferred by the Ukrainian State to a public law company … It later became known as Oschadbank." Petition, ECF 1, ¶22.[4] "Oschadbank" is the Ukrainian word for "Sberegatel'niy Bank", the Russian abbreviation for state savings bank. The assets were transferred in September 1991 and it was later "registered on December 31, 1991." *Id.*, ¶22, 52. "Its 100% shareholder is the Ukrainian State." *Id.* ¶4. Oschadbank had 294 branches in Crimea. *Id.* ¶22.

In 1998, the RF and Ukraine agreed to the BIT with the goal of encouraging and protecting reciprocal investments. It entered into force on January 27, 2000. *Id.* ¶12; BIT, ECF 1-3, Art. 14(1). The "intention [was] to create and maintain favorable conditions for reciprocal investments" and "favorable conditions for the promotion of economic cooperation." BIT, Preamble. The BIT protects "investments … invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws," *id.*, Art. 1(1), "***[starting from] 1 January 1992***."[5] *Id.*, Art. 12. "[T]erritory" is defined as "the territory of Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone ["EEZ"] and continental shelf ["CS"], as defined in conformity with international law." *Id.*, Art. 1(4).[6] The BIT provides

[4] The U.S. recognized Ukraine's independence from the Soviet Union on December 25, 1991, https://history.state.gov/countries/ukraine. The United States recognized the RF as the successor to the Soviet Union on December 25, 1991, https://history.state.gov/countries/russia.

[5] *See supra* fn. 2 concerning the translation of Article 12.

[6] During the May 7, 2024 pre-motion conference, the Court inquired whether international law governed the BIT. As RF counsel explained, BIT Art. 1(4) expressly provides for international law to govern. The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679

for resolution of disputes between an investor from one state over claims for expropriation of investments made in the territory of the other state. *Id.*, Arts. 1(2) (investor), 5 (expropriation), and 9 (arbitration).

B. The Accession of Crimea

On March 17, 2014, the Crimean Republic declared itself an independent state. Petition, ECF-1, ¶23. On March 18, 2014, the Crimean Republic and RF signed a treaty for accession, ratified by the RF on March 21, 2014 ("**Accession Treaty**"). *Id.* Oschadbank alleges that Crimea thereby "became a constituent entity of the [RF] from the perspective of Russian law." *Id.*

On March 21, 2014, the RF adopted the Law On Acceptance of the Crimean Republic into the RF, Federal Constitutional Statute No. 6-FKZ ("**Accession Statute**"), Ex. 1, setting forth a transition period and allowing Ukrainian licensed banks to continue operating in Crimea subject to RF law, and permitting them until January 1, 2015 to apply to the Central Bank of the Russian Federation ("Bank of Russia") for a license. *Id.*, Art. 17(2). It also allowed for continuation of certain banking transactions in Ukrainian hryvnia. *Id.*, Art. 16(1) - (4).

On April 2, 2014, the RF adopted Law No. 37-FZ ("**Transition Period Statute**"), Ex. 2, allowing Ukrainian banks to continue operations in Crimea until January 1, 2015, provided, *inter alia,* that they notify the Bank of Russia by April 17, 2014, of their intention to do so. *Id.*, Art. 3(1), (3). Oschadbank did not do so. *See* Professor Elizaveta Lauts Russian Banking Expert Report, ¶¶51, 69-78 ("Lauts Banking Rpt.").

C. Oschadbank Terminated Its Operation in Crimea

(January 27, 1980) ("VCLT"), Ex. 10, is "as an authoritative guide to the customary international law of treaties" and "a codification of customary international law." *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001). *See United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (citing VCLT as authority on "[b]asic principles of treaty interpretation"). Under VCLT Art. 31(3)(c), treaties are interpreted under relevant rules of international law.

On April 15, 2014, Ukraine enacted a law stating that Crimea "is an integral part of the territory of Ukraine [and] the laws of Ukraine shall extend to such territory" ("**Disputed Territory Law**"), Ukraine Law No. 1207-VII, Art. 1, Ex. 4. On May 6, 2014, the National Bank of Ukraine ("NBU") "issued Resolution No. 260 ["**NBU Resolution**"] that prohibited the Ukrainian banks from … conducting any banking activities in Crimea … ***To this end, the Ukrainian banks were obliged to immediately cease any activities of their existing Crimean branches and to close them by 6 June 2014.***" Oschadbank Statement of Claim, Ex. 9, ¶200. On May 8, 2014, Oschadbank stated that because of its inability to comply with Ukraine law and the NBU's requirements, it would close its operations in Crimea, which it did on May 26, 2014. *See* May 8, 2014 Oschadbank Resolution 286, Ex. 5; May 13, 2014 Oschadbank Minutes, Ex. 6; May 26, 2014 Oschadbank Email to NBU, Ex. 7.

D. The Default Arbitration Award

On January 16, 2016, Oschadbank initiated BIT arbitration before the Permanent Court of Arbitration ("PCA"). It submitted its Statement of Claim on August 26, 2016. Statement of Claim, Ex. 9. The RF did not participate in the arbitration, having sent a letter dated December 24, 2015, ECF 36-1, to Oschadbank denying it had offered to arbitrate claims involving investments in Crimea before January 1, 1992 as well as before its Accession. Oschadbank then chose for the arbitration to be seated in France. *See* July 30, 2016 Oschadbank email and draft Procedural Order No. 1, ECF 36-2 and 36-3. On November 26, 2018, the Tribunal issued the "Award" in favor of Oschadbank, finding, *inter alia*, compliance with the Bank of Russia regulations put Oschadbank's offices in Crimea "in direct violation of their obligations under Ukrainian law." *See* Award, ECF 1-2, ¶¶293-305. *See also* Petition, ECF 1, ¶¶2, 24-27 (citing the Award).

E. The French Proceedings

The RF promptly sought to set aside the Award in France, the seat of the arbitration.

1. The French Set Aside Proceedings

On July 18, 2019, the RF commenced a Set Aside Action in the Paris Court of Appeal ("Paris COA"), pursuant to French Code of Civil Procedure ("FCCP") Art. 1502, on the basis that the Tribunal wrongly determined it had jurisdiction for multiple reasons.

On March 30, 2021, the Paris COA set aside the Award, finding the Tribunal lacked jurisdiction to hear a dispute over investments made prior to January 1, 1992. *See Russian Federation* v. *Oschadbank*, Paris Court of Appeal, Case No. 23/2021 Judgment of March 30, 2021 ("COA Judgment"), ECF 1-4, ¶¶70, 71, 75, 76, 81-89, 93, 101. Oschadbank appealed to the Court of Cassation, the highest court in France for this purpose ("Cassation Court").

On December 7, 2002, the Cassation Court reversed the Paris COA without substantive analysis, narrowly holding that (1) Articles 1 and 9 on their face contained no temporal restrictions, and (2) Article 12's temporal limitation of January 1, 1992 was not jurisdictional. Accordingly, it held the Paris COA was only required to ascertain that the dispute had arisen after the BIT entered into force in 2000. *See JSC Oschadbank v. The Russian Federation*, French Court of Cassation, Appeal No. 21-15.390, Judgment of December 2, 2022 ("Cassation Judgment"), ECF 1-5, ¶13. The Cassation Court remanded the case to the Paris COA, for consideration by a different set of judges. *Id.* at p. 5.

On March 8, 2024, the RF "seized" the Paris COA to renew the Set-Aside Action and it will be asked to decide on all set aside grounds put forward by the RF, including the lack of jurisdiction ground *ratione temporis* (Art. 12 BIT). The Paris COA is not bound to comply with the Cassation Judgement and is allowed make its own determination *de novo* regarding jurisdiction based on Article 1520 1° FCCP. *See* Pinna Dec., ECF 35, ¶¶ 11-14.

2. The Revision Action

On August 19, 2019, the RF filed a "*Révision*" application seeking to revoke the Award

with the Tribunal, setting forth that Oschadbank concealed from the Tribunal the date at which the alleged investment had been made and that the RF gained access to archives in Kiev and obtained decisive documents showing that the alleged investment had been made prior to January 1, 1992 and therefore was not protected by the BIT, ("Revision Action"). On December 11, 2023, the Tribunal dismissed the Revision application based on the Cassation Court decision. *See* Pinna Dec., ECF 35, ¶¶ 15-16; Revision Decision, ECF 35-4. On March 8, 2024, the RF "seized" the Paris COA to set aside the Revision Decision. The Paris COA will review the Revision Decision based upon Article 1520 3° FCCP regarding the Tribunal having not complied with the mandate conferred upon it and Article 1520 4° FCCP regarding the Tribunal violating the RF's procedural due process rights. In the Revision Set-Aside Action, the RF is seeking the annulment of the Revision Decision. If the Revision Decision is annulled, the RF will be able to reinstate the Revision Action. *See* Pinna Dec., ECF 35, ¶¶ 17-19.

F. Oschadbank's Out of Time Petition

On March 21, 2023, Oschadbank filed its Petition to Confirm the November 26, 2018 Award, ECF 1. Oschadbank admits this was beyond the permitted three-year jurisdictional period for seeking confirmation of a foreign arbitral award under 9 U.S.C. §207. *Id.*, ¶40.

G. The *Notes Verbales* of Major Western Countries Affirming Jurisdiction of RF BITs Does Not Extend to Crimea

In August 2023, the RF sent diplomatic notes to 13 states and the European Union, regarding application of their respective bilateral investment treaties with the RF, in relation to Crimea. *See* RF *Notes Verbales* Chart, Ex. 20. For example, the August 21, 2023 *Note Verbale* the RF sent to France stated, in part, that the "the Russian Federation confirms that [their bilateral investment treaty] shall apply similarly to the Republic of Crimea and federal city of Sevastopol." August 21, 2023 RF-France *Note Verbale*, Ex. 21. France's response denied application of their

treaty to Crimea, because France believes that their treaty's territorial application corresponds to alleged internationally recognized territory of the RF, which excludes Crimea as per U.N. resolutions. November 3, 2023 France-RF *Note Verbale*, Ex. 22.[7] Similar responses were forthcoming from Austria, Belgium, Canada, the European Union, Germany, Lithuania, Luxembourg, Montenegro, Netherlands, Singapore, Switzerland, and the United Kingdom. *See* RF *Notes Verbales* Chart, Ex. 20. As explained below, these communications are significant under international law, because they establish that the term "territory" in BITs does not include Crimea because of its disputed sovereignty.

ARGUMENT

FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). "FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies[.]" *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). "Unless an enumerated exception applies, courts of this country lack jurisdiction over claims against a foreign nation." *Belize Social Development, Ltd. v. Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015).

FSIA guarantees the "resolution of an immunity assertion before the sovereign can be compelled to defend the merits" under the FAA (NY Convention). *Process & Industrial Developments, Ltd. v. Federal Republic of Nigeria,* 962 F.3d 576, 585 (D.C. Cir. 2020). Under FSIA, this court must resolve disputed issues of fact related to subject-matter jurisdiction, even if they overlap with the merits. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 178 (2017) ("We recognize that merits and jurisdiction will sometimes

[7] For avoidance of doubt, the RF does not agree that international law recognizes that Crimea is not the sovereign territory of the RF.

come intertwined. … [T]he court must still answer the [FSIA] jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it."). Neither the FSIA arbitration nor waiver exceptions, as asserted by Oschadbank, apply.

I. FSIA'S §1605(a)(6) ARBITRATION EXCEPTION DOES NOT APPLY UNDER THE BIT

As is pertinent here, the FSIA arbitration exception applies when:

> the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration ... or to confirm an award made pursuant to such an agreement to arbitrate ... [and] the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards ....

§1605(a)(6).

In order to determine whether the exception applies, the Court makes "two jurisdictional inquiries—namely, [i] whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and [ii] whether the award is or may be governed by a relevant recognition treaty." *Chevron Corp. v. Ecuador*, 949 F.Supp.2d 57, 63 (D.D.C. 2013), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015). According to *Chevron*, the petitioner "bears the initial burden of supporting its claim that the FSIA exception applies," and then "the burden shift[s] to [the respondent sovereign] to demonstrate by a preponderance of the evidence that the [treaty] and the notice to arbitrate did not constitute a valid arbitration agreement between the parties." 795 F.3d at 204-205.[8]

[8] In a February 2, 2024, *Amicus Curae* brief in *Blasket Renewable Investments, LLC v. Spain*, No. 23-7038, D.C. Cir., Case No. 23-7038, Doc. # 2038663, Ex. 16, the United States objected to this standard and argued based on Supreme Court decisions that the burden always rests with the plaintiff to establish that the FSIA exception applies. *Id.* at 8-9 (citing *Kingdom of Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, n.20 (1983) (even if "the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act"). The RF agrees, and preserves this issue to the extent relevant in this case.

A. THIS COURT MUST INDEPENDENTLY DETERMINE WHETHER THE ARBITRATION EXCEPTION APPLIES

An investment treaty (like the BIT) is not a typical agreement to arbitrate between disputing parties, but instead constitutes a state's "offer to arbitrate," which the claimant may "accept" by submitting a notice of arbitration. *BG Group, PLC v. Argentine Republic,* 572 U.S. 25, 42 (2014). In interpreting offers to arbitrate under BITs, as with all arbitration agreements, "[d]isputes about 'arbitrability' … such as 'whether the parties are bound by a given arbitration clause' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy'" are decided by the "courts." *Id.* at 34.[9] "[T]he Supreme Court has held that it is generally for the courts to determine whether an arbitration clause is broad enough to cover a particular dispute." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988). *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) ("arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts").

As *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287 (2010), explained: "[O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement." *Id.*, 299-300 (italics in original).[10]

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[9] "Arbitrability" is a term with many meanings, including "whether the parties are ***bound*** by a given arbitration clause," that is, disputes over "formation of the parties' arbitration agreement". *BG Group*, 572 U.S. at 34.

[10] At the May 7, 2024 Pre-motion conference, Oschadbank inaccurately described the holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019) as "that when the tribunal decides that the dispute is arbitrable, the U.S. courts can't revisit that even when the finding of arbitrability was utterly groundless." May 7, 2024 H.T., ECF 36-5, at 35. Rather, *Schein* merely

In accord with this precedent, FSIA "requires the District Court to satisfy itself" that there existed "an agreement between the parties" to arbitrate. *Chevron*, 795 F.3d at 205 n.3. "The jurisdictional task before the District Court [is] to determine whether" the parties have "an agreement to arbitrate." *Id.,* at 205. Thus, whether the investor's request to arbitrate falls within the host state's standing offer to arbitrate under a foreign-investment treaty is a jurisdictional question under FSIA. *Id.,* at 206. This includes whether the claimant validly accepted the offer to arbitrate, *id.* at 205 n.3 (holding Chevron met its initial burden of proof), as well as whether the claimant satisfies other jurisdictional requirements. For example, in *Chevron*, "to prevail on its jurisdictional argument, Ecuador would have to demonstrate by a preponderance of the evidence that Chevron's suits were not 'investments' within the meaning of the BIT." *Id.,* at 206 (holding Ecuador failed to meet its response burden of proof). "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate ***that dispute.***" *Granite Rock,* 561 U.S. at 297. For a court to "eschew[] making this determination as part of its jurisdictional analysis" constitutes "error." *Chevron*, 795 F.3d at 205 n.3.[11]

"reject[ed] the 'wholly groundless' exception" for allowing a court to determine arbitrability when the arbitral contract delegates the arbitrability to the tribunal, but noting that the parties' delegation not to be assumed absent "clear and unmistakable evidence that they did so." *Id.*, at 531.

[11] Oschadbank's Pre-motion Filing (ECF 28) inaccurately claimed the RF is not entitled to *de novo* review of its arguments against FSIA jurisdiction, because it is somehow bound by the Award, even though it did not participate in the arbitration. It is black-letter law that a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 706 (1982). Moreover, as the RF explained at the conference, Oschadbank must establish the BIT contained "clear and unmistakable" language that ***must*** be construed as delegating "***exclusive authority***" on arbitrators to determine arbitrability. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010). The Article 21.1 "competence-competence" clause of the relevant 1976 UNCITRAL Rules incorporated by the BIT merely provides: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction." *Rent-A-Center* upheld delegation only because the clause vested the arbitrator with "***exclusive authority***" to decide arbitrabilty.The French Court's *de novo* review of jurisdictional

Where a court concludes that no agreement to arbitrate existed under the FSIA exception, it must dismiss the petition to enforce. *See Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021) (dismissing petition for lack of jurisdiction because "there exists no agreement among these parties to arbitrate"); *First Investment Corp. v. Fujian Mawei Shipbuilding, Ltd*., 703 F.3d 742, 756 (5th Cir. 2012) (affirming dismissal of a petition against China where petitioner did not establish that China was bound to the arbitration agreement). The multiple independent reasons the RF did not offer to arbitrate Oschadbank's investment in Crimea are discussed below.

B. FSIA §1605(a)(6) DOES NOT APPLY BECAUSE THE RF DID NOT AGREE TO ARBITRATE OSCHADBANK'S CLAIMS UNDER THE BIT

Article 12 defines the "Application of the Agreement" as follows: "This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party [starting from] 1 January 1992." As explained by international law expert Professor Yves Nouvel, "Provisions in an investment treaty which define the application of the treaty establish the limits of the offer to arbitrate." Nouvel International Law Expert Report on the BIT ("Nouvel BIT Rpt."), ¶23, ¶24 nn. 2 & 3 (citing treatises, commentary, and arbitral decisions).[12] FSIA §1605(a)(6) does not apply because the RF's offer to arbitrate under Article 9 did not extend to disputes over Oschadbank assets in Crimea under Article 12 and other provisions

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issues in set-aside proceedings alone demonstrates no such "exclusive authority" was delegated. *See Blasket Renewable Investments, LLC v. Kingdom of Spain*, 2023 U.S. Dist. LEXIS 54502 (D.D.C. March 29, 2023) (rejecting argument that UNCITRAL Rules precluded *de novo* review of validity of arbitration agreement). If Oschadbank raises this meritless issue in its response, the RF will explain in detail how this language, interpreted under international law, does not delegate "exclusive authority" to decide jurisdiction on the arbitrators.

[12] The Nouvel BIT Report references several types of jurisdiction typically considered by international arbitration tribunals: *ratione materiae* (subject matter); *ratione loci* (territorial); *ratione temporal* (temporal); *ratione voluntatis* (consent); and *ratione personae* (person).

of the BIT for seven individually dispositive reasons, as explained in Professor Nouvel's BIT Report, and discussed below.

1. The RF Did Not Offer To Arbitrate Disputes Over Investments In Crimea Because Crimea Was Considered Ukrainian Territory When The BIT Was Executed in 1998 and Entered Into Force in 2000

"[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Group,* 572 U.S. at 37. Consent is the cornerstone of all treaty commitments. In *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (2012), Ex. YN 106, the Tribunal stated:

> ***In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent of the contracting parties as expressed in the text. To go beyond those bounds would be to act ultra vires.*** … The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. … [I]t is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established … Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. … [S]tate consent is the incontrovertible requisite for any kind of international settlement procedure. … ***[It] is also true as far as the scope of this consent is concerned.***

Id. ¶¶172-175 (holding Tribunal could not interpret the "German-Argentine BIT in an evolutive way so as to achieve the enlarged meaning desired by the Claimant," *id*. ¶278).[13]

[13] The International Court of Justice ("ICJ") in *Certain Questions concerning Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, June 4, 2008, ICJ Reports 2008, Ex. 37, stated: "for jurisdiction based on *forum prorogatum* [i.e., when a body decides for itself questions of jurisdiction] … consent … must be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner … the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State." *Id.,* ¶ 62, p. 204. *See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of February 3, 2006, ICJ Reports 2006, Ex. 38, ¶88, p. 39 (court's "jurisdiction is based on the consent of the parties and is confined to the extent accepted by them … When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon").

Under the well-known principle of contemporaneity, a treaty, like any other contract, is interpreted in light of the circumstances known to and agreed by the parties at the time of its formation. *See* 11 Richard A. Lord, *Williston on Contracts* § 32:7, at 434-35 (4th ed. 1999), Ex. YN 111 ("In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution."); Nouvel BIT Rpt., ¶28 & n. 5 (citing numerous authoritative commentaries). The principle of contemporaneity is routinely applied when interpreting treaties. For example, in *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 25 Rep. of Int'l Arb. Awards (2002), Ex. YN 112, the Tribunal held that "in interpreting the Treaties it should apply the doctrine of 'contemporaneity.' … ***[A] treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time.*** The [Tribunal] agrees with this approach and has borne it in mind in construing the Treaties." *Id.* ¶3.5. *See* Nouvel BIT Rpt., ¶29 & n. 6 (citing additional decisions applying principle of contemporaneity). Under the principle of contemporaneity, the RF did not offer to arbitrate disputes regarding Ukrainian investments made in Crimea because it was not agreed to be Russian territory.

First, the "territory of the Russian Federation" was not understood to include Crimea under Article 1(4) and the other Articles related to territory. To the contrary, when the BIT was executed in 1998 and entered into force in 2000, the RF and Ukraine considered Crimea to be Ukrainian territory. Absent clear evidence of the parties' ***current*** consent as to plain meaning of territory, departing from the plain meaning of the term "territory of the Russian Federation" as understood by the parties when the BIT was entered is tantamount to amending the BIT, which requires a written instrument. *See* BIT, Art. 13 ("By mutual consent the Contracting Parties may make

necessary amendments and addenda to this Agreement … after each of the Contracting Parties notifies the other Contracting Party in writing on the completion of the intrastate procedures …").[14] This did not happen.

Second, no principle of customary international law, including the Vienna Convention on the Law of Treaties ("VCLT"), authorizes interpreting a bilateral investment treaty in a way that is expansionist or revisionist, or based upon fictitious, "***as if***," assumptions contrary to the contemporaneous understanding of a treaty.[15] Simply, "it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." *Yearbook of the International Law Commission 1964, Vol. II*, Ex. YN 116, at 202, ¶9. *See* Nouvel BIT Rpt., ¶31 & n. 7 (citing additional authorities). Thus, under the contemporaneous understanding of the BIT term "territory of the Russian Federation," and as confirmed by Ukraine's refusal to recognize Crimea as RF territory, the RF never offered to arbitrate claims of Ukrainian alleged investors like Oschadbank in Crimea.

Accordingly, there is no agreement to arbitrate under FSIA, §1605(a)(6).

2. The RF's Offer to Arbitrate Was Rejected By Oschadbank's "Notice of Arbitration"

"[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Group,* 572 U.S. at 37.

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[14] For example, Canada and the United Kingdom confirmed an amendment would be required in order for Crimea to be treated as Russian territory under their investment treaties with the RF. *See* September 11, 2023 Canada-RF *Note Verbale*, Ex. 25 and October 2, 2023 UK-RF *Note Verbale*, Ex. 34.

[15] Specifically, Oschadbank's Notice of Arbitration, Ex. 8, "reject[ed] entirely the grounds, legal or otherwise, on which Russia purports to have annexed Crimea and proclaimed it to be part of its sovereign territory," *id.*, ¶16, asserting the BIT should be interpreted on a fictitious basis, such that its "investments must be treated ***as if*** they were located in Russian territory for purposes of the Treaty." *Id.*, ¶18.

"[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921). "It is axiomatic that formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange – offer and acceptance – and consideration." *United States ex rel. D.L.I. Inc. v. Allegheny Jefferson Millwork, LLC*, 540 F.Supp.2d 165, 170 (D.D.C. 2008). "[A]n acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer … assents to the modification suggested." *Iselin v. United States*, 271 U.S. 136, 139 (1926). *See also* Nouvel BIT Rpt., ¶¶33-35, 39 (discussing international law authority applying these rules to arbitration under investment treaties).

Chevron expressly held that courts must decide whether an investor's notice of arbitration accepted the state's offer. *Id.* 795 F.3d at 205 n.3. Oschadbank's alleged acceptance did not match the RF's offer to arbitrate and, therefore, no agreement to arbitrate was formed. *See Dynamo v. Ovechkin*, 412 F.Supp.2d 24, 29 (D.D.C. 2006) (declining to enforce arbitration award where there was no acceptance of offer to arbitrate).

First, Oschadbank purported to initiate arbitration pursuant to Article 9. *See* Notice of Arbitration, Ex. 8, ¶7. But Oschadbank rejects that Crimea is RF territory: "Oschadbank … rejects entirely the grounds, legal or otherwise, on which Russia purports to have annexed Crimea and proclaimed it to be part of its sovereign territory." *Id.* ¶16. Recognizing that the RF only offered to arbitrate investments in its territory, Oschadbank sought to have it both ways, by specifying that its "***investments must be treated as if they were located in Russian territory for purposes of the Treaty.***" *Id.* ¶18. Oschadbank's attempt to mask rejection is too clever by half.

Second, the RF did not offer to arbitrate claims relating to investments that were in areas which were considered its territory for some purposes, but not for others. Instead, it only offered

to arbitrate claims arising from investments that were mutually agreed to be in its territory. *See* Art. 1 ("in the territory of") (three times); Arts. 2(1), 3, 4 ("in its territory"); Arts. 5(1), 6, 8 ("in the territory of"); Art. 9(2) ("in whose territory"); and Art. 12 ("in the territory of"). *See also* Nouvel BIT Rpt., ¶36. Oschadbank's acceptance did not match RF's offer to arbitrate, but was instead a counter-offer, which constitutes a "rejection." *Iselin*, 271 U.S. at 139. *See* Nouvel BIT Rpt., ¶39, 40 (no valid acceptance of RF offer, citing international authority). *See also Dynamo*, 412 F.Supp.2d at 29 (confirmation petition dismissed where there was no agreement to arbitrate); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293-94 (11th Cir. 2004) (same).

Accordingly, because the RF's offer was rejected, no agreement was formed under FSIA, §1605(a)(6).

3. The RF Did Not Offer To Arbitrate Disputes Concerning Investments Made Before January 1, 1992 Under Article 12

Article 12 states: "This Agreement shall apply to all investments … ***[starting from] 1 January 1992***."[16] Article 12 circumscribes the application of the BIT, including its arbitration provision, Article 9, and, therefore, the RF's offer to arbitrate. *See* Nouvel BIT Rpt., ¶¶22-25, 41. Oschadbank was created from the dismantling of the unified banking system of the USSR, and, in particular, the transfer of Sberbank's banking operations located in the territory of Ukraine, including Crimea, to the newly formed "Oschadbank of Ukraine" ***on September 3, 1991***, *i.e.,* before January 1, 1992. *See* Petition, ECF 1, ¶¶22, 52; COA Judgment, ECF 1-4, ¶¶97-100. Nevertheless, the Award provided damages to Oschadbank for such assets. *See* Award, ¶410. The RF did not offer to arbitrate investments made before January 1, 1992, which, nonetheless, are the subject of the Award, preventing confirmation.

[16] *See supra* fn. 2 concerning "starting from," the correct translation of the Russian-language BIT, instead of "as of."

First, under international law, "a temporal restriction clause governing the application of an investment treaty creates a limitation on the offer to arbitrate and the jurisdiction of the tribunal." Nouvel BIT Rpt., ¶¶42-43 (citing international law authorities, including *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1 (2000), Ex. YN 127, ¶62 ("application of [a treaty] in terms of time defines … the jurisdiction of the Tribunal *ratione temporis*")). Accordingly, the RF's offer to arbitrate under the BIT extends only to investments made starting from January 1, 1992.

Second, the ordinary meaning of Article 12 is unambiguous: "the BIT only applies to investments made starting from January 1, 1992, ***to the exclusion of any investments made prior to that date.***" Nouvel BIT Rpt., ¶45. Where the ordinary meaning of the treaty language is clear from the choice of words agreed upon by the contracting States, such interpretation must be given effect. *See Territorial Dispute (Libyan Arab Jamahiriya/Chad*), Judgment, ICJ Reports 1994, p. 6, Ex. YN 157, ¶41 ("Interpretation must be based above all upon the text of the treaty.").

Third, this understanding of Article 12's language is supported by the consideration of its object and purpose. *See* VCLT Art. 31(1) ("[a] treaty shall be interpreted … in the light of its object and purpose"). The object and purpose of Article 12 was to exclude any investments made before the dissolution of the USSR in 1991, including economic operations that became located in the RF and Ukraine as a result of the USSR's dissolution and the emergence of the RF and Ukraine as sovereign States. *See* Nouvel BIT Rpt., ¶¶46-47 & n. 9 (comparing Article 12 with similar provisions in BITs between the RF and other former USSR members).

Fourth, Ukraine agrees with this meaning of Article 12. During the arbitration, Ukraine addressed the BIT's temporal application under Article 12: "[T]he Treaty was written to protect pre-existing investments (***covering the period from 1992***, ***shortly after the dissolution of the***

USSR, to 1998, when the Treaty was concluded). ***[S]o long as the investment was made after January 1, 1992***, it is irrelevant whether the Treaty applied at that time." Submission of Ukraine as Non-Disputing Party, dated November 29, 2016, Ex. YN 133, ¶32.

Fifth, this understanding is confirmed by the preparatory work (*travaux préparatoires*) and drafts of the BIT, pursuant to VCLT Art. 32 ("Recourse may be had to … preparatory work of the treaty and the circumstances of its conclusion"). The *travaux préparatoire*s reflect that the RF and Ukraine negotiated the temporal application of the BIT, with Ukraine proposing multiple times between 1994 and 1998 to extend its protection to investments irrespective of when made, while the RF insisted on limiting the BIT to cross-border investments carried out after the dissolution of the USSR in 1991. *See* Nouvel BIT Rpt., ¶¶50-53; September 8, 1994 RF Ministry of Finance Letter, Ex. YN 135; April 7, 1997 Ukraine Ministry of Foreign Economic Relations and Trade to the RF, Ex. YN 136; and, January 19-21, 1998 Minutes of Experts' Working meeting, Ex. YN 138. Ukraine accepted the RF's position and the BIT contains this backstop date.

Finally, Article 12's jurisdictional nature was confirmed in another Crimea-related case brought by Ukrainian claimants under the BIT: "Article 12 restricts protection to investments made 'on or after January 1, 1992.' … The Tribunal … ***only had jurisdiction to adjudicate investments made on or after 1 January 1992.***" *NJSC Naftogaz of Ukraine v. Russian Federation*, PCA Case No. 2017-16 (2023), Ex. YN 131, ¶¶2, 6. In the same case, the Dutch Court annulled the tribunal's earlier Partial Award "to the extent that the arbitral tribunal ruled that it has jurisdiction to assess all claims, since it has ***jurisdiction only to rule on investments made on or after January 1, 1992***." *Russian Federation v. NJSC Naftogaz of Ukraine*, Hague Court of Appeal, Civil Law Division,

No. 200.274.564/01, Judgment (2022), Ex. YN 132, at 49, ¶6.[17]

Accordingly, whereas Article 12 defines the BIT's jurisdiction *ratione temporis*, the RF's offer to arbitrate under the BIT did not apply to investments made before January 1, 1992. Thus, the Award cannot be confirmed, because it awarded damages on Oschadbank's claims outside of the RF's offer to arbitrate.

4. The RF Did Not Offer To Arbitrate Investments Which Were Not In Conformity With RF Law Under Article 1(1)

The RF only offered to arbitrate disputes over investments "which are invested by an investor of one Contracting Party in the territory of the other Contracting Party ***in conformity with its laws*** …" Article 1(1).[18] Conformity clauses "are ***designed to prevent the treaty from protecting investments that were not made in compliance with the host state's national legislation***." J.W. Salacuse, *The Law of Investment Treaties,* at 223 (2021), Ex. YN 100. If "an investment in an arbitration case is shown not to have been made in accordance with such law, a

[17] During the Pre-motion conference, the Court inquired as to the legal consequences if the Tribunal had jurisdiction over some investment, but not that made before January 1, 1992. Courts frequently distinguish between claims for which they have jurisdiction and which they do not under FSIA. *See e.g., Simon v. Republic of Hungary*, 77 F.4th 1077 (D.C. Cir. 2023) (affirming dismissal claims of stateless persons outside FSIA immunity exception, while affirming denial of motion to dismiss claims of state nationals within a FSIA immunity exception); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) (holding failure to state claims sufficient to establish subject matter jurisdiction under FSIA for hostage taking, but remanding to allow plaintiff to amend their complaint to attempt to allege torture claim under FSIA); *Estate of Botvin v. Islamic Republic of Iran*, 873 F. Supp. 2d 232, 245 (D.D.C. 2012) (entering default judgment against Iran for compensatory damages, but not punitive damages which were unavailable, because the case was filed before passage of the superseding National Defense Authorization Act for 2008). As the *Naftogaz* award illustrates, an entire award is invalid if a reviewing court cannot separate damages arising from claims over which it lacks jurisdiction and those within jurisdiction.

[18] The requirement that investments conform with the law of the host state appears throughout the BIT. *See*, *e.g.*, Article 2(1) (host state needs "to admit such investments subject to its laws"); Art. 2(2) (host state only agrees to protect investments made "in conformity with its laws").

tribunal may conclude that it has no jurisdiction to hear the dispute." *Id.* at 263. *See also* S.W. Schill, *Illegal Investments in International Arbitration*, at 5 (2012), Ex. YN 139 ("the interpretation of explicit 'in accordance with host State law'-clauses … is one of jurisdiction *ratione materiae*"); Nouvel BIT Rpt., ¶¶58-60 (quoting numerous treatises that arbitration panels do not have jurisdiction to hear disputes under BITs arising from non-conforming investments).

"[A state has] a fundamental interest in securing respect for its law … [D]enying protection to illegally obtained investments reflects both sound public policy and sound investment practice." *Alasdair Ross Anderson v. Costa Rica*, ICSID Case No. ARB(AF)/07/3 (2010), Ex. YN 142, ¶58 (declining jurisdiction where investment did not comply with host country laws). Because an offer by a state under an investment treaty does not extend to non-conforming investments, tribunals deny subject matter jurisdiction (*ratione materiae)* or consent to jurisdiction (*ratione voluntatis*) to such claims. *See*, *e.g.*, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID No. ARB/03/25 (2007), Ex. YN 144, ¶¶402, 404 (no jurisdiction *ratione materiae* because investment did not comply with Philippine law).[19] *See also* Nouvel BIT Rpt., ¶¶62-66 (quoting treatises, commentary, and arbitral decisions that BITs do not provide jurisdiction over non-conforming investments).

On March 18, 2014, the RF signed the Accession Treaty, and on March 21, 2014, the RF adopted the Accession Statute, ratifying the Accession Treaty. Assuming, *arguendo,* Oschadbank's investment made in Crimea when it was Ukrainian territory is subject to the BIT, from the time of Crimea's accession to the RF, Oschadbank was required to be in conformity with RF banking law

[19] *See also Cortec Mining Kenya Ltd. v. Kenya*, ICSID Case No. ARB/15/29 (2021), Ex. YN 145, ¶212 (no jurisdiction *ratione materiae* under BIT over investment that did not comply with Kenyan regulations); *Anglo-Adriatic Group Limited v. Albania*, ICSID Case No. ARB/17/6 (2019), Ex. YN 146, ¶287 (denying jurisdiction where "subject-matter of a dispute arising out of an illegal investment falls outside the scope of Albania's consent to arbitrate").

and regulations. *See* Nouvel BIT Rpt., ¶¶68-70; Lauts Banking Rpt., ¶¶64-68. The Accession Statute and the Transition Period Statute provided a provisional period to obtain conformity with Russian banking law. Oschadbank did not even attempt to conform, and, in fact was prohibited by Ukrainian law from conforming. *Id*. ¶¶69-82.

First, Article 17(2) of the Accession Statute provided that Ukrainian banks operating in Crimea which held Ukrainian banking licenses prior to accession could continue to operate in Crimea if they comported with RF law. The Accession Statute also required banking transactions in Crimea to be performed in rubles but allowed circulation of the national currency of Ukraine for a certain period of time. Under Russian law, transactions in foreign currencies require a separate license. *See* Lauts Banking Rpt., ¶¶27, 43, 51, 70. Oschadbank's offices in Crimea, however, only conducted transactions in hryvnia, the Ukrainian currency. *Id.* ¶71.

Second, the transitional law adopted to provide Ukrainian banks such as Oschadbank with an opportunity to comport with Russian banking legislation further required Ukrainian banks operating in Crimea to notify the Bank of Russia by April 17, 2014, of their intention to apply for a RF banking license prior to January 1, 2015. *See* Lauts Banking Rpt., ¶51. Oschadbank never gave notice of intention to apply for a RF banking license, and never applied for one. *Id.* ¶¶72, 73. Ukrainian banks operating in Crimea were also required to submit their corporate formation documents, information about bank management and major investors, and a report of banking activities to the Bank of Russia by May 2, 2014. *Id.* ¶51. Oschadbank did not comply with these requirements. *Id.* ¶¶74-76.

Third, on April 15, 2014, Ukraine passed laws prohibiting banks headquartered in Ukraine from complying with RF law in Crimea. *See* Lauts Banking Rpt., ¶¶60-62. Oschadbank's Management and Supervisory Board adopted resolutions to comply with that prohibition and to

discontinue its operations in Crimea. *Id.* ¶¶79-81. As a result, Oschadbank's offices in Crimea were never in conformity with RF law as required under Article 1(1). *Id.* ¶¶12, 69.

In sum, because Oschadbank's business in Crimea was not "***in conformity with [RF] law,***" Article 1(1), the RF's offer to arbitrate disputes did not apply to Oschadbank's investment. Thus, there was no agreement to arbitrate this dispute under FSIA, §1605(a)(6).

5. The RF Only Offered To Arbitrate Investments In Its Undisputed Territory Based On The Text Of Article 1(4)

The RF only offered to arbitrate disputes over investments made in its undisputed territory based on the ordinary meaning of the term "territory" and the "object and purpose" of the BIT under VCLT Art. 31. Given the dispute over Crimea's sovereignty, there is no agreement to arbitrate under FSIA, §1605(a)(6).

First, under Article 12, the RF's offer to arbitrate is limited to "investments, made by the investors of one Contracting Party in the ***territory*** of the other Contracting Party." Article 1(4) defines "Territory" as "the territory of Ukraine or the territory of the Russian Federation" and their respective EEZ and CS. In the BIT, "territory" is used to refer to territory that belongs to a party. *See* Art. 1 ("in the territory of") (three times); Arts. 2(1), 3, 4 ("in its territory"); Arts. 5(1), 6, 8 ("in the territory of"); Art. 9(2) ("in whose territory"); and Art. 12 ("in the territory of"). Moreover, the use of the disjunctive "or" in the definition of this term (i.e., "the territory of the Russian Federation ***or*** the territory of the Ukraine") further confirms that territory must either be that of the RF or Ukraine. Under international law, the repeated contextual use of possessive terms related to "territory" can only mean ***sovereign*** territory, because the RF and Ukraine are each exercising ***sovereign*** authority to grant protections to investors from the other state. *See* Nouvel BIT Rpt., ¶¶74-76.

Second, that "territory" means geographic areas as to which ***both*** parties agree concerning

sovereignty can also be seen from the commonly accepted definition of "territory" in international law, where it means the state's ***sovereign*** territory. *See*, *e.g.*, *Oppenheim's International Law* (R. Jennings & A. Watts eds., 9th ed. 2008), Ex. YN 117, at 1271-72 ("State territory is that defined portion of the globe which is subjected to the sovereignty of a state.") This understanding is "essential if contracting States are to have any certainty and security as to the territorial scope of each other's undertakings." H. Waldock, *Third Report on the Law of Treaties*, 1964(2) ILC YB 5, Ex. YN 149, at 13, ¶4. The converse is also true: it is "difficult to support the position that a treaty applies to territories escaping the State's sovereignty." S. Karagiannis, *The Vienna Conventions on the Law of Treaties* (2011), Ex. YN 150, p. 752, n. 90. *See also* Nouvel BIT Rpt., ¶¶77-78 ("territory" means sovereign territory based on treatises, commentary and cases). Thus, because Ukraine and Oschadbank (100% owned by Ukraine) dispute RF sovereignty over Crimea, the RF's offer to arbitrate does not extend to investments there.

Third, that "territory" means sovereign territory is also supported by Article 1(4) defining "Territory" as "the territory of the Russian Federation or the territory of the Ukraine, ***as well as their respective exclusive economic zone and continental shelf***..." That the RF and Ukraine expressly included the EEZ and CS in Article 1(4) means "territory of" only refers to sovereign territory and does not encompass areas where the parties only exercise *de facto* or jurisdictional control. Interpreting "territory" broadly to include other areas of control, not just areas under sovereign control, would render Article 1(4)'s inclusion of the EEZ and CS superfluous, as they would be encompassed by the term "territory." "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable." *Geofroy v. Riggs*, 133 U.S. 258, 270 (1890).

Fourth, the BIT's very title "Agreement … on the Encouragement and Reciprocal Protection of Investments" demonstrates that its "object and purpose" under VCLT Art. 31(1) is to promote and protect investments of nationals of the other party. The Preamble refers to two primary goals: (a) the "intention to create and maintain favorable conditions for reciprocal investments," and (b) the "desir[e] to create favorable conditions for the promotion of economic cooperation between the Contracting Parties." *See Saluka Investments BV v. Czech Republic*, UNCITRAL (2006), Ex. YN 169, ¶299 ("The 'object and purpose' of the Treaty may be discerned from its title and preamble."). However, such an objective can only be achieved in geographic areas that are uncontested by the parties. *See* Nouvel BIT Rpt., ¶¶85-86. As evidenced by Crimea, states contesting each other's sovereignty over an area cannot cooperate in that area's economic development. *Id.* Further, nothing in the BIT's title or Preamble suggests that the RF offered to arbitrate investments by Ukrainian investors in Ukrainian territory at the time of their making. For these reasons, the RF's offer ***did not*** include arbitrating investments in Crimea.

Fifth, for the RF to have offered to arbitrate disputes over Crimea, there must be a mutual agreement regarding whether Crimea is within the "territory of the Russian Federation"; otherwise, there is no jurisdiction *ratione loci* under the BIT. *See* Nouvel BIT Rpt., ¶87. In order for BITs to accomplish their purposes, there must be reciprocity. *Id.,* ¶86. But there is no reciprocity here. *Id.,* ¶¶88, 89. Specifically, Ukraine's April 15, 2014, Disputed Territory Law rejects the RF's assertion that Crimea and Sevastopol are RF territory. *Id.*, Art. 1.1 ("The temporarily occupied territory of Ukraine (here and after – temporarily occupied territory) is an integral part of the territory of Ukraine. The application of the Constitution and the laws of Ukraine shall extend to such territory."). Similarly, the May 6, 2014, NBU Directive prohibited Ukrainian banks such as Oschadbank from, *inter alia,* conducting banking activities in Crimea. The RF never offered to

provide protections in a territory over which Ukraine purports to exercise prescriptive jurisdiction and territory that Ukraine refuses to recognize as sovereign RF territory. Nor did the RF offer to protect Ukrainian investors prohibited by Ukrainian law from conforming with Russian law. Thus, the RF did not offer to arbitrate disputes related to Crimea. *See* Nouvel BIT Rpt., ¶90. Based on this, there was no agreement under FSIA §1605(a)(6).

6. The RF Only Offered To Arbitrate Investments Which Were Cross-Border When Made Under Articles 1(1) and 1(2)

The RF only offered to arbitrate disputes with "***investor[s] of the other Contracting Party*** that arise[] in connection with the ***investments***." Article 9(1). Article 1(1) defines "investments" as assets "which are ***invested*** by an investor of one Contracting Party ***in the territory of the other Contracting Party***" (determining jurisdiction *ratione materiae*). Article 1(2) defines "investor of a Contracting Party" with respect to entities as "any legal entity, constituted under the law in force in the territory of that Contracting Party … ***to make investments in the territory of the other Contracting Party***" (determining jurisdiction *ratione personae*).

The common element of Articles 1(1) and 1(2) is that "investments" must be "invested" or "made" (an activity requirement) "in the territory of the other Contracting Party" (cross-border requirement). There is a nexus between the requirements of an action of "investing" and of such action being cross-border "in the territory of the other Contracting Party." These requirements are cumulative and must be fulfilled simultaneously to meet the definitions of "investment" and "investor" in Articles 1(1) and 1(2). *See* Ponomarev Translation Rpt., ¶¶16-17. Since an ***act*** of investing is required, the only time these requirements can be met concurrently is when such act takes place. Accordingly, an investment must be cross-border ***when made***. *See* Nouvel BIT Rpt., ¶¶91, 92.

First, the requirement that an eligible investment must be cross-border when made is clear

from the ordinary meaning of the language of Articles 1(1) and 1(2). The words "are invested" in Article 1(1) and "to make" in Article 1(2) denote an ***action of making an investment*** as opposed to mere passive holding of an investment. *See* Ponomarev Translation Rpt., ¶¶9-15. The nexus of the ***action*** of investing being "***in***" "the territory of ***the other*** Contracting Party" means that an investor must ***transfer*** something to the territory of the other Contracting Party, *i.e.,* the action of investing must be cross-border. As both elements can be present together only at the time of such action, an investment must be cross-border when made. *See* Nouvel BIT Rpt., ¶¶94-97, 98-99.

Second, pursuant to VCLT Art. 31(1), the "object and purpose" of the BIT stated in its Preamble is "promotion of economic cooperation" between the RF and Ukraine by "creat[ing] and maintain[ing] favorable conditions" for investments made by investors of one State in the territory of the other State. BIT, Preamble. This can be achieved only when an investment is made cross-border in the territory of the other State. *See* Nouvel BIT Rpt., ¶106. Thus, in *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL (2020), Ex. YN 162, under the RF-France BIT, the tribunal reached this conclusion: "The preamble of the Treaty is clear in that its aim was the promotion of foreign investment by nationals of one State into the other State… [T]his promotion of foreign investment from one State to the other can only be accomplished if … the investor of one of the State parties to the BIT makes – not simply holds – an investment in the territory of the other State … by way of a transfer of capital or [resources] between the two States in the interest of their economic development." *Id*. ¶¶415, 416. "It is a necessary consequence of the references to investments 'made' rather than investments 'held,' that [foreign] nationality condition must be fulfilled ***at the time of the making of the investment***." *Id*. ¶418 (dismissed for lack of jurisdiction). *See further* Nouvel BIT Rpt., ¶¶101, 102, 103 & n. 17, 104, 105, 109, 110, 111 & n. 20 (citing additional cases).

Third, under VCLT Art. 31(1), a "treaty shall be interpreted … in accordance with the ordinary meaning to be given to the terms of the treaty in their context." VCLT Art. 31(2) allows for consideration of other treaty provisions to provide "context for the purpose of the interpretation of a treaty." As discussed, Article 12, which excludes investments made prior to January 1, 1992, was based on the idea that an investment made in a domestic territory cannot become foreign by virtue of a change in sovereignty over that territory. The intention was to exclude the possibility of an investment arising from territorial changes, such as those which resulted from the dissolution of the USSR, but also other territorial changes, absent mutual consent, such as those which occurred in 2014 upon Crimea's accession to the RF. *See* Nouvel BIT Rpt., ¶¶112-115. Since the object and purpose of the BIT is to stimulate foreign investments, extending the BIT's protection to an investment that was domestic at the time of its making would not fulfill the BIT's "basic underlying objectives." *See ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06 (2013), Ex. YN 121, ¶423 ("BIT mechanism does not protect investments that it was not designed to protect, that is, ***domestic investments disguised as international investments***.")

Accordingly, based on the ordinary meaning of Articles 1(1) and 1(2), viewed in the context of Article 12 and the BIT's object and purpose, the RF's offer to arbitrate did not apply to investments which were not cross-border when made. Oschadbank's investments in Crimea were not "invested" in the territory of the RF when made before 2014. *See* Petition, ¶22; Award, ¶¶63-65. Thus, because the RF's offer to arbitrate under the BIT did not apply to Oschadbank's purely domestic investment, there was no agreement under FSIA §1605(a)(6).

7. The RF's Offer To Arbitrate Under The BIT Does Not Apply To Crimea Based On The Practice Of States Refusing to Recognize Crimea as RF Territory Regarding Similar BITs Under International Law

VCLT Art. 32 allows recourse to "supplementary means of interpretation." As Nouvel explains, "Treaties on the same subject matter concluded […] with third States can legitimately be

considered as part of the supplementary means of interpretation." Nouvel BIT Rpt., ¶120 (quoting *Planet Mining Pty Ltd. v. Indonesia*, ICSID Case No. ARB/12/14, 12/40 (2014), Ex. YN 118, ¶182). The RF entered into numerous investment treaties with other states similar to the BIT at issue. The practice of the other states refusing to recognize Crimea as RF territory evidences that BITs with the RF are not interpreted to include Crimea as RF territory under international law because of the absence of mutual consent.

In August 2023, the RF sent diplomatic notes to 13 states and the European Union regarding the application of their bilateral investment treaties with the RF to Crimea. *See Notes Verbales* Summary Chart, Ex. 20. For example, the August 21, 2023 *Note Verbale* sent to France stated that "the Russian Federation confirms that the Agreement shall apply similarly to the Republic of Crimea and federal city of Sevastopol." August 21, 2023 RF-France, *Note Verbale*, Ex. 21. On November 23, 2023, France rejected this application, stating it "believes that the territorial scope of the Agreement … corresponds to internationally recognized territory of the Russian Federation" pursuant to Resolutions 68/262 and ES-11/4 of the U.N. November 3, 2023 France-RF, *Note Verbale*, Ex. 22. France's response, citing U.N. Resolutions that Crimea is not the RF's territory, is the same as those from Austria, Belgium, Canada, the European Union, Germany, Lithuania, Luxembourg, Montenegro, Netherlands, Singapore, Switzerland, and the United Kingdom. *See Notes Verbales* Summary Chart, Ex. 20.

Based on these responses, these BITs would not protect investments from RF investors located in Crimea in the territory of these states, and, reciprocally, these BITs would not protect investments from their investors in Crimea. Based upon the understanding of these other countries with similar bilateral investment treaties with the RF on the same subject matter rejecting that Crimea is RF territory, under international law, including the VCLT, nationals of these countries

(including Ukraine) do not enjoy the protection of the investments made in Crimea, when their countries dispute that Crimea is the territory of the RF due to lack of mutual agreement.

C. OSCHADBANK IS NOT A PRIVATE PARTY UNDER §1605(A)(6)

The FSIA arbitration exception only applies to "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 …." §1605(a)(6). FSIA does not define private party, but it defines "foreign state" to include an "agency or instrumentality" of a foreign state. §1603(a). Oschadbank is an "agency or instrumentality of a foreign state" under §1603(b), because it is 100% directly owned by Ukraine. *See* Petition, ECF 1, ¶4.[20] Longstanding rules of statutory interpretation dictate that because Oschadbank is an "agency or instrumentality of a foreign state," it cannot, at the same time, qualify as a "private party."

First, "when a word is not defined by statute, [the court] normally construe[s] it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). Courts use Black's Law Dictionary to determine the "ordinary or natural meaning" of undefined statutory terms. *See Smith*, 508 U.S. at 228-29 (using Black's Law Dictionary). *See also Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (using Black's Law Dictionary to provide ordinary meaning of undefined term in FSIA). According to Black's, the meaning of "private" is "[r]elating or belonging to an individual, as opposed to the public or the government." Black's Law Dictionary, (9th ed. 2009). Applying this definition, courts have construed the terms "private party" and

[20] *See e.g. Rosner v. Bank of China*, 528 F.Supp.2d 419, 422, 424 (S.D.N.Y. 2007) (commercial bank owned by China is an agency or instrumentality); *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Ir. Bank Corp.*, 2011 U.S. Dist. LEXIS 136018, at *18-19 (S.D.N.Y. Nov. 28, 2011) (commercial bank owned by Ireland is an agency or instrumentality).

"private entity" in other statutes to refer to private individuals and entities that are not owned by the government. *See Navy Yard Four Assocs., LLC v. Dep't of Envtl. Prot.,* 37 N.E.3d 46, 54 (Mass. App. Ct. 2015) (construing "private tidelands" in statute to exclude tidelands held by quasi public agencies and political subdivisions); *City of Madison v. Dep't of Fin. & Prof'l Regulation,* 2021 IL. App. (5th) 190371-U, ¶ 25 (Ill. Ct. of App. Feb. 25, 2021) (term "private" in statute is "intended to regulate private individuals, corporations, or other entities engaging in the business .... [and] not []to regulate services offered by governmental entities to the public"). Because Oschadbank is considered to be a foreign state under FSIA, it is not encompassed by the "ordinary and common" meaning of private party.

Second, when different terms in a statute are juxtaposed against each other, the distinctions "are naturally understood to be significant." *Nelson*, 507 U.S. at 357 (distinction between juxtaposed terms in FSIA indicate that Congress intended different meanings for the terms). Here, §1605(a)(6) juxtaposes "foreign states" with "private parties," stating that the arbitration exception is limited to "enforce an agreement made by the ***foreign state*** with or for the benefit of a ***private party.***" The juxtaposition of these two terms indicate that Congress intended them to have different meaning. Thus, an entity that is categorized as a foreign state under §1605(b), such as Oschadbank, cannot also be a private party under §1605(a)(6).

Third, statutes are construed to give distinct meanings to each term, and against rendering one term superfluous. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) (holding FSIA should not be construed "in a manner that is strained and, at the same time, would render a statutory term superfluous"). A foreign state, including its "agency or instrumentality," cannot be the same thing as a "private party" under FSIA, as that would render the term "private party" superfluous. Had Congress intended to allow the FSIA to be used to enforce arbitration awards between two

foreign sovereigns, including their "agencies and instrumentalities," it could have simply stated that it allowed actions "to enforce an agreement made by the foreign state with or for the benefit of another party." The intentional inclusion of the word "private" before "party" demonstrates that Congress intended to limit FSIA's arbitration exception to awards between private parties and foreign sovereigns, and not between two foreign sovereigns. *Dole*, 538 U.S. at 476-77 (rejecting interpretation of FSIA that would render term superfluous).[21]

Fourth, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security v. MacLean*, 135 S. Ct. 913 (2015). Section 1605(a) lists six different exceptions to sovereign immunity, yet only §1605(a)(6) specifically limits the exception to interactions between the foreign state and a private party. The inclusion of the "private party" limitation in (a)(6), and its omission in the other five exceptions demonstrates that Congress intended to limit this exception to arbitrations between private parties and foreign sovereigns. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) ("Because Congress included the 'reasonably calculated to give actual notice' language only in §1608(b), and not in §1608(a), we resist the suggestion to read that language into §1608(a)").

***Fifth*,** these textual arguments are dispositive as the statutory text is unambiguous. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (legislative history "has no bearing" where statutory language is unambiguous and that "it is ultimately the provisions of those legislative commands rather than the principal concerns of our legislators by which we are governed.") However, the legislative history preceding the 1988 amendment adding the arbitration exception

[21] Similarly, §1605(a)(60 later encompasses the term "private party" in the term "parties." Thus, the "parties" which the arbitration agreement benefits must be the foreign state and the "private party" involved in the dispute. It is irrelevant other private parties may benefit.

in §1605(a)(6) repeatedly evidences that the purpose of the arbitration exception was to benefit "private parties," and not a foreign sovereigns. For example, the Legal Advisor of the Department of State testified that the arbitration exception "will advance our long-standing policy favoring arbitration in international commerce and particularly in business and investment relationships between ***private entities and foreign governments***." Elisabeth G. Verville, Acting Legal Adviser, Dept. of State, Testimony Before U.S. House Judiciary Subcommittee, 99th Cong., 1st sess., May 20, 1986 at 32. Similarly, the Chairman of the Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act of the American Bar Association testified that the arbitration exception was necessary, because "arbitration has become the preferred procedure for the peaceful resolution of disputes between ***private parties*** and foreign states and government agencies." Mark A. Feldman, Statement Before U.S House Judiciary Subcommittee, 99th Cong., 1st sess., May 20, 1986, at 24. This testimony illustrates that the inclusion of the term "private persons" was not accidental; rather, it reflected Congress' intent that the arbitration exception be limited to benefit private persons.

Finally, the term "private party" recognizes the obvious: sovereign states can resolve disputes among themselves through diplomatic channels. Private parties have no such ability. Limiting the arbitration exception to private parties creates a means for them to obtain redress while minimizing the involvement of American courts in exercising jurisdiction over foreign sovereigns and risking interfering in the foreign affairs of our nation.

In sum, enforcing an arbitration award between two foreign sovereigns would improperly interject the Court into international foreign relations which Congress deliberately avoided. The Court must respect the statutory limitation on this exception to sovereign immunity and hold that FSIA does not allow U.S. courts to enforce this award, as it was procured by Ukraine, through its

"agency or instrumentality" against another foreign sovereign.

D. FSIA'S ARBITRATION EXCEPTION DOES NOT APPLY BECAUSE THE AWARD DOES NOT INVOLVE A LEGAL RELATIONSHIP WHICH IS COMMERCIAL UNDER THE NY CONVENTION

The FSIA's arbitration exception applies to enforcement actions only where "the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards." *Chevron*., 795 F.3d at 204. Oschadbank relies on the NY Convention, which is subject to the United States' "commercial reservation," making it applicable only to differences "arising out of ***a legal relationship, whether contractual or not, which is considered as commercial.***" 9 U.S.C. §202. The NY Convention is inapplicable, because the legal relationship between the RF and Oschadbank is sovereign in nature, not commercial.

First, VCLT Art. 32 provides that in construing a treaty, "recourse may be had to … preparatory work of the treaty and the circumstances of its conclusion." Similarly, U.S. courts "have traditionally considered as aids to [a treaty's] interpretation the negotiating and drafting history (travaux préparatoires)." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); *accord Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 216 (2009) (reviewing travaux préparatoires in order to construe scope of NY Convention). The United Nations committee which prepared the draft NY Convention, stated squarely that it "does not deal with arbitration between States." U.N. Economic & Social Council, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1 (Mar. 1955), ¶ 17. As a result, the NY York Convention cannot be used to enforce the Award, because Oschadbank is a 100% owned "agency or instrumentality" of the Ukrainian government under FSIA, §1603(b), and therefore, its dispute with the RF is an arbitration between states that is not covered by the NY York Convention.

Second, the *Restatement (Third) of Foreign Relations Law § 487 cmt. f* provides:

Ordinarily, arbitration of a controversy of a public international law character, such

> as a boundary dispute or a dispute about interpretation of or performance under an international agreement (see *§ 301*), is not subject to the New York Convention, and an award resulting from such an arbitration is not subject to enforcement through civil courts. *See § 904* and Comment e thereto.

The unique circumstances of this case involving a wholly owned "agency or instrumentality" of Ukraine and the RF, a sovereign state, render this dispute as one of a public international law character, outside the NY Convention. Unlike a traditional investor-state dispute, which involves a private party litigating against a sovereign, both the Petitioner and Respondent fall within the definition of "foreign state" under FSIA.

Third, there was no "legal relationship, whether contractual or not" between Oschadbank and RF. The D.C. Circuit has described the requirement for a "legal relationship" under the NY Convention as encompassing an agreement that contemplates "which parties it would obligate, the extent of the obligations, the remuneration exchanged for meeting the obligations, and the legal framework to govern the arrangement." *Diag Human v. Czech Rep. - Ministry of Health*, 824 F.3d 131, 135 (D.C. Cir. 2016). None of that exists here.

Oschadbank's sole conclusory allegation is that the "Award arose from a legal relationship between Petitioner and Respondent that is commercial within the meaning of [9 U.S.C. §202]," Pet. ¶63, but it alleges no facts showing how this "legal relationship" was created under the BIT. To the contrary, the record demonstrates that Oschadbank did not invest in Crimea under any agreement with the RF that defined the parties obligations, the extent of any obligations, remuneration, and a legal framework governing a relationship. Indeed, Oschadbank's investments in Crimea all preceded Crimea's ascension to the RF. Thus, the RF never approved Oschadbank's investment "in the territory of the other Contracting Party ***in conformity with its laws***" as

provided by Art. 1.1.[22]

Further, upon Crimea's ascension, Oschadbank steadfastly refused to recognize the RF's sovereignty or right to control Crimea, accept its regulation over Crimea, or engage it in any way. Oschadbank refused to comply with Russian law because Ukraine prohibited such, as detailed in the Lauts Expert Report. There can be no ***legal*** commercial relationship between Oschadbank and the RF when Ukraine prohibits such. Therefore, the Award cannot be enforced under the NY Convention.

II. FSIA'S §1605(A)(1) WAIVER EXCEPTION DOES NOT APPLY MERELY BECAUSE THE RF SIGNED THE NY CONVENTION

As an alternative rationale for jurisdiction, Oschadbank cites FSIA §1605(a)(1)'s "waiver exception" which applies when "the foreign state has waived its immunity either explicitly or by implication." *See* Petition, ¶9. It contends that the non-precedential opinion in *Tatneft v. Ukraine*, 771 F.App'x 9, 10 (D.C. Cir. 2019) somehow authoritatively held that the RF and 171 other sovereign nations which signed the NY Convention all thereby ***impliedly*** waived their sovereign immunity against lawsuits brought against them in any of the other 171 nations that have signed the Convention.[23] Neither *Tatneft* nor any other D.C. Circuit decision has precedential import on this issue, and the D.C. Circuit recently took care to avoid any endorsement of this sweeping implied waiver theory. Many factors caution against such a dangerous view.

First, *in Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F.Supp.3d 1, 13-14 (2023), the Court rejected the waiver argument as "too clever by half," declining to read D.C.

[22] *See*, *e.g.*, Article 2(1) (host state needs "to admit such investments subject to its laws"); Art. 2(2) (host state only agrees to protect investments made "in conformity with its laws").

[23] *See*: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Circuit precedent "as having overruled the requirement for a valid agreement to arbitrate." In the pending appeal, the Circuit Court asked the United States to provide an *amicus curiae* brief on the subject.[24] In its brief, the United States, citing D.C. Circuit precedent requiring that any waiver by implication under FSIA must be construed narrowly, explained that a ***specific*** arbitration agreement, not mere participation by a sovereign as a party to the NY Convention, is necessary for finding a FSIA waiver.[25] The United States explained this reading comports with existing D.C. Circuit precedent. *See* U.S Amicus Brief at 21-24. It is, of course, "well settled that the Executive Branch's interpretation of a treaty [like the Convention] 'is entitled to great weight.'" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). *See also Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060-61 (2019) (same).

Second, no textual support for this argument that the RF waived immunity "explicitly or by implication" can be found in the NY Convention, which doesn't even mention sovereign immunity. As the Supreme Court noted, for a foreign state to merely sign a Convention does not "create an exception to the FSIA." *Amerada Hess*, 488 U.S. at 442 (1989). "Nor do we see how a foreign state can 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." *Id. See also Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 733-734 (7th Cir. 2000) (sovereign does not waive immunity by signing a treaty "that contains no mention of a waiver of immunity").

Third, it is no mystery why the NY Convention does not mention sovereign immunity. It

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[24] Order dated January 5, 2024, *Blasket Renewable Investments LLC v. Kingdom of Spain*, D.C. Cir., Case No. 23-7038, Doc. # 2034696, Ex. 15 (inviting United States to address "[w]hether, by becoming a party to the New York Convention, a state waives sovereign immunity under the FSIA waiver exception, 28 U.S.C. §1605(a)(1), from any action seeking the recognition and enforcement of an arbitral award governed by the Convention").

[25] U.S. *Amicus Curiae* brief dated February 2, 2024, *Blasket,* D.C. Cir., Case No. 23-7038, Doc. # 2038663, Ex. 16 ("U.S. Amicus Brief"), at 19-21.

was not crafted to address whether a sovereign waived immunity regarding arbitration of ***public law disputes***; rather, its express purpose was to facilitate "arbitration in the settlement of ***private law disputes.***" U.N. Conference Final Act ¶1, Ex. 19.

Fourth, the idea that nations that signed the NY Convention thereby "explicitly or by implication" waived sovereign immunity cannot be squared with the theory of absolute sovereignty which many significant nations, including the U.S.S.R., adhered to during that time.[26] If that was the intention, one would have expected the issue of immunity to have been explicitly addressed in the NY Convention. In the face of silence on the matter, it is unreasonable to assume that a waiver of immunity was a consequence of signing the NY Convention.

Fifth, that neither the text nor the purpose of the NY Convention supports the implied waiver theory is decisive, given that the D.C. Circuit has "followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.11 (D.C. Cir. 2002). "Courts rarely find that a nation has waived its sovereign immunity … without strong evidence that this is what the foreign state intended." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). An "implied waiver depends upon the foreign government's having at some point indicated its amenability to suit." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (noting "intentionality requirement implicit in §1605(a)(1)") (collecting cases,

[26] *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-85 (1952) (explaining that Great Britain, Czechoslovakia, Poland, Estonia, Brazil, Chile, China, Hungary, Japan, Luxemburg, Norway, Portugal, and Germany adhered to an "absolute" theory of sovereign immunity), *also attached as* Appendix 2 to *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). *See also Gregorian v. Izvestia*, 871 F.2d 1515, 1523 (9th Cir. 1989) (U.S.S.R. continued to adhere to the "absolute" theory of sovereign immunity for decades after signing the NY Convention).

citing legislative history).

Sixth, this theory, if adopted, would have disturbing implications, as warned in the U.S. Amicus Brief at 24. If the RF can be subjected to suit in the U.S. solely because it signed the NY Convention, then the U.S. can likewise be subjected to suit in the RF or other countries based on this theory. Since "some foreign states base their sovereign immunity decisions on reciprocity," Oschadbank's overbroad interpretation of the FSIA's waiver exception could create the "potential for international discord and for foreign government retaliation." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). Indeed, this risks the United States being sued in any of the other 171 nation that signed the NY Convention, including states with which it has strained relations (e.g., Iran, Cuba) and failed states (e.g., Afghanistan, Haiti, Syria).

Seventh, confirming the destabilizing effect of this theory, after seeking the views of the United States in 2020, the D.C. Circuit declined to affirm a decision that had adopted the theory that a foreign state had so waived immunity. In *Process & Industrial Developments, Ltd. v. Federal Republic of Nigeria*, 506 F.Supp.3d 1 (D.D.C. 2020), the District Court relied on this theory in finding jurisdiction to confirm an arbitration award against Nigeria. *Id*. at 8 & n.4.[27] After considering an earlier *amicus* brief filed by the United States expressing "significant policy concerns,"[28] the D.C. Circuit declined to affirm on this ground, and instead affirmed based on the

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[27] As the decision noted, the D.C. Circuit, while having "come close" in *Creighton Ltd. v. Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999), where it "opined in dicta" that the "reasoning is correct" in *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578 (2d Cir. 1993), it "***has not adopted*** *Seetransport's* waiver as binding Circuit law." *Process & Industrial Developments, Ltd.*, 506 F.Supp.3d at 7. The decision also noted that "[b]ecause *Tatneft* is an unpublished disposition, the Court is not bound by it." *Id*. at 7 n.3 (citing *Atlas Brew Works, LLC v. Barr*, 391 F.Supp.3d 6, 21 (D.D.C. 2019)). *See also* D.C. Circuit Rule 36(e)(2) (unpublished disposition lacks precedential value); *United States v. Project on Gov't Oversight*, 484 F.Supp.2d 56, 67-68 (D.D.C. 2007) (citing the Rule and case law).

[28] *See* U.S. *Amicus Curiae* brief in *Process & Industrial Developments, Ltd. v. Fed. Republic of*

arbitration exception. *Process & Industrial Developments, Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771, 775-76 & n.3 (D.C. Cir. 2022). The compelling U.S. Amicus Brief, as well as precedent, makes clear that merely signing the NY Convention does not constitute waiver.

III. THE RF IS A "PERSON" ENTITLED TO THE FIFTH AMENDMENT'S DUE PROCESS PROTECTION FOR THE EXERCISE OF PERSONAL JURISDICTION

The RF objects to the exercise of personal jurisdiction on due process grounds under the Fifth Amendment to the U.S. Constitution to avoid any argument that it waived its right to raise this issue on appeal. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002), held that that foreign states do not qualify as "persons" under the Due Process Clause of the Fifth Amendment. However, the RF maintains that *Price* was wrongly decided and is subject to challenge on appeal based upon, *inter alia*, **(a)** its misplaced reasoning that *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), supports treating foreign states the same as U.S. states, which are not "persons" under the Fifth Amendment; **(b)** its inconsistency with the Supreme Court precedent recognizing foreign states are treated as "persons" for the purpose of requiring process to assert personal jurisdiction, *see*, *e.g.*, *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978) (allowing foreign nations to sue as a "person" within the meaning of the Clayton Act); **(c)** its inconsistency of treatment because agencies or instrumentalities of foreign states are treated as persons under the FSIA, *see Livnat v. Palestinian Authority*, 851 F.3d 45, 48-49 (D.C. Cir. 2017) ("[n]othing in *Price*, other precedent, … compels us to extend the rule in *Price* to all foreign government entities"); **(d)** the intent of the drafters of the Due Process Clause; and **(e)** FSIA implicitly treats foreign states as persons for due process purposes.

Nigeria D.C. Cir., No. 21-7003, Document # 1931435 (Jan. 20, 2022), Ex. 17. Among other things, the United States noted that the waiver theory "could . . . implicate adverse reciprocity concerns were foreign courts to take a broad view of waiver in cases brought against the United States." *Id.* at 6.

CONCLUSION

The Motion should be granted and the case dismissed for lack of subject matter and personal jurisdiction based on Oschadbank's failure to establish an exception to sovereign immunity under FSIA §1605(a)(1) & (6), with prejudice.

Dated: May 30, 2024

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CERTIFICATE OF SERVICE

I certify that on May 30, 2024, the foregoing document was filed electronically and served upon all counsel of record via the Court's CM/ECF filing system in accordance with the Federal Rules of Civil Procedure.

Dated: May 30, 2024

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