UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JOINT STOCK COMPANY STATE SAVINGS BANK OF UKRAINE (ALSO KNOWN AS JSC OSCHADBANK), Petitioner, v. THE RUSSIAN FEDERATION, Respondent.	Case No. 1:23-cv-00764

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative History

Other Authorities

Petitioner Joint Stock Company State Savings Bank of Ukraine ("**Oschadbank**") respectfully submits this memorandum of law in opposition to Respondent the Russian Federation's ("**RF's**") motion to dismiss (Dkt. 38, "**MTD**") the Petition (Dkt. 1, "**Pet.**").

PRELIMINARY STATEMENT

Under the law in this Circuit, the arbitration exception to the Foreign Sovereign Immunities Act ("**FSIA**"), 28 U.S.C. § 1605(a)(6), is satisfied if this Court finds "the existence of [a] [bilateral investment treaty], [a party's] notice [of arbitration], [and] the tribunal's arbitration decision." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204-05 (D.C. Cir. 2015). If these "purely factual predicate[s]" are met, *id.* at 204 (citation omitted), the Court has jurisdiction under the FSIA.

There is no question that Oschadbank has met these requirements. The parties have "produced copies of the [bilateral investment treaty], the notice[] of arbitration[,] and the tribunal's decision" (the "**Award**"), which together "demonstrate[] that the arbitration exception appli[es]." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). As in *Chevron* and *Stileks*, RF "does not dispute the existence of" these documents. *Chevron*, 795 F.3d at 204-05. Under D.C. Circuit precedent, the FSIA's arbitration exception therefore applies, and the Court has subject matter jurisdiction over this proceeding.

The point of RF's many hundreds of pages of submissions boils down to an argument that the D.C. Circuit has repeatedly held does ***not*** bear on jurisdiction under the FSIA. RF claims (MTD 12) that the arbitration exception does not apply because it "did not agree to arbitrate Oschadbank's claims under the" Russia-Ukraine Bilateral Investment Treaty (the "**BIT**") (capitalization altered). But such a challenge to the BIT's ***scope***, rather than its ***existence***, is, at best, "a defense to confirmation"—in other words, a merits defense. *Stileks*, 985 F.3d at 878. It unequivocally does not pose "a jurisdictional question under the FSIA." *Id.*; *see Chevron*, 795 F.3d at 205-06. RF may rebut Oschadbank's showing that the arbitration exception applies only

by disproving "that the BIT and [Oschadbank's] notice of arbitration constituted an agreement to arbitrate." *Chevron*, 795 F.3d at 205. RF makes just one argument potentially touching that issue, that "Oschadbank's alleged acceptance did not match the RF's offer to arbitrate" (MTD 16). But this point is easily disproven by comparing the notice of arbitration with the BIT's plain text—which it matches word-for-word. *Compare* Dkt. 1-3 at 8, art. 9(1)-(2)(c), *with* Dkt. 39-9 at 3-4.

Chevron also disposes of RF's argument (MTD 2) that "there is no international agreement calling for the recognition of the Award." The FSIA's arbitration exception "does not require that the District Court determine that the award is governed by a treaty; ... the District Court has jurisdiction so long as the award 'is ***or may be*** governed by a treaty.'" *Chevron*, 795 F.3d at 204 n.2 (emphasis in original) (quoting 28 U.S.C. § 1605(a)(6)). And in any case, the Award is plainly governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "**New York Convention**").

RF makes only one other argument that is not barred under *Stileks* and *Chevron*. In substance, RF contends that the arbitration exception applies only where the award in question arose from an arbitration agreement made for the exclusive benefit of private parties—and is not available where, as here, the treaty in question is invoked by a state-owned enterprise like Oschadbank. This argument cannot be squared with the plain language of the arbitration exception, which applies to any award rendered under an "agreement made by the foreign state with or for the benefit of a private party." 28 U.S.C. § 1605(a)(6). Here the award Oschadbank seeks to confirm was issued under the BIT, which is an agreement for the benefit of private investors. The fact that the BIT also benefits a state-owned enterprise like Oschadbank, which is an independent commercial entity under Ukrainian law, does not take it outside the ambit of the statute—and RF can point to no language in the statute, or any other authority, that suggests

otherwise. The intent and meaning of the arbitration exception was to ensure that U.S. courts would enforce all arbitral awards issued under the New York Convention, not exclude any category of awards from enforcement. Moreover, a state-owned corporation like Oschadbank is a separate commercial entity, not the state itself. And courts have long recognized "that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824).

Finally, the FSIA's waiver exception, 28 U.S.C. § 1605(a)(1), provides an independent ground for this Court to exercise subject matter jurisdiction over RF. As the Court of Appeals explicitly held in *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019), and *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999), "a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states." 771 F. App'x at 10. RF's effort to wish away these authorities by describing them as "dicta" are unavailing, as *Tatneft* specifically held that "[t]he waiver exception applies to" the very BIT at issue here. *Id*. In any case, *Tatneft* and *Creighton* are both correct, and U.S. courts have held as much since the FSIA's enactment. *E.g.*, *Ipitrade Int'l, S. A. v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978). Endorsing RF's contention that neither the arbitration exception nor the waiver exception apply would require this Court to rule that the D.C. Circuit's decision in *Tatneft*—which also involved a state-owned enterprise enforcing an arbitral award against a foreign state—was wrongly decided. It would also extend the FSIA's grant of immunity far beyond what the restrictive theory of sovereign immunity requires, and would place the United States in violation of its treaty obligations under the New York Convention.

BACKGROUND

The dispute underlying this proceeding arose from a BIT between Ukraine and RF that entered into force in 2000. Pet. ¶ 12. The BIT protects all "Investments"—which is defined broadly to include "all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws[.]" *Id.* ¶ 14. "Investor of a Contracting Party" is also defined broadly to include "any legal entity, constituted under the law in force in the territory of that Contracting Party, provided, that the legal entity is competent under the laws of its Contracting Party to make investments in the territory of the other Contracting Party." *Id.* Article 5 of the BIT provides that "[t]he investments of investors of one Contracting Party, made in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to measures, the effect of which is tantamount to expropriation (hereinafter referred to as - expropriation) …." *Id.* ¶ 16. Article 9 creates a mechanism for settling disputes between an investor and the state where it made its investment, and provides:

> Any dispute between either Contracting Party and an investor of the other Contracting Party … shall be subject to a written notification, accompanied by detailed comments, which the investor shall forward to the Contracting Party involved in the dispute…. If the dispute is not resolved in that way within six months as of the date of the written notification, as mentioned in para 1 of this Article, it shall be referred for consideration to: … c) an ad hoc arbitral tribunal in conformity with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Dkt. 1-3 at 8, art. 9(1)-(2)(c). Finally, under Article 9(3) of the BIT, "[t]he arbitral award shall be final and binding upon both parties to the dispute. Each Contracting Party shall undertake to enforce such an award in conformity with its laws." *Id.*, art. 9(3).

Under the UNCITRAL rules, "[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," and "shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part." UNCITRAL Arbitration Rules, G.A. Res. 31/91 art. 21 (Dec. 15, 1976). The D.C. Circuit has expressly held that a party that agrees to arbitrate under UNCITRAL rules, as a result, "consent[s] to allow the arbitral tribunal to decide issues of arbitrability—including whether [the party] ha[s] 'investments' within the meaning of the treaty." *Chevron*, 795 F.3d at 207-08.

Oschadbank is one of the largest banks in Ukraine and historically had an extensive presence in the Crimean Peninsula. Pet. ¶ 22. In late February 2014, the RF invaded and occupied the Crimean Peninsula in violation of international law. *Id.* ¶ 23. After staging a referendum widely criticized as fraudulent, RF forcibly occupied Crimea and purported to annex it under Crimean law. *Id.* RF then enacted a series of laws targeting Ukrainian banks like Oschadbank and their employees which made it impossible for such banks to continue operations. *Id.* ¶¶ 24-26. Eventually, RF shut down all Oschadbank operations in Crimea. *Id.* ¶ 27.

In 2015, Oschadbank commenced proceedings against RF under the BIT, and in 2016, initiated arbitration proceedings under Article 9(2)(c) of the BIT before an arbitration Tribunal seated in France. *Id.* ¶¶ 7, 32. RF was on notice of the proceedings and received delivery (both electronic and hard copy) of all materials pertaining to the proceedings. RF sent the tribunal a letter objecting to its jurisdiction, contending that Oschadbank's claims do not fall "under the" BIT because Oschadbank's expropriated assets were not "investments" within the meaning of the BIT. Dkt. 1-2 ¶ 20. Russia otherwise refused to participate in the arbitration. Pet. ¶¶ 33-39.

On November 26, 2018, the tribunal issued its 120-page final Award. *Id.* ¶ 40. The tribunal rejected RF's jurisdictional objections in full, finding "that it has jurisdiction under the [BIT]." Dkt. 1-2 ¶ 239. It then found RF liable for breaching the expropriation provision in the BIT and

awarded Oschadbank USD 1,111,300,729 as compensation for its losses, plus pre- and post-judgment interest, as well as fees. *See* Pet. ¶¶ 46-47.

RF commenced annulment proceedings in France, the seat of the arbitration. *Id.* ¶ 48. The Paris Court of Appeal annulled the Award, but, on December 7, 2022, its annulment was overturned by the Court of Cassation, which also reinstated the Award. *Id.* ¶¶ 51-56.

Oschadbank filed its Petition to confirm and enforce the Award in this Court on March 21, 2023. RF appeared, and moved to dismiss for lack of subject-matter jurisdiction.

LEGAL STANDARD

"Where a plaintiff has asserted jurisdiction under the FSIA and the defendant foreign state asserts 'the jurisdictional defense of immunity,' the defendant state 'bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.'" *Hulley Enterprises Ltd. v. Russian Fed'n*, 2023 WL 8005099, at *8 (D.D.C. Nov. 17, 2023) (quoting *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015)). "Where a jurisdictional dispute challenges only the 'legal sufficiency' of the jurisdictional basis, the court should take the petitioner's factual allegations as true and draw all reasonable inferences in the plaintiff's favor." *Id.* (quoting *Simon v. Republic of Hungary*, 77 F.4th 1077, 1116 (D.C. Cir. 2023)).

The FSIA's arbitration exception is satisfied for purposes of determining the court's subject matter jurisdiction when the petitioner seeking confirmation and enforcement establishes "[1] the existence of an arbitration agreement, [2] an arbitration award and [3] a treaty [potentially] governing the award." *Stileks*, 985 F.3d at 877. "The statute does not require that the District Court determine that the award is governed by a treaty; if the first two jurisdictional facts are established, the District Court has jurisdiction so long as the award 'is *or may be* governed by a treaty.'" *Chevron*, 795 F.3d at 204 n.2 (emphasis in original) (quoting 28 U.S.C. § 1605(a)(6)).

In a case where the award derives from an arbitration arising under a bilateral investment treaty, the petitioner meets this burden by exhibiting to its petition "copies of the [bilateral investment treaty], the notices of arbitration and the tribunal's decision." *Stileks*, 985 F.3d at 877.

The FSIA's waiver exception, 28 U.S.C. § 1605(a)(1), applies when a foreign state "sign[s] the New York Convention" and the award enforced against it arises under the New York Convention. *Tatneft*, 771 F. App'x at 10.

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER THE FSIA'S ARBITRATION EXCEPTION.

A. The D.C. Circuit's Three-Part Test For Invoking The Arbitration Exception Is Plainly Satisfied.

The arbitration exception to the FSIA provides, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is brought ... to confirm an award made pursuant to ... an agreement to arbitrate, if ... the agreement or award is or may be governed by a treaty or other international agreement in force ... calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6). The exception applies if the Court finds that "[1] an arbitration agreement, [2] an arbitration award and [3] a treaty governing the award" exist. *Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria*, 2023 WL 417975, at *10 (D.D.C. Jan. 26, 2023) (quoting *Stileks*, 985 F.3d at 877). "As to these three requirements, petitioner bears 'a burden of production" to support a claim that the arbitration exception applies; 'the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence.'" *Id.* (quoting *Chevron*, 795 F.3d at 204). All three requirements are plainly met here.

First, there is an arbitration agreement. In 1998, Ukraine and RF entered into the BIT, which came into force in 2000. Pet. ¶ 12. Under Article 9 of the BIT (submitted as Dkt. 1-3), the

parties agreed to arbitrate "[a]ny dispute between either Contracting Party and an investor of the other Contracting Party that arises in connection with the investments[.]" Pet. ¶ 18. RF does not dispute that this treaty exists, is valid, or that it remains in force. RF, in turn, has submitted a copy of Oschadbank's notice of arbitration. *See* Dkt. 39-9. The BIT and notice of arbitration "are regularly said to demonstrate an arbitration agreement between the parties." *Deutsche Telekom AG v. Republic of India*, 2024 WL 1299344, at *3 (D.D.C. Mar. 27, 2024); *see, e.g.*, *Stileks*, 985 F.3d at 877; *Chevron*, 795 F.3d at 204-05.

Second, there is an arbitration award. The Tribunal issued the Award, which is final and binding, on November 26, 2018. Dkt. 1-2. RF does not dispute that the Award exists, and the existence of an arbitration award, issued by an international tribunal, satisfies the arbitration exception's second requirement. *See, e.g.*, *Stileks*, 985 F.3d at 877 (the exception's first two requirements are met when the petitioner produces "copies of the [BIT], the notices of arbitration and the tribunal's decision"); *Chevron*, 795 F.3d at 204; *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 273 (D.D.C. 2022).

Third, there is a treaty governing recognition and enforcement of the Award. Pet. ¶ 62. Both RF and the United States are parties to the "New York Convention, a multilateral treaty providing for 'the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.'" *Creighton*, 181 F.3d at 121 (quoting New York Convention, art. I(1)). This satisfies Section 1605(a)(6), as the FSIA "does not require that the District Court determine that the award is governed by a treaty; if the first two jurisdictional facts are established, the District Court has jurisdiction so long as the award 'is *or may be* governed by a treaty.'" *Chevron*, 795 F.3d at 204

n.2 (emphasis in original) (quoting 28 U.S.C. § 1605(a)(6)). RF's contention (MTD 34-36) that the New York Convention does not apply is thus a merits issue, and does not bear on the FSIA.

***

Although the Court need go no further, it can and should rule the New York Convention ***does*** in fact apply to the Award. The New York Convention governs any "arbitral award that: (1) arises out of a legal relationship that is 'commercial' … ; (2) has a reasonable relationship with one or more foreign States; (3) is in 'writing' and arises from an arbitration agreement in 'writing,' … ; and (4) was made in a Contracting State to the New York Convention." Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.4(b) (2023). Requirements (2)-(4) are not in dispute: the Award has a reasonable relationship with both RF and Ukraine (the BIT signatories), is in writing and arises from an arbitration agreement in writing, and was made in France, a New York Convention signatory. *See* Pet. ¶¶ 61-65. On the first requirement, a "crush of cases"[1] has held that an award arising from a BIT, like this one, arises out of a legal relationship that is "commercial." *Zhongshan*, 2023 WL 417975, at *7.

RF's counter-argument that the relationship is not commercial because Oschadbank is majority-owned by Ukraine (MTD 34-36), ignores that "the term 'commercial' covers a vast array of relationships, including … relations between States and foreign investors." Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1 (2023). A relationship is "commercial" for purposes of the New York Convention if it has a "connection with commerce," *Belize Soc. Dev.*, 794 F.3d at 104

[1] *See, e.g.*, *Tatneft v. Ukraine*, 21 F.4th 829 (D.C. Cir. 2021) (same BIT as this case); *Chevron*, 795 F.3d at 203-204; *LLC Komstroy v. Republic of Moldova*, 2019 WL 3997385, at *1-2 (D.D.C. Aug. 23, 2019) (confirming arbitral award pursuant to multilateral Energy Charter Treaty); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 105-08 (D.D.C. 2017) (confirming arbitral award resulting from Venezuelan expropriation of investments pursuant to BIT between Canada and Venezuela); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 118-20 (D.D.C. 2015) (same).

(citation omitted), and all bilateral investment treaties qualify. The fact that Oschadbank is a government-owned investor does not lessen the BIT's "connection with commerce." *Id.* (citation omitted). Only "arbitration of a controversy of a public international law character"—*i.e.*, "*arbitration[] between states*"—is non-commercial and outside the New York Convention's scope. *Zhongshan*, 2023 WL 417975, at *6 (emphasis in original) (first quoting Restatement (Third) of Foreign Relations Law § 487 cmt. f (1987) (*cited* MTD 34-35)). A dispute involving "state-owned commercial enterprises," by contrast, "is usually not governed by international law, and may provide for arbitration subject to the Convention." Restatement (Third) of Foreign Relations Law § 487 cmt. f (1987).

B. RF's Arguments About The BIT's Scope Are Not Jurisdictional.

1. *Chevron* And Its Progeny Squarely Preclude RF's Arguments.

This Court can readily disregard RF's argument (MTD 12) that it "did not agree to arbitrate Oschadbank's claims under the BIT" (capitalization altered) because it presents, at most, a merits defense to recognition under the New York Convention and has no bearing on jurisdiction under the FSIA. In *Chevron*, for example, a three judge panel of the D.C. Circuit unanimously held that a plaintiff invoking the arbitration exception need only prove the existence of the bilateral investment treaty, the New York Convention, and the award as "factual propositions," rather than engage with the merits arguments about whether the "the plaintiff's claim" fell within the scope of the arbitration clause. 795 F.3d at 204 (citation omitted).

Importantly, the court in *Chevron* rejected the very argument RF makes here (Mot. 10-12)—*i.e.*, "that the FSIA required the District Court to make a de novo determination of whether Ecuador's offer to arbitrate in [a bilateral investment treaty] encompassed Chevron's breach of contract claims,"—finding that this argument conflates "the jurisdictional standard of the FSIA with the standard for review under the New York Convention." 795 F.3d at 205; *compare* MTD

11 n.11 (contending that it is "entitled to *de novo* review of its arguments against FSIA jurisdiction"). "For FSIA purposes, Chevron made a prima facie showing that there was an arbitration agreement by producing the [bilateral investment treaty] and the notice of arbitration. Once Chevron made this showing, the burden shifted to Ecuador to demonstrate by a preponderance of the evidence that the [bilateral investment treaty] and the notice to arbitrate did not constitute a *valid* arbitration agreement between the parties." 795 F.3d at 205 (emphasis added). "The dispute over whether the [expropriated assets] were 'investments' for purposes of the treaty" has nothing to do with the validity of the arbitration agreement, and thus were irrelevant to the FSIA. 795 F.3d at 206.

So too here. RF's eighteen pages of legal argument (and forty-page expert report, Dkt. 40) as to why its "offer to arbitrate under Article 9 did not extend to disputes over Oschadbank assets in Crimea under" the BIT (MTD 12) are variations of the same argument that *Chevron* held is not jurisdictional: that the expropriated assets are purportedly not covered "investments" under Article 1(1) of the BIT (Dkt. 1-3 at 1), for alternative reasons.[2] They do not bear on whether the BIT, notice of arbitration, and Award all exist—all facts that are undisputed. *Supra*, pp.7-9.

2. RF Mischaracterizes *Chevron* And Conflates Disputes Over An Arbitration Agreement's Existence With Disputes Over Its Scope.

RF does not cite a single case treating a challenge to a bilateral investment treaty's scope as jurisdictional. Instead, it mischaracterizes *Chevron*. For example, RF contends that *Chevron* held that "whether the investor's request to arbitrate falls within the host state's standing offer to

[2] *See* MTD 13 (not a covered investment because Crimea was not RF territory in 2000); MTD 17 (same, because Oschadbanks' investments were made before 1992); MTD 20 (same, because Oschadbank's investments were not made in conformity with RF law); MTD 23 (same, because the BIT covers only investments made in "undisputed territory"); MTD 26 (same, because the BIT covers only investments that were "cross-border" when made); MTD 29 (same, because other states interpret their RF BITs to exclude Crimea).

arbitrate under a foreign-investment treaty" is a jurisdictional question under FSIA. MTD 11. In fact, *Chevron* held that this is a merits question: "The dispute over whether the lawsuits were 'investments' for purposes of the treaty is properly considered as part of review under the New York Convention," not the FSIA. 795 F.3d at 206. RF then quotes (MTD 11) *Chevron* as holding that "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." 795 F.3d at 206. But RF misleadingly fails to mention that that the court made that statement when explaining, in the alternative and after the holding discussed *supra*, pp.10-11, that Ecuador's argument would still lose "[e]ven were we to conclude that the FSIA required a de novo determination of arbitrability," which it did not. *Id.*

RF's trick throughout its brief is to conflate "whether the parties are bound by a given arbitration clause" with "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." MTD 10 (citation omitted). *Chevron* specifically rejects this conflation between whether a foreign state's "offer to arbitrate in [a bilateral investment treaty] encompassed [a petitioner's] claims"—"the arbitrability question"[3]—with the "jurisdictional" question of whether "there was an arbitration agreement," which is proved "by producing the BIT and the notice of arbitration." 795 F.3d at 205. Thus, when RF quotes *Chevron* as holding that a court cannot "eschew[] making ***this determination*** as part of its jurisdictional analysis," 795 F.3d at 205 n.3 (emphasis added) (quoted in MTD 11), RF omits that the determination *Chevron* was

[3] RF notes (MTD 10 n.9) that *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014), used the term "arbitrability" to refer to ***both*** disputes about the arbitration agreement's formation and disputes about the agreement's scope. But this is irrelevant because *Chevron* distinguished these issues, and used the word "arbitrability" to refer only to the arbitration clause's scope.

referring to was whether "the [bilateral investment treaty] and the notice of arbitration together constituted an agreement between the parties," and nothing more. *Id.*

Even if *Chevron* were not clear in holding that RF's scope-of-the-BIT arguments are not jurisdictional (and it is clear on that point), subsequent precedent leaves no room for doubt on this issue. In *Stileks*, Moldova argued (like RF here) that even if the investment treaty "may establish that Moldova agreed to arbitrate certain disputes, it does not prove that it agreed to arbitrate this *particular* dispute." 985 F.3d at 878 (emphasis in original). The panel unanimously held that "[i]f Moldova is correct, it might have a defense to confirmation under the New York Convention .... We have held, however, that the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Id.* (citing *Chevron*). Moreover, in *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 2022) (*cited* MTD 39), another D.C. Circuit panel unanimously held that "[t]he application of the arbitration exception [] [was] straightforward" when there was "an agreement to arbitrate," an award, and a treaty governing the award (the New York Convention). 27 F.4th at 776. And just two months ago, the D.C. Circuit again affirmed that, "under the FSIA arbitration exception, the relevant jurisdictional question is the existence of a valid agreement to arbitrate," and nothing more. *Micula v. Gov't of Romania*, 101 F.4th 47, 53 (D.C. Cir. 2024). Not one D.C. Circuit judge has dissented or proposed that an arbitration agreement's scope bears on FSIA jurisdiction. And following *Chevron* and *Stileks*, this Court has, without exception, rejected every effort by a foreign state to argue that its challenge to a bilateral investment treaty's scope bears on the FSIA.[4]

[4] *See, e.g.*, *Deutsche Telekom*, 2024 WL 1299344, at *3; *VAMED Mgmt. und Serv. Gmbh v. Gabonese Republic*, 2024 WL 1092232, at *3 (D.D.C. Mar. 13, 2024); *Hulley Enterprises*, 2023 WL 8005099, at *17-29; *Marseille-Kliniken AG v. Republic of Equatorial Guinea*, 2023 WL 8005153, at *3 (D.D.C. Nov. 17, 2023); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 188 (D.D.C. 2016).

RF cannot cite a single case that treated an arbitration agreement's scope as jurisdictional under the FSIA. In *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794 (5th Cir. 2021) (*cited* MTD 12), the court held that the arbitration exception did not apply, but that is because, unlike here with the BIT, the underlying contract plaintiff sued under "does not so much as mention arbitration." *Id.* at 801-02. And in *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012), *as revised* (Jan. 17, 2013) (*cited* MTD 12), there was an arbitration agreement, but "[t]he PRC was not … a party to [it]," again, unlike here. *Id.* at 756.[5]

RF makes only one argument that could be understood as arguably bearing on whether an "agreement to arbitrate was formed" (MTD 16), but the argument is meritless. RF contends (MTD 17) that no agreement was formed because Oschadbank's notice of arbitration did not "match" the offer to arbitrate in Article 9 of the BIT. This is disproved simply by reviewing the text of the BIT and the notice of arbitration. RF's offer to arbitrate, as stated in the BIT, provides:

> Any dispute between either Contracting Party and an investor of the other Contracting Party … shall be subject to a written notification, accompanied by detailed comments, which the investor shall forward to the Contracting Party involved in the dispute…. If the dispute is not resolved in that way within six

[5] None of the other cases RF cites (MTD 10-11 & nn.10-11) have anything to do with the FSIA or jurisdiction generally and are thus inapposite. *See*, *e.g.*, *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) (holding that absent a delegation of arbitrability to the arbitrator, which happened here, *infra*, pp.15-16, the court should determine arbitrability itself); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (same); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (same); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010) (same); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 299-300 (2010) (same, but holding that the court can resolve, as a merits issue, whether an arbitration agreement exists when, unlike here, *supra*, pp.7-8, this issue in dispute). RF's citation (MTD 13-14, 18, 21) of arbitral awards that addressed arbitrability only underscores that it is up to the tribunal, not the Court under the FSIA, to determine arbitrability. *See*, *e.g.*, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, ¶¶ 162-65 (2012) (stating only that a bilateral investment treaty should be interpreted to effectuate its purposes); Decision regarding delimitation of the border between Eritrea and Ethiopia, 25 Rep. of Int'l Arb. Awards ¶ 3.5 (2002) (interpreting treaty in accord with its contemporary meaning); *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 62 (2000) (ascertaining the temporal limits of a bilateral investment treaty).

> months as of the date of the written notification, as mentioned in para 1 of this Article, it shall be referred for consideration to: … c) an ad hoc arbitral tribunal in conformity with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Dkt. 1-3 at 8, art. 9(1)-(2)(c). Oschadbank's notice of arbitration accepted this offer, quoting the treaty article word-for-word, and invoking the right to arbitrate under UNCITRAL rules. Dkt. 39-9 at 3-4. RF does not dispute this. It claims instead (MTD 16-17) that it "only offered to arbitrate investments in its territory," "Oschadbank reject[ed] that Crimea is [RF] territory," and so "Oschadbank's acceptance did not match [RF's] offer to arbitrate." But the offer to arbitrate is in Article 9, printed above, and it does not require the party accepting the offer to concede that RF's illegal occupation of Crimea, or any other territory, was lawful. RF states that it "only offered to arbitrate claims arising from investments that were mutually agreed to be in its territory." MTD 16-17. But RF can cite nothing to suggest there was any such "mutual agreement" condition. And in any case, this is the exact same argument *Chevron* held was ***not*** jurisdictional. *See* 795 F.3d at 205 (rejecting the argument 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").

3. RF Is Precluded From Challenging The BIT's Scope.

Although it need go no further, the Court can and should hold that RF's challenges to the BIT's scope are also irrelevant on the merits because it consented to UNCITRAL rules. Dkt. 1-3 at 8, art. 9(2)(c). Agreeing to these rules constitutes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability," and thus forecloses a respondent like RF from opposing recognition on these grounds. *Stileks*, 985 F.3d at 879 (quoting *Chevron*, 795 F.3d at 208). RF denies (MTD 11 n.11) this point, but ignores *Stileks* and *Chevron*'s binding holdings on the issue. In fact, every circuit to consider the issue has "held that a bilateral investment treaty's incorporation of the UNCITRAL rules was clear and unmistakable evidence that the parties

intended questions of arbitrability to be decided by the arbitral panel in the first instance." *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1073-74 (9th Cir. 2013) (ellipsis omitted) (quoting *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012)); *see ROHM Semiconductor USA, LLC v. MaxPower Semiconductor, Inc.*, 17 F.4th 1377, 1383 (Fed. Cir. 2021); *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714 (5th Cir. 2017). So has this Court. *See, e.g.*, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp. 3d 137, 147 (D.D.C. 2018) ("[W]hen the parties have delegated the arbitrability issue to the arbitrator, the party resisting confirmation of the award 'is not entitled to an independent judicial redetermination of that same question.'") (quoting *Schneider*, 688 F.3d at 74) (collecting authorities). RF's pretension that this is in any way an open legal question borders on frivolous.

There is no obstacle to this Court so ruling at this stage in the case. The D.C. Circuit has held that because arbitration proceedings are summary, the Court can resolve both the FSIA and enforceability of the award in one proceeding. *See Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 369 (D.C. Cir. 2011) (per curiam). This Court often confirms awards when a foreign sovereign had the opportunity to raise a merits defense but opted not to. *See, e.g.*, *Deutsche Telekom*, 2024 WL 1299344, at *4. Because RF has not done so, and indeed, has no such merits defense, the Court can do the same here.

C. The FSIA's Plain Text Precludes RF's "Private Party" Argument.

The FSIA's arbitration exception applies to all awards issued against foreign states "concerning a subject matter capable of settlement by arbitration under the laws of the United States." 28 U.S.C. § 1605(a)(6). It is not limited, as RF contends (MTD 30-34), to agreements between a foreign state and private party. Even if it were, Oschadbank qualifies as a private party.

First, the statute is not limited to agreements formed with a private party, but extends to agreements to "submit to arbitration" that are made "for the benefit of a private party." 28 U.S.C.

§ 1605(a)(6). Where, as here, the petitioner obtained an arbitral award under a [bilateral investment treaty], the treaty is the agreement to "submit to arbitration" for purposes of the exception. *See Chevron Corp. v. Ecuador*, 949 F. Supp. 2d 57, 62 (D.D.C. 2013) ("the Award's own language indicates it was rendered pursuant to the [bilateral investment treaty], an agreement that provides for arbitration"), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015); *see also, e.g.*, Restatement (Fourth) of Foreign Relations Law § 458 reporter's notes 5-6 (2018) (referring to "arbitral awards entered under the numerous bilateral investment treaties"). A treaty, after all, is "[a]n agreement … between two countries." "Treaty," BLACK'S LAW DICTIONARY (12th ed. 2024). RF itself concedes (MTD 16) that "Oschadbank purported to initiate arbitration pursuant to Article 9" of the BIT, even if it disagrees whether the dispute fell within the ambit of the BIT. And the BIT in this case benefits all investors, as it protects "any legal entity … competent … to make investments," not just privately-held corporations. Dkt. 1-3 at 1, art. 1(2)(b) (defining "investor"). Accordingly, the BIT is an agreement to arbitrate that is made "for the benefit of a private party," and the Award was issued "pursuant to [this] agreement," as Section 1605(a)(6) requires.

The FSIA's structure and purpose also show that awards between foreign states and state-owned enterprises are covered by Section 1605(a)(6). The exception covers any arbitration agreement "with respect to a defined ***legal relationship, whether contractual or not***, **concerning a subject matter capable of settlement by arbitration under the laws of the United States**" (emphases added). The italicized text is copied and pasted directly from the New York Convention's implementing legislation, 9 U.S.C. § 202, illustrating that Congress wrote Section 1605(a)(6) to cover all New York Convention awards. The underlined text shows that the exception is not limited to "commercial" relationships under the New York Convention, *supra*, pp.9-10, but covers all enforceable awards against foreign states. Moreover, the legislative history

RF cites (MTD 32-33) does not suggest any intent to exclude awards benefitting state-owned enterprises. To the contrary, it shows that Congress's intent was to "prohibit the application of … the sovereign immunity principle to defeat the enforcement of arbitral awards rendered under the New York Convention."[6] Congress had good reason to write the exception this broadly: denying recognition to awards simply because they benefit foreign state-owned enterprises would violate the United States' obligations to enforce all New York Convention awards unless an Article V nonrecognition ground exists. *See, e.g.*, *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007).

Second, Oschadbank is a "private party" for purposes of Section 1605(a)(6). Oschadbank is not a state but rather is a "Joint Stock Company" owned by the Ukrainian State. Pet. ¶ 4. It is thus a "separate legal person" from the Ukrainian government, just as much as any other corporation—and unlike a "political subdivision" (MTD 31). *See, e.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) (recognizing that agencies and instrumentalities, unlike political subdivisions, are separate from the state itself). The fact that Oschadbank is publicly ***owned*** does not mean that it is not a "private party" under Section 1605(a)(6). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities…. The fact that the shareholder is a foreign state does not change the analysis."

---

[6] Testimony of Cecil J. Olmstead on Behalf of the National Foreign Trade Council, Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, May 28, 1987, at 1, *reprinted in* 2 WILLIAM H. MANZ, FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 WITH AMENDMENTS: A LEGISLATIVE HISTORY OF PUB. L. NO. 94-583, at 186 (2000); *see* Statement of Monroe Leigh on Behalf of the Rule of Law Committee, on H.R. 3106, Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, United States House of Representatives, May 20, 1986, at 6, *reprinted in* MANZ, *supra*, at 205 ("The Rule of Law Committee strongly urges passage … in order to ensure that the proper enforcement of foreign arbitral awards under the New York Convention will not be unfairly frustrated.") (capitalization altered).

Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003). A state-owned enterprise "devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) at 907; *see, e.g.*, *PNC Fin. Servs. Grp., Inc. v. C.I.R.*, 503 F.3d 119, 128 (D.C. Cir. 2007) ("governmental entities may in some circumstances be treated as private when taking on a private role or function"); *Guevara v. Republic of Peru*, 468 F.3d 1289, 1296 (11th Cir. 2006) ("A state not acting in its unique role as sovereign is akin to a private citizen or merchant."). Underscoring this point, the FSIA refers to "privately-owned" entities in Section 1605(c)-(d), but not in Section 1605(a)(6), demonstrating that "private party" is not synonymous with "privately-owned" party.

For all these reasons, this Court has jurisdiction under the FSIA's arbitration exception.

II. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER THE FSIA'S WAIVER EXCEPTION.

Even if this Court lacked subject-matter jurisdiction under the arbitration exception, it has jurisdiction under the FSIA's waiver exception. This exception grants federal courts jurisdiction over a civil action against a foreign sovereign that "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Courts have uniformly found implied "waivers [of immunity] in cases where a foreign state has agreed to arbitration in another country." *Creighton*, 181 F.3d at 122 (quoting H.R. Rep. No. 94-1487, at 18 (1976)). RF thus waived immunity by ratifying the BIT. And a foreign state that is a signatory to the New York Convention and signs an arbitration agreement impliedly waives sovereign immunity because, "by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." *Creighton*, 181 F.3d at 123 (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989

F.2d 572, 578 (2d Cir. 1993)). Customary international law recognizes the same principle.[7] It is thus not the New York Convention that waived immunity, as RF suggests (MTD 37), but the BIT itself; the New York Convention then makes clear that this waiver applies to all countries.[8]

The D.C. Circuit has endorsed this principle twice. *See Tatneft*, 771 F. App'x at 10 ("In *Creighton*, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states.") (internal citations omitted); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020) (*Tatneft* "holds that the waiver exception does apply if the foreign sovereign has signed the Convention."). This Court has also repeatedly applied this waiver rule since the FSIA's enactment.[9] The same legislative history that RF cites (MTD 33) as authoritative endorses this understanding of the waiver exception too.[10] To Oschadbank's knowledge, no court has taken the

---

[7] *See* Draft Articles on Jurisdictional Immunities of States and Their Property, With Commentaries, art. 17 commentary (6) ("[C]onsenting to a commercial arbitration necessarily implies consent to all the natural and logical consequences of the commercial arbitration.... [I]t may therefore be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another State, competent to supervise the implementation of the arbitration agreement."), *in* 2 Y.B. INT'L L. COMM'N 1991, at 55, A/CN.4/SER.A/1991/Add.l (Part 2).

[8] The fact that some states recognized an "absolute" theory of immunity (MTD 38) when the New York Convention was ratified is neither here nor there. Absolute immunity was waivable, *see, e.g.*, Restatement (Second) of Foreign Relations Law § 70(1) (1965), and, in any case, the waiver of immunity is in the BIT, and RF ratified the BIT long after its adoption of the restrictive theory.

[9] *See, e.g.*, *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, 2022 WL 3576193, at *7 (D.D.C. Aug. 19, 2022); *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 190-91 (D.D.C. 2018), *aff'd*, 771 F. App'x 9 (D.C. Cir. 2019); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 190 (D.D.C. 2016); *Ipitrade*, 465 F. Supp. at 824.

[10] Statement of Mark B. Feldman, Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act Section of International Law and Practice American Bar Association, Proposed Amendments to the Foreign Sovereign Immunities Act of 1976, Before the Subcommittee on Administrative Law and Governmental-Relations, Committee on the Judiciary, U.S. House of Representatives, In Support of Enactment of H.R. 3137 and H.R. 4592, May 20, 1986, at 6-7, *in* 2 MANZ, *supra* note 6, at 90-91.

contrary position.[11] In any case, this Court should find an implied waiver independent of the New York Convention because the BIT does not restrict the location of the seat of the arbitration. Dkt. 1-3 at 8, art. 9(2)(c). Courts around the country have consistently "found an implicit waiver under § 1605(a)(1) … [when] 'a foreign state has agreed to arbitrate disputes without specifying jurisdiction in a particular country or forum.'" *Tatneft*, 301 F. Supp. 3d at 191 (citation omitted). RF consented to arbitrate anywhere Oschadbank desired, and cannot pretend that it waived immunity only as to enforcement proceedings in certain countries but not others.

III. RF HAS NO PERSONAL JURISDICTION DEFENSE.

RF correctly recognizes (MTD 40) that it is not entitled to raise any personal jurisdiction defenses grounded in the Fifth Amendment under D.C. Circuit precedent. *See, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 85-86 (D.C. Cir. 2002) (a foreign state "is not a 'person' within the meaning of the Due Process Clause" and thus cannot invoke any personal jurisdiction rights beyond what Congress grants it). But this Court can go further and rule that RF has waived any such arguments, and not preserved them for the record (as it claims, MTD 40), because it does not argue that the Fifth Amendment would prohibit the exercise of jurisdiction here. Nor could it. By virtue of ratifying the New York Convention and signing the

[11] *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1, 13 (D.D.C. 2023) (*cited* MTD 36-37), ruled only that ratifying the New York Convention was not a waiver when there was no "agreement to arbitrate." On appeal, the United States suggested in an amicus brief that the arbitration exception "was intended to displace the waiver exception, at least for arbitration agreements and arbitral awards involving disputes between private parties and sovereign states." Dkt. 39-17 at 22. But there is nothing in the FSIA's arbitration exception that shows "a clearly expressed congressional intention" to repeal the implied waiver exception as to arbitral agreements, which courts had recognized before the arbitration exception's enactment. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation omitted). In any case, even taking the United States' argument as true, this would mean that there was no displacement to the extent the Court finds that Oschadbank is not a private party, *supra*, pp.16-19.

BIT, RF "must have contemplated enforcement actions" here, and thus purposefully availed itself of U.S. jurisdiction. *Creighton*, 181 F.3d at 123 (citation omitted).

CONCLUSION

For these reasons, this Court should deny RF's motion to dismiss.

Dated: July 2, 2024

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By: /s/
Dennis H. Hranitzky (Bar No. NY0117)

2755 E. Cottonwood Parkway, Suite 430
Salt Lake City, UT 84121
801-505-7300 Main Office Number
801-515-7400 FAX

Debra O'Gorman (Bar No. NY0499)

51 Madison Avenue, 22nd Floor
New York, NY 10010
212-849-7000 Main Office Number
212-849-7100 FAX

Attorneys for Petitioner