UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS PETITION TO CONFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Treaties

Other Authorities

Constitutional Authorities

Respondent The Russian Federation (the "Federation" or "Russia") respectfully submits this memorandum of law in support of its motion to dismiss (the "Motion") the petition to confirm (the "Petition") the award rendered in *NJSC Naftogaz of Ukraine, et al. v. The Russian Federation,* PCA Case No. 2017-16 (the "Award") filed by NJSC Naftogaz of Ukraine, National Joint Stock Company Chornomornaftogaz, JSC Ukrtransgaz, JSC Ukrgasvydobuvannya, JSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny (collectively, "Petitioners").[1]

PRELIMINARY STATEMENT

Petitioners are Ukraine's national gas company and subsidiaries, and are wholly owned and controlled by the State of Ukraine. Petitioners had authorization from the Ukrainian government to use Ukrainian state property located in the Autonomous Republic of Crimea and the City of Sevastopol ("Crimean Republic" or "Crimea"). In 2014, the Crimean Republic declared independence and declared all Ukrainian state property located in Crimea to be state property of the Crimean Republic. Thereafter, the Crimean Republic and Russia entered into a treaty providing for the accession of Crimea into Russia (the "Accession Treaty"). Petitioners commenced an arbitration against Russia under a bilateral investment treaty, the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investment, dated November 27, 1998 (the "BIT"). While Ukraine refuses to recognize Crimea's accession and continues to claim Crimea as Ukrainian territory, Petitioners argued that Crimea should be treated as Russian territory for purposes of the BIT. Two members of the Tribunal (the "Majority") agreed, and awarded Petitioners billions of dollars. The Majority offers no cogent rationale for its decisions or for its

[1] As defined herein, the Award includes the Partial Award rendered by a majority of the Tribunal on February 22, 2019 (Dkt. No. 1-4) and the Final Award rendered by a majority of the Tribunal on April 12, 2023 (Dkt. No. 1-2).

disagreement with the powerful, well-reasoned dissent of the independently appointed third arbitrator (the "Dissent"). However, at this stage, this Court need not address the merits of the Petition, the patent defects in the Award or the public policy concerns of enforcing it. The only question presently before this Court is whether there is subject matter and personal jurisdiction under the FSIA to entertain the Petition. The answer to that threshold question is a resounding no.

The Federation is a foreign state under the FSIA and is therefore presumptively immune from the jurisdiction of U.S. courts unless and until it is conclusively determined that one of the FSIA's enumerated exceptions to immunity applies. Petitioners assert that the Federation's immunity can be abrogated under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), and its waiver exception, 28 U.S.C. § 1605(a)(1). Neither exception applies.

The FSIA's arbitration exception has three elements that must be satisfied: (1) there must be an agreement to arbitrate between the foreign state and a private party; (2) there must be an award based on that agreement; and (3) the award must be governed by a treaty in force in the United States calling for the recognition and enforcement of arbitral awards. *Chevron Corp. v. Republic of Ecuador,* 795 F.3d 200, 204 (D.C. Cir. 2015). Those requirements are not met in this case. Russian never agreed to arbitrate with Petitioners, Petitioners are not private parties and the Award is not governed by any treaty in force in the United States.

Petitioners argue that Russia made a standing offer to arbitrate under the terms of the BIT, which Petitioners accepted by commencing the arbitration, thereby forming an arbitration agreement. This Court is therefore required to independently analyze the terms of the BIT to determine whether any such offer was made. The BIT explicitly applies only to "investments ***made*** by investors of one Contracting Party [*i.e.*, Ukraine] ***in the territory*** of the other

Contracting Party [*i.e.*, Russia], on or after January 1, 1992." BIT, art. 12 (emphasis added). The term "made" appears throughout the BIT and, in each instance, carries a temporal element, *i.e.*, an investment must be "made" at a certain point in time, and it must be made either in Ukraine or Russia. Petitioners concede that they "made" their investments in Crimea when it was Ukrainian territory. The plain language of the BIT shows that the Federation made no offer to arbitrate with Petitioners, who made domestic investments in Ukraine. Thus, no agreement was formed and the FSIA's arbitration exception does not apply.

Petitioners ignore this plain language of the BIT and insist that the accession of Crimea to the Federation in 2014 had the effect of retroactively transforming their domestic investments in Ukraine into investments made in Russia under the BIT. However, the BIT is a contract between Ukraine and the Federation and must therefore be interpreted consistent with the Contracting Parties' intentions and understandings. It is undisputed that when the BIT was drafted and concluded, both Contracting Parties understood Crimea to be Ukrainian territory. Modifying the BIT to include Crimea as Russian territory within the definition of that term in the BIT would require a subsequent agreement between Ukraine and the Federation formalized in accordance with the BIT's express provisions on amending the treaty. No such amendment was ever made. Ukraine does not consider Crimea to be Russian territory. Petitioners as Ukrainian state entities should not be able to assume a different position for purposes of bringing a claim against Russia under the BIT.

Any other construction would not only effect a change in the scope of the BIT according to its express terms, but it would also defeat the object and purpose of the BIT, which was to promote cross-border investments between Ukraine and the Federation to the benefit of both nations' economies. Petitioners made no contributions to the Russian economy. They made

investments in Ukraine. In sum, Russia made no offer to arbitrate with Petitioners and no arbitration agreement exists as required to satisfy the FSIA's arbitration exception.

Furthermore, the FSIA's arbitration exception only applies where there is an arbitration agreement between the foreign state and a private party, and Petitioners are not private parties. While the FSIA does not define private party, it does define "foreign state" to include companies that are majority-owned by a foreign state. Congress thus clearly intended the private party requirement to exclude awards between states entities from the scope of the FSIA's arbitration exception. Petitioners are wholly owned and controlled by Ukraine and thus are not private parties under the FSIA.

The FSIA's arbitration exception is also inapplicable because the Award is not governed by a treaty in force in the United States. While Petitioners assert that the Award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), that Convention only applies to awards arising out of a commercial legal relationship between the parties, 9 U.S.C. § 202. The commercial reservation is designed to exclude political awards relating to territorial disputes and resulting claims of succession to state property from the scope of the Convention. *See Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 904, cmt. a ("RESTATEMENT OF FOREIGN RELATIONS"). In other words, the commercial reservation was intended to exclude precisely the sort of award that Petitioners are seeking to enforce here. Russia had no commercial relationship with Petitioners.

The FSIA's waiver exception is also inapplicable. It is undisputed that Russia has not explicitly waived its immunity under the FSIA. Petitioners argue that Russia implicitly waived

its immunity by acceding to the New York Convention. However, that argument is foreclosed by the Supreme Court's holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989), that a waiver of immunity under the FSIA cannot be inferred from a foreign state's accession to a treaty that does not address foreign sovereign immunity. The Convention does not mention sovereign immunity and does not provide for the enforcement of arbitral awards against foreign states.

This case must also be dismissed for lack of personal jurisdiction. The FSIA's personal jurisdiction statute, 28 U.S.C. § 1330(b), applies only where subject matter jurisdiction is established and service is made in accordance with the FSIA. Here, there is no subject matter jurisdiction under the FSIA. Nor was service made in accordance with the FSIA. Russia also objects to the exercise of jurisdiction on due process grounds in order to preserve its right to challenge on appeal the D.C. Circuit's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), that foreign states are not entitled to due process.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background of the Parties

The Federation is a foreign state as defined in the FSIA, 28 U.S.C. § 1603(a). Petitioner NJSC Naftogaz of Ukraine ("Naftogaz") is Ukraine's national gas company and is 100% owned by the Ukrainian government. Partial Award ¶¶ 1, 69. Naftogaz wholly owns each of the other Petitioners and claims to have invested in Crimea through them. *Id.* ¶¶ 70-72, 74, 77-79.

B. The Events Giving Rise to the Underlying Dispute

The underlying dispute arose out of events occurring in Crimea. It is undisputed that Crimea was part of the territory of the Ukraine prior to 2014. On February 27, 2014, the Crimean Parliament voted to hold a referendum on the independence of the Crimean Republic.

Partial Award ¶ 88. On March 16, 2014, voters in Crimea approved the referendum on Crimean independence. *Id.* ¶ 92. On March 17, 2014, the Crimean Republic adopted Resolution No. 1745-6/14 (the "Independence Resolution") that proclaimed the Crimean Republic an independent sovereign state. *Id.* ¶ 93. The Independence Resolution further declared that "State property of Ukraine located in the territory of the Republic of Crimea … shall become state property of the Republic of Crimea." *Id.* ¶ 93. On March 17, the Crimean Parliament also enacted Resolution No. 1758-6/14 (the "Nationalization Resolution"), nationalizing Petitioners' assets in Crimea. *Id.* ¶ 108.

On March 18, 2014, the Crimean Republic and the Russian Federation entered into the Accession Treaty. Partial Award ¶ 94. The Accession Treaty provided for a transitional period during which the legal rights and duties of the Crimean Republic would be integrated into the Russian legal system. Dissent, Partial Award ¶ 17. It further provided that the legal acts of the Crimean Republic would remain in effect during the transitional period. *Id.* On March 21, 2014, the Russian Parliament ratified the Accession Treaty and enacted a law governing the admission of the Crimean Republic into the Federation (the "Law on Admission"). *Id.* ¶ 18. The Law on Admission further confirmed the validity of the legal acts of the Crimean Republic, including the Independence and Nationalization Resolutions. *Id.* ¶ 19. The Law on Admission applied retroactively to the date of the Accession Treaty, March 18, 2014. *Id.* ¶ 18.

On April 11, 2014, the Crimean Parliament clarified that the Nationalization Resolution had nationalized the Ukrainian gas supply and pipeline systems in Crimea and any interests that Naftogaz had in that system. Dissent, Partial Award ¶¶ 20, 22. On May 21, 2014, the Crimean Parliament further clarified that certain of Petitioners' other assets had been nationalized under the Nationalization Resolution. Partial Award ¶ 125.

C. Petitioners Commence the Underlying Arbitration

In October 2016, Petitioners commenced the underlying arbitration against the Federation, asserting breaches of the BIT. Petition to Confirm ¶ 26 ("Pet.").

1. The Russia-Ukraine BIT

The BIT was intended to promote and encourage cross-border investments between Russia and Ukraine by offering certain protections to qualifying investors. BIT, art. 2(1). The BIT explicitly applies only to "investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992." BIT, art. 12. The BIT defines "investment" as "assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation." BIT, art. 1(1). It defines "investor" to mean "any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party to make investments in the territory of the other Contracting Party." BIT, art. 1(2)(b). It defines Russian "territory" as "the territory of the Russian Federation . . . as well as [its] respective exclusive economic zone and the continental shelf, defined in accordance with international law." BIT, art. 1(4).

Petitioners invoked arbitration under Article 9(2) of the BIT, which provides that disputes may be submitted to "an ad hoc arbitration tribunal, in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL)." They asserted that expropriation of their property by the Crimean Republic violated the BIT.

2. Appointment of the Tribunal

On October 17, 2016, Petitioners appointed Charles Poncet as an arbitrator. Partial Award ¶ 18. On November 22, 2016, Petitioners requested the Permanent Court of Arbitration

("PCA") to appoint an arbitrator on behalf of Russia. *Id.* ¶ 19. The PCA appointed Dr. Maja Stanivuković as an arbitrator on behalf of Russia on February 14, 2017, and appointed Ian Binnie as the presiding arbitrator on April 13, 2017. *Id.* ¶¶ 26-27. On July 19, 2017, the Tribunal appointed the PCA to administer the arbitration and designated The Hague as the seat of the arbitration. *Id.* ¶¶ 29-30. Russia did not participate in this initial stage of the arbitration.

D. The Partial Award on Jurisdiction

The Tribunal bifurcated the arbitral proceedings into an initial phase on jurisdiction and liability under the BIT, followed by a second phase on damages. Partial Award ¶ 38. Ukraine appeared and made submissions supporting the positions taken by Petitioners – all of which are wholly owned by Ukraine. *Id.* ¶ 44. The Tribunal admitted Ukraine as a "non-disputing party" and entered its submissions into the record. *Id.* ¶¶ 15, 47. In May 2018, the Tribunal held a hearing on jurisdiction and liability. *Id.* ¶ 50. Russia did not participate in the initial phase on jurisdiction and liability. On February 22, 2019, the Majority issued the Partial Award, concluding that the Tribunal had jurisdiction under the BIT and finding Russia liable. Pet. ¶ 36. Dr. Maja Stanivuković dissented. *Id.*

1. The Majority's Decision on Jurisdiction and Liability

In concluding that the Tribunal had jurisdiction to hear Petitioners' claims, the Majority acknowledged that the BIT only applies to Ukrainian investors who made investments in Russian territory. Partial Award ¶¶ 142-43. Nevertheless, the Majority held that it did not need to determine whether Crimea was part of Russian territory as a matter of international law. *Id.* ¶¶ 161, 169-72. It stated that Crimea became Russian territory upon the execution of the Accession Treaty because Russia exercised control over Crimea, and Crimea's integration into Russia was "a *fait accompli*." *Id.* ¶¶ 163, 179-81.

The Majority also acknowledged that it was undisputed that Petitioners' investments in Crimea were made in Ukrainian territory, not Russian territory, at the time they were made. Partial Award ¶ 146. Although the BIT expressly applies only to investments that were "made" by investors of one Contracting Party in the territory of the other Contracting Party, the Majority concluded that it was irrelevant that the Ukrainian Petitioners made their investments in Ukraine. *Id.* ¶ 191. In its view, the critical question was whether Petitioners' investments were located in Russian territory at the time of the alleged breach of the BIT and the commencement of the arbitration. *Id.* ¶¶ 164-65. The Majority stated that there was "no doubt Crimea and Sevastopol were part of Russia" when the arbitration was initiated in 2016, even though Ukraine itself does not recognize that as Russian territory. *Id.* ¶ 176.

The Majority further held that Russia's breach of the BIT occurred upon the execution of the Accession Treaty on May 18, 2014. Partial Award ¶ 181. It acknowledged that the Crimean Republic expropriated Petitioners' property through the Independence and Nationalization Resolutions prior to the execution of the Accession Treaty. *Id.* ¶ 224. It further acknowledged that, under its own analysis, Russia had no obligations to investors in Crimea prior to the execution of the Accession Treaty and was not responsible for any prior expropriations by the Crimean Republic. *Id.* However, it concluded that the Independence and Nationalization Resolutions were a nullity because the Ukrainian Parliament had stripped the Crimean Parliament of its powers prior to the enactment of those Resolutions. *Id.* ¶¶ 227-31. The Majority held that the expropriation of Petitioners' property did not occur until Russia subsequently executed the Accession Treaty and thereby gave legal validity and force to the prior expropriation decrees of the Crimean Parliament. *Id.*

With respect to liability, the Majority held that Russia "bears international responsibility" for the Crimean Republic's seizure of Petitioners' property by virtue of the execution of the Accession Treaty. Partial Award ¶¶ 245, 262. It therefore concluded that Russia violated its obligations under Article 5 of the BIT because Petitioners' property was expropriated by the Crimean Republic without due process or compensation. *Id.* ¶ 262. Its decision relied heavily on the fact that Russia did not appear in the arbitration. *Id.* ¶¶ 257, 268, 272.

Thus, the Majority concluded that Russia's single act of executing the Accession Treaty "simultaneously" constituted both (i) the triggering event giving rise to Russia's obligations to investors in Crimea under the BIT and (ii) the breach of those obligations. Partial Award ¶ 181.

2. The Dissenting Opinion on Jurisdiction and Liability

Dr. Stanivuković – who was appointed by the PCA and not the Federation – issued a powerful dissent concluding that the Federation had not consented to arbitration and was not liable under the BIT. Dissent, Partial Award ¶ 1. The Dissent stated that the arbitration clause in "Article 9 of the BIT does not give the Tribunal the power of general jurisdiction under international law." *Id.* ¶ 69. Rather, the Federation's offer to arbitrate and thus the Tribunal's jurisdiction was limited by the terms of Articles 1, 9 and 12 of the BIT to resolving investment disputes with Ukrainian nationals whose investments were made in Russian territory at the time they were made. *Id.* ¶¶ 25-29, 123, 186. Thus, the "Federation did not consent to arbitrate" disputes with Petitioners who were Ukrainian investors who made domestic investments in Ukraine. *Id.* ¶¶ 67, 134, 186-87.

The Dissent concluded that Crimea was not Russian territory under the BIT. It is undisputed that Crimea was not Russian territory when the BIT entered into force, and the Dissent rejected the Majority's view that Crimea became Russian territory for purposes of the

BIT when the Crimean Republic acceded into the Russian Federation in March 2014. Dissent, Partial Award ¶¶ 41, 45. It explained that Article 1 of the BIT defines Russian "territory" by reference to international law and that, as a matter of international law, a state's "territory" refers to its sovereign territory. *Id.* ¶¶ 45, 47, 54, 71. The Dissent concluded that, even if Crimea could be considered Russian territory, the Federation never assumed any obligations to investors in Crimea under the BIT. Dissent, Partial Award ¶ 122. There is no legal basis to conclude that the Federation *automatically* assumed obligations to Ukrainian investors in Crimea upon taking possession of Crimea. *Id.* ¶¶ 87, 90-97, 122.

The Dissent further concluded that Petitioners could not invoke the BIT because they made no investments in Russian territory. The BIT explicitly applies only to "investments ***made*** by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992." BIT, art. 12 (emphasis added). The Dissent explained that the term "made" has a temporal element. Dissent, Partial Award ¶¶ 129, 137-38, 155-57. It stated that "an investment can only be 'made' at a certain point in time, and it must be made either in Ukraine or in the Russian Federation." *Id.* ¶ 157. Petitioners repeatedly admitted that they made their investments in Ukraine long before the Accession Treaty. *Id.* ¶¶ 127, 129, 138, 157. Thus, Petitioners made a domestic "Ukrainian investment in Ukraine that was not protected by the BIT when the investment was made." *Id.* ¶ 67.

The Dissent explained that its conclusion was compelled by the plain language of the BIT, which uses the term "made" seven times. *Id.* ¶¶ 125, 137-38, 156. It also pointed out that its interpretation was supported by the purpose of the BIT, which is to encourage new investments and develop economic cooperation between Russia and Ukraine. *Id.* ¶ 65. Allowing

Petitioners to invoke the BIT would not serve that objective because they never invested in Russian territory. *Id.*

The Dissent further concluded that the BIT was only open to "private investor[s]" and "was not intended to apply to situations" arising out of territorial disputes and "the resulting claims to ownership of state property by the occupying state." Dissent, Partial Award ¶ 68. Petitioners were all owned and controlled by Ukraine, and their alleged "investments" in Crimea were former Soviet state-owned property that they received from the Ukrainian state. *Id.* ¶¶ 174-81. Such investments were "essentially an investment of the State of Ukraine and the dispute is a dispute between two sovereign States about the rights over the use of natural resources and infrastructure in Crimea." *Id.* ¶ 183. The Dissent found that Russia did not consent to arbitrate such a dispute and therefore the Tribunal had no jurisdiction. *Id.* ¶¶ 134, 238.

The Dissent also concluded that Russia was not liable under the BIT and characterized the Majority's findings on liability to be conclusory and unsupported. Dissent, Partial Award ¶ 227. Petitioners alleged a direct expropriation of their assets pursuant to the Independence and Nationalization Resolutions issued by the Crimean Parliament. The investments were therefore expropriated by the Crimean Republic, not Russia. *Id.* ¶¶ 198-99. The Dissent explained that, even if the Crimean Republic's expropriation of Petitioners' property could be attributed to Russia, that was not enough to establish Russia's liability under the BIT. *Id.* ¶ 216. While it disagreed with the Majority's conclusion that Russia automatically assumed obligations to Ukrainian investors in Crimea upon the execution of the Accession Treaty, it found that the expropriation of Petitioners' property occurred prior to the execution of the Accession Treaty and thus before Russia had any obligations under the BIT under the Majority's analysis. *Id.* ¶¶ 192, 216-17, 221. The Dissent also concluded that Russia had no liability under the BIT for

an expropriation of Ukrainian state property because the "State of Ukraine is not a protected investor under the BIT." *Id.* ¶ 218.

E. The Final Award

After the issuance of the Partial Award, the Federation appeared for the first time and sought leave to assert challenges to the Tribunal's jurisdiction and the merits of Petitioners' claims. Russia further requested a stay of the arbitration pending proceedings to set aside the Partial Award. Final Award ¶ 67. The Tribunal denied Russia's requests. *Id.* ¶ 84. The parties made written submissions on damages, and a hearing was held in February and March 2022. *Id.* ¶ 228. On July 19, 2022, the Hague Court of Appeal entered a judgment partially annulling the Partial Award, holding that the Tribunal did not have jurisdiction over claims relating to investments made before 1992. *Id.* ¶ 5. That judgment has been appealed to the Dutch Supreme Court. Meehan Decl. Ex. 29. In view of the partial annulment by the Hague Court of Appeal, Russia requested a rehearing of certain jurisdictional issues. Final Award ¶ 266. The Tribunal denied that request. *Id.* ¶ 274.

On April 12, 2023, the Tribunal rendered a Final Award by majority, with Dr. Stanivuković dissenting. The Majority held that all of the Petitioners' investments were made after 1992 as required under the BIT and awarded Petitioners over $4.2 billion in compensation. Dissent, Final Award ¶ 1; Final Award ¶ 717. It awarded Petitioners approximately $24 million in legal fees and costs. *Id.* ¶ 717. While the BIT provides for compensation to accrue interest at the 3-month LIBOR rate plus 1%, the Majority refused to apply the BIT rate and, instead, awarded interest at the 6-month EURIBOR rate plus 2%, compounded semi-annually. *Id.*

The Dissent found that Petitioners could not seek compensation for any of the underlying assets, including the oil and gas fields, pipelines and storage facilities, because it was undisputed

that such assets were property of the State of Ukraine and were never owned by Petitioners. Dissent, Final Award ¶¶ 15-18. It also found that many of the assets that Petitioners claimed as investments were, in fact, investments made by the Soviet Union well prior to 1992 and therefore could not qualify for protection under the BIT. *Id.* ¶¶ 1, 36-37, 99-100. It concluded that the Majority overstated the value of the investments by failing to account for the value attributable to the pre-1992 investments. *Id.* ¶¶ 1, 5, 129-30.

On July 12, 2023, the Federation commenced an action to set aside the Final Award in the Dutch Court of Appeals. Meehan Decl. Ex. 29, ¶ 8.

F. Procedural History in this Court

On June 22, 2023, Petitioners filed the Petition in this Court. Dkt. No. 1. Petitioners requested service on the Federation via diplomatic channels under 28 U.S.C. § 1608(a)(4). Dkt. No. 5. In their request, Petitioners argued that service could not be effected on the Federation under 28 U.S.C. §§ 1608(a)(1)-(2) because no special arrangement for service exists between the parties, and service under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Convention"), was unavailable. *Id.* Petitioners further argued that service could not be made under Section 1608(a)(3), which provides for service by mail on a foreign state's Minister of Foreign Affairs, because the Federation has objected to service by mail under Article 10 of the Hague Convention. *Id.*

On July 7, 2023, the Clerk of Court filed a Certificate of Mailing stating that the service documents were sent to the U.S. Department of State pursuant to the provisions of 28 U.S.C. § 1608(a)(4). Dkt. No. 7. In a letter dated October 16, 2023, the State Department stated that the service documents were delivered to the Embassy of the Federation in Washington D.C. on

October 11, 2023. Dkt. No. 11. The State Department noted that the letter should "not be construed as an indication in any way of the United States' position or views on whether plaintiffs have properly complied with all statutory requirements of the FSIA, … [or] whether service was properly effected." *Id.*

The Federation returned the service documents on November 15, 2023, refusing service as improper on the grounds that it did not comply with the Federation's declarations on service through diplomatic channels under the Hague Convention as well as an Agreement between the Soviet Union and the United States relative to the execution of letters rogatory, dated November 22, 1935. Meehan Decl. Ex. 1.

ARGUMENT

I. THE PETITION MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION UNDER THE FSIA

Russia is a foreign state as defined in the FSIA. 28 U.S.C. § 1603(a). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). A foreign state is entitled to immunity from suit unless the "substantive requirements" of any one of the exceptions to immunity are satisfied. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170 (2017) ("Helmerich"); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 489 (1983). "If no exception applies, a foreign sovereign's immunity under the FSIA is complete," and the district court must dismiss for lack subject matter jurisdiction. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000). A court is obligated to make the sovereign immunity determination at the outset, and a foreign state is not required to assert its substantive defenses against confirmation of an award until that threshold determination of FSIA immunity has been conclusively and authoritatively resolved.

Process & Indus. Devs. v. Fed. Republic of Nig., 962 F.3d 576, 584 (D.C. Cir. 2020) ("*P&ID*") (holding that ordering a foreign state to brief its substantive defense under the New York Convention together with its immunity defense under the FSIA impermissibly infringed on a state's immunity).[2]

Here, Petitioners invoke two exceptions to immunity under the FSIA: the arbitration exception, 28 U.S.C. § 1605(a)(6), and the waiver exception, 28 U.S.C. § 1605(a)(1). Neither applies. Thus, the Petition must be dismissed for lack of subject matter jurisdiction.[3]

A. The FSIA's Arbitration Exception Does Not Apply

The D.C. Circuit has established a three-part test that a petitioner must satisfy for the arbitration exception to apply. *Chevron Corp. v. Republic of Ecuador,* 795 F.3d 200, 204 (D.C. Cir. 2015). The petitioner must demonstrate that: (1) the foreign state made an agreement to arbitrate with or for the benefit of a private party; (2) there is an award based on that agreement; and (3) the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards. *See id.* A "non-frivolous claim involving an arbitration award" is not enough to sustain jurisdiction; the Court must determine that each of these requirements has actually been met. *See id.*; *see also Helmerich*, 581 U.S. at 187 (holding that a non-frivolous argument is not enough to abrogate immunity under the FSIA). Here, Petitioners

[2] To be clear, the Federation's position is that the Award is unenforceable under the New York Convention. Under *P&ID*, those substantive defenses to enforcement need not be litigated unless and until the Court denies the Federation's Motion and that decision is upheld on appeal.

[3] The U.S. government argues that Chervon's application of a burden-shifting analysis is inconsistent with the Supreme Court's decisions in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) and *Verlinden*, and that a plaintiff always bears the burden of rebutting the presumption that a foreign state is immune under the FSIA. Brief for United States as Amicus Curiae, *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 23-7038 (D.C. Cir. Feb. 2, 2024) (ECF No. 2038663), at pp. 9-10 n.2 ("U.S. Blasket Amicus Br.").

cannot satisfy the elements of the FSIA's arbitration exception. Russia never agreed to arbitrate with Petitioners; Petitioners are not private parties; and the Award is not governed by any treaty in force in the United States calling for the enforcement of arbitral awards. Thus, the FSIA's arbitration exception does not apply.

1. There Is No Arbitration Agreement between the Parties

A district court must establish the existence of an arbitration agreement "as part of its jurisdictional analysis" under the FSIA's arbitration exception. *Chevron*, 795 F.3d at 205 n.3; *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022) ("*P&ID II*"). In the absence of a valid arbitration agreement, the district court "lacks jurisdiction over the foreign state and the action must be dismissed." *Chevron*, 795 F.3d at 204; *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (noting that the arbitration exception requires a "valid agreement . . . to submit to arbitration," quoting § 1605(a)(6)); *see also Al-Waleed v. Saudi Arabian Oil Co.,* 19 F.4th 794, 802 (5th Cir. 2021) ("Because there exists no agreement among the parties to arbitrate, th[e] [FSIA's arbitration] exception does not apply."); *Gater Assets Ltd. v. Moldovagaz,* 2 F.4th 42, 65-66 (2d Cir. 2021) (Section 1605(a)(6) did not apply because there was no agreement to arbitrate with the foreign state defendant); *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) ("*Fujian*") (concluding that Section 1605(a)(6) did not apply where the parties had not entered into an arbitration agreement); *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 21-3249 (RJL), 2023 U.S. Dist. LEXIS 54502, at *21 (D.D.C. Mar. 29, 2023) ("*Blasket*") (dismissing petition to confirm an arbitral award because the FSIA's arbitration exception did not apply where no valid arbitration agreement was formed); *DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201, 207-08 (D.D.C. 2014) (dismissing for lack of jurisdiction under Section

1605(a)(6) because no arbitration agreement existed between the parties); *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul*, No. 08-102, 2010 U.S. Dist. LEXIS 109577, at *13-18 (E.D. Pa. Oct. 13, 2010) (rejecting jurisdiction under Section 1605(a)(6) because the parties "did not agree to arbitrate anything related to this case"), *aff'd*, 441 F. App'x 822 (3d Cir. 2011); U.S. Blasket Amicus Br. at pp. 10, 13.

The Court must determine for itself whether a valid arbitration agreement exists under Section 1605(a)(6). *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *12. Indeed, the United States government responded to the D.C. Circuit's invitation in the *Blasket* case to provide its position on the FSIA's arbitration exception and the government confirmed its position that the exception requires courts to independently determine whether an agreement to arbitrate exists as a threshold jurisdictional matter. *See* U.S. Blasket Amicus Br. at pp. 10, 13-16.

That position is based on the well-established principle that questions concerning formation of the arbitration agreement "must always be decided by the courts." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988); *see also Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 998 F.3d 449, 456-57 (D.C. Cir. 2021) ("[T]he threshold question whether a valid arbitration agreement exists . . . is necessarily for the court to determine, such that it cannot be delegated to an arbitrator[.]") (quotation marks and brackets omitted) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)). This is because "if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration." *Nat'l R.R. Passenger Corp.*, 850 F.2d at 761 (internal quotations omitted). Accordingly, a reviewing court "may not afford any deference at all to the arbitrator's view" as to the existence of an arbitration agreement. *See Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 299-301 (2010); *see*

also Doctor's Assocs. v. Alemayehu, 934 F.3d 245, 251 (2d Cir. 2019) ("[P]arties may not delegate to the arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place."); *KenAmerican Res. v. Int'l Union, UMW*, 99 F.3d 1161, 1163 (D.C. Cir. 1996) (holding that the district court had "incorrectly deferred to the arbitrator" on whether the defendant entered into an arbitration agreement and concluding that defendant had not agreed to arbitrate); *Bailey v. Fed. Nat'l Mortgage Ass'n*, 209 F.3d 740, 746-47 (D.C. Cir. 2000) (finding no mutual assent to arbitration); *Amirmotazedi v. Viacom, Inc.*, 768 F. Supp. 2d 256, 263 (D.D.C. 2011) (denying motion to compel arbitration because mental capacity defense went to the "formation" or "making" of the arbitration agreement, and had to be decided by the court).[4]

Petitioners assert that an agreement to arbitrate was formed when they commenced the underlying arbitration and thereby accepted a standing offer by the Federation in the BIT to arbitrate investment disputes with Ukrainian investors who made investments in Russian territory. Pet. ¶¶ 1, 55. However, Petitioners admit that they made their investments in Ukrainian territory, not Russian territory. *Id.* ¶ 16. Accordingly, the BIT extended no offer to arbitrate for Petitioners to accept. "Because there was no valid offer to arbitrate, there is no arbitration agreement, which is required to establish subject matter jurisdiction under 28 U.S.C. § 1605(a)(6). As such, this Court cannot establish jurisdiction under that FSIA exception." *Blasket*, 2023 U.S. Dist. LEXIS 54502, at *21.

[4] Although the analysis of whether a valid arbitration agreement exists under Section 1605(a)(6) may overlap with merits defenses under the New York Convention, courts must still resolve the jurisdictional question under the FSIA as a threshold matter even if it requires consideration of matters that may overlap with the merits of the case. *See Helmerich*, 581 U.S. at 178; *Chevron*, 795 F.3d at 205 n.3, 207.

It is well established that the interpretation of a treaty, like any other contract, is a matter of determining the parties' intent. *See BG Grp. plc v. Republic of Arg.*, 572 U.S. 25, 37 (2014); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (courts must give "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Wright v. Henkel*, 190 U.S. 40, 57 (1903) ("Treaties must receive a fair interpretation, according to the intention of the contracting parties."); *Arizona v. Navajo Nation*, 599 U.S. 555, 143 S. Ct. 1804, 1825 (2023) ("courts must look to the 'shared expectations of the contracting parties,'" with "an eye to ensuring both sides receive the 'benefit of their bargain'") (quoting *Air France*, 470 U.S. at 399, and *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 621 (2000)); *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties[.]"). This basic principle of treaty interpretation is also well established in international law. *See, e.g.,* Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 84, WTO Doc. WT/DS62-67-68/AB/R (June 5, 1998) ("The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties.").[5]

Moreover, the principle of contemporaneity requires that the terms of a treaty, like any other contract, are to be interpreted in light of the circumstances known to the parties at the time of contract formation. *See* 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32:7, at 434-35 (4th

[5] Courts apply the interpretive principles set forth in the Vienna Treaty Convention "as an authoritative codification of customary international law." *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000); *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (citing Vienna Treaty Convention as authority on "[b]asic principles of treaty interpretation").

ed. 1999) ("In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution."); *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, Award on Jurisdiction, Case No. 2010-9, ¶ 289 (Perm. Ct. Arb. 2012) (observing that it is "appropriate and helpful to resort to the principle of contemporaneity in treaty interpretation, particularly pertinent in the case of bilateral treaties," which "requires that the meaning and scope" of a treaty term "be ascertained as of the time the states negotiated their BIT"); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 225 (1957) ("rights of parties to a dispute … [are determined] on the basis of the contemporaneous meaning of the treaty terms at the date of its conclusion, and in the light of current usages and practice at that time").

It is undisputed that at the time the BIT came into force, Ukraine and the Federation both understood that Crimea was Ukrainian territory and thus did not fall within the definition of Russian territory under BIT Article 1(4). Departing from the plain meaning of the term Russian "territory" as understood by the Contracting Parties at the time the BIT was entered into would be tantamount to amending the BIT, and it is fundamental that a treaty – or any contract – cannot be amended without the consent of the parties. In this case, the BIT itself states that any amendments would require the mutual consent of both Contracting Parties and must be formalized through the Contracting Parties' relevant protocols or understandings. BIT, art. 13; *see also* Vienna Convention on the Law of Treaties art. 39, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Treaty Convention"); RESTATEMENT OF FOREIGN RELATIONS § 334. No such agreement or understanding was reached between Ukraine and the Federation. On the contrary, Ukraine disputes Crimea's accession to Russia.

The undisputed fact that Ukraine disputes Russia's sovereignty over Crimea should itself preclude Petitioners' argument as to the existence of an agreement to arbitrate in this case, as it shows that the parties have no common understanding of the meaning of "territory." That common understanding existed when the BIT was concluded. In accordance with that understanding, the parties' offer to arbitrate under the BIT can only apply to territories that are mutually recognized as either Ukrainian or Russian territory. It cannot apply to disputed territory, such as Crimea.[6]

Indeed, the entire BIT can only function on the basis of mutually recognized territories. Mutual recognition of Crimea is necessary to determine the nationality of Crimean investors, the territorial locus of the investments in Crimea and the national legislation applicable to such investments. Furthermore, applying the BIT to disputed territory would undermine the principle of reciprocity embodied in the BIT's primary purpose of providing "mutual protection of investments." Ukraine does not recognize Crimea as Russian territory and has not agreed to undertake any obligations to Crimean investors who make investments in Ukraine. Reciprocity dictates that Russia cannot be deemed to have agreed to undertake any obligations to Ukrainian investors in Crimea. Simply put, it makes no sense to even try to apply the BIT where one party does not recognize the territory of the other.

Notably, in August 2023, the Federation sent diplomatic notes to various counterparties under its bilateral investment treaties, including the United Kingdom, Canada, Switzerland,

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[6] *See Island of Palmas (or Miangas) (Neth. V. U.S.)*, Award, Case No. 1925-01, at 838-40 (Perm. Ct. Arb. 1928) ("Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.").

Belgium, France, Germany, Lithuania, Luxembourg, Montenegro, the Netherlands, and Singapore, indicating its willingness to apply its bilateral investment treaties with those countries to investments made in Crimea after the date of Crimea's accession into the Russian Federation and in accordance with Russian law. Meehan Decl. Exs. 3-24. Each of these counterparties responded by rejecting Russia's note and refusing to recognize Crimea as part of Russian territory for purposes of the treaties. *See id.* For example, Canada responded by stating that it "rejects the proposed changes to the scope and territorial application of the [treaty] put forward by the Russian Federation" and that "any attempt to change the scope and coverage of the [treaty] would amount to an amendment and that such a change cannot be effected unilaterally by one Party." Meehan Decl. Ex. 6. Similarly, the United Kingdom responded that the Federation's diplomatic note proposed a "change of territorial scope of the [treaty]," and rejected that proposal, stating that the "United Kingdom does not agree with this amendment and believes that the Russian Federation is not empowered to assume international obligations as for the territories mentioned in the note as these territories are not part of the Russian Federation." Meehan Decl. Ex. 4. Those responses confirm the common understanding by parties to all such treaties that the term "territory" has the meaning ascribed to it at the time those treaties were signed, absent an amendment, and specifically that the treaties did not apply to territory (Crimea) whose sovereignty was disputed. Russia sent a similar diplomatic note to Ukraine, but Ukraine never responded. Meehan Decl. Ex. 25. Instead, Ukraine gave notice of its intent to terminate the BIT. Meehan Decl. Ex. 26.

Petitioners' argument that the BIT constitutes a standing offer to arbitrate with Ukrainian investors in Crimea apparently rests on the notion that the accession of Crimea into the Federation in March 2014 somehow retroactively converted their domestic Ukrainian

investments into investments made in Russian territory. But the plain language of the BIT makes clear that Russia's offer to arbitrate can only be invoked by Ukrainian investors who made investments in territory that was part of Russia at the time of the investment. Specifically, the offer applies to claims arising out of "investments ***made*** by investors of ***one*** Contracting Party [*i.e.*, Ukraine] ***in the territory of the other*** Contracting Party [*i.e.*, Russia], on or after January 1, 1992." BIT, art. 12 (emphasis added). An investment can only be "made" in one of two territories: Ukraine or Russia, and it can only be made once: at the time of its inception. It is undisputed that Petitioners did not "make" an investment in Russian territory. They "made" an investment prior to 2014 in Ukrainian territory. Pet. ¶ 16.

The BIT uses the term "made" in seven instances and each instance confirms this plain reading of the BIT. *See* BIT, arts. 1, 3, 4, 5, 9, 12, 14. For example, Article 1(1) of the BIT states: "Any ***alteration*** of the type of investments in which the assets are invested shall not affect their nature as investments, provided that such alteration is not contrary to legislation of a Contracting Party in the territory of which the investments ***were made***." BIT, art. 1(1) (emphasis added). This language confirms that an investment must first be made before it can be altered and thus confirms that the term "made" carries a temporal element that defines investments as having been made at a particular time. Since Petitioners admit that their investments were made "prior to 2014, when Crimea was under the jurisdiction of Ukraine," such investments were not "made" in Russian territory. Pet. ¶ 16.[7]

[7] That conclusion is supported by numerous international court and tribunal decisions, analyzing similar provisions in other BITs. For example, in *Pugachev v. Russian Federation*, Award on Jurisdiction, UNCITRAL (June 18, 2020), a case under the Russia-France BIT, the tribunal stated that an eligible investment must be cross-border when made: "[T]he Treaty clearly refers to investments made … and not to investments held… [A]n investment is made, according to the BIT, when the investor acquires … any of the assets and rights listed in Article 1 of the

A contrary conclusion would not only ignore the plain language of the BIT and the common understanding of the parties regarding the meaning of the term "territory" as defined in the BIT, but it would also conflict with the object and purpose of the BIT. *See* Vienna Treaty Convention, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *see also* RESTATEMENT OF FOREIGN RELATIONS § 32. The preamble to the BIT states that its purpose is to "develop the basic provisions of the Agreement on Cooperation in the Sphere of Investment Activity of December 24, 1993"; "create and maintain favorable conditions for mutual investments"; and "create favorable conditions for the expansion of economic cooperation between the Contracting Parties." BIT, Preamble; *see Saluka Investments BV v. The Czech Republic,* Partial Award, Case No. 2001-04, ¶ 299 (Perm. Ct. Arb. 2006) ("The 'object and purpose' of the Treaty may be discerned from its title and preamble."). In other words, the stated aim of the BIT was to attract investments from one state to the other, and to promote economic development. This aim is not achieved if the BIT is interpreted so as to create obligations of Russia towards Ukrainian investors who made investments in Ukrainian territory. There can be no doubt that at the time of the BIT's entry into force, Russia did not intend to offer protections, including an offer to arbitrate, to Ukrainian investors in Crimea, *i.e.*, Ukrainian territory. Thus, the context, object and purpose of the BIT make clear that it does not include an offer to arbitrate with Petitioners.

Courts and tribunals uniformly hold that domestic investments and domestic investors are not protected under investment treaties. For example, in *Pugachev v. Russian Federation*, under

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BIT…." *Id.* ¶¶ 413, 418. "[A]n investment, in order to be protected, must be (i) transnational (cross-border) from inception…" *Id.* ¶ 417.

the Russia-France BIT, the tribunal found that there was no jurisdiction because the claimant was a national of the host State (Russia) and did not hold French nationality "on the date on which the investment was made." *Pugachev v. Russian Federation*, Award on Jurisdiction, UNCITRAL (June 18, 2020), ¶ 420. In reaching this conclusion, the tribunal relied on an analysis of the object and purpose of that BIT: "The preamble of the [Russia-France BIT] 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 the [foreign] nationality condition must be fulfilled at the time of the making of the investment." *Id.* ¶ 418. In *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, UNCITRAL (Jan. 28, 2008), a case under the NAFTA, the tribunal found no jurisdiction "where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants [as here] do not seek to make, are not making and have not made any investments in the territory of the United States of America." ¶ 233; *see also Littop Enterprises Ltd. et al. v. Ukraine*, Final Award, Case No. V 2015/092 (SCC 2021) (no jurisdiction under the Energy Charter Treaty over domestic investment because claimant was controlled by Kolomoisky, a national of Ukraine at the time of the investment).

Finally, the hard cut-off date of January 1, 1992 in Article 12 also confirms that Russia made no offer to arbitrate with Petitioners as their investments were made before 1992.

Petitioners' alleged investments were interests in gas projects that were developed by the Soviet Union and its state-owned enterprises prior to 1992. Dissent, Final Award ¶¶ 56-68, 112, 119. Following the collapse of the Soviet Union, those Soviet enterprises were "transformed" into Petitioners under a legal process in which Petitioners became the legal successors to all rights and interests in the property of their Soviet predecessors. *Id.* ¶¶ 56-61. Article 12 makes clear that Russia never offered to arbitrate with Petitioners in respect of interests in legacy investments of the Soviet Union that were made prior to 1992.[8]

2. Petitioners Are Not Private Parties under Section 1605(a)(6)

The FSIA's arbitration exception explicitly applies only where the award was rendered pursuant to "an agreement made by the foreign state with or for the benefit of a ***private party***." 28 U.S.C. § 1605(a)(6) (emphasis added). While the FSIA does not define the term "private party," it does define "foreign state" to include corporations that are majority owned by the foreign state. *See* 28 U.S.C. § 1603(a)-(b). It is thus clear that Congress did not intend the arbitration exception to apply to actions to enforce awards rendered in an arbitration between two state entities. But that is exactly the situation in this case. Petitioners are Ukrainian state entities, not private parties. Thus, the FSIA's arbitration exception does not apply.

Petitioners admit that they are wholly owned and controlled by the State of Ukraine. Pet. ¶ 15. The role that the Ukrainian government "plays is rather different from best practices" and goes beyond that of a mere shareholder. *See* Naftogaz, Annual Report 2021 at p. 233.[9] The

[8] The language of Article 12 also shows the importance of determining when an investment was made, and whether at the time it was made it was made in Russian territory.

[9] This Court may take judicial notice of Naftogaz's Annual Report for 2021, which is available at https://www.naftogaz.com/short/0ac0b2d1. *See, e.g., Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.,* 2016 U.S. Dist. LEXIS 64427, at *22 (S.D.N.Y. May 16, 2016).

Ukrainian "state has powers … that normally the executive body of a company might have." *Id.* Ukraine's Cabinet of Ministers – the same entity that signed the BIT on behalf of Ukraine – acts as both Naftogaz's shareholder and as its Supervisory Board. *Id.* The Cabinet of Ministers has the "responsibility to approve hundreds, if not thousands, of management decisions." *Id.* It "sets objectives and even provides instructions for Naftogaz." *Id.* Naftogaz is left "fighting political meddling" by the Ukrainian government. *Id.* Naftogaz received all of its assets from the Ukrainian government, and the government treats Naftogaz's property as state property, including the property at issue in the underlying arbitration. *Id.* at p. 234; Dissent, Partial Award ¶¶ 176-79, 234-36. The Ukrainian government's control extends to Naftogaz's subsidiaries, and those subsidiaries do not have their own supervisory boards. *See* Naftogaz, Annual Report 2021 at p. 233. While technically owned by Naftogaz, its subsidiaries are required to pay their dividends "directly to the state budget." *Id.* at pp. 233-34. Naftogaz received its equity interests in its subsidiaries from the Ukrainian government and warns that the Ukrainian government may decide to transfer away all or part of Naftogaz's equity interests in those subsidiaries. *Id.* at p. 301; Dissent, Partial Award ¶ 175. The Ukrainian government even appeared as a party in the underlying arbitration and made submissions in support of Petitioners' claims. Partial Award ¶¶ 15, 44-47. As the Dissent explained: "It appears from these facts that the Naftogaz Group is essentially an investment of the State of Ukraine, and the dispute is a dispute between two sovereign States over the natural resources and infrastructure in Crimea." Dissent, Partial Award ¶ 183. Thus, Petitioners are not "private parties" and cannot invoke the FSIA's arbitration exception.

3. The Award Is Not Governed by a Treaty in Force in the U.S.

The FSIA's arbitration exception applies in award 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. Here, Petitioners allege that the Award is governed by the New York Convention. Pet. ¶ 6. While the United States is a party to the New York Convention, the United States adopted the so-called "commercial reservation" when acceding to the Convention. The commercial reservation is codified in the Federal Arbitration Act ("FAA"), which states: "An arbitration agreement or arbitral award arising out of ***a legal relationship, whether contractual or not, which is considered as commercial***, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202 (emphasis added). Thus, the New York Convention only governs awards arising out of a commercial relationship between the parties. No such commercial relationship exists between Russia and Petitioners.

The commercial reservation was intended to exclude "political awards" from being enforced under the New York Convention. *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973) ("*Curacao*"). An arbitration concerning "a dispute about interpretation of or performance under an international agreement is not subject to the New York Convention, and an award resulting from such an arbitration is not subject to enforcement through civil courts." RESTATEMENT OF FOREIGN RELATIONS § 487, cmt. f. The commercial reservation also "excludes arbitration agreements and awards arising out of … disputes concerning succession to property." *Id.* *See also id.* § 904, cmt. a (distinguishing "arbitration of disputes between states under international law" and "commercial arbitration between a state and a private person").

The Award is exactly the sort of arbitration award that the commercial reservation was intended to exclude from the scope of the New York Convention. Indeed, as the Dissent observed, the arbitration was, at bottom, "a dispute between two sovereign States over the natural resources and infrastructure in Crimea." Dissent, Partial Award ¶ 183. Ukraine even appeared in the underlying arbitration in support of Petitioners, and is the real party in interest. The underlying dispute concerned a territorial dispute and "the resulting claims to ownership of state property" in the disputed territory. *Id.* ¶ 68. Such a "political award" does not arise out of a commercial relationship and is not governed by the New York Convention. *See Curacao*, 356 F. Supp. at 13; RESTATEMENT OF FOREIGN RELATIONS § 904, cmt. a.

Petitioners allege that the Award arises out of a commercial relationship because it arises out of their investments in Crimea. Pet. ¶ 55. But a commercial investment is insufficient to establish a commercial relationship between the entity and the foreign state. Petitioners' argument ignores the unprecedented nature of the facts underlying this dispute, and specifically the lack of a relationship, or any interaction whatsoever, between Petitioners and the Federation in connection to their "investments." The mere fact that Petitioners invoke the BIT does not create such a relationship. Pet. ¶ 55.

Petitioners argue that other courts have confirmed investment treaty awards under the New York Convention, citing *Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela*, 244 F. Supp. 3d 100 (D.D.C. 2017), and *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57 (D.D.C. 2013). However, neither decision addresses the New York Convention's commercial relationship requirement, much less finds that a bilateral investment treaty alone creates a commercial relationship between a contracting State and private investors. Those courts had no reason to address the commercial relationship requirements because it was undisputed that the

parties had significant commercial relationships. In *Chevron*, the parties had "signed an agreement allowing Chevron to develop Ecuadorian oil fields in exchange for providing below-market oil to the Ecuadorian government for domestic use." *Chevron*, 795 F.3d at 202. In *Crystallex*, the dispute arose out of the allegedly wrongful termination of a mining contract between Crystallex and Venezuela. *See* 244 F. Supp. 3d at 105-06. Here, by contrast, Petitioners and Russia never had any commercial dealings. Petitioners have no contracts with Russia. They never obtained any permits or licenses from Russia. Petitioners were never incorporated or authorized to do business in Russia. In short, Russia and Petitioners were complete strangers.

B. The FSIA's Waiver Exception Does Not Apply

Petitioners also cannot establish jurisdiction under the FSIA's waiver exception, which applies only where the foreign state has waived immunity from suit in the "courts of the United States" either "explicitly or by implication." 28 U.S.C. § 1605(a)(1). Petitioners do not allege that Russia has "explicitly" waived immunity; nor could they. Instead, they allege that Russia implicitly waived its immunity by becoming a party to the New York Convention and agreeing to arbitrate with Petitioners. Pet. ¶ 11.

The FSIA's "implied waiver provision" must be construed "narrowly." *Creighton v. Qatar,* 181 F.3d 118, 122 (D.C. Cir. 1999) (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)); *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). "[Section] 1605(a)(1) requires that the plaintiff demonstrate proof of a subjective intent to waive immunity." *Cabiri v. Gov't of Ghana,* 165 F.3d 193, 201 (2d Cir. 1999). Indeed, the D.C. Circuit and other courts of appeals have uniformly held that a waiver

under section 1605(a)(1) should not be implied absent "strong evidence" that the foreign state intended to waive its sovereign immunity. *See Creighton*, 181 F.3d at 122 (quoting *Foremost-McKesson*, 905 F.2d at 444). Here, Petitioners have no evidence – let alone strong evidence – that Russia intended to waive its immunity.

As explained above, Russia never agreed to arbitrate with Petitioners. *See supra* at 17-27. Furthermore, the BIT does not contain any waivers of immunity, and the dispute resolution provisions in the BIT do not contemplate any role for U.S. courts or otherwise suggest any intent to waive immunity. In any event, courts have held that an agreement to arbitrate outside the U.S. does not constitute an implicit waiver of immunity in actions in the U.S. to enforce the resulting award. *See Creighton,* 181 F.3d at 122-23; *Maritime Int'l Nominees Establishment v. Republic of Guinea* ("*MINE*"), 693 F.2d 1094, 1103 n.15 (D.C. Cir. 1982).

For example, in *Creighton,* the D.C. Circuit held that Qatar did not implicitly waive its immunity in an action to enforce an arbitral award simply because the parties agreed to arbitrate in France. *See* 181 F.3d at 122-23. The D.C. Circuit joined other circuits in "rejecting … a broad reading of the 'implicit waiver' exception" that would apply anytime a foreign state agreed to arbitration outside of its borders. *Id.* at 122. It reasoned that "[s]uch an interpretation of § 1605(a)(1)'s 'implicit waiver' exception would vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations." *Id.*

Petitioners' assertion that Russia waived its immunity by acceding to the New York Convention runs headlong into the Supreme Court's decision in *Amerada Hess* that a foreign state does not waive its immunity under the FSIA by signing a treaty that is silent on the issue of immunity. *See* 488 U.S. at 441-43. Here, the Convention does not require contracting states to waive their immunity or otherwise consent to jurisdiction with respect to any awards rendered

against them. It does not mention immunity at all. Nor does it address the enforcement of arbitral awards against States.[10] Therefore, under *Amerada Hess*, the Convention cannot be construed as *sub silentio* waiving the immunity of all 172 signatory states.

Applying this same rationale, the U.S. government recently took the position before the D.C. Circuit that foreign states do not waive their immunity by acceding to the New York Convention and cautioned that such a broad reading of the waiver exception could "have implications for the treatment of the United States in foreign courts and for our relations with foreign states." *See* U.S. Blasket Amicus Br. at pp. 20, 24.

Nothing in the New York Convention supplies the requisite "strong evidence" that the signatories to the Convention intended to waive their immunity. *See Creighton*, 181 F.3d at 122; *Foremost-McKesson*, 905 F.2d at 444. Had the Convention been intended to implicitly waive the immunity of contracting states, that would have been a radical departure from the theory of absolute immunity that prevailed in many countries – including Russia – when the Convention was being drafted and negotiated in the 1950s.[11] *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-985 (1952) (explaining that, at the time, Great Britain, Czechoslovakia, Poland, Estonia, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway,

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[10] The U.S. government has taken the position that a foreign state does not waive its immunity by acceding to the ICSID Convention, a treaty that expressly contemplates enforcement of arbitral awards against foreign states. *See* U.S. Blasket Amicus Br. at 22.

[11] The New York Convention originated out of a draft convention put forward by the International Chamber of Commerce in 1953. That draft was followed by meetings in New York in March 1955 which, in turn, was followed by an additional period of commenting leading up to the issuance of the final text in 1958. Russia signed the New York Convention in 1958. *See* New York Convention, Status Table, *available at* https://www.newyorkconvention.org/list+of+contracting+states.

Portugal and Germany all adhered to an absolute theory of sovereign immunity); *Gregorian v. Izvestia,* 871 F.2d 1515, 1523 (9th Cir. 1989) (explaining that Russia continued to adhere to the absolute theory of immunity decades after signing the Convention). If that was the intention, one would have expected the issue of immunity to have been explicitly addressed in the Convention. But, again, the Convention is silent on immunity. Thus, it is unreasonable to assume that countries intended to waive their immunity when they signed the Convention.

Petitioners rely on the D.C. Circuit's unpublished and non-binding decision in *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019), which held that the Ukraine impliedly waived its immunity by signing the New York Convention. *Tatneft* has not been applied by any other panel of the D.C. Circuit. In fact, the D.C. Circuit explained in its subsequent decision in *P&ID* that *Tatneft* was non-binding and refused to apply it. *See P&ID*, 962 F.3d at 584; *see also P&ID II,* 27 F.4th at 775.

This Court is, however, bound by the Supreme Court's holding in *Amerada Hess* – a holding that cannot be reconciled with *Tatneft.* To be sure, *Tatneft* recognized the Supreme Court's holding in *Amerada Hess*, but misread *Creighton* as distinguishing *Amerada Hess* and holding that the waiver exception applies where the foreign state signed the Convention because signatories "must have contemplated" that they would be subject to enforcement actions in the United States. *Tatneft*, 771 F. App'x at 10. Because the panel in *Tatneft* believed that it was bound by this misreading of *Creighton*, it held that Ukraine had implicitly waived its immunity by signing the Convention. *Id.* But the panel in *Creighton* did not distinguish *Amerada Hess*. Rather, it stated that *Amerada Hess* read Section "1605(a)(1) to require an intention to waive immunity in the United States" and that such an intent could not be inferred from the foreign state's signing of "an international agreement that contains no mention of a waiver of immunity

to suit in United States courts[.]" *Creighton*, 181 F.3d at 123 (quoting *Amerada Hess*). The panel in *Creighton* then refused to infer an intent to waive immunity under the Convention where the respondent, Qatar, was not even a signatory to that treaty but merely agreed to arbitration in France, which is a party to the Convention. *Id.* Thus, as the D.C. Circuit has subsequently explained, *Creighton* did not decide the issue of whether a foreign state waives its immunity under the FSIA by acceding to the Convention. *See P&ID*, 962 F.3d at 583.

Petitioners' argument that the waiver exception applies in actions to enforce arbitral awards under the New York Convention even where, as here, the substantive requirements of the arbitration exception are not satisfied would also run afoul of mandatory rules of statutory construction by impermissibly rendering the later enacted and more specific arbitration exception superfluous. The Supreme Court has repeatedly held that, when construing two statutory provisions, courts must give effect to the later enacted and more specific statute. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 132 S. Ct. 2065, 2071 (2012); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see also Qi-Zhou v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16, 20 n.7 (D.D.C. 2007), *aff'd*, 304 F. App'x 872 (D.C. Cir. 2008); U.S. Blasket Amicus Br. at p. 22.

Tatneft dismissed the notion that applying the waiver exception in actions to enforce arbitral awards under the New York Convention would impermissibly swallow the arbitration exception. *Tatneft,* 771 F. App'x at 9-10. It reasoned that the two exceptions did not entirely overlap because the waiver exception requires an intentional waiver of immunity, whereas in its view the arbitration exception contains no intentionality requirement. *Id.* at 10. But the *Tatneft* panel goes on to construe the intentionality requirement of the waiver exception as being satisfied where a foreign state signs a treaty on the enforcement of arbitral awards. That

interpretation not only conflicts with *Amerada Hess*, but it impermissibly strips the later enacted and more specific arbitration exception of its effectiveness. It is hard to imagine a case that would fall within the arbitration exception (which applies only where the award is governed by a treaty in force in the U.S. providing for the enforcement of arbitral awards) but not the waiver exception as broadly construed by *Tatneft* (which held that the waiver exception applies in actions to enforce arbitral awards against foreign states that have acceded to a treaty calling for the enforcement of arbitral awards).

Tatneft also ignores the history of the FSIA. As originally enacted in 1976, the FSIA included the waiver exception, Section 1605(a)(1), but not the arbitration exception, Section 1605(a)(6). The arbitration exception was not enacted until 1988. *See Creighton*, 181 F.3d at 125-26. In the intervening years between 1976 and 1988, courts split on whether the FSIA (and more specifically the waiver exception) conferred jurisdiction in actions to enforce arbitral awards against foreign states. By 1985, the Seventh Circuit summarized the majority view as follows: "[M]ost courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States." *Frolova*, 761 F.2d at 377, 377 n.10; *see also MINE*, 693 F.2d at 1103 n.15. Congress brought clarity to the issue when it enacted the arbitration exception in 1988. In doing so, it was no doubt aware that a small minority of cases asserted jurisdiction over actions to enforce arbitral awards under the waiver exception. It could have simply amended the waiver exception under Section 1605(a)(1) to apply whenever a foreign state agreed to arbitrate outside of its borders. It did not. Congress could have amended the waiver exception to state that a foreign state's ratification of a treaty providing for the enforcement of arbitral awards, such as the New York Convention, constitutes a waiver of immunity. It did not. Instead of embracing such broad

waiver theories, Congress created the arbitration exception *sui generis* and prescribed specific substantive requirements for abrogating a foreign state's immunity in actions to enforce arbitral awards. Accordingly, this Court should not ignore the substantive requirements of the arbitration exception in favor of the broad waiver theory proposed by Petitioners. *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *24; U.S. Blasket Amicus Br. at p. 22.

II. THE PETITION MUST BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

Personal jurisdiction is required in every action to confirm a foreign arbitral award under the New York Convention. *See GSS Grp. Ltd v. Nat'l Port Auth.* ("GSS"), 680 F.3d 805, 808 (D.C. Cir. 2012). The FSIA authorizes the exercise of personal jurisdiction over a foreign sovereign where one of the FSIA's exceptions to immunity applies and service was made in accordance with the FSIA. *See* 28 U.S.C. § 1330(b). Here, neither statutory requirement is met.

A. The Federation Was Not Properly Served

As a foreign state, service of process can only be effected on the Federation pursuant to 28 U.S.C. § 1608(a), which "sets forth the exclusive procedures for service on a foreign state." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 155 (D.C. Cir. 1994) (quoting H.R. REP. NO. 1487, at 24 (1975), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6623). Service under § 1608(a) requires strict adherence to its terms. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019). Neither substantial compliance nor actual notice will suffice. *See id.* Section 1608(a) sets out the methods of serving foreign states in hierarchical order. *See id.*

Petitioners attempted to serve the Federation via diplomatic channels under Section 1608(a)(4).[12] The State Department did not properly effect service on Russia because serving

[12] While the State Department submitted a letter informing the Court that it had transmitted the service documents to the Russian Embassy in Washington, D.C., it explicitly cautioned that its

the Russian Embassy contravened Russia's declarations on service through diplomatic channels under Article 8 of the Hague Convention, which declared that "documents intended for service upon the Russian Federation" should be "transmitted through diplomatic channels, i.e. by Notes Verbales of diplomatic missions of foreign States accredited in the Russian Federation."[13] Thus, to effect service on Russia through diplomatic channels, the service documents must be transmitted from the U.S. Embassy in Moscow to Russia's Ministry of Foreign Affairs.

The Federation's declaration on diplomatic service under Article 8 of the Hague Convention determines the method for serving the Federation through diplomatic channels under Section 1608(a)(4). The Supreme Court has held that "the Hague Service Convention specifies certain approved methods of service and 'pre-empts inconsistent methods of service' wherever it applies." *Water Splash v. Menon,* 581 U.S. 271, 284 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)). In *Water Splash*, the Supreme Court held that service cannot be effected by mail in countries that have objected to service by mail under Article 10 of the Hague Convention. *See* 581 U.S. at 284. Following *Water Splash*, this court has held that service by mail on the Minister of Foreign Affairs under Section 1608(a)(3) is "categorically unavailable" where the foreign state has objected to service by postal methods under Article 10 of the Hague Convention. *See Azadeh v. Gov't of the Islamic Republic of Iran*, 318 F. Supp. 3d 90, 99 (D.D.C. 2018); *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. 17-1457 (TJK), 2018 WL 6605633, at *5 (D.D.C. Dec. 17, 2018). In fact, Petitioners

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letter should "not be construed as an indication in any way on the United States' position or views on …whether service was properly effected." Dkt. No. 11.

[13] Declarations and Reservations of the Russian Federation on the Hague Convention, ¶ IV, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=418&disp=resdn.

represented to this Court that the Federation could not be served under Section 1608(a)(3) because the Federation had objected to service by mail under Article 10 of the Hague Convention. Dkt. No. 8. It follows that the Federation's declaration on service by diplomatic channels under Article 8 of the Hague Convention requiring such service to be effected through the transmission of a Note Verbale from the U.S. mission in Moscow to the Federation's Ministry of Foreign Affairs likewise preempts any other method of diplomatic service that might otherwise be available under Section 1608(a)(4).

The State Department did not even comply with its own practices and regulations on effecting service under Section 1608(a)(4). "When transmitting legal process through diplomatic channels, the State Department's typical practice is for the United States' embassy in the foreign state to deliver the papers to the state's foreign ministry" – *i.e.*, the method mandated by the Federation's declarations under the Hague Convention. *Kumar v. Republic of Sudan*, 880 F.3d 144, 160 (4th Cir. 2018) (quoting U.S. amicus brief). That typical practice is reflected in the State Department's regulation for effecting service under Section 1608(a)(4). *See* 22 C.F.R. § 93.1(c)(1). That regulation only permits service of documents on a foreign state's embassy in Washington, D.C. "[i]f the foreign state so requests or if otherwise appropriate." 22 C.F.R. § 93.1(c)(2). Indeed, the State Department has explained that service on the foreign state's embassy in the United States only occurs "[i]n some unusual circumstances, or if the foreign state so requests." *Kumar*, 880 F.3d at 160 (quoting U.S. amicus brief). Here, the Federation did not request diplomatic service on its Embassy in Washington, and the Federation's declarations on diplomatic service under Article 8 of the Hague Convention demonstrate that service on the Russian Embassy was not "otherwise appropriate."

Serving the Federation's Embassy in Washington, D.C. also violates the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502 ("VCDR"). Both the United States and the Federation are parties to the VCDR. Article 22 of the VCDR provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, Art. 22(1). Consistent with that provision of the VCDR, the Supreme Court has held that service by mail cannot be effected on a foreign sovereign's embassy in the United States under § 1608(a)(3). *See Harrison*, 139 S. Ct. at 1060-61. The same prohibition should apply to the service on foreign sovereigns through diplomatic channels under § 1608(a)(4), particularly where, as here, the foreign state has declared under Article 9 of the Hague Convention that diplomatic service must be transmitted to the ministry of foreign affairs in the foreign state.

Even prior to enactment of the FSIA, the State Department took the position that it "would not, in the absence of express statutory or treaty provision, attempt to transmit [a] summons by an official diplomatic note to the embassy of a sending state, unless the embassy indicated a willingness to accept the summons." Letter From Leonard C. Meeker, Acting Legal Advisor, to John W. Douglas, U.S. Asst. Att'y Gen., Am. J. Int'l L. at 110 (1965). These statements are binding commitments under customary international law, and other states may legitimately rely on the United States' representation that service on embassies will not be made unless there are exceptional circumstances. *See* Meehan Decl. Ex. 2 at 29-31.[14]

[14] Petitioners did not follow the hierarchy of Section 1608 by first attempting service under Section 1608(a)(2) by serving via diplomatic channels in accordance with Article 8 of the Hague Convention.

B. Exercising Jurisdiction Over the Federation Would Violate Due Process

It is undisputed that this case has no connection to the United States. The application of the FSIA's arbitration exception and exercise of jurisdiction under the FSIA would not comport with due process. *See Bristol-Myers Squibb v. Superior Court of California,* 137 S. Ct. 1773, 1781 (2017); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982). Courts must dismiss award enforcement actions for lack of personal jurisdiction where, as here, the action has no connection to the United States. *See GSS*, 680 F.3d at 808*; Conti 11. Container Schiffarts-GMBH & Co. KG M.S. v. MSC Mediterranean Shipping Co. S.A.*, 91 F.4th 789 (5th Cir. 2024); *Gater Assets,* 2 F.4th at 65-66; *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002); *Base Metal Trading v. Ojsc Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002).

Petitioners assert that the Federation is not a "person" under the Fifth Amendment and therefore this Court may exercise jurisdiction without regard for the limitations of due process under *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). While *Price* is binding on this Court, the Federation maintains that *Price* was wrongly decided and should be overturned. The Federation therefore objects to the exercise of personal jurisdiction under the FSIA to preserve its right to ask the D.C. Circuit to overturn *Price* on appeal.

Price reasoned that because *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), held that U.S. states are not "persons" under the Fifth Amendment, there was no compelling reason to treat foreign states differently. *Price*, 294 F.3d at 97. But *Katzenbach* involved a lawsuit by South Carolina against the U.S. challenging the Voting Rights Act. It had nothing to do with personal jurisdiction or foreign states. Moreover, the Supreme Court has long held that U.S. states and foreign states must be treated differently under the Constitution. Ratification of the

Constitution by U.S. states constitutes a "waiver or consent" to the terms of the "constitutional plan," which provides for U.S. states to be sued in federal courts in certain circumstances and subject to the protections afforded by the Eleventh Amendment. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). As a result, suits against U.S. states in federal courts do not raise due process concerns. The same cannot be said of foreign states.

The Supreme Court has long recognized foreign states as "persons" that can only be reached through proper process. *See The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812); *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793). Furthermore, the Due Process Clause must be read in light of the drafters' understanding of the term "person," and the founders routinely referred to foreign states as "persons." *See* James Madison, *Essay on Sovereignty*, *in* 9 THE WRITINGS OF JAMES MADISON 572 (Gaillard Hunt ed., 1900); James Kent, *Dissertations: Being the Preliminary Part of a Course of Law Lectures* 52 (New York, 1795).

The majority of circuits to address the issue have held that the exercise of jurisdiction over foreign states under the FSIA must comport with due process. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994); *Vermeulen v. Renault, U.S.A., Inc.,* 985 F.2d 1534, 1545 (11th Cir. 1993); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 n.5 (5th Cir. 1985). While the Second Circuit has adopted *Price*, it recently acknowledged that its decision has been criticized and may have been wrong. *See Gater Assets*, 2 F.4th at 66 n.24.

Price should also be revisited in light of the Supreme Court's recent decision in *Turkiye Halk Bankasi v. United States*, 143 S. Ct. 940 (2023) ("*Turkiye*"), which held that foreign states can be criminally prosecuted in U.S. courts and that the protections and immunities accorded to foreign states under the FSIA do not apply in such criminal cases. In holding that foreign states

are not "persons" under the Fifth Amendment, *Price* never considered the numerous protections afforded to "persons" in criminal cases under the Due Process, Double Jeopardy and Self-Incrimination Clauses of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant the Motion and dismiss the Petition.

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Respectfully submitted,

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