UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JSC DTEK KRYMENERGO, Petitioner, v. THE RUSSIAN FEDERATION, Respondent.	Case No. 1:23-cv-3330-CJN **Oral Argument Requested**

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

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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 *JSC DTEK Krymenergo v. The Russian Federation,* PCA Case No. 2018-41 (the "Award")[1] filed by Petitioner JSC DTEK Krymenergo ("DTEK") for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and Federal Rules of Civil Procedure 12(b)(1) and (2).

PRELIMINARY STATEMENT

Petitioner seeks to enforce an award that was rendered against the Federation in an arbitration that Petitioner commenced 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").[2] However, this is no ordinary investment treaty case. Petitioner is a Ukrainian corporation created by the Ukrainian government to hold Ukrainian state assets inherited from the Soviet Union to operate an electric utility in Crimea. It is undisputed that Petitioner's supposed investment in Crimea was not made in Russian territory at the time it was made. Petitioner nevertheless takes the position that Crimea is now Russian territory for purposes of the BIT and is asking this Court to enshrine that position in a U.S. court judgment, even though neither Ukraine nor the United States considers Crimea part of Russia. 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. Nor does this Court need to consider the serious red flags of fraud, corruption and illegality that taint the Award, including the fact that Petitioner's main

[1] The Award is appended as Exhibit A to the Declaration of Marney L. Cheek. Dkt. No. 1-2.

[2] The BIT is appended as Exhibit B to the Declaration of Marney L. Cheek. Dkt. No. 1-3.

shareholder, Rinat Akhmetov, has deep ties to organized crime. 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. Petitioner asserts 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 Petitioner, and the Award is not governed by any treaty in force in the United States.

Petitioner asserts that the Federation made a standing offer to arbitrate under the terms of the BIT, which Petitioner 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. Petitioner "made" its investment in Crimea at a time when both Contracting Parties recognized Crimea as Ukrainian territory. The plain language of the BIT shows that the Federation made no offer to arbitrate with Petitioner, who made a domestic investment in Ukraine. Thus, no arbitration agreement was formed and the FSIA's arbitration exception does not apply.

The BIT is a contract between Ukraine and the Federation and, like any other contract, must 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 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, since Ukraine does not consider Crimea to be Russian territory.

Changing the BIT's definition of "territory" would not only effect a change in the scope of the BIT, but would also defeat the object and purpose of the BIT, which was to promote cross-border investments between Ukraine and the Federation for the benefit of both nations' economies. Petitioner made an investment in Ukraine – not Russia. In sum, Russia made no offer to arbitrate with Petitioner and no arbitration agreement exists as required to satisfy the first requirement of the FSIA's arbitration exception.

The FSIA's arbitration exception is also inapplicable because the Award is not governed by a treaty in force in the United States. While Petitioner asserts 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

arbitral awards arising out of a commercial legal relationship between the parties. 9 U.S.C. § 202. The commercial reservation is specifically designed to foreclose application of the New York Convention to political awards relating to territorial disputes and resulting claims of succession to state property. *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) ("*Curacao*"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 904, cmt. a [hereinafter "RESTATEMENT OF FOREIGN RELATIONS"]. In other words, the commercial reservation was intended to exclude precisely the sort of award that Petitioner is seeking to enforce here. Since this case does not arise out of a commercial legal relationship between Petitioner and the Federation, the New York Convention does not apply and therefore the Petitioner cannot establish the third requirement of the FSIA's arbitration exception.

Petitioner's reliance on the FSIA's waiver exception is equally misplaced. It is undisputed that Russia has not explicitly waived its immunity under the FSIA, so Petitioner argues 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, and Russia objects to the exercise of personal 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), which held 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 DTEK is a joint-stock company organized under the laws of Ukraine. Petition to Confirm ¶ 5 ("Pet."). Petitioner claims to be the owner and operator of an electricity utility in Crimea. Award ¶ 2. The majority of Petitioner's assets were legacy assets previously owned by the Soviet Union (the "Soviet Assets"). *Id.* ¶¶ 324, 349. Following the collapse of the Soviet Union, the Soviet Assets were transferred to Petitioner in order to operate an electric utility in Crimea. *Id.* ¶¶ 349-50.

While Ukraine initially owned 100% of Petitioner's shares, the "DTEK Group" – a group of entities owned by Ukrainian oligarch Rinat Akhmetov – eventually acquired 57.49% of Petitioner's shares. Award ¶¶ 352, 474. Mr. Akhmetov, Petitioner's largest ultimate shareholder, is alleged to have deep ties to organized crime. *Id.* ¶¶ 492, 523-28. Mr. Akhmetov holds considerable political power in Ukraine and was the leader and main financial backer of the "Party of Regions," a Ukrainian political party. *Id.* ¶ 504. Mr. Akhmetov and his Party of Regions were supporters of former Ukrainian President Viktor Yanukovych (the former governor of the Donetsk Oblast). *Id.* ¶¶ 502-08. Mr. Akhmetov was a member of Ukraine's Parliament and allegedly controlled approximately half of its members. *Id.* Mr. Akhmetov used

this political power for self-enrichment. *Id.*[3] In fact, there is considerable evidence that Mr. Akhmetov wielded his political power to acquire his interests in Petitioner through corrupt dealings with the Ukrainian government. *Id.* ¶¶ 594-604.

B. The Events Giving Rise to the Underlying Dispute

The underlying dispute arose out of events occurring in Crimea. It is undisputed that prior to 2014 Crimea formed part of the territory of the Ukraine. On March 16, 2014, voters in Crimea approved the referendum on Crimean independence. Award ¶ 665. On March 17, 2014, the Crimean Republic adopted Resolution No. 1745-6/14 (the "Independence Resolution"), which declared the Crimean Republic an independent sovereign state. *Id.* ¶ 195.

On March 18, 2014, the Crimean Republic and the Russian Federation entered into the Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation (the "Accession Treaty"). Award ¶ 196. 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. *Id.* ¶ 197.

On March 21, 2014, the Federation enacted a federal constitutional law governing the accession of the Crimean Republic to the Federation. On April 30, 2014, the Crimean Parliament issued a resolution expropriating certain properties within Crimea, including Ukrainian state property (the "Nationalization Resolution"). *Id.* ¶ 199. Thereafter, the Crimean

[3] The conviction of U.S. political consultant Paul Manafort on Foreign Agent Registration Act violations was due in part to Mr. Manafort's significant work for Mr. Akhmetov. *See United States v. Manafort*, 314 F. Supp. 3d 258, 261 (D.D.C. 2018).

Parliament amended the Nationalization Resolution to specifically include all of Petitioner's tangible and intangible assets in Crimea among the list of expropriated properties. *Id.* ¶ 206.

C. Petitioner Commences the Underlying Arbitration

In February 2018, Petitioner commenced the underlying arbitration against the Federation, asserting breaches of the BIT. Pet. ¶ 20.

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). It 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 the term "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). An "investor" is defined as "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). Finally, Russian "territory" is defined 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).

Petitioner 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)." BIT, art. 9(2). Petitioner alleged that the expropriation of its property by the Crimean Republic violated the BIT.

2. The Arbitral Proceedings

In its request for arbitration, Petitioner appointed Mr. J. William Rowley KC as arbitrator. Award ¶ 18. The Federation did not participate in the appointment of the Tribunal. Pet. ¶ 22. On March 30, 2018, Petitioner requested the designation of an appointing authority for the appointment of the second arbitrator by the Secretary-General of the Permanent Court of Arbitration (the "PCA"). Award ¶ 19. On June 18, 2018, the PCA appointed Professor Vladimir Pavić as arbitrator on behalf of the Federation. *Id.* ¶¶ 21-22. On July 3, 2018, Mr. Rowley and Professor Pavić appointed Mr. Stanimir Alexandrov as Presiding Arbitrator. *Id.* ¶ 3.

On April 5, 2019, the Federation submitted a letter to the Tribunal stating that it "would like to participate in the Arbitration," and the Tribunal granted its request on April 23, 2019. Award ¶¶ 26, 28.

On June 21, 2020, the Presiding Arbitrator resigned based on his relationship with Petitioner's expert – a relationship that had previously led to the annulment of an ICSID award in *Infrastructure Limited and Energía Solar Luxembourg SARL v. Kingdom of Spain*, in which the Presiding Arbitrator had served as an arbitrator appointed by the claimant. *Id.* ¶¶ 73-86. On June 29, 2020, Arbitrators Rowley and Pavić appointed Juan Fernandez Armesto as the new Presiding Arbitrator. *Id.* ¶ 92.

D. The Award

The Tribunal issued the Award on November 1, 2023. Pet. ¶ 25. First, a Majority of the Tribunal concluded that they had jurisdiction over the parties' dispute under the BIT. Award ¶¶ 291, 368, 407, 452. On the merits, the Tribunal identified serious "red flags" of fraud and corruption relating to Mr. Akhmetov's "personal connections and close ties with politicians at the highest levels of the Ukrainian State" and his active participation in politics. *Id.* ¶ 606.

Nevertheless, a Majority of the Tribunal ruled in favor of Petitioner under Articles 2, 3 and 5 of the BIT. Award ¶¶ 779-787. Professor Pavić dissented from certain of the Majority's conclusions, but did not issue a separate opinion.

As to damages, a Majority of the Tribunal awarded Petitioner a total of $207.8 million in compensation, as well as pre- and post-award interest running from January 22, 2015 until the date of payment at the LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually. Award ¶¶ 952, 981. The Majority also awarded Petitioner costs and expenses of the arbitration, comprised of $9,401,644.76 in legal costs and $1,362,422.88 in administrative costs. *Id.* ¶¶ 1027-1030.[4]

E. Procedural History in This Court

On November 7, 2023, Petitioner filed the Petition in this Court, and requested service on the Federation via diplomatic channels under 28 U.S.C. § 1608(a)(4). Dkt. Nos. 1, 6. On April 24, 2024, the State Department sent a letter indicating that the United States Embassy in Moscow had transmitted the documents to the Russian Ministry of Foreign Affairs under cover of diplomatic note No. 028/2024, dated March 24, 2024, and delivered March 29, 2024. Dkt. No. 9. On May 17, 2024, the Federation filed a consent motion requesting an extension of time to file a response and for entry of a briefing schedule, which this Court granted on May 21, 2024. Dkt. Nos. 12, 13.

[4] Claimant's Arbitrator issued a dissenting opinion stating that he was "unable to agree" with the calculation of damages in the Award and argued that Petitioner should have been awarded greater compensation. Arbitrator Rawley's dissenting opinion on damages is appended to the Award. *See* Dkt. No. 1-2 at ECF 203-05.

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 Venez. 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 the action for lack subject matter jurisdiction. *Phoenix Consulting, Inc. v. Republic of Angol.*, 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 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).[5]

[5] To be clear, the Federation's position is that, to the extent the New York Convention even applies, the Award is unenforceable under that 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.

Petitioner invokes 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). Pet. ¶ 9. Neither applies.[6]

A. The FSIA's Arbitration Exception Does Not Apply

The D.C. Circuit has established a three-part test that a petitioner must satisfy in order to invoke the arbitration exception against a foreign sovereign. *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). Petitioner has failed to do so here. The Federation never agreed to arbitrate with Petitioner, and the Award is not governed by any treaty in force in the United States calling for the recognition and enforcement of arbitral awards.

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;

[6] The U.S. government has taken the position that *Chevron*'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. *See* 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.").

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 Hond.*, 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 recently took the position that the FSIA's arbitration 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 the formation of an 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).

Since the existence of an arbitration agreement is a threshold requirement for subject matter jurisdiction under the FSIA, it follows that the Tribunal's determination as to its own jurisdiction, including its analysis of the meaning of various terms in the BIT, has no bearing on this Court's analysis. In other words, 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); *see also Bailey v. Fed. Nat'l Mortgage Ass'n*, 209 F.3d 740, 746-47 (D.C. Cir. 2000) (finding no mutual assent to arbitration policy); *cf. 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 therefore had to be decided by the court).[7]

Petitioner claims that the requisite agreement to arbitrate exists because the BIT "contains a standing offer to arbitrate '[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments.'" Pet. ¶ 19. But the "standing offer" set forth in the BIT was directed only to Ukrainian investors who chose to invest in Russian "territory." Petitioner is a Ukrainian entity who chose to invest in Ukraine. Accordingly, there was never any offer for Petitioner 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.

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

[7] 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.

the contracting parties."); *Arizona v. Navajo Nation*, 599 U.S. 555, 143 S. Ct. 1804, 1825 (2023) ("[C]ourts 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.") (emphasis added).[8]

Under basic principles of contract law, "[t]he manifested intention of the offeror determines the person or persons in whom is created a power of acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 29. In other words, the "offeror is the master of his offer; just as the making of any offer at all can be avoided by appropriate language or other conduct, so the power of acceptance can be narrowly limited. The offeror is bound only in accordance with his manifested assent." RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. a. Thus, if an offer is not directed at a particular individual, such individual cannot accept its terms, and no contract may be formed.

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

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 the treaty was ratified. *See* 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32:7, at 434-35 (4th 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 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, and passed a law last year terminating the BIT to take effect on January 27, 2025.

The undisputed fact that Ukraine disputes Russia's sovereignty over Crimea should itself preclude Petitioner's argument as to the existence of an agreement to arbitrate in this case, as it shows that the contracting parties have no common understanding of the meaning of the term "territory." The BIT cannot apply to disputed territory, such as Crimea.[9]

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 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.

[9] *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.").

Notably, in August 2023, the Federation sent diplomatic notes to various counterparties under its bilateral investment treaties, including the United Kingdom, Canada, Switzerland, 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. 1-22, 25-26. 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. 4. 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. 2. Those responses confirm the common understanding by parties to all such treaties that, absent an amendment, the term "territory" has the meaning ascribed to it at the time those treaties were signed 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. 23. Instead, Ukraine gave notice of its intent to terminate the BIT. Meehan Decl. Ex. 24.

Petitioner's 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 its domestic Ukrainian investment into an investment made in Russian territory. Pet. ¶ 19. 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.

Indeed, 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. There is no dispute that Petitioner's investment was "made" when Crimea was under the jurisdiction of Ukraine. *See, e.g.,* Award ¶ 401. Accordingly, Petitioner never "made" an investment in Russian territory.[10]

[10] 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

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 used 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 Petitioner.

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the BIT, when the investor acquires . . . any of the assets and rights listed in Article 1 of the BIT[.]" *Id*. ¶¶ 413, 418. "[A]n investment, in order to be protected, must be (i) transnational (cross-border) from inception[.]" *Id*. ¶ 417.

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 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), ¶ 233, a case under NAFTA, the tribunal found no jurisdiction "where all of the Petitioners' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Petitioners [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"; *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 a national of Ukraine at the time of the investment).

Finally, the hard cut-off date of January 1, 1992 in Article 12 confirms that Russia made no offer to arbitrate with Petitioner because the bulk of Petitioner's investment consists of the Soviet Assets, which were inherited from Soviet-era state-owned entities and thus pre-date 1992. *See* Award ¶ 304. Article 12 makes clear that Russia never offered to arbitrate with Petitioner or anyone else in respect of interests in legacy investments of the Soviet Union that were made prior to 1992.[11]

2. 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, Petitioner alleges that the Award is governed by the New York Convention. Pet. ¶ 4. In acceding 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, under U.S. law, the New York Convention only governs awards arising out of a commercial relationship between the parties. No such commercial relationship exists between Russia and Petitioner.

The commercial reservation was intended to exclude "political awards" from being enforced under the New York Convention. *See Curacao*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973).

[11] 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.

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").

Petitioner fails to identify any commercial relationship between itself and the Republic. Indeed, the term "commercial" does not appear anywhere in the Petition. Nor could it. To the contrary, the Award is exactly the sort of arbitration award that the commercial reservation intended to exclude from the scope of the New York Convention. *See Curacao*, 356 F. Supp. at 13; RESTATEMENT OF FOREIGN RELATIONS § 904, cmt. a.

The Federation's allegedly expropriatory conduct did not establish a commercial legal relationship between the parties. *See, e.g., Ivanenko v. Yanukovich*, 995 F.3d 232, 238-39 (D.C. Cir. 2021) (holding that Ukraine's expropriation of property was a "quintessentially sovereign act" and thus not commercial in nature); *De Csepel v. Republic of Hung.*, 714 F.3d 591, 600 (D.C. Cir. 2013) (holding that "expropriation 'constitute[s] a quintessentially sovereign act'") (quoting *Yang Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006)); *see also Garb v. Republic of Poland*, 440 F.3d 579, 583 (2d Cir. 2006) ("[A] government's expropriation of property . . . is a quintessentially sovereign act and is never viewed as having commercial character") (internal quotations omitted). The mere fact that the Federation may have expropriated Petitioner's investment is insufficient in itself to establish a commercial relationship.

In every case invoking the New York Convention as the "treaty" for purposes of the FSIA's arbitration exception, the claimants had entered into commercial contracts with the State and thereafter brought commercial arbitrations arising out of the breach of their contractual relationships with the State. That is not the case here. Until the alleged expropriation, Petitioner had no contracts or commercial dealings with the Federation.

B. The FSIA's Waiver Exception Does Not Apply

Petitioner also cannot establish jurisdiction under the FSIA's waiver exception, which applies only where a 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). Petitioner does not allege that Russia has "explicitly" waived immunity; nor could it. Instead, it alleges that Russia implicitly waived its immunity in award enforcement action by becoming a party to the New York Convention. Pet. ¶ 9.

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, Petitioner has no evidence – let alone strong evidence – that Russia intended to waive its immunity.

Petitioner's assertion that the Federation implicitly 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. The New York 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.[12] 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.[13] *See* Letter from Jack B. Tate, Acting Legal

[12] 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.

[13] 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, were followed by an additional period of commenting leading up

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, 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.

Petitioner cites 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. Pet. ¶ 9. *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

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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.

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 arbitrate 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.

Petitioner's 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 Maritime Int'l Nominees Establishment v. Republic*

of Guinea ("*MINE*"), 693 F.2d 1094, 1103 n.15 (D.C. Cir. 1982). 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. *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *24; U.S. Blasket Amicus Br. at p. 22.

Petitioner's reliance on *Creighton* is also misplaced. 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*.

Finally, while Petitioner asserts that the Federation implicitly waived its immunity under the FSIA by agreeing to arbitrate, as explained above, no such agreement to arbitrate with Petitioner was ever formed. *See supra* at 11-22. 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; *MINE*, 693 F.2d at 1103 n.15.

II. EXERCISING JURISDICTION OVER THE FEDERATION WOULD VIOLATE DUE PROCESS

The Petition should also be dismissed for lack of personal jurisdiction, because 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). It is undisputed that this case has no connection to the United States. 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 Group Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 808 (D.C. Cir. 2012)*; 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).

The Federation recognizes that the D.C. Circuit has held that foreign states do not qualify as "persons" under the Due Process Clause. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). However, 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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