IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JSC DTEK KRYMENERGO, *Petitioner*, v. THE RUSSIAN FEDERATION, *Respondent.*	Case No. 1:23-cv-03330-CJN

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

In February 2014, the Russian Federation ("Russia") occupied Crimea, asserting effective control and jurisdiction over the territory. Thereafter, Russia began integrating Crimea into the Russian legal order, and effective March 18, 2014, Russia annexed the territory as a matter of Russian law. By exercising jurisdiction and control over Crimea as its own territory, Russia assumed international legal obligations under the 1998 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (the "Ukraine-Russia BIT," "BIT," or "Treaty") in respect of Ukrainian investors and investments in Crimean territory. In violation of its obligations under the Treaty, Russia conducted mass expropriations of Ukrainian investments across Crimea, including the energy infrastructure assets owned by Petitioner DTEK Krymenergo. Cheek Decl. Ex. A (Award) ¶¶ 194–197, ECF No. 1-2.

Petitioner initiated an arbitration against Russia on February 16, 2018 under the Ukraine-Russia BIT and pursuant to the Arbitration Rules of the United Nations Commission for International Trade Law 1976 (the "UNCITRAL Rules"). The arbitration was seated in The Hague, the Netherlands, and concerned Russia's breaches of the Treaty in relation to Petitioner's investments in Crimea following its unlawful occupation and control of Crimea in 2014. Award, ¶¶ 1, 18, 135–136. On November 1, 2023, the arbitral tribunal (the "Tribunal") issued its final award (the "Award"), which (i) rejected all of Russia's objections to the Tribunal's jurisdiction and the admissibility of Petitioner's claims; (ii) ruled that Russia's actions against DTEK Krymenergo constituted an unlawful expropriation and violated several provisions of the Treaty; and (iii) awarded DTEK Krymenergo US$ 207,800,000 in damages, plus interest and costs. *See id.* ¶ 1030.

DTEK Krymenergo initiated the present action on November 7, 2023 to enforce the final and binding Award before this Court. Pet. Confirm Foreign Arbitration Award, ECF No. 1. The

Award is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), as implemented by the Federal Arbitration Act (the "FAA"). 9 U.S.C. §§ 201–208. Under the FAA, a district court "shall confirm" an award falling under the New York Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. None of those grounds apply in this case.

Contrary to the arguments raised by Russia in its motion to dismiss, the Court has subject-matter jurisdiction over this action under the Foreign Sovereign Immunities Act (the "FSIA"). *First*, pursuant to Section 1605(a)(6) (the "arbitration exception"), a foreign state "shall not be immune from the jurisdiction of [U.S.] courts" "in which the action is brought . . . to confirm an award made pursuant to [] an agreement to arbitrate" and the "award is . . . governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Here, all three elements are met: (i) Russia agreed to arbitrate its dispute with Petitioner in the Ukraine-Russia BIT; (ii) Petitioner seeks to confirm the resulting Award; and (iii) that Award is governed by the New York Convention, a treaty in force for the United States calling for the recognition and enforcement of arbitral awards. Thus, the arbitration exception applies.

Russia argues that there is no arbitration agreement between the Parties because DTEK Krymenergo did not make its investments in Russian territory, thereby placing those investments outside the protection of the Ukraine-Russia BIT and outside the scope of Russia's agreement to arbitrate. *See* Mem. P. & A. Supp. Resp't Mot. Dismiss Pet. Confirm ("RF Br.") § I.A.1, ECF No. 13-1. This argument is not a proper challenge to the Court's subject-matter jurisdiction under the FSIA. Instead, Russia is attempting to relitigate questions of the Tribunal's jurisdiction under

the Treaty that were already decided by the Tribunal in the Award. The D.C. Circuit has consistently held that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021); *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015). Russia's attempt to re-litigate the arbitrability of the underlying dispute is thus irrelevant to this Court's jurisdiction over this Award confirmation proceeding. Regardless, as discussed further below, the Tribunal already considered and rejected Russia's arguments on arbitrability, and this Court must defer to that ruling.

Russia also argues that the Award is not governed by the New York Convention because it does not arise out of a "commercial relationship." RF Br. § I.A.2. This is also meritless — "commercial" is interpreted expansively, and it is well-established under existing case law that investor-state arbitrations satisfy the "commercial" requirement of the FAA. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 103–04 (D.C. Cir. 2015); *Diag Human, S.E. v. Czech Republic–Ministry of Health*, 824 F.3d 131, 136 (D.C. Cir. 2016).

Separately and independently, Section 1605(a)(1) (the "waiver exception") of the FSIA provides this Court subject-matter jurisdiction. A foreign state "waives its immunity from arbitration-enforcement actions in other signatory states" by "signing the New York Convention." *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam); *see also Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). It is undisputed that Russia has signed and ratified the New York Convention and agreed to arbitrate in signatory states, including in the Netherlands where this arbitration was seated. It has therefore waived its sovereign immunity in this case.

The Court also has personal jurisdiction over Russia under the FSIA, as Russia does not contest the adequacy of service made on March 29, 2024 pursuant to 28 U.S.C. § 1608(a)(4). *See*

28 U.SC. § 1330. Russia argues that exercising jurisdiction over it would violate due process, *see* RF Br. § II, but this argument is foreclosed by *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), which makes clear that foreign states do not enjoy constitutional due process protections. Regardless, the exercise of personal jurisdiction here comports with due process since Russia was properly served under the FSIA and the requirements of the FSIA "clearly express[] the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state . . . coextensive with the [statutory] exceptions to foreign sovereign immunity." *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

For these reasons, the Court should deny Russia's motion to dismiss.

BACKGROUND

A. Russia Unlawfully Expropriated Petitioner's Investments in Crimea.

Petitioner JSC DTEK Krymenergo is a subsidiary of DTEK Energy Group ("DTEK"). DTEK is one of the largest privately-owned electricity distribution companies in Ukraine and prior to Russia's unlawful occupation of Crimea, maintained investments in Crimea. Award, ¶¶ 2–3, 191–193. Between 2006 and 2012, DTEK acquired a majority ownership interest in the Ukrainian state-owned electricity distributor in Crimea. *Id.* ¶¶ 191–193. By January 2015, DTEK Krymenergo operated the power distribution grid system and distributed electricity in Crimea, maintaining electricity supply and distribution operations across the Crimean peninsula. *See id.*

Before Russia's occupation of Crimea, DTEK Krymenergo serviced a territory of approximately 27,000 square kilometers and provided electricity to more than 780,000 customers across 23 regional electricity networks. *See id.* DTEK Krymenergo's assets in Crimea included valuable equipment and moveable property; intangible assets such as license and contract rights; and cash and securities. *See id.*

In February 2014, the Russian Federation occupied Crimea. *See id.* ¶¶ 194–206, 664–679. Starting in March 2014, the Russian Federation began integrating Crimea into the Russian legal order, including through formal annexation measures. *See id.* ¶¶ 194–206, 664–679. On March 16, 2014, following a so-called "independence referendum," the State Council of Crimea unlawfully declared the Republic of Crimea an independent state. *Id.* ¶¶ 195–196, 665. Two days later, on March 18, 2014, the Russian Federation annexed Crimea and the Federal City of Sevastopol and extended the application of Russian law to the territory. *See id.* ¶¶ 195–196, 666.

On March 21, 2014, the Russian Federation further incorporated Crimea into its legal order through the adoption of a Federal Constitutional Law "on the Admission of the Republic of Crimea to the Russian Federation, and the Formation of the New Constituent Entities with the Russian Federation – the Republic of the Crimea and the Federal City of Sevastopol" (the "Incorporation Law"). *Id.* ¶¶ 197–198, 667. The Incorporation Law, *inter alia*, "[e]xtended the application of the Russian tax regime to the territory of the Republic of Crimea," "[i]ntroduced the Russian RUB as the national currency in Crimea," and "[e]stablished Russian courts in Crimea." *Id.* ¶¶ 197–198, 667.

On April 30, 2014, the State Council of the Republic of Crimea used the Incorporation Law as a legal basis to issue the Expropriation Resolution, which provided that certain categories of property "shall be considered the property of the Republic of Crimea." *Id.* ¶¶ 199, 668. At that time, the affected categories of assets included Ukrainian State-owned property and "abandoned properties," and therefore did not cover Petitioner's assets. *Id.* ¶¶ 199, 668–669. However, the Crimean Parliament later amended the Expropriation Resolution to target and nationalize Petitioner's investments in Crimea. *See id.* ¶¶ 206, 668–669.

DTEK Krymenergo continued to own and operate its business until January 21, 2015, when the State Council of the Republic of Crimea passed an amendment (i.e., the "Annex") to the Expropriation Resolution, adding to the list of dispossessed properties all of Petitioner's tangible and intangible assets in Crimea and transferring Petitioner's property to the ownership of the Republic of Crimea — thereby executing a formal, direct expropriation of DTEK Krymenergo's assets. *See id.* ¶¶ 206, 670–686, 695. That same day, uniformed men took control of DTEK Krymenergo's premises and thereafter denied the company's managers re-entry to the premises. *See id.* ¶¶ 206, 677. By assuming physical control over and legal title to DTEK Krymenergo's property in Crimea, Russia expropriated Petitioner's assets. *See id.* ¶¶ 680–686, 695. No compensation has ever been paid by the Crimean or Russian authorities for Petitioner's expropriated assets. *See id.* ¶¶ 674–679.

B. The BIT Affords Protection to Petitioner and Its Investments.

The Ukraine-Russia BIT is concerned with the "encouragement and mutual protection of investments." Cheek Decl. Ex. B (BIT), ECF No. 1-3. The Treaty protects "'investments' . . . which are invested by an investor of one Contracting Party" (here, Petitioner) "in the territory of the other Contracting Party" (here, the Russian Federation). *Id.* Art. 1(1). The Treaty defines "territory" as including "the territory of the Russian Federation . . . defined in accordance with international law." *Id.* Art. 1(4). Petitioner's investments in Crimea were protected by the Ukraine-Russia BIT. *See* Award, ¶¶ 369, 452, 661.

Under the terms of the Treaty, each Contracting Party agreed to provide certain standards of protection to investments in its territory made by investors of the other Contracting Party. *See* BIT, Arts. 2–5. Russia therefore guaranteed Ukrainian investments in the territory of the Russian Federation protection against discrimination and expropriation without due process of law and prompt, adequate, and effective compensation. *See id.*; Award, ¶¶ 655–663, 827–833.

Under the Ukraine-Russia BIT, each Contracting Party also agreed to arbitrate "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments" under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce or in an *ad hoc* arbitration under the UNCITRAL Rules, at the choice of the investor. BIT, Art. 9. Petitioner elected to initiate an *ad hoc* arbitration under the UNCITRAL Rules. *See* Award, ¶ 1. The 1976 UNCITRAL Rules provide comprehensive procedural rules for the conduct of the arbitration and state that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement" and "shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part." UNCITRAL Rules 1976, Art. 21(1)–21(2).

C. The Tribunal Upheld Its Jurisdiction, Found Russia Liable for Expropriating Petitioner's Investments, and Awarded Petitioner US$207 Million in Damages.

DTEK Krymenergo initiated the arbitration through its Request for Arbitration dated February 16, 2018. Award, ¶ 18; Second Cheek Decl. Ex. A (Request for Arbitration). The Tribunal was constituted of Professor Vladimir Pavić and J. William Rowley KC, and chaired by Stanimir A. Alexandrov until his resignation on June 21, 2020. Award, ¶¶ 8–12, 18–24, 73–106. On June 29, 2020, Mr. Rowley and Professor Pavić appointed Professor Juan Fernández-Armesto as presiding arbitrator. *See id.* ¶¶ 8–12, 18–24.

Petitioner DTEK Krymenergo submitted its Statement of Claim on December 7, 2018. *See id.* ¶ 25. DTEK Krymenergo alleged that Russia breached its obligations under the Treaty by unlawfully expropriating DTEK Krymenergo's investment, in addition to failing to provide full protection and security, non-discriminatory treatment, and fair and equitable treatment. *See id.* ¶¶ 2, 25, 618, 827.

After initially writing a letter objecting to the Tribunal's jurisdiction and deciding not to actively participate in the proceedings, on April 5, 2019, Russia submitted a letter to the Tribunal stating that it had decided to actively participate in the Arbitration and requested a six-month extension to its Statement of Defense. *See id.* ¶ 26. On April 23, 2019, the Tribunal granted an extension for Russia to submit its Statement of Defense and make the payment of its share of the advance requested by the PCA. *See id.* ¶¶ 26–28. Thereafter, both Parties participated actively in the arbitration, which involved multiple rounds of written briefing, a week-long hearing on jurisdiction, merits, and quantum at the Peace Palace in The Hague in September 2021, and two rounds of post-hearing briefs and submissions on costs. *See id.* ¶¶ 26–134. The Tribunal declared the proceeding closed pursuant to Article 29(1) of the UNCITRAL Rules on October 30, 2023. *See id.* ¶ 146.

In the arbitration, Russia raised four jurisdictional objections: (i) that the Treaty is not applicable to Crimea since there is a territorial dispute between the Russian Federation and Ukraine regarding the status of Crimea; (ii) that a portion of Petitioner's investments were made before January 1, 1992 and therefore are not protected under Article 12 of the BIT; (iii) that the definition of "investment" in Article 1(1) of the BIT requires an active cross-border investment at its inception in conformity with the host State's legislation, and the three requirements of Article 1(1) (activity, cross-border and legality) must be met cumulatively and concurrently at the time of the investment; and (iv) that Petitioner does not meet the definition of an investor under Article 1(2)(b) of the Treaty. *See id.* ¶¶ 210, 227–239, 301–310, 381–387, 414–419. Russia also alleged that Petitioner's owner, Mr. Rinat Akhmetov, acquired DTEK Krymenergo through fraud and corruption, and therefore that Petitioner's claims were inadmissible. *See id.* ¶¶ 453–463.

In the Award, the Tribunal rejected all of Russia's objections to jurisdiction and admissibility and ruled that it had jurisdiction to decide the dispute. *See id.* ¶¶ 291–296, 368–371, 393–407, 428–452, 605–613, 1030. As a preliminary matter, the Tribunal found that the Ukraine-Russia BIT remains in full force and effect, "[n]otwithstanding the existence of an armed conflict between Ukraine and the Russian Federation" and by a majority determined that the arbitration did not require the Tribunal to impermissibly rule on the legal status of Crimea. *Id.* ¶¶ 212–224. The Tribunal then dismissed all of Russia's jurisdictional objections, finding: (i) that for purposes of the Ukraine-Russia BIT, Crimea is part of the territory of the Russian Federation; (ii) that DTEK Krymenergo's investment in Crimea met the temporal requirements of the Treaty; (iii) that DTEK Krymenergo's investment qualified as an investment under the Ukraine-Russia BIT; and (iv) that DTEK Krymenergo met the definition of an "investor" under Article 1(2) of the Treaty. *Id.* ¶¶ 291–296, 368–371, 393–407, 428–452.

On the first issue concerning the definition of "territory" in the Treaty, the Tribunal applied Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") — considering the ordinary meaning of the term "territory," the context of the term "territory" in the BIT, the object and purpose of the BIT, and the principle of good faith in the interpretation and performance of the BIT — and determined that Crimea is part of the "territory" of the Russian Federation under the BIT. *Id.* ¶¶ 250–299. Specifically, the Tribunal determined that for purposes of the Ukraine-Russia BIT, "the 'territory of the Russian Federation' includes all territory which, at the time of the alleged breach of the Treaty, is under the control of the Russian Federation," and there is no dispute that since 2014 Crimea is under the control of the Russian Federation. *Id.* ¶¶ 250–253.

On the second issue concerning the temporal scope of the BIT, the Tribunal "concluded that the proper interpretation of Article 12 of the BIT implies that investments, to be protected,

must have been 'made' or 'carried out' by the investor post-1992; and investments are 'made' or 'carried out' when the investor acquires ownership (or some other *ius in rem* over such assets)." *Id.* ¶¶ 321–371. Since the Parties agreed DTEK Krymenergo's acquisition of its Crimean assets occurred after January 1, 1992, the Tribunal found the requirement of Article 12 satisfied. *See id.* ¶¶ 368–369.

On the third issue concerning whether DTEK Krymenergo's assets qualified as an "investment" under Article 1(1) of the Treaty, the Tribunal agreed with Russia that Article 1(1) requires "[t]hat the investor must have performed an activity, [t]hat the investment must be cross-border, [and] [t]hat the investment must comply with the legislation of the host State," but, interpreting Article 1(1) in light of the VCLT, rejected Russia's argument that "that these three requirements must be met concurrently at the inception of the investment." Award, ¶¶ 393–398. The Tribunal then found that DTEK Krymenergo's investment in Crimea met Article 1(1)'s three requirements. *See id.* ¶¶ 399–406.

On the fourth issue concerning whether DTEK Krymenergo qualified as an "investor" under the Treaty, the Tribunal rejected Russia's argument that DTEK Krymenergo did not satisfy the requirements of Article 1(2) because it was not "competent" to carry out its investment in Crimea. *Id.* ¶¶ 428–430. After determining that competency must be "ascertained at the time when the impugned measures were adopted by Russia," the Tribunal concluded that DTEK Krymenergo "was competent in accordance with the legislation of Ukraine to invest and maintain its investment in Russia in general and in Crimea in particular." *Id.* ¶¶ 436–452.

Finally, the Tribunal rejected Russia's allegations that DTEK Krymenergo's investment had been acquired through fraud or corruption. *See id.* ¶¶ 605–613.

On the merits, the Tribunal determined that Russia's taking of DTEK Krymenergo's assets constituted an unlawful expropriation in breach of Article 5 of the Treaty, as it was not accompanied by compensation, not taken in the public interest, not taken in accordance with due process, and discriminatory. *See id.* ¶¶ 653–786. The Tribunal rejected Russia's defenses under the police powers doctrine and the doctrine of exceptional circumstances. *See id.* ¶¶ 787–826. The Tribunal also concluded that Russia breached Article 2 of the Treaty by failing to legally protect DTEK Krymenergo's investment and breached Article 3 of the Treaty by subjecting DTEK Krymenergo to discriminatory treatment. *See id.* ¶¶ 827–833.

In its Award, issued on November 1, 2023, the Tribunal held Russia liable to Petitioner in the amount of USD 207,800,000, plus interest, and awarded costs in the amount of USD 9,401,644.76 in legal costs and USD 1,362,422.88 in arbitration costs, plus interest. *See id.* ¶ 1030.

By a majority, the Tribunal applied a weighted average of the different valuation alternatives put forward by both Parties to arrive at the fair market value of DTEK Krymenergo's expropriated business. *See id.* ¶¶ 947–952. The Tribunal also awarded DTEK Krymenergo pre- and post-award interest on the compensation of USD 207.8 million 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. *See id.* ¶¶ 964–981, 1030.

On February 1, 2024, Russia filed with The Hague Court of Appeal to set aside the Award. Second Cheek Decl. ¶ 3. The set-aside proceeding is ongoing, and no decisions have been rendered by The Hague Court of Appeal. *See id.* DTEK is summoned to appear before The Hague court on October 1, 2024. *See id.*

D. Petitioner Seeks to Confirm the Final Award in This Court.

Petitioner commenced this proceeding to confirm the Award on November 7, 2023. Pet. Confirm Foreign Arbitration Award, ECF No. 1. On November 20, 2023, Petitioner submitted its request for service "through diplomatic channels" under 28 U.S.C. § 1608(a)(4), explaining that service was unavailable under the methods described in 28 U.S.C. §§ 1608(a)(1)–(3). Aff. Requesting Foreign Mailing, ECF Nos. 6, 6-1.

On April 25, 2024, the State Department sent a letter to the Court Clerk stating that it had delivered the required judicial documents to the Ministry of Foreign Affairs in Moscow on March 29, 2024. Return Service Aff., ECF No. 9. Russia has not contested service.

ARGUMENT

In resolving a motion to dismiss under the FSIA, a court must assume "a plaintiff's unchallenged factual allegations . . . to be true." *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 398 (D.C. Cir. 2018) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)). Where a foreign state "contests only the legal sufficiency of plaintiff's jurisdictional claims, the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief." *Id.* (quoting *Price*, 294 F.3d at 93). Since Russia has not introduced evidence contesting the basis for the Court's jurisdiction under the FSIA, the Court "must assume the truth of [Petitioner's] allegations, make all reasonable inferences in [its] favor, and properly place the ultimate burden of proof with [Respondent]." *Id.* at 401.

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

Under the FSIA, this Court's jurisdictional inquiry is "narrow." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 65 (D.D.C. 2013). The only question is whether an exception to Russia's sovereign immunity applies. If the Court is able to "satisfy itself that one of the exception

applies," then subject-matter jurisdiction is proper. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983).

In its motion to dismiss, Russia wrongly attempts to expand the scope of this Court's jurisdictional inquiry under the FSIA by conflating it with substantive challenges to the recognition and enforcement of the Award under the New York Convention. Russia's arguments are premature, since they go at most to the merits of Petitioner's claim for enforcement of the Award. They are also meritless. The New York Convention and the FAA establish clear, limited grounds to refuse recognition and enforcement (none of which apply here), and courts afford tribunals "considerable deference" when assessing those grounds. *See, e.g.*, *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 844 F.3d 281, 289 (D.C. Cir. 2016).

Here, Russia's challenge to the Court's subject-matter jurisdiction under the FSIA must be rejected because at least two exceptions to Russia's immunity apply. Under either or both the arbitration exception in 28 U.S.C. § 1605(a)(6) (Section A), and the waiver exception in 28 U.S.C. § 1605(a)(1) (Section B), Russia is not immune from this Court's jurisdiction.

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

The FSIA's arbitration exception applies where a petitioner has established three "jurisdictional facts": (1) "the existence of an arbitration agreement"; (2) "an arbitration award"; and (3) "a treaty governing the award," such as the New York Convention. *See Stileks*, 985 F.3d at 877; *see also Chevron*, 795 F.3d at 204. Petitioner has met its burden by showing that there is an arbitration agreement, there is an Award, and the New York Convention governs the award. *See Chevron*, 795 F.3d at 204–05; *Stileks*, 985 F.3d at 877; *supra* pp. 7–11.

The burden therefore shifts to Russia to "establish the absence of the factual basis by a preponderance of the evidence." *Chevron*, 795 F.3d at 204–05 (internal citation omitted). As explained below, Russia cannot and does not meet its burden here. Russia's arguments challenging

the arbitrability of the Parties' dispute do not bear on the Court's jurisdiction under the FSIA (Section 1). Further, this Court is bound by the Tribunal's ruling on its jurisdiction (Section 2), which rejected Russia's arbitrability challenges (Section 3). Last, Russia's claim that the Award is not governed by the New York Convention lacks merit (Section 4).

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

Russia argues that the FSIA's arbitration exception does not apply because "[t]he Federation never agreed to arbitrate with Petitioner." RF Br. 11. According to Russia, because "Petitioner's investment was 'made' when Crimea was under the jurisdiction of Ukraine," RF Br. 19, it was a "domestic investment" outside the scope of the BIT, and thus outside the scope of Russia's offer to arbitrate with Ukrainian investors such as Petitioner. RF Br. 21. Russia claims that "[b]ecause there was no valid offer to arbitrate, there is no arbitration agreement." RF Br. 14 (quoting *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1, 13 (D.D.C. 2023)).

This argument does not go to the application of the FSIA's arbitration exception — it incorrectly conflates the issue of arbitrability of the dispute (i.e., whether Russia's consent to arbitrate under the BIT extends to the *particular dispute* with the Petitioner reflected in the underlying Award) with the question of whether there is an arbitration agreement within the meaning of Section 1605(a)(6) of the FSIA (i.e., whether the BIT contains Russia's consent to arbitrate with Ukrainian investors).

The D.C. Circuit has consistently held that "the *arbitrability* of a dispute is not a jurisdictional question under the FSIA." *E.g.*, *Stileks*, 985 F.3d at 878 (emphasis added); *Chevron* 795 F.3d at 206; *see also Hulley Enters. Ltd. v. Russian Fed'n*, No. CV 14-1996, 2023 WL 8005099, at *11 (D.D.C. 2023); *Blasket*, 665 F. Supp. 3d at 10; *Tethyan Copper Co. Pty Ltd. v.*

Islamic Republic of Pakistan, 590 F. Supp. 3d 262, 275 (D.D.C. 2022). The jurisdictional question under the FSIA is not whether a treaty extends to a particular dispute, but whether there was an offer to arbitrate that was accepted in the manner required by the treaty. *See Chevron* 795 F.3d at 206. In other words: did Russia offer to arbitrate with Ukrainian investors under the BIT, and was that offer properly accepted by Petitioner? *See Chevron* 795 F.3d at 205–06; *Stileks*, 985 F.3d at 877–78.

Russia does not dispute the existence or validity of the Ukraine-Russia BIT, nor that it agreed in the BIT to arbitrate investment disputes with Ukrainian investors. *See* ECF 1.3; *supra* pp. 6–7. Russia also does not dispute that Petitioner accepted this offer of arbitration by filing its Request for Arbitration on February 16, 2018, thereby initiating the arbitration that culminated in the final Award of November 1, 2023 that Petitioner now seeks to enforce. *See* ECF 1.2 at 16; *supra* p. 7; Second Cheek Decl., Ex. A (Request for Arbitration). Instead, Russia attempts to challenge the arbitrability of the specific dispute that underlies the Award — that is, whether Petitioner's particular claims were covered by the BIT.

Russia's arguments go to the question of the arbitral tribunal's jurisdiction (in other words, a question on the arbitrability of the underlying dispute), which is a different issue than the jurisdictional question this Court must answer under Section 1605(a)(6) of the FSIA, which is whether there was an agreement to arbitrate in the first instance. The D.C. Circuit addressed precisely this issue in *Chevron*. There, Ecuador argued that "if Chevron's claims are not covered by the BIT, then Ecuador never agreed to arbitrate with Chevron, and the District Court consequently lacked jurisdiction." *Chevron*, 795 F.3d at 205. The D.C. Circuit rejected Ecuador's argument, explaining that "[t]he BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty. The

FSIA therefore allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award." *Id.* at 206.

The D.C. Circuit reached a similar conclusion in *Stileks*, where Moldova argued that the petitioner was not a qualifying "investor" under the Energy Charter Treaty ("ECT") and therefore could not have properly invoked the ECT's arbitration clause. *See Stileks*, 985 F.3d at 877–78. Moldova argued that, even if the ECT established that it had agreed to arbitrate certain disputes, "it does not prove that [Moldova] agreed to arbitrate *this particular dispute*." *Id.* at 878 (emphasis added). The D.C. Circuit rejected Moldova's argument, explaining that "the arbitrability of a dispute is not a jurisdictional question under the FSIA," *id.* at 878, and that Moldova's position incorrectly "conflate[d] the jurisdictional standard of the FSIA with the standard for review under the New York Convention." *Id.*

Russia makes the same error here. By contesting the arbitrability of the underlying dispute, Russia is challenging, at most, the merits of Petitioner's confirmation request — *not* the Court's subject-matter jurisdiction under the arbitration exception of the FSIA. *See Chevron*, 795 F.3d at 206; *Stileks*, 985 F.3d at 878. Russia's brief ignores the D.C. Circuit's clear guidance on this point in *Chevron* and *Stileks*, and instead invokes a series of inapposite district court decisions in its attempt to argue that this Court should inquire into the nature and scope of Russia's arbitration agreement with Petitioner (i.e., the arbitrability of their dispute).

Russia relies on the district court's decision in *Blasket*, but that case does not support Russia's position. *See* RF Br. 12–13. In *Blasket*, the issue was whether Spain's agreement to arbitrate in the ECT was "invalid under EU law" and thus void *ab initio*. *Blasket*, 665 F. Supp. 3d at 11. Spain argued "that, under the law applicable to them [EU law], the parties were incapable of entering into an agreement to arbitrate *anything at all*." *Id.* at 10 (emphasis added). The court

agreed that Spain "lacked the legal authority to make a standing offer to arbitrate to the Companies under the law that applies to both parties." *Id.* at 12. In reaching this conclusion, Judge Leon expressly noted the distinction between the case before him, which turned on the parties' legal capacity to enter into an agreement to arbitrate, and the *Chevron* and *Stileks* decisions, which concerned "*questions about the 'scope of arbitrability.*'" *Id.* at 9 (emphasis added). Here, Russia does not contest its legal capacity to agree to arbitration in the BIT, nor does it argue this consent to arbitrate was otherwise invalid. Instead, like in *Chevron* and *Stileks*, Russia is improperly challenging the scope of its arbitration agreement and whether it properly extended to Petitioner's claims.[1]

Other cases on which Russia relies are similarly not applicable. *See* RF Br. 12. In *Al-Qarqani v. Saudi Arabian Oil Co*., the Fifth Circuit held that the FSIA's arbitration exception did not apply where the agreement at issue contained no offer to arbitrate on its face, and in fact said "nothing whatsoever about arbitration." *Al-Qarqani v. Saudi Arabian Oil Co*., 19 F.4th 794, 802 (5th Cir. 2021). In other words, there was no evidence that the defendant had agreed to arbitrate anything at all. That is plainly distinguishable from the present case, where it is undisputed that Russia agreed to arbitrate disputes with Ukrainian investors in Article 9 of the Ukraine-Russia BIT.

[1] As Judge Leon explained recently in *Deutsche Telekom AG v. Republic of India*, "arguments, like these, about whether a sovereign's offer to arbitrate covers 'this particular dispute' concern 'the arbitrability of a dispute[, which] is not a jurisdictional question under the FSIA.'" No. 21-1070 (RJL), 2024 WL 1299344, at *3 (D.D.C. 2024) (quoting *Stileks*, 985 F.3d at 878). In *Tethyan Copper Co. v. Islamic Republic of Pakistan*, Judge McFadden similarly explained that "[i]nquiring into the arbitrability of the underlying dispute would examine the contractual rights of the parties to arbitration and would thus be beyond the reach of the FSIA's cabined jurisdictional inquiry." 590 F.Supp.3d 262, 274 (D.D.C. 2022) (quoting *Chevron*, 949 F. Supp. 2d 57, 63).

Russia cites additional cases that are similarly inapposite because they involved arbitration agreements to which the sovereign was not a party. *See* RF Br. 12. In *DRC, Inc. v. Honduras*, for example, the plaintiff sought enforcement against Honduras rather than against the award debtor, a sub-entity of Honduras. *See DRC, Inc. v. Honduras*, 71 F. Supp. 3d 201, 214–219 (D.D.C. 2014). The court determined that because Honduras was not itself a party to the arbitration agreement, and the award was issued solely against its separate and independent entity, the court lacked jurisdiction to entertain the confirmation petition. *See id*. The other cases Russia cites are similarly irrelevant. *See, e.g.,* RF Br. 12 (citing *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 69–70 (2d Cir. 2021) (holding that Moldova was not a party to the applicable arbitration agreement), *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) (holding that the People's Republic of China was not a party to the relevant arbitration agreement), *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul, No.* 08-102, 2010 WL 4027382, at *5–6 (E.D. Pa. Oct. 13, 2010) (finding that sovereign defendant had never been party to the applicable agreement to arbitrate), aff'd sub nom. *Aurum Asset Managers, LLC v. Bradesco Companhia de Seguros*, 441 F. App'x 822 (3d Cir. 2011)).

Petitioner has thus met its burden of demonstrating the existence of an arbitration agreement under Section 1605(a)(6) of the FSIA. Russia agreed to arbitration with Ukrainian investors in the Ukraine-Russia BIT, which DTEK Krymenergo accepted through its Request for Arbitration. *See Chevron*, 795 F.3d at 205; *see also Deutsche Telekom AG v. Republic of India*, No. 21-1070 (RJL), 2024 WL 1299344, at *4 (D.D.C. 2024) ("As far as the FSIA is concerned, that ends the Court's inquiry. India's arbitrability arguments are no response to [the petitioner's]

evidence of an arbitration agreement, so India is not immune from suit in our courts."). The Court's analysis can and should end here.[2]

2. This Court Must Defer to the Tribunal's Ruling on Arbitrability.

As explained above, Russia's arbitrability challenges are not relevant to the Court's assessment under Section 1605(a)(6) of the FSIA. But even if the Court were to consider Russia's arguments on this issue, it must defer to the Tribunal's ruling that Russia agreed to arbitrate the particular dispute with Petitioner underlying the Award.

In *Chevron*, the D.C. Circuit held that Article 21(1) of the UNCITRAL Rules, which delegates to the arbitral tribunal "the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause," constitutes "clear and unmistakable" evidence that the defendant had "consented to allow the arbitral tribunal to decide issues of arbitrability." *Chevron*, 795 F.3d at 207–08 (internal citation omitted). The Ukraine-Russia BIT clearly and unmistakably delegates questions of arbitrability to the arbitrators by providing for arbitration under the UNCITRAL Rules. *See* BIT, Art. 9(2)(c). Because the Parties here clearly and unmistakably agreed to delegate questions of arbitrability to the Tribunal, the Court "must defer to [the] arbitrator's arbitrability decision." *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Further, under the D.C. Circuit's decision in *Stileks*, "that standard is more than mere deference." 985 F.3d at 878. Where "an agreement assigns the arbitrability determinations to an arbitrator, 'a court possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'" *Id.*

[2] In May, the D.C. Circuit again confirmed that, "under the FSIA arbitration exception, the relevant jurisdictional question is the existence of a valid agreement to arbitrate," and nothing more. *Micula v. Gov't of Romania*, 101 F.4th 47, 53 (D.C. Cir. 2024) (citing *Stileks*, 985 F.3d at 877).

Russia fails to address the Parties' clear and unmistakable delegation of arbitrability under the Ukraine-Russia BIT, and instead cites inapplicable cases where the question of arbitrability was not clearly delegated to the arbitral tribunal. *See* RF Br. 13. In particular, Russia's brief cites no precedent where a court reviewed arbitrability *de novo* — as Russia asks this Court to do here — when the Parties clearly and unmistakably delegated that question to the arbitral tribunal. *See Granite Rock Co. v. Int'l Bhd of Teamsters*, 561 U.S 287, 297 & n.5 (2010).

Russia relies instead on cases regarding the *existence* of an arbitration agreement, which are again inapplicable here since Russia's objections concern the *scope* of the agreement to arbitrate (i.e., the arbitrability of the Parties' dispute) — not its *existence* (e.g., the validity of Russia's consent to arbitration in the Ukraine-Russia BIT). RF Br. 13–14; *cf., e.g.*, *Bailey v. Fed. Nat. Mortg. Ass'n*, 209 F.3d 740, 744 (D.C. Cir. 2000) ("[T]his is not a case in which the parties disagree over the meaning of an existing agreement. Rather, the legal battle here is over the *existence* of a contract, not its meaning." (emphasis in original)); *KenAmerican Res., Inc. v. Int'l Union, United Mine Workers of Am.*, 99 F.3d 1161, 1163 (D.C. Cir. 1996) (explaining that the appellants argued that they "never agreed at all to the [agreement containing an arbitration clause] . . . and therefore they did not agree to arbitrate disputes as to its interpretation").

These cases confirm that to confirm its subject-matter jurisdiction under the FSIA, there is no basis for this Court to consider the question of arbitrability. And even if the Court were to consider the issue, it must defer to the Tribunal's ruling that Russia's agreement to arbitrate in the Ukraine-Russia BIT extended to its particular dispute with Petitioner.

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

As explained in Section 1 above, under the FSIA this Court need only determine the *existence* of an arbitration agreement, not its scope and whether that agreement properly extended to Petitioner's claims. And as explained above in Section 2, even if this Court were to consider

Russia's arguments on this issue, because the Parties delegated the question of arbitrability to the Tribunal, this Court must defer to the Tribunal's ruling on arbitrability.

But even if this Court chose to consider the merits of Russia's arbitrability challenges *de novo*, it should reject them. In this regard, Russia asserts three challenges to the arbitrability of its dispute with Petitioner: (i) Crimea was not part of Russia's "territory" for the purposes of the BIT (Section a); (ii) Petitioner did not "make" any investments in Russian territory (Section b); and (iii) Petitioner's investments fall outside the BIT's temporal scope (Section c).

As explained below, each of Russia's challenges should be rejected — a conclusion that is consistent with the findings of the Tribunal, which itself considered and rejected these same arguments. As the U.S. Government has argued at the D.C. Circuit, when a court makes an independent determination of whether there was an agreement to arbitrate, it should "consider affording respectful consideration to the findings made by the arbitral tribunal" in cases where the contested issue implicates factual questions. Br. for United States as Amicus Curiae, *Blasket Renewable Invs*., *LLC v. Kingdom of Spain*, No. 23-7038 at 13 (D.C. Cir. Feb. 2, 2024), ECF No. 2038663 (citing *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (noting that a court's independent consideration may be "informed by the arbitrator's resolution of the arbitrability question")). Such consideration is particularly warranted here, as Russia's objections to arbitrability concern issues of treaty interpretation and international law in which "[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 40 (2014).

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

Under the BIT, Russia agreed to protect Ukrainian investments "in the territory" of the Russian Federation. BIT, Art. 1(1). The BIT defines "territory" as "the territory of the Russian

Federation or the territory of Ukraine . . . defined in accordance with international law." BIT, Art. 1(4).

In the Award, the Tribunal determined that for purposes of the Ukraine-Russia BIT, Crimea is part of the territory of the Russian Federation: "the 'territory of the Russian Federation' includes all territory which, at the time of the alleged breach of the Treaty, is under the control of the Russian Federation; there is no dispute that since 2014 Crimea is under the control of the Russian Federation – and the alleged breach occurred in 2015." Award, ¶ 253. This conclusion is consistent with the interpretation of every tribunal in every publicly available arbitral award to have considered this question.[3]

National courts have also reached this conclusion. For example, the Swiss Federal Supreme Court rejected Russia's attempts to set aside two Swiss-seated arbitral awards, finding that the tribunals had properly applied the concept of "territory" in the BIT to Crimea.[4]

Russia argues that "territory" must be fixed in time at the moment of the BIT's conclusion, when both Ukraine and Russia "understood that Crimea was Ukrainian territory and thus did not fall within the definition of Russian 'territory' under [the] BIT." RF Br. 16. Russia also claims that the BIT cannot apply to "disputed territory, such as Crimea." RF Br. 17. Russia is wrong on both counts.

[3] *See* Award, ¶ 179, *NJSC Naftogaz of Ukraine v. The Russian Federation*, 1:23-cv-01828-JDB (D.D.C.), ECF No. 1 (finding that Crimea is part of the territory of the Russian Federation under Article 1(4) of the BIT); Award, ¶ 218, *Public Joint Stock Company "State Savings Bank of Ukraine" v. Russian Fed'n*, No. 1:23-cv-00764-ACR (D.D.C.), ECF No. 1-2 (same); Award on Jurisdiction, ¶ 175, *Stabil v. Russian Fed'n*, No. 1:22-cv-00983-TNM (D.D.C.), ECF No. 2-4 (same).

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

First, as the Tribunal concluded in the Award, "there is no indication that the Contracting Parties, when they signed the BIT, wished to restrict its geographic scope to the territories which, at that time, were under their respective control . . . what is relevant is the territory which the Contracting Parties had under their effective control as of the date when the alleged breach of the Treaty occurred." Award, ¶ 266.

Russia also asserts that applying the BIT to Crimea would be "tantamount to amending the BIT." RF Br. 16. This argument also must be rejected. As the Tribunal explained in the Award, "the fact that the Contracting Parties did not include a reference to sovereignty [in the BIT] is a clear indication that they wished that investments in new territories, which might in the future come under their control, also benefit from Treaty protection." Award, ¶ 266.

Second, despite Russia's contention otherwise, the fact that "Ukraine disputes Russia's sovereignty over Crimea" is irrelevant. RF Br. 17. Nothing in Article 1(4) of the BIT or elsewhere excludes the BIT from applying to "disputed territory," as Russia suggests. RF Br. 17. As the Tribunal explained, under the BIT, "the 'territory of the Russian Federation' includes all territory which, at the time of the alleged breach of the Treaty, is under the control of the Russian Federation," and "there is no dispute that since 2014 Crimea is under the control of the Russian Federation." Award, ¶ 253. In its reasoning, the Tribunal referenced the powers ascribed by the BIT to the Contracting Parties in their respective territories, and concluded that "the Russian Federation is *de facto* exercising each of these powers in Crimea." Award, ¶ 270. Russia's claim that the "BIT can only function on the basis of mutually recognized territories" is thus wrong, RF Br. 17, as only Russia is in a position to exercise the Contracting Party's obligations under the Treaty in Crimea.

Russia claims to find support for this argument in its diplomatic correspondence related to the application of its BITs with other states. *See* RF Br. 18; Meehan Decl. Exs. 1–22, 25–26. This correspondence is irrelevant, and in any event it lends no support for Russia's argument.

First, the views of third States have no bearing on the interpretation of a bilateral investment treaty between Russia and Ukraine.[5] The Tribunal, in its ruling on the meaning of "territory" under the BIT, properly applied the international law rules on treaty interpretation, as reflected in Article 31 of the VCLT. Award, ¶¶ 254-285.

Second, the correspondence Russia cites demonstrates that Russia interprets its obligations under its BITs with those States as *applying* in the territory of Crimea. *See, e.g.*, Meehan Decl. Ex. 1 (Russia's Ministry of Foreign Affairs "notify[ing]" the British Government that the Russia-UK BIT "shall apply to legal relations arising out of investments made in accordance with the legislation of the Russian Federation" in the territories Russia has purported to annex in eastern Ukraine and "shall apply similarly to the Republic of Crimea and the federal city of Sevastopol."); Meehan Decl. Ex. 3 (Russia's Ministry of Foreign Affairs "notify[ing]" the Government of Canada that the Russia-Canada BIT "shall apply to legal relations arising out of investments made in accordance with the legislation of the Russian Federation" in the territories Russia has purported to annex in eastern Ukraine and "shall apply similarly to the Republic of Crimea and the federal city of Sevastopol.").

In sum, as the Tribunal rightfully concluded, Crimea was the "territory" of the Russian Federation for the purposes of Article 1(4) at the time Russia breached the BIT and when the arbitration commenced. Award, ¶¶ 225–299.

[5] *See* Vienna Convention on the Law of Treaties ("VCLT"), Arts. 31–32.

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

Article 1(1) of the BIT protects "assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party," while Article 12 states that the BIT applies to "all" investments "made by investors of one Contracting Party in the territory of the other Contracting Party" after January 1, 1992. BIT, Arts. 1(1), 12. Russia claims that "Russia's offer to arbitrate can only be invoked by Ukrainian investors who "made investments in territory that was part of Russia *at the time of the investment*." RF Br. 19 (emphasis in original).

The Tribunal also considered and rejected this argument in the Award. *See* Award, ¶¶ 381–412. As the Tribunal reasoned, "the purpose of the BIT is to protect cross-border investment from improper measures of the host State. There is no reason to deprive an asset from protection only because it was made in a territory which initially did not form part of the other Contracting State and which, thereafter, was annexed and incorporated into such State." Award, ¶ 404. The Tribunal therefore concluded that "[a] measure, adopted by the host State against an investment owned by an investor from the other Contracting State, cannot be excused simply because the protected investment is situated in a territory annexed by such State while the BIT was in force." Award, ¶ 404. As the Tribunal further explained, "[t]he moment when the cross-border requirement must be met is when the impugned measures are adopted by the host State, when the assets owned by a protected investor from the other Contracting Party are impaired, and when the protection granted by the BIT to foreign investment becomes effective." Award, ¶¶ 250–299, 401–403; *see supra* p. 10.

Consistent with the Tribunal's conclusion, at the time Russia expropriated Petitioner's investments, Petitioner held investments in the territory of the Russian Federation, and thus qualified as a protected investor under the BIT.

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

Article 12 of the BIT provides that "the Agreement shall apply to all 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. Russia maintains that it "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." RF Br. 22.

The Tribunal considered and rejected this argument, too. *See* Award, ¶¶ 300–369. As the Tribunal explained, to benefit from protection under the Treaty, Petitioner "must have acquired its Crimean assets, including the Soviet Assets, after 1 January 1992." Award, ¶ 369. The Tribunal unanimously concluded that "[t]here is no dispute that Krymenergo meets this test. . . . [B]oth Parties agree that the acquisition occurred after 1 January 1992; the requirement of Article 12 of the Treaty is thus satisfied." Award, ¶¶ 321–369; *see supra* pp. 9–10.

The facts plainly affirm that, as the Tribunal determined, Petitioner acquired its investments on or after January 1, 1992.

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

In addition to having established the existence of an arbitration agreement and an arbitration award, Petitioner has met the third element under the FSIA's arbitration exception: the award Petitioner seeks to enforce "is or may be governed by a treaty" in force in the United States. *Chevron*, 795 F.3d at 204 n.2; *supra* pp. 2–3.

Russia does not dispute that the Award is subject to the New York Convention, nor that Russia, the United States, and the Netherlands (the seat of the arbitration) are all signatories to the

Convention.[6] Nevertheless, Russia argues that the Award falls outside the scope of the New York Convention as codified in U.S. law because it does not "aris[e] out of a commercial relationship between the parties." RF Br. 22; *see* 9 U.S.C. § 202 (providing that an arbitral award must "arise[] out of a legal relationship, whether contractual or not, which is considered as commercial" to fall under the Convention). According to Russia, this commercial reservation to the New York Convention precludes the Convention from applying here because "[n]o such commercial relationship exists between Russia and Petitioner." RF Br. 22.

Russia is plainly wrong. The Parties' dispute arose out of Petitioner's investments in Crimea, in particular its electricity distribution business, operating the power distribution grid and distributing electricity to more than 780,000 consumers in Crimea. *See* Award, ¶¶ 191–206; *supra* pp. 4–6. This is an activity "in connection with commerce" and thus "commercial" for purposes of the New York Convention.[7] *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 103–04 (D.C. Cir. 2015) (observing that "[i]n the context of international arbitration, 'commercial' refers to 'matters or relationships, whether contractual or not, that arise out of or in connection with commerce.'"). In this regard, the D.C. Circuit has consistently adopted a broad definition of "commercial" under the New York Convention and FAA. *See Hulley*, 2023 WL 8005099, at *25 ("The D.C. Circuit invites a broad interpretation of the meaning of commercial in this context."); *Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria, No.* CV 22-170 (BAH), 2023 WL 417975, at *5 (D.D.C. 2023) ("The FAA does not define the term 'commercial,' but the D.C. Circuit has interpreted the term expansively.").

[6] *See Contracting States*, New York Convention, https://www.newyorkconvention.org/countries.

[7] Russia says that "[t]he commercial reservation was intended to exclude 'political awards' from being enforced under the New York Convention." RF Br. 22. But this is not a political award. The Award arose out of a dispute between Russia and JSC DTEK Krymenergo, a Ukrainian company wholly owned by SCM Group, a private entity. *See* Award, ¶ 3; *supra* p. 4.

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

DTEK Krymenergo has demonstrated the required "commercial" relationship under the FAA: it is enforcing an investor-state award rendered under a BIT, which is subject to the New York Convention. That Award arose from the Parties' dispute under the BIT, which related to Russia's expropriation of Petitioner's electricity distribution business (a commercial activity). Russia's contention that it did not have commercial dealings directly with Petitioner is immaterial and ignores the "crush of cases"[8] that have held that an award arising from a BIT such as this one arises out of a legal relationship that is "commercial." *See, e.g., Zhongshan*, 2023 WL 417975, at *7–8 (rejecting Nigeria's "false dichotomy between sovereign and commercial conduct in the context of the New York Convention" and finding "there can be no debate that the multimillion-dollar investment that Petitioner made in Nigeria to develop, manage and operate a free trade zone near Lagos was connected with commerce'"); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179,

[8] *Zhongshan*, 2023 WL 417975, at *7 (D.D.C. 2023).

186–87 (D.D.C. 2016) (finding a commercial relationship between the parties to an investment treaty award where, "[i]n the transactions underlying this case, respondent Kazakhstan granted and revoked petitioners' rights to develop oil and gas fields within its borders" (citing *Belize*, 794 F.3d at 104)); *Hulley*, 2023 WL 8005099, at *27 (listing "the nature of the assets involved" as evidence "confirm[ing] the commercial relationship underlying the dispute leading to the Final Awards" which arose out of an investment treaty).

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

As addressed in Part A, Russia is not immune from this Court's jurisdiction under the FSIA's arbitration exception. In addition, Russia also is not immune from jurisdiction under the FSIA's waiver exception.

Under the waiver exception to the FSIA, a foreign state is not immune from the court's jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Separately and independently from the application of the arbitration exception, this Court has subject-matter jurisdiction under the FSIA's waiver exception because as a signatory to the New York Convention that agreed to arbitration in Convention states, including the Netherlands (the seat of the arbitration), Russia waived its immunity in this case.

Courts in this District have consistently found the waiver exception satisfied where a state signatory to the New York Convention agreed to arbitrate in another signatory state. *See Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 192 (D.D.C. 2018) (explaining that Ukraine should have anticipated enforcement actions in New York Convention signatory states based on Ukraine's agreements to arbitrate in other Convention signatory states), aff'd, 771 F. App'x 9 (D.C. Cir. 2019); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 189 (D.D.C. 2016) ("[W]hen a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states.") (quoting *Creighton*, 181 F.3d

at 123); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria ("P&ID")*, 506 F. Supp. 3d 1, 9–11 (D.D.C. 2020) (noting that it would "undermine the fundamental policy of the New York Convention" to hold that Nigeria had retained its sovereign immunity), aff'd on other grounds, 27 F.4th 771 (D.C. Cir. 2022); *see also ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, 628 F. Supp. 3d 1, 7 (D.D.C. 2022) (finding Venezuela implicitly waived immunity by becoming a contracting state to the ICSID Convention).[9]

The D.C. Circuit has noted that "when a country becomes a signatory to the [New York] Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." *Creighton*, 181 F.3d at 123 (quoting *Seetransport Wiking Trader v. Navimpex Centrala Navala*, 989 F.2d 572, 578–79 (2d Cir. 1993)). The D.C. Circuit further expressly held in *Tatneft* that "by signing the New York Convention, [a signatory] waives its immunity from arbitration-enforcement actions in other signatory states." *Tatneft*, 771 F. App'x at 10 (citing *Creighton*, 181 F.3d at 123). As a signatory to the New York Convention that agreed to arbitration in Convention states, including the Netherlands (the seat of the arbitration), Russia has impliedly waived its immunity in this case. *See supra* p. 3.

Russia dismisses the D.C. Circuit's *per curiam* holding in *Tatneft*, calling the decision "unpublished and non-binding." RF Br. 26. Russia further claims that in *P&ID* the D.C. Circuit "refused to apply" *Tatneft*. RF Br. 26. But that is not true — in *P&ID*, the D.C. Circuit merely "*decline[d] to address* the district court's interpretation and application of the waiver exception and instead [found] Nigeria's sovereign immunity abrogated by the arbitration exception." *P&ID*, 27 F.4th at 775 (emphasis added). As a court in this District recently noted, "nothing in that

[9] Courts in the Second Circuit have adopted the same analysis. *See Seetransport*, 989 F.2d at 578–79 (New York Convention); *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (ICSID Convention).

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

Russia also claims that *Tatneft* is inconsistent with the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). RF Br. 26–27. This is also incorrect. *Amerada Hess* held that a foreign state does not waive its immunity under the FSIA "by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts *or even the availability of a cause of action in the United States*." *Creighton*, 181 F.3d at 123 (emphasis added) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989)). Unlike the international agreements in *Amerada Hess*, the New York Convention is "an international treaty obligating member states to recognize and enforce arbitral awards issued in other member states," including the United States. *P&ID*, 27 F.4th at 772.

Russia's objections to the application of the waiver exception also find no support in the text or legislative history of the FSIA. *See* RF Br. 28–29. Russia argues that applying the waiver exception here would render the arbitration exception "superfluous" and "strip[] the later enacted and more specific arbitration exception" of its effectiveness. RF Br. 27–28. This argument has already been rejected by the D.C. Circuit, which explained in *Tatneft* that because "the waiver exception requires a foreign sovereign to give up its immunity defense intentionally, whereas the arbitration exception does not," these two exceptions may overlap but are not coterminous. *Tatneft*, 771 F. App'x at 10 (citing *Creighton*, 181 F.3d at 126); *see also P&ID*, 506 F. Supp. 3d at 9–10. Further, while Russia insists that "[i]t is hard to imagine a case that would fall within the arbitration exception . . . but not the waiver exception," RF Br. 28, *Creighton* "is precisely the case that [Respondent] claims to have trouble imagining." *P&ID*, 506 F. Supp. 3d at 9–10 (explaining that

the court in *Creighton* found jurisdiction over a non-signatory to the New York Convention under the FSIA's arbitration exception but not its waiver exception).

Russia also is wrong in arguing that Congress legislated against the rule of implied waiver when it amended the FSIA to enact the arbitration exception instead of revising the waiver exception. This argument conflates "whether an agreement to arbitrate overseas, by itself, constitutes a waiver of immunity under the FSIA," with "whether entering the New York Convention or a similar treaty effects a waiver of immunity in a subsequent proceeding brought in the U.S. to enforce an arbitral award rendered in the territory of a Convention signatory." *P&ID*, 506 F. Supp. 3d at 9–10. Even if "Congress implicitly answered the first question in the negative" by enacting the FSIA's arbitration exception, it "does not follow that Congress expressed any view on the second question, which *Seetransport* answered in the affirmative." *Id.* at 9–10. In other words, there remains an independent ground to invoke the waiver exception, regardless of whether the arbitration exception may also apply.

Finally, Russia also paints an incomplete picture of the D.C. Circuit's decision in *Creighton*. RF Br. 29. In *Creighton*, Qatar had *not* signed the New York Convention, and therefore, according to the D.C. Circuit, had not "demonstrate[d] the requisite intent to waive its sovereign immunity in the United States." *Creighton*, 181 F.3d at 123. Thus, the court declined to find an implicit waiver of sovereign immunity in U.S. courts based *solely* on "Qatar's agreement to arbitrate in France." *Creighton*, 181 F.3d at 121.

Creighton is plainly distinguishable here. It is undisputed that Russia has both acceded to the New York Convention *and* agreed to arbitrate in the Netherlands, a Convention signatory.[10]

[10] As explained above, Russia's arbitrability objections have no bearing on this conclusion. Russia consented to resolution of disputes by the Arbitration Institute of the Stockholm Chamber of Commerce or under the UNCITRAL Rules. BIT, Art. 9(2)(b)–(c). In accordance with Article 9,

Consistent with *Tatneft*, this is sufficient for the waiver exception to apply. Russia cites *no* authority from any court that would support its contention that the waiver exception does not apply where — as here — a signatory to the New York Convention has agreed to arbitration in a Convention signatory state.

Thus, regardless of whether this Court finds the arbitration exception applies, the Court separately has subject-matter jurisdiction under the FSIA's waiver exception.

II. This Court Has Personal Jurisdiction Under the FSIA.

The FSIA provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction . . . where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). In other words, as the D.C. Circuit has explained, "under the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.1 (D.C. Cir. 1987). Here, the Court has personal jurisdiction over the Russian Federation under the FSIA because an enumerated exception to Russia's jurisdictional immunity applies, *supra* Part I, and because Russia was properly served via diplomatic channels under 28 U.S.C. § 1608(a)(4). 28 U.S.C. § 1330.

Russia does not contest the adequacy of the service under 28 U.S.C. § 1608(a)(4). Instead, Russia argues that "exercise of jurisdiction under the FSIA would not comport with due process" because "this case has no connection to the United States." RF Br. 30. As an initial matter, Russia's due process argument fails because foreign states are not "persons" protected by the Fifth

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Petitioner commenced arbitration under the applicable UNCITRAL Rules, which provide that the tribunal shall determine the seat of arbitration if not otherwise agreed by the parties. UNCITRAL Rules 1976, Art. 16(1). It is undisputed that the Tribunal designated The Hague, the Netherlands, as the seat of arbitration.

Amendment. The D.C. Circuit has held that "the Fifth Amendment poses no obstacle" to personal jurisdiction in the federal courts where the FSIA's requirements are met. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

As the D.C. Circuit further elaborated in *TMR Energy*, the requirements of the FSIA "clearly express[] the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state . . . coextensive with the [statutory] exceptions to foreign sovereign immunity." *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005). Accordingly, courts in this Circuit have applied this specific precedent in assessing personal jurisdiction in actions to enforce arbitral awards under the New York Convention. *See, e.g.*, *TMR Energy Ltd.*, 411 F.3d at 302 (referencing *Price* when finding that an agency or instrumentality of a foreign state, like its principal, "is not a 'person' for purposes of the due process clause and cannot invoke the minimum contacts test to avoid the personal jurisdiction of the district court"); *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 244 (D.D.C. 2015) (upholding personal jurisdiction in award-enforcement action under the FSIA, despite the foreign state's argument that it lacked minimum contacts required by due process).

Russia recognizes the binding precedent in *Price*, but "maintains that *Price* was wrongly decided and should be overturned" and seeks "to preserve its right to ask the D.C. Circuit to overturn Price on appeal." RF Br. 30. Russia is not asking this Court to overturn *Price*, nor should this Court overturn *Price* — this Court should apply the binding and consistent precedent of the D.C. Circuit. Because the Court has subject-matter jurisdiction under Section 1605(a)(6) and 1605(a)(1), and Russia was properly served under Section 1608, the FSIA authorizes the Court's exercise of personal jurisdiction over Russia.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court deny Russia's Motion to Dismiss.

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Respectfully submitted,

Marney L. Cheek (DC Bar No. 470596)
Amanda Tuninetti (DC Bar No. 1521002)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
mcheek@cov.com
atuninetti@cov.com

Counsel for Petitioner