UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DECLARATION OF ALEXEI S. AVTONOMOV

Petitioner Joint Stock Company State Savings Bank of Ukraine ("**Oschadbank**") respectfully submits this memorandum of law in support of its motion to strike the declaration of Alexei S. Avtonomov dated August 7, 2024 and the exhibits thereto (the "**Avtonomov Declaration**") (ECF 52) filed with the Russian Federation's ("**RF's**") reply memorandum of law in support of its motion to dismiss. (ECF 51).

PRELIMINARY STATEMENT

The RF burdened the record on its motion to dismiss with a 41-page opening brief (ECF 38), four lengthy declarations[1], and over five thousand pages of exhibits that it contends support its entitlement to dismissal of this case on jurisdictional grounds. Nearly all of these submissions are irrelevant to whether the Court has subject matter jurisdiction to hear this proceeding. In

[1] One such declaration relates to service of process and has been rendered moot.

opposition to the motion to dismiss, Oschadbank submitted a concise brief (ECF 43) arguing solely issues of law, and no supporting evidence. In a gross abuse of the page limitations for reply submissions, on August 9, 2024, RF filed a 26-page reply memorandum and a separate 27-page declaration of Avtonomov, a law professor and purported specialist in "the international law of treaties, international arbitration, and comparative law analysis," on the issue of whether "by adopting the UNCITRAL Rules, did the Parties intend to exclude post-arbitration *de novo* judicial review of Arbitrability?" ECF 52 at 1-2. The Avtonomov Declaration is accompanied by an annex and 38 separate exhibits comprised of over 800 pages—all purporting to address whether Article 21(1) of the UNCITRAL rules "reflect an agreement to exclude post-arbitration *de novo* judicial review of Arbitrability." *Id.* at 3.[2]

The reply declaration is neither responsive to Petitioner's opposition, nor does it have any bearing on Russia's motion to dismiss. As this Court has already recognized during the pre-motion conference in this matter, the issues addressed in the Avtonomov Declaration are the subject of settled U.S. law. In response to RF's counsel's suggestion that the doctrine of "competence-competence" was applicable, the Court unequivocally stated "but that's not the law in the U.S. It's just not. I mean, I've taught the doctrine." ECF 32 at 46-47, lines 20-25; 1-9. The Court does not need to hear from a purported international law expert to determine, as a matter of U.S. law, whether the arbitrability of the underlying dispute can be revisited. As Oschadbank explained in its opposition brief, the binding decisions in *Stileks* and *Chevron* establish that agreeing to the UNCITRAL rules constitutes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 879 (D.C. Cir. 2021)

[2] With this new 800-plus-page reply, RF's total submissions for its motion to dismiss approach ***six thousand pages***—or roughly 265 times as many pages as Oschadbank's submissions.

(quoting *Chevron Corp. v. Ecuador*, 795 F.3d 200, 208 (D.C. Cir. 2015). And on August 16, 2024, the D.C. Circuit re-affirmed this holding in *Kingdom of Spain*, stating that both "ICSID and UNCITRAL [] delegate to the arbitral tribunal the power to decide threshold issues of arbitrability." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 23-7031, 2024 WL 3837484, at *4 (D.C. Cir. Aug. 16, 2024). In the face of this unequivocal authority, the Avtonomov Declaration is extraneous and unnecessary information that should be stricken from the record.

The Avtonomov Declaration is also an improper reply submission. The RF acknowledged its perceived need to submit a declaration to "explain in detail" how the Article 21.1 "competence-competence" clause of the relevant 1976 UNCITRAL Rules is "interpreted under international law" (ECF 38 at 11, n. 11), yet omitted any such evidence in its opening submissions. If the RF was of the view that the (irrelevant) opinions contained in the Avtonomov Declaration were necessary to support its motion to dismiss, it should have included the declaration with its opening papers. The RF should not be permitted to belatedly burden the Court and Petitioner with over 800 pages of new evidence on reply that is not responsive to any evidence offered by Petitioner.

Finally, the Avtonomov Declaration is an impermissible use of expert testimony to opine on an ultimate legal issue within the sole purview of the Court. While Federal Rule 44.1 permits a U.S. court to receive evidence to assist in determining foreign law, general principles of international law are not covered by this rule. Instead, RF's international law declaration is an improper effort to circumvent this Court's briefing page limits.

LEGAL STANDARD

Motions to strike are governed by Federal Rule of Civil Procedure 12(f), which permits the court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter" on its own initiative or through a party's motion. Fed. R. Civ. P. 12(f); *Shaw v. Dist. of Columbia*, No. CV-1700738 (DLF/RMM), 2018 WL 5044248, at *2 (D.D.C. Sept. 11, 2018).

Notwithstanding the limited scope of Rule 12(f), courts in this district entertain motions to strike filings that are not pleadings. *See, e.g., Larouche v. Dep't of the Treasury,* No. 91-CV-1655 (RCL), 2000 WL 805214, at *13-14 (D.D.C. Mar. 31, 2000) (explaining the propriety of considering a motion to strike a declaration attached to a cross-motion for summary judgment), *amended in part sub nom. LaRouche v. U.S. Dep't of Treasury*, No. 91-CV-1655 (RCL), 2000 WL 33122742 (D.D.C. Nov. 3, 2000); *see also Lamb v. Millennium Challenge Corp.,* 228 F. Supp. 3d 28, 38 (D.D.C. 2017) (considering motion to strike a declaration submitted with a reply brief in support of a motion for summary judgment); *Scott v. J.P. Morgan Chase & Co.*, 296 F. Supp. 3d 98, 105 (D.D.C. 2017) (considering motion to strike documents attached to a motion to dismiss); *Partridge v. Am. Hosp. Mgmt. Co., LLC,* 289 F. Supp. 3d 1, 11 (D.D.C. 2017) (considering motion to strike an errata). Whether to grant a motion to strike is "vested in the trial judge's sound discretion." *Gates v. District of Columbia*, 825 F. Supp. 2d 168, 169 (D.D.C. 2011).

ARGUMENT

I. THE AVTONOMOV DECLARATION IS IMPERTINENT AND SHOULD BE STRICKEN.

This Court does not need another 27-page declaration and over 800 additional pages of exhibits to rule on RF's motion to dismiss. It already has before it extensive briefing and four declarations from the RF with 5,114 pages of exhibits in support of RF's motion. It should not consider yet another new declaration that is not responsive to any evidence offered by Oschadbank and is completely unnecessary for resolution of RF's motion to dismiss, which turns solely on whether RF is entitled to sovereign immunity under U.S. law.

The subject of the Avtonomov Declaration is whether the arbitrability of the underlying dispute that led to the award can be revisited post-arbitration by a court considering whether to grant recognition to the award. In a U.S. enforcement proceeding, this question is a matter of

U.S. law, not general principles of international law. And in this Circuit, the unequivocal answer to that question is "no". There is no question that under the law of this Circuit, a parties' agreement to the UNCITRAL rules constitutes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Stileks*, 985 F.3d at 879 (quoting *Chevron,* 795 F.3d at 208). Thus, "when the parties have delegated the arbitrability issue to the arbitrator, the party resisting confirmation of the award 'is not entitled to an independent judicial redetermination of that same question.'" *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp. 3d 137, 147 (D.D.C. 2018) (quoting *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012). More recently, in a case in which the RF is also challenging the Court's subject matter jurisdiction to enforce an award, Judge Howell rejected "[t]he Russian Federation's reliance on the principle of Competence-Competence" as "merely a deflection of the import of its explicit agreement to have the Tribunal decide its own jurisdiction to resolve the arbitration claims brought by the Shareholders." *Hulley Enterprises Ltd. v. Russian Federation*, 14-1996, 2023 WL 8005099, at *14 (D.D.C. Nov. 17, 2023). And, just last week, the D.C. Circuit reiterated in the *Kingdom of Spain* cases that both "ICSID and UNCITRAL [] delegate to the arbitral tribunal the power to decide threshold issues of arbitrability" and that "what was true in *Stileks* is true here," namely, that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *NextEra Energy Glob. Holdings B.V.*, 2024 WL 3837484, at *4, 10.

The RF asks this Court to toss aside the binding authority espoused in *Stileks*, *Chevron*—and presumably *NextEra* as well—because it contends neither case "appears to have considered international law in interpreting 'competence-competence' clauses under UNCITRAL Rules." ECF 51 at 15-16, 16 n. 16. However, the fact that these Courts ruled without applying the

doctrine or requiring any such evidence demonstrates that it is simply not a relevant inquiry and thus one that this Court need not consider.

II. THE AVTONOMOV DECLARATION IS AN IMPERMISSIBLE REPLY SUBMISSION.

Oschadbank limited its opposition to RF's motion to dismiss to a 22-page opposition brief, focused purely on U.S. law, with no supporting evidence. There is no legitimate reason for the RF to respond to this absence of evidence with voluminous (and irrelevant) new international law evidence offered for the first time on reply.

To make matters worse, the RF was well-aware long before it filed its motion to dismiss of Oschadbank's (and the Court's) understanding that the question of arbitrability is not reviewable by the court *de novo*. The issue was first addressed in the parties exchange of letters preceding the pre-motion conference on RF's motion to dismiss. (ECF 28, at 1-2). Later, during the pre-motion conference the parties and the Court discussed this argument ***at length***:

> Mr. Hranitzky: [U]nder that case [Chevron], D.C. Circuit said when the parties agree that the issue of arbitrability is to be decided by the tribunal… when the tribunal finds that the dispute is arbitrable, there's no issue under Section 1605(a)(6), that is clear law in this Circuit.
>
> The Court: Yeah, but if the BIT doesn't apply, then there was no agreement to let the arbitrators decide.
>
> Mr. Hranitzky: But then that's a merits issue. What *Chevron* says is that that's a merits issue. …
>
> The Court: Okay. …
>
> (ECF 32 at 34, lines 3-16)
>
> …
>
> The Court: [O]nce the tribunal makes the decision … the tribunal wins.
>
> Mr. Marks: No. There has to be exclusive delegation, Your Honor. And ***that's why it's so important and it will have to be briefed***, and it wasn't mentioned here, but Your Honor might be familiar there's

> a doctrine called Competence-Competence…. And under the doctrine of Competence-Competence, all you're saying is, listen, we're going to let the tribunal look at it first, but that's without prejudice, either side to file a set-aside --
>
> The Court: Yeah, ***but that's not the law in the U.S. It's just not.*** I mean, I've taught the doctrine.
>
> (ECF 32 at 46-47, lines 22-25; 1-9) (emphasis added)

But there is still more. RF expressly acknowledged in its opening brief the need to respond to that argument with expert evidence, yet held off doing so until reply. In its opening brief, RF stated:

> Oschadbank's Pre-motion Filing (ECF 28) inaccurately claimed the RF is not entitled to *de novo* review of its arguments against FSIA jurisdiction, because it is somehow bound by the Award, even though it did not participate in the arbitration. … If Oschadbank raises this meritless issue in its response, the RF will explain in detail how this language, interpreted under international law, does not delegate "exclusive authority" to decide jurisdiction on the arbitrators. ECF 38 at 11-12, n. 11 (emphases in original).

It also bears noting that RF, through the very same counsel representing it here, has previously retained Avtonomov as an expert on the competence-competence doctrine. *See Yukos Capital Limited v. The Russian Federation*, 1:22-cv-00798-CJN (ECF 42) (D.D.C. Jan. 30, 2023) (report of Alexei Avtonomov prepared at the request of Marks & Sokolov, LLC on the issue of "by adopting the UNCITRAL Rules in this case, did the Parties intend to exclude post-arbitration de novo judicial review of Arbitrability?"). Thus, the RF cannot credibly claim that it needed time to develop the opinions in the Avtonomov Declaration; RF advanced these arguments a year and a half ago in connection with a related matter.

In this Circuit, it is a "basic precept that arguments generally are forfeited if raised for the first time in reply." *Twin Rivers Paper Co. v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019); *see also United States v. Sum of $70,990,605*, 4 F. Supp. 3d 189, 197 n.5 (D.D.C. 2014) (holding that

"arguments raised for the first time in a reply brief [in support of a motion to dismiss] are not considered.") The same is true for new evidence submitted with a reply submission. *See Nguyen v. U.S. Department of Homeland Security,* 460 F. Supp.3d 27, 34 (D.D.C. 2020) ("arguments generally are forfeited if raised for the first time in reply" and "[t]his same principle applies to newly proffered evidence attached to a reply brief." (internal citations omitted)); *Patterson v. Johnson*, 391 F. Supp. 2d 140, 142 n.1 (D.D.C. 2005), (refusing to consider four affidavits attached to the movant's reply brief), *aff'd,* 505 F.3d 1296 (D.C. Cir. 2007). In *National Parks Conservation Association v. U.S. Forest Service,* CV 15-01582 (APM), 2015 WL 9269401, at *3 (D.D.C. Dec. 8, 2015), the Court declined to consider three declarations submitted with a reply brief where "Plaintiff easily could have offered such evidence with its Motion." As the *National Parks* Court observed, "Litigation is a not a shell game, in which a movant is permitted to make general assertions in a motion, leaving its opponent to guess at its grounds, only then to supply content in a reply brief." *Id*.

The same should apply here. The purpose of this rule is to avoid surprises and give the opposing party a fair opportunity to respond. *Id.* (noting that it would be "patently unfair" for the court to "consider Plaintiff's arguments made for the first time in its Reply"). This rule is even more compelling, where, as here, both a pre-motion exchange and lengthy pre-motion conference preceded the motion. A pre-motion exchange requires that "the moving party shall submit a short notice . . . setting forth the basis for the anticipated motion, including the legal standards and the claims at issue" and that the opposing party "set[] forth their anticipated responses to the proposed motion." Standing Order 7(f). And during the pre-motion conference, the Court and the parties discussed the arbitrability review argument in detail. *See* ECF 32 at 32-35, 40, 45-51. Given that these procedures are intended (and clearly, did) allow the moving party to anticipate arguments in

opposition, it is egregious that RF failed to submit all of its evidence when it filed its dismissal motion.

III. THE AVTONOMOV DECLARATION IS AN IMPERMISSIBLE OPINION OF LAW.

RF's international law declaration is also an improper effort to circumvent this Court's briefing page limits and use expert testimony to opine on "ultimate legal conclusion[s]." *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 65 (S.D.N.Y. 2001). To be sure, Rule 44.1 allows parties to submit "testimony" to determine "foreign law." But "foreign law" in this context refers to the law of a foreign state, not international law. *See ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 628-29 (2022) (the word "foreign" means "belonging to another nation or country") (internal citations and brackets omitted). This is no accident: U.S. courts have always distinguished between "[i]nternational law," which is relevant to the extent that it "is part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and foreign law, which, historically, posed a question of fact. *See The Scotia*, 81 U.S. 170, 188 (1871) ("Foreign municipal laws must indeed by proved as facts, but it is not so with the law of nations."). Rule 44.1 departs from the common law by making foreign law a question of law, albeit one provable by testimony. *See Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 42 (2018). But Rule 44.1 does not address international law, which has always been a question of law for U.S. courts, and as such should be addressed by counsel within the (comparatively generous) page limits for motion practice specified by this Court's local rules.

CONCLUSION

For these reasons, this Court should grant Petitioner's Motion to Strike the declaration of Alexei S. Avtonomov in its entirety.

DATED: August 20, 2024

Respectfully submitted,

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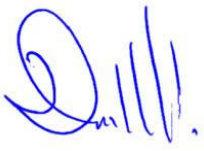
By 

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