IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank), Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. 1:23-cv-00764 (ACR)

RESPONDENT RUSSIAN FEDERATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE PETITION TO CONFIRM THE ARBITRATION AWARD OF JOINT STOCK COMPANY STATE SAVINGS BANK OF UKRAINE (OSCHADBANK)

(ORAL HEARING SEPTEMBER 18, 2024)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Cases

Statutes

Rules

Treaties

Publications and Other Authorities

PRELIMINARY STATEMENT[1]

Based on FSIA's presumption of sovereign immunity, the MTD demonstrated that this Court lacks subject matter jurisdiction because Oschadbank did not establish that FSIA §1605(a)(6) arbitration or §1605(a)(1) waiver exceptions apply. Deliberately ignoring most of the RF's arguments, Oschadbank gambles on four main assertions. All fail.

First, Points IA-C below, when a sovereign invokes immunity, an investor-claimant cannot satisfy the arbitration exception by simply introducing a few pieces of paper, *i.e.*, a BIT, notice of arbitration, and an award. More is required. U.S. Supreme Court precedent dictates that courts, not arbitrators, decide whether an arbitration agreement applies to a particular type of controversy. And, as the Supreme Court held in *Helmerich* and other post-*Chevron* cases, courts must decide FSIA jurisdictional issues, even if they overlap with merits. This mandates finding whether there was an "agreement … to submit to arbitration," *i.e.*, whether the RF's offer to arbitrate in the BIT applies to the Crimea, and whether Oschadbank accepted the offer. The Response, 11, consciously ignores the RF's six jurisdictional arguments that it never offered to arbitrate investments made in Crimea, or any investments made before January 1, 1992. As such, they are admitted. And, even if the RF made such an offer, the Notice of Arbitration rejected it by denying that Crimea was RF territory. Either basis requires the MTD to be granted.

Second, Point ID, the Response, 15-16, cursorily argues that the BIT's incorporation of the UNCITRAL Rules "competence-competence" clause precludes the RF from challenging jurisdiction. This fails, because there is no "clear and unmistakable" evidence the RF and Ukraine delegated "exclusive authority" to arbitrators to decide whether the RF offered to arbitrate

[1] Unless otherwise stated, all emphases are added, and all citations, quotation marks, footnotes, ellipses and brackets omitted. Abbreviated citations and defined terms are those used in the MTD.

investments in Crimea. Further, contrary to the Response, 16, under *P&ID I*, the Court may not rule on the RF's NY Convention merits defenses until jurisdiction is resolved. *See* MTD, 1 n.1, 8.

Third, Points IE and IF, even if an offer was made and not rejected, Oschadbank is not a "private party" under §1605(a)(6). Under §1603(b), Oschadbank is indisputably an "agency or instrumentality" of Ukraine, which wholly owns it, and therefore itself falls within the definition of a "foreign state" under §1603(a). Thus, it is not a "private party" based on elementary principles of statutory construction. Nor is there a "commercial" legal relationship between Oschadbank and the RF as the NY Convention (as adopted by the U.S.) requires, because the Convention's history establishes it does not apply to disputes between foreign states. *Tatneft I,* an unpublished and non-precedential decision to begin with, says nothing on the issue, contrary to the Response, 3, because Ukraine did not assert the claimant was not a private party under FSIA or that the legal relationship was not commercial. On either ground, the MTD must be granted.

Fourth, Point II, the Response, 19-21, abandons the assertion that the RF waived immunity by merely signing the NY Convention under FSIA §1605(a)(1). Instead, it now argues that signing a BIT and the NY Convention together somehow waives immunity as "to all countries." Response, 20. As the MTD explains, signing a BIT does not waive immunity outside of §1605(a)(6), because the "specific governs the general." *See* MTD, 37 (citing the United States' 2024 *Blasket* Amicus). Under the Response's bizarre theory, merely signing a BIT would waive immunity even if the claimant or controversy had no relationship to the BIT or §1605(a)(6)'s "private party" and commercial legal relationship requirements were not met. This is nonsense.[2]

In sum, no FSIA immunity exception applies. The MTD must be granted.

[2] The Response ends by claiming the RF waived personal jurisdiction, because it did not discuss the Due Process standard. But, such discussion is premature until *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) is overturned.

LEGAL STANDARDS

The legal analysis of the Response, 6-7, is faulty from its inception, getting long-standing legal standards governing FSIA and its arbitration exception wrong. This taints its entire analysis.

First, "FSIA begins with a presumption of immunity, [under] which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183-86 (D.C. Cir. 2013). Only then does "the sovereign bear[] the ultimate burden of persuasion to show the exception does not apply[.]" *Id*. Contrary to the Response, 6, the RF does not bear the initial burden of bringing the case within an exception to immunity.[3]

Second, the RF disputes both the factual and legal sufficiency of the Petition's allegations.[4] Thus, contrary to the Response, 6, this Court must not take Oschadbank's factual allegations as true or draw all reasonable inferences in its favor. *See, e.g., Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 38-40 (D.C. Cir. 2000) ("Because Angola's motion to dismiss raised a factual challenge to the court's subject-matter jurisdiction under FSIA, the district court erred in accepting as true the jurisdictional facts alleged by the plaintiff. Instead, the court should have settled any contested jurisdictional facts necessary to decide Angola's motion to dismiss.").

Third, as explained below, the Response, 6-7, misstates §1605(a)(6)'s jurisdictional test. Oschadbank cannot avoid having this Court determine whether the RF offered to arbitrate investments in Crimea by characterizing it as a merits issue.

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[3] The Response, 6, quotes *Hulley Enterprises Ltd. v. Russian Fed'n*, 2023 U.S.Dist.LEXIS 206199 (D.D.C. Nov. 17, 2023) out of context. This quote refers to the burden of persuasion, not production. *Hulley* acknowledges "petitioner bears a burden of production." *Id.*, *30-*31.

[4] For example, the RF disputes that it offered to arbitrate disputes over investments made before January 1, 1992 (MTD 17-20) or investments not in conformity with RF law (MTD 20-23).

ARGUMENT

I. FSIA'S §1605(A)(6) ARBITRATON EXCEPTION DOES NOT APPLY

A. This Court Must Decide Whether The RF Offered To Arbitrate Investments In Crimea And Oschadbank Accepted The Offer, As Jurisdictional Issues

As the MTD explained, under BITs, "[d]isputes about 'arbitrability' … such as 'whether the parties are bound by a given arbitration clause' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy'" are decided by "courts." *BG Group, PLC v. Argentine Republic,* 572 U.S. 25, 34 (2014) (quoting *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002)). "[D]isputes over 'formation of the parties' arbitration agreement' and 'its enforceability or applicability to the dispute' at issue are 'matters … the court must resolve.'" *Id*. (quoting *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 299-300 (2010)).[5] The Response, 7, misstates the test based on its fundamental error in concluding that this Court need only consider the BIT, Award, and NY Convention and then wave a magic wand conferring jurisdiction. Sovereign immunity is not so easily eviscerated.

FSIA §1605(a)(6) applies to "enforce an agreement … to submit to arbitration" and "confirm an award" against a foreign state. An investment treaty (like the BIT) constitutes a state's "offer to arbitrate," which the claimant may "accept" by submitting a notice of arbitration. *BG Group,* 572 U.S. at 42. Nothing in FSIA suggests that a court may sustain jurisdiction under the arbitration exception to compel arbitration or enforce an award without first determining if an alleged offer applies to a "particular type of controversy," which would contradict *BG Group* and *Granite Rock.* After all, there is no "agreement…to submit to arbitration" if the sovereign did not offer to arbitrate the controversy at issue.

[5] *See also Granite Rock,* 561 U.S. at 297 ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.").

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170 (2017) held that a "nonfrivolous argument" is "insufficient to confer jurisdiction," *id.* at 174, overruling the standard discussed in *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015).[6] Granting "sovereign entities an immunity from suit in our courts both recognizes the absolute independence of every sovereign authority … including our own." *Helmerich*, 581 U.S. at 179. "[T]he nonfrivolous-argument interpretation would affron[t] other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated." *Id*., 183.

Since *Chevron*, the Supreme Court has repeatedly recognized that courts must determine, as a jurisdictional threshold, whether an immunity exception applies to specific facts. *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 218-219 (2018) held that property of Iran was outside FSIA's attachment jurisdiction where the immunity of the property was not rescinded under a separate exception. *F.R.G. v. Philipp*, 592 U.S. 169, 184 (2021) held that a claim for property expropriation by the Nazis was outside §1605(a)(3) exception based on the "domestic takings" rule, emphasizing *Helmerich's* warnings to "avoid producing friction" with foreign sovereigns that could risk "embroil[ing] the United States in expensive and difficult litigation" in foreign courts. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33-37 (2015) held that the "commercial activity carried on in the United States by [a] foreign state" exception in §1605(a)(2) did not extend FSIA jurisdiction to the sale of a rail ticket in the U.S. where plaintiff was later involved in an accident in Austria. In each case, the question of whether FSIA immunity applied to specific facts was

[6] *Chevron* observed that the "exception allows jurisdiction any time a plaintiff asserts a non-frivolous claim involving an arbitration award." *Id.*, at 204 (citing Chevron's Brief). Thus, *Chevron* did not treat whether the BIT applied to the controversy at issue as jurisdictional.

treated as jurisdictional to avoid embroiling foreign sovereigns in full-fledged merits litigation and to encourage foreign courts to apply the same deferential approach to immunity to the U.S. abroad.

Under *Helmerich,* courts must now "answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it." *Helmerich*, 581 U.S. at 179. *Helmerich's* reasoning precludes courts from kicking the issue of whether the sovereign offered to arbitrate a controversy down the road, because it allegedly overlaps a merits issue. Otherwise, §1605(a)(6) would offer sovereigns little protection when defending claims to compel arbitration or enforce awards. Courts could strip foreign states of immunity and order arbitration or recognize an award simply because a claimant produced a BIT, without considering, under *BG Group* and *Granite Rock*, whether the sovereign offered to arbitrate the controversy at issue. This would do exactly what *Helmerich* warns against: embroiling a foreign sovereign in "expensive and difficult litigation … which should be vitiated" and exposing the U.S. to the same abroad. *Id.* at 183.

Most recently, the DC Circuit applied this reasoning in *Chabad v. Russian Federation*, 2024 U.S.App.LEXIS 19564 (D.C. Cir. 2024), vacating judgments against the RF for lack of subject matter jurisdiction years after they were rendered because the §1605(a)(3) expropriation exception did not apply to the alleged facts because the property at issue was not in the United States. *Chabad* vacated the judgments notwithstanding the "rule of finality," recognizing that "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Id*., at *25.

B. The RF Did Not Offer To Arbitrate Investments In Crimea In The BIT

Under *BG Group, Granite Rock*, and *Helmerich*, as well as *Chabad,* this Court must decide as threshold jurisdictional issues whether the RF offered to arbitrate investments in Crimea, and whether Oschadbank accepted the RF's offer as made. The Response, 12-14, hangs its hat on the

argument that §1605(a)(6) does not require courts to determine whether an alleged offer covers the particular controversy, misconstruing *Chevron, Stileks,* and other cases.

BG Group requires courts to decide "'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy'" or "'the dispute' at issue." *Id*., 572 U.S. at 34 (quoting *Howsam* and *Granite Rock*). Crucially, a BIT "is not an already agreed-upon arbitration provision between known parties." *Id*., at 46 (Sotomayor, J., concurring in part). Rather, a BIT narrowly sets forth "a nation state's standing offer to arbitrate" which must be accepted by the investor. *Id.* "[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *Id*., at 37. Thus, this Court must determine whether an agreement to arbitrate was formed.

The MTD, 12-28, explained, based on undisputed principles of U.S. and international law governing treaties, that the RF only offered to arbitrate disputes over investments made in Russian territory, which did not include Crimea when the BIT was signed in 1998. Also, the RF only offered to arbitrate investments made on or after January 1, 1992.[7] The Response acknowledges each of the RF's six contractual jurisdictional arguments related to Crimea and the temporal limitation in the MTD and does not dispute them. *See* Response, 11 n.2 (citing MTD and summarizing each argument). Neither *Chevron, Stileks,* nor any other case holds this Court may eschew determining whether the RF agreed to arbitrate investments made in Crimea, or any investments made before January 1, 1992.

First, in sustaining FSIA jurisdiction, as an initial holding, *Chevron* stated where Ecuador did not dispute the "BIT includes a standing offer to ***all potential U.S. investors***," the dispute over "whether lawsuits were 'investments' for the purpose of the treaty is properly considered as part

[7] Importantly, the finding of the Paris Court of Appeal (ECF 1-4), ¶¶96-100, that the investments occurred before January 1, 1992 was not disputed by the Cassation Court. (ECF 1-5), ¶¶10-13.

of the review under the New York Convention." 795 F.3d at 206. As the MTD, 11, made clear, *Chevron* merely stands for the proposition that where the claimant's investor status is not disputed, a disagreement over whether an "investment" fits within the BIT's technical definitions falls under the NY Convention (which the Response, 15-16, describes as "scope"). Thus, *Chevron* held that the question of whether "breach of contract claims" were "investments" was not jurisdictional under FSIA. *Id.* at 203. *Chevron* did not hold, nor could it under *BG Group, Howsam,* and *Granite Rock,* that courts may eschew deciding whether a sovereign's offer extended to particular controversies or disputes such that an agreement to arbitrate exists under FSIA.

Nonetheless, recognizing that this could be a jurisdictional issue, as a second holding, *Chevron* stated, if "FSIA required a *de novo* determination … Ecuador would have to demonstrate by a preponderance of the evidence that Chevron's suits were not 'investments' within the meaning of the BIT. This Ecuador failed to do." *Id*. at 206. *Chevron's* second holding confirms that courts decide jurisdictional issues under FSIA based on the preponderance of the evidence.

Here, the RF argues it did not offer to arbitrate controversies over investments made in Crimea because it was not Russian territory when the BIT was signed in 1998, or any investments made before January 1, 1992. This argument is neither a "trick" as the Response, 12, contends, nor does it conflate "arbitrability" with "jurisdictional" questions. The fundamental "arbitrability" issue of whether an offer covers this controversy must be decided by courts under *BG Group* and the cases it cites.[8] Other disputes, such as whether something is an investment (*Chevron*), or an

[8] *BG Group* stated "arbitrability" includes (1) "whether the parties are ***bound*** by a given arbitration clause," that is, disputes over "formation of the parties' arbitration agreement"; (2) "whether an arbitration clause in a concededly binding contract ***applies*** to a particular type of controversy"; and (3) whether "particular preconditions for the use of arbitration," have occurred. *Id.*, 572 U.S. at 34. *BG Group* held courts determine the first two issues of arbitrability, while arbitrators decide pre-litigation conditions such as those at issue in that case.

investor is eligible (*Stileks*), may fall outside FSIA's jurisdictional analysis. Thus, this Court must decide whether the RF's offer applied to Crimea as a threshold jurisdictional issue under *Helmerich, Rubin*, *Philipp*, and *Sachs*, as well as *Chabad*.

Second, *LLC SPC Stileks v. Republic of Moldova,* 985 F.3d 871 (D.C. Cir. 2021) is no different in its limited application.[9] *Stileks* described *Chevron* as holding "that the arbitrability of a dispute is not a jurisdictional question." *Id.* at 878. This is true as far as it goes, because *Chevron* only held an "arbitrability" dispute over whether lawsuits fell within the technical definition of investments under the BIT was not jurisdictional. And, *Stileks* narrowly held an "arbitrability" dispute over whether the claimant was an eligible investor was not jurisdictional. *Id.* at 878. The Response's manifest error is ignoring that *BG Group* held "arbitrability" encompasses issues which must be decided by courts, including the arbitration agreement's "applicability to the dispute at issue." *BG Group,* 572 U.S. at 34. Unlike *Chevron* (as circumscribed by *Helmerich),* the RF's agreement to arbitrate does not apply to this controversy, because its offer — made in a BIT signed in 1998 — did not extend to Crimea, or to investments made before January 1, 1992.[10]

Third, the Court should not overlook the significance of the Response deliberately not addressing six of the RF's jurisdictional arguments, which are thus unopposed. As the MTD and Nouvel BIT expert report (ECF 40) explain, unless the Tribunal had jurisdiction over the RF, its

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9 The Response, 7-8, cites *Stileks* and other cases for the unremarkable proposition that production of these three documents establishes a *prima facie* case of jurisdiction. While this may be true, it does not undercut the Supreme Court's direction that courts must decide whether an arbitration agreement applies to a specific controversy, the jurisdictional predicate under §1605(a)(6).

10 The Response, 13, also cites *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria,* 27 F.4th 771, 776 (D.C. Cir. 2022) ("*P&ID III*") and *Micula v. Gov't of Romania,* 101 F.4th 47, 53 (D.C. Cir. 2024). In *P&ID III*, unlike here, the existence of agreement to arbitrate (based on a non-BIT contract clause) was not disputed. In *Micula*, Romania conceded jurisdiction, but later contended that subsequent EU decisions rendered the parties' agreement under the BIT *void ab initio.* Here, the RF does not seek to void an admittedly applicable agreement. The Response also cites several district court cases, which are non-binding and equally inapposite.

Award is a nullity and cannot be recognized under §1605(a)(6).[11] The MTD, 13-28, and Nouvel BIT Report, ¶¶26-124, quote numerous authorities that the Tribunal lacked jurisdiction over the RF. *See* Response, 11 n.2 (citing each argument). Thus, if the Court concludes one (or more) of these arguments are jurisdictional, the MTD is admitted and must be granted.[12]

C. Oschadbank Rejected Any Alleged RF Offer

The MTD, 15-17, established this Court lacks jurisdiction, because Oschadbank rejected the RF's offer to arbitrate disputes arising from investments in its territory, denying Crimea was Russian territory.[13] The Response, 14-15, (begrudgingly) concedes that failure to accept an offer is a jurisdictional issue under FSIA. Nor does it dispute that "an acceptance, upon terms varying from those offered, is a rejection of the offer." *Iselin v. United States*, 271 U.S. 136, 139 (1926).[14] It argues solely that the RF's offer was accepted, because the arbitration demand copied the arbitration provision "word for word." Response, 15. This argument misses the mark; the purported acceptance was a counteroffer.

First, BIT Article 9 provides for arbitration of "any dispute between either Contracting

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[11] *See* MTD, 12 ("Where a court concludes that no agreement to arbitrate existed under the FSIA exception, it must dismiss the petition to enforce.") (*citing Al-Qarqani v. Saudi Arabian Oil Co*., 19 F.4th 794, 802 (5th Cir. 2021) (dismissing petition for lack of jurisdiction)).

[12] *See, e.g. Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294-95 (D.C. Cir. 2004) (affirming dismissal: "Where the district court relies on the absence of a response as a basis for treating the motion [to dismiss] as conceded, we honor its enforcement of the rule."); *Lockhart v. Coastal Int'l Sec.*, 905 F.Supp.2d 105, 118 (D.D.C. 2012) (dismissing four counts, holding that "when a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded").

[13] FSIA "requires the District Court to satisfy itself" of the existence of "an agreement between the parties" to arbitrate, including whether the offer was accepted. *Chevron*, 795 F.3d at 205 n.3. For a court to "eschew[] making this determination as part of its jurisdictional analysis" constitutes "error." *Id*.

[14] *See also* Nouvel BIT Report, ¶¶33-35, 39 (citing *Guaracachi America, Inc., et al. v. Bolivia*, PCA No. 2011-17 (2014) (investor can "only accept the offer of arbitration as it was presented and not as it would have liked to receive it")).

Party and an investor of the other Contracting Party that arises in connection with the investments, including disputes … provided for in Article 5." Article 1 defines "investments" as "assets … which are invested by an investor of one Contracting Party ***in the territory of the other Contracting Party*** in conformity with its laws…" This is repeated in Article 5 which states "investments of investors of one Contracting Party, ***made in the territory of the other Contracting Party***, shall not be expropriated…" Thus, the RF's offer expressly limits arbitration to investments in Russian territory. Notably, Ukraine never agreed with the RF's *Note Verbale* offering reciprocal treatment of Crimea, underscoring its denial that Crimea constitutes RF territory. *See* RF's Aug. 21, 2023 *Note Verbale*; *cf*. Ukraine's Sept. 7, 2023 *Note Verbale* (ECF 39-36) (terminating BIT).

Second, and significantly, Oschadbank did not merely copy Article 9 into its Notice of Arbitration. Its Notice went further, rejecting that its investment was made in the RF's territory: "***Oschadbank*** considers Russia's actions in respect of Crimea wholly illegal under Ukrainian and international law, and ***rejects entirely the grounds, legal or otherwise, on which Russia purports to have annexed Crimea and proclaimed it to be part of its sovereign territory***." Notice, ¶16. Thus, no agreement to arbitrate was formed because Oschadbank's acceptance failed to match the RF offer. *See Iselin, supra; Dynamo v. Ovechkin,* 412 F.Supp.2d 24, 29 (D.D.C. 2006) (declining to enforce award absent acceptance of offer). Instead, the Notice made a counteroffer, stating: "investments must be treated ***as if they were located in Russian territory*** for purposes of the Treaty." *Id.* ¶18. Oschadbank's Notice "varying terms from those offered" is a rejection. *See Iselin, supra; Meeg v. Heights Casino*, 2020 U.S.Dist.LEXIS 56387, at *14-*15 (E.D.N.Y. Mar. 27, 2020) (no agreement to arbitrate formed: "Plaintiff's conditions … amounted to a rejection of Defendants' offer to agree to arbitrate disputes and a counteroffer to work for Defendants without entering into an arbitration agreement."). *See also* Nouvel BIT Report, ¶¶33-40 (counteroffer is a

rejection of offer under international law).

Third, the Response, 15, also argues that it is not required "to concede that RF's illegal occupation of Crimea, or any other territory, was lawful." But this misses the point. Oschadbank's interjection of this issue into its Notice was a rejection of the RF's offer, and a counteroffer which the RF did not accept. The mismatch between the RF's offer to arbitrate disputes in its territory, and Oschadbank's counteroffer, which was to arbitrate disputes in what it claims is Ukrainian territory, confirms there was no mutual offer and acceptance.

D. The RF Is Not Precluded From Challenging Jurisdiction Based On Incorporation Of UNCITRAL Rules In The BIT

The Response, 15-16, claims the RF is somehow precluded from raising its jurisdictional defenses, which it (mis)characterizes as merits challenges under the NY Convention, because the BIT incorporates UNCITRAL Rules. This argument is baseless.

1. The Court May Not Decide Merits Defenses At This Stage

FSIA guarantees the "resolution of an immunity assertion before the sovereign can be compelled to defend the merits" under the NY Convention (FAA). *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria,* 962 F.3d 576, 585 (D.C. Cir. 2020) ("*P&ID I*"). The RF reserved its merits defenses, including Oschadbank's failure to file its petition within the three-year FAA statute of limitations. *See* MTD, 1 n.1. Nonetheless, the Response, 16, argues "the Court can resolve both the FSIA and enforceability of the award in one proceeding," ignoring *P&ID I*. *Arguendo,* if the RF's arguments are not jurisdictional under FSIA (they are), the Court cannot convert them into merits defenses and decide them now, let alone without full NY Convention briefing. Oschadbank cannot backdoor a merits issue that the RF is bound by the Award into a defense to a jurisdictional challenge. The Response's cases are inapposite.

Argentine Republic v. Nat'l Grid, Plc, 637 F.3d 365 (D.C. Cir. 2011) (*per curium*) did not

involve resolving FSIA jurisdiction and enforceability in one stage. Argentina itself filed the case to vacate a domestic award and never raised a FSIA defense. *Deutsche Telekom AG v. Republic of India*, 2024 U.S.Dist.LEXIS 55140 (D.D.C. March 27, 2024) denied India's motion to dismiss under FSIA and then confirmed the award, apparently without allowing full merits briefing. *Id.* at *9-*10. The court purported to distinguish *P&ID I*, which it held "allow[s] separate briefing of immunity and merits issues only if immunity assertion is 'colorable,' which India's is not." *Id.* at *13. At most, *P&ID I* allows courts to order merits briefing if the immunity defense is not colorable; it does not permit recognition before the merits are briefed. *See, e.g.*, *Hulley Enterprises Ltd. v. Russian Fed'n,* 2022 U.S.Dist.LEXIS 68521, *3 n.1 (D.D.C. April 13, 2022) (denying motion to compel briefing pending appeal of jurisdictional decision). The Response, 2, concedes that the RF's argument that Oschadbank rejected its alleged offer to arbitrate is a colorable jurisdictional argument, and does not contest its other arguments as not colorable. The Court may not decide the RF's merits defenses now.

2. A Defendant May Always Challenge A Default Judgment Or Award For Lack Of Jurisdiction

The Response, 15, argues that "the Court can and should hold that RF's challenges to the BIT's scope are also irrelevant on the merits because it consented to the UNCITRAL Rules"—even though the RF did not participate in the arbitration. However, a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 706 (1982). *See, e.g., Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987) (same, citing *Compagnie*). This principle applies equally to arbitration proceedings. *MCI Telecomms. Corp. v. Exalon Indus.*, 138 F.3d 426, 430 (1st Cir. 1998) (holding party not participating in arbitration may make jurisdictional challenges to confirmation,

noting: "this situation is analogous to where a lawsuit proceeds against a non-appearing party over whom personal jurisdiction has not been acquired…[the] party can challenge the judgment when it is executed, for it lacks legal validity"); *Langlais v. Pennmont Benefit Servs.*, 2012 U.S.Dist.LEXIS 95897, at *16 (E.D. Pa. July 10, 2012) (not requiring participation in arbitration to preserve jurisdictional challenges, as doing so "would … make little sense") (citing *MCI*).

3. The Response Does Not Establish The RF "Clearly And Unmistakably" Delegated "Exclusive Authority" To Determine Jurisdiction

In one paragraph, ignoring Supreme Court precedent, and without evidence, the Response, 15-16, argues incorporation of the UNCITRAL Rules into the BIT somehow establishes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability" (quoting *Stileks* quoting *Chevron).* This argument is completely wrong.

Article 21(1) of the relevant 1976 UNCITRAL Rules reads:

> The 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.

This language, known as a "competence-competence" clause in international arbitration, merely authorizes arbitrators to rule on ***objections*** to their jurisdiction, and plainly leaves room for courts to conclude that parties did ***not*** intend for the arbitrators to have ***exclusive*** authority over ***all*** issues of arbitrability – including whether an agreement to arbitrate was made in the first place.

First, in holding that parties did not agree to delegate arbitrability to the arbitrators, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) stated: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear[] and unmistakabl[e] evidence that they did so." *Id*. at 947. As *First Options* explained, the "'who (primarily) should decide arbitrability' question [] is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers … And, given the

principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

Following *First Options*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) held that arbitrators had the authority to decide arbitrability only because the parties had "clearly and unmistakably" delegated "exclusive authority" to them to do so. *Id.* at 66.[15] Neither the BIT, nor the open-ended UNCITRAL Rule says anything about "exclusive authority." The Rule merely states that the tribunal, in the first instance, has "the power to rule on objections that it has no jurisdiction." In stark contrast, the agreement in *Rent-A-Center* stated, "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have ***exclusive authority*** to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." *Id*. The Response submitted ***no evidence*** that either Ukraine or the RF understood in 1998 that the mere incorporation of a UNCITRAL Rule in the BIT "clearly and unmistakably" delegated "exclusive authority" to arbitrators, as *First Options* and *Rent-A-Center* require.

Second, *DDK Hotels v. Williams-Sonoma,* 6 F.4th 308 (2d Cir. 2021) explains that "context matters" because "incorporation of … rules into an arbitration agreement does not, *per se*, demonstrate clear and unmistakable evidence of the parties' intent to delegate." *Id*. at 318. Whatever incorporation of a "competence-competence" clause meant to Ecuador when it signed

[15] Courts interpreting *Rent-A-Center* emphasize that "to demonstrate clear and unmistakable intent to delegate questions of arbitrability, provisions must be both ***specific*** and ***exclusive.***" *Deardorff v. Cellular Sales of Knoxville, Inc.,* 2022 U.S.Dist.LEXIS 23870, *21-*22 (E.D. Pa. Feb. 9, 2022). *See, e.g., Masci v. Capital Grille, GMRI, Inc.*, 2024 U.S.Dist.LEXIS 77, *8-*9 (E.D. Pa. Jan. 2, 2024) (rejecting delegation under FAA, because the clause did not "specifically state enforceability of the arbitration agreement is within the ***exclusive authority*** of the arbitrator").

the US-Ecuador BIT (*Chevron*), or to Moldova when it signed the ECT (*Stileks*),[16] has no significance as to what ***the RF and Ukraine*** understood when signing their BIT in 1998. If Ukraine believed that a "competence-competence" clause "clearly and unmistakably" delegated "exclusive authority" to decide arbitrability to arbitrators, Oschadbank (100% owned by Ukraine) would have submitted evidence to meet its heavy burden under *First Options* and *Rent-A-Center.* It didn't. Decisions under U.S. law in *Chevron*, *Stileks,* and other cases decades later have no relevance to what the RF and Ukraine intended to agree in 1998.

Third, the BIT, as a treaty, is interpreted under international law, including the VCLT. *See* VCLT, Art. 31(3)(c); *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F.Supp.3d 1, 10 (D.D.C. 2023) (considering "rules of international law applicable between the parties in interpreting the meaning of a treaty. Vienna Convention art. 31(3)(c)."). Neither *Chevron*, nor *Stileks,* nor any other case cited by the Response appears to have considered international law in interpreting "competence-competence" clauses under UNCITRAL Rules.[17] As explained in Professor Avtonomov's UNCITRAL legal expert report, filed contemporaneously, ("Av.Rpt."), incorporation of UNCITRAL Rule 21(1) does not constitute "clear and unmistakable" evidence of delegating "exclusive authority" to decide arbitrability, *i.e.*, whether an offer applies to a specific dispute, to provide jurisdiction to arbitrators. Rather, international law, as well as national law of the RF, Ukraine, France, and all other relevant jurisdictions, holds "competence-competence" clauses merely allow arbitrators to decide jurisdictional issues at the first instance, subject to *de novo* legal review by domestic courts of primary (seat of arbitration) and secondary (where enforcement is sought) jurisdictions. *See* Av.Rpt. ¶¶10-15. The VCLT analysis confirms this.

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16 Neither sovereign apparently submitted any evidence on their understanding of "competence-competence" clauses, or how they are interpreted under international law.

17 Most recently, *Blasket* concluded the UNCITRAL Rules did not prevent *de novo* review of whether the parties entered into "an agreement to arbitrate." *Id.*, 665 F.Supp.3d at 9-10.

VCLT Art. 31(1): The starting point for applying the VCLT is Article 31(1), which provides that "[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 light of its ***object and purpose***." Av.Rpt. ¶¶10, 18. With respect to Rule 21(1)'s "ordinary meaning," "the arbitrators' 'power to rule on objections' is not characterized as exclusive. Neither the word, 'exclusive,' nor any synonym appears in this provision." *Id*. ¶19. With respect to the "context" and "object and purpose" of Rule 21(1), the UNCITRAL Rules "compris[e] one element of the 'unified legal framework' that also includes the [NY] Convention and the 1985 UNCITRAL Model Law."[18] Av.Rpt., ¶20 (citing American arbitration scholar, Professor George A. Bermann, Supp. Expert Op. (Dec. 10, 2015) (Av.Rpt. Ex. 3), ¶48). "Both [those sources] provide for post-arbitration *de novo* judicial review of Arbitrability." *Id*. ¶21.[19] Thus, under VCLT Art. 31(1), "the UNCITRAL Rules should not be interpreted as precluding such *de novo* judicial review." *Id.* (citing Bermann ¶48).

VCLT Art. 31(3)(c): Article 31(3)(c) provides that the BIT, and the UNCITRAL Rules incorporated therein, should be interpreted in accordance with "relevant rules of international law applicable in the relations between the parties." In this case, "relevant rules" include the principle of competence-competence, codified in the European Convention on International Commercial Arbitration, 484 U.N.T.S. 349 (1961) ("1961 Geneva Convention") (Av.Rpt. Ex. 5), binding on the RF and Ukraine as signatories. *Id*. ¶¶11, 25. Geneva Convention Article V(3) provides that a

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18 UNCITRAL Model Law on International Commercial Arbitration (1985) (Av.Rpt. Ex. 4).

19 See NY Convention, Art. V(1)(a) ("Recognition and enforcement of the award may be refused [if] … the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration"); 1985 UNCITRAL Model Law, Art. 34(2) ("An arbitral award may be set aside by the court [if] … the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration."); Art. 36(1) ("Recognition or enforcement of an arbitral award ... may be refused [if] … the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration").

tribunal is "entitled . . . to rule on [its] own jurisdiction," while Article IX(1) provides that annulment and denial of recognition are allowed where courts find an award "deals with a difference not contemplated or not falling within the terms of the submission to arbitration." *Id.* ¶¶12, 29-33. The 1961 Geneva Convention, which imposes no restrictions on court review, reflects the broad international understanding that competence-competence merely provides initial power to arbitrators to rule on jurisdiction, not "exclusive authority." *Id.* ¶¶24-26 (citing Bermann, ¶¶22-27 (collecting decisions of the highest courts of the UK, France, and the Netherlands)).[20]

VCLT Art. 31(4): Article 31(4) requires consideration of any "special meaning" that "the parties ... intended" should be given to any term of an international agreement. Here, the "special meaning" of competence-competence shared by the RF and Ukraine confirms they did not intend to exclude *de novo* judicial review of arbitrability by adopting UNCITRAL Rules. RF and Ukraine — as well as France, the seat of the arbitration — "apply the same understanding of [competence-competence] that is set forth in the 1961 Geneva Convention." Av.Rpt. ¶¶13, 35. The RF and Ukrainian legal frameworks both include the NY Convention, the 1961 Geneva Convention, near-identical statutes "On International Commercial Arbitration" ("ICA Statutes") based on the 1985 UNCITRAL Model Law, and similar procedural rules authorizing "comprehensive" and "direct examination" of evidence in set-aside and recognition proceedings. *See* Av.Rpt. ¶¶37, 40, 45, 47. Both RF and Ukrainian ICA Statutes (numbered identically) include the principle of competence-competence in Articles 16(1) (tribunal can "rule on its own jurisdiction") and the power of post-arbitration *de novo* judicial review of the issues of arbitrability (whether an arbitration agreement "is not valid" or an award was "made regarding a dispute not contemplated by or not falling within

[20] The 1985 UNCITRAL Model Law includes the same provisions in Art. 16(1) ("arbitral tribunal may rule on its own jurisdiction") and Arts. 34(2) and 36(1) (*see supra*, n.19), providing for competence-competence and *de novo* judicial review. *See* Av.Rpt. ¶27.

the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement") in Articles 34(2)(1) (set-aside) and 36(1)(1) (denial of enforcement). *Id*. ¶¶38-40, 46, 47. Cases and legal commentary in both the RF and Ukraine confirm competence-competence does not convey exclusive authority to arbitrators to decide jurisdiction. *Id*. ¶¶39, 42, 43, 49-51. Finally, "France is also a party to the 1961 Geneva Convention [and] recognizes both the [competence-competence] principle and the authority of French courts to review Arbitrability *de novo*," as occurred in this very case. *Id*. ¶52; *also* ¶¶53-56 (citing cases and legal commentary). Given both the RF and Ukraine internal law, incorporation of UNITRAL Rules did not delegate "exclusive authority" to arbitrators to decide jurisdiction.

VCLT Art. 31(3)(b): Article 31(3)(b) concerns "subsequent practice" of the parties, which in this case "regarding 'competence-competence' is reflected in the choices of seats of arbitration by the BIT signatory States … in other arbitrations since 1998" when the BIT was signed. *Id.* ¶¶14, 58. "Jurisdictions such as Canada, the Netherlands, Switzerland, and the United Kingdom, where Ukraine and the Russian Federation have consented to arbitrate in other cases, all recognize that 'competence-competence' merely provides for tribunals to initially decide Arbitrability, with courts later reviewing the issues *de novo* in set-aside and enforcement proceedings." *Id*. ¶14; *see also* ¶59 n.19 (collecting cases from four jurisdictions), ¶¶60-64 (Canada), ¶¶65-68 (Netherlands), ¶69 (Switzerland), and ¶¶70-72 (UK). How could the RF and Ukraine have delegated exclusive authority to decide jurisdiction when they repeatedly chose seats with post-award *de novo* review?

In sum, there is no "clear and unmistakable evidence" that the RF and Ukraine delegated "exclusive authority" to decide whether they agreed to arbitrate this dispute in the BIT. To the contrary, under international, Russian, and Ukrainian law, "competence-competence" merely permits arbitrators to determine their jurisdiction, subject to *de novo* court review.

E. Oschadbank Is Not A Private Party Under §1605(a)(6)

The MTD, 30-34, established, based on the text and history of FSIA, that §1605(a)(6)'s jurisdictional "private party" limitation does not encompass arbitrations between sovereigns, FSIS defines to include agencies and instrumentalities. The Response, 16-17, does not address any arguments premised on FSIA's plain text and rules of statutory construction. Instead, it claims, with no authority, the exception applies notwithstanding that it is wholly owned by Ukraine.

First, the Response, 18, argues that Oschadbank is a "private party," because it is a "separate legal person" from the Ukraine. However, this ignores that FSIA §1603(b) explicitly states that "separate legal persons" can be an "agency or instrumentality of a foreign state" if the "majority of [their] shares is owned by a foreign state." *Id.* Courts repeatedly recognize that state-owned banks are an agency or instrumentality of foreign states notwithstanding separate corporate existence. *See, e.g., Shoham v. Islamic Republic of Iran*, 2017 U.S.Dist.LEXIS 84119 (D.D.C. June 1, 2017) (bank primarily owned by Iran is a foreign instrumentality under FSIA). None of the Response's cases suggest otherwise.[21] FSIA's express language deems corporations majority owned by a foreign state to be foreign states, notwithstanding separate existence.

Second, the Response, 16-17, then concedes that Oschadbank is not a "private party," but nonetheless argues the Award "was issued under the BIT, which is an agreement for the benefit of private investors." The Response improperly reads words into §1605(a)(6), which only states, "an

[21] *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 151 (D.C. Cir.1994) concerned a distinction between "foreign states" and their "agencies or instrumentalities" for §1608 service of process, inapplicable here. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) held a company was an independent entity rather than an instrumentality, because the foreign state did not directly own it, as required by §1603(b)(2). *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006) discussed §1605(a)(2)'s "commercial activity" exception rather than the definition of a "foreign state" under FSIA. The Response's other cases were not even FSIA disputes, merely discussing the general principle that corporations are considered separate legal entities.

agreement made by the foreign state with or for the benefit of a private party." [22] It does not say that it can be used to enforce agreements "for the benefit of a private party ***and foreign sovereigns/ instrumentalities***." *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) rejected interpretation of a statute that "would have us read an absent word into the statute," because doing so would "rewrite[] rules that Congress has affirmatively and specifically enacted." *Id.* at 538. Further, "an agreement … with … a private party" obviously means the "private party" must be the claimant. Therefore, "for the benefit of a private party" must mean the "private party" is also the claimant. "Private party" cannot refer to two different people (claimants and non-claimants) at the same time. *Clark v. Martinez*, 543 U.S. 371, 378 (2005) rejected construction of statute that gave the "same words a different meaning" as doing so "would be to invent a statute rather than interpret one." *A fortiori,* the words "private party" used just once cannot have two meanings.

Third, the Response, 18, argues that the U.S. has "obligations to enforce all New York Convention awards unless an Article V nonrecognition ground exists." The Response ignores that the NY Convention Article V(2)(b) provides recognition may be denied if "contrary to the public policy of that country." Obviously, the FSIA and its "private party" restriction represent a significant U.S. public policy to avoid embroiling U.S. courts in disputes between sovereigns.

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[22] The Response, 8, wrongly argues this requirement is not jurisdictional based on the "is or may be" language. The reason for this language is that some treaties, such as the ECT, acknowledge application of the NY Convention (thus, the "is" language), while other treaties, such as the BIT, do not (thus, the "may be" language). *Cf.* ECT Art. 26(5)(a)(ii) (the ECT and notice of arbitration "shall be considered to satisfy the requirement for … an 'agreement in writing' for purposes of article II of the [New York Convention]"); RF-Ukraine BIT (no provision). *Chevron*, n.2, stated, without analysis, FSIA jurisdiction does not require determining whether an award is governed by a treaty, citing the "is or may be" language. Under *Helmerich,* decided after *Chevron,* this Court must resolve the "may be" dispute, *i.e.*, whether the Award falls under the Convention, as jurisdictional. Further, *Chevron's* language was *dicta* because "the parties d[id] not dispute that the New York Convention governs" the award. *Id.*

F. The Award Does Not Involve A Legal Relationship Which Is Commercial Under The NY Convention

The MTD, 34-36, established that, based on its undisputed legislative history, the NY Convention does not apply to the Award, because there is no "legal relationship … which is considered as commercial," given the dispute is between foreign states, the RF and Oschadbank.

First, the Response, 9, relies on a "crush of cases" where the NY Convention was used to recognize arbitration awards that arise from disputes under BITs. But every cited case involves a dispute between a ***private investor*** and a foreign sovereign.[23] This dispute is between ***foreign states*** (Ukraine by Oschadbank and the RF), so those cases are all inapposite.

Second, despite the Convention's clear history, the Response, 9, argues that all there needs to be is a "connection to commerce," citing *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99 (D.C. Cir. 2015). *Belize* concerned a commercial contract between a private telecommunications company and Belize. *Id.* at 101. Here, no contractual relationship existed between the RF and Oschadbank. There was not even a legal commercial regulatory relationship because Oschadbank refused to submit itself to Russian banking regulation. *See* Lauts Report, ¶¶79, 81 (citing May 2014 Oschadbank resolutions and letters refusing to comply with Russian regulations and terminating operations). The purpose of the "commercial" reservation was to exclude "political awards, and the like." *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp. 1, 13 (S.D.N.Y. 1973). This dispute involves a political conflict between two sovereigns over Crimea, and Ukraine

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[23] *See Zhongshan Fucheng Indus. Inv. Co. v. Fed. Rep. of Nigeria,* 2023 U.S.Dist.LEXIS 13603, *16 (D.D.C. Jan. 26, 2023) (dispute "between Nigeria and Zhongshan, a private actor—not two states"); *Tatneft v. Ukraine,* 21 F.4th 829 (D.C. Cir. 2021) ("*Tatneft II*") (Russian privately-owned company against Ukraine); LLC *Komstroy v. Republic of Moldova,* 2019 U.S.Dist.LEXIS 143739 (D.D.C. Aug. 23, 2019) (Ukrainian private company against Moldova); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F.Supp.3d 100 (publicly traded Canadian company against Venezuela); *Gold Reserve v. Bolivarian Republic of Venezuela,*146 F.Supp.3d 112 (D.D.C. 2015) (private Canadian company against Venezuela).

prohibiting its banks to operate there. There is nothing "commercial" about this.

Third, the Response, 10, relies on a deliberately truncated quote from the Restatement (Third) of Foreign Relation, §487 cmt. f. Comment f, with the omitted portion in italics, states: "a contract between two state-owned commercial enterprises – *e.g., a steel company owned by state A and an automobile company owned by state B* – is usually not governed by international law, and may provide for arbitration subject to the Convention." Putting aside the Restatement is not binding, at most it suggests a general rule applicable to ***contracts*** between state-owned enterprises. But, here, there is no contract at all, let alone one between state-owned enterprises.

II. FSIA'S §1605(A)(1) WAIVER EXCEPTION DOES NOT APPLY SIMPLY BECAUSE THE RF SIGNED THE NY CONVENTION

As an alternative grounds for jurisdiction, Oschadbank claimed that the RF "waived its immunity from suit under Section 1605(a)(1) by acceding to the New York Convention." Petition, ¶9. Instead, Oschadbank now claims for the first time that the RF "waived immunity by ratifying the BIT." Response, 19. The Response concedes that "[i]t is not the New York Convention that waived immunity … but the BIT itself." *Id*., 20. As such, the MTD's arguments, 36-40, are admitted and the Petition's §1605(a)(1) claim should be dismissed. *See Fox*, *Lockhart, supra,* n.12. The Response's new claim that signing a BIT and the "New York Convention then makes it clear that this waiver applies to all countries" is incoherent and wrong.

First, the Response cites no case holding that merely signing a BIT and the NY Convention waives immunity as "to all countries" under §1605(a)(1). As the MTD, 37, explains, signing a BIT does not waive immunity outside of §1605(a)(6), because the "specific governs the general."[24] Thus, signing a BIT may only satisfy the arbitration exception if an award is rendered under it.

[24] If §1605(a)(6) may apply, the waiver exception should not be considered under "commonplace statutory construction that the specific governs the general." 2024 U.S. *Blasket* Amicus, at 22 (quoting *RadLax Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012)).

Under the Response's bizarre theory, signing a BIT would waive immunity even if the claimant and dispute had no relationship to the BIT and §1605(a)(6)'s "private party" and commercial requirements were not met. The Response, 19, cites *Creighton Ltd. v. Gov't of Qatar,* 181 F.3d 118 (D.C. Cir. 1999), but it applied the arbitration, not the waiver, exception. *Id.* at 124. Qatar did not even sign the Convention. *Id.* at 121. Thus, *Creighton* offers no support for the assertion that signing a BIT and the NY Convention waives immunity for "all countries."

Second, the Response disingenuously quotes *Tatneft v. Ukraine,* 771 F.App'x 9, 10 (D.C. Cir. 2019) ("*Tatneft I*") for the proposition that "*Creighton* … concluded that a sovereign, by signing the New York Convention, waives its immunity." Response, 20. As noted in the MTD, 39 n.27, *Creighton* concluded no such thing, nor could it because Qatar had not signed the Convention. Rather, as *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F.Supp.3d 1 (D.D.C. 2020) ("*P&ID II*") observed, this discussion in *Creighton* was *dictum. Id.* at 7 (holding *Creighton* did not adopt this theory "as binding Circuit law"). Further, the Response fails to disclose that *Tatneft I* is an unpublished disposition lacking precedential value. *Id.* at 7 n.3; D.C. Circuit Rule 36(e)(2). Thus, *Tatneft I* does not help in whatever argument the Response is attempting to make. None of the other cases cited in the Response, 20 n.9, support the proposition that merely signing a BIT and the Convention waives immunity "in all countries," let alone the United States.[25]

Third, the Response, 20, argues that customary international law recognizes the "same principle" but never explains what this principle may be, merely citing to draft articles. *Id*., n.7. The Response makes no argument that such draft articles are authoritative, or have anything to do

[25] *See ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, 628 F.Supp.3d 1, 3 (D.D.C. 2022) (finding waiver based on the ISCID Treaty, not a BIT); *Stati v. Kazakhstan*, 199 F.Supp.3d 179, 188-189 (D.D.C. 2016) (finding waiver based on arbitration exception and erroneously double counting signing the ECT as the basis for implied waiver); *Ipitrade Int'l, S.A. v. Fed. Republic of Nigeria*, 465 F.Supp. 824, 826 (D.D.C. 1978) (finding waiver based on choice-of-law provision in an agreement to arbitrate under ICC Rules, not signing the NY Convention).

with the RF signing the NY Convention. Similarly, the Response, 20 n.10, claims the legislative history of the arbitration exception somehow "endorses" "this understanding" of the waiver exception, but never explains what this history may be or what "understanding" it endorses.

Finally, the Response, 21, argues that the RF waived immunity because the RF "consented to arbitrate anywhere Oschadbank desired." This is blatantly false. BIT Article 9 provides three forums, including arbitration under UNCITRAL Rules. Rule 16 provides a procedural framework for parties to select the seat of arbitration; it does not allow investors to arbitrarily select the forum. Thus, the RF did not agree to arbitrate "without specifying jurisdiction," as discussed in *Tatneft*, 301 F.Supp.3d at 191. Moreover, *Tatneft* relied on *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985), which found no implicit waiver; to the contrary, it held "courts have refused to find an implicit waiver to suit in American courts from a contract clause providing for arbitration in a country other than the United States." *Id*. at 377.

In sum, the Response concedes that signing the NY Convention does not waive immunity. Merely signing the BIT does not waive immunity other than under the arbitration exception.

III. THE RF DID NOT WAIVE PERSONAL JURISDICTION

The MTD objected to personal jurisdiction on Fifth Amendment due process grounds to avoid any argument that the RF waived its right to raise this issue on appeal. If *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) is reversed, Oschadbank will be able to amend its Petition to attempt to comport with Due Process "minimum contacts" requirement. At this point, there was nothing for the RF to argue (or waive), because the Petition contained no minimum contacts allegations because *Price* required none.

CONCLUSION

For the foregoing reasons, the MTD should be granted, and the Petition dismissed.

Dated: August 9, 2024

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CERTIFICATE OF SERVICE

I certify that on August 9, 2024, the foregoing document was filed electronically and served upon all counsel of record via the Court's CM/ECF filing system in accordance with the Federal Rules of Civil Procedure.

Dated: August 9, 2024

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