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
NOTICE OF SUPPLEMENTAL AUTHORITY[1]

The Russian Federation submits *Wye Oak Tech., Inc. v. Republic of Iraq*, 2014 U.S. App. LEXIS 17426 (D.C. Cir. July 16, 2024), Exh. A, as supplemental authority that its arguments regarding the existence of an agreement to arbitrate with Oschadbank are jurisdictional under FSIA §1605(a)(6).

Wye Oak vacated a judgment against Iraq because it had not lost its immunity under FSIA, §1605(a)(2).[2] Following an appeal vacating a judgment entered under the second bracketed provision of §1605(a)(2) and a new judgment entered after remand, *Wye Oak* stated that the "only jurisdictional question left in this case [was] whether Iraq's breach [of contract] caused a direct effect in the United States" under the third bracketed provision of §1605(a)(2). *Id.*, *12. *Wye Oak* found that because Iraq's breach did not create a direct effect, "Iraq is immune from suit. The

[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.

[2] §1605(a)(2) provides an exception to immunity based "[1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

district court accordingly lacked jurisdiction." *Id.*, *24. In deciding this was a jurisdictional question, *Wye Oak* analyzed the extensive factual record, including the (1) place of payment, *id.*, *14-16; the place of performance, *id*., *16-20, and (3) the breach's alleged diplomatic and military impacts in the United States, *id.*, *20-24. *Wye Oak* confirms that factual disputes regarding a FSIA jurisdictional term -- "direct effect" -- cannot be relegated to "merits" issues.[3]

As the RF has explained, under investment treaties "[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).[4] FSIA §1605(a)(6) applies to "enforce an agreement … to submit to arbitration" and "confirm an award" against a foreign state. Nothing in FSIA suggests that a court may sustain jurisdiction to compel arbitration or enforce an award without first determining if an alleged offer applies to a "particular type of controversy." *See* MTD, 10 (ECF 38) and MTD Reply, 4 (ECF 51).

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.*, 174, overruling the standard discussed in *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (2015).[5] "[T]he nonfrivolous-argument interpretation would affron[t] other nations, producing

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[3] *Chabad v. Russian Federation*, 2024 U.S.App. LEXIS 19564 (D.C. Cir. Aug. 6, 2024), previously cited, vacated 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 facts related to a jurisdictional term – "property." There, the property at issue – a library and archives -- was not in the U.S, a jurisdictional requirement for suits against a foreign state under §1605(a)(3). *Id.*, *18.

[4] *See also Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010) ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute").

[5] *Chevron* observed that the "exception allows jurisdiction any time a plaintiff asserts a non-

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." *Helmerich,* 581 U.S. at 183. Even when facts are in dispute, courts must "answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it." *Id.*, 178. Since *Chevron*, the Supreme Court has repeatedly recognized that courts must determine, as a jurisdictional threshold, whether an immunity exception applies to specific facts.[6]

Under the Supreme Court's *Helmerich*, *Rubin*, *Phillip,* and *Sachs* decisions, as well as the D.C. Circuit *Wye Oak* and *Chabad* decisions, factual and legal disputes over FSIA's terms -- such as an "agreement to arbitrate" under §1605(a)(6) -- are jurisdictional. Thus, this Court must determine as a threshold matter whether the RF offered to arbitrate investments made by Ukrainian investors in Crimea (it didn't), and Ukraine and/or Oschadbank accepted such offer (they didn't) for an arbitration agreement to exist (it doesn't), given Ukraine and the RF have never mutually agreed that Crimea would be considered as Russian territory under the 1998 RF-Ukraine BIT, and Ukraine disputes such to this day.

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frivolous claim involving an arbitration award." *Id.*, 204 (citing Chevron's Brief).

[6] *See* MTD Reply, 5-6 (citing *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 218-219; *F.R.G. v. Philipp*, 592 U.S. 169, 184 (2021); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33-37 (2015)).