APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7057 **September Term, 2019**

Filed On: May 28, 2019

PAO TATNEFT,

APPELLEE

v.

UKRAINE, C/O MR. PAVLO PETRENKO, MINISTER OF JUSTICE,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00582)

Before: WILKINS and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the United States District Court for the District of Columbia be affirmed.

This case arises from a dispute among the shareholders of Ukrtatnafta, a Ukrainian oil company. The primary shareholders were Ukraine, Tatarstan (a republic of the Russian Federation), and Tatneft (a Tatarstan oil company). When Ukrainian courts invalidated Tatneft's shares, Tatneft sought arbitration under the Russia-Ukraine Bilateral Investment Treaty. An arbitral tribunal in Paris awarded Tatneft $112 million in damages against Ukraine.

Tatneft petitioned the district court to confirm and enforce the award under the New York Convention—a treaty in which signatories agree to enforce arbitral awards made in other signatory countries. Ukraine moved to dismiss the petition on sovereign-immunity and *forum non conveniens* grounds. The district court concluded that the waiver and arbitration exceptions to the Foreign Sovereign Immunities Act (FSIA) apply to this case. The court also rejected the *forum non conveniens* defense. Ukraine sought interlocutory review of the immunity question under the collateral-order doctrine. We affirm based on the waiver exception.

Ukraine contends that Tatneft failed to timely raise the waiver exception before the district court. But that court excused the forfeiture because Ukraine had ample opportunity to respond and thus suffered no prejudice. This decision was not an abuse of discretion, so we decline to revisit it. *See Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014).

Ukraine next argues that an arbitration agreement cannot constitute an implied waiver of foreign

sovereign immunity. Otherwise, Ukraine reasons, the general waiver exception, which applies whenever a foreign state "has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), would swallow up the more specific arbitration exception, which applies only to actions to enforce certain arbitration agreements, and only under certain conditions, *id.* § 1605(a)(6).

Ukraine is mistaken. To begin, the waiver exception requires a foreign sovereign to give up its immunity defense intentionally, whereas the arbitration exception does not. *See Creighton Ltd. v. Qatar*, 181 F.3d 118, 126 (D.C. Cir. 1999). So, while the exceptions partially overlap, each contains its own unique elements. Ukraine responds that the arbitration exception incorporates an intentionality requirement by stating, as one of its four conditions, that "paragraph (1) of this subsection [*i.e.*, the waiver exception] is otherwise applicable." 28 U.S.C. § 1605(a)(6)(D). But the conditions in the arbitration exception are disjunctive—listed and linked by the word "or." *Id.* § 1605(a)(6). And none of the other conditions, which turn on the place of arbitration, the kind of governing treaty, and the nature of the underlying claims, requires an intentional waiver. *Id.* § 1605(a)(6)(A)–(C). Because the overlap is incomplete, no structural considerations justify narrowing the waiver exception.

The waiver exception applies to this case. In *Creighton*, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. 181 F.3d at 123. Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it.

Ukraine fails to distinguish *Creighton*. It invokes *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), in which the Supreme Court refused to find a waiver from the signing of an international agreement "contain[ing] 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." *Id.* at 442–43. But *Creighton* specifically distinguished *Amerada Hess* on the ground that signatories to the New York Convention must have contemplated arbitration-enforcement actions in other signatory countries, including the United States. 181 F.3d at 123. Ukraine contends that, because the United States afforded foreign countries absolute sovereign immunity until the FSIA was enacted in 1976, Ukraine could not have anticipated being subjected to enforcement in the United States when it signed the Convention in 1958. But the United States transitioned from an absolute to a "restrictive" view of foreign sovereign immunity in 1952—six years earlier. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–87 (1983). In any event, Ukraine raises an argument not that *Creighton* is distinguishable, but that it was wrongly decided. Because *Creighton* controls, the waiver exception applies here.

Finally, we decline to exercise pendent jurisdiction over the *forum non conveniens* issue, which is neither "inextricably intertwined" with the immunity issues nor "necessary to ensure meaningful review" of those issues. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199 (D.C. Cir. 2004) (quotation marks omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven

days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAO TATNEFT,
Petitioner-Plaintiff,

v.

UKRAINE,
Respondent-Defendant.

Civil Action No. 17-582 (CKK)

MEMORANDUM OPINION

(March 19, 2018)

This matter comes before the Court on review of an arbitration award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention") and its implementing legislation, 9 U.S.C. §§ 201–208. Petitioner Pao Tatneft ("Tatneft" or "Petitioner") seeks recognition and enforcement of the Award on the Merits ("Merits Award") conferred in *OAO Tatneft v. Ukraine*, an arbitration conducted under the auspices of the Permanent Court of Arbitration, seated in Paris, France, and pursuant to the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNICITRAL") and 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, otherwise known as the Russia–Ukraine Bilateral Investment Treaty. The arbitral tribunal issued its Merits Award in favor of Petitioner on July 29, 2014, Respondent Ukraine ("Ukraine" or "Respondent") was di-

rected to pay Tatneft 112 million in United States Dollars in damages plus interest. That Merits Award was upheld by the Paris Court of Appeal when Ukraine moved to overturn it.

On March 30, 2017, Tatneft filed its Petition to Confirm Arbitral Award and to Enter Judgment in favor of Petitioner, which is opposed by Ukraine. On June 12, 2017, Ukraine filed a motion to stay proceedings in this Court, pending the outcome of a foreign set-aside proceeding, which was opposed by Tatneft. Subsequently, Ukraine filed both a motion to dismiss the petition and a motion for jurisdictional discovery. Because the Petition and three motions filed by Ukraine are interrelated, they will be considered by the Court together.

For the reasons explained below, the Court shall DENY Respondent's Motion to Dismiss, DENY Respondent's Motion for Leave to take Jurisdictional Discovery, DENY Respondent's Motion to Stay, and HOLD IN ABEYANCE Tatneft's Petition for enforcement of the arbitration award until Tatneft submits additional briefing with regard to the issues raised in Ukraine's Opposition to Tatneft's Petition.[1]

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[1] In connection with this Memorandum Opinion and the accompanying Order, the Court reviewed the following documents: Petition to Enforce, ECF No. 1 ("Pet."); Opposition to Petition, ECF No. 22 ("Opp'n to Pet."); Motion to Stay, ECF No. 14 ("Mot. to Stay"); Opposition to Motion to Stay, ECF No. 16 ("Opp'n to Stay"); Reply to Opposition to Stay, ECF No. 18 ("Reply to Stay"); Motion to Dismiss, ECF No. 21 ("Mot. to Dismiss"); Consolidated Opposition to Motion to Dismiss and Motion for Leave to Seek Discovery, ECF No. 26 ("Consol. Opp'n"); Reply to Opposition to Motion to Dismiss, ECF No. 29 ("Reply to Dismiss'); Motion for Leave to Seek Discovery, ECF No. 23 ("Mot. for Disc."); Consolidated Opposition to Motion to Dismiss and Motion for Leave to

I. FACTUAL BACKGROUND

A. Formation of Ukrtatnafta

Pao Tatneft, formerly known as OAO Tatneft, is a "publicly-traded open joint stock company, established and existing under the laws of the Russian Federation." See Pet. ¶ 1.[2] On July 4, 1995, Tatarstan and Ukraine entered into an agreement to create CJSC Ukrtatnafta Transnational Financial and Industrial Oil Company ("Ukrtatnafta"), a Ukrainian joint stock company that operates the largest oil refinery in Ukraine, with Tatneft, Ukraine and Tatarstan as its three major shareholders.[3] *See* Declaration of Jonathan I. Blackman in support of Petition ("Blackman Decl."), ECF No. 1–3, Ex. A (Merits Award), ECF No. 1–4, ¶¶ 57–59.[4] Tatneft and Tatarstan were initially slated to make capital contributions of oil-related fixed

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Seek Discovery, ECF No. 26 ("Consol. Opp'n"); Reply to Opposition to Motion for Leave to Seek Discovery, ECF No. 30 ("Reply to Disc."). The Court also considered Tatneft's Notice of Filing, ECF No. 31 ("Tatneft's Notice"); Ukraine's Notice of Filing, ECF No. 32 ("Ukraine's Notice"); and the arbitral tribunal's Jurisdiction Decision, ECF No. 27–3 (attached as an exhibit to Tatneft's motion for summary judgment).

[2] Ukraine alleges that Tatneft is a "Tatarstan State-owned oil company under pervasive State control" and further, that it was transformed by the Republic of Tatarstan—a political subdivision of the Russian Federation—into a shareholding company in 1994. Mot. to Dismiss at 8. The Court notes that the page number citations refer to the numbers assigned by the Court's Electronic Case Filing system.

[3] Ukraine's shares were held by its state-owned oil and gas company, NJSC Naftogaz ("Naftogaz") after 2004. Mertis Award at 141, 562 n. 903.

[4] The Merits Award [Ex. A] is filed on the Court docket in four parts at ECF No. 1–4 through ECF No. 1–7, because of the length of the document.

assets to Ukrtatnafta, but later agreed to make contributions of cash and other assets in 1997 and 1998. Merits Award ¶¶ 61, 174, 176.

In 1998 and 1999, the United States-based Seagroup International, Inc. ("Seagroup") and Switzerland-based AmRuz Trading Co. ("AmRuz") acquired shares in Ukrtatnafta, and together with Tatneft and Tatarstan (the four entities are collectively referred to as the "Tatarstan Shareholders"), they owned a majority 56% of Ukrtatnafta's shares, and they agreed to vote as a bloc. *See id.* ¶¶ 141, 562 n.903. In January 2007, the Ukrainian Privat Group acquired a 1% interest in Ukrtatnafta. *Id.* ¶¶ 143, 223, 268. The Privat Group subsequently obtained Ukrainian judgments that purportedly invalidated the 1997 and 1998 shareholder resolutions whereby Tatarstan and Tatneft obtained their interests in Ukrtatnafta, and resulted in the Tatarstan Shareholders being barred from management of Ukrtatnafta and ownership of its shares. *Id.* ¶¶ 126–28, 147, 156, 159–62, 169–71, 174–76, 221–38, 276–80, 316, 320, 325, 465.

B. Arbitral Tribunal Proceedings

On December 11, 2007, Tatneft sent a Notice of Dispute to Ukraine, requesting negotiations pursuant to Article 9(1) of the Russia–Ukraine Bilateral Investment Treaty ("Russia–Ukraine BIT" or "BIT"). Merits Award ¶ 6; Blackman Decl., ECF No. 1–3, Ex. B (Russia–Ukraine BIT), ECF No. 1–8, Art. 9(1). On May 21, 2008, after trying to resolve the dispute for approximately five months, Tatneft served Ukraine with a Notice of Arbitration and Statement of Claim under UNCITRAL, alleging that Ukraine had violated its obligations with regard to granting legal protection to and disallowing discrimination against investors from

Russia, such as Tatneft, under the Russia–Ukraine BIT. Merits Award ¶ 7; Russia–Ukraine BIT Arts. 2, 3(1).

Following written submissions and a hearing, the arbitral tribunal issued a September 28, 2010 decision confirming its jurisdiction over Tatneft's claims (the "Jurisdiction Decision"), and after receiving additional written submissions and documents, the arbitral tribunal held a merits hearing from March 18, 2013 to March 27, 2013, wherein fact and expert witnesses testified. Award ¶¶ 6–46. On July 29, 2014, the arbitral tribunal issued a Merits Award, whereby it concluded that Ukraine's actions resulted in a "total deprivation of [Tatneft's] rights as a shareholder of Ukrtatnafta" and further, that Ukraine had failed under the Russia–Ukraine BIT to provide "fair and equitable treatment" (FET) to Tatneft. Merits Award ¶¶ 464, 412. Ukraine was ordered to "pay [Tatneft] the amount of US$ 112 million as compensation for its breaches of the Russia–Ukraine BIT" along with interest at the U.S. dollar LIBOR rate plus 3% compounded every three months, with further instructions about the accrual of interest. *Id.* ¶ 642(1)–(3).

C. Proceedings following the Arbitration

On August 27, 2014, Ukraine brought an action before the Paris Court of Appeal in France to annul both the Merits Award and the earlier Jurisdiction Decision. Blackman Decl. ¶ 5. On November 29, 2016, the Paris Court of Appeal rejected Ukraine's annulment request, upheld both the Jurisdiction Decision and the Merits Award, and ordered Ukraine to pay fees and costs to Tatneft. *Id.* Ukraine filed a subsequent request for appeal, on March 21, 2017, to the French Court of Cassation.

On December 29, 2016, Tatneft sent a letter to Ukraine demanding payment of the Merits Award amount and noting that if payment was not made by February 15, 2017, Tatneft would commence enforcement proceedings. *See* Blackman Decl., ECF No. 1–3, Ex. C (Dec. 29, 2016 Demand Letter), ECF No. 1–9, at 2. Tatneft filed its Petition to Confirm Arbitral Award on March 30, 2017, seeking recognition of the award in this Court. Ukraine requested that this Court stay its determination of the Petition pending the decision in the French Court of Cassation. Shortly after the briefing on the stay motion became ripe, Ukraine filed its opposition to Tatneft's Petition, and also filed a motion to dismiss and motion for jurisdictional discovery.[5] Ukraine's opposition to the Petition focuses on alleged doubts regarding the arbitrator's impartiality and independence, and asserts that recognition and enforcement of the award would be contrary to United States' public policy.

In its motion to dismiss Tatneft's Petition, Ukraine argues that this Court lacks subject matter jurisdiction because Ukraine is entitled to foreign sovereign immunity and further, that dismissal is warranted on grounds of *forum non conveniens*. With regard to the jurisdictional challenge, Ukraine contends more specifically that the arbitration exception in Section 1605(a)(6) of the Foreign Sovereign Immunities Act does not apply because Tatneft is not a "private party" and the award was not made "pursuant to" any agreement to arbitrate. Ukraine moves for permission to

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[5] The Court indicated that it would consider Ukraine's jurisdictional objection before ruling on any motion to stay. *See* July 10, 2017 Minute Order. In this Memorandum Opinion, the motion to stay will be considered after consideration of the motion to dismiss and motion for jurisdictional discovery.

conduct jurisdictional discovery in the event that this Court does not grant its motion to dismiss. Petitioner Tatneft opposes all of Ukraine's motions.

II. LEGAL STANDARD

Prior to beginning an analysis of the arguments raised in the motions and the petition which are pending before the Court, it may be useful to briefly set out the legal provisions underlying such analysis, *i.e.*, the Foreign Sovereign Immunities Act and the arbitration exception thereto, which govern this Court's jurisdiction over Respondent Ukraine, and The New York Convention, which governs enforcement of foreign arbitration awards.

A. Foreign Sovereign Immunities Act and the Arbitration Exception

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), codified at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611, is the "sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States]." *Belize Social Development Ltd. v. Government of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989)). When considering enforcement of an arbitral award against a foreign state, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, *et seq* "is 'the sole basis for obtaining jurisdiction over a foreign state in our courts.'" *Nemariam v Fed. Dem. Rep. of Ethiopia*, 491 F.3d 470, 474 (D.C. Cir. 2007) (quoting *Argentine Rep. v Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). Foreign states enjoy sovereign immunity under the FSIA unless an international agreement or one of several exceptions in the statute provides otherwise. *See generally* FSIA; *see also Phoenix Consulting, Inc. v. Republic*

of Angola, 216 F.3d 36, 39 (D.C. Cir. 2000). Accordingly, "[i]n the absence of an applicable exception, the foreign sovereign's immunity is complete [and] [t]]he district court lacks subject matter jurisdiction over the plaintiff's case." *Id.* (citation and internal quotation marks omitted).[6] Because "subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions... [a]t the threshold of every action in a District Court against a foreign state... the court must satisfy itself that one of the exceptions applies[.]" *Verlinder B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983); *see also Saudi Arabia v Nelson*, 507 U.S. 349, 355 (1993) ("[U]ness a specified exception applies, a federal court lacks subject-matter jurisdiction over a claims against a foreign state." (citations omitted)).

The FISA provides an exception to foreign sovereign immunity for actions to confirm certain arbitration awards, as follows:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States in any case— . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in

[6] There is no dispute that Ukraine is a foreign state pursuant to 28 U.S.C. Section 1603(a).

> force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6)(B).

B. The New York Convention

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, codified into United States law through the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 *et seq.,* is a multilateral treaty providing for "the recognition and enforcement of arbitral awards" across international borders. Pursuant to Section 202 of the FAA, "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial ... falls under the [New York] Convention." 9 U.S.C. § 202. The "district courts of the United States . . . shall have original jurisdiction over such an action or proceeding [falling under the Convention], regardless of the amount in controversy." 9 U.S.C. § 203. *See also BCB Holdings Ltd. v Gov't of Belize*, 110 F.Supp.3d 233, 242 (D.D.C. 2015) (finding that the FAA affirms that the purpose of the New York Convention is to encourage recognition and enforcement of commercial arbitration agreements in international contracts), *aff'd*, 650 F. App'x 17 (D.C. Cir. 2016), *cert den.,* 137 S.Ct. 619 (2017). This Circuit has made clear that "the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception." *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). The arbitration exception set forth in Section 1605(a)(6) "by its terms" applies to actions to confirm arbitration awards under the New York Convention. *Id.*

Federal courts in the United States have minimal discretion to refuse to confirm an arbitration award under the FAA, which provides that the district court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [ ] Convention." 9 U.S.C. § 207; *see TermoRio S.A. E.S.P. v. Electanta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (A district court "may refuse to enforce the award [under the New York Convention] only on the grounds explicitly set forth in Article V of the Convention."), *cert denied*, 552 U.S. 1038 (2007); *see also Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F.Supp.2d 12, 20 (D.D.C. 2011) ("Confirmation proceedings are generally summary in nature" because "the New York Convention provides only several narrow circumstances where a court may deny confirmation of an arbitral award.") (citation omitted).

Pursuant to the New York Convention: (1) an arbitral award may be refused at the request of the party against whom it is invoked where (a) the parties to the agreement were under some incapacity; (b) the party against whom the award is invoked did not receive proper notice of the arbitration proceedings; (c) the award deals with an issue not falling within the terms of the parties' submission to arbitration; (d) the composition of the arbitral tribunal was not in accordance with the parties' agreement; (e) the award has not yet become binding; or (2) recognition and enforcement of an arbitral award may be refused in the country where it is sought if (a) the issue arbitrated is not capable of being arbitrated under the law or (b) it would be contrary to the public policy of such country. New York Convention, Art. V, June 10, 1958, 21 U.S.T. 2517,

1970 WL 104417 (effective for the United States on Dec. 29, 1970).

Ukraine argues against confirmation and enforcement of the Merits Award on N.Y. Convention Article V grounds; namely, Ukraine alleges there was a lack of impartiality of the arbitral tribunal, and further, that recognition and enforcement would be contrary to the public policy of the United States. Ukraine's previously-noted challenges based on sovereign immunity and *forum non conveniens* are outside of the confines of Article V and were raised in its Motion to Dismiss as opposed to its response to the Petition. The Court will first address Ukraine's jurisdictional and other non-Article V arguments before analyzing the merits of its Article V arguments.

III. DISCUSSION

A. Ukraine's Motion to Dismiss is based on alleged lack of subject matter jurisdiction

Before a court may exercise subject matter jurisdiction over a proceeding to enforce an arbitral award against a foreign sovereign, first, "there must be a basis upon which a court in the United States may enforce a foreign arbitral award" and second, the foreign sovereign "must not enjoy sovereign immunity from such an enforcement action." *Diag Human, S.E. v. Czech Republic–Ministry of Health*, 824 F.3d 131, 133–34 (D.C. Cir. 2016), *cert denied*, U.S. 137 S.Ct. 1068 (2017). In the event that the court lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3); *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety"). This Court considers the two *Diag Human* factors in reverse order, first

considering the applicability of the foreign arbitration exception to sovereign immunity before examining the New York Convention, which is the basis for confirmation of an arbitral award.

Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of the United States courts," and "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Accordingly, a district court charged with consideration of an action brought against a foreign state "must satisfy itself that one of the exceptions applies." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 (D.C. Cir. 1987) ("If an exception to the main rule of sovereign immunity applies, then the FSIA confers subject matter jurisdiction on the district courts.").

The petitioner bears the initial burden of supporting its claim that a FSIA exception applies, and this burden of production may be met where a party seeking to confirm an award produces "the BIT, [its] notice of arbitration against [the foreign sovereign], and the tribunal's arbitration decision." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015), *cert denied*, 136 S.Ct. 2410 (2016). In the instant case, Tatneft has satisfied its burden of production pursuant to *Chevron*. The burden of persuasion then shifts to Ukraine, the foreign sovereign that is claiming immunity, "to establish the absence of the factual basis by a preponderance of the evidence." *Id.*; *see also Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) ("Where a plaintiff has asserted jurisdiction under the FSIA and the defendant foreign state has asserted the

jurisdictional defense of immunity, the defendant state bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.") (citation and internal quotation marks omitted), *cert denied*, 137 S.Ct. 617 (2017).

1. Arbitration Exception to FSIA

Tatneft asserts that this Court may exercise subject matter jurisdiction in this case because the FSIA provides an exception to foreign sovereign immunity for actions to confirm arbitration awards that are made pursuant to an agreement to arbitrate and are governed by an international treaty in force in the United States calling for the recognition and enforcement of arbitral awards. [7] *See* 28 U.S.C. § 1605(a)(6)(B). Tatneft asserts that its Petition falls under this exception because the Merits Award was made pursuant to the Russia–Ukraine BIT and it is governed by the New York Convention. *See* Pet. ¶¶ 3, 11, 16.

Tatneft's assertions are confirmed, first, by the language of the Merits Award, which indicates that it was made pursuant to the BIT, an agreement that provides for arbitration. Article 9 of the Russia–Ukraine BIT provides in part that:

> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes regarding the amount, terms of and procedure for payment of the compensation . . .,

[7] Tatneft argues alternatively that the Court has jurisdiction under Section 1605(a)(1) because Ukraine waived sovereign immunity when it signed the New York Convention, although the Court notes that this basis for jurisdiction was not raised by Tatneft in its Petition.

> shall be set out in a written notification accompanied by detailed comments which the investor shall send to the Contracting Party involved in a dispute. The parties to the dispute shall attempt to resolve that dispute where possible by negotiation.
>
> 2. In the event that the dispute is not resolved within six months of the date of the written notification, . . ., the dispute shall be referred to be considered by:
>
> * * *
>
> (c) an ad hoc arbitration tribunal, in conformity with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICITRAL).
>
> 3. The arbitration award shall be final and binding upon both parties to the dispute. . . .

Russia–Ukraine BIT, ECF No. 1–8, Article 9. *See, e.g.,* Merits Award, ECF No. 1–4, at 16, 17, 23 (referring to obligations "under the Russia–Ukraine BIT" and describing the subject of the arbitration as concerning "the lawfulness under the Russia–Ukraine BIT"); ECF No. 1–5, at 43 (setting out Tatneft's claims under the Russia–Ukraine BIT).

Second, there is no dispute that the Merits Award is governed by the New York Convention, which controls when a party moves for recognition and enforcement of an arbitral award that was made in the territory of a State other than the State where such award recognition and enforcement is sought. *See generally* New York Convention, 21 U.S.T. 2517. Awards are enforceable in the courts of any signatory so long as "the place of the award ... is in the territory of party to the

Convention." *Creighton*, 181 F.3d at 121 (quotation omitted). The arbitration in this case was held in Paris, and France is a party to the New York Convention; thus, the Merits Award is governed by the Convention. *See* Pet. ¶¶ 19, 23; U.S. Dept. of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2007, § 2 at 12, *available at* http://www.state.gov/documents/organization/89668.pdf.

Ukraine argues however that the arbitration exception to foreign sovereign immunity does not apply because: (1) Tatneft is a state-controlled entity and not a "private party" as per the arbitration exception to the FSIA; (2) the Merits Award, which was based on the "fair and equitable treatment" provision, was not made "pursuant to" any agreement to arbitrate because that "fair and equitable treatment" provision was excluded from the Russia–Ukraine BIT and; (3) the Merits Award awarded the "vast majority of the damages for the shares of Swiss and American companies that were not covered by Ukraine's offer to arbitrate with Russian investors" because Tatneft lacked standing to assert claims on behalf of AmRuz and Seagroup. *See generally* Mot. to Dismiss at 13–33.

In this case, "the [arbitral] tribunal bifurcated the proceedings in order to first consider Ukraine's various 'objections to jurisdiction and admissibility.'" *See* Supplemental Blackman Decl., ECF No. 27–2, Ex. A (Jurisdiction Decision), ECF No. 27–3, ¶¶ 16–19.[8] Tatneft contends that "[b]etween February 20, 2009 and December 14, 2009, the parties [ ] submitted extensive

[8] Tatneft references the Jurisdiction Decision in its Consolidated Opposition.

written briefing solely addressing [ ] these threshold [jurisdictional] issues." Consol. Opp'n at 17, Jurisdiction Decision ¶¶ 17–32. This was followed by a three-day hearing in The Hague, which resulted in the tribunal issuing an 87–page Jurisdiction Decision confirming its competence to hear the dispute and the "admissibility" of Tatneft's claims under the Russia–Ukraine BIT and applicable international law.[9] *See* Jurisdiction Decision ¶¶ 75–77, 100, 152, 164, 200, 224, 238, 252–53. In the Jurisdiction Decision, the arbitral tribunal explained that its consideration of issues relating to jurisdiction and admissibility was undertaken at the behest of Ukraine. "Respondent [Ukraine] made in its Statement of Defense [a request] that the Tribunal rule on the issue of jurisdiction as a preliminary question, in accordance with Article 21(4) of the UNCITRAL Rules." Jurisdiction Decision ¶ 17.

The arbitral tribunal's Jurisdiction Decision addressed and rebutted a variety of jurisdictional objec-

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[9] Tatneft explains that in the context of this arbitration, "an "admissibility" objection goes to the question of whether the claim should be heard at all (e.g., whether the claim is time barred or subject to some similar legal defect), unlike a "jurisdictional" objection, which goes to the tribunal's power to decide the claim (whether there is a valid agreement to arbitrate)." Consol. Opp'n at 17, n.6. (referencing Jan Paulsson, *Jurisdiction and Admissibility,* Global Reflections on International Law, Commerce and Dispute Resolution 601 (Gerald Aksen *et al.* eds. 2005)). Tatneft further explains that "admissibility objections are considered merits issues for the arbitral tribunal, not the courts, to decide." *Id.*; *see* Case Comment, *Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone Between Jurisdiction and Admissibility,* 9 Dispute Resolution Int'l 85, 87 n.4 (2014) ("[I]f parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be final.") (citation omitted).

tions raised by Ukraine, including that: (1) the Russia–Ukraine BIT does not apply to disputes concerning Ukrtatnafta; (2) Tatneft is not an investor within the meaning of the BIT because it is controlled by the Government of Tatarstan; (3) Tatneft's participation in Ukrtatnafta is not an investment within the meaning of the BIT; and (4) Tatneft's participation in Ukrtatnafta is not in conformity with Ukrainian legislation. The tribunal further addressed a number of admissibility objections raised by Ukraine, including that: (1) Tatneft has no standing on behalf of AmRuz and Seagroup; (2) Tatneft has no standing to claim for unpaid oil deliveries; and (3) Tatneft failed to state an arguable case concerning alleged violations of its rights under the BIT and for damages. *See* Jurisdiction Decision at 30–49 (addressing objections to jurisdiction); 72–88 (addressing objections to admissibility).

With regard to the allegations that Ukraine is relying on in this case—that Tatneft is not a private party, the "fair and equitable treatment" provision is not incorporated in the BIT, and Tatneft has no standing on behalf of AmRuz and Seagroup—the Court notes that the tribunal made specific findings in favor of Tatneft on each of these claims. By way of example, the tribunal found that "[t]here is undoubtedly a government presence in Tatneft [ ]," but it concluded that "business-related aspects predominate in Tatneft's operations and [ ] it is thus entitled to claim as a private investor under the Russia–Ukraine BIT." Jurisdiction Decision ¶¶ 129, 151. The tribunal characterized the issue regarding the fair and equitable treatment provision as "a matter for the merits," and upon consideration of the merits, the tribunal found that Ukraine agreed to provide fair and equitable treatment to Tatneft by incorporation through the most-favored-nation

clause, but failed to provide such treatment. *See* Jurisdiction Decision ¶ 249; Merits Award ¶¶ 391–413. Finally, when confronted with Ukraine's assertions that Tatneft could not make a claim on behalf of Seagroup and AmRuz, the tribunal considered and rejected these assertions in the context of the Jurisdiction Decision. *See* Jurisdiction Decision Paragraphs 202–224.

By means of its Motion to Dismiss, Ukraine is asking this Court to revisit its previously-raised jurisdiction and admissibility objections, in the context of this Court's determination whether or not to apply the arbitration exception to Ukraine's foreign sovereign immunity. Factually similar to the instant case is *Chevron Corp.*, where Ecuador, the foreign sovereign, asserted that the arbitration exception to the FSIA "required the District Court to make a *de novo* determination of whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's breach of contract claims" because, according to Ecuador, if such claims were not covered by the BIT, there was no agreement to arbitrate. 795 F.3d at 205. Ecuador viewed arbitrability as a jurisdictional question to be addressed by the Court. *Id.* The D.C. Circuit rejected this argument, noting that "Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention," and finding that the District Court's "jurisdictional task" was "to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate." *Id.*

In the underlying *Chevron* decision, Judge James E. Boasberg rejected Ecuador's suggestion that the Court conduct an independent *de novo* determination of the arbitrability of a dispute in connection with the FSIA's arbitration exception, noting that:

> Such an argument appears to be an attempt by Ecuador to get two bites at the apple of the merits of its dispute with Chevron, by seeking to have this Court separately determine the arbitrability of the underlying dispute under both the FSIA and the New York Convention. The inquiry Ecuador suggests runs counter to the clear teaching of this Circuit on the purpose and role of the FSIA. The FSIA is a jurisdictional statute that speak[s] to the power of the court rather than to the rights and obligations of the parties. Likewise § 1605(a) does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning enforcement of an arbitral award. Inquiring into the merits of the enforcement dispute—that is, the arbitrability of the underlying claims—would involve an inquiry into the contractual rights of the parties to arbitration and would thus be beyond the reach of the FSIA's cabined jurisdictional inquiry.

Chevron Corp. v. Republic of Ecuador, 949 F.Supp.2d 57, 63 (D.D.C. 2013) (internal citations and quotation marks omitted), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015). Judge Boasberg applied an approach consistent with many other federal courts engaging in only two jurisdictional inquiries including "whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and whether the award is or may be governed by a relevant recognition treaty." *Id.* Citation and internal quotation marks omitted). FSIA "allows federal courts to exercise jurisdiction over [a foreign sovereign] in order to consider an action to confirm or enforce the award" regardless of any dispute over whether the tribunal was competent to hear the

arbitration in the first place. *Chevron*, 795 F.3d at 206; *see BCB Holdings Ltd. v. Govt. of Belize*, 110 F.Supp.3d 233, 244 (D.D.C. 2015) ("Inquiring into the merits of whether this dispute was rightly submitted to arbitration is beyond the scope of the FSIA's jurisdictional framework."), *aff'd*, 650 Fed. App'x 17 (D.C. Cir. 2016).

In *Crystallex Internt'l Corp. v. Bolivarian Rep. of Venezuela,* 244 F.Supp.3d 100 ((D.D.C. 2017), the foreign sovereign argued that the tribunal exceeded the scope of its authority by addressing matters not consigned to arbitration under the applicable BIT. In determining the amount of deference to grant the tribunal's findings, the foreign sovereign relied on Supreme Court cases distinguishing between the standard of review for questions of "arbitrability" and more procedural issues. *Id.* at 111. *See generally BG Group PLC v. Republic* of Argentina, --- U.S. ---, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014) (holding that issues of arbitrability presumptively receive de novo review, while procedural jurisdiction questions presumptively receive deferential review.) The Court in *Crystallex* found however that:

> *BG Group* left intact the principle that "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *Id.* at 1206. In other words, when the parties explicitly agree that the tribunal should decide the scope of its own inquiry, then courts should review that determination deferentially. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("[A]court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration.")

Crystallex, 244 F.Supp.3d at 111; *see also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F.Supp.3d 112, 121 (D.D.C. 2015) ("In cases where both parties have clearly and unmistakably delegated the question of arbitrability to the arbitrator, a court 'should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.'") (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

In the instant case, Ukraine specifically requested that the arbitral tribunal first rule on issues of jurisdiction prior to considering the merits of Tatneft's claims. In the proceeding before this Court, Ukraine challenges the confirmation and enforcement of the foreign arbitral award through both a motion to dismiss as well as its response to the Petition, and as such, similar to the scenario in *Chevron, supra*. Ukraine appears to attempt to get "two bites at the apple of the merits of its dispute with [Tatneft], by seeking to have this Court separately determine the arbitrability of the underlying dispute under both the FSIA and the New York Convention," which is contrary to the "teaching of this Circuit on the purpose and role of the FSIA." *Chevron*, 949 F.Supp.2d at 63. Accordingly, as to the application of an exception to immunity under FSIA, the Court is satisfied that the FSIA's arbitration exception applies, and the Court has subject-matter jurisdiction to enforce the Award, and Ukraine's motion to dismiss on jurisdictional grounds shall be denied. Regardless, the Court considers the merits of Ukraine's argument pursuant to Article V of the Convention in Section III D of this opinion.

2. Implied Waiver Exception to FSIA

Tatneft argues in the alternative that this Court has jurisdiction pursuant to 28 U.S.C. § 1605(a)(1) because Ukraine waived its sovereign immunity under the theory of implied waiver. Ukraine contends that Tatneft waived this argument when it failed to raise it in the Petition. Tatneft acknowledges that Section 1605(a)(1) was not specifically mentioned in its Petition, which relies upon the exception in Section 1605(a)(6); however, Tatneft alleges that the facts supporting this argument (reliance on the New York Convention) are recited in Tatneft's Petition. Tatneft further contends that this argument has not been waived because the usual rules of pleading—whereby a plaintiff may not amend its complaint through briefs in opposition to a motion to dismiss—do not apply to this enforcement proceeding. *See TermoRio E.S.P. v. Electranta S.P.*, 487 F.3d 928, 940 (D.C. Cir. 2007) ("motions to enforce arbitral awards should proceed under motions practice, not notice pleading"), *cert denied*, 552 U.S. 1038 (2007). Ukraine argues that there should be no difference in the treatment of a complaint or petition, but the cases cited by Ukraine in support of this proposition do not involve foreign arbitration award petitions. The Court finds that while 1605(a)(1) was not specifically mentioned in the Petition, Ukraine had ample opportunity to respond to this argument in its Reply to the Motion to Dismiss, and accordingly, the theory of implied waiver will be considered by this Court in connection with the briefing on that motion.[10]

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[10] The parties consented to an extended briefing schedule on the opposition and reply to the motion to dismiss. *See* August 7, 2017 Minute Order.

The FSIA does not define "implied waiver." *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999). This Circuit has, however, "followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly." *Id. (*quoting *Shapiro v Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)). "Implicit in § 1605(a)(1) is the requirement that the foreign state has intended to waive its sovereign immunity." *Creighton*. 181 F.3d at 122. This Circuit has acknowledged the implied waiver of sovereign immunity in three circumstances: "(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country governs a contract; or (3) a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). Courts have been "reluctant to stray beyond these examples" when considering claims of implicit waiver of sovereign immunity. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D. C. Cir. 1994), *cert denied*, 513 U.S. 1121 (1995).

Courts have found an implicit waiver under § 1605(a)(1) in "cases involving contracts in which a foreign state has agreed to arbitrate disputes without specifying jurisdiction in a particular country or forum" but "most courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States."[11] *Frolova v. Union of*

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[11] The Russia–Ukraine BIT provides that disputes shall be considered by:

a) a competent court or an arbitration tribunal of the Contracting Party in whose territory the investments were made;

Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985); *see also Creighton*, 181 F.3d at 123 (examining district court cases finding an implied waiver based on the foreign sovereign's agreement to arbitrate in the territory of a state that had signed the New York Convention, and distinguishing between those in which the foreign sovereign was a signatory to the Convention and those in which the foreign sovereign was not a signatory to the Convention). In *Creighton*, the Circuit Court reasoned that "Qatar not having signed the Convention, we do not think that its agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States." *Id.* In making this distinction, the D.C. Circuit adopted the Second Circuit's reasoning in *Seetransport Wiling Trader v. Navimpex Centrala Navala* that if a foreign state agrees to arbitrate in a country that has signed the New York Convention, it waives its sovereign immunity in all of the signatory countries by virtue of the fact that "when 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

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b) the Arbitration Institute of the Stockholm Chamber of Commerce;
c) an ad hoc arbitration tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Russia–Ukraine BIT, ECF No. 1–8, at Article 9.

Legislation based on the UNCITRAL Model Law has been adopted in 109 jurisdictions, including certain states within the United States. See "Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006," http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

signatory states." *Creighton*, 181 F.3d at 123, quoting *Seetransport*, 989 F.2d 572, 578 (2d Cir. 1993); *see Stati v. Republic of Kazakhstan*, 199 F.Supp.3d 179, 189 (D.D.C. 2016) (finding an implied waiver of sovereign immunity where Kazakhstan agreed to arbitrate in Sweden, and Kazakhstan, Sweden and the United States are all signatories to the New York Convention).

In the instant case, Ukraine agreed to arbitrate in the territory of a state [France] that has signed the New York Convention, and it is also a signatory to the Convention; thus, it should have anticipated enforcement actions in signatory states. *See* "Contracting States," *New York Arb. Convention*, http://www.newyorkconvention.org/countries. Accordingly, following the standard set forth in *Creighton*, this Court finds that implied waiver under Section 1605(a)(1) is an alternative grounds for jurisdiction over Ukraine, and Ukraine's motion to dismiss on jurisdictional grounds shall be DENIED.

B. Ukraine's Motion to Dismiss asserts that the United States is a Forum Non Conveniens

Ukraine also argues that dismissal is warranted on *forum non conveniens* grounds. *See* Mot.to Dismiss at 47–50. Under this doctrine, the Court "must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas Chisidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981)). There is a "substantial presumption in favor of a plaintiff's choice of forum," *id.*, and [t]he burden is on the

defendant[ ] to satisfy the threshold requirement of demonstrating the existence of an adequate alternate forum with jurisdiction over the case." *De Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 138 (D.D.C. 2011), *aff'd in part, rev'd in part on other grounds*, 714 F.3d 591 (D.C. Cir. 2013).

This Court must determine first if an alternative forum "is both available and adequate." *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 571 (D.C. Cir. 2010). An alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981). If the remedy provided by the alternative forum "is so clearly inadequate or unsatisfactory that it is no remedy at all," the district court "may conclude that dismissal would not be in the interests of justice." *Id.* at 254. Tatneft argues that Ukraine cannot satisfy the first step of the *forum non conveniens* test because the D.C. Circuit has plainly stated that there is no alterative forum that has jurisdiction to attach the commercial property of a foreign nation located in the United States. *TMR Energy, Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

In *TMR*, the petitioner moved to enforce an arbitration award obtained in Sweden against Ukraine, and the respondent argued that the courts of Ukraine and Sweden were adequate forums in which to enforce the award. The petitioner countered however that only a United States court could attach the commercial property of a foreign state, which was located in the United States, upon judgment entered by a United States court. *Id.* Ukraine asserts that Tatneft's reliance on *TMR* is misplaced because, in this case, "Tatneft has

not attempted to identify any Ukrainian commercial property in the United States that could be subject to attachment [and thus,] the existence of Ukraine's commercial assets in the United States is *hypothetical and speculative*." Reply to Dismiss at 31–32 (emphasis in original).

Ukraine's argument ignores the reasoning set forth by the D.C. Circuit [in *TMR*] in response to the Respondent's argument that "the district court should have dismissed this action because [it] had no assets in the United States against which a judgment [could] be enforced." 411 F.3d at 304. The D.C. Circuit explained that:

> Even if [Respondent] currently has no attachable property in the United States, however, it may own property here in the future, and [Petitioner's] having a judgment in hand will expedite the process of attachment. In any event, the possibility that the judgment of the district court may go unenforced does not bear upon whether that court is an inconvenient forum in which to defend. [Respondent] also speculates that [Petitioner's] true motive is to go after the property of the State of Ukraine, but [Petitioner's] motive is immaterial and whether [Petitioner] could properly attach such property is not before us.
>
> Because there is no other forum in which [Petitioner] could reach the [Respondent's] property, if any, in the United States, we affirm the district court's refusal to dismiss this action based upon the doctrine of *forum non conveniens*.

TMR, 411 F.3d at 303–04; *see generally Belize Social Dev. Ltd. v. Gov't of Belize*, 5 F.Supp.3d 25, 34 (D.D.C.

2011) (noting that *TMR Energy* is "the controlling law in [this] Circuit"), *aff'd*, 794 F.3d 591 (D.C. Cir. 2013).

With respect to the aforementioned first step in the test for dismissal based on *forum non conveniens*, Tatneft bolsters its argument that Ukraine is not an adequate alternative forum with its allegation that "the [Merits] Award is based on the wrongful actions of the Ukrainian courts, prosecutors, and court officials" and accordingly, there is no expectation of impartiality on behalf of the Ukrainian courts and in fact, an expectation that they would fail to enforce the Merits Award on the same "grounds they used to deprive Tatneft of its interests in Ukrtatnafta in the first place." Consol. Opp'n at 50. *Cf. Daventree Ltd. v. Republic of Azerbaijan*, 349 F.Supp.2d 736, 756 (S.D.N.Y. 2004) (holding that defendant's court system was an inadequate alternative forum because "the possibility that the Sovereign defendants could dictate the outcome of this dispute through their control of the [ ] courts would effectively foreclose the plaintiffs' right to pursue their claims"); *Cabiri v. Assasie–Gyimah*, 921 F.Supp. 1189, 1198–99 (S.D. N.Y. 1996) (the alternative forum was inadequate for plaintiff's claim that he was persecuted by that forum's government official).

Ukraine relies upon *In re Arbitration between Monegasque De Reassurances v Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002), where the Second Circuit rejected the petitioner's "bare denunciations and sweeping generalizations" about Ukraine's judicial system, finding this was "speculation insufficient to defeat a finding of an adequate alternative forum." Notably, the court in *Monegasque* distinguished between situations where the Petitioner made sweeping generalizations and those where the "alternative forum

[was] characterized by a complete absence of due process or an inability of the forum to provide substantial justice to the parties." 311 F.3d at 499; *see Rasoulzadeh v. Associated* Press, 574 F.Supp. 854, 861 (S.D.N.Y. 1983) (finding that a defendant's motion to dismiss for *forum non conveniens* should generally be denied if the foreign law is inadequate or the conditions in the foreign forum reveal that plaintiffs are unlikely to obtain basic justice, and in this particular case, where the court had "no confidence whatsoever in the plaintiffs' ability to obtain justice at the hands of the courts" in Iran), *aff'd*, 767 F.2d 908 (2d Cir. 1985) (mem.). This Court finds that Tatneft's assertions more closely approximate allegations revealing why Tatneft will be unable to obtain basic justice in Ukraine: (1) because of the nature of the claims in the underlying dispute—which incriminate certain Ukrainian court orders and judicial actors—and (2) the procedural posture of this case in the Ukrainian courts prior to arbitration, rather than allegations containing sweeping generalizations about the inadequacy of the Ukrainian judicial system.

Accordingly, because the rationale in *TMR Energy* controls the specific *forum non conveniens* question before the Court, and further, Tatneft has raised a credible issue of its ability to obtain justice in Ukraine, this Court finds that Ukraine cannot show that an alternative forum exists. The Court need not thus engage in the balancing step of the *forum non conveniens* test. *See TMR Energy*, 411 F.3d at 303 ("The district court need not weigh any factors favoring dismissal . . . if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose."). Ukraine's motion to dismiss on *forum non conveniens* grounds shall be DENIED.

C. Ukraine's Motion for Jurisdictional Discovery

Ukraine argues that it should be permitted to engage in jurisdictional discovery as to the issue of whether Tatneft is a "private party" for purposes of applying the FSIA arbitration exception. *See* 28 U.S.C. § 1605(a)(6) (a foreign state is not immune from the jurisdiction of U.S. courts in a case "in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties . . . .") "It is well established that the 'district court has broad discretion in its resolution of [jurisdictional] discovery problems.' " *FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1093 (D.C. Cir. 2008) (quoting *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983)). "This Circuit's standard for permitting jurisdictional discovery is quite liberal." *Diamond Chem. Co. v. Atofina Chems., Inc.*, 268 F.Supp.2d 1, 15 (D.D.C. 2003). "[H]owever, in order to get jurisdictional discovery a plaintiff must have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless* PLC, 148 F.3d 1080, 1090 (D.C. Cir. 1998). Moreover, "a plaintiff must make a 'detailed showing of what discovery it wishes to conduct or what results it thinks such discovery would produce.'" *Atlantigas Corp. v. Nisource, Inc.*, 290 F.Supp.2d 34, 53 (D.D.C. 2003) (quoting *Phillip Morris*, 116 F.Supp.2d at 130, No. 6). In the instant case, Respondent Ukraine wants to conduct jurisdictional discovery to demonstrate that the Court lacks jurisdiction because Tatneft is allegedly not a private party.

Tatneft contests Ukraine's request for jurisdictional discovery on grounds that Ukraine has not explained what additional facts from discovery "would affect the court's jurisdictional analysis" and thus, Tatneft argues that it is appropriate to deny discovery. Consol. Opp'n at 47, citing *Maqeleh*, 738 F.3d at 326; *see also Mwani v. Bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (confirming the district's court's discretion over a request for jurisdictional discovery and the denial of jurisdictional discovery where such discovery would not change the FSIA jurisdictional analysis); *Crist v Republic of Turkey*, 995 F.Supp. 5, 12 (D.D.C. 1998) ("Requests for jurisdictional discovery should be granted only if the plaintiff presents non-conclusory allegations that, if supplemented with additional information, will materially alter the court's analysis with regard to the applicability of the FSIA.") (internal quotation marks and citation omitted).

In light of the fact that this Court has already determined in Section III A. 1. herein that it will defer to the arbitral tribunal's determination on jurisdiction, which was upheld by the Paris Court of Appeal, Ukraine's request for jurisdictional discovery on the issue of whether Tatneft is a private party is moot. Furthermore, this Court has also determined that Section 1605(a)(1) is an alternative basis to conclude that the FSIA does not grant Ukraine immunity, and that section is not limited to proceedings to enforce arbitral awards made under agreement "with or for the benefit of a private party." Accordingly, Ukraine's request for jurisdictional discovery should be DENIED because Ukraine cannot show that additional discovery will change the Court's analysis of jurisdiction with regard

to 28 U.S.C. § 1605(a)(6), and the Court also has jurisdiction pursuant to § 1605(a)(1), which does not mention a "private party."

D. Ukraine's Motion to Stay

As previously noted herein, Tatneft's Notice of Arbitration was filed on May 21, 2008, and on September 28, 2010, the tribunal rendered an Award on Jurisdiction upholding its jurisdiction over the dispute between Tatneft and Ukraine. The tribunal held a subsequent hearing on the merits, from March 18, 2013 to March 27, 2013, and on July 29, 2014, the tribunal subsequently rendered a Merits Award holding Ukraine liable for violation of the "fair and equitable treatment" standard and ordering it to pay damages to Tatneft in the amount of $112 million plus interest. On August 27, 2015, Ukraine commenced a proceeding to set aside both the Jurisdictional Award and the Merits Award at the seat of the arbitration, in Paris, France, before the Paris Court of Appeal. "In French setting aside proceedings, the Paris Court of Appeal exercises *de novo* review ... of all issues pertaining to the arbitral tribunals' jurisdiction and discretionary review of all other issues." Mot. to Stay at 7. On November 29, 2016, the Paris Court of Appeal issued a decision upholding both the Jurisdiction Award and the Merits Award.

Ukraine filed cassation proceedings before the French Court of Cassation on March 21, 2017, seeking to overturn the decision of the Paris Court of Appeal upholding the Merits Award. Tatneft moved to dismiss Ukraine's case until it has paid the Merits Award and the attorneys' fees and costs ordered by the Paris Court of Appeal pursuant to Article 1009–1 of the French Code, "which authorizes the Court of Cassation to remove a case from its docket if the petitioner has

failed to comply with the term of the order that it plans to challenge." Opp'n to Stay at 10–11.

Ukraine's Motion to Stay is based on the pendency of the proceedings in the French Cassation Court; more specifically, Ukraine asserts that enforcement of the Merits Award would "enable multiplication of litigation" and "may lead to inconsistent results," and if the Award were enforced and then set aside, Ukraine would be forced to try to recover money that had already been paid out, which would pose a hardship. Motion to Stay at 8. Ukraine contends that the stay will be for a limited period of time, and as of the June 13, 2017 filing of the Motion to Stay, Ukraine estimated that "the French Cassation Court w[ould] likely deliver its decision in June 2018 or earlier." Motion to Stay at 14. Tatneft opposes the stay on grounds that the Merits Award has already been upheld by the Paris Court of Appeal and the mere possibility that the Court of Cassation will overturn the Merits Award is not enough to justify a stay.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with an economy of time and effort for itself, for counsel, and for litigants." *Landis v N. Am. Co. v. Am. Water Works & Elec. Co.*, 299 U.S. 248 (1936); *see also Enenlow v. New York Life Ins Co.*, 293 U.S. 379 (1935) (recognizing that a district court may stay a case "pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice"). Pursuant to the New York Convention, district courts have dis-

cretion to stay proceedings where "a parallel proceeding[12] is ongoing in the originating country and there is a possibility that the award will be set aside." *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57, 71 (D.D.C. 2013), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015) (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998)). "[T]he adjournment of enforcement proceedings impedes the goals of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation" and thus, "a stay of confirmation should not be lightly granted." *Id.* Courts evaluate the following factors, with more weight given to the first and second factors, in determining whether or not to grant a stay: (1) the general objectives of the arbitration; (2) the status of the foreign proceedings and estimated time for resolution; (3) whether the award will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce or set aside an award, (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity, (iii) whether they were initiated by the party trying to enforce the award in federal court, and (iv) whether they were initiated under circumstances evidencing intent to hinder or delay; (5) a balancing of the hardships to the parties, with the idea that if enforcement is postponed, the party seeking enforcement may

[12] Ukraine notes that there are two additional "parallel" proceedings that were filed in Moscow and London, but its argument in support of the motion to stay focuses on the "parallel" proceeding in France, which is the country where the Award was rendered.

receive "suitable security;" and (6) any other circumstances that could shift the balance in favor of either party. *Europcar*, 156 F.3d at 317–18.

In this case, however, this Court has been informed that the parallel proceeding that was ongoing in the French Court of Cassation has been dismissed without prejudice. On November 13, 2017, Tatneft filed a [31] Notice of Filing of a November 9, 2017 Radiation Order entered by the French Court of Cassation, which "dismisses without prejudice Ukraine's Court of Cassation appeal from the judgment of the Paris Court of Appeal that confirmed the Final Award in Tatneft's favor and rejected Ukraine's attempt to annul it." *See* Tatneft Notice of Filing, ECF No. 31, at 1.[13] In Ukraine's [32] Notice of Filing, Ukraine acknowledges that the case is inactive and explains that the "French Cassation Court will not examine the case until the petitioner proves that it has executed the decision the cassation of which is sought" and if Ukraine does not provide proof of this execution within two years, the case is closed.[14] *See* Ukraine Notice of Filing, ECF No. 32, at 1. "In this case, Ukraine has not paid 200,000 Euros in legal costs to Tatneft pursuant to the Paris Court of Appeal decision" and while Ukraine has "never denied

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[13] Ukraine explains that "'[r]adiation' is a measure of administration of justice ... provided in Article 1009–1 of the French Code of Civil Procedure, which allows the First President of the Cassation Court [ ] to temporarily remove the case from the docket if 'the petition cannot prove that it has executed the decision the cassation of which is sought,' except if he/she finds 'that the execution would entail manifestly excessive consequences or that it is impossible for the petitioner to execute such decision.'" Ukraine's Reply to Stay at 8 (citations and quotations omitted).

[14] Ukraine disagrees with the Tatneft's characterization as a "dismissal without prejudice" and states that it is "more analogous to a 'stay.'" Ukraine's Reply to Stay at 9.

its liability" for this payment, Tatneft must "apply for such writ of execution to the Ukrainian authorities for Ukraine to be able to make this payment[.]" *Id.* at 2.

Ukraine asserts however that it is now either preparing to challenge, or in the process of challenging, the Radiation Order issued by the French Court of Cassation through an abrogation proceeding. This Court notes that an abrogation proceeding does not directly challenge the Merits Award; instead, the purpose of this new proceeding is to "seek [ ] abrogation of the decree that introduced Article 1009–1 of the French Code of Civil Procedure before the French State Council" and in the event Ukraine prevails on that challenge, the Cassation Court's Radiation Order "will be annulled, and the French cassation proceeding will resume." *Id.*

The Court finds that a stay of the recognition and enforcement proceeding in this case is without merit because Ukraine's motion to stay is based on the idea that the ongoing French setting aside proceeding was a parallel proceeding that warranted consideration of the *Europcar* factors addressed in *Chevron*, but that setting aside proceeding is no longer active. Despite the fact that Ukraine has indicated its intent to challenge the French Court of Cassation's decision to "deactivate" the setting aside proceeding, Ukraine's prospective challenge is not a "parallel proceeding" that will have any immediate effect on the Paris Court of Appeals' upholding of the Merits Award; *i.e.*, the most that Ukraine can hope to accomplish is the reactivation of the setting aside proceeding in the French Court of Cassation. "[A] court abuses its discretion in ordering a stay 'of indefinite duration in the absence of a pressing need.'" *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 731–32 (D.C. Cir. 2012) (quoting

Landis, 299 U.S. at 255). This Court sees no reason to further delay the proceedings in this case where there is no foreseeable conclusion to Ukraine's challenge of the underlying Merits Award in the French Cassation Court, particularly when Ukraine has already appealed from the Merits Award, and that Award was confirmed by the Paris Court of Appeal. Ukraine's motion to stay should thus be DENIED.

E. Overview of Tatneft's Petition to Confirm Arbitration Award

United States courts have little discretion to refuse to confirm an award under the FAA, which provides that, in exercising its original jurisdiction over enforcing international arbitral awards, the district court "shall confirm the award 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. *See Yusuf Ahmed Alghanim & Sons, W.I.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) ("There is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award."). The grounds for refusal enumerated in the Convention are as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement . . . were, under the law applicable to them, under

some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings . . .; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration . . .; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . .; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970).

As discussed above, courts "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)) (internal quotation marks omitted). Because "the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature." *Int'l Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology,* 763 F.Supp.2d 12, 20 (D.C. Cir. 2011). "[T]he burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation," and "the showing required to avoid summary confirmation is high." *Id.* (quoting *Imperial Ethiopian Gov't v. Baruch–Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987)) (internal quotation marks omitted).

Ukraine has brought two defenses under Article V to the New York Convention against the enforcement of the Award, alleging that recognition and enforcement of the Merits Award should be refused because: 1) the composition of the arbitral tribunal was not in accordance with the agreement of the parties; and 2) it would be contrary to the public policy of the United States.

Upon review of Tatneft's Petition to Confirm the Arbitral Award, ECF No. 1, and Ukraine's Opposition to the Petition, ECF No. 22, this Court finds that it

would be useful to have Tatneft reply to Ukraine's opposition prior to this Court ruling on the Petition, and accordingly, by no later than April 19, 2018, Tatneft shall provide a reply to Ukraine's opposition.

IV. CONCLUSION

For the foregoing reasons, the Court shall DENY Respondent Ukraine's Motion to Dismiss, DENY Respondent Ukraine's Motion for Leave to Take Jurisdictional Discovery, and DENY Respondent Ukraine's Motion to Stay. Petitioner Tatneft is permitted until April 19, 2018 to file its reply to Ukraine's Opposition to Tatneft's Petition, and the Petition is HELD IN ABEYANCE until that time. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAO TATNEFT,
Petitioner/Plaintiff,

v.

UKRAINE,
Respondent/Defendant.

Civil Action No. 17-582 (CKK)

ORDER

(March 19, 2018)

Upon consideration of the pending motions before this Court, and for the reasons set forth in the accompanying Memorandum Opinion, it is this 19th day of March, 2018, hereby

ORDERED that Respondent Ukraine's [14] Motion to Stay is DENIED, and it is further

ORDERED that Respondent Ukraine's [21] Motion to Dismiss is DENIED, and it is further

ORDERED that Respondent Ukraine's [23] Motion to Leave to Seek Discovery is DENIED, and it is further

ORDERED that Petitioner Tatneft's [1] Petition is HELD IN ABEYANCE, and Tatneft is directed to file its reply to Ukraine's Opposition to the Petition by no later than April 19, 2018.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7057 **September Term, 2019**

1:17-cv-00582-CKK

Filed On: September 16, 2019

Pao Tatneft,

Appellee

v.

Ukraine, c/o Mr. Pavlo Petrenko, Minister of Justice,

Appellant

BEFORE: Wilkins and Katsas, Circuit Judges; Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on July 29, 2019, and the response thereto; and appellant's motion for leave to file a reply, and the lodged reply, it is

ORDERED that the motion for leave to file a reply be denied. It is

FURTHER ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7057 **September Term, 2019**

1:17-cv-00582-CKK

Filed On: September 16, 2019

Pao Tatneft,

Appellee

v.

Ukraine, c/o Mr. Pavlo Petrenko, Minister of Justice,

Appellant

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the response thereto; appellant's motion for leave to file a reply, and the lodged reply; and the absence of a request by any member of the court for a vote, it is

ORDERED that the motion for leave to file a reply be granted. The Clerk is directed to file the lodged reply to the response to appellant's petition for rehearing en banc. It is

FURTHER ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7057 **September Term, 2019**

1:17-cv-00582-CKK

Filed On: October 9, 2019

Pao Tatneft,

Appellee

v.

Ukraine, c/o Mr. Pavlo Petrenko, Minister of Justice,

Appellant

BEFORE: Wilkins and Katsas, Circuit Judges; Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's motion to stay issuance of the mandate pending disposition of a petition for writ of certiorari, and the opposition thereto, it is

ORDERED that the motion be granted to the extent that the Clerk is directed to withhold issuance of the mandate through November 8, 2019. If within the period of stay, appellant notifies the Clerk in writing that a petition for writ of certiorari has been filed, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition. See Fed. R. App. P. 41(d)(2)(B); D.C. Cir. Rule 41(a)(2).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX G

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1605

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign

state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall

be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[**(e), (f)** Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery

for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.--

(1) In general.--If--

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.--

(A) Nazi-era claims.--Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works.--In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions.--For purposes of this subsection--

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means--

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

APPENDIX H

UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

(NEW YORK, 10 JUNE 1958)

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the

United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the

Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the

federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.