No.

In the Supreme Court of the United States

UKRAINE, PETITIONER

v.

PAO TATNEFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARIA KOSTYTSKA
WINSTON & STRAWN LLP
68 rue du Faubourg Saint Honoré
Paris 75008, France

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601

LAUREN GAILEY
SPENCER W. CHURCHILL
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036

JOHN P. ELWOOD
Counsel of Record
JOHN B. BELLINGER, III
DAVID J. WEINER
SALLY L. PEI
SEAN A. MIRSKI
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

QUESTION PRESENTED

Whether the doctrine of *forum non conveniens* is available in proceedings to confirm a foreign arbitral award in the United States.

PARTIES TO THE PROCEEDING

Petitioner Ukraine was respondent in the U.S. District Court for the District of Columbia and appellant in the D.C. Circuit.

Respondent PAO Tatneft was petitioner in the district court and appellee in the D.C. Circuit.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *PAO Tatneft* v. *Ukraine*, No. 1:17-cv-582 (D.D.C.), judgment entered on January 11, 2021;
- *PAO Tatneft* v. *Ukraine*, No. 18-7057 (D.C. Cir.), judgment entered on May 28, 2019;
- *PAO Tatneft* v. *Ukraine*, No. 20-7091 (D.C. Cir.), judgment entered on December 28, 2021; and
- *PAO Tatneft* v. *Ukraine*, No. 21-7132 (D.C. Cir.).

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 21 F.4th 829. The opinion of the district court (App. 19a-55a) is reported at 301 F. Supp. 3d 175.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2021. App. 1a. The petition for rehearing was denied on February 3, 2022. App. 56a. On March 23, 2022, the Chief Justice extended the time to file a petition for writ of certiorari until July 3, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

One of the common law's most established doctrines, *forum non conveniens* permits courts to dismiss cases whenever two conditions are met: first, there is an adequate alternative forum where the defendants are amenable to service of process and the subject matter of the dispute can be litigated, and second, that alternative forum is better suited to hear the case based on a weighing of private and public interests. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). This Court has emphasized that what makes the doctrine "so valuable" is its "flexibility," which ensures that it can consistently serve the interests of justice. *Id.* at 250.

This case involves an entrenched and widely recognized circuit split over whether this long-standing doctrine is available in proceedings to confirm foreign arbitral awards. The Second Circuit has held that it is. There, courts may dismiss such proceedings when a defendant can point to an alternative forum better suited to handle the litigation. By contrast, the D.C. Circuit has held that *forum non conveniens* is categorically unavailable in proceedings to confirm foreign arbitral awards, reasoning that foreign courts are *per se* inadequate because they cannot attach U.S.-based assets. See pp. 13-16, *infra*.

The consequences of the D.C. Circuit's rule are far-reaching. Under its rule, district courts may *never* dismiss foreign award confirmation actions on *forum non conveniens* grounds, even if the dispute lacks any connection to the United States, even if the respondent has no attachable assets here, and even if the confirmation of the award turns on complicated issues of foreign law that would be better resolved elsewhere. Combined with the powerful post-judgment discovery mechanisms available in the U.S. legal system, the D.C. Circuit's sweeping rule provides irresistible incentive for award holders

to use the D.C. district court as a launching pad for worldwide fishing expeditions into debtors' assets—regardless of whether they have any intention of ever actually seeking to attach assets in the United States.

Here, the stakes could scarcely be higher. PAO Tatneft is one of Russia's largest oil companies, and it was and remains closely affiliated with the Russian government. One of Russia's constituent states, the Republic of Tatarstan, controls close to 30% of the company, and the Republic's President is the Chairman of Tatneft's Board. In the late 1990s and early 2000s, Tatneft employed questionable means to seize majority control of a joint venture that operated Ukraine's largest oil refinery. When Ukrainian courts invalidated some of those actions, Tatneft initiated arbitration proceedings that eventually led to an award against Ukraine that now totals over $170 million.

The merits of that award are not at issue here; where Tatneft should enforce it is. Tatneft initiated confirmation proceedings in the District Court for the District of Columbia, even though the United States has no connection to the underlying dispute and even though Tatneft identified no attachable assets in this country. Instead, Tatneft appears to be using this country's permissive discovery laws to trawl for information about Ukraine's assets worldwide. That kind of fishing expedition would be concerning enough, but it became downright ominous when Tatneft began targeting third parties integral to Ukraine's national security in the run-up to Russia's invasion of Ukraine.

Given this forum's evident unsuitability, Ukraine has identified an adequate alternative forum where Tatneft should try to confirm the award: Ukraine itself. As multiple courts have held, Ukraine is an adequate alternative forum, including for the recognition and enforcement of arbitral awards against the State. That remains true to this day; despite the war,

Ukraine's courts remain open and would fairly consider Tatneft's request for relief. But the district court refused to even consider sending this case to Ukraine or any other forum, holding instead that the D.C. Circuit's precedent categorically forbids applying *forum non conveniens* in foreign arbitral award confirmation proceedings.

This Court's intervention is urgently needed. Together, the Second and D.C. Circuits adjudicate about half of all foreign arbitral award confirmation cases, especially against sovereigns, and these cases raise serious foreign-policy concerns. If the D.C. Circuit's rule stands, it will further reinforce the District of Columbia's status as a magnet for foreign confirmation actions with no connections to this country. Six years ago, this Court recognized the significant consequences of that possibility and called for the views of the Solicitor General in a case raising the same question. See Order, *Gov't of Belize* v. *Belize Soc. Dev. Ltd.*, No. 15-830 (U.S. Mar. 28, 2016). The Solicitor General's Office did not dispute the importance of resolving this issue, but it ultimately recommended that this Court await a better vehicle. This case is that vehicle, and it is time for this Court to step in.

A. Legal Background

1. Recognition and enforcement of foreign arbitral awards

Over recent decades, international arbitration has boomed with the globalization of the world economy.

International commercial arbitration is a longstanding mode of dispute resolution. Parties to international commercial contracts often agree to resolve disputes by means of private arbitration, rather than litigation in national courts. Pursuant to the parties' agreement, an independent arbitrator, or a panel of arbitrators, hears the dispute and issues a binding award.

See generally Gary Born, International Arbitration: Law and Practice § 1.01 (3d ed. 2021).

Another form of international arbitration that has gained prominence in recent decades is investor-State arbitration, also known as investment arbitration. Born, *supra*, § 18.01. Such arbitrations are premised on bilateral or multilateral investment treaties between sovereign States. Those treaties obligate States to provide foreign investors certain standards of treatment, and also permit foreign investors to initiate arbitration proceedings against States alleging violations of those obligations. *Ibid.*

Unlike national courts, however, arbitral tribunals generally lack legal authority to enforce the awards they render, and they cannot compel the losing party to take any particular action or to satisfy an award. Thus, unless the losing party pays voluntarily, the prevailing party must seek recourse from national courts to secure award recognition and enforcement. They do so by commencing an action in domestic court to convert the award to a domestic judgment, which that court then may enforce. This process is known as recognition (or confirmation) and enforcement.

States have ratified a number of treaties to streamline and standardize the recognition and enforcement process. The most important is the New York Convention, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, which 170 countries have ratified. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, United Nations Commission on International Trade Law, https://bit.ly/3u4ITlE (last accessed June 30, 2022). It requires each Contracting State to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the

territory where the award is relied upon * * * ." New York Convention Art. III.

The New York Convention specifies grounds on which Contracting States may refuse recognition and enforcement of awards. *Id.* Art. V. For example, a court may decline to recognize and enforce an award when "[t]he parties to the [underlying arbitration] 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." *Id.* Art. V(1)(a). A court may also decline to recognize and enforce an award that "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration." *Id.* Art. V(1)(c). Recognition and enforcement may also be refused if it "would be contrary to the public policy of th[e] country [in which recognition and enforcement are sought]." *Id.* Art. V(2)(B). Other treaties work in materially similar ways. See Inter-American Convention on International Commercial Arbitration ("Panama Convention"), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245.

Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*, implements the New York Convention domestically. The Act provides that "any party to the arbitration" may apply to a court with jurisdiction "for an order confirming the award as against any other party to the arbitration," and the court "shall confirm the award" unless one of the Convention's exceptions applies. 9 U.S.C. § 207; see *id.* § 302 (similar rules for the Panama Convention).

2. The doctrine of forum non conveniens

Forum non conveniens permits a federal district court, in its discretion, to dismiss a case "where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the

court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Piper Aircraft*, 454 U.S. at 249.

Forum non conveniens analysis entails a two-step inquiry. First, the court considers whether there is an adequate alternative forum abroad. An alternative forum is adequate if the defendants are "amenable to service of process" there, and if it "permit[s] litigation of the subject matter of the dispute." *Id.* at 254 n.22.

Second, if an adequate alternative forum exists, the court considers whether the balance of private and public interests favors dismissal. See *Gulf Oil Co.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947). The private interests include the relative access to evidence and witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* at 508. Among the public interests to be weighed are "a local interest in having localized controversies decided at home" and the interest in "having the trial of a * * * case in a forum that is at home with the * * * law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 509.

B. Factual and Procedural History

In July 1995, Ukraine and the Republic of Tatarstan—a political subdivision of Russia—founded Ukrtatnafta, a joint-stock company that would own and operate Ukraine's largest oil refinery. App. 2a. Ukrtatnafta was designed with a shareholder structure that ensured parity between Ukrainian interests on one side, and Russian interests represented by Tatarstan and Tatneft on the other. *Ibid.* Each party was obligated to make specified contributions to Ukrtatnafta's charter fund: Ukraine was to provide the refinery, Tatarstan was to contribute rights to oil deposits, and Tatneft was to contribute $180.9 million in capital assets for oil extraction. *Ibid.*

Ukraine fulfilled its end of the agreement, but Tatarstan and Tatneft did not. As relevant here, Tatneft belatedly contributed $31 million in cash, leaving Ukrtatnafta severely undercapitalized and searching for additional funding. App. 2a. In the late 1990s, Ukrtatnafta sought to remedy its capital shortage by selling a combined 18.3% stake to two foreign-incorporated shell companies in exchange for $66 million in promissory notes. App. 2a-3a; D.C. Cir. JA740. Only later would media sources reveal that the two shell companies were controlled by high-level Tatneft executives. App. 2a-3a.

Tatneft used this new toehold to assume control over Ukrtatnafta, entering into a Russian voting alliance with Tatarstan and the shell companies that eventually gave Tatneft and the other Russian shareholders control of 55.7% of the company. App. 3a.

Starting in 2001, various public and private actors challenged the legality of the shell companies' share purchases before Ukrainian courts. In a series of opinions from 2007 to 2009, four levels of Ukrainian courts, including the Ukrainian Supreme Court, determined that the shell companies' share purchases had been unlawful. App. 3a; see D.C. Cir. JA140, JA743-745.

In 2008, Tatneft initiated arbitration proceedings against Ukraine under the Russia-Ukraine bilateral investment treaty. App. 3a. Before a tribunal constituted under the United Nations Commission on International Trade Law Rules and seated in Paris, Tatneft argued that Ukraine had wrongfully deprived it of its shareholding in Ukrtatnafta and sought damages based on the loss of its direct ownership of Ukrtatnafta and its indirect ownership through the shell companies. See App. 3a-4a.

In 2014, the tribunal issued its award, holding that Ukraine owed Tatneft $112 million in compensation, plus interest, due

to procedural defects in the Ukrainian legal proceedings. App. 4a. That determination was contested in post-arbitral proceedings, and the High Court of Justice in England disagreed with the tribunal's procedural fairness concerns, noting that the Ukrainian courts "cannot properly be criticised." Judgment, *PAO Tatneft* v. *Ukraine* [2020] EWHC 3161 (Comm) ¶ 34 (Smith, J.), https://bit.ly/3Nwnzfx. Either way, the arbitral tribunal did not decide whether the share purchase underlying Tatneft's indirect shareholding claim was illegal, nor did it disagree with the Ukrainian courts that the share purchases by the shell companies violated Ukrainian law. D.C. Cir. JA150 (describing Tatneft's argument for legality as merely "tenable").

In 2017, Tatneft applied to confirm the award under the New York Convention in the U.S. District Court for the District of Columbia. App. 4a. The dispute had no connection to the United States, and Tatneft identified no U.S.-based Ukrainian assets that it hoped to attach. See App. 42a-43a.

Ukraine moved to dismiss on *forum non conveniens* grounds. App. 41a. Ukraine first identified an adequate alternative forum for Tatneft's claim: the courts of Ukraine. By law, Ukraine permits recognition and enforcement of international arbitral awards and foreign judgments, including against the State; for that reason, other U.S. courts have held that it is an adequate alternative forum for recognition and enforcement proceedings against Ukraine, as well as other types of litigation. App. 43a-44a; see, *e.g.*, *In re Arbitration between Monegasque De Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002); *Autobidmaster LLC* v. *Martyshenko*, No. 20-cv-6181, 2021 WL 1907792, at *5-7 (W.D. Wash. May 12, 2021); *Klumba.UA. LLC* v. *Klumba.com*, No. 15-cv-760, 2017 WL 5068532, at *1 (E.D. Va. Sept. 11, 2017); *Firebird Republics Fund, Ltd.* v. *Moore*

Cap. Mgmt. LLC, No. 9-cv-303, 2009 WL 2043885, at *2 (S.D.N.Y. July 14, 2009). Ukraine demonstrated that the balance of public and private interests tilted strongly in favor of dismissing the case, which concerns the application of Ukrainian, Russian, and Soviet law to a complex corporate dispute between Ukrainian and Russian interests over property located in Ukraine and Russia. See Mot. to Dismiss at 43-44, *Pao Tatneft* v. *Ukraine*, No. 17-cv-582 (D.D.C. July 25, 2017) (ECF No. 21). Ukraine further argued that Ukrainian regulations required that payments from the State budget for international arbitral awards be made upon presentation of a resolution regarding the initiation of enforcement proceedings in Ukraine, and that it would undermine Ukraine's "sovereign prerogative" to have the confirmation action heard in the United States. See Mot. to Dismiss at 43-44, *Tatneft*, No. 17-cv-582 (D.D.C. July 25, 2017) (ECF No. 21).

But the district court rejected Ukraine's *forum non conveniens* defense. App. 45a.[1] In December 2021, the D.C. Circuit affirmed. The court explained that it had "squarely held 'that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States.'" App. 17a (quoting *LLC SPC Stileks* v. *Republic of Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021), and citing *TMR Energy Ltd.* v. *State Prop. Fund of Ukraine*, 411 F.3d 296, 303-304 (D.C. Cir. 2005)). Furthermore, the court held, "the rule applies even if the defendant 'currently has no attachable property in the United States, [as] it may own property here in the future.'" App. 17a (quoting *TMR*, 411 F.3d at 303). Finally, the D.C. Circuit held that it was irrelevant that Ukraine, not

[1] In the alternative, the district court concluded that Tatneft had raised "a credible issue of its ability to obtain justice in Ukraine." App. 45a. The D.C. Circuit did not review that conclusion.

the United States, was "the locus of both the controversy and the major portion of the assets with which Ukraine would satisfy any judgment." App. 17a. The D.C. Circuit denied Ukraine's petition for rehearing *en banc*. App. 56a.

Even as Ukraine's appeal was pending, Tatneft began serving broad, extraterritorial discovery requests on Ukraine and numerous third parties. In the District of Columbia, Tatneft sought extensive information about Ukraine's assets worldwide, defining "Ukraine" to include not only the State itself, but also numerous third parties of strategic importance to Ukraine's national security, such as SC Ukroboronoprom, a Ukrainian manufacturer of weapons and military hardware, and SE Ukrkosmos, a satellite communications company. Exs. 1 and 2 to Mot. to Compel Prod., *Tatneft*, No. 17-cv-582 (D.D.C. July 27, 2021) (ECF No. 76-2 and 76-3).

Tatneft also sought discovery in the Southern District of New York. In March 2021, Tatneft served sweeping subpoenas on 25 financial institutions, Exs. A and B to Decl. of M. Kostytska, *Ukraine* v. *PAO Tatneft*, No. 21-MC-376 (S.D.N.Y. Mar. 26, 2021) (ECF Nos. 2-1 and 2-2); on January 25, 2022, Tatneft served substantially identical subpoenas on 52 more financial institutions, Exs. A and B to Mem. in Support of Mot. to Quash, *Ukraine* v. *PAO Tatneft*, No. 22-MC-36 (S.D.N.Y. Feb. 8, 2022) (ECF Nos. 2-1 and 2-2). Tatneft demanded compliance with these latest subpoenas no later than February 10. *Ibid.*

On February 24, Russia invaded Ukraine. Russia continues to engage in military operations in Ukraine, and thousands of Ukrainians have been killed. Shortly after the initial invasion, the U.S. District Court for the District of Columbia issued a temporary moratorium on discovery, see Order, *Tatneft*, No. 17-cv-582 (D.D.C. Mar. 4, 2022) (ECF No. 105); that moratorium could end at any time.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Crystallizes A Recognized Circuit Split

1. The decision below further sharpens a division between the D.C. Circuit and the Second Circuit over the availability of *forum non conveniens* in actions to confirm foreign arbitral awards. In holding that *forum non conveniens* is unavailable in award confirmation actions because the United States is the only adequate forum to attach U.S.-based assets, the decision below squarely conflicts with the approach taken by the Second Circuit. That court has, under indistinguishable circumstances, held that actions to confirm foreign arbitral awards may be dismissed on the basis of *forum non conveniens*.[2]

a. The D.C. Circuit and the Second Circuit have long been at odds about the availability of *forum non conveniens* in actions to confirm foreign arbitral awards. The question first arose in the Second Circuit in *In re Arbitration between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488 (2002). There, an arbitral award holder, known as Monde Re, requested entry of judgment against both a Ukrainian company and Ukraine. Ukraine moved to dismiss on *forum non conveniens* grounds, arguing that Ukrainian courts were an adequate alternative forum.

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[2] Every other court of appeals to have addressed *forum non conveniens* arguments in award confirmation cases did so in unpublished decisions and assumed that the defense remains available. See *Melton* v. *Oy Nautor AB*, 161 F.3d 13, at *1 (9th Cir. 1998) (unpublished) ("an adequate alternative forum exists" because both parties "are subject to * * * jurisdiction in Finland"); *Venture Glob. Eng'g, LLC* v. *Satyam Comput. Servs., Ltd.*, 233 F. App'x 517, 521 (6th Cir. 2007) (concluding "the adequate alternative forum requirement is satisfied by a showing that Defendant is 'amenable to process' in the foreign jurisdiction").

The Second Circuit held that *forum non conveniens* dismissal was proper. The court rejected Monde Re's argument that the Convention itself precludes application of *forum non conveniens*. 311 F.3d at 496-497. Noting that "the jurisdiction provided by the Convention is the only link between the parties and the United States," *id.* at 499, the Second Circuit considered the adequacy of the alternative Ukrainian forum and the balance of public and private interests. The court rejected Monde Re's "meager and conclusory" allegations that corruption and bias rendered Ukrainian courts inadequate to hear the dispute, *id.* at 499, and held that the public and private interests favored adjudication in Ukraine, *id.* at 500-501.

b. Three years later, the D.C. Circuit took a different path. In *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296 (2005), the D.C. Circuit affirmed the denial of a motion to dismiss an award confirmation action against Ukraine's State Property Fund on *forum non conveniens* grounds. There, the State Property Fund argued that Ukraine was an available adequate forum, noting that the award holder had already sought enforcement there (among other jurisdictions). The D.C. Circuit held, however, that "only a court of the United States * * * may attach the commercial property of a foreign nation located in the United States." *Id.* at 304. That conclusion was not altered by the fact that "the SPF has no assets in the United States against which a judgment can be enforced." *Ibid.* "Even if the SPF currently has no attachable property in the United States," the court theorized, "it may own property here in the future." *Ibid.*

c. The question soon arose again in the Second Circuit. In *Figueiredo Ferraz e Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), Peru sought dismissal, on *forum non conveniens* grounds, of an action brought to confirm an award against it under the Panama Convention.

The district court denied the motion, relying on *TMR Energy*'s reasoning that only U.S. courts are an adequate forum to attach foreign assets in this country. See *id.* at 390. The Second Circuit reversed, noting that "we respectfully disagree" with the D.C. Circuit's conclusion in *TMR Energy*. *Ibid.* The Second Circuit held that "the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there." *Id.* at 391. A contrary rule, the court reasoned, would mean that "every suit having the ultimate objective of executing upon assets in this country could never be dismissed because of [*forum non conveniens*]." *Id.* at 390. The Second Circuit therefore weighed the public and private interests and determined that those factors favored dismissal. *Id.* at 392-393.

d. The D.C. Circuit has since reaffirmed its approach in ever more definitive terms. In *BCB Holdings Ltd.* v. *Government of Belize*, 650 F. App'x 17 (D.C. Cir. 2016), the court rejected Belize's argument that an award confirmation action against it should have been dismissed on *forum non conveniens* grounds. The court stated that the argument was "squarely foreclosed" by *TMR Energy*, which "held that the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations." *Id.* at 19. The court reiterated that view in *LLC SPC Stileks* v. *Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021).

In the decision below, the D.C. Circuit reaffirmed its rule, stating that "we have squarely held 'that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign assets found within the United States.'" App. 17a (quoting *Stileks*, 985 F.3d at 876 n.1). "For that reason," the D.C. Circuit stated, "no adequate alternative forum outside the U.S. exists." App. 17a.

The court further confirmed that "[t]he rule applies even if the defendant 'currently has no attachable property in the United States,'" because of the possibility that "'it may own property here in the future.'" *Ibid.* (quoting *TMR Energy*, 411 F.3d at 303).

2. This split of authority is widely acknowledged. Courts addressing the confirmation of foreign arbitral awards regularly recognize the Second and D.C. Circuits' conflicting approaches to the availability of *forum non conveniens* in the award-confirmation context. *Stileks*, 985 F.3d at 876 n.1 ("Regardless of whether we find *Figueiredo* persuasive, we are bound by our precedent."); *Belize Soc. Dev. Ltd.* v. *Gov't of Belize*, 5 F. Supp. 3d 25, 34 n.9 (D.D.C. 2013) ("*TMR Energy* is binding, unlike Second Circuit case law").

Academics and commentators have likewise noted that "US appellate courts are split on the availability of the *forum non conveniens* defense in * * * actions [to confirm or recognize or enforce an arbitral award]," Catherine A. Rogers et al., *The US Law of International Commercial Arbitration Restated*, 21 No. 1 Disp. Resol. Mag. 8, 11 (2014), and have called on "the Supreme Court [to] resolve this apparent inconsistency between the circuits," Rostyslav I. Shiller, *Recent Developments in Foreign Arbitral Awards Enforcement under the New York Convention against an Instrumentality of a Foreign State*, 16 Am. Rev. Int'l Arb. 581, 607 (2005). As one arbitration group has observed, "[t]he debate over the proper role of *forum non conveniens* in Convention enforcement cases will continue until the issue is resolved by the Supreme Court of the United States." Rep. of the Int'l Arb. Club of N.Y., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New*

York and Panama Conventions, 24 Am. Rev. Int'l Arb. 1, 3 (2012).

3. The U.S. Government has also recognized that the Second and D.C. Circuits take disparate approaches to the availability of *forum non conveniens* in foreign award confirmation actions. In 2016, this Court sought the Solicitor General's views in a case raising the same question. Order, *Gov't of Belize* v. *Belize Soc. Dev. Ltd.*, No. 15-830 (U.S. Mar. 28, 2016). In its response, the Government acknowledged that the Second Circuit had "stated that, to the extent that the D.C. Circuit [in *TMR Energy*] established a categorical rule that 'a foreign forum [is] inadequate because the foreign defendant's precise asset in this country can be attached only here,' it disagreed with that rule." Br. for United States as Amicus Curiae at 10, *Belize*, 2016 WL 7157092 (U.S. Dec. 7, 2016), https://bit.ly/3O4XFAx ("U.S. Belize Br.").

Although the Government ultimately recommended denial, this case presents none of the case-specific concerns underlying that conclusion. First, the Government believed that the D.C. Circuit had addressed *forum non conveniens* "only in summary fashion," *id.* at 15, and that it was unclear "whether the D.C. Circuit in *TMR* intended to establish a categorical rule," *id.* at 11, 15. But any remaining doubt on that score has since vanished. The D.C. Circuit made clear in non-summary fashion in this case that its rule is indeed categorical. App. 17a.

Second, the Government identified a vehicle problem because the petitioner had conceded that the respondent had "no meaningful possibility of enforcing the arbitral award" in the alternative forum due to a previous high-court ruling. *Id.* at 13. No such vehicle issue exists here: Ukraine has argued that its courts permit recognition and enforcement of arbitral awards, including against the State. See Mot. to Dismiss at 42,

Pao Tatneft v. *Ukraine*, No. 17-cv-582 (D.D.C. July 25, 2017) (ECF No. 21); see also *Monegasque*, 311 F.3d at 499 (Ukraine is an adequate alternative forum for recognition and enforcement proceedings against the State).[3]

4. This square division warrants review now. These circuits are the centers for award confirmation actions in the United States. "New York is by far the most important hub for international arbitration in the U.S.," with several arbitration institutions headquartered in Manhattan. Andreas A. Frischknecht et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* 18 (2018). This stature, combined with New York's "status as a crossroad for global trade and commerce," as well as "the state's longstanding pro-enforcement policies, and the powerful tools New York law makes available to creditors to locate and execute upon the debtor's assets," have long made New York—and, by extension, the Second Circuit—an important and attractive jurisdiction for award creditors. *Id.* at 17-18. Many award confirmation proceedings against foreign sovereigns, agencies, and instrumentalities also take place in New York because they often hold assets or conduct transactions there.

Washington, D.C. is likewise a prominent forum for award confirmation actions. The District Court for the District of Columbia is the default venue for actions "brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4). Such actions must be filed in the District of

[3] The parties' briefing on the adequacy of Ukrainian courts preceded the Russian invasion of Ukraine. If this Court grants review and reverses the decision below regarding the availability of *forum non conveniens*, Ukraine would be prepared to supplement the record before the district court to demonstrate that Ukrainian courts remain open and available to Tatneft. In any event, the D.C. Circuit did not reach the adequacy of the Ukrainian forum; the question is one for remand.

Columbia unless "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated," elsewhere. 28 U.S.C. § 1391(f)(1). For this reason, the District of Columbia is typically the proper venue for actions to confirm awards against foreign sovereigns. See, *e.g.*, *Foresight Luxembourg Solar 1 S.A.R.L.* v. *Kingdom of Spain*, No. 19-cv-3171, 2020 WL 1503192, at *4-5 (S.D.N.Y. March 30, 2020) (transferring confirmation action to D.C. pursuant to § 1391(f)); *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, No. 18-cv-1963, 2019 WL 6785504, at *10 (D. Del. Dec. 12, 2019) (same).

The Second and D.C. Circuits together thus account for an outsized proportion of the award-confirmation cases adjudicated in the United States. A survey of 268 petitions to confirm foreign arbitral awards filed in federal courts nationwide since June 2012 reveals that over half (136) were filed in district courts in the Second or D.C. Circuits.[4]

The disagreement between the Second and D.C. Circuits over whether *forum non conveniens* is available in actions to confirm foreign arbitral awards is clear and firmly entrenched, with no prospect of resolution. Only this Court can resolve the conflict and restore harmony to this important area of the law.

B. The Question Presented Is Important and Recurring

Whether courts have discretion to consider dismissing an action brought to confirm a foreign award in the United States on *forum non conveniens* grounds is extraordinarily important not only to Ukraine, but also to other foreign sovereigns, as well as countless private parties that participate in international

[4] A list of the results of a search for petitions filed between June 2012 and June 2022 is set forth in Appendix D. Appendix E lists the number of petitions by district.

arbitration proceedings. This Court has long recognized that U.S. courts are "extremely attractive to foreign plaintiffs." *Piper Aircraft*, 454 U.S. at 252 & n.18. Left uncorrected, the D.C. Circuit's rule will cement the District of Columbia as the confirmation forum of choice for foreign arbitral award holders, regardless of whether the award debtor has *any* assets within the United States. That is because—as this case vividly illustrates—reducing an arbitral award to a U.S. judgment unlocks the formidable tools of U.S. post-judgment discovery, which judgment creditors have used as license to trawl the globe for information about judgment debtors' assets located worldwide.

1. Rule 69 of the Federal Rules of Civil Procedure provides that, "[i]n aid of the judgment or execution, the judgment creditor or a successor in interest * * * may obtain discovery from any person—including the judgment debtor." Fed. R. Civ. P. 69(a)(2). This Court has never ruled on the scope of Rule 69(a)(2). But litigants have relied on this Court's opinion in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014)—in which the Court held that the Foreign Sovereign Immunities Act does not bar worldwide post-judgment discovery into the assets of a foreign State—to assert an entitlement to expansive worldwide discovery.[5] The United States' delegation of broad authority to judgment creditors to scour the globe for assets is highly unusual. In many other countries, asset searches are conducted by bailiffs or other gov-

[5] In *NML Capital*, this Court "assumed without deciding" that "in a run-of-the-mill execution proceeding * * * the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." 573 U.S. at 140 (citation omitted). The scope of Rule 69(a)(2) was not before the Court. *Id.* at 139-140 & n.2; *id.* at n.6 ("this appeal concerns only the meaning of the [Foreign Sovereign Immunities] Act").

ernment authorities, not through civil discovery. See generally *How To Enforce a Court Decision*, European Judicial Network, https://bit.ly/3AryWmn (last updated May 11, 2022); *Litigation & Dispute Resolution Laws and Regulations 2021 – Japan*, Global Legal Insights, https://bit.ly/3QOohYs. Even legal systems that permit post-judgment discovery allow only limited inquiries under close court supervision. See, *e.g.*, English Civil Procedure Rules Part 71.

Some U.S. courts have allowed judgment creditors to obtain "discovery related to assets abroad, even though [they] may have to seek execution on those assets from a foreign court." *Amduso* v. *Republic of Sudan*, 288 F. Supp. 3d 90, 97 (D.D.C. 2017). See also, *e.g.*, *Stati* v. *Republic of Kazakhstan*, No. 14-1638, 2020 WL 13144317, at *4-5 (D.D.C. May 18, 2020) (similar). Judgment debtors regularly issue expansive subpoenas to U.S. financial institutions, demanding that they furnish documents and information about accounts and assets held around the world. District courts may enforce such subpoenas even if foreign law prohibits such discovery. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987).

2. The decision below robs district courts of discretion to consider whether another jurisdiction might be a more convenient forum in which to pursue recognition and enforcement of a foreign arbitral award. Under the D.C. Circuit's rule, even if it is undisputed that the award debtor has no assets in the United States, but has attachable assets elsewhere, *forum non conveniens* remains categorically unavailable as a basis for dismissal—leaving a foreign award creditor free to embark on a fishing expedition into the debtor's worldwide assets.

These consequences would be troubling in any award confirmation case. But they are particularly disturbing in cases

against foreign sovereigns, which make up a large and growing share of award confirmation actions. See App. D (providing a list of petitions to confirm foreign arbitration awards, including many cases against foreign states, agencies, or instrumentalities). That is because—as this Court has recognized—award creditors' expansive discovery requests in such cases often sweep in information about highly sensitive government assets, including military and diplomatic property. *NML Capital*, 573 U.S. at 144-145.

Such far-reaching discovery can go beyond mere annoyance or harassment. This case starkly illustrates how such discovery can affect a foreign State's security interests. Shortly after the award was recognized, Tatneft—which has "close ties to the Russian government," App. 2a—served broad extraterritorial discovery requests on Ukraine, demanding full information about the nation's assets and financial transactions, including its military, diplomatic, and intelligence funding and expenditures. Tatneft also demanded full information about the assets and financial transactions of 19 third parties with strategic roles in Ukrainian industries—even though it made no showing that those enterprises were controlled by or related to Ukraine for purposes of liability, attachment, or execution. Ukraine objected to these requests, and the district court agreed that they were "general in nature and broad in scope." Mem. Op. and Order, *Tatneft*, No. 17-cv-582, at 11 (D.D.C. Oct. 18, 2021) (ECF No. 83). But the district court granted Tatneft's motion to compel. *Ibid.* And in March 2021, Tatneft served similarly sweeping subpoenas on 25 financial institutions in New York; in January 2022, as Russian troops were gathering along the Russia-Ukraine border, Tatneft served substantially identical subpoenas on 52 more financial institutions.

Tatneft's focus on discovering militarily, diplomatically, and economically sensitive information in the run-up to Russia's invasion of Ukraine strongly suggests intelligence gathering. Tatneft has, for example, sought information on the worldwide assets of SC Ukroboronoprom, a Ukrainian manufacturer of weapons and military hardware; SE Ukrkosmos, a Ukrainian company that maintains satellite communications used to gather intelligence and coordinate military movements; and State Aviation Enterprise Ukraine, a company that, among other things, owns the aircraft used to transport senior governmental officials, including the President of Ukraine. See p. 11, *supra*. Tatneft has not seriously claimed that any of these entities possess U.S. assets that can be seized to satisfy an arbitral judgment; instead, Tatneft appears merely to be exploiting U.S. discovery rules for ends that the New York Convention never contemplated.

3. Inviting a deluge of foreign arbitral award confirmation cases threatens to clog U.S. courts with complex international disputes—many with no connection to the United States—that turn on difficult questions of foreign law. To be sure, in many cases, confirmation of an award may be a relatively straightforward procedure, in view of the narrowness of the generally available defenses to recognition and enforcement. See New York Convention Art. V. But some cases raise complicated threshold legal questions.

For example, under the New York Convention, recognition and enforcement of an award may be refused if the arbitral agreement "is not valid under the law to which the parties have subjected to it or * * * under the law of the country where the award was made." *Id.* Art. V(1)(a). Recognition and enforcement may also be refused in the absence of a binding award. *Id.* art. V(1)(e). Similarly, in an action brought to recognize and enforce an arbitral award against a foreign

sovereign, the threshold jurisdictional inquiry under the Foreign Sovereign Immunities Act requires the claimant to establish that the award was "made pursuant to an agreement to arbitrate." 28 U.S.C. § 1605(a)(6); see *Stileks*, 985 F.3d at 877 ("[T]he existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established[.]"). Yet determining whether the underlying arbitration agreement is valid, and that the award is final and binding, may require courts to decide difficult questions of foreign law.

In *Diag Human S.E.* v. *Czech Republic-Ministry of Health*, 907 F.3d 606 (D.C. Cir. 2018), for example, the court had to decide whether an award issued by a Czech arbitral panel was binding on the parties, which required delving into uncertain questions of Czech arbitration law. *Id.* at 611-612. And in *Micula* v. *Romania*, 404 F. Supp. 3d 265 (D.D.C. 2019), the district court was presented with the threshold jurisdictional question whether the underlying treaty's dispute-resolution provision was invalid under EU law. See *id.* at 276-280. Many now-pending confirmation cases turn on the similarly complex question whether an EU Member State may validly offer to arbitrate disputes with investors of other EU Member States under the Energy Charter Treaty.[6]

To be sure, U.S. courts regularly confront and decide questions of foreign law. But in the context of award confirmation cases—particularly those in which there is no reason to believe that the debtor has U.S. assets, or that the award creditor has initiated proceedings here for any reason other than to exploit permissive U.S. post-judgment discovery

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[6] *E.g.*, *AES Solar Energy Cooperatief U.A.* v. *Kingdom of Spain*, No. 1:19-cv-3249 (D.D.C.); *Novenergia II – Energy & Environment (SCA)* v. *Kingdom of Spain*, No. 1:18-cv-01148 (D.D.C.); *CEF Energia, B.V.* v. *Italian Republic*, No. 1:19-cv-03443 (D.D.C.).

rules—it is far from clear that a U.S. court, rather than the courts of the foreign state whose law is at issue, is the most appropriate forum to resolve such questions. Yet the D.C. Circuit's rule deprives courts of discretion to even *consider* whether the existence of complex issues of foreign law weighs in favor of requiring a foreign award holder to seek recognition and enforcement elsewhere.

4. Finally, the question whether *forum non conveniens* is available in arbitral award confirmation actions recurs with increasing frequency. The issue has arisen repeatedly in the Second and D.C. Circuits since 2005 and "[t]he debate over the proper role of *forum non conveniens* in Convention enforcement cases will continue until the issue is resolved by the Supreme Court of the United States." Rep. of the Int'l Arb. Club of N.Y., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*, 24 Am. Rev. Int'l Arb. at 3.

International arbitration cases are on the rise worldwide, and so too are confirmation actions in the United States including against foreign sovereigns. The number of disputes submitted to the world's 11 leading international commercial arbitral institutes increased nearly sixfold from 1992 to 2018. See Christopher A. Whytock, *Transnational Litigation in U.S. Courts*, 19 J. Empirical Legal Stud. 4, 25 fig. 3 (2022). And the number continues to climb. For instance, the International Chamber of Commerce International Court of Arbitration—one of the world's preeminent arbitral institutes—registered 853 new cases in 2021. *ICC unveils preliminary dispute resolution figures for 2021*, ICC (Jan. 26, 2022), https://bit.ly/3MYFqeX. Investor-State arbitration, too, has seen massive growth, with the number of new cases registered growing from single digits in the early 1990s to 68 in 2020 alone.

Investor-State Dispute Settlement Cases: Facts and Figures 2020, United Nations Conference on Trade and Development (Sept. 2021), https://bit.ly/3AcE2T4.

These figures represent the leading edge of a wave of award recognition and enforcement actions, which—particularly given the liberal approach to post-judgment discovery in the United States—has already reached U.S. shores. In recent years, U.S. courts have seen a burgeoning number of actions to confirm foreign arbitral awards.[7] This Court's intervention is needed now to ensure that district courts are equipped with the appropriate tools to address cases now before the courts. And there is no reason to believe this sustained growth will not continue.

C. The Decision Below Is Wrong

This Court has developed a set of well-defined rules governing *forum non conveniens*, and that framework applies readily to foreign arbitral award confirmation proceedings. By holding that *forum non conveniens* never applies in those proceedings, the D.C. Circuit has misunderstood what makes an alternative forum "available and adequate," ignored creditors' improper reasons for choosing a forum, disregarded the text of the relevant international conventions, and contravened this Court's refusal to countenance *per se* rules in the application of *forum non conveniens*.

1. *Forum non conveniens* is a longstanding common-law doctrine. See *Piper Aircraft*, 454 U.S. at 249 n.13. It allows district courts to dismiss cases before them "when considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 423 (2007). Consistent with its Latin name, "the central focus of the *forum non conveniens* inquiry is convenience," and

[7] See, *e.g.*, cases cited *supra* n.6; App. D & E.

dismissal will ordinarily be appropriate whenever a weighing of private and public interest factors suggests that proceeding in a plaintiff's chosen forum would impose a heavy burden on the defendant or court without providing countervailing convenience to the plaintiff. See *Piper Aircraft*, 454 U.S. at 249.

Courts usually apply that standard to cases about liability and damages, but its underlying principles apply equally to proceedings to recognize and enforce awards. Some forums may be prime candidates for *forum non conveniens* dismissal, for example, because they are especially inconvenient for the recognition and enforcement of a foreign award. Creditors may begin proceedings far from home forums, in places where a debtor has no attachable assets and where courts are ill-equipped to address the foreign law or the overseas events central to the confirmation proceeding. See, *e.g.*, *Piper Aircraft*, 454 U.S. at 251 n.17 (*forum non conveniens* appropriate where "none of the parties are American, and * * * there is absolutely no nexus between the subject matter of the litigation and the United States."); *Sinochem*, 549 U.S. at 426, 435-436 ("the gravamen" of a suit between Malaysian and Chinese companies about alleged misrepresentations in China was abroad, making it "a textbook case for immediate *forum non conveniens* dismissal").

Creditors may also seek a forum for the wrong purpose. For example, a creditor may begin confirmation proceedings without any real expectation of enforcing an award or judgment in that jurisdiction; instead, the creditor may be improperly seeking to harass a debtor, or to take advantage of favorable discovery laws to find debtor assets in other, more convenient forums. See *Piper Aircraft*, 454 U.S. at 249 n.15 ("[D]ismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law.").

Conventional *forum non conveniens* principles also illuminate whether, in assessing the private and public interest factors, a foreign court is a convenient forum for recognition and enforcement of an award. For example, a foreign forum will be especially convenient when it is a creditor's home forum, see *Piper Aircraft*, 454 U.S. at 255-256, or where the debtor has many attachable assets there. Cf. *Gilbert*, 330 U.S. at 508 (listing "questions as to the enforc[ea]bility of a judgment" as one private interest factor to be considered in a *forum non conveniens* analysis). Foreign forums may also be convenient because they can easily resolve whether the award should be confirmed, because those forums have familiarity either with the underlying dispute or applicable law. See *Piper Aircraft*, 454 U.S. at 251, 260 ("[T]here is 'a local interest in having localized controversies decided at home.'" (citation omitted)). Finally, a foreign forum may be especially suitable for a recognition and enforcement proceeding where that forum has "a very strong interest in [the] litigation," *ibid.*, perhaps because the case implicates a foreign sovereign's "paramount interests" and "principles of comity," *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996).

2. Cases like this one fall squarely within the category of appropriate candidates for *forum non conveniens* dismissal. Tatneft is trying to confirm its arbitral award in a forum without any connection to the underlying dispute and without any suggestion that it expects to attach any Ukrainian assets in the United States. Instead, Tatneft has apparently chosen this forum to exploit this country's discovery laws, in ways that now raise serious questions about whether it is acting as a cat's paw for Russian intelligence operations.

The D.C. Circuit never reached any of these factors, however. It instead held that, no matter the balance of private and public interest factors, a *forum non conveniens* dismissal is never appropriate "in proceedings to confirm a foreign arbitral award."

App. 17a. That categorical rule contravenes this Court's caselaw in multiple ways.

First, the D.C. Circuit's exclusive focus on attachable assets in the United States frames the adequacy of foreign forums far too narrowly. Courts begin the *forum non conveniens* inquiry by asking whether an alternative forum exists, a requirement ordinarily met if the defendant can be served in the other jurisdiction. *Piper Aircraft*, 454 U.S. at 254 n.22. In "rare" circumstances, an alternative forum may be inadequate because it would offer the plaintiff a "clearly unsatisfactory" remedy, as where the alternative forum would "not permit litigation of the subject matter of the dispute." *Ibid.* In confirmation proceedings like this one, "the subject matter of the dispute" is not a particular set of assets found in the United States, but rather the confirmation of the award. For that reason, as the Second Circuit has held, "the adequacy of the alternate forum depends on whether there are *some* assets of the defendant in the alternate forum, not whether the *precise asset* located here can be executed upon there." *Figueiredo*, 665 F.3d at 391 (emphases added). So long as an alternate forum has some defendant assets, the remedy it offers is not "clearly unsatisfactory."

The D.C. Circuit also erred in assuming that a party has a right to execute on specific assets. That assumption does not follow from the text of either the New York Convention or the Federal Arbitration Act, which both focus on the "recognition or enforcement of the award" generally. 9 U.S.C. § 207; see New York Convention Art. I ("This Convention shall apply to the recognition and enforcement of arbitral awards * * * ."). The D.C. Circuit's myopic focus also conflicts with this Court's decision in *Piper Aircraft*, which held that an alternative forum does not become inadequate simply because an unfavorable change in law means that plaintiffs cannot win as large an award there. 454 U.S. at 254-255. Just as an alternative forum is

adequate so long as it provides *some* remedy (even if not the same remedy as in the plaintiff's chosen forum), an alternative forum is also adequate for recognition and enforcement purposes so long as it contains *some* debtor assets (even if not the same assets as in the plaintiff's chosen forum).

Even on its own terms, the D.C. Circuit's reasoning does not hold up. It may be true that "only U.S. courts can attach foreign commercial assets found within the United States," App. 17a, but a creditor may launch confirmation proceedings for reasons *other* than attaching assets found within the United States. For example, the *forum non conveniens* doctrine regularly disposes of cases where a plaintiff is weaponizing the U.S. court system to "'vex,' 'harass,' or 'oppress' the defendant." *Gilbert*, 330 U.S. at 508. Or a plaintiff may file a case not to attach assets in the United States, but to exploit the country's favorable discovery rules. In either situation, it cannot be said, even under the D.C. Circuit's view, that U.S. assets are truly the "subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 254 n.22.

Furthermore, the D.C. Circuit's rule cannot be squared with the text of the New York Convention and other treaties that require Contracting States to recognize and enforce arbitral awards in accordance with their "rules of procedure." See New York Convention Art. III; Panama Convention Art. IV (requiring recognition and execution in accordance with each Contracting State's "procedural laws"). *Forum non conveniens* is a doctrine "of procedure rather than substance," *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 453 (1994), and must therefore be available in these treaty-based recognition and enforcement proceedings. But the D.C. Circuit renders the doctrine a dead letter, applying it only in a null set of cases. Not only does that practice contravene the treaties' plain text, but it also runs counter to this Court's repeated instruction that where "a common-law principle is well established" (as *forum non conveniens* surely is), "the courts may

take it as given that Congress has legislated with an expectation that the principle will apply." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991).

Finally, the D.C. Circuit's categorical rule conflicts with this Court's regular rejection of *per se* rules in this context. One of the hallmarks of the *forum non conveniens* inquiry is its flexibility, and this Court has "repeatedly rejected the use of *per se* rules in applying the doctrine." *Am. Dredging*, 510 U.S. at 455; accord *Piper Aircraft*, 454 U.S. at 249 ("[T]his Court's earlier *forum non conveniens* decisions * * * have repeatedly emphasized the need to retain flexibility."). "Each case [must] turn[] on its facts," *Piper Aircraft*, 454 U.S. at 249 (citation omitted), and courts must resist both "rigid rule[s]," *ibid.*, and "formalization" in favor of "look[ing] to the realities that make for doing justice," *Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 528 (1947). The D.C. Circuit ignored this instruction, crafting a rigid rule that forbids dismissals in *every* foreign award confirmation proceeding, even if a debtor "currently has no attachable property in the United States," App. 17a; even if "the locus" of the controversy is abroad, *ibid.*; even if the award's confirmation may turn on events that occurred entirely abroad or on complicated questions of foreign law, see *ibid.*; and even if the creditor is weaponizing U.S. courts for purposes entirely antithetical to the New York Convention and other international arbitration treaties. By holding that none of these factors can ever matter—or even be considered—the D.C. Circuit has sacrificed "the very flexibility that makes [the *forum non conveniens* doctrine] so valuable." *Piper Aircraft*, 454 U.S. at 250. That rule cannot stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

MARIA KOSTYTSKA
WINSTON & STRAWN LLP
68 rue du Faubourg
Saint Honoré
Paris 75008, France

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601

LAUREN GAILEY
SPENCER W. CHURCHILL
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036

JOHN P. ELWOOD
Counsel of Record
JOHN B. BELLINGER, III
DAVID J. WEINER
SALLY L. PEI
SEAN A. MIRSKI
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

JULY 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 15, 2021 Decided December 28, 2021

No. 20-7091

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)

Maria Kostytska argued the cause for appellant. With her on the briefs was *Geoffrey P. Eaton*.

Mark E. McDonald argued the cause for appellee. With him on the brief were *Jonathan I. Blackman* and *Matthew D. Slater*.

Before: SRINIVASAN, *Chief Judge*, and HENDERSON, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Pao Tatneft (Tatneft), a Russian company, filed a petition in district court to confirm and enforce its arbitral award against Ukraine. The district court granted the petition, rejecting Ukraine's arguments that the court should have declined to enforce the award under The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, and should have dismissed the petition on the basis of *forum non conveniens*. As explained *infra*, we agree with the district court and affirm its judgment.

I. BACKGROUND

In July 1995, the Republic of Tatarstan (Tatarstan) and Ukraine founded the CJSC Ukrtatnafta Transnational Financial and Industrial Oil Company (Ukrtatnafta), a joint-stock company that owns and operates Kremenchug, a Ukrainian oil refinery. Ukrtatnafta had three major shareholders: Tatarstan, Tatneft and Ukraine. Tatneft had close ties to the Russian government and Tatarstan is a Russian republic—i.e., one of Russia's federated states. To ensure equal ownership between Russian and Ukrainian interests, Ukraine owned half of Ukrtatnafta and the two Russian entities, Tatneft and Tatarstan, owned the other half. Securing their respective ownership stakes, Ukraine agreed to contribute the oil refinery, Tatarstan, the rights to its region's oil deposits and Tatneft, $180.9 million in oil-related capital assets. Ukraine contributed the oil refinery but Tatneft and Tatarstan failed to make their promised contributions. Tatneft instead contributed $31 million in cash and had its ownership stake reduced by 57%, as approved by Ukrtatnafta's shareholders.

In 1998 and 1999, Ukrtatnafta sold share offerings to AmRuz Trading Co. (AmRuz) and Seagroup International Inc. (Seagroup). AmRuz and Seagroup agreed to issue promissory notes in exchange for the shares. Media

sources have since reported that, at the time of the transaction with Ukrtatnafta, Tatneft executives owned AmRuz and Seagroup. AmRuz, Seagroup, Tatarstan and Tatneft then entered into a Russian voting alliance, eventually formalized through an agreement in October 2006, that controlled 55.7% of Ukrtatnafta's shares.

Beginning in 2001, private and public Ukrainian actors challenged AmRuz and Seagroup's share purchases, arguing that Ukrainian law prohibited the purchase of shares with promissory notes. While this litigation was ongoing, Tatneft purchased AmRuz and Seagroup. After a series of lawsuits, the Kyiv (Ukraine) Economic Court invalidated the share purchases and ordered AmRuz and Seagroup to return their shares to Ukrtatnafta.

A Ukraine conglomerate, the Privat Group, then acquired a small share in Ukrtatnafta. The Privat Group initiated further litigation that resulted in the Economic Court of the Poltava Region, another Ukrainian court, forcing Ukrtatnafta to sell the returned shares at auction. The court did not inform Tatneft, AmRuz or Seagroup about the impending sale. The Privat Group was the sole bidder and purchased the shares.

On May 21, 2008, Tatneft served Ukraine with a Notice of Arbitration and Statement of Claim pursuant to the Russia– Ukraine Bilateral Investment Treaty. *See* Russia–Ukraine Bilateral Investment Treaty, Russ.-Ukr., Nov. 27, 1998. Tatneft claimed that Ukraine, including the Ukrainian courts, improperly facilitated the Privat Group's acquisition of Ukrtatnafta shares and sought damages for unpaid oil deliveries. In accordance with the Russia–Ukraine Bilateral Investment Treaty, each party appointed an arbitrator. *Id.* art. 10. The party-appointed arbitrators then appointed the third arbitrator, Professor Francisco Orrego Vicuña.

In an initial jurisdictional proceeding, Ukraine argued that the arbitral tribunal lacked jurisdiction because

Tatneft could not raise claims on behalf of AmRuz and Seagroup. The tribunal disagreed and affirmed its jurisdiction of the dispute. The parties submitted merits arguments but before the tribunal issued its final decision, both Tatneft's law firm (Cleary Gottlieb Steen & Hamilton LLP) and Ukraine's law firm (King & Spalding LLP) had appointed Vicuña as an arbitrator in separate matters. The Russia–Ukraine Bilateral Investment Treaty incorporates the United Nations Commission on International Trade Law's (UNCITRAL) arbitration rules. *Id.* art. 9(2)(c). Under UNCITRAL rules, Vicuña had to notify all parties to the Tatneft-Ukraine arbitration about his subsequent appointments if the appointments raised "justifiable doubts" about his impartiality. UNCITRAL Arbitration Rules, art. 9, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). Vicuña did not inform either party that he had accepted an arbitral appointment from the other party's counsel.

The tribunal issued its "Final Award" in July 2014. *Tatneft v. Ukraine*, 2017 WL 3311265 (July 19, 2014) (Brower, Lalonde, Vicuña, Arbs.). It concluded that Ukraine acted improperly, primarily due to the Ukrainian litigation's procedural defects, thereby depriving Tatneft of its shares in Ukrtatnafta. It awarded Tatneft $112 million in damages and denied Tatneft's claims for unpaid oil deliveries. Ukraine unsuccessfully attempted to annul the Final Award in the Court of Appeal of Paris, which—as the arbitration panel sat in France—had the power to annul the award under the New York Convention. See New York Convention art. V(1)(e) (award may be "set aside or suspended by a competent authority of the country in which . . . that award was made"). In 2017 Tatneft sued to enforce the Final Award, both in the United Kingdom and in the United States District Court for the District of Columbia. *See id.* art. IV(1) (party may apply "for recognition and enforcement" of award). In district court,

Ukraine moved to dismiss Tatneft's suit on the basis of Ukraine's sovereign immunity and under the doctrine of *forum non conveniens*. The district court rejected both claims. It held that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, did not apply based on the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), as well as the waiver exception, id. § 1605(a)(1). *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 190 (D.D.C. 2018). Regarding the forum non conveniens ground, it held that "no alter[n]ative forum . . . has jurisdiction to attach the commercial property of a foreign nation located in the United States." Id. at 192–93. On interlocutory appeal, *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1025 (D.C. Cir. 1997) (collateral order doctrine extends to denial of motion to dismiss on sovereign immunity ground), this court affirmed the district court on the sovereign immunity claim and declined to exercise pendent jurisdiction of the *forum non conveniens* claim. *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam), *cert. denied sub nom. Ukraine v. Tatneft*, 140 S. Ct. 901 (2020).

On February 13, 2020, Ukraine moved for supplemental briefing on whether AmRuz and Seagroup had illegally purchased their shares with promissory notes. If true, the parties presumably did not consent to arbitrate the dispute pursuant to the Russia–Ukraine Bilateral Investment Treaty. See art. 1 (no consent to arbitrate "illegal" investments). The district court could then deny enforcement under the New York Convention. *See* New York Convention art. V(1)(c) (court may deny enforcement if parties have not consented to arbitration). The district court denied the motion because Ukraine did not explain its failure to make the argument timely.

The district court then granted Tatneft's petition on the merits, enforcing the arbitral award under the New York Convention. *Pao Tatneft v. Ukraine*, 2020 WL

4933621 (D.D.C. Aug. 24, 2020). Ukraine had opposed enforcement because Vicuña failed to disclose his outside appointments and thus violated the UNCITRAL rule that he disclose any appointment raising "justifiable doubts" about his impartiality, UNCITRAL Arbitration Rules, art. 9, and because enforcement violated the U.S. policy against illegality, *see United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("a court may refuse to enforce contracts that violate law or public policy"), as AmRuz's and Seagroup's purchase of their shares via promissory notes allegedly violated Ukrainian law. The district court rejected both arguments. On the arbitrator bias claim, it held that Vicuña did not have an obligation to disclose a "single" arbitral appointment and that he had not evinced any partiality in ruling for Tatneft. *Pao*, 2020 WL 4933621, at *7–9. On the public policy-against-illegality claim, it held that Ukraine failed to carry its "substantial burden" because it did not identify a specific public policy that enforcement would violate. *Id.* at *9–10.

Ukraine timely appealed. This court then held the appeal in abeyance pending the district court's decision regarding prejudgment interest. Order of January 19, 2021 in *Pao Tatneft v. Ukraine*, No. 20-7091 (D.C. Cir. 2021). The district court subsequently awarded prejudgment interest and ordered Ukraine to pay nearly $173 million in damages. Ukraine timely filed an amended notice of appeal.

We have jurisdiction of the August 24, 2020 final order pursuant to 28 U.S.C. § 1291. Our jurisdiction also extends to the interlocutory rulings that preceded the district court's entry of final judgment. *Ciralsky v. C.I.A.*, 355 F.3d 661, 668 (D.C. Cir. 2004). We therefore also have jurisdiction of the March 19, 2018 interlocutory ruling on *forum non conveniens*.

II. ANALYSIS

Ukraine argues that the district court should have denied enforcement under the New York Convention or, in the alternative, should have dismissed the case on *forum non conveniens*. The New York Convention in general requires American courts to enforce international arbitral awards. *See* 9 U.S.C. § 207 ("court shall confirm [foreign arbitral] award[s] unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention"). Under the Convention, however, a court may deny enforcement if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," New York Convention, art. V(1)(c), if "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties," *id.*, art. V(1)(d), or if enforcement would be "contrary to the public policy of that [court's] country," *id.*, art. V(2)(b). Under the *forum non conveniens* doctrine, a court may decline to exercise jurisdiction if it determines it is an inappropriate forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504–05 (1947).

"We review a district court's confirmation of an arbitration award for clear error with respect to questions of fact and de novo with respect to questions of law." *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 355 (D.C. Cir. 2006). We review the district court's denial of supplemental briefing for abuse of discretion. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008). We also review a *forum non conveniens* determination for abuse of discretion, keeping in mind that "[t]here is a substantial presumption in favor of a plaintiff's choice of forum." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008). When a foreign plaintiff seeks review in an American court, however, the presumption applies with less force. *Friends for*

All Child., Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 605 (D.C. Cir. 1983) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255– 56 (1981)).

A. NEW YORK CONVENTION

Ukraine makes three New York Convention arguments: (1) the Convention's exception to enforcement in Article V(1)(c) applies to this dispute; (2) the district court exceeded its authority under the Convention; and (3) the district court incorrectly enforced the arbitral award, rejecting others of the Convention's exceptions to enforcement.

1. Whether enforcement of the arbitral award should have been denied under New York Convention art. (V)(1)(C)

Ukraine first argues that the arbitral award should not be enforced because AmRuz and Seagroup acquired the disputed shares in exchange for promissory notes in violation of Ukrainian law. In the Russia–Ukraine Bilateral Investment Treaty, the parties consented to arbitration regarding "investments" but defined that term to exclude illegal purchases. Russia–Ukraine Bilateral Investment Treaty art. 1. If AmRuz and Seagroup in fact acquired their shares through illegal purchases, the parties' consent to arbitrate would be vitiated. The district court could therefore have declined to enforce the arbitral award under the Convention. See New York Convention art. V(1)(c) (court may deny enforcement if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration"). The district court declined to reach this argument because Ukraine did not timely raise it. We likewise decline to reach the argument.

Ukraine did not make this argument in its initial responses to Tatneft's petition to confirm the arbitral award. By asserting that AmRuz and Seagroup acquired

shares in violation of Ukrainian law, Ukraine alleged the necessary condition for the claim. But Ukraine did not connect the dots and explain how Article V(1)(c) of the New York Convention therefore allows the district court not to enforce the arbitral award. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005).

Ukraine admitted by implication that it failed to raise the argument when it moved for supplemental briefing on the question. The district court denied that motion. As the district court explained, Ukraine offered no reason that it could not have raised the argument much earlier in the litigation. On appeal, Ukraine claims that supplemental briefing would have been "helpful" or "efficient." As noted, we review a denial of supplemental briefing under the abuse of discretion standard. *Cal. Valley Miwok Tribe*, 515 F.3d at 1266. We do "not substitute our judgment for that of the trial court, . . . determining whether we would have reached the same conclusion." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (citation and internal quotation marks omitted). We instead review whether the district court exceeded its "range of choice" or made a "mistake of law." *United States v. Volvo Powertrain Corp.*,758 F.3d 330, 345 (D.C. Cir. 2014) (citation omitted). The district court neither exceeded its discretion nor made legal error when it denied Ukraine's motion for supplemental briefing, made years after the parties had initially briefed the merits.

Although we have discretion to consider an issue for the first time on appeal, we exercise it only in "exceptional circumstances." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). No such circumstance exists here. Ukraine contends that a significant monetary judgment against a foreign government

could upset international relations but we have not accepted that argument if the judgment would not threaten the stability of the foreign government. *See Acree v. Republic of Iraq*, 370 F.3d 41, 58 (D.C. Cir. 2004) ("The circumstances of this case are even more extraordinary when one considers the stakes: Appellees have obtained a nearly-billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy."). The record reflects that Ukraine can pay the $173 million judgment without risking a collapse.

2. Whether the district court exceeded its authority under the New York Convention

Ukraine next argues that the district court exceeded its authority under the Convention by modifying the Final Award. Although the Convention plainly authorizes the district court to recognize and enforce an arbitral award, New York Convention art. III; *see also* 9 U.S.C. §§ 201, 207, other courts have held that they lack the power to *modify* an arbitral award. *See Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 747 (5th Cir. 2008) (court lacks subject-matter jurisdiction over "claims seeking to . . . modify a foreign arbitral award").

The "modification" Ukraine challenges arises from the Final Award's provision of differing principal damages in its analysis section and in its "dispositif." In French law, the dispositif is "the operative provisions of the judgment." *See Dispositif*, ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW (3d ed. 2009). Accordingly, Ukraine argues, the district court necessarily "modified" the Final Award by choosing the award amount included in the dispositif and, in effect, nullifying the portion of the analysis that includes different principal damages. For its part, Tatneft disputes that the Final Award has any inconsistency and contends that this court should treat the "dispositif" as the binding provision.

We need not reach the question of how to interpret a contradictory arbitral award because the Final Award is not internally inconsistent. The arbitral tribunal calculated the total amount that Tatneft paid for its 22.7% equity stake in Ukrtatnafta ($112 million) as one measure of the total value of Tatneft's shares. J.A. 245–46. Other estimates—including the amount the Privat Group paid for its shares—confirmed the $112 million evaluation. J.A. 245. The arbitral panel applied the evaluation for the total 22.7% shareholding to both the "14.09% indirect shareholding . . . which [Tatneft] held through AmRuz and Seagroup" and Tatneft's "8.61% direct shareholding in Ukrtatnafta." J.A. 249. Accordingly, the arbitral panel held "that interest shall begin to accrue on the amount of US$ 68.44 million [from the date Tatneft was deprived of its indirect shareholdings], and on the amount of US$ 43.56 million [from the date Tatneft was deprived of its direct shareholdings]." J.A. 249. Ukraine argues that the Final Award elsewhere defines the principal sums as $81 million and $31 million—the amounts Tatneft in fact paid for its indirect and direct shareholdings, with a higher per share price for the indirect transaction. But the arbitral tribunal did not award damages to restore what Tatneft paid for its shares. Instead, it estimated the per share value of Ukrtatnafta itself (in part by looking at what Tatneft paid, on average, per share) and awarded damages according to the estimated value of the taking from Tatneft. Because the Final Award does not reflect any award inconsistency, the district court did not exceed its jurisdiction by issuing its enforcement judgment.

3. Whether other New York Convention enforcement exceptions apply

Ukraine also argues that the district court mistakenly enforced the arbitral award, in spite of the New York Convention's "public policy" and "improper composition" exceptions. See 9 U.S.C. § 207 ("The 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 [New York] Convention."). We reject both arguments.

A. Public Policy Exception *(New York Convention art. V(2)(b))*

Ukraine contends that the district court erroneously enforced the award because enforcement would violate the U.S. policy against illegality. *See* New York Convention, art. V(2)(b) (court may deny enforcement if "enforcement of the award would be contrary to the public policy of [the court's] country"). "The public policy defense is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (citation omitted). Ukraine asserts that AmRuz and Seagroup acquired their shares in Ukrtatnafta using promissory notes in violation of Ukrainian law. Ukraine thus argues that the district court should decline to enforce the award under Article V(2)(b) because enforcement would violate U.S. policy. Even assuming *arguendo* that AmRuz and Seagroup's share purchases violated Ukrainian law, enforcement did not violate U.S. public policy.

Ukraine's argument fails because the U.S. does not have a policy against enforcing arbitral awards predicated on underlying violations of foreign law. Under the common law, a court "may refuse to enforce contracts that violate law or public policy." *United Paperworkers*, 484 U.S. at 42. As applied to a *domestic* arbitral award, the doctrine extends to an "arbitrator's *interpretation* of . . . [a] contract[] . . . where the contract as interpreted would violate" a public policy. *Id.* at 43 (emphasis in original). But a party does not necessarily "found[] a cause of action upon an immoral or illegal act" if it seeks to enforce an arbitral award as to which some underlying activity was illegal. *Cf.*

id. at 43–45 (court enforced arbitration decision reinstating employee discharged for illegal drug use). The parties have already litigated and arbitrated their claims on the merits; now they argue about whether the U.S. can enforce the award. If Ukraine wanted to raise claims about the illegality of the share purchases and the arbitral panel's jurisdiction, it had the opportunity to raise those claims before the arbitral panel. *See Chevron Corp. v. Ecuador*, 795 F.3d 200, 208 (D.C. Cir. 2015) (parties "consented to allow the arbitral tribunal to decide issues of arbitrability—including whether [the parties] had 'investments' within the meaning of the treaty"). We need consider only whether U.S. public policy would be violated by enforcing the arbitral award. Because Ukraine does not offer any argument that the arbitration tribunal interpreted the Russia–Ukraine Bilateral Investment Treaty in such a manner as to violate U.S. public policy, the district court was without authority to apply the New York Convention's public policy exception.

B. Improper Composition Exception *(New York Convention art. V(1)(d))*

Ukraine next argues that the district court should have denied enforcement because Vicuña failed to disclose that Tatneft's law firm appointed him to another arbitration panel. "Recognition and enforcement of the award may be refused" if "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties." New York Convention, art. V(1)(d). The parties' agreement incorporates the UNCITRAL rules. See Russia–Ukraine Bilateral Investment Treaty art. 9(2)(c) ("[T]he dispute shall be referred to be considered by . . . an ad hoc arbitration tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."). The UNCITRAL rules require an arbitrator to disclose "any circumstances likely to give rise to justifiable doubts as to

his impartiality or independence." UNCITRAL Arbitration Rules, art. 9. Accordingly, if Vicuña failed to disclose circumstances creating "justifiable doubts" about his impartiality, the "composition of the arbitral authority" would not have been "in accordance with the agreement of the parties." Unlike in the domestic arbitral context, the district court did not need to find that Vicuña in fact evinced "evident partiality." *Cf. Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1112 (D.C. Cir. 2017).[1]

We conclude that Ukraine has not shown that the appointment "give[s] rise to justifiable doubts as to [Vicuña's] impartiality or independence." Although an arbitrator should promote openness in disclosing other arbitral appointments or any outside contact with a party's counsel, we do not interpret the "justifiable doubts" standard to require a searching review of an arbitrator's ethics. *Cf. id.* at 1112 ("Article V(2)(b) does not require a fly-specking of the ABA Model Rules of Professional Conduct."). And we do not think that Vicuña's failure to disclose raises any question of his impartiality.

In applying the "justifiable doubts" standard, we look to the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (2004) (IBA Guidelines) as authority on the ethics of international arbitrators. *Cf., e.g., New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (court "considered" IBA Guidelines). The IBA Guidelines identify conduct that will and will not raise "justifiable doubts." The "Red List" identifies situations that "give rise to justifiable doubts as to the arbitrator's impartiality

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[1] We note that the district court read *Belize Bank* to hold that parties may challenge an arbitrator's bias only under New York Convention art. V(2)(b) (public policy exception). *Belize Bank* limited its analysis to the public policy exception simply because it was the only claim that "warrant[ed] further discussion." *Belize Bank*, 852 F.3d at 1109.

and independence." IBA Guidelines pt. II, § 2. The "Orange List" identifies situations that "may . . . give rise to doubts as to the arbitrator's impartiality or independence." *Id.* pt. II, § 3. Situations not identified in the Orange List, however, "are generally not subject to disclosure" but might raise justifiable doubts depending on specific factual circumstances. *Id.* pt. II, § 6. And the "Green List" identifies "situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List." *Id.* pt. II, § 7.

The IBA Guidelines do not address the specific conduct here—accepting an arbitral appointment from one party's counsel—but the included examples suggest that Vicuña's conduct falls somewhere between the "Green List" and the "Orange List." The "Green List" includes "initial contact with a party's . . . counsel[,] prior to appointment" about "availability and qualifications" to serve. *Id.* pt. II, art. 4.4.1. The "Orange List" addresses circumstances in which an "arbitrator has within the past three years been appointed as arbitrator on two or more occasions by . . . an affiliate of one of the parties," including counsel, *id.* pt. II, art. 3.1.3, and circumstances in which "[t]he arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm," *id.* pt. II, art. 3.3.7. Vicuña accepted only one appointment from Tatneft's law firm (indeed, neither law firm appointed Vicuña to this Tatneft-Ukraine tribunal), leaving his conduct outside the "Orange List." But his conduct goes beyond the "Green List" because his contact was not "limited to [discussing] the arbitrator's availability and qualifications to serve"—Vicuña in fact accepted the appointment.

Even under a strict interpretation of the IBA Guidelines, we think that Vicuña did not have a duty to disclose.

Situations not identified in the Orange List "are generally *not* subject to disclosure." IBA Guidelines, pt. II, § 6 (emphasis added). Ukraine does not identify any additional reason to doubt Vicuña's impartiality, such as an unusually lucrative fee or an unusually prestigious appointment. And we note that Vicuña accepted a separate arbitral appointment from the law firms for *both* parties, arguably relieving doubt about his impartiality.

Vicuña, a well-known arbitrator, followed an apparently common practice. *See Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 479–80 (S.D.N.Y. 2016) ("it cannot be that selection and payment for a person's services as a party-arbitrator or umpire, without more, produces a 'material or commercial financial relationship' sufficient to constitute disqualifying partiality [because if] it did, the entire commercial arbitration system, which universally uses such procedures, would be undermined") (citation omitted), *aff'd*, 675 F. App'x 89 (2d Cir. 2017). Indeed, other courts have found no ethical breach. The Court of Appeal of Paris concluded that "a single appointment in the course of the seven years that the arbitration lasted, which did not characterize a history of business between this arbitrator and this law firm, [did not have] the potential to raise a reasonable doubt about the independence and impartiality of Mr. Orrego Vicuña." J.A. 349. The United Kingdom's High Court of Justice "d[id] not consider that it can at all be said that a single appointment in the course of the seven years the arbitration lasted would or might provide the basis for a reasonable apprehension about the independence or impartiality of Professor Vicuña; and still less that they were likely to give rise to justifiable doubts so as to trigger the duty of disclosure." J.A. 996. Nonetheless, we emphasize the narrowness of our holding—Vicuña was not required to disclose his appointment because it did not raise "justifiable doubts" regarding his impartiality.

B. *FORUM NON CONVENIENS*

Finally, Ukraine maintains that the district court should have dismissed the case under the doctrine of *forum non conveniens*. "A *forum non conveniens* dismissal . . . is a determination that the merits should be adjudicated elsewhere," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007), "even when jurisdiction is [otherwise] authorized," *see Gilbert*, 330 U.S. at 507. "In deciding forum non conveniens claims, a 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 Chasidei Chabad*, 528 F.3d at 950. Ukraine argues that the parties should litigate this case in Ukraine, the locus of both the controversy and the major portion of the assets with which Ukraine would satisfy any judgment. But we have squarely held "that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021) (citing *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303–04 (D.C. Cir. 2005)). For that reason, no adequate alternative forum outside the U.S. exists. The rule applies even if the defendant "currently has no attachable property in the United States, [as] it may own property here in the future." *TMR*, 411 F.3d at 303.

Ukraine argues that our decisions in *Moldova* and *TMR* run afoul of the Supreme Court's *Sinochem* decision. In *Sinochem*, a Chinese corporation successfully filed suit in the Guangzhou Admiralty Court, China's maritime court, against a Malaysian shipping corporation. 549 U.S. at 426. The Malaysian shipping corporation filed a countersuit in the Eastern District of Pennsylvania seeking damages from the Chinese corporation for negligent

misrepresentations made in the Chinese court. Id. at 427. The district court dismissed on the *forum non conveniens* ground. *Id.* at 427. The Supreme Court recognized that a district court may sometimes address a *forum non conveniens* claim before affirming its jurisdiction because resolving a *forum non conveniens* motion does not require the court to assume a "substantive 'law-declaring power.'" *Id.* at 433 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). But *Sinochem* does not address the relevant issue here: namely, whether an adequate alternative forum exists if a party seeks to attach assets located in the U.S.

For the foregoing reasons, we affirm the judgment of the district court enforcing the arbitration award against Ukraine.

So ordered.

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 directed 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

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 assets to Ukrtatnafta, but later agreed to

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Motion to Dismiss and Motion for Leave to 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. Merits 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.

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 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

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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.

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*

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

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 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*, 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

[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.

> in connection with investments, including disputes regarding the amount, terms of and procedure for payment of the compensation . . ., 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 written briefing solely addressing [ ] these threshold [jurisdictional] issues." Consol. Opp'n at 17, Jurisdiction Decision ¶¶ 17-32.

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

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 objections 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

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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).

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 185 (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]

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

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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.

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 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

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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;

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.

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 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 discretion 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

[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.

may 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 its liability" for this payment, Tatneft must "apply for such writ of execution to the Ukrainian

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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.

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 COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-7091 September Term, 2021
1:17-cv-00582-CKK
Filed On: February 3, 2022

Pao Tatneft,
Appellee
v.
Ukraine, c/o Mr. Pavlo Petrenko, Minister of Justice,
Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

APPENDIX D

Petitions to confirm foreign arbitration awards filed in or removed to federal court, June 2012–present:[1]

1. Sigma Constructores, S.A. v. Republic of Guatemala, No. 1:22cv1674 (D.D.C. June 10, 2022)
2. Belmond Anguilla Owner, LLC v. DCK International, 1:22cv4817 (S.D.N.Y. June 9, 2022)
3. Twitch Interactive, Inc. v. Fishwoodco Gmbh, No. 5:22cv3218 (N.D. Cal. June 2, 2022)
4. Metallurgical Plant Kazsilicon LLP v. Clean Power Innovations, LLC, No. 4:22cv3117 (N.D. Cal. May 27, 2022)
5. GamesBoost42 Ltd. v. Cinemood Trendsetters Co., No. 5:22cv2929 (N.D. Cal. May 17, 2022)
6. Crescent Petroleum Co. Int'l v. Nat'l Iranian Oil Co., No. 1:22cv1361 (D.D.C. May 16, 2022)
7. Stabil LLC v. Russian Federation, No. 1:22cv983 (D.D.C. Apr. 9, 2022)

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[1] The cases listed below are the results of two keyword searches of all U.S. district court dockets, together with the underlying documents listed on those dockets. The first search string was ((petition /5 confirm) /s (arbitra! /5 award)) AND (foreign OR international). The second search string was ("Inter-American Convention on International Commercial Arbitration" OR "New York Convention" OR "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" OR "Panama Convention") AND (confirm OR enforce) /s award. The results of both searches were manually reviewed to exclude cases involving domestic or ICSID awards.

8. Drip Capital, Inc. v. M/S Goodwill Apparels, No. 1:22cv2806 (S.D.N.Y. Apr. 5, 2022)

9. Yukos Capital Ltd. v. The Russian Federation, No. 1:22cv798 (D.D.C. Mar. 23, 2022)

10. Bella + Canvas, LLC v. Choi Shin Nicaragua S.A., No. 2:22cv217 (C.D. Ca. Jan. 11, 2022)

11. Bloomfield Invs., LLC v. Grow Land & Water LLC, No. 4:21mc80306 (N.D. Cal. Dec. 23, 2021)

12. Nutramax Lab'ys Inc v. Bioiberica SA, No. 0:21cv4106 (D.S.C. Dec. 21, 2021)

13. Iraq Telecom Ltd. v. IBL Bank SAL, No. 1:21cv10940 (S.D.N.Y. Dec. 21, 2021)

14. Ti Educ. Servs. Ltd. v. Lowe, No. 2:21mc216 (D. Kan. Dec. 16, 2021)

15. Williams Grand Prix Eng'g Ltd. v. Rokit Mktg. Inc., No. 2:21cv9695 (C.D. Cal. Dec. 15, 2021)

16. ABC v. DEF, No. 1:21mc856 (S.D.N.Y. Dec. 14, 2021)

17. AES Solar Energy Cooperatief U.A. v. Kingdom of Spain, No. 1:21cv3249 (D.D.C. Dec. 10, 2021)

18. Prodigy Fin. CM2017-1 DAC v. Martins, No. 2:21cv1601 (W.D. Wash. Nov. 30, 2021)

19. Immersive Management Holdings LLC v. Indigo Dragon Group UK Ltd., No. 2:21cv8895 (C.D. Cal. Nov. 11, 2021)

20. Huzhou Chuangtai Rongyuan Investment Management Partnership Et Al v. Qin, No. 1:21cv9221 (S.D.N.Y. Nov. 8, 2021)

21. M Company Oy v. M Room Company USA, Inc., No. 2:21cv740 (M.D. Fla. Oct. 6, 2021)

22. Transcanada Turbines Ltd. v. Ministry of Electricity, No. 1:21cv2409 (D.D.C. Sep. 13, 2021)

23. Chiejina v. Federal Republic of Nigeria, No. 1:21cv2241 (D.D.C. Aug. 24, 2021)

24. Ace American Insurance Co. v. University of Ghana, No. 1:21cv6472 (S.D.N.Y. July 29, 2021)

25. Generali Espaa de Seguros y Reaseguros, S.A., No. 1:21cv4080 (E.D.N.Y. July 20, 2021)

26. CN Romtehnica SA v. PW Arms Inc., No. 2:21cv953 (W.D. Wash. July 16, 2021)

27. Weihai Textile Grp. Imp. & Exp. Co. v. Eruption Holdings Inc., No. 2:21mc147 (D. Wyo. June 15, 2021)

28. Global Gaming Philippines, LLC v. Razon, No. 1:21cv2655 (S.D.N.Y. June 13, 2021)

29. AIU Insurance Co. v. Bothnia International Insurance Company Ltd., No. 1:21cv5164 (S.D.N.Y. June 10, 2021)

30. Trajkovski Invest Ab v. I.Am.Plus Electronics, Inc., No. 2:21cv4246 (C.D. Cal. May 20, 2021)

31. Olin Holdings Ltd. v. State of Libya, No. 1:21cv4150 (S.D.N.Y. May 10, 2021)

32. Andes Petroleum Ecuador Ltd. v. Occidental Exploration & Production Company, No. 1:21cv3930 (S.D.N.Y. May 3, 2021)

33. Abalith Holdings Ltd. v. Eikeland, No. 9:21cv80791 (S.D. Fla. Apr. 29, 2021)

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232. Glocoms Grp., Inc. v. Vietnam Bank for Agric. & Rural Dev., No. 1:13cv8763 (N.D. Ill. Dec. 9, 2013)

233. CAML Ghana Ltd. v. Westchester Resources Ltd., No. 1:13cv8124 (S.D.N.Y. Nov. 14, 2013)

234. AVR Commc'ns Ltd. v. Am. Hearing Sys., Inc., No. 0:13cv3027 (D. Minn. Nov. 5, 2013)

235. Stena Bulk LLC v. Sunstone Natural Resources International Inc., No. 8:13cv1441 (C.D. Cal. Sep. 16, 2013)

236. Swiss Institute of Bioinformatics v. Global Initiative on Sharing All Influenza Data, No. 1:13cv1274 (D.D.C. Aug. 20, 2013)

237. Kelowna Flightcraft Ltd. v. Anham, LLC, No. 1:13cv969 (E.D. Va. Aug. 6, 2013)

238. Health Robotics, SRL v. Devon Robotics - I.V. Station, LLC, No. 2:13cv4498 (E.D. Pa. Aug. 2, 2013)

239. Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria, No. 1:13cv1106 (D.D.C. July 19, 2013)

240. Telekom Malay. Berhad, No. 6:13cv2284 (W.D. La. July 16, 2013)

241. CIMC Raffles Offshore (Sing.) PTE Ltd. v. Soratu Drilling LLC, No. 1:13cv4933 (S.D.N.Y. July 15, 2013)

242. CIMC Raffles Offshore (Sing.) PTE Ltd. v. Baerfield Drilling LLC, No. 1:13cv4932 (S.D.N.Y. July 15, 2013)

243. Science Applications International Corp. v. Hellenic Republic, No. 1:13cv1070 (D.D.C. July 12, 2013)

244. Hoechst GmbH v. Genentech, Inc., No. 1:13cv4170 (S.D.N.Y. June 17, 2013)

245. Commissions Import Export S.A. v. Republic of the Congo, No. 1:13cv713 (D.D.C. May 15, 2013)

246. Sea Hope Navigation Inc. v. Novel Commodities SA, No. 1:13cv3225 (S.D.N.Y. May 14, 2013)

247. Wires Jolley LLP v. Zia Shlaimoun, No. 2:13cv3324 (C.D. Cal. May 9, 2013)

248. Daum Global Holdings Corp. v. Ybrant Digital Ltd., No. 1:13cv3135 (S.D.N.Y. May 9, 2013)

249. I.M. Skaugen Marine Services Pte. Ltd. v. Qiu, No. 3:13cv2596 (D.N.J. Apr. 23, 2013)

250. CBF Industria de Gusa S/A v. Amci Holdings, Inc., No. 1:13cv2581 (S.D.N.Y. Apr. 18, 2013)

251. Limited Liability Company Irkutsk Oil Co. v. AG Equipment Co., No. 4:13cv177 (N.D. Okla. Mar. 26, 2013)

252. Mercury Venture International Ltd. v. DGM Commodities Corp., No. 2:13cv1521 (E.D.N.Y. Mar. 22, 2013)

253. Diag Human S.E. v. Czech Republic-Ministry of Health, No. 1:13cv331 (D.D.C. Mar. 14, 2013)

254. Zen Cap. A/S v. Lund Trading, LLC, No. 1:13cv780 (D. Md. Mar. 13, 2013)

255. Latinam. Theatrical Grp. LLC v. Swen Int'l Holding, No. 2:13cv1270 (C.D. Cal. Feb. 21, 2013)

256. Omar Shipping Company S.A. v. Rika Global Impex Ltd., No. 1:13cv994 (S.D.N.Y. Feb. 13, 2013)

257. Omar Shipping Company S.A. v. Marina Shipping & Trading Pte, No. 1:13cv892 (S.D.N.Y. Feb. 6, 2013)

258. Frontenac International S.A. v. Global Marketing Systems, JLT, No. 1:13cv122 (D. Md. Jan. 11, 2013)

259. CIMC Raffles Offshore (Sing.) PTE Ltd. v. Schahin Holding S.A., No. 1:13cv52 (S.D.N.Y. Jan. 2, 2013)

260. Marker Volkl (International) GmbH v. Epic Sports International, Inc., No. 1:12cv8729 (S.D.N.Y. Nov. 30, 2012)

261. Nokia Corp. v. Rsch. in Motion Ltd., No. 5:12cv5992 (N.D. Cal. Nov. 26, 2012)

262. Heroic Cetus, Inc. v. Samho Shipping Co. Ltd., No. 1:12cv6464 (S.D.N.Y. Aug. 23, 2012)

263. Leeward Construction Company, Ltd. v. American University of Antigua--College of Medicine, No. 1:12cv6280 (S.D.N.Y. Aug. 16, 2012)

264. Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. Dominican State, No. 1:12cv1335 (D.D.C. Aug. 13, 2012)

265. Chevron Corp. v. Republic of Ecuador, No. 1:12cv1247 (D.D.C. July 27, 2012)

266. STX Pan Ocean Shipping Co. v. Progress Bulk Carriers Ltd., No. 1:12cv5388 (S.D.N.Y. July 12, 2012)

267. Shinhan Art Materials, Inc. v. Song, No. 2:12cv3951 (D.N.J. June 27, 2012)

268. Daebo International Shipping Co. v. Americas Bulk Transport Ltd., No. 1:12cv4750 (S.D.N.Y. June 18, 2012)

APPENDIX E

U.S. District Court	Petitions Filed (June 2012- June 2022)
New York Southern	68
D.C.	60
California Central	33
California Northern	20
Florida Southern	16
Washington Western	8
New Jersey	6
New York Eastern	6
Missouri Western	5
Texas Southern	4
Delaware	3
Illinois Northern	3
Massachusetts	3
Pennsylvania Eastern	3
California Southern	2
Colorado	2
Connecticut	2
Florida Middle	2
Maryland	2
Virginia Eastern	2
Alaska	1
California Eastern	1
Georgia Northern	1
Kansas	1
Louisiana Western	1
Michigan Eastern	1
Minnesota	1
Nebraska	1

North Carolina Middle	1
North Carolina Western	1
Oklahoma Northern	1
Pennsylvania Western	1
South Carolina	1
Tennessee Eastern	1
Texas Northern	1
Utah	1
Wisconsin Eastern	1