

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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RUSSIAN FEDERATION,

*Petitioner,*

v.

STABIL LLC, ET AL.,

*Respondents.*

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*On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This petition presents the same question pending before this Court in *Kingdom of Spain v. Basket Renewable Investments, LLC, et al.* (No. 24-1130) on the proper interpretation and application of the arbitration exception of the Foreign Sovereign Immunities Act (FSIA), which provides that a foreign state shall not be immune in an action to confirm an award rendered pursuant to “an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences \* \* \* between the parties.” 28 U.S.C. 1605(a)(6); Appendix (Pet. App.) 85a. This petition, however, presents the question from a different but complementary angle. While *Basket* involves the foreign state’s legal authority to offer (consent) to arbitrate with investors from certain Contracting Parties under a multilateral investment treaty, this petition involves the legal authority of domestic investors to accept an offer to arbitrate under a bilateral investment treaty that by its terms extends only to foreign investors. Although Russia’s petition is independently certworthy, this Court would benefit from granting both petitions and hearing the cases together. That way it can conduct a 360-degree review of the relevant issues and fully resolve the existing circuit split on the question presented, which is:

Whether Section 1605(a)(6) requires a court to determine, as a threshold jurisdictional matter, that the foreign state offered (consented) to arbitrate “with or for the benefit of a private party” such that an arbitration agreement exists between those parties.

(ii)

## **PARTIES TO THE PROCEEDING**

The petitioner is the Russian Federation (appellant in both cases below, Nos. 25-7005 and 25-7064).

The respondents are Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-NAFTA LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, and Stemv Group LLC (together, the “Stabil Investors”) (appellees in No. 25-7005), and JSC DTEK Krymenergo (“DTEK”) (appellee in No. 25-7064).

(iii)

### **RELATED PROCEEDINGS**

The proceedings directly related to this petition are:

- *Stabil LLC, et al., v. Russian Federation*, No. 25-7005 (D.C. Cir. Feb. 13, 2026).
- *JSC DTEK Krymenergo v. Russian Federation*, No. 25-7064 (D.C. Cir. Feb. 13, 2026).
- *Stabil LLC, et al., v. Russian Federation*, No. 1:22-cv-00983 (D.D.C. Dec. 12, 2024).
- *JSC DTEK Krymenergo v. Russian Federation*, No. 1:23-cv-03330 (D.D.C. Apr. 17, 2025).

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES .....	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
INTRODUCTION .....	1
OPINIONS BELOW .....	6
JURISDICTION OF THIS COURT.....	7
RELEVANT STATUTORY PROVISIONS .....	7
STATEMENT.....	7
A. Legal Background.....	7
B. Factual Background .....	8
C. Proceedings Below.....	11
REASONS FOR GRANTING THE PETITION.....	14
I. Joint Review with <i>Blasket</i> Would Help to Fully Resolve an Existing Circuit Split under the FSIA’s Arbitration Exception .....	15

A. The D.C. Circuit Departs from the Second and Fifth Circuits.....	15
B. This Petition Should Be Granted and These Cases Heard with <i>Basket</i> .....	22
C. This Petition Is Also a Good Vehicle on Its Own.....	26
II. The Decision Below is Wrong.....	27
CONCLUSION.....	34

## TABLE OF AUTHORITIES

### Cases

<i>1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.</i> , 485 A.2d 199 (D.C. 1984) .....	31
<i>Air France v. Saks</i> , 470 U.S. 392 (1985) .....	21
<i>AlixPartners, LLP v. Fund for Prot. of Investors’ Rights in Foreign States</i> , 142 S. Ct. 638 (2021) .....	24
<i>Al-Qarqani v. Arab AMOCO</i> , No. 4:18-CV-1807, 2020 U.S. Dist. LEXIS 214237 (S.D. Tex. Nov. 17, 2020).....	18
<i>Al-Qarqani v. Saudi Arabian Oil Co.</i> , 19 F.4th 794 (5th Cir. 2021) .....	18, 19, 20, 28
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428 (1989) .....	7
<i>Bachli v. Holt</i> , <i>Bachli v. Holt</i> , 200 A.2d 263 (Vt. 1964).....	30
<i>BG Grp. plc v. Republic of Argentina</i> , 572 U.S. 25 (2014) .....	21, 30, 31
<i>Bolivarian Republic of Venezuela v. Helmerich &amp; Payne Int’l Drilling Co.</i> , 581 U.S. 170 (2017) .....	5, 7, 33

<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006) .....	33
<i>Cargill Int’l S.A. v. M/T Pavel Dybenko</i> , 991 F.2d 1012 (2d Cir. 1993).....	4, 16, 17, 20, 27, 28
<i>Chevron Corp. v. Republic of Ecuador</i> , 795 F.3d 200 (D.C. Cir. 2015) .....	28
<i>Granite Rock Co. v. Int’l Bhd. of Teamsters</i> , 561 U.S. 287 (2010) .....	33
<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003) .....	23
<i>Grieve v. Mullaly</i> , 293 P. 619 (Cal. 1930) .....	30
<i>Henry Schein, Inc. v. Archer &amp; White Sales, Inc.</i> , 586 U.S. 63 (2019) .....	33
<i>Jones v. Bock</i> , 549 U.S. 199 (2007) .....	23
<i>Kingdom of Spain v. Blasket Renewable Invs. LLC</i> , 146 S. Ct. 86 (2025) .....	25
<i>Learning Res., Inc. v. Trump</i> , Nos. 24-1287, 25-250, (Feb. 20, 2026), slip op.....	23
<i>NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain</i> , 112 F.4th 1088 (D.C. Cir. 2024) .....	1, 12, 19

*Obergefell v. Hodges*,  
574 U.S. 1118 (2015) ..... 22

*Paige v. Faure*,  
127 N.E. 898 (N.Y. 1920) ..... 30

*Trimount Bituminous Prods. Co. v. Chittenden  
Trust Co.*,  
*Prods. Co. v. Chittenden Trust Co.*, 379 A.2d  
1266 (N.H. 1977) ..... 30

*Verlinden B.V. v. Central Bank of Nigeria*,  
461 U.S. 480 (1983) ..... 7

*Wright v. Henkel*,  
190 U.S. 40 (1903) ..... 30

*ZF Auto. US, Inc. v. Luxshare, Ltd.*,  
596 U.S. 619 (2022) ..... 1, 2, 24, 27

**Statutes**

28 U.S.C. 1254(1) ..... 7

28 U.S.C. 1604 ..... 7

28 U.S.C. 1605(a)(6)..... i, 2, 4, 7, 20, 27

28 U.S.C. 1782 ..... 1, 2, 22, 23

**Other Authorities**

1 Timothy Murray, CORBIN ON CONTRACTS (2025).. 29

11 Richard A. Lord, WILLISTON ON CONTRACTS (4th ed. 2012).....	31
2 Richard A. Lord, WILLISTON ON CONTRACTS (4th ed. 2007) .....	29
Gerald Fitzmaurice, <i>The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points</i> , 33 BRIT. Y.B. INT'L L. 203 (1957).....	32
<i>ICS Inspection and Control Serv. Ltd (U.K.) v. Republic of Argentina</i> , Award on Jurisdiction, PCA Case No. 2010-9 (2012) .....	32
Restatement (Second) of Contracts (Am. Law Inst. 1981).....	29, 31

## PETITION FOR A WRIT OF CERTIORARI

Russia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

### INTRODUCTION

This petition presents the same threshold sovereign immunity question regarding the proper interpretation and application of the arbitration exception under the Foreign Sovereign Immunities Act (FSIA) that is pending before this Court in *Kingdom of Spain v. Basket Renewable Invs. LLC* (No. 24-1130). Indeed, the D.C. Circuit’s disposition of the relevant issue in these cases hinged on the very case from which Spain’s certiorari petition arises: *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024). This petition, however, presents the question in a different factual context that helps to crystallize the existing circuit split and the D.C. Circuit’s error.

While this petition should be independently granted, the Court should grant certiorari in *Basket* as well and decide these cases together, as it did in *ZF Automotive US, Inc. v. Luxshare, Ltd.* (No. 21-401) and *AlixPartners, LLP v. Fund for Protection of Investors’ Rights in Foreign States* (No. 21-518). There, the petitions raised the same interpretative question under the same federal statute: whether the phrase “foreign or international tribunal” in 28 U.S.C. 1782 authorized federal courts to order discovery for use in international arbitrations. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 623 (2022). However, each case presented the question in distinct “factual

contexts,” one involving commercial arbitration between private parties (*ZF Automotive*) and the other involving investor–state arbitration under an investment treaty (*AlixPartners*). *Id.* at 624-27. The Court granted both petitions, consolidated them for argument, and issued a single opinion holding that the term “foreign or international tribunal” in Section 1782 did not include purely commercial or investment treaty arbitrations. See *id.* at 638. Granting the petition only in one case risked leaving substantial uncertainty in the other context due to factual differences that ultimately proved immaterial.

The same approach is needed here. In both *Blasket* and here, the dispositive statutory question is whether, in order to exercise jurisdiction over a foreign state in an action to confirm an award under the FSIA, a court must first find the existence of an agreement “made by the foreign state with or for the benefit of a private party,” such that an agreement to arbitrate exists “between the parties,” that is, between the sovereign and the private party invoking the purported agreement. 28 U.S.C. 1605(a)(6); Pet. App. 85a. In *Blasket*, Spain (a Member State of the European Union) argued that it lacked the legal authority to consent to arbitration with nationals from other EU Member States as a matter of governing EU law under the Energy Charter Treaty—a multilateral investment treaty that includes both EU and non-EU Contracting Parties—and that therefore no valid agreement to arbitrate between Spain and EU investors could have ever been formed. By contrast, the issues in this petition arise under a bilateral investment treaty between Russia and

Ukraine. Russia argues that Ukrainian investors who did not invest in mutually agreed-upon Russian territory (Crimea) were not offerees with authority to accept an offer to arbitrate under the treaty, and thus no valid agreement to arbitrate with or for the benefit of those investors exists as a matter of basic contract formation principles, which apply when interpreting treaties as this Court has repeatedly held.

As with *ZF Automotive* and *AlixPartners*, Russia's and Spain's arguments arise in different factual contexts but are ultimately mirror images of each other. Addressing this important question only in the multilateral treaty context involving diverse Contracting Parties could superficially obscure the basic contract formation issue that is evident here. While the multilateral nature of the treaty at issue in *Blasket* creates the unusual situation where the same arbitration provision validly extends to similarly situated investors from non-EU Member States but not EU Member States, here in the context of a bilateral investment treaty, it is clear that the arbitration provision by its plain terms does not extend to any investors who did not invest in the agreed territory of the other Contracting Party. Granting both petitions and deciding these cases in tandem would allow the Court to analyze a broader range of contract formation issues from different angles across a full range of treaty-based arbitrations, thereby providing clearer guidance to lower courts and conclusively resolving the existing circuit split.

The circuit split is clear and entrenched. The Second and Fifth Circuits correctly treat the existence

of a valid agreement to arbitrate between the parties to the dispute as a threshold requirement that must be satisfied before a court may exercise jurisdiction over a foreign state under Section 1605(a)(6). As the Second Circuit correctly held, Section 1605(a)(6) is satisfied only where the foreign state “intended to confer a benefit” on the party invoking the arbitration clause. *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (1993). The D.C. Circuit in *NextEra* and here, by contrast, treated fundamental questions about whether an arbitration agreement exists between the parties to the dispute as a “merits question,” allowing plaintiffs to drag foreign states through extended litigation over the enforceability of an arbitral award even when it is clear that no relevant agreement to arbitrate exists.

The decision below furthers an unsustainable precedent that allows *any* party to bypass a foreign state’s sovereign immunity simply by pointing to the existence of an arbitration clause, regardless of whether the sovereign ever offered (consented) to arbitrate with or for the benefit of the party invoking that clause. With this approach, a Ukrainian investor who made investments in France, and argues that Russia did something to harm those investments, would be able to invoke a court’s jurisdiction under the D.C. Circuit’s interpretation of Section 1605(a)(6) by pointing to the arbitration clause in a bilateral investment treaty between Russia and Ukraine that protects only investments made in each other’s respective territories because the clause applies to *some* Ukrainian investors. Russia’s sovereign immunity would then be defeated despite the obvious

absence of an agreement to arbitrate with or for the benefit of Ukrainians who made investments outside of Russia. This cannot be what Congress intended when it crafted the narrow arbitration exception to sovereign immunity.

As aptly explained by Spain in its petition, this doctrinal confusion carries consequences for U.S. foreign relations and reciprocity. Foreign sovereigns—including the United States when sued abroad—deserve clarity about when they may be haled into court. Pet. for Writ of Certiorari at 16-17, *Kingdom of Spain v. Blasket Renewable Investments LLC, et al.*, No. 24-1130 (May 1, 2025) (“Spain Pet.”). The FSIA’s “basic objective” is to protect sovereigns “from the inconvenience of suit” consistent with international law. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 581 U.S. 170, 174, 184 (“*H&P*”). The D.C. Circuit’s approach eviscerates this protection by deferring threshold sovereign immunity determinations until after burdensome merits proceedings. And it denies foreign sovereigns the right to seek interlocutory review under the collateral order doctrine if this defense is deemed non-jurisdictional. With the United States involved in “about 1,000 cases in 100 courts around the world” at any given time, the rules that apply to foreign states in U.S. courts are closely watched and often mirrored abroad. *Id.* at 183. This Court’s review is urgently needed to restore clarity to FSIA jurisprudence, protect the dignity of foreign states, and encourage reciprocal treatment for the United States in foreign courts.

Alternatively, if the Court elects to proceed first in *Blasket*, Russia asks that this petition be held in abeyance pending disposition of *Blasket* and then resolved through a grant-vacate-remand (GVR) so that the D.C. Circuit can reconsider its judgment in light of this Court's decision in *Blasket*. Either course—joint review now or GVR later—would ensure that the FSIA's arbitration exception is interpreted uniformly in cases turning on whether there was ever a valid offer to arbitrate or a valid acceptance of that offer sufficient to form an arbitration agreement between the parties to the dispute under either multilateral or bilateral investment treaties.

In sum, this petition should be granted, ideally with *Blasket*. Otherwise, it should be held in abeyance and GVR'd in light of the Court's decision in *Blasket*.

### **OPINIONS BELOW**

The court of appeals' opinion in Nos. 25-7005 and 25-7064 is available at 2026 U.S. App. LEXIS 4462 (D.C. Cir. Feb. 13, 2026) and reprinted in the Appendix (Pet. App.) at 1a-40a.

The decision of the district court in the Stabil action, No. 1:22-cv-00983, is available at 2024 U.S. Dist. LEXIS 224751 (D.D.C. Dec. 12, 2024). Pet. App. 41a-57a.

The decision of the district court in the DTEK action, No. 1:23-cv-03330, is available at 2025 U.S. Dist. LEXIS 73499 (D.D.C. Apr. 17, 2025). Pet. App. 58a-81a.

## JURISDICTION OF THIS COURT

The court of appeals issued its judgment on February 13, 2026. This petition is timely filed on March 13, 2026. This Court has jurisdiction under 28 U.S.C. 1254(1).

### RELEVANT STATUTORY PROVISIONS

Sections 1604 and 1605(a)(6) of Title 28 are reproduced at Pet. App. 82a-94a.

### STATEMENT

#### A. Legal Background

The FSIA “provides the sole basis for obtaining jurisdiction over a foreign state” in any civil action. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the FSIA, foreign states such as Russia are presumptively immune from the jurisdiction of U.S. courts unless a plaintiff can satisfy the “substantive requirements” of an exception to immunity. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 581 U.S. 170, 177 (2017) (“H&P”); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983).

Under the FSIA’s arbitration exception, sovereign immunity may be abrogated only in circumstances where an action is brought to “confirm an award made pursuant to” an “agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences \* \* \* between the parties.” 28 U.S.C. 1605(a)(6); Pet. App. 85a.

## B. Factual Background

1. The events giving rise to both disputes began with the respondents' domestic investments in energy projects between the 1990s and 2000s. The Stabil Investors invested in the petrol retail business between 2000 and 2010, and DTEK invested in electricity distribution between 2006 and 2012. Both investments were made by Ukrainian entities in Crimea when it was indisputably part of Ukraine. 25-7064 C.A. App. 9 (¶ 13); 88 (¶¶ 349-50); 25-7005 C.A. App. 15 (¶ 16); Pet. App. 7a-9a.<sup>1</sup>

In March 2014, Crimea acceded to Russia pursuant to the Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation. On March 21, 2014, the Russian Parliament ratified the Accession Treaty and enacted a law governing the admission of Crimea into Russia in accordance with the Russian constitution. 25-7005 C.A. App. 15-16; Pet. App. 43a.

2. After the accession, the Crimean paramilitary forces allegedly seized the Stabil Investors' petrol stations and an office located in Crimea. In September 2014, the Crimean State Council issued a decree nationalizing assets in Crimea, including various assets of the Stabil Investors related to their petrol investments, and declaring them to be property of the

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<sup>1</sup> References to "25-7064 C.A. App." and "25-7005 C.A. App." are to the joint appendices in the cases below respectively.

Republic of Crimea. 25-7005 C.A. App. 17 (¶ 20); Pet. App. 43a.

DTEK's investments in Crimea followed a similar trajectory. In May 2014, DTEK restructured its corporate presence in Crimea by moving its "corporate seat" to Kiev, Ukraine and registered a branch office in Crimea. By January 2015, all of DTEK's tangible and intangible assets in Crimea were, by amendment, folded into the Crimean State Council's September 2014 nationalization decree. 25-7064 C.A. App. 57 (¶ 200); 77 (¶ 295); 58 (¶ 206); Pet. App. 59a-60a. Authorities in Crimea soon adopted an additional regulation placing DTEK's movable and immovable property in Crimea under the control of a state-owned company. 25-7064 C.A. App. 58 (¶ 206); Pet. App. 59a-60a.

3. The Stabil Investors and DTEK commenced separate arbitrations against Russia, invoking the Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (the "Bilateral Investment Treaty"), which by its terms applies to "investments made by investors of one Contracting Party in the territory of the other" Contracting Party. 25-7064 C.A. App. 236; 25-7005 C.A. App. 173; Pet. App. 8a. Specifically, Article 9 provides that "resolution of disputes between a Contracting Party and an Investor of the other Contracting Party arising in connection with investments \* \* \* shall be referred to," among other forums, "an ad hoc arbitration tribunal, in accordance with the Arbitration Rules of the United Nations

Commission for International Trade Law (UNCITRAL).” *Ibid.* Under Article 1(1), the term “investments” is defined to mean any assets “which are invested by an investor of one Contracting Party in the territory of the other Contracting Party.” 25-7064 C.A. App. 85 (¶ 333). The crux of the respondents’ claims was that Russia had expropriated their properties in Crimea in violation of Article 5 of the Bilateral Investment Treaty, which requires the payment of prompt and adequate compensation for expropriation of investments made in Russian territory. 25-7064 C.A. App. 11 (¶ 21); 25-7005 C.A. App. 172; Pet. App. 10a.

3.a. The Stabil arbitration proceeded first in 2015 without Russia’s participation at any phase of the proceeding. In 2017, the tribunal issued a partial award concluding that it had jurisdiction over the dispute under the Bilateral Investment Treaty. 25-7005 C.A. App. 336 (¶ 235). The tribunal recognized that the Stabil Investors had made domestic, rather than foreign, investments when they invested in Crimea. The tribunal also noted that it received a non-party submission from Ukraine stating that Crimea remains an inseparable part of Ukraine. Despite its understanding that the Bilateral Investment Treaty limits the offer to arbitrate to investors of one Contracting Party who made investments in the territory of the other Contracting Party, the tribunal concluded that it had jurisdiction over the dispute because Russia exercised “de facto control” over Crimea during the alleged events giving rise to the Stabil Investors’ claims. 25-7005 C.A. App. 289-92 (¶¶ 96, 98); 278 (¶ 63); 318 (¶ 175); Pet. App. 35a-36a.

Ultimately, the tribunal issued an award in which it concluded that Russia had violated Article 5 of the Bilateral Investment Treaty, and awarded the Stabil Investors \$34 million in compensation. 25-7005 C.A. App. 112 (¶ 259); 167-68 (¶ 430); Pet. App. 10a.

3.b. The DTEK arbitration followed a similar route starting in 2020. However, Russia participated in every phase of this arbitral proceeding aside from the appointment of the arbitrators. Ukraine did not submit a non-party statement in this proceeding. In 2023, a majority of the tribunal concluded that it had jurisdiction over the dispute under the Bilateral Investment Treaty and, like the tribunal in the Stabil arbitration, hung its jurisdictional determination on Russia's exercise of "de facto" control over Crimea at the time of the alleged breach of the Bilateral Investment Treaty. The majority ruled for DTEK on the merits, awarding \$208 million in compensation. 25-7064 C.A. App. 32 (¶¶ 8-12); 34 (¶¶ 21-22); 70 (¶ 253); 73 (¶ 270); 77 (¶ 291); 91 (¶ 368); 98 (¶ 407); 107 (¶ 452); Pet. App. 11a.

### **C. Proceedings Below**

1. The Stabil Investors and DTEK separately filed petitions to confirm their awards in the U.S. District Court for the District of Columbia.

In both actions, Russia moved to dismiss the petition for lack of jurisdiction. Relevantly, Russia argued that the FSIA's arbitration exception to sovereign immunity did not apply because under the plain terms of the Bilateral Investment Treaty, Russia never agreed to arbitrate with Ukrainian investors who invested in Ukraine, which was

indisputably the case at the time the respondents made their investments in Crimea. Pet. App. 11a-12a; 47a-48a; 67a-68a. Subsequent events could not alter that fact without a mutual understanding and amendment between Russia and Ukraine on the territorial status of Crimea under Article 13 of the Bilateral Investment Treaty. Because the Stabil Investors and DTEK were not offerees with the legal power to accept Russia's offer to arbitrate under the Bilateral Investment Treaty as a matter of basic contract formation principles, a valid agreement to arbitrate any differences—a key jurisdictional predicate under the arbitration exception—was never made with or for the benefit of these investors, and therefore no agreement to arbitrate exists between Russia and the respondents. *Ibid.*

The district court in *Stabil* ruled first. It denied Russia's motion to dismiss, holding that the FSIA's arbitration exception was satisfied. In particular, the district court concluded that the Stabil Investors had met their burden of establishing the existence of an arbitration agreement by producing a copy of the Bilateral Investment Treaty and the notice of arbitration. Pet. App. 47a-54a. The district court relied directly on *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024). A few months later, the district court in *DTEK* made a substantially similar ruling. Also relying on *NextEra*, the district court held that Russia's argument was about "arbitrability," that is, whether Russia "agreed to arbitrate this *particular* dispute," rather than about the formation and existence of a

valid arbitration agreement in the first instance. Pet. App. 68a-71a.

2. Russia timely appealed both district court orders and briefed the appeals separately. Russia argued that the issue of whether it offered (consented) to arbitrate with these investors goes to whether an agreement to arbitrate any differences between the parties was ever validly formed, insofar as it implicated the legal power of these investors to accept Russia's offer to arbitrate as a matter of basic contract formation principles. Pet. App. 15a-16a. On Russia's motion, the D.C. Circuit consolidated the appeals for oral argument. Pet. App. 13a.

The D.C. Circuit disposed of both appeals in a single opinion affirming the lower courts' denial of Russia's sovereign immunity. The court of appeals agreed that the respondents had met their burden to show that an arbitration agreement existed simply by producing a copy of the Bilateral Investment Treaty and the notices of arbitration. Pet. App. 31a-32a. Relying on *NextEra* and its progeny, the court of appeals held that "precedent foreclose[d]" Russia's argument that the courts were required to decide, at the threshold jurisdictional stage, whether Russia's offer to arbitrate in the Bilateral Investment Treaty extended to these investors so as to empower them to validly accept that offer and form an arbitration agreement with Russia. Pet. App. 18a. As in *NextEra*, the court of appeals considered the arbitration clause in the Bilateral Investment Treaty as establishing the existence of an agreement to arbitrate between Russia and Ukraine for the benefit of *some* investors, and

held that the arbitration agreement between the sovereigns was sufficient to satisfy the arbitration exception. Pet. App. 17a-25a. According to the court of appeals, whether particular investors were covered by the Bilateral Investment Treaty's arbitration clause was a "merits" question about the "scope" of a validly existing arbitration agreement between the sovereigns, rather than a jurisdictional question under Section 1605(a)(6). Pet. App. 17a-19a.

The court of appeals made clear that the question of whether an agreement to arbitrate existed between Russia and these particular investors was for the "merits" stage. Pet. App. 19a-20a.

### **REASONS FOR GRANTING THE PETITION**

This Court should consider and grant Russia's certiorari petition together with Spain's petition in *Blasket*. Joint consideration of these cases would allow this Court to review more fully the proper interpretation and application of Section 1605(a)(6) in different treaty contexts, enabling it to provide clearer guidance to lower courts on a question that has divided the D.C. Circuit from the Second and Fifth Circuits.

These circuits are split on the question of whether, as a threshold jurisdictional matter under the FSIA's arbitration exception, a court is required to determine that a sovereign consented to arbitrate with the specific parties invoking the arbitration clause, and therefore that an agreement to arbitrate anything at all was ever made between the parties to the dispute. Resolving this split is essential to ensure uniformity

in FSIA jurisprudence and prevent inconsistent application of sovereign immunity principles.

This petition provides a straightforward context for resolving that split. The Bilateral Investment Treaty between Russia and Ukraine contains clear language limiting the Contracting Parties' offer (consent) to arbitrate to specific investors (those who made investments in the territory of the other Contracting Party), making it an ideal vehicle to analyze whether a valid agreement to arbitrate anything at all exists between the parties to the dispute. As explained in Spain's petition (at 16-18), clarifying the proper interpretation and application of Section 1605(a)(6) will promote stability, ensure that foreign states are not subjected to unnecessary litigation in U.S. courts, and encourage reciprocal treatment of the United States abroad.

Alternatively, this Court should hold this petition in abeyance pending disposition of *Blasket*, and if the petition in *Blasket* is granted and the D.C. Circuit's *NextEra* decision is overruled, vacated or otherwise modified, then GVR for reconsideration in light of *Blasket*.

**I. Joint Review with *Blasket* Would Help to Fully Resolve an Existing Circuit Split under the FSIA's Arbitration Exception**

**A. The D.C. Circuit Departs from the Second and Fifth Circuits**

The Second, Fifth, and D.C. Circuits have irreconcilable approaches to interpreting and applying the FSIA's arbitration exception, creating a

circuit split that requires this Court's review. The disagreement centers on whether courts must determine, as a threshold jurisdictional matter, that a foreign state offered (consented) to arbitrate with or for the benefit of the party invoking the arbitration clause, and that therefore an agreement to arbitrate exists between the foreign state and that party.

1. In the Second and Fifth Circuits, one cannot surpass the high bar of sovereign immunity simply by producing an agreement to arbitrate with any party. The plaintiff must show, as a jurisdictional matter, that the arbitration agreement applies to them (as distinct from whether it applies to the subject matter of the dispute).

In *Cargill Int'l S.A. v. M/T Pavel Dybenko*, the Second Circuit held that whether an agreement to arbitrate was made between the parties to the dispute was a threshold question of "subject matter jurisdiction" under the FSIA's arbitration exception. 991 F.2d 1012, 1019 (1993). The case involved a charter party between an oil *exporter* and an oil shipper, a Russian state-owned entity, that included a dispute resolution clause requiring arbitration in London. The oil *importer*, as the receiver of goods under bills of lading that were supposed to incorporate the charter party by its own terms, moved a U.S. federal district court to compel arbitration in London with the oil shipper after the goods were found to be contaminated during shipment. The importer argued that Section 1605(a)(6) applied because it was an intended third-party beneficiary of the arbitration

agreement made between the *exporter* and the shipper. *Id.* at 1014-15.

Because the agreement to arbitrate in the charter party on its face was between only the oil exporter and the oil shipper, the district court held that it lacked subject matter jurisdiction over the action. *Id.* at 1018. The court declined to consider any arguments from the importer about whether it was a third-party beneficiary of the arbitration clause. *Id.* at 1015.

On appeal, the Second Circuit reversed. It held that the district court must decide, at the jurisdictional stage, whether the exporter and the shipper “intended to make” the importer “a third party beneficiary of the Charter Party,” and thus, whether an agreement to arbitrate existed between the shipper and the importer. *Id.* at 1019. Put differently, the importer was required to show that “the parties to that contract intended to confer a benefit on it when contracting,” and thus “the district court was required to weigh the contractual arguments” to decide “whether subject matter jurisdiction existed.” *Ibid.* (cleaned up). Only if the importer was entitled to benefit from the agreement would it be proper to exercise jurisdiction “to enforce the arbitration agreement against” the sovereign entity. *Id.* at 1020. Whether an agreement was made to arbitrate with or for the benefit of someone else was not the end of the jurisdictional inquiry. The Second Circuit remanded “to the district court for a determination of whether CBV [the importer] can prove its third party beneficiary status and thus establish subject matter jurisdiction.” *Id.* at 1015.

Similarly, in *Al-Qarqani v. Saudi Arabian Oil Co.*, the Fifth Circuit declined to assert jurisdiction in an action to confirm an \$18 billion award under Section 1605(a)(6) where no arbitration agreement was made “among the parties” to the dispute. 19 F.4th 794, 802 (2021). There, the petitioners claimed inheritance rights to oil-rich land under a 1933 agreement with Saudi Arabia and 1949 agreement with a supposed predecessor-in-interest of Saudi Aramco, Saudi Arabia’s national oil company. *Id.* at 797. The petitioners invoked the FSIA’s arbitration exception on the theory that Saudi Aramco’s predecessor-in-interest had agreed to arbitrate disputes with petitioners’ predecessors-in-interest. The Fifth Circuit, in its analysis of both the 1933 and 1949 agreements, examined whether there was an agreement to arbitrate “among the parties” to the dispute rather than merely whether the sovereign had agreed to arbitrate with or for the benefit of someone else. *Id.* at 802. Having found no agreement among the parties to the dispute, the Fifth Circuit held that the arbitration exception could not apply, and Saudi Aramco was immune. *Ibid.*<sup>2</sup>

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<sup>2</sup> The lower court denied the petition to enforce the award because the plaintiffs lacked any right to invoke the purported arbitration agreement. *Al-Qarqani v. Arab AMOCO*, No. 4:18-CV-1807, 2020 U.S. Dist. LEXIS 214237, at \*15-20 (S.D. Tex. Nov. 17, 2020) (“[T]he petitioners here cannot enforce the arbitration provisions \* \* \*, even assuming that Saudi Aramco is bound by those provisions.”). The Fifth Circuit concluded that the lower court’s analysis of the contractual arguments was “quite accurate,” but should have been done as a jurisdictional matter under the FSIA’s arbitration exception rather than on the

2. The D.C. Circuit takes a different approach, treating the question of whether a sovereign agreed to arbitrate with the private parties invoking the treaty's arbitration clause as a "merits question," not a "jurisdictional question under the FSIA." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1101 (D.C. Cir. 2024); Pet. App. 17a. Instead of performing the proper analysis as to whether the sovereign intended to confer a benefit on *the parties invoking the arbitration clause* in the treaty, and therefore, an agreement to arbitrate exists between the sovereign and those parties, courts in the D.C. Circuit need only find that the sovereign "entered into an arbitration agreement" that was "for the benefit" of at least "some investors" to establish jurisdiction. *NextEra*, 112 F.4th at 1103; Pet. App. 20a-21a.

The D.C. Circuit's holdings in both of these cases and *Blasket* illustrate the need for this Court to definitively hold that an agreement to arbitrate must exist between the parties to the dispute for Section 1605(a)(6) to apply. Current D.C. Circuit precedent reveals the misstep of not addressing this question at the jurisdictional stage. In the D.C. Circuit's analysis, a Ukrainian who invested anywhere in the world may defeat Russia's sovereign immunity to confirm an award under the FSIA's arbitration exception, so long as Russia consented to arbitrate with *some* Ukrainian investors under the Bilateral Investment Treaty. Pet. App. 19a (citing *NextEra*, 112 F.4th at 1104). In the

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merits of the petition for enforcement. *Al-Qarqani*, 19 F.4th at 802.

D.C. Circuit's view, arguments about why the treaty's arbitration clause may not be properly invoked at all by specific investors are treated as "merits" questions going to the "scope" of the treaty's arbitration clause, requiring the foreign sovereign to trudge through extended merits litigation before extricating itself from the U.S. courts, even if basic contract arguments plainly reveal that an agreement to arbitrate any differences could not be made between the parties to the dispute. For instance, Russia would not be immune from the jurisdiction of U.S. courts in an action to confirm an award rendered pursuant to the Bilateral Investment Treaty where a Ukrainian investor made investments in France. Russia would be forced to remain in the litigation through a merits phase even though it would be obvious that no agreement to arbitrate with or for the benefit of those investors was ever made. That cannot be the law.

3. Comparing D.C. Circuit precedent to *Cargill* and *Al-Qarqani* highlights the divide in how courts in the different circuits consider the existence of an agreement to arbitrate under the FSIA's arbitration exception. If D.C. Circuit law applied in *Cargill*, production of the agreement to arbitrate between the exporter and the shipper would have been enough to satisfy the arbitration exception with respect to the action brought by the importer, and the question of whether the arbitration clause was for its benefit would have been punted to the merits phase. If D.C. Circuit law applied in *Al-Qarqani*, production of the 1933 and 1949 agreements containing arbitration clauses directed at different parties would have been the petitioners' ticket to the merits phase, without

careful consideration as to whether those arbitration clauses evidenced an agreement to arbitrate between the heirs and Saudi Aramco. If, however, the D.C. Circuit applied the rule from *Cargill* and *Al-Qarqani*, the existence of an agreement to arbitrate with or for the benefit of the private parties to the dispute would be a question of sovereign immunity under Section 1605(a)(6), and the courts below would have been required to rule on Russia’s contractual arguments at the jurisdictional stage—with little additional effort because it is a solely legal issue.

The fact that *Cargill* and *Al-Qarqani* involved arbitration clauses in commercial contracts rather than investment treaties is of no moment because, as this Court has repeatedly held, treaties are contracts and should be interpreted as such. See, e.g., *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 634 (2022) (“[A] treaty is a contract, though between nations.” (citation omitted)); see also *BG Grp. plc v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Air France v. Saks*, 470 U.S. 392, 399 (1985). In these cases, which involve a bilateral rather than a multilateral investment treaty, the irrelevance of the investment treaty context is all the more obvious because similarly situated investors from both Russia and Ukraine would be subject to the same rule, unlike the unusual situation under a multilateral treaty such as the Energy Charter Treaty where the arbitration clause may validly extend to similarly situated investors from some Contracting Parties but not others.

In brief, the inquiry into whether an agreement to arbitrate was made by the foreign state with or for the

benefit of the private parties invoking that agreement—and therefore whether an agreement to arbitrate any differences exists between those parties—is treated differently by the D.C. Circuit and the Second and Fifth Circuits, and that difference is dispositive as to the foreign state’s entitlement to sovereign immunity under the FSIA’s arbitration exception. This Court’s review is needed.<sup>3</sup>

**B. This Petition Should Be Granted and These Cases Heard with *Blasket***

Like *Blasket*, this petition implicates the same circuit split regarding the requirement to determine the existence of an agreement to arbitrate under Section 1605(a)(6). This petition, however, presents the question in a different but complementary factual context. While Russia’s petition is worthy of being granted on its own, this Court should grant both petitions, align the briefing schedules and hear the cases together. See *Obergefell v. Hodges*, 574 U.S. 1118 (2015). No delay would result from doing so, because at this point, if certiorari were granted in

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<sup>3</sup> As Spain explained in its petition (at 13-15), no further percolation of this issue is expected because the District of Columbia is the default venue for suing foreign states, and therefore the issue is unlikely to repeat itself in other circuits. In particular, now that the law in the D.C. Circuit is more favorable to plaintiffs on the issue of sovereign immunity under the FSIA’s arbitration exception, plaintiffs seeking to enforce awards rendered pursuant to investment treaties will have strong reason to commence their actions to confirm their awards within the D.C. Circuit.

*Blasket*, oral argument in that case would not be heard any earlier than next term in any case.

1. The Court regularly aligns cases presenting similar legal questions in different factual or procedural contexts. See, e.g., *Learning Res., Inc. v. Trump*, Nos. 24-1287, 25-250 (Feb. 20, 2026), slip op. 4-5 (granting certiorari in separate cases involving identical questions of law in different procedural contexts and consolidating them for briefing and argument); *Obergefell*, 574 U.S. (similar); *Jones v. Bock*, 549 U.S. 199, 211 (2007) (similar); *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (“Petitioners asked this Court to grant certiorari in this case as well \* \* \* so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so.”). This practice is a particularly useful approach where, as here, the different cases present the same question but with their own nuances, allowing this Court to consider and answer the question more fully.

The petitions in *ZF Automotive US, Inc. v. Luxshare, Ltd.* (21-401), and *AlixPartners, LLP v. Fund for Protection of Investors’ Rights in Foreign States* (21-518), are illustrative. Both cases presented the same core question: whether 28 U.S.C. 1782 authorizes federal courts to order discovery for use in foreign or international arbitration proceedings. Both cases arose from efforts to obtain U.S.-style discovery in aid of international arbitral proceedings, and both squarely implicated a deep circuit split over the meaning of the term “foreign or international

tribunals” in Section 1782. *ZF Automotive*, 596 U.S. at 623. However, *ZF Automotive* presented the question in the context of purely commercial arbitration between private parties, while the question in *AlixPartners* arose in the context of investor-state arbitration under an investment treaty. *Id.* at 624-27.

Rather than tackle the question only in one context, this Court granted certiorari in both *ZF Automotive* and *AlixPartners*, consolidated the cases and allowed each party to file its own briefs. See *AlixPartners, LLP v. Fund for Prot. of Investors’ Rights in Foreign States*, 142 S. Ct. 638 (2021). Considering the identical legal issue, the substantial analytical overlap, and the apparent differences in the relevant contexts, this Court was able to provide more comprehensive guidance as to whether the arbitral tribunals, in the context of both cases, were governmental authorities, and thus qualified as international or foreign tribunals under Section 1782. *ZF Automotive*, 596 U.S. at 638 (holding that “neither the private commercial arbitral panel in the first case *nor* the ad hoc arbitration panel in the second case qualifies” (emphasis added)).

Had the Court decided to consider the question only in *ZF Automotive*, it might have left unresolved the application of Section 1782 to investor-state arbitrations. That approach could have led to further unnecessary litigation in lower courts and unfair disparate treatment of parties in different factual contexts that turned out to be legally indistinguishable under Section 1782. Inversely, considering the issue solely with respect to investor-

state arbitration in *AlixPartners* would have deprived the Court of the benefits of comparatively analyzing the issues both from the perspective of treaty arbitration involving a foreign sovereign and purely commercial arbitration involving only private parties.

2. This Court, the lower courts and the litigants would all benefit from following the same approach here. There is no risk of delay or other prejudice to the parties in *Blasket* from considering the petitions together. The petition for certiorari in *Blasket* is still pending, and this Court has “invited the Solicitor General to file a brief expressing the views of the United States.” *Kingdom of Spain v. Blasket Renewable Invs. LLC*, 146 S. Ct. 86, 86 (2025). The Solicitor General has yet to submit his views. In any case, the Court’s invitation alone underscores the significance of the question presented in both *Blasket* and this petition alike. And if the Court grants certiorari in *Blasket*, which presents the same question as here, the certworthiness of that issue will be established as to both cases.

Consideration of these cases with *Blasket* would serve judicial efficiency while ensuring a more comprehensive analysis of the question across a broader spectrum of international agreements—the bilateral investment treaty context here and the multilateral investment treaty context in *Blasket*. Furthermore, Spain’s petition includes an overlay of EU law pursuant to which Spain (and other EU Member States) were deprived of the legal authority to offer (consent) to arbitrate with nationals of other EU Member States—a nuance that could be used to

complicate the otherwise basic contract formation principles underlying Spain's arguments. Here, the terms of the Bilateral Investment Treaty are clear: Russia's standing offer to arbitrate extends only to Ukrainian investors who invested in Russia, and thus, Ukrainian investors such as the respondents who invested in Ukraine lacked legal power to accept an offer that was not directed at them. Granting the petition in both cases and hearing them together would thus allow the Court to decide the issue from both angles: lack of authority by the sovereign to make an offer (consent) and lack of authority by the private parties to accept an offer (assent).

If the Court addresses the question only in *Blasket*, it may be deprived of the benefit of analyzing the issue in the more straightforward context of a bilateral investment treaty implicating basic universal principles of contract formation. It also might render a decision that inadvertently leaves unresolved the application of Section 1605(a)(6) in cases such as these that present what may ultimately turn out to be immaterial differences (as in *ZF Automotive*).

### **C. This Petition Is Also a Good Vehicle on Its Own**

While the question presented in *Blasket* is essentially the same as here, and *Blasket* is an apt vehicle for this question, this petition involves a more straightforward Bilateral Investment Treaty between Russia and Ukraine that contains an arbitration provisions offering (consenting) to arbitrate only with investors of a Contracting Party who made investments in the territory of the other Contracting

Party. See, e.g., *ZF Automotive*, 596 U.S. at 626 (“The treaty seeks to promote ‘favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party.’”). Thus, the question is whether Ukrainian investors who made investments in Ukraine are intended third-party beneficiaries of the treaty’s arbitration clause and therefore legally empowered to accept Russia’s offer to arbitrate. Russia’s contractual argument focuses precisely on the jurisdictional question that divides the circuits: whether courts must determine, in ascertaining their own subject matter jurisdiction, that the foreign state actually agreed to arbitrate with or for the benefit of the private parties invoking the purported agreement.

The bilateral nature of the treaty at issue in these cases and the simple question of contract formation crystallizes the jurisdictional question presented in *Blasket*. These cases are thus an ideal vehicle to resolve the circuit split even without *Blasket*.

## II. The Decision Below is Wrong

The FSIA creates an exception to foreign sovereign immunity in cases in which the action is brought to “confirm an award made pursuant to” an “agreement made by the foreign state *with or for the benefit of a private party* \* \* \* to submit to arbitration all or any differences \* \* \* *between the parties.*” 28 U.S.C. 1605(a)(6) (emphases added); Pet. App. 85a. This exception authorizes jurisdiction only where an arbitration agreement exists between the foreign state and the “private party” invoking the purported agreement. See *Cargill*, 991 F.2d 1019-20; *Al-*

*Qarqani*, 19 F.4th at 802; see also *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 & n.3 (D.C. Cir. 2015).

1. The court of appeals declined to address the question of whether an agreement to arbitrate existed between Russia and the respondents. Pet. App. 17a-18a. It treated the phrase “with or for the benefit of” as establishing a two-pronged test. Because Russia did not dispute that the Bilateral Investment Treaty “exists or that it contains an agreement to arbitrate” between Russia and Ukraine “for the benefit” of *some* investors, the court concluded that it need not go any further to determine the existence of an agreement to arbitrate “with” the respondents. Pet. App. 19a. The court then treated Russia’s arguments about the existence of an agreement to arbitrate between Russia and the respondents as an argument about the “scope” of the agreement between the sovereigns. *Id.* at 20a-21a. That is wrong.

The phrase “agreement made by the foreign state with or for the benefit of a private party” refers to only one agreement: an agreement to arbitrate “between the parties,” that is, between the foreign state and the “private party” referenced in the exception (not another sovereign). See *Cargill*, 991 F.2d at 1019-20; *Al-Qarqani*, 19 F.4th at 802; see also *Chevron*, 795 F.3d at 205 & n.3. The question of whether an agreement to arbitrate exists between Russia and the respondents is different from questions about the “scope” of a validly existing agreement. If, for example, an offer to arbitrate was unquestionably made by a sovereign to a group of investors, the

sovereign may have valid arguments that the type of investments made by investors within the group put them outside of the scope of the agreement to arbitrate. Or, the sovereign may argue that certain prerequisites have not been met by investors within the group, putting those investors outside the scope of the otherwise validly existing agreement to arbitrate. None of those arguments go to the formation of an agreement to arbitrate. They are merits questions, different from the question here: whether the offer to arbitrate extends to the respondents in the first place, such that they are members of the group (offerees) who may validly accept it, thereby forming an agreement to arbitrate between them and Russia.

2. There is no question that offer and acceptance are fundamental principles of contract formation. Restatement (Second) of Contracts § 22(1) (A.L.I. 1981) (“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.”). “One of the necessary elements of any proposed contract is the person with whom the contract is to be made.” 2 Richard A. Lord, WILLISTON ON CONTRACTS § 6:27 (4th ed. 2007). The discretion to limit the power of acceptance to certain offerees is “wholly within the offeror’s power.” 1 Timothy Murray, CORBIN ON CONTRACTS § 3.2 (2025); see also Restatement (Second) of Contracts § 52 cmt. a (“The offeror is the master of his offer, and the power of acceptance rests on his manifested intention.”). These basic rules of contract formation have been reinforced many times over by the highest state courts. See, e.g., *Trimount Bituminous Prods.*

*Co. v. Chittenden Trust Co.*, 379 A.2d 1266, 1269 (N.H. 1977) (“Only the offeree can accept an offer.”); *Bachli v. Holt*, 200 A.2d 263, 266-67 (Vt. 1964) (“The offer could be accepted only by the person to whom it was addressed. Neither the owner nor her architect could accept the bid, since it was extended only to the defendant.”); *Paige v. Faure*, 127 N.E. 898, 900 (N.Y. 1920); *Grieve v. Mullaly*, 293 P. 619, 620 (Cal. 1930).

As with the interpretation of any contract, a court must look to the text of the treaty and the intent of the Contracting Parties to identify who may validly accept the sovereign’s standing offer to arbitrate. *BG Group*, 572 U.S. at 37 (“[A] treaty is a contract.”); see also *Air France*, 470 U.S. at 399 (explaining that courts must give “the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”); *Wright v. Henkel*, 190 U.S. 40, 57 (1903) (“Treaties must receive a fair interpretation, according to the intention of the contracting parties.”). For if the offer was not directed at the investors invoking it, then they are not offerees who can validly accept it, and no agreement to arbitrate any difference may be formed between them and the sovereign.

3. Under Article 9 of the Bilateral Investment Treaty, Russia and Ukraine agreed between themselves to resolve disputes with each other’s nationals through arbitration, subject to certain limitations. However, Article 9 is not an agreement to arbitrate any disputes directly with anyone. It operates as a standing offer by the sovereign to arbitrate that investors may accept in accordance with the treaty’s terms. The combination of the offer

plus a legally valid acceptance forms an agreement to arbitrate between the sovereign and the investors. See *BG Group*, 572 U.S. at 61 (Roberts, C.J., dissenting). Specifically, Article 9 provides that “resolution of disputes between a Contracting Party and an Investor of the other Contracting Party arising in connection with investments \* \* \* shall be referred to,” among other forums, “an ad hoc arbitration tribunal, in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).” Pet. App. 29a. An “Investor of the Other Contracting Party” must be competent “to make investments in the territory of the other Contracting Party.” 25-7064 C.A. App. 99 (¶ 413); Bilateral Investment Treaty, art. 1(2)(a)-(b). And the “investments” must have been made “by an investor of one Contracting Party in the territory of the other Contracting Party.” 25-7064 C.A. App. 85 (¶ 333); Bilateral Investment Treaty, art. 1(1). Because the respondents here invested in Crimea when it was indisputably Ukrainian territory, and Ukraine disputes that Crimea is Russian territory, the respondents are not offerees who may validly accept Russia’s offer to arbitrate under the Bilateral Investment Treaty.<sup>4</sup>

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<sup>4</sup> Principles of contract interpretation dictate that the parties’ intent “must be ascertained in light of all the circumstances surrounding the parties *at the time the contract was made.*” 1010 *Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984) (emphasis added) (citing Restatement (Second) of Contracts §§ 202, 212(1) (1981)); see also 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32:7, at 713 (4th ed. 2012) (“In construing a contract, a court seeks to ascertain the meaning of

If the court below had interpreted and applied Section 1605(a)(6) correctly, it would have resolved Russia's contractual arguments about the existence of an agreement to arbitrate between Russia and the respondents as a jurisdictional matter, relieving Russia of the indignity and burden of having to defend the actions on the merits because it is clear that no agreement to arbitrate exists between Russia and the respondents. This Court need not decide the ultimate question of whether an agreement exists between Russia and the respondents, only whether that question must be decided at the jurisdictional stage under Section 1605(a)(6).

4. It is imperative that a district court satisfy itself of the existence of a relevant arbitration agreement as part of its jurisdictional analysis consistent with the

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the contract at the time and place of its execution.”). The principle of contemporaneity in international law similarly requires that the terms of a treaty, like other contracts, be interpreted in light of the circumstances known to the parties at the time the treaty was ratified. See, e.g., *ICS Inspection and Control Serv. Ltd. (U.K.) v. Republic of Argentina*, Award on Jurisdiction, PCA Case No. 2010-9, ¶ 289 (2012) (observing that it is “appropriate and helpful to resort to the principle of contemporaneity in treaty interpretation, particularly pertinent in the case of bilateral treaties,” which “requires that the meaning and scope” of a treaty term “be ascertained as of the time the states negotiated their [investment treaty]”); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 225 (1957) (“[R]ights of parties to a dispute \* \* \* [are determined] on the basis of the contemporaneous meaning of the treaty terms at the date of its conclusion, and in the light of current usages and practice at that time.”).

general rule that formation of an arbitration agreement is always a threshold question for courts. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (holding that “whether a valid arbitration agreement exists” is a question for “the court [to] determine[]”); *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299-301 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (“The issue of the agreement’s ‘validity’ is different from the issue [of] whether any agreement between the parties ‘was ever concluded.’”). It does not matter that this question might overlap with a “merits” defense in the context of an action to enforce an award, because as this Court has made clear, “merits and jurisdiction will sometimes come intertwined” under the FSIA, whose “basic objective” is to avoid embroiling foreign sovereigns in more burdensome litigation where a dispositive question may be answered as a threshold matter of sovereign immunity. *H&P*, 581 U.S. at 178 (“We recognize that merits and jurisdiction will sometimes come intertwined \* \* \* If so, the court must still answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it.”). Answering this threshold question at the jurisdictional stage imposes no additional burden on courts, since they would be required to conduct the same analysis anyway, albeit at a later “merits” stage of the litigation.

In brief, the question of whether an agreement to arbitrate exists between Russia and the respondents must be decided as a matter of sovereign immunity under Section 1605(a)(6). Since no such agreement

exists, the actions to enforce these awards should have been dismissed for lack of jurisdiction under the FSIA.

### CONCLUSION

This petition should be granted, ideally with Spain's petition in *Basket*. Alternatively, it should be held in abeyance pending this Court's ultimate disposition of *Basket* and GVR'd for reconsideration in light of *Basket*.

Respectfully submitted,

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