No. 22-19

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

REPLY BRIEF FOR PETITIONER

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The decision below entrenches a *per se* rule that courts may *never* dismiss actions to confirm a foreign arbitral award on *forum non conveniens* grounds—even where the underlying dispute has no relation to the United States, the respondent has no attachable assets here, and confirmation requires resolving threshold legal questions that foreign courts are far better equipped to address. It deepens a break with the Second Circuit, which applies no such categorical rule, and cements Washington, D.C.'s longstanding status as foreign forum-shoppers' favorite enforcement venue.

Unable to deny "a conflict between the Second Circuit and the D.C. Circuit," Opp. 16, Tatneft waves it away as inconsequential. But the question matters tremendously to the swelling ranks of respondents in increasingly prevalent award-confirmation proceedings. Award-holders need no further incentive to continue flocking to U.S. courts than the prospect of using liberal discovery to perform intrusive global asset searches. The

D.C. Circuit's rigid approach—which Tatneft never attempts to reconcile with the flexibility that this Court has identified as the hallmark of *forum non conveniens*—dismantles a fundamental bulwark against such abuses. Absent this Court's intervention, situations like the one Ukraine faces will become even more common. Tatneft still has given no indication that it actually seeks to attach any U.S.-based assets. Yet Tatneft has been allowed to deploy a full arsenal of discovery tools to demand information about Ukrainian assets and transactions worldwide—including those of importance to Ukraine's national security.

Tatneft attempts to distract the Court by selectively quoting out-of-context language from the arbitral award and confirmation proceedings to cast aspersions on Ukraine. But the English High Court rejected Tatneft's arguments that Ukrainian courts acted improperly, and regardless, Tatneft nowhere contends that any aspect of its skewed account would impede this Court's review of the question presented.

Given that the majority of award-confirmation actions are brought in the two opposing circuits of this persistent split, Pet. 17-18, review is needed now to restore uniformity to this important area of the law.

A. The Circuit Split Is Important

1. Tatneft downplays the split by arguing that it is limited to awards against foreign nations. Even if true, that would not lessen the split's importance. Over 93% of confirmation cases brought in the D.C. Circuit in the last decade (56 of 60) have been against foreign nations. See Pet. App. D. It thus makes no practical difference whether the D.C. Circuit's rule applies only to foreign nations or all judgment creditors.

Regardless, that supposed "limitation" finds no support in the caselaw or in Tatneft's own briefing. As Tatneft concedes (Opp. 18), the D.C. Circuit identified no such limitation when it "squarely held 'that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award.'" Pet. App. 17a (quoting *LLC SPC Stileks* v. *Republic of Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021)). Nor did Tatneft suggest any such limitation below when it represented that D.C. Circuit precedent "conclusively precludes dismissal of a New York Convention award enforcement case in favor of any forum outside the United States." C.A. Appellee Br. 57-58.

Tatneft also finds no support for its "limitation" in the D.C. Circuit's reasoning. That court bars *forum non conveniens* from confirmation proceedings "because only U.S. courts can attach foreign commercial assets found within the United States," which is true of private and state-owned assets alike. Pet. App. 17a (citation omitted).[1] Tatneft tries to root the court's logic (Opp. 17-18) in the Foreign Sovereign Immunities Act (FSIA) instead, but that makes no sense; the D.C. Circuit's reasoning turns on whether *foreign* courts can execute against assets in the United States, not how the FSIA constrains the authority of *U.S.* courts. See Pet. App. 17a.

In any event, the D.C. Circuit's categorical rule is troubling precisely because it is frequently applied to foreign nations. See Pet. 20-22. Cases against foreign nations often implicate sensitive "principles of comity" and "the paramount interests of another sovereign" in

[1] Tatneft speculates (Opp. 18) that there "may well" be different "considerations" in cases against non-sovereign respondents, but Tatneft has not identified any. Its sole "example" relates to constraints on U.S., not foreign, courts. Opp. 18.

ways that make *forum non conveniens* dismissal especially imperative. *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996).

2. Tatneft also argues (Opp. 19-20, 28) that the split does not encompass the "broader question" whether the New York Convention permits the application of *forum non conveniens*, and suggests that this Court await a case in which that question is presented. But as Tatneft acknowledges (Opp. 19 n.5), there is no reason the D.C. Circuit will *ever* reach that issue, because its existing rule renders *forum non conveniens* categorically unavailable, regardless of how the treaty is interpreted. Pet. App. 17a; see also *Entes Indus. Plants, Constr. & Erection Contracting Co.* v. *Kyrgyz Republic*, No. 18-cv-2228, 2019 WL 5268900, at *5 (D.D.C. Oct. 17, 2019) (not interpreting the treaty because the D.C. Circuit already "laid down a practical barrier to ever obtaining [*forum non conveniens*] dismissal"). If Tatneft is suggesting this Court should not resolve this split until the D.C. Circuit interprets the Convention further, that day is unlikely to ever come.

3. Tatneft argues (Opp. 20) that the circuit split has "almost no practical consequence" because *forum non conveniens* dismissal is "inappropriate in all but extraordinary circumstances." Under that logic, this Court would *never* resolve disagreements involving *forum non conveniens*, which is plainly wrong. Moreover, this Court has squarely rejected the idea that "*forum non conveniens* * * * dismissal would rarely be proper," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 250 (1981), and Tatneft cannot dispute that the Second Circuit has repeatedly addressed the doctrine in award-confirmation proceedings and held that dismissal was warranted—

including where the alternative forum was Ukraine. *Figueiredo Ferraz e Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384 (2011); *In re Arbitration between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488 (2002).

Tatneft claims (Opp. 20-21) that those cases presented "anomalous facts." But as this Court has emphasized, "each [*forum non conveniens*] case turns on its facts." *Piper Aircraft*, 454 U.S. at 249 (cleaned up). The D.C. Circuit's categorical approach precludes courts from *ever* considering a case's facts to determine whether dismissal is appropriate—even if the award debtor has no U.S. assets, the case has no connection to this jurisdiction, and confirmation requires deciding foreign-law issues better resolved elsewhere.

Furthermore, the facts of *Figueiredo* and *Monegasque* are not unusual. Tatneft contends (Opp. 21) that *Figueiredo* involved a "unique" Peruvian statute. But *Figueiredo* did not turn on that statute's "precise meaning," 665 F.3d at 386 n.1, and many foreign laws—including Ukrainian ones—similarly reflect a "sovereign prerogative" to regulate how "[national] funds are spent to satisfy judgments." *Id.* at 392.[2] Other types of "sovereign prerogative[s]" are also implicated in award-confirmation proceedings. See, *e.g.*, *Esso Expl. & Prod. Nigeria Ltd.* v. *Nigerian Nat'l Petrol. Corp.*, 397 F. Supp. 3d 323, 349 (S.D.N.Y. 2019) ("Nigeria arguably has an interest in barring tax disputes from arbitration"),

[2] *E.g.*, Resolution of the Cabinet of Ministers of Ukraine No. 408 of Mar. 7, 2007, Decl. of M. Kostytska, Ex. 63, *Tatneft*, No. 17-cv-582 (D.D.C. July 25, 2017) (ECF No. 24-63).

vacated in part on other grounds, 40 F.4th 56 (2d Cir. 2022).

Nor was *Monegasque* unusual. Tatneft claims (Opp. 21) the case was exceptional because it involved "whether Ukraine [wa]s bound as a non-signer of the [arbitration] agreement" under Ukrainian law. Threshold foreign-law questions are not uncommon, contra Opp. 25-26; see also Pet. 22-23, and Tatneft never explains why U.S. courts should invariably have to expend resources deciding foreign-law issues, even when the award debtor has no attachable assets in this country.

B. This Case Is An Ideal Vehicle For Resolving An Important And Recurring Question

1. Tatneft claims (Opp. 27) that this case is an unsuitable vehicle because "*forum non conveniens* was not Ukraine's primary issue on appeal." But it suffices that the issue was pressed and passed upon. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Unlike in *Belize*, where the D.C. Circuit disposed of petitioner's *forum non conveniens* argument in a single sentence alongside "several other arguments," *Belize Soc. Dev. Ltd.* v. *Gov't of Belize*, 794 F.3d 99, 105 (D.C. Cir. 2015), the argument here was canvassed over a dozen pages of briefing and squarely resolved in the most exhaustive analysis that the D.C. Circuit will likely provide henceforth.

Tatneft further contends (Opp. 28) the conflict is not outcome-determinative here because the district court suggested that Tatneft "raised a credible issue of its ability to obtain justice in Ukraine." Tatneft is wrong. First, as Tatneft acknowledges (Opp. 30), the D.C. Circuit never reached this issue. It is thus no impediment to review; this Court routinely grants certiorari despite

potential alternative bases for affirmance on remand. See, *e.g.*, *Rosemond* v. *United States*, 572 U.S. 65, 82-83 (2014); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 200-202 (2012). Even if the petitioner later loses on an alternative ground, that does not negate the benefit of resolving a circuit conflict. That is especially true where, as here, the district court's suggestion did not even constitute an actual holding. Pet. App. 45a.

Second, Tatneft can obtain justice in Ukraine, which, in seeking EU membership, has confirmed its commitment to democratic principles, transparency, and accountability. Tatneft claims (Opp. 29) that the underlying dispute involved alleged wrongdoing by the Ukrainian judiciary itself. See Pet. App. 45a. But a U.S. court should not lightly impugn the integrity of a foreign sovereign's judiciary, especially when other courts (notably, the Second Circuit) have held that it is an adequate alternative forum. Pet. 9-10. Moreover, the High Court of Justice in England rejected Tatneft's contention that Ukrainian courts acted improperly. *PAO Tatneft* v. *Ukraine* [2020] EWHC 3161 (Comm) ¶¶ 28, 34 (Smith, J.), https://bit.ly/3Nwnzfx. Regardless, the earlier decisions were rendered by Ukraine's economic court system, whereas any enforcement action would be heard by its civil courts, which are separate from, and not bound by, the former's legal findings. Decl. of G. Tyshchenko ¶ 9, *Tatneft*, No. 17-cv-582 (D.D.C. Apr. 30, 2021) (ECF No. 73-10). It makes no sense to say that one branch of Ukraine's judiciary would not provide an adequate alternative forum because of alleged wrongdoing by another branch over a decade (and many anti-corruption reforms) ago.

2. Attempting to minimize the stakes of the question presented, Tatneft argues (Opp. 24) that "the scope of post-judgment discovery is not relevant to applicability of the Convention exceptions." And it dismisses the idea (Opp. 26-27) that parties file U.S. enforcement actions for "nefarious motives," venturing that the "more likely explanation" is that "assets of almost any foreign sovereign or transnational business are likely to be found" here. But award-enforcement specialists advise that "even if the debtor does not have readily seizable property in the United States, a judgment creditor may still benefit from taking enforcement steps [there] to obtain information about assets that may be subject to execution elsewhere." Jef Klazen et al., *Enforcement in the United States*, Global Arbitration Review (Oct. 13, 2020), https://bit.ly/3Km4pct. And this Court has recognized that "extensive" U.S. discovery is among the features that both make U.S. courts "extremely attractive" *and* make *forum non conveniens* critically important. *Piper Aircraft*, 454 U.S. at 252 & n.18.

Tatneft calls Ukraine's concerns about broad post-judgment discovery "premature" and "speculative," because district courts can "careful[ly] manag[e]" post-judgment discovery. Opp. 24-25. But that skips the antecedent question whether U.S. courts must be forced to supervise worldwide fishing expeditions into a foreign party's assets in every award-confirmation case, regardless of how little connection it has with the United States.

Tatneft also trivializes the national security concerns that unbridled post-judgment discovery can present—concerns dramatically illustrated by this case. Tatneft contends (Opp. 25) that the district courts have correctly

found Ukraine's security concerns to be "unsubstantiated" and "addressable, if and when needed, through means of protecting confidentiality," and through a temporary stay. Ukraine, now entering its seventh month under sustained Russian assault, does not share that optimism. It took a war in Europe—and a notification by the United States that it was "actively considering whether to file a Statement of Interest * * * addressing U.S. foreign policy interests," Notice by the United States of Potential Participation, *Tatneft*, No. 17-cv-582 (D.D.C. Feb. 22, 2022) (ECF No. 99)[3]—for Tatneft to accept even a temporary moratorium that could be lifted at any time. See Pet. 11.

4. Absent this Court's intervention, the question whether *forum non conveniens* is available in award-confirmation proceedings will continue to recur. The issue has arisen repeatedly in the two relevant courts of appeals in recent years—including as recently as two months ago. See *Esso Expl. & Prod. Nigeria Ltd.* v. *Nigerian Nat'l Petrol. Corp.*, 40 F.4th 56 (2d Cir. 2022). With the sustained growth of international arbitration and the concomitant rise in U.S. confirmation proceedings, Pet. 24-25, this Court's guidance is needed now.

C. The Decision Below Is Wrong

Tatneft's defense of the D.C. Circuit's holding underscores how far that court has strayed from this Court's caselaw.

1. An alternative forum exists for *forum non conveniens* purposes so long as it offers a remedy that is not "so clearly inadequate or unsatisfactory that it is no

[3] The Court may wish to call for the views of the Solicitor General (as it did in *Belize*) to better understand these concerns.

remedy at all." *Piper Aircraft*, 454 U.S. at 254. Tatneft concedes (Opp. 31) that the remedy in a confirmation proceeding is "an executable judgment." But that is *exactly* the remedy that Ukraine's courts afford. See Pet. 9-10. Just because a Ukrainian judgment can only be executed in Ukraine—and an American judgment only in the United States—does not mean that an executable Ukrainian judgment is "no remedy at all." Indeed, *Piper Aircraft* squarely held that even a less favorable remedy in an alternative forum "should not, by itself, bar dismissal." 454 U.S. at 250-251.

2. Creditors sometimes begin confirmation proceedings not to attach assets, but to harass a debtor or to take advantage of favorable discovery laws. Tatneft acknowledges as much when it observes (Opp. 32) that efficiency is the "likely"—but not the only—motive for launching confirmation proceedings. Tatneft also does not dispute that, if a case is brought for improper reasons, "dismissal may be warranted." *Piper Aircraft*, 454 U.S. at 249 n.15. Yet Tatneft never explains how to square those concessions with the D.C. Circuit's categorical rule, which *never* allows dismissal of a confirmation proceeding, no matter how blatantly improper the underlying motives.

3. Tatneft primarily defends the decision below by reasoning that the New York Convention "*forbids* the application of *forum non conveniens*." Opp. 33. Not only has the D.C. Circuit never endorsed this argument, *no court of appeals has*, and both the Government and the Second Circuit have expressly rejected it. See U.S. Br. as Amicus Curiae at 21-22, *Figueiredo* (2d Cir. Feb. 25, 2011), https://bit.ly/3QOt4sF; *Monegasque*, 311 F.3d at 495-497. For good reason: the Convention and other treaties require Contracting States to recognize and

enforce arbitral awards consistent with their "rules of procedure," see New York Convention Art. III; Panama Convention Art. IV, and "*forum non conveniens* is nothing more or less than a supervening venue provision," a quintessential rule "of procedure rather than substance," *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 453 (1994).[4]

Tatneft admits (Opp. 34) that *forum non conveniens* is "considered 'procedural,'" but says this common-law doctrine has no place in treaties drafted by "civil law jurists," and that a treaty's text should yield to its supposed purpose. Opp. 35. But "the drafters of the Convention * * * contemplated that different procedural rules would be applied in the courts of the various signatory nations," including common-law jurisdictions. *Monegasque*, 311 F.3d at 496. It is furthermore "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1060 (2019) (citation omitted). Tatneft does not explain why its interpretation of the Convention should override the U.S. State Department's.

Tatneft's interpretation would also invert the rule that courts should presume that well-established common-law doctrines like *forum non conveniens* are available unless a treaty's text compels a different conclusion. See Pet. 29-30. Nothing in the Convention's text comes close. *Forum non conveniens* is admittedly not

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[4] Tatneft claims this is a new argument, but Ukraine repeatedly encouraged the D.C. Circuit to follow the Second Circuit's reasoning in *Figueiredo*, including on this point. C.A. Appellant Br. 45-46; C.A. Oral Arg. 6:47-7:26, https://bit.ly/3RIb3we. Regardless, "parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

among the substantive defenses to a confirmation proceeding listed in the Convention, Opp. 33, but that is because *forum non conveniens* is not a substantive defense at all; "[i]t simply denies relief * * * , leaving a plaintiff free to seek enforcement of an award elsewhere." *Figueiredo*, 665 F.3d at 393 n.11.

Finally, *forum non conveniens* advances the purpose of award-confirmation treaties, which is to promote international trade by making arbitration an appealing means of dispute settlement. It would "chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of arbitral awards in a petitioner's chosen forum." *Monegasque*, 311 F.3d at 496-497 (citation omitted). Ensuring that parties litigate in convenient forums makes arbitration *more* attractive, not less.

4. At bottom, Tatneft cannot escape the fact that the D.C. Circuit has done exactly what this Court has repeatedly said it should not: it has established a rigid, *per se* rule barring *forum non conveniens* from an entire class of proceedings, even though the doctrine's value comes from its flexibility and case-by-case application. *Piper Aircraft*, 454 U.S. at 250. That error and split with the Second Circuit must be corrected. This case provides the perfect vehicle for doing so.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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