No. 22-19

In The
Supreme Court of the United States

UKRAINE,
Petitioner,
v.
PAO TATNEFT,
Respondent.

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

BRIEF IN OPPOSITION

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
Alexandra Mansbach
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Counsel for PAO Tatneft

QUESTION PRESENTED

Whether, in a petition to confirm an arbitral award against a foreign nation under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (New York Convention) a foreign forum can be adequate when only a U.S. court can attach the award-debtor foreign nation's U.S. assets?

RULE 29.6 STATEMENT

PAO Tatneft certifies, as required under Supreme Court Rule 29.6, that it is a publicly traded open joint-stock company, established and existing under the laws of the Russian Federation. It has no corporate parent and no publicly traded company owns 10% or more of its shares

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

STATEMENT 1

A. Legal Framework 2

B. The Parties and the Underlying Dispute 3

C. The Arbitration Award.. 6

D. Proceedings in France 7

E. Proceedings in the United Kingdom................... 8

F. Proceedings in the United States 10

REASONS FOR DENYING THE PETITION 14

A. Because Relatively Few Arbitrations Involve Foreign Sovereigns, Any Circuit Conflict Is Narrow and Insignificant. 16

B. This Case Is an Unsuitable Vehicle for Resolving the Question Presented. 27

C. The D.C. Circuit's Decision Is Correct. 30

CONCLUSION 37

APPENDIX A – Selected provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 1a

APPENDIX B – List of petitions to confirm foreign arbitration awards filed in or removed to federal court, June 2012–present, in which decisions were entered addressing *forum non conveniens* motions.. 3a

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Dredging Co. v. Miller,
510 U.S. 443 (1994) 34

AutoBidmaster LLC v. Martyshenko, No. 20-cv-6181, 2021 U.S. Dist. LEXIS 90962 (W.D. Wash. May 12, 2021) 29

BCB Holdings Ltd. v. Government of Belize,
650 F. App'x 17 (D.C. Cir. 2016) 17

Bennett v. Spear,
520 U.S. 154 (1997) 30

Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petro Corp., 40 F.4th 56 (2d Cir. 2022) 21

Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011) 17, 21, 34, 35

Firebird Republics Fund, Ltd. v. Moore Cap. Mgmt. LLC, 2009 U.S. Dist. LEXIS 59982 (S.D.N.Y. July 14, 2009) 29

In re Subpoenas Served on Lloyd's Banking Grp. PLC, No. 1:21-mc-376, 2021 U.S. Dist. LEXIS 227007 (S.D.N.Y. Nov. 22, 2021) 14

Klumba UA. LLC v. klumba.com, No. 15-cv-760, 2017 U.S. Dist. LEXIS 213772 (E.D. Va. Sept. 11, 2017) 29

Katsuko Hosaka v. United Airlines, 305 F.3d 989 (9th Cir. 2002) 35

Koehler v. Bank of Bermuda Ltd., 577 F.3d 497 (2d Cir. 2009) 18

Levin v. Bank of N.Y., No. 9-CV-5900, 2022 U.S. Dist. LEXIS 30463 (S.D.N.Y. Feb. 22, 2022) 18

LLC SPC Stileks v. Republic of Moldova, 985 F.3d 871 (D.C. Cir. 2021) 17, 18

Melton v. Oy Nautor AB, 1998 U.S. App. LEXIS 22100 (9th Cir. Sept. 4, 1998)....19, 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)....2, 23

Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukr., 311 F.3d 488 (2d Cir. 2002)....19, 21, 29

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 3, 24, 30, 36

Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014) 18, 24, 25

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)....2, 23, 35

Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007) 36

TMR Energy, Ltd. v. State Property Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005) 10, 11, 17, 19, 31, 32

United States v. Williams, 504 U.S. 36 (1992) 28

Venture Global Eng'g LLC v. Satyam Comput. Servs., 233 F. App'x 517 (6th Cir. 2007) 20

Statutes and Treaties

9 U.S.C. § 207 .... 2, 24, 32, 33

28 U.S.C.
§1609 .... 17, 31
§1610(a)(6) 17, 31

Convention on the Recognition & Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 2
Art. III 2, 34
Art. V 3, 7, 24, 33

Rules

Fed. R. Civ. P. 62(a) 11

Fed. R. Civ. P. 69 24

Other Authorities

Javier C. Aguilar, *Sovereign Wealth Funds Take to the Stage*, IE Univ. Insights (Mar. 11, 2022) 27

Br. for United States as Amicus Curiae, *Gov't of Belize v. Belize Soc. Dev. Ltd.*, No. 15-830 (U.S. Dec. 7, 2016) 17, 20, 27, 28

Int'l Commercial Disputes Comm., Ass'n of the Bar of N.Y.C., *Lack of Jurisdiction and* Forum Non Conveniens *as a Defense to the Enforcement of Foreign Arbitral Awards*, 15 Am. Rev. Int'l Arb. 407 (2004) 33, 36, 37

Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2020* 26

William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251 (2006) 32, 34

PAO Tatneft v. Ukraine,
[2018] EWHC 1797 (Comm) 8, 9
[2019] EWHC 3740 (Ch) 8, 9
[2020] EWHC 3161 (Comm) 8, 9

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 (2012) 36

Restatement (Third) of the U.S. Law of International Commercial Arbitration (Am. L. Inst., Proposed Final Draft, 2019)
§ 4.1 31
§ 4.27 .... 22, 31, 33, 34, 36

Catherine A. Rogers, et al., *The US Law of International Commercial Arbitration*, 21 Disp. Resol. Mag. 8 (Fall 2014) 20

Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. Int'l L. & Pol. 1063 (2013) 35

Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 Loy. L.A. L. Rev. 1337 (2007) 35

U.N. Econ. & Soc. Council, *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. Doc. E/2704 (Mar. 28, 1955) 34

BRIEF IN OPPOSITION

STATEMENT

In 2014, an arbitration panel sitting in Paris awarded PAO Tatneft, a Russian company, $112 million in damages. Tatneft had prevailed in its dispute with Ukraine in an arbitration brought under the Russia-Ukraine Bilateral Investment Treaty. French courts denied Ukraine's petition to annul the award. Courts in Russia, the United Kingdom, and the United States—all nations where Ukrainian assets are likely to be found, given their geographic proximity or status as global financial centers—have all confirmed the award under the New York Convention, thereby rendering an enforceable judgment in each confirming jurisdiction. In the United States, award confirmation was delayed by four years of litigating threshold issues, including Ukraine's first petition for certiorari in this case, which was denied.[1]

Rejecting Ukraine's attempts to again avoid what is supposed to be a speedy and straightforward determination under the New York Convention, the district court has now confirmed the award and the court of appeals has affirmed. Eight years after losing the arbitration, Ukraine has yet to pay—in any country—any part of the repeatedly-affirmed award. This drawn-out controversy (Ukraine has made three trips to the D.C. Circuit already) is a terrible vehicle to review a threshold question that is narrow, of no

[1] *Ukraine v. PAO Tatneft*, No. 19-606, 140 S. Ct. 901 (2020).

practical importance, immaterial to the outcome of this case, and in any event was properly decided.

A. Legal Framework

The United States has an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

Embodying this strong federal policy, 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, commonly known as the New York Convention, aims "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts" and "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

Under the Convention, each signatory—including Ukraine and the United States—"shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in" the Convention. Art. III, 21 U.S.T. 2519, 330 U.N.T.S. 40. In the United States, international arbitration awards are enforceable under Chapter Two of the Federal Arbitration Act. *See* 9 U.S.C. § 207. Courts "shall confirm the award" unless one of the Convention's seven express

exceptions applies. *See* Art. V, 21 U.S.T. 2520, 330 U.N.T.S. 42 (delineating exceptions).[2]

The common law doctrine of *forum non conveniens* is not one of the Convention's seven delineated exceptions to award confirmation. The doctrine provides U.S. courts with discretion to dismiss a case in favor of an alternative forum only when "trial in the chosen forum would 'establish … oppressiveness and vexation to a defendant … out of all proportion to plaintiff's convenience.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

At the "outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Id.* at 254 n.22. "[W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative." *Id.* If there is an adequate alternative forum, then a court may dismiss an action, but "only when the private and public interest factors clearly point towards trial in the alternative forum." *Id.* at 255.

B. The Parties and the Underlying Dispute

Tatneft is a publicly traded Russian company. App. 21a. The Republic of Tatarstan—a constituent republic of the Russian Federation—owns a minority

---

[2] Relevant sections of the Convention are reproduced in Appendix A to this brief.

of Tatneft's shares and does not control its day-to-day operation. CAJA343.

In 1995, Tatarstan and Ukraine founded the CJSC Ukrtatnafta Transnational Financial and Industrial Oil Company (Ukrtatnafta), a company that owns and operates the Kremenchug Refinery, the largest oil refinery in Ukraine. App. 21a, 2a. When Ukrtatnafta was formed, Tatneft, Ukraine, and Tatarstan were the three major shareholders. *Id.* To ensure parity between Russian and Ukrainian interests, Ukraine owned half the corporation and Tatneft and Tatarstan together owned the other half. App. 2a. Initially, Ukraine agreed to contribute the Kremenchug refinery, Tatarstan agreed to contribute the rights to its oil deposits, and Tatneft agreed to contribute certain oil-related capital assets. *Id.* All parties later approved an amendment, whereby Tatneft would contribute $31 million cash instead, with its ownership stake reduced commensurately. App.2a; CAJA68 (Arbitral Award ¶61), CAJA121 (¶221); CAJA130 (¶249), CAJA178 (¶402); CAJA260 (Jt. Chronology ¶10), CAJA261 (Jt. Chronology ¶15).

In the late 1990s, Ukrtatnafta sold shares to AmRuz Trading Co. and Seagroup International Inc. in exchange for promissory notes. App. 2a. Tatneft executives owned AmRuz and Seagroup. App. 2a-3a. Private parties and Ukraine's Prosecutor General challenged the share purchases, arguing that Ukrainian law prohibited the purchase of shares with promissory notes. App. 3a. These challenges were all rejected by Ukrainian courts. CAJA137-39 (¶272, ¶274, ¶275); CAJA151(¶313); CAJA264-65 (Jt.

Chronology ¶¶33-34). Eventually, Tatneft purchased AmRuz and Seagroup, and collectively Tatarstan, Tatneft, AmRuz, and Seagroup controlled 55.7% of Ukrtatnafta's shares. App. 3a.

In 2007, a Ukrainian conglomerate (the Privat Group) with close political ties to the Ukrainian government, CAJA70-71 (¶69), CAJA92 (¶143), acquired a 1% interest in Ukrtatnafta. CAJA92 (¶143), CAJA339 (French Decision). Soon afterwards, Ukrainian courts and prosecutors assisted the Privat Group in seizing control of Ukrtatnafta.

First, there was a "forceful takeover of the Kremenchug refinery and the administrative offices," under the direction of a Ukrainian court bailiff with assistance of Ukrainian military forces. CAJA79 (¶93), CAJA94 (¶147), CAJA197 (¶465). Next, the Prosecutor General sued to invalidate the shareholder resolutions that years earlier had approved Tatneft's amended capital contribution. CAJA101 (¶173). Even though ordinarily this claim would be time-barred, and the Prosecutor had previously investigated these exact transactions, the Kyiv Economic Court excused the time bar. CAJA102 (¶174); CAJA122-23 (¶¶224-225); CAJA124 (¶229). The court then nullified the shareholder resolutions, a decision affirmed by three more Ukrainian courts. CAJA102-03 (¶174, ¶176).

The Prosecutor General next petitioned the Supreme Court of Ukraine to set aside the 2002 decision upholding the legality of the share sale to Amruz and Seagroup. CAJA139 (¶276). The Supreme Court of Ukraine again excused the statute of limitations, ordering the case to be retried. CAJA139

(¶277); CAJA151-52 (¶314). On re-trial, the Kyiv Economic Court reversed its 2002 decision that had originally validated the share purchase agreements, ordering AmRuz and Seagroup to return their shares to Ukrtatnafta. CAJA140 (¶278).

The Economic Court then ordered Ukrtatnafta to sell the returned shares at auction, without informing Tatneft, AmRuz or Seagroup. App. 3a. The Privat Group was the sole bidder and purchased the shares. *Id*.

C. The Arbitration Award

After a failed attempt at settlement, CAJA59 (¶6), Tatneft initiated arbitration with Ukraine in Paris under the Russia-Ukraine Bilateral Investment Treaty. App. 3a, 19a. Tatneft claimed that Ukraine, including the Ukrainian courts, improperly facilitated the Privat Group's acquisition of Ukrtatnafta shares. *Id*. Each party appointed an arbitrator, and the party-appointed arbitrators appointed the third panel member. *Id*.

The arbitral tribunal issued two unanimous decisions. First, it confirmed its jurisdiction over Tatneft's claims. App. 3a-4a. Then, it issued a Final Award concluding that Ukraine had "compromised" its duty under the Bilateral Investment Treaty to provide "fair and equitable treatment" to Tatneft "by a number of court actions." CAJA202 (¶481); *see* App. 4a. The tribunal explained that "almost every decision adopted [by the Ukrainian courts] resulted in a sequence that was with each step more adverse to [Tatneft] and directly l[ed] to findings that would in the end deprive

[Tatneft] of all rights in [Ukrtatnafta].” CAJA136 (¶267).

The tribunal found that the judicial process in Ukraine “might have run astray of due process and the necessary impartiality in delivering justice,” CAJA135 (¶265), “call[ing] into question the independence with which the [Ukrainian] courts proceeded in such cases,” and “cast[ing] a serious doubt about whether there was any intention to examine the rights claimed so as to impartially rule on their eventual merit,” CAJA136 (¶266). The tribunal found that the “court proceedings and decisions” were “manifestly unfair and unreasonable.” CAJA178-79 (¶¶401, 405). “Due process issues and procedural propriety were … compromised,” especially with “the reopening of cases beyond the limits of the statute of limitations,” which was “not an isolated event but a continuing one.” CAJA179 (¶404).

In 2014, the tribunal awarded Tatneft $112 million in damages, plus interest, for these treaty violations. App. 4a, 20a.

D. Proceedings in France

Ukraine attempted to annul both the jurisdiction decision and the Final Award in the Court of Appeal of Paris, which had annulment authority under the New York Convention, art. V(1)(e). App. 4a, 23a. Among other grounds, Ukraine argued that because the AmRuz and Seagroup investments were supposedly illegal under Ukrainian law (as had been held in the Ukrainian courts’ repudiation of their earlier decisions after the Privat Group arrived on the scene), there was

no agreement to arbitrate issues related to those investments. CAJA341, 344-45, 349 (French Decision). The Paris Court of Appeal rejected all of Ukraine's annulment arguments, upheld both Awards, and ordered Ukraine to pay €200,000 in attorneys' fees and costs to Tatneft. CAJA318. Ukraine then filed a request for appeal to the French Court of Cassation, which that court dismissed. App. 50a; CAJA319; Judgment, *PAO Tatneft v. Ukraine* [2019] EWHC 3740 (Ch) ¶24 (Cockerill, J.), https://tinyurl.com/2ncn2a5z ("Cockerill").

E. Proceedings in the United Kingdom

Because Ukraine did not pay the award against it, even after its annulment attempts were rejected by the Paris Court of Appeal, Tatneft filed petitions to enforce the award in both the United Kingdom and the United States. The award was ultimately confirmed in both countries. This case involves the U.S. proceeding.[3]

Tatneft won permission to enforce the Award in the United Kingdom in August 2017. Judgment, *PAO Tatneft v. Ukraine* [2020] EWHC 3161 (Comm) ¶ 1 (Smith, J.), https://tinyurl.com/mukex6h2 ("Smith"); Judgment, *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm) ¶¶20-22 (Butcher, J.), https://tinyurl.com/w6bp56sr ("Butcher"). Ukraine challenged this order in 2018, 2019, and 2020. Smith ¶1. Each time, the English courts upheld enforcement of the Final Award. Smith ¶¶1, 91.

---

[3] Tatneft also successfully enforced the award in Russian courts. *See* Smith ¶15.

First, Ukraine raised sovereign immunity. Smith ¶4; Butcher ¶29. The court dismissed this appeal. Smith ¶5; Butcher ¶111. Next, Ukraine challenged the Award on grounds related to the composition of the arbitral panel. Smith ¶6; Cockerill ¶4. This challenge was also rejected. Smith ¶6; Cockerill ¶¶99, 105.

Then Ukraine challenged enforcement of the component of the Award attributable to the wrongful invalidation of the Seagroup and Amruz transactions. Ukraine made an "issue estoppel" argument that Tatneft could not dispute the "illegality" of these share transactions because the issue had already been decided against Tatneft in the Ukrainian courts. Smith ¶8-9.

The court did not decide issue estoppel. *Id.* ¶33. Instead, it found that Ukraine had violated rules "against abuse of process," *id.* ¶54, by "deliberate[ly]" not raising the illegality argument at previous opportunities, *id.* ¶67. The unnecessarily successive hearings had the effect of "unjustly harass[ing]" Tatneft, especially because Ukraine had "not paid the costs awarded against it at earlier stages" of the litigation. *Id.* ¶68. The court therefore affirmed the order enforcing the Final Award. *Id.* ¶90.[4]

---

[4] The English court noted that the Ukrainian Supreme Court could not "be criticized" for reopening the "illegality" issue, Smith ¶34, but did not address, much less disagree with, all of the arbitral tribunal's "procedural fairness concerns," *contra* Pet. 9.

F. Proceedings in the United States

1. Tatneft filed its petition to enforce the arbitral award in the district court in 2017. App. 4a. Ukraine moved to dismiss under both the Foreign Sovereign Immunities Act and *forum non conveniens*. App. 24a. The district court denied the motion on both grounds. App. 19a–55a.

On Ukraine's first appeal, under the collateral order doctrine, the D.C. Circuit unanimously affirmed the district court's FSIA ruling, CAJA948-50, but declined to exercise pendent jurisdiction over the *forum non conveniens* issue. App. 5a; CAJA950. Ukraine's petition for certiorari seeking review of the FSIA decision was denied. 140 S. Ct. at 901.

2. The district court then considered and rejected Ukraine's various arguments against enforcement under the New York Convention. App. 20a. On Ukraine's second appeal, the D.C. Circuit unanimously affirmed the district court confirmation of the Final Award on the merits. The court explained that the New York Convention generally "requires American courts to enforce international arbitral awards," with only limited exceptions, none of which were implicated by Ukraine's arguments. App. 7a, 12a, 16a. Ukraine does not challenge this holding.

3. The D.C. Circuit also reviewed the district court's ruling on *forum non conveniens*. App. 7a.

a. The district court had rejected Ukraine's *forum non conveniens* motion on two grounds. First, it applied *TMR Energy, Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005), which

held that no alternative forum has "jurisdiction to attach the commercial property of a foreign nation located in the United States." App. 42a.

Second, the district court held that Ukraine was not an adequate alternative forum for the additional and independent reason that Tatneft had "raised a credible issue of its ability to obtain justice in Ukraine." App. 45a. The district court found Tatneft's contention "bolster[ed]" by the argument that the Award was "'based on the wrongful actions of the Ukrainian courts, prosecutors, and court officials,'" and the expected lack of "impartiality … of the Ukrainian courts." App. 43a-44a (quoting Tatneft's Opp'n at 50). The "procedural posture of this case in the Ukrainian courts prior to arbitration," and the nature of the arbitrated claims—"which incriminate certain Ukrainian court orders and judicial actors"—convinced the court that Tatneft would "be unable to obtain basic justice in Ukraine." App. 45a. Ukraine, the court concluded, was thus an inadequate forum. *Id.*

b. The D.C. Circuit affirmed, applying *TMR Energy*. App. 17a (citing 411 F.3d at 303-04). It did not reach the district court's independent holding that Ukrainian courts were unable to provide substantial justice and therefore Ukraine was an inadequate forum. Ukraine's petition for rehearing en banc was denied. App. 56a.

4. Thirty days after the district court's judgment, after Ukraine had neither paid nor posted a bond, *see* Fed. R. Civ. P. 62(a), Tatneft began to seek discovery in aid of execution. Order Denying Stay Without Bond,

Dkt. No. 75, at 2 (D.D.C. June 1, 2021) ("Stay Order"). Ukraine agreed to produce certain documents, but then moved to stay execution, still without filing a bond. Order Granting Motion to Compel, Dkt. No. 83, at 2-3 (D.D.C. Oct. 18, 2021) ("Discovery Order"). The district court denied a stay because, among other reasons, Ukraine had made no "assurance of its intention to pay this arbitral award." Stay Order at 8. The D.C. Circuit likewise denied a stay. *PAO Tatneft v. Ukraine*, No. 20-7091 (D.C. Cir. July 23, 2021).

When Ukraine failed to produce any documents, and declined to negotiate regarding the scope of discovery, Tatneft filed a motion to compel which the district court granted. Discovery Order at 3-4.

The district court first ordered Ukraine to produce the documents it had already agreed to produce, criticizing the refusal to do so as "another delaying tactic in this case." Discovery Order at 6. The court then rejected Ukraine's contention that discovery should be geographically limited to assets within Ukraine, because Ukraine had refused to "provide[] any information about its assets located within the territory of Ukraine or anywhere else." *Id.* at 6-7. Any burden on Ukraine, the district court further held, was "of [Ukraine's] own making based on its refusal to voluntarily pay any of the judgment" and "its complete refusal to provide any information to facilitate Pao Tatneft's execution of the Judgment." *Id.* at 8. Although the district court contemplated ordering the parties to reach agreement on a "narrower range of information—as opposed to a worldwide

inquiry," "Ukraine's past and continuing behavior [indicated] that no compromise would be reached." *Id.*

In considering Ukraine's contention that discovery sought sensitive diplomatic and military information, the district court described Ukraine's "characterization" of Tatneft's discovery requests as "misleading at best," explaining that there were "no requests … *specifically* targeting embassy and consular bank accounts or military activity and equipment. *Id.* at 10 (emphasis in original). Even still, the court expressed its willingness to "prioritize discovery of non-invasive documents," although it was unable to do so because Ukraine had made "no effort … to limit the definition of information being sought." *Id.* at 10, 14. Ukraine instead simply "refuse[d] to comply" with any discovery requests or to produce a plan for production**.** *Id.* at 10. Ukraine had also "summarily rejected the possibility of negotiating a confidentiality agreement or protective order." *Id.* at 17. After reiterating that "Ukraine has and continues to stonewall" Tatneft, the court granted Tatneft's motion to compel and awarded costs and attorneys' fees to Tatneft. *Id.* at 18-19.

Ukraine later moved to stay production pending a last-minute motion for a protective order, after "continu[ing] to stonewall." Order, Dkt. No. 93, at 3 (D.D.C. Feb. 2, 2022). The district court denied the motion, but only after reviewing the production "with an eye toward Ukraine's alleged security concerns," noting Tatneft's counsel's agreement to treat the production as "outside counsel 'attorney's eyes only,'" and finding that Ukraine had not substantiated its

claim that "Tatneft's purported relationship with the Russian Federation poses a risk … with regard to [sharing] the information." *Id.* at 3-5. Ukraine appealed the district court's order granting Tatneft's motion to compel (its third appeal in this case). Notice of Appeal, Dkt. No. 85 (D.D.C. Nov. 8, 2021).

While discovery was ongoing in D.C., Tatneft also served nonparty subpoenas on financial institutions in New York. The district court for the Southern District of New York considered and rejected the same security and breadth-of-discovery arguments considered in D.C., denying Ukraine's motion to quash, while directing entry of a protective order. *See In re Subpoenas Served on Lloyd's Banking Grp. PLC*, No. 1:21-mc-376, 2021 U.S. Dist. LEXIS 227007 (S.D.N.Y. Nov. 22, 2021).

When Russia invaded Ukraine, the parties jointly moved for a moratorium on discovery, and the district court ordered an indefinite stay. Order, Dkt. No. 105 (D.D.C. Mar. 4, 2022). The parties also agreed to hold Ukraine's discovery appeal in abeyance. Order, *Ukraine v. PAO Tatneft*, No. 21-7132 (D.C. Cir. Mar. 21, 2022).

REASONS FOR DENYING THE PETITION

No circuit conflict warrants this Court's review because the only arguable conflict is narrow and lacks practical significance. Although the petition frames the question as covering the general availability of *forum non conveniens* in foreign arbitration enforcement proceedings, the D.C. Circuit has never addressed that broad question (much less disagreed

with the Second Circuit about it), and no other court of appeals has considered it.

The only identifiable divide, between two circuits only, is about how to evaluate the adequacy of the alternative forum when a foreign nation is the defendant. That issue arises rarely. And, when it does arise, any difference in legal standards is immaterial, given that courts in the Second and D.C. Circuits routinely deny *forum non conveniens* motions in this context. The very few Second Circuit cases granting *forum non conveniens* dismissals to foreign sovereigns fighting enforcement of international arbitration awards involved unique and distinguishable facts not present here.

No dire consequences require this Court's attention. The trend in favor of enforcing foreign arbitral awards in U.S. courts aligns with the strong federal policy favoring arbitration. As for post-judgment discovery concerns, they are neither independently certworthy, nor fairly included within the question presented. And, as this case shows, discovery can be managed effectively to address any concerns, as district courts in both the District of Columbia and New York have already done. Although the petition dwells on them, such discovery questions are also premature. Discovery is now stayed, as is Ukraine's discovery appeal. Conclusory speculation that complex legal questions might arise in a handful of future award confirmation proceedings cannot justify review, either.

The petition is also an unsuitable vehicle for answering the narrow and formalistic question that is

actually presented. In a finding left undisturbed by the D.C. Circuit, the district court applied the same test that governs in the Second Circuit and concluded that Ukraine is not an adequate alternative forum for this dispute. No matter how the Court might resolve the question presented, Ukraine's *forum non conveniens* motion would still be denied.

Finally, the decision below is correct. The D.C. Circuit's refusal to dismiss cases in favor of a foreign forum—a forum unable to provide the only remedy sought in an arbitral award enforcement proceeding in U.S. courts—is fully consistent with well-settled *forum non conveniens* analysis. And even taking on Petitioner's newly-minted argument about the New York Convention, which was neither pressed nor passed on below, the D.C. Circuit's approach comports with the text, purpose, and common understanding of the Convention as barring application of *forum non conveniens*.

The Court should deny the petition.

A. Because Relatively Few Arbitrations Involve Foreign Sovereigns, Any Circuit Conflict Is Narrow and Insignificant.

1. The petition identifies a conflict between the Second Circuit and the D.C. Circuit, Pet. 12-15, but the conflict is significantly narrower than described, because it extends to only a single type of arbitral award debtor (foreign nations) and only a single subsidiary question under the *forum non conveniens* analysis (adequacy of the alternative forum). The categorical question posed by Ukraine is not presented.

a. The petition's question encompasses confirmation of *any* foreign arbitral award, but the Second and D.C. Circuits are in conflict over only a subset of such awards, specifically those against foreign nations. The D.C. Circuit has held that a foreign forum is inadequate in such proceedings because "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States," citing the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1609, 1610(a)(6). *TMR Energy*, 411 F.3d at 303. In *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), the Second Circuit disagreed (with Judge Lynch dissenting), stating that although "only a United States court may attach a defendant's particular assets located here, … that circumstance cannot render a foreign forum inadequate." *Id.* at 390.

Although there was some question whether the D.C. Circuit intended *TMR Energy* to establish a categorical rule, *see* Br. for United States as Amicus Curiae at 11, *Gov't of Belize v. Belize Soc. Dev. Ltd.*, No. 15-830 (U.S. Dec. 7, 2016) ("U.S. Belize Br."), it appears to have done so in cases involving foreign sovereign defendants. In *BCB Holdings Ltd. v. Government of Belize*, 650 F. App'x 17 (D.C. Cir. 2016), the D.C. Circuit affirmed the district court's denial of Belize's *forum non conveniens* motion based on its prior holding "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 (citing *TMR Energy*, 411 F.3d at 303-04). And in this case and *LLC SPC Stileks v.*

Republic of Moldova, 985 F.3d 871 (D.C. Cir. 2021), the court each time cited *TMR Energy* to reject a sovereign nation's request for *forum non conveniens* dismissal. *See* App. 17a; 985 F.3d at 876 n.1 (recognizing conflict with *Figueiredo*). Although *Stileks* states the holding of *TMR Energy* without expressly limiting it to foreign nations, 985 F.3d at 876 n.1, *Stileks*' reliance on *TMR Energy*, which, in turn, relied on the FSIA, necessarily cabins any categorical rule—and thus any conflict—to foreign-sovereign cases.

The D.C. Circuit has not addressed the application of *forum non conveniens* to foreign arbitral awards involving non-sovereign defendants (or applied *TMR Energy* to such cases). The considerations for non-sovereign award debtors may well be different. Although "[o]ur courts generally lack authority … to execute against property in other countries," *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 144 (2014), state courts can sometimes reach non-sovereign foreign assets. For example, under New York law, a judgment may be satisfied by requiring a third party to turn over a judgment debtor's assets held by the third party outside the state (including overseas). *See Koehler v. Bank of Bermuda Ltd.*, 577 F.3d 497, 499 (2d Cir. 2009). That rule does not, however, apply to sovereign assets because the FSIA preempts it. *Levin v. Bank of N.Y.*, No. 9-CV-5900, 2022 U.S. Dist. LEXIS 30463, at *91-92 (S.D.N.Y. Feb. 22, 2022) (rejecting application of *Koehler* rule to property of Iran). Foreign courts may have similarly greater scope for extraterritorial enforcement on non-sovereigns. Such differential enforcement issues may alter the D.C. Circuit's

evaluation of *forum non conveniens* in a case involving an arbitral award against a private party—a question the D.C. Circuit has never addressed.

b. The conflict also does not reach, as the petition would have it, the broad question of whether "the doctrine of *forum non conveniens* is available" in award confirmation proceedings. *See* Pet. I. In *Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002), the Second Circuit decided that *forum non conveniens* is generally available in petitions to enforce arbitral awards under the New York Convention, even though it is not one of the "seven exclusionary defenses to enforcement" listed in the Convention, on the theory that it is a "rule[] of procedure." *Id.* at 495. But the D.C. Circuit, in contrast, has expressly declined to address that question. *See TMR Energy*, 411 F.3d at 304 n.*** ("[W]e do not consider TMR's alternative contention that, contrary to the Second Circuit's decision [in *Monde Re*], the doctrine has no place in an action to enforce an arbitration award.").[5]

As the petition acknowledges (Pet. 12 n.2), no other court of appeals has reached this broader question. In *Melton v. Oy Nautor AB*, 1998 U.S. App. LEXIS 22100 (9th Cir. Sept. 4, 1998), the court found the appellant had waived any argument that the "Convention precludes application of *forum non*

---

[5] The D.C. Circuit did not need to reach the question in *TMR Energy* because the alternative forum could not attach the foreign nation's U.S. property, *id.* at 304, but it could reach the question in a proceeding to enforce an arbitral award against a private party, where the attachment calculus might be different.

conveniens," and "express[ed] no opinion" on that argument. *Id.* at *2. The Sixth Circuit affirmed the denial of a *forum non conveniens* dismissal in an unpublished opinion where no party raised the question presented. *Venture Global Eng'g LLC v. Satyam Comput. Servs.*, 233 F. App'x 517, 521 (6th Cir. 2007). Commenters cited by Ukraine (Pet. 15) acknowledge that any split does not reach this "deeper question of whether *forum non conveniens* is available more generally." Catherine A. Rogers, et al., *The US Law of International Commercial Arbitration*, 21 Disp. Resol. Mag. 8, 11 (Fall 2014). The Second Circuit is the only court of appeals to have answered the petition's far-reaching question.

What's more, this case is a poor vehicle to review that splitless broad question. Ukraine failed to brief it below and the D.C. Circuit, unsurprisingly, did not address it. Similar circumstances led the Solicitor General to recommend denial in the *Belize* cases. U.S. Belize Br. 11-12; *see* pp. 27-30, *infra*.

2. The narrow divide between the D.C. and Second Circuits' views on the question actually presented has almost no practical consequence. Under even the Second Circuit's approach, key features of award confirmation proceedings make dismissal under *forum non conveniens* inappropriate in all but extraordinary circumstances. In its most recent decision on this issue (released after the petition was filed), the Second Circuit recognized that the "summary nature of a proceeding to confirm an arbitral award" tilts *forum non conveniens'* private-interest factors—"logistical considerations of

convenience, such as the ease of access to sources of evidence"—towards denial. *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petro Corp.*, 40 F.4th 56, 71 (2d Cir. 2022). As for the public interest factors, only the "local interest in having a localized controversy decided at home" weighed in favor of dismissal; four other factors weighed against. *Id.* at *31.

Esso's denial of *forum non conveniens* dismissal after weighing public- and private-interest factors in the arbitral award confirmation context is consistent with the *Figueiredo* majority's recognition that "enforcement of such awards is normally a favored policy of the United States." 665 F.3d at 392. The *Figueiredo* majority nonetheless found this strong federal policy outweighed by a unique foreign statute that capped government payments to satisfy judgments. *Id.* That decision was wrong, *see* pp. 30-37, *infra*, but it addressed an anomalous set of facts that is unlikely to reoccur, and has also proved to be a high-water mark of the Second Circuit's receptiveness to *forum non conveniens*.

The other Second Circuit case to approve the dismissal of a foreign arbitral award proceeding with a foreign sovereign award-debtor under *forum non conveniens* likewise featured anomalous facts. In *Monde Re*, the Second Circuit considered a petition to enforce an award against Ukraine even though Ukraine was not a party to the relevant arbitration agreement. 311 F.3d at 494. The case thus raised an "[e]specially important" question of foreign law regarding "whether Ukraine is bound as a non-signer" of the agreement, *id.* at 500, distinct from the issues

presented in a typical award confirmation proceeding. In the mine-run of foreign arbitral award confirmations—like the 268 petitions identified by Ukraine over a ten-year period (Pet. 18 & App. D)—any formalistic distinction between the Second and D.C. Circuit makes no de facto difference.

The drafters of the Restatement (Third) of the U.S. Law of International Commercial Arbitration recognize as much, noting that "courts have traditionally been willing to entertain [*forum non conveniens*] motions ... (while rarely granting them)." § 4.27 Reporters' Note b(1) (Am. L. Inst., Proposed Final Draft, 2019) ("Rest. Int'l Comm. Arb."). The proof is in the pudding of case outcomes. Even with international arbitrations on the rise and petitions to enforce along with them (Pet. 24-25), *forum non conveniens* motions remain infrequent. Researching published or unpublished decisions in the tranche of cases listed in Ukraine's Appendix D—petitions to confirm foreign arbitral awards under the New York Convention (or a similar treaty, the Panama Convention) filed since June 2012—reveals only 23 cases in which *forum non conveniens* appears to have been raised. No doubt futility deters many; Respondent is aware of no decision in a post-June-2012 Convention petition case granting *forum non conveniens* dismissal (against a foreign sovereign or otherwise)—even though 9 of the cases were in the Southern District of New York.[6]

---

[6] It is possible, of course, that a district court granted a motion to dismiss under *forum non conveniens* without a decision being

Ultimately, whatever legal lens is applied—the inadequacy of the foreign forum, the lopsided balance of interests favoring a U.S. forum in the typical summary confirmation proceeding, or the strong federal policy favoring enforcement of foreign arbitral awards—the result is the same: *forum non conveniens* dismissal is not appropriate.

3. Besides arising rarely, the stakes of the question presented are much lower than Ukraine suggests. As Ukraine concedes, the "merits of th[e] award are not at issue," only "where Tatneft should enforce it." Pet. 3. And the "goal of the Convention" was "to unify the standards by which … arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. Hence, "substantive review at the award-enforcement stage remain[s] minimal." *Mitsubishi Motors*, 473 U.S. at 638. The petition acknowledges as much, noting that confirmation "may be … relatively straightforward" in "many cases," given "the narrowness of the generally available defenses." Pet. 22. Ukraine nonetheless insists that post-judgment discovery concerns and the possibility that courts might one day have to address complex legal questions make the *forum non conveniens* issue worthy of certiorari. Not so.

a. The scope of post-judgment discovery in federal courts does not confer importance on the question of whether *forum non conveniens* is available in proceedings to confirm foreign arbitral awards. Any

---

entered into the Lexis database. A full list of cases and description of the research parameters is included in Appendix B to this brief.

purportedly burdensome discovery at the execution stage is irrelevant to the question of which forum should decide whether to confirm an arbitral award. The only issue in the confirmation proceeding is whether one of the Convention's seven defenses to confirmation apply. Convention art. V(1)-(2); 9 U.S.C. § 207. And the burdens weighed in the *forum non conveniens* analysis must relate to the issue to be decided in the confirmation proceeding. *See Piper*, 454 U.S. at 241 n.6. The scope of post-judgment discovery is not relevant to applicability of the Convention exceptions.

Ukraine's discovery objections (Pet. 19-20) are thus beside the point for evaluating forum propriety. They are also premature, and speculative at best. The objections rest on contentions that Ukraine acknowledges (Pet. 19) this Court has never addressed. Any open questions about the scope of discovery available under Federal Rule of Civil Procedure 69, *NML Capital*, 573 U.S. at 140 & n.2, are best presented by a case that has decided those questions. Here, the district court is still managing a discovery process that has been indefinitely stayed by joint motion of the parties, Ukraine's appeal of the district court's discovery order has been held in abeyance, and the scope of discovery has not been considered by the court of appeals.[7]

---

[7] Before the appeal was stayed, Tatneft moved to dismiss it for lack of jurisdiction. Motion, No. 21-7132 (D.C. Cir. Dec. 10, 2021). That motion remains pending, but Ukraine is free to raise its discovery concerns in an appropriate future appeal.

Such factbound concerns about "sweeping" discovery, moreover, are also rarely certworthy, as district courts are perfectly capable of making "discretionary determination[s] … whether discovery is warranted," and weighing "comity interests and the burden that the discovery might cause to the foreign state." *NML Capital*, 573 U.S. at 146 n.6. Here, the district court (and the district court for the Southern District of New York) has carefully exercised this discretion. While rejecting Ukraine's arguments about geographic scope given repeated "stonewalling" by Ukraine, the district court still took care at every turn to address Ukraine's security concerns. The court ultimately found those concerns to be unsubstantiated and addressable, if and when needed, through means of protecting confidentiality. *See* pp. 12-14, *supra*.

The district court's careful management of the (now stayed) discovery process shows that *forum non conveniens* is not essential to protect a defendant from a "fishing expedition," "annoyance," or security impairment. Pet. 20-22. The way to manage such concerns is for the district court to address them in the discovery process—as two district courts have done here (and found Ukraine's objections wanting). It would be taking a sledgehammer to a nail—and defeat the strong federal policy favoring arbitration—for *forum non conveniens* dismissal to be the solution against potentially overbroad post-judgment discovery.

b. Nor does the remote possibility that a court might need to decide a "complicated threshold legal question[]" that turns on a "difficult question[] of

foreign law" (Pet. 22) make the availability of *forum non conveniens* an urgent concern. As Ukraine acknowledges, *most* Convention cases won't raise such questions, and even counting *every* case identified in Appendix D (not the fraction actually raising the *forum non conveniens* issue), there are about 27 a year nationwide, hardly a "deluge." Pet. 22. By comparison, over 330,000 cases were filed in district courts in 2020. Admin. Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2020*, https://tinyurl.com/4rap5nkj. What's more, as Ukraine likewise concedes, "U.S. courts regularly confront and decide questions of foreign law." Pet. 23. U.S. courts need not dismiss summary arbitral award enforcement proceedings to be saved from grappling with purported complexity.[8]

Ukraine also sees nefarious motives lurking when parties seek to enforce foreign arbitral awards in the United States, Pet. 23-24, but the more likely explanation can be found within the petition itself: "Many award confirmation proceedings … take place in New York because [parties] often hold assets or conduct transactions there." Pet. 17. The United States is a global financial center where assets of almost any foreign sovereign or transnational business are likely to be found, whether or not identified at the outset. As just one indication, the

[8] This case illustrates how rarely purportedly complex foreign legal questions matter in award enforcement. Ukraine has made its legal arguments to courts in France, the United Kingdom, the United States, and Russia. The Final Award has been enforced everywhere, and Ukraine does not challenge the D.C. Circuit's merits ruling here. Whatever complexity might exist, it does not appear to alter the outcome.

United States draws more investment from sovereign wealth funds than any other nation and has done so for 10 years. Javier C. Aguilar, *Sovereign Wealth Funds Take to the Stage*, IE Univ. Insights (Mar. 11, 2022), https://tinyurl.com/3cr7uwy5. The Convention aims to ensure uniformity of enforcement criteria across jurisdictions. The location of enforcement proceedings matters only for the practical reason that assets can generally only be reached by local courts. That commonplace of judgment enforcement is no reason to review the D.C. Circuit's judgment; it is reason to decline review.

B. This Case Is an Unsuitable Vehicle for Resolving the Question Presented.

If review of the question presented were warranted, this case would be a poor vehicle for two reasons: incomplete briefing and analysis in the court of appeals, and immateriality of the question presented to the outcome.

1. As in the *Belize* case, U.S. Belize Br. 12-13, *forum non conveniens* was not Ukraine's primary issue on appeal, which instead focused on merits arguments about why the award should not be confirmed. *See* Pet. C.A. Br. 20-42; Pet. C.A. Reply Br. 4-21. The D.C. Circuit thus focused most on the exceptions to enforcement under the Convention and rejected all of Ukraine's arguments. App. 1a-16a. Ukraine has not sought certiorari on this lion's share of the D.C. Circuit's opinion.

Forum non conveniens was discussed in a mere two paragraphs. App. 17a-18a. The D.C. Circuit did

not mention, much less pass on, the question presented: whether *forum non conveniens* is generally available in award confirmation proceedings under the New York Convention. *See* App. 17a-18a. That omission is unsurprising, because Ukraine never made before the D.C. Circuit the argument it now presses, that *forum non conveniens* is a "rule[] of procedure" within the meaning of the New York Convention and therefore *must* be available in an award confirmation proceeding. Pet. 29-30. Because the meaning of the Convention was "not pressed or passed upon below" certiorari is highly disfavored. *See United States v. Williams*, 504 U.S. 36, 41 (1992). Any review of the question presented should await a case where the court of appeals has fully aired arguments regarding the proper interpretation of the Convention.[9]

2. Also as in the *Belize* case, resolution of the narrow conflict between the D.C. and Second Circuits would not change the outcome here, because there is an independent reason why no adequate alternative forum exists. *See* U.S. Belize Br. 13. As the district court found, Tatneft "has raised a credible issue of its ability to obtain justice in Ukraine" and therefore "Ukraine cannot show that an alternative forum

---

[9] Petitioner argued in the D.C. Circuit that there was "no dispute that the doctrine of *forum non conveniens* is available." Pet. C.A. Br. 42 n.11. Respondent argued that "*forum non conveniens* dismissal is not appropriate in actions to enforce arbitral awards under the New York Convention" due to the inability to attach U.S. assets. Resp. C.A. Br. 57. Neither party made arguments related to the proper interpretation of the Convention.

exists." App. 45a.

A district court in the Second Circuit would have done the same, because the district court applied the Second Circuit's standard to evaluate the adequacy of the forum—whether it is able "'to provide substantial justice to the parties,'" App. 44a (quoting *Monde Re*, 311 F.3d at 499). It found that here, where the award was itself based on due process violations by Ukrainian courts, "Tatneft will be unable to obtain basic justice in Ukraine." App. 45a. In *Monde Re,* the Second Circuit declined to credit "bare denunciations and sweeping generalizations" of corruption or bias in Ukraine's courts. 311 F.3d at 499. The district court carefully distinguished such conclusory allegations in its factbound analysis of the unique context here, where the underlying dispute "incriminate[s] certain Ukrainian court orders and judicial actors" and the "procedural posture of this case in the Ukrainian courts prior to arbitration" indicate why basic justice would not be forthcoming for Tatneft. App. 45a.[10]

The district court's analysis is fully consistent with the arbitral tribunal's finding that it was Ukraine's courts (and judicial system participants) that breached the duty of fair and equitable treatment.

---

[10] Ukraine cites (Pet. 9-10) three other cases, but in each of them, the adequacy of the Ukrainian forum was apparently undisputed. *See AutoBidmaster LLC v. Martyshenko,* No. 20-cv-6181, 2021 U.S. Dist. LEXIS 90962, at *13 (W.D. Wash. May 12, 2021) (expressly undisputed); *Firebird Republics Fund, Ltd. v. Moore Cap. Mgmt. LLC*, 2009 U.S. Dist. LEXIS 59982, at *6 (S.D.N.Y. July 14, 2009) (same); *Klumba UA. LLC v. klumba.com*, No. 15-cv-760, 2017 U.S. Dist. LEXIS 213772, at *3 (E.D. Va. Sept. 11, 2017) (no dispute mentioned).

CAJA202 (¶481). Although the D.C. Circuit did not reach the district court's alternative holding, it acknowledged that the arbitral award was based "primarily [on] the Ukrainian litigation's procedural defects." App. 4a.

Tatneft may defend the judgment based on the inability to obtain substantial justice in Ukraine. *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Resolution of that issue in Tatneft's favor would eliminate the need for the Court to review the question presented. Alternatively, even if the Court were to adopt the Second Circuit's approach, the district court—vested with discretion to conduct the *forum non conveniens* analysis, subject to only deferential review—has already applied it and still would deny Ukraine's motion to dismiss. The Court should not grant review on *forum non conveniens* doctrine in a case where the motion to dismiss is foreordained to fail regardless of how the question presented is resolved.

C. The D.C. Circuit's Decision Is Correct.

1. A foreign forum is not adequate to enforce an arbitral award against a foreign nation because it cannot attach the foreign nation's U.S. assets.

Under long-standing *forum non conveniens* doctrine, "where the remedy offered by the other forum is clearly unsatisfactory," then it is not an adequate alternative. *Piper*, 454 U.S. at 255 n.22. An alternative forum that "does not permit litigation of the subject matter of the dispute" is one example of an inadequate forum providing a "clearly unsatisfactory" remedy, *id.*, but it is not the entire category. The D.C. Circuit

correctly held that a foreign forum is an inadequate alternative when a petitioner seeks to confirm an arbitral award against a foreign nation in the United States. The remedy in a confirmation proceeding is to convert the award into a local-court judgment that can be enforced in the confirming jurisdiction. Rest. Int'l Comm. Arb. § 4.1(a). And a foreign forum cannot provide that remedy because "only a court of the United States … may attach the commercial property of a foreign nation located in the United States." *See TMR Energy*, 411 F.3d at 303-04 (citing 28 U.S.C. §§ 1609, 1610(a)(6)).

Ukraine's rebuttal (Pet. 28) is that the "subject matter" of an enforcement petition is the "confirmation of the award," not a particular set of assets. But the sole *remedy* provided by the confirming court is an executable judgment, which a foreign forum cannot provide with respect to U.S-located foreign sovereign assets. Unlike a trial on the merits of whether a defendant is liable for some contract breach or tort, an award enforcement petition is a largely ministerial proceeding to convert an already-adjudicated decision into a domestically-enforceable judgment.

The Convention contemplates that awards will be confirmed in multiple jurisdictions precisely because enforcement in multiple jurisdictions may be needed to satisfy the award. Rest. Int'l Comm. Arb. § 4.27 Reporters' Note e. Where the remedy (and its location) is effectively the entire subject matter of the suit, the D.C. Circuit rightly concluded that it is the adequacy of the remedy that signifies under *Piper*.

Given the United States' role in the global financial and commercial system, efficiency (not harassment) is the likely motive for enforcement petitions in U.S. courts. Most international arbitration participants have assets here. And even if such assets cannot be identified when an enforcement proceeding is filed, it is highly sensible (not nefarious) to file a confirmation proceeding in the United States.

Once an award is issued, confirmation proceedings must be brought within three years. 9 U.S.C. § 207. Therefore, "[r]efusal to recognize the award" on the ground that no assets have been identified in the United States "could prove fatal to [a petitioner's] chances of making the award effective, [if] … property hidden in foreign jurisdictions [is] safely kept outside the country until the fourth year after the award was made." William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251, 261-62 (2006). A petitioner would "need a confirmed award in advance of the moment when property is present" so that they could execute the judgment after the expiration of the confirmation window, when assets are returned to the United States. *Id.* at 266.

The D.C. Circuit sensibly recognizes this reality, noting that where an award debtor "may own property here in the future," the award creditor "having a judgment in hand will expedite the process of attachment." *TMR Energy*, 411 F.3d at 303.

2. *The Convention bars, rather than requires, the application of* **forum non conveniens.**

Ukraine argues here (for the first time) that the text of the New York Convention *requires* that *forum non conveniens* be available in award enforcement proceedings. Pet. 29-30. This issue was not aired before the D.C. Circuit, and in any event, Ukraine also gets the meaning of the New York Convention exactly backwards: the Convention *forbids* the application of *forum non conveniens*.

a. The New York Convention requires that signatory states recognize and enforce an arbitration award unless one of seven express exceptions applies. N.Y. Conv. art. V. Similarly, Section 207 of the Federal Arbitration Act (which implements the Convention) states that a 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." 9 U.S.C. § 207. *Forum non conveniens* is not one of Article V's specified grounds for refusal. *See* Rest. Int'l Comm. Arb. § 4.27 cmt. b ("Inconvenience to the defendant is not among the Convention defenses to enforcement."); Int'l Commercial Disputes Comm., Ass'n of the Bar of N.Y.C., *Lack of Jurisdiction and* Forum Non Conveniens *as a Defense to the Enforcement of Foreign Arbitral Awards*, 15 Am. Rev. Int'l Arb. 407, 408, 427 (2004) ("ICDC"). Moreover, Article V states that enforcement may be refused "only" if one of the stated conditions applies. N.Y. Conv. art. V(1). The word "only" "makes clear" that "no other grounds except those included in this article may be invoked as a

defense." U.N. Econ. & Soc. Council, *Report of the Committee on the Enforcement of International Arbitral Awards* 9, U.N. Doc. E/2704 (Mar. 28, 1955), https://tinyurl.com/5n8mwmu7.

Ukraine contends *forum non conveniens* is a "rule[] of procedure" under Article III of the Convention, which requires enforcement according to each jurisdiction's procedures. Pet. 29. But although the common law doctrine of *forum non conveniens* may be considered "procedural" for some purposes in the United States, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), there is no reason to think that the multinational drafters of the Convention, "drawn from a variety of legal traditions," would have waded into the morass of distinguishing substance from procedure under U.S law, much less contemplated "this rather technical and distinctly American use of the term" and willingly created a *sub silentio* exception to Article V's exhaustive list of grounds for non-enforcement. *Figueiredo*, 665 F.3d at 399 (Lynch, J., dissenting); Park & Yanos, *supra*, at 264. In contrast to the purely ministerial and objectively procedural matters contemplated by Article III, such as setting a filing fee for a complaint or specifying the correct court in which to file, "*forum non conveniens* does not address *how* litigation shall proceed, but *whether* it shall proceed." Rest. Int'l Comm. Arb. § 4.27 Reporters' Note b(ii) (emphasis in original).

b. Applying *forum non conveniens* would also undermine the very purpose of the New York Convention—and strong federal policy—to ensure expedient enforcement of international arbitral

awards. By its very nature, this type of arbitration will often involve "foreign parties engaged in disputes whose center of gravity is outside of the United States." *Figueiredo*, 665 F.3d at 398 (Lynch, J., dissenting). Using the foreign aspects of international arbitration to defeat enforcement undercuts the whole enterprise. The goal of the Convention is to encourage international arbitration and to "enhance the currency of arbitral awards" by ensuring that enforcement will be straightforward in all signatory jurisdictions. Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. Int'l L. & Pol. 1063, 1079 (2013). Otherwise, the "parochial refusal by the courts of one country to enforce an international arbitration agreement" would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk*, 417 U.S. at 516-17.

A core purpose of the Convention is to unify the standards governing arbitral enforcement. *Id*. at 520 n.15. But *forum non convenien*s is a common law doctrine, while the New York Convention "was drafted by civil law jurists, to whom *forum non conveniens* was an alien concept." *Katsuko Hosaka v. United Airlines*, 305 F.3d 989, 999 (9th Cir. 2002) (describing the Warsaw Convention). Any application of *forum non conveniens* would be an international outlier, flouting the central unifying purpose of the New York Convention. Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 Loy. L.A. L. Rev. 1337, 1389 (2007); *see*

also, e.g., ICDC, *supra*, at 431-32; Rest. Int'l Comm. Arb. § 4.27 Reporters' Note b(ii).

c. Lastly, *Piper's* motivations for the *forum non conveniens* doctrine make little sense in this award enforcement context. *Piper*, like every other *forum non conveniens* case in this Court, involved the question of which forum should adjudicate the merits of a dispute. 454 U.S. at 241, 249, 252 n.19, 255 n.23 (discussing application of *forum non conveniens* to "trial in the chosen forum"); *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (*forum non conveniens* concerns the most "suitable arbiter of the merits of the case"). In contrast, Convention enforcement actions are meant to be streamlined, raising at most a narrow, treaty-proscribed set of questions with limited factual inquiry. Moreover, *Piper*'s emphasis on flexibility conflicts with the objective of the New York Convention to create a set of reliable and consistent bright-line rules.

For all these reasons, the overwhelming consensus of the arbitration community is that *forum non conveniens* does not apply to New York Convention enforcement actions. The Restatement firmly declares that "[a]n action to confirm or vacate a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds." Rest. Int'l Comm. Arb. § 4.27. Other commenters agree. *See, e.g.*, ICDC, *supra*, at 429-30; 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, 26 (2012).

CONCLUSION

The petition should be denied.

Respectfully submitted.

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
Alexandra Mansbach
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

August 23, 2022

APPENDIX

APPENDIX A

Selected provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

Article III

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

Article V

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

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

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

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

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

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

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

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

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

APPENDIX B

Petitions to confirm foreign arbitration awards under the New York or Panama Conventions filed in or removed to federal court, June 2012–present, in which decisions were issued addressing *forum non convveniens* motions[1]

1. Leeward Constr. Co. v. Am. Univ. of Antigua, No. 1:12cv6280, 2013 U.S. Dist. LEXIS 43550 (S.D.N.Y. Mar. 26, 2013) (denied)
2. CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., No. 1:13cv2581, 14 F. Supp. 3d 463 (S.D.N.Y. Apr. 9, 2014) (not decided)
3. Diag Human S.E. v. Czech Republic-Ministry of Health, No. 1:13cv355, 64 F. Supp. 3d 22 (D.D.C. Aug. 14, 2014) (not decided)
4. CAML Ghana Ltd. v. Westchester Res., Ltd., No. 1:13cv8124, 2015 U.S. Dist. LEXIS 11301 (S.D.N.Y. Jan. 30, 2015) (not decided)
5. BCB Holdings Ltd. v. Gov't of Belize, No. 1:14cv1123, 110 F. Supp. 3d 233 (D.D.C. June 24, 2015) (denied)
6. Harbour Vict. Inv. Holdings Ltd. v. Chawla, No. 1:15cv3212, 148 F. Supp. 3d 298 (S.D.N.Y. Dec. 3, 2015) (not decided)

[1] The cases listed are the results of two keyword searches of U.S. district court decisions available in the Lexis database. Each search string was identical to the search string listed in footnote 1 of Petitioner's Appendix D, plus the phrase "forum non conveniens." The results of both searches were manually reviewed to exclude cases involving domestic or ICSID awards, cases seeking to compel arbitration or otherwise not involving enforcement petitions, and decisions in petitions filed before June 1, 2012.

7. Crescendo Mar. Co. v. Bank of Commc'ns Co., No. 1:15cv4481, 2016 U.S. Dist. LEXIS 21824 (S.D.N.Y. Feb. 22, 2016) (denied)
8. Belize Bank Ltd. v. Gov't of Belize, No. 1:14cv659, 191 F. Supp. 3d 26 (D.D.C. June 8, 2016) (denied)
9. PAO Tatneft v. Ukraine, No. 1:17cv582, 301 F. Supp. 3d 175 (D.D.C. Mar. 19, 2018) (denied)
10. Balkan Energy Ltd. v. Republic of Ghana, No. 1:17cv584, 302 F. Supp. 3d 144 (D.D.C. Mar. 22, 2018) (denied)
11. EGI-VSR, LLC v. Mitjans, No. 1:15cv20098, 2018 U.S. Dist. LEXIS 92714 (S.D. Fla. May 31, 2018) (denied)
12. Hardy Expl. & Prod. (India) v. Gov't of India, No. 1:16cv140, 314 F. Supp. 3d 95 (D.D.C. June 7, 2018) (denied)
13. Compañía De Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua, S.A.B. de C.V., No. 1:15cv2120, 2018 U.S. Dist. LEXIS 235466 (D. Colo. Dec. 12, 2018) (denied)
14. Gretton Ltd. v. Republic of Uzb., No. 1:18cv1755, 2019 U.S. Dist. LEXIS 126279 (D.D.C. July 30, 2019) (denied)
15. LLC Energoalliance v. Republic of Mold., No. 1:14cv1921, 2019 U.S. Dist. LEXIS 143739 (D.D.C. Aug. 23, 2019) (denied)
16. Esso Expl. & Prod. Nig. v. Nigerian Nat'l Petroleum Corp., No. 1:14cv8445, 397 F. Supp. 3d 323 (S.D.N.Y. Sept. 4, 2019) (denied)
17. Entes Indus. Plants, Constr. & Erection Contr. Co. v. Kyrgyz Republic, No. 1:18cv2228, 2019 U.S. Dist. LEXIS 179473 (D.D.C. Oct. 17, 2019) (denied)
18. Estate of Ke Zhengguang v. Yu, No. 8:18cv3546, 2020 U.S. Dist. LEXIS 30619 (D. Md. Feb. 21, 2020) (denied)

19. Al-Quraishi v. Landers Distrib. Grp., Inc., No. 2:19cv3181, 2020 U.S. Dist. LEXIS 41704 (D. Ariz. Mar. 10, 2020) (denied)
20. Devas Multimedia Priv. Ltd. v. Antrix Corp., No. 2:18cv1360, 2021 U.S. Dist. LEXIS 59862 (W.D. Wash. Mar. 29, 2021) (denied)
21. Global Gaming Phil., LLC v. Razon, No. 1:21cv2655, 2022 U.S. Dist. LEXIS 50244 (S.D.N.Y. Mar. 21, 2022) (denied)
22. Olin Holdings Ltd. v. Libya, No. 1:21cv4150, 2022 U.S. Dist. LEXIS 52590 (S.D.N.Y. Mar. 22, 2022) (denied)
23. La Dolce Vita Fine Dining Co. Ltd. v. Lan, No. 1:21cv3071, 2022 U.S. Dist. LEXIS 73465 (S.D.N.Y. Apr. 20, 2022) (denied)