Does Signing an International Treaty Impliedly Waive Sovereign Immunity in the U.S. under the FSIA?

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The recent decision issued by the United States Court of Appeals for the District of Columbia in *Pao Tatneft v. Ukraine* reopened the door to whether a country waives sovereign immunity under the Foreign Sovereign Immunities Act (the "FSIA") by signing the New York Convention or other international treaties.

In *Pao Tatneft v. Ukraine*, Tatneft, a Tatarstan oil company, was a primary shareholder to a Ukrainian oil company, along with Ukraine and Tatarstan (a republic of the Russian Federation). When the Ukrainian courts invalidated Tatneft's shares, Tatneft sought arbitration against Ukraine under the Russia-Ukraine Bilateral Investment Treaty (the "Russia-Ukraine BIT"). An UNCITRAL arbitral tribunal in Paris awarded Tatneft $112,000,000 in damages plus interest against Ukraine for violating its obligations under the Russia-Ukraine BIT by failing to provide legal protection and allowing discrimination against Tatneft, an investor from Russia.

Tatneft petitioned the U.S. District Court of the District of Columbia to confirm and enforce the award under the New York Convention. Ukraine moved to dismiss the

petition on the basis of sovereign immunity and other grounds. Tatneft argued that the district court had jurisdiction pursuant to 28 U.S.C. § 1605(a)(1) because Ukraine waived its sovereign immunity under the theory of implied waiver.

The district court noted that although the FSIA does not define "implied waiver," it applied in the following circumstances: where

> *"(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country governs a contract; or (3) a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."*

The court found that if a foreign state agrees to arbitrate in a country that has signed the New York Convention, it waives its sovereign immunity in all of the signatory countries by virtue of the fact that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." The court found Ukraine agreed to arbitrate in the territory of a state that has signed the New York Convention (France); and thus it should have anticipated enforcement actions in signatory states like the U.S.

The D.C. Court of Appeals agreed, finding a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. The Court of Appeals found that signatories of the New York Convention must have contemplated arbitration-enforcement actions in other signatory countries, including the United States. The present discussion will focus on the trend of U.S. courts finding implicit waivers of sovereign immunity if the country (1) signed the New York Convention and (2) arbitrated in the territory of a state that has signed the New York Convention.

The FSIA, under 28 U.S.C. § 1605(a)(1), provides:

> *(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—*
>
> *(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.*

A good starting point for understanding the D.C. Court of Appeals' approach is the Second Circuit case, *Transatlantic Shiffahrskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 391 (2d Cir. 2000). Here, the plaintiff attempted to establish jurisdiction for a suit that did not concern the enforcement of an international arbitration award. The Court of Appeals for the Second Circuit held simply signing the New York Convention alone—without an arbitration award—was not sufficient to waive sovereign immunity unless the "cause of action is so closely related to the claim for enforcement of the arbitral award." Similarly, in *Creighton Ltd. v. Government of State of Qatar*, the D.C. Court of Appeals refused to find Qatar had waived sovereign immunity based on arbitrating in a signatory state to the New York Convention because Qatar had not signed the Convention.

U.S. courts have also denied finding a waiver of sovereign immunity when states sign international treaties that are not for the enforcement of arbitral awards. For example, in *Reers v. Deutche Bahn AG*, the U.S. District Court for the Southern District of New York held that "[b]y signing the Convention Concerning International Carriage by Rail (COTIF), a treaty that regulated litigation arising from railway transportation in signatory countries Germany and its instrumentalities did not impliedly waive sovereign immunity."

The New York Convention by its very title (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was created as a mechanism to enforce arbitration awards rendered in signatory states. U.S. courts have appreciated this and denied attempts from States to avoid this international obligation by invoking domestic statutes. Under the Vienna Convention, a state may not invoke its internal laws to avoid an international obligation. Thus, if (1) a party obtains an award from a signatory state and (2) the award was rendered in the territory of a signatory state, a state may not refuse enforcement in the U.S. based on sovereign immunity. This opens the door not only to states waiving sovereign immunity by signing the New York Convention, but also other enforcement treaties including the Panama Convention and the ICSID Convention.

On September 22, 2019, Ukraine filed a motion to stay issuance of mandate pending disposition of a petition for certiorari from the Supreme Court. On October 9, 2019, the D.C. Court of Appeals granted the stay until November 8, 2019.