APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 23-7031, No. 23-7032, No. 23-7038

NEXTERA ENERGY GLOBAL HOLDINGS B.V. and
NEXTERA ENERGY SPAIN HOLDINGS B.V.,

Appellees

v.

KINGDOM OF SPAIN,

Appellant

9REN HOLDING S.A.R.L.,

Appellee

v.

KINGDOM OF SPAIN,

Appellant

BLASKET RENEWABLE INVESTMENTS LLC,

Appellant

v.

KINGDOM OF SPAIN,

Appellee

Argued February 28, 2024

Decided August 16, 2024

OPINION

Opinion dissenting in part filed by Circuit Judge Pan.

Pillard, Circuit Judge:

A collection of Dutch and Luxembourgish energy companies made investments in the Kingdom of Spain in reliance on promised economic subsidies. Several years later, in the wake of 2008 financial crisis, Spain withdrew those subsidies to control costs. The companies challenged Spain's action. Instead of going to court, they invoked an arbitration clause in the Energy Charter Treaty, a multilateral investment treaty whose signatories include most countries within the European Union, among them Spain, the Netherlands, and Luxembourg, along with some countries outside of Europe. The companies prevailed in their respective arbitrations and secured multi-million-euro awards. The European Union, however, has taken the position that the Energy Charter Treaty's arbitration provision does not apply to disputes between a national of one EU Member State and another EU Member State, and so the resulting arbitral awards are invalid as a matter of EU law. If the companies sought to enforce the awards in an EU national court, they would lose.

So, the companies came to the United States. Although the United States is not a signatory to the Energy Charter Treaty, it is a signatory to other treaties—namely, the ICSID Convention and the New York Convention—that obligate it to enforce certain foreign arbitral awards. Invoking those treaties, the companies filed enforcement petitions in the United States District Court for the District of Columbia.

Spain defended itself in two ways relevant here. It moved to dismiss the petitions on the ground that

it enjoys sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et. seq*. And Spain filed its own lawsuits in Dutch and Luxembourgish courts seeking, among other things, an anti-suit injunction to prevent the companies from proceeding with their petitions to enforce their arbitral awards in United States courts. In response, the companies argued that the district courts had jurisdiction under the FSIA's waiver and arbitration exceptions and asked the district courts for their own *anti*-anti-suit injunction to enjoin Spain from seeking in foreign courts to enjoin the United States court proceedings.

The district courts resolved those motions in opposing ways. The court presiding over *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023), and *9REN Holding S.A.R.L. v. Kingdom of Spain*, No. 19-cv-1871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023), held that it had jurisdiction under the FSIA's arbitration exception and denied Spain's motion to dismiss in *NextEra*. (A motion to dismiss was not at issue in *9REN*.) Exercising that jurisdiction, the court granted both companies' requested injunctions to prevent Spain from seeking anti-suit relief in foreign courts.

By contrast, in *Blasket Renewable Investments, LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023), the district court deemed Spain immune under the FSIA and denied as moot the companies' requested injunction. Spain appeals the adverse decisions in *NextEra* and *9REN*, while a successor to some of the companies appeals the adverse decision in *Blasket*. Because the cases raise similar issues, we heard argument on the same day and now resolve them in a single opinion.

For the reasons that follow, we hold that the district courts have jurisdiction under the FSIA's arbitration exception to confirm these arbitration awards against Spain, but that the court in *NextEra* and *9REN* abused its discretion by enjoining Spain from pursuing anti-suit relief in Dutch and Luxembourgish courts. We therefore affirm in part and reverse in part in *NextEra*; reverse in *9REN* and *Blasket*; and remand for further proceedings.

I.

A.

These cases concern the relationship between three sets of multilateral international treaties: (1) the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU) (collectively, the EU Treaties), which created and now govern the European Union; (2) the Energy Charter Treaty (ECT), an investment treaty adopted to promote international cooperation in the energy sector; and (3) the ICSID Convention (also known as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States) and the New York Convention (also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), two treaties designed to facilitate the enforcement of international arbitration awards.

The Energy Charter Treaty was signed in 1994 among 53 nations and regional organizations to promote international cooperation in the energy sector. *See* Energy Charter Treaty art. 2, Dec. 17, 1994, 2080 U.N.T.S. 95. Its initial signatories (also known as contracting parties) included the EU, most EU Member States, including Spain, the Netherlands,

and Luxembourg, and 26 nations outside the EU. The United States is not a signatory. See *Int'l Energy Charter*, Contracting Parties and Signatories of the Energy Charter Treaty, https://perma.cc/XA3F-L2R2.

While these cases were pending, the EU, Spain, and Luxembourg each announced its intention to withdraw from the ECT. *See NextEra* 28(j) Letter dated May 20, 2024; *NextEra* 28(j) Letter dated July 9, 2024. Under Article 47 of the ECT, these withdrawals "shall take effect" one year after their announcement. ECT art. 47(2). Because the withdrawals post-date the events in question, we refer to the EU, Spain, and Luxembourg throughout this opinion as signatories to the ECT.

The ECT protects investments in the territory of a "Contracting Party" by "Investors" located or incorporated in "other Contracting Parties." *Id.* art. 10; *see also id.* arts. 1(7), 26. In particular, Article 10(1) mandates that contracting parties give "fair and equitable treatment" to the investments of other contracting parties' investors. *Id.* art. 10(1). To effectuate that protection, Article 26 provides that a foreign investor "may choose to submit" to international arbitration any "[d]ispute[ ] between a Contracting Party and an Investor of another Contracting Party relating to" a covered investment. *Id.* art. 26(1), (2). By joining the ECT, a state "unconditional[ly] consent[s]" to "international arbitration" of investment disputes at the investor's election. *Id.*, art. 26(3).

Investors can choose among several arbitral tribunals, including the International Centre for Settlement of Investment Disputes (ICSID) or ad hoc arbitration tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). *Id.* art. 26(4)(a), (b). Regardless of

arbitral forum, the ECT provides that tribunals "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." *Id.* art. 26(6). ICSID awards may be enforced under the ICSID Convention, while UNCITRAL awards may be enforced under the New York Convention. *See* ICSID Convention art. 54(1), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270; New York Convention art. III, June 10, 1958, 21 U.S.T. 2517.

B.

1.

NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (collectively, NextEra) are Dutch companies, as are AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. (collectively, AES). 9REN Holding S.À.R.L. (9REN) is a Luxembourgish company. Between 2007 and 2012, the companies made investments in solar power projects in Spain in reliance on that country's promise that they could charge subsidized electricity rates, ensuring profitable returns. NextEra and 9REN invested approximately €750 million and €211 million, respectively; AES did not detail the magnitude of its investment, but it was part of a broader group of investors that cumulatively invested approximately €2 billion.

In the wake of the 2008 financial crisis, Spain withdrew those subsidies in an effort to control costs. In response, the companies commenced arbitration under Article 26 of the ECT. Because Spain, the Netherlands, and Luxembourg are signatories to the ICSID Convention, NextEra and 9REN decided to arbitrate before ICSID tribunals in Washington D.C.

AES opted to proceed before an ad hoc UNCITRAL tribunal seated in Geneva, Switzerland. The companies argued that Spain failed to give their investments "fair and equitable treatment" in violation of Article 10(1) of the ECT.

While those arbitral proceedings were ongoing, the Court of Justice of the European Union—the EU's court of last resort—issued two landmark decisions that called into question the validity of the underlying arbitration agreements. In *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, ¶ 60 (Mar. 6, 2018), a Dutch company called Achmea prevailed in arbitration against the Slovak Republic under the terms of a bilateral investment treaty. *Achmea* ¶¶ 7, 12. The Slovak Republic had unsuccessfully objected in the arbitration to the arbitral tribunal's jurisdiction, arguing that "as a result of [the Slovak Republic's] accession to the European Union, [Achmea's] recourse to an arbitral tribunal provided for in [the bilateral investment treaty] was incompatible with EU law." *Id.* ¶ 11. Making the same argument in a German national court, the Slovak Republic sought to set aside the arbitral award, and that court referred the matter to the Court of Justice of the European Union. *Id.* ¶ 12.

The Court of Justice honored the Slovak Republic's objection. The court observed that Member States may not "submit a dispute concerning the interpretation or application of the [EU] Treaties to any method of settlement other than those provided for in the Treaties." *Id.* ¶ 32 (citing TFEU art. 344). And one such requirement, the court explained, is that a tribunal "called on to interpret or . . . apply EU law," *id.* ¶ 42, must have the authority to "make a reference to the [Court of Justice] for a preliminary ruling," with

the "object of securing uniform interpretation of EU law, thereby serving to ensure its consistency," *id.* ¶¶ 37, 49 (citing TFEU art. 267). The court reasoned that an arbitral tribunal considering an intra-EU dispute under an investment treaty "may be called on to interpret or indeed to apply EU law," *id.* ¶ 42, but, unlike national courts, would lack the authority to refer questions of EU law to the Court of Justice, *id.* ¶ 49. As a result, the court concluded, a binding commitment to submit intra-EU disputes to arbitration could prevent open legal questions "from being resolved in a manner that ensures the full effectiveness of EU law." *Id.* ¶ 56.

The Court of Justice therefore held that the EU Treaties "must be interpreted as precluding a provision in an international agreement concluded between [EU] Member States, . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept." *Id.* ¶ 60. As a result, the Court of Justice prohibited EU national courts from enforcing Achmea's arbitration award. *Id.* ¶ 60.

In *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021), the Court of Justice applied the logic of *Achmea* to the Energy Charter Treaty's arbitration provision. The Court of Justice first determined that, because the European Union is a signatory to the ECT, "the ECT itself is an act of EU law." *Komstroy* ¶ 49. A tribunal constituted under the ECT, therefore, will necessarily be "required to interpret, and even apply, EU law." *Id.* ¶ 50. And because such a tribunal cannot refer such questions to

the Court of Justice, the Treaty's arbitration provision could run afoul of the EU Treaties in just the same way as the provision at issue in *Achmea*. Apparently embracing a form of interpretation akin to our doctrine of constitutional avoidance, the Court of Justice concluded that Article 26 of the ECT "must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State." *Id.* ¶ 66.

Separately, the European Commission (EC)—the EU's executive branch—identified a different problem with the awards. Article 107 of the TFEU prohibits Member States from granting "aid" that "distorts or threatens to distort competition," absent the EC's prior approval. TFEU arts. 107, 108. The EC determined that Spain's energy subsidies were unapproved "[s]tate aid." *See* Euro. Comm'n Decision on State Aid, SA.40348, ¶ 88 (Nov. 10, 2017). That meant, according to the EC, that any arbitral award successfully challenging Spain's revocation of the subsidies "would constitute in and of itself State aid." *Id.* ¶ 165. So, even if the companies prevailed in this appeal, EU law would prohibit Spain from paying the awards unless and until the EC granted approval to do so. *Id.* The EC is currently considering whether to grant such approval, but it has made no decision to date. *See NextEra* Eur. Comm'n Amicus Br. 30.

Both arbitration regimes—ICSID and UNCITRAL—delegate to the arbitral tribunal the power to decide threshold issues of arbitrability. *See* ICSID Convention art. 41(1) ("The Tribunal shall be the judge of its own competence."); UNCITRAL Rules, art. 23(1) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with

respect to the existence or validity of the arbitration agreement."). Relying on *Achmea* and *Komstroy*, Spain argued to the arbitral tribunals that they lacked jurisdiction over the disputes because, as a matter of EU law, Spain could not lawfully enter into arbitration agreements with the companies. Spain made two primary arguments: (1) that Article 26(4) of the ECT (the arbitration provision) does not cover disputes between an investor in one EU Member State and another EU Member State; and (2) that, even if it did, Article 26(6) of the ECT (the choice-of-law provision) requires the tribunal to apply *Achmea* and *Komstroy* to prevent such intra-EU arbitration.

The tribunals rejected Spain's jurisdictional objection. The *9REN* tribunal's analysis is illustrative. First, the tribunal concluded that "the plain language of the ECT['s arbitration provision]" does not exclude "intra-EU disputes from the scope of ECT." *9REN* J.A. 86. Quoting another tribunal, the *9REN* tribunal observed that "[i]t would have been a simple matter to draft the ECT so that Article 26 does not apply to disputes between an Investor of one EU Member State and another EU Member State as respondent." *9REN* J.A. 86 n.102. But "[t]hat was not done," and the tribunal found no other "indication in the language of the ECT that any such exclusion was intended." *9REN* J.A. 86 n.102.

Second, the *9REN* tribunal determined that the ECT, so construed, does not violate the EU Treaties because the tribunal's "jurisdiction and its exercise in the present case rests upon the ECT (with international law as the applicable law) and not EU law." *9REN* J.A. at 95–96. And, looking to the ECT's choice-of-law provision, the tribunal reasoned that, "[a]s a matter of international law, the notion that EU law

may be considered only by EU judges is misconceived." *9REN* J.A. at 94. After all, "[i]nternational courts and tribunals are frequently required to consider the laws of domestic or regional jurisdictions," but their conclusions "are not binding on the courts or tribunals of the home jurisdiction." *9REN* J.A. at 94. Likewise, "[t]he award of an ECT [arbitral] tribunal does not in any way represent a threat or challenge to the autonomy or authority of the . . . the EU and the [Court of Justice]." *9REN* J.A. at 94.

On the merits, the tribunals found that Spain violated the Energy Charter Treaty and awarded damages in the amount of €290 million to NextEra, €41 million to 9REN, and €26.5 million to AES. These awards are not anomalous. Amici point out that "Spain now leads the world in noncompliance with investor-state awards," owing "more than $1.3 billion for 16 unpaid investor-state awards." *NextEra* Int'l Scholars Amicus Br. 30 & n.23.

Spain continued to fight these awards through the processes laid out in the ICSID and New York Conventions. Spain requested review of NextEra's and 9REN's awards under the ICSID annulment process, arguing that the tribunals "manifestly exceed[ed] [their] powers"—one of the five recognized grounds for annulment under Article 52 of the ICSID Convention. And Spain appealed AES's award (at issue in *Blasket*) to the Federal Supreme Court of Switzerland, as contemplated by Article V(1)(e) of the New York Convention and Swiss law. Those challenges were unsuccessful.

2.

Armed with multi-million-euro arbitration awards, the companies sought to confirm them in the United

States. "Confirmation is the process by which an arbitration award is converted to a legal judgment." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 875 (D.C. Cir. 2021). It is only once an award is confirmed that the prevailing party may seek to execute on the resulting judgment "by, for example, attaching [the sovereign's] commercial assets in the United States." *Id.*

As a signatory to the ICSID Convention, the United States instructs its federal courts to "enforce[ ]"—*i.e.*, confirm—ICSID awards and give them "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Likewise, as a signatory to the New York Convention, the United States instructs its federal courts to confirm UNCITRAL awards governed by the Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention." 9 U.S.C. § 207.

Spain defended itself in two ways. First, it moved to dismiss the petitions filed in district court by NextEra and AES in part on the ground that it enjoyed sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq*. (Spain initially moved the district court to dismiss 9REN's petition, but that motion was denied without prejudice when the case was held in abeyance pending the outcome of the ICSID annulment proceedings, and Spain did not renew its motion to dismiss once the case resumed.) Second, Spain filed its own lawsuits in the courts of the Netherlands and Luxembourg seeking, among other things, to enjoin the companies under EU law from proceeding with their petitions in the United States (a so-called anti-suit injunction).

The companies responded in kind. They argued that the district courts had jurisdiction under the FSIA's waiver and arbitration exceptions, and they asked the district courts for their own injunctions—*anti*-anti-suit injunctions—to stop Spain from seeking anti-suit injunctions in foreign courts to enjoin the U.S. court proceedings. And, in an effort to escape the jurisdictional reach of the Dutch courts, AES transferred its rights in the award to a Delaware company called Blasket Renewable Investments LLC (Blasket). Blasket, not AES, is an appellant here.

The district courts resolved these motions in early 2023. The district court presiding over *NextEra* and *9REN* held that, under our binding precedent, Spain's assertion that it "could not have entered into the ECT's arbitration provisions because EU law . . . does not permit EU members to assign questions of EU law to arbitration in non-EU tribunals" was a merits defense to enforcement, not a jurisdictional question under the FSIA. *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 213 (D.D.C. 2023) (citing *Stileks*, 985 F.3d at 878–79; *Chevron Corp. v. Ecuador*, 795 F.3d 200, 205 & n.3 (D.C. Cir. 2015)); *see also 9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-1871, 2023 WL 2016933, at *4–6 (D.D.C. Feb. 15, 2023). The court thus held it had jurisdiction under the FSIA's arbitration exception, denied Spain's motion to dismiss in *NextEra*, and granted the companies' requested injunctions to prevent Spain from seeking anti-suit relief in foreign courts. *See NextEra*, 656 F. Supp. 3d at 215–21; *9REN*, 2023 WL 2016933, at *7–13.

In *Blasket*, by contrast, the district court granted Spain's motion to dismiss, reasoning that, "[b]ecause Spain's standing offer to arbitrate was void as to the

Companies under the [EU] law to which both Spain and the Companies are subject and which applied to the dispute by the terms of the Energy Charter Treaty itself, no valid agreement to arbitrate exists." *Blasket Renewable Inv., LLC v. Kingdom of Spain*, 665 F. Supp. 3d. 1, 4 (D.D.C. 2023); *see id.* at 12–13. The *Blasket* court thus deemed Spain immune under the FSIA and denied as moot the companies' requested injunction. *Id*. at 14 & n.9.

Spain appeals the adverse decisions in *NextEra* and *9REN*; Blasket appeals the adverse decision in *Blasket*.

II.

These appeals raise two primary questions. The first question is whether the FSIA gives the district courts jurisdiction to enforce (or decline to enforce) the arbitration awards against Spain. The *NextEra* and *9REN* district court answered in the affirmative and denied Spain's motion to dismiss *NextEra* on sovereign immunity grounds; the *Blasket* district court said no and granted Spain's motion to dismiss. We have jurisdiction to review dismissals for and denials of sovereign immunity under 28 U.S.C. § 1291, and we do so *de novo*. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126–27 (D.C. Cir. 2004). The second question is whether, assuming it had jurisdiction, the district court in *NextEra* and *9REN* abused its discretion by enjoining Spain from seeking anti-suit relief under foreign law in foreign courts. We have jurisdiction to review the grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1); our review is for abuse of discretion. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984); *see Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95, 100 (D.C. Cir. 2019).

A.

We begin with jurisdiction. NextEra and 9REN seek to enforce their arbitration awards against the Kingdom of Spain under 22 U.S.C. § 1650a (implementing the ICSID Convention), while Blasket seeks to do so under 9 U.S.C. § 203 (implementing the New York Convention). Invoking the FSIA, Spain insists that it is immune from the companies' enforcement suits, so the district courts lack jurisdiction over them.

The "FSIA codifies a baseline principle of immunity for foreign states and their instrumentalities." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272, 143 S.Ct. 940, 215 L.Ed.2d 242 (2023) (citing 28 U.S.C. § 1604). It then sets out a handful of narrow exceptions to that principle. *See, e.g.*, 28 U.S.C. § 1605(a). The companies contend that two of the FSIA exceptions apply in these cases: the waiver exception and the arbitration exception. 28 U.S.C. § 1605(a)(1), (6).

1.

The waiver exception provides in relevant part that a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1). The companies contend that Spain implicitly waived its immunity by ratifying the ICSID and New York Conventions, since those conventions provide for enforcement of arbitration awards against contracting foreign sovereigns in domestic courts of any convention signatory. By mutually agreeing with other sovereigns to enforce arbitral awards rendered in disputes to which any signatory is a party, the logic goes, Spain waived its

immunity defense against such an enforcement action in U.S. court.

Embracing that logic, the Second Circuit has held that, by ratifying either convention, a country implicitly waives its sovereign immunity from suits seeking to enforce awards under that convention. *See Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (ICSID Convention); *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578–79 (2d Cir. 1993) (New York Convention). The High Court of Australia recently came to a similar conclusion. *See Kingdom of Spain v. Infrastructure Servs. Luxembourg S.à.r.l.* [2023] HCA 11 ¶ 79 (holding that Spain consented to the jurisdiction of Australian courts "because the relevant agreement arose from Spain's entry into the ICSID Convention, which included its agreement as to the consequences of an award rendered pursuant to the ICSID Convention").

The waiver issue remains "unsettled" in our Circuit. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria* (*P&ID*), 27 F.4th 771, 774 (D.C. Cir. 2022). To be sure, we have twice approvingly cited the Second Circuit's decision in *Seetransport*. In *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999), we opined in dicta that *Seetransport* "correctly" held that a foreign sovereign waives sovereign immunity when it joins the New York Convention. *Id.* at 123. Then, in *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019), we held in an unpublished judgment that "a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states." *Id.* at 10. More recently, however, we emphasized that "[a]lthough we have favorably cited *Seetransport* and

its reasoning in dicta and in an unpublished opinion, we have not formally adopted it." *P&ID*, 27 F.4th at 774. And the United States urges against doing so in this case. *See NextEra* U.S. Amicus Br. 19–25.

We leave clarification of the waiver question for another day because we conclude that the district courts have jurisdiction under the FSIA's arbitration exception, to which we now turn.

2.

As relevant here, the FSIA arbitration exception withdraws sovereign immunity:

> in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6).

To proceed under this clause of the FSIA's arbitration exception, we have explained, a district court must find three "jurisdictional facts": (1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing award enforcement.

Chevron Corp., 795 F.3d at 204 & n.2; *see also Stileks*, 985 F.3d at 877. In assessing these jurisdictional facts, we apply a burden-shifting framework. The plaintiff must initially satisfy a burden of production as to these facts, which when met requires the foreign sovereign to "establish the absence of the factual basis by a preponderance of the evidence." *Chevron*, 795 F.3d at 204 (citation omitted). The United States objects to *Chevron*'s burden-shifting framework. In its view, the plaintiff, as the party invoking the federal court's jurisdiction, must satisfy both the burden of production and persuasion. *See NextEra* U.S. Amicus Br. 9–10 n.2. We are bound by *Chevron*, however, and would have no occasion in any event to revisit the issue because the plaintiff companies satisfy the burden of persuasion in these cases.

Spain does not dispute that the companies have demonstrated arbitration awards and a treaty governing the enforcement of the awards in the United States. The only jurisdictional fact in dispute here is "the existence of an arbitration agreement." *Chevron*, 795 F.3d at 204. The word "existence" in this context is significant. It is well established in this Circuit that disputes about the scope of an arbitration agreement, such as whether a binding arbitration agreement covers a particular dispute, are not jurisdictional questions under the FSIA. *See Stileks*, 985 F.3d at 878. Scope questions instead go to the award's enforceability on the merits. To make the issue jurisdictional, the sovereign must attack the existence or validity of the arbitration agreement.

The first step in the analysis, then, is to identify the relevant arbitration agreement. As mentioned, the FSIA requires "an agreement made by the foreign state"—*either* "with" *or* "for the benefit" of a private

party—to submit certain disputes to arbitration. 28 U.S.C. § 1605(a)(6).

The most straightforward case is when a sovereign enters into an arbitration agreement directly "with" a private investor. Consider, for example, *Belize Social Development Limited v. Government of Belize*, 794 F.3d 99 (D.C. Cir. 2015). In that case, a private company entered into a business agreement containing an arbitration clause with the prime minster of Belize, who purported to sign on behalf of the country. *Id.* at 100–01. A newly elected prime minster later renounced the agreement, claiming that the previous prime minister lacked the authority to enter into the agreement. *Id.* at 101. The company nonetheless commenced arbitration, prevailed, and, invoking the FSIA's arbitration exception, sought to enforce the resultant award in the United States. *Id.* Belize resisted enforcement on the ground that it did not enter into a valid arbitration agreement with the company. *Id.* at 102. We treated Belize's argument as a jurisdictional one—it was attacking the validity of the arbitration agreement it signed "with" the private company—but we rejected the argument because the country failed to substantiate its claim that the previous prime minister "lacked authority to enter the agreement to arbitrate." *Id.* at 103 (emphasis omitted).

An arbitration provision in an investment treaty works differently. In itself, an investment treaty "cannot constitute an agreement to arbitrate *with* an investor. How could it? No investor is a party to that Treaty." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 50, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014) (Roberts, C.J., dissenting) (emphasis added). The investment treaty is instead "a contract . . . between nations." *Id.* at 37, 134 S.Ct. 1198 (majority op.). As

such, an arbitration provision in an investment treaty can both (1) constitute an agreement "for the benefit" of a private party; and (2) give rise to a separate agreement "with" a private party. 28 U.S.C. § 1605(a)(6). Under the plain terms of the FSIA's arbitration exception, either type of agreement may support the exercise of jurisdiction over a foreign sovereign.

The two agreements are related. First, the arbitration provision in an investment treaty may itself be "part of a completed agreement between" the signatory countries to arbitrate certain disputes with investors of the other's country. *BG Grp.*, 572 U.S. at 53, 134 S.Ct. 1198 (Roberts, C.J., dissenting) (emphasis omitted). Such a provision is an agreement made "for the benefit" of a private party. But it is not a complete agreement made "with" a private party. "Something else must happen to create an agreement where there was none before." *Id.* at 50, 134 S.Ct. 1198 (emphasis omitted). To that end, an investment treaty's arbitration provision operates as "a unilateral offer to arbitrate" by each sovereign to investors of the other signatory countries. *Id.* (emphasis omitted). A foreign investor seeking to take advantage of the investment treaty's arbitration agreement may accept the offer by "filing . . . a notice of arbitration," *id.* at 42, 134 S.Ct. 1198 (majority op.), and thereby create a second arbitration agreement—this one made by the sovereign "with" a private party.

In so holding, we recognize that "a sovereign's consent to arbitration is important." *Id.* at 43, 134 S.Ct. 1198. That is especially so where, as here, the agreement to arbitrate is the basis of a federal court's authority to exercise jurisdiction over the sovereign. An investment treaty may reflect the requisite consent for purposes of the FSIA's arbitration exception. When

a sovereign makes "an agreement . . . to submit to arbitration" by entering an investment treaty with other sovereigns "for the benefit of" a class of private investors, it is the treaty that manifests the sovereign's consent to arbitrate. 28 U.S.C. § 1605(a)(6). We therefore may look to the investment treaty itself to identify the scope of the sovereign's consent and the relevant agreement for purposes of the FSIA's arbitration exception.

The investment treaty offers powerful reasons to conclude that the standing offer to arbitrate contained in the ECT's arbitration provision extends to EU nationals. The clear terms of the ECT's arbitration provision cover "[d]isputes between a Contracting Party and an Investor of another Contracting Party." ECT art. 26(1). Spain is undeniably a "Contracting Party," *id.* art. 1(2), and the companies are undeniably "Investor[s] of another Contracting Party," *id.* art. 26(1), because the companies are "organized in accordance with the law applicable in" the Netherlands or Luxembourg, *id.* art. 1(7). And if the ECT's drafters nonetheless intended to exempt intra-EU disputes, they could have done so through a "disconnection clause"—a provision stating that the treaty does not govern the relationships between EU Member States. Indeed, as another ICSID tribunal explained, "during negotiation of the ECT, the EU had proposed the insertion of a disconnection clause. However, that clause was ultimately dropped from the draft treaty." *Vattenfall AB v. Fed. Republic of Germany*, ICSID Case No. Arb/12/12, Decision on the *Achmea* Issue, ¶¶ 204–05 (Aug. 31, 2018).

For its part, Spain insists that it did not enter into an arbitration agreement "with" the companies. It contends that the standing offer to arbitrate contained

in Article 26 of the ECT did not and could not "extend" to the companies because, under the Court of Justice's *Komstroy* opinion, "the Energy Charter Treaty does not permit intra-EU arbitration." *NextEra* Appellant Br. 43. Therefore, the country concludes, it "could not form any arbitration agreement" with the companies as a matter of EU law. *Id.* 31.

But we need not and do not resolve whether Spain entered into separate arbitration agreements "with" private parties because we conclude that it entered into an arbitration agreement—the Energy Charter Treaty itself—that is arguably "for the[ir] benefit." 28 U.S.C. § 1605(a)(6). Spain does not dispute that it is a signatory to the Energy Charter Treaty. And it is common ground that, in ratifying the ECT, Spain provided "unconditional consent" to arbitrate investment disputes with the investors of at least some of the other signatory nations. ECT art. 26(3)(a). Thus, as a leading scholar has explained, the treaty itself "contain[s] the *consent* of the contracting parties to submit disputes involving foreign investment to direct investor-state arbitration." Christopher Dugan et al., *Investor-State Arbitration* 241 (2008). That agreement is "for the benefit" of the signatory's investors, and therefore satisfies the FSIA's arbitration exception.

Spain agrees that the ECT was made "for the benefit" of some investors—just not those within the European Union. 28 U.S.C. § 1605(a)(6). Spain's view, again, is that the standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals like the companies; it extends only to the nationals of ECT signatories outside the European Union, like Japan. *NextEra* Appellant Br. 31, 42–44. That, however, is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*. It goes to

whether the ECT's arbitration provision applies to these disputes. And our binding precedent holds that the question "[w]hether the ECT applies to [a] dispute" is not "a jurisdictional question under the FSIA." *Stileks*, 985 F.3d at 878–79 (emphasis omitted) (citing *Chevron*, 795 F.3d at 205–06).

In *Chevron* and *Stileks*, the sovereigns argued that they never agreed to arbitrate because the scope of the relevant investment treaties' arbitration provisions did not extend to the disputes that the companies sought to arbitrate. In each case, we held that the sovereign's argument went to the enforceability of the arbitral award on the merits, rather than the district court's jurisdiction to enforce the award under the FSIA.

Chevron concerned a contractual dispute between Chevron, an American company, and the Republic of Ecuador. 795 F.3d at 202. After Chevron's lawsuits against Ecuador languished in Ecuador's courts, Chevron commenced arbitration and prevailed under an arbitration provision contained in a bilateral investment treaty between the United States and Ecuador. *Id.* at 202–03. Under that treaty, "Ecuador made a standing offer to American investors to arbitrate disputes involving investments that existed on or after the treaty's effective date." *Id.* at 202. Invoking the FSIA's arbitration exception, Chevron petitioned to enforce the award in the United States under the New York Convention. *Id.* at 203. Ecuador argued the arbitration exception did not apply because its "offer to arbitrate in the [investment treaty] [did not] encompass[ ] Chevron's breach of contract claims." *Id.* at 205. "According to Ecuador, if Chevron's claims [were] not covered by the [investment treaty], then Ecuador never agreed to arbitrate with Chevron,

and the District Court consequently lacked jurisdiction." *Id.* The panel rejected that argument, holding that "[t]he dispute over whether the lawsuits were 'investments' for purposes of the treaty" is not a jurisdictional question under the FSIA; rather it "is properly considered as part of review under the New York Convention." *Id.* at 206.

Stileks applied the reasoning of *Chevron* to the Energy Charter Treaty's arbitration provision. A Ukrainian company called Energoalliance contracted to sell electricity to the Republic of Moldova. 985 F.3d at 874–75. But Energoalliance did not sell directly to Moldova; instead, it sold the electricity to a British Virgin Islands entity called Derimen Properties, which in turn provided the electricity to Moldova. *Id.* at 875. When Moldova fell behind on payments, "Derimen assigned the debt to Energoalliance," which commenced arbitration under Article 26 of the Energy Charter Treaty. *Id.* Energoalliance secured an arbitral award and sought to enforce the award in the United States under the New York Convention. *Id.*

Like Chevron, Energoalliance invoked the FSIA's arbitration exception. *Id.* at 877. And, like Ecuador, Moldova argued that the arbitration exception did not apply. It reasoned that "Derimen's claim against [Moldova] was not an investment within the meaning of the ECT because Derimen, a [British Virgin Islands] entity, was not a qualifying investor." *Id.* at 878. So, "[a]lthough the ECT may establish that Moldova agreed to arbitrate certain disputes, it does not prove that it agreed to arbitrate this *particular* dispute." *Id.* Following *Chevron*, the panel in *Stileks* held "that the arbitrability of a dispute is not a jurisdictional question under the FSIA," and it "construe[d]

Moldova's arbitrability argument as a defense under [the New York] Convention." *Id.*

What was true in *Stileks* is true here. Like Moldova, Spain argues that the ECT's arbitration provision does not cover the companies' claims. Moldova said that was because Energoalliance's claims were not covered investments under the ECT; Spain argues it is because the EU companies are not covered investors under the ECT. Both claims go to the scope of the ECT's arbitration provision—in the former case, which disputes are covered; in the latter, which investors are covered. In *Stileks*, we squarely held that the question "[w]hether the ECT applies to the dispute" is not "a jurisdictional question under the FSIA." 985 F.3d at 878–79. It does not matter *why* the ECT may not apply to the dispute. For jurisdictional purposes, the FSIA's arbitration exception requires that the arbitral tribunal "purported to make an award pursuant to the ECT, not that it in fact did so." *Id.* at 878. Therefore, the companies showed Spain's agreement to arbitrate, for purposes of the FSIA, by "produc[ing] copies of the ECT." *Id.* at 877.

Two limits of our holding bear emphasis. First, not every arbitration provision in an investment treaty represents a completed agreement "for the benefit" of a private party. 28 U.S.C. § 1605(a)(6). That is because not all investment treaties "supply the requisite state consent to arbitration." Dugan, *Investor-State Arbitration* at 241. Some investment treaties contain "a mere agreement to agree"; they provide, for example, that a dispute "shall upon the agreement by both parties be submitted for arbitration." *Id.* at 237 (quoting Agreement Between the Government of Sweden and the Government of Malaysia Concerning the Mutual Protection of Investments art. 6, Mar. 3,

1979, 1254 U.N.T.S. 315). Unlike the ECT's arbitration provision, such a provision does not itself "constitute consent to arbitration by the States concerned." *Id.* (internal quotation omitted).

Second, we hold only that the district courts have jurisdiction to enforce these arbitration awards. That does not mean they must or should do so. By basing jurisdiction on the Energy Charter Treaty as an agreement "for the benefit" of foreign investors, we do not address the merits question whether that Treaty's arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies.

Our holding that the FSIA's arbitration exception authorizes enforcement of these arbitral awards makes it unnecessary for us to reach another issue that Blasket raised in an amicus brief it filed in *NextEra* and *9REN*. The FSIA grants sovereign immunity to foreign states, but that grant is explicitly "[s]ubject to existing international agreements to which the United States [was] a party" before FSIA's enactment in 1976. 28 U.S.C. § 1604. Because the United States ratified the ICSID Convention in 1966, the FSIA's carve-out for "existing international agreements," *id.*, may include that convention, depending on whether it "expressly conflict[s] with the [FSIA's] immunity provisions." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (formatting modified). Since we hold that district courts have jurisdiction to enforce these awards under the FSIA's arbitration exception, we see no express conflict between the FSIA's immunity provisions and the ICSID Convention. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 113–14 (2d Cir. 2017).

In sum, we take no position on the ultimate enforceability of these awards. We hold only that district courts have jurisdiction to enforce them under the FSIA's arbitration exception.

Finally, Spain contends that, even if the district courts had jurisdiction under the FSIA, they should have alternatively dismissed the petitions based on the doctrine of *forum non conveniens*. As Spain acknowledges, however, binding circuit precedent dictates that "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." *See Stileks*, 985 F.3d at 876 n.1 (citing *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303–04 (D.C. Cir. 2005)). We therefore reject that challenge.

B.

We now consider the propriety of the district court's anti-suit injunctions in *NextEra* and *9REN*. After asserting jurisdiction over the disputes, the district court preliminarily enjoined Spain from pursuing relief in the Netherlands or Luxembourg that would interfere with the district court's jurisdiction.

On appeal, Spain contends that the injunctions were an abuse of discretion. Spain's primary argument is that the injunctions violate the principle of international comity—*i.e.*, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Usoyan v. Republic of Turkey*, 6 F.4th 31, 48 (D.C. Cir. 2021) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895)). In an amicus brief, the Netherlands stresses the same theme. *See NextEra* Netherlands Amicus Br. 15–17. As does the United

States, which submitted an amicus brief and participated in oral argument at our invitation. *See NextEra* U.S. Amicus Br. 25–30.

We agree that the injunctions were an abuse of discretion.

We start with some context. There are two types of anti-suit injunctions: offensive (seeking to defeat another court's jurisdiction) and defensive (seeking to protect the ordering court's own jurisdiction). Some examples are useful to understand the difference. Suppose X sues Y in Country A. If Y turns to courts in Country B to obtain an injunction against the proceeding in Country A, that's an offensive anti-suit injunction: "Its only purpose is to destroy [Country A's] jurisdiction." *Laker Airways Ltd.*, 731 F.2d at 933 n.81. If X responds by seeking in Country A an injunction to put a stop to the Country B proceeding, that's a defensive anti-suit injunction: It is "designed to protect [Country A's] jurisdiction to proceed with the case." *Id.*

We affirmed a defensive anti-suit injunction in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). There, British company Laker Airways sued other British, American, and foreign companies in U.S. district court for anti-competitive behavior. *See id.* at 917–18. The British and some of the foreign defendant airlines went to British court and obtained an offensive anti-suit injunction, prohibiting Laker from proceeding in the U.S. court. *Id.* at 918. Laker responded by preemptively seeking in U.S. court defensive anti-suit injunctions against the U.S. airlines and the two foreign airlines that had not yet sought anti-suit relief in British court. *Id.*

The *Laker* district court granted the defensive anti-suit injunctions against those airlines, preventing them from "taking any action before a foreign court or governmental authority that would interfere with the district court's jurisdiction over the matters alleged in the complaint." *Id.* at 919. Those foreign airlines—one Dutch, the other Belgian—appealed. *Id.* at 919, 954 n.175. They did not "dispute the power of the United States District Court to issue the injunction." *Id.* at 934. Rather, they argued that the district court abused its discretion because the injunction "violate[d] their right to take part in the 'parallel' actions commenced in the English courts," in contravention of "international principles of comity." *Id.* at 921. They also argued that the injunction "ignored Britain's 'paramount right' to apply British law to Laker, which is a British subject." *Id.*

A divided panel affirmed the injunction. *Id.* at 916. The majority emphasized that an anti-suit injunction should issue only after a case-specific evaluation of the equities makes clear that it is necessary "to prevent an irreparable miscarriage of justice." *Id.* at 927. Anything less than "the most compelling circumstances" is not enough. *Id.*

The *Laker* panel approved the injunction because "the sole purpose of the English proceeding [was] to *terminate* the American action." *Id.* at 930 (emphasis in original). It ruled that the "injunctions of the United Kingdom courts [were] not entitled to comity" because the "action before the United Kingdom courts [was] specifically intended to interfere with and terminate Laker's United States antitrust suit." *Id.* at 938. In other words, the "district court's anti-suit injunction was purely *defensive*," whereas the "English injunction [was] purely *offensive*." *Id*. The majority also reasoned

that the district court exhibited comity by offering to narrow the scope of the injunction to permit the foreign airlines "to proceed in Great Britain without leaving them free to secure orders which would interfere with the district court's pending litigation." *Id.* at 942. The dissenting opinion would have held the injunction too broad but would have approved an injunction that authorized the foreign airlines to seek declaratory relief. *Id.* at 958 (Starr, J., dissenting).

Here, the district court took *Laker* as its starting point. *NextEra*, 656 F. Supp. 3d at 215. (Because the district court's analysis is substantially the same in *NextEra* and *9REN*, we cite only to the published opinion in *NextEra*.) The district court concluded that anti-suit injunctions were warranted because, like the injunction in *Laker*, the injunctions requested here were defensive anti-suit injunctions. The court found that Spain's "express and primary purpose" for initiating the Dutch and Luxemburgish suits was to terminate the ongoing district court actions. *Id.* at 215–16. And the district court permitted Spain to continue to seek declaratory relief to "vindicat[e] its interpretation of EU law." *Id.* at 217; *cf. Laker Airways*, 731 F.2d at 958 (Starr, J., dissenting). After considering the equitable factors *Laker* identifies as bearing on the propriety of anti-suit injunctions, the district court applied the traditional four-factor test for preliminary injunctions. *See NextEra*, 656 F. Supp. 3d at 214–21. It then issued the anti-suit injunctions, prohibiting Spain from pursuing relief in the Netherlands or Luxembourg that would interfere with the district court's jurisdiction. *See NextEra* J.A. 833–34.

Despite the district court's careful analysis, we conclude that it abused its discretion in issuing the anti-suit injunctions. A district court abuses its

discretion when it "fail[s] to consider a relevant factor" or "relie[s] on an improper factor." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (quotation marks omitted); *see also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 25, 139 S.Ct. 361, 202 L.Ed.2d 269 (2018) (explaining that, on abuse-of-discretion review, a court must ensure that the decisionmaker "appropriately consider[s] all of the relevant factors"). A district court also abuses its discretion if, "upon a weighing of the relevant factors," it commits "a clear error of judgment." *Truckers United for Safety v. Mead*, 329 F.3d 891, 894 (D.C. Cir. 2003) (quotation marks omitted). And, of course, a district court abuses its discretion when it commits a "material error of law." *Musgrave v. Warner*, 104 F.4th 355, 365 (D.C. Cir. 2024) (quotation marks omitted).

Before issuing an anti-suit injunction, a court "should focus on (1) whether an action in the foreign jurisdiction prevents United States jurisdiction or threatens a vital United States policy, and (2) whether the domestic interests outweigh concerns of international comity." *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 361 & n.4 (8th Cir. 2007) (citing *Laker*, 731 F.2d at 909–59). The district court made two errors in its evaluation of these factors.[1]

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[1]As mentioned, in addition to evaluating these specific anti-suit injunction factors, the district court also considered the four traditional injunction factors. Other circuits appear to be divided on whether those factors apply to anti-suit injunctions. *Compare In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 97–98 (2d Cir. 2006) (per curiam) (evaluating traditional injunction factors in addition to equitable factors specific to the propriety of an anti-suit injunction), *with, e.g., Goss*, 491 F.3d at 361 n.4. (holding

First, the district court did not address the fact that the anti-suit injunctions run against a foreign sovereign. "[A] district court's power to sanction or exercise other forms of judicial control over a foreign sovereign is not coterminous with its power to regulate or punish other litigants." *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 72–73 (3d Cir. 1994). In general, anti-suit injunctions strain the "crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations." *Laker*, 731 F.2d at 937. An anti-suit injunction against a foreign sovereign puts these comity concerns "near their peak." *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 480 (4th Cir. 2018).

The district court reasoned that anti-suit injunctions were justified by the need to protect its jurisdiction to enforce NextEra's and 9REN's awards. While such a concern could support an injunction against private parties, *see, e.g.*, *Laker*, 731 F.2d at 927–31, it alone does not account for all of the implicated interests when relief is sought against a foreign sovereign.

The injunctions here would "impinge on the sovereignty" of both the Spanish government to litigate and the Dutch and Luxembourgish courts to decide an issue that Spain and the European Union view as an important question of European Union law.

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anti-suit injunction factors displace traditional injunction factors). Because we conclude that the district court erred in its evaluation of the anti-suit injunction factors, we need not reach the question whether, in addition to those factors, a district court considering whether to issue an anti-suit injunction must also consider the four traditional injunction factors.

BAE, 884 F.3d at 480; *see NextEra* Eur. Comm'n Amicus Br. 11–12.

These are not abstract concerns. "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), and can have serious "diplomatic implications," *Republic of Sudan v. Harrison*, 587 U.S. 1, 19, 139 S.Ct. 1048, 203 L.Ed.2d 433 (2019). Indeed, the United States warns that the injunctions here "ha[ve] the potential to cause significant harm to the United States." *NextEra* U.S. Amicus Br. 29. That is because "there is a real risk that issuance of an antisuit injunction in cases like this could prompt reciprocal injunctions against the United States." *Id.* at 30.

It is thus no surprise that an anti-suit injunction against a foreign sovereign is virtually unprecedented. The injunction in *Laker* ran against private companies, and we emphasized there were "[n]o facts . . . presented . . . suggesting that the antitrust suit adversely affects the operations of foreign governments." *Laker*, 731 F.2d at 942. And, in sustaining anti-suit injunctions against private entities, other courts also stress the fact that foreign sovereigns are not involved in the lawsuit. *See, e.g.*, *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 994 (9th Cir. 2006) ("There is no indication that the government of Ecuador is involved in the litigation."). Indeed, the only case that we could find in which an appellate court was presented with a similar injunction deemed the injunction an abuse of discretion because the district court "failed to recognize [its] extraordinarily intrusive nature." *See Westinghouse Elec. Co.*, 43 F.3d at 80–81 (vacating injunction against

foreign sovereign prohibiting the sovereign from harassing witnesses who had testified against it in a suit it had brought in federal court in the United States).

The district court thus erred in issuing the injunctions without considering Spain's sovereign status.

Our partially dissenting colleague does not dispute that Spain's status as a foreign sovereign is an important part of the problem. She concludes, however, that the district court did reckon with "Spain's status as a sovereign nation." Partial Dissent 1117–17. For support, she points to the district court's statement that general "[c]onsiderations of comity" weigh against the anti-suit injunctions. *Id.* (quoting *NextEra*, 656 F. Supp. 3d at 216–17). But that is true of all foreign anti-suit injunctions, regardless of whether they target private entities or foreign sovereigns.

Our dissenting colleague also suggests that we cannot consider the views of the United States because they were "not before the district court when the anti-suit injunctions were litigated." *Id.* at 1118. She contends that, at most, we "should remand for the district court to consider the[ ] [United States' views] in the first instance." *Id.* at 1119. We disagree.

For one thing, the views of the United States *were* before the district court when the anti-suit injunctions were litigated. In opposing the injunctions before the district court, Spain pointed to the United States' amicus brief in *BAE System Technology Solution & Services*, 884 F.3d 463, a 2018 case in which the Fourth Circuit affirmed a district court's denial of an anti-suit injunction against the Republic of Korea. *See NextEra* ECF No. 81 at 15. In a portion of the amicus

brief that Spain quoted to the district court, the United States stressed—in language it echoes in its brief in this case—that "an antisuit injunction, barring a foreign sovereign from invoking the jurisdiction of its own courts, would be a truly extraordinary remedy with significant consequences for international comity, and its issuance could have significant negative consequences for the U.S. government." *See* Brief for the United States as Amicus Curiae, *BAE Sys. Tech. Sol. & Servs.*, 884 F.3d 463 (4th Cir. 2018) (No. 17-1070), 2018 WL 551803, at *2; *cf. NextEra* U.S. Amicus Br. 25 ("Enjoining a foreign sovereign from bringing suit in a foreign court is an extraordinary remedy that would rarely (and possibly never) be justified."). So, the district court was aware of the United States' position on the propriety of anti-suit injunctions against foreign sovereigns, at least as of 2018.

If the interests of the United States were not clear to the district court, it could have invited the United States to file an amicus brief to clarify its position. Indeed, no party expressed surprise at, or objected to, our invitation to the United States to participate as amicus curiae; all undoubtedly recognize that U.S. courts addressing matters touching foreign affairs give substantial respect to the views of the United States government. Restatement (Third) of Foreign Relations Law § 112, cmt. c (Am. L. Inst. 2024). And, although they took the opportunity to respond to the views of the United States, the companies did not request that, if we were unable to sustain the injunctions, we should remand them to the district court.

In any event, our holding does not turn on the views of the United States. Those views are important, to be

sure. But, even without them, we would conclude that an anti-suit injunction against a foreign sovereign presents more serious comity concerns than one against a private entity. The district court's failure to recognize that difference was an error. So, we would vacate and remand the injunctions even if the United States had not filed an amicus brief in this case asking us to do so.

Second, with comity concerns near their peak, the district court failed to identify domestic interests strong enough to warrant the anti-suit injunctions.

In approving the injunction in *Laker*, we emphasized that the injunction served substantial interests of the United States. 731 F.2d at 922–26. Although the enjoined party there was a foreign corporation, it was in liquidation and its "principal creditors [were] Americans." *Id.* at 924. In addition, the case implicated the enforcement of American antitrust laws, which would have "directly benefit[ed] American consumers," since the anticompetitive behavior was alleged to "raise fares for United States passengers." *Id.*

The only domestic interest the district court identified here is a public interest in encouraging arbitration. *NextEra*, 656 F. Supp. 3d at 221. That important interest is codified at 22 U.S.C. § 1650a(a), the federal statute implementing the ICSID Convention. Under that Convention, the United States must open the doors of its courthouses to foreign investors seeking to enforce such awards. But neither the treaty nor the statute requires the United States to remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts.

These cases are a far cry from *Laker*. The United States has no direct interest in the underlying disputes between the Dutch and Luxembourgish companies and Spain. There is no suggestion that U.S. law governs that underlying dispute. Nor does the United States have a direct interest in the interpretation of the Energy Charter Treaty, a treaty to which it does not belong. The European Union asserts that "the question of Article 26's intra-EU application is a matter internal to the EU and does not implicate the rights of third countries that are also contracting parties to the Energy Charter Treaty." *NextEra* Eur. Comm'n Amicus Br. 17; *see NextEra* U.S. Amicus Br. 28 (noting with approval that "[t]he submission of the EU explains that these questions are of extraordinary importance to that body because they 'implicat[e] the structure of the EU legal order, the role and jurisdiction of EU courts, the interpretation of EU law by non-EU adjudicatory bodies, and the future of the Energy Charter Treaty and investor-State arbitration within the EU.'" (quoting *NextEra* Eur. Comm'n Amicus Br. 26)).

Our partially dissenting colleague suggests that we "give insufficient weight to the United States' obligation to uphold the ICSID Convention and its strong interests in doing so." Partial Dissent 1120. But the United States itself tells us those interests "are far outweighed by the interests in allowing the foreign litigation to proceed." *NextEra* U.S. Amicus Br. 25.

In any event, we disagree that Spain's tactics threaten to "undermine[ ] the whole process envisioned by the ICSID Convention." Partial Dissent 1120. After all, the ICSID Convention explicitly offers recourse to signatory countries objecting that another signatory country is improperly interfering with

ICSID enforcement proceedings. Under Article 64, a signatory country may refer a dispute "concerning the interpretation or application of this Convention" to the International Court of Justice. ICSID Convention art. 64. If the Netherlands or Luxembourg concluded that Spain's treatment of their nationals was in violation of the ICSID Convention, they could refer the dispute to the International Court of Justice. Our colleague suggests the ICSID Convention's remedy is too "cumbersome," but that is neither here nor there: It is the remedy "envisioned by the ICSID Convention." Partial Dissent 1120. Not only has the Netherlands declined to pursue that remedy, it urges us to vacate the injunctions. *See* Netherlands Amicus Br. 17.

That last point bears emphasis. The companies argue that Spain is breaching the commitments it made to the Netherlands and Luxembourg in the Energy Charter Treaty and the ICSID Convention to arbitrate disputes with their nationals before an ICSID tribunal. If the Netherlands or Luxembourg agreed with the companies, they might try to put a stop to Spain's tactics. They could refer the issue to the International Court of Justice. Or their courts could simply deny Spain's requests for anti-suit relief. The countries have not taken these steps, likely because they agree with Spain that the Energy Charter Treaty "cannot and never could serve as a legal basis for intra-EU arbitration proceedings." *NextEra* 28(j) Letter dated July 9, 2024. In other words, those countries do not understand the agreement they made with Spain to obligate Spain to arbitrate with their nationals. One reason the companies may struggle to enforce their arbitration awards is that the awards are based on an interpretation of an international treaty that the treaty signers reject.

One final note about what is—and is not—at stake with these anti-suit injunctions. Our dissenting colleague laments that, without the injunctions, "[o]ur affirmance of the district court's jurisdictional rulings is a hollow victory for the [companies]" because they "will be enjoined by foreign courts from ever confirming their hard-won awards." Partial Dissent 1122. But the injunctions are one small piece of a complex international puzzle. The injunctions might help the companies confirm their awards, but—as the district court made clear—they would not stop Spain from continuing to seek declaratory and monetary relief in foreign courts that could ultimately prevent the companies from securing the money they seek. *See NextEra*, 656 F. Supp. 3d at 217.

For example, in addition to seeking an injunction, Spain asked the Dutch court for a monetary award of "[€]300 million or an amount equivalent to the amount obtained by NextEra . . . through the execution, whichever is lower." *NextEra* J.A. 800. Even if we sustained the injunctions, Spain would be free to pursue an order from the Dutch courts requiring the companies to return whatever money NextEra obtained through this enforcement action. Indeed, *Laker* itself recognized that foreign courts "can sanction their citizens for resorting to United States . . . remedies." 731 F.2d at 936. One way or another, then, the companies will have to reckon with their national courts and EU law. The injunctions might help the companies *confirm* their arbitral awards, but they would not help them *keep* the awards. At the very least, all agree that is a matter of EU law.

In sum, the district court's careful analysis overlooked the fact that anti-suit relief was sought against a foreign sovereign and the nature of the

United States' ICSID obligations. In so holding, we do not categorically foreclose anti-suit injunctions against foreign sovereigns. In this context and on this record, however, we must vacate the anti-suit injunctions.

III.

We hold that the district courts have jurisdiction to confirm these arbitration awards under the FSIA's arbitration exception, and that the preliminary injunctions in *NextEra* and *9REN* are an abuse of discretion. We therefore affirm in part and reverse in part in *NextEra*; reverse in *9REN* and *Blasket*; and remand for further proceedings.

So ordered.

Pan, Circuit Judge, dissenting in part:

I concur with the court's holding that the district court has jurisdiction under the Foreign Sovereign Immunities Act to hear the instant cases and to confirm the arbitration awards at issue. But I believe that the majority errs in vacating the anti-suit injunctions imposed by the district court. I disagree with the majority's approach to applying the abuse-of-discretion standard of review: The majority appears to perform its own balancing of interests and to substitute its own judgments for those of the district court. In so doing, the majority opinion gives insufficient weight to the United States' interest in upholding the ICSID Convention, overlooks Spain's lack of comity and apparent bad faith, and ignores the district court's finding that the injunctions were necessary to prevent irreparable harm to NextEra and 9REN. Because reasonable minds evidently differ on how to weigh the competing factors, the majority's conclusions are, at best, only arguably correct. Thus, the applicable standard of review requires us to uphold the district court's discretionary calls, which were within its "range of choice" and were "not influenced by any mistake of law." *Morrissey v. Mayorkas*, 17 F.4th 1150, 1156 (D.C. Cir. 2021). I therefore respectfully dissent as to Part II.B of the court's opinion.

I.

A.

The Energy Charter Treaty ("ECT") is a multilateral treaty that facilitates foreign investments in the energy sectors of participating nations. *See* Maj. Op. 1094–95. A key feature of the ECT is its guarantee to foreign investors that the participating nations will agree to resolve disputes arising from the foreign

investments in a neutral arbitral forum. *See id.* at 1094–95. Specifically, the ECT provides that each nation "gives its unconditional consent to the submission of [a] dispute to international arbitration." *See* Energy Charter Treaty 16 art. 26(3), Dec. 17, 1994, 2080 U.N.T.S. 95. An investor who elects to arbitrate can proceed before the International Centre for Settlement of Investment Disputes ("ICSID"). *Id.* at art. 26(3)–(5). The ICSID Convention is a multilateral treaty that authorizes ICSID "to convene arbitration, mediation, and fact-finding panels to address disputes between international investors and Contracting States." *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 514 (D.C. Cir. 2023). Signatory nations are obligated to enforce any arbitration award conferred by an ICSID tribunal as if the award "were a final judgment of a court in that [signatory nation]." *See* ICSID Convention, art. 54; *see also* Maj. Op. 1097–98; 22 U.S.C. § 1650a(a).

The ECT's arbitration provision, which includes the promise of recourse under the ICSID framework, plays an important role in encouraging foreign investments: It ameliorates the risk to private companies of doing business with a sovereign nation by ensuring that there will be a fair procedure for resolving any disputes arising from the companies' investments. Spain is a signatory of the ICSID Convention, and at the relevant time was a signatory of the ECT. The United States is a signatory of the ICSID Convention.

NextEra and 9REN (the "Investors") are energy companies from the Netherlands and Luxembourg, respectively. *See* Maj. Op. 1095. They both invested in the Spanish energy sector with the understanding that they could avail themselves of the arbitration provisions in the ECT and the ICSID Convention if

necessary. Spain accepted the capital investments made by NextEra and 9REN, but nevertheless broke its promise to provide energy subsidies that would have benefited the Investors. *See id.*

In response to Spain's breach of its commitments, NextEra and 9REN followed the procedures outlined in the ECT and the ICSID Convention. *See* Maj. Op. 1095. They participated in lengthy arbitration proceedings with Spain, in which all of Spain's arguments were fully aired. The Investors each secured significant monetary awards that were upheld pursuant to ICSID's internal appeal process. *See id.* at 1097–98. They then sought to confirm their arbitral awards in a United States district court, as permitted by the ICSID Convention. *See id.* at 1097–98. The district court ruled that it had jurisdiction to confirm the arbitral awards. *See NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 214 (D.D.C. 2023); *9REN Holding S.À.R.L. v. Kingdom of Spain*, Civ. No. 19-01871, 2023 WL 2016933, at *3 (D.D.C. Feb. 15, 2023). We unanimously affirm the district court's jurisdictional rulings and remand for further proceedings so that the Investors may litigate the confirmation of their awards. But all the Investors' efforts to date may have been for naught because the majority opinion vacates the district court's anti-suit injunctions, which protected the Investors' ability to enforce their arbitral awards under the ICSID framework.

B.

Spain has argued in this case and elsewhere that it is not obligated to arbitrate with EU nationals – such as NextEra and 9REN – because the EU's highest court has prohibited EU-member nations from making treaty commitments to arbitrate intra-EU disputes.

See Maj. Op. 1102 (citing *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021)). Based on the EU court's ruling, Spain claims that it could not have lawfully entered into arbitration agreements with the Investors, even though Spain became a signatory to the ECT and the ICSID Convention long before that ruling was made. *See id.* at 1095, 1096–97, 1102–03. Spain advanced those arguments to oppose jurisdiction in this forum, even though dozens of arbitral tribunals and non-EU courts have ruled against Spain when presented with similar claims. *See* Int'l Scholars Amicus Br. 13 n.7 (collecting examples); *Infrastructure Servs. Luxembourg S.À.R.L v. Kingdom of Spain*, [2023] EWHC 1226 (Comm) ¶ 67 (decision by the English High Court of Justice holding that "[t]he EU treaties do not trump [Spain's obligations under the ICSID Convention and the ECT], nor do they override the relevant domestic law mechanism in the United Kingdom"). Notably, Spain currently owes more than $1.3 billion for sixteen unpaid arbitral awards won by investors. See Int'l Scholars Amicus Br. 30 n.23 (citing Nikos Lavranos, *Updated Report concerning Spain's Compliance with Investment Treaty Arbitration Awards* 2023, Int'l L. Compliance (June 2023)).

In these cases, faced with the prospect of losing on the merits yet again, Spain resorted to a procedural gambit to block the Investors from using the ICSID framework to enforce their arbitral awards: Spain sued NextEra and 9REN in their home countries to enjoin the Investors from confirming their awards in the United States. In the Dutch action, Spain sought an order requiring NextEra to "take all actions necessary to suspend the proceedings currently pending before the United States District Court . . . under penalty of a daily payment of EUR 30,000 for

each day." *NextEra* J.A. 798. Spain also requested an injunction prohibiting NextEra from trying to enforce its award anywhere in the world. *Id.* at 798–99. Likewise, Spain asked the Luxembourgish court to order 9REN to "cease any enforcement of the Arbitral Award" or be subject to a penalty of EUR 100,000 per day. *9REN* J.A. 411.

The extreme remedies requested by Spain in the foreign actions were designed to deter the Investors from exercising their rights under the ECT and the ICSID Convention—even though Spain signed those treaties and thereby consented to the procedures followed by the Investors. To escape its obligations under the governing treaties and arbitrations, Spain would like to re-litigate the issues already resolved by the ICSID arbitral panels in friendlier forums in the EU: Spain apparently believes that because the Netherlands and Luxembourg are EU countries, their courts will be more receptive to Spain's arguments, which are based on a ruling of the EU Court of Justice. In short, Spain is forum-shopping.

In a pair of well-reasoned opinions, the district court granted the Investors' requests to enjoin Spain from pursuing anti-suit injunctions in the Netherlands and Luxembourg that would interfere with the district court's jurisdiction to provide relief to the Investors. *See NextEra*, 656 F. Supp. 3d at 214; *9REN*, 2023 WL 2016933, at *7.[1] The district court emphasized that the express purpose of Spain's foreign lawsuits was "to *terminate* [the U.S.] action[s]" by "ordering [the Investors] to withdraw [their] suit[s], imposing

[1] The district court's opinions in NextEra and 9REN are substantially identical in their analysis of the issues, and I therefore cite only to the published NextEra opinion.

penalties upon failure to do so, and issuing [ ] worldwide injunction[s] preventing [the Investors] from taking any action to confirm the Award[s]." *NextEra*, 656 F. Supp. 3d at 216 (emphasis in original). Moreover, Spain did not provide "any prior notice" that it was seeking the injunctions, "apparently planning to simply later advise the court of the '*fait accompli* . . . which would have virtually eliminated the court's effective jurisdiction over [the Investors'] facially valid claim[s].'" *Id.* (first and second alteration in original) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 930–31 (D.C. Cir. 1984)). Noting that U.S. courts have a "duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants," the court determined that these "most compelling circumstances" required it to "to meet the force of Spain's attempt to deprive this court of jurisdiction." *Id.* at 215–17 (first and second quoting *Laker Airways*, 731 F.2d at 927).

In reaching that conclusion, the district court considered Spain's "strenuous[ ]" arguments that "principles of comity" precluded the issuance of the injunctions, while acknowledging its duty to take Spain's claims "seriously." *NextEra*, 656 F. Supp. 3d at 216 (quoting *Laker Airways*, 731 F.2d at 937). But the district court refused to "countenance [Spain's] hypocrisy," observing that Spain's "claims of commit . . . come burdened with the failure of Spain to recognize comity," and that "[t]he comity concerns that Spain laments are of its own making." *Id.* at 217 (cleaned up). And further, the court held that "relief against Spain is warranted in the form of a preliminary injunction" because "there is a public interest in encouraging arbitration and the enforcement of international arbitration law as an efficient means of

settling disputes," as well as "an expectation on the part of Congress that actions to enforce ICSID awards would not be protracted, much less permanently halted by collateral attacks in foreign courts." *Id.* at 217, 221 (cleaned up). Finally, the district court found that the Investors would be irreparably harmed if it did not issue the injunctions because the Investors would likely be permanently enjoined from enforcing their awards. *Id.* at 220. The district court therefore held that the balance of equities "strongly" favored the Investors. *Id.* But the court tailored its relief to preserve Spain's ability to seek a declaration from the Dutch and Luxembourgish courts "vindicating its interpretation of EU law." *Id.* at 217.

II.

It is undisputed that the district court had the authority to issue the anti-suit injunctions at issue in these cases. "It is well settled that . . . American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." *Laker Airways*, 731 F.2d at 926; *see also BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 479 (4th Cir. 2018). That power may be exercised with respect to a foreign sovereign, and there is precedent for issuing an anti-suit injunction against a foreign sovereign. *See BAE*, 884 F.3d at 479 (noting that the district court "lifted a preliminary injunction it had previously imposed" against South Korea). "There are no precise rules governing the appropriateness of antisuit injunctions." *Laker Airways*, 731 F.2d at 927. Rather, we must "carefully examine[ ]" the "equitable circumstances surrounding each request for an injunction" and determine whether the injunction is necessary "to

prevent an irreparable miscarriage of justice." *Id.* We have explained that "[i]njunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum." *Id.* An anti-suit injunction is extraordinary relief that should be granted only under compelling circumstances. *Id.*; *BAE*, 884 F.3d at 480.

We review the district court's issuance of the anti-suit injunctions for abuse of discretion. *See Laker Airways*, 731 F.2d at 916, 921. "The abuse of discretion standard means that the district court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Morrissey*, 17 F.4th at 1156 (cleaned up). In other words, we ask whether the district court's decision was "at least within the zone of reasonableness, even if we might disagree with the decision[.]" *Morley v. CIA*, 894 F.3d 389, 391 (D.C. Cir. 2018). If we merely disagree, "[w]e may not substitute our judgment for that of the trial court," especially when our review involves a multi-factor balancing of interests. *Morrissey*, 17 F.4th at 1156, 1159–60. Indeed, "it will be the rare case when we can reverse a district court's balancing of [ ] factors." *Morley*, 894 F.3d at 391. Our review must be guided by "appellate restraint, a principle faithful to the reality that appellate tribunals cannot hope to have the entire range of considerations as readily at hand as the court charged with the case in the first instance." *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986); *see id.* ("The abuse-of-discretion standard calls on the appellate department, in a spirit of humility occasioned by not having participated in what has gone before, not just to scrutinize the

conclusion but to examine with care and respect the process that led up to it.").

III.

In my view, the district court did not abuse its discretion in granting the Investors' requests for anti-suit injunctions against Spain under the "equitable circumstances" presented. *Laker Airways*, 731 F.2d at 927. The district court's decisions (1) properly applied our precedent in *Laker Airways*, a case in which we upheld an anti-suit injunction in a similar posture; (2) considered the United States' interests in protecting the jurisdiction of its courts and upholding the ICSID framework; (3) assessed Spain's actions and prerogatives in a detailed discussion of "comity" concerns; and (4) gave appropriate weight to the irreparable harm that would be done to the Investors if the requested injunctions were denied.

A.

In *Laker Airways*, we considered dueling requests for injunctions, much like the ones at issue here. There, some defendants in an antitrust case in the United States successfully halted the proceedings against them by securing an anti-suit injunction in the United Kingdom. In response, the plaintiff obtained an "anti-anti-suit injunction" from the district court to prevent the remaining defendants from joining the U.K. litigation to secure similar injunctions that would have impeded the U.S. antitrust case. *See Laker Airways*, 731 F.2d at 918; Maj. Op. 1105–06. We upheld the anti-anti-suit injunction, reasoning that "where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked juris-

diction" and to protect "the court's ability to render a just and final judgment." *Laker Airways*, 731 F.2d at 930. In reaching that conclusion, we considered the defendants' "strenuous[ ]" argument "that the district court's injunction violates the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations." *Id.* at 937. But we held that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Id.*

We considered three factors important in upholding the district court's anti-suit injunction: (1) the foreign lawsuit was brought with "the sole purpose . . . [of] *terminat[ing]* the American action," *Laker Airways*, 731 F.2d at 930 (emphasis in original); (2) defendants sought to "evade culpability under statutes of admitted [ ] importance to the United States which [were] specifically applicable . . . and upon which [the plaintiff] may have legitimately relied," *id.* at 932; and (3) any comity concerns were a product of defendants' own efforts "to generate interference with the American courts," *id.* at 939–40.

Here, the district court appropriately weighed the factors that we identified in *Laker Airways.* First, it considered the type of foreign suit to be enjoined: Spain's requested relief in the Dutch and Luxembourgish courts was specifically targeted to interfere with the enforcement of the arbitral awards by the district court. The district court recognized that Spain filed its foreign lawsuits with the sole intention of depriving a U.S. court of jurisdiction to provide justice to parties that were properly before it. *See NextEra*, 656 F. Supp. 3d at 215–16. The nature of the competing foreign action weighed strongly in favor of issuing an anti-suit injunction under *Laker Airways*.

Second, the district court considered other interests of the United States, specifically "encouraging arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *NextEra*, 656 F. Supp. 3d at 221 (internal quotations omitted). Although *Laker Airways* gave weight to the district court's obligation to enforce U.S. antitrust laws – and such purely domestic laws are not at issue here – there is a strong analogous U.S. interest in enforcing the ICSID Convention, an international arbitration treaty that the United States ratified, and that Congress enacted into federal law. *See Laker Airways*, 731 F.2d at 932 (upholding the anti-suit injunction that "properly prevented appellants from attempting to escape application of [governing] laws"). We have a statutory obligation to enforce ICSID awards with "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Moreover, the United States benefits from its membership in ICSID because American companies also enforce arbitral awards issued pursuant to the ICSID Convention. In fact, there have been at least 150 ICSID arbitrations brought by American investors. *See* Int'l Scholars Amicus Br. 19 n.14.

Third, the district court recognized the importance of comity: It understood that Spain's status as a sovereign nation weighed in favor of restraint. *See NextEra*, 656 F. Supp. 3d at 216–17 (recognizing that "[c]onsiderations of comity" are "deserving [of] substantial respect," but rejecting the argument that "'comity compels us to recognize a decision by a *foreign* government that *this court* shall not apply its own laws'" (quoting *Laker Airways*, 731 F.2d at 939) (emphasis in original)). Here, Spain's claim to comity is greatly diminished by its own disregard for the

comity due to the U.S. district court, which properly exercised its jurisdiction to hear the Investors' facially valid claims. *See id.* at 217. It was Spain that filed the first requests for anti-suit injunctions in the Netherlands and Luxembourg, in a bold attempt to interfere with the Investors' cases before the district court. In short, Spain is in a weak position to demand comity when it declines to practice what it preaches.

Fourth, the district court properly weighed the prospect of irreparable harm to the Investors. The district court emphasized that "[i]f Spain receives the relief it seeks in the [foreign] action[s], [the Investors] will be permanently enjoined from enforcing the Award[s], both in this court and around the world." *NextEra*, 656 F. Supp. 3d at 220. The court found that this was "precisely the kind of irreparable harm identified by the district court, and affirmed by the D.C. Circuit, in *Laker Airways*[.]" *Id*. It was well within the district court's discretion to consider the harm to the Investors caused by Spain's actions, and to find that the balance of equities "strongly" favored the Investors. *Id.*

B.

Despite the district court's careful application of *Laker Airways*, and the equities that strongly favor granting relief to the Investors, the majority opinion holds that the district court abused its discretion in issuing anti-suit injunctions that "run against a foreign sovereign," rather than a private litigant. Maj. Op. 1107. The majority opinion states that "comity concerns [are] near their peak," *id.* at 1109, and the "only domestic interest the district court identified here is a public interest in encouraging arbitration," which does not involve the enforcement of American laws or affect the interests of American creditors or

consumers, *see id.* Moreover, the majority opinion asserts that the district court "did not address the fact that the anti-suit injunctions run against a foreign sovereign," and "failed to identify domestic interests strong enough to warrant the anti-suit injunctions." *Id.* at 1107–1109. Thus, the majority opinion emphasizes the factors that it believes are most important, performs its own weighing of interests, and reaches a different conclusion from that of the district court. I disagree with the majority's approach to reviewing the district court's exercise of discretion.

The majority opinion's independent balancing of factors understandably gives great weight to respecting the sovereignty of other nations. Its analysis, however, overlooks the narrow scope of the anti-suit injunctions issued by the district court. The majority opinion states that the injunctions "impinge on the sovereignty of both the Spanish government to litigate and the Dutch and Luxembourgish courts to decide an issue that Spain and the European Union view as an important question of European Union law." Maj. Op. 1107–08 (cleaned up). But the district court tailored its injunctions to allow Spain to obtain a ruling on that issue of EU law from the foreign courts: The district court enjoined Spain only from seeking *relief* from the foreign courts that would require the Investors to "suspend, hold in abeyance, or withdraw" their actions before the district court – *i.e.*, Spain could still litigate its claims in the Netherlands and Luxembourg to seek declaratory relief. *NextEra*, 656 F. Supp. 3d at 217, 222 (preserving Spain's ability to seek a declaration from Dutch and Luxembourgish courts "vindicating its interpretation of EU law"). In effect, the district court's injunctions impinged only on Spain's efforts to block the district court from hearing the Investors' claims. As a result, the injunctions at issue here are

far less intrusive than the ones described in other cases cited by the majority opinion. *See Republic of Philippines v. Westinghouse Elec. Co.*, 43 F.3d 65, 73 (3d Cir. 1994) (vacating injunction that "purport[ed] to supervise and control the law enforcement activities of a foreign sovereign nation against its own citizens on its own soil"); *BAE*, 884 F.3d at 480 (upholding denial of permanent injunction against South Korea in part because "comity concerns are far greater where an injunction would bar a foreign sovereign . . . from litigating a dispute in its own courts"). Indeed, it is questionable whether Spain's interference with a lawsuit in the United States can even be considered a "sovereign" prerogative.

The majority faults the district court for not paying enough attention to the two factors that the majority finds most compelling. But the district court properly considered both Spain's status as a foreign sovereign and the interests of the United States, which are not limited to purely "domestic" concerns. First, the district court recognized that only "sufficiently unusual circumstances" would warrant "a preliminary, anti-suit injunction against a *foreign sovereign*," *NextEra*, 656 F. Supp. 3d at 214 (emphasis added): The district court plainly was aware that Spain is a sovereign nation and that Spain's sovereignty raised serious comity concerns. Second, the district court understood that the facts before it implicated both domestic and international interests of the United States—it expressly noted the importance of international arbitration, as well as the fact that Congress has passed a statute codifying key terms of the ICSID Convention, which assures prompt confirmation of arbitral awards. *See id.* at 217, 221 (recognizing the "public interest in encouraging arbitration and the enforcement of international arbitration law as an efficient means of

settling disputes," as well as "an expectation on the part of Congress that actions to enforce ICSID awards [will] not be protracted, much less permanently halted by collateral attacks in foreign courts" (cleaned up)). In sum, the district court did not "fail[ ] to consider" either of the factors singled out by the majority opinion—the majority simply disagrees with the weight that the district court assigned to them. Maj. Op. 1106 (district court abuses its discretion when it "*fails to consider* a relevant factor" (emphasis added) (cleaned up)). Nor did the district court make a "clear error of judgment" when it performed the requisite balancing—the evident disagreement among members of this panel demonstrates that if there was error, it was not "clear." *Id.* (district court abuses its discretion when it "commits a *clear* error of judgment" (emphasis added) (cleaned up)).

The majority opinion relies most heavily on "international comity" and is influenced by amicus briefs filed in this court by the United States and the Netherlands. *See* Maj. Op. 1105, 1107–09.[2] But the

[2] The majority opinion notes that (1) the Netherlands and the United States "stress[ ]" the theme of international comity, Maj. Op. 1105 (citing amicus briefs of the Netherlands and the United States); (2) the United States "warns that the injunctions here 'have the potential to cause significant harm to the United States,'" *id.* at 1108 (quoting amicus brief of the United States) (cleaned up); (3) the views of the United States "are important, to be sure," *id.* at 1109; (4) the United States "tells us th[e] interests [in upholding the ICSID Convention] 'are far outweighed by the interests in allowing the foreign litigation to proceed,'" *id.* at 1110 (quoting amicus brief of the United States); (5) the Netherlands has not only declined to refer Spain to the International Court of Justice, but it "urges us to vacate the injunctions," *id.* at 1110 (citing amicus brief of the Netherlands); and (6) it "bears emphasis" that the Netherlands and Luxembourg likely "agree with Spain" in the underlying legal dispute, *id.* at 1110.

positions expressed by those amici were not before the district court when the anti-suit injunctions were litigated and therefore should not be considered here. When applying an abuse-of-discretion standard of review, it is a "commonsense notion" that we should "only examine those parts of the record that were properly before the decisionmaker at the time the question was considered." *See Sanderlin v. United States*, 794 F.2d 727, 734 (D.C. Cir. 1986). Thus, if the views of the United States and the Netherlands are important to the analysis at hand, we should remand for the district court to consider them in the first instance. Indeed, the cited amicus briefs provide us with the official positions of the United States and the Netherlands, and the interests of those nations are directly relevant to the weighing of international comity. That those amici feel strongly about how this case should be resolved is a fact that might have swayed the district court, just as it has swayed the majority. On appeal, our task is to determine "whether, *in light of the particular factual circumstances*, the trial court erred in applying or weighing the factors limiting its discretion." Edwards & Elliott, Federal Standards of Review: Review of District Court Decisions and Agency Actions 72 (3d ed., 2023 Update) (emphasis added). Because the positions of the United States and the Netherlands were never put before the district court and thus could play no role in that court's exercise of discretion, I believe that the majority opinion errs in relying on those amicus briefs—the information they provide simply is not in the record on review.

The majority opinion insists that the views of the United States "*were* before the district court" because Spain, in its briefing below, quoted an amicus brief filed in 2018 by the United States in an unrelated

and factually distinguishable case. Maj. Op. 1108 (emphasis in original) (relying on Spain's citation and quotation of Brief for the United States as Amicus Curiae, *BAE*, 884 F.3d 463 (No. 17-1070), 2018 WL 551803, at *2).[3] Of course, Spain had no authority to speak for the United States and certainly could not do so by citing a brief from a different case that is on Westlaw. Only the United States itself could state its position regarding the unique circumstances presented here. Moreover, the majority states that "[i]f the interests of the United States were not clear to the district court, it could have invited the United States to file an amicus brief to clarify its position." Maj. Op. 1109. That statement expresses how the majority would have liked to see the district court handle this case but does not identify any abuse of discretion: The district court was not *required* to invite the United States to file an amicus brief and therefore acted within its range of choices when it did not do so. The

[3] The dispute in *BAE* had nothing to do with arbitration, ICSID, or an anti-suit injunction instigated by a foreign sovereign to deprive a U.S. court of its statutorily conferred jurisdiction. Thus, the United States took no position on any of those interests in the amicus brief it filed in that case. *BAE* involved a contract dispute between a defense contractor and the Republic of Korea, where the defense contractor sought an anti-suit injunction barring Korea from pursuing a parallel contract suit in Korean courts. *See BAE*, 884 F.3d at 467. Indeed, the language that the majority opinion quotes from the United States' amicus brief in *BAE* demonstrates how that case is inapposite: It characterizes as "extraordinary" "an antisuit injunction barring a foreign sovereign from invoking the jurisdiction of *its own* courts." Maj. Op. 1109 (emphasis added) (quoting Brief for the United States as Amicus Curiae, *BAE*, 884 F.3d 463 (No. 17-1070), 2018 WL 551803, at *2). Here, the anti-suit injunctions do not interfere with Spain's invocation of the jurisdiction of *its own* (Spanish) courts.

district court was allowed to consider the United States' interests without that formal input.

In my view, the majority opinion errs by focusing only on the factors that it deems most important while failing to address or glossing over several important considerations relied upon by the district court. The majority opinion overlooks important aspects of the district court's ruling and cites no authority to support its incomplete review of the district court's reasoning.

First, the majority opinion seems to give insufficient weight to the United States' obligation to uphold the ICSID Convention and its strong interests in doing so. *See supra* at 1095. Importantly, Spain's strategy of interfering with the Investors' ability to confirm their awards undermines the whole process envisioned by the ICSID Convention and the ECT. Both of those treaties facilitate foreign investments by guaranteeing investors a neutral arbiter in disputes with sovereign nations. Spain turns the framework on its head by forcing the Investors to litigate in forums of the *sovereign's* choice. Moreover, if Spain succeeds in blocking enforcement actions under the ICSID Convention by obtaining anti-suit injunctions in foreign jurisdictions that are friendly to it, other signatory states can follow the same playbook, thereby threatening the viability of the entire ICSID framework.

Today's majority opinion makes the United States an inhospitable forum for enforcing ICSID awards: It permits a foreign sovereign with assets in the United States who does not wish to honor an ICSID award to stymie any U.S. enforcement proceeding by filing for an anti-suit injunction in another nation. In this case, Spain chose to litigate in the Investors' home countries, but nothing stops a foreign sovereign from requesting an anti-suit injunction from one of its own

national courts—exactly the type of situation that the ECT and the ICSID Convention guard against. The majority opinion appears to greenlight such tactics. *See* Maj. Op. 1109 (stating that the United States is not required to "remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts"). The majority's suggestion that the Investors could instead rely on the Netherlands and Luxembourg to refer "Spain's treatment of their nationals" to the International Court of Justice, *see id.* at 1110, misses the point: The Investors should not have to seek such a cumbersome remedy that affords them no immediate monetary compensation when the ICSID Convention and U.S. law give them a streamlined way to enforce their multi-million-euro arbitral awards in the United States.

Next, the majority opinion overlooks Spain's own lack of comity: As the district court pointed out, it is Spain that precipitated a clash of international interests by "seeking to frustrate the operation of U.S. law." *NextEra*, 656 F. Supp. 3d at 217; *supra* at 1095–96. Indeed, a strong case can be made that Spain has acted in bad faith and that the district court made a finding to that effect. Spain attempts to bully the Investors into withdrawing their legitimate lawsuits in the United States by requesting fines against them of EUR 30,000 or 100,000 per day; and it seeks foreign injunctions that plainly are intended to disrupt and hamper the cases before the district court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("[A] party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." (cleaned up)). Although the district court did not use the words "bad faith," it criticized Spain's conduct and emphasized Spain's attempt to "virtually eliminate[ ] the

court's effective jurisdiction" without "any prior notice." *See NextEra*, 656 F. Supp. 3d at 216 (quoting *Laker Airways*, 731 F.2d at 930–31); *see also id.* at 217, 221 (noting Spain's "hypocrisy" and that Spain's representations "verge on disingenuous"). Thus, the facts in the record speak for themselves and the district court both referred to and relied on Spain's arguably bad-faith actions. *See LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 906 (D.C. Cir. 1998) (It is "an empty formalism to find an abuse of discretion simply because the district court failed to invoke the magic words 'bad faith.'"). Spain's lack of comity and arguable bad faith support the anti-suit injunctions issued by the district court but are not addressed by the majority opinion.

Furthermore, the majority opinion does not mention the district court's finding that the anti-suit injunctions were necessary to prevent irreparable harm to the Investors. *See supra* at 1095–96. The lawsuits that Spain brought in the Netherlands and Luxembourg seek to block the Investors from enforcing their arbitral awards in *any* forum in *the world*. And to be clear, NextEra and 9REN are the injured parties here. They invested in Spain's energy sector after Spain promised to provide energy subsidies and that the Investors would be guaranteed a neutral arbitral forum if any disputes with Spain arose. When Spain breached its commitments, the Investors dutifully followed the procedures prescribed by the ECT and the ICSID Convention. Spain has fought them every step of the way. Thus, the Investors have expended substantial time and resources to participate in lengthy arbitration proceedings and to defend their sizeable arbitral awards in ICSID's internal appeal process. They now seek only to confirm and enforce the awards in U.S. courts, as they are entitled to do under

the ICSID Convention and U.S. law. Allowing Spain to extinguish the Investors' rights and claims by obtaining foreign injunctions that forbid the Investors from ever confirming their awards is manifestly unfair. But the majority appears to conclude that the district court's finding of irreparable harm to the Investors is irrelevant.[4]

I also believe that the majority opinion goes astray by focusing on the parties' "underlying disputes" and on matters related to the interpretation or implementation of European law. *See, e.g.*, Maj. Op. 1109. Although the "underlying disputes" between Spain and the Investors do involve EU law, those disputes already have been resolved by ICSID arbitral panels. As a result, all that remains in the cases before us is the straightforward confirmation of the ICSID arbitral awards. In such cases, the district court's scope of

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[4] In each of the two cases before us, the district court issued an injunction that relied on *both* the *Laker Airways* discussion of anti-suit injunctions *and* traditional preliminary-injunction factors. *See NextEra*, 656 F. Supp. 3d at 214–21. In other words, the district court applied two sets of factors in issuing a single injunction. Thus, both parts of the district court's analysis are relevant to our evaluation of how the district court exercised its discretion to issue each injunction. Indeed, the district court undoubtedly relied on its findings of irreparable harm when it issued the injunctions at issue. *See id.* at 220. But the majority opinion appears to limit its review to the anti-suit injunction factors discussed in *Laker Airways*, leaving its analysis incomplete. The majority opinion apparently takes this approach because the majority believes that it need not decide in this case whether a district court is *required* to consider the "four traditional injunction factors" in this context. Maj. Op. 1107 n.1. Yet, even if we need not address *whether* the preliminary-injunction factors *must* be analyzed under the circumstances presented, we still are obligated to review what the district court actually did in this case.

review is "below even the 'extremely limited' review available under the [Federal Arbitration Act]," and the district court may not consider the merits of the parties' positions before the arbitral tribunal. *See Valores*, 87 F.4th at 520; *see id.* at 515 ("Contracting states' courts are [ ] not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award." (cleaned up)). "Under the [ICSID] Convention's terms, [the district court] may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Id.* Thus, we need not dwell on the "complex international puzzle" described by the majority opinion. *See* Maj. Op. 1110. Rather, we should keep our eye on the ball and simply uphold the treaty obligation and the U.S. statute that require the district court to enforce any ICSID arbitration award as if the award "were a final judgment of a court in [the United States]." *See* ICSID Convention, art. 54; 22 U.S.C. § 1650a(a) (ICSID awards are entitled to "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.").

Unlike the majority, I am unable to reconcile our obligation to give full faith and credit to ICSID awards and to enforce them like final judgments with a ruling that allows Spain to block access to U.S. courts in a gambit to *prevent* the confirmation and enforcement of those very same awards. *See* Maj. Op. 1109 ("[T]he United States must open the doors of its courthouses to foreign investors seeking to enforce such awards. But neither the treaty nor the statute requires the United States to remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts."). Our affirmance of the district court's jurisdictional rulings is a hollow victory

for the Investors if they nevertheless will be enjoined by foreign courts from ever confirming their hard-won awards.

For the foregoing reasons, I cannot agree with the majority's approach or analysis in vacating the anti-suit injunctions. But whether my arguments are persuasive or not, the conflicting views expressed by members of this panel demonstrate that there is no objectively correct answer to the question of whether those injunctions should have been granted. Because there is more than one reasonable way to resolve these cases, the abuse-of-discretion standard requires us to affirm the choices made by the district court. *See Morrissey*, 17 F.4th at 1156 ("The abuse of discretion standard means that the district court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." (cleaned up)); *Morley*, 894 F.3d at 391 ("[I]t will be the rare case when we can reverse a district court's balancing of [ ] factors.").

* * *

Even though the district court did not take the path preferred by the majority, it acted well within its discretion when it evaluated the equities in the way that it did. The majority opinion does not identify any relevant factor that the district court failed to consider or any mistake of law that it made. Instead, the majority disagrees with the district court's weighing of interests and substitutes its own judgments for those of the district court. Because the majority opinion misapplies the required standard of review, I respectfully dissent as to Part II.B of the court's opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civil Action No. 19-cv-01618 (TSC)

NEXTERA ENERGY GLOBAL HOLDINGS B.V. AND
NEXTERA ENERGY SPAIN HOLDINGS B.V.,

Petitioners,

v.

KINGDOM OF SPAIN,

Respondent.

Signed February 15, 2023

MEMORANDUM OPINION

TANYA S. CHUTKAN, United States District Judge

Dutch-incorporated companies NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (collectively, "NextEra") have petitioned to confirm an international arbitral award they received against the Kingdom of Spain (the "Award"). Petition to Confirm International Arbitral Award Pursuant to the 1965 ICSID Convention, ECF No. 1 ("Petition"). Spain moved to dismiss the Petition, ECF No. 62 ("Spain MTD"), and NextEra cross-moved for summary judgment, ECF No. 68 ("Cross-MSJ"), as well as leave to file a surreply, ECF No. 75. In response, Spain moved to strike NextEra's cross-motion as

premature, ECF No. 71. While those motions were pending, on January 12, 2023, NextEra moved for a preliminary injunction and temporary restraining order enjoining Spain from pursuing litigation in the Netherlands that would prevent NextEra from seeking to confirm the Award. ECF No. 78 ("PI/TRO Motion").

For the reasons that follow, the court will DENY Spain's Motion to Dismiss and GRANT in part NextEra's Motion for Preliminary Injunction and Temporary Restraining Order. The court will also DENY Spain's Motion to Strike and DENY NextEra leave to file a surreply.

I. BACKGROUND

A. Laws and Treaties

This case concerns both international treaties and domestic laws and raises complex issues about how they interact for purposes of sovereign immunity.

Along with many other nations, the United States, the Netherlands, and Spain are all parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The ICSID Convention establishes an arbitration regime for resolving disputes related to international investments between the treaty's members, or "Contracting States." The Convention's Article 54(1) provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Congress has confirmed that commitment by statute: "The pecuniary obligations imposed by [an ICSID Convention] award shall be enforced and

shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a.

Spain and the Netherlands are also contracting parties to the Energy Charter Treaty (ECT), a multinational agreement designed to create "a legal framework in order to promote long-term cooperation in the energy field" through "complementarities and mutual benefits." ECT art. 2. For example, the ECT entitles investors from one contracting party to receive "fair and equitable treatment" from the other contracting parties. *Id.* art. 10(1). Should a dispute arise, the ECT provides that each contracting party "gives its unconditional consent to the submission of [that] dispute to international arbitration"—and if a consenting investor seeks arbitration, the arbitration can be carried out under the ICSID Convention. *Id.* art. 26(3)–(5).

Finally, the Foreign Sovereign Immunities Act (FSIA) provides that foreign states are immune from the jurisdiction of U.S. courts unless they fall within certain exceptions. Under the "waiver" exception, for example, U.S. courts have jurisdiction "in any case . . . in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). And under the "arbitration" exception, U.S. courts have jurisdiction in any case "in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6).

B. Facts and Procedural History

Both NextEra petitioners are private limited liability companies incorporated under the laws of the Netherlands. Petition ¶ 4. After Spain enacted legislation to encourage investment in solar power projects in its territory in 2007, "NextEra invested in the construction, development and operation of two Spanish [solar power] projects at a total cost of approximately 750 million euros." *Id.* ¶ 13. But NextEra alleges that between 2012 and 2014, Spain "fundamentally and radically changed the investment regime NextEra relied on when making its investment," causing NextEra "significant harm as a result." *Id.* ¶ 14 (quotation and citations omitted). Because the Netherlands and Spain are both contracting parties to the ECT, in 2014 NextEra sought to redress its grievances by requesting arbitration under the ICSID Convention. *Id.* ¶ 18.

In 2015, a three-member ICSID arbitral tribunal convened to address NextEra's request, and held a hearing on all issues during December of 2016. *Id.* ¶ 19. In March 2019, the ICSID tribunal issued a decision in favor of NextEra. *Id.* at 20; *see* Award, ICSID Case No. ARB/14/11, Annex A: Decision on Jurisdiction, Liability and Quantum Principles, ECF No. 1-4 ("Liability Decision"). Two months later, the tribunal issued a "Final Award requiring Spain to pay NextEra EUR 290.6 million as damages, plus pre-judgment interest at a rate of 0.234%, compounded monthly, from June 30, 2016." *Id.* ¶ 21; *see* Award, ICSID Case No. ARB/14/11, ECF No. 1-4.

NextEra petitioned this court to confirm the ICSID's Award against Spain. Petition, ECF No. 1. But in September 2020, the court stayed the case while Spain applied for an annulment of the Award with an ICSID

Annulment Committee. ECF No. 39. The court lifted that stay in April 2022 upon receiving notice that the Annulment Committee had dismissed Spain's application. April 29, 2022 Minute Order. Shortly thereafter, Spain moved to dismiss NextEra's petitions, asserting lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. ECF No. 62. NextEra opposed Spain's motion and cross-moved for summary judgment. ECF No. 68.

While those motions were pending, on December 22, 2022, Spain initiated a legal action in Amsterdam (the "Dutch Action"), seeking an order requiring NextEra to "take all actions necessary to withdraw the proceedings currently pending before the United States District Court for the District of Columbia under case number 1:19-cv-01618 . . . under penalty of a daily payment of EUR 30,000 per day for each day or part of a day that Defendants fail to effect such suspension." *See* PI/TRO Motion, Decl. of Bradley A. Klein, Exhibit 1, at 32–33, ECF No. 78-3 ("Dutch Writ"). Spain also requests a separate civil penalty and an injunction preventing NextEra from seeking to confirm the Award or otherwise pursue payment anywhere in the world. *Id.* at 33.

In response, NextEra now seeks injunctive relief of its own, asking this court to issue a preliminary injunction and temporary restraining order preventing Spain from pursuing the Dutch Action insofar as it would affect NextEra's suit here. Specifically, NextEra seeks an injunction stopping Spain from seeking any relief in the Dutch Action—or anywhere else—that would halt or obstruct this case, and requiring Spain to withdraw its requests for such relief in the Dutch Action—Claims (A) through (D) and (L) through (P)

of the Dutch Writ. *See* Proposed Order Granting Preliminary Injunction at 2–3, ECF No. 78-5.

Because Spain committed to not seek any relief in the Dutch Action until at least March 1, 2023, *see* Joint Status Report, ECF No. 80, the court did not deem it necessary to issue a temporary restraining order before deciding whether to issue a preliminary injunction.

II. LEGAL STANDARD

A. Motion to Dismiss

"Before evaluating the availability of preliminary relief, the Court must first determine that it may properly exercise jurisdiction over the action." *Rosenkrantz v. Inter-Am. Dev. Bank*, No. CV 20-3670 (BAH), 2021 WL 1254367, at *7 (D.D.C. Apr. 5, 2021) (quotation omitted), *aff'd*, 35 F.4th 854 (D.C. Cir. 2022); *see also Aamer v. Obama*, 742 F.3d 1023, 1028, 1038 (D.C. Cir. 2014) ("We begin, as we must, with the question of subject-matter jurisdiction," then "turn to the question of whether petitioners have established their entitlement to injunctive relief."). A defendant's "Motion to Dismiss under Rule 12(b)(1) therefore must be decided before plaintiffs' Motion for Preliminary Injunction may be considered." *Rosenkrantz*, 2021 WL 1254367, at *7.

Here, Spain moves for dismissal under Rule 12(b)(1) on the grounds that it is immune from jurisdiction under the FSIA, which provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (quotation omitted). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal

court lacks subject-matter jurisdiction over a claim against a foreign state." *Id.* at 355, 113 S.Ct. 1471.

When a defendant challenges the factual basis for jurisdiction under an FSIA exception, the D.C. Circuit applies a burden-shifting analysis. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). The plaintiff "bears the initial burden of supporting its claim that the FSIA exception applies." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015) (citing *Chabad*, 528 F.3d at 940). "[T]his is only a burden of production"—producing evidence of the required jurisdictional facts. *Id.* (same). If Plaintiff meets its burden, then the "burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* (same).

B. Motion for Preliminary Injunction

A preliminary injunction is an "extraordinary and drastic" remedy that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008). A movant must demonstrate (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent injunctive relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Coun., Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Because "a preliminary injunction is an extraordinary and drastic remedy," the court should not grant one "unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (internal citation omitted) (emphasis in original).

Courts in this Circuit have typically applied a "sliding-scale" approach in analyzing these four factors; a particularly strong showing in one factor could outweigh weakness in another. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). It is unclear if this approach has survived the Supreme Court's decision in *Winter*, however. *See, e.g., Banks v. Booth*, 459 F. Supp. 3d 143, 149–50 (D.D.C. 2020) (citing *Sherley*, 644 F.3d at 393). Nonetheless, the movant still bears a burden to show that "all four factors, taken together, weigh in favor of the injunction." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)).

III. JURISDICTION

A. FSIA Exceptions

NextEra asserts that the court has jurisdiction over its petition under both the FSIA arbitration and waiver exceptions. Spain contends that neither applies. Because the court concludes that it has jurisdiction under the arbitration exception, it does not reach whether the waiver exception applies.

The D.C. Circuit has found that "jurisdiction under the arbitration exception requires more than a claim invoking an arbitration award." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). "Rather," and tracking the text of the exception, the court has held that "the existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established." *Id.*; *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022). Spain does not contest the latter two facts. *See* Spain MTD at 6–8 (discussing the Award and denial of

its application for annulment); *id.* at 40 (acknowledging that "Congress implemented the ICSID Convention by enacting 22 U.S.C. § 1605a"). Instead, Spain's central argument is that "as a matter of European Union ("EU") Law . . . [,] no such agreement to arbitrate exists." *Id.* at 1. NextEra concedes that an existing agreement is essential for jurisdiction under the arbitration exception. Cross-MSJ at 18.[1]

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[1] Spain's challenge to the arbitration agreement's existence has implications for the FSIA's waiver exception as well. The D.C. Circuit has "found an implicit waiver of sovereign immunity in only three situations," *Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 10 (D.D.C. 2019) (quoting *Gutch v. Fed. Republic of Germany*, 255 F. App'x 524, 525 (D.C. Cir. 2007)), only one of which is potentially relevant here: where "a foreign state has agreed to arbitration in another country," *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (citation omitted). But in that situation, too, the key jurisdictional fact is whether the foreign state has agreed to arbitration. NextEra disagrees, relying on *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999), which in turn cites *Seetransport Wiking Trader v. Navimpex Centrala,* 989 F.2d 572, 577 (2d Cir. 1993), for the proposition that by joining the Convention, Spain "must have contemplated enforcement actions in other signatory states." *See* Cross-MSJ at 23. But *Creighton* only favorably cited that conclusion (and only with respect to the New York Convention) after noting that the Second Circuit first "found [the] implied waiver where [the] foreign government had agreed . . . to arbitrate." 181 F.3d at 123. In other words, even when a state has assented to the enforcement of arbitral awards in the United States, an agreement to arbitrate is still necessary for implied waiver of immunity. The ICSID Convention establishes an arbitration regime and commits its members to abide by arbitral awards issued under the regime, but the Convention does not constitute an agreement to arbitrate in any particular case. Under Article 25, parties must separately agree to ICSID arbitration. Therefore, a specific arbitration agreement remains a jurisdictional prerequisite under the waiver exception.

As a result, the key issue is whether an agreement to arbitrate existed between Spain and NextEra. Spain concedes—as it must—that the ECT exists, and that its terms facially create such an agreement: "Article 26 of the ECT . . . provides for the resolution of disputes between investors of one contracting party, on the one hand, and another contracting party, on the other, before an ICSID tribunal." Spain MTD at 11. So, in a purely literal sense, there is no dispute about the existence of an agreement to arbitrate.

Whether the ECT's agreement to arbitrate existed as a legal matter is a harder question. Spain asserts that recent decisions of the Court of Justice of the European Union (CJEU)—which interprets and enforces EU law—have clarified that Spain never had the authority to agree to ICSID arbitration via the ECT. In *Slovak Republic v. Achmea B.V.*, Case No. C-284/16 (Mar. 6, 2018), ECF No. 62-47 (*Achmea*), the CJEU addressed the relationship between international arbitration agreements and the Treaty on the Functioning of the European Union, "which sets forth the EU's authority to legislate and key principles of EU law." *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 278 (D.D.C. 2019), *aff'd,* 805 F. App'x 1 (D.C. Cir. 2020). In *Achmea,* the CJEU held that

> Articles 267 and 344 [of the] TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose

> jurisdiction that Member State has undertaken to accept.

Achmea ¶ 60.

In other words, to protect "the autonomy of EU law," *Achmea* invalidated arbitration agreements that would "call upon [an] arbitral tribunal to interpret or apply EU law . . . not subject to review by a court or tribunal within the EU's judicial system." *Micula*, 404 F. Supp. 3d at 279. In *Republic of Moldova v. Komstroy*, Case C-741/19 (Sept. 2, 2021), ECF No. 62-67, the CJEU confirmed that its reasoning in *Achmea* applied specifically to ECT Article 26. Based on *Achmea* and *Komstroy*, Spain contends that "[a]s a matter of EU law, the law to which Spain and Petitioners are both subject, no arbitration agreement exists between Spain and Petitioners because any such agreement would violate core tenets of EU sovereignty as set out in the EU Treaties." Spain MTD at 4–5.

As another court in this district recognized in similar case, "[a]ssuming Spain is correct, the dominoes begin to fall. If there was no agreement to arbitrate, the ICSID tribunal never had jurisdiction, its award is not enforceable, and therefore it is not entitled to full faith and credit in this Court." *InfraRed Env't Infrastructure GP Ltd. v. Kingdom of Spain*, No. CV 20-817 (JDB), 2021 WL 2665406, at *4 (D.D.C. June 29, 2021). "Moreover, absent an agreement to arbitrate, Spain maintains its immunity under the FSIA, leaving this Court without subject-matter jurisdiction to rule on the merits of the complaint." *Id.* For its part, NextEra disputes the legal effects of *Achmea* and *Komstroy* but argues that in any event, those effects go to the merits and validity of the arbitration agreement rather than its existence. Cross-MSJ at 30–38. In NextEra's view, the existence

of the agreement is *res judicata* after the ICSID tribunal's decision, and Spain's resort to EU law is a disguised form of collateral attack on the Award. *Id.* at 24–30.

Only one U.S. court has attempted to grapple with the implications of *Achmea* for its jurisdiction under the FSIA to confirm an ICSID arbitral award. In *Micula v. Government of Romania*, Swedish investors had "initiated arbitration proceedings against Romania before an ICSID tribunal" pursuant to a Romania-Sweden bilateral investment treaty ("BIT"), then sought to confirm that award in this district. 404 F. Supp. 3d at 270, 272–73. Romania argued that the FSIA arbitration exception did not apply "because the arbitration clause in the Sweden-Romania BIT has been declared invalid" by the *Achmea* decision, *id.* at 277—the same argument Spain advances here with respect to the ECT's Article 26.

After "carefully consider[ing] the *Achmea* decision," the court in *Micula* held that Romania "ha[d] failed to carry its burden of showing that *Achmea* forecloses this court's jurisdiction under the FSIA's arbitration exception." *Id.* at 279. Specifically, Romania had "not shown that the concern that animated *Achmea*—the un-reviewability of an arbitral tribunal's determination of EU law by an EU court—[was] present in [that] case." *Id.* The court gave three reasons for that conclusion, all of which related to the fact that "all key events to the parties' dispute occurred *before* Romania acceded to the EU." *Id.* at 280. First, "Romania's challenged actions occurred when it remained . . . subject, at least primarily, to its own domestic law." *Id.* Second, the parties agreed that the "substantive rules" of the "Sweden-Romania BIT," not EU law, "supplied the applicable law" for the claims at issue—the ICSID

tribunal only considered EU law "for factual context, not as a source of controlling law." *Id.* (quotation omitted). And third, a ruling from a CJEU constituent court had expressly distinguished *Achmea* on the grounds that the arbitral tribunal in *Micula* "was not bound to apply EU law to events occurring prior to the accession before it." *Id.* at 280. The court found that that ruling "therefore explicitly refute[d] Romania's position that the CJEU's decision in *Achmea* nullified the arbitration agreement contained in the Sweden Romania BIT." *Id.*

A panel of the D.C. Circuit affirmed Judge Mehta's conclusion in an unpublished, per curiam opinion, noting the "question[ ] whether Romania's agreement to arbitrate was nullified by its ascension to the European Union." *Micula v. Gov't of Romania*, 805 F. App'x 1, 1 (D.C. Cir. 2020). But the panel did not address that question because, "as the district court carefully explained, Romania did not join the EU until after the underlying events here, so the arbitration agreement applied." *Id.*

Even more recently, however, the D.C. Circuit has indicated that there is no need to reach an analysis of EU law and the CJEU's *Achmea* decision in this context. In *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 875 (D.C. Cir. 2021), Energoalliance, a Ukrainian energy provider, had invoked the ECT's arbitration clause to initiate a proceeding against Moldova before the United Nations Commission on International Trade Law (UNCITRAL). After that arbitral tribunal issued an award, Energoalliance sought to confirm it in the United States. Moldova argued before the district court and D.C. Circuit that U.S. courts lacked jurisdiction under the FSIA's arbitration exception because Energoalliance was not

a qualifying investor under the ECT and therefore could not have validly invoked the ECT's arbitration clause. *Id.* at 875, 877–78. Thus, Moldova argued, "[a]lthough the ECT may establish that Moldova agreed to arbitrate certain disputes, it does not prove that it agreed to arbitrate this *particular* dispute." *Id.* at 878. In other words, Moldova argued—as Spain does here—that whether one party could have validly agreed to arbitrate under the ECT implicated the agreement's very existence and was therefore a necessary jurisdictional question under the FSIA.

The D.C. Circuit panel squarely rejected that argument. It characterized Moldova's argument as contesting the arbitrability of the dispute, not the necessary jurisdictional fact of an agreement's existence. *Id.*; *see also id.* at 877 n.3 (observing "no disagreement that Moldova is a party to the ECT, which provides for the arbitration of certain disputes"). And, citing *Chevron Corp. v. Ecuador*, 795 F.3d 200, 205–06 (D.C. Cir. 2015), the Court concluded that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." 985 F.3d at 878. In *Chevron*, Ecuador asserted that it "had never agreed to arbitrate with Chevron" because Chevron's investments had terminated before the relevant treaty came into force. 795 F.3d at 203. But, the Court ruled, that assertion "conflate[d] the jurisdictional standard of the FSIA with the standard for review" of the award's merits based on its arbitrability or lack thereof. 795 F.3d at 205. Likewise, the *Stileks* panel declined to address Moldova's argument that Energoalliance could not have invoked the ECT's arbitration provision

for purposes of resolving the issue of jurisdiction under the FSIA. 985 F.3d at 878.[2]

The lesson of *Stileks* and *Chevron* appears to be this: The assertion that a party lacked a legal basis to enter or invoke an arbitration agreement is not a challenge to the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability. And that assertion goes to arbitrability even if it contends that the ECT was not validly applied. As the Circuit noted in *Stileks*: "*Whether the ECT applies to the dispute* and *whether the tribunal had jurisdiction under the ECT* are different ways of framing the same question" about the merits of an award—namely, whether a dispute was arbitrable. *Id.* at 879. A defendant may accordingly assert the lack of a legal basis for entering an agreement to contest an award's merits (where the law provides for judicial review of an award's merits), but not to rebut a

[2] The *Stileks* Court did consider Moldova's arguments in deciding whether it could assert "a defense to confirmation under the New York Convention." 985 F.3d at 878. But even in that context, the Court declined to "pass[ ] on the merits of that defense" because the ECT bound its parties to arbitration under UNCITRAL's rules, one of which was that UNCITRAL had power to rule on its own jurisdiction. *Id.* Thus, the ECT's parties had delegated the question of arbitrability to the UNCITRAL tribunal, and therefore the "court possesse[d] no power to decide the arbitrability issue." *Id.* at 878–79 (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, —— U.S. ——, 139 S.Ct. 524, 529, 202 L.Ed.2d 480 (2019)). Ultimately, however, there is no need to replicate that analysis here because unlike the New York Convention—and as reiterated *infra* Section III.B.1—the ICSID Convention's Article 54(1) and 22 U.S.C. § 1650a do not provide for judicial review of an ICSID tribunal award's merits, including the question of arbitrability.

plaintiff's evidence that an agreement to arbitrate exists.

At least one other judge in this district has applied *Stileks* in that way. In *Tethyan Copper Co. Party Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262 (D.D.C. 2022), Tethyan, an Australian mining company, sought to confirm an ICSID arbitration award against Pakistan. Under the relevant treaty, a referral to arbitration required written consent. Pakistan argued that it had "never provided such written consent," and therefore had "never agreed to arbitrate at ICSID." *Id.* at 273. In evaluating that purported "dispute[ ] over the existence of an arbitration agreement," *id.*, the court recognized that Tethyan had met its jurisdictional burden to produce "copies of the [underlying treaty], the notice[ ] of arbitration, and the tribunal's decision," *id.* (quoting *Stileks*, 985 F.3d at 877), which together "entitle[d] Tethyan to a presumption of a valid arbitration agreement," *id.* Further, the court expressly rejected Pakistan's argument that "the Court should make its own independent determination on the existence of an agreement," construing that argument as going to arbitrability and citing *Chevron* and *Stileks* for the proposition that an arbitrability dispute "does not affect the Court's jurisdiction." *Id.* at 273–74. Consequently, the court found, "Pakistan's arbitrability argument [was] not cognizable under FSIA" and the arbitration exception applied to grant the court jurisdiction to confirm the arbitral award. *Id.* at 275.

The court reaches the same conclusion here. As noted above, there is no question as to the existence of the "copies of the [underlying treaty], the notice[ ] of arbitration, and the tribunal's decision." *Stileks*, 985 F.3d at 877. Under the *Chevron* burden-shifting

framework, therefore, Spain has the burden of showing that, in fact, no arbitration agreement exists. *See* 795 F.3d at 204. Spain's only argument on that score is that it could not have entered into the ECT's arbitration provisions because EU law—as retroactively clarified by the *Achmea* and *Komstroy* decisions—does not permit EU members to assign questions of EU law to arbitration in non-EU tribunals. Therefore, the ECT did not apply to Spain and NextEra's dispute, and no agreement to arbitrate was ever formed. But the D.C. "Circuit [has] rejected that tactic." *Tethyan*, 590 F. Supp. 3d at 274. *Chevron* and *Stileks* treat the argument that a party lacked a legal basis to enter an agreement as a question of arbitrability and therefore an issue of the award's merits. *See Stileks*, 985 F.3d at 878; *Chevron*, 795 F.3d at 205 n.3. Spain thus cannot deploy that argument here as a backdoor challenge to FSIA jurisdiction.

Because Spain's argument "does not affect the Court's jurisdiction," *Tethyan*, 590 F. Supp. 3d at 274, there is no need at this stage to analyze the effects of *Achmea* and *Komstroy* on EU law and intra-EU disputes. And because Spain does not offer any other arguments or evidence rebutting the existence of an arbitration agreement, it has failed to carry its burden of persuasion that the necessary jurisdictional facts are not present here. As a result, the court finds that it has jurisdiction over Spain under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), and rejects this basis for Spain's motion to dismiss.[3]

[3] Because the court finds jurisdiction under the arbitration exception, it does not reach whether it also has jurisdiction under the waiver exception. *See Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 775 (D.C. Cir. 2022).

B. Forum non conveniens

Spain also urges the court to decline to exercise jurisdiction over NextEra's petition under the doctrine of *forum non conveniens*.

> A federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (cleaned up) (quotation omitted).

Here, Spain's argument is even more clearly foreclosed by *Stileks*. In that decision, the D.C. Circuit plainly stated that "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." 985 F.3d at 876 n.1. Spain's gymnastic but unavailing efforts to circumvent that holding "do not require sustained discussion." *Id.* In short, Spain argues that *Stileks*, along with *TMR Energy Ltd. v. State Prop. Fund of Ukraine,* 411 F.3d 296 (D.C. Cir. 2005), and *Tatneft v. Ukraine*, 21 F.4th 829 (D.C. Cir. 2021), do not control here because in those cases, "the court determined that it had jurisdiction under the FSIA before addressing the *forum non conveniens* motion." Spain MTD at 27. Setting aside the fact that the court has similarly determined its FSIA jurisdiction here, Spain fails to identify any indication in those cases

that they should be read so narrowly. Indeed, the D.C. Circuit's core rationale—that alternative fora are inherently inadequate because they cannot attach U.S. assets—applies regardless of procedural posture. The court therefore rejects Spain's request for dismissal on grounds of *forum non conveniens*, and its motion to dismiss will therefore be denied.[4]

IV. INJUNCTIVE RELIEF

Having found that it has jurisdiction over NextEra's petition and that dismissal is not warranted, the court turns to NextEra's request for injunctive relief. The court is persuaded that this case presents sufficiently unusual circumstances to warrant a preliminary, anti-suit injunction against a foreign sovereign.

A. Anti-Suit Injunction

U.S. federal courts "have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984). "However, . . . [t]he mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction," and "[i]f the foreign court reacts with a similar injunction, no party may be able to obtain any remedy." *Id.* at 927. Thus, "foreign anti-suit injunctions are appropriate only when 'required to prevent an irreparable miscarriage of justice,' such as when 'necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of

[4] Because the court will deny Spain's Motion to Dismiss, it will also deny as moot NextEra's Motion for Leave to File a Surreply with respect to that Motion.

the important public policies of the forum.'" *United States v. All Assets Held at Credit Suisse (Guernsey) Ltd.*, 45 F.4th 426, 434 (D.C. Cir. 2022) (quoting *Laker Airways*, 731 F.2d at 927).

The D.C. Circuit's decision in *Laker Airways* provides direct guidance in this case. In 1982, the liquidated British airline Laker Airways—which operated transatlantic flights between New York and London—brought an antitrust action against several domestic and foreign airlines, seeking to recoup losses caused by alleged predatory pricing and other economic interference. 731 F.2d at 917. Shortly thereafter, the foreign airlines initiated a suit in the United Kingdom's High Court of Justice, seeking "(1) a declaration that the four foreign defendants were not engaged in any unlawful combination or conspiracy, and (2) an injunction prohibiting Laker from taking any action *in United States courts* to redress an alleged violation by the defendants *of United States antitrust laws*," including by forcing Laker Airways to withdraw its antitrust suit. *Id.* at 918. Ultimately, the British courts did order Laker Airways to cease prosecuting at least the British airlines, and were considering a similar order protecting the other foreign airlines as well. *Id.* at 919–20. Laker Airlines sought an anti-suit injunction in this district restraining the other foreign airlines from continuing their efforts to obtain injunctive relief against Laker Airways in British courts. *Id.* at 919–21.

The D.C. Circuit concluded that, in those circumstances, an anti-suit preliminary injunction was warranted.

> Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the

> action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.

Laker Airways, 731 F.2d at 927. "[D]uplication of parties and issues alone is not sufficient" to warrant this remedy, as "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." *Id.* at 927–28. But "where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction" and protect "the court's ability to render a just and final judgment." *Id.* at 930.

That is the case here. For the reasons explained *supra* section III, this action is a "proper[ ] exercise" of the court's jurisdiction." *Id.* And the express and primary purpose of Spain's suit in the Netherlands "is to *terminate* [this] action," *id.*—ordering NextEra to withdraw this suit, imposing penalties upon failure to do so, and issuing a worldwide injunction preventing NextEra from taking any action to confirm the Award, Dutch Writ at 31–33. Like the foreign airlines in *Laker Airways*, Spain did not provide the court with "any prior notice" that it was seeking an anti-suit injunction against NextEra in the Netherlands, apparently planning to simply later advise the court of the "*fait accompli* . . . which would have virtually eliminated the court's effective jurisdiction over [NextEra's] facially

valid claim." 731 F.2d at 930–31. That leaves the court with "the stark choice of either protecting or relinquishing [its] jurisdiction" over NextEra's petition. *Id.* at 930. The court concludes that these "most compelling circumstances" require an anti-suit injunction. *Id.* at 927.[5]

Spain offers only two direct counterarguments, but both fail for reasons the court has already explained. First, Spain argues that because the court lacks jurisdiction, there is no jurisdiction here to protect. Opposition to Motion for Preliminary Injunction and Temporary Restraining Order at 10–12, ECF No. 81 ("Opp. to PI/TRO Motion"). But the court has rejected Spain's premise and found jurisdiction, so Spain's argument likewise fails. *Supra* section III.A. Second, Spain attempts to distinguish *Laker Airways* by noting that one of the D.C. Circuit's concerns in that case was that the relief plaintiffs sought—"the remedies afforded by the American antitrust laws"—were not available in foreign courts. *Id.* at 12 (citing 731 F.2d at 930). But this case does not present even that partial distinction; here, too, foreign courts are inadequate alternatives because, as the court noted *supra* section III.B, "only U.S. courts can attach foreign commercial assets found within the United States." *Stileks,* 985 F.3d at 876 n.1; *see also Laker Airways*, 731 F.2d at 936 (observing that arguments like Spain's are better suited to *forum non conveniens* cases where there is an adequate alternative forum).

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[5] Because the court's need to protect its own jurisdiction is sufficient to justify an anti-suit injunction here, the court need not reach the other "category" of compelling circumstances described by *Laker Airways*: "prevent[ing] the litigant's evasion of the important public policies of the forum." 731 F.2d at 927; *see* PI/TRO Motion at 16–18; Opp. to PI/TRO Motion at 13–16.

Considerations of comity, while deserving substantial respect, do not outweigh the need for an anti-suit injunction in this case. Like the defendants in *Laker Airways*, Spain "argue[s] strenuously" that "the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations" preclude an injunction here. 731 F.2d at 937; *see* Opp. to PI/TRO Motion at 17–20. And like the Circuit in *Laker Airways,* the court "approach[es] [Spain's] claims seriously," recognizing that "when possible, the decision of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability." 731 F.2d at 937. "However, there are limitations to the application of comity." *Id.* For one,

> United States courts must control the access to their forums. No foreign court can supersede the right and obligation of the United States courts to decide whether Congress has created a remedy for those injured by trade practices adversely affecting United States interests. Our courts are not required to stand by while [a foreign sovereign] attempts to close a courthouse door that Congress, under its territorial jurisdiction, has opened.

Id. at 935–36. In short, "[n]o nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Id.* at 937.

Under these principles, the relief Spain seeks in Amsterdam is not entitled to comity. "This is because the [Dutch Action] is specifically intended to interfere with and terminate" NextEra's petition before this court. *Id.* In *Laker Airways*, the Circuit approved of

the preliminary injunction because it was "purely *defensive*—it [sought] only to preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law"—and was granted in response to a foreign injunction that was "purely *offensive*—it [was] not designed to protect English jurisdiction, or allow English courts to proceed to a judgment on the defendant's potential liability." *Id.* at 938. The same is true here. NextEra seeks an injunction to protect this court's jurisdiction, while Spain seeks an injunction to eliminate it.

The upshot of Spain's argument, then, is the same one made by the defendant airlines and rejected by the D.C. Circuit in *Laker Airways*—"that comity compels us to recognize a decision by a *foreign* government that *this court* shall not apply its own laws." *Id.* at 939. But in the Dutch Action, Spain is zealously pursuing the very same kind of anti-suit injunction that it now asks this court to refrain from issuing. Consequently, Spain's "claims of comity now asserted in United States courts come burdened with the failure of [Spain] to recognize comity." *Id.* The *Laker Airways* court refused to countenance that hypocrisy, and neither will this court. In that case, the Circuit observed that "[t]here never would have been any situation in which comity or forbearance would have become an issue if some of the defendants involved in the American suit had not gone into the English courts to generate interference with the American courts." So too here. The court would not be considering this relief were Spain not actively seeking to frustrate the operation of U.S. law. The comity concerns that Spain laments are of its own making.

An anti-suit injunction is strong medicine. But here it is required—and will be tailored—to meet the force

of Spain's attempt to deprive this court of jurisdiction. Spain remains free, for example, to seek a declaration from Dutch courts vindicating its interpretation of EU law. *See* Dutch Writ at 32, Claim (I). But Spain may not seek to foreclose NextEra's opportunity to petition this court for the relief afforded by United States law.

B. Preliminary Injunction

Having determined that an anti-suit injunction may be appropriate in this case, the court now considers whether such relief against Spain is warranted in the form of a preliminary injunction. *See In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 98 (2d Cir. 2006) ("Once the . . . court has addressed the propriety of imposing an anti-suit injunction . . . , [the] court must then make findings on whether it is appropriate to enter a *preliminary* injunction."). All four relevant factors favor granting NextEra's motion.

1. Likelihood of success on the merits

The analysis required for confirming the Award is relatively straightforward, and NextEra's success in confirming it is highly likely. By statute, an ICSID Convention award like this one

> create[s] a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.

28 U.S.C. § 1650a(a). Moreover, the Federal Arbitration Act—and its accompanying, "more robust form of judicial review," *Tethyan*, 590 F. Supp. 3d at 268—"shall not apply to enforcement of awards rendered" under the ICSID Convention, 28 U.S.C. § 1650a(a).

"[T]he Court's role in enforcing an ICSID arbitral award is therefore exceptionally limited." *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019); *see also Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. CV 17-1457 (TJK), 2018 WL 6605633, at *6 (D.D.C. Dec. 17, 2018) (noting "the perfunctory role that 22 U.S.C. § 1650a appears to envision for federal district courts"). "The Court must ensure that it has subject-matter and personal jurisdiction; that the award is authentic; and that its enforcement order tracks the award." *Tethyan*, 590 F. Supp. 3d at 268 (citing *TECO Guatemala*, 414 F. Supp. 3d at 101; *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017)).

All those elements are present here. For the reasons explained *infra* Section III.A, the court finds that it has jurisdiction. And neither party raises any reason to believe that the Award in this case is not authentic, or that the court's enforcement order will not be able to successfully track the Award's terms. That ends the court's inquiry; the Award must be enforced.

In challenging that conclusion, Spain asks the court to look beyond the scope of 22 U.S.C. § 1650a(a) in several respects. First, reiterating its assertion that no valid arbitration agreement existed, Spain argues that NextEra's Award is not entitled to full faith and credit because the ICSID tribunal lacked jurisdiction over the underlying dispute. Spain MTD at 41–42. But under the ICSID Convention, "[m]ember states' courts are . . . not permitted to examine . . . the ICSID tribunal's jurisdiction to render the award." *Mobil Cerro*, 863 F.3d at 102. In any event, "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry

discloses that those questions have been fully and fairly litigated and finally decided" by the original court. *Durfee v. Duke*, 375 U.S. 106, 111, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *see Tethyan*, 590 F. Supp. 3d at 276. After hearing the same arguments Spain raises here, the ICSID tribunal determined that it had jurisdiction over the dispute. Liability Decision ¶¶ 272–357. Consequently, that determination, as well as the Award itself, is due full faith and credit.

Second, Spain argues that the ICSID tribunal violated EU law's prohibition on granting "state aid"—that is, subsidies to private actors—without authorization from the European Commission. *Id.* at 42–44. Insofar as Spain argues that the ICSID tribunal exceeded its own jurisdiction, that argument is foreclosed for the reasons explained in the previous paragraph. And to the extent that Spain argues that the Award itself violates EU law, that contention "goes to the merits of the ICSID panel's determination" and must be taken up with the ICSID tribunal itself. *Micula*, 404 F. Supp. 3d at 285. The ICSID Convention's Article 53 provides that an "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Nothing in § 1650a permits the court to consider this issue.

Third, Spain suggests that "the [A]ward was illegally procured by Petitioners' false representations," along with other "defenses as to the merits" of the Award that it plans to unveil in future filings. Spain MTD at 48 n.12. But as already noted, merits defenses do not factor into the court's role in enforcing

ICSID Convention awards. As the court persuasively explained in *TECO Guatemala*, under full faith and credit principles, "the relevant question is whether the ICSID Convention would permit the Court to decline to enforce the award at issue here." 414 F. Supp. 3d at 103. "It would not." *Id.* Again, the Convention's Article 53 does not contemplate member states' courts setting aside awards based on fraud or any other merits defenses. *See id.* The allegation that NextEra "engaged in fraud . . . is merely an effort to relitigate the arbitration's underlying merits masquerading as an appeal to equity" and "is at odds with the purpose of the treaty and the clear terms of the implementing legislation, both of which are designed to create a streamlined process for enforcing arbitral awards." *Id.* Neither Spain's current challenges to the merits of the Award, nor any potential future merits challenges, have any bearing on the court's duty to enforce the Award. *See also infra* Section V (discussing Spain's Motion to Strike).

Finally, Spain appeals to the "foreign sovereign compulsion" and "act of state" doctrines. Spain MTD at 43–47. Neither is applicable here. The foreign sovereign compulsion doctrine is a defense that some Circuits permit antitrust defendants to assert to shield their anticompetitive acts from liability on the grounds that those acts were compelled by a foreign government. *See Construction and Application of Foreign Sovereign Compulsion Doctrine*, 86 A.L.R. 2d 1 (2014); *see, e.g., In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136 (2d Cir. 2021). The D.C. Circuit has not adopted the doctrine. More importantly, this is not an antitrust case, and therefore the doctrine is inapplicable; the court is unaware of any authority extending this doctrine outside of the antitrust context. Spain's allusions to comity principles, *see, e.g.*,

Spain MTD at 45, do not persuade the court to do so here. *See also supra* section IV.A (discussing the role of comity in this case).

The related act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Min., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). But "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 406, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). As noted above, under § 1650a(a), the court only needs to decide three questions: (1) whether "it has subject-matter and personal jurisdiction," (2) whether "the award is authentic," and (3) whether "its enforcement order tracks the award." *Tethyan*, 590 F. Supp. 3d at 268; *TECO Guatemala*, 414 F. Supp. 3d at 101; *Mobil Cerro*, 863 F.3d at 112. Whether a foreign act was lawful is not part of this calculus. As the D.C. Circuit recognized in *Micula*, petitioners to confirm an ICSID arbitral award "have not challenged the acts or decisions of a foreign sovereign," but instead "have merely sought to enforce a decision rendered by a forum for international arbitration to which [the foreign sovereign] has voluntarily submitted itself." 2022 WL 2281645, at *2.

Still, Spain contends that confirmation of the Award here would "effectively declare invalid *Achmea*, the Joint Declaration, and the European Commission's official position." Spain MTD at 46. The Supreme

Court has rejected that perspective in language that readily applies here: "Regardless of what the court's factual findings may suggest as to the legality" of those foreign acts, their validity "is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires." *Kirkpatrick*, 493 U.S. at 406, 110 S.Ct. 701. The act of state doctrine therefore finds no purchase here.

In sum, none of Spain's protests alter the conclusion that, pursuant to 28 U.S.C. § 1650a(a)'s unambiguous directive, the court should afford the Award full faith and credit and enter judgment enforcing it. The court thus concludes that NextEra has a strong likelihood of succeeding on the merits of its petition.

2. Irreparable harm

The risk of irreparable harm to NextEra is clear. If Spain receives the relief it seeks in the Dutch action, NextEra will be permanently enjoined from enforcing the Award, both in this court and around the world. *See* Dutch Writ at 31–33. That is precisely the kind of irreparable harm identified by the district court, and affirmed by the D.C. Circuit, in *Laker Airways*:

> [I]f this Court should fail to issue an injunction and thus allow those defendants which are still before this Court to join with their alleged coconspirators before the Queen's Bench Division, the British court may very well (1) enjoin Laker from pursuing its remedies against any of the defendants in this Court, and (2) enter a judgment on the merits that the defendants here (plaintiffs there) are not liable to Laker for the acts averred in the complaints. The Court finds that, for these

> reasons, plaintiff would be irreparably injured if the Court does not issue an injunction.

Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1137–38 (D.D.C. 1983) (footnotes omitted); *see Laker Airways*, 731 F.2d at 956.

Spain's counterarguments are unpersuasive. First, it claims that "Petitioners . . . will not be prevented from prosecuting this Action permanently unless, of course, the Dutch Action finds that under EU law there was no agreement to arbitrate between the parties." Opp. to PI/TRO Motion at 21. "Second, Petitioners do not face any risk collecting the ICSID award, should they ultimately prevail." *Id.* at 22. In other words: NextEra will not be irreparably harmed unless Spain gets the very relief it is actively seeking from the Dutch court. That is precisely why it is necessary for this court to enjoin Spain from pursuing that relief. It is immaterial that the Dutch court has not yet ruled one way or another. "[G]iven the fact that, once the [Dutch] court issues an injunction of the type sought before it, it may very well be too late for [NextEra] ever to find its way back to the American judicial system," anything "less than absolute certainty concerning the [Dutch] court's intentions suffices to support a finding of irreparable injury." *Laker Airways*, 559 F. Supp. at 1137 n.58.

3. Balance of equities

The balance of equities strongly favors NextEra, which faces irreparable harm, while Spain faces only a temporary hold on its ability to pursue certain relief in the Dutch Action—relief that would usurp this court's jurisdiction. The injunction NextEra requests would still permit Spain to litigate the merits of its claims in the Dutch Action. That tailored injunction

will serve both principles of comity and equity by allowing each country's court to evaluate the legal issues presented under its respective laws. *See Laker Airways*, 731 F.2d at 937; *Teck Metals Ltd. v. Certain Underwriters at Lloyd's, London*, No. CV-05-411-LRS, 2009 WL 4716037, at *3–4 (E.D. Wash. Dec. 8, 2009).

Spain's sole response is to label the injunction's tailoring a "minor concession" and insist, without any support, that a preliminary injunction will deal "substantial harm to Spanish and American interests." Opp. to PI/TRO Motion at 23. Without more, the court cannot agree.

4. Public interest

Finally, the public interest supports an injunction here, too. As the court explained *supra* section IV.A, it is essential to the continued function of the U.S. courts that they protect their lawful jurisdiction. Moreover, Spain does not dispute that there is a public interest in "encouraging arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *Jolen, Inc. v. Kundan Rice Mills, Ltd.*, No. 19-CV-1296 (PKC), 2019 WL 1559173, at *4 (S.D.N.Y. Apr. 9, 2019); *see* Opp. to PI/TRO Motion at 23. Indeed, "the text of § 1650a 'suggest[s] an expectation' on the part of Congress 'that actions to enforce ICSID awards would not be protracted,'" *Micula*, 404 F. Supp. 3d at 283 (quoting *Mobil Cerro*, 863 F.3d at 121), much less permanently halted by collateral attacks in foreign courts.

Spain's contention that "[a]fter the Dutch Action is concluded, this Court would have the benefit of ruling on NextEra's petition with the benefit of the outcome of [that case]" rings totally hollow. Opp. to PI/TRO Motion at 23. If Spain prevails in the Dutch Action,

this court would not "have the benefit of ruling on NextEra's petition" at all, as NextEra would be forced to withdraw its suit. The court is thus not moved by Spain's assurances, which verge on disingenuous.

V. REMAINING MOTIONS

Two motions remain for the court to address—NextEra's Cross-Motion for Summary Judgment, ECF No. 70, and Spain's Motion to Strike it, ECF No. 71.

The court will deny Spain's Motion to Strike and allow NextEra's Motion for Summary Judgment to remain on the docket. Spain relies principally on *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 579 (D.C. Cir. 2020), which held that a district court may not, "in considering a petition to confirm [a New York Convention] arbitral award against a foreign sovereign . . . order the sovereign to brief the merits before resolving a colorable assertion of immunity." Besides the fact that the court has now resolved Spain's assertion of immunity, *supra* Section III, Spain's reliance on that case is misplaced for at least two reasons.

First, as explained *supra* Section IV.B.1—and unlike the New York Convention—the ICSID Convention requires no merits analysis; authentic awards simply "shall be enforced." 22 U.S.C. § 1650a(a); *see TECO Guatemala*, 414 F. Supp. 3d at 103; *Tidewater*, 2018 WL 6605633, at *6 (Section 1650a "envision[s] no role for this Court beyond ensuring its own jurisdiction over this action."). Thus, "[a]fter the complaint is filed and service effected, the award-creditor may file a motion for judgment on the pleadings . . . or a motion for summary judgment." *Mobil Cerro*, 863 F.3d at 118. An "ICSID award-debtor . . . [is not] permitted to make substantive challenges to the award." *Id.*

Consequently, there are not and will not be any merits to brief.

Second, Spain has nonetheless chosen to assert at least some merits as well as jurisdictional defenses in its Motion to Dismiss. "A foreign sovereign remains free to oppose a confirmation petition" by choosing "to brief immunity and merits issues in a single motion to dismiss," but by doing so it "may forgo its entitlement to a threshold determination of immunity." *Nigeria*, 962 F.3d at 586. Spain's Motion proffers several reasons why the Award should not be given full faith and credit even if the ICSID "Tribunal was properly constituted pursuant to a valid arbitration agreement"—i.e., assuming this court has jurisdiction under the FSIA's arbitration exception. Spain MTD at 42; *see also supra* Section IV.B.1 (rejecting these reasons). For one, Spain argues that the Award would violate EU law regarding "state aid." *Id.* at 42–44, 45. But "[t]he contention that some portion of the Award violates EU law [on state aid] goes to the merits of the ICSID panel's determination." *Micula*, 404 F. Supp. 3d at 285. For another, Spain invokes the act of state doctrine as a shield from liability. But that, too, is "a substantive rather than a jurisdictional defense . . . more appropriately raised in a motion for summary judgment than in a motion to dismiss." *See United States v. Sum of $70,990,605*, 4 F. Supp. 3d 189, 204 (D.D.C. 2014). Having made both "jurisdictional and non-jurisdictional, merits defense[s]" in its Motion to Dismiss, Spain cannot now claim the court is "order[ing] [it] to brief the merits before resolving a colorable assertion of immunity" by allowing NextEra's Cross-Motion to remain on the docket. *Hulley Enters. Ltd. v. Russian Fed'n*, No. CV 14-1996 (BAH), 2022 WL 1102200, at *1 n.1 (D.D.C. Apr. 13, 2022).

Nonetheless, the court will not rule on NextEra's Motion for Summary Judgment at this time. This will give Spain a chance to appeal the court's rulings on the other motions, including the court's jurisdictional holdings. And if the suit reaches the summary judgment stage, this will give Spain "an opportunity to supplement [its] submissions," *id.*, with the merits arguments Spain promises, including that "that the award was illegally procured by Petitioners false representations," Spain MTD at 48 n.12.

VI. CONCLUSION

For these reasons, the court will DENY Spain's Motion to Dismiss, ECF No. 62; DENY Spain's Motion to Strike, ECF No. 71; DENY NextEra's Motion for Leave to File, ECF No. 75; and GRANT in part NextEra's Motion for Preliminary Injunction and Temporary Restraining Order, ECF No. 78. Accordingly, the court will ENJOIN Spain:

(1) from seeking an interlocutory decree or any other relief in the Dutch Action or in other Dutch proceedings requiring NextEra to suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of NextEra's Petition to Confirm the Award;

(2) from pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of NextEra's Petition to Confirm the Award; and

(3) to withdraw its requests for relief in the Dutch Action requiring NextEra to suspend, hold in abeyance or withdraw proceedings before this Court, including without limita-

tion, at pages 31–33 of the Dutch Writ, Claims (A) through (D) and (L) through (P).

A corresponding order will accompany this Memorandum Opinion.

APPENDIX C

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civil Action No. 19-cv-01871 (TSC)

9REN HOLDING S.À.R.L.,

Plaintiff,

v.

KINGDOM OF SPAIN,

Defendant.

Signed February 15, 2023

MEMORANDUM OPINION

TANYA S. CHUTKAN, United States District Judge

Luxembourg-incorporated company 9REN Holding S.À.R.L. ("9REN") has brought this action to confirm an international arbitral award it received against the Kingdom of Spain (the "Award"). Complaint, ECF No. 1 ("Compl."). 9REN has moved for a preliminary injunction enjoining Spain from pursuing litigation in Luxembourg that would prevent 9REN from seeking to confirm the Award here. ECF No. 46 ("PI Motion"). For the reasons that follow, the court will GRANT the Motion for Preliminary Injunction.[1]

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[1] This opinion largely reflects the court's reasoning for granting a similar preliminary injunction in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, Case 1:19-cv-01618-TSC, ECF Nos. 84, 85 (February 15, 2023).

I. BACKGROUND

A. Laws and Treaties

This case concerns both international treaties and domestic laws and raises complex issues regarding their effects on the court's jurisdiction to enforce the Award.

Along with many other nations, the United States, Luxembourg, and Spain are all parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The ICSID Convention establishes an arbitration regime for resolving disputes related to international investments between the treaty's members, or "Contracting States." The Convention's Article 54(1) provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Congress has confirmed that commitment by statute: "The pecuniary obligations imposed by [an ICSID Convention] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a.

In addition, Spain and Luxembourg are contracting parties to the Energy Charter Treaty (ECT), a multinational agreement designed to create "a legal framework in order to promote long-term cooperation in the energy field" through "complementarities and mutual benefits." ECT art. 2. For example, the ECT entitles investors from one contracting party to receive "fair and equitable treatment" from the other contracting

parties. *Id.* art. 10(1). Should a dispute arise, the ECT provides that each contracting party "gives its unconditional consent to the submission of [that] dispute to international arbitration"—and if a consenting investor seeks arbitration, the arbitration can be carried out under the ICSID Convention. *Id.* art. 26(3)–(5).

Finally, the Foreign Sovereign Immunities Act (FSIA) provides that foreign states are immune from the jurisdiction of U.S. courts unless they fall within certain exceptions. Under the "waiver" exception, for example, U.S. courts have jurisdiction "in any case . . . in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). And under the "arbitration" exception, U.S. courts have jurisdiction in any case "in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6).

B. Facts and Procedural History

9REN is a corporation organized under the laws of Luxembourg. Compl. ¶ 2. After Spain enacted legislation to encourage investment in solar power projects in its territory in 2007, 9REN invested approximately 211 million euros across seven such projects. *Id.* ¶¶ 10–11. But 9REN alleges that between 2010 and 2014, Spain "passed measures to roll back the benefits provided" under its earlier legislation, "frustrat[ing] 9REN's legitimate expectation" in those benefits. *Id.* ¶ 12. Because Luxembourg and Spain are both contracting parties to the ECT, 9REN sought to redress its

grievances by requesting arbitration under the ICSID Convention in 2014. *Id.* ¶¶ 13, 17–21.

In 2016, a three-member ICSID arbitral tribunal convened to address 9REN's request, and the tribunal held a hearing on all issues during December of 2017. *Id.* ¶¶ 22, 24. In May 2019, the ICSID tribunal issued a decision for 9REN. *Id.* ¶ 25; *see* Award, ICSID Case No. ARB/15/15, ECF No. 1-1 ("Award"). The tribunal awarded 9REN nearly 42 million euros, plus interest and fees. Compl. ¶ 30; *see* Award ¶¶ 417, 429, 433, 445–49.

9REN asked this court to confirm the ICSID's Award against Spain in June 2019. Compl. ¶ 31. Several months later, Spain moved to dismiss 9REN's Complaint or alternatively stay this case while it applied for an annulment of the Award with an ICSID Annulment Committee. ECF No. 11 ("Spain MTD"). 9REN opposed and cross-moved for judgment on the pleadings. ECF Nos. 13, 14. In 2014, the court stayed the case and denied both motions without prejudice, contemplating that they could be renewed once the stay was lifted. ECF No. 21. In December 2022, the court lifted that stay upon receiving notice that the Annulment Committee had dismissed Spain's application, and ordered the parties to propose a briefing schedule for dispositive motions. December 7, 2022 Minute Order.

Before the briefing schedule's due date, on December 22, 2022, Spain initiated a legal action in Luxembourg (the "Luxembourg Action"), seeking an order requiring 9REN to either "cease . . . any enforcement of the [Award]" or be subject to a penalty of 100,000 EUR per day until "the cessation by [9REN] of all actions or judicial or administrative proceedings which violate the terms of this ruling." *See* PI Motion at 1; *id.*,

Decl. of Thomas C.C. Childs, Exhibit 1, at 21, ECF No. 46-3 ("Luxembourg Complaint").

In response, 9REN now seeks injunctive relief of its own, asking this court to issue a preliminary injunction preventing Spain from pursuing the Luxembourg Action insofar as it would affect 9REN's suit here. Specifically, 9REN seeks an injunction

> (1) enjoining Spain from (a) seeking any relief in the Luxembourg Action or in other Luxembourg proceedings requiring Petitioner to cease, suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of Petitioner's Petition to Confirm the Award, and (b) pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of Petitioner's Petition to Confirm the Award; and (2) directing Spain to withdraw its request for relief in the Luxembourg Action requiring Petitioner to "cease . . . any enforcement" of the Award insofar as it relates to the proceedings before this Court.

PI Motion, Proposed Order at 2, ECF No. 46-4.[2]

II. LEGAL STANDARD

A. FSIA Jurisdiction

"Before evaluating the availability of preliminary relief, the Court must first determine that it

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[2] In a Joint Status Report on January 26, 2023, 9REN also appeared to request that the court enter a temporary restraining order with the same effects as its proposed preliminary injunction. ECF No. 50. But under Local Civil Rule 65.1(a), "[a]n application for a temporary restraining order shall be made in a motion separate from the complaint." And in any event, that request will be mooted by the court's order granting a preliminary injunction.

may properly exercise jurisdiction over the action." *Rosenkrantz v. Inter-Am. Dev. Bank*, No. CV 20-3670 (BAH), 2021 WL 1254367, at *7 (D.D.C. Apr. 5, 2021) (quotation omitted), *aff'd*, 35 F.4th 854 (D.C. Cir. 2022); *see also Aamer v. Obama*, 742 F.3d 1023, 1028, 1038 (D.C. Cir. 2014) ("We begin, as we must, with the question of subject-matter jurisdiction," then "turn to the question of whether petitioners have established their entitlement to injunctive relief."). Spain argues that it is immune from jurisdiction under the FSIA, which provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Id.* at 356.

When a defendant challenges the factual basis for jurisdiction under an FSIA exception, the D.C. Circuit applies a burden-shifting analysis. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). The plaintiff "bears the initial burden of supporting its claim that the FSIA exception applies." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015) (citing *Chabad*, 528 F.3d at 940). "[T]his is only a burden of production"—producing evidence of the required jurisdictional facts. *Id.* (same). If Plaintiff meets its burden, then the "burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* (same).

B. Motion for Preliminary Injunction

A preliminary injunction is an "extraordinary and drastic" remedy that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). A movant must demonstrate (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent injunctive relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because "a preliminary injunction is an extraordinary and drastic remedy," the court should not grant one "unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal citation omitted) (emphasis in original).

Courts in this Circuit have typically applied a "sliding-scale" approach in analyzing these four factors; a particularly strong showing in one factor could outweigh weakness in another. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). It is unclear if this approach has survived the Supreme Court's decision in *Winter*, however. *See, e.g.*, *Banks v. Booth*, 459 F. Supp. 3d 143, 149–50 (D.D.C. 2020) (citing *Sherley*, 644 F.3d at 393). Nonetheless, the movant still bears a burden to show that "all four factors, taken together, weigh in favor of the injunction." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)).

III. JURISDICTION

The court concludes that it has jurisdiction under the FSIA's arbitration exception.

The D.C. Circuit has found that "jurisdiction under the arbitration exception requires more than a claim

invoking an arbitration award." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). "Rather," and tracking the text of the exception, the court has held that "the existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established." *Id.*; *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022). Spain does not contest the latter two facts.[3] *See* Spain MTD at 16–17 (discussing the Award and its application for annulment); *id.* at 2 (acknowledging that "Congress passed legislation implementing the ICSID Convention" by enacting 22 U.S.C. § 1650a(a)). Instead, Spain's central argument is that "9REN does not have a valid arbitration agreement with Spain." *Id.* at 20. 9REN does not dispute that an existing agreement is essential for jurisdiction under the arbitration exception.

As a result, the key issue is whether an agreement to arbitrate existed between Spain and 9REN. Spain concedes—as it must—that the ECT exists, and that its terms facially create such an agreement: Article 26 "provides for resolution of disputes between investors of a contracting party and another contracting party through arbitration under various arbitral rules, including those set forth in the ICSID Convention." Spain MTD at 10. So, in a purely literal sense, there is

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[3] As noted *supra* Section I.B., Spain's original Motion to Dismiss was denied without prejudice. But Spain's Opposition to 9REN's Motion for Preliminary Injunction refers to its original motion's arguments asserting sovereign immunity. *See* Opposition to Motion for Preliminary Injunction at 12-14, ECF No. 55 at 12–14 ("Opp. to PI Motion"). Because the court must determine whether it has jurisdiction before considering preliminary relief, *see supra* Section II.A., it will consider those jurisdictional arguments here.

no dispute about the existence of an agreement to arbitrate.

Whether the ECT's agreement to arbitrate existed as a legal matter is a harder question. Spain asserts that recent decisions of the Court of Justice of the European Union (CJEU)—which interprets and enforces EU law—have clarified that Spain never had the authority to agree to ICSID arbitration via the ECT. In *Slovak Republic v. Achmea B.V.*, Case No. C-284/16 (Mar. 6, 2018), ECF No. 62-47 (*Achmea*), the CJEU addressed the relationship between international arbitration agreements and the Treaty on the Functioning of the European Union, "which sets forth the EU's authority to legislate and key principles of EU law." *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 278 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020). In *Achmea*, the CJEU held that

> Articles 267 and 344 [of the] TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Achmea ¶ 60.

In other words, to protect "the autonomy of EU law," *Achmea* invalidated arbitration agreements that would "call upon [an] arbitral tribunal to interpret or apply EU law . . . not subject to review by a court or tribunal within the EU's judicial system." *Micula*, 404 F. Supp. 3d at 279. In *Republic of Moldova v. Komstroy*,

Case C-741/19 (Sept. 2, 2021), ECF No. 62-67, the CJEU confirmed that its reasoning in *Achmea* applied specifically to ECT Article 26. Based on *Achmea* and *Komstroy*, Spain contends that "as a matter of EU law, no valid arbitration agreement existed between Spain and 9REN" because any such agreement would violate core tenets of EU sovereignty as set out in the EU Treaties. Spain MTD at 26; *see id.* at 24–26.

As another court in this district recognized in similar case, "[a]ssuming Spain is correct, the dominoes begin to fall. If there was no agreement to arbitrate, the ICSID tribunal never had jurisdiction, its award is not enforceable, and therefore it is not entitled to full faith and credit in this Court." *InfraRed Env't Infrastructure GP Ltd. v. Kingdom of Spain*, No. CV 20-817 (JDB), 2021 WL 2665406, at *4 (D.D.C. June 29, 2021). "Moreover, absent an agreement to arbitrate, Spain maintains its immunity under the FSIA, leaving this Court without subject-matter jurisdiction to rule on the merits of the complaint." *Id.*

Only one U.S. court has attempted to grapple with the implications of *Achmea* for its jurisdiction under the FSIA to confirm an ICSID arbitral award. In *Micula v. Government of Romania*, Swedish investors had "initiated arbitration proceedings against Romania before an ICSID tribunal" pursuant to a Romania-Sweden bilateral investment treaty ("BIT"), then sought to confirm that award in this district. 404 F. Supp. 3d at 270, 272–73. Romania argued that the FSIA arbitration exception did not apply "because the arbitration clause in the Sweden-Romania BIT has been declared invalid" by the *Achmea* decision, *id.* at 277—the same argument Spain advances here with respect to the ECT's Article 26.

After "carefully consider[ing] the *Achmea* decision," the court in *Micula* held that Romania "ha[d] failed to carry its burden of showing that *Achmea* forecloses this court's jurisdiction under the FSIA's arbitration exception." *Id.* at 279. Specifically, Romania had "not shown that the concern that animated *Achmea*—the un-reviewability of an arbitral tribunal's determination of EU law by an EU court—[was] present in [that] case." *Id.* The court gave three reasons for that conclusion, all of which related to the fact that "all key events to the parties' dispute occurred *before* Romania acceded to the EU." *Id.* at 280. First, "Romania's challenged actions occurred when it remained . . . subject, at least primarily, to its own domestic law." *Id.* Second, the parties agreed that the "substantive rules" of the "Sweden-Romania BIT," not EU law, "supplied the applicable law" for the claims at issue—the ICSID tribunal only considered EU law "for factual context, not as a source of controlling law." *Id.* (quotation omitted). And third, a ruling from a CJEU constituent court had expressly distinguished *Achmea* on the grounds that the arbitral tribunal in *Micula* "was not bound to apply EU law to events occurring prior to the accession before it." *Id.* at 280. The court found that that ruling "therefore explicitly refute[d] Romania's position that the CJEU's decision in *Achmea* nullified the arbitration agreement contained in the Sweden Romania BIT." *Id.*

A panel of the D.C. Circuit affirmed Judge Mehta's conclusion in an unpublished, per curiam opinion, noting the "question[ ] whether Romania's agreement to arbitrate was nullified by its ascension to the European Union." *Micula v. Gov't of Romania*, 805 F. App'x 1, 1 (D.C. Cir. 2020). But the panel did not address that question because, "as the district court carefully explained, Romania did not join the EU until

after the underlying events here, so the arbitration agreement applied." *Id.*

Even more recently, however, the D.C. Circuit has indicated that there is no need to reach an analysis of EU law and the CJEU's *Achmea* decision in this context. In *LLC SPS Stileks v. Republic of Moldova*, 985 F.3d 871, 875 (D.C. Cir. 2021), Energoalliance, a Ukrainian energy provider, had invoked the ECT's arbitration clause to initiate a proceeding against Moldova before the United Nations Commission on International Trade Law (UNCITRAL). After that arbitral tribunal issued an award, Energoalliance sought to confirm it in the United States. Moldova argued before the district court and D.C. Circuit that U.S. courts lacked jurisdiction under the FSIA's arbitration exception because Energoalliance was not a qualifying investor under the ECT and therefore could not have validly invoked the ECT's arbitration clause. *Id.* at 875, 877–78. Thus, Moldova argued, "[a]lthough the ECT may establish that Moldova agreed to arbitrate certain disputes, it does not prove that it agreed to arbitrate this *particular* dispute." *Id.* at 878. In other words, Moldova argued—as Spain does here—that whether one party could have validly agreed to arbitrate under the ECT implicated the agreement's very existence and was therefore a necessary jurisdictional question under the FSIA.

The D.C. Circuit panel squarely rejected that argument. It characterized Moldova's argument as contesting the arbitrability of the dispute, not the necessary jurisdictional fact of an agreement's existence. *Id.*; *see also id.* at 877 n.3 (observing "no disagreement that Moldova is a party to the ECT, which provides for the arbitration of certain disputes"). And, citing *Chevron Corp. v. Ecuador*, 795 F.3d 200, 205–06 (D.C. Cir. 2015),

the Court concluded that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." 985 F.3d at 878. In *Chevron*, Ecuador asserted that it "had never agreed to arbitrate with Chevron" because Chevron's investments had terminated before the relevant treaty came into force. 795 F.3d at 203. But, the Court ruled, that assertion "conflate[d] the jurisdictional standard of the FSIA with the standard for review" of the award's merits based on its arbitrability or lack thereof. 795 F.3d at 205. Likewise, the *Stileks* panel declined to address Moldova's argument that Energoalliance could not have invoked the ECT's arbitration provision for purposes of resolving the issue of jurisdiction under the FSIA. 985 F.3d at 878.[4]

The lesson of *Stileks* and *Chevron* appears to be this: The assertion that a party lacked a legal basis to enter or invoke an arbitration agreement is not a challenge to the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability. And that assertion goes to arbitrability even if it contends that the ECT was not validly applied. As

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[4] The *Stileks* Court did consider Moldova's arguments in deciding whether it could assert "a defense to confirmation under the New York Convention." 985 F.3d at 878. But even in that context, the Court declined to "pass[ ] on the merits of that defense" because the ECT bound its parties to arbitration under UNCITRAL's rules, one of which was that UNCITRAL had power to rule on its own jurisdiction. *Id.* Thus, the ECT's parties had delegated the question of arbitrability to the UNCITRAL tribunal, and therefore the "court possesse[d] no power to decide the arbitrability issue." *Id.* at 878–79 (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 529 (2019)). Ultimately, however, there is no need to replicate that analysis here because unlike the New York Convention—and as reiterated *infra* Section III.B.1—the ICSID Convention's Article 54(1) and 22 U.S.C. § 1650a do not provide for judicial review of an ICSID tribunal award's merits, including the question of arbitrability.

the Circuit noted in *Stileks*: "*Whether the ECT applies to the dispute* and *whether the tribunal had jurisdiction under the ECT* are different ways of framing the same question" about the merits of an award—namely, whether a dispute was arbitrable. *Id.* at 879. A defendant may accordingly assert the lack of a legal basis for entering an agreement to contest an award's merits (where the law provides for judicial review of an award's merits), but not to rebut a plaintiff's evidence that an agreement to arbitrate exists.

At least one other judge in this district has applied *Stileks* in that way. In *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262 (D.D.C. 2022), Tethyan, an Australian mining company, sought to confirm an ICSID arbitration award against Pakistan. Under the relevant treaty, a referral to arbitration required written consent. Pakistan argued that it had "never provided such written consent," and therefore had "never agreed to arbitrate at ICSID." *Id.* at 273. In evaluating that purported "dispute[ ] over the existence of an arbitration agreement," *id.*, the court recognized that Tethyan had met its jurisdictional burden to produce "copies of the [underlying treaty], the notice[ ] of arbitration, and the tribunal's decision," *id.* (quoting *Stileks*, 985 F.3d at 877), which together "entitle[d] Tethyan to a presumption of a valid arbitration agreement," *id.* Further, the court expressly rejected Pakistan's argument that "the Court should make its own independent determination on the existence of an agreement," construing that argument as going to arbitrability and citing *Chevron* and *Stileks* for the proposition that an arbitrability dispute "does not affect the Court's jurisdiction." *Id.* at 273–74. Consequently, the court found, "Pakistan's arbitrability argument [was] not cognizable under FSIA" and the arbitration exception applied to grant

the court jurisdiction to confirm the arbitral award. *Id.* at 275.

The court reaches the same conclusion here. As noted above, there is no question as to the existence of the "copies of the [underlying treaty], the notice[ ] of arbitration, and the tribunal's decision." *Stileks*, 985 F.3d at 877. Under the *Chevron* burden-shifting framework, therefore, Spain has the burden of showing that, in fact, no arbitration agreement exists. *See* 795 F.3d at 204. Spain's only argument on that score is that it could not have entered into the ECT's arbitration provisions because EU law—as retroactively clarified by the *Achmea* and *Komstroy* decisions—does not permit EU members to assign questions of EU law to arbitration in non-EU tribunals. Therefore, the ECT did not apply to Spain and 9REN's dispute, and no agreement to arbitrate was ever formed. But the D.C. "Circuit [has] rejected that tactic." *Tethyan*, 590 F. Supp. 3d at 274. *Chevron* and *Stileks* treat the argument that a party lacked a legal basis to enter an agreement as a question of arbitrability and therefore an issue of the award's merits. *See Stileks*, 985 F.3d at 878; *Chevron*, 795 F.3d at 205 n.3. Spain thus cannot deploy that argument here as a backdoor challenge to FSIA jurisdiction.

Because Spain's argument "does not affect the Court's jurisdiction," *Tethyan*, 590 F. Supp. 3d at 274, there is no need at this stage to analyze the effects of *Achmea* and *Komstroy* on EU law and intra-EU disputes. And because Spain does not offer any other arguments or evidence rebutting the existence of an arbitration agreement, it has failed to carry its burden of persuasion that the necessary jurisdictional facts are not present here. As a result, the court finds

that it has jurisdiction over Spain under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6).

IV. INJUNCTIVE RELIEF

Having found that it has jurisdiction over this action, the court turns to 9REN's request for injunctive relief. The court is persuaded that this case presents sufficiently unusual circumstances to warrant a preliminary, anti-suit injunction against a foreign sovereign.

A. Anti-Suit Injunction

U.S. federal courts "have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984). "However, . . . [t]he mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction," and "[i]f the foreign court reacts with a similar injunction, no party may be able to obtain any remedy." *Id.* at 927. Thus, "foreign anti-suit injunctions are appropriate only when 'required to prevent an irreparable miscarriage of justice,' such as when 'necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum.'" *United States v. All Assets Held at Credit Suisse (Guernsey) Ltd.*, 45 F.4th 426, 434 (D.C. Cir. 2022) (quoting *Laker Airways*, 731 F.2d at 927).

The D.C. Circuit's decision in *Laker Airways* provides direct guidance in this case. In 1982, the liquidated British airline Laker Airways—which operated transatlantic flights between New York and London—brought an antitrust action against several

domestic and foreign airlines, seeking to recoup losses caused by alleged predatory pricing and other economic interference. 731 F.2d at 917. Shortly thereafter, the foreign airlines initiated a suit in the United Kingdom's High Court of Justice, seeking "(1) a declaration that the four foreign defendants were not engaged in any unlawful combination or conspiracy, and (2) an injunction prohibiting Laker from taking any action *in United States courts* to redress an alleged violation by the defendants *of United States antitrust laws*," including by forcing Laker Airways to withdraw its antitrust suit. *Id.* at 918. Ultimately, the British courts did order Laker Airways to cease prosecuting at least the British airlines, and were considering a similar order protecting the other foreign airlines as well. *Id.* at 919–20. Laker Airlines sought an anti-suit injunction in this district restraining the other foreign airlines from continuing their efforts to obtain injunctive relief against Laker Airways in British courts. *Id.* at 919–21.

The D.C. Circuit concluded that, in those circumstances, an anti-suit preliminary injunction was warranted.

> Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.

Laker Airways, 731 F.2d at 927. "[D]uplication of parties and issues alone is not sufficient" to warrant this remedy, as "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel

proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." *Id.* at 927–28. But "where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction" and protect "the court's ability to render a just and final judgment." *Id.* at 930.

That is the case here. For the reasons explained *supra* section III, this action is a "proper[ ] exercise[ ]" of the court's jurisdiction." *Id.* And the express and primary purpose of Spain's suit in Luxembourg "is to *terminate* [this] action," *id.*—ordering 9REN to withdraw this suit, imposing penalties upon failure to do so, and issuing an injunction preventing 9REN from taking any action to confirm the Award, Luxembourg Complaint at 21. Like the foreign airlines in *Laker Airways*, Spain did not provide the court with "any prior notice" that it was seeking an anti-suit injunction against 9REN in Luxembourg, apparently planning to simply later advise the court of the "*fait accompli* . . . which would have virtually eliminated the court's effective jurisdiction over [9REN's] facially valid claim." 731 F.2d at 930–31. That leaves the court with "the stark choice of either protecting or relinquishing [its] jurisdiction" over 9REN's petition. *Id.* at 930. The court concludes that these "most compelling circumstances" require an anti-suit injunction. *Id.* at 927.[5]

[5] Because the court's need to protect its own jurisdiction is sufficient to justify an anti-suit injunction here, the court need not reach the other "category" of compelling circumstances

Spain offers only three direct counterarguments, but each fails for reasons the court has already explained. First, Spain argues that because the court lacks jurisdiction, there is no jurisdiction here to protect. Opp. to PI Motion at 15–18. But the court has rejected Spain's premise and found jurisdiction, so Spain's argument likewise fails. *Supra* section III. Second, Spain argues that jurisdiction under the FSIA's arbitration exception does not extend to issuing an anti-suit injunction. Opp. to PI Motion at 14–15. But that theory would render FSIA jurisdiction totally defenseless to foreign collateral attacks—like Spain's Luxembourg Action. In reality, U.S. courts have not just the power but the "duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants." *Laker Airways*, 731 F.2d at 927. Third, Spain attempts to distinguish *Laker Airways* by noting that one of the D.C. Circuit's concerns in that case was that the relief plaintiffs sought—"the remedies afforded by the American antitrust laws"—were not available in foreign courts. Opp. to PI Mot. at 17 (citing 731 F.2d at 930). But this case does not present even that partial distinction; here, too, foreign courts are inadequate alternatives because, as the D.C. Circuit has observed, "only U.S. courts can attach foreign commercial assets found within the United States." *Stileks*, 985 F.3d at 876 n.1; *see also Laker Airways*, 731 F.2d at 936 (observing that arguments like Spain's are better suited to *forum non conveniens* cases where there is an adequate alternative forum).

Considerations of comity, while deserving substantial respect, do not outweigh the need for an anti-suit

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described by *Laker Airways*: "prevent[ing] the litigant's evasion of the important public policies of the forum." 731 F.2d at 927.

injunction in this case. Like the defendants in *Laker Airways*, Spain "argue[s] strenuously" that "the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations" preclude an injunction here. 731 F.2d at 937; *see* Opp. to PI Motion at 18–22. And like the Circuit in *Laker Airways,* the court "approach[es] [Spain's] claims seriously," recognizing that "when possible, the decision of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability." 731 F.2d at 937. "However, there are limitations to the application of comity." *Id.* For one,

> United States courts must control the access to their forums. No foreign court can supersede the right and obligation of the United States courts to decide whether Congress has created a remedy for those injured by trade practices adversely affecting United States interests. Our courts are not required to stand by while [a foreign sovereign] attempts to close a courthouse door that Congress, under its territorial jurisdiction, has opened.

Id. at 935–36. In short, "[n]o nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Id.* at 937.

Under these principles, the relief Spain seeks in Luxembourg is not entitled to comity. "This is because the [Luxembourg Action] is specifically intended to interfere with and terminate" 9REN's petition before this court. *Id.* In *Laker Airways*, the Circuit approved of the preliminary injunction because it was "purely *defensive*—it [sought] only to

preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law"—and was granted in response to a foreign injunction that was "purely *offensive*—it [was] not designed to protect English jurisdiction, or allow English courts to proceed to a judgment on the defendant's potential liability." *Id.* at 938. The same is true here. 9REN seeks an injunction to protect this court's jurisdiction, while Spain seeks an injunction to eliminate it.

The upshot of Spain's argument, then, is the same one made by the defendant airlines and rejected by the D.C. Circuit in *Laker Airways*—"that comity compels us to recognize a decision by a *foreign* government that *this court* shall not apply its own laws." *Id.* But in the Luxembourg Action, Spain is zealously pursuing the very same kind of anti-suit injunction that it now asks this court to refrain from issuing. Consequently, Spain's "claims of comity now asserted in United States courts come burdened with the failure of [Spain] to recognize comity." *Id.* The *Laker Airways* court refused to countenance that hypocrisy, and neither will this court. In that case, the Circuit observed that "[t]here never would have been any situation in which comity or forbearance would have become an issue if some of the defendants involved in the American suit had not gone into the English courts to generate interference with the American courts." 731 F.2d at 939–40. So too here. The court would not be considering this relief were Spain not actively seeking to frustrate the operation of U.S. law. The comity concerns that Spain laments are of its own making.

An anti-suit injunction is strong medicine. But here it is required—and will be tailored—to meet the force of Spain's attempt to deprive this court of jurisdiction.

Spain remains free, for example, to seek a declaration from Luxembourg courts vindicating its interpretation of EU law. *See* Luxembourg Complaint at 22. But Spain may not seek to foreclose 9REN's opportunity to petition this court for the relief afforded by United States law.

B. Preliminary Injunction

Having determined that an anti-suit injunction may be appropriate in this case, the court now considers whether such relief against Spain is warranted in the form of a preliminary injunction. *See In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 98 (2d Cir. 2006) ("Once the . . . court has addressed the propriety of imposing an anti-suit injunction . . . , [the] court must then make findings on whether it is appropriate to enter a *preliminary* injunction."). All four relevant factors favor granting 9REN's motion.

1. Likelihood of success on the merits

The analysis required for confirming the Award is relatively straightforward, and 9REN's success in confirming it is highly likely. By statute, an ICSID Convention award like this one

> create[s] a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.

28 U.S.C. § 1650a(a). Moreover, the Federal Arbitration Act—and its accompanying, "more robust form of judicial review," *Tethyan*, 590 F. Supp. 3d at 268—"shall not apply to enforcement of awards rendered" under the ICSID Convention, 28 U.S.C. § 1650a(a).

"[T]he Court's role in enforcing an ICSID arbitral award is therefore exceptionally limited." *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019); *see also Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. CV 17-1457 (TJK), 2018 WL 6605633 (D.D.C. Dec. 17, 2018) (noting "the perfunctory role that 22 U.S.C. § 1650a appears to envision for federal district courts"). "The Court must ensure that it has subject-matter and personal jurisdiction; that the award is authentic; and that its enforcement order tracks the award." *Tethyan*, 590 F. Supp. 3d at 268 (citing *TECO Guatemala*, 414 F. Supp. 3d at 101; *Mobil Cerro Negro, Ltd. v. Bolivarian Repub. of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017)).

All those elements are present here. For the reasons explained *infra* Section III, the court finds that it has jurisdiction. And neither party raises any reason to believe that the Award in this case is not authentic, or that the court's enforcement order will not be able to successfully track the Award's terms. That ends the court's inquiry; the Award must be enforced.

In challenging that conclusion, Spain asks the court to look beyond the scope of 22 U.S.C. § 1650a(a) in several respects. First, reiterating its assertion that no valid arbitration agreement existed, Spain argues that 9REN's Award is not entitled to full faith and credit because the ICSID tribunal lacked jurisdiction over the underlying dispute. Spain MTD at 26–28, 29–30. But under the ICSID Convention, "[m]ember states' courts are . . . not permitted to examine . . . the ICSID tribunal's jurisdiction to render the award." *Mobil Cerro*, 863 F.3d at 103. In any event, "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry dis-

closes that those questions have been fully and fairly litigated and finally decided" by the original court. *Durfee v. Duke*, 375 U.S. 106, 111 (1963); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *see Tethyan*, 590 F. Supp. 3d at 276. After hearing the same arguments Spain raises here, the ICSID tribunal determined that it had jurisdiction over the dispute. Award ¶¶ 116–208. Consequently, that determination, as well as the Award itself, is due full faith and credit.

Second, Spain argues that the ICSID tribunal violated EU law's prohibition on granting "state aid"—that is, subsidies to private actors—without authorization from the European Commission. Spain MTD at 29–30. Insofar as Spain argues that the ICSID tribunal exceeded its own jurisdiction, that argument is foreclosed for the reasons explained in the previous paragraph. And to the extent that Spain argues that the Award itself violates EU law, that contention "goes to the merits of the ICSID panel's determination" and must be taken up with the ICSID tribunal itself. *Micula*, 404 F. Supp. 3d at 285. The ICSID Convention's Article 53 provides that an "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Nothing in § 1650a permits the court to consider this issue.

Finally, Spain appeals to the "foreign sovereign compulsion" and "act of state" doctrines. Spain MTD at 30–34. Neither is applicable here. The foreign sovereign compulsion doctrine is a defense that some Circuits permit antitrust defendants to assert to shield their anticompetitive acts from liability on the grounds that those acts were compelled by a foreign government. *See Construction and Application*

of Foreign Sovereign Compulsion Doctrine, 86 A.L.R. 2d 1 (2014); *see, e.g.*, *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136 (2d Cir. 2021). The D.C. Circuit has not adopted the doctrine. More importantly, this is not an antitrust case, and therefore the doctrine is inapplicable; the court is unaware of any authority extending this doctrine outside of the antitrust context. Spain's allusions to comity principles, *see, e.g.*, Spain MTD at 33–34, do not persuade the court to do so here. *See also supra* section IV.A (discussing the role of comity in this case).

The related act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). But "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990). As noted above, under § 1650a(a), the court only needs to decide three questions: (1) whether "it has subject-matter and personal jurisdiction," (2) whether "the award is authentic," and (3) whether "its enforcement order tracks the award." *Tethyan*, 590 F. Supp. 3d at 268; *TECO Guatemala*, 414 F. Supp. 3d at 101; *Mobil Cerro*, 863 F.3d at 112. Whether a foreign act was lawful is not part of this calculus. As the D.C. Circuit recognized in *Micula*, petitioners to confirm an ICSID arbitral award "have not challenged the acts or decisions of a foreign sovereign," but instead "have merely sought to enforce a decision rendered by a forum for international

arbitration to which [the foreign sovereign] has voluntarily submitted itself." 2022 WL 2281645, at *2.

Still, Spain contends that finding the existence of an award here would effectively question the validity of the "contrary holdings by the European Commission . . . EU Court of Justice's decision in *Achmea*, . . . Joint Declaration of EU Member States[,] and the EU's own statements." Spain MTD at 32. The Supreme Court has rejected that perspective in language that readily applies here: "Regardless of what the court's factual findings may suggest as to the legality" of those foreign acts, their validity "is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires." *Kirkpatrick*, 493 U.S. at 406. The act of state doctrine therefore finds no purchase in this case.

In sum, none of Spain's protests alter the conclusion that, pursuant to 28 U.S.C. § 1650a(a)'s unambiguous directive, the court should afford the Award full faith and credit and enter judgment enforcing it. The court thus concludes that 9REN has a strong likelihood of succeeding on the merits of its petition.

2. Irreparable harm

The risk of irreparable harm to 9REN is clear. If Spain receives the relief it seeks in the Luxembourg action, 9REN will be permanently enjoined from enforcing the Award. *See* Luxembourg Complaint at 21. That is precisely the kind of irreparable harm identified by the district court, and affirmed by the D.C. Circuit, in *Laker Airways*:

> [I]f this Court should fail to issue an injunction and thus allow those defendants which are still before this Court to join with their alleged

> coconspirators before the Queen's Bench Division, the British court may very well (1) enjoin Laker from pursuing its remedies against any of the defendants in this Court, and (2) enter a judgment on the merits that the defendants here (plaintiffs there) are not liable to Laker for the acts averred in the complaints. The Court finds that, for these reasons, plaintiff would be irreparably injured if the Court does not issue an injunction.

Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1137–38 (D.D.C. 1983) (footnotes omitted); *see Laker Airways*, 731 F.2d at 956.

Spain's counterarguments are unpersuasive. First, it claims that "nothing prevents 9REN from seeking enforcement of its ICSID Award in the Luxembourg court, nor to continue this proceeding after the Luxembourg court resolves core issues of EU law." Opp. to PI Motion at 24. "Second, 9REN has not shown any risk with respect to collecting payment of the award, should it ultimately prevail." *Id.* In other words: 9REN will not be irreparably harmed unless Spain gets the very relief it is actively seeking from the Luxembourg court. That is precisely why it is necessary for this court to enjoin Spain from pursuing that relief. It is immaterial that the Luxembourg court has not yet ruled one way or another. "[G]iven the fact that, once the [Luxembourg] court issues an injunction of the type sought before it, it may very well be too late for [9REN] ever to find its way back to the American judicial system," anything "less than absolute certainty concerning the [Luxembourg] court's intentions suffices to support a finding of irreparable injury." *Laker Airways*, 559 F. Supp. at 1137 n.58.

3. Balance of equities

The balance of equities strongly favors 9REN, which faces irreparable harm, while Spain faces only a temporary hold on its ability to pursue certain relief in the Luxembourg Action—relief that would usurp this court's jurisdiction. The injunction 9REN requests would still permit Spain to litigate the merits of its claims in the Luxembourg Action. That tailored injunction will serve both principles of comity and equity by allowing each country's court to evaluate the legal issues presented under its respective laws. *See Laker Airways*, 731 F.2d at 9378; *Teck Metals Ltd. v. Certain Underwriters at Lloyd's, London*, No. CV-05-411-LRS, 2009 WL 4716037, at *3–4 (E.D. Wash. Dec. 8, 2009).

Contrary to Spain's arguments, then, 9REN's requested injunction will not "deny Spain the opportunity to obtain a decision on its rights and obligations under EU law, by an EU court," Opp. to PI Motion at 25—it will simply preserve this court's ability to decide the parties' rights and obligations under U.S. law.

4. Public interest

Finally, the public interest supports an injunction here, too. As the court explained *supra* section IV.A, it is essential to the continued function of the U.S. courts that they protect their lawful jurisdiction. Moreover, Spain does not dispute that there is a public interest in "encouraging arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *Jolen, Inc. v. Kundan Rice Mills, Ltd.*, No. 19-CV-1296 (PKC), 2019 WL 1559173, at *4 (S.D.N.Y. Apr. 9, 2019); *see* Opp. to PI Motion at 25–26. Indeed, "the text of § 1650a 'suggest[s] an expectation' on the part of Congress 'that actions to enforce ICSID awards would not be protracted,'" *Micula*, 404 F. Supp.

3d at 283 (quoting *Mobil Cerro*, 863 F.3d at 121), much less permanently halted by collateral attacks in foreign courts.

Spain's contention that this court "stands to benefit from a decision by the Luxembourg court" rings totally hollow. Opp. to PI Motion at 26. If Spain prevails in the Luxembourg Action, this court would effectively lose jurisdiction over this case, as 9REN would be forced to withdraw its suit. The court is thus not moved by Spain's assurances, which verge on disingenuous.

V. CONCLUSION

For these reasons, the court will GRANT 9REN's Motion for Preliminary Injunction, ECF No. 46. Accordingly, the court will ENJOIN Spain:

(1) from seeking any relief in the Luxembourg Action or in other Luxembourg proceedings requiring 9REN to cease, suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of 9REN's Petition to Confirm the Award;

(2) from pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of 9REN's Petition to Confirm the Award; and

(3) to withdraw its requests for relief in the Luxembourg Action requiring 9REN to "cease . . . any enforcement" of the Award insofar as it relates to the proceedings before this court.

A corresponding order will accompany this Memorandum Opinion.

APPENDIX D

[Dkt. ## 15, 40]

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civil Case No. 21-3249 (RJL)

BLASKET RENEWABLE INVESTMENTS, LLC,[1]

Petitioner,

v.

THE KINGDOM OF SPAIN,

Respondent

Signed March 29, 2023

MEMORANDUM OPINION

RICHARD J. LEON, United States District Judge

In 2007, two Dutch companies, AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. (collectively, the "Companies"), invested in renewable energy projects in order to take advantage of favorable tax incentives offered by the Kingdom of Spain ("Spain"). However, in the wake of the 2008 financial crisis, Spain implemented reforms in its energy sector that had the effect of reducing the value of the

[1] Blasket Renewable Investments LLC has been substituted as petitioner in this action in place of AES Solar Energy CoÖperatief, U.A. and Ampere Equity Fund, V.B. *See* Minute Order of March 7, 2023.

Companies' investment. The Companies invoked the arbitration provision of the Energy Charter Treaty, to which both Spain and the Netherlands are signatories, and were awarded compensation for their losses by an arbitral tribunal seated in Switzerland. The Companies have petitioned this Court to confirm their award. Spain has moved to dismiss the petition on multiple grounds, including a lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act. Because Spain's standing offer to arbitrate was void as to the Companies under the European Union law to which both Spain and the Companies are subject and which applied to the dispute by the terms of the Energy Charter Treaty itself, no valid agreement to arbitrate exists, and this Court therefore lacks the subject matter jurisdiction necessary to confirm the tribunal's award. Accordingly, I will **GRANT** Spain's motion [Dkt. # 15] and dismiss the petition.

BACKGROUND

I. Factual Background

This case arises from a dispute between Spain and the Companies regarding the validity of an arbitration provision of the Energy Charter Treaty ("ECT") as applied to disputes between Member States of the European Union ("EU") and investors of other EU Member States.

The ECT is a multilateral treaty intended to promote investment in energy and thereby encourage economic growth. *See* Energy Charter Treaty ("ECT"), Pet. to Enforce Arbitral Award Ex. 3 [Dkt. # 1-3]. Spain and the Netherlands are both signatories. *See* Signatories/Contracting Parties, Energy Charter Treaty, https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/. Other than Italy,

which withdrew in 2016, every other EU Member State and the EU itself are also signatories to the ECT. *Id.* The United States is not a signatory. *Id.* Among other things, the ECT obligates signatories to protect investments in their domestic territories made by investors from other signatory states. *See, e.g.*, ECT art. 10(1). The ECT provides an enforcement mechanism to protect such cross-border investments by establishing a framework to resolve disputes between foreign investors and governments in Article 26. *Id.* art. 26. That article provides that any arbitral tribunal established under its authority "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." *Id.* art. 26(6).

The underlying dispute in this case relates to investments made by the Companies in Spain in reliance on economic incentives provided by Spanish legislation. In short, Spain enacted legislation at various times prior to 2010 creating economic incentives for firms to invest in certain renewable energy projects in Spain. Final Award ("Award") [Dkt # 1-2] ¶¶ 189–95. The Companies relied on those programs for investment in Spanish projects. Beginning in 2010, however, Spain rescinded those incentives, harming the Companies by reducing the value of their investments. *Id.* ¶¶ 199–207.

Not surprisingly, the Companies invoked their right to arbitration under Article 26 of the ECT in 2011. Rozen Decl. Ex. B, Preliminary Award on Jurisdiction ("Prelim. Award") [Dkt. #1-2] ¶ 11. The arbitral panel, which was seated in Switzerland and convened under the auspices of the United Nations Commission on International Trade Law ("UNCITRAL"), found that it had jurisdiction over the dispute in 2014 and issued an

award in favor of the Companies in 2020. *Id.* ¶ 375(a); Award ¶¶ 847, 909(b). Spain challenged the award before the Swiss Federal Supreme Court, which dismissed the challenge and confirmed the award in 2021. Bundesgericht [BGer] [Federal Supreme Court] Feb. 23, 2021, 4A_187/2020, slip op. at 11–12 (Switz.). That award is now final and not subject to further challenge in Switzerland.

The Netherlands and Spain, of course, are also members of the EU. The EU is a supra-national organization comprising 27 countries, referred to as EU Member States. Decl. of Professor Steffen Hindelang ("First Hindelang Decl.") [Dkt. # 15-2] ¶ 30. Each EU Member State retains its sovereignty, but EU Member States are *prohibited* from violating EU law. *Id.* This legal rule is referred to as the principle of "primacy" in EU law. *Id.* The ultimate sources of EU law are the Treaty of European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU"), collectively referred to as the EU Treaties. *Id.* ¶¶ 30–31. Every EU Member State, including Spain and the Netherlands, has signed and ratified both the TEU and the TFEU as a necessary precondition of membership. *Id.* at 30. Among other things, the EU treaties establish the institutions of the EU and delineate powers between the EU itself and its Member States and among the EU institutions. *See Id.*

One of the EU institutions established by those treaties is the Court of Justice of the European Union ("CJEU"). *See id.* ¶ 38. The CJEU is analogous to the Supreme Court in the United States' legal system in that it is the final arbiter of questions of EU law under the EU Treaties. *Id.* ¶ 20. Spain's legal arguments in this case are derived from a series of decisions by that

court interpreting EU law as it pertains to the validity of agreements to arbitrate between EU entities.

In 2018, the CJEU invalidated an arbitral award issued against the Slovak Republic issued under the authority of a Bilateral Investment Treaty ("BIT") between that country and the Netherlands in a case called *Achmea B.V. v. Slovak Republic* ("*Achmea*"). *Slovak Republic v. Achmea*, Case C0284/16 (6 March 2018), ECLI:EU:C:108:158, ECF No. 51-3. The basis for the court's decision is the premise that CJEU is the ultimate arbiter of EU law under the EU Treaties. As such, the interpretation of EU law by arbitral panels in cases involving EU Member States creates a risk of inconsistent application of EU law. *See id.*; *see also* First Hindelang Decl. ¶ 22. Therefore, according to the CJEU, EU Member States are prohibited from entering into a "treaty by which [it] agree[s] to remove from the jurisdiction of [its] own courts . . . disputes which may concern the application or interpretation of EU law." *Achmea* ¶ 55. Doing so would violate the treaty obligations of EU Member States to uphold "the autonomy of the EU and its legal order." *Achmea* ¶ 57.

Indeed, the CJEU has since extended this analysis to encompass multilateral treaties containing arbitration agreements in a September 2021 case, *Republic of Moldova v. Komstroy* ("*Komstroy*"). Case C-741/19 (2 September 2021), ECLI:EU:C:2021:655. In that case, which addressed the validity of an award issued under the ECT, the CJEU extended the core holding of *Achmea* to find that arbitration provisions contained in multilateral treaties are incompatible with EU law insofar as they are applied to disputes between an EU Member State and a national of another EU Member State. *Id.* ¶52. The *Komstroy* ruling expressly, and with retroactive effect, invalidated any arbitral award

issued to an investor from an EU Member State (an "EU investor") against another EU Member State because no EU Member State could make a valid offer to arbitrate such a dispute under EU law. *Id.* ¶ 66.

II. Procedural Background

The Companies filed a petition in this Court to confirm the Award on December 10, 2021, under the authority of the New York Convention.[2] *See* Petition to Enforce Arbitral Award ("Petition") [Dkt. # 1]. Spain moved to dismiss on May 6, 2022. *See* The Kingdom of Spain's Mot. to Dismiss the Petition ("Mot. to Dismiss") [Dkt. # 15]. The motion to dismiss has been fully briefed. *See* Petitioners' Response to Spain's Mot. to Dismiss ("Resp.") [Dkt. # 20]; Reply in Support of the Kingdom of Spain's Mot. to Dismiss the Petition ("Reply") [Dkt. # 23]. With the Court's permission, the European Commission, which is the organ of the European Union responsible for representing the European Union to foreign governments, filed an amicus brief in support of Spain's motion. *See* Br. for the European Comm'n On Behalf Of the European Union In Support of the Kingdom of Spain ("Amicus Br.") [Dkt. # 19]. I heard oral argument on Spain's motion on October 31, 2022.

Subsequent to that round of briefing, the Companies transferred their interest in the Award issued by the arbitral tribunal to a Delaware firm, Blasket Renewable Investments LLC ("Blasket"). The Companies accordingly moved to substitute Blasket as petitioner under Federal Rule of Civil Procedure 25(c),

[2] The Netherlands, Spain, Switzerland, and the United States are signatories to the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (the "New York Convention").

which Spain opposed. *See* Mot. for Substitution [Dkt. # 31]; The Kingdom of Spain's Opp. to Petitioners' Mot. for Substitution [Dkt. # 37]. I granted the Companies' motion and ordered Blasket substituted as petitioner on March 7, 2023. *See* Minute Entry of March 7, 2023; Minute Order of March 7, 2023.

LEGAL STANDARD

In resolving a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, "a court is not limited to the allegations in the Petition, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 90 (D.D.C. 2005) (collecting cases), *aff'd*, 452 F.3d 883 (D.C. Cir. 2006). Because subject matter jurisdiction focuses on the Court's power to hear a claim, however, the Court must give the plaintiff's factual assertions closer scrutiny when reviewing a motion to dismiss for lack of subject matter jurisdiction and "no presumption of truthfulness applies to the factual allegations" in the Petition. *Klayman v. Nat'l Sec. Agency*, 280 F. Supp. 3d 39, 50 (D.D.C. 2017) (citation omitted). Finally, the petitioner "bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998).

DISCUSSION

Spain has moved to dismiss on four grounds. *See generally* Mot. to Dismiss. First, Spain challenges this Court's subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 15–21. Second, Spain argues that the Court should refuse

enforcement of the Award under the New York Convention. *Id.* at 22–23. Third, Spain argues that granting the petition would violate the foreign sovereign compulsion doctrine. *Id.* at 23. Finally, Spain argues that the entire case should be dismissed under the doctrine of *forum non conveniens*.[3] *Id.* at 24. However, because this Court has concluded it lacks subject-matter jurisdiction, I need not reach the merits of Spain's arguments under the New York Convention or the doctrine of foreign sovereign compulsion.

I. Subject Matter Jurisdiction – Arbitration Exception

Blasket and the Companies (collectively, "petitioners") contend that this Court has subject matter jurisdiction over this case under the arbitration exception to the FSIA. 28 U.S.C. § 1605(a)(6). I disagree. A petitioner seeking to confirm an arbitral award must establish three "jurisdictional facts" to establish jurisdiction: an agreement to arbitrate; an arbitral award; and a treaty governing the award. *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). Petitioners have made that initial showing in the form of the ECT, the Award, and the New York Convention. *See LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). Thus, the "burden shift[s] to

[3] While the Court can consider Spain's challenge to this Court's authority to hear the case under the doctrine of *forum non conveniens* without first establishing jurisdiction, *see Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 432, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007), such a challenge is futile. Our Circuit Court has "squarely held 'that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States.'" *Tatneft v. Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021) (citation omitted).

[Spain] to demonstrate by a preponderance of the evidence that the [ECT] and the notice to arbitrate did *not* constitute a valid arbitration agreement between the parties." *Chevron*, 795 F.3d at 205 (emphasis added) (citing *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008)). Because Spain has established by a preponderance of the evidence that it lacked the legal capacity to make a valid offer to arbitrate as to the Companies under the law that the tribunal should have applied, the ECT was not a valid offer to arbitrate *as to them.* How so?

Petitioners argue that the Swiss tribunal's determination that a valid agreement to arbitrate existed between Spain and the Companies is binding on this Court. It is not. Unfortunately for petitioners, Spain's challenge to its legal capacity to extend an offer to arbitrate to the Companies, without which no valid agreement to arbitrate can exist, falls outside the scope of matters entrusted to the arbitrator to resolve.

"[A]rbitration is a matter of contract." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, —— U.S. ——, 139 S. Ct. 524, 529, 202 L.Ed.2d 480 (2019); *see also B.G. Grp., PLC v. Rep. of Argentina*, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014). Indeed, under our Circuit Court's precedent, treaties containing agreements to arbitrate constitute two independent contracts: a substantive agreement and an agreement to arbitrate (or a standing offer to arbitrate) nested within that larger agreement. *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015). It is well established that "challenges specifically [to] the validity of the agreement to arbitrate" are presumptively heard by courts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citations omitted); *see also*

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.") (citations omitted).

Guided by those principles, courts in this district have routinely held that challenges to the validity of an arbitration clause on grounds that the parties lacked the legal capacity to form an agreement to arbitrate must be resolved by a court, not an arbitrator. Deference to the arbitrator merely presupposes that the party in question both had that capacity and had exercised it to form the arbitration agreement. *See, e.g.*, *Johansson v. Cent. Properties, Inc.*, 320 F. Supp. 3d 218, 221 (D.D.C. 2018) (Contreras, J.); *RDP Technologies, Inc. v. Cambi AS*, 800 F. Supp. 2d 127, 139 (D.D.C. 2011) (Bates, J.); *Amirmotazedi v. Viacom, Inc.*, 768 F. Supp. 2d 256, 262 (D.D.C. 2011) (Kessler, J.). In the event of a challenge to the validity of the arbitration clause, however, courts in this district, like my colleague Judge Mehta, have declined to defer to the arbitrator's ruling that an agreement to arbitrate existed. Indeed, he did so in another case challenging the validity of an agreement to arbitrate between an EU Member State and an EU national. *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265 (D.D.C. 2019). And our Circuit Court affirmed his authority to reach those questions of foreign law. *Micula v. Gov't of Romania*, 805 F. App'x 1, 1–2 (D.C. Cir. 2020).

It is true, as the petitioners argue, that this presumption can be overcome in cases where there is "clear and unmistakable" evidence that the parties delegated authority to the arbitrator to resolve challenges to the existence of an arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514

U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (cleaned up). As relevant here, one way in which parties may show such clear and unmistakable evidence is to agree to arbitrate under rules that expressly delegate such authority to the arbitrator. *See Chevron*, 795 F.3d at 207. And it is true that the ECT provides for arbitration under the International Centre for Settlement of Investment Disputes ("ICSID") and UNCITRAL, both of which contained such a provision *before* the signing of the ECT. *See* ECT art. 26(4)(a), (b); UNCITRAL Rules, art. 23(1) (1976); ICSID Rules, art. 41 (1966). Relying on that fact in a case resolving the same underlying dispute that later reached the CJEU in *Komstroy*, our Circuit Court has already held that a signatory to the ECT has made such a clear showing as required by *First Options*. *See Stileks*, 985 F.3d at 878–89. And that, according to petitioners, should be sufficient. *See* Resp. at 19. Not so!

Petitioners ask the Court, in essence, to follow the path taken by my colleague Judge Chutkan in two recently decided cases applying *Chevron* and *Stileks*. *See* Petitioners' Notice of Supp. Auth. [Dkt. # 30]. In those cases, both of which resolved petitions to enforce arbitral awards issued against Spain under the authority of the ECT, Judge Chutkan rejected the same arguments Spain makes here and found that the petitioners had established jurisdiction under the arbitration exception to the FSIA. *See NextEra Energy Global Holdings B. V. v. Kingdom of Spain*, No. 1:19-cv-01618-TSC, 2023 WL 2016932 at *7 (D.D.C. Feb. 15, 2023); *9Ren Holding S.A.R.L. v. Kingdom of Spain*, No. 1:19-cv-1871-TSC, 2023 WL 2016933 at *6 (D.D.C. Feb. 15, 2023). Both decisions relied on our Circuit Court's decisions in *Stileks* and *Chevron*, finding that those cases held that "[t]he assertion that a party lacked a

legal basis to enter or invoke an arbitration agreement is not a challenge to the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability." *NextEra*, 2023 WL 2016932 at *7; *9Ren*, 2023 WL 2016933 at *6. I respectfully disagree.

Both *Stileks* and *Chevron* resolved questions about the "scope of arbitrability." In *Stileks*, the parties disagreed whether the specific investment at issue fell within the ambit of the ECT by nature of the type of investment. *Stileks*, 985 F.3d at 878. And in *Chevron*, Ecuador challenged jurisdiction on the grounds that the valid arbitration agreement contained in a BIT between Ecuador and the United States had not yet come into effect at the time that the investment was made. *Chevron*, 795 F.3d at 206–07. In both cases, our Circuit Court held that the district court before which the petition to enforce the award was brought must defer to the tribunal's determination that the underlying dispute fell within the four corners of the agreement to arbitrate. *See Stileks*, 985 F.3d at 878–79; *Chevron*, 795 F.3d at 207–08. As such, these decisions merely stand for the proposition that a reviewing court must defer to an arbitral tribunal's judgment that a particular investment fell within the scope of an arbitration provision that applies to disputes between two parties to that agreement.

However, neither challenge was predicated on an argument that, under the law applicable to them, the parties were *incapable* of entering into an agreement to arbitrate anything at all. Deference to the tribunal in such a case effectively assumes away the antecedent question of whether the parties could have agreed to do so in the first instance. *See Buckeye Check Cashing*, 546 U.S. at 445–46, 126 S.Ct. 1204; *Granite Rock Co.,*

561 U.S. at 296, 130 S.Ct. 2847. Spain's challenge, by contrast, turns on that exact question. As such, I decline petitioner's invitation to defer to the tribunal and will reach the merits of Spain's argument.[4]

The text of the ECT, supported by the subsequent interpretation of the signatories, precludes a tribunal constituted under its authority from disregarding EU law invalidating the purported agreement to arbitrate between an EU Member State signatory and other EU nationals. As such, no valid agreement to arbitrate existed.

International treaties are contracts between nations, and interpretation of a treaty is "a matter of determining the parties' intent." *See B.G. Grp.,* 572 U.S. at 37, 134 S.Ct. 1198. In interpreting treaties, courts look first to "the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991). The "context" of a treaty includes, "in addition to the text (including its preamble and annexes) . . . any other agreement that was made between all the parties in connection with the conclusion of the treaty. . . ." The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980) (the "Vienna Convention"), art. 31(2),

[4] Petitioners argue in passing that the Swiss court decision should be accorded preclusive effect. *See* Resp. at 32 n.15. However, courts are not required to accord preclusive effect to foreign judgments in petitions pursuant to the New York Convention. *See Process & Ind. Devs. Ltd. v. Rep. of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022). Because the arbitral award affirmed by the Swiss court is not entitled to deference for the reasons previously discussed, neither is the judicial affirmation of that award.

(2)(a).[5] Courts may also refer to "conduct of parties to [a treaty] and the subsequent interpretation of the signatories" to clarify the meaning of the treaty's terms. *Air France v. Saks*, 470 U.S. 392, 403, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985); *see also Medellin v. Texas*, 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). If the parties to a treaty "agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [a court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); *see also* Vienna Convention art. 31(3)(a). Finally, courts "shall" also "take[ ] into account" "any relevant rules of international law applicable between the parties" in interpreting the meaning of a treaty. Vienna Convention art. 31(3), (3)(c).

Article 26 of the ECT requires an arbitral tribunal established under its authority "to decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law" in resolving a dispute between a party to the treaty, i.e. a nation that signed the ECT, and an investor domiciled in the territory of another signatory country. ECT art. 26(6). The most straightforward reading of that provision is that any award issued by an arbitral tribunal

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[5] In interpreting treaties, courts may refer to the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which the United States has signed but not ratified. *See* The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980) (the "Vienna Convention"); *United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) (citing the Vienna Convention as a source of "[b]asic principles of treaty interpretation").

established under the authority of Article 26 must be consistent with both the ECT itself and any other "rules and principles of international law" that apply to a dispute between the parties. As such, when resolving a dispute between an EU Member State and another EU national, the tribunal must apply "rules and principles" derived from the EU treaties—sources of international law—as those rules are "applicable" to the parties before it. *Id.* Because the agreement to arbitrate between Spain and the Companies was invalid under EU law, *see Komstroy* ¶ 66, there was no valid agreement to arbitrate as defined by the ECT itself.[6] As such, the tribunal lacked authority to decide the dispute, and any award was, by definition, *ultra vires*.

The "subsequent interpretation of the signatories" supports this reading. *Air France*, 470 U.S. at 403, 105 S.Ct. 1338. Spain has identified two specific examples

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[6] While neither the Supreme Court nor our Circuit Court has squarely addressed the deference the Court should accord to rulings by the CJEU, this Court finds those rulings to be conclusive as to the meaning of EU law. The Supreme Court has held that a decision of a foreign jurisdiction's highest court as to the meaning of that state's law is binding on federal courts, analogizing a court's assessment of foreign rulings under Federal Rule of Civil Procedure 44.1 to a federal court's deference to determinations by a state's highest court of that state's own law. *See Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, —— U.S. ——, 138 S. Ct. 1865, 1874, 201 L.Ed.2d 225 (2018). The Court also notes that the European Commission filed an amicus brief on behalf of Spain. *See* Amicus Br. This brief represents the official position of the EU and is therefore entitled to the Court's "respectful consideration." *Animal Sci. Products*, 138 S. Ct. at 1870. In this case, given that the amicus brief endorses the CJEU's reasoning in full and the Court has already accepted the CJEU's decision as dispositive, further analysis would be unnecessarily duplicative.

of evidence in support of this argument: the 2007 Lisbon Treaty and a 2019 declaration issued by 22 EU Member States—including both Spain and the Netherlands—asserting that arbitration provisions in both bilateral investment treaties and multilateral investment treaties like the ECT were illegal as applied to intra-EU disputes given the CJEU's decision in *Achmea*. Hindelang Decl. at ¶ 47. The *amicus* brief filed by the European Commission in its official capacity as a representative of the EU as an entity in this litigation provides further support for this proposition. *See* Amicus Br. at 17–18.

In ratifying the 2007 Lisbon Treaty, the EU Member States—again including Spain and the Netherlands—expressly affirmed their collective agreement that the obligations imposed on each Member State by the EU Treaties retained "primacy" over inconsistent obligations incurred by the Member States. Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy, 2008 O.J. (C 115) 334, Hindelang Ex. 36 [Dkt. # 15-28] ("Lisbon Decl."). The declaration expressly references the "well settled case law of the Court of Justice of the European Union" in expressly incorporating the concept of "primacy" into the EU Treaties. *Id.* Under EU law, "primacy" includes two dimensions, precluding Member States from either enacting domestic laws inconsistent with EU law or, as relevant here, from entering into international agreements with each other or with non-EU countries that would bind the Member States to obligations inconsistent with their obligations under the EU Treaties. *See id.*; *see also Commission v. Council*, Case No. 22/70 (31 March 1971) ¶ 15 (expressly precluding Member States from entering into agreements with third parties that

would be inconsistent with obligations under the Treaties). The inclusion of this provision in the 2007 Lisbon Treaty, ratified before the events giving rise to this case, reflects the shared understanding of the EU Member States that they lacked the legal capacity to enter into agreements inconsistent with their obligations under the EU Treaties. *See* Vienna Convention, art. 31(3)(a), (3)(c).

The EU Member States subsequently dispelled any ambiguity about application of those principles to arbitration provisions in multilateral treaties like the ECT. In January 2019, following the *Achmea* decision, a collection of EU Member States released a statement speaking directly to the question at issue in this case: whether the EU Treaties are subject to or supersede conflicting provisions of the ECT. The joint statement expressed the shared understanding that "international agreements concluded by the Union, including the Energy Charter Treaty, . . . must . . . be compatible with the Treaties." Decl. of the Reps. of the Gov'ts of the Member States of 15 January 2019, Hindelang Ex. 9 [Dkt. # 15-11] ("2019 Decl.") at 2, 5, 6. Both Spain and the Netherlands joined this declaration. *Id.* While the 2019 declaration was prompted by the CJEU's decision in the *Achmea* case, which held that intra-EU BITs lacked jurisdiction under the EU Treaties, *see id.* at 1, the EU Member States expressly stated that the logic of the *Achmea* decision applied equally to multilateral investment treaties like the ECT, *see id.* at 2, 3. Of course, the CJEU affirmed this interpretation in the 2021 *Komstroy* decision. In any event, the "subsequent agreement of the parties regarding the interpretation of the [ECT]" offers persuasive evidence that the EU Member States understood their obligations under the ECT's arbitration clause to be limited by their obliga-

tions under the EU Treaties. Vienna Convention, art. 31(3)(a).

Furthermore, the text of Article 26 of the ECT prohibits a tribunal established under its authority from disregarding a rule of international law applicable to the parties to the dispute before it. ECT art. 26(6). Indeed, the parties, in this context Spain and the Netherlands, agree that this is what the text of the treaty means. *See* Lisbon Decl.; 2019 Decl. Because petitioners have failed to "provide extraordinarily strong contrary evidence," this Court will "defer to that interpretation." *Sumitomo Shoji Am., Inc.*, 457 U.S. at 185, 102 S.Ct. 2374.[7]

As such, the bottom line is straightforward. Spain lacked the legal authority to make a standing offer to arbitrate to the Companies under the law that applies to both parties. The tribunal was bound to issue a decision "in accordance with" that law by the terms of the treaty under which it was convened. Because there was no valid offer to arbitrate, there is no arbitration agreement, which is required to establish subject

[7] Petitioners' strongest counterargument, while ultimately unpersuasive, is that the view of the EU Member States is not entitled to any special consideration because the word "parties" refers only to *all* signatories of the ECT and not any subset thereof. *See* Resp. at 26–27. In their view, the "subsequent interpretation of the parties" would only be relevant if all ECT signatories, not just EU Member States, also shared this understanding. Unfortunately for petitioners, this argument. Even if petitioners were correct, that would only preclude the Court from relying on the shared understanding of the EU Member States to shed light on the meaning of Article 26(6) of the ECT. It would not disturb this Court's reading of the treaty's plain language as requiring decisions issued by tribunals under that authority to render decisions "in accordance with" EU law in intra-EU disputes.

matter jurisdiction under 28 U.S.C. § 1605(a)(6). As such, this Court cannot establish jurisdiction under that FSIA exception.[8]

II. Subject Matter Jurisdiction – Waiver

While the Court lacks subject matter jurisdiction under the FSIA's arbitration exception, petitioners, undaunted, also argue that jurisdiction is nonetheless proper under the FSIA's waiver exception. *See* Resp. at 12–14. Under that provision, a court may establish jurisdiction over a foreign sovereign if that foreign state has waived its immunity from suit. *See* 28 U.S.C. § 1605(a)(1). In a 2019 case, our Circuit Court held that a foreign state "waives its immunity from arbitration-enforcement actions in other signatory states" by "sign[ing] the [New York] Convention." *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam). Spain has done so, and petitioners argue that jurisdiction is therefore retained.

Unfortunately for petitioners, this argument is too clever by half. The scope of FSIA's waiver exception as applied to the arbitration context was defined by our Circuit Court in a 1999 case, *Creighton Ltd. v. Government of State of Qatar*. 181 F.3d 118 (D.C. Cir. 1999). In that case, our Circuit Court adopted a "narrow" reading of the waiver exception, resting on the implicit "requirement that the foreign state [ ] intended to waive its sovereign immunity." *Id.* at 122. One prerequisite to finding such an intention is the

[8] Of course, even were the Court to find jurisdiction, it would still have discretion to refuse to enforce the award under the terms of the New York Convention itself because the parties lacked the capacity to form an agreement to arbitrate "under the law applicable to them." The New York Convention, art. V(1), (1)(a).

existence of an agreement to arbitrate. *See id.* at 123 (holding that all examples of implied waiver arise either from "the foreign state's agreement to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity". No such agreement exists in this case for the reasons previously given, so the waiver exception is insufficient to establish jurisdiction.

Unfortunately for petitioners, *Tatneft* is not a ruling to the contrary. Indeed, our Circuit Court characterized its decision in *Tatneft* as "holding that the waiver exception applies if the foreign sovereign is a party to the New York Convention and *has agreed to arbitrate* in a Convention state." *Process & Ind. Devs. Ltd. v. Rep. of Nigeria*, 27 F.4th 771, 774 (D.C. Cir. 2022) (emphasis added). Spain did not and could not agree to arbitrate with the Companies, so the exception does not apply.

Moreover, even absent that clarification, *Tatneft* did not disturb the rule set forth in *Creighton*. The panel that decided *Tatneft* elected against publishing its decision according to the criteria established by D.C. Circuit Rule 36. *See Tatneft v. Ukraine*, 771 F. App'x at 10. Under Rule 36, our Circuit Court will select for publication any decision that, among other criteria, resolves a substantial legal question, "alters, modifies, or significantly clarifies a rule of law previously announced by the court," or "criticizes or questions existing law." D.C. Cir. R. 36(c)(2). Unpublished cases, on the other hand, are limited to those cases that "do[ ] not satisfy any of the criteria for publication set out in subsection (c)." *Id.* (e)(1). The *Tatneft* Court, then, did not see its opinion as altering, modifying, or clarifying the standard set forth in *Creighton*. As such, this

Court will not read *Tatneft* as having overruled the requirement for a valid agreement to arbitrate.

The FSIA's waiver exception does not allow prospective litigants to make an end run around the requirement for a valid arbitration agreement. Because the Court has already found the absence of such an agreement for the reasons previously given, the waiver exception is inapplicable here.[9]

CONCLUSION

Spain lacked the legal capacity to extend an offer to arbitrate *any* dispute with the Companies under the law that applied to the parties. As such, no agreement to arbitrate ever existed. Absent such an agreement, this Court cannot establish jurisdiction under any exception to the Foreign Sovereign Immunities Act. Accordingly, I will **GRANT** Spain's Motion to Dismiss [Dkt. # 15] and dismiss the case. An Order consistent with this Memorandum Opinion will issue on this date.

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[9] Blasket also filed a motion for a temporary restraining order and preliminary injunction on March 15, 2023. *See* Blasket's Mot. for TRO and Prelim. Injunction [Dkt. # 40]. Because this Court concludes that it lacks jurisdiction over petitioners' case, it also lacks jurisdiction to resolve Blasket's motion for injunctive relief. *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 623 (D.C. Cir. 2020). Accordingly, Blasket's motion is denied as moot.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed On: December 2, 2024]

No. 23-7031
September Term, 2024
1:19-cv-01618-TSC

NEXTERA ENERGY GLOBAL HOLDINGS B.V AND
NEXTERA ENERGY SPAIN HOLDINGS B.V.,

Appellees

v.

KINGDOM OF SPAIN,

Appellant

No. 23-7032
1:19-cv-01871-TSC

9REN HOLDING S.A.R.L.,

Appellee

v.

KINGDOM OF SPAIN,

Appellant

No 23-7038
1:21-cv-03249-RJL

BLASKET RENEWABLE INVESTMENTS LLC,

Appellant

v.

KINGDOM OF SPAIN

Appellee

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Rogers, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing en banc filed by the kingdom of Spain, the responses thereto, the brief of amicus curiae the European Commission in support of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–

* * *

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

* * *