No. 24-1130

In the Supreme Court of the United States

KINGDOM OF SPAIN, PETITIONER

v.

BLASKET RENEWABLE INVESTMENTS, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Timothy G. Nelson
Scott Boisvert
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
New York, NY 10001

David Herlihy SC
A&O SHEARMAN (IRELAND) LLP
53 Merrion Square South, Ste. 201
Dublin, Ireland
D02 PR63

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Bradley Klein
Sylvia O. Tsakos
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Respondents NextEra Energy Global Holdings B.V., NextEra Energy Spain Holdings B.V., & 9REN Holding S.À.R.L.

QUESTIONS PRESENTED

More than 150 nations, including Spain and the United States, have ratified the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). That treaty establishes an arbitration regime for resolving disputes between investors and states, and for enforcing the resulting awards. Member-state courts "shall recognize" the awards "as binding" and enforce them. ICSID Convention art. 54(1). Implementing that command, 22 U.S.C. § 1650a directs that awards "shall be enforced" and given "full faith and credit" in U.S. courts. At all relevant times, Spain, the Netherlands, Luxembourg, and other countries were also contracting parties to the Energy Charter Treaty (ECT). By ratifying the ECT, they "unconditional[ly] consent[ed]" to submit to ICSID arbitration "[d]isputes between a Contracting Party and an Investor of another Contracting Party." ECT art. 26(1), (3), (4)(a)(i). The questions presented are:

1. Whether ECT member states' unconditional consent to arbitrate for the benefit of investors is an agreement "for the benefit of a private party" that satisfies the Foreign Sovereign Immunities Act's (FSIA) arbitration exception, 28 U.S.C. § 1605(a)(6).

2. Whether Spain agreed to arbitrate with investors from other ECT member states and cannot use European Union law to renege on that agreement.

3. Whether ICSID Convention members "waived … immunity either explicitly or by implication" to ICSID-award-enforcement suits under the FSIA's waiver exception, 28 U.S.C. § 1605(a)(1).

4. Whether the district court correctly refused to dismiss this action based on forum non conveniens.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Spain's lists of the parties to the proceeding and directly related proceedings are complete and correct.

CORPORATE DISCLOSURE STATEMENTS

NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. are wholly owned by the publicly held corporation NextEra Energy, Inc. No publicly held corporation holds 10% or more of NextEra Energy, Inc.'s stock, which is traded on the New York Stock Exchange under the symbol NEE.

9REN Holding S.À.R.L., a private limited liability company (*société à responsabilité limitée*) existing under the laws of the Grand Duchy of Luxembourg, having its registered office at 15, boulevard Friedrich Wilhelm Raiffeisen, L-2411 Luxembourg, Grand Duchy of Luxembourg, registered with the R.C.S. Luxembourg under number B137669 (9REN) is wholly owned by FR Solar Luxco S.à r.l., a private limited liability company (*société à responsabilité limitée*) existing under the laws of the Grand Duchy of Luxembourg, having its registered office at 15, boulevard Friedrich Wilhelm Raiffeisen, L-2411 Luxembourg, Grand Duchy of Luxembourg, registered with the R.C.S. Luxembourg under number B238294. No publicly held corporation holds 10% or more of 9REN's shares.

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INTRODUCTION

Spain's petition paints a picture of a beleaguered foreign sovereign wrongly dragged before the U.S. courts to pay awards from arbitration proceedings it never agreed to.

Nothing could be further from the truth.

Spain doesn't confront the multiple international treaties it is asking the U.S. courts to disregard, along with clear congressional directives to enforce the awards. There is nothing certworthy here—no meritorious argument for violating treaties; no outcome-determinative circuit split; and no reason for this Court to intervene to help Spain continue breaking its promises, at the cost of violating the United States' own treaty obligations.

Start with the Energy Charter Treaty (ECT), Dec. 17, 1994, 2080 U.N.T.S. 95, which Spain ratified in 1997. Designed to promote long-term energy investments, the ECT provides for member states' "unconditional consent" to arbitrate with another member state's investors. ECT art. 26(3)(a). Spain and the European Union (EU), plus many other EU and non-EU countries, were ECT members at all times relevant here.

Spain enticed Respondents NextEra Energy Global Holdings B.V., NextEra Energy Spain Holdings B.V. (together, NextEra), and 9REN Holding S.À.R.L., to invest nearly €1 billion in solar energy plants in Spain based on promises of long-term subsidies. After the plants were built, Spain reneged and abolished the subsidies, violating the ECT and costing NextEra and 9REN hundreds of millions of Euros.

So NextEra and 9REN initiated arbitration against Spain under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, 17 U.S.T. 1270, as the ECT gives them the right to do. The ICSID Convention is an international treaty, ratified by Spain, the United States, and over 150 other nations, that establishes a comprehensive arbitration and arbitral-award-enforcement regime specifically for disputes between investors and member states. Member-state courts "shall recognize" the awards "as binding" and enforce them. ICSID Convention art. 54(1). Implementing that command, 22 U.S.C. § 1650a directs that awards "shall be enforced" and given "full faith and credit" in U.S. courts.

The ICSID tribunals ruled against Spain, ordering it to pay NextEra €290 million and 9REN €41 million. And they rejected Spain's argument that, despite the ECT's plain text, Spain's express agreement with other member states to arbitrate with investors did not cover *EU* investors based on decisions from the Court of Justice of the European Union (CJEU) more than twenty years after Spain ratified the ECT.

NextEra and 9REN went to federal district court to enforce the awards under 22 U.S.C. § 1650a. Those should have been streamlined proceedings. But Spain claimed that the court lacked jurisdiction under the Foreign Sovereign Immunities Act (FSIA) and alternatively urged the court to dismiss on forum non conveniens grounds. Spain claimed there was no agreement to arbitrate because, despite the ECT's plain text, EU law prohibited it from agreeing to arbitrate with EU investors.

The district court and court of appeals rejected Spain's arguments.

Spain now comes to this Court, claiming that both rulings—that the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), confers jurisdiction, and that forum non conveniens doesn't apply—are wrong; that the courts of appeals are split; and that this Court's review is critical. Those arguments fail.

As to the arbitration exception, the court of appeals correctly held that Article 26 of the ECT (which, again, provides "unconditional consent" to arbitrate with another member state's investors) qualified as an arbitration agreement "made by the foreign state … for the benefit of a private party." *Id.* The FSIA's text makes that point clear. Yet Spain contends that the court needed to decide whether Spain agreed to arbitrate specifically with NextEra and 9REN. That's wrong. The ICSID Convention commits that question to the ICSID tribunal as a question of the *scope* of the arbitration agreement in the ECT. Spain can't (and doesn't) deny that it agreed with all other ECT member states that it would arbitrate with investors.

So Spain falls back on an alleged split with the Second and Fifth Circuits. But neither court addressed an international treaty or the rule for whether an arbitration agreement is "for the benefit of a private party."

Spain's problems don't end there. Even if Spain could show that the courts must decide whether it agreed to arbitrate with NextEra and 9REN, the straightforward answer is yes. Spain's argument that EU law modifies the ECT's plain text—a novel understanding that would have been news to the ECT's drafters and member states—violates basic principles

of international law embodied in the Vienna Convention on the Law of Treaties art. 6, May 23, 1969, 1155 U.N.T.S. 331. Spain's express commitment in the ECT to arbitrate is a binding treaty obligation. And beyond that, Spain waived its immunity to ICSID-award-enforcement suits by ratifying the ICSID Convention. The Second Circuit and the high court of Australia (among other foreign tribunals) have held that the ICSID Convention necessarily waives member states' immunity to award-enforcement suits. That's the point of a worldwide treaty regime designed to make binding, enforceable arbitration awards.

That leaves Spain's forum non conveniens argument. But Spain itself hasn't taken that argument seriously, and for good reason. Only U.S. courts can attach U.S. assets, meaning there is no adequate alternative forum anywhere else—and, in fact, Spain's entire argument (and goal) is that *no* forum should enforce the ICSID awards. Nor is there anything inconvenient about what should be summary award-enforcement proceedings. Beyond that, Spain's claimed circuit split doesn't withstand scrutiny—and Spain cannot satisfy the doctrine even assuming it could apply (despite Congress's clear command in § 1650a(a) to enforce ICSID awards and the ICSID Convention's clear provision for enforcement in *all* member-state courts).

The Court should deny review.

STATEMENT

A. Legal background

1. a. The ICSID Convention is an international treaty that establishes both an arbitration mechanism for resolving disputes between private investors and foreign sovereigns, and a regime for reviewing and

enforcing resulting awards. ICSID Convention arts. 1, 36–55; *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 513-16 (D.C. Cir. 2023). The United States, Spain, and many other nations are ICSID Convention members. ICSID, *Database of ICSID Member States*, https://tinyurl.com/mr3djunp.

The Convention arose to address concerns that investors might not invest in developing countries without a fair, reliable way to resolve disputes with those states. ICSID, History of the ICSID Convention, vol. I, at 2 (1970), https://tinyurl.com/2t6m7dnh. Investors feared "political risks" like "expropriation," "governmental interference," and the host government's failure to observe contractual obligations. ICSID, History of the ICSID Convention, vol. II-1, at 73 (1968), https://tinyurl.com/jdpv7cnf. Recognizing that disputes will arise between Convention members, or "Contracting States," and "nationals of other Contracting States," ICSID Convention preamble, the ICSID Convention established ICSID, an organization based in Washington, DC, with authority to convene arbitration tribunals to resolve disputes. *Id.* art. 1.

The Convention makes clear that ICSID tribunals are "the judge of [their] own competence," or jurisdiction. *Id.* art. 41(1); *see id.* art. 41(2). It also establishes a robust mechanism for enforcing ICSID awards. Investors must initiate proceedings in a contracting-state court, which "shall recognize" the award "as binding and enforce the pecuniary obligations imposed by that award … as if it were a final judgment of a court in that State." *Id.* art. 54(1). And contracting states must "abide by and comply" with awards entered against them, which are binding and can be set aside only through the Convention's annulment process. *Id.* arts. 53(1), 52.

b. Congress implemented the United States' ICSID Convention obligations in 22 U.S.C. § 1650a. Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, 80 Stat. 344. Under § 1650a, an ICSID award "shall be enforced" and "given the same full faith and credit as if the award were a final judgment of" a state court. ICSID awards are "entitled to full faith and credit—even as to questions of jurisdiction"—when the ICSID tribunal "fully and fairly litigated and finally decided" those questions. *Valores*, 87 F.4th at 519-20; *see Durfee v. Duke*, 375 U.S. 106, 111 (1963).

Section 1650a makes clear that the Federal Arbitration Act (FAA) "shall not apply to enforcement of [ICSID] awards." Congress thus directed that even the limited grounds for disturbing arbitral awards under the FAA, *see* 9 U.S.C. § 10(a), are unavailable under the ICSID Convention. In contrast, the FAA applies to international arbitral awards governed, for example, by the New York Convention, which chapter 2 of the FAA implements. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (New York Convention); 9 U.S.C. §§ 201–208. The New York Convention, in turn, is a treaty that the United States, Spain, and many other countries have ratified requiring member states to "recognize arbitral awards" "as binding and enforce them," New York Convention art. III, subject to limited grounds for setting aside awards, *see id.* art. V. For example, courts can refuse enforcement if it "would be contrary to the public policy of [the] country" where enforcement is sought. *Id.* art. V(2). The FAA implements those rules. *See* 9 U.S.C. § 207; *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 145 S. Ct. 1572, 1578 (2025).

2. The ICSID tribunals here found that Spain violated its obligations under the ECT. The ECT is an international treaty designed to "promote long-term cooperation in the energy field" among member states. ECT art. 2. By ratifying the ECT, members, including (at all times relevant) the European Union, Spain, Luxembourg, the Netherlands, and many other EU and non-EU nations, agreed to treat investors of other member states "fair[ly] and equitabl[y]." ECT art. 10(1); International Energy Charter, The Energy Charter Treaty, https://tinyurl.com/bddswuvv.

Anticipating investor-state disputes about ECT obligations, the ECT provides that member states give their "unconditional consent to the submission of a dispute [with Investors of another Contracting Party] to international arbitration" if an investor "choose[s] to submit" the dispute to arbitration. ECT art. 26(1), (2), (3)(a). One option is ICSID arbitration, if "the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention." ECT art. 26(4)(a)(i).

Although Spain has announced its intention to leave the ECT, Pet. App. 5a, it was a member at all times relevant here. Because Spain's withdrawal affects its obligations only prospectively, its preexisting treaty obligations remain binding. *See* ECT art. 47.

B. Factual and procedural background

1. Between 2007 and 2012, Spain lured NextEra (a Dutch company) and 9REN (a Luxembourgish company) to invest nearly €1 billion in energy projects, promising stable long-term subsidized rates that would generate profitable returns. Pet. App. 6a. Although NextEra and 9REN relied on those promises, Spain later abolished the subsidies. *Id.* So the

investors invoked the ECT's arbitration provision to seek redress before ICSID tribunals. Pet. App. 6a-7a.

2. Spain participated fully in the arbitrations and asserted that the ICSID tribunals lacked jurisdiction to resolve disputes between EU member states and nationals of other EU member states. Pet. App. 7a-10a. Pointing to *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018), a CJEU decision involving non-ICSID arbitration under a different investment treaty, Spain claimed that the ECT's arbitration provision, Article 26(4), doesn't cover disputes between EU members and investors from other EU member states. Pet. App. 7a-8a, 10a. In *Achmea*, the CJEU reasoned that EU treaties require EU law to be interpreted consistently, meaning the CJEU must always have the last word—something it cannot do with arbitral awards. Pet. App. 7a-8a. The CJEU thus concluded that the arbitral tribunal in that case couldn't resolve intra-EU disputes, because they might raise questions of EU law. Pet. App. 8a.

The ICSID tribunals unanimously rejected Spain's arguments and issued awards requiring Spain to pay NextEra €290 million and 9REN €41 million, plus interest. Pet. App. 11a. The tribunals reasoned "that 'the plain language'" of the ECT's arbitration provision "does not exclude 'intra-EU disputes'" from the ECT's scope, so there was no bar on the tribunals' resolving them. Pet. App. 10.

3. Invoking the ICSID Convention's appeal mechanism in article 52, Spain asked two ICSID annulment committees to invalidate the awards. Spain relied, among other things, on *Achmea* and an intervening 2021 CJEU decision, *Republic of Moldova v.*

Komstroy LLC, ECLI:EU:C:2021:655 (Sept. 2, 2021), that held that under EU law, Article 26 of the ECT "must be interpreted as not being applicable" to intra-EU disputes. Pet. App. 9a, 11a. The committees unanimously rejected Spain's arguments. Pet. App. 11a.

4. NextEra and 9REN petitioned the district court to enforce their awards under 22 U.S.C. § 1650a. Pet. App. 11a-12a. Spain moved to dismiss, claiming sovereign immunity under the FSIA and alternatively seeking dismissal for forum non conveniens. Pet. App. 12a, 81a. The court held that it had jurisdiction under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), because Spain agreed to arbitrate in the ECT, and rejected Spain's forum non conveniens argument. Pet. App. 13a, 64a-65a, 71a-82a, 106a-115a.

5. Spain appealed, and the court of appeals affirmed. Its opinion also addressed a separate case brought by Blasket Renewable Investments, LLC, to enforce a New York Convention award against Spain. Pet. App. 1a-40a.

a. The court of appeals held that the district court had jurisdiction under the FSIA's arbitration exception. Pet. App. 17a. "The only jurisdictional fact" that Spain disputed was "the existence of an arbitration agreement." Pet. App. 18a. But an arbitration agreement exists because Article 26 of the ECT is an arbitration agreement "for the benefit of" private parties, 28 U.S.C. § 1605(a)(6). Pet. App. 18a-22a. "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," the court explained, "the treaty … manifests the sovereign's consent to arbitrate." Pet. App. 20a-21a. Here, by providing "unconditional consent" in Article

26 to arbitrate disputes with member states' investors, Spain entered into an arbitration agreement with other member states "for the benefit of … private part[ies]," 28 U.S.C. § 1605(a)(6). Pet. App. 19a-20a.

The court of appeals reasoned that § 1605(a)(6) allows a claimant to establish an arbitration agreement "'made by the foreign state'—*either* 'with' *or* 'for the benefit' of a private party." Pet. App. 18a-19a. The award-holder doesn't need to establish both. And an investment treaty like the ECT, as an agreement among nations, can satisfy the for-the-benefit requirement. Pet. App. 19a-20a. "[A]n 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." *Id.* One agreement is among the treaty members. *Id.* And the other agreement "with" a private party is formed when a foreign investor files a notice of arbitration and accepts the investment treaty's standing offer to arbitrate. Pet. App. 20a. Because Article 26 is an arbitration agreement that Spain and other ECT members made "for the benefit" of private parties, the investors didn't also need to show that Spain entered into an arbitration agreement *with them*. Pet. App. 20a-22a.

The court also rejected Spain's argument that Article 26 doesn't reach intra-EU disputes. That argument presented a question about the agreement's *scope*, "not its *existence*." Pet. App. 22a-23a. Spain didn't dispute that it ratified the ECT and thus "provided 'unconditional consent' to arbitrate investment disputes with the investors of at least some of the other signatory nations." Pet. App. 22a (quoting ECT art. 26(3)(a)). And "Spain agrees that the ECT was made 'for the benefit' of some investors—just not those

within the [EU]." *Id.* Spain's argument thus presented a scope, not an existence, question. Pet. App. 22a-23a.

The court emphasized that its holding applies only to investment treaties, like the ECT, that provide consent to arbitrate. Pet. App. 25a-26a. The court noted that its decision doesn't apply to treaties that "contain 'a mere agreement to agree.'" Pet. App. 25a.

b. The court of appeals also rejected Spain's forum non conveniens argument. Forum non conveniens is unavailable in proceedings to enforce international arbitral awards, the court reasoned, "because only U.S. courts can attach foreign commercial assets found within the United States." Pet. App. 27a.

6. The court of appeals rejected Spain's petition for rehearing en banc. No judge called for a vote. Pet. App. 150a-151a.

REASONS FOR DENYING THE PETITION

Neither question presented warrants review.

I. The court of appeals' arbitration-exception ruling is correct and doesn't conflict with decisions of any other court of appeals. Nor would resolving the question make any difference: Spain wants the U.S. courts to decide whether it can breach its ECT commitment to arbitrate based on recent CJEU decisions. International law makes clear that the answer is no. And, as the Second Circuit, joined by the high court of Australia and other foreign tribunals, has held, ratifying the ICSID Convention (as Spain has) waives immunity to ICSID-award-enforcement suits in member-state courts. Congress required U.S. courts to summarily enforce ICSID awards in 22 U.S.C. § 1650a, but Spain wants the Court to ignore § 1650a and the United States' own treaty commitments to

help Spain break *its* treaty promises. The Court should decline that invitation.

A. The court of appeals correctly held that Article 26 of the ECT satisfies the FSIA's arbitration exception because it is an agreement "made by" Spain "for the benefit of a private party" under the arbitration exception. 28 U.S.C. § 1605(a)(6). Article 26(3)(a) of the ECT provides member states' "unconditional consent" to arbitrate with nationals from other member states. Spain's complaint that, despite the ECT's clear terms, EU law means it didn't agree to arbitrate with *NextEra and 9REN* is just a scope question for the arbitral tribunal, which resolved it against Spain.

B. Spain claims a split with the Second and Fifth Circuits over whether § 1605(a)(6) requires courts to find that the sovereign consented to arbitrate with the plaintiff. There is no split. The court of appeals here held that ECT Article 26 is an agreement to arbitrate "for the benefit of a private party" under 28 U.S.C. § 1605(a)(6). Neither the Second nor the Fifth Circuit has articulated a test for when an arbitration agreement (much less an agreement in an international treaty) is "for the benefit of a private party." But another Second Circuit decision betrays Spain's claimed split, holding that whether a particular investor qualified under a treaty's arbitration provision was a scope, not an existence, question.

C. Merits and splitlessness aside, the question presented doesn't ultimately matter. Spain wants the U.S. courts to decide whether it agreed to arbitrate *with NextEra and 9REN* because, it claims, internal EU law prohibits such an agreement. But international law holds Spain to the plain text of the treaties it ratified. What's more, the FSIA's waiver exception,

28 U.S.C. § 1605(a)(1), independently provides jurisdiction. As the Second Circuit holds, when ICSID Convention members ratified the Convention, they waived immunity to award-enforcement proceedings in U.S. courts. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113-14 (2d Cir. 2017); *Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 83-84 (2d Cir. 2013). The Australian high court, plus other foreign tribunals, have reached the same conclusion under their own laws. The Court shouldn't intervene to continue entertaining Spain's requests to break its obligations in the hopes that the U.S. courts will break theirs. Congress made the rule simple in 22 U.S.C. § 1650a: enforce the awards.

II. The court of appeals' forum non conveniens holding doesn't warrant review, either. Spain claims a circuit split over whether forum non conveniens is unavailable in foreign-arbitral-award-enforcement proceedings. But it would make no difference if the doctrine were available here, because Spain could never satisfy it. Spain's bottom-line position is that NextEra or 9REN cannot enforce the awards *anywhere*—effectively a concession that this action should go forward. That makes sense, because only U.S. courts can attach assets located in the United States. And Spain is wrong about circuit conflict—the Fourth and Ninth Circuits haven't resolved the question presented, and the Second Circuit has done so only outside the ICSID-award-enforcement context, while moving away from its position in other contexts. And on the merits, the D.C. Circuit has it right: Congress left no room for forum non conveniens in 22 U.S.C. § 1650a (for ICSID awards) or chapter 2 of the FAA (for New York Convention awards).

I. The arbitration-exception question doesn't warrant review.

A. The court of appeals' decision is correct.

1. Article 26 is an arbitration agreement "made by" Spain "for the benefit of a private party" under § 1605(a)(6).

The court of appeals correctly held that Article 26 of the ECT satisfies the FSIA's arbitration exception because it is an arbitration agreement "made by" Spain "for the benefit of a private party." 28 U.S.C. § 1605(a)(6). The exception authorizes suits against foreign sovereigns "to confirm an award made pursuant to" an arbitration agreement "made by the foreign state with or for the benefit of a private party." *Id.* Article 26 of the ECT provides for member states' "unconditional consent" to arbitrate with investors from other member states. ECT art. 26(3)(a); Pet. App. 22a. The court of appeals thus correctly held that Article 26 is an arbitration agreement "made by" Spain and other ECT members "for the benefit of … private part[ies]." Pet. App. 20a-22a.

That makes sense. An investment treaty like the ECT is "an already-binding arbitration contract." *BG Group v. Republic of Argentina*, 572 U.S. 25, 41 (2014). ECT member states, like Spain, agreed with each other in Article 26 to arbitrate with a class of investors—that is, the member states agreed with each other "for the benefit" of the investors. 28 U.S.C. § 1605(a)(6). And whether a particular company is an "Investor," under the ECT, *see* ECT art. 1(7), is thus a question about the scope of the ECT and its arbitration provision. Pet. App. 22a-25a.

To be sure, Article 26 also makes investors a standing offer to arbitrate, and investors can accept

that offer by initiating arbitration. ECT art. 26(2)(c); Pet. App. 19a-22a. Doing so creates a further agreement between the foreign state and the investor, and is thus itself *also* an arbitration agreement—this time, one "made by the foreign state *with*" the investor under § 1605(a)(6). Pet. App. 20a, 22a. But under the FSIA, an award-holder need not show *both* its own arbitration agreement with the foreign sovereign *and* an arbitration agreement for the benefit of a private party. Section 1605(a)(6)'s plain language makes clear that either one supports jurisdiction. Pet. App. 18a-19a. Whether the state-to-state agreement for the benefit of private parties covers a particular investor is a scope question ECT members agreed the arbitrator would decide: The ECT incorporates the ICSID Convention, ECT art. 26(4)(a)(i), and the ICSID Convention states that the ICSID tribunal "shall be the judge of its own competence," art. 41(1).

Legislative history and statutory purpose confirm that conclusion. Congress designed the FSIA to provide "bright-line rule[s]," not "fuzzy legal standards." *CC/Devas*, 145 S. Ct. at 1578. And Congress added the arbitration exception to ensure that U.S. courts would enforce arbitral awards against foreign states and to resolve "ambiguities [that] occasionally cloud[ed] [their] enforcement." *Foreign Sovereign Immunities Act: Hearing on H.R. 1149, H.R. 1689, and H.R. 1888 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 2 (1987) (statement of Rep. Fish). The court of appeals' holding that ECT Article 26 satisfies the arbitration exception aligns with those goals. It means that U.S. courts have jurisdiction over award-enforcement actions when a foreign state has unconditionally consented to arbitrate in a treaty like

the ECT, without miring courts and parties in drawn-out litigation about scope arguments that the parties agreed the arbitrators would resolve.

2. Spain's counterarguments lack merit.

a. Spain asserts that § 1605(a)(6)'s reference to an agreement to arbitrate "differences … between the parties" shows that the plaintiff must prove to the court that the sovereign agreed to arbitrate with the specific plaintiff. Pet. 19-20. That is incorrect. The statute's text doesn't require the court to find "an agreement made by the foreign state … for the benefit of the private party that is party to the litigation," as Spain would have it. That reading would "go[] beyond the text of the FSIA." *CC/Devas*, 145 S. Ct. at 1576. Rather, the arbitration provision's text requires only "an agreement made *by* the foreign state … for the benefit of *a* private party." 28 U.S.C. § 1605(a)(6) (emphasis added). Whether the plaintiff qualifies as that private party and whether there are "differences … between the parties" is a scope question for the arbitral tribunal, as explained (at 14-15).

b. Spain next says (Pet. 20-21), that just as the FSIA's expropriation exception requires plaintiffs to establish that they have asserted rights in "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), the arbitration exception requires proof that the sovereign agreed to arbitrate with the plaintiff. But Spain fails to explain how the FSIA's separate expropriation exception informs the interpretation of the arbitration exception. "Each immunity exception should be interpreted according to the text Congress enacted." *CC/Devas*, 145 S. Ct. at 1582. And the text of § 1605(a)(6), as explained (at 14), makes clear that an award-holder can show a foreign sovereign's

agreement either with *or* for the benefit of a private party. If the agreement is "for the benefit of a private party," then the arbitration agreement can delegate the question of whether the plaintiff qualifies to the arbitral tribunal—a feature of the arbitration context absent from the expropriation context.

c. Spain asserts (Pet. 22), that the court of appeals' decision contravened the background arbitration principle that courts rather than arbitral tribunals must determine whether the parties formed an arbitration agreement. But the court of appeals *did* resolve whether Spain formed an arbitration agreement. It held that Article 26 of the ECT is an arbitration agreement "made by" Spain "for the benefit of … private part[ies]." Pet. App. 22a. To be sure, Spain wants to convert a question about the interpretation of Article 26(3) and the definition of "Investor" in Article 1(7) into an existence question. But Spain's argument that EU law prohibited it from agreeing to arbitrate with EU investors is not an argument about the *existence* of an arbitration agreement. It's an argument about how to interpret the scope of the ECT and thus the scope of the arbitration agreement—a question committed to the arbitrators.

B. The court of appeals' decision does not conflict with any decision of another courts of appeals.

Spain claims (Pet. 10-15), that the court of appeals' decision conflicts with decisions from the Second and Fifth Circuits. That is incorrect. Neither circuit has addressed the requirements for showing the existence of an arbitration agreement "for the benefit of a private party," much less resolved the question presented about whether the ECT's

"unconditional consent" language satisfies it. And contrary to Spain's argument, Second Circuit caselaw *aligns* with the court of appeals' decision by making clear that when an investment treaty grants qualifying investors the right to arbitrate, it may also commit to the arbitral tribunal the question whether a particular claimant qualifies as an investor—as the ECT and ICSID Convention did here.

1. The D.C. Circuit holds that Article 26 of the ECT satisfies the arbitration exception as an agreement "for the benefit of a private party."

As explained (at 9-11), the court of appeals held that Article 26 of the ECT satisfies the FSIA's arbitration exception because it is an agreement "for the benefit of" private parties, 28 U.S.C. § 1605(a)(6). Pet. App. 18a-22a. "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," the court reasoned, "the treaty … manifests the sovereign's consent to arbitrate." Pet. App. 20a-21a. And by providing "unconditional consent" in Article 26 to arbitrate disputes with member states' investors, Spain entered into an arbitration agreement with other member states "for the benefit of … private part[ies]," 28 U.S.C. § 1605(a)(6). Pet. App. 19a-20a. Whether Article 26 extends to particular investors is a question about the *scope* of the arbitration agreement—not its existence. Pet. App. 22a-23a. The court went no further, limiting its holding to arbitration provisions in a specific subset of investment treaties: those, like the ECT, that already contain consent to arbitrate. Pet. App. 25a.

2. The Second Circuit has not addressed the requirements for showing an arbitration agreement "for the benefit of a private party," but its precedent *supports* the D.C. Circuit's approach.

Spain claims Second Circuit precedent conflicts with the D.C. Circuit's decision below. That argument gets Second Circuit precedent backwards. The decision Spain relies on (*Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993)), which didn't involve investment treaties, nonetheless made clear that third-party-beneficiary agreements *can* satisfy the arbitration exception. And another decision Spain doesn't cite (*Olin Holdings Ltd. v. Libya*, 73 F.4th 92 (2d Cir. 2023)), which *did* involve an investment treaty, confirms that a treaty can commit to the arbitrator as a scope question whether an investment treaty covers a particular investor.

a. Spain claims (Pet. 10) that the court of appeals' decision conflicts with *Cargill*. That is incorrect. *Cargill* did not address whether a foreign sovereign's treaty agreement to arbitrate for the benefit of a class of private investors is an arbitration agreement "for the benefit of a private party" under § 1605(a)(6). Indeed, it didn't even resolve whether an arbitration agreement "for the benefit of a private party" existed in that case.

In *Cargill*, Novorossiysk Shipping Company (Novorossiysk), a foreign state-owned entity, entered into an arbitration agreement with an intermediary company, CISA, that sold soybean oil to another company, Cargill B.V. (CBV). 991 F.2d at 1014-15. Novorossiysk delivered contaminated oil to CBV, and CBV sued

Novorossiysk to compel it to arbitrate. *Id.* CBV hadn't entered into an arbitration agreement with Novorossiysk; CISA had. CBV argued "that it was a third-party beneficiary of the arbitration clause" in the CISA-Novorossiysk agreement, but the district court "refused to consider" the argument and held that the FSIA's arbitration exception did not apply. *Id.* at 1015. The Second Circuit reversed and remanded for the district court to consider the third-party beneficiary argument. *Id.* at 1015, 1017-20. If CBV was a third-party beneficiary, the Second Circuit reasoned, the district court might be able to enforce the agreement against Novorossiysk.

Cargill thus didn't address any scope or delegation questions. The court didn't decide whether the arbitration provision was an agreement made "for the benefit of a private party"—rather, it noted that the parties hadn't "adequately addressed" CBV's third-party beneficiary argument. *Id.* at 1020. And the case didn't involve a treaty, like the ECT, in which the foreign sovereign agreed with other nations to arbitrate disputes with private parties. In short, nothing in *Cargill* is inconsistent with the court of appeals' decision here.

b. The Second Circuit's decision in *Olin*—which Spain doesn't cite—confirms that there is no circuit conflict. *Olin* affirmed a district court decision enforcing a Cypriot investor's arbitral award against Libya. 73 F.4th at 97. Libya had "indisputably agreed to arbitrate" "when it signed a [bilateral investment] treaty providing Cypriot investors with the option of resolving disputes" via arbitration. *Id.* One of Libya's arguments, which Libya tried framing as an existence argument, was that the claimant wasn't an "investor" under the treaty. *Id.* at 102-04. The court rejected that

argument, ruling that the dispute was about the "construction of the arbitration provision." *Id.* at 103 n.6, 104. Although *Olin* was not an FSIA case, it makes clear that whether a claimant is a qualifying "investor" that can arbitrate can be a scope question under the relevant treaty. Spain's intra-EU existence argument thus would fail in the Second Circuit too.

3. The Fifth Circuit has not addressed any third-party beneficiary question under the arbitration exception.

Spain also claims (Pet. 12), that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794 (2021). That's likewise incorrect. *Al-Qarqani* involved no treaty, and the court did not address any arbitration agreement "for the benefit of a private party" under § 1605(a)(6).

In *Al-Qarqani*, Saudi and Egyptian nationals sued Saudi Arabian Oil Company (Saudi Aramco), a Saudi-owned entity, to enforce a purported $18 billion award that an Egyptian arbitration panel had issued in sham proceedings. *Id.* at 797, 800-02. The plaintiffs invoked the arbitration exception based on two agreements. *Id.* at 797, 801. But neither the plaintiffs *nor* Saudi Aramco had signed the agreement with the arbitration provision, and the agreement Saudi Aramco did sign said nothing about arbitration. *Id.* 801-02. The arbitration exception thus did not apply, because Saudi Aramco hadn't entered into *any* arbitration agreement. *Id.* at 801.

Nothing in *Al-Qarqani* suggests any tension, much less conflict, with the court of appeals' decision here. The Fifth Circuit didn't confront a situation in which the foreign state indisputably entered into an

arbitration agreement for the benefit of private parties. Nor did the Fifth Circuit address when an arbitration agreement "for the benefit of a private party" exists under § 1605(a)(6), let alone establish a rule for making that determination.

C. The Court should not intervene regardless, because the courts have jurisdiction under the FSIA no matter how the question presented is resolved.

Merits and splitlessness aside, the Court's intervention wouldn't change the outcome. Even assuming § 1605(a)(6) requires showing that Spain agreed to arbitrate specifically with 9REN and NextEra, fundamental international-law principles requiring interpretation of the ECT by its plain terms show that Spain agreed to arbitrate and cannot use internal EU law to renege on its treaty commitments. The U.S. courts also have jurisdiction here under the FSIA's waiver exception because the ICSID Convention makes clear that member states waive their immunity to award-enforcement suits in member-state courts. That's what the Second Circuit has held (further dispelling any claimed circuit conflict), along with English courts and the high court of Australia.

1. Bedrock principles of international law make clear that Spain agreed to arbitrate with NextEra and 9REN, and that Spain cannot use EU law to renege on its treaty commitments.

Spain's core argument is that it didn't agree in the ECT to arbitrate with EU investors because doing so would violate EU law. But that late-breaking argument contravenes the ECT's plain terms, and basic international-law principles make clear that nations

cannot use their internal law to evade treaty commitments. Spain ratified the ECT, and the ECT binds it.

a. Nations are bound by their consent to international treaty obligations even when those obligations violate the nation's internal law, unless the violation was objectively manifest at the time of ratification. Vienna Convention art. 46(1). Nation-states have "capacity to conclude treaties." *Id.* art. 6. When they ratify a treaty, nation-states "consent to be bound" by the treaty terms, *id.* art. 2(1)(b), which become "binding" on the parties and require them to perform their obligations "in good faith," *id.* art. 26; *accord* Restatement (Third) of Foreign Relations Law § 321 (1987). If a state's international treaty obligations conflict with its internal law, the state can decline to give the treaty effect domestically, but the state's international obligations remain. *See* Restatement (Third) of Foreign Relations Law § 115(1)(b); *accord id.* § 111.

The Vienna Convention sets out the international-law limits on the ways states can argue that they didn't consent to treaty terms. *See* Vienna Convention art. 42(1). Most relevant here, a state cannot argue that its consent is invalid because it "violat[ed] … its internal law regarding competence to conclude treaties." *Id.* art. 46(1); *accord id.* art. 27; Restatement (Third) of Foreign Relations Law §§ 115(1)(b), 311(3). The only exception is when the violation was "manifest and concerned a rule of [the state's] internal law of fundamental importance." Vienna Convention art. 46(1). "Manifest" means "objectively evident" to other states at the time the state entered into the treaty, *id.* art. 46(2)—something as obvious as the U.S. President's inability to "make a treaty without the consent of the Senate," Restatement (Third) of Foreign Relations Law § 311 cmt. c.

b. When Spain ratified the ECT, it agreed to arbitrate with EU investors, including NextEra and 9REN. Spain "unconditional[ly] consent[ed]" to arbitrate "[d]isputes between a Contracting Party and an Investor of another Contracting Party." ECT art. 26(1), (3)(a). As the court of appeals recognized, "Spain is undeniably a 'Contracting Party,'" "and the companies are undeniably 'Investor[s] of another Contracting Party,'" Pet. App. 21a (quoting ECT arts. 1(2), 26(1)). "[I]f 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." *Id.* But the ECT contains no carveout for disputes between EU member states and EU investors. In fact, during negotiations over the ECT's terms, the European Commission (EC) proposed such a carveout—"a disconnection clause"—but it "was ultimately dropped from the draft treaty." *Id.*

Before this litigation, EU nations like the Netherlands read the ECT to mean what it says, and what it meant when they ratified it. Those nations recognized the clear meaning of the ECT—that international arbitral tribunals *could* resolve intra-EU disputes and that EU law "cannot and [does] not affect … the existing jurisdiction of" arbitral tribunals. *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction ¶ 161 (Oct. 26, 2010), https:// tinyurl.com/ 2pv42f6w.

c. Spain and the EC's newfound interpretation of EU law cannot change that. EU law is internal to the European Union; it binds only the EU's member states within the European Union's borders. *See Achmea* BV, ECLI:EU:C:2018:158 ¶ 41. And Spain's EU-

law interpretation was not objectively evident to other parties to the ECT when Spain ratified that treaty in 1997. To the contrary, the CJEU decided *Achmea* and *Komstroy* in 2018 and 2021, decades after Spain unconditionally agreed to arbitrate in the ECT; years after EU nations like the Netherlands themselves recognized the ECT's arbitration provisions as binding; and years after NextEra and 9REN initiated ICSID arbitrations. Spain and other EU members didn't condition their ratification on an intra-EU carveout (which the treaty drafters had rejected)—rather, they agreed that "no reservations may be made to [the ECT]." ECT art. 46. The ICSID tribunals here thus unanimously rejected Spain's intra-EU arguments because the ECT means what it says: Spain agreed unconditionally to arbitrate with investors from all other ECT member states. *See* Pet. App. 10a-11a.

Last year, Spain announced its withdrawal from the ECT, *supra* p. 7, underscoring that it no longer wants to be bound by the ECT going forward. But Spain also agreed to the ECT's withdrawal procedures, which do not allow Spain to renege on its past treaty commitments. *See* ECT art. 47(3).

2. Regardless, membership in the ICSID Convention waives immunity, as the Second Circuit and foreign high courts have held, and Spain ratified the ICSID Convention.

Spain's arbitration-exception arguments make no difference anyway, because the U.S. courts also have jurisdiction under the FSIA waiver exception, 28 U.S.C. § 1605(a)(1). The Second Circuit has correctly held that ratifying the ICSID Convention waives immunity to ICSID-award-enforcement suits, and no

court of appeals has held otherwise. And based on the ICSID Convention's plain text and structure, foreign high courts have likewise found that the ICSID Convention waives sovereign immunity.

a. The FSIA gives federal courts jurisdiction where a foreign sovereign "has waived its immunity either explicitly or by implication." *Id.* The exception applies, as the Second Circuit holds, when an ICSID award-holder presents its award against an ICSID Convention member. *Mobil Cerro*, 863 F.3d at 113-14; *Blue Ridge*, 735 F.3d at 84. That's because Convention members agreed in Article 54 that they "shall recognize" an ICSID award "as binding and enforce the pecuniary obligations imposed by that award … as if it were a final judgment of a court in that State." *Blue Ridge*, 735 F.3d at 84. "In light of th[at] enforcement mechanism," member states "'must have contemplated enforcement actions in other [Contracting] [S]tates,' including the United States." *Id.*

To explain: ICSID Convention articles 53, 54, and 55 make clear that members waived immunity to award-enforcement actions in member-state courts.

First, Articles 53 and 54 establish a unique enforcement scheme. Member states agree to enforcement of ICSID awards in member states' courts. They also agree that they will "abide by and comply with" ICSID awards, which are final and "binding," ICSID Convention art. 53(1); that awards "shall not be subject to any appeal or to any other remedy except those provided for in th[e] Convention," *id.*; and that an award can be enforced in the courts of every other member state, *id.* art. 54(1).

Second, Article 54(1) and (2) provide for recognition and enforcement in member states' courts—what

NextEra and 9REN seek here. Article 54(3) leaves the distinct step of "execution" to the laws of the state where execution is sought. Article 55, in turn, provides that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." ICSID Convention art. 55. But neither Article 54 nor Article 55 preserves immunity as to recognition or enforcement. Thus, as the high court of Australia and courts in New Zealand and England & Wales have held, Article 54 waives immunity from ICSID-award-enforcement suits in member-state courts. *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 ¶¶ 7-9, 67-80 (Austl.), https://tinyurl.com/3vxw7cxd; *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 ¶¶ 22-25, 43-44 (N.Z.), https://tinyurl.com/ycxws6hu; *Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain* [2024] EWCA Civ 1257 ¶¶ 59-98 (Eng.), https://tinyurl.com/s3k9et5r.

The whole point of the ICSID Convention is to establish procedures for arbitration with and award enforcement against foreign sovereigns. Member states designed the treaty so that if an award was entered against them, the award-holder could pursue enforcement actions in member-state courts, including those of the United States. *Blue Ridge*, 735 F.3d at 84. By "authorizing suit against the government," Article 54 thus "waive[s] sovereign immunity," even though Spain might complain that the Convention lacks "magic words" in a "separate waiver provision." *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 53 (2024).

b. The waiver exception applies here, because NextEra and 9REN seek to enforce ICSID awards,

and Spain has ratified the ICSID Convention. And the Second Circuit's ICSID Convention waiver rule betrays any argument of circuit conflict. Spain would have gotten the same result in the Second Circuit—FSIA jurisdiction—as it did here.

3. At bottom, Spain wants this Court to intervene to help it break its treaty promises, at the cost of the United States' own treaty obligations.

Spain purports to present a narrow question about the arbitration exception. But that question cannot resolve the case in Spain's favor, because even crediting Spain's preferred answer to the question, Spain's core argument is that (a) it doesn't need to comply with its ECT promises because of late-breaking interpretations of EU law, and (b) its ratification of the ICSID Convention doesn't mean ICSID awards can be enforced. And Spain isn't just asking this Court (and the courts below) to help it break its treaty promises. It is asking them to disregard *the United States' own* commitment in the ICSID Convention to enforce ICSID awards—which Congress implemented by unambiguously directing that ICSID awards "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 EC may not like the treaty promises they made, and even assuming Spain violates EU law in abiding by them, that is, at most, an internal problem between Spain and the EC, not a license for U.S. courts to ignore the United States' treaty obligations and Congress's command.

II. The forum non conveniens question doesn't warrant review either.

Spain's forum non conveniens question likewise doesn't warrant review. Spain claims this case presents the question whether forum non conveniens is categorically unavailable in foreign-arbitral-award-enforcement proceedings. But that academic question cannot change the outcome. For one thing, the question here is whether forum non conveniens is available in an action to enforce an ICSID award under 22 U.S.C. § 1650a. It is not, and despite Spain's claims of a circuit split as to *other* arbitral-award-enforcement treaties, no court has suggested that forum non conveniens is available for ICSID awards. That makes sense given Congress' clear command in § 1650a, which leaves no room for forum non conveniens. Regardless, even on Spain's terms, the question doesn't matter. Applying the doctrine here makes clear that U.S. courts are the necessary fora—only they can attach assets in the United States—and there is nothing inconvenient about what is supposed to be a summary enforcement action (as Spain itself promised in the ICSID Convention). Tellingly, Spain has made little attempt to develop the argument before this Court or the lower courts. This Court has repeatedly denied review of the question Spain presents, and Spain provides no reason for a different result here.

A. Even if forum non conveniens were available in ICSID-award-enforcement suits, it couldn't apply here.

Start with the problem that Spain cannot satisfy the forum non conveniens doctrine even assuming it could apply here.

1. Forum non conveniens is a common-law doctrine allowing a federal district court to "dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 425, 430 (2007). "At the outset," courts "must determine whether there exists an alternative forum" that is "adequate." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 255 n.22 (1981). A forum is inadequate when it "does not permit litigation of the subject matter of the dispute," or when the remedy the other forum offers "is clearly unsatisfactory." *Id.* at 255 n.22.

If there is an adequate alternative forum, courts weigh private and public interest factors to assess whether a foreign forum is more suitable. The private interest factors include how easy it is for the parties to access evidence and obtain witness testimony in the chosen forum, and any "other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 241 n.6. The public interest factors include "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.*

2. Even assuming forum non conveniens could apply, dismissing NextEra's and 9REN's actions for forum non conveniens would be error.

First, there is no adequate alternative forum. Spain doesn't even suggest one. Just the opposite. Spain and the EC claim the awards are unenforceable and that the investors would face sure "defeat in Europe." Pet. 1; EC Br. 2. Spain even initiated lawsuits

overseas to try to stop the investors from enforcing their awards anywhere in the world. Pet. App. 12a, 68a, 103a. Rather than showing that another forum can "permit litigation of the subject matter of the dispute," *Piper Aircraft*, 454 U.S. at 254 n.22, Spain and the EC seek to ensure that no forum can.

Second, the public and private interest factors—though unnecessary to reach given Spain's failure on the alternative forum question—likewise weigh against dismissal. As for the private factors, "the summary nature of a proceeding to confirm" ICSID awards means discovery and evidentiary proceedings are unnecessary. *Esso Exploration & Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, 40 F.4th 56, 71 (2d Cir. 2022); *see* Restatement (Third) of International Commercial Arbitration § 4.27 Reporters' Note a(ii). On the public factors, the summary nature of ICSID-award-enforcement proceedings also means there is little risk of congestion in the district court. The delay to date is simply the result of Spain's efforts to avoid paying the awards through meritless jurisdictional arguments preventing the courts from following 22 U.S.C. § 1650a's straightforward directive. In addition, ICSID is Washington, DC–based, confirming a local interest in having the cases proceed in federal district court there. And U.S. courts are familiar with "the law governing the dispute"—§ 1650a and the ICSID Convention the United States ratified but Spain wants the courts to ignore—so that factor disfavors dismissal, too.

B. There is no circuit conflict on whether forum non conveniens is available in ICSID-award-enforcement proceedings, and any broader disagreement is with only the Second Circuit, which has backed away from its categorical rule.

Spain claims (Pet. 23-28), that the D.C. Circuit split from the Second, Ninth, and Fourth Circuits in holding that forum non conveniens is unavailable in proceedings to confirm international arbitral awards. That is incorrect. Only the Second Circuit has held that the doctrine can be available in international-arbitral-award-enforcement cases, but never in the *ICSID* context—the relevant issue here—and has since limited the doctrine's reach.

1. The D.C. Circuit holds that forum non conveniens is unavailable in arbitral-award-enforcement proceedings.

In the D.C. Circuit, forum non conveniens is unavailable "in proceedings to confirm a foreign arbitral award." Pet. App. 27a. Forum non conveniens cannot apply because "only U.S. courts can attach foreign commercial assets found within the United States," *Id.*; *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005) (citing 28 U.S.C. §§ 1609, 1610(a)(6)). That means no other jurisdiction can provide an adequate alternate forum, so the doctrine cannot apply. Pet. App. 27a.

2. The Ninth and Fourth Circuits have not decided whether forum non conveniens is unavailable in award-enforcement proceedings.

Contrary to Spain's claims of circuit conflict, neither the Fourth nor the Ninth Circuit has decided

whether forum non conveniens is available in foreign-arbitral-award-enforcement proceedings, much less in the ICSID context.

a. In *Estate of Ke v. Yu*, 105 F.4th 648, 656 (4th Cir. 2024), the court speculated, without deciding, that forum non conveniens "might … not [be] available under the [New York] Convention." It then *assumed* that the doctrine could apply, only to reject dismissal because the district court was the "most suitable forum" for the award-enforcement action. *Id.*

b. The unpublished Ninth Circuit panel decision Spain cites, *Melton v. Oy Nautor Ab*, 161 F.3d 13, 1998 WL 613798 (9th Cir. 1998), didn't decide the issue either. The panel affirmed the dismissal of an arbitration-award-enforcement action under the New York Convention, but neither the award-holder nor the court addressed whether the New York Convention barred applying forum non conveniens. The court considered the argument "waived," assumed the doctrine could apply, and then applied it "to the specific facts of [the] case." *Id.* at *1.

3. The Second Circuit hasn't decided whether forum non conveniens is available in the ICSID context, and any other disagreement is waning.

a. There is no circuit conflict, because the Second Circuit has not addressed the dispositive question here: whether the doctrine is available in ICSID-award-enforcement proceedings. *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 491 (2d Cir. 2002), involved the New York Convention. And *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of*

Peru, 665 F.3d 384, 392-93 (2d Cir. 2011), involved the Panama Convention.

b. Outside the ICSID context, any disagreement between the D.C. and Second Circuits about whether forum non conveniens is available in arbitral-award-enforcement proceedings is waning, because the Second Circuit has limited the doctrine's reach in such actions against foreign states. Although the Second Circuit reversed a district court's refusal to dismiss an arbitral-award-enforcement action on forum non conveniens grounds in *Figueiredo*, 665 F.3d at 386, it limited that decision's reach in *Esso*, 40 F.4th at 71. There, the court affirmed the district court's refusal to dismiss an arbitral-award-enforcement action against Nigeria on forum non conveniens grounds, reasoning that the "summary nature" of arbitral-award-enforcement actions weighs against applying the doctrine. *Id.* And in *Olin*, the Second Circuit similarly affirmed the district court's denial of a motion to dismiss an award-enforcement action against Libya on forum non conveniens grounds. 73 F.4th at 109-10.

C. The court of appeals' decision is correct.

Forum non conveniens doesn't apply in actions to enforce ICSID or New York Convention awards, because dismissing on that ground would contravene both treaties and the federal statutes implementing them. As a common-law rule, forum non conveniens must give way to Congress's command.

Start with ICSID Convention Article 54(1), which *requires* enforcement in *any* member-state court. Congress, in turn, directed that courts "shall" enforce the awards and give them "full faith and credit." 22 U.S.C. § 1650a(a). "[T]he word 'shall' … creates an obligation impervious to judicial discretion," *CC/Devas*, 145

S. Ct. at 1580, including any discretion to dismiss for forum non conveniens. And chapter 2 of the FAA, which implements the New York Convention, makes clear that courts "shall confirm" New York Convention awards "unless" one of the Convention's enumerated defenses applies. 9 U.S.C. § 207; New York Convention art. V. Forum non conveniens isn't one of them. *See* New York Convention art. V; Restatement (Third) of International Commercial Arbitration § 4.27 cmt. b.

Congress's choice to omit forum non conveniens makes sense. Only U.S. courts can attach assets in the United States. So there is no adequate remedy elsewhere, and forum non conveniens cannot apply on its own terms. *Supra* pp. 29-31.

Spain addressed none of these problems in its cursory arguments before this Court or the courts below. This Court shouldn't be the first to consider them.

CONCLUSION

The petition should be denied.

Respectfully submitted.

Timothy G. Nelson
Scott Boisvert
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
New York, NY 10001

David Herlihy SC
A&O SHEARMAN (IRELAND) LLP
53 Merrion Square South, Ste. 201
Dublin, Ireland
D02 PR63

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Bradley Klein
Sylvia O. Tsakos
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Respondents NextEra Energy Global Holdings B.V., NextEra Energy Spain Holdings B.V., & 9REN Holding S.À.R.L.

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