NO. 24-1130

In the Supreme Court of the United States

KINGDOM OF SPAIN,

Petitioner,

v.

BLASKET RENEWABLE INVESTMENTS, LLC, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an investment treaty that manifests a sovereign's unconditional consent to arbitrate with private investors of other treaty signatory states constitutes an agreement "for the benefit of a private party" to submit disputes to arbitration under 28 U.S.C. § 1605(a)(6).

2. Whether *forum non conveniens* is a defense available to foreign sovereigns in arbitral-award-enforcement proceedings.

PARTIES TO THE PROCEEDING

Petitioner is the Kingdom of Spain. Spain was Appellee in No. 23-7038 below and Appellant in Nos. 23-7031 and 23-7032.

Respondents are Blasket Renewable Investments, LLC (Appellant in No. 23-7038), NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (Appellees in No. 23-7031), and 9REN Holding S.À.R.L. (Appellee in No. 23-7032).

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Blasket Renewable Investments, LLC is a Delaware limited-liability company, 60% of which is owned by its sole managing member, Trinity Investments DAC, an Irish designated activity company, and 40% of which is owned by Blasket Investments DAC, an Irish designated activity company, and that no publicly held corporation owns more than 10% of Blasket.

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BRIEF IN OPPOSITION

Respondent Blasket Renewable Investments, LLC ("Blasket") respectfully submits that the petition for a writ of certiorari should be denied.

INTRODUCTION

Blasket is one of several parties seeking to enforce arbitral awards obtained under the Energy Charter Treaty ("ECT") against the Kingdom of Spain ("Spain"). The ECT is a multilateral investment treaty among both EU-member states and non-EU member states in which participating nations promise to treat each others' investors fairly and provide them a reliable, efficient remedy for treaty violations through arbitration. When Spain joined the ECT, it "unconditional[ly] consent[ed]" to the submission of investment disputes arising under the treaty to "international arbitration" at the investor's election. ECT art. 26(2), (3)(a), Dec. 17, 1994, 2080 U.N.T.S. 95. Spain further agreed that arbitral awards issued under the ECT would be enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention"), a treaty signed by the United States, Spain, and most nations of the world that obliges signatories to recognize and enforce international arbitral awards.

The award here was issued to Blasket's predecessors-in-interest ("Claimants") for Spain's unlawful actions in retrenching on renewable energy incentives that Claimants relied upon in investing in Spain. That award is indisputably final; the highest court in the country where the arbitration was

seated—the Swiss Federal Supreme Court—has dismissed Spain's application to set aside the Award. But Spain still has refused to pay, maintaining that its own unambiguous consent to arbitrate with EU-based investors under the ECT was "void ab initio" under European Union ("EU") law.

Because Spain has not paid the Award and holds assets in the United States, Claimants brought this action seeking recognition and enforcement of the Award under the New York Convention and its implementing legislation, 9 U.S.C. §§ 201-208. To overcome Spain's presumptive immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, Claimants invoked two exceptions to immunity: (1) the arbitration exception, which confers jurisdiction over actions against a foreign state to "enforce an agreement [to arbitrate] made by the foreign state with or for the benefit of a private party," *id.* § 1605(a)(6); and (2) the waiver exception, which allows a foreign state to "waiv[e] its immunity either explicitly or by implication," *id.* § 1605(a)(1). The district court dismissed the petition, accepting Spain's EU-law objection and concluding that without a valid arbitration agreement, the FSIA's arbitration and waiver exceptions did not apply, and that Spain therefore was immune from suit.

The D.C. Circuit reversed. It held that the arbitration exception was satisfied because the ECT constitutes "an agreement … for the benefit of a private party to submit" disputes to arbitration, *id.* § 1605(a)(6). Spain's EU-law objection pertained only to the *scope* of the ECT—a merits objection about whether EU investors were among the ECT's intended

beneficiaries, not a jurisdictional objection about whether Spain acceded to the ECT. Given its holding that Spain had agreed to arbitrate *for the benefit* of private parties in joining the ECT, the D.C. Circuit declined to consider at the jurisdictional stage the other potential basis for applying the arbitration exception—whether Spain had agreed to arbitrate "with" a private party, *id.* Citing longstanding circuit precedent, the court of appeals also rejected Spain's defense that Claimants' action to enforce the Award by attaching Spain's U.S.-based assets belonged in a European forum under the doctrine of *forum non conveniens*.

This Court should decline review. Spain's principal argument below—that the arbitration exception requires an arbitration agreement *with* private parties, not just for their benefit—is squarely foreclosed by the FSIA's plain text. And Spain's self-described "key" argument before this Court—that the arbitration exception requires an agreement to arbitrate "'differences … between the parties'" to the litigation, Pet. 19 (quoting 28 U.S.C. § 1605(a)(6))—was never briefed, preserved, or decided below. No court of appeals has addressed that argument, much less adopted Spain's position. There accordingly is no circuit split on Spain's first question presented. And even if there were, it would not warrant this Court's review, much less in this case. The D.C. Circuit correctly determined that *who* may invoke a foreign state's arbitration agreement is a merits question, not a jurisdictional question under the FSIA. And this Court should not review that issue in a case where the petitioner's "key" argument was never developed or considered.

Spain also asks this Court to decide whether *forum non conveniens* is available as a defense to the enforcement of foreign arbitral awards. Any split on that issue is both shallow and stale. This Court has twice declined to take up that question in the last eight years, and nothing has changed to warrant review now.

The Court should deny the petition.

STATEMENT

A. Spain Induces Claimants' Investments and Then Retrenches on Its Incentives

Claimants are Dutch companies that invested billions of euros in solar energy installations in Spain in reliance on financial incentives that Spain enacted to promote the development of renewable energy. App.6a. Spain reaped the benefits of those incentives: The influx of foreign investment jump-started its renewable energy sector, enabling it to compete with conventional energy sources. Ct. App. Joint Appendix ("J.A.") 75-76, 83.[1]

But Spain's favorable treatment of renewable energy investments was short-lived. Beginning in 2010, Spain adopted a series of measures retrenching on, and eventually revoking, the incentives on which Claimants had relied, costing them millions of euros in promised returns. App.6a, 131a.

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[1] All references to appellate briefing, appendix, and oral argument refer to D.C. Circuit appeal No. 23-7038, unless otherwise noted.

B. Claimants' Investments Were Protected by the Energy Charter Treaty and the New York Convention

Claimants' investments in Spain were protected by two international treaties: the Energy Charter Treaty and the New York Convention.

The ECT is a multilateral investment treaty adopted in 1998 among 53 nations and regional organizations to "establis[h] a legal framework [for] promot[ing] long-term cooperation in the energy field." ECT art. 2. Its contracting parties include the EU, every EU member except Italy (which withdrew in 2016), and 26 nations outside the EU. The ECT protects investments in the territory of a "Contracting Party" to the treaty (*e.g.*, Spain) by "Investors" (*e.g.*, Claimants) located or incorporated in "other Contracting Parties" (*e.g.*, the Netherlands). ECT arts. 1(7), 10(1), 26, 40(2).

To give those protections teeth, the ECT's contracting parties "unconditional[ly] consent" to the submission of investment disputes arising under the treaty to "international arbitration" at the investor's election. ECT art. 26(2), (3)(a). Investors can choose among several arbitration formats, including the option Claimants selected here—an "ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law" ("UNCITRAL Rules"). ECT art. 26(1), (4)(b). To provide streamlined enforcement of awards resolving disputes under the ECT, the ECT permits "any party to the dispute" to insist that arbitration take place "in a state that is a party to the New York Convention." ECT art. 26(5)(b).

The New York Convention is a multilateral treaty among 170 nations—including Spain, the Netherlands, and the United States—that governs "the recognition and enforcement" of commercial arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention art. I(1). Parties to the Convention agree to "recognize" such awards "as binding and enforce them." *Id.* art. III. Awards thus are immediately enforceable in any country that is a party to the Convention, and can be set aside only "by a competent authority of the country in which, or under the law of which, … th[e] award was made." *Id.* art. V(1)(e). The ECT's incorporation of the New York Convention thus ensures that ECT awards are widely and expeditiously enforceable.

C. The Arbitral Tribunal Awards Claimants Relief

In 2011, Claimants initiated arbitration against Spain under the UNCITRAL Rules, alleging that Spain violated the ECT through its legislative actions that diminished the returns on their investments. App.7a, 131a. Over the ensuing eight years, an arbitral tribunal seated in Switzerland (the "Tribunal") considered and rejected all of Spain's objections to the Tribunal's jurisdiction and ultimately awarded relief to Claimants. App.131a-132a.

Before the Tribunal, Spain argued that as a matter of EU law, the Tribunal could not exercise jurisdiction over an "intra-EU" dispute between an EU member state and EU-based investors. App.10a. In a 2014 Preliminary Award on Jurisdiction, the Tribunal

rejected that argument, finding "no indication in the text of the [ECT] that the Contracting Parties have limited their consent to arbitration on the basis that some" are EU members, and held that EU law could not "override the [ECT's] investor-state mechanism explicitly agreed to by the EU member states and the EU itself." J.A. 391, 395 ¶¶ 181, 191 (Preliminary Award on Jurisdiction, J.A. 335-450). Although Swiss law allowed Spain to immediately appeal this jurisdictional ruling to the Swiss Federal Supreme Court, Spain did not do so.

In 2018, while the arbitral proceedings were pending, the Court of Justice of the European Union ("CJEU"), the judicial body created by the EU's foundational treaties to interpret those treaties, decided Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018). *Achmea* held that an arbitration provision in a bilateral investment treaty between two EU member states was incompatible with EU law because it could lead to the resolution of EU law outside the EU judicial system, contravening the Treaty on the Functioning of the European Union and the Treaty of European Union (collectively, the "EU Treaties"). *Id.* ¶¶ 43-55, 60; App.7a-8a.

Spain asked the Tribunal to revisit its jurisdictional ruling in light of *Achmea*. J.A. 69 ¶ 151. The Tribunal rejected that request, reaffirming its own jurisdiction. J.A. 70 ¶ 155. In its 2020 Final Award, the Tribunal held that Spain breached its obligations under the ECT by depriving Claimants of a reasonable rate of return on their investments and directed Spain to pay €26.5 million in damages, plus

interest. J.A. 192-193, 222, 285-286, 303-304 ¶ 909(b)(i), (iii). Spain then initiated proceedings before the Swiss Federal Supreme Court to set aside the award, relying primarily on *Achmea*. In February 2021, the Swiss Federal Supreme Court dismissed those proceedings, holding that Spain had forfeited its objection to the arbitral tribunal's jurisdictional ruling by failing to timely appeal that ruling. J.A. 452-469.

D. Claimants Seek to Enforce the Award

The Award was due in full upon its rendering, fully enforceable in the courts of each signatory state to the New York Convention, and subject to set-aside proceedings only at the seat of the arbitration—in the Swiss Federal Supreme Court. Yet after the Swiss Court denied Spain's set-aside application, Spain still refused to pay. Claimants thus commenced this action to recognize and enforce their award under the New York Convention and its implementing legislation, 9 U.S.C. §§ 201-208.

Claimants grounded jurisdiction for the suit on the FSIA's arbitration and waiver exceptions to sovereign immunity. *See* 28 U.S.C. §§ 1330(a), 1605(a)(1), (6). The arbitration exception authorizes a proceeding against a foreign state "to confirm an award made pursuant to … an agreement" to "submit to arbitration" by the foreign state, "with or for the benefit of a private party." *Id.* § 1605(a)(6). And the waiver exception subjects a foreign state to jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1).

Spain moved to dismiss the enforcement petition. App.130a, 135a. Spain argued that its EU-law objection—the same objection the Tribunal rejected—raised a question about the existence of an arbitration agreement that the district court must decide *de novo*. In addition to *Achmea*, Spain relied on a CJEU decision issued after the arbitration was completed—Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021)—that applied *Achmea*'s holding to intra-EU arbitration under the ECT. *Id.* ¶¶ 51-52. Spain argued that the CJEU's recent interpretations of EU law retroactively undermined its capacity, as an EU member state, to form an arbitration agreement with the EU-based Claimants in the ECT when the arbitration was commenced in 2011. Dist. Ct. Mem. of Law at 16-17 (Dkt. 15-1). Spain also contended that the waiver exception did not apply because its accession to the New York Convention could not be construed as an implied waiver of immunity absent a valid agreement to arbitrate. *Id.* at 19-22.

While Spain's motion was pending, Claimants assigned their interests in the Award to Blasket, which was substituted for Claimants as the award petitioner in the district court. J.A. 8.

The district court accepted Spain's arguments and dismissed the action. The court held that it lacked subject matter jurisdiction under both the FSIA's arbitration and waiver exceptions. App.147a, 149a. The court held that both exceptions required the court to determine *de novo* whether Spain had validly consented to arbitrate. App.137a-141a. Departing from the Tribunal's ruling, the court then held that "no

valid agreement to arbitrate existed" between Spain and Claimants because EU law "invalidat[ed]" Spain's consent in the ECT to arbitrate intra-EU disputes. App.141a.

Blasket's appeal was coordinated for argument with two appeals, Nos. 23-7031 ("*NextEra*"), 23-7032 ("*9REN*"), involving materially similar award enforcement actions in which the district court had reached the opposite conclusion, rejecting Spain's EU-law objection.

E. The Court of Appeals Reverses the District Court

The D.C. Circuit reversed in *Blasket* and affirmed in *NextEra* and *9REN*, holding the district court had jurisdiction under the FSIA's arbitration exception. The court of appeals declined to reach the waiver exception.

The D.C. Circuit began with the arbitration exception's text, which requires "'an agreement made by the foreign state'—*either* 'with' *or* 'for the benefit' of a private party—to submit certain disputes to arbitration." App.18a-19a (quoting 28 U.S.C. § 1605(a)(6)). In disputes under an "investment treaty" like the ECT, the court explained, both prongs may be relevant. An investment treaty is a "contract between nations," and "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." App.19a-20a (cleaned up). But such a provision also "operates as a unilateral offer to arbitrate by each sovereign to investors of the other

signatory countries." App.20a (cleaned up). Accordingly, the treaty "can both (1) constitute an agreement" between sovereign states "'for the benefit' of a private party; and (2) give rise to a separate agreement 'with' a private party" when an investor accepts the treaty's standing offer to arbitrate. App.19a-20a (quoting 28 U.S.C. § 1605(a)(6)). And "either type of agreement may support … jurisdiction." App.20a.

Here, the D.C. Circuit reasoned that because Spain undisputedly signed the ECT, the ECT itself established the "agreement" between nations "'for the benefit'" of private parties required to satisfy the arbitration exception. App.22a. The court did not "need" to resolve—and thus "d[id] not resolve"—the distinct issue "whether Spain entered into separate arbitration agreements 'with'" Claimants. App.22a (quoting 28 U.S.C. § 1605(a)(6)). Nor did the court need to resolve "the scope of the ECT's arbitration provision"—*i.e.*, whether it "extend[ed] to EU nationals." App.25a-26a. Unlike questions about an arbitration agreement's *existence*, the court explained, "disputes about the scope of an arbitration agreement … are not jurisdictional questions." App.18a. Spain's attempt to excise "intra-EU" arbitration from the ECT's scope was thus irrelevant to jurisdiction.

The D.C. Circuit denied rehearing en banc. App.151a.

REASONS FOR DENYING THE PETITION

I. Spain's FSIA Question Does Not Warrant Review.

Spain's first question presented asks if the issue of "whether the sovereign consented to arbitrate with the plaintiff is a threshold jurisdictional matter" under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6). Pet. 10. That formulation conflates two distinct questions: (1) whether the arbitration exception requires an arbitration *agreement with* the plaintiff; and (2) if not, whether it nonetheless requires an agreement that provides for *arbitration with* the plaintiff. Neither question warrants review.

Below, Spain briefed only the first question. It argued that the FSIA's arbitration exception requires proof that "Spain and claimants … formed an arbitration agreement" with each other. Spain Ct. App. Br. 3. The D.C. Circuit easily rejected that argument because the FSIA does not require an agreement by Spain "with" a private party. An agreement "*either* 'with' *or* 'for the benefit' of a private party" will suffice, and "Spain agree[d] that the ECT was made 'for the benefit' of" private parties. App.18a-19a, 22a (quoting 28 U.S.C. § 1605(a)(6)). No circuit has held otherwise.

In this Court, however, Spain pivots to the second question. Even if the ECT is an agreement "for the benefit of a private party," Spain claims it is not an agreement concerning the arbitration of "differences … between" the right "parties." Pet. 19 (quoting 28 U.S.C. § 1605(a)(6)). But Spain's briefs never raised that argument in the D.C. Circuit, and the D.C.

Circuit never addressed it. Nor do Spain's cases from other circuits. Indeed, no circuit split exists on either version of Spain's argument. And any purported tension between the circuits would not warrant review in any event.

A. There Is No Circuit Split

1. The D.C. Circuit's principal holding is that an arbitration agreement "'for the benefit' of a private party" suffices, so no "separate arbitration agreemen[t] 'with' private parties" is required to establish jurisdiction under the arbitration exception, App.20a, 22a. Spain does not dispute that no other court has even addressed—much less disagreed with the D.C. Circuit on—*that* issue. Nor does Spain dispute that the FSIA's text unambiguously authorizes jurisdiction either when the foreign state agrees to arbitrate "with" *or* "for the benefit" of a private party.

Neither of Spain's cases—*Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993), nor *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794 (5th Cir. 2021)—addresses the "for the benefit" standard. And *Cargill*, if anything, suggests that an agreement "with" the plaintiff is *not* required. The plaintiff there (CBV) was not a party to any arbitration agreement. Instead, it claimed to be a "third-party beneficiary" to an affiliate's arbitration agreement. 991 F.2d at 1015. Yet the Second Circuit held that it was error for the district court to dismiss for lack of jurisdiction under the FSIA's arbitration exception without considering that argument. *Id.* at 1019-20.

Al-Qarqani, meanwhile, did not involve third-party beneficiaries at all. Instead, the issue was the absence of *any* agreement by the foreign state defendant (Saudi Aramco) whatsoever. The plaintiffs invoked an agreement by "the Kingdom of Saudi Arabia," but that agreement did not "bind Saudi Aramco." 19 F.4th at 801. The only other alleged agreement—a "1949 agreement between the purported ancestors of the plaintiffs and the Arabian American Oil Company"—did not "so much as mention arbitration." *Id.* at 801-02. There was thus no "agreement made by the foreign state with or for the benefit" of anyone. 28 U.S.C. § 1605(a)(6).

2. Unable to identify a conflict on the D.C. Circuit's principal holding, Spain presses a new argument—raised for the first time to this Court—that the FSIA also requires an agreement to settle "differences … between" the plaintiff bringing the lawsuit and the sovereign defendant. 28 U.S.C. § 1605(a)(6). But it forfeited that argument below. It mentioned the language it now calls dispositive just once—in passing—in only one of the consolidated appeals. Spain Ct. App. Br. 27. And its single mention of the language at oral argument, *see* Ct. App. Oral Argument at 25:36-27:25 (Feb. 28, 2024), came too late to preserve the argument. *See*, *e.g.*, *U.S. ex. rel. Davis v. District of Columbia*, 793 F.3d 120, 127 (D.C. Cir. 2015) ("Generally, arguments raised for the first time at oral argument are forfeited.").

To be sure, Spain's briefs below argued that Spain's "offer to arbitrate contained in … the ECT does not extend to EU nationals." App.22a. But the purported upshot of that argument was that

Claimants could not "accept" the offer, so no agreement to arbitrate was "formed." Spain Ct. App. Br. 29. Spain's briefs never suggested that the FSIA imposed a *further* requirement that even if an arbitration agreement had been formed, that agreement must contemplate arbitration specifically with the plaintiff bringing the lawsuit. *Id.* at 27-29. The panel opinion thus did not address such a requirement.

Regardless, there is no circuit split on Spain's new argument because neither *Cargill* nor *Al-Qarqani* held that the arbitration exception requires an agreement that contemplates arbitration with the plaintiff.

In *Cargill*, Spain's purported requirement was not litigated because no party disputed it. The district court found the FSIA's arbitration exception inapplicable because the relevant arbitration agreement "was not signed" by the plaintiff. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 1992 WL 42194, at *5 (S.D.N.Y. Feb. 27, 1992), *rev'd*, 991 F.2d 1012 (2d Cir. 1993). On appeal, the plaintiff countered that "[t]here is no requirement of signature in … the FSIA," and it could invoke the arbitration exception because it was a "nonsignatory third party beneficiary." Br. for Pls.-Appellants at 17-18, *Cargill*, 991 F.2d 1012 (No. 92-7876), 1992 WL 12024953. The plaintiff thus *assumed*—and no party disputed—that third-party beneficiary status was necessary to jurisdiction under the arbitration exception. But the parties failed to "adequately addres[s] this issue in their briefs," 991 F.2d at 1020, so the Second Circuit never decided it.

Rather than analyzing the FSIA's requirements, the Second Circuit focused on the district court's failure to consider the plaintiff's arguments. It explained that "a district court must look at the substance of the allegations to determine jurisdiction"—and there, the plaintiff had expressly premised jurisdiction on the "allegation[]" that it was a "third party beneficiary" of the arbitration agreement. *Id.* at 1019. The Second Circuit thus assumed that this allegation was "jurisdictional" and held that the district court was required to decide it as part of its "'[j]urisdiction to determine jurisdiction.'" *Id.* (quoting 13D Wright & Miller, Federal Practice and Procedure § 3536 (3d ed.)). By "not assess[ing]" the "third party beneficiary argument," the district court "erred." *Id.* at 1018.

"[D]rive-by jurisdictional rulings of this sort"—where the jurisdictional nature of an issue is "assumed by the parties … without discussion by the Court"—"have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). That is doubly so when such assumptions are embedded in dicta—a mere "outlin[e]" of the "proper analysis," Pet. 11, on an issue "not adequately addressed" by the parties, *Cargill*, 991 F.2d at 1020.

In any event, the Second Circuit's jurisdictional assumptions are irrelevant to the arbitration exception's "for the benefit" prong. *Cargill* involved an agreement the foreign state had made *with* a private party (*i.e.*, the plaintiff's affiliate). The Second Circuit seemingly viewed the third-party beneficiary question as jurisdictional because, in the court's view, an arbitration agreement's existence is bound up with its

enforceability: A district court may not deny a non-signatory's "motion to compel based upon a finding … that no arbitration agreement *existed*" without first analyzing whether a non-signatory could "*enforce* the agreement as a third party beneficiary." 991 F.2d at 1020 (emphases added). Whatever the merits of that *assumption* about the *enforceability* of a foreign state's agreement made "with" a private party in the context of a motion to compel arbitration, *Cargill* plainly does not conflict with the D.C. Circuit's jurisdictional *holding* about the *existence* of a foreign state's agreement made "for the benefit of" a private party in the context of an action to confirm an arbitral award.

Al-Qarqani is even further afield. Because the foreign state defendant there never consented to arbitrate against anyone, *see supra* p. 14, the Fifth Circuit had no occasion to consider whether it "consented to arbitrate *with the plaintiff*," much less whether such consent "is a threshold jurisdictional matter." Pet. 9-10 (emphasis added). There is thus no split on any aspect of Spain's first question presented.

3. Even if Spain's FSIA question were the subject of any real division of authority, the issue would benefit from further percolation. On Spain's telling, the divide is only two-to-one. Its two cited cases present no square conflict because neither the Second nor Fifth Circuits considered the arguments the D.C. Circuit accepted here. And *no* court—not even the D.C. Circuit—has considered Spain's new arguments (Pet. 19-21) about the arbitration exception's text.

Spain insists (Pet. 15) that further percolation is unlikely because plaintiffs generally may sue foreign sovereigns in the District of Columbia under 28 U.S.C.

§ 1391(f)(4). Of course, FSIA cases may be brought in other jurisdictions, too. *E.g. CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 145 S. Ct. 1572 (2025) (reversing Ninth Circuit). But even if the District of Columbia henceforth attracted all FSIA suits to enforce arbitral awards, the D.C. Circuit has yet to be afforded an opportunity to opine on the argument Spain advances here.

B. The Decision Below Is Correct

The D.C. Circuit's straightforward analysis of the FSIA's arbitration exception also is correct. Spain's argument below ignored the FSIA's plain text. And its new argument before this Court both misconstrues the key language and undercuts the arbitration exception's purpose.

1. Spain has largely abandoned its argument below that the FSIA's arbitration exception requires an "agreement between the parties" to the litigation. *E.g.*, Spain Ct. App. Br. 22. The D.C. Circuit correctly rejected that argument because the exception is clear: "'[A]n agreement made by the foreign state'—*either* 'with' *or* 'for the benefit' of a private party" is sufficient. App.18a-19a (quoting 28 U.S.C. § 1605(a)(6)). Requiring an agreement "with" a private party would read the phrase "or for the benefit of" out of the statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are … 'reluctan[t] to treat statutory terms as surplusage' in any setting." (quoting *Babbitt v. Sweet Home Chapter Communities for Great Ore.*, 515 U.S. 687, 698 (1995)).

The D.C. Circuit also correctly applied that holding to this case. Spain "d[id] not dispute that it is

a signatory to the [ECT]" or 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." App.22a (quoting ECT art. 26(3)(a)). Under the arbitration exception's plain text, therefore, the ECT constitutes "an agreement" "made by [Spain] … for the benefit of a private party" to arbitrate "differences … between the parties." 28 U.S.C. § 1605(a)(6). The panel thus correctly declined to "resolve" the separate issue "whether Spain entered into separate arbitration agreements 'with'" Claimants. App.22a.

2. Spain's new argument before this Court fares no better. Spain argues that even if the ECT is an "agreement made by the foreign state with or for the benefit of a private party," it is not the kind of agreement required by the FSIA: an agreement to arbitrate "differences … between the parties." 28 U.S.C. § 1605(a)(6). According to Spain, "[i]t's not enough that the sovereign consented to 'submit to arbitration … differences' with *someone*" because the statute's reference to "'the parties'" means that "the sovereign must have agreed to arbitrate differences … between itself and *the plaintiff*." Pet. 19 (quoting 28 U.S.C. § 1605(a)(6)) (second emphasis added).

Spain's argument misconstrues the phrase "the parties." The arbitration exception references two parties: "the foreign state" that "made" the "agreement to arbitrate" and "a private party" "with or for the benefit of" whom the agreement was made. 28 U.S.C. § 1605(a)(6). The phrase "the parties," *id.*, naturally refers to *those* parties, not the parties *to the lawsuit*. As a result, as long as the foreign state has

entered an agreement "with or for the benefit of a private party" to arbitrate "differences … between" itself and that private party, the identity of that party is not a jurisdictional fact. *Id.* The FSIA permits suits to "enforce" that "agreement" and any resulting "award," *id.*, and *who* may do so is a "merits" question. App.18a.

Nothing in the phrase "an agreement made by the foreign state with or for the benefit of a private party" suggests that the "private party" must be the plaintiff. 28 U.S.C. § 1605(a)(6). In ordinary usage, "private party" simply means a non-governmental entity, not necessarily a party to litigation. *E.g.*, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (distinguishing "a foreign state" from "a private party"). And while Congress referred specifically to "*the* foreign state" claiming immunity, its reference to "*a* private party" is more general. 28 U.S.C. § 1605(a)(6) (emphases added). By using an "indefinite article," Congress referred to an "undetermined or unspecified" party, not any particular person or entity, *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quotation marks omitted).

Spain therefore does not base its argument on the phrase "a private party." Instead, it claims "[t]he key language is 'differences … between the parties.'" Pet. 19 (quoting 28 U.S.C. § 1605(a)(6)). But the natural referent of "the parties" is to the two parties mentioned in the preceding clause of the same provision. The word "'the' … indicat[es] that a following noun … has been previously specified by context." *Nielsen v. Preap*, 586 U.S. 392, 408 (2019)

(quotation marks omitted). The only parties "previously specified" in the arbitration exception, *id.* are "the foreign state" and the "private party" "with or for the benefit of" whom it contracted. 28 U.S.C. § 1605(a)(6). "[T]he plaintiff" is not mentioned. Pet. 19.

Spain's attempt to equate "the parties" with the litigants also flies in the face of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Pereira v. Sessions*, 585 U.S. 198, 211 (2018) (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012)). The arbitration exception's first use of the word "party" ("a private party") uses that term in its broadest sense (a person or entity) not narrowly as a synonym for "litigant." The exception's second use of "party" must be given the same broad meaning.

When Congress wanted to refer to the plaintiff in an FSIA provision, it knew how to do so. Section 1605(b)(1), for example, refers expressly to "the party bringing the suit." If Congress wanted to limit the arbitration exception to agreements "with or for the benefit of the party bringing the suit," it would have said so.

b. Congress's decision to leave questions about *who* may enforce an arbitration agreement to the merits phase also accords with the arbitration exception's goals. The exception contemplates "the recognition and enforcement of arbitral awards" pursuant to a wide range of "treat[ies] … in force for the United States." 28 U.S.C. § 1605(a)(6). Each of those treaties imposes different standards for

enforcement. For example, the treaty at issue in *Blasket*—the New York Convention—lists a limited number of grounds for refusing confirmation of an arbitral award. *See* New York Convention art. V. By contrast, the treaty at issue in *NextEra* and *9REN*—the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 ("ICSID Convention")—specifies that the awards it governs must be treated as "binding," "final judgment[s]" that are not "subject to any appeal or to any other remedy" in any court. ICSID Convention arts. 53(1), 54(1). "'Contracting states' courts are thus not permitted to examine an … ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award.'" *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 515 (D.C. Cir. 2023) (quoting *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 102 (2d Cir. 2017)).

By avoiding an inquiry into *who* may enforce an arbitration agreement at the jurisdictional stage, Congress ensured that courts would decide that question consistently with the specific treaty standard applicable to each award. Otherwise, the FSIA would pose a barrier to fulfilling the nation's treaty obligations. Congress deliberately sought to avoid that result by specifying that foreign state immunity is "[s]ubject to existing international agreements." 28 U.S.C. § 1604. And under settled principles of interpretation, federal statutes "are always to be construed"—"if … possible"— "so as to conform to the provisions of a treaty." *United States v. Forty-Three*

Gallons of Whisky, 108 U.S. 491, 496 (1883). Because Spain's interpretation risks defiance of the ICSID Convention, it must be rejected.

Spain's reliance on "[b]ackground arbitration principles" fails for the same reason. Pet. 21. Which "arbitration principles" apply to a given award against a foreign state depends on the treaty that governs its enforcement. Even if the background principles applicable to private commercial arbitrations were relevant, moreover, they would cut against Spain's argument. Spain claims "courts 'must resolve'" whether an arbitration agreement was "formed." Pet. 22 (brackets omitted) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-300 (2010)). But no one disputes that the applicable agreement here—the ECT—was formed. As the decision below recognized, the issue here is the "scope" of that agreement, not its "existence." App.22a-25a (emphasis omitted). That decision accords with the decisions of other courts holding that questions about who may benefit from an arbitration agreement go to scope, not existence. *E.g.*, *Swiger v. Rosette*, 989 F.3d 501, 506-07 (6th Cir. 2021); *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714-15 (5th Cir. 2017); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 209-11 (2d Cir. 2005). "Arbitration is … 'a matter of consent,'" *Granite Rock*, 561 U.S. at 299 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)), and there is no principled reason why Party A cannot express its consent, in an arbitration agreement with Party B, to have an arbitrator decide which other parties may benefit from the agreement. If anything, therefore,

background arbitration principles *support* the D.C. Circuit's decision here.

C. This Case Is a Poor Vehicle and Does Not Otherwise Merit the Court's Review

1. Even if this Court were nonetheless inclined to consider Spain's first question presented, this case presents a poor vehicle for three reasons.

First, Spain's central textual argument was never briefed in the D.C. Circuit. *See supra* pp. 12-15. This Court "will not consider" arguments that were "inadequately preserved in the prior proceedings." *Auer v. Robbins*, 519 U.S. 452, 464 (1997). "In the ordinary course, prudence 'dictates awaiting a case in which the issue was fully litigated below,'" so that this Court has "'the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.'" *FDA v. R.J. Reynolds Vapor Co.*, 145 S. Ct. 1984, 1996 (2025) (cleaned up) (quoting *Yee v. City Escondido*, 503 U.S. 519, 538 (1992)).

Second, because Spain never presented its textual argument below, no Court has yet considered it. This Court is "a court of review, not of first view," and it should not grant certiorari to review arguments that "were not addressed by the Court of Appeals," or any other appellate court. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 719 (2005).

Third, review would accomplish nothing in this case because the outcome in favor of Blasket is foreordained. Spain's question is anything but "outcome-determinative." Pet. 13-14. Even if the question whether Spain consented to arbitrate with Claimants were jurisdictional, courts still must defer

to the Tribunal's determination about Spain's consent to arbitrate. It is settled that "parties may agree to have an arbitrator decide … 'gateway questions of arbitrability,'" including "'whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67-68 (2019) (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). When a question of arbitrability has been clearly and unmistakably delegated to the arbitral tribunal, the court "possesses *no power* to decide the arbitrability issue," and the arbitral tribunal's decision is binding even if it is "wholly groundless." *Id.* at 68 (emphasis added). Here, Spain and Claimants clearly and unmistakably agreed to arbitrate the question whether Spain agreed to arbitrate because the ECT's arbitration provisions incorporate the UNCITRAL Rules, which empower the tribunal "to rule on its own jurisdiction." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878-79 (D.C. Cir. 2021) (quotation marks omitted). In ratifying the ECT, Spain thus delegated to the Tribunal the power to rule on any objection to its jurisdiction, including "objections with respect to the existence or validity of the arbitration agreement." UNCITRAL Rules art. 23(1). So the Tribunal's finding is controlling, regardless of how Spain's FSIA question is resolved.

The Tribunal's finding is doubly controlling because Spain affirmatively submitted its intra-EU objection to the Tribunal and asked it to decide the issue. J.A. 351-352, 620. "[A]fter an arbitral award," a party "cannot argue … that the arbitrator lacked authority to decide a jurisdictional or arbitrability

issue the party itself submitted." *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Loc. 103*, 324 F.3d 42, 50 (1st Cir. 2003). That makes this case a uniquely unsuitable vehicle for deciding Spain's FSIA question.

The Tribunal's decision was also correct. The ECT unambiguously provides for intra-EU arbitration, and nearly 50 arbitral tribunals have rejected Spain's EU-law objection. *See* Decl. of A. Bjorklund ¶ 165, *BayWa r.e. AG v. Kingdom of Spain*, No. 1:22-cv-2403 (D.D.C. Jan. 30, 2023), Dkt. 21. These tribunals include many of the world's leading experts on international law, most operating under the auspices of the World Bank's International Center for Settlement of Investment Disputes. *Id.*; J.A. 679 ¶ 127 & n.85. And these tribunals have uniformly rejected Spain's objection. Foreign courts have done the same: As the United Kingdom's High Court has recognized, "[t]he EU treaties do not trump" Spain's "pre-existing treaty obligations under … the ECT." *Infrastructure Services Luxembourg S.À.R.L. v. Kingdom of Spain*, [2023] EWHC 1226, ¶ 67 (Comm), bit.ly/45wjoL2; *see also, e.g.*, *Kingdom of Spain v. Infrastructure Servs. Luxembourg S.à.r.l* [2023] HCA 11 ¶¶ 10, 78, 82 (Austl.); *EDF Energies Nouvelles, S.A. v. Kingdom of Spain*, Federal Supreme Court, Apr. 3, 2024, No. 4A_244/2023 (Switz.).

2. Nor is the question presented otherwise worthy of review. To begin with, Spain fails to demonstrate that its question presented bears any practical import. The D.C. Circuit has already held in *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam), that a foreign sovereign waives immunity from suit by ratifying the New York Convention. *See*

28 U.S.C. § 1605(a)(1). The same principle applies to the enforcement convention at issue in *NextEra* and *9REN*, the ICSID Convention. *See Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013). Granting certiorari in these cases would not change whether Spain is subject to jurisdiction under the FSIA.

Although the D.C. Circuit below chose to leave "waiver … for another day," App.17a, *Tatneft* is correct and accords with other D.C. Circuit decisions, *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999); the rule in other circuits, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578-79 (2d Cir. 1993), *as amended* (May 25, 1993); and foreign courts' interpretations of both the New York Convention, *see*, *e.g.*, *CCDM Holdings, LLC v. Republic of India* (No 3) [2023] FCA 1266 ¶¶ 35, 41, 51, 103 (Austl.), and the ICSID Convention, *see*, *e.g.*, *Infrastructure Servs.*, [2023] EWHC 1226 ¶¶ 67, 91-103; *Sodexo Pass Int'l SAS v. Hungary*, CIV-2020-485-734 [2021] NZHC 371 ¶¶ 23, 25 (N.Z.); *Société Africiane des Bétons Industriels (SOABI) v. Senegal Cour de Cassation* (11 June 1991) 2 ICSID Reports 341 (Fr.). Spain and most nations of the world are parties to those treaties—the principal treaties governing enforcement of arbitral awards against foreign states. The waiver exception thus establishes jurisdiction regardless of the arbitration exception.

Review of this case would also change nothing on the ground. As the European Commission admitted below, "[m]ost of the known intra-EU awards against

States are *already* the subject of enforcement actions here." European Comm'n Reh'g *Amicus* Br. 12 (emphasis added). Spain's concerns about facing the "burdens of litigation" and "appellate consequences," Pet. 16, are thus largely moot. Even if Spain had a "meritorious immunity defense," *id.*, it would not retroactively protect Spain "from the inconvenience" of suits already filed, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 179 (2017) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

Spain fares no better in invoking "reciprocity concerns for our own government." Pet. 17. A ruling that the FSIA is not satisfied would amount to a failure to fulfill the United States' own international treaty obligations under the ICSID Convention and the New York Convention. *See supra* pp. 21-23. These treaties sought "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (in ratifying New York Convention, United States sought to advance the "emphatic federal policy in favor of arbitral dispute resolution," which applies with "special force in the field of international commerce"). If anything, therefore, reciprocity concerns support the D.C. Circuit's decision and counsel against review.

Spain's *amicus* the European Commission adds that the decision below will encourage intra-EU arbitration, which is "incompatible with the very structure of the EU legal order." European Comm'n *Amicus* Br. 9, 13-17 (U.S.). But the D.C. Circuit made clear that it was "not address[ing] the merits question whether [the ECT's] arbitration provision extends to EU nationals." App.26a. And whatever the courts below may ultimately hold on that merits issue, award holders remain free to enforce their intra-EU awards in other New York Convention signatory countries that have already rejected Spain's intra-EU objection, including the U.K. *See*, *e.g.*, *Infrastructure Servs.*, [2023] EWHC 1226 ¶¶ 93-95. The decision below in no way disturbs the "EU legal order."

II. Spain's *Forum Non Conveniens* Question Does Not Warrant Review.

Spain also contends that review is warranted to resolve a split on whether *forum non conveniens* is an available defense in arbitral award enforcement cases. But Spain overstates the depth of the circuit split on that issue. In truth, only the Second and D.C. Circuits have weighed in, and there is little daylight between those two circuits' approaches: *Forum non conveniens* is categorically inapplicable in international arbitral award enforcement actions against foreign sovereigns in the D.C. Circuit, while it is *almost* categorically inapplicable in such actions in the Second Circuit. Accordingly, this Court has denied review on Spain's *forum non conveniens* issue twice in the last eight years. *See Government of Belize v. Belize Soc. Dev. Ltd.*, 580 U.S. 1046 (2017) (mem.); *Ukraine v. PAO*

Tatneft, 143 S. Ct. 290 (2022) (mem.). Nothing has changed to warrant review now.

1. Spain greatly exaggerates the divide among the courts of appeals and the practical importance of any such disagreement. In the D.C. Circuit, *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award against a foreign sovereign because "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005) (citing 28 U.S.C. §§ 1609, 1610(a)(6)). The D.C. Circuit, however, has applied that rule only to "actions in the United States to enforce arbitral awards *against foreign nations*." *BCB Holdings Ltd. v. Government of Belize*, 650 F. App'x 17, 19 (D.C. Cir. 2016) (emphasis added). It has had no occasion to consider whether *forum non conveniens* is available as a defense in actions to enforce foreign arbitral awards against private parties. *Cf. TMR*, 411 F.3d at 303 (citing the FSIA's attachment and execution provisions).

Only the Second Circuit has adopted a contrary rule concerning the doctrine's application to award enforcement actions against a foreign state. But in practice, the Second Circuit's approach largely overlaps with the D.C. Circuit's, as evidenced by the fact that the Second Circuit has not dismissed an enforcement action against a foreign state on *forum non conveniens* grounds in over a decade—not since *Figueiredo Ferraz e Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011). In *Figueiredo*, the Second Circuit "disagree[d]" with *TMR*

to the extent it "considered a foreign forum inadequate because the foreign defendant's precise asset in this country can be attached only here." *Id.* at 391.

The Second Circuit, however, has since limited *Figueiredo*'s holding, affirming the denial of a *forum non conveniens* defense in an award enforcement action against Nigeria because the "summary nature" of such actions weighs heavily against applying the doctrine. *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 71 (2d Cir. 2022). *Esso* also underscored that the award holder's "choice of forum in the United States was owed deference," even though "all parties" were "incorporated" in Nigeria. *Id.* Given *Esso*'s rationale, it is largely irrelevant whether a court applies the Second Circuit's approach to *forum non conveniens* or the D.C. Circuit's: Either way, award enforcement actions against foreign sovereigns may proceed.

Spain's efforts to widen the split fall flat. The decision below does not conflict with the Ninth Circuit's decision in *Melton v. Oy Nauror Ab*, 161 F.3d 13, 1998 WL 613798, at *1 (9th Cir. Sept. 4, 1998) (table). *Melton* involved private parties, not a foreign sovereign, so there is no inconsistency with the D.C. Circuit's holding, which arose in an FSIA case and has not yet been applied in a case involving only private parties. Regardless, because *Melton* is unpublished and does not bind future Ninth Circuit panels, it cannot be the subject of any split. *See* 9th Cir. R. 36-3.

Nor does the decision below conflict with Spain's Fourth Circuit case, *Estate of Ke v. Yu*, 105 F.4th 648 (4th Cir. 2024). Like *Melton*, that case involved

private parties. And the Fourth Circuit expressly declined to take sides in the narrow disagreement between the Second and D.C. Circuits, because it could reject the defense in light of "the circumstances of th[e] case." *Id.* at 656-57 ("While it might well be that the defense of *forum non conveniens* is not available under the Convention," the Court "need not decide that question in the context of this particular proceeding[.]").

Any split on Spain's *forum non conveniens* question is both shallow and stale. It does not merit review.

2. Certiorari is also unwarranted because the purported split is neither "outcome-determinative" nor "important." Pet. 29-30, 32-33. As noted above, the Second Circuit has not applied *forum non conveniens* in an arbitral award enforcement action against a foreign sovereign in nearly fifteen years, and its most recent decision in *Esso* strongly signaled that such defenses are rarely meritorious. Because even courts "willing to entertain [*forum non conveniens*] motions … rarely gran[t] them," Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.27 reporters' note b(ii) (2023), the *forum non conveniens* question is of little practical importance. The Fourth Circuit's decision in *Yu* is illustrative: In most cases, it will be unnecessary to decide whether "*forum non conveniens* is not available under the [New York] Convention." 105 F.4th at 656.

This case, too, exemplifies the point. Both the private- and public-interest factors favor denial of Spain's *forum non conveniens* defense. Spain asserts (Pet. 32) that the "private interests are a wash," but

even the Second Circuit has recognized that the plaintiff's choice of forum in award enforcement actions should control. *Supra* p. 31. Spain argues (Pet. 32) that the public-interest factors favor a European forum, but Spain's consent to arbitrate is governed by customary international law—not EU law. *See*, *e.g.*, J.A. 845. And Spain's effort to downplay *the United States*' interests flies in the face of the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, and our nation's treaty obligations under both the ICSID Convention and the New York Convention. The "flexib[le]" analysis Spain seeks (Pet. 32-33) would thus lend it no support in any event.

3. The D.C. Circuit's longstanding rule is sound. As this Court has explained, *forum non conveniens* applies only if "there exists an alternative forum" that is "adequate." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). If other forums "d[o] not permit litigation of the subject matter of the dispute" or the "remedy" they offer is "clearly unsatisfactory," the defense is unavailable. *Id.* That is the case in actions to enforce arbitral awards against foreign sovereigns: "[O]nly a court of the United States … may attach the commercial property of a foreign nation located in the United States." *TMR*, 411 F.3d at 303; *see* 28 U.S.C. § 1610(a)(6) (permitting attachment of foreign sovereign's commercial property in the United States upon a judgment entered *by a court of the United States*). A court in Europe cannot provide that relief.

Spain's rejoinder—that the D.C. Circuit's rule is inconsistent with "the doctrine's hallmark flexibility," Pet. 33—fundamentally misunderstands the doctrine.

That flexibility comes into play only *after* clearing the threshold adequate-alternative-forum hurdle. *Piper Aircraft*, 454 U.S. at 255. And there is no need to balance the "public and private interest[s]" for each forum, *id.*, in foreign-arbitral-award enforcement cases against foreign sovereigns because there is never an adequate forum outside the United States, *TMR*, 411 F.3d at 303.

Spain also contends that its European assets "will do just as well as" its U.S. assets in a New York Convention action. Pet. 3, 30. But that misunderstands the nature of Blasket's cause of action. In confirmation actions under the New York Convention, the award holder "seek[s] to enforce an arbitral award against a [debtor] in the United States" precisely because the debtor "will have assets *here*" that can be attached to satisfy the debt. *Devas Multimedia Private Ltd. v. Antrix Corp.*, 2023 WL 4884882, at *4 (9th Cir. Aug. 1, 2023) (Miller, J., concurring) (emphasis added), *rev'd*, 145 S. Ct. 1572 (2025). Blasket's effort to convert the Award to a judgment is merely a step in a single action aimed ultimately at attaching Spain's *U.S.-based assets* to satisfy the Award. *See Mobil Cerro*, 863 F.3d at 118 n.18 ("an award-creditor need file only a single action to enforce the foreign New York Convention award under the FAA," reducing the award "into a federal judgment on which execution (attachment, imposition of a lien, garnishment) may occur"). Spain's argument is thus not that Blasket should pursue the *same* action elsewhere—an impossibility—but that it should pursue a *different* action altogether. That is not an argument for *forum non conveniens.*

Spain's submission would also fundamentally undercut the New York Convention's policies. The Convention's basic purpose is to spare investors the burden of pursuing their claims in the unfriendly fora of a foreign state defendant's national courts. *See* Stefan Kröll, *Enforcement of Awards*, *in* Marc Bungenberg et al., International Investment Law: A Handbook 1483 (2015) (observing that a state's refusal to pay an award is "usually coupled with an inability of the investor to find judicial or administrative support for enforcement in that country itself"); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1051 (1961) (noting "discrimination against foreign awards" in "national courts"). The New York Convention guarantees "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention art. I(1). And Congress implemented the Convention in mandatory terms: Such awards "shall" be enforced in United States courts. 9 U.S.C. § 207.

In implementing the New York Convention, the Executive Branch and Congress thus recognized this country's interest in fulfilling its binding treaty commitment to enforce arbitral awards. Spain's efforts to seek a home court advantage are understandable. But that is the very advantage the New York Convention sought to neutralize. *Forum non conveniens* is "not a principle of universal applicability" and cannot be used to subvert this "right of choice" of a U.S. forum guaranteed by Congress.

United States v. Nat'l City Lines, Inc., 334 U.S. 573, 596-97 (1948).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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