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 FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act provides that foreign states are generally immune from civil lawsuits in state and federal courts, save for limited exceptions. 28 U.S.C. 1604. Under one of those exceptions, a foreign state is not immune from certain suits seeking to "confirm an award" under an arbitration agreement "made by the foreign state with or for the benefit of a private party." 28 U.S.C. 1605(a)(6). Petitioner, the Kingdom of Spain, is a signatory to an investment treaty providing for "unconditional consent" to arbitrate disputes with investors from other signatory states, including the Netherlands and Luxembourg. Respondents are Dutch and Luxembourgish investors or their successors who seek to enforce arbitral awards they obtained against Spain. Spain, however, contends that it never formed valid arbitration agreements with respondents or their predecessors because European law forbids European states and European nationals from agreeing to arbitrate their disputes involving European law.

The questions presented are:

1. Whether Spain's assertion about European law, if correct, affects the existence of the arbitration agreement (and thus Spain's sovereign immunity) or only the agreement's scope.

2. Whether a suit to confirm a foreign arbitral award against a foreign state may be dismissed on grounds of *forum non conveniens*.

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## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## INTRODUCTION

This case involves the attempted confirmation of arbitral awards against the Kingdom of Spain (petitioner) obtained by Dutch and Luxembourgish companies (respondents and their predecessors in interest) that had invested in Spain in reliance on subsidies that Spain later withdrew. The Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, ordinarily precludes courts from exercising jurisdiction over civil suits against foreign states, but the statute contains an exception for suits to confirm awards under arbitration agreements "made by the for-

eign state with or for the benefit of a private party." 28 U.S.C. 1605(a)(6).

Spain, however, maintains that it never had valid arbitration agreements with or for the benefit of those companies. Although an investment treaty included Spain's "unconditional consent" to arbitrate disputes with investors from other signatory states, Spain contends that it lacked legal capacity to form an arbitration agreement to resolve disputes with the companies because European Union (EU) law forbids arbitration between EU member states and EU nationals of disputes that involve EU law.

The court of appeals held that these suits could proceed under the FSIA. The court reasoned that the investment treaty itself is an arbitration agreement between signatory states "for the benefit of a private party," and that whether the companies can qualify as such parties under EU law is a question not of that agreement's *existence*, but merely its *scope*. That distinction can be critical because under the FSIA, the existence of an arbitration agreement is a jurisdictional question that a federal court must decide for itself de novo, whereas the scope of an arbitration agreement (*i.e.*, whether the agreement covers the particular dispute at issue) is a question that the parties may delegate to arbitrators, whose decision is either binding on or reviewed highly deferentially by a court. Because the arbitrators here rejected Spain's argument, the court of appeals' holding will permit withdrawal of Spain's sovereign immunity without a federal court's ever determining that Spain in fact has valid arbitration agreements with the companies.

That holding is incorrect. The FSIA permits suit under 28 U.S.C. 1605(a)(6) only if the foreign state has an

arbitration agreement "with or for the benefit of" *the FSIA plaintiff*—not some unrelated third party. That is the best contextual reading of "party" in that provision. Even in the domestic context, where Congress has expressed a national policy favoring arbitration, courts (not arbitrators) resolve challenges to the validity of arbitration clauses. Congress could not have wanted courts to exercise *less* oversight in cases where the immunity of a foreign sovereign is at stake.

Nevertheless, the court of appeals' holding does not warrant further review because the asserted circuit conflict is shallow and resolution of the issue is unlikely to make a difference in this case. Even on de novo review, the court of appeals would be likely to conclude that the investment treaty reflects a valid arbitration agreement "with or for the benefit of" the companies. 28 U.S.C. 1605(a)(6). The treaty's language is unequivocal: Spain gave its "unconditional consent" to arbitrate disputes with investors. And the Vienna Convention on the Law of Treaties, *done* May 23, 1969, 1155 U.N.T.S. 331—to which Spain, the Netherlands, and Luxembourg are parties—provides that, with exceptions not relevant here, a state may not invoke "internal law" to avoid a treaty obligation. Arts. 27, 46(1), 1155 U.N.T.S. 339, 343. The EU law that allegedly vitiates Spain's "unconditional" promise is just the sort of "internal law" on which Spain may not rely. Spain thus likely would not be entitled to relief even if it prevailed on the first question presented, making this case a poor vehicle in which to address that question.

Nor is this Court's review warranted on the question whether *forum non conveniens* dismissal is available. Although that question is important and has divided the

circuits, this case is a poor vehicle in which to address it because of unresolved factual issues.

## STATEMENT

1. Between 2007 and 2012, respondents or their predecessors in interest (collectively, respondents) made investments in Spain's renewable energy sector in reliance on a Spanish subsidy program. Pet. App. 6a. When Spain later altered the subsidies, respondents claimed that the alterations violated the Energy Charter Treaty (ECT or Treaty), *adopted* Dec. 17, 1994, 2080 U.N.T.S. 95, a multilateral investment treaty joined by many nations within the EU (including Spain, the Netherlands, and Luxembourg) as well as some nations outside of it (including, for instance, Japan), but not the United States. Pet. App. 4a-7a, 22a.

Article 26 of the Treaty provides that with exceptions not relevant here, "each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration." ECT art. 26(3)(a). Invoking that provision, the *NextEra* and *9REN* respondents pursued arbitration against Spain under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), *done* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, while the predecessors in interest of the *Blasket* respondent pursued arbitration against Spain under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). See Pet. App. 6a-7a.

Spain contested the arbitral panels' jurisdiction, arguing that Spain had never formed valid arbitration agreements with respondents because EU law prohibits EU member states from arbitrating disputes against EU nationals if the arbitration would raise questions of

EU law (on the theory that doing so would interfere with the autonomy of the EU courts). See Pet. App. 10a-11a. The Court of Justice of the European Union—the EU's highest court—has endorsed that argument in a pair of holdings involving arbitral decisions against Slovakia and Moldova. See *Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018:158, ¶ 60 (Mar. 6, 2018); *Republic of Moldova* v. *Komstroy LLC*, ECLI:EU:C:2021:655 ¶ 66 (Sept. 2, 2021). In contrast, the arbitral panels here (like nearly all arbitral panels to have addressed the issue) rejected Spain's argument, found Spain to have violated the Treaty, and entered substantial awards in favor of respondents. Pet. App. 11a (awards of €290 million, €41 million, and €26.5 million).

2. Respondents filed three separate suits against Spain in federal district court in the District of Columbia seeking to enforce their respective arbitral awards. See Pet. App. 11a-14a. The United States is a party both to the ICSID Convention, which imposes an obligation to confirm international arbitral awards, and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), *done* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, which imposes a similar obligation under UNCITRAL. See ICSID Convention art. 54(1), 17 U.S.T. 1291; New York Convention art. III, 21 U.S.T. 2519; see also 9 U.S.C. 201 *et seq.* (domestic enforcement of New York Convention); 22 U.S.C. 1650a (same for ICSID). The *NextEra* and *9REN* cases were assigned to Judge Chutkan and the *Blasket* case was assigned to Judge Leon. See Pet. App. 64a-149a.

Spain moved to dismiss all three cases under the FSIA, which provides that as a general matter, a "foreign state shall be immune from the jurisdiction of the

courts of the United States and of the States" in civil cases. 28 U.S.C. 1604; see Pet. App. 12a-14a. The FSIA further provides, however, that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" where suit is expressly permitted by certain international agreements or by exceptions enumerated in the FSIA. 28 U.S.C. 1605(a). When one of those exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations on punitive damages. 28 U.S.C. 1606.

Respondents relied in part on the arbitration exception set forth in 28 U.S.C. 1605(a)(6). See Pet. App. 13a. That exception permits suit "to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship," or "to confirm an award made pursuant to such an agreement," if certain other conditions (not relevant here) are satisfied. 28 U.S.C. 1605(a)(6). Respondents contended that the Treaty itself reflects an arbitration agreement with or for the benefit of investors such as themselves, and they asserted that Spain's argument concerned the agreement's scope, not its existence, so that the decision about that argument's correctness was properly delegated to the arbitrators. See Pet. App. 22a.

3. Judge Leon dismissed the *Blasket* suit for lack of jurisdiction. Pet. App. 129a-149a. He explained that "challenges to the validity of an arbitration clause on grounds that the parties lacked the legal capacity to form an agreement to arbitrate must be resolved by a court, not an arbitrator," and he concluded that in light

of the European Court of Justice decisions in *Achmea* and *Komstroy*, Spain "lacked the legal capacity to make a valid offer to arbitrate" disputes with EU nationals. *Id.* at 137a-138a.

Judge Chutkan, in contrast, held that the *NextEra* and *9REN* suits could proceed under the arbitration exception. Pet. App. 64a-99a (*NextEra*), 100a-128a (*9REN*). She concluded that the Treaty "in a purely literal sense" created an arbitration agreement, and that Spain's argument concerned only the scope of that agreement. *Id.* at 73a, 107a; see *id.* at 78a-80a, 112a-114a. Judge Chutkan also denied Spain's request to dismiss the suit on *forum non conveniens* grounds, citing D.C. Circuit precedent precluding such dismissal in suits seeking to enforce foreign arbitral awards. *Id.* at 81a-82a. Judge Chutkan enjoined Spain from pursuing an anti-suit injunction in the Netherlands or Luxembourg that would have required respondents to abandon their FSIA suits. *Id.* at 88a-96a, 121a-128a.

4. The court of appeals resolved all three appeals in a single opinion, holding that the district court had jurisdiction over respondents' suits and remanding each case for further proceedings. Pet. App. 1a-63a. The court of appeals concluded that Spain's argument "that the standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals" is an "argument regarding the *scope* of the Energy Charter Treaty, not its *existence*." *Id.* at 22a. The court explained that a scope question is "not 'a jurisdictional question under the FSIA,'" but instead a merits question to be resolved by the arbitrators. *Id.* at 23a (citation omitted).

The court of appeals also explained that circuit precedent foreclosed Spain's *forum non conveniens* argument. *Id.* at 27a. And the court vacated Judge Chut-

kan's anti-anti-suit injunction. *Id.* at 27a-40a. Judge Pan dissented only from the vacatur of that injunction. *Id.* at 41a-63a.

## DISCUSSION

The petition for a writ of certiorari should be denied. On the first question presented, about the FSIA's arbitration exception, the court of appeals erred in holding that arbitrators rather than courts should decide whether Spain has an arbitration agreement that is "with or for the benefit of" respondents, 28 U.S.C. 1605(a)(6). But even on de novo review, the courts below would likely agree with the arbitrators that the EU case law on which Spain relies does not relieve it of its obligations under the Energy Charter Treaty. In that event, Spain would not be entitled to relief even if it were to prevail on the first question presented, making this a poor vehicle in which to address that question.

Nor is review warranted of the second question presented, about the availability of *forum non conveniens* in suits against foreign states to confirm arbitral awards. Although that question is important and the subject of a narrow circuit conflict, the factual record here remains undeveloped, and Spain might not have been entitled to such a dismissal under any circuit's rule.

### A. This Court Should Deny Review Of The Court Of Appeals' Interpretation Of The FSIA's Arbitration Exception

1. a. Under the FSIA, "a foreign state is presumptively immune" from civil liability in U.S. courts, and "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); see 28 U.S.C. 1330(a), 1604.

Because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," a court must satisfy itself of the facts necessary to establish its jurisdiction. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). "At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983). Although a foreign state may waive immunity, it cannot forfeit immunity: A federal district court must determine whether "immunity is unavailable under the Act"—that is, whether an exception to foreign sovereign immunity applies—"even if the foreign state does not * * * assert an immunity defense." *Id.* at 494 n.20; cf. 28 U.S.C. 1605(a)(1) (foreign state may "waive[] its immunity").

The FSIA's arbitration exception in paragraph (6) of Section 1605(a) withdraws foreign sovereign immunity in any case brought "to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship," or "to confirm an award made pursuant to such an agreement to arbitrate," with certain additional requirements not relevant here. 28 U.S.C. 1605(a)(6). In determining whether that exception applies, a court must therefore determine whether an arbitration agreement, as described in the exception, exists.

Accordingly, Spain's sovereign immunity here, and the jurisdiction of federal courts over respondents' suits, depends on whether Spain has a valid arbitration

agreement "with or for the benefit of a private party." 28 U.S.C. 1605(a)(6). The court of appeals viewed the Treaty itself as establishing a valid arbitration agreement "for the benefit of" at least *some* private investors from signatory states—for instance, investors from Japan—thereby satisfying the plain text of paragraph (6). Pet. App. 22a. The court viewed Spain's contention that EU law precluded the formation of intra-EU arbitration agreements as affecting only the *scope* of the agreement, *i.e.*, whether that agreement covered the particular dispute between respondents and Spain at issue here. *Id.* at 23a. And as to questions of scope, the court observed, the arbitrators' decision controls. *Ibid.*; see ICSID Convention, art. 53, 17 U.S.T. 1291 (arbitral decision is binding and unreviewable); New York Convention, art. V, 21 U.S.T. 2520 (recognition and enforcement of arbitral decision may be refused only on extremely limited grounds).

b. The court of appeals' view is incorrect. In context, the phrase "an agreement made by the foreign state with or for the benefit of *a private party*" is best read to mean an agreement with or for the benefit of *the FSIA plaintiff*—not some unrelated third party (such as a hypothetical Japanese investor). 28 U.S.C. 1605(a)(6) (emphasis added). That is the most natural reading of a jurisdictional provision—especially one that withdraws the immunity of a foreign sovereign in U.S. courts. Jurisdictional provisions generally turn on the status of the parties to the litigation, not of unrelated third parties. *E.g.*, 28 U.S.C. 1332(a) (diversity jurisdiction). It would be strange—and at odds with the carefully crafted exceptions in the FSIA—for Congress to withdraw a foreign state's sovereign immunity from a suit brought by one party solely because that state

would lack immunity from a suit brought by someone else.

The surrounding text in paragraph (6) confirms that reading. As noted, that provision authorizes the exercise of jurisdiction over a foreign state in certain cases involving "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between *the parties* with respect to a defined legal relationship." 28 U.S.C. 1605(a)(6) (emphasis added). The only relevant "parties" that have both a "defined legal relationship" and "differences" to be resolved in the case are the foreign state and the FSIA plaintiff seeking to enforce an arbitration agreement (or confirm an award under such an agreement). Respondents observe (*Blasket* Br. in Opp. 19-21; *NextEra/9REN* Br. in Opp. 20-21) that the phrase "the parties" in paragraph (6) is most naturally read as referring to "the foreign state" and "a private party" earlier in the sentence. 28 U.S.C. 1605(a)(6). That is true, but it cuts against respondents because it confirms that "a private party" for whose benefit an arbitration agreement has been made must *also* be one of "the parties" with "differences" to be resolved—namely, the FSIA plaintiff. *Ibid.*

Emphasizing the statute's use of the indefinite article ("*a* private party"), respondents contend that a court should ask only whether the foreign-state defendant has made an arbitration agreement with or for the benefit of *some* private party, somewhere; and if the answer is "yes," whether that agreement covers the FSIA plaintiff's dispute is reserved for the arbitrators to decide. *Blasket* Br. in Opp. 20; *NextEra/9REN* Br. in Opp. 16. That argument proves too much. If it were correct, even a national of a *non*-signatory country to the Treaty

could maintain a suit in federal court to "enforce" arbitration at the outset of a dispute, 28 U.S.C. 1605(a)(6), on the theory that the Treaty constitutes an arbitration agreement for the benefit of "*a* private party" (*e.g.*, some hypothetical investor from a signatory country such as Japan), and whether that agreement actually encompasses any other investor-plaintiff's dispute would be a matter of scope to be decided by the arbitrators, after the court compels arbitration. And if the plaintiff later were to prevail before the arbitral panel, he could sue in federal court to confirm the award—again based solely on the hypothetical Japanese investor. To be sure, conscientious arbitrators presumably would not accept outlandish arguments about the Treaty's scope. But the key point is that federal courts should determine for themselves whether they in fact have jurisdiction—especially where it affects the sovereign immunity of a foreign state—instead of basing their jurisdictional determinations on hypothetical parties not before the court and effectively outsourcing determination of the true jurisdictional facts to arbitrators.

c. Even in the context of domestic arbitration, where Congress has expressed a strong "national policy favoring arbitration," courts themselves will resolve any "validity challenge * * * to the arbitration clause itself." *Granite Rock Co.* v. *International Brotherhood of Teamsters*, 561 U.S. 287, 298-299 (2010) (brackets and citations omitted); see *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445 (2006); *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-404 (1967); cf. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate

is to be decided by the court, not the arbitrator."). Here, Spain challenges the validity not of the Treaty as a whole, but of the arbitration clause (article 26) as applied to EU nationals like respondents. An analogous challenge to an arbitration-enforcement suit in the domestic context would trigger a court's obligation to determine for itself the underlying arbitration clause's validity. There is no sound basis to read the FSIA as requiring a different result, especially given that the determination implicates foreign sovereign immunity and the court's jurisdiction.

Respondents cite lower-court cases holding that arbitrators are often delegated the authority to decide whether a non-signatory to a contract may invoke (or be bound by) the contract's arbitration clause. See *Blasket* Br. in Opp. 23 (citing *Swiger* v. *Rosette*, 989 F.3d 501 (6th Cir. 2021); *Brittania-U Nigeria, Ltd.* v. *Chevron USA, Inc.*, 866 F.3d 709 (5th Cir. 2017); and *Contec Corp.* v. *Remote Solution, Co.*, 398 F.3d 205 (2d Cir. 2005)). But unlike this case, those cases did not involve claims that allowing the non-signatories to invoke (or be bound by) the arbitration clauses would *ipso facto* render the clauses invalid, or that the counterparties lacked legal capacity to enter into arbitration agreements with those non-signatories. That the non-signatories in those cases had close legal relationships to the signatories makes the cases even less apposite. See *Swiger*, 989 F.3d at 503 (coconspirator); *Brittania-U*, 866 F.3d at 711 (employee and agent); *Contec*, 398 F.3d at 207 (successor corporation).

The court of appeals' reading is also inconsistent with principles of contract law. Cf. *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25, 33-37 (2014) (explaining that "[a]rbitration is a matter of contract" and

that arbitration clauses in treaties are generally interpreted like those in contracts) (citation omitted). A third party to a contract generally "cannot enforce" a contractual promise unless he "was intended to be the beneficiary of the promise." *Constable* v. *National Steamship Co.*, 154 U.S. 51, 98 (1894); see *Astra USA, Inc.* v. *Santa Clara County*, 563 U.S. 110, 117 (2011) ("A nonparty becomes legally entitled to a benefit promised in a contract * * * only if the contracting parties so intend."). As the court recognized, the Treaty here is analogous to a contract between the signatory states. Pet. App. 19a. But Spain—supported by several EU signatories and the EU itself—contends that EU signatory states did not intend for their own nationals to be beneficiaries of the Treaty's arbitration clause with respect to investments in other EU signatory states. See European Commission Amicus Br. 7-11; see also Republic of Poland Amicus Br. 2-3; Romania Amicus Br. 3-4, 13-18; Republic of Bulgaria Amicus Br. 3, 10-11. Yet the court would nonetheless permit such EU nationals (like respondents) to invoke and enforce article 26 without resolving for itself whether Spain's contention is in fact correct.

d. Observing that review of arbitration awards is highly deferential, respondents contend that "avoiding an inquiry into *who* may enforce an arbitration agreement at the jurisdictional stage" would better ensure consistency "with the specific treaty standard applicable to each award." *Blasket* Br. in Opp. 22; see *id.* at 21-23. But that conflates the grounds on which a court may refuse to confirm an arbitral award under the New York or ICSID Conventions with the jurisdictional determination that a U.S. court must make under the FSIA. Neither the Conventions nor their implementing stat-

utes preclude a federal court's independent assessment of its own jurisdiction under domestic law. Congress could have easily written the FSIA to permit *all* suits seeking to confirm an arbitral award against a foreign state under the ICSID or New York Conventions, but instead chose to write the carefully phrased arbitration exception. Although the ICSID Convention provides that an arbitral tribunal "shall be the judge of its own competence," art. 41(1), 17 U.S.T. 1286; cf. UNCITRAL *Model Law on International Commercial Arbitration*, 1985, art. 16(1) (amended 2006) ("The arbitral tribunal may rule on its own jurisdiction."), that does not (and could not) displace a federal court's duty to assure itself of jurisdiction.

2. Nevertheless, this Court's review of the first question presented is not warranted because the alleged circuit conflict is shallow and Spain would be unlikely to obtain relief even if the threshold "who decides" question were resolved in Spain's favor.

a. Spain asserts (Pet. 10-13) that the decision below conflicts with *Cargill International S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993), and *Al-Qarqani* v. *Saudi Arabian Oil Co.*, 19 F.4th 794 (5th Cir. 2021), cert. denied, 142 S. Ct. 2753 (2022). But any alleged conflict is tenuous at best.

In *Cargill*, the Second Circuit reversed the dismissal of a suit seeking to compel arbitration because "the district court ought to have determined whether, if the facts as alleged by [the plaintiff] are true, the arbitration agreement in [the relevant contract] was intended to benefit" the plaintiff as a third-party beneficiary. 991 F.2d at 1019. Although *Cargill* directed the district court to make that determination on remand, the reference to taking the plaintiff's allegations as true (instead

of determining the actual facts) makes it unclear whether *Cargill* viewed the determination as a scope question that the parties could delegate to the arbitrators.

In *Al-Qarqani*, the Fifth Circuit ordered the dismissal of a suit to enforce an arbitral award after concluding that the parties did not have a "valid arbitration agreement" under the governing contract, which "sa[id] nothing whatsoever about arbitration." 19 F.4th at 801-802. The court did not defer to the arbitrators' contrary conclusion, but it is unclear whether that was because the court viewed the issue as jurisdictional or because the arbitration proceedings there had been a "sham," *id.* at 802; see *id.* at 797 (describing the "shenanigans"); cf. New York Convention art. V(1)(d), 21 U.S.T. 2520 (arbitral award need not be enforced if "the arbitral procedure was not in accordance with the agreement of the parties").

Accordingly, although both *Cargill* and *Al-Qarqani* appeared to assume without discussion that the relevant arbitration agreement must be with or for the benefit of the FSIA plaintiff (and not some unrelated third party), neither court had occasion to address the contrary reasoning that the D.C. Circuit adopted here. Any tension between the unelaborated assumptions in those decisions and the decision below is thus at best shallow and underdeveloped, and could benefit from more percolation. We acknowledge that further percolation may be less likely given that D.C. is always an available venue for civil claims against foreign states, see 28 U.S.C. 1391(f)(4), but there may be many cases arising out of the D.C. Circuit itself that could provide opportunities to review the issue if necessary, including under other investment treaties. Cf. European Commission

Amicus Br. 19 n.8 (listing pending cases), 21-22 & nn. 10-11 (listing bilateral investment treaties).

b. In addition, this case would be a poor vehicle for addressing the first question presented because Spain would likely not be entitled to relief even if that question were resolved in its favor. Spain's core argument is that the supposedly "unconditional consent" it manifested in the Treaty to arbitrate disputes with investors, ECT art. 26(3)(a), was conditional after all. Specifically, Spain contends that under EU law, it lacked capacity to form an arbitration agreement with other EU signatories for the benefit of each other's nationals or to consent to arbitrate disputes with respondents directly. But Spain, the Netherlands, and Luxembourg have all acceded to or ratified the Vienna Convention, which addresses treaty interpretation. See United Nations, *Treaty Collection, Status of Treaties*, perma.cc/JJG2-MFB8. Article 27 of the Vienna Convention provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." 1155 U.N.T.S. 339. And article 46 provides: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Vienna Convention art. 46(1), 1155 U.N.T.S. 343.

The court of appeals on remand would therefore be likely to reject Spain's reliance on EU law to justify its failure to honor the "unconditional" promise reflected in the Treaty's plain text. ECT art. 26(3)(a). After all, Spain does not contest that the Treaty itself is best read to establish an arbitration agreement with or for the

benefit of all investors. See *Medellín* v. *Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); see also Vienna Convention art. 31(1), 1155 U.N.T.S. 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). Nor does Spain contend that the Treaty draws a distinction between EU and non-EU investors. Instead, Spain views internal law—that is, EU law—as having created an implicit carveout with respect to EU investors. That is precisely what the Vienna Convention forbids. See *id.* arts. 27, 46(1), 1155 U.N.T.S. 339, 343. As the court of appeals observed, had the Treaty's drafters "intended to exempt intra-EU disputes" from article 26's otherwise unequivocal command, "they could have done so through a 'disconnection clause,'" such as the one that the EU (unsuccessfully) proposed during treaty negotiations. Pet. App. 21a.

Furthermore, some respondents suggest (*NextEra/9REN* Br. in Opp. 14-15) that in addition to being an agreement to arbitrate for the benefit of investors, article 26 of the Treaty is a standing offer to arbitrate that investors accept by initiating arbitration. On that view, the Treaty would be an arbitration agreement "with" respondents, not just for their benefit. 28 U.S.C. 1605(a)(6). Once again, Spain's only response is that article 26 could not constitute a standing offer to arbitrate with respondents because Spain lacks legal capacity to extend such an offer to EU nationals. See Pet. App. 21a-22a. The court of appeals did not resolve that dispute, but it appeared to favor respondents' view. *Id.* at 22a.

Accordingly, the court of appeals would likely conclude on a de novo review that Spain does have valid arbitration agreements with or for the benefit of respondents in particular. In that case, if this Court were to grant certiorari and reverse the court of appeals' erroneous interpretation of the FSIA's arbitration exception, Spain would not be entitled to relief because the lower courts would still have jurisdiction over respondents' suits. At a minimum, the likelihood of that occurrence makes this a poor vehicle in which to address that interpretation.

### B. The *Forum Non Conveniens* Question Does Not Warrant This Court's Review At This Time

Spain asks this Court to review the court of appeals' holding that "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award." Pet. App. 27a (citation omitted). Although that issue is important and the subject of a conflict with the Second Circuit, further review would be premature in this case.

1. The *forum non conveniens* doctrine provides that when an alternative forum has jurisdiction to hear a case, a federal court may, "'in the exercise of its sound discretion,'" dismiss the case "even if jurisdiction and proper venue are established" upon consideration of the public interest and the interests of the litigants. *American Dredging Co.* v. *Miller*, 510 U.S. 443, 448 (1994) (citation omitted) (listing factors). If "the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement"—namely, that "there exists an alternative forum"—"may not be satisfied." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981).

The decision below applied circuit precedent dating back to *TMR Energy Ltd.* v. *State Property Fund of*

*Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), in holding that *forum non conveniens* is categorically unavailable in suits seeking to confirm foreign arbitral awards. Pet. App. 27a. *TMR Energy* reasoned that a district court need not even consider whether to dismiss under *forum non conveniens* "if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose." 411 F.3d at 303. *TMR Energy* concluded that when a party seeks to have a U.S. court confirm a foreign arbitral award, a foreign court cannot be an adequate alternative 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." *Ibid.* In subsequent cases, including the decision below, the D.C. Circuit has reiterated that holding without further analysis. *E.g.*, Pet. App. 27a; *Deutsche Telekom, A.G.* v. *Republic of India*, 155 F.4th 694, 700 (2025); *Tatneft* v. *Ukraine*, 21 F.4th 829, 840 (2021), cert. denied, 143 S. Ct. 290 (2022); *LLC SPC Stileks* v. *Republic of Moldova*, 985 F.3d 871, 876 n.1 (2021); *BCB Holdings Ltd.* v. *Government of Belize*, 650 Fed. Appx. 17, 19 (2016) (mem.), cert. denied, 580 U.S. 1047 (2017); *Newco Ltd.* v. *Government of Belize*, 650 Fed. Appx. 14, 16 (2016) (mem.), cert. denied, 580 U.S. 1047 (2017).

Nothing in the FSIA, however, purports to categorically preclude the application of *forum non conveniens*. If anything, the foreign-affairs and comity concerns that arise when U.S. courts entertain civil suits against foreign states make it all the more important for courts to consider the public- and private-interest factors. As this Court recognized long before the FSIA was enacted, "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or

where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 423 (1932); see *Piper Aircraft*, 454 U.S. at 248 (treating *Canada Malting* as a *forum non conveniens* case).

The D.C. Circuit's categorical rule is inconsistent with that precedent, in part because it gives dispositive weight to the unavailability of the plaintiff's desired remedy in an alternative forum instead of treating that as one factor in the analysis, to be balanced against other relevant considerations (including the availability of alternative equivalent remedies). Cf. *American Dredging*, 510 U.S. at 455 ("We have emphasized that each case turns on its facts and have repeatedly rejected the use of *per se* rules in applying the doctrine.") (brackets and quotation marks omitted).

2. For that reason, the Second Circuit has disagreed with the D.C. Circuit's rigid approach, holding that "in the context of a suit to obtain a judgment and ultimately execution on a defendant's assets, the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there." *Figueiredo Ferraz E Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384, 391 (2011).

3. Notwithstanding the importance of the *forum non conveniens* issue, the narrow conflict, and D.C.'s prominence as a venue for cases against foreign states, this case would be a poor vehicle in which to address the issue at this time.

At least on the current record, it is unclear whether Spain's *forum non conveniens* argument could prevail in any circuit, including the Second Circuit. Given the apparently entrenched standoff between European

courts and arbitrators about whether EU investors are entitled to arbitrate disputes against EU signatory states to the Treaty, it seems unlikely that respondents could get any relief in any European forum. Cf. *Piper Aircraft*, 454 U.S. at 254 n.22 ("In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative."). Nor is it clear whether and to what extent Spain has attachable assets in any plausibly available non-European forum—even assuming that the public- and private-interest factors would favor such a forum over the United States. Accordingly, as the record now stands, the outcome of Spain's motion to dismiss on *forum non conveniens* grounds might well have been the same under any circuit's rule, making this a poor vehicle in which to address the availability of that doctrine at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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