

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-7005, No. 25-7064

STABIL LLC, ET AL, APPELLEES,

v.

RUSSIAN FEDERATION, APPELLANT.

JSC DTEK KRYMENERGO, APPELLEE,

v.

RUSSIAN FEDERATION, APPELLANT.

December 4, 2025, Argued;
February 13, 2026, Decided

Opinion

CHILDS, *Circuit Judge*: When Russia invaded Crimea in 2014, it did not arrive at an empty field. Ukrainian companies were already there, embedded in the daily life of the peninsula. Their businesses were lawful, visible, and stationary. Within months, Russian and Crimean forces seized facilities, transferred

operations, and refused to provide compensation. In the cases before us, two sets of Ukrainian companies were affected (“Companies”). One is JSC DTEK Krymenergo (“DTEK”), an electricity distributor, and the other is a group of Ukrainian companies (“Investors”) that owned and operated petrol stations across Crimea and lost those businesses.

The Companies turned to a bilateral investment treaty between Russia and Ukraine—the *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* (“Investment Treaty”). The Investment Treaty promised protection against uncompensated expropriation and offered arbitration to resolve disputes arising in connection with investments. The Companies, under that agreement, sued Russia in arbitral tribunals. Those arbitral tribunals concluded that Russia had breached the Investment Treaty and awarded damages to the Companies. The Companies thereafter sought to enforce these arbitral awards in the United States District Court for the District of Columbia.

In those district court proceedings, Russia acknowledged that the arbitrations occurred and that the tribunals issued the awards. It disputed, however, the authority of the district court to enforce them. In Russia’s view, the Foreign Sovereign Immunities Act (“FSIA”) did not afford jurisdiction because the Investment Treaty never covered investments in Crimea, the resulting awards are political rather than

commercial, and the lack of minimum contacts with the United States bars the exercise of personal jurisdiction.

The district court rejected those arguments. It held in both cases that jurisdiction exists under the FSIA's arbitration exception and that personal jurisdiction follows once an FSIA exception applies and service is proper. Russia now brings these interlocutory appeals under the collateral order doctrine.

Our task is limited. We do not decide the sovereignty of Crimea. We do not revisit the merits of the arbitral awards. Instead, we decide whether the district court possessed jurisdiction to hear these enforcement petitions under the FSIA, and whether Russia—once the district court concluded that the FSIA's arbitration exception applied and service was proper—may nonetheless invoke the Fifth Amendment's Due Process Clause to defeat personal jurisdiction.

Having reviewed the record and the parties' briefs, we affirm the district court's judgments.

I.

A.

1.

For more than a century and a half, the United States treated foreign sovereigns as immune from suit in its

courts. That understanding begins with *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812). Chief Justice Marshall recognized the breadth of territorial jurisdiction—“susceptible of no limitation not imposed by itself”—but explained that the United States had chosen not to exercise that power in certain cases involving foreign sovereign acts. *Id.* at 136. The holding was modest: a foreign warship in an American port lay beyond judicial reach. But that reasoning traveled. Courts soon read *The Schooner Exchange* opinion as endorsing near-absolute immunity for foreign states. See *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574 (1926) (reasoning that foreign sovereign immunity applied to “all ships held and used by a government for a public purpose”); see also Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat’l L. 33, 39 (1978) (noting that *The Schooner Exchange* “doctrine remained largely unchallenged”).

The Schooner Exchange decision also anchored the doctrine’s foundation. Sovereign immunity does not flow from the Constitution; it rests on “grace and comity.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (discussing *The Schooner Exchange*). Because immunity reflects a choice, not a constitutional command, courts historically deferred to the political branches—especially the Executive—when deciding whether to hear suits against foreign states and their instrumentalities. See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943) (“The case involves the dignity and rights of a friendly

sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State.”); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) (reasoning that foreign sovereign immunity is “founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings”). That deference tracked prevailing international norms, which we later described as the “general concepts of international practice.” *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (quoting Michael Wallace Gordon, *Foreign State Immunity in Commercial Transactions* § 3.01 (1991)).

By 1952, the ground had shifted. Foreign states no longer confined themselves to diplomacy and defense; they entered markets and engaged in “commercial activity in the United States.” *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208 (2018). That reality, the State Department concluded, required a system that allowed private parties “doing business with them to have their rights determined in the courts.” *Id.* (quoting J. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dept. State Bull. 984, 985 (1952)). The State Department adopted this “‘restrictive’ theory of foreign sovereign immunity,”

advising courts to grant immunity for public acts but to withhold it in disputes arising from a foreign state's "strictly commercial acts." *Verlinden*, 461 U.S. at 487.

Congress codified that approach in 1976. Through the FSIA, it preserved the historical respect owed to foreign sovereigns while insisting on accountability when they act as market participants. *See* 28 U.S.C. § 1602 et seq. The statute largely embraces the "restrictive theory of sovereign immunity," translating Executive practice into governing law. *Verlinden*, 461 U.S. at 488.

These cases also implicate the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"), opened for signature June 10, 1958, 21 U.S.T. 2517. Put simply, the Convention is a multilateral treaty among sovereigns that governs 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). The United States is a signatory, and it applies the Convention "on the basis of reciprocity," limiting enforcement to awards rendered in the territory of "another Contracting State." *Id.* art. I(3). Congress implemented the Convention in Chapter 2 of the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. §§ 201-208.

When the United States ratified the Convention, it adopted a commercial reservation. *See* New York Convention art. I(3) (noting that the Convention only

applies to legal relationships that are “considered as commercial”); *see also* 9 U.S.C. § 202 (same). The FAA then makes two points clear. First, any action “falling under the Convention” “arise[s] under the laws and treaties of the United States.” 9 U.S.C. § 203. Second, the Convention reaches only arbitral awards arising from a “legal relationship, whether contractual or not,” that the law “consider[s] as commercial.” *Id.* § 202.

B.

These consolidated appeals before us trace back to a single rupture, felt across different industries but anchored in the same place and time. In 2014, Russia moved into Crimea, a region internationally recognized as part of Ukraine. Within weeks, Russia asserted control and began reorganizing Crimea’s economy. Ukrainian-owned businesses operating there—some supplying electricity, others fuel—were caught in the transition. What followed were seizures, nationalizations, and the effective transfer of private assets to Russian-controlled entities.

The legal framework governing those events is straightforward. In 1998, Russia and Ukraine executed the Investment Treaty designed to encourage cross-border investment. The Investment Treaty promised foreign investors fair and equitable treatment, protection against uncompensated expropriation, and access to arbitration for disputes arising in connection with covered investments. It applies to investments made by investors of one

contracting party in the territory of the other and contains a standing offer by each signatory state to arbitrate qualifying disputes at the investor's election—either under the United Nations Commission on International Trade Law (“UNCITRAL”) Rules or before designated arbitral institutions. When Russia entered Crimea in February 2014, the Investment Treaty remained in full force and effect.

At that time, Ukrainian companies had long operated substantial businesses in Crimea. Their operations were integrated into local markets and regulated under Ukrainian law. Russia's subsequent actions—formal annexation, extension of Russian law, and measures to seize or nationalize assets—were undertaken against that settled commercial landscape. For the Companies, the change was swift and decisive. Crimean and Russian forces seized control of the Companies' facilities and, by decree, transferred their assets without compensation in one case.

DTEK's operations exemplified that reality. It ran an integrated electricity network serving hundreds of thousands of customers across Ukraine, supported by generation-related assets, transmission infrastructure, substations, equipment, licenses, and contractual rights. These investments were capital-intensive and immobile by design. The Investors' businesses differed in form but not in permanence. They owned and operated petrol stations throughout Crimea, relying on real property, storage facilities,

fuel inventories, vehicles, branding, and local workforces.

Russia's response to these entrenched operations was not negotiation or compensation, but displacement. For DTEK, that displacement came through legislative acts and physical takeover. After Russia extended its law to Crimea, local authorities adopted measures transferring ownership of designated assets to the Republic of Crimea. DTEK's property was later added explicitly to the list. Uniformed personnel took control of facilities and denied company managers access.

The Investors experienced a similar fate through a more incremental process. Russian paramilitary forces seized petrol stations and offices, sold fuel inventories, and displaced management. Over time, Crimean authorities issued orders nationalizing the remaining stations and transferring operational rights to Russian state-owned entities. By 2016, the Investors' Crimean operations had been fully extinguished.

The Investment Treaty supplied the Companies' response. It promised arbitration as the means of enforcement when its protections were breached. The Companies invoked that mechanism. Their paths differed in timing and participation, but their claims paralleled: Russia's actions in Crimea constituted unlawful expropriation and a breach of the Investment Treaty.

The Investors moved first. In June 2015, they initiated arbitration against Russia under the UNCITRAL Rules. Russia declined to participate. The tribunal proceeded nonetheless, addressing jurisdiction as a threshold matter and concluding that the Investors qualified as protected investors, their assets were covered investments, and the dispute fell within the Investment Treaty's arbitration clause.

Russia challenged that jurisdictional ruling in the Swiss Federal Supreme Court. That court rejected the challenge. The case returned to the tribunal, where it then proceeded to the merits and, in April 2019, issued a final award concluding that Russia had expropriated the Investors' assets without compensation and breached its Investment Treaty obligations. The tribunal awarded more than \$34 million in damages. Russia's subsequent effort to set aside the award in Swiss court failed.

DTEK's arbitration followed a later but similar course. In February 2018, it commenced arbitration under the UNCITRAL Rules. Russia initially refused to participate but later entered the case and contested both jurisdiction and the merits. Russia argued that Crimea was not Russian territory and that the Investment Treaty therefore did not apply. The tribunal rejected those arguments, concluding that Russia exercised effective control over Crimea and that the Investment Treaty's territorial requirement was satisfied.

After full merits proceedings—including extensive briefing and a week-long evidentiary hearing—the tribunal issued its final award in November 2023. The tribunal concluded that Russia had expropriated DTEK’s assets, subjected it to discriminatory treatment, and failed to provide compensation or due process. It awarded approximately \$208 million in damages. Russia has applied to set aside DTEK’s award in the Hague Court of Appeal, and those proceedings remain pending.

Armed with final arbitral awards, the Companies turned to the United States District Court for the District of Columbia. Each filed a petition under the New York Convention, as implemented by the FAA, seeking confirmation of its award against the Russian Federation. The filings were separate and assigned to different judges. But the posture was the same—a foreign sovereign, an adverse arbitral award, and threshold challenges to federal jurisdiction.

The Investors filed first, in April 2022. Russia moved to dismiss, arguing that it remained immune under the FSIA, that no valid agreement to arbitrate existed, and that exercising personal jurisdiction would violate due process. The district court rejected those arguments. It concluded that the Investors had satisfied the FSIA’s arbitration exception and that personal jurisdiction followed from subject-matter jurisdiction and proper service. *See Stabil LLC v. Russian Fed’n*, No. 1:22-CV-00983, 2024 WL 5093202, at *2-6 (D.D.C. Dec. 12, 2024). Although the district court deferred confirmation, it squarely held that it

had jurisdiction to proceed. *See id.* at *6 (“Though a stay is unwarranted, so too is immediate confirmation of the award.”).

DTEK’s petition followed shortly after its final award issued. Russia again moved to dismiss, advancing the same jurisdictional theories. The district court rejected them. It held that DTEK had made a *prima facie* showing under the FSIA’s arbitration exception and that Russia’s arguments went to arbitrability and the merits, not jurisdiction. *See JSC DTEK Krymenergo v. Russian Fed’n*, No. 1:23-CV-03330, 2025 WL 1148347, at *4-6 (D.D.C. Apr. 17, 2025); *see also id.* at *4 (“DTEK Krymenergo has met its initial burden of production by pointing to (1) the Ukraine-Russia BIT, (2) the arbitral award issued under that BIT, and (3) the New York Convention.”). The district court also denied Russia’s request for a stay, explaining that parallel foreign proceedings did not warrant delay under the New York Convention. *Id.* at *7.

By the end of those rulings, the posture of both cases was clear. The district court, applying the same statutory framework and precedent, concluded that it possessed jurisdiction to adjudicate the Companies’ petitions. The merits of enforcement remained unresolved. But the threshold jurisdictional questions—pressed by Russia at every turn—had been answered in the same way twice.

Invoking the collateral order doctrine, Russia seeks interlocutory review of both jurisdictional holdings.

The appeals were docketed separately, briefed in parallel, and have now been consolidated before us.

II

A

We begin, as we must, with our appellate jurisdiction. Because Russia appeals the district court's judgements under the collateral order doctrine, we start there. This doctrine supplies a narrow alternative path to "appellate jurisdiction." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 864 (D.C. Cir. 2008) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). It permits interlocutory review "only to a 'small class' of decisions" that conclusively resolve a disputed question, decide an important issue wholly separate from the merits, and would be effectively unreviewable after final judgment. *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 n.3 (2017) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Supreme Court has repeatedly warned that the doctrine's scope is deliberately modest, and it has rebuffed efforts to enlarge that "small class" beyond its narrow and selective bounds. *Will v. Hallock*, 546 U.S. 345, 350 (2006); *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[T]he narrow exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment." (citation modified)).

Here, we exercise our appellate jurisdiction “under the collateral order doctrine to review the denial of Russia’s claim of sovereign immunity.” *Hulley Enters. Ltd. v. Russian Fed’n*, 149 F.4th 682, 687 (D.C. Cir. 2025) (citation omitted). That conclusion follows from first principles. Sovereign immunity is not a defense to be weighed after the fact; it is an immunity from suit itself. And once a sovereign is required to litigate, the immunity—like the quiet it protects—is already lost. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 581 U.S. 170, 174 (2017) (explaining that foreign sovereign immunity’s “basic objective” is “to free a foreign sovereign from suit” (citation omitted)).

When we take up a denial of immunity under the FSIA through the collateral-order doctrine, as we do here, our review does not necessarily stop there. We may also consider a foreign sovereign’s challenge to personal jurisdiction under our pendent appellate jurisdiction, and we do so here. *See, e.g., Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (addressing a personal jurisdiction challenge vis-à-vis pendant appellate jurisdiction); *Helmerich & Payne Int’l Drilling Co. v. Venezuela*, 153 F.4th 1316, 1325 (D.C. Cir. 2025) (same).

B

Our standard of review proceeds on settled ground. Whether an exception to sovereign immunity applies under the FSIA is a legal question, and we review it

“de novo.” *Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria (Zhongshan)*, 112 F.4th 1054, 1061 (D.C. Cir. 2024). The same is true of the threshold questions that frame the arbitration exception: whether a qualifying arbitration agreement exists under 28 U.S.C. § 1605(a)(6), and whether a treaty potentially governs enforcement of the award. Those determinations, too, are reviewed “de novo.” *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain (NextEra)*, 112 F.4th 1088, 1099 (D.C. Cir. 2024). And because personal jurisdiction under the FSIA presents a legal question once the relevant facts are set, we likewise review that question “de novo.” *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venezuela*, 23 F.4th 1036, 1040 (D.C. Cir. 2022).

Any factual findings that bear on jurisdiction are reviewed for what they are—facts—and we disturb them only for “clear error.” *Jungquist*, 115 F.3d at 1028 (citing *Herbert v. Nat’l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)).

III

Russia presses several arguments on appeal. It contends that the district court erred in denying immunity under the FSIA and in concluding that personal jurisdiction exists given, in its view, the protections of the Due Process Clause. We disagree. Properly understood, neither of Russia’s contentions undermines the district court’s subject-matter and personal jurisdiction.

A

The FSIA begins from a simple premise that foreign states are immune from suit in American courts. But that premise is not absolute. The Act sets out a series of carefully drawn exceptions, and when one applies, foreign sovereign immunity falls away. See *LLC SPC Stileks v. Republic of Moldova (Stileks)*, 985 F.3d 871, 877 (D.C. Cir. 2021) (explaining that foreign states are “generally immune” under the FSIA, but that the Act “also established various exceptions” (citing 28 U.S.C. §§ 1604, 1605)); see also *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (“Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies.” (citing 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993))). Those exceptions are not supplemental; they are exclusive. They provide the “sole basis for obtaining” subject-matter jurisdiction over a foreign state “in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Russia invokes foreign sovereign immunity here. The Companies, for their part, seek enforcement of their respective arbitral awards under the FSIA’s arbitration exception. The question before us is whether the Companies satisfy that exception.

In addressing this issue, the governing framework is well settled. In *NextEra*, we explained that the FSIA arbitration exception, 28 U.S.C. § 1605(a)(6), requires three jurisdictional facts: “(1) an arbitration agreement, (2) an arbitration award, and (3) a treaty

potentially governing award enforcement.” 112 F.4th at 1100. We “must independently confirm” each of those facts. *Hulley*, 149 F.4th at 687 (citation omitted). Once they are confirmed, the FSIA’s arbitration exception is satisfied; questions about the reach, application, or merits of a treaty-based arbitration clause do not enter our jurisdictional inquiry. See *NextEra*, 112 F.4th at 1101. The Companies bear the “initial burden” of establishing these jurisdictional facts. *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). And they have carried that burden.

B

We first address whether the Companies have shown the existence of an arbitration agreement. They have done so in the usual way by “producing the [Investment Treaty] and the notice of arbitration.” *Chevron*, 795 F.3d at 205. Doing so is ordinarily enough. Russia nevertheless resists that conclusion. It argues that the Companies did not make investments in Russian territory because they invested in Crimea, which Russia insists remained part of Ukraine at the time. In Russia’s view, the Investment Treaty’s arbitration clause never extended to the Companies’ investments, and Russia’s subsequent control over Crimea did not transform them into covered ones under the treaty.

That argument is flawed. At bottom, Russia does not deny that the Investment Treaty exists or that it contains an agreement to arbitrate. In essence, Russia invokes a familiar but unavailing contention that the

Investment Treaty “does not prove that it agreed to arbitrate this *particular* dispute,” but only that it agreed “to arbitrate certain disputes” with Ukrainian investors. *Stileks*, 985 F.3d at 878. Our precedent forecloses that argument.

As we recently explained, “questions about whether an arbitration agreement covers a particular investment pertain to the scope of the agreement and are not jurisdictional.” *Hulley*, 149 F.4th at 689 (citation omitted); *see also NextEra*, 112 F.4th at 1101 (“[D]isputes about the scope of an arbitration agreement, such as whether a binding arbitration agreement covers a particular dispute, are not jurisdictional questions under the FSIA.” (citation modified)). Russia’s argument therefore fails because it turns on whether the Companies’ investments fall within the scope of the Investment Treaty—not on whether an agreement to arbitrate exists at all.

The point is reinforced by how the FSIA’s arbitration exception operates. It requires only that the arbitral tribunal “purported to make an award pursuant to the [Investment Treaty], not that it in fact did so.” *NextEra*, 112 F.4th at 1104. Here, the tribunals concluded that the Investment Treaty supplied jurisdiction and held Russia liable for breaching it. That should end our jurisdictional inquiry. Russia nonetheless turns to first principles of contract law, and its asserted intentions when it signed the Investment Treaty, urging that no applicable arbitration agreement exists. That effort fares no better.

By pressing these arguments, Russia collapses two questions that our caselaw keeps distinct. One asks whether a dispute is arbitrable under the Investment Treaty. The other asks whether an arbitration agreement exists for purposes of the FSIA. The first goes to the scope and merits of the agreement; the second to jurisdiction. They are not the same and treating them as such does not make them so.

Russia's silence makes that point. It does not deny that it consented to arbitrate investment disputes in the Investment Treaty. It does not dispute that the treaty was in force at the relevant time. It does not claim that the agreement to arbitrate is void. Strip those points away, and nothing jurisdictional remains. What is left is a merits defense—one dressed up as a challenge to the court's jurisdiction to hear the case.

Russia's reframing does not cure the defect. It next insists that it never intended to agree to arbitrate for the benefit of particular investors—Ukrainian investors operating in Crimea. But that contention merely repackages the same mistake. It again confuses who ultimately prevails under the Investment Treaty with whether an agreement to arbitrate exists at all. We have rejected this maneuver before, and repeatedly.

For example, in *NextEra*, Spain argued that the “standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals like the companies,” but instead reaches only investors from

non-EU signatories. 112 F.4th at 1103. We rejected that contention because it “regard[ed] the scope of the Energy Charter Treaty, not its *existence*,” and thus went only to “whether the ECT’s arbitration provision applies to these disputes,” not to whether an agreement to arbitrate existed in the first place. *Id.*

Russia, however, argues that *NextEra* stood for the proposition that a party relying on an investment treaty to establish the existence of a relevant arbitration agreement under the FSIA must demonstrate that it belongs to the “class of private investors,” 112 F.4th at 1102, that may invoke the benefits of the treaty. Russia misreads that case.

There, we clarified that “[w]hen a sovereign makes ‘an agreement . . . to submit to arbitration’ by entering an investment treaty with other sovereigns ‘for the benefit of’ a class of private investors, it is the treaty that manifests the sovereign’s consent to arbitrate.” *Id.* at 1102 (quoting 28 U.S.C. § 1605(a)(6)). In doing so, we “look[ed] to the investment treaty itself to identify the scope of the *sovereign’s consent* and the relevant agreement for purposes of the FSIA’s arbitration exception.” *Id.* (emphasis added). And while “a sovereign’s consent to arbitration is important,” “sovereigns can condition their consent to arbitrate by writing various terms into their bilateral investment treaties.” *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 43 (2014).

In addressing whether Spain consented to arbitration, we held that “[t]he investment treaty offer[ed]

powerful reasons to conclude that the standing offer to arbitrate contained in the ECT's arbitration provision extends to EU nationals." *NextEra*, 112 F.4th at 1102. That was because "[t]he clear terms of the ECT's arbitration provision cover disputes between a Contracting Party and an investor of another Contracting Party." *Id.* (citation modified). And in short order, we concluded that Spain was clearly a "Contracting Party" and the companies were "undeniably Investor[s] of another Contracting Party," because those companies were "organized in accordance with the law applicable in the Netherlands or Luxembourg." *Id.* (internal quotation marks omitted).

Here, the Investment Treaty leaves little room for doubt. It covers "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments." No. 25-7064, J.A. 236. Russia is indisputably a "Contracting Party." *Id.* And the Companies are "investor[s] of a Contracting Party," because they are "legal entit[ies] constituted in accordance with the legislation in force in [Ukraine]." No. 25-7064, J.A. 233; *see also* 25-7064, J.A. 376 (noting that DTEK is "a Ukrainian energy supplier"); 25-7064, J.A. 383 (observing that Russia refers to DTEK as "a Ukrainian entity"); 25-7005, J.A. 183 (explaining, in the Notice of Arbitration, that the Investors are "eleven companies organized under the laws of Ukraine"). On that much, the Investment Treaty's text—and the record—are clear.

Russia's objection begins only with the definition's second clause, which requires that the "legal entity" be "competent" to make investments "in the territory of the other Contracting Party." No. 25-7064, J.A. 233. But even there, Russia does not argue that the Companies would generally fall outside the Investment Treaty's definition of an investor. It instead advances a narrower contention that because the Companies' investments were in Crimea, the Investment Treaty's arbitration clause does not apply here.

As mentioned, that argument reprises a familiar refrain. As in *NextEra*, "[i]t does not matter *why* the [Investment Treaty] may not apply to the dispute." 112 F.4th at 1104 (citation modified). The reason is decisive that "[w]hether the [Investment Treaty] applies to [a] dispute is not a jurisdictional question under the FSIA." *Id.* at 1103 (citation modified). Questions about territorial reach and treaty coverage go to the scope of the agreement—to arbitrability—not to the existence of consent. For jurisdictional purposes, that is the end of the matter. The Companies therefore "showed [Russia]'s agreement to arbitrate" within the meaning of the FSIA by "produc[ing] copies of the [Investment Treaty]." *Id.* (quoting *Stileks*, 985 F.3d at 877). *NextEra* aside, we have rejected in other cases similar arguments to Russia's.

Hulley, for instance, followed the same path. There, Russia pointed to treaty language "provid[ing] for settlement of disputes between a Contracting Party

and an Investor of another Contracting Party,” and argued that the claimants—though formally organized abroad—were controlled by Russian nationals and therefore not investors “of another Contracting Party.” *Hulley*, 149 F.4th at 690 (internal quotation marks omitted). We rejected that argument as well, holding that “[o]ur decision in *NextEra* squarely foreclose[d] Russia’s argument.” *Id.*

So too in *Chevron*. Ecuador insisted that if Chevron’s claims fell outside the treaty, “then Ecuador never agreed to arbitrate with Chevron,” and the district court therefore lacked subject-matter jurisdiction. *Chevron*, 795 F.3d at 205. All that the FSIA requires of the petitioner for jurisdictional purposes is a *prima facie* showing of the existence of an agreement to arbitrate, which the foreign sovereign then must rebut. *Id.* Ecuador’s only response was that it did not agree to arbitrate this agreement, not that no agreement to arbitrate existed at all. *Id.* We declined that invitation. The argument failed because it mistook a question of scope for a defect of jurisdiction.

Stileks drove the point home. There, Moldova argued that the Energy Charter Treaty did not give the arbitral tribunal jurisdiction over the dispute and that “the resulting award was not ‘made pursuant to such an agreement to arbitrate.’” *Stileks*, 985 F.3d at 877 (quoting 28 U.S.C. § 1605(a)(6)). It elaborated that although the treaty “may establish that Moldova agreed to arbitrate certain disputes,” it did not agree “to arbitrate this *particular* dispute.” *Id.* at 878. We answered directly that “the arbitrability of a dispute

is not a jurisdictional question under the FSIA.” *Id.* (citation omitted). From that premise followed the conclusion we have repeated many times since— “[t]he FSIA’s arbitration exception therefore applies,” rejecting Moldova’s immunity claim. *Id.*

Just as we did in those cases, we reject Russia’s argument here because it goes to the scope of the arbitration agreement and not its existence. Again, Russia does not dispute that it has entered into an arbitration agreement by signing the Investment Treaty with Ukraine. It only disputes that the Investment Treaty does not apply to the Companies’ investments. That is a textbook defense against the arbitrability of these disputes, not the existence of the agreement.

For these reasons, we hold that the Companies have satisfied the first element of the FSIA’s arbitration exception.

C

There is no genuine dispute whether the arbitral tribunals issued arbitral awards—the second element of FSIA’s arbitration exception. The record confirms that awards were issued, and Russia does not contend otherwise. Still, because the inquiry is jurisdictional, we do not proceed on these concessions alone. As discussed above, we “must independently confirm,” *Hulley*, 149 F.4th at 687 (citations omitted), whether the tribunals issued arbitral awards.

In DTEK’s arbitration proceeding, the tribunal awarded DTEK roughly \$208 million. And in the Investors’ arbitration proceeding, the respective tribunal awarded them more than \$34 million in damages. Those awards settle the issue. *See id.* at 688 n.3 (holding that the second element of the FSIA’s arbitration exception was satisfied because “[t]he [t]ribunal awarded the [s]hareholders \$50 billion in damages” (citation omitted)). Thus, we hold that the Companies have satisfied the second element of the FSIA’s arbitration exception.

D

With the first two elements of the FSIA arbitration exception established, we address whether the New York Convention potentially governs the awards. Russia says no. In its view, the awards are political awards and falls outside the Convention’s ambit, relying on *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973), *aff’d*, 489 F.2d 1313 (2d Cir. 1974). Russia insists that the awards would not exist but for the tribunals’ conclusion that Crimea is Russian territory—a determination Russia characterizes as geopolitical rather than commercial. We disagree.

Russia’s argument stumbles out the gate. It asserts that, to invoke the FSIA’s arbitration exception, the award must in fact be governed by a relevant treaty. But that is not what the statute says. Section 1605(a)(6) provides that the arbitration exception applies so long as “the agreement or award is or *may*

be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.” 28 U.S.C. § 1605(a)(6)(B) (emphasis added). Congress chose its words carefully. The statute requires only the possibility of treaty governance, not certainty. Put differently, the question is not whether the New York Convention ultimately controls the award, but whether it plausibly could. Potential coverage suffices. And so, on this point as well, Russia’s argument fails.

With that argument rejected, the proper question becomes whether the New York Convention potentially governs the awards in this case. On that question, our caselaw has long been settled. “[T]he New York Convention ‘is exactly the sort of treaty Congress intended to include in the arbitration exception.’” *Creighton Ltd. v. Gov’t of Qatar*, 181 F.3d 118, 123-24 (D.C. Cir. 1999) (quoting *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993)). We have said as much repeatedly, and without equivocation. See *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria (P&ID)*, 27 F.4th 771, 776 (D.C. Cir. 2022) (“We have recognized that ‘the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception.’” (quoting *Creighton*, 181 F.3d at 123-24)); *Stileks*, 985 F.3d at 877 n.3 (“Nor is there doubt that the New York Convention, ratified by the United States, calls for the enforcement of arbitral awards.” (citing *Creighton*, 181 F.3d at 123-24)).

That said, the Convention's reach has limits. It applies only where certain conditions are met. The Convention requires that the arbitrated dispute "(1) arise out of a legal relationship that is (2) considered as commercial." *Zhongshan*, 112 F.4th at 1062 (citation modified).

1

The Convention's first requirement—a legal relationship—is not demanding. Under the Convention, such a relationship exists "if there is an agreement, whether contractual or not." *Id.* But not every agreement qualifies. The agreement must "explicitly contemplate[] which parties it would obligate"; it must determine "the extent of the obligations"; and it must provide "the legal framework to govern the arrangement." *Diag Hum., S.E. v. Czech Republic—Ministry of Health*, 824 F.3d 131, 135 (D.C. Cir. 2016). When those elements are present, the Convention's legal relationship requirement is met. The Investment Treaty satisfies each of these elements.

To begin, it "explicitly contemplate[s] which parties it would obligate." *Id.* at 135. Article 2(2) of the Investment Treaty requires that "[e]ach Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party." No. 25-7005, J.A. 547; *see also* No. 25-7064, J.A. 234 (same). The obligation runs in both directions, and it runs to investors of the other State.

That is sufficient. *See Zhongshan*, 112 F.4th at 1062 (concluding that a legal relationship existed because “the Investment Treaty expressly obligate[d] Nigeria to protect investments made by Chinese investors, including those by Zhongshan” (citation omitted)).

Next, the Investment Treaty determines “the extent of the obligations.” *Diag Hum.*, 824 F.3d at 135. Article 2(2) of the Investment Treaty, as discussed above, guarantees legal protection for “investments by investors of the other Contracting Party.” No. 25-7005, J.A. 547; *see also* No. 25-7064, J.A. 234 (same). Article 3(1) goes further, requiring each “Contracting Party” to ensure that investments made by investors of the other party receive “treatment no less favorable than that which it accords to its own investors or to investors of any third state.” No. 25-7005, J.A. 547; *see also* No. 25-7064, J.A. 234 (same). Article 4 requires that each “Contracting Party . . . shall ensure the greatest possible transparency and accessibility of [its] legislation” concerning investments made by foreign investors. No. 25-7005, J.A. 548; *see also* No. 25-7064, J.A. 234 (same). Article 5(2) specifies that the “amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known.” No. 25-7005, J.A. 549; *see also* No. 25-7064, J.A. 235 (same). And Article 7(1) guarantees investors, after satisfying applicable tax obligations, “unimpeded transfer abroad of payments associated with the investments.” No. 25-7005, J.A. 550; *see also* No. 25-

7064, J.A. 235 (same). These provisions do not gesture vaguely toward obligations; they define them.

Moreover, the Investment Treaty supplies “the legal framework to govern the arrangement.” *Diag Hum.*, 824 F.3d at 135. Article 9(1) provides that “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation,” falls within its ambit. No. 25-7005, J.A. 551; *see also* No. 25-7064, J.A. 236 (same). The Investment Treaty then sets the path for resolving such disputes. Article 9(1) further provides that the disputing parties “shall endeavor to settle the dispute through negotiations if possible.” No. 25-7005, J.A. 551; *see also* No. 25-7064, J.A. 236 (same). And Article 9(2) declares that if those efforts fail within six months of written notice, the dispute proceeds to “a competent court or arbitration court,” the “Arbitration Institute of the Stockholm Chamber of Commerce,” or an “‘ad hoc’ arbitration tribunal, in accordance with the Arbitration Regulations of the . . . [UNCITRAL].” No. 25-7005, J.A. 551-52; *see also* No. 25-7064, J.A. 236 (same).

Additionally, while the Investment Treaty ran between Russia and Ukraine, not Russia and the Companies, it pledged protection and fair treatment to foreign investors.

It is, however, no novelty for an investment treaty to confer a benefit on third parties. Contract law has long

recognized as much through the doctrine of third-party beneficiary—a doctrine with longstanding common law pedigree. See Curtis R. Reitz, *Construction Lenders’ Liability to Contractors, Subcontractors, and Materialmen*, 130 U. Pa. L. Rev. 416, 423 (1981) (“It is well-settled in the law of contracts that the creation of third-party-beneficiary status occurs only when the two parties negotiating the arrangement intend to confer that status on a third party.” (citation omitted)). Such an agreement “creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.” *Zhongshan*, 112 F.4th at 1062. And while the analogy between a treaty and a private contract is imperfect, it is close enough to be instructive. After all, “[a] treaty is ‘essentially a contract between two sovereign nations.’” *Herrera v. Wyoming*, 587 U.S. 329, 345 (2019) (quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675, *modified rev’d nom. Washington v. United States*, 444 U.S. 816 (1979)). And “the Supreme Court has analyzed a similar bilateral investment treaty as if it were a contract between the sovereign and the investor corporation seeking to confirm an arbitral award.” *Chevron*, 795 F.3d at 207.

Moreover, an arbitration clause “in an investment treaty can both (1) constitute an agreement ‘for the benefit’ of a private party; and (2) give rise to a separate agreement ‘with’ a private party.” *NextEra*, 112 F.4th at 1101 (quoting 28 U.S.C. § 1605(a)(6)). An

arbitration provision found in an investment treaty, like the one here, creates “a *unilateral offer* to arbitrate by each sovereign to investors of the other signatory countries.” *Id.* at 1102 (emphasis added) (citation modified). Consequently, foreign investors desiring to invoke an investment treaty’s arbitration clause “may accept the offer by filing a notice of arbitration, and thereby create a second arbitration agreement—this one made by the sovereign with a private party.” *Id.* (citation modified).

Here, the Investment Treaty conferred specified benefits upon investors. It expressly guarantees Ukrainian investors protection of their investments and fair and equal treatment. The benefits the Investment Treaty guarantees to investors are distinct from those it guarantees to the signatory states. That is evidenced by the fact that the Investment Treaty provides two distinct dispute-resolution mechanisms: one for investor-state arbitrations, found in Article 9, and one for arbitrations between the signatory states, found in Article 10. What’s more, the Companies invoked the Investment Treaty’s arbitration provision here by filing notices of arbitration. Given those facts, we hold that a legal relationship exists between Russia and the Companies.

2

That discussion takes us to whether the legal relationship between Russia and the Companies is “commercial.” *Zhongshan*, 112 F.4th at 1062. Russia

insists that it is not. This case, in its view, is *sui generis* because the award is geopolitical in nature, overwhelming any commercial character that the dispute might otherwise possess. In support of that position, Russia asserts that neither of the arbitral awards would exist but for a border dispute between Russia and Ukraine. From that premise, it reasons that the dispute turns exclusively on whether Crimea is Russian or Ukrainian territory—a question Russia labels geopolitical rather than commercial. We once again disagree. Whatever rhetorical force the label “geopolitical” may carry, it does not do the work Russia assigns it.

Before we reach the merits of Russia’s argument, however, we address the Investors’ forfeiture contention. The Investors contend that Russia forfeited this argument. In their view, Russia raises this contention for the first time on appeal, and arguments first sprung at this stage are “plainly forfeited.” *Crooks v. Mabus*, 845 F.3d 412, 422 (D.C. Cir. 2016). And that is ordinarily how it goes, but that rule, in this instance, does not end this matter.

That rule carries an exception: “Arguments against subject-matter jurisdiction cannot be waived.” *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 512 (D.C. Cir. 2009) (citing *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003)). This principle is “axiomatic.” *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008). Subject-matter jurisdiction, after all, “involves a court’s power to hear a case.” *United States v. Delgado-Garcia*, 374

F.3d 1337, 1341 (D.C. Cir. 2004). And while arguments in favor of jurisdiction “can be waived by inattention or deliberate choice,” we, as a court of limited jurisdiction, are bound by a stricter command that “no action of the parties can confer subject-matter jurisdiction upon a federal court.” *NetworkIP*, 548 F.3d at 120.

That command governs here. Russia advances its argument as a challenge to the applicability of the New York Convention to the arbitral awards—an objection that, if accepted, would defeat the district court’s subject-matter jurisdiction under the FSIA. Because the argument strikes at the district court’s subject matter jurisdiction, Russia has not forfeited it. But clearing this forfeiture hurdle does not carry Russia’s argument. Considered on the merits, the argument does not fare well.

We have defined “commercial” as “matters or relationships, whether contractual or not, that arise out of or in connection with commerce.” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 794 F.3d 99, 104 (D.C. Cir. 2015). On its face, this definition is quite broad. While broad, however, that reading of “commercial” maps onto the phrase’s “established meaning as a term of art” in the field of international arbitration. *Diag Hum.*, 824 F.3d at 136 (citation omitted). And “[i]n the absence of contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning.” *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (citing *Morissette*

v. United States, 342 U.S. 246, 263 (1952); *Gilbert v. United States*, 370 U.S. 650, 658 (1962)).

Here, the dispute between Russia and DTEK arises from investments planted squarely in commerce. DTEK’s investment in Crimea consisted of an electricity distribution business that operated the power grid and supplied “electricity to more than 780,000 consumers” across Ukraine. No. 25-7064, J.A. 56. An investment of that sort is plainly “in connection with commerce” and therefore commercial for purposes of the New York Convention. *Belize*, 794 F.3d at 104; *see also id.* (concluding that the “provision of telecommunication services has an . . . obvious connection to commerce”).

The Investors’ dispute with Russia makes the point even more vividly. It concerns the seizure and sale of petrol stations—retail enterprises by any measure. In *Belize*, we held that the “sale of real property” constitutes a “transaction with a connection to commerce.” 794 F.3d at 104. The arbitral tribunal found that Russia seized “a chain of 31 Petrol stations” that the Companies “owned, operated, and supplied.” No. 25-7005, J.A. 60. Russian paramilitary forces then sold the remaining fuel at “substantially lower prices.” No. 25-7005, J.A. 68. The Crimean government also stripped the Investors of the “right or economic management” of the stations. No. 25-7005, J.A. 70. If these facts do not establish a “connection to commerce,” *Belize*, 794 F.3d at 104, it is hard to imagine what would. The record tells a straightforward account of commercial enterprises

taken, sold, and transferred. That telling overwhelms Russia's attempt to recast the dispute as something else entirely.

Furthermore, contrary to Russia's insistence, neither arbitral award resolved a geopolitical dispute. In both proceedings, the tribunals expressly declined to determine whether Crimea falls under Russia's sovereignty.

In the arbitration concerning DTEK's investments, the tribunal simply observed that "there is no dispute that since 2014 Crimea is under the control of the Russian Federation—and the alleged breach occurred in 2015." No. 25-7064, J.A. 71. That statement did not purport to settle questions of sovereignty. To be sure, when construing the definition of "territory," the tribunal turned to the word's ordinary meaning, citing the tenth edition of *Black's Law Dictionary*, which defines "territory" as "[a] geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control." *Id.* (citation modified). From that definition, the tribunal drew a candid conclusion that the ordinary meaning of "territory" "encompasses the entire area within a State's possession or control, over which a government exercises *de facto* jurisdictional powers—irrespective of the question of sovereignty." *Id.*

In the Investors' arbitration proceeding, the tribunal took the same tack. It did not adjudicate competing claims of sovereignty. It instead interpreted treaty

language according to its plain and ordinary meaning. That is the work of contract interpretation, not the stuff of geopolitics. The tribunals, in both proceedings, did not resolve border disputes or pronounce on international status. They applied the Investment Treaty to commercial conduct occurring in territory under Russia's *de facto* control. Nothing more—and nothing less. Thus, we conclude that the Companies have established that their legal relationship with Russia is “commercial.” *Zhongshan*, 112 F.4th at 1062.

Because the Companies have shown “(1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing award enforcement,” *NextEra*, 112 F.4th at 1100, we hold that the district court did not err in applying the FSIA's arbitration exception.

E

We now turn to DTEK's alternative grounds for affirmance. DTEK argues that the district court's exercise of jurisdiction may be sustained under the FSIA's waiver exception because Russia implicitly waived its sovereign immunity when it ratified the New York Convention. On its telling, the Convention contemplates enforcement of arbitral awards against contracting sovereigns in the domestic courts of other signatories, and Russia's reciprocal agreement to that regime amounts to an implicit waiver of foreign sovereign immunity.

Although we once held in an unpublished judgment that “a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states,” *Tatneft v. Ukraine*, 771 F. App’x 9, 10 (D.C. Cir. 2019), we have declined to “formally adopt[] [that theory].” *P&ID*, 27 F.4th at 774. We will do so again today. Because we have concluded that the district court has jurisdiction under the FSIA’s arbitration exception, we need not decide whether ratification of the New York Convention alone affects an implicit waiver of foreign sovereign immunity. See *Metro. Wash. Chapter, Associated Builders & Contractors, Inc. v. District of Columbia*, 62 F.4th 567, 576 (D.C. Cir. 2023) (explaining “the cardinal principle of judicial restraint” that courts should resolve no more than is necessary to decide the case (citation modified)).

IV

Having established that the district court properly exercised subject-matter jurisdiction, we turn to Russia’s remaining argument. It maintains that the district court nonetheless lacked personal jurisdiction. According to Russia, the Fifth Amendment, entitles it, even as a foreign state, to due-process protections, and absent minimum contacts with the United States, the exercise of personal jurisdiction here would be unconstitutional. Russia acknowledges that our precedent stands in its way. It argues instead that our precedent is wrong. That is a heavy lift, and Russia fails to carry it. As before, Russia urges us to revisit

ground we have already covered. And as before, we reject that request.

As a matter of course—and as Russia itself concedes—our precedent forecloses its argument. We have long held that “foreign states are not ‘persons’ protected by the Fifth Amendment,” and therefore are not entitled to the constitutional protections afforded to private defendants. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). That rule has been settled for decades. So whatever theoretical appeal Russia’s position may have, it runs headlong into institutional reality. Even if we were inclined to revisit *Price*, we could not do so. Panels are bound by prior decisions of this court unless and until they are overturned by us “sitting en banc” or by “the Supreme Court.” See *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996)).

Russia also cites *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012) for the rule that enforcement of an arbitral award must be dismissed for lack of personal jurisdiction where, as here, the action has no connection to the United States. Russia misconstrues that case.

GSS Group did not involve a foreign government. There, we explained that “precedent foreclose[d] [the appellant]’s argument,” because “the Supreme Court and this court have repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over

them.” *Id.* at 813 (collecting cases). We read Price narrowly because its “limit on due process protections applied only to *an actual foreign government*,” not to foreign corporations, even those owned by a state. *Id.* at 814 (emphasis added) (citation modified). That distinction matters here. Russia undoubtedly is a foreign government, not a foreign corporation. *GSS Group* therefore speaks past the instant case and is inapposite. All told, this case does not advance Russia’s cause.

More too, the Supreme Court’s recent holding in *CC/Devas (Mauritius) Ltd. v. Antrix Corp.* eliminates any lingering doubt that personal jurisdiction was lacking here. *See* 605 U.S. 223, 237 (2025). There, the Court held that personal jurisdiction exists under the FSIA, “when an immunity exception applies and service is proper.” *Id.*; *see also Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 397 n.1 (D.C. Cir. 2018) (explaining that personal jurisdiction exists where “subject matter jurisdiction has been satisfied” and “proper service has been effected” (citing 28 U.S.C. § 1330(b))).

On that note, because Russia does not dispute that the Companies properly effected service, personal jurisdiction here “turns on the satisfaction of an FSIA exception.” *Schubarth*, 891 F.3d at 397 n.1. As explained above, the Companies have satisfied the FSIA’s arbitration exception. Therefore, we hold that the district court did not err in determining that personal jurisdiction exists in these cases.

* * * *

For the foregoing reasons, we affirm the district court's judgments.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:22-cv-00983 (TNM)

STABIL LLC, ET AL, PETITIONERS,

v.

RUSSIAN FEDERATION, RESPONDENT.

December 12, 2024, Decided;
December 12, 2024, Filed

Opinion by: TREVOR N. McFADDEN

MEMORANDUM ORDER

Petitioners are a group of eleven Ukrainian companies (“the Companies”) that owned and operated petrol stations in Crimea. But then the Russian Federation invaded Crimea, declared it part of Russia, and seized their assets. Leveraging the terms of an investment treaty, the Companies obtained an arbitration award of over \$34 million against Russia. They asked this Court to confirm the award under an international arbitration treaty. Russia now moves to dismiss,

declaring itself immune from suit under the Foreign Sovereign Immunities Act (FSIA) and asserting personal jurisdiction defects. An exception to FSIA immunity applies though, and precedent forecloses Russia's personal jurisdiction arguments. Yet Russia contends that four unrelated appeals could change this outcome, so it requests a stay pending resolution of those cases. The Court is unpersuaded and will thus deny Russia's motions.

I.

The Court accepts the factual background laid out by the arbitration tribunal. *See* Decl. of James H. Boykin ("Boykin Decl."), Ex. A ("Final Arb. Award"), ECF No. 2-1. These findings resulted from multiple adversarial hearings where both parties had the opportunity to participate. *See id.* ¶¶ 4, 51, 78, 141.

In 1998, the Russian Federation and Ukraine signed a bilateral investment treaty ("the BIT") "to create and maintain favorable conditions for mutual investments." *See* Boykin Decl., Ex. B (Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (November 27, 1998)) at 308, ECF No. 2-2. In the BIT, both states agree to safeguard investments made in their territories by investors of the other state. *See id.* at 308-13. Generally, the states pledge equal treatment for foreign and domestic investors; they guarantee that investments will not be expropriated or nationalized in a discriminatory way;

and they promise compensation if they do seize assets. *See id.* at 310-11. The BIT also contains a standing offer to arbitrate disputes. *Id.* at 312-13. For Russia, this means arbitrating any disputes Ukrainians have over their investments in Russian territory.

In early 2014, Russia invaded Crimea, a region consisting of the Autonomous Republic of Crimea and the City of Sevastopol. Final Arb. Award ¶¶ 94, 103-04. The next month, the new Russian-backed government in Crimea signed a treaty with the Russian Federation, purporting to incorporate Crimea into Russia. *See id.* ¶¶ 106-07. At the time, the eleven Companies each had investments related to petrol stations in Crimea, including real estate, fuel storage facilities, and other assets like vehicles and buildings. *See id.* ¶¶ 95-98.

Then, Russia began seizing and nationalizing property Crimean. *See id.* ¶¶ 122-32. In April 2014, members of a Russian paramilitary force “seized” and “looted” the Companies’ petrol stations and an office. *Id.* ¶¶ 113-19. The paramilitary forces then sold the “remaining inventory of fuel and other products at substantially lower prices than the prices set by” the Companies. *Id.* ¶ 119. As the summer ended, the Russian-backed Council of Ministers of the Republic of Crimea nationalized some of the Companies’ properties and “transferr[ed] the ‘right of economic management’ of [their] stations . . . to a Russian State-owned enterprise.” *Id.* ¶ 128 (quoting Order No. 1016-r of the Council of Ministers of the Republic of Crimea (October 7, 2014) (C-92)). Finally, in 2016, the

government nationalized the Companies' remaining petrol stations. *See id.* ¶ 132.

In response, the Companies invoked the BIT. They accepted Russia's standing arbitration offer and filed a Notice of Arbitration in June 2015 over the seizure of their investments. *See id.* ¶ 9; *see also* Boykin Decl., Ex. C (Pet'rs' Notice of Arb.), ECF No. 2-3.

Arbitration began before a tribunal in Switzerland in 2015. *See* Final Arb. Award ¶¶ 9-21. Russia refused to participate. *See id.* ¶¶ 11-14, 19, 24-26, 35. The tribunal first considered whether it had jurisdiction to hear the dispute and concluded it did. *See id.* ¶¶ 35, 40-41. Russia challenged this jurisdictional finding in the Swiss Federal Supreme Court, but the court sided with the tribunal. *Id.* ¶¶ 44-45; *see also* Boykin Decl., Ex. E (Swiss Federal Supreme Court Judgment on Jurisdiction), ECF No. 2-5. So a hearing on the merits followed—again sans Russia. *See* Final Arb. Award ¶¶ 49, 51.

In the end, the tribunal issued a 126-page decision, finding that Russia breached the BIT. The tribunal awarded the Companies over \$34 million in damages. *See id.* ¶ 430. Russia again went to the Swiss high court and filed an application to set aside the award, but without success. *See* Boykin Decl., Ex. F (Swiss Federal Supreme Court Judgment on Award) at 6, ECF No. 2-6. The court dismissed Russia's application in 2019. *Id.* at 12.

Final arbitration award in hand, the Companies petitioned this Court in 2022 to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), codified at 9 U.S.C. § 201 et seq. *See* Pet. to Confirm Arb. Award (“Pet.”) ¶ 7 (citing New York Convention Art. I(1), 21 U.S.T. 2517, and 330 U.N.T.S. 38), ECF No. 4. Russia responded with a motion to dismiss for lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. Resp’t’s Mot. to Dismiss, ECF No. 22.

II.

Foreign states are generally immune from suit under the FSIA, but there are several exceptions. *See LLC SPC Stileks v. Rep. of Moldova*, 985 F.3d 871, 877, 450 U.S. App. D.C. 342 (D.C. Cir. 2021). These exceptions are the “sole basis for obtaining [subject matter] jurisdiction over a foreign state.” *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). Courts also have personal jurisdiction over foreign states “where (1) subject matter jurisdiction has been satisfied, and (2) proper service has been effected.” *Schubarth v. Fed. Rep. of Germany*, 891 F.3d 392, 397 n.1, 436 U.S. App. D.C. 16 (D.C. Cir. 2018) (citing 28 U.S.C. § 1330(b)). Russia does not contest service, so personal

jurisdiction also turns on the existence of a FSIA exception.¹ *See id.*

III.

Russia asserts immunity under the FSIA and disputes the existence of personal jurisdiction as well as its propriety under the Due Process clause. It fails on all grounds. The Companies correctly rely on the FSIA's arbitration exception for jurisdiction and binding precedent forecloses Russia's Due Process argument. In short, the Court has both subject matter jurisdiction and personal jurisdiction over Russia.

A.

The arbitration exception is a carveout to the FSIA's general rule of sovereign immunity. It allows courts to hear petitions "to confirm an award made pursuant to" an arbitration agreement if the foreign state formed the agreement "with or for the benefit of a private party." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1100 (D.C. Cir. 2024) (quoting 28 U.S.C. § 1605(a)(6)). Under this exception, the Companies bear the initial burden of production for "three 'jurisdictional facts': (1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing award enforcement [in the United States]." *Id.* (citing *Chevron Corp. v.*

¹Russia first alleged improper service but later withdrew that argument. *See* ECF No. 26.

Ecuador, 795 F.3d 200, 204, 417 U.S. App. D.C. 463 & n.2 (D.C. Cir. 2015)).

Under current caselaw, the burden then shifts to Russia to “establish the absence of the factual basis” for the Companies’ jurisdictional facts “by a preponderance of the evidence.” *Id.* (quoting *Chevron Corp.*, 795 F.3d at 204). The Supreme Court is now considering a case that could reverse that presumption. *See Simon v. Rep. of Hungary*, 77 F.4th 1077, 1092, 462 U.S. App. D.C. 411 (D.C. Cir. 2023), cert. granted, 144 S. Ct. 2680, 219 L. Ed. 2d 1297 (2024). At oral argument though, the foreign sovereign conceded it had the burden of persuasion on jurisdiction and acknowledged it had not preserved the issue for appeal. Tr. of Oral Arg. at 10:13-11:2, *Rep. of Hungary v. Simon* (No. 23-867) (U.S. Dec. 3, 2024). That said, even if the Supreme Court reaches the question, *Simon* will not alter the path of this case because the Companies meet their potential burden of persuasion on jurisdiction.

Russia disputes the first and third jurisdictional facts.

1.

Begin with the existence of an arbitration agreement. The Companies have “made a prima facie showing that there was an arbitration agreement by producing the BIT and the notice of arbitration.” *Chevron*, 795 F.3d at 205; *see Boykin Decl.*, Exs. B and C. In rebuttal, Russia insists the Companies never made any investments in Russian territory because they

invested in Crimea when it was still part of Ukraine. *See* Resp't's Reply at 6, ECF No. 27. So, Russia reasons, its standing offer to arbitrate did not extend to the Companies, and Russia's de facto control of Crimea does not convert the Companies into covered investors under the BIT. *See id.* at 7. In other words, Russia does not dispute that the BIT "establish[es] that [Russia has] agreed to arbitrate certain disputes" with Ukrainian investors but says the BIT "does not prove that it agreed to arbitrate this *particular* dispute" with these specific investors. *Stileks*, 985 F.3d at 878.

Russia misses the mark. "For jurisdictional purposes, the FSIA's arbitration exception requires that the arbitral tribunal 'purported to make an award pursuant to the [BIT], not that it in fact did so.'" *NextEra Energy*, 112 F.4th at 1104 (quoting *Stileks*, 985 F.3d at 878). Here, the tribunal concluded that the BIT gave it jurisdiction and it premised the Companies' award on Russia's alleged breach of the BIT. *See* Final Arb. Award ¶¶ 35, 40-41, 430. The Swiss Federal Supreme Court affirmed the tribunal on both fronts. *See* Boykin Decl., Exs. E and F. Russia offers nothing to undermine the existence of these facts.

Instead, Russia warns that "the very structure of the BIT" is rendered "unworkable" because Ukraine and the international community refuse to recognize Russia's claim on the Crimean Peninsula. Resp't's Reply at 8. According to Russia, the BIT "can only function" in "mutually recognized territories," so its

standing arbitration offer “cannot apply to disputed territory, such as Crimea.” Resp’t’s Mot. to Dismiss at 20. As a result, Russia steadfastly insists there is no threshold arbitration agreement. Resp’t’s Reply at 12-13.

This rather cynical argument is too clever by half. Russia “must attack the *existence or validity* of the arbitration agreement” “to make the issue jurisdictional.” *NextEra Energy*, 112 F.4th at 1101 (emphasis added). But Russia disputes only the *scope*, not the validity, of its standing offer to arbitrate. No matter how Russia tries to repackage this argument, it still cashes out as a quarrel over arbitrability, not jurisdiction. Russia’s focus on the BIT’s geographic contours “conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention.” *Chevron Corp.*, 795 F.3d at 205. While arbitrability may be germane to a merits defense under the New York Convention, it “does not affect the Court’s jurisdiction” under the FSIA. *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 274 (D.D.C. 2022) (citing *Stileks*, 985 F.3d at 878).

So for purposes of the arbitration exception, Russia has not rebutted the Companies’ factual support for the existence of an arbitration agreement. See *NextEra Energy*, 112 F.4th at 1100. More, the Companies affirmatively satisfy the burden—should it belong to them after *Simon*—of showing that “the arbitral tribunal purported to make an award

pursuant to” an arbitration agreement. *NextEra Energy*, 112 F.4th at 1104 (cleaned up).

2.

Next, the Companies must identify a treaty governing award enforcement. The Companies point to the New York Convention—an international treaty to which the United States and Russia are both signatories. *See* Pet. ¶ 54 (citing 751 U.N.T.S. 398 and 374 U.N.T.S. 386). The New York Convention allows for “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.” *Process & Indus. Devs. Ltd. v. Fed. Rep. of Nigeria*, 27 F.4th 771, 774, 456 U.S. App. D.C. 154 (D.C. Cir. 2022) (quoting New York Convention Art. I(1)). But the United States included a “commercial reservation” when signing this treaty. *See Zhongshan Fucheng Indus. Inv. Co. v. Fed. Rep. of Nigeria*, 112 F.4th 1054, 1059 (D.C. Cir. 2024). The reservation cabins the treaty’s applicability to “[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial.” 9 U.S.C. § 202; *see also Zhongshan*, 112 F.4th at 1059. The Companies invoke the BIT as the source of the commercial relationship, so Russia must show either that there was no legal relationship under the BIT or that any relationship was not commercial. Russia says the parties lack “any legal relationship,” much less a commercial one, because the BIT is an agreement solely between two sovereigns. Resp’t’s Mot. to Dismiss at 25-26.

A legal relationship under the New York Convention exists when parties enter an agreement that: “(1) explicitly contemplates which parties it will obligate; (2) determines the extent of the obligations; and (3) provides the legal framework to govern the arrangement.” *Zhongshan*, 112 F.4th at 1062 (cleaned up). And “contract law has long permitted parties to contract for the benefit of a third party,” so when an agreement between sovereigns is “intended to confer specified benefits upon investors,” the agreement operates “as if it were a contract between the sovereign and the investor corporation seeking to confirm an arbitral award.” *Id.* at 1062-63 (quoting *Chevron Corp.*, 795 F.3d at 207). Indeed, courts have “repeatedly enforced under the New York Convention arbitral awards arising from foreign states’ sovereign acts that breach obligations owed to a third-party investor under an investment treaty.” *Id.* at 1074.

The BIT expressly obligates its two signatories, Russia and Ukraine. *See Boykin Decl.*, Ex. B at 308. It details the extent of the states’ obligations, including requirements for how each state must treat foreign investors and investments. *See id.* at 309-11. And the dispute resolution provisions contain reciprocal standing offers to arbitrate with third-party investors. *See id.* at 312. Thus, because “the agreement define[s] a relationship between the parties,” and includes “reciprocal obligations and responsibilities, . . . the relationship [i]s legal in nature.” *Diag Hum. v. Czech Republic-Ministry of Health*, 824 F.3d 131, 135, 422 U.S. App. D.C. 413 (D.C. Cir. 2016).

Consider next whether the relationship is commercial. The commercial reservation has a “broad compass.” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 794 F.3d 99, 104, 417 U.S. App. D.C. 257 (D.C. Cir. 2015). Its scope is like that of “the more familiar term ‘affecting commerce’—[a term] of art that ordinarily signal[s] the broadest permissible exercise of Congress’ Commerce Clause power.” *Id.* (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003)). In other words, the commercial reservation “reaches anything with a *connection* to commerce.” *Zhongshan*, 112 F.4th at 1064 (emphasis added).

Russia seized a “chain of 31 petrol stations” that the Companies “owned, operated, and supplied.” Final Arb. Award ¶ 95. Owning, operating, and supplying petrol stations “has an obvious connection to commerce.” *Diag Hum.*, 824 F.3d at 136. Recall, for instance, that Russian paramilitary forces seized the Companies’ facilities and sold the remaining petrol for “substantially lower prices.” Final Arb. Award ¶ 119. And the Crimean government issued an order transferring the “right of economic management” for the petrol stations away from the Companies. *Id.* ¶ 128. Connections to commerce permeate these facts. Any “argument to the contrary will not sell.” *Gov’t of Belize*, 794 F.3d at 105.

Russia maintains that government seizure of private property is a sovereign act excluded from the commercial sphere. See Resp’t’s Reply at 16. But it relies on inapt cases discussing the contours of the

FSIA's commercial activity exception. *See, e.g., id.* (citing *Ivanenko v. Yanukovich*, 995 F.3d 232, 239, 452 U.S. App. D.C. 76 (D.C. Cir. 2021)). The Companies do not rely on the commercial activity exception for jurisdiction, and that exception's commercial nexus requirement is more stringent than the standard courts apply under the New York Convention. *See Gov't of Belize*, 794 F.3d at 104-05.

In sum, the BIT “creates a legal relationship between the parties that is commercial in nature, and [the] arbitral award arising from that relationship satisfies the commercial reservation.” *Zhongshan*, 112 F.4th at 1065. Russia has not rebutted the Companies' showing that the New York Convention is “a treaty potentially governing award enforcement.” *NextEra Energy*, 112 F.4th at 1100. More, the Companies' facts establish that the New York Convention *does*, in fact, apply to their arbitration award.

* * *

The Companies have satisfied their burden of production—and persuasion, if required—under the FSIA's arbitration exception. They have: (1) produced an arbitration agreement between themselves and Russia; (2) furnished an award rendered under that agreement; and (3) identified a treaty governing enforcement of the award. Russia has not rebutted the Companies' jurisdictional facts. The Court thus has subject matter jurisdiction under the arbitration

exception.² And because the Court has subject matter jurisdiction and Russia does not dispute service, the Court also has personal jurisdiction over Russia.

B.

Next, Russia protests that personal jurisdiction violates the Due Process clause because this case has no connection with the United States. Resp't's Reply at 19. But the Due Process clause offers Russia no shelter because foreign states are not "persons" entitled to Fifth Amendment protections. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96, 352 U.S. App. D.C. 284 (D.C. Cir. 2002). Though Russia maintains that *Price* was wrongly decided, see Resp't's Mot. to Dismiss at 41-42, this Court is "obligated to follow controlling circuit precedent until either [the D.C. Circuit], sitting en banc, or the Supreme Court, overrule[s] it." *United States v. Torres*, 115 F.3d 1033, 1036, 325 U.S. App. D.C. 130 (D.C. Cir. 1997). And under controlling circuit precedent, Russia cannot hide behind the Due Process clause. See *Price*, 294 F.3d at 96.

Russia has made its bed and now must lie in it. After all, "[c]ountries that do not wish to arbitrate or to be subject to enforcement proceedings in foreign courts do not have to extend to commercial investors a

² Accordingly, the Court need not reach the Companies' separate argument that Russia waived sovereign immunity. See Pet'rs' Opp'n to Mot. to Dismiss at 22-23, ECF No. 23.

standing offer to arbitrate like [Russia] did.” *Zhongshan*, 112 F.4th at 1065.

C.

In a final gambit, Russia seeks to stay proceedings pending the outcome of appeals in four separate cases. See Resp’t’s Mot. to Stay, ECF No. 32. The Court declines Russia’s invitation.

It is a “rare” case in which a litigant will “be compelled to stand aside” pending the resolution of independent proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 81 L. Ed. 153 (1936). In assessing such requests, the Court balances hardship to the parties and benefits to judicial efficiency. *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732-33, 399 U.S. App. D.C. 179 (D.C. Cir. 2012).

Begin with hardship. Russia contends the FSIA shields it from the “burdens of litigation,” so continued engagement with this case is itself a hardship. Resp’t’s Mot. to Stay at 11 (cleaned up). But the arbitration exception strips Russia of immunity. And “being required to defend a suit, without more, does not constitute a clear case of hardship.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (cleaned up). In contrast, the Companies’ fully adjudicated award has been languishing for half a decade despite their best efforts to collect. “[O]bvious harm arises from [the Companies’] wait . . . for compensation. [Further] delay hurts the economic interests of not only the compan[ies] but also of [their] shareholders

and employees.” *Tethyan*, 590 F. Supp. 3d at 271. More, the Court is unconvinced that the outstanding cases Russia points to are truly the silver bullets it suggests. Recall that at least one, *Simon*, is unlikely to have any impact on this litigation.

As for judicial efficiency, the Court is mindful that confirmation petitions are meant to be “summary” proceedings, not multi-year slugfests. *Argentine Republic v. Nat’l Grid PLC*, 637 F.3d 365, 369, 394 U.S. App. D.C. 431 (D.C. Cir. 2011). The Companies filed for confirmation over two-and-a-half years ago and there is more briefing still to come on the merits. Stalling resolution of the Court’s jurisdiction does not promote judicial efficiency. *Accord Tethyan*, 590 F. Supp. 3d at 270 (“[J]udicial economy also favors swift adjudication.”).

Though a stay is unwarranted, so too is immediate confirmation of the award. The Companies ask the Court to move beyond jurisdiction and reach the merits without further briefing. *See* Pet’rs’ Opp’n to Mot. to Stay at 16, ECF No. 34. But foreign sovereigns are entitled to a threshold immunity determination before raising merits-based defenses. *See Process & Indus. Devs. Ltd. v. Fed. Rep. of Nigeria*, 962 F.3d 576, 585-86, 447 U.S. App. D.C. 316 (D.C. Cir. 2020). The Companies previously conceded as much by asking the Court to wait until “it reaches the merits of the Petition” to consider Russia’s “premature” arbitrability arguments. Pet’rs’ Opp’n to Mot. to Dismiss at 14-15, ECF No. 23. Though Russia could have waived bifurcation had it simultaneously briefed

merits and jurisdictional defenses, *see Process & Indus. Devs.*, 962 F.3d at 585-86, it did not, *see* Resp't's Mot. to Dismiss at 14 & n.9. So the Petition is not yet ripe for decision.

IV.

For these reasons, the Court **ORDERS** that Respondent's Motion to Dismiss and Respondent's Motion to Stay are **DENIED**.

SO ORDERED.

Dated: December 12, 2024

/s/ Trevor N. Mcfadden

TREVOR N. McFADDEN

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:23-cv-03330 (CJN)

JSC DTEK KRYMENERGO, PLAINTIFF,

v.

RUSSIAN FEDERATION, DEFENDANT.

April 17, 2025, Decided;

April 17, 2025, Filed

Opinion by: CARL J. NICHOLS

MEMORANDUM OPINION

JSC DTEK Krymenergo, a Ukrainian energy supplier, initiated this action to confirm an arbitral award that it secured against the Russian Federation after Russia invaded Crimea and expropriated DTEK Krymenergo's assets there. The Russian Federation moved to dismiss on the grounds that the Court lacks both subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act, and then later moved to stay these proceedings pending the outcome

of additional arbitral and judicial proceedings in other fora. For the reasons below, the Court denies both of Russia's motions.

I. Background

A. Factual Background

JSC DTEK Krymenergo is a subsidiary of DTEK Energy Group, one of the largest privately-owned energy distributors in Ukraine. ECF No. 1-2 (Award) ¶¶ 2-3, 191-93. Before Russia occupied Crimea in February 2014, DTEK Krymenergo was a major energy supplier there: it provided electricity to more than 780,000 Crimean customers across 23 regional electricity networks and 27,000 square kilometers. *Id.* ¶¶ 191-93. DTEK Krymenergo's assets in Crimea included real estate, equipment and other physical property, license and contract rights, securities, and cash. *Id.* ¶ 192.

On March 18, 2014, the Russian Federation formally annexed Crimea and extended the application of Russian law to the territory. *Id.* ¶ 196. On April 30, 2014, the State Council of the Republic of Crimea issued an expropriation resolution providing that certain categories of property in the region, including Ukrainian state-owned property and abandoned property, would thereafter "be considered the property of the Republic of Crimea." *Id.* ¶ 668. DTEK Krymenergo's assets were not covered by the original April 2014 resolution. *Id.* ¶ 669. But on January 21, 2015, the Crimean Parliament amended the

resolution to specifically state that all of DTEK Krymenergo's tangible and intangible assets in Crimea were also transferred to the ownership of the Republic of Crimea. *Id.* ¶¶ 206, 695. The same day, uniformed men took control of DTEK Krymenergo's premises and denied its managers reentry. *Id.* ¶¶ 206, 677. To date, DTEK Krymenergo has not received any compensation from Russian or Crimean authorities for its expropriated assets. *Id.* ¶¶ 674-79.

B. Arbitral Proceedings

On February 16, 2018, DTEK Krymenergo commenced arbitration against the Russian Federation pursuant to the 1998 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments.¹ *Id.* ¶¶ 1, 18. The stated purpose of that Agreement, known as the Ukraine-Russia Bilateral Investment Treaty, or BIT, is to “encourage” cross-border investments between the two nations by offering reciprocal protections to qualifying investors. ECF No. 1-3 (BIT) art. 2. Those protections cover “investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.” *Id.* art. 12. Relevant here, the BIT defines Russian “territory” as “the territory of the Russian Federation . . . as well as [its] . . .

¹The Ukraine-Russia BIT was terminated on January 27, 2025, at Ukraine's option. *See* ECF No. 13-3 at 105.

exclusive economic zone and the continental shelf, defined in accordance with international law.” *Id.* art. 1(4).

When the BIT applies, it requires Russia and Ukraine to refrain from discriminating against each other’s cross-border investments, as well as from expropriating them absent due process of law and prompt, adequate, and effective compensation. *Id.* arts. 3-6. The BIT further commits both nations to arbitrate “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments.” *Id.* art. 9(1). Such arbitration may be conducted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, or in an “ad hoc” arbitration in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law of 1976 (UNCITRAL). *Id.* art. 9(2). DTEK Krymenergo opted to challenge the expropriation of its Crimean property under the UNCITRAL Rules. Award ¶ 1.

Because the Russian Federation initially declined to participate in the arbitration, it was not involved in appointing any of the arbitrators to the ad hoc tribunal. *Id.* ¶¶ 18-22. Instead, DTEK Krymenergo appointed the first arbitrator, and the Permanent Court of Arbitration selected the second arbitrator on Russia’s behalf. *Id.* ¶¶ 18-21. Those two arbitrators together appointed the Presiding Arbitrator.² *Id.* ¶ 22.

²The first Presiding Arbitrator resigned in June 2020 due to his relationship with DTEK Krymenergo’s expert. Award ¶¶ 73-86.

In April 2019, over a year after DTEK Krymenergo submitted its request for arbitration, the Russian Federation informed the tribunal it wished to join the proceedings. *Id.* ¶ 26.

From then on, both parties participated actively in the arbitration, which ultimately involved multiple rounds of briefing, a week-long hearing at The Hague in September 2021, and two rounds of post-hearing briefs and submissions on costs. *Id.* ¶¶ 26-134. The Russian Federation raised various objections to the tribunal's jurisdiction throughout those proceedings, including by arguing that the BIT did not apply because DTEK Krymenergo's energy-infrastructure investments were not in Russian territory at the time they were made and because, in any event, Crimea's territorial status remains subject to dispute. *Id.* ¶¶ 227, 381. But when the tribunal issued its award in November 2023, a majority of the arbitrators rejected Russia's objections and held they had jurisdiction over DTEK Krymenergo's claims. *Id.* ¶¶ 1030(1)-(4), (6). On the merits, the majority concluded that Russia had breached the BIT by failing to protect DTEK Krymenergo's investments in Crimea, by subjecting DTEK Krymenergo to discriminatory treatment, and by expropriating DTEK Krymenergo's property without compensation, due process of law, and consideration of the public interest. *Id.* ¶¶ 653-786, 827-33, 1030(7). Although

He was then replaced by a different Presiding Arbitrator chosen by the same method. *Id.* ¶ 92.

the arbitrator appointed for the Russian Federation dissented from some of the majority's conclusions, he did not issue a separate opinion. *See id.* ¶ 1030.

To redress the breaches it identified, the tribunal awarded DTEK Krymenergo \$207.8 million in compensatory damages, plus pre- and post-award interest. *Id.* ¶ 1030(8). (The arbitrator appointed by DTEK Krymenergo would have awarded more compensation, and so dissented from that portion of the award.) *Id.* at 201-03. The tribunal also awarded DTEK Krymenergo the costs and expenses of arbitration, which it calculated at over \$10 million. *Id.* ¶ 1030(9).

In February 2024, Russia moved The Hague Court of Appeal to set aside the tribunal's award. ECF No. 14-1 ¶ 3. Those proceedings are ongoing, and The Hague Court of Appeal has not yet rendered any decisions. *Id.*

C. District Court Proceedings

The same month the tribunal issued the award, DTEK Krymenergo filed this action, in which it petitions this Court to confirm the award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). ECF No. 1 (Pet.) ¶ 4. After DTEK Krymenergo effected proper service, the Russian Federation moved to dismiss, arguing that the Court lacks subject matter jurisdiction under the FSIA and that its exercise of personal jurisdiction over Russia

would violate due process. *See* ECF No. 9; ECF No. 13 (MTD). While that motion was pending, Russia moved to stay proceedings pending both the conclusion of the Hague set-aside proceedings and the disposition of several purportedly related cases in the Court of Appeals and the Supreme Court. *See* ECF No. 19 (MTS). DTEK Krymenergo opposes both the motion to dismiss and the stay motion. *See* ECF No. 14 (MTD Opp.); ECF No. 21 (MTS Opp.).

II. Legal Standard

“[O]n a motion to dismiss under the FSIA where [the foreign sovereign] ha[s] not disputed any facts,” courts “must assume the truth of [the petitioner’s] allegations, make all reasonable inferences in [its] favor, and . . . place the ultimate burden of proof with [the sovereign].” *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 401, 436 U.S. App. D.C. 16 (D.C. Cir. 2018). “Thus, where the [foreign sovereign] contests only the legal sufficiency of [the petitioner’s] jurisdictional claims, the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93, 352 U.S. App. D.C. 284 (D.C. Cir. 2002). A foreign state “bears the burden of proving sovereign immunity, including that the [petitioner’s] allegations do not bring its case within a statutory exemption to immunity.” *Schubarth*, 891 F.3d at 398 (quotation marks omitted).

Even before establishing jurisdiction, courts have an inherent “power to stay proceedings” in order to control their dockets “with economy of time and effort for [the judicial system], for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936); see *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 38-39 (D.D.C. 2019). In determining whether a stay is warranted, courts must “weigh competing interests and maintain an even balance between the court’s interests in judicial economy and any possible hardship to the parties.” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732-33, 399 U.S. App. D.C. 179 (D.C. Cir. 2012) (quotation marks and citations omitted).

III. Motion to Dismiss

“Federal courts may exercise jurisdiction over claims against a foreign state” like Russia “only pursuant to the FSIA.” *Schubarth*, 891 F.3d at 398 (citing 28 U.S.C. § 1604). The FSIA “establishes a default rule of foreign sovereign immunity,” *id.*, thereby depriving courts of subject matter jurisdiction in “every action against a foreign sovereign” unless one of the FSIA’s textually enumerated “exceptions to foreign sovereign immunity” applies. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) (citing 28 U.S.C. § 1330(a)); see 28 U.S.C. §§ 1605, 1607. The FSIA also governs the exercise of personal jurisdiction over a foreign state, requiring as preconditions for personal jurisdiction that (1) subject matter jurisdiction be “satisfied” via a specified

immunity exception and (2) service be proper. *Schubarth*, 891 F.3d at 397 n.1 (citing 28 U.S.C. § 1330(b)).

In its motion to dismiss, Russia challenges the Court's exercise of both subject matter jurisdiction and personal jurisdiction. Neither challenge has merit.

A. Subject Matter Jurisdiction

As noted, the FSIA's default rule of foreign sovereign immunity is subject to several exceptions. One provides that foreign states are subject to federal jurisdiction in actions brought "to confirm an award made pursuant to . . . an agreement to arbitrate," as long as the agreement is "made by the foreign state with or for the benefit of a private party" and "is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). To proceed under this so-called "arbitration exception," a petitioner must "satisfy a burden of production" as to three "jurisdictional facts": "(1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing award enforcement." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1100 (D.C. Cir. 2024). If the petitioner carries that burden, the exception applies unless the foreign state "establish[es] the absence of the factual basis by a preponderance of the evidence." *Id.*

DTEK Krymenergo has met its initial burden of production by pointing to (1) the Ukraine-Russia BIT, (2) the arbitral award issued under that BIT, and (3) the New York Convention—“an international treaty obligating member states,” including Russia, the United States, and the Netherlands, “to recognize and enforce arbitral awards issued in other member states.”³ *Process & Indus. Dev. (P&ID) v. Fed. Rep. of Nigeria*, 27 F.4th 771, 772, 456 U.S. App. D.C. 154 (D.C. Cir. 2022) (citing June 10, 1958, 21 U.S.T. 2517); Contracting States, New York Arbitration Convention, available at <https://www.newyorkconvention.org/countries> (last visited April 14, 2025); see *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204, 417 U.S. App. D.C. 463 (D.C. Cir. 2015) (“Chevron has met its burden of production by producing the BIT, Chevron’s notice of arbitration against Ecuador, and the tribunal’s arbitration decision.”); *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 n.3, 450 U.S. App. D.C. 342 (D.C. Cir. 2021) (“Nor is there doubt that the New York Convention, ratified by the United States, calls for the enforcement of arbitral awards.”). But Russia challenges DTEK Krymenergo’s showings as to the first and third jurisdictional facts, arguing that “[t]he Federation never agreed to arbitrate with [DTEK Krymenergo], and the Award is not governed by any treaty in force in the United States calling for the

³The Netherlands is the location of the arbitral proceedings at issue here. See Award ¶¶ 13-14, 49.

recognition and enforcement of arbitral awards.” MTD at 11.

The Court disagrees on both points.

1. Arbitration Agreement

The arbitration exception “requires a valid ‘agreement . . . to submit to arbitration,’” and “whether a valid arbitration agreement exists” is a question for courts, not arbitrators, to resolve. *Belize Soc. Dev., Ltd. v. Gov’t of Belize*, 794 F.3d 99, at 102, 417 U.S. App. D.C. 257 (quoting 28 U.S.C. § 1605(a)(6)); *Dist. No. 1, Pac. Coast Dist., Marine Eng’rs Beneficial Ass’n, AFL-CIO v. Liberty Mar. Corp.*, 998 F.3d 449, 457, 452 U.S. App. D.C. 228 (D.C. Cir. 2021). Here, Russia argues that it never entered a valid arbitration agreement with DTEK Krymenergo because the “standing offer to arbitrate” set forth in the Ukraine-Russia BIT “was directed only to Ukrainian investors who chose to invest in Russian ‘territory’” after 1992. MTD at 14, 22. According to Russia, DTEK Krymenergo is “a Ukrainian entity” that, notwithstanding Russia’s later invasion of Crimea, “chose to invest in Ukraine”—and did so with assets “which . . . pre-date 1992.” *Id.* Moreover, according to Russia, “that Ukraine disputes Russia’s sovereignty over Crimea” itself defeats “the existence of an agreement to arbitrate in this case, as it shows that the contracting parties have no common understanding of the meaning of the term ‘territory.’” *Id.* at 17.

Russia's arguments incorrectly conflate the "arbitrability" of its dispute with DTEK Krymenergo—that is, whether Russia "agreed to arbitrate this *particular* dispute"—with the *jurisdictional* question of whether an arbitration agreement exists—which is whether Russia "agreed to arbitrate *certain* disputes" with Ukrainian investors. *Stileks*, 985 F.3d at 878 (second emphasis added). In *Stileks*, for example, the Court of Appeals confronted Moldova's argument that the arbitral award in question was not "made pursuant to . . . an agreement to arbitrate" under 28 U.S.C. § 1605(a)(6) because the claimant was "not a qualifying investor" under the relevant bilateral arbitration treaty.⁴ *Id.* at 877-78. The Court explained that, "[i]f Moldova [wa]s correct, it might have a defense to confirmation under the New York Convention, which provides for non-recognition of an award if ' . . . it contains decisions on matters beyond the scope of the submission to arbitration.'" *Id.* at 878 (quoting New York Convention, art. V(1)(c)). But the Court held that Moldova did not have a *jurisdictional* defense, because "*the arbitrability of a dispute is not a jurisdictional question under the FSIA.*" *Id.* (emphasis added); *see also NextEra*, 112 F.4th at 1101 ("It is well established in this Circuit that *disputes about the scope of an arbitration agreement, such as whether [it] covers a particular*

⁴The Federation thus errs in arguing that, in *Stileks*, it was "unquestionabl[e]" that "[t]he claimants were investors with authority to accept the standing offer to arbitrate." ECF No. 15 (MTD Reply) at 13.

dispute, are not jurisdictional questions under the FSIA.”) (emphasis added). “For jurisdictional purposes, the FSIA’s arbitration exception requires that the arbitral tribunal purported to make an award pursuant to the [BIT], not that it in fact did so.” *NextEra*, 112 F.4th at 1104 (quotation marks omitted).

At the very least, the arbitral tribunal here “purported” to make an award under the BIT. In particular, as in other cases, “the tribunal concluded that the BIT gave it jurisdiction and it premised [DTEK Krymenergo’s] award on Russia’s alleged breach of the BIT.” *Stabil LLC v. Russian Fed’n*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *3 (D.D.C. 2024); see Award ¶¶ 1, 1030. And Russia disputes neither the existence of the BIT nor the fact that the BIT committed Russia to arbitrate investment disputes with *some* Ukrainian investors.

Instead, Russia argues that *DTEK Krymenergo’s* claims are not covered by the BIT, because while Russia extended some arbitration offers, it “never extended an offer to arbitrate to [DTEK Krymenergo].” ECF No. 15 (MTD Reply) at 3. As much as Russia attempts to portray this question as one about the existence of an arbitration agreement, in this circuit it is plain that this argument goes to the agreement’s scope. See *NextEra*, 112 F.4th at 1103 (Spain’s argument “that the standing offer to arbitrate contained in [the BIT] d[id] not extend to EU nationals” was “an argument regarding the *scope* of the [BIT], not its *existence*”). This argument is

therefore irrelevant to the Court’s exercise of jurisdiction under FSIA’s arbitration exception—which in this context demands only that “[t]he BIT includes a standing offer to all potential [Ukrainian] investors to arbitrate investment disputes” and that DTEK Krymenergo “accepted [the offer] in the manner required by the treaty.” *Chevron*, 795 F.3d at 206; see also *NextEra*, 112 F.4th at 1102 (“[A]n investment treaty’s arbitration provision operates as a unilateral offer to arbitrate by each sovereign to investors of the other signatory countries.”) (quotation marks omitted). Because Russia does not and cannot contest that those preconditions are met here, it “has not rebutted [DTEK Krymenergo’s] factual support for the existence of an arbitration agreement.” *Stabil*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *4 (finding non-jurisdictional Russia’s argument that Ukraine-Russia BIT did not extend to investment made in Crimea prior to Russian occupation).

2. Applicable Treaty

To proceed under the arbitration exception, a plaintiff must also proffer “a treaty potentially governing award enforcement” in the United States. *NextEra*, 112 F. 4th at 1100-01. As noted above, the New York Convention has been signed by Russia, the United States, and the Netherlands, and generally permits the enforcement here of arbitral awards made elsewhere. *See Stabil*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *4. Still, Russia argues that the New York Convention does not permit the enforcement of *this* award because it “only governs

awards arising out of a commercial relationship between the parties” and “[n]o such commercial relationship exists between Russia and [DTEK Krymenergo].” MTD at 22.

It is true that the United States adopted a “commercial reservation” when signing the New York Convention, thereby limiting its enforcement scope to arbitral awards “arising out of a legal relationship, whether contractual or not, which is considered as commercial.” *Zhongshan Fucheng Indus. Inv. Co. LTD v. Fed. Republic of Nigeria*, 112 F.4th 1054, 1059 (D.C. Cir. 2024) (quoting 9 U.S.C. § 202). But the arbitral award here falls comfortably within how that reservation has been construed by the Court of Appeals.

As the Court of Appeals has held, the term “commercial” has a “broad compass” in the international arbitration context: it simply requires that the parties’ relationship “have a connection to commerce.” *Gov’t of Belize*, 794 F.3d at 104-05. Here, DTEK Krymenergo established energy infrastructure in Crimea that, before its 2015 expropriation by the Russian Federation (including for some time after Crimea was annexed), provided electricity to more than 780,000 customers. Award ¶¶ 191-93. Russia’s decision to nationalize that economically productive infrastructure—Ukraine-Russia BIT notwithstanding—plainly placed Russia and DTEK Krymenergo in a relation with “connections to commerce.” *Zhongshan*, 112 F.4th at 1063-64 (relationship between Nigeria and Chinese developer

operating there was commercial in light of, among other features, developer’s “investment in a money-making enterprise,” Nigeria’s collection of “revenue” from developer’s investment, and BIT’s “express[] design[] to promote commerce”); *see also Stabil*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *5 (award under Ukraine-Russia BIT regarding Russia’s seizure of Crimean petrol stations arose out of commercial relationship because “[o]wning, operating and supplying petrol stations has an obvious connection to commerce”) (quotation marks omitted). Indeed, the Court of Appeals has specifically stated that, if a BIT “confers third-party rights upon commercial investors” and “makes [them] a standing offer . . . to arbitrate disputes involving their third-party rights,” any resulting arbitral award “satisfies the commercial reservation.” *Zhongshan*, 112 F.4th at 1065; *see also Stileks*, 985 F.3d at 880 (“[T]he primary goal of the [New York] Convention is to facilitate the recognition and enforcement of arbitral awards.”).

Against this authority, Russia maintains that it has no commercial relationship with DTEK Krymenergo because “government seizure of private property is a sovereign act excluded from the commercial sphere.” *Stabil*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *5; *see* MTD at 23. But just as in *Stabil*, Russia’s argument “relies on inapt cases discussing the contours of the FSIA’s commercial activity exception.” *Stabil*, 2024 U.S. Dist. LEXIS 224751, 2024 WL 5093202, at *5; *see* MTD at 23 (citing, *inter alia*, *Ivanenko v. Yanukovich*, 995 F.3d 232, 238-39,

452 U.S. App. D.C. 76 (D.C. Cir. 2021)). That statutory exception to sovereign immunity, which DTEK Krymenergo does not invoke here, involves a more “restrictive” definition of “commercial” than the New York Convention does. *Gov’t of Belize*, 794 F.3d at 104-05. And the Court of Appeals has distinguished the definition of “commercial” across the two contexts, holding that conduct can be “commercial” for purposes of the New York Convention even if it involves “powers peculiar to sovereigns”—like expropriation. *Id.* at 105. Russia has thus failed to rebut DTEK Krymenergo’s showing that the New York Convention—and the arbitration exception more generally—applies to this case.⁵

B. Personal Jurisdiction

“[U]nder the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction.” *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11, 258 U.S. App. D.C. 354 (D.C. Cir. 1987) (quotation marks omitted). For the reasons already discussed, the Court possesses subject matter

⁵ Because the Court is persuaded that it possesses subject matter jurisdiction over DTEK Krymenergo’s petition pursuant to the arbitration exception, 28 U.S.C. § 1605(a)(6), it sees no need to analyze whether it also has subject matter jurisdiction over the petition under the FSIA’s waiver exception, 28 U.S.C. § 1605(a)(1). See *NextEra*, 112 F.4th at 1099-1100 (acknowledging that it is “unsettled” in this Circuit whether signing the New York Convention implicitly waives foreign sovereign immunity and affirming district court’s jurisdiction under the arbitration exception alone).

jurisdiction over DTEK Krymenergo's petition via the FSIA's arbitration exception. And Russia does not contest the adequacy of DTEK Krymenergo's service, which was made via diplomatic channels under 28 U.S.C. § 1608(a)(4). *See* ECF No. 9. Instead, Russia's only argument against the Court's exercise of personal jurisdiction is that it "would not comport with due process" because "this case has no connection to the United States." MTD at 30. As the Federation acknowledges, however, the Court of Appeals has held that foreign states are not "persons" protected by the Fifth Amendment's Due Process Clause—meaning that the Clause's "minimum contacts" requirement "poses no obstacle" to this Court's exercise of personal jurisdiction over Russia. *Price*, 294 F.3d at 96-99. Even as Russia "maintains that *Price* was wrongly decided and should be overturned," MTD at 30, the Court is bound to apply it here.

IV. Motion to Stay

"[W]holly apart from the question of jurisdiction under the [FSIA]," Russia seeks a stay—presumably as to even its motion to dismiss—on essentially prudential grounds. MTS at 1. Russia points first to the ongoing proceedings at The Hague Court of Appeal to set aside the arbitral award; it argues that the Court should stay this action pending their resolution since, if the award is set aside, that would "moot this case in its entirety." *Id.*

When evaluating a request to stay confirmation proceedings based on the pendency of set-aside

proceedings elsewhere, courts must evaluate the traditional stay considerations—“interest in judicial economy and relative hardships to the parties”—“through the lens of” two additional factors particular to arbitration. *Hulley Enters. Ltd. v. Russian Fed’n*, 2022 U.S. Dist. LEXIS 68521, 2022 WL 1102200, at *9 (D.D.C. 2022). Specifically, the Court would “abuse its discretion” if in assessing the propriety of such a stay it did not consider (1) “the general objectives of arbitration,” namely, “the expeditious resolution of disputes and the avoidance of protracted and expensive litigation,” and (2) “the status of the foreign proceedings and the estimated time for those proceedings to be resolved.” *Stileks*, 985 F.3d at 879-80.

Taking those factors into account, a stay is not warranted based on the ongoing proceedings at The Hague. Denying Russia’s motion to dismiss on jurisdictional grounds, as the Court does today, involves no outsized use of judicial resources. Nor does it mean that confirmation of the underlying arbitral award—the first judicial event that would be in tension with The Hague’s possibly setting that award aside—is imminent. *See P&ID*, 27 F.4th at 772 (“[A] foreign court’s order ostensibly setting aside an arbitral award has no bearing on the district court’s jurisdiction and is instead an affirmative defense properly suited for consideration at the merits stage.”). Instead, the parties will first need to brief the merits of Russia’s defenses to enforcement under the New York Convention. *Cf. RREEF Infrastructure*

(G.P.) Ltd. v. Kingdom of Spain, 2021 U.S. Dist. LEXIS 63261, 2021 WL 1226714, at *3 (D.D.C. 2021) (“If this Court were to affirm an award that ICSID later annuls, more expensive litigation involving more complex issues would result.”) (quotation marks and alterations omitted).

To be sure, staying the case now would preserve the possibility that the parties could avoid that step entirely, in the event that The Hague sets aside the award. But the defenses Russia raises here will likely overlap substantially with those the parties have already briefed—both at the motion to dismiss stage and before The Hague. In light of that fact, as well as the fact that the arbitration began seven years ago and the underlying expropriation occurred more than a decade ago, the Court sees no compelling reason why merits briefing should not proceed even as The Hague proceedings do also. Indeed, any other course would seem inconsistent with “arbitration’s aim of expeditious dispute resolution.” *Hulley*, 2022 U.S. Dist. LEXIS 68521, 2022 WL 1102200, at *6, *9. That is especially true where Russia instituted the set-aside proceedings *after* DTEK Krymenergo instituted this enforcement action (and only moved to stay an additional seven months after that, once its motion to dismiss was fully briefed), and has offered no estimate of when the set-aside proceedings might conclude.⁶ *Cf.*

⁶ Russia incorrectly asserts that “the set-aside proceedings were initiated prior to the U.S. enforcement action.” MTS at 10. DTEK Krymenergo petitioned to confirm the arbitral award in November 2023, *see* ECF No. 1, and Russia applied to the Hague

Stati v. Republic of Kazakhstan, 199 F. Supp. 3d 179, 193 (D.D.C. 2016) (staying case pending foreign set-aside proceedings where “a decision by the Swedish court [wa]s expected in the coming months”).

For similar reasons, the balance of the hardships does not favor a stay. Russia argues that it would face “very real harm” if its assets are seized pursuant to an order enforcing the arbitral award and The Hague “subsequently ‘determine[s] that the award was improper.’” MTS at 7 (quoting *Matter of Arb. of Certain Controversies Between Getma Int’l & Republic of Guinea*, 142 F. Supp. 3d 110, 118 (D.D.C. 2015)). But again, there is no imminent prospect of confirming the award, much less executing it. Meanwhile, if the Court were to delay confirmation briefing pending The Hague’s set-aside decision and The Hague did *not* set aside the award, the result would be a substantial delay in DTEK Krymenergo’s ability to potentially recover its duly owed compensation. As DTEK Krymergo points out, that delay could itself affect the likelihood of recovery, since other Russian creditors are proceeding with similar confirmation actions in this District and could deplete the same American-held assets that DTEK Krymenergo hopes to attach. *See* MTS Opp. at 3 & n.1 (compiling cases).

Court of Appeal to set aside the award in February 2024, *see* ECF No. 14-1 ¶ 3.

In its reply, Russia argues that a stay is warranted based on several pending cases that, in its view, could affect the disposition of this matter. *See* ECF No. 22 (MTS Reply) at 14-17. But by now, only one of the cases that Russia identifies indeed presents an open question. In March 2025, the Supreme Court heard argument in *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, Nos. 23-1201, 24-17, to decide “[w]hether the exercise of personal jurisdiction over a foreign state under the Foreign Sovereign Immunities Act requires satisfaction of the minimum-contacts test.” But at oral argument, counsel for all parties appeared to agree that the answer to that question was “no,” and to focus instead on other possible reasons—largely not raised in the courts below—why jurisdiction over the foreign-government-owned corporation might not be proper. *See* Oral Arg. Tr. 32:47-25:36. Russia suggests that *Devas* could overturn the Court of Appeals’ decision in *Price* and “hold[] that the exercise of personal jurisdiction over foreign states must comport with due process.” MTS at 15. But that outcome appears unlikely, and at least speculative. *Devas* thus does not create the “rare circumstances” in which DTEK Krymenergo could be “compelled to stand aside while [another] litigant . . . settles the rule of law that will define the rights of both.”⁷ *Nat’l Indus. for Blind v.*

⁷Russia also argued that a stay was warranted due to the pendency of (1) *Republic of Hungary v. Simon*, 604 U.S. , 145 S. Ct. 480, 221 L. Ed. 2d 1 (2025), (2) the petition for rehearing in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024), and (3) the petition for certiorari in *Zhongshan Fucheng Indus. Inv. Co. Ltd. v. Fed. Republic of*

Dep't of Veterans Affs., 296 F. Supp. 3d 131, 137 (D.D.C. 2017).

V. Conclusion

For the foregoing reasons, the Court denies Russia's motion to dismiss, ECF No. 13, and its motion to stay, ECF No. 19. Within two weeks of the issuance of this Opinion, the parties shall file a Joint Proposed Scheduling Order governing further proceedings in this matter. An Order will accompany this Opinion.

DATE: April 17, 2025

/s/ Carl J. Nichols

CARL J. NICHOLS

United States District Judge

Nigeria, 112 F.4th 1054 (D.C. Cir. 2024). Russia speculated that *Simon* could disrupt Circuit precedent holding that “a foreign state bears the ultimate burden of proving that an exception to immunity under the FSIA does not apply.” MTS at 15. But *Simon*—which in any event pertained to the expropriation rather than arbitration exception to the FSIA—has now been decided and expressly did not reach “who bears the burden of production to prove (or disprove) that expropriated property has a commercial nexus with the United States” and “[w]ho bears the burden of persuasion on that issue.” 604 U.S. at 9-10, n.1, 145 S. Ct. 480, 221 L. Ed. 2d 1. As for *NextEra* and *Zhongshan*, the petition for rehearing was denied and the petition for certiorari was dismissed, respectively. Those cases' applications of the arbitration exception are thus final and binding on the Court.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion to Dismiss, ECF No. 13, and Motion to Stay, ECF No. 19, are **DENIED**; and it is further

ORDERED that, on or before May 1, 2025, the Parties shall file on the docket a Joint Proposed Scheduling Order governing further proceedings in this matter.

DATE: April 17, 2025

/s/ Carl J. Nichols

CARL J. NICHOLS

United States District Judge

APPENDIX D**28 USCS § 1604****§ 1604. Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607 of this chapter [28 USCS §§ 1605–1607].

APPENDIX E**28 USCS § 1605****§ 1605. General exceptions to the jurisdictional immunity of a foreign state**

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a

commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel,

slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 [28 USCS § 1607], or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: *Provided, That—*

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime

lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 [46 USCS §§ 31301 et seq.] and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel

been privately owned and possessed a suit in rem might have been maintained.

(e) [Repealed]

(f) [Repealed]

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604 [28 USCS § 1604], but for section 1605A or section 1605B [28 USCS § 1605A or 1605B], the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The

court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law

enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted *ex parte* and *in camera*.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.

(1) In general. If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.

(A) Nazi-era claims. Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works. In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in

which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d) [28 USCS § 1603(d)]; and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions. For purposes of this subsection—

(A) the term “work” means a work of art or other object of cultural significance;

(B) the term “covered government” means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term “covered period” means the period beginning on January 30, 1933, and ending on May 8, 1945.