

1 **In the**
2 **United States Court of Appeals**
3 **FOR THE SECOND CIRCUIT**

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5
6 AUGUST TERM 2020
7 Nos. 19-3550, 19-3562,
8 19-3747, 19-4017,
9 19-4021, 19-4147

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11 **GATER ASSETS LIMITED,**
12 *Petitioner-Appellee-Cross-Appellant,*

13
14 **LLOYD’S UNDERWRITERS AT LONDON,**
15 *Petitioner,*

16
17 v.

18
19 **AO MOLDOVAGAZ, REPUBLIC OF MOLDOVA,**
20 *Respondents-Appellants-Cross-Appellees,*

21
22 **AO GAZSNABTRANZIT,**
23 *Respondent.**

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25
26 On Appeal from the United States District Court
27 for the Southern District of New York

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29 ARGUED: OCTOBER 20, 2020
30 DECIDED: JUNE 22, 2021

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* The Clerk of Court is directed to amend the caption as set forth above.

1 Before: RAGGI, SULLIVAN, and MENASHI, *Circuit Judges*.

2 Appellants AO Moldovagaz and the Republic of Moldova
3 appeal the judgment of the U.S. District Court for the Southern
4 District of New York (Preska, J.) entered on November 1, 2019—and
5 explained in the district court’s opinions of September 30, 2018, and
6 September 27, 2019—in favor of Appellee Gater Assets Limited. Gater
7 sought to renew a default judgment, which the district court entered
8 in 2000, that enforced a Russian arbitration award in favor of Lloyd’s
9 Underwriters against the appellants. Lloyd’s assigned its default
10 judgment to Gater in 2012. The district court entered a renewal
11 judgment in Gater’s favor after concluding that it had personal
12 jurisdiction over the appellants as well as subject-matter jurisdiction
13 over the renewal claims. We disagree with those conclusions.

14 First, the district court lacked personal jurisdiction over
15 Moldovagaz. The Due Process Clause prohibits federal courts from
16 exercising personal jurisdiction over Moldovagaz because
17 Moldovagaz has no contacts with the United States. We have
18 recognized an exception to this rule when a defendant is a foreign
19 sovereign or a sovereign’s alter ego. But contrary to the district court’s
20 conclusion, Moldovagaz is not an alter ego of the Republic of
21 Moldova.

22 Second, the district court lacked subject-matter jurisdiction
23 over Gater’s claim for renewal against the Republic of Moldova. The
24 Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330,
25 1391(f), 1441(d), 1602-11, provides that federal courts lack subject-
26 matter jurisdiction over claims brought against foreign states unless
27 one of the FSIA’s immunity exceptions applies. The Republic of
28 Moldova is a foreign state and no immunity exception applies to

1 Gater’s claim against it. The district court invoked the FSIA’s
2 exception for confirming awards that are issued pursuant to a
3 qualifying arbitration agreement “made by the foreign state.” 28
4 U.S.C. § 1605(a)(6). The Republic of Moldova, however, was not a
5 party to the underlying arbitration agreement and no equitable
6 theory, even assuming such theories apply under § 1605(a)(6),
7 supports abrogating the Republic’s sovereign immunity in this case.

8 Accordingly, we **VACATE** the district court’s judgment in
9 Gater’s renewal action and **REMAND** with instructions to dismiss the
10 renewal action for lack of jurisdiction. We nevertheless **AFFIRM** the
11 district court’s refusal to vacate its original default judgment because
12 the appellants have failed to demonstrate that the district court had
13 no arguable basis to exercise jurisdiction to enter that judgment.

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1 MENASHI, *Circuit Judge*:

2 This suit involves a longstanding dispute over Moldovan gas
3 debts. In 2000, the U.S. District Court for the Southern District of New
4 York (Preska, J.) entered a default judgment against Respondents-
5 Appellants—the Republic of Moldova (“Republic”) and the
6 Moldovan corporation AO Moldovagaz (“Moldovagaz”)—in favor of
7 Lloyd’s Underwriters (“Lloyd’s”), a British underwriters association.
8 The default judgment confirmed a Russian arbitration award granted
9 to Lloyd’s after Moldovagaz’s predecessor-in-interest, AO
10 Gazsnabtranzit, defaulted on debt it owed to a Russian gas supply
11 company named Gazprom. Lloyd’s had reinsured the debt. In 2012,
12 Lloyd’s assigned its right to collect on the default judgment to
13 Petitioner-Appellee Gater Assets Limited (“Gater”), a British Virgin
14 Islands company. With the limitations period for enforcing the
15 default judgment nearing its end, Gater brought a renewal action in
16 the same district court pursuant to New York Civil Practice Law and
17 Rules § 5014, which allows for the renewal of a judgment and the
18 restarting of its limitations period. On November 1, 2019, the district
19 court entered a renewal judgment in Gater’s favor against both
20 Moldovagaz and the Republic. The district court explained its
21 underlying reasoning in opinions filed on September 30, 2018,¹ and
22 September 27, 2019.²

¹ See *Gater Assets Ltd. v. AO Gazsnabtranzit (Gater I)*, No. 16-CV-4118, 2018 U.S. Dist. LEXIS 171350 (S.D.N.Y. Sept. 30, 2018).

² See *Gater Assets Ltd. v. AO Gazsnabtranzit (Gater II)*, 413 F. Supp. 3d 304 (S.D.N.Y. 2019).

1 Moldovagaz and the Republic contest the district court’s
2 jurisdiction to enter the renewal judgment. Because this case involves
3 only foreign parties and a cause of action that arises under New York
4 state law, this suit would seem to fall outside the subject-matter
5 jurisdiction of the federal courts under Article III of the Constitution.
6 A lawsuit between foreign parties does not implicate diversity
7 jurisdiction, *see Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800), and
8 a claim under New York state law does not generally “aris[e] under
9 ... the Laws of the United States,” U.S. Const. art. III, § 2; *see Wilson v.*
10 *Sandford*, 51 U.S. (10 How.) 99, 101-02 (1850).

11 Because of the particular respondents, however, jurisdiction
12 may exist pursuant to the Foreign Sovereign Immunities Act
13 (“FSIA”), 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11. The FSIA
14 provides federal district courts with “original jurisdiction” over “any
15 nonjury civil action against a foreign state as defined in [the FSIA] ...
16 with respect to which the foreign state is not entitled to immunity
17 either under [the FSIA] or under any applicable international
18 agreement.” *Id.* § 1330(a). In *Verlinden B.V. v. Cent. Bank of Nigeria*, the
19 Supreme Court held that this jurisdictional grant, when viewed in
20 light of the FSIA as a whole, suffices to provide federal courts with
21 arising-under jurisdiction. 461 U.S. 480, 496-97 (1983). Therefore, if the
22 respondents are foreign states for the purposes of the FSIA, then the
23 district court had subject-matter jurisdiction over Gater’s renewal
24 action so long as an exception to the general rule of foreign sovereign
25 immunity applies.

26 Yet subject-matter jurisdiction is not enough by itself. A court
27 must also have personal jurisdiction over a party in order to enter a
28 binding judgment against it. The FSIA provides that a court with
29 subject-matter jurisdiction pursuant to the FSIA also has “[p]ersonal

1 jurisdiction over a foreign state” so long as “service [was] made” in
2 accordance with the FSIA’s service rules. 28 U.S.C. § 1330(b). Neither
3 Moldovagaz nor the Republic argues that it did not receive proper
4 service. Still, the Due Process Clause of the Fifth Amendment
5 independently prohibits federal courts from exercising personal
6 jurisdiction over parties that lack “minimum contacts” with the
7 court’s forum. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317,
8 330-31 (2d Cir. 2016).

9 That rule, too, has an exception. We have held that foreign
10 states do not enjoy due process protections from the exercise of the
11 judicial power because foreign states, like U.S. states, are not
12 “persons” for the purposes of the Due Process Clause. *See Frontera*
13 *Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393,
14 399 (2d Cir. 2009); *see also* U.S. Const. amend. V (“[N]or shall any
15 person ... be deprived of life, liberty, or property, without due process
16 of law.”). When applying the Fifth Amendment, moreover, we do not
17 define a foreign state in the same way the FSIA does. The FSIA’s
18 definition of a foreign state includes both the sovereign itself and its
19 agencies and instrumentalities, which are separate legal persons from
20 the sovereign. *See* 28 U.S.C. § 1603(a)-(b). Yet when it comes to the
21 Fifth Amendment, we have indicated—and today hold directly—that
22 only the sovereign itself and its “alter egos” are not “persons.”
23 Agencies and instrumentalities of foreign sovereigns retain their
24 status as “separate legal person[s],” *id.* § 1603(b)(1), and receive
25 protection from the exercise of personal jurisdiction under the Due
26 Process Clause.

27 All told, the requirements for exercising jurisdiction over the
28 claims against each Respondent-Appellant may be simply stated.
29 First, to pursue its claim for a renewal judgment against Moldovagaz,

1 Gater must establish (1) that Moldovagaz is a foreign state for the
2 purposes of the FSIA and that an FSIA immunity exception applies
3 (thus allowing the exercise of subject-matter jurisdiction), and (2) that
4 Moldovagaz either has minimum contacts with the district court's
5 forum or is an alter ego of the Republic (thus allowing the exercise of
6 personal jurisdiction). Second, because the Republic is
7 unquestionably a foreign sovereign, Gater's claim for a renewal
8 judgment against it must fit within an exception to sovereign
9 immunity under the FSIA (thereby allowing the exercise of both
10 subject-matter jurisdiction and personal jurisdiction).

11 As we explain below, the record here fails to establish that
12 Gater's renewal action meets the jurisdictional requirements for its
13 claims against each Respondent-Appellant. With respect to
14 Moldovagaz, Gater concedes that Moldovagaz has no contacts with
15 the United States. And, contrary to the district court's conclusion,
16 Moldovagaz is not an alter ego of the Republic. The Republic neither
17 exercises "extensive[] control" over Moldovagaz nor abused the
18 corporate form such that respecting Moldovagaz's separate juridical
19 personhood "would work fraud or injustice." *First Nat'l City Bank v.*
20 *Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 629
21 (1983). Therefore, the district court lacked personal jurisdiction over
22 Moldovagaz.

23 With respect to the Republic, Gater's claim against it does not
24 fit within an FSIA immunity exception. The district court invoked the
25 exception for actions to confirm arbitration awards issued pursuant
26 to a qualifying agreement "made by the foreign state." 28 U.S.C.
27 § 1605(a)(6). But the Republic was not a party to the underlying
28 arbitration agreement. Recognizing this fact, the district court relied
29 on direct benefits estoppel to hold that the immunity exception

1 nevertheless applied. It is not clear to us, however, that a theory of
2 direct benefits estoppel can establish that a foreign state “made” an
3 agreement to which it was not a party. But even assuming that it can,
4 the direct benefits theory cannot support subject-matter jurisdiction
5 here because Gater fails to demonstrate either that the agreement
6 “expressly provide[d] [the Republic] with a benefit” or that the
7 Republic “actually invoke[d] the contract to obtain its benefit.” *Trina*
8 *Solar US, Inc. v. Jasmin Solar Pty Ltd*, 954 F.3d 567, 572 (2d Cir. 2020).
9 The district court, therefore, lacked subject-matter jurisdiction over
10 Gater’s renewal claim against the Republic.

11 Accordingly, we vacate the district court’s judgment in
12 Gater’s renewal action and remand with instructions to dismiss the
13 renewal action for lack of jurisdiction. We nevertheless affirm the
14 district court’s refusal to vacate its original default judgment because
15 the appellants have failed to demonstrate that the district court had
16 no arguable basis to exercise jurisdiction to enter that judgment.

17 BACKGROUND

18 I

19 Moldovans rely on natural gas supplied by Gazprom, a gas
20 supply company that is majority-owned by the Russian government.
21 Many Moldovan customers—especially those in the autonomous
22 region of Transnistria—use the gas without providing full payment.
23 See J. App’x 1181-82. As a result of this and other factors, the Republic
24 and some Moldovan gas entities accumulated large debts to Gazprom
25 in the early 1990s. To help address the mounting debt, in 1995 the
26 Republic formed a corporation called Gazsnabtranzit by privatizing
27 several Moldovan state-owned gas transmission companies and
28 giving Gazprom a majority equity stake in the resulting corporation.

1 pursuant to the arbitration clause. On November 12, 1998, the ICAC
2 awarded Lloyd’s \$8.5 million plus costs against Gazsnabtranzit.

3 In December 1999, Lloyd’s filed a petition in the U.S. District
4 Court for the Southern District of New York to confirm the award
5 against Gazsnabtranzit, Moldovagaz (which by that time had
6 succeeded Gazsnabtranzit), and the Republic. Lloyd’s brought suit
7 pursuant to legislation implementing the Convention on the
8 Recognition and Enforcement of Foreign Arbitral Awards (“New
9 York Convention”). *See* 9 U.S.C. §§ 201-08. After the defendants failed
10 to appear, the district court entered a default judgment for Lloyd’s in
11 July 2000. In 2012, Lloyd’s assigned that judgment to Gater. As the
12 twenty-year statute of limitations to collect the judgment approached,
13 Gater filed an action under New York’s “renewal” statute, N.Y.
14 C.P.L.R. § 5014, which permits a plaintiff to obtain a renewed
15 judgment with its own limitations period by bringing a new action on
16 an existing judgment. This time, Moldovagaz and the Republic
17 appeared and sought dismissal of Gater’s renewal action pursuant to
18 Federal Rule of Civil Procedure 12(b)(1) (lack of subject-matter
19 jurisdiction) and 12(b)(2) (lack of personal jurisdiction). Moldovagaz
20 and the Republic also moved pursuant to Rule 60(b)(4) to vacate the
21 district court’s original 2000 default judgment as void due to a lack of
22 jurisdiction.

23 The district court denied the motions and granted judgment in
24 favor of Gater in its renewal action. The district court concluded that
25 Moldovagaz was an “organ” of the Republic and therefore qualified
26 as a foreign state under the FSIA. *Gater I*, 2018 U.S. Dist. LEXIS 171350,
27 at *22-43. This conclusion meant that the district court would have
28 subject-matter jurisdiction over the suit against Moldovagaz so long
29 as an exception to sovereign immunity under the FSIA applied. *See*

1 28 U.S.C. § 1330(a). The district court also held that Moldovagaz was
2 an “alter ego” of the Republic and that the court therefore had
3 personal jurisdiction over Moldovagaz so long as it was properly
4 served pursuant to the FSIA. *See* 28 U.S.C. § 1330(b); *Gater II*, 413
5 F. Supp. 3d at 313-25.

6 In addition, the district court held that neither the Republic nor
7 Moldovagaz was entitled to immunity under the FSIA because
8 Gater’s action for a renewal judgment fit into the FSIA’s immunity
9 exception for actions brought “to confirm an award made pursuant”
10 to an arbitration “agreement made by the foreign state” that is
11 governed by “a treaty or other international agreement in force for the
12 United States.” *Gater II*, 413 F. Supp. 3d at 325-28 (quoting 28 U.S.C.
13 § 1605(a)(6)); *Gater I*, at *53-56 (same). Finally, the district court ruled
14 that the Southern District of New York was a proper venue for the
15 renewal action because “a substantial part of the events or omissions
16 giving rise to the claim,” namely the original 2000 suit that resulted in
17 the default judgment Gater sought to renew, occurred in the Southern
18 District of New York. *Gater II*, 413 F. Supp. 3d at 328 (quoting 28
19 U.S.C. § 1391(f)(1)). Moldovagaz and the Republic timely appealed.

20 STANDARD OF REVIEW

21 We review a district court’s factual determinations in making
22 jurisdictional rulings under the FSIA for clear error. *See Frontera*, 582
23 F.3d at 395 (personal jurisdiction); *Filler v. Hanvit Bank*, 378 F.3d 213,
24 216 (2d Cir. 2004) (subject-matter jurisdiction). Under this standard,
25 we will disturb the district court’s findings only if we have a “definite
26 and firm conviction” that the district court made a mistake. *Anderson*
27 *v. Bessemer City*, 470 U.S. 564, 573 (1985). At the same time, we review
28 the district court’s legal conclusions on these issues de novo. *EM Ltd.*

1 *v. Banco Central de la República Argentina*, 800 F.3d 78, 89 (2d Cir. 2015)
2 (personal jurisdiction); *Filler*, 378 F.3d at 216 (subject-matter
3 jurisdiction). Here, because we identify certain clear errors of fact, we
4 will discount those factual findings and determine de novo if the
5 district court had jurisdiction over Gater’s renewal action with respect
6 to Moldovagaz and the Republic.

7 Regarding the Rule 12(b)(1) motions to dismiss Gater’s renewal
8 claims for lack of subject-matter jurisdiction, once a movant such as
9 the Republic “present[s] a *prima facie* case that it is a foreign
10 sovereign,” the non-movant then “has the burden of going forward
11 with evidence showing that, under exceptions to the FSIA, immunity
12 should not be granted.” *Virtual Countries, Inc. v. Republic of South*
13 *Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (internal quotation marks and
14 emphasis omitted). If the non-movant can satisfy that burden of
15 production, the foreign state bears the “ultimate burden of persuasion
16 by a preponderance of the evidence.” *Id.* at 242.³ As for Moldovagaz’s
17 Rule 12(b)(2) motion to dismiss Gater’s renewal claim for lack of
18 personal jurisdiction, Gater bears the burden of showing that the
19 district court had personal jurisdiction over Moldovagaz. *In re*
20 *Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003).

³ The parties cite *Swarna v. Al-Awadi*, which stated that the plaintiff bears its burden of production “by a preponderance of the evidence.” 622 F.3d 123, 143 (2d Cir. 2010). But our earlier cases indicate that the preponderance-of-the-evidence standard applies to the foreign sovereign’s ultimate burden of persuasion, not to the plaintiff’s burden of production. See *Virtual Countries*, 300 F.3d at 241-42. To the extent that these articulations of the standard conflict, we are bound to follow the earlier precedent. See *Tanasi v. New All. Bank*, 786 F.3d 195, 200 n.6 (2d Cir. 2015).

1 Moldovagaz and the Republic bear a heavier burden when it
2 comes to the Rule 60(b)(4) motions to vacate the district court's
3 original default judgment. A party moving for relief under Rule 60(b)
4 generally must "present[] highly convincing ... evidence in support of
5 vacatur" and "show good cause for the failure to act sooner and that
6 no undue hardship be imposed on other parties." *Kotlicky v. U.S. Fid.*
7 *& Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987) (internal quotation marks and
8 citation omitted); *see also United States v. Int'l Brotherhood of Teamsters*,
9 247 F.3d 370, 391 (2d Cir. 2001). "A motion to vacate a default
10 judgment as void" under Rule 60(b)(4), however, usually "may be
11 made at any time." *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180,
12 190 (2d Cir. 2006). Still, "[i]n the context of a Rule 60(b)(4) motion, a
13 judgment may be declared void for want of jurisdiction only when
14 the court 'plainly usurped jurisdiction,' or, put somewhat differently,
15 when 'there is a total want of jurisdiction and no arguable basis on
16 which it could have rested a finding that it had jurisdiction.'" *Cent. Vt.*
17 *Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 190 (2d Cir. 2003) (quoting
18 *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)). Considering the
19 general rule that a movant bears the burden in Rule 60(b) motions, *see*
20 *Kotlicky*, 817 F.2d at 9, and that neither Moldovagaz nor the Republic
21 argues on appeal that it lacked actual notice of the original action that
22 led to the default judgment, we place the burden on Moldovagaz and
23 the Republic to show that vacatur was warranted under the standard
24 set out in *Herbert*. *See "R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115,
25 126 (2d Cir. 2008) ("[I]n a collateral challenge to a default judgment
26 under Rule 60(b)(4), the burden of establishing lack of personal

1 jurisdiction is properly placed on a defendant who had notice of the
2 original lawsuit.”).⁴

3 DISCUSSION

4 The district court lacked jurisdiction over Gater’s renewal
5 action. Moldovagaz has no contacts with the United States and,
6 contrary to the district court’s conclusion, it is not an alter ego of the
7 Republic. Due process protects a party from being subject to personal
8 jurisdiction in a forum with which it has no connection. *See, e.g., Int’l*
9 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Although we have
10 denied this protection to foreign sovereigns and their alter egos, *see*
11 *Frontera*, 582 F.3d at 399, that exception does not extend to all agencies
12 or instrumentalities of foreign states as defined by the FSIA.
13 Therefore, the district court lacked personal jurisdiction over
14 Moldovagaz even if it is an agency or instrumentality of the Republic.

15 The Republic, meanwhile, was not a party to the arbitration
16 agreement that the district court held triggered the FSIA’s immunity
17 exception for arbitral awards. The district court nevertheless bound
18 the Republic to this arbitration agreement and abrogated its
19 immunity under a theory of direct benefits estoppel. For the FSIA
20 arbitration immunity exception to apply, however, the relevant
21 agreement must have been “made by” the Republic, 28 U.S.C.
22 § 1605(a)(6), and it is not clear to us that a direct benefits estoppel

⁴ We express no view regarding whether an exception to the general rule that the movant bears the burden in a Rule 60(b) motion exists when circumstances indicate that a movant challenging personal jurisdiction lacked actual notice of the original lawsuit. *Cf. Middleton v. Green Cycle Hous., LLC*, 689 F. App’x 12, 13 (2d Cir. 2017) (“We need not resolve the issue of whether a defendant who concedes service, but not actual notice, bears the burden of disproving jurisdiction.”).

1 theory can establish that a foreign state “made” an agreement to
2 which it was not a party. But even assuming the point *arguendo*, direct
3 benefits estoppel cannot support subject-matter jurisdiction here
4 because Gater failed to demonstrate either that the agreement
5 “expressly provide[d] [the Republic] with a benefit” or that the
6 Republic “actually invoke[d] the contract to obtain its benefit.” *Trina*
7 *Solar*, 954 F.3d at 572. Because no other FSIA exception applies here,
8 the district court lacked subject-matter jurisdiction over Gater’s claim
9 against the Republic.

10 Because we conclude that the district court was powerless to
11 entertain Gater’s renewal action against either Moldovagaz or the
12 Republic, we do not address the other issues raised here—namely,
13 whether Moldovagaz is an agency or instrumentality of the Republic
14 as defined by the FSIA, whether a renewal action under N.Y. C.P.L.R.
15 § 5014 qualifies as an action to “confirm” an arbitration award under
16 the FSIA’s arbitration immunity exception, and whether venue for the
17 renewal action was proper in the district court.

18 I

19 The Due Process Clause of the Fourteenth Amendment protects
20 a party from being subject to personal jurisdiction in a state court if it
21 does not have “minimum contacts” with the forum state. *Int’l Shoe*,
22 326 U.S. at 316. This protection applies to domestic and foreign parties
23 alike. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915,
24 918-20 (2011); *Daimler AG v. Bauman*, 571 U.S. 117, 120-22 (2014).
25 Although the Fourteenth Amendment does not limit the district
26 court’s power in this case,⁵ we have held that the Fifth Amendment’s

⁵ Often, federal courts effectively face the same Fourteenth Amendment personal jurisdiction limitations as state courts. See Fed. R. Civ. P. 4(k)(1)(A)

1 Due Process Clause places similar constitutional constraints on the
2 exercise of federal judicial power. *Waldman*, 835 F.3d at 330 (“This
3 Court’s precedents clearly establish the congruence of due process
4 analysis under both the Fourteenth and Fifth Amendments.”).⁶

5 Here, all parties agree that Moldovagaz “has no contacts with
6 the United States.” *Gater I*, 2018 U.S. Dist. LEXIS 171350, at *56 n.8
7 (quoting *Gater*’s brief before the district court). Ordinarily, then, the
8 district court would have lacked personal jurisdiction over
9 Moldovagaz. Yet we have recognized an exception to the minimum
10 contacts requirement when a sovereign state is the defendant. *See*
11 *Frontera*, 582 F.3d at 399. Sovereign states may not invoke the
12 protection of the Fifth Amendment’s Due Process Clause because that

(“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”). That rule does not apply, however, when service is independently “authorized by a federal statute.” Fed. R. Civ. P. 4(k)(1)(C). The FSIA authorizes service and personal jurisdiction so long as service is made pursuant to the FSIA’s requirements. *See* 28 U.S.C. §§ 1330(b), 1608.

⁶ Recently the Supreme Court has been careful to avoid addressing this issue. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783-84 (2017). But earlier decisions from the Court indicate that the Fifth Amendment’s Due Process Clause limits the ability of a federal court to exercise personal jurisdiction over parties with no connection to the court’s forum; the open question is whether, for the purposes of the Fifth Amendment, the court’s forum consists of the entire United States or is limited to the state in which the court sits. *See Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987) (plurality opinion). Our court has endorsed the former view. *See Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998). This issue does not affect the outcome of this case because all parties agree that Moldovagaz has no contacts at all with the United States.

1 clause protects only “person[s],” and our precedent considers foreign
2 states, like U.S. states, not to be “persons” under the Fifth
3 Amendment. *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-
4 24 (1966)). For that reason, a court may exercise personal jurisdiction
5 over a foreign sovereign without regard to minimum contacts. *Id.*

6 Moldovagaz is a gas company rather than a sovereign. Still, we
7 have held that entities that are alter egos of foreign sovereigns also
8 cannot claim the protection of the Fifth Amendment’s Due Process
9 Clause. *Id.* at 400. To determine whether an entity is an alter ego of a
10 foreign sovereign, we use the framework set out in the Supreme
11 Court’s decision in *Bancec*, 462 U.S. 611. *See Frontera*, 582 F.3d at 400.
12 Although *Bancec* addressed whether a court could pierce the
13 corporate veil between a corporation and a sovereign for the purpose
14 of imposing liability, the standards set out in that case allow us to
15 assess when a corporate entity may share an identity with the
16 sovereign and therefore lack personhood for the purposes of the Fifth
17 Amendment. *See id.* at 400-01; *see also GSS Grp. Ltd v. Nat’l Port Auth.*,
18 680 F.3d 805, 815, 817 (D.C. Cir. 2012) (“[When] a foreign sovereign
19 controls an instrumentality to such a degree that a principal-agent
20 relationship arises between them, the instrumentality receives the
21 same due process protection as the sovereign: none.”).

22 An alter ego relationship is not easily established. In *Bancec*, the
23 Supreme Court explained that basic legal principles, the FSIA’s
24 legislative history, and considerations of comity and respect for
25 foreign sovereigns all dictate that “duly created instrumentalities of a
26 foreign state are to be accorded a presumption of independent
27 status.” 462 U.S. at 625-28. This “presumption of separateness is a
28 strong one.” *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215
29 F.3d 247, 252 (2d Cir. 2000). Nonetheless, it “may be overcome” in two

1 circumstances: “where a corporate entity is so extensively controlled
2 by its owner that a relationship of principal and agent is created” or
3 where recognizing the instrumentality’s separate juridical status
4 “would work fraud or injustice.” *Bancec*, 462 U.S. at 628-29.

5 In applying *Bancec*’s “extensive control” prong, “the touchstone
6 inquiry” is “whether the sovereign state exercises significant and
7 repeated control over the instrumentality’s day-to-day operations.”
8 *EM Ltd.*, 800 F.3d at 91.⁷ An entity does not become a sovereign’s alter
9 ego merely because it “assist[s]” the sovereign in carrying out the
10 sovereign’s “policies and goals.” *EM Ltd.*, 800 F.3d at 94. To qualify as
11 sufficiently extensive under *Bancec*, the sovereign’s control over an
12 entity must rise above the level that corporations would normally
13 tolerate from significant shareholders or expect from government
14 regulators. *See EM Ltd.*, 800 F.3d at 93 (“[A]n exercise of power
15 incidental to ownership ... is not synonymous with control over the
16 instrumentality’s day-to-day operations.”); *GSS Grp. Ltd. v. Nat’l Port*
17 *Auth. of Liber.*, 822 F.3d 598, 606 (D.C. Cir. 2016) (“[A] government can
18 wield power not only as [a] shareholder but also as [a] regulator.”)
19 (internal quotation marks omitted).

⁷ Factors relevant to this inquiry include “whether the sovereign nation: (1) uses the instrumentality’s property as its own; (2) ignores the instrumentality’s separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state.” *EM Ltd.*, 800 F.3d at 91.

1 regulatory power over Moldovagaz. While some aspects of the
2 Republic’s relationship with Moldovagaz appear somewhat
3 irregular, those aspects do not sufficiently demonstrate that the
4 Republic “exercise[d] significant and repeated control over
5 [Moldovagaz’s] day-to-day operations.” *EM Ltd.*, 800 F.3d at 91. These
6 facts, therefore, are insufficient to rebut the strong “presumption” in
7 favor of recognizing Moldovagaz’s “independent status.” *Bancec*, 462
8 U.S. at 627.

9 **1. The Republic’s Regulation of Moldovagaz**

10 As the district court emphasized, the Republic sets the rates
11 that Moldovagaz may charge customers for gas. *Gater II*, 413
12 F. Supp. 3d at 315, 317, 319, 325. The Republic does so through its
13 ratemaking agency, the National Energy Regulatory Agency
14 (“ANRE”). But governments routinely engage in ratemaking for
15 companies in important sectors of their national economies, especially
16 public utilities. *See generally* Charles F. Phillips Jr., *The Regulation of*
17 *Public Utilities* (1988). That does not make those companies their alter
18 egos.⁹

⁹ On one occasion, the ANRE directed Moldovagaz to apply a new, reduced rate retroactively from the beginning of the calendar year. The district court thought it significant that the Moldovan prime minister had earlier voiced an opinion in favor of that reduced rate—as well as its retroactive application—and demanded that Moldovagaz work out a system to issue the appropriate refunds if the ANRE adopted his view. *See Gater II*, 413 F. Supp. 3d at 315, 319. A politician’s statement in favor of a position, however, does not indicate alter ego status for an entity that later acts in accordance with that view. *See, e.g.,* Bernie Woodall & David Shepardson, *Chided by Trump, Ford Scraps Mexico Factory, Adds Michigan Jobs*, Reuters (Jan. 3, 2017).

1 Gater argues that Moldovagaz is a special case because the
2 ANRE has historically set rates that force Moldovagaz to operate at a
3 deficit. Yet Moldovagaz generated a profit from 2016 to 2018.
4 Regardless, setting rates below cost does not necessarily indicate that
5 a sovereign has crossed the boundary from regulator to alter ego. In
6 fact, Moldovagaz has challenged the ANRE's rates in Moldovan
7 courts over eighty times and complained about those rates to the
8 International Monetary Fund, the World Bank, the European Energy
9 Community, and the European Court of Human Rights.¹⁰

¹⁰ The district court recognized that Moldovagaz has challenged the ANRE's rates, but it discounted this evidence because the Moldovagaz chairman behind these complaints, Alexandru Gusev, was eventually prosecuted by the Republic and fled the country. *See Gater II*, 413 F. Supp. 3d at 321. But the news article on which the district court relied to infer improper influence by the Republic merely reported that the Moldovan government opened the prosecution after investigations into "several fraudulent schemes to write off funds due to unaccounted gas losses and overestimate[s] in purchasing gas metering and other equipment" as well as "frauds in the purchase of currency." J. App'x 1805. Although one unnamed source quoted in the article surmised that the Republic undertook the prosecution to remove Gusev from his position, this speculation cannot support a finding that the Republic undertook a criminal investigation in bad faith. *See Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 54 (2d Cir. 2016) ("[C]onclusory criticisms of the manner in which [a sovereign] has conducted [an] investigation are insufficient to prove a violation of international law."); *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992) ("[A]rgumentative inferences favorable to the party asserting jurisdiction should not be drawn."). Even if it could support such a finding, moreover, the fact that a sovereign would need to initiate a prosecution to drive a corporate executive out of the country would suggest that the sovereign did not exercise extensive control over the corporation's day-to-day activities in the first place. The record indicates that the Republic could not simply remove the chairman or direct Moldovagaz to change its policies. *See* J. App'x 1806 (reporting a statement

1 Gater also observes that the Republic mandates that
2 Moldovagaz service and maintain the country's gas pipelines and
3 regulates how Moldovagaz must carry out that obligation. But
4 governments routinely enact maintenance requirements and safety
5 regulations without rendering companies subject to that oversight the
6 government's alter ego. *Compare* J. App'x 631-35 (Moldovan pipeline
7 maintenance law), *with* 49 U.S.C. §§ 60101-41 (U.S. pipeline safety
8 regulations).

9 Finally, Gater notes that the Moldovan Parliament has
10 conducted two investigations into Moldovagaz in the past twenty
11 years. A government's investigation of a business, however, is not
12 remarkable. And these investigations in particular do not establish
13 extensive control. The first investigation lasted one month and
14 occurred as part of the Parliament's investigation of the entire
15 Moldovan electricity and natural gas industry. The second
16 investigation was focused on Moldovagaz, but it lasted only four
17 months and apparently ended because the commission conducting
18 the investigation could not subpoena witnesses or appoint experts.
19 Thus, it appears that these investigations did not significantly impact
20 Moldovagaz's operations.

21 **2. The Republic's Exercise of Its Minority Interest in**
22 **Moldovagaz**

23 The Republic also exercises some authority over Moldovagaz
24 via its ownership interest, but that authority is not enough to render

of the head of the Moldovan Parliament's Commission for Economy, Budget, and Finance) ("Moldovan authorities ... have been trying to dismiss [the chairman] for a year already, but Moscow, which has four votes out of six in the Moldovagaz supervisory board, disagrees.").

1 Moldovagaz the Republic’s alter ego. Moldovagaz’s governance
2 structure works as follows: Certain fundamental decisions, such as
3 amending the corporate charter, are reserved for shareholder
4 meetings. Aside from those decisions, Moldovagaz is governed by a
5 Supervisory Council (akin to a board of directors) and managed by a
6 Board (the duties and powers of which resemble those of officers).
7 The Republic appoints some directors to the Supervisory Council, and
8 many of its appointees have been civil servants. But these directors
9 constitute only a minority of the Council; Gazprom appoints the
10 majority of the Council’s members. Gazprom’s representatives also
11 hold a majority of the positions on the Board.

12 Gater notes that Gazprom’s representatives at shareholder and
13 Council meetings do not vote on any transactions between
14 Moldovagaz and Gazprom. According to Gater, these are the “most
15 critical votes, which ultimately determine the day-to-day affairs” of
16 Moldovagaz. Brief for Petitioner-Appellee-Cross-Appellant Gater
17 Assets Limited 26. Moldovagaz’s shareholders and Council, however,
18 make important decisions that do not involve transactions with
19 Gazprom. For example, the Council votes to approve nominees to
20 Moldovagaz’s Board. Moreover, the fact that Gazprom and its
21 appointees are conflicted out of votes regarding possible self-dealing
22 transactions is an unremarkable result of ordinary corporate law,
23 which hardly establishes Moldovagaz as the alter ego of the Republic.
24 *See, e.g.,* 3 William M. Fletcher et al., *Fletcher Cyclopedia of the Law of*
25 *Corporations* § 913 (2020); N.Y. Bus. Corp. Law § 713; 8 Del. Code § 144.

26 Even if the inability of Gazprom’s representatives to vote on
27 transactions with Gazprom meant that the Republic effectively wields
28 the power of a majority shareholder over Moldovagaz—a conclusion
29 that the record does not support—such authority does not in itself

1 establish extensive control. Black letter corporate law provides that a
2 corporation and its controlling shareholder are distinct entities. *See*
3 *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *see also Transamerica*
4 *Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 849 (D.C. Cir.
5 2000) (“If majority stock ownership and appointment of the directors
6 were sufficient, then the presumption of separateness announced in
7 *Bancec* would be an illusion.”).¹¹

8 The fact that the Republic appoints civil servants to exercise its
9 ownership interest on Moldovagaz’s Council similarly does not
10 establish extensive control. Appointing loyal board members is a due
11 “exercise of power incidental to ownership.” *EM Ltd.*, 800 F.3d at 92-
12 93. Indeed, “courts have consistently rejected the argument that the
13 appointment or removal of an instrumentality’s officers or directors,
14 standing alone, overcomes the *Bancec* presumption because the
15 exercise of such powers is not synonymous with control over the
16 instrumentality’s day-to-day operations.” *Arch Trading Corp. v.*
17 *Republic of Ecuador*, 839 F.3d 193, 203 (2d Cir. 2016) (internal quotation
18 marks and citation omitted). To establish extensive control, Gater
19 must additionally show that the Republic “use[d] its influence over
20 these directors in order to interfere with the instrumentality’s
21 ordinary business affairs.” *EM Ltd.*, 800 F.3d at 93. Gater identifies a
22 provision of Moldovan law, which applies to all representatives of the

¹¹ Gater also points to Moldovagaz’s 90 percent supermajority requirement for measures to pass at shareholder meetings as evidence of the Republic’s extensive control of Moldovagaz. This argument fails for two reasons. First, whatever veto power this rule effectively gives to the Republic, it also effectively gives to Gazprom. Second, control over votes at shareholder meetings does not necessarily render the corporation the alter ego of the controlling entity. *See Transamerica Leasing*, 200 F.3d at 849.

1 Republic's ownership interest on corporate boards, that requires the
2 Republic's representative to notify the Republic's government of any
3 decision the board makes "that prejudices the interests of the State"
4 and then submit "a substantiated demand concerning the repeal ... or
5 the suspension" of that decision. J. App'x 645. But as the district court
6 noted, there is nothing in this law that provides that the board must
7 then accede to that demand. *Gater I*, 2018 U.S. Dist. LEXIS 171350, at
8 *34-35.

9 The Republic also nominates Moldovagaz's chief officer, the
10 Board chairman. The Republic's nominee, however, must be
11 approved by the Council, of which Gazprom's representatives
12 constitute the majority. Undisputed evidence shows that the Council
13 has blocked the Republic's nominee on at least two occasions in the
14 past five years. Thus, even if direct appointment of corporate officers
15 could establish that a shareholder controls a corporation's day-to-day
16 operations, the record will not admit a finding that the Republic
17 wielded such power over Moldovagaz. Moreover, as previously
18 noted, at least one former Moldovagaz chairman repeatedly clashed
19 with the Republic, further indicating that the Republic's ability to
20 nominate the chairman does not mean that it controls Moldovagaz's
21 day-to-day operations.¹²

22 **3. Apparent Irregularities in the Republic-Moldovagaz** 23 **Relationship**

24 Gater identifies some instances in which the Republic arguably
25 intruded into Moldovagaz's affairs to a degree atypical of a
26 shareholder or government regulator. Yet this evidence still falls short

¹² See *supra* note 10 and accompanying text.

1 of establishing that the Republic “exercise[d] significant and repeated
2 control over the instrumentality’s day-to-day operations,” *EM Ltd.*,
3 800 F.3d at 91, such that Gater can “overcome” the strong
4 “presumption” in favor of Moldovagaz’s “independent status,”
5 *Bancec*, 462 U.S. at 627-29.

6 First, Gater identifies an agreement the Republic signed with
7 the Russian government in 2001 that dictated many aspects of
8 Moldovagaz’s business relationship with Gazprom. The agreement
9 bound Moldovagaz to terms regarding the price it would pay
10 Gazprom for gas, how Moldovagaz would make those payments to
11 Gazprom, and the interest rate on Moldovagaz’s debt to Gazprom.
12 Moldovagaz responds that the agreement cannot evidence extensive
13 control because it expressly provided that Gazprom and Moldovagaz
14 would determine “amounts and conditions for the sale” of gas.
15 J. App’x 948. Moldovagaz also posits that the agreement resembles
16 trade agreements into which foreign states routinely enter with one
17 another. For purposes of the personal jurisdiction inquiry in this case,
18 we need not decide whether this kind of an agreement can establish
19 extensive control.¹³ That is because this 2001 agreement expired in
20 2006. Since then, Moldovagaz itself—not the Republic—has
21 negotiated these issues with Gazprom. A bilateral agreement that

¹³ While participation in negotiations can sometimes indicate control over ordinary business decisions, we have held that “nonspecific oversight of and participation in contractual negotiations, standing alone,” does not suffice “to permit us to conclude that [instrumentalities] are mere shells for corporate activity.” *Arch Trading*, 839 F.3d at 204 (internal quotation marks omitted). The Republic’s role in the negotiation of this 2001 agreement, however, appears to exceed mere “nonspecific oversight ... and participation.” *Id.*

1 terminated over a decade ago has limited probative value in
2 determining whether Moldovagaz was the Republic’s alter ego at the
3 time of Gater’s renewal action.¹⁴

4 Second, Gater relies on a 2014 Moldovan law that purportedly
5 directed Moldovagaz to invest in a specific compressor station and
6 pipeline. That decree, however, directed the Republic’s Ministry of
7 Economy—which administers the Republic’s stake in Moldovagaz—
8 to “facilitate the insertion” of these capital improvements into
9 Moldovagaz’s investment program. J. App’x 998. The district court
10 called this a “striking example” of “active control over the day-to-day
11 activities of Moldovagaz” and relied on it to conclude that the
12 Republic “sets specific priorities for Moldovagaz.” *Gater II*,
13 413 F. Supp. 3d at 315-16. But while the decree may have set priorities
14 for the Ministry of Economy, the law did not direct Moldovagaz to
15 take any action. The mere fact that the Republic, which maintains a
16 35.3 percent ownership interest in Moldovagaz, sought to advance
17 certain investment goals does not show that the Republic exercised
18 any outsized authority over Moldovagaz. Neither the district court
19 nor Gater identifies evidence indicating that the Ministry of Economy
20 forced Moldovagaz to invest in these improvements or even that it

¹⁴ On a few occasions in its opinion, the district court implied that the Republic still binds Moldovagaz to contracts the Republic signs, dictates the price that Moldovagaz pays Gazprom for gas, and sets the interest rates on Moldovagaz’s debts to Gazprom. *See Gater II*, 413 F. Supp. 3d at 315, 318-19. Such a finding lacks support in the record. To the extent the district court relied on Gater’s briefs, *see id.*, the only evidence identified therein are the 2001 agreement that expired in 2006; the subsequent agreement, which was entered into by Moldovagaz; and the instance discussed above, *supra* note 9, in which the Republic’s prime minister expressed a view in favor of retroactive application of a reduced rate.

1 could have done so, given that Gazprom controls Moldovagaz's
2 governing bodies. Regardless, Gater does not produce any other
3 examples of such control, and one instance of an alleged directed
4 investment over the course of twenty years is insufficient as a matter
5 of law to demonstrate "significant and repeated control over ... day-
6 to-day operations." *EM Ltd.*, 800 F.3d at 91.

7 Third, Gater notes that the Republic has negotiated with
8 Gazprom and the Russian government regarding important issues
9 relating to Moldovagaz, including its debts to and contracts with
10 Gazprom. High ranking Moldovan officials, including the president
11 and prime minister, have met with Gazprom and Russian officials on
12 several occasions to discuss these issues, often alongside members of
13 Moldovagaz's Board. In light of *Bancec's* admonition that
14 "government instrumentalities established as juridical entities
15 distinct and independent from their sovereign should normally be
16 treated as such," 462 U.S. at 626-27, we cannot conclude that a
17 government's intercession on behalf of an important domestic utility
18 company renders that company its alter ego—especially where the
19 government's efforts are related to promoting the company's interests
20 vis-à-vis other entities rather than directing the company's day-to-
21 day operations. Additionally, the Republic and Gazprom are both
22 shareholders of Moldovagaz and, as such, would normally negotiate
23 over their jointly owned corporation's affairs. These negotiations do
24 not indicate that the Republic, the minority shareholder, exercised
25 more authority over Moldovagaz than Gazprom, the majority
26 shareholder. Therefore, while the Republic may have a special
27 interest in Moldovagaz's affairs, the negotiations do not indicate a
28 principal-agent relationship sufficient to establish alter ego status.

1 Finally, Gater points out that, during one negotiation, the
2 Moldovan president stated that Moldovagaz’s debt to Gazprom “is
3 the total debt of Moldova.” J. App’x 1185. (After this statement caused
4 a small uproar, the president clarified that “this is not a debt of
5 Moldova, of the country’s Government, but the debt of
6 ‘Moldovagaz.’” J. App’x 1560.) Similarly, a June 2018 press release
7 from the Republic reported that “officials” at another meeting “noted
8 that Moldova ... performs on time and in full the gas payments ...
9 [and] has managed to pay some of the historical debts.” J. App’x 1207.
10 These statements reflect the Republic’s special interest in
11 Moldovagaz’s affairs and might even serve as evidence that the
12 Republic does not always recognize Moldovagaz’s separate status—
13 a factor we have recognized as relevant to the “extensive control”
14 inquiry. *See EM Ltd.*, 800 F.3d at 91. But two isolated statements—one
15 of which was retracted—do not suffice to establish extensive control
16 by the sovereign over a corporation. *See Bancec*, 462 U.S. at 625 (noting
17 that courts should generally honor the separate legal status of
18 “utilities and industries which are given priority in the national
19 development plan” in “countries which have insufficient private
20 venture capital to develop”).

21 **4. The Failure to Show Extensive Control**

22 In sum, Gater has failed to show that the Republic “exercises
23 significant and repeated control over [Moldovagaz’s] day-to-day
24 operations.” *EM Ltd.*, 800 F.3d at 91. Therefore, the district court erred
25 in concluding that Moldovagaz is the Republic’s alter ego under
26 *Bancec*’s extensive control prong.

27 Gater insists that the facts here resemble those in a recent Third
28 Circuit case in which the court concluded that Venezuela extensively

1 controlled the oil company Petróleos de Venezuela (“PDVSA”). See
2 *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126,
3 146-49 (3d Cir. 2019). In that case, the evidence showed that
4 Venezuela actively interfered in the operations of PDVSA in a way
5 that rendered PDVSA little more than Venezuela’s political tool. The
6 Venezuelan government forced PDVSA to sell oil “for no, or *de*
7 *minimis*, consideration” and ordered sales to political allies at a “steep
8 discount.” *Id.* at 146-47. It also ordered the company to spend more
9 than \$4 billion on “social programs and projects” that had “nothing
10 to do with its business.” *Id.* Additionally, Venezuela wholly owned
11 PDVSA. *Id.* at 148. Here, by contrast, the Republic owns a minority
12 stake in Moldovagaz and has not exercised the level of control that
13 Venezuela did in *Crystallex*.¹⁵

14 B

15 Turning to *Bancec*’s second prong, Gater has failed to show that
16 recognizing Moldovagaz’s separate juridical status “would work
17 fraud or injustice.” *Bancec*, 462 U.S. at 629. It may be true, as the
18 district court observed, that “[a]s a practical matter ... whatever
19 corporate arrangements the Republic has with Moldovagaz, they
20 have thus far worked to prevent Plaintiff from collecting its

¹⁵ The district court’s opinion in *Crystallex* further illustrates how PDSVA differs from Moldovagaz. The court explained that (1) Venezuela forced PDVSA to provide oil to China and Russia as repayment for loans those countries had made to Venezuela; (2) Venezuela used PDVSA’s property, “including aircraft and tanker trucks, for its own political purposes”; (3) PDVSA identified Venezuela’s extensive control as a risk factor in its bond offering documents; and (4) Venezuela appointed PDVSA’s entire board. *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 402 (D. Del. 2018). No comparable facts are present here.

1 judgment." *Gater II*, 413 F. Supp. 3d at 322. However, to meet *Bancec's*
2 fraud or injustice prong, *Gater* must do more than "merely to point
3 out an injustice that would result from an adverse decision." *First Inv.*,
4 703 F.3d at 755. Rather, it must demonstrate that the Republic or
5 Moldovagaz has "abused the corporate form" to "avoid[]" their
6 obligations." *EM Ltd.*, 800 F.3d at 95.

7 The facts on which the district court relied to pierce the veil
8 between the Republic and Moldovagaz do not indicate an abuse of
9 the corporate form. The district court emphasized that the Republic
10 has at times provided funds to pay some of Moldovagaz's debts to
11 Gazprom but not to other creditors. *See Gater II*, 413 F. Supp. 3d at 322-
12 23. Yet *Gater* does not cite any authority establishing that preferring
13 certain creditors qualifies as an abuse of the corporate form. In *EM*
14 *Ltd.*, we held that there was "nothing irregular or fraudulent" about
15 Argentina preferring the International Monetary Fund over other
16 creditors because such a policy was necessary "to protect the funds of
17 [the IMF's] member states." 800 F.3d at 93 n.70, 96. Here too there is
18 nothing "irregular or fraudulent" about the Republic and
19 Moldovagaz preferring Gazprom, which supplies Moldovans with an
20 essential commodity, over other creditors.

21 The district court also pointed to Moldovagaz's "chronic
22 undercapitalization" and to Moldovagaz's efforts to evade the ICAC's
23 arbitral award judgment when it was originally issued. *Gater II*, 413
24 F. Supp. 3d at 322. But the record does not suggest that those
25 circumstances involved a manipulation of Moldovagaz's corporate
26 form. The district court cited no evidence that the Republic
27 undercapitalized Moldovagaz for the purpose of evading its

1 creditors.¹⁶ Rather, the evidence suggests that Moldovagaz’s dire
2 finances result from other circumstances. Almost 90 percent (\$6.04
3 billion) of Moldovagaz’s \$6.76 billion debt stems from losses in the
4 autonomous region of Transnistria. Customers there take gas from
5 the supply lines that pass through that region and refuse to pay for it
6 in full, and the Republic has no practical power to make them pay.¹⁷
7 By contrast, a 2016 report on which Gater relies attributed under
8 3 percent (\$140.5 million) of Moldovagaz’s debts to the Republic’s
9 regulatory policies. There is no record basis to conclude, in light of
10 Gazprom’s majority stake, that the Republic could successfully
11 undercapitalize Moldovagaz to avoid its creditors—the largest of
12 which was Gazprom itself.

¹⁶ The parties agree that according to relevant American corporate law, undercapitalization at the time of incorporation can be evidence of an abuse of the corporate form. *See* Response and Reply Brief for Respondent-Appellant-Cross-Appellee Moldovagaz 27-28 (citing 1 Fletcher § 41.33); *see also* Brief for Petitioner-Appellee-Cross-Appellant Gater Assets Limited 59 & n.11. If an entity is undercapitalized at that point, it “reveals ... the corporation was created to avoid liability.” 1 Fletcher § 41.33. “Inadequate capitalization after incorporation” meanwhile, “is generally relevant if the capital was removed as part of a fraudulent conveyance scheme. In such a scheme, the inappropriate transfer of assets and not the level of capitalization would be the prevailing factor in determining whether to pierce the corporate veil.” *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 730 n.7 (8th Cir. 2008). Even assuming that debt accumulated post-incorporation could show abuse of the corporate form, *see* 1 Fletcher § 41.55 (noting that “[i]nsolvency” is a factor that may be “considered ... in deciding whether to pierce the corporate veil”), the debt in this case does not show such abuse.

¹⁷ Some record evidence suggests that Gazprom is complicit in this state of affairs, providing gas to the separatist region of Transnistria in exchange for political fealty.

1 In a separate part of its opinion, the district court found that the
2 Republic failed to adequately capitalize Moldovagaz at the time of its
3 incorporation. *Gater II*, 413 F. Supp. 3d at 324. The record does not
4 support that conclusion. Moldovagaz’s constitutive contract indicates
5 an initial capitalization of \$290.5 million. The district court apparently
6 disregarded the contract in part because it believed there was no
7 “independent valuation” of those capital contributions. *Gater II*, 413
8 F. Supp. 3d at 324. But Moldovan law and Moldovagaz’s charter both
9 required an independent valuation. Moreover, Moldova’s
10 Commission on Financial Markets may not register a corporation’s
11 securities until it receives an independent report on the market value
12 of the capital contributions, and the Commission did register
13 Moldovagaz’s shares. The district court therefore clearly erred in
14 concluding that no independent valuation was completed simply
15 because Moldovagaz could not produce a copy of a document—more
16 than twenty years after Moldovagaz was created—that contained the
17 initial valuation. *See Gater II*, 413 F. Supp. 3d at 324.

18 The district court also thought that a July 2000 decree from the
19 Republic’s Parliament showed that “the capital contributions had not
20 been made in full” by that date. *Id.* But that decree does not indicate
21 that there was a delay in contributing capital to Moldovagaz; it refers
22 to a delay in Russia’s recognition of Gazprom’s new ownership stake
23 and the debt reduction that should have resulted.¹⁸ *Gater* attempts to

¹⁸ *See* J. App’x 1820. (“[T]he Government shall[] turn to the Government of the Russian Federation with regard to the question of *accelerating the legal formalization* of the transfer to ... Gazprom on the account of repayment of the indebtedness of the Republic [of] Moldova[,] property in the amount of 93.3 million US dollars as the participatory share of participation in ... Moldova-Gaz S.A.”) (internal quotation marks omitted) (emphasis added).

1 provide further support for the district court’s conclusion that the
2 Republic undercapitalized Moldovagaz at its inception, but the only
3 additional evidence it identifies relates to the Republic’s alleged
4 undercapitalization of Gazsnabtranzit, not Moldovagaz.

5 This case does not resemble those circumstances that we have
6 said justify piercing the veil between a sovereign and a related entity
7 to avoid a fraud or injustice:

8 [I]n *Bridas S.A.P.I.C. [v. Gov’t of Turkmenistan]*, 447 F.3d
9 411 (5th Cir. 2006)], the Fifth Circuit found “fraud or
10 injustice” where Turkmenistan dissolved a state-owned
11 oil company that was in breach of a joint venture with
12 plaintiff, and replaced it with an under-capitalized state-
13 owned oil company endowed with newly-enacted
14 immunity protection [in order to escape liability]. And in
15 ... *Kensington International Ltd. v. Republic of Congo*, [No.
16 03-CV-4578, 2007 WL 1032269 (S.D.N.Y. Mar. 30, 2007),]
17 the Republic of Congo structured its relationship to its
18 purportedly independent oil company by, *inter alia*:
19 (1) designing the company’s corporate structure to allow
20 Congo to engage in “unnecessarily complex transactions
21 and charades for the purpose of confounding its
22 creditors”; (2) passing all proceeds from oil sales on to
23 the government, rather than permitting the company to
24 exercise its right to collect a percentage on transactions;
25 and (3) commingling state and company assets. ...

26 In *Bancec*, Cuba sought relief in a court of the United
27 States while simultaneously trying to shield itself from
28 liability by asserting its claim through its dissolved
29 instrumentality.

30 *EM Ltd.*, 800 F.3d at 95 (footnotes omitted). And in *Corporacion*
31 *Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-*

1 *Exploracion Y Produccion*, we disregarded an entity’s separate status
2 when it tried to argue that it simultaneously was an independent
3 corporation “for personal jurisdiction purposes” and should be
4 “treated ... as [a] foreign sovereign” for “other issues in th[e]
5 litigation.” 832 F.3d 92, 103 (2d Cir. 2016). Unlike those cases, the
6 evidence and litigation history here do not suggest that the Republic
7 or Moldovagaz has been inconsistent or abusive with respect to
8 Moldovagaz’s corporate form.¹⁹ The district court erred in
9 concluding that Moldovagaz qualified as the Republic’s alter ego
10 under *Bancec*’s fraud or injustice prong.

11 In the end, the district court’s conclusion that Moldovagaz is
12 the Republic’s alter ego seems to have been influenced by the fact that
13 “Moldovagaz was created to pay down part of the Republic’s debt to
14 Gazprom and to provide for Moldova’s citizens’ energy needs.” *Gater*
15 *II*, 413 F. Supp. 3d at 325; *see also id.* at 317, 320. But a sovereign may
16 form a separate entity to help it address problems such as these, and
17 that entity retains its separate juridical status even if it “assist[s]” the
18 sovereign in achieving the sovereign’s “policies and goals.” *EM Ltd.*,
19 800 F.3d at 94; *see also Seijas v. Republic of Argentina*, 502 F. App’x 19,
20 22 (2d Cir. 2012) (noting that an instrumentality’s conduct taken “in
21 accordance with [the sovereign’s] policy preferences” and “as a
22 vehicle for the government to obtain ... financial resources ... does not
23 demonstrate that [the instrumentality] was an alter ego of [the
24 sovereign]”) (internal quotation marks and citation omitted). Such an
25 entity loses its “presumption of independent status” only if the
26 sovereign “so extensively control[s]” it “that a relationship of

¹⁹ In contrast to the *Pemex* case, here Moldovagaz argues that it should not be treated like a foreign state for any purpose.

1 principal and agent is created” or if recognizing that separate status
2 “would work fraud or injustice.” *Bancec*, 462 U.S. at 627-29. Here,
3 neither the Republic nor Moldovagaz has acted in a way that justifies
4 denying Moldovagaz its status as a corporation juridically separate
5 from the Republic.

6 III

7 Our recognition of Moldovagaz’s status as a corporate juridical
8 entity separate from the Republic should dispose of the personal
9 jurisdiction question in this case. Because we do not equate
10 Moldovagaz with a foreign sovereign, due process requires that it
11 have minimum contacts with the United States before an American
12 court may exercise jurisdiction over it. Gater does not suggest that
13 Moldovagaz has such contacts. Instead, Gater asks us to expand the
14 exception we announced in *Frontera* and rule that agencies and
15 instrumentalities of foreign sovereigns, as defined in the FSIA, are
16 also not “persons” entitled to due process protections, even if those
17 agencies and instrumentalities do not qualify as the sovereign’s alter
18 ego.²⁰

²⁰ We left this question open in *Frontera*. See 582 F.3d at 401 (noting that “it would be premature for us to address” whether “a corporation owned by a foreign state but not the state’s agent [under *Bancec*] was entitled to the Due Process Clause’s protections”). In *Pemex*, we quoted *Frontera* in stating that “[t]he jurisdictional protections of the Due Process Clause do not apply to ‘foreign states and their instrumentalities.’” 832 F.3d at 102 (quoting *Frontera*, 582 F.3d at 399). The *Pemex* court proceeded to state that “[t]he same conclusion does not follow for foreign corporations ... which are persons at law.” *Id.* at 103. It then analyzed the case before it the same way that the *Frontera* court did, using the *Bancec* framework. *Id.* (“The line between a foreign sovereign and a foreign corporation ... is informed by [*Bancec*].”). The language that *Pemex* quoted from *Frontera* regarding

1 We decline to do so. Foreign corporations are plainly persons
2 entitled to the personal jurisdiction protections that litigants receive
3 as a matter of due process. *See Pemex*, 832 F.3d at 103 (“The
4 jurisdictional protections of the Due Process Clause ... apply to ...
5 foreign corporations. ... [D]ue process rights can only be exercised by
6 persons, including corporations, which are persons at law.”) (internal
7 citations omitted); *see also Goodyear Dunlop Tires*, 564 U.S. at 918-20;
8 *Daimler*, 571 U.S. at 120-22. This remains true regardless of which Due
9 Process Clause applies. *See Waldman*, 835 F.3d at 330 (“This Court’s
10 precedents clearly establish the congruence of due process analysis
11 under both the Fourteenth and Fifth Amendments.”). Our conclusion
12 that Moldovagaz is not an alter ego of the Republic necessarily
13 implies that we recognize its status as a foreign corporation. It may be
14 a foreign corporation that serves as an agency or instrumentality of a
15 foreign sovereign—as the FSIA defines that term—but Gater offers no
16 compelling reason to conclude that while the Fifth Amendment’s use
17 of the word “person” generally includes corporations, it excludes
18 those corporations that have a close relationship with a foreign
19 sovereign.²¹ Nor does it cite authority to establish that a corporation’s

“foreign states and their instrumentalities,” *id.* at 102, therefore, is properly understood as referring to instrumentalities that are alter egos under the *Bancec* test, not to all entities that may be considered agencies or instrumentalities under the FSIA. In quoting and relying on *Frontera*, the court in *Pemex* did not purport to resolve the question that *Frontera* left open.

²¹ Congress, meanwhile, has expressed its view that corporations qualifying as agencies or instrumentalities under the FSIA are persons. By definition, an “agency or instrumentality of a foreign state” must be “a separate legal *person*, corporate or otherwise.” 28 U.S.C. § 1603(b)(1) (emphasis added).

1 juridical personhood is dependent on the identities of its
2 shareholders.²²

3 We therefore join two of our sister circuits in holding that
4 foreign corporations that do not meet *Bancec*'s veil-piercing standards
5 "enjoy all the due process protections" regularly afforded to litigants
6 challenging personal jurisdiction. *GSS Grp.*, 680 F.3d at 815; *see also*
7 *First Inv.*, 703 F.3d at 752-55. This remains true regardless of whether
8 the corporation qualifies as an agency or instrumentality of a foreign
9 state under the FSIA. Because Moldovagaz is not the Republic's alter
10 ego under *Bancec*, "United States courts may not exercise personal
11 jurisdiction over [Moldovagaz] unless [it] has 'minimum contacts'
12 with the relevant forum." *GSS Grp.*, 680 F.3d at 817. It is undisputed
13 that Moldovagaz "has no contacts with the United States apart from
14 this litigation." *Gater I*, 2018 U.S. Dist. LEXIS 171350, at *56 n.8
15 (quoting *Gater*'s brief before the district court). Therefore, the district
16 court lacked personal jurisdiction over Moldovagaz for *Gater*'s
17 renewal action.²³

²² The FSIA's definition of an "agency or instrumentality of a foreign state" includes, with narrow exceptions, all corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," regardless of the corporation's activities. 28 U.S.C. § 1603(b). We doubt that the reach of the Due Process Clauses depends on whether only private as opposed to public entities hold ownership interests in a corporation otherwise entitled to protection. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.").

²³ Recent scholarship suggests that we err in viewing due process as an independent constraint on a court's exercise of personal jurisdiction. *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 *Tex. L. Rev.* 1249, 1323 (2017) ("[D]ue process requires jurisdiction, full stop, with the actual jurisdictional

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IV

Having concluded that the district court lacked personal jurisdiction over Moldovagaz, we turn to Gater’s renewal claim against the Republic. As a foreign sovereign, the Republic may not protest that allowing this suit to proceed against it would violate due process limits on personal jurisdiction. *See Frontera*, 582 F.3d at 399.²⁴ Instead, the Republic argues that the district court lacked subject-matter jurisdiction over Gater’s claim against it. We agree.

standards supplied by other sources of law.”). In the United States, a forum’s legislature always had ultimate authority to determine when its courts should exercise the judicial power. *Id.* at 1284-87; *see also Picquet v. Swan*, 19 F. Cas. 609, 615 (Story, Circuit Justice, C.C.D. Mass. 1828). Here, Congress has expressly provided for personal jurisdiction so long as a foreign state is served pursuant to the FSIA’s requirements. *See* 28 U.S.C. § 1330(b). Moldovagaz does not argue that it was not properly served. Therefore, under this view, if Moldovagaz is a foreign state under the FSIA—a category that includes a sovereign’s agencies and instrumentalities, *see* 28 U.S.C. § 1603(a)—then the district court would have had personal jurisdiction regardless of minimum contacts or an alter ego analysis. *See* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 681-86 (2019). However compelling this view might be, it conflicts with controlling precedent. *See Waldman*, 835 F.3d at 329-31.

²⁴ Recent scholarship questions our earlier holding in *Frontera* that foreign sovereigns do not qualify as persons under the Due Process Clause. *See* Brief of Amicus Curiae Professor Ingrid Brunk Wuerth in Support of Neither Party 6-13 (detailing evidence that, at the time of the founding, foreign sovereigns were considered “persons” entitled to “process”). Yet we remain bound by *Frontera* here. *See In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (“[T]his court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*.”).

1 “The FSIA provides the sole basis for obtaining jurisdiction
2 over a foreign state in the courts of this country.” *Barnet v. Ministry of*
3 *Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 199 (2d Cir. 2020).
4 Because the FSIA directs that a “foreign state shall be immune from
5 the jurisdiction of the courts of the United States and of the States
6 except as provided in sections 1605 to 1607,” sovereign immunity
7 from suit “is the default rule, subject only to specific exceptions.” *Id.*

8 The district court held that Gater’s claim against the Republic
9 fits into section 1605’s exception for actions “to confirm an award
10 made pursuant” to a qualifying “agreement to arbitrate” that was
11 “made by the foreign state.” 28 U.S.C. § 1605(a)(6); *see Gater II*, 413
12 F. Supp. 3d at 325-28. For that immunity exception to apply here, the
13 relevant arbitration agreement must have been “made by” the
14 Republic. 28 U.S.C. § 1605(a)(6). All parties agree that the qualifying
15 “agreement to arbitrate” in this case is a 1996 contract entered into by
16 Gazprom and Moldovagaz’s predecessor, Gazsnabtranzit. The award
17 Gater seeks to collect resulted from an arbitration that occurred
18 pursuant to the arbitration clause in that contract.

19 It is undisputed that the Republic never signed that contract,
20 and nowhere does the contract indicate that the Republic was a party
21 to it.²⁵ Nevertheless, the district court concluded that the contract was
22 “made by” the Republic because the Republic could be bound to the

²⁵ In one clause, the contract stipulates that “Moldova will produce a timetable for paying off” certain debts. J. App’x 32. But the clause notes that this obligation “result[s]” from “the inspection of [certain] joint settlements,” implying that it does not derive from the contract itself. J. App’x 32. In addition, a section of the contract titled “Responsibilities and Obligations of the Parties” does not assign any obligations to the Republic. J. App’x 32-33.

1 contract's arbitration clause under a "direct benefit[s] estoppel
2 theory" — a theory under which courts may "bind[] nonsignatories to
3 arbitration agreements." *Gater II*, 413 F. Supp. 3d at 325-27 (citing
4 *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.
5 1995)).²⁶ The district court found that the Republic directly benefited
6 from the Gazsnabtranzit-Gazprom agreement because the Republic
7 discharged a preexisting treaty obligation to Russia by causing
8 Gazsnabtranzit to enter into the contract. *Id.* at 326. The district court
9 concluded that a direct benefits estoppel theory may apply so long as
10 a party accepts any benefit that flows from a contract's formation,
11 even if that benefit does not derive from any terms in the contract
12 itself. *See id.* at 327.

13 We have suggested in dicta that direct benefits estoppel can
14 apply not only to bind a private party to an arbitration agreement but
15 also to abrogate a state's immunity under the FSIA's arbitration

²⁶ In addition to finding subject-matter jurisdiction on this alternative basis, the district court concluded that Moldovagaz, as Gazsnabtranzit's successor-in-interest, assumed Gazsnabtranzit's obligations under the contract. *Gater Assets*, 2018 U.S. Dist. LEXIS 171350, at *53-56. The district court then relied on its determination that Moldovagaz is the Republic's alter ego to hold that the Republic "made" the contract. *Gater II*, 413 F. Supp. 3d at 326. Because we conclude that Moldovagaz is not the Republic's alter ego, this reasoning can no longer support subject-matter jurisdiction over Gater's claim against the Republic. If Gazsnabtranzit itself were the Republic's alter ego, that might support the application of the FSIA's arbitration exception here. *See Thomson-CSF*, 64 F.3d at 777. The district court, however, did not make any conclusions regarding Gazsnabtranzit's possible alter ego status and Gater does not pursue this theory on appeal. Accordingly, we deem this argument waived. *See Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006).

1 immunity exception.²⁷ Yet the applicability of this equitable doctrine
2 to the FSIA is far from clear. When Congress codified the arbitration
3 immunity exception, it specified that the exception applied only in the
4 presence of an agreement “made by the foreign state.” 28 U.S.C.
5 § 1605(a)(6). A contract can be said to be “made by” only the parties
6 to it.²⁸ While we have said that courts should use their “equitable”
7 powers to “estop[]” a party “from denying its obligation to arbitrate
8 when it receives a direct benefit from a contract containing an
9 arbitration clause,” *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*,
10 170 F.3d 349, 353 (2d Cir. 1999), that does not necessarily mean that
11 parties in such a position “made” the underlying contract.
12 Nevertheless, we need not conclusively decide whether direct

²⁷ In *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, we affirmed the district court’s *forum non conveniens* dismissal of a petition to enforce an arbitration award against Naftogaz and Ukraine. 311 F.3d 488, 501 (2d Cir. 2002). Because we affirmed on *forum non conveniens* grounds, we declined to “address the [petitioner’s] substantive contentions” that an arbitration agreement that bound Naftogaz could abrogate Ukraine’s immunity under the FSIA because Naftogaz was either Ukraine’s agent or alter ego. *Id.* at 494-95. In bypassing that argument, we included “estoppel” on a list of “theories under which a non-signatory party may be bound by an arbitration agreement and thus subject to the jurisdiction of the court in proceedings to compel arbitration or confirm an arbitration award.” *Id.* at 495.

²⁸ In fact, Congress added the arbitration exception “to implement the Inter-American Convention on International Commercial Arbitration.” Pub. L. No. 100-669, 102 Stat. 3969 (1988). That convention, in turn, speaks of “parties” who have “undertake[n] to submit to arbitral decision any differences that may arise or have arisen between them” in an “agreement ... set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.” Inter-American Convention on International Commercial Arbitration, art. 1, *done* Jan. 30, 1975, T.I.A.S. 90-1027, 1438 U.N.T.S. 245.

1 benefits estoppel can abrogate a foreign state’s immunity under the
2 FSIA.²⁹ Even assuming that direct benefits estoppel can apply here,
3 Gater cannot avail itself of such a theory.

4 To be bound under a theory of direct benefits estoppel, “[t]he
5 nonsignatory beneficiary must actually invoke the contract to obtain

²⁹ The Supreme Court’s recent decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), does not compel the conclusion that direct benefits estoppel applies to the FSIA. In a case involving private parties, the Court reiterated that the Federal Arbitration Act “permits courts to apply state-law doctrines related to the enforcement of arbitration agreements,” including “equitable estoppel.” *Id.* at 1643-44. The Court then held that the New York Convention, to which the Federal Arbitration Act’s rules apply absent a conflict, “does not conflict” with “the equitable estoppel doctrines permitted under” the Federal Arbitration Act. *Id.* at 1644-45, 1648. That the Federal Arbitration Act and the New York Convention permit the application of estoppel doctrines does not suggest that such doctrines establish that a foreign state “made” an arbitration agreement and must answer claims based on that agreement in an American court. 28 U.S.C. § 1605(a)(6). Unlike the arbitration context generally, there is no “strong and ‘liberal federal policy favoring arbitration agreements’” that would subject foreign states to the jurisdiction of American courts. *Thomson-CSF*, 64 F.3d at 776 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)). Moreover, the application of the estoppel doctrine in *GE Energy* “allow[ed] a *nonsignatory* to a written agreement containing an arbitration clause to compel arbitration where a *signatory* to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory.” 140 S. Ct. at 1644 (emphasis added). Here, by contrast, a signatory’s assignee (Gater) seeks to use the arbitration agreement against a nonsignatory (the Republic) not only to collect an arbitral award but also—through an equitable theory—to abrogate its immunity under the FSIA and to require it to answer in an American court. *GE Energy* did not consider, much less compel, the extension of direct benefits estoppel to confer jurisdiction in a case like the one before us.

1 its benefit, or the contract must expressly provide the beneficiary with
2 a benefit." *Trina Solar*, 954 F.3d at 572; *see also* *MAG Portfolio Consult,*
3 *GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 62 (2d Cir. 2001)
4 (holding this theory applies only when a nonsignatory "knowingly
5 exploited [a] purchase contract and thereby received a direct benefit
6 from the contract") (alterations and internal quotation marks
7 omitted). As district courts in this circuit have recognized, "the mere
8 fact of a nonsignatory's affiliation with a signatory will not suffice to
9 estop the nonsignatory from avoiding arbitration, no matter how
10 close the affiliation is." *Life Techs. Corp. v. AB Sciex Pte. Ltd.*, 803
11 F. Supp. 2d 270, 274 (S.D.N.Y. 2011). Examples of direct benefits
12 serving as the basis for estoppel have included, for example, (1) the
13 right of a foreign affiliate to use the "Deloitte" trade name, arising
14 from an agreement resolving an intellectual property dispute to
15 which that particular affiliate was not a signatory but which expressly
16 conferred the trade name right on the affiliate, *Deloitte Noraudit A/S v.*
17 *Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1062, 1064 (2d Cir. 1993); and
18 (2) the right of a vessel owner, which had commissioned a custom
19 racing sailboat, to take advantage of lower maritime insurance rates
20 and to register a vessel under a particular flag, *Tencara Shipyard*, 170
21 F.3d at 353.

22 As the district court acknowledged, the Gazsnabtranzit-
23 Gazprom agreement gave the Republic no rights to purchase or
24 receive gas. Rather, Gater argued—and the district court found—that
25 the Republic derived direct and substantial benefits from the
26 Gazsnabtranzit-Gazprom agreement by "discharging [the Republic's]
27 obligations" under an earlier 1996-97 Moldova-Russia trade
28 agreement. *Gater II*, 413 F. Supp. 3d at 326.

1 The record does not support the conclusion that this alleged
2 benefit binds the Republic to arbitration under a direct benefits
3 estoppel theory. The Gazsnabtranzit-Gazprom agreement did not
4 “expressly provide the [Republic] with a benefit” with respect to the
5 trade agreement. *Trina Solar*, 954 F.3d at 572. Moreover, the trade
6 agreement required only that the Republic “instruct” the relevant
7 state bodies “to prepare proposals” for the inter-country shipment of
8 specified quantities of over fifty products, including natural gas.
9 J. App’x 1104, 1107-10. The specific purchase terms and even the
10 consummation of the Gazsnabtranzit-Gazprom agreement were not
11 necessary for the Republic to discharge its obligations under the trade
12 agreement. By contrast, our cases have estopped nonsignatories only
13 when the agreement itself confers a “tangible and definite” benefit.
14 *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 39-40 (2d Cir. 2002)
15 (discussing *Deloitte*, 9 F.3d 1060, and *Tencara Shipyard*, 170 F.3d 349).

16 Additionally, the record here does not indicate that the
17 Republic “actually invoke[d]” the Gazsnabtranzit-Gazprom
18 agreement to obtain any benefit the agreement might have provided
19 with respect to the discharge of the Republic’s obligations to Russia
20 under the trade agreement. *Trina Solar*, 954 F.3d at 572-73 (rejecting
21 direct benefits estoppel because, although a nonsignatory “surely
22 benefited” from the contract by receiving solar panels, “no record
23 evidence” indicated that the nonsignatory “invoked the Contract to
24 demand delivery of the solar panels” or “invoke[d]” a signatory’s
25 “duties” in order to “seek or obtain” any benefits at all). Absent
26 evidence of a direct and definite benefit, Gazsnabtranzit’s and
27 Gazprom’s agreement to arbitrate disputes over gas supplied to the

1 Republic in 1997 does not estop the Republic from claiming immunity
2 here.³⁰

3 In sum, the Republic was not a party to the Gazsnabtranzit-
4 Gazprom agreement, and that agreement does not bind the Republic
5 to arbitration or abrogate its immunity under 28 U.S.C. § 1605(a)(6).³¹
6 The district court, therefore, lacked subject-matter jurisdiction over
7 Gater’s renewal claim against the Republic.

8 V

9 While we have concluded that the district court lacked
10 jurisdiction over both parties for the renewal action, we must now
11 consider whether the district court erred by denying the motions to
12 vacate the original default judgment under Rule 60(b)(4).³² It did not.
13 A party appealing the denial of a Rule 60(b)(4) motion must carry a
14 heavy burden to merit vacatur of the original judgment. It must show

³⁰ The district court itself recognized “concern about [its] broader reading of direct benefit estoppel theory” but considered that concern “mitigate[d]” by “the unique alter ego relationship between the Republic and Moldovagaz.” *Gater Assets*, 413 F. Supp. 3d at 328. As we have held, however, the record does not support the conclusion that Moldovagaz is an alter ego of the Republic.

³¹ If the Republic—rather than Moldovagaz—had assumed Gazsnabtranzit’s obligations under the contract, that might establish that the Republic “made” the agreement and must answer to Gater’s claims premised on it because, as a legal matter, the Republic would have stepped into Gazsnabtranzit’s shoes. *See Thomson-CSE*, 64 F.3d at 777. Yet Gater does not establish that the Republic assumed these obligations.

³² Only the Republic specifically requests that we vacate the original default judgment, but Moldovagaz adopted the Republic’s arguments pursuant to Federal Rule of Appellate Procedure 28(i) to the extent that those arguments are applicable to Moldovagaz.

1 that the district court in that original action “plainly usurped
2 jurisdiction” such that there was “a total want of jurisdiction and no
3 arguable basis on which [the district court] could have rested a
4 finding that it had jurisdiction.” *Herbert*, 341 F.3d at 190.

5 To determine whether the district court had jurisdiction to issue
6 the default judgment, we would need to analyze the relationship
7 between Moldovagaz and the Republic when Lloyd’s filed the
8 original action to confirm its arbitral award in December 1999. But the
9 arguments in this appeal focus on the Moldovagaz-Republic
10 relationship at the time of Gater’s renewal action and rely heavily on
11 facts that postdate the default judgment. We therefore conclude that
12 neither the Republic nor Moldovagaz has satisfied its burden to show
13 that vacatur is warranted.

14 CONCLUSION

15 For the foregoing reasons, the district court lacked jurisdiction
16 over Gater’s renewal action. Accordingly, we **VACATE** the district
17 court’s judgment in the renewal action and **REMAND** with
18 instructions to dismiss the renewal action for lack of jurisdiction.
19 Nevertheless, because Moldovagaz and the Republic failed to
20 demonstrate that the district court lacked an arguable basis to exercise
21 jurisdiction over the original action, we **AFFIRM** the district court’s
22 denial of the Rule 60(b)(4) motions.