ORAL ARGUMENT NOT YET SCHEDULED
Nos. 23-7031, 23-7032

In the
United States Court of Appeals
for the District of Columbia Circuit

NEXTERA ENERGY GLOBAL HOLDINGS B.V., ET AL.,
Petitioners-Appellees,

v.

KINGDOM OF SPAIN,
Respondent-Appellant.

9REN HOLDING S.A.R.L.,
Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia, Case Nos. 1:19-cv-1618 and 1:19-cv-1871
Hon. Tanya S. Chutkan, *United States District Judge*

AMICUS CURIAE BRIEF OF INTERNATIONAL SCHOLARS IN SUPPORT OF APPELLEE AND AFFIRMANCE

Paul M. Levine
James J. East, Jr.
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 861-1500

Carlos Ramos-Mrosovsky
Counsel of Record
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
14th Floor
New York, NY 10111
(212) 589-4200
cramosmrosovsky@bakerlaw.com

Counsel for Amici Curiae International Scholars

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Prof. Crina Baltag, Prof. Diane Desierto, Dr. Richard Happ, Charles Kotuby, Prof. Veronika Korom, Prof. Dr. Nikos Lavranos, Ben Love, Loukas Mistelis, Prof. Dr. Christoph Schreuer, Prof. Frédéric Sourgen, Prof. Dr. Christian Tietje, and Dr. Claus von Wobeser (collectively, "International Scholars") submit this certificate as to parties, rulings, and related cases.

A. Parties and Amici

Except for the following, all parties and intervenors appearing in this Court are listed in the Brief of Appellees: (1) *amici curiae* International Scholars in support of Appellees; (2) *amicus curiae* the Chamber of Commerce of the United States in support of Appellees; and (3) *amicus curiae* MOL Hungarian Oil and Gas PLC in support of Appellees.

B. Rulings under review

References to the rulings at issue appear in the Brief of Appellees.

C. Related cases

Any related cases appear in the Brief of Appellees.

/s Carlos Ramos-Mrosovsky
Carlos Ramos-Mrosovsky

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* International Scholars are individual natural persons and are not required to file a disclosure statement pursuant to these rules.

/s Carlos Ramos-Mrosovsky
Carlos Ramos-Mrosovsky

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), a separate *amici curiae* brief for International Scholars is necessary. International Scholars are some of the leading global experts in the fields of public international law, investor-state disputes, and the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (the "ICSID Convention," a copy of which was provided in Appellees' Addendum at 5). International Scholars have written extensively on these topics, including leading commentaries on the ICSID Convention that are routinely cited by courts in the United States and abroad and by investment arbitration tribunals. Amici also have extensive practical experience of investor-state arbitration in general, ICSID arbitration in particular, and the international enforcement of arbitral awards (including ICSID awards). Therefore, amici International Scholars have a unique global perspective regarding the ramifications of this case for the multilateral investor-state dispute settlement system enshrined in the ICSID Convention.

International Scholars will address the public international law implications of the ICSID framework which, by design, establishes a comprehensive and self-contained public international law framework for resolving investor-state disputes through arbitration before a neutral forum without later review by national courts. The position taken in this case by Spain and the European Commission (EC) threatens to undermine this framework despite being upheld by courts across the world and implicates the United States' performance of its own international law obligations under the ICSID Convention. International Scholars rely heavily on international and foreign court decisions, investor-state arbitration decisions, international treatises, and other international works of scholarship to support their positions. International Scholars' experience and scholarship in the fields of public international law and investor-state dispute settlement prepare them to be of respectful assistance to the Court in its consideration of the issues presented by these cases.

/s Carlos Ramos-Mrosovsky
Carlos Ramos-Mrosovsky

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

This brief was authored solely by counsel for International Scholars, no party or its counsel contributed money to fund preparing or submitting this brief, and no person (other than International Scholars or its counsel) contributed money intended to fund preparing or submitting this brief.

/s/ Carlos Ramos-Mrosovsky
Carlos Ramos-Mrosovsky

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GLOSSARY

ECT	Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95
EC	European Commission
EU	European Union
FAA	Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
FSIA	Foreign Sovereign Immunities Act, Pub. L. 94-583, 90 Stat. 2891 (1976), 28 U.S.C. §§ 1330
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270
ILC	International Law Commission
UNCITRAL	United Nations Commission on International Trade Law

STATUTES AND TREATIES

All applicable statutes and treaties are provided in the Brief of Appellees.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are scholars, counsel, and arbitrators from around the globe concentrating on the fields of public international law and investor-state dispute settlement. *Amici*, some of the world's foremost experts on the ICSID Convention, are interested in this case because it directly implicates the United States' performance of its treaty obligations to enforce arbitration awards issued under the ICSID Convention. Spain's success on this appeal would involve the United States in a breach of those obligations and undermine the multilateral architecture for investor-state dispute settlement under World Bank auspices to which the United States, Spain, and 156 other Contracting States consented in the ICSID Convention.[1]

Profiles of Amici

Dr. Crina Baltag is an Associate Professor in International Arbitration and the Academic Director of the LL.M. in International Commercial Arbitration Law at Stockholm University. She is the author of *The Future of Investment Treaty Arbitration in the EU* (Kluwer 2020) and *The Energy Charter Treaty: The Notion of Investor* (Kluwer 2012).

[1] *Amici* take no position on the merits of the disputes underlying Appellees' awards.

Dr. Baltag serves as a delegate observer to the United Nations Commission on International Trade Law (UNCITRAL). She has more than 20 years of experience as arbitrator, legal expert, and counsel in international disputes.

Prof. Dr. Diane Desierto is Professor of Law and Global Affairs at the University of Notre Dame Law School. She has practiced before the Permanent Court of Arbitration, the Singapore International Arbitration Centre, the International Court of Justice, the International Criminal Court, various United Nations treaty bodies, and the Philippines Supreme Court. She is a Member of the Expert Group of the United Nations Working Group on the Right to Development, Expert for the Association of Southeast Asian Nations, and has lectured at the Hague Academy of International Law.

Dr. Richard Happ is president of the Arbitration Council of the German Institute of Arbitration and leads the Complex Disputes practice at Luther in Hamburg. Dr. Happ has published extensively on international investment law, including *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck 2022). He is ranked as a

leading arbitration and dispute resolution counsel in *Chambers Global*, *Chambers Europe*, and *Legal 500*.

Prof. Charles Kotuby is Professor of Practice and Executive Director of the Center for International Legal Education at the University of Pittsburgh School of Law, Honorary Professor of Law at Durham Law School, and a Visiting Professor of Law at the Kyiv School of Economics. Prof. Kotuby has appeared before the U.S. Supreme Court, the Court of Justice of the European Union, and in ICSID arbitrations. He is a member of the U.S. Government Delegation to UNCITRAL Working Group III on Investor-State Dispute Settlement Reforms and of the U.S. State Department Advisory Committee on Private International Law. His writings include *General Principles of Law and International Due Process* (Oxford, 2017).

Prof. Veronika Korom is President of the Hungarian Arbitration Association and Assistant Professor for International Business Law and Arbitration at ESSEC Business School in France. Ms. Korom is also a Member of the Board of the Vienna International Arbitral Center. She has extensive experience as arbitrator and counsel in investor-state disputes, including before ICSID, and publishes widely on international

law, including *Intra-EU BITs in Light of the Achmea Decision*, 3(1) Cent. Eur. J. Compar. L., 2022, at 97-117.

Prof. Dr. Nikos Lavranos is the first Secretary-General of the European Federation for Investment Law and Arbitration. Prof. Lavranos acts as an independent external legal advisor and legal expert for several international law firms and serves as arbitrator and mediator in investment treaty arbitrations. He publishes extensively and is Co-Editor-in-Chief of the *European Investment Law and Arbitration Review* and of *International Arbitration and EU Law* (Elgar 2021).

Mr. Ben Love is a partner in the International Arbitration practice at Boies Schiller Flexner in New York and Washington, D.C., teaches international investment law at Brooklyn Law School, and serves on the Executive Council of the American Society of International Law. He has acted in dozens of investment disputes, and his publications include *ICSID Convention and ICSID Arbitration Rules, Concise International Arbitration* (Mistelis ed., 2015) (with Rubins and Kalderimis) and "Article 43 of the ICSID Convention" in *The ICSID Convention, Rules and Regulations: A Commentary* (Fouret ed., 2019).

Prof. Loukas Mistelis is Professor of Transnational Commercial Law and Arbitration and former Director of the School of International Arbitration at the Centre for Commercial Law Studies, Queen Mary University of London. He regularly sits as an arbitrator under all major sets of arbitration rules, including ICSID. Prof. Mistelis is also a partner at Clyde & Co LLP and a member of the Court of the Saudi Centre for Commercial Arbitration. He is co-author of *Comparative International Commercial Arbitration* (Kluwer 2003); author and editor of *Concise International Arbitration* (Kluwer 2015); Co-Editor-in-Chief of the *European Investment Law and Arbitration Review*; and Editor-in-chief of *World Arbitration Reporter* (Juris).

Prof. Dr. Christoph Schreuer is the author of the leading commentary on the ICSID Convention—*The ICSID Convention: A Commentary*, now in its third edition. Prof. Schreuer spent most of his more than 40-year academic career at the Department of International Law of the University of Salzburg. From 1992 to 2000 he was Edward B. Burling Professor of International Law at the Paul H. Nitze School of Advanced International Studies at The Johns Hopkins University. From October 2000 to September 2009, he was Professor of Interna-

tional Law at the University of Vienna. Prof. Schreuer has been cited by the United States Supreme Court, the Second Circuit, and the Supreme Court of the United Kingdom.[2]

Prof. Frédéric Sourgens is James McCulloch Chair in Energy Law at Tulane University Law School. He is co-lead investigator with OPEC's General Legal Counsel of the energy transition policy and regulatory briefs project for the Organization of Petroleum Producing States (OPEC). He holds multiple editorial appointments and has published over 90 books, textbooks, articles, chapters, book reviews, and essays on topics of international investment law and energy law.

Prof. Dr. Christian Tietje is Professor for Public Law, European Law, and International Economic Law and Director of the Institute for Economic Law at Martin Luther University Halle-Wittenberg. Prof. Tietje's scholarship focuses on European Union law and international investment law and arbitration. Prof. Tietje publishes widely in in these fields and advises Governments, international organizations, and non-governmental organizations.

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[2] *See, e.g.*, *BG Grp. Plc v. Republic of Argentina*, 572 U.S. 25 (2014); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017); *Micula v. Romania*, [2020] UKSC 5 (U.K.).

Dr. Claus von Wobeser is the founding partner of von Wobeser y Sierra in Mexico. He has acted as arbitrator or counsel in more than 200 arbitrations under all major international arbitration rules and was appointed to ICSID's Panel of Arbitrators by the President of the World Bank in 2011. Dr. von Wobeser is President of the Latin American Arbitration Association and of the Mexican chapter of the International Chamber of Commerce, and a member of the Governing Board of the International Council for Commercial Arbitration. He has served as an ad hoc judge of the Inter-American Court of Human Rights.

ARGUMENT

ICSID Convention Article 54 requires the United States to enforce Appellees' final ICSID awards in fulfillment of treaty obligations owed to every other Contracting State to the ICSID Convention. That the courts of the United States must enforce ICSID awards without the extensive review that Appellant demands is at the heart of the ICSID Convention's multilateral framework for investor-state dispute settlement, and precisely the result to which the United States, Spain, and 156 other ICSID Convention Contracting States consented.

Alleged conflicts between Spain's obligations to arbitrate investor-state disputes under the ECT and EU law were properly resolved within the ICSID framework. While the United States is neither a party to the ECT nor an EU Member State, it is a Contracting Party to the ICSID Convention. The United States' treaty obligation is straightforward: to enforce Appellees' awards under Article 54. Non-enforcement would place the United States in breach of its Article 54 obligations and seriously undermine the operation and legitimacy of the investor-state dispute settlement framework established by the Convention.

I. The ICSID Convention establishes a unique multilateral framework for Investor-State Arbitration

The ICSID Convention serves to reduce the political risk of foreign investment and thus advance "international cooperation for economic development, and the role of private international investment therein." ICSID Convention, preamble.

To that end, the ICSID Convention, 17 U.S.T. 1270, establishes a uniquely "'delocalized' procedural framework governed exclusively by public international law." Gabrielle Kaufmann-Kohler & Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* 55-56, 73 (2020). This system, in which "national courts have no jurisdiction in aid or control of the arbitration," *id.*, serves to "insulate such disputes from the realm of politics and diplomacy." Andreas Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 Ga. J. Int'l & Comp. L. 47, 48-55 (2009). The ICSID Convention instead establishes "a comprehensive, self-sufficient system of truly international arbitration…solely on the basis of the provisions of the Convention and the Rules and Regulations issued thereunder, excluding application of any national arbitration law." Albert Jan van den Berg, *Recent Enforcement Problems under the New York and ICSID*

Conventions, 5 Arb. Int'l 1, 3-4 (1989). As such, "[n]o other venue broadly available to foreign investors is of such truly 'international' nature." R. Doak Bishop & Silvia M. Marchili, *Annulment Under the ICSID Convention* ¶ 2.28 (2012) ("ICSID is independent of any other legal framework and of the decisions of any other courts.") (A-057).

The ICSID Convention accordingly contains unique provisions regarding the review and enforcement of ICSID awards to which its Contracting Parties agreed and which are critically relevant here.

A. Review of awards occurs exclusively within the ICSID system

ICSID Convention Article 52 establishes an exclusive mechanism for review and annulment of awards *within* the ICSID framework, while Article 53 provides both that States shall "abide and comply" with ICSID awards and that such awards "shall not be subject to any appeal or to any other remedy except those provided for *in this Convention*."[3] It follows that "[u]nder the Convention, Art. 52 is the only way of having

[3] ICSID Convention Articles 50 and 51 provide for interpretation and correction of awards that are likewise "self-contained" within the ICSID framework. *See* Christoph Schreuer et al., *Principles of International Investment Law* 445-46 (3d ed. 2022) (A-029).

the award set aside." Christoph Schreuer, 1 *The ICSID Convention: A Commentary* 1225 (3d ed. 2022) (A-021).

The annulment grounds enumerated in Article 52 resemble the judicial review of an arbitration award under Article V of the N.Y. Convention (incorporated at Chapter 2 of the FAA). But there is a critical difference: Article 52 review occurs not before courts but before three-member ad hoc "annulment committees" appointed by the ICSID Secretary-General from lists of arbitrators proposed by ICSID Contracting Parties (including Spain).[4] This recourse entirely replaces supervision by the courts of an arbitral "seat." *See* II Restatement of U.S. L. of Int'l Com. and Inv.-State Arb. 454 (Am. L. Inst. 2023) ("[T]he ICSID Convention regime designedly affords avenues for the correction, modification, or remand [*i.e.*, annulment] of awards, *thus obviating the need for recourse to a court* for these purposes."). This, as one commentator noted, "is perhaps the most remarkable feature of the ICSID system." Bishop & Marchili, *supra*, ¶ 2.28.[5] Indeed, Aron Broches (the ICSID Conven-

[4] *See* ICSID Convention, arts. 12-13 (Contracting States may designate four Arbitrators to the ICSID Panel).

[5] *See also* Bishop & Marchili, *supra*, ¶¶ 2.09-2.23 (tracing the historical evolution of proposals for "an appeal or control mechanism for international awards, other than through international courts") (A-051).

tion's principal architect[6]) described the obligation of all Contracting States to enforce ICSID awards without further review as a "core idea" of the Convention that "survived the onslaught in Committee by representatives who wanted the Convention to permit refusal of enforcement either on all the grounds on which such refusal may be based under the 1958 New York Convention." Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev. Foreign Inv. L. J. 287, 317 (1987); *see also* Aron Broches, II-1 *History of the ICSID Convention* 427-28 (1968) (the Parties sought "to establish a *self-contained system* as was found in judicial or arbitral proceedings between States under which there would be *no recourse to an outside authority against decisions of tribunals*...it was something midway between commercial and inter-State arbitration") (emphasis added).

ICSID Convention Article 41 provides that a tribunal convened under its auspices of "shall be the judge of its own competence." Given the self-contained review of awards within the ICSID framework, only a

[6] Andreas Lowenfeld, *International Economic Law* 539 (2008) ("Broches…as General Counsel of the World Bank and first Secretary-General of ICSID may be said to be the founding father of the Convention.").

committee constituted under Article 52 may review that jurisdictional determination. Thus, after Spain's jurisdictional challenges were rejected first by an ICSID tribunal and then by an ICSID annulment committee, Spain had no more recourse.[7] Consistent with the ICSID Convention's "self-contained" review mechanism, neither Article 54 nor its implementing statute at 22 U.S.C. § 1650a provide any basis for national courts to deny enforcement of ICSID awards. *See* Restatement, *supra*, at 419.

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[7] The "intra-EU objection" has consistently failed in dozens of ICSID arbitrations. The EC frequently intervenes in the ICSID Arbitrations, as it did in *NextEra Energy Global Holdings B.V. v. Spain*. *See* Decision on Jurisdiction, Liability and Quantum Principles ¶¶ 325-31. Arbitrators who have decided this issue include leading public international lawyers, including Joan Donoghue (arbitrator in *Soles BadaJoz GmbH v. Spain* and current president of the International Court of Justice); John Crook (arbitrator in *Micula v. Romania*, former attorney for the U.S. State Department, and current member of the NATO Administrative Tribunal); O. Thomas Johnson (arbitrator in *Silver Ridge Power BV v. Italy* and the U.S. appointed judge on the Iran-U.S. Claims Tribunal); and Lord Collins of Mapesbury (arbitrator in *Cavalum SGPS, S.A. v. Spain* and former UK Supreme Court Justice). In the cases before this court, the Tribunals included Ian Binnie, former Canadian Supreme Court Justice; Yves Fortier, former Canadian Ambassador to the United Nations and former President of the U.N. Security Council; Donald McRae, an experienced trade attorney and panel judge under the first Canadian-U.S. Free Trade Agreement; and the late V.V. Veeder QC, one of the most experienced and well-respected international arbitrators in the world.

By contrast, the N.Y. Convention and national arbitration laws leave open the possibility for review and confirmation of awards at courts at the "seat" of an arbitration that has "primary" jurisdiction over an award, or more limited review in a secondary jurisdiction where enforcement is sought. These grounds for review are irrelevant, however, where ICSID Convention Articles 52 and 53 preclude review before national courts and where the ICSID implementing statute expressly precludes the applicability of the FAA. *See* Julien Fouret et al., *The ICSID Convention, Regulation and Rules: A Practical Commentary* 725 (2019) ("While it was for a time suggested that recognition and enforcement provisions in the ICSID Convention would align with Article V of the N.Y. Convention, that position did not prevail. Instead, the ICSID Convention incorporated an exclusively internal process for the review of Awards.").[8] To be sure, many investment treaties provide for arbitration outside of the ICSID Convention. Russia, India, and Poland,

[8] *See also* Anna Stier, "Enforcement of ICSID Awards – a Walk in the Park?" in *ICSID Rules and Regulations* 776 (Happ & Wilske eds., 2022) ("Article 54 of the ICSID Convention is considered to be (most) remarkable for its absence of any grounds for the enforcement court to refuse the recognition of an ICSID award, save for the obligation to furnish an authentic copy.") (A-004).

for example, are all party to numerous investment treaties but not ICSID Contracting States.[9]

Spain made different choices by consciously acceding to the ICSID Convention in 1994. Extensive citations by Appellant and the European Commission to cases involving judicial review of arbitrability in cases governed by the N.Y. Convention are therefore irrelevant. Spain's citations and arguments presuppose the treaty architecture that Spain might prefer to have apply (the N.Y. Convention) rather than the one that actually does (the ICSID Convention).

[9] Under the N.Y. Convention, U.S. Courts should enforce an award rendered outside of the United States and confirmed at the seat, except upon the limited bases to refuse enforcement as a "secondary" jurisdiction under Article V thereof. The award rendered in *Blasket Renewable Investments LLC v. Spain*, 23-7308 (D.C. Cir.) and confirmed at the seat of arbitration (Switzerland) should be enforced accordingly.

B. ICSID Awards have the status of final judgments in all Contracting States

The obligation of all Contracting States to enforce ICSID awards is another key feature of the ICSID Convention. Article 54 provides that:

> Each Contracting State *shall recognize* an award rendered pursuant to this Convention as binding *and enforce* the pecuniary obligations imposed by that award within its territories *as if it were a final judgment of a court in that State*. (emphases added)

Article 54 means that—again, unlike cases governed by the N.Y. Convention—"domestic courts have no power to stay, compel or to otherwise influence ICSID proceedings" and that they do not have "the power to set aside or otherwise review ICSID awards." *See* Schreuer, *Principles*, *supra*, at 343 (A-026).

U.S. courts have consistently recognized that their role in ICSID cases is limited to the formalities of "recognition or enforcement" of a duly presented ICSID award even, as here, in the face of persisting jurisdictional objections from a State displeased with the result. *See, e.g.*, *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 102 (2d Cir. 2017) ("Member states' courts are thus not permitted to examine an ICSID award's merits, its compliance with international

law, or the ICSID tribunal's jurisdiction to render the award…").[10] *See also* Appellees' Br. 44-45.

C. The ICSID Convention binds States only with their consent

Despite putting in place this framework for investor-state arbitration, the ICSID Convention does not define standards of treatment for foreign investment. Nor, in itself, does the ICSID Convention contain any State's consent to arbitrate disputes with foreign investors. The ICSID Convention is instead a framework Convention *about* the conduct of investor-state dispute settlement and treatment of resulting awards—"an arbitration convention, not a convention concerning the international law of investment." Lowenfeld, *ICSID Convention*, *supra*, at 51; *see also* Schreuer, *Principles*, *supra*, at 368 (A-027).

Only where (i) both the respondent State and the claimant investor's State are Contracting Parties to the ICSID Convention *and* (ii) the State and investor have both elsewhere consented to resolve disputes through investor-state arbitration within the ICSID framework—

[10] Successful ICSID claimants receive no special treatment once their award becomes a final judgment, however. ICSID Convention Article 55 provides that a respondent State's assets retain any immunity from execution to which they may be entitled under the national law of the country in which enforcement is sought.

usually in a bilateral or multilateral investment treaty—can an ICSID arbitration happen. Here, Spain's standing consent to arbitrate was found in Article 26 of the ECT.[11] *See* Appellees' Br. 48-54.

Once both parties have consented to ICSID arbitration, "no party may withdraw its consent unilaterally." ICSID Convention, art. 25(1). As Professor Schreuer has explained, Article 25(1) made Spain's consent "binding and irrevocable" and a "manifestation of the maxim *pacta sunt*

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[11] EU Member States could have included a "disconnection clause" in the ECT exempting intra-EU disputes. A disconnection clause is used to ensure that provisions of a multilateral treaty are not applicable to certain State-parties, who may have other agreements or legal arrangements to govern their relations. Numerous ICSID Tribunals have observed that the EU, itself a party to the ECT, included a disconnection clause for the Svalbard Treaty, concerning an archipelago in the Arctic, but omitted to specify that the ECT's dispute settlement system would not apply between EU member states. *See* Crina Baltag & Stefan Dudas, "Achmea, Arbitral Tribunals and the ECT: Modernisation or Regression?" in *The Future of Investment Treaty Arbitration in the EU* 34 (Baltag & Stanic eds., Kluwer 2020) (noting that "it is generally accepted that States can include in multilateral treaties provisions accommodating possible conflicting treaties" and the inclusion of such clauses by the EU in multilateral treaties on antiterrorism and tax cooperation) (A-035). *See also* *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award, ¶¶ 302, 311-12 (May 16, 2018). As one Tribunal explained, "during negotiation of the ECT, the EU had proposed the insertion of a disconnection clause. However, that clause was ultimately dropped from the draft treaty." *Vattenfall v. Germany*, ICSID Case No. Arb/12/12, Decision on the *Achmea* issue, ¶¶ 204-05 (Aug. 31, 2018). *Amicus* Richard Happ was counsel for the *Vattenfall* investors.

servanda." *See* Schreuer, *Principles*, *supra* at 369. Any challenges to arbitral jurisdiction including as to the existence of the respondent-State's irrevocable consent are resolved during the arbitration, pursuant to ICSID Convention Article 41.

States may of course withdraw from (or "denounce") the ICSID Convention. ICSID Convention Article 71 provides that any Contracting State may denounce the ICSID Convention on six months written notice.[12] Venezuela, Bolivia, and Ecuador, for example, all denounced the ICSID Convention (although Ecuador has since rejoined).[13] Spain has not done so, and, equally, Spanish investors continue to bring (and win) ICSID arbitrations.[14]

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[12] Denunciation is prospective and would not affect the determination in this case. *See* ICSID Convention, art. 72.

[13] Denunciation has consequences. In August 2021, Ecuador rejoined the ICSID Convention after a marked decline in foreign investment. *See* Gustavo Prieto, *Ecuador returns to the ICSID Convention: A brief assessment of its decade-long international investment law 'exit strategy*,' EJIL: Talk! (July 19, 2021).

[14] Spanish investors have brought 46 ICSID arbitrations against other States, while Spain itself has been a respondent in 43 ICSID arbitrations. U.S. investors have brought at least 150 ICSID arbitrations and the United States has been a respondent under the ICSID Convention four times (but never lost an arbitration). *See* ICSID, *Cases Database* (last visited June 30, 2023).

II. ICSID Convention Article 54 obliges the United States to enforce all final ICSID awards without further review

While Appellees' ICSID awards concern Spain's obligations under the ECT, a treaty to which the United States is not a party, the *reception* of those same awards in United States courts is *very much* the subject of the United States' treaty obligations. As an ICSID Contracting State, the United States must enforce Appellees' awards because it owes an obligation to all other ICSID Convention Contracting States—and by extension to any ICSID award holder—to uphold the multilateral ICSID framework.

A. Foreign courts routinely carry out their States' *erga omnes* Article 54 obligation

As noted, Article 54(1) requires that "*each* Contracting State *shall* recognize an award" as a final judgment of its national courts. Article 54 permits no distinction among ICSID awards, whether based on the nationality of the enforcing Court or of the parties to the underlying

arbitration. Mandatory enforcement of all awards is part of the Convention's fundamental design, as recognized from ICSID's inception.[15] Because all 158 ICSID Contracting States share an interest in the operation of the system and even where the enforcing state does not have an interest in each particular dispute settled through that system, it follows that each Contracting State's obligation to enforce all ICSID awards is owed *erga omnes partes*, that is, to all other ICSID Contracting States.[16]

As Prof. Schreuer explains, "[t]he obligation to recognize and enforce awards applies to all States parties to the ICSID Convention. It applies not just to the State party to the proceedings and to the State whose national was a party to the proceedings." Schreuer, *Commentary*, *supra*, at 1478 (A-023). Rather, in the event that an ICSID award debtor "does not comply with the (pecuniary) award, the award creditor may

[15] Spain's delegate to the Convention's negotiation understood the import of the proposal that eventually became Article 54. During the sixth negotiation session on February 20, 1964, the Spanish delegate observed that the proposal "should not cause surprise to practicing lawyers. It was normal to provide for enforcement of arbitral awards which in the context must be equated with the final judgment of the national courts of a State." Broches, *History*, *supra*, at 428.

[16] Obligations *erga omnes* are obligations so integral to a treaty's object and purpose that no reservations would be permissible.

then turn to any (other) member state of the ICSID Convention for enforcement." Stier, *supra*, at 775 (A-003). The ICSID enforcement framework thus depends on each Contracting State being "obliged to directly enforce every arbitral award, regardless against which state." Christian Tietje, *EU Law Breaks International Law? The fallacy of the European Calvo Doctrine*, Verfassungsblog (2023), at 2 (A-016).

The unanimous decision of the United Kingdom Supreme Court in *Micula v. Romania* upholding enforcement of an intra-EU ICSID award is instructive. *See* [2020] UKSC 5. The court grounded its ruling in "the structure" and language of the ICSID Convention, explaining that Article 54's obligations are "expressed in unqualified terms" and that these obligations run "to all other States party to the Convention as well as to any party to the award," because "[t]he failure of any Contracting State to enforce an award in accordance with Article 54 would undermine the Convention Scheme on which investors and Contracting States all rely." *Id.* ¶¶ 105-06. The court noted that failure to uphold the United Kingdom's *erga omnes* obligation under Article 54 could lead to a state-to-state dispute before the International Court of Justice. *See id.* ¶ 105; *see also id.* ¶ 106 (explaining that the ICSID Convention *travaux* demon-

strated that drafters anticipated Contracting States could take action against one another for failing to enforce awards).

In practice, courts around the world regularly recognize and carry out their States' Article 54 obligations with respect to awards rendered against foreign States in favor of investors from another foreign State—or against their own State. *See, e.g.*, *Kingdom of Spain v. Infrastructure Servs. Lux. S.a.r.l.*, [2023] HCA 11 (Austl.), ¶ 4 (dismissing Spain's appeal against the recognition and enforcement of an ICSID award); *Von Pezold v. Zimbabwe*, [2023] High Court of Malaya, ¶ 7; *Von Pezold v. Zimbabwe*, [2023] HC 792/23 (High Court of Zimbabwe); *SOABI v. Senegal*, 2 ICSID Rep. 341 (Cass. 1991) (Fr.) (A-058); Federal Supreme Court, Mar. 17, 2022, 5A_406/2022 (Switz.), ¶ 3.2.3; *Sodexo Pass v. Hungary*, [2021] NZHC 371 (N.Z.). Indeed, the Argentinian Supreme Court in *Urbaser v. Argentina* recently enforced an ICSID Award against Argentina and in favor of Spanish investors.[17]

[17] An English-language article about *Urbaser* reports the award was enforced under Articles 53 and 54, subject to any immunity defenses to execution against State assets that Argentina has under Article 55. *See Argentine Court Grants Recognition and Enforcement of Urbaser v Argentina Costs Award*, IAReporter, July 3, 2023 (A-044); *see also* Federal Administrative Court, 13/6/2023, "Urbaser v. Argentina," 20642/2021 (A-066).

These courts' application of Article 54 adheres to the customary international law of multilateral obligations, which recognizes that State parties to multilateral agreement share an interest in the faithful implementation of that agreement among all of its members.[18] For example, Article 48 of the International Law Commission (ILC) Articles on State Responsibility—accepted as reflecting customary international law—provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State…if the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group." *See also S.W. Africa Cases*, Prelim. Objections, 1962 I.C.J. 387, 425 (Dec. 21) (separate opinion by Jessup, J.) ("[I]nternational law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material', or, say, 'physical' or 'tangible interests.'").

[18] While not binding on this Court, these foreign decisions constitute State practice in the application of Article 54. *See* Statute of the International Court of Justice, Article 38(1)(d) (identifying "judicial decisions...of the various nations" as a "subsidiary means" of determining public international law); *United States v. Smith*, 18 U.S. 153, 160-61 (1820) ("[T]he law of nations…may be ascertained by consulting…judicial decisions recognising and enforcing the law.").

The ICSID Convention creates such a collective interest in the promotion of investment and effectiveness of its denationalized framework for investor-state dispute settlement.[19] As Aron Broches observed, "[a]ny party to the Convention has a clear legal interest in seeing its provisions observed, whether or not its immediate interests or those of its nationals are affected." Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of other States," in 136 *Recueil des Cours* 379-80 (1972) (A-008). This was because "[f]ailure by Contracting States to comply with awards, or to recognize and enforce awards as required by the Convention, are violations of the Convention which endanger the achievement of its purposes and the security of investments made in reliance on ICSID arbitration agreements." *Id.*

[19] *See also* ILC Article 48 (cmt. 2 "Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States…responsibility may be invoked by States which are not themselves injured [directly]"); *id.* at 7 (the relevant collective interest is one that "transcend[s] the sphere of bilateral relations…to foster a common interest").

B. Courts have consistently implemented the United States' Article 54 obligation

Congress implemented the United States' Article 54 obligations in a manner fully consistent with these principles. Without drawing distinctions about the parties to an ICSID arbitration or the treaty under which they consented to ICSID arbitration, §1650a declares that any ICSID Convention award creates a "right under a Treaty of the United States," and "shall be enforced" by U.S. courts as a final judgment.

U.S. courts have implemented Article 54 in exactly this way, routinely enforcing ICSID awards in favor of foreign investors (including Spanish and European investors) in a third State. In *Perenco Ecuador Ltd. v. Republic of Ecuador*, for example, the district court enforced an ICSID award pursuant to a bilateral investment treaty between France and Ecuador; in doing so, the court recognized that parties in ICSID arbitration must raise challenges to an award solely within the self-contained ICSID system. No. 1:19-cv-2943 (JMC), 2023 WL 2536368, at *5 (D.D.C. Mar. 16, 2023) (citing Schreuer, *Commentary*, *supra*, at 732); *see also Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, No. 19-cv-46-FYP-RMM, 2022 WL 17370242, at *9 (D.D.C. Aug. 3, 2022) (enforcing an ICSID award in favor of Spanish investor and refusing to

depart "from the general rule that an authentic ICSID arbitral award will be enforced"); *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, No. 1:19-cv-0683 (CJN), 2022 WL 3576193, at *2 (D.D.C. Aug. 19, 2022) (enforcing an $8.7 billion ICSID award in favor of Dutch investors); *Levy v. Republic of Guinea*, No. 19-cv-2405 (DLF), 2020 WL 3893019 (D.D.C. July 10, 2020) (enforcing an ICSID award in favor of French investors).

Thus, for Spain and the EC to suggest that Appellees' awards have little "to do with the United States" misses the point. *See* EC Amicus 60. The courts enforcing awards pursuant to Article 54 in the cases above were not meddling in matters which did not concern their States. Rather, the United States, like all ICSID Contracting States, has "a clear legal interest in seeing [the Convention's] provisions observed" and in the "achievement of its purposes and the security of investments made in reliance on ICSID arbitration agreements." *See* Broches, *Convention*, *supra*, at 379-80 (A-008). Over the long run, the reliable operation of the Convention benefits U.S. investors in foreign countries who rely on the ICSID framework when investing. It follows that the forum non conveniens doctrine is accordingly inapplicable here. *See* Restate-

ment, *supra*, at 447 ("[E]nforcement of ICSID Convention awards is required by treaty and the language of the ICSID Convention leaves no room for dismissal or stay…on the basis of forum non conveniens.").

The United States also has a duty to carry out its ICSID Convention Article 54 obligations. While performance of those obligations is delegated to Federal courts, responsibility for the breach of international obligations may be triggered by a judicial decision. *See*, *e.g.*, ILC Article 4(1) ("The conduct of any State organ," including its judicial branches, "shall be considered an act of that State under international law…"); *accord Compagnie Noga D'Importation et D'exp. S.A. v. Russian Fed'n*, 361 F.3d 676, 688 (2d Cir. 2004).[20] A U.S. court's failure to enforce a val-

[20] James Crawford, *Brownlie's Principles of Public International Law* 532 (9th ed. 2019) ("[A] State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so…their judgments involve the State in a breach of treaty.") (citation omitted). The interpretive canon by which courts construe U.S. statutes to avoid conflict with international law reflects this principle. *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804). Fortunately, § 1650a and the FSIA are fully consistent with the United States' ICSID Convention obligations. *See* Appellees' Br. 39-54.

id ICSID award would therefore engage the United States' international responsibility to every other ICSID Contracting State.[21]

This Court should reject Spain's invitation to draw the United States into a breach of it own treaty obligation on account of Spain's allegedly conflicting obligations under other treaties to which the United States is not a party. If Spain faces a conflict between its ICSID, ECT, and EU obligations, it is for Spain to resolve that conflict, whether through diplomacy, a prospective withdrawal from those treaties, or negotiating changes to its obligations.[22] *See* *Infrastructure Servs. Lux. S.a.r.l. v. Kingdom of Spain*, [2023] EWHC 1226 (Comm) (U.K.), ¶ 80 (enforcing intra-EU ICSID award against Spain and stating that "the difficulties in which Spain finds itself does not assist it here, given the

[21] ICSID Convention Article 53(1) provides that "[e]ach party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." This provision implicates the interest of all ICSID Contracting States "in seeing [the Convention's] provisions observed" no less than Article 54. *See* Broches, *Convention*, *supra*, at 379-80 (A-008); ILC Article 48. Spain—like any Respondent State that fails to "abide by and comply with" a valid ICSID award—is likewise in breach of obligations that it owes not just to the Appellees but to *all* ICSID Contracting States, including the United States.

[22] Spain has announced its intention to withdraw from the ECT, citing climate concerns, but has not yet done so. Toby Fisher, *Spain announces withdrawal from ECT*, *Glob. Arb. Rev.* (Oct. 13, 2022) (A-063).

United Kingdom's own treaty obligations under the ICSID Convention, which are owed to all signatories of the ICSID Convention.").

III. The United States' breach of its Article 54 obligations would undermine the ICSID system and the rule of international law

Spain now leads the world in noncompliance with investor-state awards and is subject to more unpaid investor-state awards than Russia and Venezuela combined.[23] Meanwhile, investors from Spain and other EU member States continue to avail themselves ICSID arbitration and to pursue enforcement of awards against non-EU and often less economically developed States before U.S. Courts.[24]

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[23] Spain currently owes more than $1.3 billion for 16 unpaid investor-state awards. *See* Nikos Lavranos, *Updated Report concerning Spain's Compliance with Investment Treaty Arbitration Awards 2023*, Int'l L. Compliance (June 2023).

[24] *See, e.g.*, Petition to Enforce Arbitral Award, *Titan Consortium 1, LLC v. Argentina*, No. 1:21-cv-02250 (D.D.C. Aug. 24, 2021) (seeking enforcement of $325 million ICSID award rendered in favor of Spanish investors); *ADP International S.A. v. Chile*, ICSID Case No. ARB/21/40 (French investor against Chile). Recently, the intra-EU objection did not stop state-controlled French company EDF Energies Nouvelles from winning €29.6 million against Spain in an ECT arbitration under UNCITRAL Rules. *See* Erik Brouwer, *UNCITRAL Tribunal Reportedly Awards Almost 30 Million EUR to French Government-Controlled Energy Giant EDF in Dispute under Energy Charter Treaty*, IAReporter, July 3, 2023 (A-049).

By insisting that the "intra-EU objection" entitles it to the very judicial review precluded by the ICSID Convention framework to which it agreed, Spain demands the United States breach its own Convention obligations by creating a two-tier system of ICSID award enforcement that would privilege EU Member States. However, international law requires the United States to carry out its Article 54 obligations with respect to all ICSID Contracting States evenhandedly. It is axiomatic that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" by carrying out the substance of agreements "honestly and loyally." Charles T. Kotuby & Luke Sobota, *General Principles of Law and International Due Process* 91 (2017) (A-014); Vienna Convention on the Law of Treaties, Article 26 (1969); *see also* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 114-15 (1953).

Good faith performance of a multilateral treaty such as the ICSID Convention that allows no distinction between States with respect to Article 54 means not introducing such distinctions and enforcing final ICSID awards against *any* of the 157 other Contracting States without further review. *See The Wimbledon*, (Gr. Brit. v. Germ.) 1923 P.C.I.J.

(ser. A01) at 25 (Aug. 17) (rejecting differential application of a treaty obligation owed to multiple states as contrary to "*general considerations of the highest order*…gainsaid by consistent international practice and…at the same time contrary to the wording of [the treaty]" and barring Germany from discriminating among States to whom it was obliged to allow access to a waterway) (A-102).

The implications of a contrary result for the protection of investments—including U.S. investments abroad—and for the rule of international law are obvious. If U.S. courts fail to apply rules of general application established in a multilateral treaty to some of the richest and most developed States party to that treaty, other States will foreseeably feel themselves less bound by the same rules. It would be difficult to resist the narrative that some of the largest capital-exporting economies refused to abide by the same reciprocal obligations that they expect other States to comply with once, as ICSID's case statistics show, an increasing number and some of the largest ICSID claims began to be directed against wealthier respondent States.[25] Other States would be encouraged to demand that they too be exempted from the enforcement of

[25] ICSID, *The ICSID Caseload – Statistics* 24 (2023-1).

ICSID awards, ultimately eroding the effectiveness of the framework established by the ICSID Convention and the rule of international law.

CONCLUSION

For all these reasons and those in Appellees' brief, the Court should affirm the decision below.

Paul M. Levine
James J. East, Jr.
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 861-1500

/s Carlos Ramos-Mrosovsky
Carlos Ramos-Mrosovsky
Counsel of Record
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
14th Floor
New York, NY 10111
(212) 589-4200
cramosmrosovsky@bakerlaw.com

Counsel for Amici Curiae International Scholars

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, as calculated by Microsoft Word, it contains 6,498 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 29(a)(4) and 32(f) and Circuit Rule 32(e)(1). I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Century Schoolbook font.

Dated: July 6, 2023

Respectfully submitted,

By: /s Carlos Ramos-Mrosovsky

Carlos Ramos-Mrosovsky
BakerHostetler LLP
45 Rockefeller Plaza,
14th Floor
New York, NY 10111
212.589.4200
cramosmrosovsky@bakerlaw.com

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(b) and Circuit Rule 25(f), I certify that on July 6, 2023, the foregoing brief and following addendum was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. I further certify that counsel of record for all parties are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: July 6, 2023

Respectfully submitted,

By: /s Carlos Ramos-Mrosovsky

Carlos Ramos-Mrosovsky
BakerHostetler LLP
45 Rockefeller Plaza,
14th Floor
New York, NY 10111
212.589.4200
cramosmrosovsky@bakerlaw.com

Counsel for *Amici Curiae*

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