**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

NOVENERGIA II – ENERGY & ENVIRONMENT (SCA),

Petitioner,

v.

THE KINGDOM OF SPAIN,

Respondent.

Civil Action No. 1:18-cv-1148 (TSC)

# BRIEF OF MOL HUNGARIAN OIL AND GAS PLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S RESPONSE TO RESPONDENT KINGDOM OF SPAIN'S MOTION TO DISMISS AND TO DENY PETITION TO CONFIRM FOREIGN ARBITRAL AWARD

Dennis H. Hranitzky
(DC Bar No. NY0117)

DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
Phone: (212)641-5647
Email: dennis.hranitzky@dechert.com

Arif Hyder Ali
(DC Bar No. 434075)
Alexandre de Gramont
(DC Bar No. 430640)
Michael H. McGinley
(DC Bar No. 1006943)

DECHERT LLP
1900 K Street, NW
Washington, D.C. 2006
Phone: (202)261-3333
Email: arif.ali@dechert.com

*Counsel for* Amicus Curiae
*MOL Hungarian Oil and Gas Plc*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 7(o)(5) and Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), I, the undersigned, counsel of record for MOL Hungarian Oil and Gas Plc, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of MOL Hungarian Oil and Gas Plc that have any outstanding securities in the hands of the public:

1. Energopetrol d.d., a subsidiary of MOL Hungarian Oil and Gas Plc, is listed on the Sarajevo Stock Exchange.

2. INA Industrija Nafte d.d., a subsidiary of MOL Hungarian Oil and Gas Plc, is listed on the Zagreb Stock Exchange.

3. Slovnaft, a.s., a subsidiary of MOL Hungarian Oil and Gas Plc, is listed on the Bratislava Stock Exchange.

4. MOL Hungarian Oil and Gas Plc is itself listed on the Budapest Stock Exchange and the Warsaw Stock Exchange.

5. To the best of undersigned counsel's knowledge and belief, no other subsidiary or affiliate of MOL Hungarian Oil and Gas Plc has any outstanding securities in the hands of the public.

These representations are made in order that judges of this Court may determine the need for recusal.

## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* is MOL Hungarian Oil & Gas Plc ("**MOL**"), a company established under the laws of Hungary, with its principal place of business in Budapest. MOL is a fully integrated energy company, with operations in and outside Europe. It is the largest company in Hungary and the second largest company (by revenue) in Central and Eastern Europe.

MOL was formerly the State-owned energy company of Hungary. MOL is now publicly traded on the Budapest Stock Exchange and the Warsaw Stock Exchange. Although Hungary owns approximately 25% of MOL's outstanding shares, a large portion of MOL's shares are owned by foreign (mostly institutional) investors, as well as Hungarian institutional and individual shareholders. *See Investor Relations*, MOL GROUP, https://molgroup.info/en/investor-relations (last visited Dec. 6, 2018). Through its subsidiary MOL Group, MOL holds significant shareholding in other European energy companies, including in the Republic of Croatia ("**Croatia**"), Bosnia and Herzegovina, and Slovenia. Thus, MOL operates and invests in the heart of the region where the Energy Charter Treaty (sometimes referred to as the "**ECT**") was intended to promote energy sector investments and protect them through, *inter alia*, the availability of international arbitration in a neutral forum.

Since 2013, MOL has been involved in two arbitrations against Croatia. One is an arbitration brought by MOL against Croatia under the ECT and pursuant to the Arbitration Rules of the International Centre for Settlement of Investment Disputes ("**ICSID**") (the "**ICSID Arbitration**").[2] The second is an arbitration that Croatia commenced against MOL—in retaliation

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, made any monetary contribution intended to fund the preparation of this brief.

[2] ICSID is part of the World Bank Group. It is headquartered in Washington, D.C.

against MOL for having commenced the ICSID Arbitration—under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**") (the "**UNCITRAL Arbitration**").

In the ICSID Arbitration, MOL is seeking nearly $1 billion in damages from Croatia based on Croatia's efforts to wrest back control of MOL's investment in Croatia and renege on its investment protection commitments under the ECT.[3] MOL alleges, *inter alia*, that Croatia has used its police powers to manufacture false allegations of bribery against MOL, and has used its judiciary in its campaign to attack MOL's multibillion dollar investment in Croatia. MOL's allegations of prosecutorial and judicial misconduct are supported by the award of the Tribunal in the UNCITRAL Arbitration. *See Republic of Croatia v. MOL Hungarian Oil and Gas Plc*, PCA Case No. 2014-15 (UNCITRAL), Final Award (Dec. 23, 2016).

Croatia's main claim in the UNCITRAL Arbitration was that certain agreements that it had entered into with MOL in 2009, and which gave MOL control over Croatia's state-owned oil and gas company, were null and void. It based this claim on the allegation that the Chairman and CEO of MOL, Mr. Zsolt Hernádi, had bribed the former Prime Minister of Croatia, Dr. Ivo Sanader. The allegations and evidence Croatia put forward in the arbitration were largely the same as the allegations and evidence on which Croatia's prosecutorial authorities have relied in pursuing criminal charges against Mr. Hernádi and former Prime Minister Sanader.[4] Croatia's sham allegations of criminal wrongdoing against MOL pose great risk not only for MOL's business and

[3] After nearly five years, hearings in the ICSID Arbitration concluded in July 2018, and the parties are now awaiting an award from the Arbitral Tribunal.

[4] Dr. Sanader was convicted of bribery and abuse of authority in 2013, and was sentenced to ten years in prison. He served approximately four years of this sentence, much of it in solitary confinement. This conviction was subsequently quashed by the Croatian Constitutional Court. Dr. Sanader, who is no longer in custody, is now being re-tried, and his trial has been joined to the criminal trial of Mr. Hernádi.

shareholders, but also to the individuals at MOL whom Croatia has falsely accused. Following three years of arbitration, in December 2016, the UNCITRAL Arbitration Tribunal rejected Croatia's bribery allegations outright and awarded costs in MOL's favor.

Without access to an independent and impartial international arbitral tribunal, MOL would be forced to make its ECT breach claims against Croatia in that country's court system. But, in defending itself against Croatia's bribery allegations and in pursuing its own claims against Croatia under the ECT associated with Croatia's misuse of its police powers and judiciary to damage MOL's multi-billion dollar investment in Croatia, MOL has asserted (and shown) that Croatia's courts are politically motivated and hopelessly biased against MOL, and that the conduct of the Croatian courts with respect to MOL by itself violates Croatia's obligations under the ECT. For MOL, pursuing its ECT claims in the courts of Croatia—which would be required if the Kingdom of Spain's ("**Spain**") position regarding the validity of its consent to arbitrate disputes under the ECT is accepted—would therefore be futile at best. MOL's only viable option is to pursue its claims in the international arbitral forum to which Croatia (along with the European Union (the "**EU**") and fifty other Contracting Parties) agreed in ratifying the ECT.

The central issue raised by Spain in this case—whether an agreement to arbitrate pursuant to the ECT's dispute resolution mechanism between an investor of an EU Member State and a different EU Member State is enforceable in the United States—is therefore of great importance to MOL.[5] That is true not only because MOL is involved in a significant pending ECT arbitration that it might later seek to enforce in the United States, but also because MOL has also made

[5] Hungary acceded to the EU on May 1, 2004. *See Hungary Overview*, EUROPA, https://europa.eu/european-union/about-eu/countries/member-countries/hungary_en (last visited Dec. 7, 2018). Croatia acceded to the EU on July 1, 2013. *See Croatia Overview*, EUROPA, https://europa.eu/european-union/about-eu/countries/member-countries/croatia_en (last visited Dec. 7, 2018).

investments in other EU Member States—investments which are protected by the ECT and its arbitration provisions.

In addition to expressing its own interests through this *amicus* brief, MOL is well-situated to explain the interests of the approximately 60 EU investors who are currently involved in arbitrations against EU Member States under the ECT (or those who have recently obtained awards in such arbitrations that will require recognition and enforcement).[6] MOL is also able to explain the interests of EU investors who have made energy investments in other EU Member States in reliance on the protections and arbitration provisions of the ECT (regardless of whether such investors are currently involved in ECT arbitration). And as a significant regional European energy company based in Hungary—one of the original Contracting Parties to the ECT and an EU Member State since 2004—MOL is well-situated to providing additional clarity on the purpose and functioning of the ECT as well as its relationship with EU law.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on a single issue: whether this Court should accept Spain's invitation to expand the March 6, 2018, preliminary ruling by the Court of Justice of the European Union (the "**CJEU**") in *The Slovak Republic v. Achmea B.V.*, invalidating an agreement to arbitrate investment disputes expressed in a bilateral treaty between EU Member States, and hold that the decision invalidates arbitration agreements concluded pursuant to the ECT.

[6] As further discussed below, based on publicly available information, there are approximately 60 pending ECT arbitration cases brought by EU investors against EU Member States. Approximately 12 ECT awards have been rendered in disputes by EU investors against EU Member States. Investors may seek recognition and enforcement thereof if they remain unsatisfied. *See* Exhibit 1.

The CJEU's preliminary ruling is plainly limited by its terms to *bilateral* investment treaties ("**BITs**") *between* EU Member States. By contrast, the ECT is a multilateral treaty among EU Member States, 24 non-EU States,[7] and *to which the EU is itself a Contracting Party*. The CJEU's preliminary decision does not purport to extend to multilateral treaties to which the EU itself is a Contracting Party. Nor is the CJEU competent to nullify provisions in international treaties previously entered into and ratified *by the EU*. That is why every international arbitral tribunal to have considered the argument made by Spain in this case has rejected it (including several cases decided after the CJEU's preliminary decision in *Achmea*). *See, e.g.*, *Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (Aug. 3, 2018), ¶¶ 167, 182; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), ¶¶ 674-76, 683. Such attempts to retroactively nullify an arbitration agreement would be contrary to the US public policy in favor of binding arbitration clauses and repugnant to fundamental notions of fairness. *See Corporación Mexicana de Mantenimiento Integral, S. de R.L. v. Pemex-Exploración y Prod.*, 962 F. Supp. 2d 642, 656-57 (S.D.N.Y. 2013); *Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, 939 F. Supp. 907, 913 (D.D.C. 1996).

Moreover, the practical consequences of accepting Spain's view would be catastrophic. Expanding *Achmea* to encompass the arbitration mechanism provided for by the ECT would not only be wrong as a matter of US and EU law. It would affect billions of dollars of ECT claims that are currently pending in international arbitration, as well as billions of dollars of ECT awards

[7] The ECT also includes among its Contracting Parties non-EU States as politically and geographically diverse as Afghanistan, Armenia, Australia, Azerbaijan, Belarus, Georgia, Japan, Kazakhstan, Liechtenstein, Moldova, Mongolia, Montenegro, Norway, Switzerland, Tajikistan, Ukraine, and Uzbekistan.

that have been rendered but not yet enforced. If the Court were to accept Spain's argument, it would effectively deprive legitimate award creditors against EU Member States of access to assets located in the United States. Indeed, it is no coincidence that there are currently six separate enforcement proceedings by EU investors currently underway in US courts, five of which are before this Court alone. In sum, the potential consequences of this Court's ruling on the *Achmea* issue go far beyond the particular dispute between the Petitioner and Respondent in this case.

This Court should reject Spain's invitation to extend *Achmea* to the ECT, for all of the reasons stated in Petitioner's submissions. In addition, MOL respectfully submits the following points from the perspective of a regional European energy company, which itself is involved in its own ECT arbitration that is critically important to its future, and which has relied and continues to rely on the ECT in making other energy investments in EU Member States:

*First*, the CJEU's preliminary ruling in *Achmea* is simply inapplicable to disputes governed by the ECT. The ECT is a unique, multilateral investment treaty to which the EU itself is a party. The text, structure, and history of the ECT demonstrate that it is fundamentally different from the BIT at issue in *Achmea*—and thus the arguments offered by Spain to extend *Achmea* to the ECT are erroneous.

*Second*, MOL's case against Croatia exemplifies why energy investors' right to resolve disputes by arbitration against EU Member States before independent and impartial international arbitral tribunals under the ECT is indispensable to promoting and protecting investment in the EU energy sector—and why concluding that the ECT's arbitration provisions do not apply in intra-EU disputes would not only be baseless, but would also seriously undermine the ECT's purpose.

*Third*, *Achmea* by its terms is limited to BITs between EU Member States, and has no application to multilateral treaties to which the EU itself is a party. As a matter of US and EU law,

this Court cannot and should not extend *Achmea* to nullify the longstanding arbitration provisions in the ECT with respect to intra-EU disputes.

## ARGUMENT

### I. THE ENERGY CHARTER TREATY'S ARBITRATION MECHANISM IS ONE OF THE CORNERSTONES OF THE TREATY'S INVESTMENT PROTECTION REGIME

The Energy Charter Treaty has long been recognized as a "unique" multilateral treaty. *See, e.g.*, Craig S. Bamberger, *An Overview of the Energy Charter Treaty*, *in* THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE 1 (Thomas W. Wälde ed., 1996). Limited solely to the energy sector, "[t]he ECT establishes legal rights and obligations with respect to a broad range of investment, trade and other matters, and in large part provides for their enforcement." *Id.* The idea for the ECT was conceived after the fall of the Berlin Wall in 1989. The former Soviet Republics—suddenly independent States—were in desperate need of foreign investment to rebuild their crumbling energy infrastructure. However, the capital investment required for energy infrastructure projects is typically enormous—often in the hundreds of millions and even billions of dollars with a long-term horizon. In the early to mid-1990s, Western investors were reluctant to make such investments in the former Soviet Republics. *Id.* at xx.

The drafters of the ECT therefore sought to promote Western energy investment into the former Soviet Republics by guaranteeing through a multilateral treaty that these investments would be subject to a range of protections recognized in international law. These protections include the right not to be expropriated, unless the expropriation is (a) for a purpose which is in the public interest, (b) not discriminatory, (c) carried out under due process of law, and (d) accompanied by the payment of prompt, adequate, and effective compensation," ECT, Art. 13(1); not to be treated unfairly or inequitably; to be free from "unreasonable or discriminatory measures"; and to be

accorded treatment that is no "less favorable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favorable." ECT, Arts. 10(1) and 10(3).

Such protections would be meaningless, however, if they had to be enforced against the States where the investments were made in the courts of those very States. Instead, in the words of Judge Stephen S. Schwebel—the former President of the International Court of Justice—the ECT achieves the "promotion and protection of investment in energy" by "*provid[ing] for direct arbitral recourse in settlement of disputes that arise under the Treaty*." Stephen S. Schwebel, *Remarks by Judge S. Schwebel*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY ix (Clarisse Ribeiro ed., 2006) (emphasis added). Specifically, each Contracting Party to the ECT "gives its *unconditional consent*" to the international arbitration of disputes with investors from the other Contracting Parties. ECT, Art. 26(3)(a) (emphasis added). ECT investors can choose to submit their disputes with Contracting Parties to one of three international arbitration regimes: (1) arbitration at ICSID; (2) arbitration before a sole arbitrator or an *ad hoc* tribunal under the UNCITRAL Arbitration Rules; or (3) arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC**"). ECT, Arts. 26(2)(c), (4).[8] The ECT also provides that an investor may pursue its claims in the host State's own courts, but this has seldom, if ever, been done.

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[8] As stated above, MOL chose to submit its ECT arbitration against Croatia at ICSID, which requires that both the investor's home State and the State party to the dispute also be signatories to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Mar. 18, 1965) (the "**ICSID Convention**"). The Petitioner in this case submitted its ECT arbitration to the SCC.

The fundamental importance of the ECT's dispute resolution mechanism to its investment protection regime is reflected in the Treaty's Article 16. That article addresses the situation—as here—where "two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V" of the ECT (ECT, Art. 16),[9] and specifies that nothing in the terms of any such agreement "shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment." ECT, Art. 16(2).

The ECT and its guarantee to investors of international arbitration has led to massive investments that have benefitted each of the ECT's member states. The myriad of energy-sector investments made since the ECT's entry into force have been spurred not only by the Treaty's substantive investment protections, but also by the regime it established to enforce those protections.

Statistics bear out just how critical the ECT's international arbitration regime has been to attracting investment in the energy sector, including within the EU. ECT arbitration has become widely employed to resolve energy disputes often worth hundreds of millions or billions of dollars. There have been at least 119 known ECT arbitrations, with a full 76 of those arbitrations between a current EU Member State and an investor from another EU Member State.[10] At present, at least 60 intra-EU disputes under the ECT have pending arbitrations, and a number of additional disputes have pending enforcement proceedings.

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[9] ECT Part III deals with "Investment Promotion and Protection" and Part V addresses "Dispute Settlement."

[10] Not all of those ECT Contracting Parties were EU Member States at the times when the relevant disputes arose or were arbitrated.

The outcomes of these ECT arbitrations are balanced, and indeed arguably favor the host States of energy investments. Of the ECT awards reported as of May 2018, the State had prevailed in 22 while the investor had prevailed in 14. *See Changing dynamics of investment cases under the Energy Charter Treaty (ECT)*, INT'L ENERGY CHARTER, https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018/ (last visited on Dec. 6, 2018). A variety of energy investors have resorted to arbitration under the ECT: at least 14 of the arbitrations have been brought by large corporations, 171 by small and medium sized enterprises or investment funds, and 11 by individual investors. Many of the energy investors that have sought to exercise their rights through ECT arbitration are well-known companies or their subsidiaries, such as EDF (Électricité de France), E.ON, and Yukos. Indeed, the Arlington, Virginia-based US energy company AES has resorted to ECT arbitration on multiple occasions via European subsidiaries.

Notwithstanding the availability of recourse to the local courts of investment hosting States, energy investors have elected to use arbitration out of concern that they will not receive an impartial hearing before the domestic courts regarding the often highly political decisions that produce energy disputes. These decisions have given rise to intra-EU disputes regarding, for example, the introduction of a prohibition on hydrocarbon exploration within twelve miles of the Italian coastline, a change to requirements for the mandatory fuel reserves to be held by energy firms in Poland, and the enactment of legislation to eliminate the nuclear power industry in Germany. *See* Exhibit 1. Such general changes to national regulation touch on sensitive issues of local public policy, the public coffers, and national sovereignty over hydrocarbon and energy resources.

The current wave of ECT arbitrations against Spain is a case in point. Spain currently faces 42 known cases under the ECT (and three non-ECT cases), with a full 40 of those cases

concerning claims brought by investors from other EU Member States. *See* Exhibit 2. All of these ECT disputes against Spain stem from the same measures in the renewable energy sector. At the beginning of the last decade, Spain created a regulatory framework[11] to promote the development of its clean energy sector, including through commitments to the stability of electricity tariffs and to a reasonable return on investment. A massive influx of investment resulted. However, following a change of government in late 2011, Spain rolled back its commitments to clean energy investors in order to bolster the public coffers. Many of the investors who had relied on Spain's clean energy commitments – including a subsidiary of the Arlington, Virginia-based AES Corporation – have subsequently resorted to ECT arbitration to vindicate their rights, lodging approximately €10 billion in claims against Spain. *See* Arif H. Ali, *In the Eye of the Storm: Spain's Nexus to Investment Disputes*, 18 SPAIN ARB. REV. 5 (2013).

Thus, the "unconditional consent" to arbitrate intra-EU disputes under the ECT has emerged as a key protection for energy investors within the EU. Indeed, in the following section, we demonstrate why MOL's case underscores how the ECT's investment protection and arbitration provisions remain essential for intra-EU disputes.

## II. MOL'S CASE DEMONSTRATES THE IMPORTANCE OF THE ECT'S ARBITRATION PROVISIONS IN INTRA-EU DISPUTES

Spain has suggested that the import of the preliminary ruling in *Achmea* is that ECT investors must now seek recourse for ECT violations in the local courts of ECT Contracting Parties that are also EU Member States. *See* Respondent the Kingdom of Spain's Memorandum of Law in Support of Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award, ECF

[11] Through the 2000 Plan for Renewable Energy, the 2005 Spanish Renewable Energy Plan, and Royal Decree 661/2007.

No. 18 (hereafter, "Resp. Mem."), at 24-26. Spain's assertions are incorrect as a matter of law for the reasons stated in Petitioner's submissions as well as in this *amicus* brief. Moreover, as we explain in this section, the manner in which MOL has been treated in Croatia—by the country's prosecutors, judiciary and politicians—demonstrates why the resolution of disputes via international arbitration pursuant to the mechanism provided under the ECT cannot be dismantled as Spain has requested.

As mentioned above, MOL has been involved in two arbitrations arising from MOL's acquisition of a controlling stake in Croatia's formerly state-owned energy company, INA Industrija Nafte d.d. ("**INA**"). MOL's investment in INA began in 2003, when it acquired a 25% stake in INA following Croatia's passage of the INA Privatization Act, which required Croatia gradually to privatize INA as part of its efforts to accede to the EU. By late 2008, MOL was the single largest shareholder in INA, at a cost of nearly USD 2 billion. In January 2009, MOL negotiated two agreements with Croatia (the "**2009 Agreements**"), which, *inter alia*, gave MOL effective management control over INA.

By late 2009, however—with a new government in place and a new prime minister in office—Croatia decided to reverse course on INA's privatization. Croatia undertook a series of measures designed to take back control of INA, including launching a criminal prosecution against MOL's Chairman and CEO, Mr. Zsolt Hernádi, alleging that he had offered a EUR 10 million bribe to Croatia's former Prime Minister, Dr. Ivo Sanader, to procure the 2009 Agreements. *See Croatia v. MOL*, ¶¶ 15-16, 45-69. In 2011-2012, Croatia tried and convicted Dr. Sanader for having accepted a bribe from Mr. Hernádi. The conviction was subsequently quashed in July 2015 by Croatia's Constitutional Court. In March 2014, Croatia indicted Mr. Hernádi for having allegedly bribed Dr. Sanader. *See id.* ¶¶ 69-74.

In January 2014—just before issuing its indictment against Mr. Hernádi—Croatia commenced an arbitration against MOL under the arbitration clauses contained in the 2009 agreements, which provided for international arbitration seated in Geneva, Switzerland, under the UNCITRAL Arbitration Rules. An arbitral tribunal (the "**UNCITRAL Tribunal**") comprising three esteemed, highly qualified arbitrators was constituted: Croatia nominated Professor Jakša Barbić, a Croatian national and distinguished academic who is among the leading scholars of Croatian companies law; MOL nominated Professor Jan Paulsson, one of the foremost international arbitration practitioners and arbitrators, holder of the Michael Klein Distinguished Scholar Chair & Professor of Law at the University of Miami School of Law and former President of the London Court of International Arbitration; and the parties agreed to the appointment of Neil Kaplan CBE QC SBS, a former judge of the High Court of Hong Kong and former Chairman of the Hong Kong International Arbitration Centre with decades of experience serving as arbitrator, to chair the Tribunal. Croatia asked the Tribunal, among other things, to declare the 2009 Agreements null *ab initio* because they were allegedly procured by bribery.

The evidentiary record of the UNCITRAL Arbitration was extensive. It encompassed 613 factual exhibits, 19 witness statements, 25 expert reports, and 32 written submissions totaling over 1800 pages. The Tribunal held six evidentiary hearings over 19 days, during which it heard oral testimony from 15 fact witnesses and 11 expert witnesses.

Croatia's key witness in support of its bribery allegation in the UNCITRAL Arbitration was Robert Ježić, who claimed to have acted as an intermediary for the alleged bribe transaction.[12] Mr. Ježić, was also the prosecution's main witness in the first criminal trial of Dr. Sanader, and is

[12] Although Mr. Ježić's name is redacted in the publicly available version of the Tribunal's Award, his role in the case has been widely reported in the Croatian press and elsewhere.

being put forward by Croatia again as the mainstay of the prosecution's case in a new criminal trial that has recently commenced against Messrs. Hernádi and Sanader on the same bribery charges on which former Prime Minister Sanader was previously convicted.

In May 2011, shortly after being released from four months of "investigative detention," Mr. Ježić provided a statement to Croatian prosecutors. He alleged that he had acted as the intermediary for an alleged bribe that was supposed to have been paid from Mr. Hernádi to Dr. Sanader to procure Croatia's entry into the 2009 Agreements. Ježić conceded that he had kept and/or spent the alleged bribe money and never passed it on to Dr. Sanader. Despite promising to remit the alleged bribe money to Croatia, Mr. Ježić has never done so, and Croatia has never undertaken any serious effort to recover it. *See id*. ¶¶ 16, 59-61, 67, 299, 301. Although Croatia insists that it had no deal with Mr. Ježić, all other criminal charges against him were dropped except one (which was recently dismissed on the first day of trial because one of his co-defendants had since passed away). Zeljko Petrusic, *Both sentenced and freed in just an hour*, JUTARNJI LIST, Oct. 23, 2018. Nor has Mr. Ježić ever faced charges for his supposed role in the alleged bribery scheme.

Mr. Ježić testified over two days in the UNCITRAL Arbitration, during which time he was subject for the first time to extensive cross-examination, as well as examination by the Tribunal. His testimony was the subject of much discussion among the parties and among their respective expert witnesses. Among those experts engaged by MOL were Sir David Calvert-Smith, QC, an English barrister, prosecutor, and judge, who served as the Director of Public Prosecutions for England and Wales, and who prosecuted some of the most serious and high profile criminal cases in the United Kingdom; Robert Quick, QPM, formerly the most senior police detective in the United Kingdom whose positions included Detective Chief Superintendent of the Metropolitan

Police at New Scotland Yard, where he led that force's Anti-Corruption Command; and Judge Arend B. Vast, an esteemed prosecutor and judge from The Netherlands, where he served as a Chief Public Prosecutor and as The Netherlands' national member at Eurojust (the judicial co-operating body of EU Member States). Each of these experts carefully examined the testimony of Mr. Ježić and the evidence offered by Croatia to support it. Each of them concluded independently that Ježić was a manifestly unreliable witness; that the prosecutors and the courts appeared highly biased; and that the case appeared politically motivated.

On December 23, 2016, the UNCITRAL Tribunal found in MOL's favor on all of Croatia's claims, and ordered Croatia to reimburse MOL for its arbitration costs and fees in the amount of approximately $15 million. *Croatia v. MOL*, ¶ 489.[13]

In its Award, the Tribunal felt it necessary to comment specifically on Mr. Ježić's veracity as a witness, stating that it was "quite satisfied that no judge or tribunal seeing or reading Mr Ježić's testimony would come to any other conclusion but that he was a wholly unreliable witness." *Id.* ¶ 329. The Tribunal stated further that it had "no choice but to conclude Mr. Ježić is a witness unworthy of belief, who had a strong motive to shift the blame onto Dr Sanader." *Id.* ¶ 330. Furthermore, the Tribunal concluded that Croatian prosecutors had apparently provided Mr. Ježić with documents in advance of his testimony that they then "used to corroborate Mr. Ježić's testimony." *Id.* ¶ 303.

The rigorous procedure of the UNCITRAL Arbitration, and the reasoning of the Tribunal in its award, contrast sharply against the procedure and reasoning of the Croatian judiciary in adjudicating the bribery allegation.

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[13] After MOL had commenced its action in this Court to enforce the UNCITRAL Award, Croatia agreed to pay the costs award in full, and MOL subsequently dismissed the enforcement action voluntarily.

The failings of Croatia's judicial apparatus began with the investigation and prosecution of the bribery allegation, which were characterized by lapses so serious they cannot be attributed to mere incompetence. For instance, investigators failed to disclose the circumstances under which Ježić and another witness, Ježić's Swiss tax advisor Stephan Hürlimann, had come to provide their initial statements. Second, investigators reached an immunity deal with Ježić that was not disclosed to the defense. Third, investigators failed to pursue obvious lines of inquiry, including probing glaring inconsistencies in Ježić's testimony; establishing a money trail connecting Mr. Hernádi and Dr. Sanader as the alleged offeror and recipient of the bribe, respectively; and seeking important evidence from other jurisdictions using the machinery of mutual legal assistance treaties.

The failings of the trial compounded these lapses. First, there was a manifest lack of fairness in the trial. The Court unquestioningly accepted and fully embraced the prosecution's theory of the case, which posited that the agreements were harmful to Croatia and therefore must have been procured by corruption. Notwithstanding the implausible and contradictory testimony of Ježić, and his obvious animus toward MOL, the Court characterized his testimony as plausible, impartial, and clear. On the other hand, the Zagreb County Court categorically rejected the defense witnesses, claiming that they were biased, often by their mere association with MOL.

The Court embraced evidence as corroborating Ježić's account, even when it was of questionable provenance or merely confirmed facts that were not in dispute. For example, the prosecution put forward a manipulated CCTV recording that purportedly showed Ježić meeting with Mr. Hernádi and Dr. Sanader at a Zagreb restaurant on 19 October 2009. The CCTV tape was leaked to the press and published just as the trial was getting underway. *Sensational Discovery: Secret Video Recording of the Agreement between Hernádi and Sanader during Lunch*,

JUTARNJI LIST, Oct. 31, 2011 & Nov. 1, 2011. Despite the questionable legitimacy of the recording, and the fact that it contradicted the testimony of every witness including Ježić, the Court concluded that it corroborated Ježić's account.

At the same time, the prosecution sought to exclude and/or the court failed to consider potentially exculpatory evidence. Most egregiously, the Court paid no regard to the investigative file provided to it by the Hungarian Prosecutor General. The investigative file was extensive and the result of the investigation was strongly in favor of the defense.

Second, the County Court displayed clear bias against MOL and Hernádi (even though they were not parties to the Sanader trial) and the notion that a Hungarian investor should take control of a company which, according to the Court, was of special interest to Croatia. Presiding Judge Ivan Turudić made statements during and after the trial demonstrating that he was not an impartial and neutral decision-maker but rather biased and nationalistic. Indeed, the UNCITRAL Tribunal took notice of Judge Turudić's "obvious bias":

> [T]he Tribunal cannot ignore the Judge's obvious bias at trial. The Tribunal needs not say anything about this save to point out that after a retrial had been ordered by the Constitutional Court, Judge Turudić sought to reserve the case to himself and gave two interviews to the press . . . , which made quite clear that he disagreed with the decision of the Constitutional Court and intended to hear the retrial himself.

*Croatia v. MOL*, ¶ 138. After news of the UNCITRAL Award was announced, Judge Turudić publicly criticized the State Attorney's office for not seeking to annul the 2009 agreements after he had issued his original judgment. His public remarks leave no doubt as to his actual motive in overseeing the Sanader proceedings: to provide Croatia with a means to nullify the 2009 agreements and take back control of INA. *Cvitan responds to Turudić's statements: 'What he says is beyond common sense, but he knows why he is doing this*,' VECERNJI LIST, Dec. 27, 2016.

Third, the Croatian Supreme Court's April 3, 2014, judgment affirming the County Court's conviction suffered from the very same deficiencies, including a systematic acceptance of the prosecution's evidence and arguments—and a systematic rejection of the defense's evidence and arguments—with little or no reasoning.

It is thus evident that both the Zagreb County Court and the Supreme Court sought to tailor the evidence to fit the theory of the case rather than conducting a critical and independent analysis thereof. Such inconsistent treatment, and the approach to the evidence taken by the first instance Court and the Supreme Court as a whole, cannot be reconciled with the principles of consistency, independence, fairness, and impartiality that apply to judges and prosecutors.

Remarkably, notwithstanding the UNCITRAL Award, Croatia has continued to assert its bribery allegations as a jurisdictional defense in the ECT arbitration brought by MOL, and moreover, has continued to prosecute Mr. Hernádi *in absentia* on the same bribery allegations that the UNCITRAL Tribunal rejected. The criminal trial against Mr. Hernádi and Dr. Sanader is currently scheduled to begin on December 17, 2018. Croatian prosecutors have announced that Mr. Ježić will be their first witness. In the meantime, the Croatian courts have doubled down on their efforts to extradite Mr. Hernádi from Hungary. *Croatia again asks INTERPOL to extend red notice for MOL CEO*, HINA & N1 ZAGREB, Aug. 11, 2018.

MOL's pending ECT arbitration against Croatia includes claims based on Croatia's attempts to reassert control over INA by way of the courts. It is abundantly clear that MOL has no realistic possibility of asserting such claims in the courts of Croatia, even though Croatia is now an EU Member State. To the contrary, the treatment that MOL's investment has received in Croatia demonstrates that the reasons underlying the ECT's investment protection and arbitration provisions are just as important and relevant as when the EU negotiated and ratified the Treaty in

the 1990s. Were this Court to accept Spain's invitation to expand the CJEU's preliminary decision in *Achmea* to the ECT—and to conclude that MOL and other similarly situated claimants could not enforce ECT awards in intra-EU disputes in the courts of the United States—the Court's ruling would significantly undermine the investment protections of the ECT, along with the important purposes that they serve.

## III. THE *ACHMEA* DECISION DOES NOT EXTEND TO THE ECT

Ultimately, none of the arguments put forward by Spain justify the dismantling of the ECT's international arbitration mechanism, which would undoubtedly occur if Spain's position is accepted. For the reasons set forth in Petitioner's submissions, including the Expert Opinion of Professor Kessedjian, there are no grounds for concluding that *Achmea* provides any basis for this Court to refuse the recognition and enforcement of such awards. We briefly summarize the key points from MOL's perspective in this Section. Expert Declaration of Catherine Kessedjian, ECF No. 23 (Nov. 30, 2018) ("Kessedjian Decl.").

*First*, the arbitration provision at issue in *Achmea* was contained in a *bilateral* investment treaty between two EU Member States—not a multilateral treaty to which the EU itself is a Contracting Party (along with numerous States in and outside the EU). The *Achmea* decision is specifically limited to bilateral agreements between EU Member States to which the EU is not a party.

By now, this Court is no doubt fully familiar with the procedural posture in which the CJEU issued its preliminary ruling in *Achmea*. In short, after Achmea B.V. (a Dutch company) obtained a EUR 21.1 million award against the Slovak Republic under the Netherlands-Slovak Republic bilateral investment treaty, the Slovak Republic sought to set-aside the award in the courts of Germany, where the arbitration had been seated. The questions that the German Federal Court

referred to the CJEU were specifically limited to "the application of a provision ***in a bilateral investment protection agreement between Members of the European Union (a so-called intra-EU BIT)***." German Federal Court of Justice, *Slovak Republic v. Achmea*, Judgment (Oct. 31 2018), Case I ZB/15 (emphasis added). In responding to those questions in its preliminary ruling, the CJEU stated that EU law "precludes" an international arbitration clause in an "international agreement ***concluded between Member States***." *Id.* (emphasis added). After receiving the CJEU's preliminary ruling, the German Federal Court set aside the *Achmea* award, because it was based on an arbitration clause in "an agreement that ***has not been entered by the European Union but rather by Member States***." *Id.* (emphasis added). Thus, by its very terms, the *Achmea* decision is limited to arbitration clauses in bilateral investment agreements between EU Members States, to which the EU is not a party. And this Court is not empowered, in the context of an enforcement proceeding, to extend *Achmea* beyond its clearly defined limits. Thus, contrary to Spain's assertions, there is no basis on which this Court could conclude that, as a matter of EU law, *Achmea* extends to the Energy Charter Treaty, and on those grounds, refuse to recognize and enforce an arbitral award in an intra-EU dispute under the ECT.

*Second*, the fact that the *Achmea* decision is limited by its terms to bilateral investment agreements between EU Member States—and that it contains no mention of the ECT—is not an accident. As explained by the CJEU's Advocate General in his opinion submitted in advance of the *Achmea* preliminary ruling,[14] no EU Member State or institution had ever sought the CJEU's opinion concerning the compatibility of the ECT with EU law, because no one ever had the "slightest suspicion" that any provision in the ECT could violate EU law:

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[14] The CJEU's Advocates General give non-binding reasoned opinions in cases assigned to them, before the CJEU renders a ruling. Treaty on the Functioning of the European Union, Art. 252, O.J. (C 326) (2012).

> If no EU institution and no EU Member State sought an opinion from the Court on the compatibility of that treaty [i.e., the ECT] with the EU and FEU Treaties, that is because ***none of them had the slightest suspicion that it might be incompatible***.

Case No. C-284/16, *Slovak Republic v. Achmea B.V.*, Opinion of Advocate General Wathelet, ECLI:EU:C:2017:699 (Nov. 19, 2017), at 43 (emphasis added). The fact that the CJEU was well aware of this issue—but made no mention of the ECT and specifically limited its preliminary ruling to the context of an "international agreement concluded ***between Member States***—further shows the lack of any basis on which this Court could conclude that, under EU law, *Achmea* extends to the ECT.

*Third*, the ECT was specifically drafted to avoid the result sought by Spain in this case—and its text reflects that purpose. Under Article 26(3)(a) of the ECT, "each Contracting Party gives its ***unconditional consent*** to the submission of [disputes as specified under the Treaty] to international arbitration or conciliation in accordance with the provisions of this Article." (Emphasis added). Notwithstanding that provision, Spain invokes *Achmea* to argue that the ECT's arbitration provisions are "void *ab initio* as between EU Member States like Luxembourg and Spain." Resp. Mem., at 18. According to Spain, the import of *Achmea* is that no EU Member State can consent to arbitration against investors of other EU Member States under the ECT. Thus, under Spain's argument, the "unconditional consent" to international arbitration given by States who were already EU Members at the time they entered into the ECT (such as Spain and Luxembourg) was not "valid" by operation of EU law. *See id*. at 2, 22-25. And, according to Spain, the "unconditional consent" given by States who were not EU Member States at the time they entered into the ECT became invalid upon their succession to the EU. *See id.*[15]

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[15] Although Spain does not explicitly so state, this appears to be a necessary conclusion of its argument.

As set forth above, *Achmea* provides no basis to support Spain's assertions. Moreover, the Contracting Parties to the ECT—including the EU and Spain—ratified additional provisions in the ECT expressly to avoid such a result. As previously mentioned, Article 16 of the ECT provides:

> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement . . . , ***nothing in such terms of the other agreement shall be construed to derogate . . . from any right to dispute resolution with respect thereto under this Treaty***.

(Emphasis added). In other words, the Contracting Parties to the ECT (including the EU and Spain) specifically agreed that they would not construe any other international agreements (including the EU Treaties) so as to derogate from an investor's right to international arbitration under Article 26 ECT. *See, e.g.*, *Vattenfall* (expressly rejecting *Achmea*'s application to the ECT based on, *inter alia*, Article 16).

*Fourth*, the negotiators of the ECT could easily have included language that would have made certain provisions (including the international arbitration provisions) inapplicable in intra-EU disputes. They chose not to do so. Indeed, at one point in the negotiations, the European Communities proposed a clause that would have made the ECT inapplicable in the "mutual relations" of Member States, "except insofar as there is no Community rule governing the particular subject concerned." Draft Treaty, Basic Agreement for the European Energy Charter (Aug. 12, 1992), at 85. This clause was ultimately rejected, leaving the ECT with no exceptions for intra-EU disputes.

*Fifth*, Spain's reliance on the position of the European Commission (the "**Commission**") on the *Achmea* issue is misplaced. Contrary to Spain's suggestion, the Commission is not a legislative or judicial body of the EU. Rather, the Commission is the executive organ of the EU. It can advocate positions on certain matters (just as the executive branch of the US government can advocate positions on certain matters); but EU courts are free to reject those positions. The

fact that the Commission has offered a particular argument in no way transforms that argument into EU law. As observed in Petitioners' submissions, the Commission has taken inconsistent and often contradictory positions on this matter. It is worth reiterating Petitioner's point that every international arbitral tribunal that has considered the argument that EU law prohibits international arbitration in intra-EU disputes under the ECT argument has rejected it—including in decisions rendered after *Achmea*. *See* Novenergia's Petition to Confirm Arbitration Award against the Kingdom of Spain, ECF No. 1 (May 16, 2018), at 11; Kessedjian Decl.

## CONCLUSION

For the reasons set forth above, and in Petitioner's submissions, this Court should reject Spain's arguments that *Achmea* requires (or even permits) this Court to refuse to recognize and enforce an arbitral award in an intra-EU dispute under the Energy Charter Treaty. None of the grounds stated in the New York Convention for refusing to recognize and enforce an international arbitration award are applicable to intra-EU disputes under the Energy Charter Treaty based on *Achmea*.

Dated: December 7, 2018

By: //s//

Arif Hyder Ali
(DC Bar No. 434075)
DECHERT LLP
1900 K Street, NW
Washington, D.C. 20006-1110
Telephone: (202) 261-3333
Email: arif.ali@dechert.com

*Counsel for* Amicus Curiae
*MOL Hungarian Oil and Gas Plc*

**CERTIFICATE OF SERVICE**

I hereby certify that, on December 7, 2018, I electronically filed the foregoing Brief of MOL Hungarian Oil and Gas Plc as *Amicus Curiae* in Support of Petitioner's Response to Respondent Kingdom of Spain's Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award with the Clerk of the District Court for the District of Columbia by using the electronic CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: December 7, 2018

By: //s//

Arif Hyder Ali
(DC Bar No. 434075)
DECHERT LLP
1900 K Street, NW
Washington, D.C. 20006-1110
(202) 261-3333
arif.ali@dechert.com

*Counsel for* Amicus Curiae
*MOL Hungarian Oil and Gas Plc*