IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| Hydro Energy 1, S.À.R.L. and Hydroxana Sweden AB,<br><br>*Petitioners*,<br><br>v.<br><br>Kingdom of Spain,<br><br>*Respondent*. | Civil Action No. 1:21-cv-02463-RJL |

**Expert Declaration of Andrea K. Bjorklund**

1. My name is Andrea K. Bjorklund. I am the Associate Dean of Graduate Studies and the L. Yves Fortier Chair in International Arbitration and International Commercial Law, as well as a Full Professor, at the McGill University Faculty of Law in Montreal, Canada.

2. This report has five parts. The first offers a summary of my conclusions. The second outlines my qualifications. The third discusses the development of the international investment regime, and in particular the conclusion of investment protection agreements that contain investment arbitration provisions. The fourth addresses the enforcement of awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").[1] The fifth looks more particularly at the relationship between the Energy Charter Treaty (the "ECT")[2] and the treaties of the European Union ("EU") from the perspective of public international law.

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 U.S.T. 1270 (Mar. 18, 1965), ("ICSID Convention"), ECF No. 1-2.

[2] Energy Charter Treaty, 2080 U.N.T.S. 95 (Dec. 17, 1994), ("ECT"), ECF No. 1-3.

## I. Summary of Conclusions

3. States party to the ICSID Convention created a system of robust enforcement of arbitral awards to encourage foreign direct investment and ensure that foreign investors whose property was injured or taken in violation of international law could gain redress easily. Thus, each ICSID Member State must enforce awards of tribunals convened under that Convention as if they were final judgments of the courts of that State. The award may not be reviewed by the enforcing court for any reason; the only recourse against the award is found in the ICSID system itself. Consequently, recognition and enforcement in a U.S. court of an ICSID award such as this one is essentially automatic.

4. The United States has undertaken obligations under the ICSID Convention to enforce awards rendered pursuant to that treaty. "Comity" does not require a refusal to enforce Petitioners' award in this case; to the contrary, respect for the United States' obligations under the ICSID Convention dictates enforcement of the award in this case.

5. Intra-EU investment disputes are arbitrable under the plain language of the ECT. Article 26 of the Treaty contains the Contracting Parties' clear offer to arbitrate claims made by an investor from another Contracting State that the host State failed to abide by the protections found in Part III of the ECT. Luxembourg, Sweden, and Spain are all unquestionably Contracting Parties to the ECT.

6. The petitioners here, incorporated in Luxembourg and Sweden, accepted the offer extended by Spain to arbitrate their ECT dispute under the framework of the ICSID Convention.

7. By the plain terms of the ECT, its dispute settlement provisions are available to investors from all Contracting Parties who make an investment in the territory of another Contracting Party. No implicit understandings or subsequent agreements between a small subset

of ECT Member States changes that fundamental fact. The ECT also contains no disconnection clause or other provision that would negate Article 26's clear offer to arbitrate as between intra-EU disputing parties.

8. Treaties may not be modified implicitly; any suggestion that the ECT's terms do not apply between EU Member States because of a tacit incompatibility with EU law must fail as a matter of international law.

9. Neither Spain nor any other EU Member State, nor the EU itself, has explicitly modified the ECT. It is valid under international law and its Contracting Parties must in good faith honor their obligations under it pursuant to the principle of *pacta sunt servanda*.

10. Contrary to Spain's arguments, principles of public international law dictate that the ECT prevails over EU law. First the ECT contains a hierarchical clause (Article 16) specifically providing that if there are conflicts between the ECT and other treaties (such as the EU Treaties) to which the Contracting Parties adhere regarding protection of investments and dispute settlement, investors under the ECT may choose whichever regime is more favorable to them. Here the investors chose arbitration under the ECT.

11. Second, the ECT would prevail over inconsistent EU law even without applying its hierarchical clause. Under the principle of *lex posterior*, later treaties can displace earlier treaties if they cover the same subject matter. The ECT is the later-in-time treaty, as the treaty provisions which concerned the CJEU in *Achmea* predate the ECT.

12. Third, the autonomy of EU law is a principle of EU law, but not of international law. States may not invoke domestic law as justification for failing to abide by their international legal obligations. Spain has obligations under both the ECT and the ICSID Convention. The fact that EU law is itself treaty-based does not lead to a different conclusion. International law is what

renders EU law enforceable on the international plane, and EU law is thus also governed by the principles of good faith and *pacta sunt servanda*.

## II. Qualifications

13. I am a U.S. citizen, born on January 22, 1965.

14. I am the Associate Dean of Graduate Studies, a Full Professor, and the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. Prior to joining the faculty at McGill, I was a Professor at the University of California, Davis, School of Law. I teach or have taught public international law, conflict of laws, international investment law, international trade law, international civil litigation, international commercial arbitration, and contracts.

15. I earned a Juris Doctor (J.D.) from Yale Law School in 1994. I also hold an M.A. in French Studies from New York University and a B.A. (with High Honors) in History and French from the University of Nebraska, Lincoln. I clerked for Judge Sam J. Ervin, Jr., on the U.S. Court of Appeals for the Fourth Circuit.

16. I am admitted to practice in Maryland and the District of Columbia. I am a member of the bar of the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. District Court for the District of Columbia.

17. My experience with international investment law started approximately 27 years ago when I was still in private practice at Miller & Chevalier, Chartered, in Washington, DC. As a member of the firm's international group I worked on arbitrations, on trade remedies cases, on a constitutional challenge to Chapter XIX of the North American Free Trade Agreement ("NAFTA"), on the then-ongoing negotiations for a multilateral agreement on investment that

occurred under the auspices of the Organisation for Economic Co-operation and Development, and on a variety of other matters.

18. In 1999, I was hired as an inaugural member of the NAFTA Arbitration Division of the Office of the Legal Adviser in the U.S. Department of State, where I defended the U.S. Government in NAFTA Chapter XI investment arbitrations and also monitored cases submitted against Canada and Mexico.

19. Since I entered the academy, I have published many articles, books, and book chapters on international investment law. The treatise on NAFTA that I authored with Meg Kinnear and John Hannaford, which was first published in 2006, has been updated twice, and a second edition is underway.

20. I am a recognized expert in international investment law and in public international law. I am a Vice President of the American Society of International Law. I have served as an expert for international organizations. In 2014, I was named the inaugural ICSID Scholar in Residence. I consulted with the United Nations Conference on Trade and Development (UNCTAD) to prepare the updated volume of their "pink series" manuscript on investor-State dispute settlement, which was published in 2014. I have served as consulting or testifying expert, for both claimants and respondents, in several investment cases.

21. I am currently an editor of Cambridge University Press's International Trade and Economic Law Series. I am a visiting professor at Tsinghua University in Beijing, where I teach international investment law in Tsinghua's International Arbitration and Dispute Settlement program. For three years, I was editor-in-chief of the Yearbook on International Investment Law and Policy, published by Oxford University Press. I am on the advisory board of the British Institute for International and Comparative Law's Investment Treaty Forum. I am an adviser to

the American Law Institute's project on restating the law of U.S. international commercial arbitration. From 2012 to 2015, I was Chair of the Academic Council of the Institute for Transnational Arbitration. In 2022, the Government of Canada appointed me to its roster of ICSID arbitrators. My detailed *curriculum vitae* is attached (Ex. 1 hereto).

22. I have been retained by Hydro Energy S.À.R.L. and Hydroxana Sweden AB (hereinafter "Petitioners") to provide an expert opinion on the relationship between public international law, EU Law, and the ECT. Specifically, I was asked to consider as a matter of international law:

(a) whether EU law has any effect on the enforceability in the United States of the Final Award in *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB 15/42;

(b) whether the ECT applies to intra-EU Disputes; and

(c) whether the ECT is displaced by the Treaty on the Functioning of the European Union ("TFEU") and related EU treaties.

23. In addition to basing my opinion on my existing knowledge of the topics of public international law and international investment law, Petitioners have provided me with the following materials:

(a) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB 15/42, Decision on Jurisdiction, Liability, and Directions on Quantum (Mar. 9, 2020);

(b) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB 15/42, Award (Aug. 5, 2020);

(c) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, Civil Action No. 1:21-cv-02463, Petition to Enforce Arbitral Award (Sept. 20, 2021);

(d) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, Civil Action No. 1:21-cv-02463-RJL, Memorandum of Law in Support of the Kingdom of Spain's Motion to Dismiss the Petition or Stay the Proceeding (Feb. 24, 2022);

(e) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, Civil Action No. 1:21-cv-02463-RJL, Declaration of Professor Steffen Hindelang (Feb. 24, 2022); and

(f) *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, Civil Action No. 1:21-cv-02463-RJL, Brief for the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of the Kingdom of Spain (Mar. 17, 2022).

24. I am being compensated at a rate of $700 per hour for my work on this matter.

25. I have no familial or business relationship or affiliation with any of the parties in the above-captioned matter. I have never provided legal advice to them or represented them in any capacity. I have provided a legal opinion on similar matters in three other enforcement proceedings regarding awards in ECT cases brought by EU investors against the Kingdom of Spain: *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, No. 1:18-cv-1686 (D.D.C); *Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar B.V. v. Kingdom of Spain*, No. 1:18-cv-1753 (D.D.C.); and *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, No. 1:19-cv-03783-CJN (D.D.C.).

## III. The Law of International Investment Protection

26. The modern regime of investment protection can be traced to the law of "State Responsibility for Injuries to Aliens," a branch of public international law that developed primarily in the nineteenth and early twentieth centuries. In the parlance of that time, "aliens" doing business in a foreign jurisdiction were obliged to follow the laws in that jurisdiction, but were entitled to some protections under international law.

### A. Customary International Law Development of the Law of State Responsibility for Injuries to Aliens

27. In the early twentieth century, capital-exporting States argued for the development of customary international law standards to protect both the property and personal integrity of "aliens"—their investors—abroad. Some attempts were made to codify this law; it was initially

regarded as sufficiently developed to be ripe for codification by the Committee of Experts for the Progressive Codification of International Law in the late 1920s. As part of that project, Professor Edwin Borchard and his colleagues produced the Harvard Research Draft of 1929.[3]

28. The Commission dealing with State Responsibility, however, was not able to agree on a draft Convention due to the dissent of primarily capital-importing States.[4] Further attempts were made to codify the law of State responsibility once the International Law Commission was established after the Second World War.

29. Debates about multiple issues, including the exact content of customary international law, stymied the successful completion of a codification.[5] In fact, in the early 1960s, the U.S. Supreme Court recognized the uncertainty surrounding the definition of expropriation in the *Sabbatino* case.[6]

30. This uncertainty was later reflected in the attempt by many developing States to form a "New International Economic Order," which was characterized by a lack of special protections afforded to foreign-owned property. In the early and mid-1970s a series of U.N.

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[3] Research in International Law at Harvard Law School, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. SPEC. SUPP. (i) 133 (1929) (Ex. 2 hereto).

[4] Edwin M. Borchard, *Responsibility of States,* at the Hague Codification Conference, 24 Am. J. Int'l L. 517, 518 (1930) (Ex. 3 hereto).

[5] Eventually the International Law Commission revised the scope of the codification project to address "secondary rules" of State responsibility—those provisions that apply once the breach of a "primary rule" has been established. These Articles on State Responsibility were adopted by the United Nations General Assembly in 2001. Responsibility of States for Internationally Wrongful Acts, II (2) Y.B. Int'l L. Comm'n, U.N. Res. 56/83 (Dec. 12, 2001), as corrected by A/56/49(Vol. I)/Corr 4) ("Articles on State Responsibility"), https://tiny.cc/mkpirz.

[6] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").

General Assembly Resolutions rejected the idea, traditionally championed by developed, capital-exporting countries, that expropriations need to be accompanied by prompt, adequate, and effective compensation.[7]

**B. The Era of International Investment Agreements**

31. Against this uncertain background, States sought to develop treaties that would clarify the existence and content of those customary international law obligations and turn them into conventional obligations that would protect foreign investors. Western European countries were the first to negotiate significant numbers of bilateral investment treaties ("BITs") with such obligations. The German-Pakistan treaty of 1959, for example, is generally described as the first BIT. Other European countries, including the United Kingdom, Germany, and France, also developed active investment treaty programs.[8] The United States' investment treaty program gained momentum in the 1980s; prior to that time the United States had negotiated Treaties of Friendship, Commerce, and Navigation, which are often viewed as the precursors to modern BITs.[9]

32. International investment agreements today include BITs, investment chapters in free trade agreements, and sectoral treaties. While most often bilateral, they can be multilateral. NAFTA has an investment chapter (Chapter 11), as does the Comprehensive and Progressive Trans-Pacific Partnership. UNCTAD now counts 2,558 investment agreements in force.[10]

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[7] *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 477-85 (Cambridge University Press, 2d ed., 2004) (Ex. 4 hereto).

[8] According to UNCTAD's Investment Policy Hub, Germany has 132 International Investment Agreements in force; France has 95; and the United Kingdom has 94. https://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited January 9, 2019).

[9] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 158-59, 170-75 (2005) (Ex. 5 hereto).

[10] United Nations Conference on Trade and Development, Investment Policy Hub, International Investment Agreements Navigator, https://tiny.cc/wc2jrz (last visited, April 25, 2022).

33. Investment treaties are important tools both to promote and to protect investments. Essentially, they are a "grand bargain" whereby host States seek foreign direct investment to facilitate their economic development. In return for that investment they offer protections in investment treaties so that investors can safely and securely invest knowing they have rights conferred by the treaties that can be vindicated in arbitration.

***Substantive Protections***

34. Protections typically included in investment treaties include the obligation not to discriminate against foreigners in favor of domestic entities (national treatment); the obligation to accord equal treatment to all foreign investors (most-favored-nation treatment); the obligation to accord fair and equitable treatment and full protection and security (due process obligations); and the obligation not to expropriate property except in accordance with due process, on a non-discriminatory basis, for a public purpose, and upon payment of prompt, adequate, and effective compensation (expropriation).[11]

35. The protections in investment treaties are often more extensive than those found in national laws. For example, Canada does not have a constitutional protection against expropriation. The scope of investment protection in investment treaties such as the ECT is wider than that found in the EU treaties, though there is some overlap.[12]

***Access to Arbitration***

36. The existence of substantive protections is not the only benefit of investment treaties. Most treaties permit investors to commence arbitration against the host State for

[11] Other obligations include permitting the transfer of currency and profits and agreeing not to impose performance requirements on foreign investors.

[12] Opinion of Advocate General Wathelet, ¶¶ 179-228, Case No. C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C 2017:699 (Sept. 19, 2017), https://tiny.cc/sdpirz.

violations of the investment treaty. The ability to seek relief in a neutral arbitral forum is one of the principal advantages of investment treaties.

37. Arbitration as a means of resolving disputes between States, and of resolving disputes between citizens of one State and another State, has a long pedigree. The Jay Treaty of 1794 established a mixed claims commission composed of arbitrators from the United States and Great Britain to determine whether claims for redress by U.S. persons against Great Britain for British seizures of American ships (or other property), and for redress by British persons whose property was seized by captures within the United States, would be resolved by arbitration.[13]

38. The first BIT to offer investors the possibility of investment arbitration was the Dutch-Indonesia BIT of 1968, while the first to offer unconditional investment arbitration was the Chad-Italy BIT of 1969.[14]

39. Investment treaty arbitration is slightly different from commercial arbitration in that it is forward looking. The treaty acts as a standing offer by the States party to the treaty to arbitrate disputes covered by the treaty—disputes relating to investments in the territory of the host State. Investors who have the nationality of one of the other parties to the treaty (usually referred to as the "home" State) can accept the offer by commencing an arbitration. The investment treaty will usually contain several options from which the investor may choose with respect to the arbitration,

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[13] Treaty of Amity, Commerce and Navigation, London, U.S.-U.K., 8 Stat. 116 (Nov. 19, 1794), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=129.

[14] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 44-45 (Kluwer Law Int'l 2009) (Ex. 6 hereto).

including, for example, arbitration under the ICSID Convention, which entered into force in 1966 and had 156 State parties as of April 2022,[15] or ad hoc arbitration under the UNCITRAL Rules.[16]

40. Arbitration is attractive for many reasons, but one of them is the robust international mechanism for the enforcement of arbitral awards. The ICSID Convention is one such regime; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[17] (popularly known as the "New York Convention") is the other significant treaty with global reach.

**C. The Energy Charter Treaty**

41. The investment treaty in this case—the ECT—represents the same type of bargain as other modern international investment agreements. It is a multilateral, sectoral agreement that seeks to facilitate long-term cooperation in the energy field, which would "not take place without a massive transfer of capital and technology, particularly to the States with significant energy resources but insufficient means to develop them."[18]

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[15] Database of ICSID Member States, available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

[16] UNCITRAL is the United Nations Commission on International Trade Law. UNCITRAL has promulgated frequently used arbitration rules, but UNCITRAL itself does not administer arbitrations.

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (June 10, 1958), ("New York Convention"), http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[18] Jeswald Salacuse, *The Energy Charter and Bilateral Investment Treaty Regime*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 321, 328 (Thomas Wälde ed., Kluwer Law International 1996), ("Salacuse") (Ex. 7 hereto).

42. The ECT was finalized on December 17, 1994; it entered into force in April 1998.[19] The EU itself is a Contracting Party, along with more than 50 other countries, including every EU Member State except Italy (whose withdrawal was effective January 1, 2016).[20]

43. The ECT started with the negotiation of the non-binding European Energy Charter, a process initiated by a proposal from the Dutch government.[21] While it involved many European states, it was not solely a European project. Russia, Canada, and the United States, to name just a few countries, were instrumental in influencing the treaty's negotiation. Graham Coop, the former General Counsel to the ECT Secretariat, noted:

> The negotiating partners consisted of more than fifty delegations with very different backgrounds and divergent interests and perceptions. To reflect this, and in particular the interest shown by countries such as the United States, Canada, Japan and Australia, the term "European", which had formed part of the title of the Charter, was dropped from the title of the Treaty.[22]

44. One of the ECT's primary negotiators has emphasized the difficulties in completing the negotiations due to the divergent interests of the negotiating parties: "The slightly more than three years that it took to agree the Treaty is a relatively modest period within which to complete a treaty of such scope, complexity, novelty and political sensitivity among so many parties having

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[19] The International Energy Charter Consolidated Energy Charter Treaty with Related Documents at 8, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf (last updated Jan. 15, 2016).

[20] *Jordan is the 51st Contracting Party to the ECT*, International Energy Charter, (Dec. 12, 2018), https://tiny.cc/rh2jrz; International Energy Charter, The Energy Charter Treaty, https://tiny.cc/ij2jrz (last visited June 29, 2020).

[21] Graham Coop, *The Energy Charter Treaty: More than a MIT*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 3, 4-5 (Clarisse Ribeiro, ed., Juris, 2006) (Ex. 8 hereto).

[22] Coop, *supra* n.21 at 5. The ECT Secretariat's website shows the large number of successive drafts of the European Energy Charter, which later evolved into the Energy Charter Treaty—22 different iterations—suggesting that coming to an agreement was not an easy matter. International Energy Charter, Drafts of the Energy Charter Treaty (Dec. 1, 2016), https://tiny.cc/kk2jrz.

divergent interests."[23] Some of those divergent interests were among Western states; others showed fundamental differences in ideas between Western and non-Western states.[24] The resulting ECT is thus a multilateral instrument, which imposes international law disciplines on its Member States, not European law disciplines. Although it is a multilateral agreement, the provisions of BITs are the most relevant precedent for the protections for investors found in the ECT, and the practice of (and negotiators from) the United States and European countries influenced the investment protection provisions in the treaty.[25]

## IV. Enforcement of Awards under the ICSID Convention

45. The ICSID Convention was drafted in the early 1960s, was finalized in 1965, and entered into force in 1966. The moving force behind it was the then-General Counsel of the World Bank, Aron Broches. Although attempts to codify substantive international law were not proving successful, Mr. Broches and others thought there was an appetite for dispute settlement mechanism given the number of times the then-President of the World Bank was asked to mediate or arbitrate investment disputes.[26]

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[23] Craig S. Bamberger, "Chapter 1. Overview," IN THOMAS W. WÄLDE (ED), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE AT 2 (Kluwer Law International 1996) (Ex. 9 hereto).

[24] Julia Doré, "Chapter 5, Negotiating the Energy Charter Treaty," in THOMAS W. WÄLDE (ED), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE, (Kluwer Law International 1996), pp. 140-41; 143-44 (Ex. 10 hereto), (noting differences between the U.S. and Norway, and between the US and France, among others, during the negotiations); 145-46 (noting Eastern countries' dissatisfaction with proposals for investment protection in particular).

[25] *Salacuse, supra* n.18 at 322 (the "concepts, principles, and terminology of the Energy Charter Treaty owe an undeniable debt to the concepts, terminology and principles employed in bilateral investment treaties").

[26] ANTONIO R. PARRA, THE HISTORY OF ICSID 22-26 (Oxford 2012) (Ex. 11 hereto).

46. The ICSID Convention thus established a framework for the settlement of investment disputes. It contains provisions on both conciliation and arbitration, though the arbitration rules have been invoked much more frequently than the conciliation rules.[27]

47. The ICSID Convention is available for the resolution of investment disputes so long as both the host State of the investment and the home State of the investor are parties to the ICSID Convention.

**A. Purpose and Design of the ICSID Convention**

48. The object and purpose of the ICSID Convention was to create a more stable environment for foreign investment by ensuring that investment disputes would be subject to neutral dispute settlement resulting in an award enforceable in all States party to the ICSID Convention. This would help ensure that the prevailing party would not be obliged to enforce the judgment only in the respondent State, which might frustrate such enforcement efforts for political or public policy reasons.

49. While States have frequently voluntarily complied with their obligations under the ICSID Convention, where they have not, the ability of investors to enforce the award in any of the States party to the ICSID Convention is of utmost importance. One of the goals of the ICSID Convention was to reassure investors that they need not depend on the host State, with which they were already in dispute, should voluntary payment not be forthcoming. As Stefan Kröll has observed, a state's refusal to pay an award "is usually coupled with an inability of the investor to find judicial or administrative support for enforcement in that country itself. In such cases the only

[27] For the year 2018, ICSID reported having registered 695 ICSID Convention arbitration cases and 11 conciliation cases over the course of its existence. *See* ICSID, *The ICSID Caseload - Statistics* (Issue 2019-1), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202019-1%20%28English%29_rev.pdf.

opportunity for a successful party to benefit from the orders made in the award is to get it enforced and executed in a different country."[28]

50. With this context, the ICSID Convention was designed to provide access to arbitration that is both self-contained and "a-national." An arbitral tribunal is convened to hear an individual dispute. There is no "place" of arbitration in ICSID Convention arbitration the way that there is in non-ICSID arbitrations, where a link to a national jurisdiction confers authority on the courts of that jurisdiction to assist the arbitration and to police the integrity of the proceedings.

51. In an ICSID arbitration, the only recourse against an award is annulment under Article 52 of the ICSID Convention. In an annulment proceeding, an *ad hoc* committee, comprised of three ICSID panel members selected to hear the dispute by the Chairman of the World Bank, decides whether annulment should be permitted, in whole or in part. The ICSID panel is composed of individuals nominated by States party to the ICSID Convention and 10 members chosen by the Chairman of the World Bank.

52. One of the fundamental features of arbitration is that decisions are final and binding and not subject to iterative appeals and remands. Control mechanisms, such as ICSID's annulment regime, ensure that the arbitral process is fair but do not permit review of the merits outside ICSID itself.

53. In keeping with the prioritization of finality, ICSID awards are fully enforceable when rendered unless one of the parties applies to annul the award, resulting in an automatic provisional stay of enforcement until the *ad hoc* annulment committee is constituted and rules on

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[28] Stefan Kröll, *Enforcement of Awards*, IN BUNGENBERG ET AL, INTERNATIONAL INVESTMENT LAW: A HANDBOOK, 1483 (C.H. Beck 2015) (Ex. 12 hereto).

whether to continue the stay. If the *ad hoc* annulment committee lifts the provisional stay of enforcement, the award becomes immediately enforceable again.

**B. Recognition, Enforcement, and Execution of ICSID Convention Awards**

54. In a non-ICSID arbitration, a losing party can seek to have the award set aside in the courts of the place of arbitration on grounds found in the applicable arbitration law. That is not the case under the ICSID Convention.

55. Instead, the States party to the ICSID Convention made reciprocal promises to each other that they would recognize an arbitral award rendered by a tribunal convened under the ICSID 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."[29] The United States, as a Party to the ICSID Convention, thus has an obligation to enforce this award under the terms of the Convention.

56. This process contrasts markedly with the enforcement scheme under the New York Convention, which permits the judgment debtor to resist enforcement on five enumerated grounds; it also gives the enforcing court the discretion not to enforce the award if (1) the subject matter of the dispute is not considered arbitrable in the enforcing State or (2) if enforcement would violate the public policy of the enforcing State.[30]

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[29] ICSID Convention, *supra* n.1, art. 54(1), ECF No. 1-2.

[30] New York Convention, *supra* n.17, art. V. Note that under the New York Convention the question is whether the award violates the public policy of the enforcing State, here the United States, and not the public policy of the party seeking to resist enforcement. In other words, the New York Convention does not ask whether enforcement of an investment treaty arbitral award violates the public policy of the European Union or one of its Member States, but only whether enforcement would violate the public policy of the United States itself.

57. Unlike the New York Convention, the ICSID Convention does not permit challenges to an ICSID award on the basis of public policy, or, indeed, on any other ground.[31] Post-award review of ICSID awards in national courts is not permitted by the Convention. As the ALI Restatement of the U.S. law of International Commercial and Investor-State Arbitration notes: "The ICSID Convention drastically curtails post-award review of ICSID Convention awards. . . . The ICSID Convention imposes on courts of contracting States an obligation to recognize and enforce such awards. It identifies no grounds on which a court may decline to do so."[32]

**C. The ICSID Convention's Effect on Sovereign Immunity**

58. The ICSID Convention's recognition and enforcement provisions embody the Contracting Parties' agreement to waive immunity to the jurisdiction of domestic courts for the recognition and enforcement of ICSID awards.

59. While foreign states are presumptively immune from the jurisdiction of national courts, unless an exception applies, municipal laws generally distinguish between jurisdictional immunity and execution immunity, a distinction that finds support in both customary international law and international treaties on immunity.[33] Jurisdictional immunity has to do with the obligation

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[31] To this effect, the American Law Institute has recently approved the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, which provides that "the Convention identifies in Article 54 no grounds on the basis of which recognition or enforcement of such awards may be denied," and that "Articles 53 and 54 of the Convention make it clear that the national courts are to enforce ICSID Convention awards as rendered and exclude resort to any remedies other than those provided for in the Convention itself." Restatement of the U.S. Law of Int'l Commercial and Investor-State Arbitration, Proposed Final Draft (April 24, 2019) ("Restatement") 933, 938 (Ex. 13 hereto). The draft has been approved by the ALI Membership and Council subject to minor editorial changes.

[32] Restatement, *supra* n.31, § 5.5, cmt (b).

[33] HAZEL FOX, PHILIPPA WEBB, THE LAW OF STATE IMMUNITY (Oxford University Press, Aug. 2013) 601-603 (Ex. 14 hereto).

of a foreign state to appear before a court, whereas execution immunity refers to the immunity possessed by a State's assets. A State can waive jurisdictional immunity without waiving its execution immunity. The U.S. Foreign Sovereign Immunities Act ("FSIA") recognizes this distinction and contains provisions on immunity from execution separate from its provisions on immunity from suit.[34] The ICSID Convention also makes this distinction.

60. The ICSID Convention embodies a waiver of the first type of immunity, jurisdictional immunity, as Contracting Parties agree that ICSID awards are final and will be subject to enforcement against all Contracting Parties in the courts of any other Contracting Party. Specifically, Article 53 of the ICSID Convention provides that the "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[35] Moreover, "[e]ach party shall abide by and comply with the terms of the award."[36] Under Article 54 of the Convention, State Parties further agree to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[37]

61. The Parties' agreement to enforce final awards as binding in the courts of any other Contracting Party does not depend on domestic courts' assessment of matters already decided by the tribunal, such as whether the tribunal has jurisdiction over the dispute. Indeed, under Article 41 of the ICSID Convention, Contracting Parties have already assigned to the tribunal authority to determine its own jurisdiction, which is final and binding, subject only to remedies within the

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[34] *See* 28 U.S.C. §§ 1609, 1610 regarding immunity from attachment and execution and exceptions therefrom.

[35] ICSID Convention, *supra* n.1, art. 53(1).

[36] *Id.*

[37] ICSID Convention, *supra* n.1, art. 54(1).

Convention. The ICSID Convention thus avoids any impediments to enforcement found in treaties or domestic laws applicable to the enforcement of foreign judgments or awards.[38]

62. A number of courts have therefore recognized that Contracting Parties waive their immunity to enforcement of ICSID awards against them under the Convention.

63. In one of the first cases on this issue, *Benvenuti & Bonfant v. The People's Republic of the Congo*, the French appellate court upheld its jurisdiction for purposes of recognition and enforcement under Article 54 of the ICSID Convention.[39]

64. In 1986, the Southern District of New York came to a similar conclusion in *LETCO v. Liberia*, holding that "Liberia, as a signatory to the [ICSID] Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention."[40] Although the dispute was between a French entity and Liberia, the court further determined that, "Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award."[41] More recent U.S. cases have come to the same conclusion. In *Blue Ridge Investments., LLC v. Republic of Argentina*, for example, the Second Circuit noted that "Argentina waived its sovereign immunity by becoming a party to the ICSID Convention."[42]

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38 Christoph Schreuer et al., THE ICSID CONVENTION, A COMMENTARY 1117-18 (2d ed. 2009) (Ex. 15 hereto).

39 *Benvenuti & Bonfant v. The People's Republic of the Congo,* Cour D'appel de Paris (1e Ch. Suppl.) (Jun. 26, 1981) (Ex. 16 hereto).

40 *Liberian E. Timber Corp. v. Liberia*, 650 F. Supp. 73, 76 (SDNY 1986).

41 *Id*. at 76-77.

42 *Blue Ridge Invs., L.L.C. v. Republic of Argentina,* 735 F.3d 72, 84 (2d. Cir. 2013).

65. Similarly, the UK Court of Appeal, in the *Micula v. Romania* case, held that enforcement of an ICSID award is intended to be automatic, highlighting "the importance of ease of enforcement of ICSID awards under the Convention and the significance of the exclusion of any public policy exception."[43] The Court further noted that "[e]nforcement cannot be resisted on the basis that the award was wrongly decided or improperly obtained. It must be taken as it stands."[44]

66. The UK Supreme Court, tasked with considering the relationship between EU law and the ICSID Convention, held decisively that the UK was bound by its ICSID Convention obligations:

> The first step in the analysis should be to ask whether the United Kingdom has relevant obligations arising from the ICSID Convention which, by operation of article 351 TFEU, preclude the application of the [EU] Treaties. … In any event, the proper interpretation of the Convention is given by principles of international law applicable to all Contracting States and it cannot be affected by EU law.[45]

67. The U.K. Supreme Court's statement makes clear that recognition and enforcement process should be automatic; arguments based on the ECT and its relationship to EU law are not properly the subject of consideration by an enforcing court.[46] Thus, regardless of what happens internally within the EU, the United States has an obligation to enforce an ICSID award presented to it.

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[43] *Viorel Micula v. Romania and European Commission*, [2018] EWCA Civ 1801, (Jul. 27, 2018), ¶ 148, https://tiny.cc/q2pirz.

[44] *Id*.

[45] *Micula v. Romania*, [2020] UKSC 5 (Feb. 19, 2020), ¶ 87, https://bit.ly/2LYde2c

[46] The European Commission has launched an infringement procedure against the UK on the grounds that the UK Supreme Court failed to honor the primacy of EU law by enforcing the UK's obligations under the ICSID Convention. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_802.

68. These outcomes are altogether consistent with the purpose of the ICSID Convention to create a stable foreign investment environment in which the prevailing party may enforce their judgment not only in the Respondent State, which may be inclined to frustrate enforcement efforts for political or other reasons, but in any other ICSID Contracting Party. This carefully designed regime would be frustrated by the ability of a State to claim jurisdictional immunity before the courts of other ICSID Convention Member States. In this case, for example, were Spain allowed to invoke sovereign immunity, it could effectively prevent the United States from honoring its obligation to recognize and enforce the award rendered in this case, thereby rendering nugatory the ICSID Convention's recognition and enforcement provisions.[47]

69. Spain argues that international comity considerations compel this Court to abstain from adjudication of this dispute because the United States has no interest in the dispute. That argument ignores the United States' obligations under the ICSID Convention. By signing the ICSID Convention, the United States promised the other ICSID Member States that it would honor its obligations under that agreement. The United States, and every one of the other ICSID Member States, have a connection to the dispute when they are asked to honor their obligations under the ICSID Convention, as is the case here.

70. So long as both the State hosting the investment and the investors' home State are party to the ICSID Convention, ICSID Convention arbitration is one of the choices of which investors can avail themselves when submitting a claim under the ECT. Luxembourg, Sweden,

[47] On recent cases involving enforcement of ICSID awards, *see* Andrea K. Bjorklund, Lukas Vanhonnaeker, and Jean-Michel Marcoux, *State Immunity as a Defense to Resist the Enforcement of ICSID Awards*, 35 ICSID REVIEW 1, 13 (2021) ("If States could always argue that this particular tribunal lacked jurisdiction, whether because of an incompatibility with EU law or for some other reason, they could effectively mount a challenge to any ICSID Convention award."), https://academic-oup-com.eres.qnl.qa/icsidreview/article/35/3/506/6304980.

and Spain are each contracting Parties to the ICSID Convention; Petitioners here made that choice and won the Award against Spain. The United States is obligated under the terms of the ICSID Convention to enforce that Award.

71. Spain's reference to Article 55 as evidence that the ICSID Convention expressly preserves sovereign immunity fails to appreciate the difference between jurisdictional immunity and execution immunity. Article 55 provides "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." This language does preserve a State's immunity from execution. But Article 54, not Article 55, deals with recognition and enforcement, and the obligation of an ICSID Convention Member State to submit to the jurisdiction of other ICSID member-State courts for recognition and enforcement purposes. Indeed, Article 55's reference to a State's continued immunity from execution can usefully be contrasted with the text of Article 54, which contains no reference to the maintenance of immunity with respect to recognition and enforcement.

72. Though it gives the State the opportunity to assert an immunity claim to resist execution of the award as against particular assets and thereby to preserve the inviolability of key sovereign assets such as consular funds, Article 55 has no bearing on the Award's status. States have a compliance obligation under Article 53 regardless of an investor's ability to execute on the judgment.

73. As the United States itself has recognized, "The procedural requirements outlined in Article 54—including enforcement of an award 'as if it were a final judgment of a court in that State' and execution as 'governed by the laws concerning the execution of judgments in force in

the State'—certainly do not allow a losing State to avoid its obligation under Article 53 to satisfy an ICSID award in full."[48]

74. In sum, an award rendered by an ICSID Convention tribunal is binding and must be recognized and enforced by all States party to the ICSID Convention as if it were a final judgment of a court of the enforcing State. Unlike an award enforceable under the New York Convention, there are no defenses to enforcement that a judgment debtor may raise. The recognition and enforcement process should thus be virtually automatic; arguments based on the ECT and its relationship to EU law are not properly the subject of consideration by an enforcing court.

## V. The Public International Law View of the Intersection of Investment Arbitration under the ECT and EU Law

75. The ECT requires its Member States to provide certain protections to investments of investors of other Member States and offers arbitration under the ICSID Convention as a remedy should the State have allegedly violated those protections.

76. Over 120 investment arbitrations have now been brought under the ECT. More than half of those arbitrations have been intra-EU—i.e., cases in which the home State of the investor and the host State were both Member States of the EU.

77. The decision of the CJEU in *Achmea v. Slovak Republic*[49] determined that investment arbitration in the Netherlands-Slovak Republic BIT was incompatible with the

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[48] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, U.S. Department of State Letter 2 (May 1, 2008) (Ex. 17 hereto).

[49] *Slowakische Republic (Slovak Republic) v. Achmea BV*, Case No. C-284/16, ECLI:EU:C:2018:158 (Mar. 6, 2018), ECF No. 12-9.

European legal order. *Komstroy v. Moldova*[50] extended that incompatibility to ECT arbitrations between EU member states, notwithstanding the EU's and Spain's clear obligations under the ECT itself. Spain and the European Commission argue that these decisions negate the validity of the multiple awards rendered against Spain, including the one in this case. They argue that no investor from a European Union member state has ever been able to initiate an arbitration under the ECT against an EU member state due to limitations ostensibly imposed on them by EU law.[51]

78. These arguments ignore the terms of the ECT, an international treaty adhered to by Spain and the European Union, and under which they undertook clear obligations. They dismiss the obligation undertaken by the EU and its member states under this multilateral treaty. They also misapprehend the relationship between the ECT and the EU treaties as dictated by principles of public international law.

### A. The *Achmea* and *Komstroy* Decisions

79. The starting point of the discussion must be the CJEU decisions themselves, starting with *Achmea*. The CJEU's involvement arose when the Slovak Republic asked the Federal Court of Justice in Germany (Germany was the place of arbitration) to set aside an award rendered in favor of the claimant, *Achmea*, by an arbitral tribunal convened under the Netherlands-Slovak

[50] *Republic of Moldova v. Komstroy*, Case No. C-741/19, Judgment of the Court (September 2, 2021), ECF No. 12-10.

[51] In *European Commission v. European Food SA,* ECLI:EU: C:2022:50 (Judgment of the Court, Jan. 25, 2022), ECF No. 12-69, the CJEU held that once Romania acceded to the European Union its consent to arbitrate disputes under the Romania – Sweden BIT lacked any legal force but was instead replaced by the system of remedies provided for in the TFEU and TEU treaties. While consistent with the *Achmea* decision, this argument also fails as a matter of international law for the reasons described below.

Republic BIT. The Slovak Republic argued that the arbitration clause in the BIT was void due to its incompatibility with Articles 267 and 344 of the TFEU.[52]

80. Article 344 of the TFEU prohibits EU Member States from referring disputes concerning the interpretation or application of the EU treaties to any method of dispute settlement aside from those methods found in the treaties. Article 267 of the TFEU outlines the preliminary reference procedure whereby courts and tribunals of Member States can refer questions of interpretation of EU law to the CJEU. Arbitral tribunals that are not considered courts and tribunals of the Member States are not able to seek preliminary rulings from the CJEU.[53]

81. The CJEU found that the arbitration clause in the BIT was incompatible with the European legal order because arbitral tribunals convened under the treaty could potentially interpret and apply EU law, in violation of the principle of autonomy of the EU legal order and the obligation in Article 344 of the TFEU. Additionally, because the arbitral tribunal was not a court or tribunal of a Member State, it was not authorized to refer questions to the CJEU under Article 267 of the TFEU. The CJEU thus had no way to control any interpretation or application of EU law in which the BIT tribunal might engage.

82. The CJEU did not, in fact, rule out the possibility that the EU could sign a treaty and agree to refer matters regarding compliance with that treaty to independent dispute settlement.[54] Notwithstanding recognition of the EU's need to have this capacity, in *Komstroy* the

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[52] Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2008 O.J. C 326/47 ("TFEU"), ECF No. 12-6.

[53] *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97, ¶ 40 (June 1, 1999) ("EcoSwiss"), https://tiny.cc/9aqirz.

[54] *Achmea, supra* n.49, ¶ 57.

CJEU extended the conclusions it had reached in *Achmea* to intra-EU disputes brought under the Energy Charter Treaty.[55]

**B. Intra-EU Disputes are Arbitrable under the Plain Terms of the ECT**

83. Contrary to the arguments advanced by Spain, the European Commission, and Professor Hindelang, neither the *Achmea* and *Komstroy* decisions nor the EU treaties render it impossible for an investor from an EU Member State to submit a claim against Spain under the ECT for the following reasons:

(a) The plain language of the ECT permits investors from one Contracting Party (such as Luxembourg or Sweden) to submit arbitral claims against another Contracting Party (such as Spain);

(b) There is no disconnection clause, or other treaty provision, limiting the Applicability of Article 26, and its offer to arbitrate disputes, in the case of intra-EU claims;

(c) There is no evidence that any of the contracting parties to the ECT (whether EU member states or not) understood Article 26 to contain implicit limitations at the time the ECT was drafted;

(d) The ECT is a multilateral instrument reflecting the interests of *all* ECT States parties;

(e) ECT Contracting Parties have not entered into subsequent agreements to change the interpretation of or modify the ECT to preclude intra-EU arbitration.

***The Plain Language of the ECT Authorizes Intra-EU Arbitration***

84. The ECT clearly provides for arbitration between "a Contracting Party" and "an investor of another Contracting Party." In Article 1(7)(a)(ii), it defines an investor as "a company . . . organized in accordance with the law applicable in that Contracting Party."

85. Here, there is no question that Spain is a Contracting Party to the ECT. Hydro Energy 1 S.À.R.L. is organized in accordance with the laws of Luxembourg, also a Contracting

[55] *Komstroy*, *supra* n.50, ¶ 66.

Party to the ECT, and Hyrdoxana Sweden AB is organized in accordance with the laws of Sweden, also an ECT Contracting Party.

86. Article 26 of the ECT authorizes an investor of a Contracting Party to submit a dispute against another Contracting Party to a number of dispute resolution forums, including ICSID arbitration.

87. Thus, the straightforward interpretation of this language is that Petitioners have standing to submit a claim against Spain under the ECT to ICSID arbitration.

***There is No Provision in the ECT Precluding Intra-EU Arbitration***

88. Nothing in the ECT suggests that a special regime exists as between the EU Member States who are also Party to the ECT. For example, there is no "disconnection clause" in the Treaty that makes the Treaty, or dispute settlement under it, inapplicable to intra-EU disputes.

89. The Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT") sets out the canons of treaty interpretation for international treaties.[56] In addition to being a treaty adhered to by 116 States, it is regarded as customary international law and thus is utilized to interpret treaties entered into by States who have not ratified it.[57]

90. The Vienna Convention provides that treaties be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in

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[56] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1115 U.N.T.S. 331 ("VCLT" or "Vienna Convention"), Ex. 18.

[57] The United States has called it "a primary source of reference for determining what are the customary principles of treaty law." Written Statement of the Government of the United States of America, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1970 I.C.J. Pleadings 843, 855 (Nov. 12, 1970) (Ex. 19 hereto).

the light of its object and purpose."[58] The context of the treaty comprises the entire treaty and its annexes.[59]

91. Here, the ordinary meaning of the ECT's provisions on investment protection is that investors from one Contracting Party can submit claims against other Contracting Parties for violations of the Treaty. According to the Preamble, the object and purpose of the treaty were, *inter alia*, "to catalyse economic growth by means of measures to liberalize investment and trade in energy." Encouraging investment by promising protections to those investments and assuring investors of the ability to vindicate those rights in arbitration are means of fulfilling the goals of the treaty. The ultimate goal of the ECT was and is to create and maintain a stable and efficient energy market that would facilitate long-term cooperation in the energy field, which would "not take place without a massive transfer of capital and technology, particularly to the States with significant energy resources but insufficient means to develop them."[60]

92. Nothing in the context of the ECT suggests a different conclusion. The ECT contains no "disconnection" clause applicable to Article 26 and its provisions regarding investors' ability to submit their claims to arbitration under the ICSID Convention. A disconnection clause serves the purpose of "ensuring the primacy of Union law obligations in relations between the Member States themselves and to render this more transparent to other parties."[61] By contrast, the ECT does contain a disconnection clause applicable to Article 16, which gives investors the ability

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[58] VCLT, *supra* n.56, art. 31(1).

[59] *Id.*, art. 31(2).

[60] Salacuse, *supra* n.18 at 328.

[61] M. Cremona, DISCONNECTION CLAUSES IN EU LAW AND PRACTICE, MIXED AGREEMENTS RE-VISITED – THE EU AND ITS MEMBER STATES IN THE WORLD (C. Hillion and P. Koutrakos eds., 2010) 160 (Ex. 20 hereto).

to elect protections under the ECT if they conflict with provisions relating to the same subject matter but that are less favorable to them. That disconnection clause ensures that Article 16 does not operate vis-à-vis the Svalbard Treaty.[62] Yet, the ECT does not contain a disconnection clause applicable to Article 26. As observed by the tribunal in *PV Investors v. Spain*:

> It would seem striking that the Contracting Parties made an express exception for the Svalbard Treaty, which concerns an archipelago in the Arctic, but somehow omitted to specify that the ECT's dispute settlement system did not apply in all of the EU member states' relations. Compared to the Svalbard Treaty exception, an exception with regard to the intra-EU relations would be of much greater significance. It would be extraordinary than an essential component of the Treaty, such as investor-state arbitration, would not apply among a significant number of Contracting Parties without the Treaty drafters addressing this exception.[63]

93. The ECT also includes a limitation in Article 25, which provides that parties to an economic integration agreement are not obliged by the most-favored-nation clause in the ECT to extend the privileges of the economic integration agreement to ECT Contracting Parties. These examples are part of the context that informs the proper interpretation of Article 26; it demonstrates that the Parties to the ECT were capable of including a disconnection clause when they wanted to preclude the application of a particular article due to potential incompatibility with other commitments. Yet there is simply no such disconnection clause applicable to Article 26.

94. Normally, the VCLT does not permit recourse to negotiating history unless interpretation under Article 31 is ambiguous or unclear, which is not the case here. If such recourse

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[62] Final Act of the European Energy Charter Conference, Annex 2 (Ex. 21 hereto); *see also Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (Aug. 31, 2018) ("*Vattenfall*") ¶ 204 n.123, https://tiny.cc/xjqirz; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.À.R.L. v. Kindgom of Spain*, ICSID, Case No. ARB/13/36, Award, ¶ 187 & n.187 (May 4, 2017), https://tiny.cc/pkqirz; *Antin Infrastructure Services Luxembourg S.À.R.L. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), ¶¶ 215-216, https://tiny.cc/flqirz.

[63] *PV Investors v. Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (Oct. 13, 2014), ¶ 183 (Ex. 22 hereto).

were necessary, however, the negotiating history of the ECT reveals that the EU proposed to add a disconnection clause with respect to the EU treaties, but the clause was not included in the final treaty.[64]

95. The Vienna Convention requires that treaties be interpreted in good faith; a corollary principle is that treaty negotiators act in good faith. Professor Hindelang's and Spain's assertions, however, would require the conclusion that Spain and other EU Member States violated this principle.

96. In his declaration, Professor Hindelang states that the *Achmea* decision has retroactive effect, and sets "the content and meaning of a given rule *ab initio*."[65]

97. What is now Article 344 of the TFEU was previously Article 292 of the Treaty Establishing the European Community of 1992, and was Article 219 of the Treaty of Rome. The same can be said of Article 267, which was Article 234 of the TEC and Article 177 of the Treaty of Rome.[66] These provisions were thus extant at the time the ECT was negotiated and ratified.

98. Thus, according to Professor Hindelang and Spain, none of the EU Member States, nor the EU itself, has ever been, consistent with EU law, able to comply with Article 26 and agree to submit disputes to arbitration under Part V of the treaty for intra-EU disputes. Yet they did in

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[64] Draft Treaty, Basic Agreement for the European Energy Charter, at 84 (Aug. 12, 1992), https://tiny.cc/3evirz.

[65] Hindelang Decl. ¶ 60, ECF No. 12-2.

[66] Articles 267 and 344 of the TFEU were originally Articles 177 and 219 of the 1956 Treaty establishing the European Economic Community (the "Rome treaty" or "EEC"). *See* Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (Ex. 23 hereto). The 1992 Treaty on the European Union, usually called the "Maastricht Treaty" or the "TEU," renamed the Rome Treaty the Treaty Establishing the European Community ("TEC"), and renumbered Articles 177 and 219 of the Rome Treaty as Articles 234 and 292. *See* Treaty on European Union (Consolidated version 2016), June 7, 2016, 2016 O.J. (C 202), https://tiny.cc/z3tirz. *See generally Vattenfall*, *supra* n.62, ¶¶ 205-06 & n.124.

fact agree to do so. Ratifying a treaty with which a country cannot comply violates the principle of good faith found in VCLT Article 26.[67] Thus, under settled treaty interpretation principles under international law, the ECT and TFEU must be read in a manner that do not render "void *ab initio*", as Professor Hindelang claims, the content and meaning of the ECT. There is no evidence that any of the contracting parties to the ECT (whether EU member states or not) understood Article 26 to contain implicit limitations at the time the ECT was drafted.

99. Whatever view the Commission, Spain, and Professor Hindelang may take today about the validity of intra-EU arbitration under the ECT, no one questioned at the time the ECT was concluded that EU members could bind themselves to arbitration regarding intra-EU disputes. The ECT negotiations took place in the 1990s. It was not clear in the 1990s that intra-EU investment arbitration was impermissible, whether it occurred under the auspices of the ECT or under BITs. Instead, it was not until the 2000s that scholars began to question the availability of intra-EU investment arbitration. Anticipating many of the arguments that would subsequently be made by the Commission and by certain Member States, they nonetheless concluded that intra-EU investment arbitration, including arbitration under the ECT, was possible. "In conclusion, the legal character of the ECT as a mixed agreement under EC law does not influence the comprehensive legally-binding effect of the treaty in view of the EC and its Member States from the perspective of public international law. Similarly, the ECT's legally-binding effect as public international law extends to the *inter se* relationship of the EU Member States."[68]

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[67] VCLT, *supra* n.56, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[68] Christian Tietje, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, Inst. of Econ. Law 8-9 (Sept. 2008), http://tiny.cc/5d8btz. Further, Tietje notes, "Consequently, from a public international law perspective, an *inter se* modification of the ECT by EC law is not possible. This is particularly the case if such a

100. Notable as well is that well into the 2000s, some EU Member States remained of the opinion that their EU obligations did not preclude investment treaty obligations. In 2010, for example, the Netherlands took the position that:

> "the BIT in question in this dispute [The Netherlands – Slovak Republic BIT] continues to be fully in force. Consequently, there is also no reason to doubt the jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal."[69]

101. Thus, even in 2010, EU Member States themselves were not uniformly of the opinion that intra-EU investment arbitration, whether under a BIT or under the ECT, was impermissible as a matter of EU law. Some 15 years earlier third states negotiating the ECT could not have been expected to understand that the obligations they were undertaking were not in fact being undertaken as between the EU member states themselves absent a disconnection clause making that point clear.[70]

102. Indeed, through its actions, the European Commission has acknowledged that intra-EU investment agreements remained binding notwithstanding the accession of formerly non-EU countries to EU membership.[71] In 2015, the European Commission asked EU Member States

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modification would have a negative impact on the substantive and procedural legal rights of investors." *Id.* at 13; *see also* Markus Burgstaller, *European Union Law and Investment Treaties*, 26 J. Int'l Arb. 181, 211 (2009) (Ex. 24 hereto) ("The conclusion that EU nationals may bring claims under the ECT against other Member States is reinforced by the notion that *inter se* agreements are generally considered to be precluded once the respective treaty has an individual rights dimension.").

69 *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction (Oct. 26, 2010), ¶ 161, http://tiny.cc/kbh8tz.

70 Tietje, *The Applicability of the ECT*, *supra* n.68, at 11.

71 It is also notable that the EU did not take any kind of steps to seek modification of Article 26 in 2004, when a number of eastern European states acceded to the European Union. Had that

to abrogate their intra-EU BITs.[72] When most failed to do so, the Commission launched infringement proceedings against several of those States.[73] Infringement proceedings against EU Member States for their failure to terminate their intra-EU BITs would not be necessary were the treaties themselves negated simply by their incompatibility with EU law. No similar infringement proceedings have been brought regarding the ECT.

103. Article 26(1) refers to "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." The European Commission would ignore the plain meaning of this provision and the facts of conclusion of the ECT. The EU Member States (aside from Italy, which withdrew in 2016) are all "Contracting Parties" to the ECT in their own right. The European Commission suggests that because, as a Regional Economic Integration Organisation ("REIO"), it can make binding decisions for its Member States, the EU Member States should be treated as a unit for all ECT purposes; thus, a reference to the "Area" of "another" contracting party would not refer to an area within the EU. Yet this provision merely defines a REIO, and in no way implies that where the EU can bind its members, they cease being Contracting Parties in their own right.

104. The European Commission also suggests that by entering the ECT together, the EU and its Member States acted as a single entity of public international law, "bound by treaty obligations to other contracting parties but not as between themselves." ECF No. 25-1 ("EC Br.")

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act changed those states' obligations under the ECT one might have expected the EU to take steps to modify the jurisdictional clause in article 26. *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ICSID ARB/15/20 (Feb. 19, 2019) ("*Cube*"), ¶¶ 136-137, https://tiny.cc/suchrz.

[72] European Commission, Commission asks Member States to terminate their intra-EU bilateral investment treaties (18 June 2015), http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last visited Jan. 11, 2018).

[73] *Id.*

6-7. Yet this argument, again based solely on the definition of REIO, ignores the fact that, at the time of the signing of the ECT, the EU did not have competence over all matters covered by the ECT.[74] Neither the EU nor its Member States could have intended, or anticipated, that the EU eventually would have competence over foreign direct investment or dispute resolution matters. The former came about only with the Lisbon Treaty in 2008, and the latter is still a subject of mixed competence. Thus, the fact that the EU joined the ECT as an REIO did not mean that the EU functionally replaced the Member States for all matters.

105. Furthermore, even now the EU does not act as a bloc with respect to the ECT. For example, Italy has withdrawn from the ECT, but none of the other Member States have, nor has the EU itself. Article 26(3(b)(i) of the ECT permits ECT contracting states to refuse their consent to arbitration if the investor had previously submitted its claim to domestic courts. This is colloquially known as a "fork-in-the-road" requirement. The ECT contracting states who have refused their consent are listed in Annex 1D to Article 26; only 14 of the 27 EU Member States, and the EU itself, have elected this option, again demonstrating the failure of the EU to act as a single entity under the ECT.[75]

106. The Commission's arguments, made in 2022, ignore the historical context in which the ECT negotiations took place in the mid-1990s. It was understood by all Parties that the Commission lacked competence over all of the areas covered by the ECT. There was no expectation either of a change in competence as between the EU Member States and the European

[74] *See* ECF No. 17 (EC Br.) at 9 n.5: ("The ECT was signed by the EU as well as its Member States because at the time, the EU did not possess full, exclusive external competence over all matters to which the ECT applied.").

[75] The Member States that require investors to elect a fork in the road are Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Greece, Hungary, Ireland, Poland, Portugal, Romania, Slovenia, Spain, and Sweden.

Union or of a change in the obligations they undertook vis-à-vis third parties or vis-à-vis each other.

107. The understanding that the EU and its Member States will work together to implement "mixed agreements" to which they are all parties is indeed essential, especially given potential uncertainty about the boundaries of their respective competences. The European Commission was present as a negotiating party and was negotiating on its own behalf during the ECT negotiations. All of the EU Member States participated fully in the negotiations and did not always agree with the Commission.[76] Moreover, the talks were characterized by "constant rifts between France and the United States."[77] The European Commission was not, therefore, the sole mouthpiece of the Union during the negotiations.

108. To this day, the EU and its Member States have continuing separate obligations under the ECT due to their respective competences. Even after the entry into force of the Treaty of Lisbon, the EU still does not have full competence over dispute resolution with respect to foreign direct investment; the CJEU has held that dispute settlement in trade agreements is a matter of shared competence.[78] Only individual Member States have ever been respondents in ECT cases; the European Commission has never elected to have the Union serve as the Respondent.

109. There is no reason to think that the states negotiating the ECT, whether they were outside the EU (and of course many current EU Member States were not Member States at the

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[76] Julia Doré & Robert De Bauw, The Energy Charter Treaty 6 (1995) (Ex. 25 hereto) ("Some EU countries opposed to the Commission's proposals on the internal market for electricity and gas fought against an alleged clandestine introduction of third party access (TPA) to transportation networks.").

[77] *Id.* at 30.

[78] Opinion 2/15 of the Court (May 16, 2017), ¶¶ 285-93, https://tiny.cc/8crirz.

time of the negotiations) or inside it, expected that the ECT disciplines were not binding among all contracting Parties.[79] The European Commission quotes a book chapter written by Bleckmann for the proposition that when the EU and its Member States cooperate in the conclusion of mixed agreements, they act "as a unity vis-à-vis the third States";[80] yet on the very next page, Bleckmann writes: "[T]he principle of equality of all States of the international community leads to the conclusion that all mixed agreements must be interpreted in a way which attributes equal rights and duties to all parties to the Treaty."[81] Bleckmann, thus, confirms that even in mixed agreements all contracting states have equal status, including equal rights and duties.

110. It is indeed possible, depending on the type of treaty and the manner in which it is concluded, for a treaty to be constructed so as to be between the EU on the one hand and another state party (or parties) on the other. For example, the Comprehensive Economic and Trade Agreement Between Canada and the EU ("CETA") is drafted in such as a way as to make clear that Canada is one "Party" and the EU or its Member States are the other "Party" to the treaty; investors from one of the Parties can submit claims in arbitration against the other Party.

111. The ECT, on the other hand, explicitly defines each state as a "Contracting Party." Spain, Luxembourg, and Sweden are thus all discrete Contracting Parties under the ECT. Individual EU Member States thus were, and are still, essential actors in the ECT universe.

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[79] Writing in 1995, Doré and De Bauw note that "An unprecedented dispute settlement procedure then gives an investor or a government the possibility of arbitration if it feels its rights . . . have been disregarded. Again, this holds for Western investment in other countries of the West as much as for investment in the East, and dispute settlement provisions might have a notable impact on intra-Western practices." Ex. 25 at 67.

[80] EC Br. at 9 n.6.

[81] Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, in David O'Keeffe & Henry G. Schermers, Mixed Agreements 155, 159 (1983) (Ex. 26 hereto) (footnote omitted).

***The ECT Is A Multilateral Instrument Reflecting The Interests Of All ECT States Party***

112. The ECT is a multilateral instrument with 51 Contracting parties.[82] The EU's suggestion that EU Member States have no interests vis-à-vis each other is not a matter of indifference to the other Contracting Parties. The ECT imposes international law disciplines on the states that are party to it, not European law disciplines. This is important because of the manner in which differences in obligations might distort the treatment given to aspiring investors.

113. For example, the ECT requires host states to accord fair and equitable treatment to investors from Contracting Parties. The European Commission posits that EU investors can only receive recompense if paying them does not constitute unlawful "state aid" under EU Law. EU Brief pp. 24-25. The implication is that the standard might be interpreted differently in an extra-EU situation. Or to put it in a more straightforward manner, it is that an extra-EU investor could in fact submit a claim for a breach of fair and equitable treatment, as permitted by the ECT.

114. While on the surface this possibility might seem to confer a benefit on the non-EU investor as compared to the EU investor, and to preserve the rights of that investor, in practice that is not necessarily the case. The ECT was meant to ensure security of investments and uniformity of treatment of investors, regardless of their country of origin, in all of the Contracting Parties. Thus questions of national origin are not supposed to influence a host state that is deciding, for example, to which investors it should award preferential contracts for the exploitation of natural resources. Yet if that state owes international law obligations to some investors, and does not owe those obligations to other investors, the state might have an incentive to award the contract to the

[82] International Energy Charter, *Jordan Is the 51st Contracting Party to the ECT* (Dec. 12, 2018), https://energycharter.org/media/news/article/jordan-is-the-51st-contracting-party-to-the-ect/; International Energy Charter, *The Energy Charter Treaty* (Feb. 18, 2019), https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

investor to whom it *does not* owe any international law obligations, and to whom it does not need to answer in international arbitration.

115. To put it more plainly, using the facts of this case, Spain might well favour EU investors over non-EU investors in future similar situations if in fact the ECT provided no redress to EU investors but did provide redress to investors from non-EU Contracting Parties.

116. It is true that the national-treatment or most-favored-nation obligation might be pressed into service by a non-EU investor denied a contract, yet proving discrimination on the basis of nationality is difficult given the myriad considerations that dictate decisions such as the awarding of concession agreements.

117. Similar concerns are illustrated in disciplines on "performance requirements" that are found in some investment treaties and in the ECT. A performance requirement is usually an obligation not to require the use of local content in return for permission to invest. While most obligations in investment treaties apply only to investors from states party to the treaty, a state that agrees not to impose performance requirements on investors generally agrees not to do so for all investors, not just for investors from states party to the treaty.[83]

118. The reason for this is the concern that if a state could impose performance requirements on a non-covered investor, the state might prefer that investor over the investor from the state party to the treaty. Thus, agreeing to forego imposing performance requirements on all investors negates the advantage that non-protected investors might enjoy.

[83] *See, e.g.*, North American Free Trade Agreement ("NAFTA"), art. 1106(1), http://tiny.cc/wbh8tz ("No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory . . . .").

119. Thus, it is not the case that interpreting the ECT as imposing no intra-EU obligations would have no effect on non-EU Parties. It is clear that it can affect non-EU parties, and that the ECT negotiations would likely have been different had such a disparity in obligation been understood to exist.

***The Contracting Parties Have Not Modified the ECT to Preclude Intra-EU Arbitration***

120. Spain and the European Commission point to a statement by some EU Member States issued on January 15, 2019, where 22 Member States agreed to terminate intra-EU BITs and took the position that Article 26 of the ECT is incompatible with the EU treaties.[84] However, the EU Member States' statement, without more, has no legal effect under international law. It does not constitute subsequent agreement between parties regarding the interpretation of the Treaty and does not modify the Treaty even as between the EU Member States.

121. As a preliminary matter, the EU Member States did not adopt a unanimous position on the interpretation of ECT Article 26. Six EU Member States, including the home states of the Petitioners (Luxembourg and Sweden), made separate statements, five together, and one (Hungary) writing separately. While these six Member States agreed to attempt to terminate their intra-EU BITs, these countries correctly noted that the impact of *Achmea* was limited to BITs with arbitration clauses "such as the one described in the *Achmea* judgment."[85] Notably, these six countries refrained from declaring that EU law takes precedence over the international law obligations of the EU Member States. Additionally, the six Member States disagreed that the ECT was incompatible with EU law, noting that "it would be inappropriate, in the absence of a specific

[84]22 Member States' Decl. at 2, ECF No. 12-12.

[85]Declaration of the Representatives of the Government of the Member States (Jan. 16, 2019) ("Five Member States' Decl.") at 1, ECF No. 12-13.

judgment on this matter, to express views as regards the compatibility with [EU] law of the intra EU application of the [ECT]."[86]

122. Further, Hungary wrote: "The *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the ECT and it does not concern any pending or prospective arbitration proceedings initiated under the ECT."[87] While the issuance of *Komstroy* means that the CJEU has now issued a judgment specific to the ECT, these statements nonetheless demonstrate a lack of agreement about the effect of *Achmea* and *Komstroy* and still more disagreement about their scope of application.

123. The six EU Member States also declined to inform ECT investment arbitration tribunals about the legal consequences of the *Achmea* judgment as set out in the 22 Member States Declaration, or to direct their investors not to initiate arbitrations under the ECT.[88]

124. The disparity in views demonstrated by the three statements negates any suggestions that these statements could be viewed as a subsequent agreement between the parties regarding the interpretation of the ECT or the application of Article 26, pursuant to Vienna Convention Article 31(3)(a) or (b).[89] This is particularly so since Luxembourg and Sweden, the

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[86] *Id*. at 3.

[87] Declaration of the Representative of the Government of Hungary, (Jan. 16, 2019) ("Decl. of Hungary"), ¶ 8, ECF No. 12-14.

[88] *Compare* Decl. of Hungary, *supra* n.88, ¶¶ 1, 3 *and* Five Member States' Decl., *supra* n.85, ¶¶ 1, 3, *with* 22 Member States' Decl., *supra* n.84, ¶¶ 1, 3.

[89] VCLT, *supra* n.56, art. 31(3) provides that a treaty interpreter shall "take into account, together with the context:

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision; [and]
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"

home States of the Petitioners, held the view that the ECT was unaffected by the *Achmea* decision under EU law.

125. Additionally, of course, the ECT is in a different posture than intra-EU BITs, given that its membership includes non-EU Member States. Thus, there can be no question of a subsequent agreement between only some of the parties that would provide interpretive guidance on the ECT, which applies between all States that are party to it. As Professor Richard Gardiner has stated, "[t]he key issue is whether the interpretive instrument is one to which the parties have given their *concordant* blessing."[90] The World Trade Organization ("WTO") Appellate Body has similarly held:

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.[91]

The ECT is not a "bilateralizable" treaty. It is a multilateral treaty which, by its plain terms, cannot be modified *inter se* absent adherence to strict provisions.

126. Moreover, as a matter of international law, the declaration by some EU Member States does not modify the ECT. VCLT Article 41 (Agreements to Modify Multilateral Treaties Between Certain of the Parties Only) first asks whether the treaty (the ECT, in this case) provides for the possibility of such a modification. In this case, the ECT has a specific article that addresses amendments, including modifications that would apply only as between some Member States. Article 42 of the ECT provides that the text of proposed amendments must first be adopted by the

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[90] RICHARD GARDINER, TREATY INTERPRETATION 231 (OUP, 2d edition 2016) (emphasis added) (Ex. 27 hereto).

[91] Appellate Body Report, EC – Computer Equipment, ¶ 84, WTO Doc., WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R (adopted Jun. 5, 1998), (emphasis in original), https://tiny.cc/tk9jrz.

Charter Conference, and that they thereafter be distributed to all Contracting Parties for ratification, acceptance, or approval. Amendments enter into force between Contracting Parties that have ratified, accepted, or approved them on the 90th day after instruments showing ratification, acceptance, or approval by at least *three-quarters* of the Contracting Parties have been submitted to the Depository.

127. Thus, any implicit understanding by the EU Member States and the EU itself that some provisions of the ECT, including the ability to submit claims to arbitration, did not or do not apply as between themselves would be simply ineffective to change the Treaty. Moreover, parties to a treaty cannot amend the treaty only as between themselves without complying with the amendment process specified in the treaty.

128. Even assuming *arguendo* that Article 42 of the ECT could be read to permit *inter-se* modification (*i.e.* only between EU Member States), the parties in question must "notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[92] This has never been done. Moreover, while agreements concluded by all of the parties to a treaty in connection with the conclusion of a treaty can be considered in the interpretation of a treaty, as can instruments made by one party in connection with the conclusion of a treaty and accepted by all of the other parties to a treaty as an instrument related to the treaty, no such collective agreements have been entered into by all ECT Member States.[93]

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[92] VCLT, *supra* n.56, art. 41. This provision also requires that the modification not be incompatible with execution and purpose of the treaty as a whole; arguably such a modification would be incompatible with the execution and purpose of the Energy Charter Treaty given that "Article 16 ECT prevents the EU Treaties from being construed so as to derogate from the more favourable rights of the Investor in Parts III and V of the ECT, including the right to dispute resolution." *Vattenfall*, *supra* n.62, ¶ 221.

[93] VCLT, *supra* n.56, art. 31(2)(b), 3(a).

129. As the Permanent Court of International Justice ("PCIJ") said in the *Eastern Greenland* case, "[w]hat the Court cannot regard as being in accordance with the undertaking of July 2nd, 1919 is the endeavour to replace an unconditional and definitive undertaking by one which was subject to reservations."[94] Article 26 of the ECT, and indeed the entire ECT itself, is an unconditional undertaking.

130. Accordingly, without the agreement of all the Parties to the ECT, the declarations do not constitute binding subsequent interpretations of or modifications of the ECT so as to prohibit intra-EU arbitration under the Treaty.

131. Moreover, the EU Member States' actions acknowledge that the declarations, by themselves, lacked legal force. As noted above, the EU Member States in the January 2019 declaration agreed to terminate intra-EU BITs, and on May 5, 2020, twenty-three EU Member States entered into a treaty to do so.[95] Notably Sweden did not sign the termination treaty. That agreement is still subject to ratification, approval or acceptance, and thus has not yet entered into force. Termination of the intra-EU BITs would not be necessary were those treaties simply inoperable by virtue of the declarations. Termination would not be necessary if the CJEU decisions in *Achmea*, *European Commission v. European Foods SA*, and *Komstroy*, without more, sufficed to render any treaty void *ab initio*.

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94 *Denmark v. Norway*, PCIJ General List No. 43, Judgments No. 20, ¶ 200 (Sep. 5, 1933), http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm.

95 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (May 5, 2020), https://tiny.cc/w8qirz.

### C. The EU Treaties Do Not Displace the ECT under International Law

132. The ECT is compatible with the EU treaties as a matter of international law. As demonstrated above, it is entirely possible for them to co-exist and for the Parties to each treaty to fulfill their obligations under them. To the extent they are regarded as being in conflict, under the terms of the Energy Charter itself, and the relevant rules of international law, the ECT prevails.

133. It is not uncommon that States will be parties to multiple treaties and that the relationship between the treaties, and the obligations contained therein, can be complex. As noted above, public international law, and the Vienna Convention in particular, have rules governing the interaction between treaties.[96]

134. Vienna Convention Article 30(2) provides that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. The converse is also true.

135. Thus, one must look to the treaties themselves to ascertain whether the parties have given any indication as to their views of the hierarchy among treaty obligations. Frequently parties have not done this, but in this particular case, the ECT has a very explicit clause asserting its supremacy when the same subject matter is at issue. In the case of conflict, Article 16 provides that:

> When 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 this Treaty
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
>
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution

[96] *See supra* ¶ 89.

> with respect thereto under this Treaty, *where any such provision is more favourable to the Investor or Investment.*

136. This is a clear statement of both retrospective and prospective supremacy of the ECT to the extent it is more favorable to the investor or the investment.

137. Article 16 is only applicable insofar as there is a conflict between the subject matter of Part III (obligations) and Part V (investor-State dispute settlement).

138. All of the relevant countries were parties to the EU at the time they signed the ECT. They did not take reservations as to Article 16. Indeed, Article 46 of the ECT, in fact, prohibits the taking of reservations, suggesting that the Contracting Parties viewed the terms of the Treaty as essential to ensure its full and desired implementation. Article 16 is thus applicable in the event of a conflict between the ECT and the EU treaties.

139. Nor, as noted above, did ECT Parties include a "disconnection" clause providing that Article 16 not apply as between EU Member States.[97] There is no basis to support the idea that the Parties signed on to the ECT knowing that many of its key provisions were inapplicable between more than a dozen of the treaty parties, but they did not amend the treaty to indicate this significant limitation in its reach.[98] In a multilateral treaty, in the absence of a disconnection clause,

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[97] *See supra* ¶ 92.

[98] The Commission refers to *Commission v. Ireland*, colloquially known as *Mox Plant*, to show that the ECJ held that an inter-state arbitration provision found in the U.N. Convention on the Law of the Sea ("UNCLOS") could not be applied in the intra-EU context. EC Br. 22; *see also* Case C-459/03, *Commission v. Ireland* ("*Mox Plant*"), ECLI:EU:C:2006:345, Judgment (May 30, 2006), http://tiny.cc/5ch8tz. In fact, however, dispute settlement under UNCLOS is remarkably different from dispute settlement under the ECT. Unlike Article 26 of the ECT, in which States bind themselves to arbitrating disputes under the treaty, Article 280 of UNCLOS says that States Party to the treaty retain the right "to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."

"a corresponding treaty has supremacy of application over Union law. That is not a particularity, but it is imperative for international law."[99]

140. Article 16 is thus applicable in the event of a conflict between the Energy Charter Treaties and the EU treaties. As the tribunal in *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain* stated, "in case of any contradiction between the ECT and EU law, the Tribunal would have to ensure the full application of its '*constitutional*' instrument, upon which its jurisdiction is founded. . . . [I]f there must be a '*hierarchy*' between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore, the ECT prevails over any other norm (apart from those of *[j]us cogens* – but this is not an issue in the present case)."[100]

141. Even without Article 16's clear directive, the principle of *lex posterior* still requires that the ECT be given precedence.

142. *Lex posterior* is the principle that the later-in-time treaty covering the same subject matter controls.[101] Under this principle, the ECT prevails over conflicting provisions of EU law. The ECT was adopted in 1998, after the predecessor provisions to Articles 267 and 344 of the TFEU were originally enacted as Articles 177 and 219 of the Treaty of Rome.[102] Thus, as the

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[99] Christian Tietje, *Bilateral Investment Treaties Between EU Member States (Intra-EU BITs) – Challenges in the Multilevel System of Law*, 10:2 Transnational Dispute Management 1, 10 (March 2013) (Ex. 28 hereto).

[100] *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (June 6, 2016), ¶ 75, ECF No. 1-1.

[101] VCLT, *supra* n.56, art. 30(3) ("the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty").

[102] *See supra*, ¶ 97 and n.66.

later-in-time treaty, the ECT would control over those provisions of the TFEU to the extent they address the same subject matter.

143. Ultimately, however, *lex posterior* cannot be used to replace Article 16's clear directives due to another principle of international law—that of *lex specialis*—the proposition that the more specific rule overrides the general one. In this case, the ECT is unquestionably more specific regarding the relationship between it and competing agreements than are the far more general provisions of the TFEU. A general principle of incompatibility with EU law cannot displace this specific provision that was agreed to by the EU itself and the EU Member States. Accordingly, even if Articles 267 and 344 of the TFEU were considered later enactments, Article 16 of the ECT would still control.

144. Thus, even if there is a conflict between the ECT and the EU treaties, the former's provisions authorizing intra-EU arbitration prevail under settled interpretation principles of international law.

145. In addition, the ECT does not permit an arbitral tribunal to *apply* EU law, and instead calls for arbitration under generally applicable principles of international law, with the law applied to be the obligations found in the ECT itself. The ECT confers specific authority on tribunals to hear "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III" – if the dispute cannot be settled amicably. Part III of the ECT contains the obligations undertaken by Contracting States to other States and to their investments. A tribunal convened under the ECT can only hear claims of an alleged breach of an obligation under the Treaty. Those provisions limit the authority of the tribunal. Thus, the tribunal can decide if there is a violation of the national treatment standard, or of the fair and

equitable treatment standard, or the other provisions laid out in Part III. These specific treaty obligations are the only issues to be determined by the tribunal. In short, these provisions are the law applicable to the merits of the dispute—the rules of decision in an ECT case. An ECT tribunal thus does not have the authority to "apply" EU law to the merits of the dispute. This conclusion is supported by the plain text of Article 26(6) of the ECT, which directs tribunals to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

**E. Primacy of International Law**

146. Autonomy of EU law is a principle of EU law, not of public international law. Neither the EU nor its Member States are permitted to derogate from public international law on the basis of the "autonomy" of the EU legal order. There is additionally no rule in public international law that EU law is "superior [in] rank" to other public international law applicable between the EU Member States.[103]

147. The fact that the EU is constituted by a set of interlocking treaties does not mean that EU law is inevitably superior to, or displaces, any other international law. The fact that EU treaties are international legal instruments does not change the fact that the principles of primacy and autonomy are principles of EU law, not international law. These two principles have been used to constitutionalize EU law.[104] Because the EU is comprised of a federation of different nation states with independent sovereignty, they do not have a domestic constitution uniting the 27 Member States as a matter of domestic law.

148. But the mere fact that the legal relationship between the EU Member States is effectuated by international treaties does not make those treaties superior to other international

[103] Hindelang Decl., *supra* n.65, ¶ 35.

[104] Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, ILC, A/CN.4/L.682 (Apr. 13, 2006), ¶ 218, https://tiny.cc/h0rirz.

agreements as a matter of international law. In effect, the principle of the primacy of EU law operates as a Supremacy Clause. Within the EU legal order, the EU and its Member States can determine how much effect they want to give EU law, including ensuring that it prevails over any other obligation. This decision does not, however, negate their obligations on the international plane.

149. On the contrary, the very principles that make international law binding, and that make the EU treaties binding, lead to a different conclusion. EU law cannot be part of international law yet also act in a manner that is completely self-contained and divorced from any other principle of international law. EU law is indeed often viewed as a subset of international law. It is not on that basis superior to other international law regimes.

150. Professor Hindelang points to three cases decided by the Court of Justice of the European Union where the Court concluded that the EU could not become a party to an international convention (the draft European Free Trade Association, the proposed European and Community Patent Court, and the European Court of Human Rights), due to the incompatibility of those Conventions and their associated dispute settlement mechanisms with the principle of primacy of EU law. Hindelang Decl. ¶¶ 70-72. Yet those cases all differ from this one in one key respect: the decisions in those cases came *before* the EU had ratified the agreement in question, not more than twenty years later. Thus, in each of those cases the European Union decided not to move forward with the agreement on the grounds that to do so would mean undertaking obligations inconsistent with EU law. That is the appropriate approach. In this case, the decision in *Komstroy* came more than 20 years *after* the EU and its member states had ratified the ECT.

151. The desire to preserve the autonomy of EU law might lead the EU or its Member States not to take on international obligations, but if they do take on those obligations they are

obliged to perform them in good faith[105] and they will be held internationally responsible if they breach them.[106] The desire to preserve that autonomy might even cause them to breach their international obligations, but that choice does not excuse them from the international obligation; it simply places them in breach on the international plane, regardless of the effect on the EU plane.[107]

152. The appropriate approach, therefore, is for the European Union and its Member States either to withdraw from the Energy Charter Treaty or to renegotiate it so that its provisions accurately reflect the commitments that the EU and its member states are willing to make. The same principle holds for investment treaties, whether they be intra- or extra-EU. The suggestion in the recent *European Food* case that "with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure" in the Romania – Sweden BIT might be true as a matter of EU law, but it is not true as a matter of international law. The appropriate course of action would be for Romania and Sweden to terminate the BIT between them, as in fact they have done. Absent that termination the treaty, including its arbitration provisions, would remain in force and constitute a binding international obligation between the two states. Indeed, if the treaty were not binding, but had

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[105] Article 26 of the Vienna Convention, *supra* n.56, enshrines the principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[106] Articles on State Responsibility, *supra* n.5, art. 1 ("Every internationally wrongful act of a State entails the international responsibility of that State."); art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.").

[107] *Id.*, art. 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by international law.").

been superseded or amended merely as a result of Romania's accession to the EU, there would have been no need to terminate the treaty.

153. Article 27 of the VCLT sets forth the bedrock principle of international law that a treaty party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

154. Article 46 of the VCLT confirms this conclusion in the case of EU Member States:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

155. Furthermore:

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

156. Spain here is arguing that its consent to be bound by the ECT, at least insofar as the ECT pertains to other EU Member States and investors from those Member States, was a violation of its internal law (in this case EU law) which invalidated its consent. In order to excuse Spain from its obligation, however, that violation had to be manifest. Spain's ratification of the ECT comported with all formal requirements, and all requirements of Spanish law. Articles 267 and 344 of the TFEU existed, albeit with different numbering, in the TEU, yet Spain ratified the ECT anyway. In such a case, Spain's authority (or lack thereof) to ratify the provision was not "manifest."

157. Likewise, the EU is an international actor. It can and does enter into international agreements, as it did with the ECT. To do so effectively, it must be able to bind itself, as recognized by the CJEU in *Achmea*. When it binds itself and holds itself out to other nations as

having bound itself, it must honor that decision. To find otherwise would be to make it impossible for the EU to act internationally. The EU has bound itself to the ECT.

158. Spain has also ratified the ICSID Convention, and is thereby obligated to pay any awards rendered by an ICSID Convention arbitral tribunal. ICSID Convention Article 53(1) provides that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each 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." In fact, the failure to comply with an award equates to an international wrong that entitles the home State of the investor to engage in diplomatic protection, or bring an international claim, on the investor's behalf.[108]

159. That the European Commission might regard Spain's act of paying the Award, even when done to comply with a U.S. court judgment enforcing the Award, to be unlawful state aid does not negate Spain's obligation to honor its commitments under both the ECT and the ICSID Convention. Asserting that the failure to comply with Spain's obligations stems from EU law in its guise as international law is equally unavailing under Articles 27 and 46 of the VCLT.

160. The difficulty surrounding apparent conflicts between EU Member States' EU law obligations and other international obligations is not specific to ECT arbitration. It has also arisen before the European Court of Human Rights. In *Matthews v. the United Kingdom*, for example, the violation alleged to have been committed by the United Kingdom originated in primary EU law. The United Kingdom argued that its violation was required (and excused) due to authority it had transferred to the EU. The European Court was not moved: While nothing in the European Convention of Human Rights precluded a transfer of authority to an international organization (in

[108] ICSID Convention, *supra* n.1, art. 27(1).

this case the EU), Convention rights needed to remain secured, and the responsibility of Member States therefore continued after the transfer.[109]

161. Thus, Spain cannot escape its obligations under international law by invoking EU law or *Achmea*. For these reasons, over 40 ECT investor-State arbitration tribunals, to date, have unanimously concluded that EU Member States, including Spain, must honor their obligation under the ECT to arbitrate disputes and pay resulting awards to protected investors, even if they are from other EU Member States.[110]

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[109] *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361 (1999), ¶¶ 26-35, https://tiny.cc/6dakrz.

[110] *See Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012), ¶¶ 4.111-4.199, https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf; *EDF International S.A. v. Republic of Hungary*, UNCITRAL, Award (Dec. 4, 2014) (not public); *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Final Award (Jan. 21, 2016), ¶¶ 424-447, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (June 6, 2016), ¶¶ 71-90, https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf; *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Final Award and Dissenting Opinion (July 12, 2016), ¶¶ 622-660, https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award (Dec. 27, 2016), ¶¶ 277-309, https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award (Feb. 15, 2018), ¶¶ 449-466, https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), ¶¶ 204-230, https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf; *Greentech Energy Sys. A/S v. Italian Republic*, SCC Arbitration V (2015/095), Final Award (Dec. 23, 2018), ¶¶ 336-55, 388-403, https://tiny.cc/eg0jrz; *CEF Energia BV v. Italian Republic*, SCC Case No. V2015/158, Award (Jan. 16, 2019), ¶¶ 57-102, https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf; *Foresight Lux. Solar 1 S.a.r.l. v. Kingdom of Spain,* SCC Arbitration V (2015/150), Final Award (Nov. 14, 2018), ¶ 220, https://tiny.cc/h75irz; *Vattenfall*, *supra* n.62, ¶¶ 163-64; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), ¶ 679, https://tiny.cc/tk0jrz; *Cube*, *supra* n.71, ¶¶ 118-60; *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection (Feb. 25, 2019), ¶¶ 88-194, https://tiny.cc/tn0jrz; *Eskosol*

*S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (May 7, 2019), ¶¶ 167-77, https://tiny.cc/xq3irz; *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (Mar. 12, 2019), ¶¶ 332-57, https://tiny.cc/4w3irz; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019), ¶¶ 168-73, https://tiny.cc/t03irz; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection (June 26, 2019), ¶¶ 141-97, https://tiny.cc/o33irz; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (July 31, 2019), ¶¶ 223-53, https://tiny.cc/9a4irz; *InfraRed Environmental Infrastructure GP ltd. et al v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award (Aug. 2, 2019), ¶¶ 256-274, https://www.italaw.com/sites/default/files/case-documents/italaw11360.pdf; *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019), ¶¶ 288-340, https://tiny.cc/de4irz; *OperaFund Eco-Invest SICAV PLC v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award (Sept. 6, 2019), ¶¶ 378-388, https://tiny.cc/u71jrz; *BayWa r.e. Renewable Energy GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (Dec. 2, 2019), ¶¶ 244-83, https://tiny.cc/uo4irz; *Stadtwerke München GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (Dec. 2, 2019), ¶¶ 123-46, https://tiny.cc/es4irz; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (Dec. 30, 2019), ¶¶ 309-74, https://tiny.cc/av4irz; *Watkins Holdings SARL et al v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award (Jan. 21, 2020), ¶¶ 180-226, https://tiny.cc/t14irz; *The PV Investors*, *supra* n.63, ¶¶ 174-207; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Spain*, Decision on Jurisdiction, Liability, and Directions on Quantum (Mar. 9, 2020), ¶¶ 446-502, https://tiny.cc/kd5irz; *Sun Reserve Luxco Holdings SARL et al. v. The Italian Republic*, SCC Arbitration V (2016/32), Final Award (Mar. 25, 2020), ¶¶ 350-464, https://tiny.cc/5j5irz; *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Jurisdiction (Aug, 20, 2020) (not public); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (Aug. 31, 2020), ¶¶ 301-371, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/80_Cavalum/2020.08.31_Decision_on_Jurisdiction__Liability_and_Directions_on_Quantum.pdf ; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award (Sep. 14, 2020), ¶¶ 266-339, https://www.italaw.com/sites/default/files/case-documents/italaw11827.pdf; *STEAG GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (Oct. 8, 2020), ¶¶ 227-298, https://www.italaw.com/sites/default/files/case-documents/italaw11900.pdf; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award (Feb. 26, 2021), ¶¶ 191-238, https://www.italaw.com/sites/default/files/case-documents/italaw16138.pdf; *ČEZ, a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/16/24, Decision on Jurisdiction (Mar. 2, 2021) (not public); *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award (Mar. 8, 2021), ¶¶ 309-335, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/112_FREIF_Eurowind_Holdings_Ltd_v._Spain/2021.03.08_Award.pdf; *Eurus Energy Holdings Corporation v. Kingdom of Spain,* ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (Mar. 17, 2021), ¶¶ 213-

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I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on April 25, 2022
Montreal, Quebec, Canada

Andrea K. Bjorklund

**CERTIFICATE OF SERVICE**

I hereby certify that, on April 25, 2022, I caused the foregoing Expert Declaration of Andrea K. Bjorklund, and exhibits thereto, to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

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