IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.,

Petitioners,

v.

The Kingdom of Spain,

Respondent.

Civil Action No. 1:21-cv-03249-RJL

Petitioners' Response to Spain's Motion to Dismiss the Petition

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GLOSSARY

CJEU ..... Court of Justice of the European Union

ECT ..... Energy Charter Treaty

EU ..... European Union

FAA ..... Federal Arbitration Act

FSIA ..... Foreign Sovereign Immunities Act

TFEU ..... Treaty on the Functioning of the European Union

INTRODUCTION

Petitioners AES Solar Energy Coöperatief U.A. ("AES") and Ampere Equity Fund B.V. ("Ampere") (collectively, "Petitioners") hold a EUR 26.5 million plus interest share of an arbitral award (the "Award," ECF No. 1-2, Ex. A) against the Kingdom of Spain ("Spain"). That Award is indisputably valid, as the highest court in the country where arbitration was seated—the Swiss Federal Supreme Court—has dismissed Spain's appeal against the Award. But Spain nonetheless refuses to pay. Petitioners thus brought this action under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention," ECF No. 1-1), seeking recognition and enforcement of the Award in the United States.

The New York Convention is a treaty signed by the United States, Spain, and most nations of the world that obliges signatories to recognize and enforce foreign arbitral awards in the same way as domestic awards. The United States therefore has a treaty obligation to "recognize arbitral awards" governed by the Convention "as binding and enforce them." New York Convention, art. III. Congress has made clear that the New York Convention "shall be enforced in United States courts." 9 U.S.C. § 201. And the Federal Arbitration Act ("FAA")—which implements the Convention in the United States—directs courts to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." *Id.* § 207. Those grounds are exceptionally limited, *see* New York Convention, art. V—and none of the limited grounds applies here. Given the strong federal policy in favor of arbitration, moreover, the FAA does not permit parties to relitigate the merits of issues assigned to and decided by the arbitral tribunal. The FAA thus "affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012).

Through its motion to dismiss, Spain nonetheless resists enforcement by attempting to collaterally attack the tribunal's jurisdictional decision that the dispute was arbitrable. Its central argument is that European Union ("EU") law renders Spain's consent to arbitration invalid. That argument fails on its own terms because Spain's unambiguous consent to arbitrate investment disputes is reflected in a multilateral investment treaty with EU and non-EU nations alike. As the arbitral tribunal recognized, EU law cannot override Spain's treaty commitments under international law. But that question is, in any event, not for this Court to decide. The arbitral rules chosen by the parties assign the question to the arbitrator, and it is settled law that in these circumstances, the arbitrator's determinations on arbitrability issues—including the validity of the arbitration agreement itself—are not subject to collateral attack. Spain raised its EU-law objection to the tribunal and lost, and it subsequently waived any challenge to that determination by failing to properly appeal the tribunal's determination to the courts of the seat of arbitration. Any challenge to the enforceability of the Award under the New York Convention and the FAA is thus foreclosed.

With no serious argument to resist enforcement under the New York Convention or the FAA, Spain attempts to reframe its EU-law argument as an attack on this Court's jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). But, of course, this Court's jurisdiction depends not on EU law, but on the FSIA itself. Two provisions of that law establish jurisdiction without regard to Spain's challenge to the tribunal's jurisdiction. *First*, the FSIA provides for jurisdiction whenever a foreign state has waived its immunity from suit. 28 U.S.C. § 1605(a)(1). The D.C. Circuit has squarely held that a foreign state "waives its immunity from arbitration-enforcement actions in other signatory states" by "sign[ing] the [New York] Convention," as Spain undisputedly has done. *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) ("*Tatneft I*") (per curiam). *Second*, the FSIA also abrogates a foreign state's immunity when the action is "to confirm an

award made pursuant to . . . an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). For purposes of that exception to immunity—just as on the merits—this Court is bound by the arbitral tribunal's determination that Spain validly agreed to arbitrate, as the D.C. Circuit recently recognized in *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021). That is because courts may not override the parties' indisputable agreement to commit questions of arbitrability to arbitration. Spain's repackaged EU-law argument thus fails for the same reason under the FSIA as under the FAA: The arbitral tribunal's determination that there was a valid arbitration agreement between the parties is binding on this Court. In any event, the arbitral tribunal was correct: Spain's consent to arbitrate investment disputes is unambiguous and is binding under international law.

Spain is thus left with meritless nonstatutory defenses—foreign sovereign compulsion and *forum non conveniens*—that have no basis in the New York Convention or the FAA, and that therefore cannot override those authorities' command to enforce the Award. EU state aid law does not bar Spain from paying the Award, and even if it did, that would have nothing to do with this Court's duty to enter judgment enforcing the Award. And the D.C. Circuit has squarely and repeatedly held that *forum non conveniens* does not apply to actions to enforce arbitral awards against foreign states because only U.S. courts can enforce awards against assets in this country.

Petitioners therefore respectfully request that this Court deny the motion to dismiss.

BACKGROUND

I. Petitioners' Investment In Spain

Petitioners are Netherlands-based companies that invested significantly in photovoltaic installations in Spain. *See* Award ¶ 181; Preliminary Award on Jurisdiction, ECF No. 1-2, Ex. B ("Jx. Dec.") ¶ 2. Petitioners made these investments in reliance on financial incentives and inducements enacted by Spain to promote the development of renewable energy, including photovoltaic installations. Award ¶¶ 189-95.

Spain's favorable treatment of renewable energy investment was short lived. Between 2010 and 2014, Spain adopted a series of measures retrenching on, and eventually revoking, the incentives on which Petitioners had relied in making their investments, substantially reducing Petitioners' returns on their investments. Award ¶¶ 198-212, 648, 845-48.

II. The Energy Charter Treaty And The New York Convention

Petitioners' investments in Spain were protected by two treaties: the Energy Charter Treaty, ECF No. 1-3 (the "ECT"), and the New York Convention.

The ECT is a multilateral investment treaty adopted in 1998 among 53 nations and regional organizations to "establis[h] a legal framework [for] promot[ing] long-term cooperation in the energy field." ECT, art. 2; *see also* Award ¶ 568. Its contracting parties include the EU and every EU member except Italy, as well as 26 other nations outside the EU.[1] The ECT protects investments in the territory of a "Contracting Party" to the treaty (*e.g.*, Spain) by "Investors" *(e.g.*, Petitioners) located or incorporated in "other Contracting Parties" (*e.g.*, the Netherlands). ECT, arts. 1(7), 10(1), 26, 40(2). As relevant here, Contracting Parties agree to "accord . . . fair and equitable treatment" to the investments of other Contracting Parties' investors, *id.*, art. 10(1), and "unconditional[ly] consent" to submission of investment disputes arising under the treaty to "international arbitration" under the treaty's terms, at the investor's election, *id.*, art. 26(2), (3)(a).

To enforce those protections, the ECT authorizes investors to submit investment disputes under the treaty to arbitration. ECT, art. 26(1). Investors can choose between a variety of arbitration formats, including the option Petitioners chose here: an "ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law" (the "UNCITRAL Rules," Ex. 1 hereto). ECT, art. 26(4)(b). The 1976 UNCITRAL Rules provide

[1] *See* Energy Charter Treaty, *Signatories/Contracting Parties*, bit.ly/35XDuE0.

comprehensive procedural rules for international arbitration proceedings. In particular, one critical feature of those rules is that they specifically authorize arbitral tribunals to resolve questions about the scope of their jurisdiction, rather than leaving that question for later determination by a reviewing court after the arbitration has completed. Article 23 provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." UNCITRAL Rules, art. 23(1). The UNCITRAL Rules thus further protect investors by ensuring that questions about the parties' consent to arbitration are settled by neutral arbitrators well in advance of any litigation to enforce any resulting arbitral award.

To ensure that any resulting arbitral award will be enforceable around the world, the ECT also provides for the application of the New York Convention. The New York Convention is a multilateral international treaty between 170 nations—including Spain, the Netherlands, and the United States[2]—governing "the recognition and enforcement" of commercial arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, art. I(1). Parties to the New York Convention agree to "recognize" such awards "as binding and enforce them." *Id.*, art. III. Enforcement is subject only to the limited defenses specified in Article V of the Convention, which largely parallel the defenses to enforcement of a domestic arbitration award under the FAA. *Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987). An award is immediately enforceable in any country that is a party to the Convention, but can be set aside only "by a competent authority of the country in which, or under the law of which, th[e] award was

[2] *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, United Nations (last visited June 16, 2022), https://bit.ly/3QvY7te (listing Spain and the United States as parties to the Convention).

made." New York Convention, art. V(1)(e).

The ECT provides for enforcement under the New York Convention by allowing "any party to the dispute" to insist that arbitration take place "in a state that is a party to the New York Convention." ECT, art. 26(5)(b). Further, because the New York Convention gives participating states the option to limit the Convention's application to "commercial" disputes only, New York Convention, art. I(3), the ECT also expressly treats treaty disputes as "commercial," ECT, art. 26(5)(b). Specifically, it states that "[c]laims submitted to arbitration" under the ECT "shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of [the New York] Convention." *Id*. Together, these provisions ensure that enforcement of any award resulting from arbitration under the ECT will be governed by the New York Convention, ensuring that such awards are broadly and expeditiously enforceable nearly worldwide, with few available defenses to the validity of the award or the conclusions of the arbitral tribunal.

III. The Arbitration Proceeding And Spain's Appeal To The Federal Supreme Court of Switzerland

In November 2011, Petitioners and other investors jointly submitted a Notice of Arbitration to Spain for arbitration under the UNCITRAL Rules, alleging that Spain's legislative actions that diminished the returns on Petitioners' investments constituted a breach of Spain's obligations under the ECT. Jx. Dec. ¶ 11; Award ¶¶ 213-14, 481-82. Petitioners invoked Spain's consent under ECT Article 26 to arbitrate disputes under that treaty. Jx. Dec. ¶ 10. An arbitral tribunal (the "Tribunal") was constituted in May 2012, *id*. ¶ 12, and the arbitration was seated in Switzerland, *id*. ¶ 17, which is not a member of the EU.[3] The Tribunal then bifurcated the arbitration proceedings into a jurisdictional phase and a liability phase. *Id*. ¶ 19.

[3] European Union, *Country Profiles* (last visited June 6, 2022), https://bit.ly/3O3U7yK.

At the jurisdictional phase, Spain challenged the Tribunal's jurisdiction on several grounds. As relevant here, Spain argued that EU law precludes the application of the ECT to so-called "intra-EU" disputes between EU member states and EU-based investors. Jx. Dec. ¶¶ 132-73. It claimed that EU "investors' rights" in EU member states are "governed by EU law" and "must be resolved within the judicial system of the EU" rather than through arbitration. *Id.* ¶ 133. On October 13, 2014, however, the Tribunal issued its Preliminary Award on Jurisdiction, rejecting this argument. *Id.* ¶ 207. The Tribunal emphasized that the ECT's "text" gave "no indication" that EU member states had "limited their consent to arbitration" against EU investors, and that "the ECT contains no disconnection clause" that would limit the treaty's application between EU members. *Id.* ¶¶ 181-82. Though Swiss law would have permitted Spain to immediately appeal this jurisdictional ruling to the Federal Supreme Court of Switzerland—the seat of arbitration—Spain did not appeal at that time, Bundesgericht [BGer] [Federal Supreme Court] Feb. 23, 2021, 4A_187/2020, slip op. § 5.2.1 (Switz.) ("Swiss Dec."), ECF No. 1-2, Ex. C.

On March 6, 2018, as proceedings continued on liability, the Court of Justice of the European Union ("CJEU")—the highest judicial authority on EU law—issued a new decision on intra-EU arbitration in Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018) ("*Achmea*"), ECF No. 15-9. In that case, an EU member state (Slovakia) challenged the arbitration provision of a bilateral investment treaty between itself and another EU member state (the Netherlands), which provided for arbitration of disputes between each state and the other state's investors. *Id.* ¶¶ 3-4, 23. The CJEU determined that the arbitration provision was incompatible with EU law because it could lead to the resolution of EU law outside the EU judicial system, contravening the Treaty on the Functioning of the European Union ("TFEU"). *Id.* ¶¶ 43-55, 60. The CJEU has subsequently held that *Achmea* applies to intra-EU arbitration under the

ECT as well. *See* Case No. C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 ¶¶ 51-52 (Sept. 2, 2021) ("*Komstroy*"), bit.ly/3vybAr8.

Spain submitted the *Achmea* decision to the Tribunal, arguing that the decision invalidated its "consent to arbitration" of "intra-EU disputes" under the ECT and deprived the Tribunal of jurisdiction. Award ¶¶ 151, 167. The Tribunal rejected Spain's attempt to relitigate the Tribunal's jurisdiction, explaining that the arbitral tribunal had already rejected Spain's intra-EU objection in its Preliminary Award on Jurisdiction, and the *Achmea* decision did not "change the nature of [that] objection." Procedural Order No. 19 ¶ 28 (Ex. A to Declaration of Matthew S. Rozen ("Rozen Decl."), Ex. 2 hereto). Once again, Spain passed up the opportunity to appeal to the Swiss Federal Supreme Court. Swiss Dec. § 5.2.2.

In February 2020, the Tribunal issued the Award. The Tribunal *again* rejected Spain's "reques[t] that the Tribunal 'reconsider ex officio its jurisdiction' in relation to the same intra-EU jurisdictional defense which Spain raised at the outset of the proceedings and on which the Tribunal ruled in the Preliminary Award on Jurisdiction." Award ¶ 544. On the merits, the Tribunal found that Spain had breached its obligations under Article 10(1) of the ECT to accord fair and equitable treatment to Petitioners' investments by failing to ensure a reasonable rate of return on those investments. *Id.* ¶ 847; *see also id.* ¶¶ 561, 565, 647-48, 909(a). The Tribunal thus directed Spain to pay Petitioners a total of EUR 26.5 million as damages, in the amount of EUR 15.4 million to AES and EUR 11.1 million to Ampere. *Id.* ¶ 909(b). The Award further requires Spain to pay interest on the damages award at the Spanish 10-year bond rate, compounded semiannually, from June 30, 2014, until the Award is paid in full. *Id.* ¶ 909(c).[4]

[4] The Award also requires Spain to pay damages and interest to other investors. Those other investors have not joined in this Petition. Their interests under the Award accordingly are not at issue in this litigation.

On April 27, 2020, Spain filed an appeal against the Award before the Swiss Federal Supreme Court, seeking to have the Award set aside. Swiss Dec. § C. In the appeal, Spain challenged the Tribunal's refusal to reconsider its jurisdiction in light of *Achmea*, but the court held that Spain's failure to timely appeal that decision "precluded" it from "invoking [this] complain[t]" in appealing the Award. *Id.* § 5.2.2. The court also emphasized Spain's failure to timely invoke Article 190(2)(b) of the Swiss Federal Act on Private International Law of December 18, 1987 ("LDIP"), *id.* § 6.1, which provides that "[a]n arbitral award may be set aside . . . where the arbitral tribunal wrongly accepted . . . jurisdiction," LDIP, art. 190(2)(b). The court thus dismissed that appeal in a decision dated February 23, 2021. Swiss Dec. § 7.

IV. This Enforcement Proceeding

Upon its rendering, the Award was fully enforceable, due in full, and subject to potential set-aside proceedings only in the Federal Supreme Court of Switzerland—the seat of arbitration. New York Convention, arts. III, V(1)(e). Yet despite the dismissal of Spain's appeal to that court, Spain has not paid any portion of the Award. Accordingly, Petitioners commenced this action to recognize and enforce the Award.

Because Switzerland and the United States are both parties to the New York Convention,[5] the New York Convention governs the recognition and enforcement in the United States of commercial arbitral awards made in Switzerland.[6] Congress, in turn, implemented the New York Convention through Section 2 of the FAA, which provides that the New York Convention "shall be

[5] *See supra* at 5 n.2.

[6] As the New York Convention permits, *see supra* at 6, the United States applies the Convention only to commercial arbitration awards, but the "commercial relationship requirement . . . is construed broadly" and investment disputes necessarily qualify as commercial. *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 242 (D.D.C. 2015), *aff'd*, 650 F. App'x 17 (D.C. Cir. 2016); *see also Bautista v. Star Cruises*, 396 F.3d 1289, 1298 (11th Cir. 2005) ("Congress meant for 'commercial' legal relationships to consist of contracts evidencing a commercial transaction . . .

enforced in United States courts." 9 U.S.C. § 201. To enforce an award, the party seeking confirmation must submit the "duly authenticated original award or a duly certified copy thereof" and the "original agreement [to arbitrate] . . . or a duly certified copy thereof." New York Convention, art. IV(1). Upon submission of these materials, the court "*shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [Article V of the] Convention." 9 U.S.C. § 207 (emphasis added).

Consistent with these procedures, Petitioners commenced this action in December 2021 by filing their Petition requesting that this Court: (1) confirm pursuant to the New York Convention the portion of the Award awarded to Petitioners; and (2) enter judgment for Petitioners in the amount specified in that portion of the Award. ECF No. 1. Petitioners effected service of process on Spain in accordance with the FSIA, 28 U.S.C. § 1608(a), on February 15, 2022. ECF No. 7.

ARGUMENT

Spain's motion to dismiss seeks to do what Congress has expressly prohibited: to collaterally attack the Tribunal's determinations on issues that the parties agreed to arbitrate. Under the New York Convention's plain terms, the United States, as a Contracting State, "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." New York Convention, art. III. Congress codified the New York Convention in the FAA, 9 U.S.C. §§ 201-208. Under the FAA, the court "*shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added). Those grounds largely "trac[k]" those in the FAA, *Mgmt. & Tech. Consultants*, 820 F.2d at 1534, and courts

as well as similar agreements."). As discussed *supra*, at 6, the ECT provides that treaty disputes shall be treated as commercial for purposes of the New York Convention.

applying them give arbitrators the same "'considerable deference'" as under the FAA, *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 844 F.3d 281, 289 (D.C. Cir. 2016). Indeed, the same "considerable deference" applies even when the parties are foreign states and the arbitration agreement at issue is a treaty: Courts will not "treat treaties as warranting a different kind of analysis." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 42 (2014).

Given the "narrow circumstances" the Convention provides for refusing enforcement, *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011), federal courts have "minimal discretion to refuse to confirm an arbitration award under the FAA," *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 184 (D.D.C. 2018). To hold otherwise would undermine the basic objective of arbitration: "to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (cleaned up). The party resisting confirmation thus bears a "heavy burden" in "establishing that one of the grounds for denying confirmation in Article V [of the Convention] applies." *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 120 (D.D.C. 2015).

Spain seeks to avoid these clear limitations by framing its challenge to the Award as an argument that this Court lacks subject-matter jurisdiction under the FSIA. But the FSIA creates subject-matter jurisdiction over Petitioners' petition to enforce the Award without regard to any challenge to the Tribunal's determination that Spain lawfully consented to binding arbitration under the ECT. Spain's EU-law challenges to that determination also fail on their own terms because Spain's consent to arbitration is governed by international law, not EU law. And those arguments fare no better when framed in terms of the New York Convention's narrow grounds for denying enforcement. The Tribunal considered and decided the EU-law issue against Spain, its determination is entitled to substantial deference, and Spain failed to timely appeal that determination to

the Federal Supreme Court of Switzerland, the seat of arbitration. Any challenge to that determination is thus forfeited and foreclosed.

Finally, Spain's last-gasp resort to other nonstatutory defenses—foreign sovereign compulsion and *forum non conveniens*—that have no basis in the New York Convention or FAA is likewise meritless, and contrary to the Convention's and the FAA's command that foreign arbitral awards "shall" be enforced. The Court should therefore deny Spain's motion to dismiss.

I. This Court Has Jurisdiction Under The Foreign Sovereign Immunities Act's Waiver And Arbitration Exceptions Without Regard To Any Challenge To The Tribunal's Determination That Spain Consented To Arbitration

The FSIA is the exclusive basis for a federal court's exercise of jurisdiction over a foreign state. *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017). Under the FSIA, foreign states are "presumptively immune" from suit in U.S. courts, unless one of its specific, enumerated exceptions applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Two independent exceptions to Spain's immunity from suit apply here, each without regard to any challenge to Spain's consent to arbitrate this dispute based on Spain's incorrect view of EU and international law.

A. This Court Has Jurisdiction Under The FSIA's Waiver Exception Because Spain's Signing Of The New York Convention Waived Its Immunity To Enforcement Of Arbitral Awards In United States Courts

Under the FSIA's waiver exception, a foreign state is subject to jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Because the New York Convention expressly contemplates enforcement of foreign arbitral awards against signatory states in the courts of other signatories, including the United States, Spain's signing of the Convention necessarily waived its immunity from such enforcement in U.S. court. And because that waiver is based on Spain's consent to *enforcement* in *the New York Convention*, jurisdiction in no way depends on whether Spain consented to *arbitration* in *the ECT*.

1. Spain's argument that it did not "expressly waive immunity," Spain Br. 20, is irrelevant

here, as this case involves a waiver "by implication." To waive immunity by implication, a state need only "indicat[e] its amenability to suit" in U.S. court, *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994), by either: (a) showing "a subjective intent to waive immunity"; (b) "tak[ing] an act that objectively can be interpreted as exhibiting an intent to waive immunity"; or (c) "tak[ing] acts that forfeit its right to immunity, irrespective of whether it has intended to do so," *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 202 (2d Cir. 1999).

Based on these principles, it is well settled that when a foreign state joins a treaty that "contemplate[s] arbitration-enforcement actions in other signatory countries, including the United States"—as the New York Convention plainly does, *see supra*, at 5—it "waives its immunity from arbitration-enforcement actions" under the FSIA. *Tatneft I*, 771 F. App'x at 10. The D.C. Circuit held that this principle was "correc[t]" in *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). And in *Tatneft I*, the D.C. Circuit applied *Creighton* to hold that Ukraine waived its immunity to enforcement of arbitral awards under the New York Convention by signing that Convention, because signatories to the Convention "agree to enforce arbitral awards made in other signatory countries." 771 F. App'x at 9. The Second Circuit has applied the same rule to find waivers under the New York Convention, *e.g.*, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 578-79 (2d Cir. 1993), and other arbitration enforcement conventions, *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (ICSID Convention). And this Court followed that rule in *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 190 (D.D.C. 2016), and *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 2020 WL 7122896 (D.D.C. Dec. 4, 2020) ("*P&ID*").[7]

[7] The D.C. Circuit recently affirmed *P&ID* on alternate grounds in *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 2022). Contrary to Spain's

These decisions directly undercut Spain's rather outdated assertion that the D.C. Circuit has found implied waiver in "only three" situations not applicable here. Spain Br. 20.

2. Spain's waiver of immunity in no way depends, as Spain argues, on whether it "agree[d] to arbitrate" the underlying dispute. Spain Br. 21-23. The waiver occurs "'when [the] country becomes a signatory to the Convention,'" *Creighton*, 181 F.3d at 123—"by becoming a party," *Blue Ridge*, 735 F.3d at 84—not later, by signing an arbitration agreement (like the ECT). Ukraine's waiver in *Tatneft I* was thus based on its consent to "enforcement" under the New York Convention, 771 F. App'x at 9—not, as Spain suggests, its "agreement to arbitrate" the specific dispute, Spain Br. 23. The D.C. Circuit upheld jurisdiction in *Tatneft I* without even *mentioning*, much less rejecting, Ukraine's assertion that it "did not agree to arbitrate th[e] dispute"—and that "[n]o agreement to arbitrate" the claims of two of the companies involved was ever "formed," Br. for Appellant, *Tatneft v. Ukraine*, No. 18-7057, Doc. ID 1748825, at 43, 46 (D.C. Cir. Sept. 4, 2018) (cleaned up). That consideration plainly made no difference to the court's jurisdictional analysis under the waiver exception. Spain Br. 21-22. Spain's consent to enforcement proceedings thus depends solely on whether the Tribunal found jurisdiction and entered an award—not whether the Tribunal was correct to do so.

This Court thus has jurisdiction under the FSIA's waiver exception, and Spain's collateral challenge to the Tribunal's jurisdiction should have no bearing on this enforcement petition.

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assertion (at 21), the D.C. Circuit's brief discussion of the waiver exception in *dicta* in that decision does not diminish the persuasive value of *Tatneft I* and *Creighton* or their binding effect on this Court. The D.C. Circuit declined to "wade into" the waiver exception, and instead affirmed the district court's jurisdiction under the FSIA's arbitration exception. 27 F.4th at 774-76 & n.3. Although the panel noted that *Tatneft I* is "unpublished"—and therefore did not "formally" bind the panel, *id.* at 774; *see also* Spain Br. 21 & n.7—*Tatneft I* is nonetheless binding on *this Court*. Unpublished decisions that postdate January 1, 2002 "may be cited as precedent" in this circuit, D.C. Cir. R. 32.1(b)(1)(B), and have the same "precedential value" that "the Supreme Court grants to its own . . . summary affirmances," *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011), which are binding on "lower courts," *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

B. Spain Cannot Dispute This Court's Jurisdiction Under The FSIA's Arbitration Exception Because The Tribunal's Ruling That Spain Consented To Arbitration Is Binding On This Court

This Court also has jurisdiction under the FSIA's arbitration exception, which permits a proceeding against a foreign state to "confirm an award" made pursuant to an agreement "by the foreign state," "with or for the benefit of a private party," to "submit to arbitration," if the "award is . . . governed by a treaty," such as the New York Convention, that is "in force for the United States" and that "call[s] for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Spain does not dispute that this is a proceeding to "confirm an award" under the ECT, or that the Award is "governed by" the New York Convention. Instead, it claims no "'valid . . . agreement'" to "'submit to arbitration'" was formed because "EU law" bars application of the ECT's arbitration provision to intra-EU disputes. Spain Br. 16-17. As shown below, EU law has no bearing on the ECT's validity under international law. But the more immediately dispositive point is that the Tribunal already rejected Spain's argument that EU law could deprive the Tribunal of jurisdiction, Jx. Dec. ¶¶ 203-07, and that decision is binding on this Court.

1. The Tribunal thoroughly examined its own jurisdiction—including the existence of a valid arbitration agreement—because the applicable arbitration rules (the UNCITRAL Rules) required it do so. UNCITRAL Rules, art. 23(1). Spain fully litigated that question, repeatedly raising the same intra-EU argument that it raises here, but the Tribunal rejected that argument each time.

First, at the jurisdictional stage, Spain claimed that "EU law" "prevents recourse to arbitration under the ECT" for investors "who are nationals of an EU Member State," and Spain thus could not validly agree to arbitrate because "it is not possible for an international agreement to undermine the constitutional principles of EU law." Spain's Reply to the Claimants' Answer to the Objection to the Consolidation of Multiple Claims and Jurisdictional Objections ¶¶ 60, 74, 79,

81, 109 (Ex. B to Rozen Decl.) ("Jx. Reply"). In support of these arguments, Spain cited Article 267 of the TFEU and the European Commission's submission in the then-pending *Achmea* proceeding, *see* Jx. Reply ¶¶ 105, 109—among the same authorities Spain cites here, Spain Br. 4-5. *See also* df ¶ 133 (Ex. C to Rozen Decl.) (Spain's Application for Bifurcation and Jurisdictional Objections) (contending that the Tribunal lacks jurisdiction because it is "an intra-EU dispute that the Claimants seek to resolve within the framework of the ECT"). The Tribunal acknowledged but rejected these arguments in upholding its jurisdiction, Jx. Dec. ¶¶ 114, 116, 207, 238, 289, 342, stating that "intra-EU disputes are not excluded from the jurisdiction of an arbitral tribunal constituted under Article 26 of the ECT," *id*. ¶ 203, and that any alleged conflict between "the substantive provisions of the ECT and EU law" would not "affect . . . the jurisdiction of the Tribunal," *id*. ¶ 206.

After the CJEU decided *Achmea*, Spain attempted to relitigate its intra-EU objection by submitting the *Achmea* decision to the Tribunal. *See* Award ¶¶ 151, 167. The Tribunal rejected Spain's effort, reasoning that the *Achmea* decision did not "change the nature of the intra-EU objection," which the Tribunal had already rejected. Procedural Order No. 19 ¶ 28. And in issuing the Award, the Tribunal *again* rejected Spain's "reques[t] that the Tribunal 'reconsider ex officio its jurisdiction' in relation to the same intra-EU jurisdictional defense." Award ¶ 544. On three separate occasions, therefore, the Tribunal rejected Spain's efforts to raise its EU-law defense.

2. This Court is required to defer the Tribunal's determination affirming its own jurisdiction because the ECT delegates this question to the Tribunal, not the courts. It is well settled that "parties can agree to arbitrate 'gateway' questions of 'arbitrability.'" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Spain may argue that the term "arbitrability" refers only to the

applicability of an arbitration agreement, but Supreme Court precedent is clear that the "arbitrability" issues that the parties can agree to arbitrate include "'whether [the] parties have a valid arbitration agreement.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). "[P]arties may agree to have an arbitrator decide . . . 'whether the parties have agreed to arbitrate,'" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), and when they do, courts "must defer to [the] arbitrator's arbitrability decision," *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995).[8]

The same analysis applies under the FSIA's arbitration exception. The D.C. Circuit made that pellucid in *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. 2015), which, like this case, involved enforcement under the New York Convention of a commercial arbitration award issued pursuant to the UNCITRAL Rules. *Id.* at 203. The court explained that a plaintiff meets its "initial burden" of establishing that a foreign state has "agreed to arbitrate" simply by "producing" the agreement, the "notice of arbitration," and "the tribunal's arbitration decision," *id.* at 204-05—as Petitioners unquestionably have done here.[9] The "burden" then "shift[s]" to the foreign state to show that there is not "a valid arbitration agreement between the parties." *Id.* at 205. In *Chevron*, the district court made this arbitrability determination applying the New York Convention's "deferential standard of review" because the UNCITRAL Rules provide for the

[8] Spain quotes *Henry Schein* out of context as holding that "'the court'" must "'determin[e] whether a valid arbitration agreement exists,'" Spain Br. 16, but the quoted line merely describes a court's role when asked to "refe[r] a dispute to an arbitrator," 139 S. Ct. at 530—that is, before there is any arbitral decision to defer to. The Supreme Court expressly rejected Spain's suggestion that "a court must always resolve questions of arbitrability." *Id.* Any argument that *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 850 F.2d 756 (D.C. Cir. 1988), or *Bhd. of Teamsters Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507 (9th Cir. 1987), holds otherwise, Spain Br. 15-16, is foreclosed by decades of subsequent Supreme Court decisions.

[9] *See generally* ECT (ECF No. 1-3); Request for Arbitration (Ex. D to Rozen Decl.); Award (ECF No. 1-2, Ex. A).

arbitral tribunal to "resolve issues of arbitrability." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64, 67 (D.D.C. 2013).[10] The D.C. Circuit affirmed, agreeing that Ecuador's challenge to arbitrability was "properly considered . . . under the New York Convention" standard—not "*de novo*," which would "conflat[e] . . . jurisdictio[n]" with the merits. 795 F.3d at 205-06. The D.C. Circuit thus relied on the district court's deferential analysis in finding jurisdiction under the arbitration exception. *Id*. at 205 n.3 (citing 949 F. Supp. 2d at 63 and quoting language that appears at 67). *Chevron* thereby "rejected Ecuador's assertion that 'the arbitrability question is . . . a jurisdictional question'" that must be determined *de novo* independent from the standard of review applicable to a tribunal's merits determinations. *LLC Komstroy v. Republic of Moldova*, 2019 WL 3997385, at *5 (D.D.C. Aug. 23, 2019).

In *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021), another New York Convention case, the D.C. Circuit reaffirmed *Chevron*'s holding that the "arbitrability of a dispute is not a jurisdictional question under the FSIA." *Id.* at 878. If the arbitration rules selected by the parties allow the arbitral tribunal to "rule on its own jurisdiction" (as the UNCITRAL Rules do, *see* art. 23), the tribunal's decision on that issue is entitled to "more than mere deference," and "a court possesses no power to decide the . . . issue." *Id.* (cleaned up). Because the arbitral tribunal in *Stileks* had deemed the dispute arbitrable, the D.C. Circuit upheld jurisdiction under the FSIA's arbitration exception and affirmed in relevant part a judgment enforcing an award against Moldova.

Critically, the award enforced in *Stileks* was the very same arbitration award that the CJEU recently addressed in *Komstroy*—the main case (along with *Achmea*) on which Spain relies in

[10] The Court stated that it was applying this "deferential standard" in holding that "Ecuador did consent to arbitration." *Chevron*, 949 F. Supp. 2d at 64. It later applied this deferential standard in holding that the dispute involved an "investment" covered by the arbitration agreement, *id.* at 67-69, and expressly relied on that holding in finding "a valid agreement to arbitrate," *id.* at 67.

contending that FSIA's arbitration exception does not apply, *see* Spain Br. 16-17; *supra* at 7-8—and to the very same arbitration agreement at issue in that case and here (the ECT). As Spain does here, Moldova argued in *Stileks* that it had never "agreed to arbitrate th[e] particular dispute" decided in the award. 985 F.3d at 878 (emphasis omitted). Like Spain, Moldova argued that this supposed lack of consent defeated jurisdiction under the FSIA's arbitration exception. *Id.* at 877. The D.C. Circuit rejected this argument, concluding that it was required to "accept the arbitral tribunal's determination" that the arbitration dispute "fell within the ECT" because Moldova—by joining the ECT—had "agreed to assign arbitrability determinations to the [arbitral] tribunal." *Id.* at 878-79. *Stileks* therefore makes clear that the existence of a valid arbitration agreement is among the issues that Spain may not relitigate *de novo* in determining jurisdiction under the FSIA's arbitration exception.

Stileks and *Chevron* foreclose any doubt that the parties have clearly and unmistakably agreed to arbitrate arbitrability. Under Article 26 of the ECT, all parties agree to arbitration under UNCITRAL's rules. *See* ECT, art. 26(4)(b). And "the parties' adoption of UNCITRAL's arbitration rules [is] 'clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'" *Stileks*, 985 F.3d at 878-79 (quoting *Chevron*, 795 F.3d at 208). Arbitrability—including whether Spain consented to arbitration—was thus for the Tribunal to decide, and this Court "cannot disturb" that determination. *Tethyan Copper Co. PTY Ltd. v. Islamic Republic of Pakistan*, 2022 WL 715215, at *9 (D.D.C. Mar. 10, 2022) (holding that arbitral tribunal's determination that a valid arbitration agreement existed was "binding" on the Court).

II. Spain Cannot Relitigate The Tribunal's Jurisdiction Under Article V(1)(a) Of The New York Convention

Spain's attempt to relitigate the Tribunal's jurisdiction by attacking its own "capacity to

make an effective offer to arbitrate," Spain Br. 22-23, fares no better under the New York Convention than it did under the FSIA. Spain invokes Article V(1)(a) of the Convention, which provides a defense to enforcement if the parties to the arbitration agreement were "under some incapacity" or the agreement is "not valid." New York Convention, art. V(1)(a). But the Tribunal disposed of this argument when it repeatedly rejected Spain's EU-law objection to intra-EU arbitration. *See supra* at 15-16. That determination is owed the same "'considerable deference'" deference in applying the New York Convention's defenses to enforcement as it was owed under the FSIA. *Enron Nigeria*, 844 F.3d at 289; *see supra*, at 10-11, 16-19. And in any event, Spain forfeited the defense when it failed to timely raise it in the Federal Supreme Court of Switzerland—the seat of arbitration.

As in *Stileks* and *Chevron*, Spain's "merits" challenge to the Tribunal's jurisdiction is "largely coextensive with" its arguments under the FSIA, *Chevron*, 795 F.3d at 207, and the Tribunal's determinations on those issues are entitled to "more than mere deference." *Stileks*, 985 F.3d at 878. As explained *supra*, at 18-19, because the parties' adoption of the UNCITRAL Rules is "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability," *Chevron*, 795 F.3d at 208 (cleaned up), the question of Spain's capacity to consent to arbitration was left for the Tribunal to decide, *BG Grp.*, 572 U.S. at 34. Under these circumstances, when a party "raised th[e] argument" that it "was not bound by a valid agreement to arbitrate" and "[t]he tribunal rejected it," "the Court's review is 'extremely limited'" and courts generally do not "second-guess the tribunal's conclusion." *Anatolie Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 202–04 (D.D.C. 2018) (quoting *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006)), *aff'd sub nom. Stati v. Republic of Kazakhstan*, 773 F. App'x 627 (D.C. Cir. 2019); *see also Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 111-12 & n.13

(D.D.C. 2017) (noting clear and unmistakable delegation to arbitrator to decide arbitrability where BIT authorized arbitration under UNCITRAL Rules, which "delegate[d] issues of arbitrability to the Tribunal"; according deference to Tribunal's determination and rejecting Article V(1)I defense), *aff'd*, 760 F. App'x 1 (D.C. Cir. 2019); *Gold Reserve* , 146 F. Supp. 3d at 121-22 (according "substantial deference" to "Tribunal's own findings concerning its scope to act" and rejecting Article V(1)(c) defense that "Venezuela never consented to arbitration," where arbitral rules provided that the tribunal would determine its own competence).

In any event, Spain has forfeited its Article V(1)(a) defense by failing to timely raise it in set-aside proceedings before the Swiss Federal Supreme Court. A party opposing enforcement of a foreign arbitral award ordinarily is "not required to seek to have an award set aside in order to preserve an objection." Restatement (Third) U.S. Law of Int'l Comm. Arb. Proposed Final Draft § 4.23 (2019). But "when the losing party *actually brings* or otherwise participates as a party in a set-aside action," yet "in doing so fails to assert a ground despite the fact that the underlying facts relevant to that ground were known or should have been known to it at the time, that party will be deemed to have waived that particular ground for denying recognition or enforcement of the award." *Id.* (emphasis added).

That rule is a corollary of the bedrock rule that a party waives an issue in proceedings to enforce an arbitral award if it failed to raise the same issue to the arbitral tribunal in the first instance. *See, e.g.*, *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 498 (5th Cir. 2020). "Permitting parties to keep silent during arbitration and raise arguments in enforcement proceedings would 'undermine the purpose of arbitration' which is to provide a fast and inexpensive method" for resolving disputes. *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Loc. 731*, 990 F.2d 957,

960-61 (7th Cir. 1993). Enforcing waiver rules forestalls the "gamesmanship that would result" if a party could sandbag arguments for enforcement proceedings. *OJSC*, 957 F.3d at 498. Those rationales apply with no less force when a party participates in *appellate* proceedings stemming from an arbitration—in the specific forum designated for those proceedings by the Convention—yet fails to properly raise defenses it later seeks to press in enforcement proceedings elsewhere.

Here, although Spain raised its intra-EU objection to the tribunal, it failed to timely appeal the Tribunal's preliminary rulings on jurisdiction. *See supra*, at 7-9. That ruling thus became binding in subsequent proceedings. And in appealing the Tribunal's final award, which also "could have been the object of the lack of jurisdiction complaint," Spain failed to "make such a claim in its appeal." Swiss Dec. § 6.1. It instead attempted to "lodge a complaint on the grounds of lack of jurisdiction" "for the first time" on reply. *Id.* The Swiss Federal Supreme Court therefore held that Spain had "not raise[d] the claim that the arbitrators lacked jurisdiction." *Id.* Having participated in a set-aside proceeding where it did "not raise" its intra-EU objection, *id.*, Spain cannot revive it now. Spain's capacity defense is waived.

III. The Tribunal's Determination That Spain Consented To Arbitration Was Correct

For the reasons just stated, this Court need not and should not reach the merits of Spain's improper collateral attack on the Tribunal's determination that Spain validly consented to arbitration. There is no need to consider the submissions of the parties' experts on EU and international law because U.S. law limits this Court's discretion to review the Tribunal's conclusion that it had jurisdiction, and that, in turn, disposes of Spain's strained arguments for opposing jurisdiction under the FSIA's arbitration exception, *see supra* at 15-19, and opposing enforcement under Article V(1)(a) of the New York Convention, *see supra* at 19-22. Should the Court nonetheless revisit arbitrability afresh as Spain urges, it should reject Spain's argument because the Tribunal was correct: Spain undeniably consented to arbitration, and irrespective of EU law, its consent was

valid under international law.

Spain does not contest the Tribunal's holding that the ECT's arbitration provision—Article 26—was intended to apply to intra-EU disputes. Jx. Dec. ¶¶ 203-07.[11] That provision expresses each Contracting Party's consent to arbitrate all "[d]isputes between a Contracting Party and an Investor of another Contracting Party" concerning investments covered by the treaty. ECT, art. 26(1). Spain is undeniably a "Contracting Party," *id.*, art. 1(2); *see supra*, at 4; Petitioners undeniably are "Investors of" the Netherlands because they are "organized in accordance with the law applicable in" the Netherlands, ECT, art. 1(7); and the Netherlands is undeniably also a "Contracting Party," *id.*, art. 1(2); *see supra*, at 4; Bjorklund Decl. ¶ 53.

Rather than contest the ECT's plain terms, Spain argues that they are fundamentally a lie. Spain now claims years after the fact that its own unambiguous consent to arbitrate this investment dispute was "void *ab initio*" because applying the ECT's arbitration provision to intra-EU disputes is "incompatible with EU law." Spain Br. 1. That contention lacks merit. Indeed, all 40 arbitral decisions that address the issue have rejected it. *See* Bjorklund Decl. ¶ 127. The scope of the Tribunal's jurisdiction is governed not by *EU law*, but by *public international law*, and the EU's

[11] The European Commission (the "Commission") submits as an *amicus* that "the EU and its Member States assume[d] no *inter se* obligations when they enter[ed]" into the ECT, because the EU is a "Regional Economic Integration Organization" ("REIO") that acts as a single entity, with its Member States "bound by treaty obligations to other contracting parties but not as between themselves." EC Br. 9-10. But Spain never made that argument, so it is forfeited. It is also meritless. While it is true that an regional organization like the EU may join the ECT as an additional "Contracting Party," ECT, art. 1(2), that means only that it takes on *its own* duties under the treaty. The ECT contemplates that a regional organization may exercise "competence over . . . matters . . . governed by th[e] Treaty," *id.*, art. 1(3), so by acceding to the treaty, it may bind itself in exercising that competence. But the organization's members remain bound by their own commitments, too, and where appropriate, investors may "initiate proceedings against both the [EU] and [its] [m]ember[s]," as the EU's signing statement confirms. Statement Submitted by the European Communities to the Secretariat of the ECT Pursuant to Art. 26(3)(b)(ii) of the ECT, [1998] O.J. L69/115, n.1, bit.ly/3vjcnMc; *see* Bjorklund Decl. ¶¶ 71-72. The Commission's attempt to modify the ECT to eliminate *inter se* obligations between EU members was expressly rejected during the drafting process, *see infra*, at 28-29, so the Commission's interpretation is not plausible.

internal law cannot override Spain's consent and duty under international law to arbitrate this dispute and honor its commitment. *Id*. ¶¶ 52-99.

A. The ECT is an international agreement among the EU and 52 nations, including EU members and numerous other non-members. Unsurprisingly, then, the ECT provides that it is governed by "international law," not EU law. ECT, art. 26(6). The EU and Spain thus submitted to be governed by international law, including customary international law, and under that body of law, the internal law of any one signatory of the ECT (which is all the EU is for this purpose) does not control the treaty's external effects.

"[T]he customary international law of treaties" is "codified in the Vienna Convention on the Law of Treaties," 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980) ("Vienna Convention") (Ex. 3 hereto). *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000). Spain has acceded to the Vienna Convention and is bound by its rules. *See* United Nations Treaty Collection, *Vienna Convention on the Law of Treaties*, bit.ly/3jxncox. Though the United States has not signed the Vienna Convention, the State Department recognizes that it is "the authoritative guide to current treaty law and practice." William P. Rogers, U.S. Secretary of State, *Report on the Vienna Convention on the Law of Treaties*, 65 Dep't St. Bull. 684, 685 (Dec. 13, 1971); *see also* Bjorklund Decl. ¶ 57. Federal courts apply it accordingly. *Chubb*, 214 F.3d at 308 (citing, *e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982)); *see also United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) (Vienna Convention establishes "[b]asic principles of treaty interpretation").

A central premise of treaty law is that every sovereign state "possesses capacity to conclude treaties," and "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, arts. 6, 26. This is true regardless of the state's internal views of the validity of its commitments: A state may neither "invoke the provisions of its internal

law as justification for its failure to perform a treaty," nor "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." *Id*., arts. 27, 46(1); *see also* Bjorklund Decl. ¶¶ 121-23.[12] This rule ensures the "stability of treaty relations" by preventing states from "seek[ing] to avoid [their] treaty obligations by invoking decisions by [their] courts or other constructions of [their] domestic law." Restatement (Fourth) of Foreign Relations Law: Treaties, Tentative Draft No. 2 § 102, Reporter's Note 6 (Mar. 20, 2017).

These principles are familiar to U.S. courts. U.S. treaties "'may comprise international commitments'" and impose "international law obligations" on the United States even if they never come into effect as "'domestic law'" and are not "enforceable in United States courts." *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008); *cf. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) ("international obligation [would] remai[n] unaffected" by repeal of statute implementing treaty). As a result, under the Vienna Convention, a treaty signed by the President "create[s] a binding international obligation" that "remain[s]" in effect "even if [a domestic court] . . . declare[s] [the treaty] unconstitutional for purposes of domestic law." *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 n.23 (11th Cir. 2001) (citing Vienna Convention, arts. 26, 46). Similarly, a foreign country's treaty with the United States "remains in

[12] The sole exception is if the "violation was manifest and concerned a rule of its internal law of fundamental importance"—*i.e.*, if the parties to the treaty had notice that it was unlawful when it was adopted. Vienna Convention, art. 46(1). Spain does not and cannot contend that any purported conflict between the ECT and EU law was "manifest" when the ECT was signed in 1994 or ratified in 1998. The "Member States to the EU signed the ECT without qualification or reservation." *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, ¶ 283 (Dec. 27, 2016), bit.ly/3waaYKc ("*Blusun*"). Indeed, the ECT *permitted* "[n]o reservations," ECT, art. 46, so the EU and its members could not have joined it without accepting all of its terms, *see* Bjorklund Decl. ¶ 106. "[N]o EU institution and no Member State sought an opinion from the [CJEU] on the [ECT's] compatibility" with EU law "because none of them had the slightest suspicion that it might be incompatible." Opinion of Advocate General Wathelet ¶ 43, Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2017:699 (Sept. 19, 2017), bit.ly/3E82IfA.

force under principles of international law" even if that country's courts "declar[e] [the treaty] unconstitutional" so the treaty "is not domestically binding" in that country. *United States v. Martinez*, 755 F. Supp. 1031, 1032-33 (N.D. Ga. 1991) (citing Vienna Convention, arts. 27, 46). Articles 27 and 46 of the Vienna Convention apply these same principles to all treaties.

These principles prevent Spain from invoking the EU's internal law to invalidate its own international-law commitments under the ECT. EU law, as interpreted by the high EU court—the CJEU—is *internally* binding within the EU in specific ways. The courts of EU member states must accept the CJEU's interpretation of the EU's founding treaties. *See* TFEU, art. 267. And if EU members breach their EU-law obligations, the European Commission may "bring the matter before the [CJEU]." *Id.*, art. 258. But neither of these principles allows the CJEU to invalidate the EU's or its members' international law obligations. *See* Bjorklund Decl. ¶¶ 10, 114-15. EU law operates on "an internal . . . plane" within the EU legal system, but *outside* of EU tribunals its effect is qualified by the Vienna Convention rule that a State "may not invoke . . . internal law regarding competence to conclude treaties" as a means "to invalidate a treaty" already concluded. *Blusun* ¶ 283; *see also* Bjorklund Decl. ¶¶ 10, 114-18.

B. Spain contends that EU law also has external consequences because "[t]he EU treaties" themselves are "international law." Spain Br. 17; *see also* EC Br. 17-18. But it cites no principle of international law under which the EU's treaties supersede Spain's competing commitments under the ECT. The EU and its members' views (as parties to the ECT) are not entitled to any weight when it comes to interpreting the international obligations imposed by the ECT on its contracting parties, because only collective action by all parties to a treaty—for example, an "agreement between the parties regarding . . . interpretation" or an instrument made by one party and "accepted by the other parties"—can modify its plain meaning and effect. Vienna Convention, art. 31(2)(b),

(3)(a); Bjorklund Decl. ¶¶ 93, 96. And Spain's assertions of the "primacy" of EU law, Spain Br. 4, *see also* EC Br. 7-8, 16, invoke a principle of EU law that governs the interaction between EU law and the *domestic* laws of EU member states, not between EU law and the *international* obligations of the EU and its members. Bjorklund Decl. ¶¶ 114-17. Instead, under international law, to the extent there is any conflict between the ECT and the EU's foundational treaties—the source of EU law and the basis for both Spain's objection to intra-EU arbitration under *Achmea* ¶¶ 31-60 and *Komstroy* ¶¶ 51-80, *see* Spain Br. 5-9—the ECT controls by its plain terms and under ordinary treaty interpretation principles.

The ECT expressly provides that its dispute resolution provisions supersede prior treaties that are less protective of investors' rights. Under the heading "Relation to Other Agreements," Article 16 specifies precisely how the ECT should apply when a "prior" or "subsequent" treaty addresses the same "subject matter" as the ECT's dispute resolution provisions. ECT, art. 16(2). If the ECT's provisions are "more favourable to the Investor" than the other treaty, the ECT controls, and the other treaty may not "be construed to derogate from" the investors' rights under the ECT, including "any right to dispute resolution." *Id*. As a matter of international law, therefore, the EU treaties *cannot* be construed to "derogate from an Investor's right to dispute resolution" under the ECT. *Vattenfall AB v. Fed. Republic of Germany*, ICSID Case No. ARB/12/12, Decision on *Achmea* Issue ¶ 195 (Aug. 2018), bit.ly/3Kqecxo; *see also* Bjorklund Decl. ¶¶ 103-07.

The result would be the same even absent Article 16 of the ECT under the rule of *lex posteriori*, which recognizes that where two treaties are at issue, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Vienna Convention, art. 30(3); *see also* Bjorklund Decl. ¶¶ 109-10. In a "conflict between two treaties," "the more recent . . . controls." *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d

230, 233 (D.C. Cir. 2013). Here, the ECT is the more recent substantive enactment because the EU treaty provisions underlying Spain's arguments (Articles 267 and 344 of the TFEU, *see* Spain Br. 4-5) have been in place since the European Economic Community, the precursor to the EU, was formed in 1957—long before the ECT came into force in 1998—and have remained materially unchanged through successive renaming and renumbering of the EU's foundational treaties. *Compare*, *e.g.*, Treaty Establishing the European Economic Community, arts. 177, 219, bit.ly/3xie8Mq, *with* TFEU, arts. 267, 344. The ECT's adoption thus superseded those provisions to the extent of any conflict. Bjorklund Decl. ¶ 110.[13]

If the EU and its members had intended for the EU treaties to control in the event of a conflict and thus to preclude the application of the ECT's arbitration agreement to intra-EU disputes, they had other means to do so. "At the time of entering into the ECT, the EU was well aware of the possibility of including a disconnection clause, which would operate as a carve-out to ensure that the provisions of [such agreements] would not apply between EU Member States." *Vattenfall*, ¶ 203. In fact, the EU has included such disconnection clauses in at least 17 other multilateral treaties. *See* UN Int'l Law Comm'n Rep't on Fragmentation of Int'l Law ¶ 289 & n.394 (Apr. 13, 2006), bit.ly/3IikAVj; *see also Vattenfall*, ¶ 203 ("The EU had already included

[13] In 2007, the Treaty of Lisbon renumbered the TFEU, gave Articles 267 and 344 their current numbers, and made minor technical modifications to those provisions that are not relevant to this case. *Compare* Treaty Establishing the European Community, arts. 234, 292, bit.ly/3CHtjPY, *with* TFEU, arts. 267, 344. But purely "stylistic [and] nonsubstantive" alterations normally are not construed to have legal effect, Scalia & Garner, *Reading Law: The Interpretation of Legal Text* 256 (Thomas/West 2012), so the 2007 amendments to those articles plainly were not intended to modify the relationship between the ECT and EU law. Further, even if the 2007 Treaty of Lisbon were considered the later treaty for purposes of *lex posteriori*, it would not control. Article 16 of the ECT expressly supersedes both prior *and* "subsequent international agreement[s]," that are less protective of investors than the ECT. ECT, art. 16; *see also* Bjorklund Decl. ¶¶ 103-04. Nor could the Lisbon Treaty be construed as a "withdrawal" from the ECT, because the ECT requires that withdrawals occur by a signatory "giv[ing] written notification . . . of its withdrawal," ECT, art. 47(1)—which Spain has not done.

disconnection clauses in treaties prior to the ECT.").

Rather than include a disconnection clause, the ECT's drafters explicitly *rejected* a proposal—by the European Commission, no less—to include language requiring "[EU] Contracting Parties" to "apply Community rules" and "not" the ECT "except insofar as there is no Community rule governing the particular subject concerned." *See* Draft Treaty, Basic Agreement for the European Energy Charter, at 84 (Aug. 12, 1992), bit.ly/3ia5E0Z; *see also* Bjorklund Decl. ¶ 62. There were good reasons for rejecting this proposal. The ECT sought to ensure "uniformity of treatment of investors, regardless of their country of origin," to avoid the possibility that one state might arbitrarily favor awarding contracts to investors from states to whom it owes no international law obligations. Bjorklund Decl. ¶¶ 82-83. That omission of this proposed language from the ECT confirms the ECT's drafters' conscious choice to subordinate EU law to the ECT. *Vattenfall*, ¶ 206 ("[A] disconnection clause was intentionally omitted from the ECT.").[14]

C. Nor can these international law principles be evaded by reframing the issue as one of "interpret[ing]" the ECT, as the European Commission attempts to do. *See* EC Br. 12, 15, 21-24. The "starting point" for interpreting international treaties is the text. Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186

[14] By contrast, the ECT provides that "[i]n the event of a conflict between [its provisions and] the [Svalbard Treaty]," "the [Svalbard Treaty] shall prevail." *See* Decisions with Respect to the ECT, Annex 2 to the Final Act of the European Energy Charter Conference, bit.ly/3NOJujs. It "would have been a simple matter to draft the ECT so that Article 26 does not apply to [intra-EU disputes]," *Vattenfall*, ¶ 187, and, if this had been done, that clause would have had effect as a matter of international law, *see* Vienna Convention, art. 30(2) ("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."). But the ECT's drafters did not do so. The "absence of [a disconnection clause thus] confirms that the ECT was intended to create obligations between Member States of the EU, including in respect of potential investor-State dispute settlement." *Vattenfall*, ¶ 206; Bjorklund Decl. ¶ 60.

and Add.1-7, [1966] 2 Y.B. Int'l L. EC 220. "Basic principles of treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials." *Ali*, 718 F.3d at 939. As a result, "treaties cannot be re-written or expanded beyond their clear terms," even "to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). And here the plain text of the ECT provides for arbitration of intra-EU disputes. *See supra*, at 23. The Commission's failed attempt to add a disconnection clause confirms that the actually enacted text did not *already* carve out intra-EU disputes from arbitration. *See supra*, at 28-29. There is no basis to read into the ECT the disconnection clause that the Commission failed to achieve through negotiation.

Lacking textual support, the Commission pivots to contextual arguments in an effort to restore the disconnection clause. But none has merit.

The linchpin of the Commission's position is that the ECT really creates only a series of "bilateral relationships" between contracting parties, and EU law must govern bilateral agreements between EU member states. EC Br. 14, 18. But Spain did not make (and thus forfeited) this argument, and it is wrong in any event. The ECT is not a "bilateralizable" treaty; it is a multilateral treaty reflecting the interests of all ECT state parties. Bjorklund Decl. ¶ 93. Two or more ECT parties cannot simply amend the treaty only as between themselves without complying with the amendment process specified in the treaty. *Id.* ¶ 95. For good reason—differing obligations between member states "is not a matter of indifference to the other Contracting Parties," as it can distort the levels of treatment available to nationals of the third-party states. *Id.* ¶¶ 80-87. Regardless, nothing about the supremacy of international law turns on whether the obligations it creates are multilateral or bilateral. The relevant principle is simply that the EU may not invoke its internal

law to invalidate its own international-law commitments under the ECT—even commitments between its members. *See supra*, at 24-26.

The Commission further contends that its interpretation is necessary to prevent conflict with primary (EU) law. EC Br. 16. But "interpretation" cannot stretch a treaty beyond its text merely to avoid a conflict with other treaties. Bjorklund Decl. ¶ 66. It is a basic canon that a treaty's text must be interpreted in "good faith," *id.* ¶ 63, and "interpreting" the ECT to render Article 26 "void *ab initio*" would violate that principle—nullifying one of the ECT's key provisions through an implicit limitation to which no contracting party ever agreed, through a mechanism that in fact was expressly rejected during the negotiation process. *Id*. ¶¶ 62, 66.

The Commission also casts the CJEU's decision in *Komstroy* as an "interpretation of the ECT," EC Br. 21, and asks this Court to "defer" to that interpretation, EC Br. 21-24. But there is no basis for such deference. The EU is merely one party to the ECT, and under the Vienna Convention, the EU's interpretation (as set forth by the CJEU) is not authoritative: As explained *supra*, at 26, only collective action by all parties to a treaty can modify its plain meaning and effect. Vienna Convention, art. 31(2)(b), (3)(a); Bjorklund Decl. ¶¶ 93, 96. And because the ECT is not "bilateralizable," *see supra*, at 30, the CJEU cannot use the guise of "interpretation" to give the treaty one effect as between EU members and another as between other members, Bjorklund Decl. ¶ 93. Whatever effect *Komstroy* may have in EU courts, it is entitled to no deference in *this* Court. *See supra*, at 26.

The Commission's cited cases are not to the contrary. The Commission recites passing language in *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), noting the "respectful consideration" owed to the views of "an international court with jurisdiction" to interpret a treaty. *Id.* at 375. But "respectful consideration" does *not* mean deference or "controlling weight," *Animal Sci.*

Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1874 (2018), and the Court in *Breard* in fact did *not* defer to the views of the tribunal there, the International Court of Justice ("ICJ"), 523 U.S. at 374, 378 (declining to follow order discouraging petitioner's execution pending ICJ proceedings). Further, the "respectful consideration" referenced in *Breard* owed only to the ICJ's "jurisdiction" under the relevant treaty—there, the Vienna Convention on Consular Relations—to give the last word on treaty disputes. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1 (Apr. 24, 1963), bit.ly/3voO2oh. Here, by contrast, the ECT assigns that jurisdiction to arbitral tribunals—not the CJEU—so the only deference due is to the Tribunal.[15]

With no tenable legal argument, the Commission trumpets a parade of horribles about undermining the "structure of the EU legal order" and "offend[ing]" international comity. EC Br. 22-23. But nothing about enforcing the award here would undermine the "EU legal order"; the CJEU's interpretation of EU law remains binding in its own internal plane. But it cannot control the central issue in this case—whether the Award can be enforced *in the United States* against

[15] Cases requiring deference to another state's interpretation of its *own laws*—*see* EC Br. 22 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895); *Animal Sci. Prods.*, 138 S. Ct. 1865; *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984))—are similarly inapposite because the ECT is a multilateral treaty, not a uniquely EU creation. And the Commission's contention that other courts in this District have accorded deference to EU courts on "the intra-EU applicability of Article 26," EC Br. 12, likewise misses the mark. Those cases simply reflect decisions to stay U.S. arbitration enforcement proceedings under the New York Convention while the EU courts (in the country where the arbitration was held) fulfilled the role assigned to them by the Convention—deciding whether to set aside the arbitral award. *See CEF Energia, B.V. v. Italian Republic*, 2020 WL 4219786, at *2 (D.D.C. July 23, 2020); *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, 2020 WL 417794, at *4 (D.D.C. Jan. 27, 2020) (emphasizing that "the Swedish court has already acted to prohibit enforcement of the arbitral award"). Because the Swiss Federal Supreme Court has *dismissed* Spain's appeal here, any deference owed to that court only counsels in favor of enforcing the Award. Moreover, the Commission's cases each predate *Komstroy* and thus involve open questions of *EU law*. *See id.*; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019); *InfraRed Env't Infrastructure GP Ltd. v. Kingdom of Spain*, 2021 WL 2665406, at *5 (D.D.C. June 29, 2021). None of them calls for deference to the EU courts on the *international law* aspects of the present dispute, on which the CJEU speaks with no special competence or authority.

Spain's assets *here* under the applicable U.S. law implementing the New York Convention. Ultimately, of course, EU members remain free to withdraw from the ECT or renegotiate its provisions to reflect the commitments the EU and its members states are willing to make. Bjorklund Decl. ¶ 120.

The Commission's concern about a "flood" of arbitral award enforcement actions in federal courts likewise provides no basis for refusing to comply with the New York Convention and its implementing legislation. EC Br. 23. The Executive Branch (in joining the New York Convention) and Congress (in codifying that Convention as part of the FAA) already made the decision to "open the doors of the federal courts" to enforcement of foreign arbitral awards. EC Br. 22-23. Congress's clear mandate that such awards "shall" be enforced, 9 U.S.C. § 207, limits discretionary abstention from enforcement of arbitral awards in the name of "comity," EC Br. 22, which cannot "override 'the emphatic federal policy in favor of arbitral dispute resolution,'" *Newco Ltd. v. Gov't of Belize*, 650 F. App'x 14, 16 (D.C. Cir. 2016).

The ECT's plain terms and bedrock principles of international law thus leave no doubt that Spain's agreement to arbitrate intra-EU disputes under Article 26 of the ECT is valid as a matter of international law, any purportedly contrary provisions of EU law notwithstanding.

IV. Spain's Nonstatutory Defenses Are Not Available Under The New York Convention And The FAA, And Lack Merit In Any Event

Unable to mount a successful defense under the New York Convention, Spain tries a series of nonstatutory defenses for refusing enforcement of the Award. Spain Br. 23-28. But those defenses have no basis in the New York Convention or the FAA, and thus cannot override the Convention's command that the United States "shall . . . enforce" the Award, New York Convention, art. III—and the FAA's concomitant command that this Court "shall confirm" it, 9 U.S.C. § 207. In any event, the defenses are meritless on their own terms.

A. The Foreign Sovereign Compulsion Doctrine Does Not Apply

Spain first invokes the "foreign sovereign compulsion doctrine," arguing that enforcement should be denied because EU state aid law purportedly bars Spain from lawfully paying the Award or a judgment enforcing it. Spain Br. 23-24; *see also* EC Br. 24-25. But Spain's purported inability to pay would not prevent this Court from complying with its statutory obligation—in fulfillment of the treaty obligations of the United States under the New York Convention—to enforce the Award. And even if it were relevant, Spain has not met its heavy burden to establish that it cannot lawfully pay.

1. The FAA is unequivocal that this Court "*shall* confirm" an award subject to the New York Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added). Foreign sovereign compulsion is not one of those "specified" grounds, and Spain's opening brief makes no attempt to link it to any defense "specified in [the] Convention." *Id.* Any attempt to do so now would thus be forfeited. *United States v. Lawrence*, 1 F.4th 40, 46 n.3 (D.C. Cir. 2021) ("[A]rguments raised for the first time in a reply brief are forfeited."). Absent any explicit exception in the statute or the Convention, the FAA's categorical command to enforce foreign arbitral awards ("shall") "militates against an implicit exception" where the judgment debtor's own laws or treaty commitments purport to prohibit it from abiding by a United States judgment. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001).

Nor does the doctrine even apply by its own terms. It provides that courts "may not require a person" to "do an act in another state that is prohibited by the law of that state." Restatement (Third) of Foreign Relations Law § 441(1)(a) (1987). For several reasons, that rule is inapposite.

First, the Award already obligates Spain to pay by stating that Spain "shall pay" the amount awarded, Award ¶ 909(b), so converting the Award into a U.S. judgment would not "require"

Spain to "do" anything new—let alone to do so "in another state," *i.e.*, outside of the United States, Restatement (Third) of Foreign Relations Law § 441(1)(a). The doctrine's "[m]ost important" feature is compulsion of a foreign person by an American court "to violate the laws of a different foreign sovereign on that sovereign's own territory." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987). But a judgment here would merely facilitate enforcement of Spain's existing obligations against its assets in the United States, which the United States has agreed by treaty to facilitate. Any voluntary payment by Spain also could be made outside of the EU using foreign assets.

Second, the doctrine applies to private parties, not governments. *E.g.*, *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). To apply it here—where Spain's own *voluntary* commitments to the EU are the source of the purported compulsion it seeks to avoid—would grant foreign states *carte blanche* to defeat the jurisdiction of U.S. courts under the FSIA simply by enacting laws or entering into treaties that purport to prohibit satisfaction of U.S. court judgments. There is no room for such a dramatic expansion of foreign state immunity in U.S. court; the FSIA already dictates the "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Republic of Argentina v. NML Capital*, 573 U.S. 134, 141 (2014).

Third, foreign sovereign compulsion applies only where there is a "realistic possibility" that the foreign entity will face severe sanctions for complying with a U.S. court order. *United States v. Brodie*, 174 F. Supp. 2d 294, 301 (E.D. Pa. 2001). A "remote" and "speculative" risk of sanctions does not excuse compliance with U.S. law. *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968). Here, it is pure speculation that the Commission would seek sanctions against Spain for paying a U.S. judgment, and even if the CJEU found a violation, EU law merely provides that it "may"—not *must*—impose a sanction. TFEU, art. 258, 260(2). Given this

"wide latitude in determining whether to award any damages even in the face of liability," the threat of a sanction is too low to justify denying relief. *First Nat'l City Bank*, 396 F.2d at 905.[16]

2. Because Spain's legal ability to pay the Award or a judgment enforcing it does not implicate the foreign sovereign compulsion doctrine, this Court need not address that issue. Should it nonetheless reach the issue, however, the Court should hold that EU law does not restrict such payments. EU state aid law protects competition within the EU by ensuring that member states do not unfairly advantage certain entities or industries. *See* TFEU, art. 107(1); Quigley Decl. ¶ 47. A measure is state aid if it: (1) confers a "selective economic advantage"; (2) "distort[s] or threaten[s] to distort competition"; (3) has the "potential" to affect trade between Member States; and (4) is "imputable to the [S]tate." European Commission, Decision on State Aid S.A. 38517 (2014/C) (ex 2014/NN), Arbitral Award, *Micula v. Romania*, 2015 O.J. L 232/43 ¶ 79 (Mar. 30, 2015), ECF No. 15-68; Quigley Decl. ¶ 34. If these conditions are met, the measure cannot go into effect before the Commission reviews it to determine whether the aid is "compatible" with the EU internal market. TFEU, art. 108(1), (2).

Spain's theory is that the renewable energy incentives at issue in the underlying arbitration are unlawful state aid, and therefore the Award is unlawful state aid too. Spain Br. 10-12. But each of Spain's premises is flawed. No authority has held that the incentives here were illegal state aid. *See* Quigley Decl. ¶ 33. Spain's own authority (at 11) suggests they were not. In its Decision on State Aid SA.40348 (2015/NN), *Spain*: *Support for electricity generation from renewable energy sources, cogeneration and waste*, 2017 O.J. (C442) (Nov. 10, 2017), ECF No. 15-67, the Commission held that a separate Spanish regulatory regime—the one that replaced the

[16] For the same reasons, Spain's cursory reference to its meritless objection to intra-EU arbitration based on *Achmea*, Spain Br. 23-24, does not implicate the foreign sovereign compulsion doctrine. Indeed, Spain does not even attempt to explain how "recogniz[ing] and validat[ing] an arbitration that [it contends] contravenes EU law," *id.*, could lead it to face sanctions under EU law.

incentives at issue here—was "compatible with the internal market" and therefore not illegal. *Id.* at 34; *see also id.* ¶ 156; *id.* § 2.1; Quigley Decl. ¶ 26. This confirms that a renewable energy regime (and thus an Award enforcing it) may be lawful even if they are state aid.

The Award and a U.S. judgment enforcing it would be even farther from the definition of state aid. The Award does not give Petitioners an economic advantage; it *compensates* them for damages caused by Spain's violation of the ECT. Quigley Decl. ¶ 54. Once compensated, Petitioners will be no better off than they would have been but for Spain's violation. The Award thus cannot distort competition or affect trade in the EU. Quigley Decl. ¶¶ 57-59. Nor can paying an Award or judgment *mandated* by a tribunal or court be "imput[ed]" to Spain. An externally imposed legal obligation is not voluntary state aid. *Id.* ¶ 61. As the CJEU has recognized, therefore, state aid is "fundamentally different . . . from damages" ordered by "competent national authorities" as "compensation" for injuries caused by the state. Joined Cases 106-120/87, *Asteris v. Greece*, 1988 E.C.R. 5531 (Sept. 27, 1988), ¶ 23, bit.ly/3uzgjt4; *see also id.* ¶ 24, *dispositif* 3.

Spain cites no authority for the startling proposition that it could be *unlawful* for an EU member to pay the Award, much less a U.S. court *judgment* enforcing it. Spain merely cites the European Commission's views on the subject. Spain Br. 11-12; *see also* EC Br. 5, 24-25. But the Commission does not speak authoritatively on EU law—the CJEU does—and it has overturned the Commission's aid decisions a number of times. *See* Quigley Decl. ¶ 74. As an executive body, not a court, the Commission's views of EU law lack "conclusive effect." *Animal Sci. Prods.*, 138 S. Ct. at 1869. Its "litigating positions" as an *amicus* merit even less weight. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). And even if the Award or a judgment enforcing it were state aid, that would not mean Spain could never pay (or the Tribunal or this Court could not issue)

the Award or a judgment enforcing it. It would merely require Spain to obtain Commission approval before paying. TFEU, art. 108. Spain cites nothing suggesting such approval would be denied. EU state aid law thus does not preclude payment of the Award.[17]

B. Forum Non Conveniens Does Not Apply

Spain's final defense—*forum non conveniens*, Spain Br. 24-28—is squarely foreclosed in this Circuit. As the D.C. Circuit first held in *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005)—and has recently and repeatedly reaffirmed—"'*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award.'" *Tatneft v. Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021) ("*Tatneft II*"); *Stileks*, 985 F.3d at 876 n.1; *accord BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17, 19 (D.C. Cir. 2016); *Newco*, 650 F. App'x at 16; *TMR*, 411 F.3d at 303-04.[18] Spain may prefer out-of-circuit authorities that expressly "disagree[d]" with *TMR*, *see Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011); Spain Br. 27, but *TMR* and the many D.C. Circuit decisions reaffirming it are binding on this Court.

Forum non conveniens allows dismissal only where "an adequate alternative forum for the dispute is available." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008). But a foreign court is no substitute for "enforc[ing] [an] arbitration award" against a foreign state in U.S. court because "no other forum . . . c[an] reach [a foreign state's] property . . . in the United States." *TMR*, 411 F.3d at 303-04. "[O]nly a court of the United States" can grant

[17] If anything, the European Commission's assertion that it may *later* "decide whether or not payment of the award is compatible with the [EU] internal market," EC Br. 25, only further confirms that the threat of sanctions is at best too "speculative" to trigger the foreign sovereign compulsion doctrine, *First Nat'l City Bank*, 396 F.2d at 905.

[18] *See also Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 155 (D.D.C. 2018) (denying motion to dismiss); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013) (same); *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 57-58 (D.D.C. 2010) (same).

that relief, *id*., so *forum non conveniens* simply "does not apply to actions in the United States to enforce arbitral awards against foreign nations," *BCB Holdings*, 650 F. App'x at 19.

Far from establishing a "limited restriction," Spain Br. 26, these decisions categorically bar a foreign state from "*ever* obtaining dismissal of a petition to enforce an arbitration award . . . based on *forum non conveniens*" in this Court, *Entes Indus. Plants, Constr. & Erection Contracting Co. v. Kyrgyz Republic*, 2019 WL 5268900, at *5 (D.D.C. Oct. 17, 2019) (emphasis added). That rule applies not just in "execut[ing] a judgment," Spain Br. 27, but also "in proceedings to *confirm* a foreign arbitral award," *Tatneft II*, 21 F.4th at 840 (emphasis added), including where the right to a judgment is disputed, *e.g.*, *id.*; *Stileks*, 985 F.3d at 876 n.1; *BCB Holdings*, 650 F. App'x at 19; *Newco*, 650 F. App'x at 16; *TMR*, 411 F.3d at 303-04.

Spain claims this case is different because it presents a "threshold" question of this Court's "jurisdiction" that purportedly turns on the "interpretation of EU law." Spain Br. 25, 27. But Petitioners brought this action to enforce the Award against Spain's U.S. assets, not to resolve issues of EU law. This Court's jurisdiction turns exclusively on the FSIA and international law—not EU law—and this Court can find jurisdiction, reject Spain's "merits" defenses, and enforce the Award without deciding *any* question of EU law. *See supra*, at 12-33. Further, Spain's attempt to raise EU law obliquely—as an issue of this Court's jurisdiction under the FSIA—does not *strengthen* Spain's *forum non conveniens* defense. It undercuts that defense. The EU is not a more convenient forum to decide whether a *U.S. court* has jurisdiction under *U.S. law*. And even if it were, a foreign action would not substitute for enforcement *in the U.S.* against Spain's *U.S. assets*.

It is irrelevant, moreover, that Spain may have property in other forums. That was true in *Tatneft II* too. *See* 21 F.4th at 840. If *forum non conveniens* applied simply because "the ordinary place to find Spanish assets is in Spain," Spain Br. 25, no foreign arbitral award could ever be

enforced in this country. That is not the choice the political branches made in signing and implementing the New York Convention. Indeed, the New York Convention's entire purpose is to protect investors like Petitioners from having to pursue their claims and enforce any resulting awards against a foreign state in that state's home forum. *See* Stefan Kröll, *Enforcement of Awards*, *in* Marc Bungenberg et al., International Investment Law: A Handbook 1483 (C.H. Beck 2015) (observing that 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," and "the only 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"). The Convention guarantees "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, art. I(1). And Congress implemented the Convention in mandatory terms: Such awards "shall" be enforced in U.S. court. 9 U.S.C. § 207; *cf. Alabama*, 533 U.S. at 153 (use of "shall" "militates against an implicit exception"). In doing so, Congress necessarily recognized this country's interest in fulfilling its binding treaty commitment to enforce arbitral awards under the New York Convention in U.S. court. *Forum non conveniens* is "not a principle of universal applicability," and cannot be used to overcome this "right of choice" of a U.S. forum guaranteed by Congress. *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 596-97 (1948).

CONCLUSION

The Court should deny Spain's Motion to Dismiss.

Dated: June 17, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2022, I caused the foregoing Response to Spain's Motion to Dismiss, 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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