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. KINGDOM OF SPAIN, *Respondent*.	Civil Action No. 1:21-cv-3249-RJL **Hon. Richard J. Leon** **Oral Argument Requested**

REPLY IN SUPPORT OF THE KINGDOM OF SPAIN'S MOTION TO DISMISS THE PETITION

Jonathan M. Landy (D.C. Bar No. 467847)
Benjamin W. Graham (D.C. Bar No. 1044724)
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
Tel.: (202) 434-5000
Fax: (202) 434-5029
Email: jlandy@wc.com

Csaba M. Rusznak (D.C. Bar No. 1030310)
SOVEREIGN ARBITRATION ADVISORS LLC
1050 Connecticut Avenue, N.W., Ste. 66255
Washington, DC 20035
crusznak@sovereignarbitration.us

Counsel for the Kingdom of Spain

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INTRODUCTION

The Opposition confirms Spain's assessment of this case—two European companies have traveled to the courts of the United States to enforce an award about a European dispute against a European sovereign in violation of the laws of the European Union. And Petitioners do not deny their motivation for doing so: Petitioners filed in the District of Columbia because European courts applying binding EU law would dismiss their claim at home.

Nor are Petitioners shy about their request. They urge this Court to treat the foundational EU Treaties as mere domestic legislation, to ignore the binding decisions of the EU Court of Justice on matters of EU law, and to deem sovereign immunity waived for each of the 169 parties to the New York Convention—even in cases where those sovereigns never agreed to arbitrate the dispute in the first place. Those arguments are sweeping. Granting the Petition would require the Court to contravene foundational principles of sovereign immunity, international comity, and arbitral jurisdiction, not to mention the basic tenets of contract formation. For any of the myriad reasons below, the Court should decline Petitioners' invitation.

ARGUMENT

I. THE PETITION FAILS FOR LACK OF SUBJECT-MATTER JURISDICTION.

The Petition should be dismissed at the threshold because the Court lacks subject-matter jurisdiction. Petitioners agree that Spain is presumptively immune from the Court's jurisdiction, that the FSIA provides the "exclusive basis" for jurisdiction over a foreign sovereign, and that Petitioners must therefore establish one of the enumerated statutory exceptions to Spain's immunity. Opp'n 12.

"Because 'subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity' laid out in the FSIA, as a 'threshold' matter in every action against a foreign state, a district court 'must satisfy itself that one of the

exceptions applies.'" *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 150–51 (D.D.C. 2018) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)); *accord Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020). In an action against a foreign sovereign, this "critical preliminary determination" must be made "as early in the litigation as possible[.]" *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F. 3d 36, 39 (D.C. Cir. 2000).

A. The "Arbitration Exception" in Section 1605(a)(6) Does Not Apply.

Petitioners concede that the arbitration exception applies only where there is a valid "agreement to arbitrate." 28 U.S.C. § 1605(a)(6); *see* Opp'n 15. Petitioners' arguments to conjure a valid arbitration between the parties run the gamut—they contend the Tribunal's determination of its own jurisdiction is binding on this Court; that EU law does not apply to Spain's ability to make a valid offer to arbitrate; and that the EU Court of Justice's decisions in *Achmea* and *Komstroy* should not be taken at face value. None of those contentions has merit.

1. The Tribunal's jurisdictional decision does not bind this Court.

Petitioners argue the Court must defer to the Tribunal's decision about whether there was a valid agreement to arbitrate. Opp'n 15–16. That suggestion would put the cart before the horse—and is contrary to both settled federal law and common sense.

Petitioners' argument contravenes basic principles of the Supreme Court's arbitration jurisprudence. The Supreme Court has held that "the court"—and not the Tribunal—"determines whether a valid arbitration agreement exists[.]" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 530 (2019). That is because "if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) (internal quotation marks omitted). Thus, where parties "disagree as to whether they ever entered into any arbitration

agreement at all, the court must resolve that dispute" on its own and without reliance on any decision from the Tribunal. *Id.*; *see also Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 n.3 (D.C. Cir. 2015) (the court has an independent duty to "satisfy itself" of the existence of a valid arbitration agreement).

Petitioners nonetheless argue that the ECT delegate questions of "arbitrability" to the Tribunal, and that the Court must defer to the arbitrator's decision. Opp'n 19. But that conflates the concepts of jurisdiction and arbitrability. *See* Opp'n 20–21. The question of ***jurisdiction*** is whether the parties formed a valid agreement to arbitrate. The Tribunal's existence is dependent on that agreement. The question of ***arbitrability***, by contrast, is "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995). That is a second-order question, which assumes the existence of a validly constituted Tribunal—i.e., that the jurisdictional question has already been resolved—and "arises when the parties have a contract that provides for arbitration of some issues" but not others. *Id.*

The Supreme Court's recent decision on arbitrability illustrates the difference. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), the parties entered into a valid arbitration agreement that called for arbitration of "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .)[.]" *Id.* at 528. The plaintiff filed suit in court, seeking both monetary damages and injunctive relief, and the defendant moved to compel arbitration. *Id.* The case thus presented a question of arbitrability—i.e., whether the claim fell within the scope of the arbitration agreement. The agreement invoked the rules of the American Arbitration Association, which delegates questions of arbitrability to the arbitrators (just as Petitioners say the ECT does here). In announcing the applicable framework for such

issues, the Supreme Court distinguish between the questions of jurisdiction and arbitrability, and required the courts to resolve the former:

> To be sure, ***before referring a dispute to an arbitrator***, ***the court determines whether a valid arbitration agreement exists***. *See* 9 U.S.C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Id. at 530 (emphasis added); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement," including where that agreement contains a "delegation provision" reserving questions of "enforceability" to the tribunal). Petitioners complain that Spain "quotes *Henry Schein* out of context," Opp'n 17 n.8, but the relevant context admits of only one reading: A determination of arbitrability is distinct from a determination of jurisdiction. Parties can delegate arbitrability to a tribunal, but a tribunal cannot manufacture jurisdiction where it has none. Here, the Tribunal lacked jurisdiction because there was no valid agreement to arbitrate.

Petitioners' preferred authorities make the same point: Arbitrability is the question of whether the claim "went beyond the scope of the agreement" to arbitrate, not whether an agreement exists in the first place. *LLC Komstroy v. Republic of Moldova*, 2019 WL 3997385, at *5 (D.D.C. Aug. 23, 2019). Spain thus agrees with Petitioners' observation that "'arbitrability of a dispute is not a jurisdictional question under the FSIA.'" Opp'n 21 (quoting *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021)). But Spain is not arguing that Petitioners' claims in the underlying arbitration went "beyond the scope of the submission to arbitration." *Stileks*, 985 F.3d at 878. To the contrary, Spain is arguing there was no agreement to submit any dispute with Petitioners to arbitration in the first place.

2. EU law governs Spain's putative offer to arbitrate.

Petitioners' position on the substance is that EU law does not apply to the question of whether Spain made a valid offer to arbitrate. *See* Opp'n 23–28. In particular, Petitioners argue that the EU Treaties are matters of "domestic law," that their application represents only Spain's "internal views of the validity of its commitments" under the ECT, and that the ECT takes precedence over the EU Treaties. *Id.* at 24. Those arguments are mistaken.

First, the EU Treaties are international law, not domestic law. The Member States of the European Union are sovereign states. Each Member State possesses international legal personality, and agreements between them are thus international law. The fact that EU law also applies within each Member State does not domesticate it. *Cf. Downes v. Bidwell*, 182 U.S. 244, 369 (1901) ("international law, . . . though a part of our municipal law, is not a part of the organic law of the land"). The ECT is not alone in the category of international law.

Second, the ECT does not take precedence over the EU Treaties. Petitioners rely on the Vienna Convention on the Law of Treaties, which establishes background norms for the application of international agreements. *See* Opp'n 24–25. In particular, Petitioners cite the Vienna Convention's principle of *lex posterior*, which instructs that in the case of conflict between treaties, the more recent controls. Opp'n 27. But default rules do not apply where, as here, the EU Treaties establish a specific rule for resolving apparent conflicts between the EU Treaties and other obligations the Member States purport to undertake. *See* Hindelang Supp. ¶ 40. The Member States of the European Union have agreed on a specific rule of conflict (*lex specialis*), which takes precedence over any general rule. *See* Vienna Convention, Art. 31(3)(c). The EU Treaties provide that in case of a conflict, the EU Treaties prevail. The Court of Justice held, as a matter of the Member States' delegation of sovereignty and the primacy of the EU Treaties, that "an international agreement cannot affect the allocation of power fixed by the EU

[Treaties] or, consequently, the autonomy of the EU legal system." *In re ECHR*, CJEU Op. 2/13 ¶ 201 (Hindelang Decl. Ex. 29). In any event, *lex posteriori* would not resolve the conflict in Petitioners' favor: The Member States' "declaration concerning primacy" in the Treaty of Lisbon from December 2007 is the most recent statement of "a rule of international law," RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 103(2)(d), and it affirms the primacy of EU law. *See* Hindelang Supp. ¶ 72 (discussing the Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. (C 306) 1). Even under *lex posterior*, the obligations of the EU Treaties bind Spain over any contrary obligation under the ECT.

Third, the ECT itself recognizes that the EU Treaties apply to the Member States and their obligations under the ECT. As defined in the ECT, the EU is a "Regional Economic Integration Organisation," which is an "organization constituted by states to which they have transferred competence of over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters." ECT, Art. 1(3). Among other things, the Member States delegated to the EU the authority for the Court of Justice to "take decisions binding on them," including in matters like the dispute-resolution provision of Article 26 of the ECT. The signatories to the ECT cannot claim to be surprised that the EU Treaties apply to—and limit—the Member States' participation in the ECT. Nor can Petitioners, who made their investments ***after*** the ECT was executed.

Such limitations on Spain and the other Member States should also not be surprising to the Court. As Spain pointed out in its brief, the United States Constitution imposes similar limitations on the states via the Compact Clause. *See* Br. 18 n.7. The Compact Clause "adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938). By

ratifying the Constitution and joining the Union, the several states agreed to limitations on their sovereign authority. One such limitation is the Compact Clause's prohibition that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State[.]" U.S. Const., Art. I, § 10, cl. 3. Any such agreement that violates the Compact Clause is invalid.

Achmea recognizes a similar principle under the "constitutional structure" of the European Union. *Achmea* ¶ 33. The Member States agreed to a limitation on their ability to enter certain international agreements. As relevant here, the Member States cannot enter agreements that conflict with EU law. *See generally* Br. 4 (discussing the principle of primacy). Where a Member State attempts to do so, that agreement is unenforceable and void *ab initio*. *Id.*

3. Under EU law, there was no agreement to arbitrate.

An arbitration agreement is the *sine qua non* of arbitration. That is because consent is the "first principle that underscores all of [the Supreme Court's] arbitration decisions[.]" *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (collecting cases). As with any agreement, ordinary principles of contract law apply. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent[,]" mostly frequently through "an offer . . . made binding by an acceptance[.]" RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 18. In this case, Petitioners claim that Spain made a standing offer to arbitrate investment disputes via the ECT, which could be accepted by filing a request for arbitration and naming Spain as a respondent. Thus, the threshold question is whether Spain made a valid offer. And the answer to that question requires the application of EU law, which binds Spain and limits its ability to conclude certain agreements.

Petitioners do not contest that the EU Court of Justice is the final authority on matters of EU law, and that its decisions in *Achmea* and *Komstroy* are the relevant cases. *See* Opp'n 27.

Nor do they deny that decisions of the Court of Justice are binding on Spain, which is unquestionably subject to EU law. The Court of Justice held that a putative agreement by a Member State to "remove from the jurisdiction of their own courts . . . disputes which may concern the application or interpretation of EU law" is invalid. *Achmea* ¶ 55. Under EU law, Spain cannot make a valid offer to arbitrate such disputes. That is the straightforward application of *Achmea*, and it is the same conclusion the German Federal Court of Justice reached on remand from the EU Court of Justice: Because the Slovak Republic was subject to the EU Treaties, "[t]here is therefore no offer to conclude an arbitration agreement" in the applicable treaty, *Achmea*, Case No. I ZB 2/15, ¶ 28 (Nov. 8, 2018) (Hindelang Decl. Ex. 8), and because there was no valid offer for the claimant to accept, "there is no arbitration agreement in the relationship between the parties," *id.* ¶ 28. The German court applied the same, ordinary principles of contract formation that are familiar to this Court. And the conclusion the Court reaches here should be the same: There was no agreement to arbitrate. Petitioners do not grapple with the German court's decision, *see* Br. 7, and instead choose to ignore it.

3. There is a split among arbitral tribunals about *Achmea*, *Komstroy*, and arbitral jurisdiction in intra-EU disputes.

There is clear, binding, and uniform authority from the courts of the European Union on the validity of an offer to arbitrate disputes under the ECT. Petitioners do not—and could not—deny or limit the holdings of the EU Court of Justice in *Achmea* and *Komstroy*. Against that uniform set of decisions from those sister courts, arbitral tribunals are divided. On June 16, 2022, an arbitral tribunal issued a jurisdictional award in *Green Power v. Spain*, dismissing the petitioners' claims in their entirety. *See* Hindelang Decl. Ex. 78. The case was ostensibly lodged by two Danish claimants under the Energy Charter Treaty, thus presenting an intra-EU dispute. The tribunal concluded:

> Following the reasoning of the CJEU Grand Chamber in the *Achmea* Judgment and subsequently confirmed in the *Komstroy* Judgment, this Tribunal considers that the offer of the Respondent, as an EU Member State, to arbitrate under Article 26 ECT a dispute with investors of another EU Member State which would of necessity, require this Tribunal to interpret and apply the EU Treaties, is precluded. Therefore, there is no unilateral offer by the Respondent which the Claimants could accept.

Id. ¶ 477. The *Green Power* award underscores the importance of the EU Court of Justice's decisions protecting the primacy and supremacy of its decisions on matters of EU law. *See* Br. 4–5. Consistency and finality in the interpretation of EU law is fundamental to the legal order within the European Union. Hindelang Decl. ¶¶ 35, 47–53. And as the *Green Power* award shows, arbitral tribunals are now making contrary determinations even among themselves. Rather than relying on the final, settled determinations of the EU Court of Justice, Spain is now left to the whims of which arbitrators are appointed on each subsequent tribunal.

These private arbitral tribunals are sitting to hear disputes from EU claimants, arising in sovereign EU territory, against EU Member States. They are making decisions contrary to settled EU law, and thereby arrogating power to themselves in contravention of *Achmea* and *Komstroy*. Allowing EU claimants to then enforce the ensuing awards in the United States in contravention of EU law violates fundamental principles of comity.

B. The "Waiver Exception" in Section 1605(a)(1) Does Not Apply.

Petitioners concede that Spain did not expressly waive immunity and instead rely on an alleged implied waiver. Opp'n 11–12. Rather than following the D.C. Circuit's instruction to cabin the implied-waiver provision "narrowly," *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999), Petitioners argue for a sweeping waiver of sovereign immunity by every party to the New York Convention. Indeed, Petitioners go so far as to argue that every sovereign state that joined the New York Convention immediately waived sovereign immunity,

even in cases where they never agreed to arbitration. *See* Opp'n 12 ("jurisdiction in no way depends on whether Spain consented to arbitration"). That argument is unavailing for several reasons.

As an initial matter, Petitioners concede that none of the three circumstances for implied waiver identified the D.C. Circuit in *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990), obtain in this case. *See* Opp'n 12; Br. 21–22. Instead, Petitioners rely on *Tatneft v. Ukraine*, 771 Fed. App'x 9 (D.C. Cir. 2019) and *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) as having created a "well settled" method of implied waiver. Opp'n 12–13. Not so.

As explained in Spain's opening brief, Petitioners' waiver argument both misstates the holdings of the D.C. Circuit and misapplies the *Seetransport* rule from the Second Circuit that it seeks to import. *See* Br. 21–22. The D.C. Circuit admonished this year that "[a]lthough we have favorably cited *Seetransport* and its reasoning in dicta and in an unpublished opinion, ***we have not formally adopted it***." *P&ID*, 27 F.4th at 774 (emphasis added). *Seetransport* and its implied-waiver rule are not the law in this Circuit. *See also id.* n.3 (noting "the murky waters of the waiver exception"). Thus, Petitioners are wrong to claim it is "well settled" that a sovereign state waives sovereign immunity merely by joining the New York Convention. Opp'n 13.

Second, even if *Seetransport* were good law, it would not apply to this case. Petitioners read *Seetransport* to hold that a sovereign waives immunity when it becomes a signatory to the convention, and "not later, by signing an arbitration agreement[.]" Opp'n 14. But that is not what the case says. States do not waive immunity simply by signing the New York Convention. Rather, the Second Circuit reasoned that "when a country becomes a signatory to the Convention, . . . the signatory State must have ***contemplated enforcement*** actions in other

signatory States." 989 F.2d at 578 (emphasis added). But contemplation of litigation in the abstract does not effectuate a waiver. Instead, the Second Circuit concluded that it is a country's subsequent "agreement to settle all disputes" in the territory of another signatory that "constituted a waiver of sovereign immunity under the Act." *Id.* Thus, the Second Circuit held that there was a waiver because the parties had uncontestedly agreed to arbitrate their dispute. *Id.* at 574. Because Spain did not agree to arbitrate Petitioners' claims, it did not waive its sovereign immunity.[1]

Petitioners attempt to resist this conclusion by arguing that "[t]he 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.'" Opp'n 14 (quoting Br. for Appellant, *Tatneft v. Ukraine*, No. 18-7057, Doc. ID 1748825, at 43, 46 (D.C. Cir. Sept. 4, 2018)). But Petitioners are misrepresenting Ukraine's brief: Ukraine conceded that a valid arbitration agreement existed to create and empower the tribunal, but contended that the particular type of claim at issue—a "fair and equitable treatment" claim—was excluded. *See* Br. for Appellant at 43. Petitioners are again confusing the issues of arbitrability (i.e., which claims fall within the arbitration agreement) and jurisdiction (i.e., whether a valid arbitration exists in the first place).

[1] Unless the Court separately dismisses the Complaint under the doctrine of *forum non conveniens*, *see* Part IV *infra*, the Court must resolve the question of subject-matter jurisdiction before considering the merits of Petitioners' case. That is because the Court "must make the critical preliminary determination of its own jurisdiction as early in the litigation as possible." *Phx. Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000). "[T]o defer the question is to 'frustrate the significance and benefit of entitlement to immunity from suit.'" *Id.* Importantly, Spain has the "right to take an immediate appeal" for denial of immunity under the collateral-order doctrine. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1323 (2017) (collecting cases).

II. THE COURT SHOULD REFUSE ENFORCEMENT UNDER THE NEW YORK CONVENTION.

As Spain explained in its opening brief, *see* Br. 22–23, if the Court were to find jurisdiction, it should nonetheless decline to enforce the Award. Specifically, under Article V(1)(a) of the Convention, "[t]he parties to the [arbitration] agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid . . ."). *See* New York Convention, 21 U.S.T. at 2560; 9 U.S.C. § 207. The EU Court of Justice has held that Spain lacked the capacity to make an effective offer to arbitrate a dispute with investors from another Member State. Thus, there was no offer for Petitioners to accept and no valid agreement to arbitrate. *See* Part I.A *supra*.

Petitioners make two arguments in response. *First*, they argue that the Tribunal resolved the validity of the arbitration agreement, and that its determination is owed "considerable deference." Opp'n 19. Petitioners are wrong. Courts do not defer to arbitrators' ***jurisdictional*** determinations of the validity of the arbitration agreement. *See supra* at 2–4. Petitioners' authority makes the same point. *See* Opp'n 20. In *Stileks*, the D.C. Circuit considered "Moldova's ***arbitrability*** argument as a defense under Article V(1)(c) of the Convention." 985 F.3d at 878 (emphasis added). Where the parties delegate questions of arbitrability to the arbitrators, their conclusions are due "more than mere deference." *Id.* But Spain is not advancing an arbitrability defense under Article V(1)(c), which asks whether "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration" or "contains decisions on matters beyond the scope of the submission to arbitration." Spain is advancing a jurisdictional defense under Article V(1)(a), which questions whether the parties were "under some incapacity" and whether the arbitration agreement is "not valid."

Petitioners' other authority also considered defenses under Article V(1)(c). *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 110 (D.D.C. 2017) ("Venezuela argues that the Tribunal exceeded the scope of Venezuela's consent to arbitrate by addressing matters the BIT did not consign to arbitration [under] Article V(1)(c)"); *Gold Rsrv. Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 120 (D.D.C. 2015) ("Respondent invokes Article V(1)(c) of the New York Convention . . ."). The only cited case to mention an invalid-agreement defense under Article V(1)(a) is *Stati v. Kazakhstan*, in which the court rejected the respondent's claim as poorly formed. Kazakhstan did not deny making a valid offer of arbitration, but rather raised concerns that were "procedural, not jurisdictional in nature," and thus not subject to review by the court. *Anatolie Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 203 (D.D.C. 2018).

Second, Petitioners argue that Spain "forfeited its Article V(1)(a) defense by failing to timely raise it in set-aside proceedings before the Swiss Federal Supreme Court." Opp'n 21. In so doing, Petitioners accuse Spain of engaging in "gamesmanship" by "sandbag[ging] arguments for enforcement proceedings" rather than raising them in a set-aside action. *Id*. at 22. Those accusations are ironic. Spain has never hidden its intra-EU jurisdictional defense. There is no gamesmanship. Petitioners' own recounting of the facts recalls that Spain lodged that defense in the first, bifurcated phase of the underlying arbitration in 2013. *See* Opp'n 6–7. In any event, the waiver rule that Petitioners derive from the Draft Restatement would not apply even by its own terms: When Spain "participate[d] as a party in a set-aside action," it did not "fail[] to assert a ground" for annulment. Restatement (Third) U.S. Law of Int'l Comm. Arb. Proposed Final Draft § 4.23 (2019). Spain did assert the invalidity of the arbitration agreement; the Swiss court then denied the defense on procedural grounds as untimely and did not consider it on the merits.

III. THE PETITION SHOULD BE DISMISSED UNDER THE FOREIGN SOVEREIGN COMPULSION DOCTRINE.

One of the non-jurisdictional defenses Spain raised is that the Award should not be enforced under the foreign sovereign compulsion doctrine because such doing so would compel Spain to act in contravention of the laws of a foreign sovereign (i.e., the European Union). Br. 24. Petitioners' various arguments against this defense are makeweight.

First, Petitioners argue that to require Spain to pay the Award "would not require Spain to do anything new[.]" Opp'n 34–35 (internal quotation marks omitted). That is a curious argument, given that the Petition certainly seeks to make Spain do something—i.e., pay Petitioners millions of Euros. Petitioners suggest that Spain could avoid its binding obligations, and the application of the foreign sovereign compulsion doctrine, by sneaking out of the European Union to pay the award "outside of the EU using foreign assets." *Id.* at 35. Spain cannot avoid its obligations under EU law by laundering money through foreign jurisdictions, as Petitioners request. Spain, as a sovereign state and a Member State of the European Union, is subject to EU law regardless of where its assets lie.

Second, Petitioners argue that the doctrine "applies to private parties, not governments." Opp'n 35. That distinction exists to prevent a foreign sovereign from passing *post hoc* laws to avoid its own obligations. *See* Opp'n 35 (raising concerns that a foreign sovereign would have "*carte blanche*" to defeat the jurisdiction of U.S. courts "by enacting laws"). But Petitioners mistake the relevant relationship here—Spain is bound by its obligations as a Member State of the European Union; the state aid laws are not of its own making. To the extent that Spain made "voluntary commitments" to the EU, *id.*, the same could be said of any "private party" that chooses its domicile or state of residence.

Third, Petitioners blithely assert that any risk of "severe sanctions," if Spain were to pay the Award in violation of EU law, is "remote" and "speculative." Opp'n 38. But "severe sanctions" are not part of the standard. The case Petitioners cite for this proposition, *see* Opp'n 38, proves the opposite: The doctrine applies where the action to be compelled "conflict[s] with the public policy of a foreign state," including "vital national interest of a foreign nation, especially in matters relating to economic affairs[.]" *United States v. First Nat. City Bank*, 396 F.2d 897, 902 (2d Cir. 1968). There is no requirement that the party face "criminal" or other "severe" sanctions. *Id.* Moreover, that Spain's payment of the Award would violate EU state-aid law is not remote or speculative. The European Commission has issued a decision regarding Spain's regulatory regime, which determined that (1) subsidies in the energy sector constitute state aid; (2) Spain's payment of those subsidies without the Commission's approval was "in breach of Article 108(3)" of the TFEU; and "any compensation which an Arbitration Tribunal were to grant to an investor" in respect of the subsidies that were the subject of Spain's regulatory reforms in the energy sector "would constitute in and of itself State aid." Br. 9–10 (citing Decision 2017/7384 (Nov. 10, 2017) (Hindelang Decl. Ex. 65)).

Fourth, Petitioners contend that "Spain cites no authority for the startling proposition that it could be unlawful for an EU member to pay a U.S. court judgment." Opp'n 37 (emphases omitted). But as discussed immediately above, and at length in Spain's opening brief, "any compensation" granted by the Tribunal "would constitute . . . State aid." Br. 9–10. The authority for that proposition is the binding determination of the European Commission, the EU entity responsible for such determinations. Petitioners' strange attempt to distinguish between the pecuniary obligations of the Award and the "U.S. court judgment" into which they would be rendered is sophistry. There is no material difference between them; both purport to require

Spain to pay "compensation . . . to an investor" in violation of EU law. Decision 2017/7384 (Nov. 10, 2017) (Hindelang Decl. Ex. 65).

IV. IN THE ALTERNATIVE, THE PETITION SHOULD BE DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*.

As before, the legal arguments above are dispositive of this case. Settled EU law demands that this Court dismiss the Petition. But if Petitioners' opposition raised any question about EU law and its application to this case, then the Court should dismiss under the doctrine of *forum non conveniens*.

Petitioners' response to this argument misses the mark. Petitioners rely on *Tatneft v. Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021) for the proposition that "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." Opp'n 40; *see also TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303–04 (D.C. Cir. 2005). But Petitioners do not engage with Spain's response: *Tatneft* and *TMR Energy* address a later stage of the enforcement proceedings, where the live issue was which fora were available for attached commercial assets within the United States. That only occurs after the court's jurisdiction had been established. The respondent in *TMR Energy* case ***did*** "***not dispute*** that [the] case [came] within . . . the exception to immunity for any action brought to confirm an arbitration award" under Section 1605(a)(6) of the FSIA. 411 F.3d at 324 (emphasis added). By contrast, Spain vigorously contests the Court's jurisdiction. The Court's jurisdiction must be resolved as a threshold matter—and thus well before the issue of attachment and enforcement in *TMR Energy* become relevant.

Petitioners' response simply urges the Court to sidestep that threshold question by arguing that "[t]his Court's jurisdiction turns exclusively on the FSIA and international law—not

EU law—and this Court can find jurisdiction . . . without deciding any question of EU law." Opp'n 42. For the reasons discussed above, Petitioners are wrong: EU law governs the question of Spain's ability to agree to arbitrate disputes with EU investors. And if there is question about the application of EU law, the Court should dismiss and allow Petitioners to address that question in EU courts.

CONCLUSION

For these reasons, Spain respectfully requests the Court enter an order dismissing the Petition for lack of subject-matter jurisdiction; dismissing the Petition under the doctrine of *forum non conveniens*; or denying Petitioners' claims on the merits under either the foreign sovereign compulsion doctrine or the New York Convention.

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Respectfully submitted,

/s/ Jonathan M. Landy

Jonathan M. Landy (D.C. Bar No. 467847)
Benjamin W. Graham (D.C. Bar No. 1044724)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Tel.: (202) 434-5000
Fax: (202) 434-5029
Email: jlandy@wc.com

Csaba M. Rusznak (D.C. Bar No. 1030310)
SOVEREIGN ARBITRATION ADVISORS LLC
1050 Connecticut Avenue, N.W., Ste. 66255
Washington, DC 20035
crusznak@sovereignarbitration.us

Counsel for the Kingdom of Spain

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I caused the foregoing to be filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered participants.

/s/ Jonathan M. Landy
Jonathan M. Landy