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**

SECOND EXPERT DECLARATION OF PROFESSOR STEFFEN HINDELANG

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I. INTRODUCTION AND BACKGROUND

1. I, Steffen Hindelang, make this declaration in the above-captioned case based upon my personal knowledge, except where stated on information and belief. The statements in this declaration, and the information upon which they are based, are true to the best of my knowledge and belief.

2. This is my second declaration in this matter in the above-captioned case. I affirm all the statements made in my first declaration ("First Hindelang Declaration")[1] in Support of Respondent the Kingdom of Spain's ("Spain's") Motion to Dismiss the Petition in the matter of *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. v. Kingdom of Spain*, Case No. 1:21-cv-3429 (RJL).

3. My second declaration addresses the opinions on European Union ("EU") and public international law expressed in the expert declarations of Professor Andrea K. Bjorklund ("Bjorklund Declaration")[2] and Conor Quigley, QC ("Quigley Declaration"),[3] filed in support of the Petitioners.

4. All authorities I have relied upon are set forth at the end of my declaration and referred to as Exhibits to this declaration.

5. I do not express an opinion on any other law in this declaration other than EU and international law relevant to the issues I have been asked to address.

6. I am being compensated at a rate of EUR 550 per hour to prepare this expert declaration and, if required, to testify in this matter.

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[1] Expert Declaration of Professor Steffen Hindelang (**ECF No. 15.2**).
[2] Expert Declaration of Professor Andrea K. Bjorklund (**ECF No. 22**).
[3] Expert Declaration of Mr. Conor Quigley, QC (**ECF No. 21**).

7. In my First Declaration, I explained that the Tribunal in *PV Investors* (AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. being among the group of claimants to which the tribunal referred to as "PV Investors") *v. Kingdom of Spain*, PCA Case No. 2012-14 ("*AES Solar v. Spain*") had to apply the Treaty on European Union ("TEU") (**Ex. 3**) and the Treaty on the Functioning of the European Union ("TFEU") (**Ex. 4**) (collectively, the "EU Treaties") as well as the legal order flowing therefrom. Its purported jurisdiction on the basis of Article 26 of the Energy Charter Treaty ("ECT") (**Ex. 5**) conflicts with the EU Treaties. The EU Treaties enjoy primacy over any conflicting international law obligation between EU Member States, including an offer to arbitrate purportedly contained in Article 26 of the ECT. By virtue of the principle of primacy, the said Tribunal was therefore not only entitled, but legally *obliged* – like any public body created by one or more EU Member States, to prevent conflict by declining its jurisdiction. Despite such clear and unambiguous instruction by law, the Tribunal, however, chose to act against the sovereign will clearly expressed in the EU Treaties by those States to which it owes its very existence, and to render an award in absence of an arbitration agreement, and consequently, despite a lack of jurisdiction.

8. Professor Bjorklund's Declaration avoids addressing the palpable conflict between the purported intra-EU arbitration agreement based on Article 26 of the ECT and the EU Treaties' principle of autonomy, as codified in Articles 19(1), 267 and 344 of the TFEU, and the principle of primacy, a cornerstone of the EU Treaties reflected in the "Declaration concerning Primacy."[4] The EU Treaties, as authoritatively interpreted by the Court of Justice of

[4] Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy, 2008 O.J. (C 115) (**Ex. 36**).

the European Union ("CJEU") in *Achmea*[5] and *Komstroy*,[6] preclude intra-EU arbitration under Article 26 of the ECT, and none of Professor Bjorklund's arguments to the contrary survives scrutiny under international law.[7] As elaborated below, *first*, the EU Treaties are always applicable international law in intra-EU investment disputes such as the one in *AES Solar v. Spain*. *Second*, the principle of primacy of EU law, enshrined in the EU Treaties, is the supreme conflict rule governing the relationship in international law between the EU Treaties and other international agreements with regard to obligations of the EU Member States *inter se*. It means that Article 26 of the ECT does not apply between EU Member States and precludes an EU Member State from extending a valid offer to arbitrate to a national of another EU Member State. *Finally*, paying any amount in satisfaction of the Award would require the EU Commission's approval in order not to violate EU law. The arguments put forward in the Quigley Declaration do not change this conclusion in any way.

II. THE EU TREATIES ARE APPLICABLE LAW UNDER ART. 26(6) OF THE ECT

A. The EU Treaties constitute rules of international law applicable between the EU Member States within the meaning of Article 26(6) of the ECT

9. As explained in my First Declaration, the EU Treaties establish a unique legal order which is both a highly elaborate legal regime in public international law between Member States and a constitutional framework creating law applicable within Member States.[8] Since the

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[5] CJEU, Case C-284/16, ECLI:EU:C:2018:158, ¶ 41 – *Achmea B.V. v. Slovak Republic* ("*Achmea"*) (**Ex. 7**).
[6] CJEU, Case C-741/19, ECLI:EU:C:2021:655 – *Komstroy LLC v. Republic of Moldova* ("*Komstroy*") (**Ex. 13**).
[7] Article 26(6) of the ECT reads: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." (**Ex. 5**).
[8] First Hindelang Declaration, ¶¶ 32 *et seq*. (**ECF No. 15.2**).

EU Treaties thus possess character of international law, they would need to be considered under the applicable law clause of Article 26(6) of the ECT.

10. Article 26(6) of the ECT, by its terms, or in Professor Bjorklund's words, "its plain language,", includes *all* "applicable rules of international law." While Professor Bjorklund acknowledges that "the EU Treaties are international legal instruments,"[9] she proceeds to opine that the EU Treaties do not form part of the applicable rules of international law under Article 26(6) of the ECT.[10] This position is logically unsustainable because the EU Treaties, satisfying the definition of a treaty in international law set out in Article 2(1)(a) of the Vienna Convention on the Law of Treaties ("VCLT"), i.e. "[a]n international agreement concluded between [s]tates in written form and governed by international law", are rules of international law, and Article 26(6) of the ECT does not exclude any rules of international law from its coverage.

11. Professor Bjorklund seeks to exclude the EU Treaties from Article 26(6) of the ECT, arguing that the jurisdiction of the Tribunal under Art. 26(1) of the ECT limits the scope of the "rules of international law" in Article 26(6) of the ECT to "generally applicable principles of international law", thus, not including the EU Treaties.[11] This not only ignores the plain language of Article 26(6) of the ECT, which Professor Bjorklund herself relies on heavily, but seeks to rewrite the said Article to remove treaties from its scope.

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[9] Bjorklund Declaration, ¶ 115, *see* also ¶ 116 (**ECF No. 22**) where Professor Bjorklund admits that "the legal relationship between the EU Member States is effectuated by international treaties."

[10] Bjorklund Declaration, ¶ 113 (**ECF No. 22**).

[11] Bjorklund Declaration, ¶ 113 (**ECF No. 22**) where she states that "these [the ECT's] provisions are the law applicable to the merits of the dispute" and later that "[t]his conclusion is supported by the plain text of Article 26(6) of the ECT."

12. Professor Bjorklund attempts to justify rewriting Article 26(6) of the ECT by referring to Article 26(1) of the ECT, which defines arbitrable disputes as those which concern "an alleged breach of an obligation . . . under Part III [of the ECT]." However, the scope of arbitrable disputes and the applicable law provisions are distinct. Article 26(1) of the ECT defines which disputes the arbitral tribunal may decide. Article 26(6) of the ECT determines what law it is to apply in deciding those disputes. The jurisdiction of an arbitral tribunal does not limit the law that the tribunal can (and must) apply.

13. The EU Treaties are "applicable" whenever they are relevant to determining the "issues in dispute." It is untenable to maintain that the ECT tribunals will never be called upon to apply and interpret EU law. The Tribunal in *AES Solar v. Spain*, for example, interpreted EU law when it decided that the EU Treaties did not preclude it from exercising jurisdiction.[12] It is indeed not uncommon for investment arbitration tribunals to face questions of EU law. In a recent award , a tribunal constituted under the ECT in *Greenpower v. Spain*[13] held that, under the circumstances analogous to this case, i.e. the intra-EU context, "interpreting Article 26 [of the] ECT without resorting to EU law is inconclusive,"[14] and went on to apply "EU law together with the ECT to resolve the issues raised by the jurisdiction *ratione voluntatis*,"[15] along with the rationale of *Komstroy*.[16] By way of another example, in *Isolux v. Spain*, the Tribunal found that the EU Treaties formed part of the "applicable rules and principles of international law" within

[12] Decision on Jurisdiction, ¶¶ 188 et seq (**ECF No. 1.2 at Ex. B**).
[13] Green Power Partners K/S SCE Solar Don Benito APS v. Kingdom of Spain, SCC Arbitration V (2016/135), Award (**Ex. 78**).
[14] *Greenpower v. Spain*, ¶ 412 (**Ex. 78**).
[15] *Greenpower v. Spain*, ¶ 446 (**Ex. 78**).
[16] *Komstroy*, ¶ 66 (**Ex. 13**).

Article 26(6) of the ECT, and concluded that "[i]t is admitted today, *in a general manner*, that arbitral tribunals not only have the power, but rather the obligation to apply EU law."[17]

14. In another context, Professor Bjorklund also argues that EU law would *only* be internal law of the Member States and that such law cannot be invoked to justify failure to comply with international obligations.[18] This ignores the above-mentioned unique characteristics of the EU legal order established by the EU Treaties, which certainly form part of the EU Member States' internal law, but at the same time constitute public international law by their very nature as treaties between the Member States. On several occasions, this has been confirmed by the international court charged to deliver the binding authoritative interpretation of the EU Treaties[19], the CJEU: "[EU] law must be regarded . . . as deriving from an international agreement between the Member States."[20] This was also resonated in the findings of the Tribunal in *Greenpower v. Spain*, where it held that "the distinction made between separate planes [i.e. ECT and public international, on the one hand, and EU law on the other] is artificial and obscures the issues that must be decided."[21] Thus, under the perspective of public international law, which Professor Bjorklund so vividly emphasises, the EU Treaties are to be considered what they are: international law. They are, thus, applicable law between Spain and the Netherlands under Article 26(6) of the ECT.

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[17] The original text in Spanish reads "Además, se admite hoy, de modo general, que los tribunales arbitrales no solamente tienen el poder sino también el deber de aplicar el derecho europeo." *See Isolux Netherlands, BV v. Kingdom of Spain,* SCC Case V2013/153, ¶ 654 (**Ex. 79**). *See also Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, ¶¶ 4.151-4.160 (25 November 2015) (**Ex. 80**).

[18] *See* Bjorklund Declaration, ¶ 123 (emphasis added) (**ECF No. 22**).

[19] Cf. TEU, Article 19(1) which reads: "The Court of Justice of the European Union . . . shall ensure that in the interpretation and application of the Treaties the law is observed."

[20] *See Achmea*, ¶ 41 (**Ex. 7**).

[21] *Greenpower v. Spain* ¶ 332 (**Ex. 78**).

15. Furthermore, Professor Bjorklund's position also contradicts Article 31 of the VCLT, which states:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
> . . .
> 3. There shall be taken into account, together with the context:
> . . .
> (c) any relevant rules of international law applicable in the relations between the parties.[22]

16. As noted, the EU Treaties are international law applicable between EU Member States, including Spain and the Netherlands. As such, they are, in principle, relevant within the meaning of Article 31(3)(c) of the VCLT and must be taken into account when interpreting and applying the ECT in this dispute.[23]

17. In her ill-founded attempt to exclude EU Law from the applicable law in the context of this case, Professor Bjorklund fails in particular to apply the central rule of treaty interpretation relevant to circumstances when parties are subject to obligations under more than one treaty, i.e. Article 31(3)(c) of the VCLT, which requires an interpreter to take into account other treaties applicable between the parties. Article 31(3)(c) of the VCLT is part of the general rules of treaty interpretation contained in the VCLT that cannot be ignored at will.

18. As regards a multilateral treaty like the ECT, the "relevant rules" include those rules that are applicable to *some* instead of *all* treaty parties, to the extent that the treaty entails rights and obligations that are owed *bilaterally* between the concerned parties rather than to *all*

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[22] VCLT, 1155 U.N.T.S. 331, Art. 31 (**Ex. 81**).

[23] Interestingly, *littera* (c) seems to be the only one under Article 31 of the VCLT, which Professor Bjorklund does not address in her declaration, although she relies heavily on the rules of interpretation under the VCLT.

the parties as a group (*erga omnes partes*) – and such – without prejudice to the rights and obligations of the treaty parties who are not subject to the said *inter se* arrangements.[24]

19. Applying Article 31(3)(c) of the VCLT to the interpretation of the ECT thus renders the ECT subject to commitments of EU Member States between themselves as provided for under the EU Treaties. This includes the limitations under the EU Treaties that preclude the EU Member States from entering into international commitments *inter se* that are incompatible with EU law. While on principle the EU Member States can commit to investor-State arbitration with respect to third countries subject to certain restrictions[25], the CJEU emphasized in *Achmea*[26] and *Komstroy*[27] that the EU Treaties do not permit them to do so *vis-à-vis* nationals of other EU Member States in the form currently provided for in the ECT. Irrespective of what Professor Bjorklund thinks[28] of the Declarations of six EU Member States[29] issued in the aftermath of the CJEU's *Achmea* judgment, since the CJEU has repeatedly confirmed its authoritative interpretation of the EU Treaties in *Achmea*, the position under the EU Treaties is crystal clear: no intra-EU investor-State arbitration on the basis of the ECT.[30]

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[24] McLachlan in The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention (54 INT'L & COMP. L. Q., 2005) 279, 315 (**Ex. 82**).
[25] CJEU, Opinion 1/17, ECLI:EU:C:2019:341 – *CETA* ("Opinion 1/17"), ¶¶ 120 et seq. (**Ex. 31**); CJEU, Opinion 2/15, ECLI:EU:C:2017:376 – *(Free Trade Agreement between the European Union and the Republic of Singapore)*, ¶ 292 (**Ex. 83**).
[26] *Achmea,* ¶¶ 58-60 (**Ex. 7**).
[27] *Komstroy* ¶¶ 62-64 (**Ex. 13**).
[28] Bjorklund Declaration, ¶¶ 89-90 (**ECF No. 22**).
[29] Declaration of the Representatives of the Government of the Member States, On the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union, (2019) 1 (**Ex. 9**); Declaration of the Representative of the Government of Hungary, On the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union (2019), ¶ 8 (**Ex. 11**).
[30] *Komstroy* ¶ 64 (**Ex. 13**); *See also Greenpower v. Spain* – Award, ¶¶ 431, 436 (**Ex. 78**).

B. No contracting out: EU Treaties are always applicable international law between the EU Member States in intra-EU relations

20. Even if, *arguendo,* Professor Bjorklund's statements were assumed to be true and the "applicable rules and principles of international law" in Article 26(6) of the ECT were not to refer to the EU Treaties, EU law would still be applicable law in an intra-EU investment arbitration, such as the one at issue. The EU Treaties do not allow the EU Member States to contract out of or simply disapply EU law. It is, thus, always applicable when they act *inter se*.

21. The CJEU, being *the* international court charged with setting the content and meaning of the EU Treaties in an binding fashion for the EU Member States, made the point abundantly clear that "the very nature of EU law . . . requires that relations *between* the Member States be governed by EU law to the exclusion, if EU law so requires, of *any* other law."[31] Put differently, the EU Treaties are the *supreme* international law applicable between the EU Member States, derogating – by virtue of the principle of primacy – any other choice of law in case of conflict. In intra-EU matters, every judicial authority created by the EU Member States – such as the Tribunal in *AES Solar v. Spain* – must therefore apply EU law – no matter whether there was any explicit reference to EU law, or even if explicitly excluded in an international agreement to which the Member States are a party to. Such Tribunal is responsible that EU law is fully respected.[32]

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[31] CJEU, Opinion 2/13, ECLI:EU:C:2014:2454, ¶ 212 – *ECHR* ("Opinion 2/13") (**Ex**. **29**) (emphasis added).

[32] *See* CJEU, Case 106/77, ECLI:EU:C:1978:49, ¶ 21 – *Simmenthal II* ("*Simmenthal II*") (emphasis added) (**Ex**. **23**); CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315, ¶¶ 16, 18 – *Zwartveld* (**Ex**. **54**).

C. Arguendo, EU law is applicable to intra-EU disputes by virtue of Article 41(1)(b) of the VCLT

22. As just explained, the EU Treaties contain a specific rule, developed in case law, on the applicable law between EU Member States. If Member States should deviate from this specific applicable law rule in their *inter se* dealings, such other rule would have to be disapplied according to the principle of primacy. The same result, *arguendo*, in the case at hand can be reached with reference to Article 41(1)(b) of the VCLT which provides for a default rule on *inter se* modification of a multilateral agreement. It reads in the relevant part:

> Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> . . .
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

23. Applying Article 41(1)(b) of the VCLT to the situation at hand, by concluding the EU Treaties, the EU Member States that are also Members of the ECT, such as Spain and the Netherlands, have modified the relevant provision on applicable law, i.e. Articles 26(6) of the ECT, in a way that, in matters *inter se*, the EU Treaties, including the principles of autonomy and primacy, are always applicable law in intra-EU investment disputes. Thus, even if, *arguendo*, Article 26(6) of the ECT, at the starting point, was not referring to the EU Treaties, the ECT provision was modified by the EU Treaties containing the rule firmly established in case law that EU law is always applicable between the EU Member States in an intra-EU context.[33]

[33] Opinion 2/13, ¶ 212 (**Ex. 29**) (emphasis added).

24. Professor Bjorklund seeks to avoid this consequence of an *inter se* modification of the ECT by already erroneously assuming that Article 42 of the ECT – which, according to its clear title and wording, applies *only* to treaty *amendments*[34] – would also cover "modifications that would apply only as between some Member States."[35] This ignores the paramount distinction in the international law of treaties between treaty *amendment* that affects *all* contracting parties, addressed in Article 40 of the VCLT, and *modification* between *some* contracting parties, which is dealt with in Article 41 of the VCLT.[36] As Special Rapporteur Sir Waldock noted in his Third Report on the Law of Treaties:

> . . . there is a considerable difference between the use of the *inter se* technique in cases where *all* the parties to the original treaty take part in the adoption of a new treaty providing for amendments to come into force *inter se* [amendment] and its use in cases where some of the parties have no part in the drawing up of the amending treaty [modification]. In the former case the *inter se* revision takes place by consent, even if not all the parties ratify the new treaty; in the latter case it does not.[37]

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[34] Article 42 of the ECT is entitled "Amendments" and read in its relevant parts as follows:

> (1) Any Contracting Party may propose *amendments* to this Treaty.
> (2) The text of any proposed *amendment* to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.
> (3) *Amendments* to this Treaty, texts of which have been *adopted by the Charter Conference* [which acts in *unanimity* according to Article 36(1)(a) of the ECT], shall be communicated by the Secretariat to the Depository which shall submit them to *all* Contracting Parties for ratification, acceptance or approval.
> . . . (emphasis added).

[35] Bjorklund Declaration, ¶ 94 (**ECF No. 22**).

[36] *See* Rigaux, Anne and Simon, Denys in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary (OUP 2011), Article 41, ¶ 9 (**Ex. 84**).

[37] Yearbook of the International Law Commission, 1964, Vol. II, A/CN.4/SER.A/1964/ADD.1, p. 49, ¶ 8 (**Ex. 85**) (emphasis added).

25. Since Article 42 of the ECT, by its title and wording, concerns treaty *amendment*, and treaty amendment by all parties is with Special Rapporteur Sir Waldock not an "*inter se* modification plus" but an *aliud*, the provision does not regulate *inter se* modification by *some* parties to the ECT, like in the case at hand. To put it in Professor Bjorklund's words, the plain language of the ECT does not allow for a reading that includes *inter se* modifications into the scope of Article 42 of the ECT.

26. Thus, since the ECT does not address *inter se* modification, recourse can be taken to the default rule in Article 41 of the VCLT. A modification of Article 26(6) of the ECT through conclusion of the EU Treaties by the EU Member States also fulfils all requirements stipulated in Article 41(1)(b) of the VCLT:

27. First, the ECT does not contain an explicit prohibition on *inter se* modification[38], as shown above.

28. Second, due to the bilateral or reciprocal nature of the obligations in the ECT, a modification by EU Member States of the rule on applicable law (and others relating to dispute settlement) does neither affect the rights of contracting third parties nor the effective performance of their obligations.

29. Third, since the obligations in the ECT are reciprocal and not of an absolute character, such modification does also not relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the ECT.

[38] Any implicit prohibition on modification contained in the ECT would be irrelevant as the wording "explicitly or impliedly prohibited" contained in an earlier draft of the VCLT was abandoned in favour of the current wording requiring an explicit prohibition. *See* Yearbook of the International Law Commission, 1964, Vol. I, A/CN.4/SER.A/1964, p. 271-272, ¶ 73 (**Ex. 86**).

30. When it comes to the fulfilment of the criteria in Article 41(1)(b)(i) and (ii) of the VCLT, the nature of an agreement and the obligations contained therein are decisive.[39] In this respect, multilateral treaties and their underlying obligations are divided into two groups: those of an interdependent (*erga omnes partes*) or integral nature (*erga omnes*), and those of a reciprocal one.[40] In case the obligations of the underlying treaty to be modified are of an interdependent or integral nature, an *inter se* modification will most likely not be permissible.[41] Such obligations require the compliance with the obligations contained therein by each contracting party with regard to all other contracting parties or in general. In contrast, in case of reciprocal obligations, *inter se* modification is usually possible.[42] Reciprocal obligations are obligations consisting in a synallagmatic grant or interchange between two parties.[43] Thus, the respect of the latter obligations is due only with regard to the respective other party.

31. The obligations under the ECT, including those concerning applicable law under Articles 26(6) of the ECT, are bilateral in nature.[44] They are founded on reciprocity amongst

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[39] Rigaux, Anne and Simon, Denys in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary (OUP 2011), Article 41, ¶ 35 (**Ex. 84**).

[40] Rigaux, Anne and Simon, Denys in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary (OUP 2011), Article 41, ¶ 35 (**Ex. 84**); *see* also von der Decken, Kerstin in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 41, ¶ 18 (**Ex. 87**).

[41] Von der Decken, Kerstin in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 41, ¶ 18 (**Ex. 87**); *see also* Rigaux, Anne and Simon, Denys in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary (OUP 2011), Article 41, ¶ 37 (**Ex. 84**).

[42] *See* von der Decken, Kerstin in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 41, ¶ 18 (**Ex. 87**); *see also* Rigaux, Anne and Simon, Denys in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary (OUP 2011), Article 41, ¶ 36 (**Ex. 84**).

[43] Schmalenbach, Kirsten in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 26, ¶¶ 34, 36-38 (**Ex. 87**).

[44] *Komstroy*, ¶ 64 (**Ex. 13**). *See also* CJEU, Case C-741/19, ECLI:EU:C:2021:164, Opinion of Advocate General *Maciej Szpunar,* ¶ 41 – *Komstroy, the successor in law to the company*

concerned parties only. A third party to the ECT has no right, interest, or is in any way affected in the performance of its obligations[45] by the law applicable between Spain and the Netherlands in this case. None of its consequential effects would affect matters which are not between the EU Member States only.

32. Professor Bjorklund asserts that the ECT "is not a 'bilateralizable' treaty."[46] She argues that Spain or other EU Member States "might well favour EU investors over non-EU investors in future similar situations" as the latter, third-country investor, has access to investor-State dispute settlement ("ISDS") and the EU investor has not.[47] However, this argument is flawed and cannot change the above result.

33. Professor Bjorklund's argument is founded on the assumption that having access to domestic courts is *per se* disadvantageous compared to a potential access to ISDS. This premise is already questionable since, under Article 26(2) of the ECT, the different dispute resolution methods, including domestic courts and ISDS, are treated at equal footing. There is

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Energoalians v. Republic of Moldova (**Ex. 13**): "[T]he ECT, although a multilateral agreement, consists of a set of bilateral obligations between the Contracting Parties, including the European Union and the Member States. The obligations established by the ECT essentially allow the protection of investments made by investors from one Contracting Party in another Contracting Party. The infringement of one of those obligations therefore does not mean that all the Contracting Parties are always able to claim compensation, as those obligations apply only bilaterally, between two Contracting Parties." Moreover, the CJEU addressed the situation where a multilateral treaty contains bilateral relationships whereby Member States make certain undertakings inter se also, e.g., in CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of the Italian Republic* (**Ex. 41**) (addressing the situation of bilateral rights and obligations in a multilateral treaty in respect of the General Agreement on Tariffs and Trade (GATT); holding that GATT tariffs rules cannot be applied between the EU Member States to the extend they contradict obligations in EU law).

[45] Cf. In general, von der Decken, Kerstin in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 41, ¶ 18 (**Ex. 87**).

[46] Bjorklund Declaration, ¶ 93 (**ECF No. 22**).

[47] Bjorklund Declaration, ¶ 83 (**ECF No. 22**).

nothing in the terms of the Article which suggests any sort of superiority of ISDS as alleged by Professor Bjorklund.

34. Professor Bjorklund's argument of an alleged favouritism of intra-EU investors due to their lack of access to ISDS is based on another doubtful assumption, i.e. that the State parties to the ECT would act *per se* illegally[48]. Essentially, she argues that States would readily breach public procurement rules and non-discrimination standards in domestic law, EU law, and under the ECT by illegally favouring such investors which lack access to ISDS, with the prospect of defeating them in corrupt state court proceedings after they have maltreated them. However, despite a lot of imagination, one can hardly see a State behaving unlawfully all the time.

35. Further, the said *inter se* modification would also not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole pursuant to Article 41(1)(b)(ii) of the VCLT. The purpose of the ECT is, according to Article 2 of the ECT, "to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." This purpose is not affected by a modification of the applicable law as it might even contribute to a wider acceptance of the ECT.

36. Moreover, Article 41(2) of the VCLT provides that "the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides." No particular form is required. The notification serves the preservation of third parties rights and interests. In the case at hand, even if assumed that there is a lack of notification, no such rights and interested are affected and thus an assumed lack of notification would not change the result reached.

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[48] Bjorklund Declaration, ¶¶ 85-86 (**ECF No. 22**).

37. In conclusion so far, the EU Treaties would also be applicable law in intra-EU disputes on the basis of the ECT by the way of *inter se* modification according to Article 41(1)(b) of the VCLT.

III. THE PRINCIPLE OF PRIMACY IS THE SUPREME CONFLICT RULE IN INTERNATIONAL LAW GOVERNING THE RELATIONS BETWEEN EU MEMBER STATES

38. As I explained in my First Declaration, the EU Treaties establish an all-encompassing *conflict rule*, the principle of primacy of EU law.[49] This rule means that in the international law relationships between EU Member States, the EU Treaties and the legal order created by them prevail over any inconsistent treaty provision entered into by the Member States.[50]

39. A conflict between Article 26 of the ECT and the EU Treaties exists because, under *Achmea* as confirmed by *Komstroy*, Article 26, when applied to intra-EU investment disputes, conflicts with Articles 267 and 344 of the TFEU.[51] Thus, as in *Komstroy*, where Article 26 of the ECT was found in conflict with the principle of autonomy of EU law, the conflict in *AES Solar v. Spain* between Article 26 of the ECT and the EU Treaties must be resolved by giving priority to the provisions of Articles 267 and 344 of the TFEU, as also confirmed by the reasoning of the tribunal in *Greenpower v. Spain*.[52] In consequence, the Tribunal in *AES Solar v. Spain* lacks jurisdiction, as Spain has never given its consent to

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[49] First Hindelang Declaration, ¶ 34 (**ECF No. 15.2**).

[50] This is of course because the EU is comprised of 27 Member States that have ceded to the EU aspects of sovereignty to establish one integrated Europe characterized by a common law, values, and a single market. The EU Treaties have limited the Member States' sovereignty more significantly than "typical" founding instruments of international organisations.

[51] First Hindelang Declaration, ¶¶ 39-40. *See also*, *Greenpower v. Spain*, ¶ 425 et seq. (**Ex. 78**). - the findings of the tribunal that in the intra-EU context there is no distinction between investment-arbitration clauses in BITs and Article 26 of the ECT.

[52] *Greenpower v. Spain*, ¶ 423 (**Ex. 78**).

arbitrate. The same conclusion was reached by the Tribunal in a largely identical case in *Greenpower v. Spain* which held that "the Tribunal concludes that the CJEU Grand Chamber's *Achmea Judgment* is fully relevant for the question raised by the Respondent in its jurisdictional objection *ratione voluntatis*, and that it leads to a clear answer to such question, as further confirmed in the CJEU Grand Chamber's *Komstroy Judgment*. This answer is that Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations and hence there is no offer of arbitration that the Claimants could accept."[53]

A. The principle of primacy is applicable in international law governing the relations between Member States

40. Professor Bjorklund attempts to challenge the above by misstating the scope of application of the principles of autonomy and primacy of EU law. On the principle of autonomy, Bjorklund argues that "[a]utonomy of EU law is a principle of EU law, not of public international law."[54] Further, she suggests that "the principle of the primacy of EU law operates as a [s]upremacy [c]lause," but *only* within the EU legal order without, however, having any effect on the EU Member States international obligations.[55] This line of arguments is flawed in several ways.

41. First, as demonstrated above, the EU Treaties and the legal order they create also constitute international law; albeit of *superior rank* between the EU Member States. If the EU Treaties are international law, so are the principles of primacy and autonomy contained therein. Professor Bjorklund's reading of the principles is in direct opposition with jurisprudence of the international court charged to set out the content and meaning the EU Treaties in a binding

[53] *Greenpower v. Spain*, ¶ 445 (**Ex. 78**).
[54] Bjorklund Declaration, ¶¶ 10, 116 (**ECF No. 22**).
[55] Bjorklund Declaration, ¶¶ 115-116 (**ECF No. 22**).

fashion for its State parties, i.e. the CJEU, which constitutes the final arbiter of questions related to the interpretation and application of the EU Treaties and the legal order based on them.[56] The CJEU made the point abundantly clear, when in *Achmea* it held:

> Given the nature and characteristics of EU law [. . . EU] law must be regarded both as forming part of the law in force in every Member State and *as deriving from an international agreement* between the Member States.[57]

42. Second, Professor Bjorklund also ignores the "settled case-law of the [CJEU that] an international agreement [such as the ECT] cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court."[58]

43. The CJEU's case law contradicts Professor Bjorklund's view that the "decision [how much effect the EU and its Member States want to give EU law, including its primacy over other obligations] does not . . . negate [the Member States'] obligations on the international plane" and that EU law "is not . . . superior to other international law regimes."[59] As early as in 1962, the CJEU stated that

> a Member State which by virtue of the entry into force of the EEC Treaty [Treaty establishing the European Economic Community - a predecessor to the EU Treaties], assumes new obligations which conflict with rights held under an earlier agreement, refrains from exercising such rights to the extent necessary for the performance of its new obligations; Article 234 of the EEC Treaty [now Article 351

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[56] Cf. TEU, Art. 19(1) (**Ex. 3**).
[57] *Achmea*, ¶ 41 (**Ex. 7**) (emphasis added). *See also Id.*, ¶ 33, where the CJEU states that "[a]ccording to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States *and to international law* is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law." (emphasis added).
[58] *Achmea*, ¶ 32 (**Ex. 7**).
[59] Bjorklund Declaration, ¶¶ 116-117 (**ECF No. 22**).

> of the TFEU] only guarantees the rights held by third countries under earlier agreements.[60]

44. The Court made clear that

> in matters governed by the EEC Treaty [a predecessor to the EU Treaties,] that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT [General Agreement on Tariffs and Trade of 1947].[61]

In this respect, it is worth pointing out that GATT of 1947 is a multilateral agreement to which, in 1962, the EU Member States and third countries were parties to. The EU joined in 1995.

45. While the above judgement dealt with treaties in force prior to the entry into force of the EEC Treaty, since then, the Court has developed as a bedrock principle of EU law that

> the provisions of a convention concluded . . . by a Member State with another Member State could not apply . . . in the relations between those States if they were found to be contrary to the rules of the Treat[ies].[62]

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[60] CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of the Italian Republic*, Summary Point 1 (**Ex**. **41**).

[61] CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of the Italian Republic* (**Ex**. **41**).

[62] CJEU, Case C-3/91, ECLI:EU:C:1992:420, ¶ 8 – *Exportur* ("*Exportur*") (**Ex**. **42**) (emphasis added). *See also* CJEU, Case 235/87, ECLI:EU:C:1988:460, ¶ 23 – *Matteucci* (**Ex**. **88**) ("A bilateral agreement which reserves the scholarships in question for nationals of the two Member States which are the parties to the agreement cannot prevent the application of the principle of equality of treatment between national and Community workers established in the territory of one of those two Member States."); CJEU, Case C-469/00, ECLI:EU:C:2003:295, ¶ 37 – *Ravil* ("*Ravil*") (**Ex**. **43**) ("It should be observed, first, that the provisions of a convention between two Member States *cannot apply* in the relations between those States *if* they are *found to be contrary to the rules of the Treaty*, in particular the rules on the free movement of goods . . . ") (emphasis added); CJEU, Case C-478/07, ECLI:EU:C:2009:521, ¶ 98 – *Budějovický Budvar* ("*Budějovický Budvar*") (**Ex**. **24**) ("It follows that, since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods".); CJEU, Case C-546/07, ECLI:EU:C:2010:25, ¶ 44 – *Commission v. Germany* ("*Commission v. Germany*") (**Ex**. **44**) ("Nevertheless, . . . application of the German-Polish Agreement concerns, since the accession of the Republic of Poland to the Union, two Member States, with the result that the provisions of that agreement can apply to relations between those

This applies whether the offending treaty was concluded before or after the Member State's accession to the EU Treaties.

46. As a result, the principles of autonomy and primacy of EU law are also such of international law. The principle of the primacy of EU law does not only apply with regards to domestic law of the EU Member States but with equal force to the obligations of the Member States in international law when acting *inter se*. The principle obliges *any authority,* such as the Tribunal in *AES Solar v. Spain*, tasked with applying the incompatible act, namely Article 26 of the ECT, *to disregard it*.

B. Article 16 of the ECT is no conflict rule and even if it were, it would need to be disapplied

47. Professor Bjorklund's refusal to acknowledge the all-encompassing conflict rule established by the EU Treaties, the principle of primacy, leads her to opine that if there was a conflict between the ECT and EU law, the former would prevail. To reach such conclusion, Professor Bjorklund turns to Art. 16 of the ECT which she believes to be a conflict rule.[63] Such argumentation is flawed in two ways. First, it already rests on an erroneous premise, i.e. that Article 16 of the ECT constitutes a conflict of law. Second, even if, *arguendo*, this premise was as assumed to be correct, the EU Treaties would still prevail.

48. Article 16 of the ECT provides:

> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III [Investment Promotion and Protection] or V [Dispute Settlement] of this Treaty,
> (1) nothing in Part III or V of this Treaty shall be *construed* to derogate from any provision of such terms of the other agreement or

Member States only in compliance with Community law, in particular with the Treaty rules on the free provision of services.").

[63] Bjorklund Declaration, ¶¶ 103-108 (**ECF No. 22**).

> from any right to dispute resolution with respect thereto under that agreement; and
> (2) nothing in such terms of the other agreement shall be *construed* to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.[64]

49. Article 16 of the ECT, by its plain language, speaks of "construing", rather than "derogating" or similar wording typical for a conflict clause. This, in turn, suggests that Article 16 of ECT is a rule of interpretation rather than conflict.

50. However, even if, *arguendo*, Bjorklund's assertion were to be correct and Article 16 of the ECT would constitute a conflict rule, the EU Treaties would nonetheless take precedence over any conflicting rule in the ECT.

51. If Article 16 of the ECT were to be applicable to a conflict between the ECT and the EU Treaties, it is already questionable whether the ECT constitutes the more favourable regime since the EU Treaties constitute by far the more developed and articulated legal order, proving for legal safeguards in all sorts of investment related cross-border activities, in any phase from market access, to treatment, to de-investment. A key feature of the EU legal order is that an aggrieved investor can regularly seek *annulment* of an act violating its rights;[65] something difficult to achieve under the ECT.[66] The fact that under the ECT the investor might have

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[64] (emphasis added).
[65] Cf. TEU, Art. 263(1) (**Ex. 3**).
[66] Professor Bjorklund's statement that "[t]he scope of investment protection in investment treaties such as the ECT is wider than that found in the EU treaties" [Bjorklund Declaration, ¶ 35] relies on a statement of Advocate General Wathelet, whose conclusions that "the scope of the BIT is wider than that of the EU and FEU Treaties and that the guarantees of the protection of investments introduced by the BIT are different from those afforded in EU law, without being incompatible with EU law [and] that [for that] reason, a dispute between a Netherlands investor and the Slovak Republic falling under the BIT is not a dispute concerning the interpretation or application of the EU and FEU Treaties." [CJEU, Case C-284/16, ECLI:EU:C:2017:699, ¶ 228 – Opinion of Advocate General Wathelet (**Ex. 89**)] have been overturned by the CJEU in *Achmea.*

recourse to investor-State arbitration does not change that conclusion as – as demonstrated above – the ECT itself puts the different dispute settlement procedures under Article 26(2) of the ECT at par; hence the ECT would not be the more favourable treatment. Thus, Article 16 of the ECT cannot serve to justify priority to be given to the ECT in case of conflict with the EU Treaties.

52. Even if the EU Treaties were not to be the more favourable regime compared to the ECT, Article 16 of the ECT would need to be disapplied in an intra-EU investment dispute, such as the one in *AES Solar v. Spain*. Professor Bjorklund's assertion that Article 16 of the ECT would include "a clear statement of both retrospective and prospective supremacy of the ECT"[67] rests upon the false presumption that EU Member States can circumvent the EU Treaties by concluding international treaties between them.

53. However, the EU Treaties, in an intra-EU context, prevail over commitments of the EU Member States *inter se* contained in international agreements, irrespective of whether these agreements are earlier or later in time.[68]

The Court held explicitly that "the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital." *Achmea,* ¶ 41 (**Ex**. **7**). Therefore, her statement is not only unsubstantiated but simply incorrect. Moreover, as the European Commission has rightly pointed out: "[EU investors] cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty. *However, the EU legal system offers adequate and effective protection for cross-border investors in the single market, while ensuring that other legitimate interests are duly and lawfully taken into account.*" (emphasis added) European Commission, Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM(2018) 547 final (**Ex**. **60**). Thus, the EU legal order offers at least the same, if not better, protection to EU investors compared to the ECT.

[67] Bjorklund Declaration, ¶ 104 (**ECF No**. **22**).

[68] *See Exportur,* ¶ 8 (**Ex**. **42**). *See also* CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of the Italian Republic* (**Ex**. **41**); *Ravil*, ¶ 37 (**Ex**. **43**); *Budějovický Budvar*, ¶ 98 (**Ex**. **24**); *Commission v. Germany*, ¶ 44 (**Ex**. **44**).

54. EU Member States are not permitted to derogate from or contract around the primacy of EU law (or any other rule established by the EU Treaties) by concluding other international agreements between them. The CJEU made this point abundantly clear when it held that "the obligations imposed by an international agreement cannot have the effect of prejudicing the . . . principles of the [EU Treaties]."[69]

55. The EU Member States cannot escape their obligations flowing from the EU Treaties by resorting to international law in their *inter se* dealings. The all-encompassing conflict rule of primacy of EU law provides that the EU Treaties cannot be overwritten by domestic or international law created by the EU Member States alone or *inter se* respectively.

56. In sum, and as already outlined above, the principle of primacy enshrined in the EU Treaties is applicable to any international agreements between EU Member States, including the ECT. It takes precedence over any other conflict rule in an intra-EU context. Assuming that Article 16 of the ECT is relevant in relation to the provisions of the EU Treaties, the principle of primacy takes precedence over it. The EU Member States cannot create any other "special" rules, such as the purported conflict rule in Article 16 of the ECT, to derogate from their obligations under the EU Treaties.

C. The principle of primacy requires disapplication of Article 26 of the ECT until it has been repealed or reformed

57. In an attempt to avoid the application of and the legal consequences flowing from the principle of primacy of EU law to the case at hand, i.e. the disapplication of any provision of

[69] CJEU, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, ¶ 285 – *Yassin Abdullah Kadi, Al Barakaat International Foundation* ("*Kadi*") (**Ex. 20**). *See* CJEU, Case C-266/16, ECLI:EU:C:2018:118, ¶ 46 – *Western Sahara Campaign UK* (**Ex. 45**) (concluding in the context of an international agreement concluded by the EU, its Member States and third countries, that "[t]he provisions of such agreements must therefore be entirely compatible with the Treaties and with the constitutional principles stemming therefrom.").

the ECT (or other international agreements) conflicting with the EU Treaties in an intra-EU context, Professor Bjorklund argues that "[i]nfringement proceedings against EU Member States for their failure to terminate their intra-EU [bilateral investment treaties] [("]BITs[")] would not be necessary were the treaties themselves negated simply by their incompatibility with EU law."[70] However, this statement is based on a flawed perception of the legal situation under the EU Treaties.

58. According to established case law, the legal consequences resulting from the principle of primacy in case of conflict between the EU Treaties and other international obligations of the EU Member States *inter s*e are manifold. First, the application of the principle of primacy of EU law – as stated in my First Declaration[71] and further above[72] – results in a disapplication of the provision being in conflict with the EU Treaties. Disapplication of the conflicting rule secures the effectiveness of EU Law and prevents circumvention of the EU Treaties by the EU Member States. Second, the principle or primacy, in conjunction with the principles of legal certainty and clarity, require the EU Member States to remove, or at least reform the conflicting inapplicable treaty norm. As the CJEU clearly stated, a rule

> that is incompatible with a provision of the Treaty, . . . , is retained unchanged, . . . amounts to a failure by the State in question to comply with its obligations under the Treaty.[73]

So-called infringement proceedings[74] may be initiated by the Commission against an EU Member State failing to do so.[75]

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[70] Bjorklund Declaration, ¶ 70 (**ECF No. 22**).
[71] First Hindelang Declaration, ¶¶ 46, 52 (**ECF No. 15.2**).
[72] *See* above, ¶¶ 43-46.
[73] CJEU, Case 168/85, ECLI:EU:C:1986:381, ¶ 11 – *Commission v Italian Republic.* (**Ex. 90**).
[74] TFEU, Art. 258 (**Ex. 4**).
[75] Cf. TFEU, Arts. 258 et seq. (**Ex. 4**).

59. Similarly, Professor Bjorklund assumes that the termination of the still existing intra-EU BITs "would not be necessary if the CJEU decisions . . ., without more, sufficed to render any treaty void ab initio."[76] This argument is flawed in various ways.

60. First, it operates under the premise that the CJEU could declare void or annul an international agreement between the EU Member States conflicting with the EU Treaties. This assumption is incorrect as the CJEU is the authoritative interpreter of the EU Treaties and their relation to conflicting international agreements, but not of the conflicting international agreement itself.[77] This means that the CJEU might find the international agreement to be *incompatible* with EU law. Any provision in an international agreement in relations between EU Member States incompatible with EU law is inoperative from the time the respective conflicting rule in the EU Treaties entered into force as a consequence of the operation of the principle of primacy of EU law.[78]

61. Second, the termination or reformation of intra-EU BITs is a duty flowing from the principle of primacy as showed above and obviously also quite apt because – as evidenced by the present enforcement proceedings – tribunals keep assuming jurisdiction *contra legem,* wilfully ignoring the proper, i.e. the CJEU's binding interpretation of the EU Treaties and their impact on intra-EU BITs as well as on the ECT.

62. As demonstrated, Professor Bjorklund's contestations cannot change the fact that the principle of primacy of EU law requires intra-EU investment tribunals, such as the one in the case at hand, to disapply Article 26 of the ECT.

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[76] Bjorklund Declaration, ¶ 99 (**ECF No. 22**).
[77] Cf. TEU, Art. 19 (1) (**Ex. 3**).
[78] *See* First Hindelang Declaration, ¶¶ 38-45 (**ECF No. 15.2**).

D. The operation of the principle of primacy does not violate either the ECT or the principle of good faith under the VCLT

63. Professor Bjorklund attempts to "scandalise" the operation of the conflict rule governing the relationship between the EU Treaties and other *inter se* agreements of the EU Member States. However, the application of the principle of primacy of EU law in an intra-EU context is quite the opposite: it is a legal matter of course and the lawful course of action. In Professor Bjorklund's view, the disapplication of Article 26 of the ECT due to its incompatibility with the EU Treaties, as firmly established in the CJEU's case law and put beyond any hint of a doubt in *Achmea* and *Komstroy,* through the principle of primacy would "ignore the terms of the ECT."[79] Furthermore, by disapplying Article 26 of the ECT, the EU and its Member States would violate principles of interpretation under the VCLT, such as the principle of interpretation in good faith.[80] All these arguments are unsustainable due to flawed premises.

64. Contrary to the assertions of Professor Bjorklund, the disapplication of Article 26 of the ECT through the principle of primacy is permissible in law. It is the result of an operation of a conflict rule, something that is a matter of course and found in most if not any legal order. By the very nature of such operation, the conflict between two or more provisions "is resolved in favour of one of the two rules because that rule has been, or can be, labelled as the more 'prominent' or 'relevant' one. The result of these 'priority rules' is that only one of the two rules applies to the particular situation at hand."[81] In Professor Bjorklund's words, one of the rules, in this case Art. 26 of the ECT, is "ignored" and others are applied, namely Articles 267 and 344 of the TFEU.

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[79] Bjorklund Declaration, ¶ 46 (**ECF No. 22**).
[80] Also asserted by Bjorklund Declaration, ¶ 66 (**ECF No. 22**).
[81] Pauwelyn, Joost, Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law, Cambridge University Press (2003), p. 327 (**Ex. 91**).

65. The fundamental difference between Professor Bjorklund's assertions and the actual legal situation at hand is that the EU Member States, in their *inter se* relations, agreed to interpret and apply international agreements in conformity with the rules and principles arising out of the EU Treaties. This means that the Member States deviated from the default conflict rules contained in the VCLT – something sovereigns can readily do[82] – and chose to apply a specific conflict rule contained in the EU Treaties, namely the principle of primacy. Thus, the operation of the principle of primacy of EU law does not "ignore" the terms of the ECT, it simply creates a situation which is the normal result of an operation of a conflict rule, the application of one instead of the other rule.

66. In addition, Professor Bjorklund assumes incorrectly that the fact, that the EU Member States "[ratified] a treaty [- the ECT -] with which [they] cannot comply," causes a violation of the principle of interpretation in good faith as stated by Article 26 of the VCLT.[83] The assumption is based on the premise that we are dealing with a situation of noncompliance, or put differently, breach. However, there is no such situation in the first place. Rather, the EU Member States agreed among each other in the EU Treaties, by virtue of the principle of primacy, to *not apply* any rule contained in an *inter se* agreement, such as Article of the 26 of the ECT, conflicting with the EU Treaties. It is difficult to comprehend how the EU Member States can possibly act in bad faith when entering into the ECT in an understanding that any conflicting rule therein would be disapplied among each other by virtue of the principle of primacy. Thus,

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[82] *See*, e.g., Int'l Law Comm'n, Rep. of the Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (2006), ¶ 470 (**Ex. 57**); Schmalenbach, Kirsten, in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 1, ¶ 2 (**Ex. 58**).

[83] Bjorklund Declaration, ¶ 66 (**ECF No. 22**).

since third countries do not have any interest in *inter se* deviations between the EU Member States, and since the EU Member States among each other agreed to disapply any rule conflicting with the EU Treaties, they could have never violated the principle of good faith under the VCLT with regard to themselves or any other party.

67. Even assuming that it is correct that "no one questioned at the time the ECT was concluded" that intra-EU investment arbitration under the ECT would be possible, as Professor Bjorklund suggests,[84] such hypothesis still fails to recognise the position under the EU Treaties where the CJEU, by sovereign choice of the EU Member States, is charged to act as final arbiter with regard to the interpretation of the EU Treaties and its judgements given retroactive effect.[85] And the CJEU has been clear on this: no intra-EU arbitration on the basis of the ECT.[86] It does not matter what the EU Member States might have thought at the conclusion of the ECT, or whether they might have erred regarding the application of Article 26 of the ECT in an intra-EU context. It is exactly for such situations that the EU Treaties provide for the principle of primacy of EU law, which as stated above, applies irrespective of whether the incompatible agreement has been concluded earlier or later in time and provides the legal consequences, namely the disapplication of the incompatible provision.

68. As a result, the operation of the principle of primacy, and the consequential disapplication of Article 26 of the ECT, does neither violate the terms of the ECT, nor does it violate the principle of good faith under the VCLT.

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[84] Bjorklund Declaration, ¶ 86 (**ECF No. 22**).
[85] *See* First Hindelang Declaration, ¶¶ 20, 43 (**ECF No. 15.2**).
[86] *See Achmea* (**Ex. 7**) and *Komstroy* (**Ex. 13**).

E. Even if the principle of primacy were not be the supreme conflict rule in inter se relations between the EU Member States, the EU Treaties would still prevail in a conflict with the ECT by way of the lex posterior rule

69. Professor Bjorklund also opines that, under the *lex posterior* rule, the ECT were to take precedence over the EU Treaties as the treaty later in time.[87] However, as already stated in my First Declaration and further above, the EU Member States derogated from any default conflict rule in the VCLT by concluding the EU Treaties containing the principle of primacy which itself applies irrespective of whether the incompatible agreement has been concluded earlier or later in time. Thus, in accordance with the CJEU, there is no room for a *lex posterior* rule in relation to law created by the EU Member States.[88] Moreover, no derogation is allowed from the principle of primacy.[89]

70. Even if the principle of primacy of EU law were not to apply and assumed for the sake of the argument that the ECT and the EU Treaties relate to the same subject matter, as provided by Article 30 of the VCLT, the *lex posterior* rule would support the opposite of what Professor Bjorklund suggests. In fact, the EU Treaties prevail over the ECT.

71. As not all of the 27 EU Member States are at the same time parties to the ECT, the situation would be governed by Article 30(4)(a) of the VCLT in connection with Article 30(3) of the VCLT. The latter reads as follows:

> [in case that] the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the

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[87] Bjorklund Declaration, ¶¶ 9, 110 (**ECF No. 22**).
[88] CJEU, Case 6/64, ECLI:EU:C:1964:66 – *Costa v ENEL* (**Ex. 22**). While the case was on the relationship of the EU Treaties and domestic law, the principle of primacy was later on extended to international agreements of the EU Member States inter se and with it, implicitly, also the non-applicability of the *lex posterior* rule. *See* CJEU, Case C-3/91, ECLI:EU:C:1992:420, ¶ 8 – *Exportur* (**Ex. 42**). *See also Commission v. Italian Republic* (**Ex. 90**); *Ravil*, ¶ 37 (**Ex. 43**); *Budějovický Budvar*, ¶ 98 (**Ex. 24**); *Commission v. Germany*, ¶ 44 (**Ex. 44**).
[89] First Hindelang Declaration, ¶¶ 34, 51 (**ECF No. 15.2**).

> extent that its provisions are compatible with those of the latter treaty.

72. The most recent treaty the EU Member States signed with regards to the European Union was the so-called Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community[90] in 2007, which entered into force 2009. As the treaty title suggests, the TEU and the TFEU were amended. The ECT was signed in 1994, and entered into force in April 1998. Thus, the EU Treaties constitute the later in time treaties and qualify as *lex posterior*.

73. As a result, even if the principle of primacy would not be the supreme conflict rule, the EU Treaties would still prevail over the ECT in case of a conflict through the *lex posterior* rule.

IV. THE ABSENCE OF A SO-CALLED DISCONNECTION CLAUSE IS IRRELEVANT FOR THE QUESTION OF CONFLICT BETWEEN ARTICLE 26 OF THE ECT AND THE EU TREATIES

74. Professor Bjorklund's Declaration argues that "[n]othing in the ECT suggests that a special regime exists as between the EU Member States who are also Party to the ECT . . . [and that] there is no 'disconnection clause' in the [ECT] that makes the [ECT], or dispute settlement under it, inapplicable to intra-EU disputes."[91] Further, Professor Bjorklund goes on to state that "[t]he ECT contains no 'disconnection' clause applicable to Article 26 and its provisions regarding investors' ability to submit their claims to arbitration under UNCITRAL Rules."[92] Such assertions are incorrect and legally irrelevant.

75. The EU's and its Member States' ratification of the ECT without a disconnection clause would not cure the incompatibility of Article 26 of the ECT with the EU Treaties. The

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[90] OJ C 306, 17 December 2007 (**Ex. 92**).
[91] Bjorklund Declaration, ¶ 56 (**ECF No. 22**).
[92] Bjorklund Declaration, ¶ 60 (**ECF No. 22**).

CJEU has authoritatively determined that the EU Treaties prohibit investor-State arbitration clauses agreed to between Member States such as one in the Article 26 of the ECT. As noted above,[93] the EU and/or its Member States cannot by its "agreement" override the EU Treaties, except for by the amendment procedure provided in Article 48 of the TEU.

76. Moreover, the absence of a disconnection clause in the ECT does not save Article 26 of the ECT from violating Articles 267 and 344 of the TFEU. To the contrary, only the inclusion of such clause might have cured the defect and remedied the incompatibility of Article 26 of the ECT with Articles 267 and 344 of the TFEU. This follows from settled case law of the CJEU. For example, the absence of a "disconnection clause" in the draft accession agreement of the EU to the ECHR did not cure the breach of EU law. Rather, it rendered the agreement irreconcilable with Article 344 TFEU. In Opinion 2/13 the CJEU held:

> the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue . . . . The very existence of such a possibility undermines the requirement set out in Article 344 TFEU[94] . . . In those circumstances, only the express exclusion of the ECtHR's [95]jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae of EU law would be compatible with Article 344 TFEU.[96]

77. Similarly, in the present context, the non-existence of a disconnection clause supplements the incompatibility of Article 26 of the ECT with EU law.

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93 *See* above, ¶¶ 20-21.
94 Opinion 2/13, ¶ 208 – *ECHR* (**Ex. 29**).
95 Opinion 2/13, ¶ 205 (**Ex. 29**).
96 Opinion 2/13, ¶¶ 205-13 (**Ex. 29**).

V. SPAIN WOULD BE IN VIOLATION OF EU LAW IF IT PAID ANY AMOUNT IN SATISFACTION OF THE AWARD

78. In my First Declaration, I demonstrated that the Award in *AES Solar v. Spain* seeks to compensate the Respondent for the changes in the premium economic scheme brought about by the revised scheme without prior review and approval of this State aid measure by the Commission.[97] However, under the TFEU, only the EU Commission has the authority and power to investigate State aid measures and to make decisions on whether such measures can be implemented.[98] EU Member States may not implement State aid measures without the Commission's approval.

79. Mr. Quigley agrees that "[a]id put into effect without having been first approved by the Commission as being compatible with the internal market is . . . 'illegal aid.'"[99] I am not aware of any decision by the Commission allowing Spain to implement the said State aid measure, i.e. the payment of the Award. Mr. Quigley cites none. Anything in Mr. Quigley's Declaration that suggests that the EU Commission has erred in its State Aid Decision 7384,[100] does not change this fact.[101]

80. Contrary to the assertions of Mr. Quigley[102], the standstill obligation contained in Article 108(3) of the TFEU not to pay the Award is, furthermore, triggered independently of the Commission's statements or assessments.[103] However, the findings of the Commission support

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[97] First Hindelang Declaration, ¶¶ 87-97 (**ECF No. 15.2**).
[98] *See* TFEU, Arts. 107, 108 (**Ex. 4**).
[99] Quigley Declaration, ¶ 22 (**ECF No. 21**).
[100] European Commission, Decision 7384 on State Aid, Case No. SA.40348 (2015/NN) (10 November 2017), ¶ 165 – Spain's support for electricity generation from renewable energy sources, cogeneration and waste (**Ex. 65**).
[101] I am also not aware that the Petitioners have challenged the State Aid Decision 7384, and I note that they do not claim to be challenging it.
[102] Quigley Declaration, ¶¶ 20-24 (**ECF No. 21**).
[103] First Hindelang Declaration, ¶¶ 87-88 (**ECF No. 15.2**).

my independent assessment that the award in the case at hand indeed constitutes notifiable State aid and that payment would violate the EU Treaties if not approved by the Commission. Spain requested the Commission's confirmation that payment of a similar award issued in another arbitration matter involving the same regulatory scheme addressed in State Aid Decision 7384, would be unlawful under the EU law.[104] The Commission confirmed that it would, in fact, be unlawful.[105] The Commission also recalled that "the payment of compensation before the Commission rules on its compatibility would be contrary to Union Law, in particular to Article 108(3) TFEU."[106] As explained in my First Declaration, more recently, the European Commission opened an in-depth investigation into the arbitration award in favour of *Antin* to be paid by Spain; again the underlying facts are similar to the case at hand. That means that the European Commission, at this stage of the proceedings on a preliminary basis, perceives the payment of the award to constitute State aid.

81. Paying the Award in contravention of Spain's obligations under Article 108(3) of the TFEU would make Spain subject to sanctions under EU law. The Commission has the power to compel Spain to recover any amounts paid under the Award without the Commission's approval. It can also commence an infringement proceeding against Spain before the CJEU if Spain is unable to recover such payments, and, eventually, may seek the imposition of monetary penalties. For example, in *Commission v. Greece*,[107] the EU Court of Justice ordered Greece to

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[104] *See Communication from the Legal Service of the European Commission to the Attorney General of the Kingdom of Spain* 2-3 (October 26, 2018) ("EC Legal Service Communication") (**Ex. 93**).

[105] *Id.* ("[Under Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), Member States cannot put the State aid measures into effect without prior approval by the Commission of the State aid in question as aid compatible with the internal market.").

[106] *Id.* p. 2.

[107] CJEU, Case C-93/17, EU:C:2018:903 – *Commission v. Greece* (**Ex. 94**).

pay 10 million euros as well as a periodic penalty payment of 7,294,000 Euros for every six-month period in which the unlawful State aid granted by Greece to Hellenic Shipyards had not yet been recovered.[108]

82. Finally, Mr. Quigley's argument that the Tribunal did not "encroach on the Commission's competence to review State aid"[109] misses the obvious.[110] It is one thing to *review* State aid issues, and fundamentally another to issue and compel payment in violation of the EU State aid rules.[111] Regardless of the Tribunal's reasoning and findings in the underlying arbitration, it awarded State aid by issuing the Award, which Spain cannot pay without violating the EU Treaties and being subjected to serious sanctions under EU law. Further, the Tribunal's

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[108] I also respectfully disagree with Quigley's analysis and conclusions. For example, he argues that the compensation ordered in the Award does not confer any "economic advantage" on the investors. However, such ordered compensation undoubtedly confers an economic advantage upon the Petitioners that would not otherwise have been available to them under normal market conditions. *See* CJEU Case C-39/94, EU:C:1996:285, ¶ 60– *SFEI and Others* (**Ex. 62**); CJEU, Case C-342/96, EU:C:1999:210, ¶ 41 – *Spain v. Commission* (**Ex. 95**). Further, the advantage is selective because the obligation to pay damages did not arise from the application of a *general* rule of law for government liability. *See* European Commission Decision 1470 on State Aid, Case No. SA.38517 (2014/C) (30 March 2015), OJ L 232, 43, ¶¶ 109 *et seq.* – arbitral award *Micula v. Romania* of 11 December 2013 (**Ex. 66**). The criteria for state aid are therefore satisfied. Furthermore, the CJEU has indicated in a recent judgment concerning the Decision 7384 of the Commission that EU State aid law may well be violated by the payment of an award in an intra-EU context. [*See* CJEU, Case C-638/19 P, ECLI:EU:C:2022:50, ¶¶ 131 in connection with, 137-145 – *Commission v. European Food and others ("European Food and Others")* (**Ex. 67**).] The CJEU did not explicitly find on whether the payment of an award in the intra-EU context constitutes State aid, as this was outside the scope of appeal. [*Id.* ¶ 131.] However, it made clear that *Achmea* was relevant to the judgement under appeal. [*Id.* ¶ 137.] "[D]amages which national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals" are fundamentally different from intra-EU arbitral awards such as this one in the case at hand and consequently only the former are outside the scope of review under the EU State aid regime. Accordingly, the EU Treaties, and thus also State aid law, are applicable to intra-EU arbitral awards and the payment of an intra-EU arbitral award without prior approval by the Commission would violate EU State aid law.

[109] Quigley Declaration, ¶ 44 (**ECF No. 21**).

[110] *See* First Hindelang Declaration, ¶¶ 93-94 (**ECF No. 15.2**).

[111] *See* European Commission Decision 1470 on State Aid, Case No. SA.38517 (2014/C) (30 March 2015), OJ L 232, 43 – arbitral award *Micula v. Romania* of 11 December 2013 (**Ex. 66**).

failure to apply EU State aid law does not in any way affect or alter the consequences under Article 108(3) of the TFEU, i.e. the standstill obligation to not pay the Award.

* * *

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

Executed on 1 July 2022, in Berlin, Germany.

Steffen Hindelang

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