UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERCURIA ENERGY GROUP LIMITED, Petitioner, v. THE REPUBLIC OF POLAND, Respondent.	Civil Action No. 1:23-cv-03572 (TNM)

DECLARATION OF PROFESSOR STEFFEN HINDELANG

TABLE OF CONTENTS

INTRODUCTION AND BACKGROUND

1. I, Steffen Hindelang, make this declaration in the above-captioned case ("*Mercuria*") based upon my personal knowledge. The statements in this declaration, and the information upon which they are based, are true to the best of my knowledge and belief.

2. I am a German citizen, and I was born on December 6, 1978.

3. I am Professor at the Faculty of Law of Uppsala University in Sweden. I teach and research in the areas of European Union ("EU") law, international economic law, in particular, international investment law, and German public law. Previously, I was Professor at the Department of Law of the University of Southern Denmark in Odense. Further, I was guest professor at the Faculty of Law of the University of Uppsala as a Swedish Prize Laureate (2018), Professor at the Freie Universität Berlin (2011-2017), senior research associate and senior lecturer at Humboldt-Universität zu Berlin (2010-2011), and research associate and lecturer at the Universität Tübingen (2004-2009). I am also a senior fellow at the Walter Hallstein-Institute of European Constitutional Law at Humboldt-Universität zu Berlin. My CV and the list of my publications are attached hereto as **Exhibit 01** and **Exhibit 02**, respectively.

4. I have no familial or business relationship or affiliation with any of the parties to this case, except for the expert reports detailed below. I have never represented any of them in any capacity. I therefore confirm my independence from the parties to this proceeding and I understand that my duty is to provide my independent view for the benefit of this Court.

5. I have previously submitted a number of reports on EU law, including rebuttal reports, in support of the Kingdom of Spain's motions to dismiss in the following enforcement proceedings in the United States District Court for the District of Columbia: (1) *Novenergia II – Energy & Environment (SCA) v. Kingdom of Spain*, Case No. 1:18-cv-1148; (2) *Eiser Infrastructure Limited et al. v. Kingdom of Spain*, Case No. 1:18-cv-1686-CKK; (3) *Infrastructure Services Luxembourg S.à r.l. et al. v. Kingdom of Spain*, Case No. 1:18-cv-1753-

EGS; (4) *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Case No. 1:18-cv-02254-JEB; (5) *NextEra Energy Global Holdings B.V. et al. v. Kingdom of Spain*, Case No. 19-cv-01618-TSC; (6) *9REN Holding S.à r.l. v. Kingdom of Spain*, Case No. 19-cv-01871-TSC; (7) *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, Case No. 1:19-cv-03783-CJN; (8) *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Case No. 1:20-cv-01708-EGS; (9) *Watkins Holdings S.à r.l. & Watkins (NED) B.V. v. Kingdom of Spain*, Case No. 20-cv-01081-TFH; (10) *Infrared Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, Case No. 1:20-cv-00817-JDB; (11) *Hydro Energy 1 S.à r.l. et al. v. Kingdom of Spain,* Case No. 1:21-cv-2463-RJL; (12) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. v. Kingdom of Spain*, Case No. 1:21-cv-03249-RJL; (13) *RWE Renewables GmbH and RWE Renewables Iberia S.A.U. v. Kingdom of Spain*, Case No. 1:21-cv-03232-JMC; (14) *BayWa r.e. AG v. Kingdom of Spain*, Case No. 1:22-cv-02403; and (15) *Swiss Renewable Power Partners SARL v. Kingdom of Spain*, Case No. 1:23-cv-00512 (DDC).

6. I have also submitted a report in support of the Kingdom of Spain's motion to dismiss in one proceeding to confirm an arbitral award before the U.S. District Court for the Southern District of New York: *Foresight Luxembourg Solar 1 S.À.R.L. v. Kingdom of Spain*, Case No. 1:19- cv-3171.

7. In addition, I have submitted a legal opinion in support of the Republic of Poland in appellate proceedings captioned *Republiken Polen (Republic of Poland) v. PL Holdings S.Á.R.L*, Case No. T 1569-19 before the Högsta Domstolen (the Swedish Supreme Court); a legal opinion in support of the Kingdom of Spain in *Kingdom of Spain v. Novenergia II Energy and Environment (SCA)*, Case No. T 4658-18 before the Svea Court of Appeal; a legal opinion in support of the Republic of Croatia in *Republik Kroatien (Republic of Croatia) v. Raiffeisen Bank International AG und die Raiffeisen Bank Austria d.d.*, Case No. 26 SchH 2/20 before the Oberlandesgericht Frankfurt am Main (Higher Regional Court Frankfurt am

Main); a legal opinion in support of the Kingdom of Spain before the Jerusalem District Court in *Sun-Flower Olmeda GmbH & Co. KG v. Kingdom of Spain*, Case No. CivC 11552-02-23. I also submitted expert reports in the Federal Court of Australia in the following cases: (1) *9REN Holding S.à r.l. v. Kingdom of Spain*, Proceedings Number NSD365/2020; (2) *Watkins Holding S.à r.l. and Watkins (Ned) B.V. v. Kingdom of Spain*, Proceedings Number NSD449/2020; (3) *Blasket Renewable Investments LLC (formally assigned from RREEF Infrastructure (G.P.) Limited & RREEF Pan-European Infrastructure Two Lux S.à r.l.) v. Kingdom of Spain,* Proceedings Number NSD 2169/2019; and (4) *NextEra Energy Global Holdings B. V. & ANOR,* Proceedings Number NSD 415/2023.

8. I have also submitted expert opinions in the proceedings under the International Centre for Settlement of Investment Disputes ("ICSID") Rules in (1) *European Solar Farms A/S v. Kingdom of Spain*, ICSID Case No. ARB/18/45; (2) *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15; (3) *Spanish Solar 1 Limited and Spanish Solar 2 Limited v. The Kingdom of Spain,* ICSID Case No. ARB/21/39; (4) *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. The Kingdom of Spain* (Resubmission), ICSID Case No. ARB/13/36; and (5) *WOC Photovoltaik Portfolio GmbH & Co. KG and Others v. Kingdom of Spain*, ICSID Case No. ARB/22/12 and in the ICSID annulment proceedings in (1) *9REN Holding S.à. r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15; and (2) *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB 14/34, as well as in proceedings under the Stockholm Chambers of Commerce ("SCC") Rules in *Green Power Partners K/S, SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V. 2016/135 ("*Green Power v. Spain*"). Further, I was nominated by the Respondent and accepted to act as arbitrator in *Donatas Aleksandravicius v. The Kingdom of Denmark*, ICSID Case No. ARB/20/30.

9. I have been asked by the Respondent, the Republic of Poland ("Poland"), in this matter to give my expert opinion on whether EU law is applicable law under Article 26 of the Energy Charter Treaty ("ECT")[1], in particular paragraph 3, in disputes between an investor from one EU Member State and another EU Member State, as well as other issues relevant to this case.

10. What I can say and will demonstrate in more detail below, is as follows:

- First, that a tribunal in an investment dispute between an EU Member State and an investor of another EU Member State ("intra-EU investment dispute") is called to apply, next to the ECT, the Treaty on European Union ("TEU")[2] and the Treaty on the Functioning of the European Union ("TFEU")[3] (collectively "EU Treaties") to both the establishment of its jurisdiction as well as the merits of the dispute. The EU Treaties apply to this matter as part of public international law.
- Second, in case of conflict, the EU Treaties impose comprehensive obligations on a tribunal to apply and give full effect to the EU Treaties. In particular, the EU Treaties enjoy primacy over any conflicting international law obligation *as applied between EU Member States*. That means that also in respect of conflict resolution, the EU Treaties constitute *lex specialis* (and *lex superior*), thereby derogating from the default rules on treaty conflict in the Vienna Convention on the Law of Treaties ("VCLT")[4].
- Third, the Tribunal, which rendered the Award relevant in the present case, should have concluded that the EU Treaties, as a matter of public international law, provide for the

[1] The Energy Charter Treaty (ECT) (adopted 17 April 1994, entered into force 16 April 1998) 2080 UNTS 95 (**Exhibit 03).**

[2] **Exhibit 04**.

[3] **Exhibit 05**.

[4] Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (**Exhibit 06**).

conflict rule by which the EU Treaties enjoy primacy over any other 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 of EU law, any purported offer to arbitrate disputes contained in Article 26 of the ECT is inapplicable. The ruling of the Court of Justice of the European Union ("CJEU" or "Court of Justice") in *Achmea*[5], as confirmed in *Komstroy*[6], means in terms of its temporal effect that intra-EU investment arbitration has been incompatible with the EU Treaties from the moment they, or their respective predecessor treaties, entered into force. In my opinion, the Tribunal was not only entitled, but legally *obliged* – like any public body created by one or more EU Member States – to prevent conflict between the EU Treaties and the ECT by declining its jurisdiction. Despite such instruction by law, the Tribunal, however, chose to render the Award in absence of an arbitration agreement, and consequently, despite a lack of jurisdiction.

11. As part of my work in connection with this declaration, I have reviewed the following submissions in the case at hand:

- *Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland*, SCC Case No. V 2019/126, Final Award (29 December 2022) ("Award");[7]
- *Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland*, Case 1:23-cv-03572, Petition to Confirm Foreign Arbitral Award (30 November 2023);

[5] CJEU, Case C-284/16, ECLI:EU:C:2018:158 – *Achmea B.V. v. Slovak Republic ("Achmea")* (**Exhibit 10**).

[6] CJEU, Case C-741/19, ECLI:EU:C:2021:655 – *Komstroy LLC, successor in law to the company Energoalians v. Republic of Moldova ("Komstroy")* (**Exhibit 11**).

[7] *Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland,* SCC Case No. V 2019/126, Final Award (29 December 2022) ("Award"). **Exhibit 39.**

- *Republic of Poland v. Mercuria Energy Group Limited*, Statement of Claim and Request for Stay of Enforcement, Case No. T 2613-23 (28 February 2023);[8]
- Svea Hovrätt [Svea Court of Appeal], Case No. T 4658-18, Order (6 March 2023) – *Poland v Mercuria.*[9]

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

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

14. I am being compensated according to the contract awarded in a Polish public procurement procedure to prepare this expert declaration and, if required, to testify in this matter without any fees contingent upon the outcome of this case.

15. This matter concerns an investment arbitration that arose between an investor and a State, both within the EU. Thus, to assist this Court in understanding the question presented to me, I set out the legal history of investment treaties in the EU as part of the background to this dispute (**Part I** below). In the second part of this declaration, I review and analyse the relevant rules and principles of the EU legal order (**Part II** below). Finally, I apply these rules and principles to the present case (**Part III** below).

I. THE GENESIS OF THE CONFLICT BETWEEN INVESTMENT ARBITRATION AND THE EU TREATIES

A. Investment Agreements in Europe

16. Investment agreements have a long history, also in Europe. Around 180 bilateral investment agreements, *i.e.*, a treaty between one State and another State, existed between EU Member States ("intra-EU BITs"). They are the result of enlargement of the EU. Most of the

[8] **Exhibit 07.**

[9] **Exhibit 38.**

intra-EU BITs were concluded after the end of the Cold War in 1989 and *before* the Central and Eastern European countries joined the EU. They essentially link "old" EU Member States and those in Central and Eastern Europe that acceded to the EU later in 2004, 2007, and 2013. Poland and Cyprus became EU Member States on May 1, 2004. The intra-EU BITs were intended to protect much needed Western European investments into Central and Eastern Europe, as the respective domestic standards of protection of investment were deemed inadequate at that time.

17. The ECT is a multilateral investment treaty that was designed to facilitate and protect investment in the energy sector. At that time, a substantial number of State parties to the ECT were also EU Member States. However, the Contracting Parties contemplated investments primarily between Western European, on the one hand, and Central and Eastern European and certain former Soviet States, on the other hand. As with the intra-EU BITs, intra-EU application of the ECT was not envisaged as the EU Treaties have governed their affairs comprehensively. The number of EU Member States being party to the ECT gradually increased over time due to the accession of Central and Eastern European States to the EU. The ECT, like the intra-EU BITs, also contains substantive standards of protection and, in Article 26 of the ECT, it provides for investor-State arbitration.

B. The Intra-EU Investment Claim "Boom" and Its End

18. Investment in EU Member States is also comprehensively regulated by the EU Treaties and the legal order based on them. Tribunals constituted under intra-EU investment agreements to resolve disputes between an EU-investor and an EU Member State cannot avoid interpreting and applying EU law. Under such treaty-based dispute-resolution mechanisms, the tribunal's conclusions on matters of EU law are essentially unreviewable. This quickly caused significant obstacles to the equal and effective application of EU law, as tribunals and EU courts were both interpreting the same body of law.

19. This tension poses a substantial problem: Under the foundational EU Treaties, the Court of Justice of the European Union ("CJEU" or "Court of Justice") is the final arbiter of questions related to the interpretation and application of the EU Treaties and their relationship to rules creates by the EU Member States in domestic and public international law. A situation in which an arbitral tribunal can sideline the CJEU and apply its own (perhaps erroneous) understanding of the EU Treaties fundamentally undercuts the EU's ability to ensure a legal level playing field, *i.e.*, equality before its own laws. From around 2006 onwards, the EU represented by the European Commission[10] as well as various defendant EU Member States have argued that intra-EU investment agreements are incompatible with EU law ("intra-EU objections").

20. On 6 March 2018, the CJEU rendered its landmark decision on the "intra-EU objection" in *Achmea v. Slovak Republic*.[11] The *Achmea* litigation arose out of an investment arbitration in which the tribunal rejected the intra-EU objection made by the Slovak Republic. The Slovak Republic challenged the tribunal's decision in an EU Member State court, namely in Germany, which in turn referred the case to the CJEU for a so-called "preliminary ruling" according to Article 267 of the TFEU on binding interpretation of the EU Treaties and the legal order they create.

21. The CJEU's holding was clear and unambiguous: A Member State may not enter into a

> treaty by which [it] agree[s] to remove from the jurisdiction of [its] own courts . . . disputes which may concern the application or interpretation of EU law.[12]

[10] *See, e.g.*, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007) ¶ 119 (**Exhibit 09**).

[11] *Achmea* (**Exhibit 10**).

[12] *Id.* ¶ 55.

Such an agreement would be incompatible with the foundational EU Treaties. Agreeing to a mechanism in an international treaty by which an arbitral tribunal may render an unreviewable interpretation of EU law violates "the autonomy of the EU and its legal order," which the EU Member States obligated themselves to uphold when they acceded to the EU by the way of concluding the EU Treaties which comprehensively govern their *inter se* relations.[13]

22. This was re-confirmed by the CJEU in *Komstroy*[14]:

> In the precisely same way as the arbitral tribunal at issue in the case giving rise to the judgment [in . . .] Achmea[15][, Article 26 of the ECT,] according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union[16][, would] call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.[17]

23. It follows from the above that any such provision in an international agreement that is incompatible with the EU Treaties would be precluded by the EU Treaties from having any legal effect.[18] This includes Article 26 of the ECT, which

> must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[19]

---

[13] *Id.* ¶ 57. Following the CJEU's decision in *Achmea*, the German Federal Court of Justice annulled the award, holding that there was no valid arbitration agreement. The Slovak Republic never made a valid offer to arbitrate which could be accepted and, thus, there was no resulting agreement to arbitrate. Bundesgerichtshof ("BGH") [German Federal Court of Justice], Case No. I ZB 2/15, Judgment (31 October 2018) - *Slovak Republic v. Achmea B.V.* (**Exhibit 12**).

[14] *Komstroy"* (**Exhibit 11**).

[15] *Id.* ¶ 52.

[16] *Id.* ¶ 62.

[17] *Id.* ¶ 63.

[18] *Achmea* ¶ 60 (**Exhibit 10**); *Komstroy* ¶ 66 (**Exhibit 11**).

[19] *Komstroy* ¶ 66 (**Exhibit 11**).

Therefore, a putative offer to arbitrate extended by an EU Member State to an investor from another EU Member State, like Article 26 of the ECT, is rendered inapplicable and cannot be accepted to form an agreement to arbitrate.

24. In the wake of the CJEU's *Achmea* decision, the EU and its Member States expressed their agreement that provisions which purportedly contain an offer to arbitrate in intra-EU investment agreements were unlawful, and consequently, without legal effect. On 15 January 2019, twenty-two EU Member States – Poland and Cyprus among them – signed a joint declaration acknowledging the CJEU's *Achmea* decision and noting, among other things, that it applies to intra-EU arbitrations on the basis of both bilateral investment agreements and multilateral agreements, such as the ECT.[20] The Declaration also states that

> Member States inform the investor community that no new intra-EU investment arbitration proceeding should be initiated.

This is of relevance to the present proceeding as Mercuria Energy Group Limited (referred to as "Mercuria")'s "Request for Arbitration dated 12 September 2019 was registered by the SCC on 16 September 2019"[21], *i.e.*, well after the *Achmea* judgment and the said declaration.

25. At that time, certain other EU Member States chose not to comment until the CJEU rendered a judgment explicitly referring to the ECT.[22] The CJEU's judgment in

---

[20] *Declaration of the Representatives of the Governments 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 ("Declaration of the Representatives of the Governments of the Member States")* (15 January 2019) (**Exhibit 13**). This declaration to which both Poland and Cyprus agreed *underscores* the finding of a lack of jurisdiction of the Tribunal on which I will elaborate in more details below. From an EU Treaties point of view, however, it is of merely *declaratory* nature as Article 26 of the ECT never was to be applied between the EU member states, as will be pointed out below as well.

[21] Award ¶ 14 (**Exhibit 39).**

[22] *See Declaration of the Representatives of the Governments of the Member States* (15 January 2019) (**Exhibit 13**). The other EU Member States chose not to comment on the status of Article 26 of the ECT in an intra-EU context, and instead decided to wait until further consideration, including of an eventual decision by the CJEU on this issue. *See Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019) (**Exhibit 14**); *Declaration of the Representative*

Komstroy confirmed that there could not have been any doubt that the reasoning in *Achmea* applies to the ECT. The CJEU reminded all stakeholders involved that Article 26 of the ECT in its current form is and has (always) been inapplicable to disputes between a Member State and an investor of another Member State.[23] On 26 October 2021, in *PL Holdings*, the CJEU again confirmed its decisions in *Achmea* and *Komstroy* and even expanded respective findings from bilateral and multilateral investment agreements to investor-State contracts.[24]

26. However, despite overwhelming evidence supporting lack of jurisdiction, the intra-EU arbitral tribunals have been largely reluctant[25] to acknowledge the inapplicability of Article 26 of the ECT to intra-EU disputes. They have also responded unsympathetically to the defending Member States' jurisdictional objections, thus continuing to render patently unlawful awards under the EU Treaties despite an obvious lack of jurisdiction.[26] EU Member States have responded by taking action that arbitral tribunals cannot ignore: On 5 May 2020, twenty-three EU Member States signed an agreement for the termination of intra-EU bilateral investment treaties.[27] On 14 May 2020, the Commission put EU Member States failing to sign

---

of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union (16 January 2019) (**Exhibit 15**). Following the declarations made by the EU Member States, the European Commission reaffirmed that the application of the arbitration provisions in the ECT in intra-EU disputes is "incompatible with EU law", European Commission, Press Release – Daily News at 1 (17 January 2019) (**Exhibit 16**).

[23] *Komstroy* ¶ 66 (**Exhibit 11**).

[24] CJEU, Case C-109/20, ECLI:EU:C:2021:875 ¶¶ 44-46 and ¶¶ 54-56 – *Republiken Polen v. PL Holdings Sàrl* (*"PL Holdings"*) (**Exhibit 17**).

[25] As will be reflected further below, the intra-EU tribunal in *Green Power v. Spain* acknowledged the role of the EU Treaties in adjudicating disputes initiated under the ECT and declined its jurisdiction under the ECT.

[26] Intra-EU investment arbitration at one point accounted for some twenty per cent of the caseload in the legal services market for investor-state dispute settlement, much (if not all) of which would have disappeared if the intra-EU objection had been accepted. *See* UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases at 3 (**Exhibit 18**).

[27] *Agreement for the Termination of Bilateral Investment Treaties Between the EU Member States* (5 May 2020) (**Exhibit 19**). This agreement entered into force on 29 August 2020.

the aforesaid agreement on notice and threatened to initiate proceedings in the Court of Justice for violating the EU Treaties by not removing intra-EU investment agreements from their legal orders.[28] On 2 December 2021, the Commission opened infringement proceedings against Austria, Sweden, Belgium, Luxembourg, Portugal, Romania, and Italy for failing to effectively remove from their legal orders the Intra-EU BITs to which they are Contracting Parties.[29]

27. As, among other motivations, investment tribunals, which lacked authority to decide intra-EU disputes – and thus act *ultra vires* – continue to render awards, more and more EU Member States have abandoned the ECT. For example, France and Germany[30] – making it clear that investor-State arbitration on the basis of the ECT has never been envisaged and its provisions have never been applicable in an intra-EU context – have already sent written notifications to the depository of the ECT, as did Poland.[31] The Netherlands, Denmark, and Ireland have announced their intention to withdraw.[32] The Commission has recommended an

[28] European Commission, *May Infringements Package: Key Decisions* (14 May 2020) (**Exhibit 20**).

[29] European Commission, *December Infringements Package: Key Decisions* (2 December 2021) (**Exhibit 21**).

[30] *Note Verbale from the authorities of the French Republic to the Energy Charter Secretariat and to the contracting parties to the Energy Charter Treaty* (19 December 2023) (**Exhibit 98)**, *Note Verbale from the Embassy of the Federal Republic of Germany to the Energy Charter Secretariat and to the contracting parties to the Energy Charter Treaty* (28 December 2023) (**Exhibit 99**).

[31] *Notification of the Republic of Poland to the Government of the Portuguese Republic, it is capacity as Depository of the Energy Charter Treaty (28 December 2022)* (**Exhibit 120**). *Also* Spain, Luxembourg, Slovenia, and Portugal sent written notifications of withdrawal. *See* ECT Secretariat, *Written notifications of withdrawal from the Energy Charter Treaty* (7 March 2024) (**Exhibit 100**); *Denuncia por Espania del Tratado de la Carta de la Energia y del Protocolo de la Carta de la Energia sobre la effcacia energética y los aspectos medioambientales relacionados* (14 May 2024) (**Exhibit 08**).

[32] *See* EURACTIV, *Netherlands follows Spain in quitting Energy Charter Treaty* (19 October 2022, updated 20 October 2022) (**Exhibit 102)**; EURACTIV, *Denmark to withdraw from Energy Charter Treaty* (14 April 2023, updated 24 April 2023) (**Exhibit 104)**; Irish Legal News, *Ireland confirms withdrawal from Energy Charter Treaty* (04 June 2024) (**Exhibit 105**).

EU-wide exit,[33] and the European Parliament has just approved it on behalf of the European Union.[34] Among others, the Commission withdrawal proposal highlighted

> the need to eliminate the risk of conflict between the [EU] Treaties and the ECT as interpreted by some arbitral tribunals, which have held that the ECT applies to intra-EU disputes. That interpretation, if confirmed by the courts of a third country, would de facto turn into a legal conflict because arbitration awards violating EU law would circulate in the legal orders of third countries. . . . [P]roceedings to obtain and enforce awards issued by tribunals purportedly established pursuant to Article 26 ECT in intra-EU disputes continue unabated. . . . [The withdrawal] would have *no impact* on intra-EU relations, to which the ECT has never, does not and will never apply . . . The codification of the interpretation of the EU and its Member States in a separate treaty (something that is possible because of the bilateral nature of the obligations) is all the more pressing in the absence of the ECT modernisation that would have embedded in the text itself and via a "for greater certainty" clause, the understanding of all Contracting Parties that its Article 26 does not apply intra-EU.[35]

28. The continuation of intra-EU investment arbitration without a valid legal basis is also resisted in the courts of the EU Member States. For example, German courts, including the Bundesgerichtshof, have set aside arbitral awards for lack of an arbitration agreement[36], and have issued anti-arbitration injunctions against ICSID[37] and non-ICSID awards[38]. French

---

[33] *See* European Commission, News Announcement, Directorate-General for Energy, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty* (7 July 2023) (**Exhibit 106**).

[34] *See* European Parliament, *Withdrawal of the Union from the Energy Charter Treaty* (24 April 2024) (**Exhibit 107).**

[35] (emphasis in the original) European Commission, *Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty* (7 July 2023) at 2 (**Exhibit 108)**.

[36] BGH, Case No. I ZB 2/15, Judgment (31 October 2018) – *Slovak Republic v. Achmea B.V.* (**Exhibit 12**).

[37] BGH, Case No. I ZB 43/22, Decision (27 July 2023) – *Germany v. Mainstream Renewable Power et al.* (**Exhibit 40**); BGH, Case No. I ZB 75/22, Decision (27 July 2023) – *The Netherlands v. RWE* (**Exhibit 74**).

[38] BGH, Case No. I ZB 16/21, Decision (17 November 2021) – *Croatia v. Raiffeisen International et al.* (**Exhibit 75**).

courts have also set aside intra-EU investment awards for lack of jurisdiction.[39] I understand that the Award on which the present case is premised is being challenged before the competent Swedish court, which suspended enforcement, and that a decision is pending.[40] Swedish courts have also consistently declared invalid[41] intra-EU awards based on the grounds of violation of European, and therefore, Swedish public policy[42] or non-arbitrability[43].

II. RELEVANT RULES AND PRINCIPLES OF THE EU LEGAL ORDER

29. The holding in *Achmea* and *Komstroy* is a direct consequence of the foundational legal order in the EU. Therefore, it may be of assistance to the Court to briefly set out the relevant rules and principles of the EU legal order: The EU is comprised of 27 Member States that have ceded to the EU aspects of sovereignty to establish one integrated Europe characterized by common laws, values, and a (single) internal market. The two main foundational instruments of the EU are the Treaty of the European Union and the Treaty on the Functioning of the European Union, signed and ratified by all EU Member States. Together,

---

[39] Cour d' Appel de Paris [Paris Court of Appeal], Case N° RG 20/14581 - N° Portalis 35L7-V-B7E-CCPBD, Decision (19 April 2022) – *Poland v. Slot Group et al.* (**Exhibit 77**); Case N° RG 20/13085 - N° Portalis 35L7-V-B7E-CCLDI, Decision (19 April 2022) – *Poland v. Strabag et al.* (**Exhibit 78**).

[40] Svea Hovrätt [Svea Court of Appeal], Case No. T 4658-18, Order (6 March 2023) – *Poland v. Mercuria.* (**Exhibit 38).**

[41] The Swedish Arbitration Act ("SAA") distinguishes between the invalidity of an arbitral award for reasons beyond the control of the disputing parties, contained in Article 33 of the SAA, and the setting aside of an arbitral award for reasons within the control of the parties, contained in Article 34 of the SAA. *See* Hobér, Kaj, International Commercial Arbitration in Sweden (Oxford University Press, 2nd ed. 2021) at 8.27 (**Exhibit 79**).

[42] Svea Hovrätt [Svea Court of Appeal], Case No. T 4236-19, Judgment (27 May 2024) – *Italy v. CEF Energia B.V.* (**Exhibit 119**); Svea Hovrätt [Svea Court of Appeal], Case No. T 15200-22, Judgment (27 March 2024) – *Spain v. Triodos SICAV II* (**Exhibit 80**); Svea Hovrätt [Svea Court of Appeal], Case No. T 12646-21, Judgment (20 December 2023) – *Festorino Investment Limited et al. v. Poland* (**Exhibit 81**); Högsta Domstolen [Swedish Supreme Court], Case No. T 1569-19, Judgment (14 December 2022) – *Poland v. PL Holdings S.á.r.l.* (**Exhibit 82**);

[43] Svea Hovrätt [Svea Court of Appeal], Case No. T 4658-18, Judgment (13 December 2022) – *Spain v. Novenergia II - Energy & Environment (SCA), SICAR* (**Exhibit 83**).

they are known as the EU Treaties. The EU's institutions include the European Parliament, the European Council, the Council of the European Union (in the EU Treaties simply called the "Council"), the European Commission (also called the "Commission"), the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.[44]

30. The most important primary sources of EU law are the EU Treaties and the Charter of Fundamental Rights of the European Union ("CFREU")[45]. According to Article 5 of the TEU, the EU can only act, *i.e.* exercise powers – in EU parlance, "competences" – that have been conferred upon it by the EU Treaties. The EU Treaties provide for different categories of competences, the most important being the so-called exclusive competences and the shared competences. Article 3 of the TFEU provides for the exclusive competence of the EU, among others, with regard to the regulation of external borders, *i.e.*, the Customs Union and external trade and investment policy. Article 4 of the TFEU explains, *inter alia*, that internal market rules are part of the so-called shared competences. Under shared competences, once the EU decides to exercise them, Member States are prevented from acting in the area covered by a particular piece of EU legislation.[46] EU law adopted by the EU institutions in the exercise of their powers under the EU Treaties, as just described, is called secondary legislation. In the EU legal order, the EU Treaties take precedence over any other EU law, including international agreements concluded by the EU.[47] In addition, EU law incorporates the jurisprudence of the CJEU.[48]

---

[44] *See* TEU, Art. 13(1) (**Exhibit 04**).

[45] **Exhibit 22**.

[46] TFEU, Art. 2(2) (**Exhibit 05)**.

[47] CJEU, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 ¶ 285 – *Yassin Abdullah Kadi and Al Barakaat International Foundation* ("*Kadi*") (**Exhibit 24**).

[48] The CJEU functions in accordance with the EU Treaties and its statute, *see* Art. 1 of the Statute of the Court of Justice of the European Union, Protocol (No. 3) to the TFEU (**Exhibit 25**).

31. In the following, the principles of the EU legal order relevant to the intra-EU investment dispute at hand are set out.

A. Dual Nature of the EU Legal Order: Superior Public International Law between EU Member States and a Constitutional Framework Creating Law in the EU Member States

32. The EU's legal order is both a highly elaborate legal regime in public international law *between* Member States and a constitutional framework creating law applicable *within* Member States. This dual nature enables Member States, including Poland and Cyprus, to work to achieve "an ever closer union among the peoples of Europe"[49], *i.e.*, a state of integration unprecedented in any other international organization.

33. In *Achmea*, the CJEU explained:

> 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.[50]

Thus, *in addition* to being instruments of international law, the EU Treaties, together with other EU law, form part of the national law of each EU Member State.[51]

34. The EU Treaties can be seen as limiting the Members States' sovereignty more significantly than "typical" founding instruments of international organizations. This is evidenced by the fact that in case of a conflict between a rule created by the EU Member States and EU law, EU law takes precedence and overrides such a rule.[52] This all-encompassing conflict rule is known in EU law parlance as the principle of primacy of EU law. As discussed

---

[49] TFEU, Preamble (**Exhibit 05**). *See also* TEU, Preamble and Art. 1(2) (**Exhibit 04**).

[50] *Achmea* ¶ 41 (**Exhibit 10**).

[51] *See, e.g.*, CJEU, Case 6/64, ECLI:EU:C:1964:66 3. Ruling – *Costa v. ENEL ("Costa v. ENEL")* (**Exhibit 26**); CJEU, Case 106/77, ECLI:EU:C:1978:49 ¶ 21 – *Amministrazione delle Finanze dello Stato v. Simmenthal SpA ("Simmenthal II")* (**Exhibit 27**).

[52] *See Simmenthal II* ¶¶ 21–22 (**Exhibit 27**).

below, no derogation is permitted from this rule, save through a formal amendment procedure required to change the terms of the EU Treaties.[53]

35. The fact that the EU Treaties may be more limiting on the Member States' sovereign powers than other international agreements does not change the fact that EU law is public international law when applied between the EU Member States, albeit with a *superior rank* in relation to other public international law applicable between the EU Member States.[54]

B. Protection under the EU Treaties of Foreign Investment against Distortion of Competition by EU Member States

36. The EU established and ensures the functioning of the internal (single) market where people, goods, services, and capital can move around freely.[55] The EU also confers European citizenship in addition to the national one[56], even with a common passport booklet design. It affords EU citizens with rights, freedoms and legal protections available under the EU Treaties, signalling that there are no internal borders, but a single market for goods, services, people and capital with one common external border. With regards to foreign investment, the EU Treaties and the secondary EU law, enacted on their basis, protect cross-border investors and their investments throughout their lifecycle, from market access, to operation, to exit. In particular, the fundamental freedoms and fundamental rights enshrined in the EU Treaties protect against discrimination and other disproportionate government interferences, thus guaranteeing undistorted competition and a level playing field for foreign investors and their investment within the single market.[57]

---

[53] *See* TEU, Art. 48 (**Exhibit 04**).

[54] *See* CJEU, Case C-478/07, ECLI:EU:C:2009:521 ¶ 98 – *Budějovický Budvar ("Budějovický Budvar")* (**Exhibit 28**) and below ¶ 65.

[55] *See* TFEU, Art. 26 (1), (2) (**Exhibit 05**).

[56] See TFEU, Art. 20 (**Exhibit 05**).

[57] European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment* (19 July 2018) (**Exhibit 91)**.

37. In respect of investors from one EU Member State with investments in another EU Member State, EU law guarantees that capital can circulate freely throughout the EU, and that investors enjoy freedom to establish a business, to invest in companies, and to provide services within the EU's internal borders.[58] EU investors enjoy the fundamental rights protected by the CFREU, *inter alia* the right to property, access to justice and non-discrimination.[59] EU investors are also protected by general principles of EU law, such as proportionality, legal certainty, and the protection of legitimate expectations.[60]

38. Investors have access to the EU Member States' national courts to vindicate these rights under EU law. Under Article 19(1) of the TEU, Member States are obliged to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.[61] EU Member States are liable for damage or loss caused to any legal or natural persons as a result of violations of EU law for which the State can be held responsible; and an aggrieved individual or company can bring a suit against an EU Member State in national courts.[62]

39. In all these cases, if a court of an EU Member State is in doubt as to the precise content and meaning of EU law, the question must ultimately be referred to the CJEU. The CJEU's rulings must then be observed by the courts across the EU Member States, ensuring that all EU investors within the EU enjoy the same rights under EU law.

---

[58] *See* TFEU, Arts. 49, 56, 57, 63(1) (**Exhibit 05**).

[59] *See* CFREU, Arts. 17, 21, 47–50 (**Exhibit 22**); CJEU, Case C-235/17, ECLI:EU:C:2019:432 ¶¶ 59, 67 *et seq.* – *Commission v. Hungary* (**Exhibit 30**).

[60] *See Id.*, Arts. 17, 21, 47; CJEU, Case C-8/55, ECLI:EU:C:1956:7 – *Fédération Charbonnière de Belgique v. High Authority* (**Exhibit 31**); CJEU, Case T-115/94, ECLI:EU:T:1997:3 ¶¶ 14 *et seq*. – *Opel Austria v. Council of the European Union* (**Exhibit 32**); CJEU, Case 120/86, ECLI:EU:C:1988:213 – *J. Mulder* (**Exhibit 33**). *See also* Paul Craig & Gráinne de Búrca, EU Law (Oxford University Press,7th ed. 2020) ("Craig & de Búrca") at 266-267 (**Exhibit 34**).

[61] *See* CJEU, Case C-64/16, ECLI:EU:C:2018:117 ¶ 29, 34 – *Associação Sindical dos Juízes Portugueses* (**Exhibit** +++); Craig & de Búrca at 276-278 (**Exhibit 35**).

[62] *See* CJEU, Joined Cases C-6/90 and 9/90, ECLI:EU:C:1991:428 ¶¶ 28 *et seq.* – *Francovich* (**Exhibit 36**); Craig & de Búrca at 288–290, 298–299 (**Exhibit 34**).

40. In addition, investors such as the Mercuria have further potential recourse before the European Court of Human Rights ("ECtHR") pursuant to the European Convention on Human Rights ("ECHR") to which both Poland and Cyprus are parties. The ECHR protects fundamental rights and freedoms, such as the right to property, the right to due process and protection from discrimination. Mercuria could have sought enforcement of its rights before the ECtHR through the individual complaints procedure after having challenged the Polish measures in question before the Polish courts.

41. If the ECtHR finds that there has been a violation of the ECHR, the ECtHR can award monetary compensation to the injured investor.[63]

C. EU Judicial System and Its Governing Principles

42. The EU judicial system is governed by the EU Treaties.[64] It is made up of the courts and tribunals of the EU Member States and the CJEU. While each EU Member State establishes its own courts and tribunals, all such courts and tribunals must apply and interpret EU law.[65]

43. The CJEU has exclusive jurisdiction in ultimately determining the content and scope of EU law. Its mandate is to ensure that "in the interpretation and application of the Treaties the [EU] law is observed."[66] The CJEU reviews the legality of the acts of the institutions of the EU, ensures that the Member States comply with obligations under the EU

---

[63] *See, e.g.*, , European Court of Human Rights (ECtHR), App. No. 14902/04, Judgement (15 December 2014) at 11-12 – *Case of OAO Neftyanaya Kompaniya Yukos v. Russia* (**Exhibit 37**) (finding that Russian authorities violated the investor's rights by failing to accord sufficient time for them to prepare their cases before national courts and awarding 1.9 billion EUR in damages to the ex-shareholders of the investor to be paid by Russian authorities).

[64] *See* TEU, Art. 19 (**Exhibit 04**); TFEU, Art. 251 *et seq.* (**Exhibit 05**).

[65] *See* TEU, Art. 19(1) (**Exhibit 04**); CFREU, Arts. 47, 51(1) (**Exhibit 22**); CJEU, Case 26/62, ECLI:EU:C:1963:1 – *van Gend & Loos* (**Exhibit 41**).

[66] *See* TEU, Art. 19(1) (**Exhibit 04**).

Treaties, and interprets EU law at the request of national courts and tribunals.[67] In so doing, the CJEU preserves the unique characteristics of EU law and guarantees equality under the law.[68] In EU law terminology: it preserves the autonomy of EU law.[69] Putting it into the words of the tribunal in *BayWa v. Spain*:

> For just as the European treaties [EU Treaties] are part of international law, so the CJEU, which exercises jurisdiction as between EU Member States, is an international court whose decisions are binding on those states *inter se*. International law allows the states parties to a regime treaty to establish their own international courts with jurisdiction over and authority to bind the Member States on issues of international law affecting them.[70]

1. The Principle of Autonomy of EU Law

44. The principle of autonomy is of fundamental importance to the EU legal order. It reflects the state of deep integration of the EU Member States and the resulting voluntary limitation of their sovereignty, which is not found in any other international organisation. Like the principle of primacy, which will be discussed later, the principle of autonomy is essential to the functioning of the EU and has been well-established long before the CJEU's decisions

---

[67] *See* TEU, Art. 19 **(Exhibit 04)**; TFEU, Art. 251 *et seq.* (**Exhibit 05**).

[68] *See* TEU, Preamble, Arts. 2, 9 (**Exhibit 04**).

[69] The principle of autonomy of EU law has been set out in a series of decisions and opinions of the CJEU. *See, e.g.*, CJEU, Opinion 1/91, ECLI:EU:C:1991:490 ¶ 35 – *EEA Agreement* ("Opinion 1/91") (**Exhibit 42**); CJEU, Opinion 1/00, ECLI:EU:C:2002:231 ¶¶ 11–12 – *European Common Aviation Area* ("Opinion 1/00") (**Exhibit 43**); CJEU, Opinion 1/09, ECLI:EU:C:2011:123 ¶¶ 77 *et seq.* - *European and Community Patents Court* ("Opinion 1/09") (**Exhibit 44**); CJEU, Opinion 2/13, ECLI:EU:C:2014:2454 – *ECHR* ("Opinion 2/13") (**Exhibit 45**); CJEU, Case C-196/09, ECLI:EU:C:2011:388 – *Paul Miles and others v. European Schools* (**Exhibit 46**); CJEU, Opinion 1/17, ECLI:EU:C:2019:341 – *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part* ("CETA") ("Opinion 1/17") (**Exhibit 47**).

[70] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. The Kingdom of Spain*, ICSID Case No. ARB/15/16 ("*BayWa v. Spain*"), Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) ¶ p280 (**Exhibit 109**). The decision was rendered prior to the CJEU's judgment in *Komstroy* (**Exhibit 11**) and found against the Respondent for reasons I do not necessarily agree with.

in *Achmea*[71], *Komstroy*[72], and *PL-Holding*[73]. In accordance with this principle, the CJEU's exclusive authority may not be circumvented or hampered by the action of EU Member States or other EU institutions.

45. For example, the jurisprudence of the CJEU establishes that

> an international agreement cannot affect the allocation of powers fixed by the [EU] Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the [CJEU][74]

and, further, the EU itself does not enjoy the competence to permit,

> in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union[75].

46. The principle of autonomy is also reflected in the provisions of the TFEU. According to Article 19 of the TEU,

> it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.[76]

---

[71] (**Exhibit 10**).

[72] (**Exhibit 11**).

[73] (**Exhibit 17**).

[74] Opinion 2/13 ¶ 201 (**Exhibit 45**). *See also, e.g.* Opinion 1/91 ¶ 35 (**Exhibit 42**); Opinion 1/00 ¶¶ 11, 12 (**Exhibit 43**); CJEU, Case C-459/03, ECLI:EU:C:2006:345 ¶¶ 123, 136 – *Commission v. Ireland ("Mox Plant*") (**Exhibit 48**); *Kadi* ¶ 282 (**Exhibit 24**); Opinion 1/17 ¶¶ 110, 111 (**Exhibit 47**).

[75] *Komstroy* ¶ 62 (**Exhibit 11**). The CJEU in *European Food and Others* (CJEU, Case C-638/19 P, ECLI:EU:C:2022:50 ¶ 144 – *Commission v. European Food and Others* ("*European Food and Others*") (**Exhibit 76**)) applied the reasoning in *Achmea* (*Achmea* ¶¶ 55, 56 (**Exhibit 10**)) and, thus, confirmed previous findings again also with regards to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (**Exhibit 92**).

[76] *Achmea* ¶ 36 (**Exhibit 10**).

Article 267 establishes a preliminary ruling procedure that permits national courts and tribunals to obtain rulings from the CJEU on questions concerning the interpretation and validity of EU law. The CJEU has described this "keystone of the [EU] juridical system"[77] as providing national courts with

> the most extensive power, or even the obligation, to make a reference to the [CJEU] if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of EU law and requiring a decision by them.[78]

The preliminary ruling procedure is designed to promote equality under the law by preventing discrepancies in the interpretation of EU law and to ensure that EU law is given its full effect within the framework of the judicial system of the EU Member States.[79]

47. Article 344 of the TFEU prohibits EU Member States from submitting a dispute concerning the interpretation or application of the EU Treaties "to any method of settlement other than those provided for therein."[80] This ensures that the EU Member States submit questions which may touch upon the interpretation and application of EU law only to such courts and tribunals which are able to refer questions to the CJEU under Article 267 of the TFEU, *i.e.*, the national courts and tribunals of the EU Member States.[81] As the CJEU has explained, the relationship between the EU Member States is "governed by EU law to the exclusion . . . of any other law," if EU law so requires.[82]

---

[77] *Komstroy* ¶ 46 (**Exhibit 11**).

[78] Opinion 1/09 ¶ 83 (**Exhibit 44**); Opinion 1/17 ¶¶ 111 (**Exhibit 47**).

[79] Opinion 1/09 ¶ 83 (**Exhibit 47**); *Komstroy* ¶ 46 (**Exhibit 11**).

[80] *See* Opinion 2/13 ¶ 201 (**Exhibit 45**); *Komstroy* ¶ 42 (**Exhibit 11**).

[81] Opinion 2/13 ¶ 210 (**Exhibit 45**).

[82] *Id.* ¶ 212.

48. The CJEU has stressed the fundamental importance of its direct communication with the national courts of EU Member States through the Article 267 procedure. Its Opinion 1/09, which addressed the lawfulness of a proposed European and Community Patents Court, held that EU Member States

> cannot confer the jurisdiction to resolve . . . disputes on a court created by an international agreement which would deprive [national] courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.[83]

49. This mechanism for communicating between the CJEU and national courts ensures the uniform application and primacy of EU law because judgments rendered by the CJEU under Article 267 of the TFEU on interpretation of EU law have general, binding effect in all EU Member States. The CJEU recently reiterated this well-settled proposition:

> Article 267 TFEU is to be interpreted as meaning that, after receiving the answer of the Court of Justice of the European Union to a question concerning the interpretation of EU law which it has submitted to the Court, or where the case- law of the Court of Justice of the European Union already provides a clear answer to that question, *a chamber of a court of final instance is itself required to do everything necessary to ensure that that interpretation of EU law is applied*.[84]

50. In addition, the judgments of the CJEU have retroactive effect. The CJEU held:

> The interpretation which, in the exercise of the jurisdiction conferred on it by [Article 267 of the TFEU], the Court of Justice gives to a rule of Community [now Union] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought *to have been understood and applied from the time of its coming into force*. It follows that the rule as thus interpreted may, and *must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation.*[85]

---

[83] Opinion 1/09 ¶ 80 (**Exhibit 44**). *See also Komstroy* ¶ 59 (**Exhibit 11**).

[84] (emphasis added) CJEU, Case C-689/13, ECLI:EU:C:2016:199 3. Ruling – *Puligienica Facility Esco SpA (PFE) v. Airgest SpA* (**Exhibit 49**).

[85] (emphasis added) CJEU, Joined Cases 66, 127 and 128/79, ECLI:EU:C:1980:101 ¶ 9 – *Salumi* (**Exhibit 50**); *PL Holdings* ¶¶ 57-61 (**Exhibit 17**).

51. Also, the obligation to respect the principle of autonomy contained in the EU Treaties cannot be "waived" – *i.e.*, the EU Member States can neither deviate from nor disapply the EU Treaties. The CJEU in *PL Holdings* even expressly held, with regard to the jurisdiction of an intra-EU investment arbitral tribunal, that a failure by an EU Member State to promptly raise issues or objections is immaterial, as it is the very existence of that tribunal which is contrary to the EU Treaties. The Court of Justice stated:

> It should also be noted that each request for arbitration made to a Member State by an investor from another Member State, on the basis of an arbitration clause in a bilateral investment treaty between those two Member States, may, despite the invalidity of that clause, constitute an offer of arbitration to the defendant Member State concerned, which could then be regarded as having accepted that offer simply because it failed to put forward specific arguments against the existence of an ad hoc arbitration agreement. *Such a situation would have the effect of maintaining the effects of the commitment – which was entered into by that Member State in breach of EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought.*[86]

52. In sum, the CJEU's rulings in the preliminary ruling procedure are binding as to EU law, setting the content and meaning of a given rule *ab initio*.[87] For the case at hand, as I will explain in more detail further below, the ruling in *Achmea*[88], as confirmed in *Komstroy*[89] and *PL Holdings*[90] and the prior case law all three decisions are based on, thus, means, in terms of its temporal effect, that intra-EU investment arbitration has been incompatible with the EU Treaties from the moment they, or their respective predecessor treaties, entered into force.

---

[86] (emphasis added) *PL Holdings* ¶ 50 (**Exhibit 17**).

[87] *PL Holdings* ¶¶ 57-61 (**Exhibit 17**). *See also above* ¶ 50.

[88] *Achmea* (**Exhibit 10**).

[89] *Komstroy* (**Exhibit 11**).

[90] *PL Holdings* (**Exhibit 17**).

Indeed, there has never been a moment in time for an EU Member State when intra-EU investment arbitration was lawful.[91]

2. The Principle of Primacy of EU law

53. The principle of primacy of EU law, enshrined in the EU Treaties, is the supreme conflict rule governing the relationship between the EU Treaties and rules created by EU Member States in case of a conflict. In such cases, according to the principle of primacy, in case of a conflict between a rule created by one of the EU Member States and EU law, EU law takes precedence and overrides such a rule. Given the dual nature of the EU Treaties, this overriding effect applies equally to rules created by a Member State in domestic law *and* to rules created between two or more EU Member States in public international law. What concerns the principle of primacy as treaty rule in public international law, the EU Member States – by concluding the EU Treaties – deviated from the default conflict rules contained in the VCLT – something sovereigns can readily do[92] – and chose to apply a specific conflict rule[93] contained in the EU Treaties, namely the principle of primacy. They went even beyond that: By strictly forbidding[94] the modification of the principle of primacy *inter se*, the EU Member States have created a *supreme* conflict rule that takes precedence over any other conflict rule in intra-EU relations. There is nothing in international law which prohibits "States

[91] EU Member State courts have consistently set aside intra-EU investment awards. *See above* ¶ 28.

[92] Schmalenbach, Kirsten in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties – A Commentary (Springer, 2nd ed. 2018), Article 1 ¶ 2 (**Exhibit 62**).

[93] *See, e.g.*, International Law Commission ("ILC"), Report of the Study Group of the International Law Commission on the Work of its 58th Session (1 May - 9 June and 3 July - 11 August 2006) UN Doc. A/CN.4/L.682 ¶ 283 (**Exhibit 61**).

[94] *See below* ¶¶ 76 *et seq.*

to establish the priority of the regime treaty over other sources of international law, at least so long as peremptory norms are not implicated."[95] The International Law Commission explained

> The EC Treaty [now the EU Treaties] takes absolute precedence over agreements that Member States have concluded between each other.[96]

54. This fundamental principle is reflected in the Treaties[97] and was succinctly described in the CJEU's case law. During the ratification of the 2009 Lisbon Treaty, the Member States attached various declarations to the Treaty reflecting intentions of the Parties. One of those confirms that EU law has primacy over domestic law of the Member States. The Declaration on Primacy

> recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

In addition, the EU Member States declared that

> [i]t results from the case-law of the Court of Justice that primacy of EC [now EU] law is a cornerstone principle of Community [now Union] law. According to the Court, this principle is inherent to the specific nature of the European Community [now Union]. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the

---

[95] *BayWa v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) ¶ 280 (**Exhibit 109**).

[96] ILC, Report of the Study Group of the International Law Commission on the Work of its 58th Session (1 May - 9 June and 3 July - 11 August 2006) UN Doc. A/CN.4/L.682 ¶ 283 (**Exhibit 61**).

[97] The principle of primacy is reflected, among others, in Article 351 TFEU which provides a narrow exception for "rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, [which] shall not be affected by the provisions of the Treaties." (emphasis added). *See also* Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy ("*Declaration concerning primacy*") (signed 13 December 2007) 2008 O.J. (C 115) 335 at 344 (**Exhibit 51**).

> future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

55. The principle of primacy is reflected, among others, in Article 351 of the TFEU which provides a narrow exception – not relevant in the present case – from the primacy for

> rights and obligations arising from agreements [in public international law] concluded before 1 January 1958 or, for acceding States [to the EU], before the date of their accession, between one or more Member States on the one hand, and one or more *third countries* on the other, [which, with regards to the rights and obligations owed to third countries,] shall not be affected by the provisions of the Treaties.[98]

56. Thus, save obligation towards *third countries* contained in international treaties and the present case is not such but one relating to obligations *between EU Member States only*, the principle of primacy overwrites any international law created between the EU Member States which is incompatible with the EU Treaties.[99]

57. Since 1964 and the first pronouncement of the principle in *Costa v. ENEL*,[100] a considerable body of case law has developed, dealing mainly – but not only, as we shall see below – with the relationship between the EU Treaties and domestic law, simply because the Member States act much more often through domestic law than through international law. One

---

[98] (emphasis added).

[99] ILC, Report of the Study Group of the International Law Commission on the Work of its 58th Session (1 May - 9 June and 3 July - 11 August 2006) UN Doc. A/CN.4/L.682 ¶¶ 283-4 (**Exhibit 61**). *See also Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19 ("*Electrabel v. Hungary*"), Decision on Jurisdiction (30 November 2012) ¶¶ 4.180 *et seq.* (**Exhibit 110**) which reads in ¶ 4.180:

> From its wording, it is clear that Article 307 EC [now Article 351 of the TFEU] cannot apply to treaties made between EU Member States. Article 307 [now Article 351 of the TFEU] deals only with relations between EU Members and Non-EU Members that survive the entry of the EU Member into the European Union; and it does not address relations between EU Member States. (in-text-citations omitted).

[100] *Costa v. ENEL* (**Exhibit 26**).

of the landmark cases setting out the mechanics of the principle of primacy is the *Simmenthal II* judgment:

> [E]very national court must, in a case within its jurisdiction, apply [EU] law in its entirety . . . and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule.
>
> Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [EU] rules from having full force and effect are incompatible with those requirements which are the very essence of [EU] law.[101]

58. EU law generally takes precedence over any conflicting rule of any rank created by the EU Member States, even if this rule is contained in the constitution of an EU Member State and would afford a more favourable legal position. This was more recently re-confirmed by the CJEU in *Stefano Melloni v. Ministerio Fiscal*, where the CJEU stated that any other reading

> would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules . . . where they infringe the fundamental rights guaranteed by that [EU Member] State's constitution.[102]

59. The principle of primacy of EU law need not be pleaded by concerned parties; it must be applied by the competent court or tribunal on its own motion.[103]

60. The principle of primacy of EU law is not limited to EU Member States' courts and tribunals but requires any competent authority to both apply and give full effect to EU

---

[101] *Simmenthal II* ¶¶ 21–22 (**Exhibit 27**).

[102] CJEU, Case C-399/11, ECLI:EU:C:2013:107 ¶ 58 – *Stefano Melloni v. Ministerio Fiscal* (**Exhibit 52**).

[103] *Simmenthal II* ¶ 24 (**Exhibit 27**).

law.[104] Thus, any competent authority applying EU law must disregard any rule created by an EU Member State that conflicts with EU law. Moreover, it falls upon all concerned EU Member State authorities to correct the incompatibility and align their laws with EU law.[105]

61. As already indicated, there cannot be any doubt that the principle of primacy of EU law also applies to obligations contained in *international agreements or treaties between EU Member States*. EU law therefore takes precedence over the rules created by EU Member States in international agreements or treaties concluded between them.[106]

62. As early as in 1962, the CJEU stated that

> a Member State which by virtue of the entry into force of the EEC Treaty [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.[107]

63. The Court of Justice 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].[108]

64. 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

---

[104] *See, e.g.*, CJEU, Joined Cases No. 205 to 215/82, ECLI:EU:C:1983:233 ¶¶ 17, 22 – *Deutsche Milchkontor v. Germany* (**Exhibit 53**); CJEU, Case C-231/96, ECLI:EU:C:1998:401 – *Edis* (**Exhibit 54**).

[105] *See* CJEU, Joined Cases No. C-231/06 to C-233/06, ECLI:EU:C:2007:373 ¶¶ 38, 41 – *Jonkman and Others v. National Pensions Office* (**Exhibit 55**).

[106] *See, e.g.,* CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of Italian Republic ("Commission v. Italian Republic")* (**Exhibit 56**); CJEU, Case C-3/91, ECLI:EU:C:1992:420 ¶ 8 – *Exportur* (**Exhibit 57**); CJEU, Case C-469/00, ECLI:EU:C:2003:295 ¶ 37 – *Ravil* (**Exhibit 58**); *Budějovický Budvar* ¶ 98 (**Exhibit 28**); CJEU, Case C-546/07, ECLI:EU:C:2010:25 ¶ 44 – *Commission v. Germany ("Commission v. Germany")* (**Exhibit 59**).

[107] *Commission v. Italian Republic*, Summary Point 1 (**Exhibit 56**).

[108] *Commission v. Italian Republic* (**Exhibit 56**).

EU joined in 1995. The scenario in this CJEU case is also similar to the present one: Poland and Cyprus acceded to the EU in 2004. The ECT is a multilateral agreement entered into force for Poland in 2000 and Cyprus 1998. Non-EU countries are also parties to the ECT. However, following the CJEU's ruling in *Commission v. Italian Republic*, provisions of the ECT that are incompatible with the EU Treaties, such as Article 26, cannot be applied in an intra-EU context.

65. While the above judgment dealt with treaties in force prior to the entry into force of the EEC Treaty (now the EU Treaties), since then, the Court of Justice 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].[109]

The principle of the primacy of EU law gives a particular provision of the EU Treaties precedence over a particular provision of another (conflicting) international treaty between EU Member States in a particular case, if both provisions as such are applicable to a particular situation. The application of the conflict rule does not lead to invalidation of the latter provision. It only disapplies it in the concrete conflict situation.[110] This applies irrespective of whether the conflicting treaty was concluded before or after the Member State's accession to the EU Treaties.[111] In this regard, it can be said that when EU Member States join the EU, they

---

[109] (emphasis added) *Exportur* ¶ 8 (**Exhibit 57**); This is confirmed by a consistent line of case law. *See* CJEU, Case 235/87, ECLI:EU:C:1988:460 ¶ 23 – *Matteucci* (**Exhibit 111**); *Ravil* ¶ 37 (**Exhibit 58**); *Budějovický Budvar* ¶ 98 (**Exhibit 28**); *Commission v. Germany* ¶ 44 (**Exhibit 59**).

[110] *Ravil* ¶ 37 (**Exhibit 58**) (emphasis added) ("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 …").

[111] The operation of the principle of primacy in an intra-EU context as prescribed here is – from a systemic point of view – not at all surprising. Similar to federal states, from which it borrows, the EU cannot allow its parts to "opt out" of their obligations under its foundational treaties by concluding *inter se* agreements. Although I am not an expert on US constitutional law, I am aware that parts of a federal state, like the States in the United States of America, for example, cannot deviate from the US

limit their sovereignty in those areas governed by EU law, as they cannot override it by means of an international treaty.

66. In contrast to the ICSID arbitration in *Electrabel v. Hungary*[112] or the SCC arbitration in *Green Power v. Spain*,[113] neither the cited parts in the EU Treaties nor the CJEU's standing case law on primacy of the EU Treaties over other public international law commitments between the EU Member States find frequently echo in tribunals' reasoning[114].

67. The application of the principle of primacy is not limited to bilateral agreements but extends to all international agreements between Member States, irrespective of whether they are bi- or multilateral,[115] with or without participation of the EU.[116]

68. The principle of primacy of EU law is of such fundamental importance to the proper functioning of the EU that no derogation is permitted. Moreover, the EU cannot exempt the Member States from observing this principle.[117] Nor can the EU Member States agree

---

Constitution or from a decision of the US Supreme Court, amongst each other or each other's citizens, at will by concluding interstate compacts. *See* Article I, Section 10, Clause 3 of the United States Constitution (adopted 1788, entered into force 1789) (**Exhibit 112**).

[112] *Electrabel v. Hungary,* Decision on Jurisdiction (30 November 2012) ¶ 4.191 (**Exhibit 110).**

[113] *Green Power Partners K/S, SCE Solar Don Benito APS v. Spain*, SCC Case No. V. 2016/135*,* Award (16 June 2022) *("Green Power v. Spain")* ¶ 469 (**Exhibit 72**).

[114] Admittedly, the tribunals typically reproduce the arguments of the disputing parties.

[115] *See Mox Plant* ¶¶ 169–171 (**Exhibit 48**) (involving the multilateral UN Convention on the Law of the Sea).

[116] Opinion 1/91 ¶¶ 40, 70 (**Exhibit 42**); Opinion 1/09 ¶¶ 74, 76 (**Exhibit 44**) (addressing an agreement to create a unified patent litigation system); Opinion 2/13 ¶¶ 182-83 (**Exhibit 45**); Opinion 1/17 ¶¶ 110, 111, 150 (**Exhibit 47**) (trade agreement).

[117] *See* CJEU, Case 26/78, ECLI:EU:C:1978:172 ¶ 9 – *Antonio Viola* ("*Viola*") (**Exhibit 23**) (Any action of the EU has its "basis, their framework and their bounds" in the EU Treaties); (**Exhibit 04; 05**). In the present case the Tribunal limited itself to the rather generic – and erroneous – statements that it "finds no support for the proposition that EU law has primacy over public international public law in determining the Tribunal's jurisdiction under Article 26 of the ECT"; and that "it is rather questionable from the standpoint of international law (which is the standpoint of this Tribunal, as discussed above) that EU law can be placed hierarchically above an instrument of international law based on EU law's own principle of primacy." Award ¶¶ 363, 424 respectively (**Exhibit 39**). What the Tribunal fails to

among each other on any other conflict rule to override the one established by the EU Treaties.[118] The only way for the EU Member States to change this rule is formally to amend the EU Treaties by following the amendment procedure set out in Article 48 of the TEU.

69. It follows that any other conflict rule created by the EU Member States among each other violates the EU Treaties and cannot be applied under international law.

70. As a matter of course, the all-encompassing conflict rule established by the EU Treaties also prevails over any customary international law conflict rules governing the relationships between international treaties. As previously mentioned, it is well-established that sovereign States may establish special conflict rules among themselves[119], which derogate from the default rules in the VCLT.[120] The principle of primacy of the EU Treaties constitutes such a special conflict rule.

D. Specific Rules of Interpretation

71. As in respect of special conflict rules, sovereign States may also establish special rules on interpretation among themselves, which modify the default rules in the VCLT, the latter shall only have a residual function. "There are much more rules of treaty interpretation applied in international practice and diplomacy than are codified in Arts 31–33 [of the] VCLT.

---

appreciate is, among others, that the EU Treaties are treaties in public international law applicable in full to the case before it, containing the principle of primacy as detailed in the CJEU's case law set out earlier.

[118] *See Kadi* ¶ 285 (**Exhibit 24**); CJEU, Case C-266/16, ECLI:EU:C:2018:118, ¶ 46 – *Western Sahara Campaign UK* ("*Western Sahara Campaign UK*") (**Exhibit 60**).

[119] *See, e.g.*, ILC, Report of the Study Group of the International Law Commission on the Work of its 58th Session (1 May - 9 June and 3 July - 11 August 2006) UN Doc. A/CN.4/L.682 ¶ 283 (**Exhibit 61**).

[120] Schmalenbach, Kirsten in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties – A Commentary (Springer, 2nd ed. 2018), Article 1 ¶ 2 (**Exhibit 62**).

The Convention's rules of interpretation are not exclusive".[121] Primacy of EU law[122] also demands that rules falling in the realm of the EU Member States are interpreted in conformity with EU law. The EU Treaties impose comprehensive obligations on the EU Member States to apply and give full effect to the EU Treaties with respect to all areas falling within their ambit.[123]

72. This includes specific rules of interpretation which dictate that, in an intra-EU context, any rule created by the EU Member States, irrespective of

> whether the provisions in question were adopted before or after the [respective rule in the EU Treaties . . .] or derive from international agreements entered into by the Member State[, must be interpreted,] as far as possible, in the light of the wording and the purpose of [the EU Treaties . . .], in order to achieve the result pursued by the [EU Treaties . . .].[124]

73. Indeed, in accordance with these specific rules of (treaty) interpretation, *i.e.*, the so-called principle of "interpretation in conformity with European law" which reflects standing case law,[125] any provision in the ECT must be interpreted in a way that accords with the requirements of the EU Treaties. To the extent this is not possible any such provision must be held "inapplicable."[126] Thus, it follows that, upon accession to the EU, EU Member States agreed to interpret and apply international agreements in their *inter se* relations in conformity with the rules and principles arising out of the EU Treaties.

---

[121] Dörr, Oliver in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties – A Commentary (Springer, 2nd ed. 2018), Article 31 ¶ 32 (**Exhibit 118**).

[122] In connection with Art. 4(3) TEU (**Exhibit 04**).

[123] *See* Art. 4(3) TEU (**Exhibit 04**).

[124] CJEU, Case C-188/07, ECLI:EU:C:2008:359 ¶ 84 – *Commune de Mesquer* (**Exhibit 63**).

[125] The principle was established in CJEU, Case 157/86, ECLI:EU:C:1988:62 ¶ 11 – *Murphy* (**Exhibit 64**) and reconfirmed in CJEU, Case C-262/97, ECLI:EU:C:2000:492 ¶ 39 – *Engelbrecht* (**Exhibit 65**) and CJEU, C-208/05, ECLI:EU:C:2007:16 ¶ 68 – *ITC Innovative Technology Center GmbH* (**Exhibit 66**).

[126] CJEU, Case 157/86, ECLI:EU:C:1988:62 ¶ 11 – *Murphy* (**Exhibit 64**).

74. Moreover, it is also settled case law that, in the event of ambiguity, any institution charged to interpret and apply EU law must interpret rules derived from the EU Treaties in such a way that they are compatible with the latter. Where the wording of a provision

> is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty[127].

75. As in respect of special conflict rules, sovereign States may also establish special rules on interpretation among themselves, which derogate from the default rules in the VCLT,[128] the latter only having a residual function. This is what the EU Member States did by concluding the EU Treaties.

E. No Contracting Out of the EU Treaties by Way of *Inter-se* Agreements

1. No Disapplication of EU Law in an Intra-EU Context

76. The EU Member States cannot derogate from EU law by simply agreeing in an international agreement to not apply EU law among each other. The CJEU 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."[129] In intra-EU matters, every judicial authority created by the EU Member States – such as the Tribunal which rendered the Award in the present case – must therefore apply EU law – no matter whether there was no explicit reference to EU law or even if explicitly excluded in an international agreement to which the Member States are a party to – and is responsible that EU law is fully respected.[130]

---

[127] CJEU, Case C-135/93, ECLI:EU:C:1995:201 ¶ 37 – *Spain v. Commission* (**Exhibit 67**); CJEU, Case 218/82, ECLI:EU:C:1983:369 ¶ 15 – *Commission v. Council* (**Exhibit 68**).

[128] *See above* footnote 120.

[129] (emphasis added) Opinion 2/13 ¶ 212 (**Exhibit 45**).

[130] *See Simmenthal II* (emphasis added) ¶ 21 (**Exhibit 27**); CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315 ¶¶ 16, 18 – *Zwartveld* (**Exhibit 69**).

2. No Derogation from EU Law in an Intra-EU Context

77. Neither the EU nor its Member States *inter se* can derogate from the principle of primacy of EU law, the rules on interpretation, or any other principle or rule of EU Treaties without explicitly changing the EU Treaties in accordance with the procedure provided for therein. Any conflict rule seeking to take precedence over the principle of primacy of EU law is not operational under the EU Treaties. Neither would be any rule which seeks to derogate from the rules on interpretation. In *Kadi*, the CJEU made abundantly clear that "the obligations imposed by an international agreement cannot have the effect of prejudicing the . . . principles of the [EU Treaties]."[131].

78. Indeed, 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, irrespective of whether this law is earlier or later in time.[132] 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 Article 16 and it takes precedence over any other default provisions found in the VCLT. The EU Member States cannot create any other "special" rules, such as the

---

[131] *Kadi* ¶ 285 (**Exhibit 24**). *See Western Sahara Campaign UK* ¶ 46 (**Exhibit 60**) (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.").

[132] In *Costa v. ENEL* (**Exhibit 26**), the CJEU decided that there is *no room for the lex posterior rule* in relation to law created by the EU Member States. 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* (**Exhibit 57**). *See also Commission v. Italian Republic* (**Exhibit 56**); *Ravil* ¶ 37 (**Exhibit 58**); *Budějovický Budvar* ¶ 98 (**Exhibit 28**); *Commission v. Germany* ¶ 44 (**Exhibit 59**).

purported conflict rule in Article 16 of the ECT, to derogate from their obligations under the EU Treaties.

79. In sum, the rules and principles enshrined in the EU Treaties are applicable to any international agreements between EU Member States, including the ECT. In particular, in case of conflict, the EU Treaties take precedence over any other rule created by the EU Member States in domestic or in international law in an intra-EU context.

III. THE PRINCIPLES CONTAINED IN THE EU TREATIES APPLIED TO *MERCURIA*

80. A tribunal in an investment dispute between a Member State and an investor of another Member State, such as the one in *Mercuria*, is called to apply the EU Treaties as well as the legal order flowing therefrom to both, the establishment of its jurisdiction as well as the merits of the dispute (A. below). Further, under *Achmea*, as confirmed in *Komstroy* and *PL Holdings*, Member States are precluded from extending an offer to arbitrate to matters that may require the interpretation or application of EU law where such interpretation or application is insufficiently reviewable by the CJEU. The consequence of that rule of EU law is that Article 26 of the ECT cannot validly be invoked to initiate arbitration over claims such as those in *Mercuria* (B. below).

A. EU Law is Applicable to both the Jurisdiction and the Merits of an Intra-EU Investment Dispute Based on Article 26 of the ECT

81. A tribunal purportedly constituted under Article 26 of the ECT in relation to a dispute between an EU Member State and an investor from another EU Member State would be required to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[133] EU law is public international law. This has been confirmed by CJEU in *Achmea.*[134] The "applicable rules and principles of international law"

[133] ECT, Art. 26(6) (**Exhibit 03**).

[134] *Achmea* ¶ 41 (**Exhibit 10**).

within the meaning of Article 26(6) of the ECT between EU Member States therefore comprise the entire EU legal order. This includes the EU Treaties, as interpreted by the CJEU, and specifically the principle of primacy and the principle of autonomy as reflected in Articles 267 and 344 of the TFEU.

82. Furthermore, Article 26(6) of the ECT applies to both jurisdiction as well as to the merits of the dispute. Attempts to justify rewriting Article 26(6) as being limited to the merits of the dispute 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]" fail to convince. 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. The EU Treaties are "applicable" whenever they are relevant to determining the "issues in dispute".

83. Furthermore, and whatever interpretative challenges a tribunal may face in the light of the VCLT to apply Article 26(6) of the ECT, and with it, EU law, to the determination of its jurisdiction, such challenges are immaterial. A tribunal in an intra-EU investment conflict, like in *Mercuria*, owes its purported existence to an alleged commitment in Article 26 of the ECT, entered into by two EU Member States, in the present case, Poland and Cyprus. The relationship between these two EU Member States is also governed by the EU Treaties and the legal order they establish. As no derogation or deselection *inter se* is allowed, EU law is always the applicable public international law between EU Member States, albeit with a superior rank in relation to other international commitments between them.[135] Therefore, EU Member States cannot authorize a body, such as the Tribunal which rendered the Award in

[135] *See above* ¶ 76.

case at hand and which sought to derive its jurisdiction from an agreement between two EU Member States, to partly or fully disregard EU law.[136] In any event, such authorization would conflict with EU law and, according to the principle of primacy of EU law, be inapplicable. Thus, a tribunal seeking to establish its jurisdiction based on an international agreement between two EU Member States is fully bound by the EU Treaties and must apply them as any other court or tribunal of the EU Member States.

84. Further, with the ruling in *Komstroy* the CJEU confirmed that the EU Treaties apply to the jurisdiction of a tribunal purportedly established on the basis of Article 26 of the ECT. The Court held that Article 26 of the ECT

> must be interpreted as *not* being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[137]

In doing so, the CJEU recalled that, the EU Treaties, and more specifically Articles 267 and 344 of TFEU preclude the application of

> a provision in an international agreement concluded between Member States, . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[138]

85. Such precluding effect is logically only possible if EU law is to be applied to the specific case by the tribunal on the question of its jurisdiction.[139] Thus, the EU Treaties,

---

[136] See also *PL Holdings* ¶¶ 52-54 (**Exhibit 17**).

[137] (emphasis added) *Komstroy* ¶ 66 (**Exhibit 11**).

[138] *Achmea* ¶ 62 (**Exhibit 10**).

[139] The very same CJEU judgments in *Komstroy* and *Achmea* also puts beyond doubt that EU Treaties in conjunction with the jurisprudence of the CJEU represent (highly) "*relevant* rules of international law applicable in the relations *between*" (emphasis added) Poland and Cyprus within the meaning of Art. 31(3) (c) of the VCLT relating to Art. 26 of the ECT.

and the legal order they establish, are applicable to the jurisdiction of a tribunal, such as the one in *Mercuria*, which purportedly constituted under Article 26 of the ECT in an intra-EU arbitration. This is particularly the case because such tribunals are responsible to ensure that the EU Treaties are fully respected.[140] In fact, this view is supported by the recent dissenting opinion of an arbitrator of an intra-EU investment arbitration tribunal, where he correctly opined that

> tribunals have no competence to challenge [the] holdings by the CJEU in *Achmea* and *Komstroy*.[141]

86. The EU Treaties are also applicable to the merits of an intra-EU dispute, such as the one in *Mercuria*.

87. Article 26(6) of the ECT also governs the applicable law to the merits of a dispute under the ECT. As explained earlier, the EU Treaties and the legal order they establish are public international law and, thus, such "applicable rules and principles of international law" according to Article 26 of the ECT a tribunal, like the one in *Mercuria*, must apply to "decide the issues in dispute".

88. It is, indeed, also not uncommon for intra-EU tribunals to face questions of EU law. By way of an example, in *Isolux v. Spain,* the tribunal found that the EU Treaties formed part of the "applicable rules and principles of international law" within Article 26(6) of the ECT and concluded that "[i]t is admitted toda*y, in a general manner*, that arbitral tribunals not only have the power, but rather the obligation to apply EU law."[142]

---

[140] *See Simmenthal II* ¶ 21 (**Exhibit 27**); CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315 ¶¶ 16, 18 – *Zwartveld* (**Exhibit 69**).

[141] *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15 (*"Portigon"*), Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti (20 October 2022) ¶ 58 (**Exhibit 95**).

[142] (emphasis added) 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, Award (17 July

89. The terms "applicable rules and principles of international law" are not limited to international customary law and general principles of law recognized by civilized nations according to Article 38(1)(b) and (c) of the Statute of the International Court of Justice. If this had been the intention of the Contracting Parties to the ECT, such deviation from a common understanding in international law would have been clarified explicitly in Article 26(6) of the ECT. Thus, *de lege lata*, excluding treaty law, like the EU Treaties, would amount to a *contra legem* interpretation of Article 26(6) of the ECT. Article 26(6) of the ECT, by its terms, includes *all* "applicable rules of international law" – especially EU Treaties, as interpreted by the CJEU, which undoubtedly form part of the corpus of international law, and more specifically the principle of primacy.

90. It is also irrelevant that EU law is not binding on the non-EU Contracting Parties to the ECT for the determination of the "applicable rules and principles of international law" in the present intra-EU case.[143] To begin with, this would ignore the language of Article 26(6) of the ECT, which does not refer to international law binding between *all* Contracting Parties, but to international law applicable to "the issues in dispute". Additionally, while the ECT is a multilateral agreement, the agreement contains bilateral commitments between the Contracting Parties, including between the EU Member States. EU law is applicable to the issues in dispute between two EU parties even though it is not binding on non-EU Contracting Parties.

91. Furthermore, the exclusion of the EU Treaties from Article 26(6) of the ECT in an intra-EU investment arbitration cannot be justified by drawing parallels between Article 26(6) of the ECT and the applicable law provision in the Comprehensive Economic and Trade

---

2016) *("Isolux v. Spain")* ¶ 654 (**Exhibit 93**). *See also Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) ¶¶ 4.151-4.160 (**Exhibit 94**).

[143] *See Komstroy* ¶¶ 41, 75 (**Exhibit 11**).

Agreement ("CETA") between Canada and the EU[144]. These provisions are not "analogous" or similar and the CJEU's recent opinion on the CETA cannot be extended to Article 26(6) of the ECT. The ECT does not define the applicable law in a comparable fashion to the CETA. CETA's Chapter Eight on investment does not govern investment relations between EU Member States. Intra-EU investment claims are not within the scope of the CETA as the agreement is intended to apply only between Canada, *on the one hand*, and the European Union and its Member States, *on the other*.[145] The question of application of the EU Treaties would not arise in this context because Canada is not a party to the EU Treaties. The CETA's applicable law provision referring to, in particular, "rules and principles of international law applicable *between the Parties*"[146] would not include the EU Treaties because they do not regulate the relationships between Canada, *on the one hand*, and the European Union and its Member States, *on the other*. In contrast, as noted above, under the ECT, the EU Treaties obviously form part of the relevant rules and principles of international law applicable to issues in dispute between EU Member State parties to the ECT.

92. Specifically, in *Mercuria*, an investor from Cyprus brought a claim against Poland on the basis of Article 26 of the ECT, purportedly extending an offer to arbitrate by *an EU Member State to an investor of another EU Member State*. Thus, the alleged basis for the

---

[144] The Comprehensive Economic and Trade Agreement ("CETA") between Canada, of the one part, and the European Union and its Member States, of the other part (entered into force provisionally 21 September 2017) O.J. (L 11) 23. **Exhibit 70.**

[145] *See* the Parties mentioned in the Title of the CETA. The same can be also drawn from Article 8.1 in conjunction with Article 8.25.1 of the CETA. Article 8.1 of the CETA defines the respondent as "Canada or, in the case of the European Union, either the Member State of the European Union or the European Union pursuant to Article 8.21". And Article 8.25.1 of the CETA provides that "[t]he respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section." Thus, an EU Member States does not extent an offer to arbitrate to an investor of another EU Member State. **Exhibit 70.**

[146] (emphasis added) Article 8.31.1 of the CETA, 2017 O.J. (L 11) 23 (**Exhibit 70**).

dispute are reciprocal commitments *between two EU Member States*, Poland and Cyprus. Such an (intra-EU) conflict simply cannot arise with regard to the CETA—not even theoretically.

93. The CJEU's recent Opinion 1/17 on CETA made it clear that this distinction between CETA and the ECT is substantial and was decisive for its finding that the applicable law provisions of the CETA did not violate the EU Treaties:

> The question of the compatibility, with EU law [i.e. the EU Treaties and secondary law], of the creation or preservation of an investment tribunal by means of such an agreement [containing commitments of the EU Member States *inter se*] must be distinguished from the question of the compatibility, with EU law, of the creation of such a tribunal by means of an agreement between the Union and a non-Member State . . . The Member States are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust. That principle obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights, such as the right to an effective remedy before an independent tribunal laid down in Article 47 of the Charter […]. However, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State.[147]

94. In sum, the CJEU's conclusions about the CETA's applicable law provision do not contradict the application of EU law in an intra-EU context; quite to the contrary.

B. EU Treaties Preclude Intra-EU Investment Arbitration under the ECT

95. As the "applicable rules and principles of international law" within the meaning of Article 26(6) of the ECT between EU Member States comprise the entire EU legal order and the latter is also applicable to the determination of a tribunal's jurisdiction, no EU Member State could extend a valid offer to arbitrate to a national of another EU Member State under the ECT. Such offer violates the principles of primacy and autonomy of EU law and particularly Articles 344 and 267 of the TFEU. Therefore, Article 26 of the ECT does not apply between

[147] Opinion 1/17 ¶¶ 126-129 (**Exhibit 47**).

EU Member States. A tribunal, such as the one in *Mercuria*, allegedly constituted under Article 26 of the ECT to resolve disputes between an EU-investor and an EU Member State lacks jurisdiction. This was held by the CJEU in *Achmea* and was confirmed in *Komstroy*.

1. The Reasoning in *Achmea*

96. The underlying arbitration in *Achmea* was based on an investment treaty between the Netherlands and the Slovak Republic. That treaty included in Article 8 a provision allowing certain disputes between an investor from one State and the other State to be referred to arbitration. The CJEU ruled that such offers to arbitrate by an EU Member State to a national of another EU Member State in an international agreement are precluded by EU law, including the principles of primacy and autonomy and Articles 267 and 344 of the TFEU. It held:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[148]

In so holding, the CJEU re-affirmed that EU law-related issues can only be decided conclusively by the CJEU in a judicial dialogue with the EU Member State courts and tribunals:

> [T]he possibility of submitting those disputes to a body which is not part of the judicial system of the EU . . . call[s] into question . . . the preservation of the particular nature of the law established by the [EU] Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and . . . has an adverse effect on the autonomy of EU law.[149]

97. Based on this, in a decision published on 8 November 2018, the Bundesgerichtshof (German Federal Court of Justice) applied the CJEU's decision in *Achmea*

---

[148] *Achmea* ¶ 62 (**Exhibit 10**).

[149] *Id.* ¶¶ 58–59.

and set aside the arbitral award. The German Federal Court of Justice, the supreme court (court of last resort) in private and criminal matters, ruled that "[a]ccording to the decision of the [CJEU] . . . there is no arbitration agreement between the parties" and "the Final Award made in these proceedings [between the Slovak Republic and Achmea] must be overturned."[150]

98. Because the CJEU's ruling sets the content and meaning of a given rule *ab initio*, at no point in time had there been an arbitration agreement between the disputing parties. Thus, there was no other way for the German Federal Court of Justice to apply properly the CJEU's ruling than to overturn the Final Award in *Achmea*.

99. The *Achmea* Judgment builds upon the CJEU's prior case law. For example, in Opinion 1/09, the Court reviewed the compatibility with EU law of a proposed multilateral international agreement to be concluded between the EU Member States, the EU, and third countries, creating a court with jurisdiction to hear actions related to European and Community patents. The Court found that this dispute resolution mechanism was incompatible with EU law because EU law issues could not be resolved in the EU Member States' national courts and, hence, could not be referred to the CJEU by means of Article 267 of the TFEU. This is the same defect that led the Court to find the arbitration clause in *Achmea* to be incompatible with the requirements of EU law.

2. *Komstroy* Confirms that *Achmea* Applies to Multilateral Treaties to Which the EU is also a Party, Like the ECT

100. The principles of primacy and autonomy, which form the basis of the CJEU's holding in *Achmea*, apply equally to bilateral and multilateral treaties and the EU's membership in the ECT is immaterial.

[150] BGH, Case No. I ZB 2/15, Judgment (31 October 2018) ¶¶ 14, 15, 25, 27 - *Slovak Republic v. Achmea B.V.* (**Exhibit 12**).

101. The CJEU in *Achmea* did not differentiate between bilateral and multilateral agreements. In fact, these terms do not even appear in the operative holding of *Achmea*, which reads:

> Articles 267 and 344 TFEU must be interpreted as *precluding a provision in an international agreement concluded between Member States, such as* Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[151]

This holding is preceded by the Court's references to a line of cases involving *multilateral* agreements that reach the same conclusion as *Achmea* regarding the violation of the EU Treaties by the dispute resolution clauses in those agreements.[152]

102. While the ECT is a multilateral treaty, the specific provision at issue, Article 26, is analogous to Article 8 of the Dutch-Slovak bilateral investment treaty ("BIT"), because it creates bilateral undertakings among the Contracting Parties to submit investment disputes to arbitration.[153] The CJEU found that Article 8 of the Dutch-Slovak BIT was precluded by the EU Treaties because:

---

[151] (emphasis added) *Achmea* ¶ 62 (**Exhibit 10**).

[152] *Id.* ¶ 57.

[153] 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 Energoalians v. Republic of Moldova* (**Exhibit 71**):

> [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. (In-text citations omitted);

> [T]he *Member States parties to it* established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[154]

103. This is precisely what Article 26 of the ECT does. It does therefore not come as a surprise when the CJEU confirmed in *Komstroy* by referring explicitly to *Achmea* that

> despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, *in an analogous way* to the provision of the bilateral investment treaty at issue in the case giving rise to the judgment of 6 March 2018, Achmea.[155]

Further, the key factors that caused the CJEU to declare inoperative the dispute resolution provision of Article 8 of the Dutch-Slovak BIT apply squarely to Article 26 of the ECT: it creates arbitral tribunals that are plainly not courts or tribunals within the EU legal system.[156] These tribunals not only "may be called on" to interpret and apply EU law[157] but

---

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 *Commission v. Italian Republic* (**Exhibit 56**) (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).

[154] (emphasis added) *Achmea* ¶ 56 (**Exhibit 10**).

[155] (emphasis added) *Komstroy* ¶ 64 (**Exhibit 11**).

[156] *Id*. ¶ 53. In *Achema*, the CJEU found that an intra-EU investment tribunal, by its very design characteristics, does *not* qualify as a "court or tribunal" within the meaning of Article 267(2) of the TFEU, entitled to refer questions for a preliminary ruling to the CJEU.

[157] In an intra-EU context, it is ultimately for the CJEU to decide *whether* and to what *extent* EU law is applicable, to what extent it may *conflict* with international commitments of the EU Member States *inter se* and what the *consequences* of such a conflict are. As the EU Treaties comprehensively regulate the relations between the EU Member States, there is always the possibility that EU law may be affected. It is estimated that a large part of national legislation in EU Member States is based on EU law. However, this percentage can vary from one area of law to another. For example, in areas such as environmental law, consumer protection, competition law and agriculture, the influence of EU law can be even higher, often exceeding 70-80%. In other words, by finding – correctly or incorrectly - that EU law is not implicated, the Tribunal is already ruling on a question that is *not* for the Tribunal but within the competence of the CJEU to decide definitively. However, since the CJEC will never have the

they are required to do so[158] and cannot refer questions of EU law to the CJEU under Article 267 of the TFEU.[159] The CJEU's findings in *Achmea* on these key factors had nothing to do with the bilateral nature of the Dutch-Slovak BIT as *Komstroy* concluded that Article 26 of the ECT

> must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[160]

104. The same conclusion was reached by the intra-EU investment tribunal in *Green Power v. Spain,* a case largely identical to the underlying investment dispute in this case. In *Green Power* the tribunal held that

> [T]he 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.[161]

The tribunal further noted—and I concur with this finding—that

> even for cases where matters of State aid do not arise, the *Achmea Judgment* remains fully relevant and it cannot be seriously contended that investment arbitration tribunals could not affect the interpretation of the EU Treaties in a manner which

---

opportunity to rule on this in the context of intra-EU arbitration (due to the lack of access to the preliminary ruling procedure), the conflict (and the breach of Articles 267 and 344 TFEU) has materialised at the moment the tribunal accepts jurisdiction. Ignoring or disregarding the EU Treaties in the drafting of the award will simply not make the conflict between two bodies of international law go away. In the present case, the Tribunal is also clearly aware that it is dealing with an intra-EU investment dispute and that, thus, EU law may be implicated. *See, e.g.*, Award ¶¶ 176, 274. This is sufficient to trigger its obligation under the EU Treaties to decline jurisdiction.

[158] *Id.* ¶ 50.

[159] *Id.* ¶ 53. *See also Achmea* ¶¶ 42, 49, 56 (**Exhibit 10**).

[160] (emphasis added) *Komstroy* ¶ 66 (**Exhibit 11**).

[161] *Green Power v. Spain* ¶ 445 (**Exhibit 72**).

> is detrimental to the consistent and uniform interpretation of EU law.[162]

105. Further, the membership of the EU in the ECT does not change this result. The Court's reasoning in *Achmea* does not limit its legal conclusions on EU law to international agreements to which the EU is *not* a party. In particular, the CJEU did *not* hold that an agreement to arbitrate is precluded by the TFEU only when contained in an international agreement between EU Member States that does *not* include other parties. To the contrary, the CJEU's reasoning in *Achmea* supports its application to any international agreement between Member States, such as the ECT, regardless of whether "a large number of third countries" or the EU itself is also a signatory.

106. This results out of the CJEU's statement in *Achmea* and the cases in support of it:

> The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*.[163]

The Court cites three cases in support of this general rule: Opinion 1/91, Opinion 1/09, and Opinion 2/13.[164]

107. All of the treaties at issue in these cases were multilateral and the EU was a party to each one. Despite this, the Court found that these agreements were in breach of EU law – precisely because they failed to respect "the autonomy of the EU and its legal order."

108. Opinion 1/91, referred to above, addressed the compatibility of the dispute settlement bodies established by a draft international agreement between the EU and its

---

[162] *Green Power v. Spain* ¶ 428 (**Exhibit 72**).

[163] (emphasis added) (internal citations omitted) *Achmea* ¶ 57 (**Exhibit 10**).

[164] Opinion 1/91 ¶¶ 40, 70 (**Exhibit 42**); Opinion 1/09 ¶¶ 74, 76 (**Exhibit 44**); and Opinion 2/13 ¶¶ 182-83 (**Exhibit 45**).

Member States, on the one hand, and the four countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. The CJEU found such bodies to be "incompatible" with the TFEU because they would impinge on the CJEU's exclusive jurisdiction to make final determinations of EU law.[165]

109. Opinion 1/09 involved a multilateral agreement intending to create a European and Community Patent Court to which the EU was a party. There, too, the CJEU found that the envisaged European and Community Patent Court was not compatible with EU law. The CJEU focused on the fact that the European and Community Patent Court had the effect of removing disputes from the domestic judiciary of the EU Member States. Precisely because the European and Community Patent Court deprived domestic courts of the EU Member States of their rights and obligations to request preliminary rulings from the CJEU under Article 267 of the TFEU, the CJEU concluded that the agreement in question was in violation of the principle of autonomy of the EU legal order.[166]

110. Finally, in Opinion 2/13, the CJEU addressed the draft agreement of the EU's accession to the ECHR, another multilateral international agreement to which the EU was supposed to become a party. Again, the CJEU found that the accession agreement's dispute resolution provisions were not compliant with EU law.[167] It reasoned that the agreement interfered with the judicial dialogue established by Article 267 of the TFEU, and was therefore "liable adversely to affect the specific characteristics of EU law and its autonomy."[168] The CJEU also concluded that it was "liable to affect Article 344 of the TFEU in so far as it does

[165] *See* Opinion 1/91 ¶¶ 31-36, 40, 70-72 (**Exhibit 42**).

[166] Opinion 1/09 ¶¶ 80, 83, 89 (**Exhibit 44**).

[167] Opinion 2/13 ¶ 258 (**Exhibit 45**).

[168] *Id*. ¶¶ 199-200, 236-248.

not preclude the possibility of disputes between Member States or between Members States and the EU" concerning matters of EU law.[169]

111. *Achmea* simply applies these precedents to the bilateral investment treaty between Slovakia and the Netherlands. It extends their holdings on the preclusive power of Articles 344 and 267 of the TFEU to any investor-State dispute resolution clauses that purport to operate as between EU Member States.[170] The holdings in *Achmea* and the preceding cases extend to *any* international agreement which contains dispute settlement mechanisms incompatible with Articles 267 and 344 of the TFEU,[171] including the ECT.[172] In *Komstroy*, the CJEU therefore stated with regard to the EU's participation in the ECT the obvious:

> [The] exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union . . . [as] [s]uch a possibility would . . . call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.[173]

---

[169] *Id*. ¶¶ 214, 224, 258.

[170] *Achmea* ¶ 58 (**Exhibit 10**).

[171] *Id.* ¶ 62. *See also* Opinion 1/17 ¶¶ 107, 119 (**Exhibit 47**). The Court of Justice applied its reasoning developed in previous case law, observing that a dispute-resolution mechanism in an international treaty is incompatible with EU law if it has an "adverse effect on the autonomy of the EU legal order" and, in particular, if an arbitral tribunal is empowered to interpret or apply EU law outside the structure of the EU judicial system. The fact that CETA had more than two Contracting Parties and that the EU was a party to the said agreement was of no consequence for the Court's analysis.

[172] *See Komstroy* ¶ 66 where the Court held the dispute settlement mechanism in Article 26 of the ECT to be incompatible with EU law (**Exhibit 11**).

[173] *Komstroy* ¶¶ 62-63 (**Exhibit 11**). *See also* CJEU, Case C-741/19, ECLI:EU:C:2021:164, Opinion of Advocate General *Maciej Szpunar* ¶¶ 81, 83 – *Komstroy, the successor in law to the company Energoalians v. Republic of Moldova* (**Exhibit 71**).

112. The EU's participation in the ECT is thus irrelevant to the question of whether the EU Member States violated the principles of autonomy and primacy of EU law by circumventing the preliminary ruling procedure of Article 267 of the TFEU when providing for intra-EU investment arbitration in Article 26 of the ECT. The tribunal in *Green Power v. Spain* came to the very same conclusion by holding that:

> The presence of the EU as a Contracting Party does not change the fact that the ECT is an 'international agreement' and that it is 'concluded between Member States'. If the CJEU had wished to limit the scope of the Achmea Judgment, it could have simply used the terminology employed by the referring court in its first question. Yet, the CJEU Grand Chamber specifically used a broader term, which clearly encompasses multilateral treaties such as the ECT.[174]

3. Violation of the Principle of Autonomy of EU Law

113. For the very same reasons as set out in *Achmea*, Article 26 of the ECT does not contain a valid offer by any Member State to arbitrate matters which may touch upon EU law in an intra-EU context. Such an offer is precluded by the principles of primacy and autonomy and particularly by Articles 267 and 344 of the TFEU. Article 26 of the ECT runs afoul of the EU Treaties, circumventing the EU Member States' national courts and the preliminary ruling procedure under Article 267 of the TFEU and interfering with the CJEU's exclusive authority to ultimately determine the content and validity of EU law under Articles 267 and 344 of the TFEU. Thus, Article 26 has been inoperative *ab initio* for intra-EU disputes, as just confirmed by the Court itself in *Komstroy*.[175]

114. In this regard, twenty-two of the (then) twenty-eight EU Member States, Poland and Cyprus among them, affirmed in a joint declaration that Article 26 of the ECT violates the

---

[174] *Green Power v. Spain* ¶ 438 (**Exhibit 72**).

[175] *Komstroy* ¶¶ 64-66 (**Exhibit 11**).

EU Treaties and, hence, is inoperative at least as between EU Member States and nationals of EU Member States.[176]

115. Accordingly, Poland did not make a legally valid offer under Article 26(3) of the ECT to arbitrate disputes that may concern matters of EU law—including, as relevant here, the dispute with Mercuria.

116. A tribunal purportedly constituted under Article 26 of the ECT is, as seen, required to apply and duly observe the rules of EU law that limit or conflict with its own jurisdiction. In particular, it has to observe the principle of autonomy of EU law as well as the primacy of EU law over any conflicting rule created by the EU Member States. Application of these rules would require the tribunal to determine that no legally permissible offer was made by an EU Member State to arbitrate with nationals of other EU Member States under the ECT because an arbitral tribunal constituted under Article 26 of the ECT, like the intra-EU investment tribunal in *Achmea*, lacks the required "links with the judicial systems of the Member States" and follows procedures that are not "a step in the proceedings before the national courts."[177]

117. Moreover, an arbitral tribunal established under Article 26 of the ECT

> may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental

[176] *See Declaration of the Representatives of the Governments of the Member States* (15 January 2019) (**Exhibit 13**). The other EU Member States chose not to comment on the status of Article 26 of the ECT in an intra-EU context, and instead decided to wait until further consideration, including of an eventual decision by the CJEU on this issue. *See Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019) (**Exhibit 14**); *Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019) (**Exhibit 15**). Following the declarations made by the EU Member States, the European Commission reaffirmed that the application of the arbitration provisions in the ECT in intra-EU disputes is "incompatible with EU law." European Commission, Press Release – Daily News at 1 (17 January 2019) (**Exhibit 16**).

[177] *Achmea* ¶ 48 (**Exhibit 10**).

> freedoms, including freedom of establishment and free movement of capital.[178]

In that regard, the CJEU stressed in *Achmea* that to violate EU law, it is not necessary that a tribunal actually applies and interprets any of the substantive provisions of EU law in the case before it. Rather, it suffices that such a tribunal "*may*" do so. The German Federal Court of Justice, in its ruling in proceedings to overturn the Final Award in *Achmea*, explained the Court's ruling:

> [I]t does not matter whether the arbitration tribunal in fact did not apply and did not have to apply European Union law in this case. To determine whether an arbitration agreement exists between the parties, the only relevant issue is whether the Petitioner was able to make an effective offer to the Respondent to conclude an arbitration agreement . . . The decision of the European Court of Justice indicates that this was not the case, irrespective of whether the arbitration tribunal had to apply European Union law in this case.[179]

118. A tribunal formed under Article 26 of the ECT may be called upon to interpret or apply EU law in regard to a range of issues. For example, in an arbitration in which the claimant alleges that the respondent State has breached the requirement under Article 10(1) of the ECT to provide its investment with fair and equitable treatment, the tribunal would need to assess the investor's assertion of its "legitimate expectations" vis-à-vis its investment. The content of those "expectations" is normally assessed by reference to the prevailing legal regime, which includes the applicable EU regulatory framework. More broadly, a tribunal might have to address the provisions of EU law that govern such matters as the movement of goods, capital, freedom of establishment and to provide services, competition, non-

[178] *Id.* ¶ 42.

[179] BGH, Case No. I ZB 2/15, Judgment (31 October 2018) ¶ 32 - *Slovak Republic v. Achmea B.V.* (**Exhibit 12**).

discrimination, or any restrictive measures in relation to foreign investment.[180] At a minimum, a tribunal constituted under Article 26 of the ECT would have to decide whether and how EU law affects its jurisdiction to arbitrate an intra-EU investment dispute – a decision that itself requires the interpretation and application of EU law. The CJEU in *Komstroy* deemed it sufficient for the conclusion that a tribunal constituted on the basis of Article 26 of the ECT "is required to interpret, and even apply, EU law"[181] that the ECT was signed and ratified, among others, by the EU. The EU being a party to the ECT – according to the settled case law – renders the treaty for the EU and its Member State, *i.e.*, in an intra-EU context, into an act of EU law.[182]

119. Additionally, like the tribunal formed under Article 8 of the Netherlands-Slovak Republic investment treaty in *Achmea*, a tribunal constituted under Article 26 of the ECT is unable to refer questions concerning EU law to the CJEU under Article 267 of the TFEU.[183] According to Article 267(2) of that treaty, only a "court or tribunal of a Member State" may refer questions of interpretation and validity of EU law to the CJEU. This, in turn, means that questions of interpretation and application of EU law would not reach the CJEU, depriving national courts of the EU Member States of part of their jurisdiction and the CJEU of its exclusive authority over the ultimate interpretation and lawful application of EU law. This is incompatible with the EU Treaties and puts the uniform interpretation of EU law at risk, undermines the full effect and autonomy of EU law, and transgresses the level legal playing field that is central to the EU legal regime.[184]

---

[180] *See, e.g.*, L. Woods *et al.,* Steiner & Woods EU Law (Oxford University Press, 14th ed. 2020) at 417–421, 470–475, 479 (**Exhibit 29**); Craig & de Búrca at 756–758, 839–843, 847, 860–861 (**Exhibit 34**); CJEU, Case C-299/02, ECLI:EU:C:2004:620 ¶ 15 – *Commission v. Netherlands* (**Exhibit 73**).

[181] *Komstroy* ¶ 50 (**Exhibit 11**).

[182] *Id.* ¶¶ 23 (with further references), 49.

[183] *Id.* ¶¶ 52-53.

[184] *Achmea* ¶ 37 (**Exhibit 10**); *Komstroy* ¶¶ 52-53 (**Exhibit 11**).

120. Finally, *Achmea* makes clear that a possible review of an arbitral award by a national court of an EU Member State in a set aside or annulment proceeding does not cure the problem. Reference of disputes to resolution by investor-State arbitration is barred by the EU Treaties even where set aside or annulment proceedings might be available. Review of an award by national courts in the context of set aside proceedings is limited in scope under national laws, even if the seat of arbitration is an EU Member State, as was the case in *Achmea*[185] and in *Komstroy*[186]. Such review will not cover *all* issues decided by the arbitration tribunal, and the tribunal itself cannot refer questions to the CJEU. Thus, arbitral tribunals cannot ensure the primacy of EU law and the autonomy of its legal order as required by Articles 267 and 344 of the TFEU on this basis.[187]

121. As just recently confirmed by the Court in *Komstroy*, the CJEU's reasoning in *Achmea* fully applies to the ECT and, thus, to the situation in *Mercuria*. As with the treaty in *Achmea,* in the ECT,

> the Member States [sic] parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[188]

122. Hence, a tribunal constituted under Article 26 of the ECT to arbitrate an intra-EU investment dispute violates core principles of EU law and is thus not empowered to resolve the dispute.[189] Consequently, as in *Achmea*, "Articles 267 and 344 TFEU must be interpreted

---

[185] *Achmea* ¶¶ 52-53 (**Exhibit 10**).

[186] *Komstroy* ¶ 57 (**Exhibit 11**): "However, such judicial review can be carried out by the referring court only in so far as the domestic law of its Member State so permits".

[187] *Achmea* ¶¶ 54–55 (**Exhibit 10**) and, "by analogy", *Komstroy* ¶ 60 (**Exhibit 11**).

[188] *Achmea* ¶ 56 (**Exhibit 10**).

[189] I note that my analysis is also consistent with the EU Commission's position as reaffirmed following *Achmea. See* European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment* (19 July 2018) (**Exhibit 91**).

as precluding" the application of Article 26 of the ECT between EU Member States.[190] The CJEU in *Komstroy* put it in almost identical words: Article 26 of the ECT "must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[191] An investment tribunal established on the basis of the ECT, such as the one in *Mercuria*, must decline jurisdiction in an intra-EU dispute.[192] This is because there has never been and, indeed, never could have been a valid offer to arbitrate from one EU Member State to an investor from another EU Member State from the moment the ECT was concluded.[193] The CJEU's ruling in *Achmea* that the applicable principles of EU law preclude such references to arbitration has retroactive effect to the time of inception of the EU. Therefore, no arbitration agreement could exist between an investor from one EU Member State and another EU Member State based on Article 26 of the ECT; a conclusion that is also readily reached by CJEU in *Komstroy*[194]. The CJEU in *European Food and Others* not only confirmed that "the system of judicial remedies provided for by the [T]EU and [T]FEU Treaties"[195] have effectively "*replaced* . . . [the]

[190] *Achmea* ¶ 62 (**Exhibit 10**).

[191] *Komstroy* ¶ 66 (**Exhibit 11**).

[192] *See also Komstroy* ¶ 64 (**Exhibit 11**); *Green Power v. Spain* ¶¶ 431, 436 (**Exhibit 72**); *Portigon,* Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti (20 October 2022) ¶ 51: "With *Komstroy* the CJEU has dissipated all doubts, explicitly extending the principles of *Achmea* to the ECT." (**Exhibit 95**). This declaration does not address the question of whether the proper construction of Article 26 of the ECT in accordance with the EU law principle of interpretation in conformity with European law, *see* CJEU, Case 157/86, ECLI:EU:C:1988:62 ¶ 11 – *Murphy* (**Exhibit 64**), must lead to the same result as the non-application of Article 26 of the ECT.

[193] In this sense, *see also PL Holdings* ¶ 58 (**Exhibit 17**).

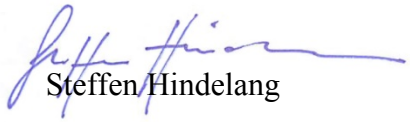
[194] *Komstroy* ¶ 66 (**Exhibit 11**).

[195] *European Food and Others* ¶ 145 (**Exhibit 76**).

arbitration procedure"[196], but also did not fail to state the obvious: consent purportedly provided towards an intra-EU investment arbitration "lacked any force."[197]

* * *

Executed on 14 June 2024, in Berlin, Germany.



Steffen Hindelang

[196] (emphasis added) *Id.*

[197] *Id*; Also the Cour de cassation du Grand-Duché de Luxembourg [Court of Cassation of the Grand Duchy of Luxembourg], in a recent judgement, by relying on the CJEU's reasoning in *European Food and Others* has confirmed that *Achmea* and *Komstroy* fully apply to intra-EU investment arbitrations based on the ICSID Convention and, thus, declined enforcement of the ICSID award at issue. *See* Cour de cassation du Grand-Duché de Luxembourg [Court of Cassation of the Grand Duchy of Luxembourg], Case No. CAS-2021-00061, Decision (14 July 2022) at 49 which makes clear that the *Achmea* case law applies to arbitrations initiated under the ICSID Convention: *"Il en suit que la jurisprudence Achmea s'applique aux clauses d'arbitrage fondées sur la Convention CIRDI et, ainsi que la Cour de justice l'a formellement confirmé, à la clause d'arbitrage en cause en l'espèce"* (**Exhibit 96**). *See also* CJEU, Case C-333/19, ECLI:EU:C:2022:749 ¶ 44 –– *Romatsa and Others* (**Exhibit 97**).

TABLE OF EXHIBITS

No.	Description
Ex. 01	CV of Prof. Steffen Hindelang
Ex. 02	List of Publications of Prof. Steffen Hindelang
Ex. 03	The Energy Charter Treaty (ECT) (adopted 17 April 1994, entered into force 16 April 1998) 2080 UNTS 95
Ex. 04	Treaty on European Union (TEU)
Ex. 05	Treaty on the Functioning of the European Union (TFEU)
Ex. 06	Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
Ex. 07	*Republic of Poland v. Mercuria Energy Group Limited*, Statement of Claim and Request for Stay of Enforcement, Case No. T 2613-23 (28 February 2023)
Ex. 08	*Denuncia por Espania del Tratado de la Carta de la Energia y del Protocolo de la Carta de la Energia sobre la effcacia energética y los aspectos medioambientales relacionados* (14 May 2024)
Ex. 09	*Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007)
Ex. 10	CJEU, Case C-284/16, ECLI:EU:C:2018:158 – *Achmea B.V. v. Slovak Republic* ("*Achmea*")
Ex. 11	CJEU, Case C-741/19, ECLI:EU:C:2021:655 – *Komstroy LLC, successor in law to the company Energoalians v. Republic of Moldova* ("*Komstroy*")
Ex. 12	Bundesgerichtshof ("BGH") [German Federal Court of Justice], Case No. I ZB 2/15, Judgment (31 October 2018) - *Slovak Republic v. Achmea B.V.*
Ex. 13	*Declaration of the Representatives of the Governments 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 ("Declaration of the Representatives of the Governments of the Member States")* (15 January 2019)
Ex. 14	*Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019)
Ex. 15	*Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019)
Ex. 16	European Commission, Press Release – Daily News (17 January 2019)
Ex. 17	CJEU, Case C-109/20, ECLI:EU:C:2021:875 – *Republiken Polen v. PL Holdings Sàrl ("PL Holdings")*
Ex. 18	UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases
Ex. 19	*Agreement for the Termination of Bilateral Investment Treaties Between the EU Member States* (5 May 2020)
Ex. 20	European Commission, *May Infringements Package: Key Decisions* (14 May 2020)
Ex. 21	European Commission, *December Infringements Package: Key Decisions* (2 December 2021)
Ex. 22	Charter of Fundamental Rights of the European Union ("CFREU")
Ex. 23	CJEU, Case 26/78, ECLI:EU:C:1978:172 – *Viola ("Viola")*

Ex. 24	CJEU, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 – *Yassin Abdullah Kadi and Al Barakaat International Foundation ("Kadi")*
Ex. 25	Statute of the Court of Justice of the European Union
Ex. 26	CJEU, Case 6/64, ECLI:EU:C:1964:66 – *Costa v. ENEL ("Costa v. ENEL")*
Ex. 27	CJEU, Case 106/77, ECLI:EU:C:1978:49 – *Amministrazione delle Finanze dello Stato v. Simmenthal SpA ("Simmenthal II")*
Ex. 28	CJEU, Case C-478/07, ECLI:EU:C:2009:521 – *Budějovický Budvar ("Budějovický Budvar")*
Ex. 29	L. Woods *et al*., Steiner & Woods EU Law (Oxford University Press, 14th ed. 2020)
Ex. 30	CJEU, Case C-235/17, ECLI:EU:C:2019:432 – *Commission v. Hungary*
Ex. 31	CJEU, Case C-8/55, ECLI:EU:C:1956:7 – *Fédération Charbonnière de Belgique v. High Authority*
Ex. 32	CJEU, Case T-115/94, ECLI:EU:T:1997:3 – *Opel Austria v. Council of the European Union*
Ex. 33	CJEU, Case 120/86, ECLI:EU:C:1988:213 – *J. Mulder*
Ex. 34	Paul Craig & Gráinne de Búrca, EU Law (Oxford University Press, 7th ed. 2020) ("Craig & de Búrca")
Ex. 35	CJEU, Case C-64/16, ECLI:EU:C:2018:117 – *Associação Sindical dos Juízes Portugueses*
Ex. 36	CJEU, Joined Cases C-6/90 and 9/90, ECLI:EU:C:1991:428, ¶¶ 28 *et seq.* – *Francovich*
Ex. 37	European Court of Human Rights (ECtHR), App. No. 14902/04, Judgment (15 December 2014) - *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*
Ex. 38	Svea Hovrätt [Svea Court of Appeal], Case No. T 4658-18, Order (6 March 2023) – *Poland v. Mercuria*
Ex. 39	*Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland,* SCC Case No. V 2019/126, Final Award (29 December 2022) ("Award")
Ex. 40	Bundesgerichtshof ("BGH") [German Federal Court of Justice], Case No. I ZB 43/22, Decision (27 July 2023) - *Germany v. Mainstream Renewable Power et al.*
Ex. 41	CJEU, Case 26/62, ECLI:EU:C:1963:1 – *van Gend & Loos*
Ex. 42	CJEU, Opinion 1/91, ECLI:EU:C:1991:490 – *EEA Agreement* ("Opinion 1/91")
Ex. 43	CJEU, Opinion 1/00, ECLI:EU:C:2002:231 – *European Common Aviation Area* ("Opinion 1/00")
Ex. 44	CJEU, Opinion 1/09, ECLI:EU:C:2011:123 – *European and Community Patents Court* ("Opinion 1/09")
Ex. 45	CJEU, Opinion 2/13, ECLI:EU:C:2014:2454 – *ECHR* ("Opinion 2/13")
Ex. 46	CJEU, Case C-196/09, ECLI:EU:C:2011:388 – *Paul Miles and Others v. European Schools*
Ex. 47	CJEU, Opinion 1/17, ECLI:EU:C:2019:341 – *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part* ("CETA") ("Opinion 1/17")
Ex. 48	CJEU, Case C-459/03, ECLI:EU:C:2006:345 – *Commission v. Ireland ("Mox Plant")*
Ex. 49	CJEU, Case C-689/13, ECLI:EU:C:2016:199 – *Puligienica Facility Esco SpA (PFE) v. Airgest SpA*

Ex. 50	CJEU, Joined Cases 66, 127 and 128/79, ECLI:EU:C:1980:101 – *Salumi*
Ex. 51	Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy ("*Declaration concerning primacy*") (signed 13 December 2007) 2008 O.J. (C 115) 335
Ex. 52	CJEU, Case C-399/11, ECLI:EU:C:2013:107 – *Stefano Melloni v. Ministerio Fiscal*
Ex. 53	CJEU, Joined Cases No. 205 to 215/82, ECLI:EU:C:1983:233 – *Deutsche Milchkontor v. Germany*
Ex. 54	CJEU, Case C-231/96, ECLI:EU:C:1998:401 – *Edis*
Ex. 55	CJEU, Joined Cases No. C-231/06 to C-233/06, ECLI:EU:C:2007:373 – *Jonkman and Others v. National Pensions Office*
Ex. 56	CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of Italian Republic ("Commission v. Italian Republic")*
Ex. 57	CJEU, Case C-3/91, ECLI:EU:C:1992:420 – *Exportur*
Ex. 58	CJEU, Case C-469/00, ECLI:EU:C:2003:295 – *Ravil ("Ravil")*
Ex. 59	CJEU, Case C-546/07, ECLI:EU:C:2010:25 – *Commission v. Germany ("Commission v. Germany")*
Ex. 60	CJEU, Case C-266/16, ECLI:EU:C:2018:118 – *Western Sahara Campaign UK ("Western Sahara Campaign UK")*
Ex. 61	International Law Commission ("ILC"), Report of the Study Group of the International Law Commission on the Work of its 58th Session (1 May - 9 June and 3 July - 11 August 2006) UN Doc. A/CN.4/L.682
Ex. 62	Schmalenbach, Kirsten in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties – A Commentary (Springer, 2nd ed. 2018), Article 1
Ex. 63	CJEU, Case C-188/07, ECLI:EU:C:2008:359 – *Commune de Mesquer*
Ex. 64	CJEU, Case 157/86, ECLI:EU:C:1988:62 – *Murphy*
Ex. 65	CJEU, Case C-262/97, ECLI:EU:C:2000:492 – *Engelbrecht*
Ex. 66	CJEU, Case C-208/05, ECLI:EU:C:2007:16 – *ITC Innovative Technology Center GmbH*
Ex. 67	CJEU, Case C-135/93, ECLI:EU:C:1995:201 – *Spain v. Commission*
Ex. 68	CJEU, Case 218/82, ECLI:EU:C:1983:369 – *Commission v. Council*
Ex. 69	CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315 – *Zwartveld*
Ex. 70	The Comprehensive Economic and Trade Agreement ("CETA") between Canada, of the one part, and the European Union and its Member States, of the other part (entered into force provisionally 21 September 2017) O.J. (L 11) 23
Ex. 71	CJEU, Case C-741/19, ECLI:EU:C:2021:164, Opinion of Advocate General *Maciej Szpunar – Komstroy, the successor in law to the company Energoalians v. Republic of Moldova*
Ex. 72	*Green Power Partners K/S, SCE Solar Don Benito APS v. Spain*, SCC Case No. V. 2016/135, Award (16 June 2022) *("Green Power v. Spain")*
Ex. 73	CJEU, Case C-299/02, ECLI:EU:C:2004:620 – *Commission v. Netherlands*
Ex. 74	Bundesgerichtshof ("BGH") [German Federal Court of Justice], Case No. I ZB 75/22, Decision (27 July 2023) - *The Netherlands v. RWE*
Ex. 75	Bundesgerichtshof ("BGH") [German Federal Court of Justice], Case No. I ZB 16/21, Decision (17 November 2021) - *Croatia v. Raiffeisen International et al.*

Ex. 76	CJEU Case C-638/19 P, ECLI:EU:C:2022:50 - *Commission v. European Food and Others* ("*European Food and Others*")
Ex. 77	Cour d'Appel de Paris [Paris Court of Appeal], Case N° RG 20/14581 - N° Portalis 35L7-V-B7E-CCPBD, Decision (19 April 2022) - *Poland v. Slot Group et al.*
Ex. 78	Cour d'Appel de Paris [Paris Court of Appeal], Case N° RG 20/13085 - N° Portalis 35L7-V-B7E-CCLDI, Decision (19 April 2022) - *Poland v. Strabag et al.*
Ex. 79	Hobér, Kaj, International Commercial Arbitration in Sweden (Oxford University Press, 2nd ed. 2021)
Ex. 80	Svea Hovrätt [Svea Court of Appeal], Case No. T 15200-22, Judgment (27 March 2024) – *Spain v. Triodos SICAV II*
Ex. 81	Svea Hovrätt [Svea Court of Appeal], Case No. T 12646-21, Judgment (20 December 2023) – *Festorino Investment Limited et al. v. Poland*
Ex. 82	Högsta Domstolen [Swedish Supreme Court], Case No. T 1569-19, Judgment (14 December 2022) – *Poland v. PL Holdings S.á.r.l.*
Ex. 83	Svea Hovrätt [Svea Court of Appeal], Case No. T 4658-18, Judgment (13 December 2022) – *Spain v. Novenergia II – Energy & Environment (SCA), SICAR*
Ex. 91	European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment* (19 July 2018)
Ex. 92	Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
Ex. 93	*Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award (17 July 2016) *("Isolux v. Spain")*
Ex. 94	*Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015)
Ex. 95	*Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15 (*"Portigon"*), Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti (20 October 2022)
Ex. 96	Cour de cassation du Grand-Duché de Luxembourg [Court of Cassation of the Grand Duchy of Luxembourg], Case No. CAS-2021-00061, Decision (14 July 2022)
Ex. 97	CJEU, Case C-333/19, ECLI:EU:C:2022:749 – *Romatsa and Others*
Ex. 98	*Note Verbale from the authorities of the French Republic to the Energy Charter Secretariat and to the contracting parties to the Energy Charter Treaty* (19 December 2023)
Ex. 99	*Note Verbale from the Embassy of the Federal Republic of Germany to the Energy Charter Secretariat and to the contracting parties to the Energy Charter Treaty* (28 December 2023)
Ex. 100	ECT Secretariat, *Written notifications of withdrawal from the Energy Charter Treaty* (7 March 2024)
Ex. 102	EURACTIV, *Netherlands follows Spain in quitting Energy Charter Treaty* (19 October 2022, updated 20 October 2022)
Ex. 104	EURACTIV, *Denmark to withdraw from Energy Charter Treaty* (14 April 2023, updated 24 April 2023)
Ex. 105	Irish Legal News, *Ireland confirms withdrawal from Energy Charter Treaty* (04 June 2024)

Ex. 106	European Commission, News Announcement, Directorate-General for Energy, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty* (7 July 2023)
Ex. 107	European Parliament, *Withdrawal of the Union from the Energy Charter Treaty* (24 April 2024)
Ex. 108	European Commission, *Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty* (7 July 2023)
Ex. 109	*BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. The Kingdom of Spain*, ICSID Case No. ARB/15/16 (*"BayWa v. Spain"*), Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019)
Ex. 110	*Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19 ("*Electrabel v. Hungary*"), Decision on Jurisdiction (30 November 2012)
Ex. 111	CJEU, Case 235/87, ECLI:EU:C:1988:460 - *Matteucci*
Ex. 112	United States Constitution (adopted 1788, entered into force 1789)
Ex. 118	Dörr, Oliver in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties – A Commentary (Springer, 2nd ed. 2018), Article 31
Ex. 119	Svea Hovrätt [Svea Court of Appeal], Case No. T 4236-19, Judgment (27 May 2024) – *Italy v. CEF Energia B.V.*
Ex. 120	*Notification of the Republic of Poland to the Government of the Portuguese Republic, it is capacity as Depository of the Energy Charter Treaty* (28 December 2022)