UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOL HUNGARIAN OIL AND GAS PLC, Petitioner, v. THE REPUBLIC OF CROATIA, Respondent.	Civil Action No. 1:23-cv-00218 (RDM)

EXPERT DECLARATION OF PROFESSOR STEFFEN HINDELANG

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INTRODUCTION AND BACKGROUND

1. I, Steffen Hindelang, make this declaration in the above-captioned case ("*MOL*") 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 these proceedings 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-APM; (15) *Swiss Renewable Power Partners SARL v. Kingdom of Spain*, Case No. 1:23-cv-00512-DDC.

6. I have further submitted a report on EU law, including rebuttal report, in support of the Republic of Poland in the United States District Court for the District of Columbia in *Mercuria Energy Group Limited v. Republic of Poland*, Case No. 1:23-cv-03572-TNM.

7. 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.

8. 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/Germany); 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 to 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.

9. 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; (2) *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB 14/34; (3) *Sevilla Beheer BV and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27; (4) *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18; and *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, 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. From time to time, I have expressed my views in online commentaries, on social media, and in seminars and fora.

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

- The Petition filed by MOL Hungarian Oil and Gas PLC ("MOL") before the District Court.
- The arbitration award ("Award") MOL seeks to enforce before the District Court.

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

12. 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.

13. I am being compensated at a rate of 895 EUR plus VAT per hour to prepare this expert declaration and, if required, to testify in this matter without any fees contingent upon the outcome of this case.

EXECUTIVE SUMMARY OF MY OPINION

14. I have been asked by the Respondent, the Republic of Croatia ("Croatia"), in this matter to give my expert opinion on the following issues:

Issue A: Whether the Court of Justice of the European Union ("CJEU" or "Court of Justice")'s decisions in *Achmea*1, *Komstroy*2, and their progeny preclude the existence of any arbitration agreement between Croatia and

[1] CJEU, Case C-284/16, ECLI:EU:C:2018:158 – *Slowakische Republik (Slovak Republic) v. Achmea BV* ("*Achmea*") (**Exhibit 10**).

[2] 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**).

> MOL under the Energy Charter Treaty ("ECT")3, including of an arbitration agreement Croatia arguably could have entered either "with" or "for the benefit" of MOL.

15. *Answer*: Yes. As of 1 July 2013, *i.e.*, when EU law became applicable between Hungary and Croatia4, there could not exist an arbitration agreement or an offer to arbitrate under Article 26 of the ECT5 between a Hungarian investor and Croatia or vice versa. This has been conclusively decided by the CJEU in a number of seminal judgments, including *Achmea*, *Komstroy*, and, more recently, *European Food and Others*[6]. In the latter decision, the CJEU was most emphatic in its expression of the non-existence of an arbitration agreement under investment agreements in an intra EU-context. The Court of Justice held:

> since, with effect from Romania's [here Croatia's] accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties *replaced* that [investment] arbitration procedure, the consent given to that effect by Romania [here Croatia], from that time onwards, lacked any force.[7]

16. Similarly, the CJEU in *Komstroy* held explicitly 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.[8]

17. The judgment in *Komstroy* follows the ruling of the CJEU in *Achmea*. There, the CJEU first explicitly ruled that an offer to arbitrate by an EU Member State to a national

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

[4] Hungary acceded to the EU on 1 May 2004, Croatia joined on 1 July 2013.

[5] The ECT entered into force for Croatia on 16 April 1998 and for Hungary on 7 July 1998.

[6] CJEU, Case C-638/19 P, ECLI:EU:C:2022:50 – *Commission v European Food and Others* ("*European Food and Others*") (**Exhibit 76**).

[7] (emphasis added) *European Food and Others* ¶145 (**Exhibit 76**). Confirmed in CJEU, Case C-516/22, ECLI:EU:C:2024:231 ¶ 80 – *Commission v. UK* (**Exhibit 121**): "[I]t follows from the Court's case-law, as enshrined in the judgment of 6 March 2018, Achmea . . . , that the system of judicial remedies provided for by the [T]EU and [T]FEU . . . replaced the arbitration procedures established between the Member States . . . " (emphasis added).

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

of another EU Member State in an investment treaty applicable between two EU Member States are precluded by EU law. The Court of Justice stated:

> Articles 267 and 344 TFEU must be interpreted as *precluding* 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.[9]

18. The holding in all three judgments referred to above is clear. EU law precludes the existence of an arbitration agreement between an EU Member State, such as Croatia, and an investor from another EU Member State, like MOL. Any purported arbitration agreement, or more aptly, any alleged offer to arbitrate in an international agreement applicable between EU Member States was "replaced" by the EU judicial system by becoming part of the EU, i.e., ratifying the EU Treaties. This means, for our purposes, that Article 26 of the ECT, and the purported offer to arbitrate therein, is not "applicable" to intra-EU investment arbitration. In other words, the judgments of the CJEU in *European Food and Others*, *Komstroy*, *Achmea*, and others, which provide final and binding interpretations of the EU Treaties and the ECT respectively10, have conclusively determined the non-existence of any alleged arbitration agreement under the ECT in an intra-EU context, including of an alleged arbitration agreement which Croatia could have entered either "with" or "for the benefit" of MOL.

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

[10] *See* CJEU, Case C-689/13, ECLI:EU:C:2016:199, 3rd Ruling – *Puligienica Facility Esco SpA (PFE) v. Airgest SpA* ("*Puligienica*"): (**Exhibit 49**). "[A]fter 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, . . . , *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*" (emphasis added), and CJEU, Case C-459/03, ECLI:EU:C:2006:345, ¶¶ 129–137 – *Commission of the European Communities v Ireland* ("*Mox Plant*") (**Exhibit 48)**, where the Court held that the exclusive competence to interpret and apply EU law extends to the interpretation and application of international agreements to which the EU and the Member States are parties, in their relationships *inter se*.

19. If Croatia should fail to abide by a judgment of the CJEU, including those mentioned above, the Commission can initiate infringement proceedings under Article 258 of the TFEU. If Croatia, having been found by the CJEU to be in violation of the EU Treaties, does not take up the necessary measures to comply with the infringement judgment, the Commission may again address the CJEU under Article 260(2) of the TFEU and propose to impose financial sanctions for failing to fulfil obligations under the Treaties. Sanctions can easily run into hundreds of millions of euros. Poland, for example, was hit by an initial fine of 1 Million euros per day for not complying with rulings of the CJEU.[11]

Issue B: Whether, under the CJEU's decisions, the existence of an arbitration agreement under the ECT binding on Croatia turns on the law applicable to the dispute, which is EU law when an EU Member State and an EU investor is involved.

20. *Answer*: Yes. According to the CJEU's rulings in *Achmea*, *Komstroy*, and *European Food and Others* the existence of an arbitration agreement binding on Croatia also depends on the law applicable to the dispute, which, where an EU Member State and an investor from another EU Member State are involved, is EU law. The CJEU found inacceptable that arbitral tribunals, that are plainly not courts or tribunals within the EU legal system are created,[12] may be called on to interpret and apply EU law but cannot refer questions of EU law to the CJEU under Article 267 of the TFEU.[13]

Issue C: Whether the European Union and the European Commission have issued declarations or other pronouncements to the effect of Issue A).

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[11] European Commission, *Communication from the Commission, Update of data used to calculate financial sanctions proposed by the Commission to the Court of Justice of the European Union in infringement proceedings* (26 January 2024), C/2024/1123 (**Exhibit 07**); *See* CJEU, Case C-204/21 R, ECLI:EU:C:2021:878 – *Commission v. Republic of Poland* (**Exhibit 08**); two years later, the sanctions were reduced to half a million.

[12] *Komstroy* ¶ 53 (**Exhibit 11**). In *Achmea*, 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.

[13] *Komstroy* ¶ 53 (**Exhibit 11**). *See also Achmea* ¶¶ 42, 49, 56 (**Exhibit 10**).

21. *Answer*: Yes. The European Union and the European Commission, as one of its institutions, have issued several declarations or other pronouncements to the effect of the judgments of the CJEU in *Achmea*, *Komstroy*, and *European Food and Others*, and others. These declarations or other pronouncements include:

- By the European Union:
  - 15 January 2019 Declaration of the EU and 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;[14]
  - 16 January 2019 Declaration of the EU and 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;[15]
  - 26 June 2024 Declaration on the legal consequences of the judgment of the Court of Justice in *Komstroy* and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings.[16]
- By the European Commission:
  - 19 July 2018 Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment;[17]
  - 17 January 2019 Press Release "Single Market: Commission welcomes Member States' commitments to terminate all bilateral investment treaties within the EU"[18]
  - 5 October 2022 Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty;[19]

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[14] *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* (15 January 2019) (**Exhibit 13**).

[15] *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**).

[16] *Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings* (26 June 2024) ("2024 Declaration") (**Exhibit 122**).

[17] European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment* (19 July 2018), COM(2018) 547 final ("*Investment Protection Communication*") (**Exhibit 91**).

[18] European Commission, *Single Market: Commission welcomes Member States' commitments to terminate all bilateral investment treaties within the EU*, Press Release – Daily News (17 January 2019) (**Exhibit 16**).

[19] European Commission, COM(2022) 523 final (**Exhibit 124**).

- 01 March 2024 Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Energy Charter Conference;[20]
- 25 July 2024 July Infringement Package: Key Decisions.[21]

Issue D: Whether Croatia or Hungary have issued declarations or other pronouncements to the effect of Issue A), or have joined declarations issued to that effect by other EU Member States.

22. *Answer*: Yes. Like the European Commission, Croatia, Hungary, and other EU Member States have issued declarations or other pronouncements to the effect of aforementioned judgments. These declarations or other pronouncements include:

- 15 January 2019 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;[22]
- 16 January 2019 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;[23]
- 16 January 2019 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;[24]
- 26 June 2024 Declaration on the legal consequences of the judgment of the Court of Justice in *Komstroy* and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings;[25]
- 26 June 2024 Declaration of the representative of the government of Hungary on the legal consequences of the judgment of the Court of Justice in Komstroy and

[20] European Commission, COM(2024) 104 final (**Exhibit 125**).

[21] **Exhibit 126**.

[22] *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* (15 January 2019) (**Exhibit 13**).

[23] *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**).

[24] *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**).

[25] *Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings* (26 June 2024) ("2024 Declaration") (**Exhibit 122**).

common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings.[26]

ANALYSIS

23. The holding in *European Food and Others*, *Komstroy* and *Achmea* and others is a direct consequence of the legal order in the EU. Thus, to assist this Court in understanding the questions presented to me, I set out, review and analyse the rules and principles of the EU legal order relevant to this case (**Part I** below). Second, I apply these rules and principles to the present case (**Part II** below).

I. Relevant rules and principles of the EU legal order

24. 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 ("TEU")[27] and the Treaty on the Functioning of the European Union ("TFEU")[28] (collectively "EU Treaties"), signed and ratified by all EU Member States. Together, 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.[29]

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[26] *Declaration of the representative of the government of Hungary on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings* (26 June 2024) ("2024 Hungarian Declaration") (**Exhibit 123**).

[27] **Exhibit 04**.

[28] **Exhibit 05**.

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

25. The most important primary sources of EU law are the EU Treaties and the Charter of Fundamental Rights of the European Union ("CFREU")[30]. 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.[31] 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.[32] In addition, EU law incorporates the jurisprudence of the CJEU.[33]

26. 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

27. 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

[30] **Exhibit 22**.

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

[32] 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**).

[33] 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**).

applicable *within* Member States. This dual nature enables Member States, including Croatia and Hungary, to work to achieve "an ever closer union among the peoples of Europe"[34], *i.e.*, a state of integration unprecedented in any other international organization.

28. 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.[35]

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.[36]

29. 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.[37] This all-encompassing conflict rule is known in EU law parlance as the principle of primacy of EU law. As discussed below, no derogation is permitted from this rule, save through a formal amendment procedure required to change the terms of the EU Treaties.[38]

30. 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

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

[35] *Achmea* ¶ 41 (**Exhibit 10**).

[36] *See, e.g.*, CJEU, Case 6/64, ECLI:EU:C:1964:66, pp. 596 *et seq.* – *Costa v. ENEL ("Costa v. ENEL")* (**Exhibit 26**); CJEU, Case 106/77, ECLI:EU:C:1978:49 ¶ 17 – *Amministrazione delle Finanze dello Stato v. Simmenthal SpA ("Simmenthal II")* (**Exhibit 27**).

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

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

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.[39]

B. Protection under the EU Treaties of foreign investment against distortion of competition by EU Member States

31. The EU established and ensures the functioning of the internal (single) market where people, goods, services, and capital can move around freely.[40] The EU also confers European citizenship in addition to the national one[41], 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.[42]

32. 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 the freedom to establish a business, to invest in companies, and to provide services within the EU's internal borders.[43] EU investors enjoy the fundamental rights protected by the CFREU, *inter alia* the right to property, access to justice and non-

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[39] *See* CJEU, Case C-478/07, ECLI:EU:C:2009:521 ¶ 98 – *Budějovický Budvar ("Budějovický Budvar")* (**Exhibit 28**) and *below* ¶ 61.

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

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

[42] *Investment Protection Communication* (**Exhibit 91**).

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

discrimination.[44] EU investors are also protected by general principles of EU law, such as proportionality, legal certainty, and the protection of legitimate expectations.[45]

33. 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.[46] 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.[47]

34. 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.

35. In addition, investors such as the MOL have further potential recourse before the European Court of Human Rights ("ECtHR") pursuant to the European Convention on Human Rights ("ECHR") to which both Croatia and Hungary are parties. The ECHR protects fundamental rights and freedoms, such as the right to property, the right to due process and protection from discrimination. MOL could have sought enforcement of its rights before the

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[44] *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**).

[45] *See* CFREU, 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 ¶¶ 93 *et seq*. (legitimate expectations), 124 *et seq.* (legal certainty) – *Opel Austria v. Council of the European Union* (**Exhibit 32**); CJEU, Case 120/86, ECLI:EU:C:1988:213 ¶¶ 21 *et seq. – 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**).

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

[47] *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**).

ECtHR through the individual complaints procedure after having challenged the Polish measures in question before the Polish courts.

36. If the ECtHR finds that there has been a violation of the ECHR, the ECtHR can award monetary compensation to the injured investor.[48]

C. EU judicial system and its governing principles

1. The jurisdiction of the CJEU

37. The EU judicial system is governed by the EU Treaties.[49] 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 they create must apply and interpret EU law.[50] 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."[51] 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 Treaties, and interprets EU law at the request of national courts and tribunals.[52] In so doing, the CJEU preserves the unique characteristics of EU law and guarantees equality under the law.[53] In EU law terminology: it preserves the autonomy of EU law.[54] Putting it into the words of the tribunal in *BayWa v. Spain*:

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[48] *See, e.g.*, European Court of Human Rights (ECtHR), App. No. 14902/04, Judgement (15 December 2014), 2nd Ruling – *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).

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

[50] *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**).

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

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

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

[54] 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, 47 – *EEA Agreement* ("Opinion

> 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.[55]

2. Securing the CJEU's exclusive jurisdiction: The principle of autonomy of EU law

38. 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 in *Achmea*[56]*, Komstroy*[57], and others. 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.

39. 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

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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 ¶¶ 67, 76 *et seq*. - *European and Community Patents Court* ("Opinion 1/09") (**Exhibit 44**); CJEU, Opinion 2/13, ECLI:EU:C:2014:2454 ¶¶ 179 *et seq. – 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**).

[55] *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) ¶ 280 (**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.

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

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

> EU legal system, observance of which is ensured by the [CJEU][58]

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[59].

40. 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.[60]

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"[61] 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.[62]

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[58] Opinion 2/13 ¶ 201 (**Exhibit 45**). *See also, e.g.* Opinion 1/91 ¶ 35 (**Exhibit 42**); Opinion 1/00 ¶¶ 11, 12 (**Exhibit 43**); *Mox Plant* ¶¶ 123, 136 (**Exhibit 48**); *Kadi* ¶ 282 (**Exhibit 24**); Opinion 1/17 ¶¶ 110, 111 (**Exhibit 47**).

[59] *Komstroy* ¶ 62 (**Exhibit 11**). The CJEU in *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**).

[60] *Achmea* ¶ 36 (**Exhibit 10**).

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

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

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.[63]

41. 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."[64] 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.[65] 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.[66]

42. 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.[67]

43. This mechanism for communicating between the CJEU and national courts ensures the uniform application and primacy of EU law because judgments rendered by the

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[63] Opinion 1/09 ¶ 83 (**Exhibit 44**); *Komstroy* ¶ 46 (**Exhibit 11**).

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

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

[66] *Id.* ¶ 212 (**Exhibit 45**).

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

CJEU under Article 267 of the TFEU on interpretation of EU law have general, binding effect in all EU Member States. The CJEU more 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*.[68]

44. In addition, the judgments of the CJEU have effect *ex tunc*. 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*.[69]

45. Also, the obligation to respect the principle of autonomy contained in the EU Treaties cannot be "waived" – *i.e.*, the EU Member States cannot deviate from, circumvent or 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

[68] (emphasis added) *Puligienica* 3rd Ruling (**Exhibit 49**).

[69] (emphasis added) CJEU, Joined Cases 66, 127 and 128/79, ECLI:EU:C:1980:101 ¶ 9 – *Salumi* (**Exhibit 50**); CJEU, Case C-109/20, ECLI:EU:C:2021:875 ¶¶ 57-61 – *Republiken Polen v PL Holdings Sàrl* ("*PL Holdings*") (**Exhibit 17**). The directly binding effect of the EU Treaties on the EU Member States aside, as a result of the direct application of EU law in the legal orders of the EU Member States and as result of being applicable law in an intra-EU investment dispute, interpretations given by the CJEU are also binding on companies incorporated in the EU, such as MOL.

> 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.*[70]

46. What can also be inferred from this decision is that the *ratio decidendi* of the jurisprudence on intra-EU arbitration is not the way in which an arbitration agreement is allegedly formed, which the CJEU takes issue with. Rather, the CJEU emphasised that there had never existed an offer to arbitrate and therefore no arbitration agreement in the first place in the context of intra-EU investment arbitration. In the view of the CJEU, it is, thus, irrelevant whether an agreement to arbitrate is allegedly formed by an EU Member State "with" an investor of an EU Member State, "for the benefit" of such an investor, or in any other form. The Court's holding in *Achmea*, *Komstroy*, *PL Holdings*, *European Foods and Others*, etc. is that there had never been an offer to arbitrate in existence in the ECT and other investment agreements in an intra-EU context.

47. 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*.[71] For the case at hand, as I will explain in more detail further below, the ruling in *Achmea*[72], as confirmed in *Komstroy*[73] and *PL Holdings*[74] 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 for

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

[71] *PL Holdings* ¶¶ 57-61 (**Exhibit 17**). *See also above* ¶ 44.

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

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

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

the respective EU Member State. Indeed, there has never been a moment in time for an EU Member State when intra-EU investment arbitration was lawful.[75]

3. Securing equality before the law: The principle of primacy of EU law

48. 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 Vienna Convention on the Law of Treaties ("VCLT")[76] – something sovereigns can readily do[77] – and chose to apply a specific conflict rule[78] contained in the EU Treaties, namely the principle of primacy.[79] They went even beyond that: By strictly forbidding[80] the modification of the principle of primacy *inter se*, the EU Member States have created a *supreme* conflict rule

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[75] EU Member State courts have consistently set aside intra-EU investment awards. *See above* ¶ 43.

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

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

[78] *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 ("2006 ILC Report") ¶ 283 (**Exhibit 61**).

[79] *See* also 2024 Declaration at 4 (**Exhibit 122**). There it is stated that the principle of primacy of EU law is "*a rule of international law* governing conflict of norms in [the . . .] mutual relations [of the EU Member States] with the result that in any event Article 26 of the Energy Charter Treaty does not and could not apply as a basis for intra-EU arbitration proceedings." (emphasis added). Hungary issued its own unilateral declaration on the same day. 2024 Hungarian Declaration (**Exhibit 123**). On the irrelevance of the latter declaration *see below* ¶¶ 113 *et seq.*

[80] *See below* ¶¶ 71 *et seq.*

that takes precedence over any other conflict rule in intra-EU relations. There is nothing in international law which prohibits "States to establish the priority of the regime treaty over other sources of international law, at least so long as peremptory norms are not implicated."[81] 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.[82]

49. This fundamental principle is reflected in the Treaties[83] 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

[81] *BayWa v. Spain* ¶ 280 (**Exhibit 109**).

[82] 2006 ILC Report ¶ 283 (**Exhibit 61**).

[83] 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."

50. 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.[84]

51. 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.[85]

52. Since 1964 and the first pronouncement of the principle in *Costa v. ENEL*,[86] 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 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

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[84] (**Exhibit 5**) (emphasis added).

[85] *2006 ILC Report* ¶¶ 283-4 (**Exhibit 61**). *See also Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction (30 November 2012) ¶¶ 4.180 *et seq.* (**Exhibit 94**) 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).

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

> 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.[87]

53. 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.[88]

54. 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.[89]

55. 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 law.[90] Thus, any competent authority applying EU law must disregard any rule created by an

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

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

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

[90] *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**).

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.[91]

56. 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.[92]

57. 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.[93]

58. 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].[94]

59. In this respect, it is worth pointing out that GATT of 1947 is a multilateral agreement to which, in 1962, the EU Member States and third countries were parties to. The EU joined in 1995. The scenario in this CJEU case is also similar to the present one: Hungary and Croatia acceded to the EU in 2004 and 2013 respectively. The ECT is a multilateral agreement entered into force for Croatia and Hungary in 1998.

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[91] *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**).

[92] *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 SA v. LOR SA and Confiserie du Tech SA* ("*Exportur*") (**Exhibit 57**); CJEU, Case C-469/00, ECLI:EU:C:2003:295 ¶ 37 – *Ravil* SARL *v.* Bellon import SARL *and* Biraghi SpA ("*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**).

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

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

60. 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.

61. 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].[95]

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.[96] This applies irrespective of whether the conflicting treaty was concluded before or after the Member State's accession to the EU Treaties.[97] In this regard, it can be said that when EU Member States join the EU, they

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[95] (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**).

[96] *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 . . . ").

[97] 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 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**).

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

62. 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,[98] with or without participation of the EU.[99]

63. 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.[100] Nor can the EU Member States agree among each other on any other conflict rule to override the one established by the EU Treaties.[101] 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.

64. 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.

65. 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[102], which derogate from

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

[99] 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).

[100] *See* CJEU, Case 26/78, ECLI:EU:C:1978:172 ¶ 9 – *Antonio Viola* (**Exhibit 23**) (Any action of the EU has its "basis, their framework and their bounds" in the EU Treaties).

[101] *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**).

[102] *See, e.g.*, *2006 ILC Report* UN Doc. A/CN.4/L.682 ¶ 283 (**Exhibit 61**).

the default rules in the VCLT.[103] The principle of primacy of the EU Treaties constitutes such a special conflict rule.

D. Specific rules of interpretation

66. 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. The Convention's rules of interpretation are not exclusive".[104] Primacy of EU law[105] 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.[106]

67. 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 . . .].[107]

68. 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

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

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

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

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

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

case law,[108] 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."[109] 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.

69. 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[110].

70. 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,[111] 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

71. 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

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[108] The principle was established in CJEU, Case 157/86, ECLI:EU:C:1988:62 ¶ 11 – *Mary Murphy and others v. An Bord Telecom Eireann* ("*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**).

[109] *Murphy* ¶ 11 (**Exhibit 64**).

[110] 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**).

[111] *See above* footnote 103.

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."[112] 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.[113]

2. No derogation from EU law in an intra-EU context

72. 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]."[114].

73. 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,

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

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

[114] *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.").

irrespective of whether this law is earlier or later in time.[115] 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 purported conflict rule in Article 16 of the ECT, to derogate from their obligations under the EU Treaties.

74. 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.

II. The Principles contained in the EU Treaties applied to *MOL*

75. A tribunal in an investment dispute between a Member State and an investor of another Member State, such as the one in *MOL*, 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 as interpreted by the CJEU is that Article 26 of the ECT cannot validly be invoked to initiate arbitration over claims such as those in *MOL*. No offer to arbitrate under Article 26 of the ECT has existed in an intra-EU context. (B. below).

[115] 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 Exportur* ¶ 8 (**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**).

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

76. 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."[116] EU law is public international law. This has been confirmed by CJEU in *Achmea.*[117] The "applicable rules and principles of international law" 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.

77. 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".

78. 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 *MOL*, owes its purported existence to an alleged commitment in Article 26 of

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

[117] *Achmea* ¶ 41 (**Exhibit 10**).

the ECT, entered into by two EU Member States, in the present case, Croatia and Hungary. 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.[118] Therefore, EU Member States cannot authorize a body, such as the Tribunal which rendered the Award in case at hand and which sought to derive its jurisdiction from an international agreement between two EU Member States, to partly or fully disregard EU law.[119] In any event, such an alleged authorization would conflict with EU law and would be automatically disapplied under the principle of primacy of EU law, and would therefore not exist. 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.

79. 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 of Justice 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.[120]

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

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[118] *See above* ¶ 71.

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

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

> against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[121]

80. 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.[122] Thus, the EU Treaties, and the legal order they establish, are applicable to the jurisdiction of a tribunal, such as the one in *MOL*, 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.[123] 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*.[124]

81. Article 26(6) of the ECT also governs the applicable law to the merits of a dispute under the ECT which means that the EU Treaties are also applicable to the merits of an intra-EU dispute, such as the one in *MOL*.

82. 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 *MOL*, must apply to "decide the issues in dispute".

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[121] *Achmea* ¶ 62 (**Exhibit 10**).

[122] 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.

[123] *See Simmenthal II* ¶ 21 (**Exhibit 27**); *Zwartveld* ¶¶ 16, 18 (**Exhibit 69**).

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

83. 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."[125]

84. 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.

85. 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.[126] 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

[125] (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 2016) ¶ 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 110**).

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

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.

86. 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 Agreement ("CETA") between Canada and the EU. 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*.[127] 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*"[128] 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.

[127] *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". Furthermore, 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.

[128] (emphasis added) Article 8.31.1 of the CETA, 2017 O.J. (L 11) 23.

87. Specifically, in *MOL*, an investor from Hungary brought a claim against Croatia 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 dispute are reciprocal commitments *between two EU Member States*, Croatia and Hungary. Such an (intra-EU) conflict simply cannot arise with regard to the CETA—not even theoretically.

88. 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.[129]

89. 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

90. 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

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

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 EU Member States. A tribunal, such as the one in *MOL*, 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*

91. 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.[130]

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

[130] *Achmea* ¶ 62 (**Exhibit 10**).

> procedure provided for in Article 267 TFEU, and . . . has an adverse effect on the autonomy of EU law.[131]

92. 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* 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."[132]

93. Because the CJEU's ruling sets the content and meaning of a given rule *ab initio*, the provision allegedly containing an offer to arbitrate in the investment treaty between the Netherlands and the Slovak Republic was inapplicable, *i.e.*, non-existent, thus, 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*.

94. The *Achmea* Judgment builds upon the CJEU's prior case law. For example, in Opinion 1/09, the Court of Justice 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 of Justice 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 of Justice to find the arbitration clause in *Achmea* to be incompatible with the requirements of EU law.

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[131] *Id.* ¶¶ 58–59.

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

2. *Komstroy* confirms that *Achmea* applies to multilateral treaties to which the EU is also a party, like the ECT

95. 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.[133]

96. 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.[134]

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.[135]

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[133] *See also Investment Protection Communication* at 3-4 (**Exhibit 91**): "The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States."

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

[135] *Id.* ¶ 57.

97. 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.[136] The CJEU found that Article 8 of the Dutch-Slovak BIT was precluded by the EU Treaties because:

> [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.[137]

98. 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.[138]

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[136] 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* ("*Komstroy Opinion*") (**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);

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).

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

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

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.[139] These tribunals not only "may be called on" to interpret and apply EU law[140] but they are required to do so[141] and cannot refer questions of EU law to the CJEU under Article 267 of the TFEU.[142] 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.[143]

99. 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:

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[139] *Id.* ¶ 53. In *Achmea*, 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.

[140] 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 CJEU will never have the 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.

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

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

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

> [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.[144]

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 is detrimental to the consistent and uniform interpretation of EU law.[145]

100. 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.

101. 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

[144] *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*") ¶ 445 (**Exhibit 72**).

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

> interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*.[146]

The Court of Justice cites three cases in support of this general rule: Opinion 1/91, Opinion 1/09, and Opinion 2/13.[147]

102. All of the treaties at issue in these cases were multilateral and the EU was a party to each one. Despite this, the Court of Justice 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."

103. 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 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.[148]

104. 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,

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[146] (emphasis added) *Achmea* ¶ 57 (**Exhibit 10**).

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

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

the CJEU concluded that the agreement in question was in violation of the principle of autonomy of the EU legal order.[149]

105. 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.[150] 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."[151] The CJEU also concluded that it was "liable to affect Article 344 of the TFEU in so far as it does not preclude the possibility of disputes between Member States or between Members States and the EU" concerning matters of EU law.[152]

106. *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.[153] The holdings in *Achmea* and the preceding cases extend to *any* international agreement which contains dispute settlement mechanisms

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

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

[151] *Id*. ¶¶ 199-200, 236-248.

[152] *Id*. ¶¶ 214, 224, 258.

[153] *Achmea* ¶ 58 (**Exhibit 10**).

incompatible with Articles 267 and 344 of the TFEU,[154] including the ECT.[155] 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.[156]

107. 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.[157]

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[154] *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.

[155] *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**).

[156] *Komstroy* ¶¶ 62-63 (**Exhibit 11**). *See also Komstroy Opinion* ¶¶ 81, 83 (**Exhibit 71**).

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

3. Violation of the Principle of Autonomy of EU Law

108. 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 of Justice itself in *Komstroy*.[158]

109. In this regard, twenty-two of the (then) twenty-eight EU Member States, Croatia among them, affirmed in a joint declaration that Article 26 of the ECT violates the EU Treaties and, hence, is inoperative as between EU Member States and nationals of EU Member States.[159] In parallel with the 2019 Declaration, Finland, Luxembourg, Malta, Slovenia and Sweden issued a declaration in which they chose to take no position on the ECT until the question of compatibility with the EU Treaties was expressly decided.[160] For its part, Hungary, which also issued a declaration in 2019, similarly said it would not take a position on the ECT, stressing "the importance of allowing due process".[161] Following the declarations made by the EU

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

[159] *See Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (15 January 2019) (**Exhibit 13**).

[160] *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) at 3 (**Exhibit 14**): "Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty".

[161] *See 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*

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."[162]

110. The incompatibility of Article 26 of the ECT with the EU Treaties was confirmed by the CJEU's judgment in *Komstroy*. Hence, if at all there was a disagreement on the understanding that the Article 26 of the ECT has never been applicable to intra-EU investment disputes – the Member States that issued separate declarations rather chose to remain silent on this point – such an alleged contradiction has been removed by the aforementioned CJEU judgment.[163]

111. In a Communication in 2022, the Commission expressed the view that:

> The EU and its Member States have always considered that the ECT in its entirety does not apply intra-EU.[164]

(16 January 2019) (**Exhibit 15**): "Against this background, Hungary underlines the importance of allowing for due process and considers that it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT. The ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States".

[162] European Commission, *Single Market: Commission welcomes Member States' commitments to terminate all bilateral investment treaties within the EU*, Press Release – Daily News at 1 (17 January 2019) (**Exhibit 16**).

[163] *See also* European Commission, *Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty* (5 October 2022), COM/2022/523 final at 3 (**Exhibit 124**): "Finally, the modernised ECT includes, for greater certainty, a clause *confirming* that an investor from a Contracting Party that is a member of a regional economic integration organisation (REIO), like the EU, cannot bring an investor-state dispute settlement (ISDS) claim against another Contracting Party member of the same REIO" (emphasis added).

[164] European Commission, *Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty* (5 October 2022), COM/2022/523 final at 4 (**Exhibit 124**). Similarly, *see* European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Energy Charter Conference* (1 March 2024), COM(2024) 104 final, at 3 (**Exhibit 125**): "It has been the consistent interpretation of the EU that the ECT does not apply and was not meant to apply 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. This interpretation was specifically confirmed by the Court of Justice of the European Union (CJEU) in its Komstroy judgment". *See also 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*

112. On 26 June 2024, the EU Member States, except for one[165], signed a "Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings" ("2024 Declaration")[166]. According to the 2024 Declaration:

> [t]he signatories hereby reaffirm, for greater certainty, that they share a common understanding on the interpretation and application of the Energy Charter Treaty, according to which Article 26 of that Treaty cannot and never could serve as a legal basis for intra-EU arbitration proceedings.[167]

The 2024 Declaration also confirms that the common understanding applies regardless of whether the arbitration is conducted under the ICSID Convention or under other arbitration rules.[168]

113. In 2024, Hungary issued a unilateral declaration in parallel to the 2024 Declaration. Therein it stated that "Article 26(2)(c) of the Energy Charter Treaty shall be interpreted and applied in such a way that it shall no longer serve as a legal basis for disputes between an investor of one Member State and another Member State in connection with an investment in the territory of that other Member State."[169] The difference between the 2024 Declaration signed by 26 Signatories and that of Hungary seems to be that the former emphasises that the CJEU's interpretation of Article 26 of the ECT applies with *ex tunc* effect,

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Federal Republic of Germany to the Energy Charter Secretariat and to the contracting parties to the Energy Charter Treaty (28 December 2023) (**Exhibit 99**).

[165] Hungary issued its own unilateral declaration on the same day. 2024 Hungarian Declaration (**Exhibit 123**).

[166] 2024 Declaration (**Exhibit 122**).

[167] 2024 Declaration at 4 (**Exhibit 122**).

[168] 2024 Declaration at 4 (**Exhibit 122**).

[169] 2024 Hungarian Declaration at 1-2 (**Exhibit 123**).

while Hungary claims an *ex nunc* effect. Both explanations, however, seem to agree that Article 26 of the ECT is and will not be applicable to intra-EU investment disputes.[170]

114. As for the difference regarding the temporal effect of interpretative judgments of the CJEU under Article 267 of the TFEU, it is simply irrelevant for our purposes. There are several reasons for this. First, Hungary does not have the competence to issue interpretative declarations on the content and application of the ECT in an intra-EU context. By signing and ratifying the EU Treaties, Hungary transferred this competence to the CJEU to issue final, authoritative and binding judgments. Second, Hungary's declaration is in direct contradiction – and, thus, in breach of the EU Treaties – with the settled case law of the CJEU declaring that its interpretative judgments apply with effect *ex tunc*, unless expressly stated otherwise.[171] Third, the leading case in which the CJEU found intra-EU investment arbitration inadmissible

[170] The Commission holds the view that not only does Hungary claim "that the Komstroy judgment only applies for future intra-EU investor-State arbitration proceedings. [but also . . .] claims that this effect for the future will only start once the Energy Charter Treaty has been amended", European Commission, *July Infringement Package: Key Decisions* (25 July 2024) (**Exhibit 126**). The Case against Hungary is ongoing and registered under INFR(2024)2206. However, this reading is not compelling, as Hungary recognises the special conflict rule in public international law contained in the EU Treaties, *i.e.*, the primacy of EU law, which – according to Hungary – would lead to a disapplication of Art. 26 of the ECT in an intra-EU context. Hungary also states that the "withdrawal of the applicability of Article 26(2)(c) of the Energy Charter Treaty in intra-EU arbitration proceedings *may* be ensured in accordance with international law by a future amendment of the Energy Charter Treaty" (emphasis added). Read together with the recognition of the principle of primacy as a special conflict rule in public international law, this suggests that Hungary is merely mentioning a further possibility, but does not dispute that Art. 26 of the ECT does not apply to intra-EU investment arbitration today. But even if the opposite was true, *quod non*, the Hungarian Declaration is in any event a legal *nullum* insofar as it violates the EU Treaties and is thus itself inapplicable by virtue of the principle of primacy of EU law, which Hungary apparently recognises.

[171] *See above* ¶ 43. Conveniently, in a case in which Hungary served as respondent, it acknowledged – in general terms – that "[t]he preliminary rulings of the CJEU – including the Achmea Decision – . . . . have retroactive effect. This retroactive effect is part of the nature of preliminary rulings, which do not create new rules but rather clarify the meaning of preexisting EU law 'as it must be or ought to have been understood and applied from the time of its coming into force.' This is consistent with international law" (emphases omitted and added), *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (09 October 2018) ¶ 232 (**Exhibit 127**). The CJEU judgment in *Komstroy* is such preliminary ruling and the CJEU has not restricted the "retroactive effect". *See* to such possibility which the CJEU has not used *PL Holdings* ¶ 81 (**Exhibit 17**).

is *Achmea*[172]; *Komstroy* is a mere confirmation. Forth, Hungary contradicts the position of the EU in violation of its duty of sincere cooperation enshrined in Article 4(3) of the TEU. Thus, in addition to the lack of competence, the principle of primacy of EU law precludes any effect flowing from the 2024 Hungarian Declaration. Any part of the 2024 Hungarian Declaration that conflicts with the EU Treaties is inapplicable and, hence, cannot create a conflict with the 2024 Declaration of the (other) EU Member States.

115. Accordingly, Croatia as an EU Member State did not, at no point in time, make a legally valid offer to arbitrate disputes that may concern matters of EU law – including, as relevant here, the dispute with MOL under Article 26(3) of the ECT as this provision does not contain an offer to arbitrate in an intra-EU context.

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 – in line with the CJEU – that no 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."[173]

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

[172] *See* CJEU, Case C-516/22, ECLI:EU:C:2024:231 ¶ 80– *Commission v. UK* (**Exhibit 121**): *"[I]t follows from the Court's case-law, as enshrined in the judgment of 6 March 2018, Achmea . . .* , that the system of judicial remedies provided for by the [T]EU and [T]FEU . . . replaced the arbitration procedures established between the Member States . . . " (emphasis added).

[173] *Achmea* ¶ 48 (**Exhibit 10**).

> freedoms, including freedom of establishment and free movement of capital.[174]

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.[175]

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-discrimination, or any restrictive measures in relation to foreign investment.[176] At a minimum,

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[174] *Id.* ¶ 42.

[175] *BGH Achmea* ¶ 32(**Exhibit 12**).

[176] *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**).

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"[177] 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.[178]

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.[179] 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.[180]

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

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

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

[179] *Id.* ¶¶ 52-53.

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

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*[181] and in *Komstroy*[182]. 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.[183]

121. As confirmed by the Court of Justice in *Komstroy*, the CJEU's reasoning in *Achmea* fully applies to the ECT and, thus, to the situation in *MOL*. 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.[184]

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.[185] Consequently, as in *Achmea*, "Articles 267 and 344 TFEU must be interpreted as precluding" the application of Article 26 of the ECT between EU Member States.[186] 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."[187] An investment

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

[182] *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".

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

[184] *Achmea* ¶ 56 (**Exhibit 10**).

[185] I note that my analysis is also consistent with the European Commission's position as reaffirmed following *Achmea. See Investment Protection Communication* (**Exhibit 91**).

[186] *Achmea* ¶ 62 (**Exhibit 10**).

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

tribunal established on the basis of the ECT, such as the one in *MOL*, must decline jurisdiction in an intra-EU dispute.[188] 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.[189] 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*[190]. 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"[191] have effectively "*replaced* . . . [the] arbitration procedure"[192], but also did not fail to state the obvious: consent purportedly provided towards an intra-EU investment arbitration "lacked any force."[193]

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[188] *See also Komstroy* ¶ 64 (**Exhibit 11**); *Green Power v. Spain* ¶¶ 431, 436 (**Exhibit 72**); *Portigon* ¶ 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 Murphy* ¶ 11 (**Exhibit 64**)) must lead to the same result as the non-application of Article 26 of the ECT.

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

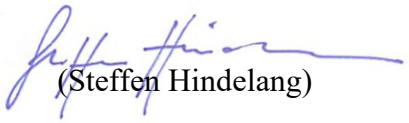
[190] *Komstroy* ¶ 66 (**Exhibit 11**).

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

[192] (emphasis added) *Id.*

[193] *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**); CJEU, Cases T-624/15 RENV, T-694/15 RENV and T-704/15 RENV, ECLI:EU:T:2024:659 ¶¶ 102-107 – *European Foods and Others II* (**Exhibit 128**).

Executed on 14 October 2024, in Berlin, Germany.



(Steffen Hindelang)

No.	Description
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Ex. 04	Treaty on European Union (TEU)
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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	European Commission, *Communication from the Commission, Update of data used to calculate financial sanctions proposed by the Commission to the Court of Justice of the European Union in infringement proceedings* (26 January 2024), C/2024/1123
Ex. 08	CJEU, Case C-204/21 R, ECLI:EU:C:2021:878 – *Commission v. Republic of Poland*
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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.* ("*BGH Achmea*")
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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, *Single Market: Commission welcomes Member States' commitments to terminate all bilateral investment treaties within the EU*, 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*")
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Ex. 23	CJEU, Case 26/78, ECLI:EU:C:1978:172 – *Antonio 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*")
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Ex. 26	CJEU, Case 6/64, ECLI:EU:C:1964:66 – *Costa v. ENEL* (("*Costa v. ENEL*")
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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 – *Francovich*
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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")
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Ex. 56	CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of Italian Republic* ("*Commission v. Italian Republic*")

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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	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 ("2006 ILC Report")
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*
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Ex. 125	European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Energy Charter Conference* (1 March 2024), COM(2024) 104 final
Ex. 126	European Commission, *July Infringement Package: Key Decisions* (25 July 2024)
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