IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hydro Energy 1, S.à.r.l., and Hydroxana Sweden AB, *Petitioners*, v. The Kingdom of Spain, *Respondent*.	**Civil Action No. 1:21-cv-02463-RJL**

Petitioners' Response to Spain's Motion to Dismiss the Petition or Stay the Proceeding

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (*CONTINUED*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (*CONTINUED*)

Page

TABLE OF AUTHORITIES (*CONTINUED*)

Page

TABLE OF AUTHORITIES (*CONTINUED*)

Page

TABLE OF AUTHORITIES (*CONTINUED*)

Page

TABLE OF AUTHORITIES (*CONTINUED*)

Page

Foreign Judicial and Administrative Decisions

TABLE OF AUTHORITIES (*CONTINUED*)

Page

Arbitration Decisions

Statutes and Rules

TABLE OF AUTHORITIES (*CONTINUED*)

Page

Treaties

TABLE OF AUTHORITIES (*CONTINUED*)

Page

TABLE OF AUTHORITIES (*CONTINUED*)

Page

Other Authorities

GLOSSARY

CJEU	Court of Justice of the European Union
ECT	Energy Charter Treaty
EU	European Union
FAA	Federal Arbitration Act
FSIA	Foreign Sovereign Immunities Act
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

Hydro Energy 1, S.à.r.l ("Hydro Energy") and Hydroxana Sweden AB ("Hydroxana," and collectively, "Petitioners") hold a €30,875,000 plus interest arbitral award (the "Award," ECF No. 1-1, Ex. A) against the Kingdom of Spain ("Spain"), resulting from arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention," ECF No. 1-2). The ICSID Convention is a treaty signed by the United States, Spain, and most nations of the world that provides a comprehensive framework for resolving investment disputes between its signatory nations and the private investors of other signatory nations through the International Centre for Settlement of Investment Disputes ("ICSID"), under the auspices of the World Bank. Countries that join the Convention are required by the treaty to pay all awards entered against them. But Spain has not paid the Award here, forcing Petitioners to seek enforcement in nations like the United States where Spain may hold assets.

The Convention and its implementing legislation in the United States provide for streamlined enforcement procedures against signatory nations. ICSID awards are treated as "binding," "final judgment[s]" that are not "subject to any appeal or to any other remedy except those provided for in th[e] Convention." ICSID Convention, arts. 53(1), 54(1). In the United States, Congress has specified that they are entitled to the same "full faith and credit" as the judgments of a state court, and they are not subject even to the limited defenses to enforcement that ordinarily are available under the Federal Arbitration Act ("FAA"). 22 U.S.C. § 1650a(a). U.S. courts uniformly agree that foreign states have no right to oppose enforcement of an ICSID award by challenging the arbitral tribunal's decisions on either jurisdiction or the merits. Instead, Congress has required federal courts to enforce an ICSID award expeditiously by converting the award into a money judgment as soon as the foreign state is served and the court's jurisdiction is established.

With no serious argument to resist enforcement under Section 1650a, Spain attempts to

complicate what Congress deliberately made straightforward. But Spain's serial efforts all fail.

Spain attacks this Court's jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") with a claim that European Union ("EU") law renders Spain's consent to arbitration invalid and thus precludes this Court from asserting jurisdiction over this action. That argument fails on its own terms because Spain's unambiguous consent to arbitrate investment disputes is reflected in a multilateral investment treaty with EU and non-EU nations alike. As the arbitral tribunal recognized, EU law cannot override Spain's treaty commitments under international law.

Of course, this Court's jurisdiction depends not on EU or international law, but on the FSIA. Two provisions of that law establish jurisdiction. *First*, the FSIA provides for jurisdiction whenever a foreign state has waived its immunity from suit. 28 U.S.C. § 1605(a)(1). As the Second Circuit has held, a foreign state "waive[s] its sovereign immunity" from enforcement of an ICSID award "by becoming a party to the ICSID Convention." *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013). The D.C. Circuit has applied the same principle to other treaties, *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019) ("*Tatneft I*") (per curiam), and its reasoning applies equally to the ICSID Convention. Spain undisputedly is a signatory to the ICSID Convention, and its waiver of immunity from suits to *enforce* ICSID awards does not depend on the validity of its consent to *arbitrate* any particular underlying dispute. That waiver is fully sufficient to establish this Court's jurisdiction to enter judgment on the Award here.

Second, the FSIA also abrogates a foreign state's immunity when the action is "to confirm an award made pursuant to . . . an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). Even though Spain now disputes that its consent to arbitrate was valid, this Court is bound by the arbitral tribunal's determination that Spain validly agreed to arbitrate, as this Court recently recognized in *Tethyan Copper Co. PTY Ltd. v. Islamic Republic of Pakistan*, 2022 WL 715215, at *9 (D.D.C.

Mar. 10, 2022). That is both because Section 1650a incorporates principles of issue preclusion and because courts may not override the parties' indisputable agreement to commit questions of arbitrability to arbitration. In any event, the arbitral tribunal was correct: Spain's consent is unambiguous and is binding under international law.

Spain's remaining arguments are makeweight. EU state aid law does not bar Spain from paying the Award, and even if it did, that would have nothing to do with the tribunal's jurisdiction or this Court's duty to enter judgment enforcing the Award. And the D.C. Circuit has squarely and repeatedly held that *forum non conveniens* does not apply to actions to enforce arbitral awards against foreign states because only U.S. courts can enforce awards against assets in this country.

Finally, Spain falls back on a request to stay enforcement while it attempts to annul the award. But the ICSID Convention directs such stay requests to the ICSID committee hearing the annulment application, not this Court. In a reasoned 38-page decision, that committee rejected Spain's request to stay enforcement, on the condition that Petitioners provide an undertaking to hold any collected proceeds in escrow pending a decision on annulment, which Petitioners have done. Spain's current motion attempts an end run around the committee's balanced decision by seeking the very stay the committee thought unnecessary. Having the benefit of the undertaking that Petitioners have made as directed by the committee to protect Spain in the unlikely event the award is annulled in whole or in part, Spain has no legitimate basis to request in this Court a stay similar to the one that the annulment committee rejected. This Court recently denied a stay under similar circumstances, and it should do the same here. *See Tethyan*, 2022 WL 715215, at *6. Petitioners should be allowed to enforce and secure the award without further delay.

Petitioners therefore respectfully request that this Court deny the motion to dismiss, grant the petition, and enter judgment in Petitioners' favor without further delay.

BACKGROUND

I. Petitioners' Investment In Spain

Petitioners Hydro Energy and Hydroxana are, respectively, Luxembourg- and Sweden-based companies that invested more than €70 million in hydropower generation projects in Spain. *See* Award, Annex A ("Jx. Dec.") ¶¶ 5, 64, 68. Petitioners made these investments in reliance on financial incentives and inducements enacted by Spain to promote the development of renewable energy, including hydroelectric power, and provide "legal certainty" to investors. *Id*. ¶¶ 73-132.

Spain's favorable treatment of renewable energy investment was short lived. Between 2012 and 2015, Spain adopted a series of measures retrenching on, and eventually revoking, the incentives on which Petitioners had relied in making their investments, substantially reducing Petitioners' returns on their investments. Jx. Dec. ¶¶ 133-63; Award ¶¶ 26-27, 123-24.

II. The Energy Charter Treaty And The ICSID Convention

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

The ECT is a multilateral investment treaty adopted in 1998 among 53 nations and regional organizations to "establis[h] a legal framework [for] promot[ing] long-term cooperation in the energy field." ECT, art. 2; *see also* Jx. Dec. ¶¶ 541, 543-44. Its contracting parties include the EU and every EU member except Italy, as well as 26 other nations outside the EU.[1] The ECT protects investments in the territory of a "Contracting Party" to the treaty (*e.g.*, Spain) by "Investors" (*e.g.*, Petitioners) located or incorporated in "other Contracting Parties" (*e.g.*, Luxembourg and Sweden). ECT, arts. 1(7), 10(1), 26, 40(2). As relevant here, Contracting Parties agree to "accord . . . fair and equitable treatment" to the investments of other Contracting Parties' investors, *id.*, art. 10(1), and "unconditional[ly] consent" to submission of investment disputes arising under the treaty to

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

"international arbitration" under the treaty's terms, at the investor's election, *id.*, art. 26(2), (3)(a).

The ICSID Convention further protects investors like Petitioners by facilitating enforcement of arbitration awards arising from violations of the ECT. The Convention is a treaty among 156 nations—including Spain, Luxembourg, Sweden, and the United States[2]—that provides a comprehensive framework for arbitrating investment disputes "between Contracting States and nationals of other Contracting States." ICSID Convention, pmbl. Arbitral tribunals constituted under the ICSID Convention are responsible for conclusively deciding not only the merits of any dispute submitted to them, *id.*, art. 48, but also all issues pertaining to their jurisdiction, including disputes about the parties' consent to arbitrate, *id.*, arts. 25, 41. By signing the ICSID Convention, Spain agreed to "abide by" and "comply with" all awards issued pursuant thereto. *Id.*, art. 53(1).

The ICSID Convention provides for only a limited review of arbitral awards and assigns that power to an *ad hoc* annulment committee. *Id.*, art. 52. Under Article 52 of the Convention, that committee—not the courts of any Contracting State—decides whether an award should be set aside on the ground that the tribunal was not properly constituted, exceeded its power, acted corruptly, seriously departed from a fundamental rule of procedure, or failed to state the reasons on which the award was based. *Id.*, art. 52(1). In assigning this role to the annulment committee, the ICSID Convention differs from other regimes like the New York Convention, in which the enforcing court would determine if the award is subject to challenge. Similarly, the Convention assigns to the annulment committee the decision whether to stay enforcement while annulment proceedings are pending. *Id.*, art. 52(5). Spain and the other parties to the ICSID Convention thus agreed that an ICSID arbitration award would be "binding" and enforceable in the courts of any Contracting State—including the United States—as "final judgment[s]" without being "subject to any

[2] *See* ICSID, *List of Member States–ICSID/3*, bit.ly/3w4CZTn.

appeal or to any other remedy except those provided for in th[e] Convention." *Id.*, arts. 53, 54.

The ECT provides for arbitration under the ICSID Convention when both the investor's nation and the opposing party are parties to the ICSID Convention, ECT, art. 26(4)(a)(i), ensuring that arbitration under the ECT will be binding and conclusive as to all issues litigated, and that any resulting arbitration awards are broadly and expeditiously enforceable nearly worldwide, without any challenge to the validity of the award or the conclusions of the arbitral tribunal.

III. The ICSID Arbitration And Annulment Proceeding

In October 2015, Petitioners submitted a request for arbitration with Spain under the ICSID Convention, alleging that Spain's legislative and regulatory actions that diminished the returns on Petitioners' investments constituted a breach of Spain's obligations under the ECT. Jx. Dec. ¶¶ 5-7. Petitioners invoked Spain's consent under ECT Article 26 to arbitrate disputes under that treaty. *Id.* ¶ 198. An ICSID arbitral tribunal (the "Tribunal") was constituted in May 2016. *Id.* ¶ 11.

In the arbitration, Spain challenged the Tribunal's jurisdiction on several grounds. As relevant here, Spain argued that EU law precludes the application of the ECT to so-called "intra-EU" disputes between EU member states and EU-based investors. Jx. Dec. ¶¶ 170-96. Spain relied mainly on the decision of the Court of Justice of the European Union ("CJEU")—the highest judicial authority on EU law—in Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018) ("*Achmea*"), ECF No. 12-9. *See* Jx. Dec. ¶ 170. In that case, an EU member state (Slovakia) challenged the arbitration provision of a bilateral investment treaty between itself and another EU member state (the Netherlands), which provided for arbitration of disputes between each state and the other state's investors. *Achmea* ¶¶ 3-4, 23. The CJEU determined that the arbitration provision was incompatible with EU law because it could lead to the resolution of EU law outside the "judicial system of the EU," contravening the Treaty on the Functioning of the European Union ("TFEU"). *Id.* ¶¶ 43-55, 60.

Spain submitted the *Achmea* decision to the Tribunal, arguing that the decision invalidated its "consent to arbitration" of "intra-EU disputes" under the ECT and deprived the Tribunal of jurisdiction. Jx. Dec. ¶¶ 189-96. In March 2020, however, the Tribunal issued its Decision on Jurisdiction, Liability and Directions on Quantum, rejecting this argument. The Tribunal started by noting that under the ICSID Convention, it is "the judge of its own competence" and found Spain had given its "unconditional consent" to arbitration under the ECT. *Id.* ¶ 502(1), (5)-(8). The Tribunal further ruled that "nothing in the *Achmea* ruling . . . could deprive a Tribunal so constituted of jurisdiction" because the Tribunal is "a creature of international law," not EU law. *Id*. ¶ 502(8), (11), (13)-(14). The Tribunal explained that while "[i]t is true that EU law is international law because it is rooted in international treaties . . . it does not follow that all of EU law is international law for all purposes, or that it will necessarily be the applicable law in all circumstances." *Id.* ¶ 502(16). Here, the applicable law was the ECT and "applicable rules and principles of international law," not EU law. *Id.* ¶ 502(3).

On the merits, the Tribunal found that Spain had breached its obligations, under Article 10(1) of the ECT, to accord fair and equitable treatment to Petitioners' investments by depriving Petitioners of "a reasonable rate of return" on that investment. Jx. Dec. ¶¶ 308-09, 695, 697, 717, 770(3); Award ¶¶ 26-27. In August 2020, therefore, the Tribunal issued the Award, directing Spain to pay Petitioners €30,875,000 as compensation, plus interest at the one-year EURIBOR rate plus 1%, compounded annually, from June 1, 2013 until the date of payment. Award ¶ 162(1).

On September 30, 2020, Spain submitted an application to ICSID for an annulment of the Award. Decision on Stay of Enforcement of the Award ¶ 2 ("Stay Denial") (Ex. A to Declaration of Matthew S. Rozen ("Rozen Decl."), Ex. 1 hereto). The Convention ordinarily allows enforcement of awards to proceed during the pendency of annulment proceedings unless enforcement is

stayed under the Convention. ICSID Convention, arts. 53(1), 54. But Spain's annulment application included a request to stay enforcement. Stay Denial ¶ 2. Under the ICSID Convention, that request automatically triggered a provisional stay of enforcement until a committee could be constituted and decide Spain's request for a longer stay while annulment proceedings are pending. ICSID Convention, art. 52(5).

On December 14, 2020, ICSID constituted a committee to hear Spain's annulment application (the "Committee"). Stay Denial ¶ 4. On March 26, 2021, the Committee issued a decision declining to continue the stay of enforcement of the Award. *Id.* ¶ 122. The Committee explained that Petitioners would suffer serious adverse economic consequences from a stay because an Award "is an instrument of value and that value is measured by its enforceability," which a stay will "inevitably" affect. *Id.* ¶ 96. And the Committee underscored the "real risk," given the many arbitral awards outstanding against Spain, that Petitioners would be "pushed to the back of a long line of award-creditors." *Id.* ¶ 99. Any potential harm to Spain from denying a stay, by contrast, could be mitigated by Petitioners' offer to provide an undertaking as security pending the denial of Spain's annulment petition. *Id.* ¶ 120. The Committee thus denied Spain's request to continue a stay of enforcement of the Award, while directing Petitioners to post the undertaking they had volunteered, *id.* ¶ 122, which Petitioners have posted, Hydro Undertaking (Ex. B to Rozen Decl.).[3]

While the annulment proceedings were pending, the CJEU decided Case No. C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2021) ("*Komstroy*"), bit.ly/3vybAr8, which extended *Achmea*'s holding from bilateral treaties to the ECT, a multilateral treaty. The CJEU held that the ECT's arbitration provision, by assigning intra-EU disputes to an arbitral tribunal not "situated within the judicial system of the European Union," was incompatible

[3] Spain has requested reconsideration of the Committee's stay denial, *see* Spain's Request for Reconsideration (Ex. C to Rozen Decl.), but the Committee has yet to rule on that request.

with EU law in the "same way as . . . in . . . *Achmea*." *Id.* ¶¶ 51-52. *Komstroy* was submitted in the annulment, and Spain addressed it at length at the annulment hearing. Annulment Proceeding Tr. (Ex. D to Rozen Decl.) at 7:20-21, 41-45, 125-26. The annulment Committee has yet to rule.

IV. This Enforcement Proceeding

Upon its rendering, the Award was fully enforceable and due in full, but despite its agreement to "comply with the terms of the award except to the extent that enforcement shall have been stayed," ICSID Convention, art. 53(1), Spain has not paid any portion of the Award. Accordingly, Petitioners commenced this action to recognize and enforce the Award.

Recognition and enforcement of ICSID awards in the United States is governed by 22 U.S.C. § 1650a, which implements the treaty obligations of the United States, as a contracting party to the ICSID Convention, to ensure that U.S. courts treat an ICSID award "as if it were a final judgment" of a state court. ICSID Convention, art. 54(1). Section 1650a thus provides, in relevant part, that "[t]he pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Enforcement proceedings are commenced by "fil[ing] a plenary action under section 1650a" to "convert [the] award into an enforceable judgment" in federal court, *Micula v. Gov't of Romania*, 104 F. Supp. 3d 42, 49-51 (D.D.C. 2015), in compliance with the Federal Rules of Civil Procedure and the FSIA's personal jurisdiction, service, and venue requirements, 28 U.S.C. §§ 1330, 1391(f), 1608; *see Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 100, 117-20 (2d Cir. 2017). Further, the statute specifies that even the limited grounds for vacating or refusing confirmation of an ordinary arbitration award under the FAA, 9 U.S.C. §§ 9-10, "shall not apply to enforcement of awards rendered pursuant to the [ICSID] convention," 22 U.S.C. § 1650a(a). "By expressly precluding the FAA's application to enforcement of ICSID Convention awards, Congress intended

to make these grounds of attack unavailable to ICSID award-debtors in federal court enforcement proceedings." *Mobil Cerro Negro*, 863 F.3d at 120-21.

Consistent with these procedures, Petitioners commenced this proceeding in September 2021 by filing its Petition requesting that this Court: (1) enforce the Award pursuant to 22 U.S.C. § 1650a in the same manner as a final judgment of a state court; and (2) enter judgment against Spain in the amount specified in the Award. ECF No. 1. Petitioners effected service of process on Spain in accordance with the FSIA, 28 U.S.C. § 1608(a), on November 11, 2021. ECF No. 7.

ARGUMENT

Spain's motion to dismiss seeks to do what Congress has expressly prohibited: to collaterally attack Petitioners' ICSID award. Under the ICSID Convention's plain terms, the United States is obligated by treaty to enforce such awards without permitting "any appeal" or "any other remedy except those provided for in th[e] Convention." ICSID Convention, art. 53(1). In Section 1650a, which implements the Convention, Congress required that ICSID awards "shall be enforced" and "given the same full faith and credit" as state court judgments. 22 U.S.C. § 1650a(a).

Section 1650a thus envisions a "perfunctory role . . . for federal district courts," *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, 2018 WL 6605633, at *6 (D.D.C. Dec. 17, 2018), in which an award debtor "[is] not . . . permitted to make substantive challenges to the award," *Mobil Cerro Negro*, 863 F.3d at 118. District courts "are . . . not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award." *Id.* at 102. Instead, courts "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Id*.

Spain seeks to avoid these clear limitations by framing its challenge to the Award as an argument that this Court lacks subject-matter jurisdiction under the FSIA. But the FSIA creates subject-matter jurisdiction over Petitioners' petition to enforce the Award without regard to any

challenge to the Tribunal's determination that Spain lawfully consented to binding arbitration under the ECT. And Spain's EU-law challenges to that determination fail on their own terms because Spain's consent to arbitration is governed by international law, not EU law. Further, because the ICSID Convention and Section 1650a do not permit any substantive defenses to enforcement of ICSID awards—and D.C. Circuit precedent squarely forecloses Spain's invocation of *forum non conveniens*—there is no basis to deny enforcement of the Award once this Court concludes that it has jurisdiction under the FSIA. Nor has Spain carried its heavy burden of justifying an indefinite stay of these proceedings while the Committee decides Spain's request to annul the Award. Instead, this Court should deny Spain's motion to dismiss without delay.

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

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

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

Under the FSIA's waiver exception, a foreign state is subject to jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Because the ICSID Convention expressly contemplates enforcement of ICSID awards against signatory states in the courts of other signatories, including the United States, Spain's signing of the Convention necessarily waived its immunity from such enforcement in U.S. court. And since

that waiver is based on Spain's consent to *enforcement* in *the ICSID Convention*, jurisdiction in no way depends on whether Spain consented to *arbitration* in *the ECT*.

1. Spain's argument that it did not "expressly waive immunity," Spain Br. 20, is irrelevant here, as this case involves a waiver "by implication." To waive immunity by implication, a state need only "indicat[e] its amenability to suit" in U.S. court, *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994), by either: (a) showing "a subjective intent to waive immunity"; (b) "tak[ing] an act that objectively can be interpreted as exhibiting an intent to waive immunity"; or (c) "tak[ing] acts that forfeit its right to immunity, irrespective of whether it has intended to do so," *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 202 (2d Cir. 1999).

Based on these principles, it is well settled that when a foreign state joins a treaty that "contemplate[s] arbitration-enforcement actions in other signatory countries, including the United States"—as the ICSID Convention plainly does, *see supra*, at 5-6—it "waives its immunity from arbitration-enforcement actions" under the FSIA. *Tatneft I*, 771 F. App'x at 10. The D.C. Circuit held that this principle was "correc[t]" in *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). And in *Tatneft I*, the D.C. Circuit applied *Creighton* to hold that by signing the New York Convention—a treaty in which "signatories agree to enforce arbitral awards made in other signatory countries"—Ukraine waived its immunity to enforcement of arbitral awards under that Convention. 771 F. App'x at 9.[4] The Second Circuit has applied the same rule

[4] Though *Tatneft I* is "unpublished," Spain Br. 22, it is binding on this Court. Unpublished decisions that postdate January 1, 2002 "may be cited as precedent" in this circuit, D.C. Cir. R. 32.1(b)(1)(B), and have the same "precedential value" that "the Supreme Court grants to its own . . . summary affirmances," *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011), which are binding on "lower courts," *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). The D.C. Circuit did not need to publish *Tatneft I* because *Creighton*, which the court found "control[ling]," already established that relevant principle that "a sovereign [that] sign[s] the New York Convention . . . waives its immunity from arbitration-enforcement actions in other signatory states." 771 F. App'x at 10. Citing the D.C. Circuit's recent decision in *Process & Industrial Developments Limited v. Federal*

to find waivers under both the ICSID Convention, *Blue Ridge*, 735 F.3d at 84, and the New York Convention, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 578-79 (2d Cir. 1993). And this Court followed that rule in *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 190 (D.D.C. 2016), and *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 2020 WL 7122896 (D.D.C. Dec. 4, 2020), *aff'd on other grounds*, 27 F.4th 771 (D.C. Cir. 2022).

These decisions directly undercut Spain's rather outdated assertion that the D.C. Circuit has found implied waiver in "only three" situations not applicable here. Spain Br. 21.

2. Spain attempts to cabin *Creighton* and *Tatneft I* to "'commercial'" arbitration under "the New York Convention." Spain Br. 22. But both conventions are materially identical in this respect, as each contemplates enforcement actions in other member nations, including the United States. Under the ICSID Convention, Contracting States agree to "enforce the pecuniary obligations imposed by [an] award within [their] territories as if it were a final judgment of a court in that State." ICSID Convention, art. 54(1); *see also* Declaration of Andrea K. Bjorklund ("Bjorklund Decl.") ¶ 55, filed herewith. They also agree to "abide by and comply with" all awards against them, ICSID Convention, art. 53(1), subject to such enforcement. Contracting States thus necessarily "'contemplat[e] enforcement actions in other Contracting States,'" including the United States, and thus "waiv[e] [their] sovereign immunity" from enforcement of an ICSID award "by becoming a party to the ICSID Convention." *Blue Ridge*, 735 F.3d at 84 (alterations omitted).

Spain claims ICSID Convention Article 55 "expressly preserves sovereign immunity."

Republic of Nigeria, 962 F.3d 576 (D.C. Cir. 2020), the European Commission misleadingly suggests that *Tatneft* "lack[s] precedential effect." European Commission Br., ECF No. 7 ("EC Br."), at 21. But *Process & Industrial Developments* states only that *Tatneft I*, like all unpublished decisions, "does not bind future panels" *of the D.C. Circuit*. 962 F.3d at 584. *This Court*, by contrast, is duty-bound to follow the D.C. Circuit's command, including its unpublished decisions.

Spain Br. 22. But the only immunity that article preserves is "immunity . . . from execution," ICSID Convention, art. 55, not jurisdiction. These "two kinds of immunity" are distinct. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 142 (2014). Jurisdictional immunity protects states from suit, 28 U.S.C. §§ 1604-1607, while execution immunity protects state assets from seizure, *id.* §§ 1609-1611. Spain invokes only immunity from suit, Spain Br. 16, but the Convention does *not* preserve that immunity. Indeed, by expressly preserving execution immunity without mentioning immunity from suit, the Convention makes clear that the latter is *not* preserved. If the drafters "intended to . . . preserv[e]" both, "it would be strange to mention specifically only [one], and leave the [other] to implication." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232 (2011).

A slew of recent foreign decisions confirm the point. The High Court of New Zealand, for example, deemed it "clear" that parties to the ICSID Convention "have agreed that an ICSID arbitral award will be recognised as enforceable before domestic courts." *Sodexo Pass Int'l SAS v. Hungary*, CIV-2020-485-734 [2021] NZHC 371 ¶¶ 23, 25 (Dec. 10, 2021) ("*Sodexo*"), bit.ly/35SaBcf. Those States have "waived any adjudicative immunity . . . in relation to recognition" of the award, the High Court explained, while retaining only the limited "immunity in relation to execution steps." *Id.* ¶ 25. Two recent decisions of the Full Court of the Federal Court of Australia underscore the same basic rule: Articles 54(1) and (2) of the ICSID Convention "constitute Spain's agreement to submit to the jurisdiction" of the courts of other parties to the Convention and "not to raise any immunity" to the jurisdiction of those courts in a proceeding seeking recognition of an ICSID award. *Kingdom of Spain v. Infrastructure Servs. Luxembourg S.A.R.L.*, [2021] FCAFC 3 ¶¶ 37, 72, 113 (Feb. 1, 2021) (Ex. 2 hereto). The ICSID Convention thus offers no immunity from suit; the only "immunity recognized by the ICSID Convention was as to execution." *Kingdom of Spain v. Infrastructure Servs. Luxembourg S.A.R.L.*, [2021] FCAFC 112 ¶ 7 (June 25,

2021) ("June Dec.") (Ex. 3 hereto).[5] The overwhelming weight of international authority thus rejects Spain's baseless assertion that it is immune from suit under Article 55 of the ICSID Convention. *See also id.* ¶ 38 (citing, *e.g.*, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Paris Ct. App. Dec. (June 26, 1981), 1 ICSID Rep. 368, 371 (Ex. 5 hereto); *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, French Ct. of Cassation Dec. (June 11, 1991), 2 ICSID Rep. 341) (Ex. 6 hereto)).[6]

3. Spain's waiver of immunity in no way depends, as Spain argues, on whether it "agree[d] to arbitrate" the underlying dispute. Spain Br. 21-23. The waiver occurs "'when [the] country becomes a signatory to the Convention,'" *Creighton*, 181 F.3d at 123—"by becoming a party," *Blue Ridge*, 735 F.3d at 84—not later, by signing an arbitration agreement (like the ECT). Ukraine's waiver in *Tatneft I* was thus based on its consent to "enforcement" under the New York Convention, 771 F. App'x at 9—not, as Spain suggests, its "agreement to arbitrate" the specific dispute, Spain Br. 22. The D.C. Circuit upheld jurisdiction in *Tatneft I* without even *mentioning*, much less rejecting, Ukraine's assertion that it "did not agree to arbitrate th[e] dispute"—and that

[5] The Full Federal Court's decisions are currently on appeal to the High Court of Australia, which granted special leave to appeal on March 18, 2022. *See* High Court of Australia, Results of Applications Listed at Canberra (Mar. 18, 2022), bit.ly/3vxnX6H.

[6] Spain's position is not strengthened by invoking an isolated sentence from State Department Legal Adviser Andreas Lowenfeld's testimony in support of the enactment of Section 1650a, the statute that implements the ICSID Convention. Spain Br. 22-23. The issue here is what the FSIA requires, and whether *Spain's* signing the Convention satisfies that requirement, not what the State Department thought when Congress enacted Section 1650a a decade before the FSIA. And Lowenfeld himself recognized that, by signing the ICSID treaty, the United States "consented . . . to be sued on an award if it hasn't been paid." Testimony of Andreas Lowenfeld, *Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the H. Comm. on Foreign Affairs, Subcomm. on Int'l Orgs. & Movements*, 89th Cong. 8-9 (1966). This confirms that signing the ICSID treaty effects a waiver of immunity. Moreover, Lowenfeld testified that an ICSID "tribunal would be the judge of its own jurisdiction" and "parties to an arbitration should be entitled to rely on an award as dispositive of the dispute between them." *Id*. Thus, his testimony—even assuming it accurately "reflect[ed] [the views] of the legislators who actually voted on the bill," *Indep. Bankers Ass'n of Am. v. Farm Credit Admin.*, 164 F.3d 661, 668 (D.C. Cir. 1999)—certainly could not justify relitigating the Tribunal's finding that Spain consented to arbitration.

"[n]o agreement to arbitrate" the claims of two of the companies involved was ever "formed," Br. for Appellant, *Tatneft v. Ukraine*, No. 18-7057, Doc. ID 1748825, at 43, 46 (D.C. Cir. Sept. 4, 2018) (cleaned up). That consideration plainly made no difference to the court's jurisdictional analysis under the waiver exception, undercutting Spain's suggestion that the existence of "a valid agreement to arbitrate" was *Tatneft*'s "fundamental premise." Spain Br. 22. And it is even less relevant under the ICSID Convention, where Contracting States agree that an ICSID tribunal—not the enforcing court—will determine whether the parties to a dispute have consented to arbitration, ICSID Convention, arts. 25, 41, and that this determination will be "final" and "binding" in enforcement proceedings without "any appeal or . . . other remedy," *id.*, arts. 53(1), 54(1). Spain's consent to enforcement proceedings thus depends solely on whether the Tribunal found jurisdiction and entered an award—not whether the Tribunal was correct to do so.

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

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

This Court also has jurisdiction under the FSIA's arbitration exception, which permits a proceeding against a foreign state to "confirm an award" made pursuant to an agreement "by the foreign state," "with or for the benefit of a private party," to "submit to arbitration," if the "award is . . . governed by a treaty," such as the ICSID Convention, that is "in force for the United States" and that "call[s] for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

Spain does not dispute that this is a proceeding to "confirm an award" under the ECT, or that the Award is "governed by" the ICSID Convention. Instead, it claims no "'valid . . . agreement'" to "'submit to arbitration'" was formed because under the CJEU's *Achmea* and *Komstroy* decisions, "EU law" bars application of the ECT's arbitration provision to intra-EU disputes.

Spain Br. 16-17. As shown below, those decisions have no bearing on the ECT's validity under international law. But the more immediately dispositive point is that the Tribunal already rejected Spain's argument that EU law could deprive the Tribunal of jurisdiction. Jx. Dec. ¶ 502(13). Section 1650a bars Spain from collaterally attacking that determination. If that were not enough, the Supreme Court has repeatedly recognized that courts may not override contracting parties' decisions to commit questions of arbitrability to arbitration, as the ECT does here.

1. Under The ICSID Convention, The Tribunal's Rulings Are Entitled To Full Faith And Credit, Resulting In Issue Preclusion

The ICSID Convention and its implementing statute preclude Spain from challenging the Tribunal's determination that Spain agreed to arbitrate this dispute. Courts are "not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award," and "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Mobil Cerro Negro*, 863 F.3d at 102. Section 1650a requires this Court to give the Award "the same full faith and credit" as a state court judgment in "enforc[ing]" the "pecuniary obligations imposed by [the Award]." 22 U.S.C. § 1650a(a). "'[F]ull faith and credit,'" in turn, "has long been understood to encompass . . . collateral estoppel, or 'issue preclusion,'" *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 336 (2005), meaning that once a tribunal "decide[s] an issue . . . necessary to its judgment," the decision "preclude[s] relitigation of the issue," *Allen v. McCurry,* 449 U.S. 90, 94 (1980).

The requirements for issue preclusion are easily satisfied here. Issue preclusion prohibits the relitigation of an issue of fact or law that was (1) "contested by the parties and submitted for judicial determination in the prior case" and (2) "actually and necessarily determined by a court of competent jurisdiction in that prior case," if (3) "preclusion in the second case [does] not work a basic unfairness to the party bound by the first determination." *Yamaha Corp. of Am. v. United*

States, 961 F.2d 245, 254 (D.C. Cir. 1992). Here, Spain actively argued in the arbitration that the ECT's arbitration provision "is not applicable" to disputes concerning "intra-EU investments," and that applying it to such disputes would be "incompatible with . . . EU law" and *Achmea*, Jx. Dec. ¶¶ 173-74, 186-96. The Tribunal actually decided the issue, holding that "nothing in . . . *Achmea* . . . could deprive [the] Tribunal . . . of jurisdiction" because it is "a creature of international law," not EU law. *Id*. ¶ 502(8), (11), (13)-(14). This holding was necessary to the Tribunal's determination that it had jurisdiction under the ECT. *Id.* ¶ 502. And Spain had every "incentive to litigate the point" in the arbitration, so there is no "unfairness" in binding it. *Yamaha*, 961 F.2d at 254.

Spain argues that this Court is not bound by the Tribunal's holding that Spain consented to arbitration because that holding implicates the Tribunal's "jurisdiction." Spain Br. 25. Spain asserts that if "there was no valid agreement to arbitrate," the "Tribunal is . . . without jurisdiction," and that courts to which an arbitral award is tendered for enforcement always may examine whether the arbitral panel exceeded its jurisdiction. *Id*. If this were correct, an arbitral tribunal's determination of arbitrability *never* could be given preclusive effect, because *all* arbitrability questions can be formulated as questions concerning the tribunal's "jurisdiction." But that is not the law. Indeed, the cases Spain cites hold the opposite: "[A] judgment is entitled to full faith and credit—*even as to questions of jurisdiction*—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (emphasis added) (cleaned up). When "the [initial] tribunal's subject matter jurisdiction is raised in the original action," its "determination of th[at] issue" is "conclusive under the usual rules of issue preclusion," *Carr v. District of Columbia*, 646 F.2d 599, 607-08 (D.C. Cir. 1980) (alteration omitted), even if the second court "disagrees with the

reasoning underlying the judgment," *V.L. v. E.L.*, 577 U.S. 404, 407 (2016). This is true "even as to questions of *ICSID's jurisdiction*." *Tidewater*, 2018 WL 6605633, at *6 n.4 (emphasis added). Where, as here, that issue "has been 'fully and fairly litigated and finally decided' by the tribunal, this Court has no authority to relitigate the matter." *Id.* Indeed, even if jurisdiction is not raised before the initial tribunal, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

2. Under The Energy Charter Treaty, The Question Of Whether Spain Consented To Arbitration Is For The Tribunal, Not This Court

Even if issue preclusion did not apply, this Court would be required to defer to the Tribunal's determination that Spain consented to arbitration because the ECT and the ICSID Convention delegate that question to the Tribunal, not the courts. Even in the commercial arbitration context, where full faith and credit is not the rule, it is now settled that "parties can agree to arbitrate 'gateway' questions of 'arbitrability.'" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Spain may argue that the term "arbitrability" refers only to the *applicability* of an arbitration agreement, but Supreme Court precedent is clear that the "arbitrability" issues that the parties can agree to arbitrate include "'whether [the] parties have a valid arbitration agreement.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). "[P]arties may agree to have an arbitrator decide . . . 'whether the parties have agreed to arbitrate,'" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), and when they do, courts "must defer to [the] arbitrator's arbitrability decision," *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995).[7]

[7] Spain quotes *Henry Schein* out of context as holding that "'the court'" must "'determin[e] whether a valid arbitration agreement exists,'" Spain Br. 17, but the quoted line merely describes a court's role when asked to "refe[r] a dispute to an arbitrator," 139 S. Ct. at 530—that is, before there is any arbitral decision to defer to. The Supreme Court expressly rejected Spain's suggestion that "a court must always resolve questions of arbitrability." *Id.* Any argument that *National*

The same analysis applies under the FSIA's arbitration exception. *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. 2015)—which involved a commercial arbitration subject to the New York Convention, *id.* at 203—lays out the standard that would apply in the absence of issue preclusion. A plaintiff meets its "initial burden" of establishing that a foreign state has "agreed to arbitrate" simply by "producing" the agreement, the "notice of arbitration," and "the tribunal's arbitration decision," *id.* at 204-05—as Petitioners unquestionably have done here.[8] The "burden" then "shift[s]" to the foreign state to show that there is not "a valid arbitration agreement between the parties." *Id.* at 205. In *Chevron*, the district court made this arbitrability determination applying the New York Convention's "deferential standard of review" because the relevant arbitration rules provided for the arbitral tribunal to "resolve issues of arbitrability." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64, 67 (D.D.C. 2013).[9] The D.C. Circuit affirmed, agreeing that Ecuador's challenge to arbitrability was "properly considered . . . under the New York Convention" standard—not "*de novo*," which would "conflat[e] . . . jurisdictio[n]" with the merits. 795 F.3d at 205-06. The D.C. Circuit thus relied on the district court's deferential analysis in finding jurisdiction under the arbitration exception. *Id*. at 205 n.3 (citing 949 F. Supp. 2d at 63 and quoting language that appears at 67). *Chevron* thereby "rejected Ecuador's assertion that 'the arbitrability question is . . . a jurisdictional question'" that must be determined *de novo* independent from the standard of review applicable to a tribunal's merits determinations. *LLC Komstroy v.*

Railroad Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756 (D.C. Cir. 1988), or *Brotherhood of Teamsters Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987), holds otherwise, Spain Br. 16-17, is foreclosed by decades of subsequent Supreme Court decisions.

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

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

Republic of Moldova, 2019 WL 3997385, at *5 (D.D.C. Aug. 23, 2019).

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

Critically, the award enforced in *Stileks* was the very same arbitration award that the CJEU addressed in *Komstroy*—the main case on which Spain relies (at 17-18) in contending that FSIA's arbitration exception does not apply—and to the very same arbitration agreement at issue in that case and here (the ECT). As Spain does here, Moldova argued in *Stileks* that it had never "agreed to arbitrate th[e] particular dispute" decided in the award. 985 F.3d at 878 (emphasis omitted). Like Spain, Moldova argued that this supposed lack of consent defeated jurisdiction under the FSIA's arbitration exception. *Id.* at 877. The D.C. Circuit rejected this argument, concluding that it was required to "accept the arbitral tribunal's determination" that the arbitration dispute "fell within the ECT" because Moldova—by joining the ECT—had "agreed to assign arbitrability determinations to the [arbitral] tribunal." *Id.* at 878-79. *Stileks* therefore makes clear that the existence of a valid arbitration agreement is among the issues that Spain may not relitigate *de novo* in determining jurisdiction under the FSIA's arbitration exception.

Here, too, the applicable arbitration rules provided for the Tribunal to resolve all objections to its jurisdiction. The ICSID Convention unmistakably provides that "[t]he Tribunal shall be the

judge of its own competence," and shall consider "[a]ny objection . . . that [a] dispute is not within the jurisdiction of [ICSID], or . . . the competence of the Tribunal." ICSID Convention, art. 41. And "ICSID's jurisdictional power . . . renders binding on this Court the Tribunal's arbitrability determination." *Tethyan*, 2022 WL 715215, at *9. *Tethyan* thus applied these principles in an ICSID case to reject a virtually identical challenge to jurisdiction: The petitioner sought to enforce an arbitral award issued against a foreign state—Pakistan—pursuant to the ICSID Convention, and Pakistan moved to dismiss under the FSIA, alleging that no valid arbitration agreement existed between the parties. *Id.* at *7. This Court rejected these arguments and denied the motion to dismiss, concluding that the arbitral tribunal's determination that a valid arbitration agreement existed was "binding" on the Court. *Id*. at *9-11. The Court emphasized that *Stileks* had "rejected" a foreign sovereign's "tactic" of using an arbitrability argument to "'bolster its claim of sovereign immunity' under FSIA." *Id.* at *8. It was enough that Pakistan "agreed to be bound by the ICSID Convention," and that "the Tribunal found" that the sovereign agreed to arbitrate. *Id*. at *9. As in *Chevron*, *Stileks*, and *Tethyan*, arbitrability—including whether Spain consented to arbitration—was for the Tribunal to decide, and this Court "cannot disturb" that determination. *Id.*

C. Spain's Argument Is Contrary To The ICSID Convention And The FSIA

Should this Court have any doubt that the FSIA requires enforcement of the Award without permitting Spain's collateral attack on the Tribunal's findings, the ICSID Convention and the FSIA would resolve it in favor of finding jurisdiction. Nothing in the Convention's text permits the United States to condition enforcement of an ICSID award on a court's independent assessment of the validity of Spain's consent to arbitration. To the contrary, the Convention requires the United States to enforce ICSID awards without permitting "any appeal or . . . *any other remedy* except those provided for in th[e] Convention." ICSID Convention, art. 53(1) (emphasis added). Declining enforcement on jurisdictional grounds would thus violate the ICSID Convention.

There is no conflict between the United States' treaty obligations under the ICSID Convention and the FSIA. The FSIA is expressly drafted to avoid any such conflict. It grants foreign states jurisdictional immunity only "[s]ubject to existing international agreements to which the United States [was] a party" when the FSIA was enacted in 1976. 28 U.S.C. § 1604. The Convention—ratified by the United States in 1966—is such a pre-existing "international agreemen[t]," *id.*, so the Convention's mandate must control to the extent of any conflict with the FSIA. Further, under settled principles of statutory interpretation, courts in this Circuit must interpret federal statutes "to avoid . . . conflicts" with preexisting treaties. *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 724 F.3d 230, 233-34 (D.C. Cir. 2013). This Court should therefore reject Spain's invitation to subvert the ICSID Convention's unequivocal directive by pitting it against the FSIA. Both the FSIA and settled rules of interpretation demand an interpretation of the FSIA that avoids any conflict with the United States' obligations under the ICSID Convention.

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

For the reasons just stated, this Court need not and should not reach the merits of Spain's improper collateral attack on the Tribunal's determination that Spain validly consented to arbitration. There is no need to consider the submissions of the parties' experts on EU and international law because U.S. law—specifically, 22 U.S.C. § 1650a—binds this Court to accept the Tribunal's conclusion that it had jurisdiction, and that, in turn, disposes of Spain's strained contention that this case is not one to "confirm an award made pursuant to" an agreement to arbitrate within the meaning of 28 U.S.C. § 1605(a)(6). Should the Court nonetheless revisit arbitrability afresh as Spain urges, it should reject Spain's argument because the Tribunal was correct: Spain undeniably consented to arbitration, and irrespective of EU law, its consent was valid under international law.

Spain does not contest the Tribunal's holding that the ECT's arbitration provision—Article

26—was intended to apply to intra-EU disputes. Jx. Dec. ¶¶ 450-51, 455-71.[10] That provision expresses each Contracting Party's consent to arbitrate all "[d]isputes between a Contracting Party and an Investor of another Contracting Party" concerning investments covered by the treaty. ECT, art. 26(1). Spain is undeniably a "Contracting Party," *id.*, art. 1(2); *see supra*, at 5; Petitioners undeniably are "Investors of" Luxembourg and Sweden because they are "organized in accordance with the law applicable in" those countries, ECT, art. 1(7); and those countries undeniably also are "Contracting Parties," *id.*, art. 1(2); *see supra*, at 5; Bjorklund Decl. ¶¶ 84-87.

Rather than contest the ECT's plain terms, Spain argues that they are fundamentally a lie. Spain now claims years after the fact that its own unambiguous consent to arbitrate this investment dispute was "void *ab initio*" because applying the ECT's arbitration provision to intra-EU disputes is "incompatible with EU law." Spain Br. 1. That contention lacks merit. Indeed, all 40 arbitral decisions that address the issue have rejected it. *See* Bjorklund Decl. ¶ 161. The scope of the Tribunal's jurisdiction is governed not by *EU law*, but by *public international law*, and the EU's internal law cannot override Spain's consent and duty under international law to arbitrate this dispute and honor its commitment. *Id.* ¶¶ 84-131.

[10] The European Commission (the "Commission") submits as an *amicus* that "the EU and its Member States assume[d] no *inter se* obligations when they enter[ed]" into the ECT, because the EU is a "Regional Economic Integration Organization" ("REIO") that acts as a single entity, with its Member States "bound by treaty obligations to other contracting parties but not as between themselves." EC Br. 9-10. But Spain never made that argument, so it is forfeited. It is also meritless. While it is true that an regional organization like the EU may join the ECT as an additional "Contracting Party," ECT, art. 1(2), that means only that it takes on *its own* duties under the treaty. The ECT contemplates that a regional organization may exercise "competence over . . . matters . . . governed by th[e] Treaty," *id.*, art. 1(3), so by acceding to the treaty, it may bind itself in exercising that competence. But the organization's members remain bound by their own commitments, too, and where appropriate, investors may "initiate proceedings against both the [EU] and [its] [m]ember[s]," as the EU's signing statement confirms. Statement Submitted by the European Communities to the Secretariat of the ECT Pursuant to Art. 26(3)(b)(ii) of the ECT, [1998] O.J. L69/115, n.1, bit.ly/3vjcnMc; *see* Bjorklund Decl. ¶¶ 103-04. The Commission's attempt to modify the ECT to eliminate *inter se* obligations between EU members was expressly rejected during the drafting process, *see infra*, at 29-30, so the Commission's interpretation is not plausible.

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

"[T]he customary international law of treaties" is "codified in the Vienna Convention on the Law of Treaties," 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980) ("Vienna Convention") (Ex. 4 hereto). *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000). Spain has acceded to the Vienna Convention and is bound by its rules. *See* United Nations Treaty Collection, *Vienna Convention on the Law of Treaties*, bit.ly/3jxncox. Though the United States has not signed the Vienna Convention, the State Department recognizes that it is "the authoritative guide to current treaty law and practice." William P. Rogers, U.S. Secretary of State, *Report on the Vienna Convention on the Law of Treaties*, 65 Dep't St. Bull. 684, 685 (Dec. 13, 1971); *see also* Bjorklund Decl. ¶ 89. Federal courts apply it accordingly. *Chubb*, 214 F.3d at 308 (citing, *e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982)); *see also United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) (Vienna Convention establishes "[b]asic principles of treaty interpretation").

A central premise of treaty law is that every sovereign state "possesses capacity to conclude treaties," and "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, arts. 6, 26. This is true regardless of the state's internal views of the validity of its commitments: A state may neither "invoke the provisions of its internal law as justification for its failure to perform a treaty," nor "invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding

competence to conclude treaties as invalidating its consent." *Id*., arts. 27, 46(1); *see also* Bjorklund Decl. ¶¶ 153-54.[11] This rule ensures the "stability of treaty relations" by preventing states from "seek[ing] to avoid [their] treaty obligations by invoking decisions by [their] courts or other constructions of [their] domestic law." Restatement (Fourth) of Foreign Relations Law: Treaties, Tentative Draft No. 2 § 102, Reporter's Note 6 (Mar. 20, 2017).

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

[11] The sole exception is if the "violation was manifest and concerned a rule of its internal law of fundamental importance"—*i.e.*, if the parties to the treaty had notice that it was unlawful when it was adopted. Vienna Convention, art. 46(1). Spain does not and cannot contend that any purported conflict between the ECT and EU law was "manifest" when the ECT was signed in 1994 or ratified in 1998. The "Member States to the EU signed the ECT without qualification or reservation." *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, ¶ 283 (Dec. 27, 2016), bit.ly/3waaYKc ("*Blusun*"). Indeed, the ECT *permitted* "[n]o reservations," ECT, art. 46, so the EU and its members could not have joined it without accepting all of its terms, *see* Bjorklund Decl. ¶ 138. "[N]o EU institution and no Member State sought an opinion from the [CJEU] on the [ECT's] compatibility" with EU law "because none of them had the slightest suspicion that it might be incompatible." Opinion of Advocate General Wathelet ¶ 43, Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2017:699 (Sept. 19, 2017), bit.ly/3E82IfA.

Martinez, 755 F. Supp. 1031, 1032-33 (N.D. Ga. 1991) (citing Vienna Convention, arts. 27, 46). Articles 27 and 46 of the Vienna Convention apply these same principles to all treaties.

These principles prevent Spain from invoking the EU's internal law to invalidate its own international-law commitments under the ECT. EU law, as interpreted by the high EU court—the CJEU—is *internally* binding within the EU in specific ways. The courts of EU member states must accept the CJEU's interpretation of the EU's founding treaties. *See* TFEU, art. 267. And if EU members breach their EU-law obligations, the European Commission may "bring the matter before the [CJEU]." *Id*., art. 258. But neither of these principles allows the CJEU to invalidate the EU's or its members' international law obligations. *See* Bjorklund Decl. ¶¶ 12, 146-47. EU law operates on "an internal . . . plane" within the EU legal system, but *outside* of EU tribunals its effect is qualified by the Vienna Convention rule that a State "may not invoke . . . internal law regarding competence to conclude treaties" as a means "to invalidate a treaty" already concluded. *Blusun* ¶ 283; *see also* Bjorklund Decl. ¶¶ 12, 146-50.

B. Spain contends that EU law also has external consequences because "the EU treaties" themselves are "international law." Spain Br. 18; *see also* EC Br. 16-17. But it cites no principle of international law under which the EU's treaties supersede Spain's competing commitments under the ECT. The EU and its members' views (as parties to the ECT) are not entitled to any weight when it comes to interpreting the international obligations imposed by the ECT on its contracting parties, because only collective action by all parties to a treaty—for example, an "agreement between the parties regarding . . . interpretation" or an instrument made by one party and "accepted by the other parties"—can modify its plain meaning and effect. Vienna Convention, art. 31(2)(b), (3)(a); Bjorklund Decl. ¶¶ 125, 128. And Spain's assertions of the "primacy" of EU law, Spain Br. 4, *see also* EC Br. 7-8, 16, invoke a principle of EU law that governs the interaction between

EU law and the *domestic* laws of EU member states, not between EU law and the *international* obligations of the EU and its members. Bjorklund Decl. ¶¶ 146-49; *see also* Jx. Dec. ¶ 502(17). Instead, under international law, to the extent there is any conflict between the ECT and the EU's foundational treaties—the source of EU law and the basis for both Spain's objection to intra-EU arbitration under *Achmea* ¶¶ 31-60 and *Komstroy* ¶¶ 51-80, *see* Spain Br. 5—the ECT controls by its plain terms and under ordinary treaty interpretation principles.

The ECT expressly provides that its dispute resolution provisions supersede prior treaties that are less protective of investors' rights. Under the heading "Relation to Other Agreements," Article 16 specifies precisely how the ECT should apply when a "prior" or "subsequent" treaty addresses the same "subject matter" as the ECT's dispute resolution provisions. ECT, art. 16(2). If the ECT's provisions are "more favourable to the Investor" than the other treaty, the ECT controls, and the other treaty may not "be construed to derogate from" the investors' rights under the ECT, including "any right to dispute resolution." *Id*. As a matter of international law, therefore, the EU treaties *cannot* be construed to "derogate from an Investor's right to dispute resolution" under the ECT. *Vattenfall AB v. Fed. Republic of Germany*, ICSID Case No. ARB/12/12, Decision on Achmea Issue ¶ 195 (Aug. 2018), bit.ly/3Kqecxo; *see also* Bjorklund Decl. ¶¶ 135-39.

The result would be the same even absent Article 16 of the ECT under the rule of *lex posteriori*, which recognizes that where two treaties are at issue, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Vienna Convention, art. 30(3); *see also* Bjorklund Decl. ¶¶ 141-42. In a "conflict between two treaties," "the more recent . . . controls." *Owner-Operator Indep. Drivers Ass'n*, 724 F.3d at 233. Here, the ECT is the more recent substantive enactment because the EU treaty provisions underlying Spain's arguments (Articles 267 and 344 of the TFEU, *see* Spain Br. 5) have been in place since the European

Economic Community, the precursor to the EU, was formed in 1957—long before the ECT came into force in 1998—and have remained materially unchanged through successive renaming and renumbering of the EU's foundational treaties. *Compare*, *e.g.*, Treaty Establishing the European Economic Community, arts. 177, 219, bit.ly/3xie8Mq, *with* TFEU, arts. 267, 344. The ECT's adoption thus superseded those provisions to the extent of any conflict. Bjorklund Decl. ¶ 142.[12]

If the EU and its members had intended for the EU treaties to control in the event of a conflict and thus to preclude the application of the ECT's arbitration agreement to intra-EU disputes, they had other means to do so. "At the time of entering into the ECT, the EU was well aware of the possibility of including a disconnection clause, which would operate as a carve-out to ensure that the provisions of [such agreements] would not apply between EU Member States." *Vattenfall*, ¶ 203. In fact, the EU has included such disconnection clauses in at least 17 other multilateral treaties. *See* UN Int'l Law Comm'n Rep't on Fragmentation of Int'l Law ¶ 289 & n.386 (Apr. 13, 2006), bit.ly/3IikAVj; *see also Vattenfall*, ¶ 203 ("The EU had already included disconnection clauses in treaties prior to the ECT.").

Rather than include a disconnection clause, the ECT's drafters explicitly *rejected* a proposal—by the European Commission, no less—to include language requiring "[EU] Contracting

[12] In 2007, the Treaty of Lisbon renumbered the TFEU, gave Articles 267 and 344 their current numbers, and made minor technical modifications to those provisions that are not relevant to this case. *Compare* Treaty Establishing the European Community, arts. 234, 292, bit.ly/3CHtjPY, *with* TFEU, arts. 267, 344. But purely "stylistic [and] nonsubstantive" alterations normally are not construed to have legal effect, Scalia & Garner, *Reading Law: The Interpretation of Legal Text* 256 (Thomas/West 2012), so the 2007 amendments to those articles plainly were not intended to modify the relationship between the ECT and EU law. Further, even if the 2007 Treaty of Lisbon were considered the later treaty for purposes of *lex posteriori*, it would not control. Article 16 of the ECT expressly supersedes both prior *and* "subsequent international agreement[s]," that are less protective of investors than the ECT. ECT, art. 16; *see also* Bjorklund Decl. ¶¶ 135-36. Nor could the Lisbon Treaty be construed as a "withdrawal" from the ECT, because the ECT requires that withdrawals occur by a signatory "giv[ing] written notification . . . of its withdrawal," ECT, art. 47(1)—which Spain has not done.

Parties" to "apply Community rules" and "not" the ECT "except insofar as there is no Community rule governing the particular subject concerned." *See* Draft Treaty, Basic Agreement for the European Energy Charter, at 84 (Aug. 12, 1992), bit.ly/3ia5E0Z; *see also* Bjorklund Decl. ¶ 94. There were good reasons for rejecting this proposal. The ECT sought to ensure "uniformity of treatment of investors, regardless of their country of origin," to avoid the possibility that one state might arbitrarily favor awarding contracts to investors from states to whom it owes no international law obligations. Bjorklund Decl. ¶¶ 114-15. That omission of this proposed language from the ECT confirms the ECT's drafters' conscious choice to subordinate EU law to the ECT. *Vattenfall*, ¶ 206 ("[A] disconnection clause was intentionally omitted from the ECT.").[13]

C. Nor can these international law principles be evaded by reframing the issue as one of "interpret[ing]" the ECT, as the European Commission attempts to do. *See* EC Br. 12, 15, 21-24. The "starting point" for interpreting international treaties is the text. Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186 and Add.1-7, [1966] 2 Y.B. Int'l L. EC 220. "Basic principles of treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials." *Ali*, 718 F.3d at 939. As a result, "treaties cannot be re-written or expanded beyond their clear terms," even "to achieve the asserted understanding of the parties." *Choctaw*

[13] By contrast, the ECT provides that "[i]n the event of a conflict between [its provisions and] the [Svalbard Treaty]," "the [Svalbard Treaty] shall prevail." *See* Decisions with Respect to the ECT, Annex 2 to the Final Act of the European Energy Charter Conference, bit.ly/3NOJujs. It "would have been a simple matter to draft the ECT so that Article 26 does not apply to [intra-EU disputes]," *Vattenfall*, ¶ 187, and, if this had been done, that clause would have had effect as a matter of international law, *see* Vienna Convention, art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."). But the ECT's drafters did not do so. The "absence of [a disconnection clause thus] confirms that the ECT was intended to create obligations between Member States of the EU, including in respect of potential investor-State dispute settlement." *Vattenfall*, ¶ 206; Bjorklund Decl. ¶ 80.

Nation of Indians v. United States, 318 U.S. 423, 432 (1943). And here the plain text of the ECT provides for arbitration of intra-EU disputes. *See supra*, at 23-24 & n.10. The Commission's failed attempt to add a disconnection clause confirms that the actually enacted text did not *already* carve out intra-EU disputes from arbitration. *See supra*, at 29-30. There is no basis to read into the ECT the disconnection clause that the Commission failed to achieve through negotiation.

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

The linchpin of the Commission's position is that the ECT really creates only a series of "bilateral relationships" between contracting parties, and EU law must govern bilateral agreements between EU member states. EC Br. 14, 17-18. But Spain did not make (and thus forfeited) this argument, and it is wrong in any event. The ECT is not a "bilateralizable" treaty; it is a multilateral treaty reflecting the interests of all ECT state parties. Bjorklund Decl. ¶ 125. Two or more ECT parties cannot simply amend the treaty only as between themselves without complying with the amendment process specified in the treaty. *Id*. ¶ 127. For good reason—differing obligations between member states "is not a matter of indifference to other Contracting Parties," as it can distort the levels of treatment available to nationals of the third-party states. *Id*. ¶¶ 112-19. Regardless, nothing about the supremacy of international law turns on whether the obligations it creates are multilateral or bilateral. The relevant principle is simply that the EU may not invoke its internal law to invalidate its own international-law commitments under the ECT—even commitments between its members. *See supra*, at 25-27.

The Commission further contends that its interpretation is necessary to prevent conflict with primary (EU) law. EC Br. 15. But "interpretation" cannot stretch a treaty beyond its text merely to avoid a conflict with other treaties. Bjorklund Decl. ¶ 98. It is a basic canon that a

treaty's text must be interpreted in "good faith," *id.* ¶ 95, and "interpreting" the ECT to render Article 26 "void *ab initio*" would violate that principle—nullifying one of the ECT's key provisions through an implicit limitation to which no contracting party ever agreed, through a mechanism that in fact was expressly rejected during the negotiation process. *Id*. ¶¶ 94, 98.

Spain also casts *Komstroy* as an "interpretation of the ECT," EC Br. 21, and asks this Court to "defer" to that interpretation, EC Br. 12, 21-24. But there is no basis for such deference. The EU is merely one party to the ECT, and under the Vienna Convention, the EU's interpretation (as set forth by the CJEU) is not authoritative: As explained *supra*, at 27, only collective action by all parties to a treaty can modify its plain meaning and effect. Vienna Convention, art. 31(2)(b), (3)(a); Bjorklund Decl. ¶¶ 125, 128. And because the ECT is not "bilateralizable," *see supra*, at 31, the CJEU cannot use the guise of "interpretation" to give the treaty one effect as between EU members and another as between other members, Bjorklund Decl. ¶ 125. Whatever effect *Komstroy* may have in EU courts, it is entitled to no deference in *this* Court. *See supra*, at 27-28.

The Commission's cited cases are not to the contrary. The Commission recites passing language in *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), noting the "respectful consideration" owed to the views of "an international court with jurisdiction" to interpret a treaty. *Id.* at 375. But "respectful consideration" does *not* mean deference or "controlling weight," *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018), and the Court in *Breard* in fact did *not* defer to the views of the tribunal there, the International Court of Justice ("ICJ"), 523 U.S. at 374, 378 (declining to follow order discouraging petitioner's execution pending ICJ proceedings). Further, the "respectful consideration" referenced in *Breard* owed only to the ICJ's "jurisdiction" under the relevant treaty—there, the Vienna Convention on Consular Relations—to

give the last word on treaty disputes. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1 (Apr. 24, 1963), bit.ly/3voO2oh. Here, by contrast, the ECT assigns that jurisdiction to arbitral tribunals—not the CJEU—so the only deference due is to the Tribunal.[14]

With no tenable legal argument, the Commission trumpets a parade of horribles about undermining the "structure of the EU legal order" and "offending" international comity. EC Br. 23. But nothing about enforcing the award here would undermine the "EU legal order"; the CJEU's interpretation of EU law remains binding in its own internal plane. But it cannot control the central issue in this case—whether the Award can be enforced *in the United States* against Spain's assets *here* under the applicable U.S. law implementing the ICSID Convention. Ultimately, of course, EU members remain free to withdraw from the ECT or renegotiate its provisions to reflect the commitments the EU and its members states are willing to make. Bjorklund Decl. ¶ 152.

The Commission's concern about a "flood" of ICSID enforcement actions in federal courts likewise provides no basis for refusing to comply with the ICSID Convention and its implementing

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

legislation. EC Br. 23. The Executive Branch (in joining the ICSID Convention) and Congress (in enacting Section 1650a) already made the decision to "open the doors of the federal courts" to enforcement of ICSID awards, EC Br. 23. Congress's clear mandate that ICSID awards "shall" be enforced, 22 U.S.C. § 1650a(a), leaves no room for discretionary abstention for enforcement of ICSID awards in the name of "comity," EC Br. 22, which cannot "override 'the emphatic federal policy in favor of arbitral dispute resolution,'" *Newco Ltd. v. Gov't of Belize*, 650 F. App'x 14, 16 (D.C. Cir. 2016); *see also* Bjorklund Decl. ¶¶ 4, 69.

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

III. Spain's Purported Merits Defenses Are Meritless

Spain also raises non-jurisdictional defenses for denying full faith and credit to the Award and refusing to enforce it. Spain Br. 23-29. The ICSID Convention leaves no room for such defenses. Spain arbitrated and lost, and the United States committed itself by treaty to enforcing the resulting award without providing "any appeal or . . . any other remedy except those provided for in [the ICSID] Convention." ICSID Convention, art. 53(1); *see also* Bjorklund Decl. ¶ 74. Once this Court finds jurisdiction, it "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award," without allowing any "substantive challenges to the award." *Mobil Cerro Negro*, 863 F.3d at 102, 118; *see supra*, at 9-10. Regardless, Spain's remaining arguments also lack merit.

A. Spain Cannot Use State Aid Law To Relitigate The Tribunal's Jurisdiction

Spain claims the Award is state aid and "not entitled to full faith and credit" because awarding state aid "exceeds [ICSID's] jurisdiction." Spain Br. 2, 25. But as explained *supra*, at 17-19, this Court "has no authority to relitigate" "ICSID's jurisdiction" where that issue was "'fully and

fairly litigated and finally decided'" in arbitration. *Tidewater*, 2018 WL 6605633, at *6 n.4.

Here, the ICSID Convention required the Tribunal to determine whether it had jurisdiction. ICSID Convention, arts. 25, 41. Spain fully litigated that question, raising the same state aid argument that it raises here: It claimed that "any compensation which the Arbitral Tribunals were to grant would constitute in and of itself State aid" that "Arbitral Tribunals are not competent to authorise." Spain Rejoinder on the Merits and Reply on Jurisdiction (Ex. F to Rozen Decl.) ¶ 97 ("Rejoinder") (citation omitted); *see also id*. ¶¶ 79, 85-91, 92; Spain Counter-Memorial on the Merits and Memorial on Jurisdiction (Ex. G to Rozen Decl.) ¶¶ 93-98, 960-73 ("Counter-Memorial"). In support of these arguments, Spain cited Articles 107 and 108 of the TFEU, *see* Counter-Memorial ¶¶ 97, 965-68; Rejoinder ¶ 97—the same provisions it cites here, Spain Br. 25. And, referencing these provisions as interpreted by the European Commission's decisions, Spain claimed that the Tribunal lacked jurisdiction. Counter-Memorial ¶¶ 96-98. The Tribunal recognized but rejected these arguments in upholding its jurisdiction. Jx. Dec. ¶¶ 183, 193, 213, 502.

The Tribunal's rejection of Spain's state aid arguments is binding. Spain may not re-litigate it here. Indeed, even if Spain had not raised the precise arguments it raises here, it could not avoid issue preclusion by raising "'new arguments . . . to obtain a different determination'" of "'issue[s]'" already decided by the Tribunal. *Yamaha*, 961 F.2d at 254-55 (quoting Restatement (Second) of Judgments § 27 cmt. c (1982)). "[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Id.* at 254 (citing *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 364-65 (D.C. Cir. 1990)). And as explained *supra*, at 19, when the issue is a "collateral attack" on the "subject-matter jurisdiction" of the issuing court, it is enough that the "party that has had an *opportunity* to litigate the question of subject-matter jurisdiction." *Ins. Corp. of Ireland*, 456

U.S. at 702 n.9 (emphasis added). It is thus too late for Spain to contest the Tribunal's jurisdiction.

Even if Spain *could* challenge the full faith and credit due to the Award by collaterally attacking the Tribunal's jurisdiction—and it cannot—EU state aid law would still be irrelevant because it *does not implicate the Tribunal's jurisdiction*. The ECT alone defines the Tribunal's jurisdiction, and nothing in it allows the EU to preempt arbitration by barring its member states from paying awards. On the contrary, Article 26(8) of the ECT provides that all Contracting Parties (including the EU and Spain) "shall carry out without delay any such award and shall make provision for the effective enforcement in its [territory] of such awards." And the provision Spain relies on (at 25) to argue that the Tribunal lacked jurisdiction to grant state aid—Article 26(6), which directs the Tribunal to decide disputes "in accordance with [the ECT] and applicable rules and principles of international law," ECT, art. 26(6)—does not even address the Tribunal's jurisdiction; it merely dictates the rules of decision for resolving *merits* disputes. *See* Bjorklund Decl. ¶ 145. Accordingly, whatever EU state aid law may say about arbitration awards, it does not implicate the Tribunal's jurisdiction or the full faith and credit due to the Award.

B. The Foreign Sovereign Compulsion Doctrine Does Not Apply

Spain's attempt to raise its state aid arguments by invoking the "foreign sovereign compulsion doctrine" is equally unavailing. Spain Br. 23-24; *see also* EC Br. 24-25. Spain's purported inability to lawfully pay a judgment in this case does not prevent this Court from complying with its statutory obligation—in fulfillment of the obligations of the United States under the ICSID Convention—to enforce the Award. Section 1650a is unequivocal that this Court "*shall* . . . enforc[e]" the Award and give it "the same full faith and credit" as a state court judgment. 22 U.S.C. § 1650a(a) (emphasis added). This categorical command ("shall") "militates against an implicit exception" where the judgment debtor's own laws or treaty commitments purport to prohibit it

from abiding by a United States judgment. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). Further, reading a "foreign compulsion doctrine" exception into Section 1650a would put that statute at odds with the ICSID Convention's prohibition on "any appeal" or "*any other remedy*" beyond the Convention itself, ICSID Convention, art. 53(1) (emphasis added). The statute must be harmonized with this treaty obligation of the United States. *See Owner-Operator Indep. Drivers Ass'n*, 724 F.3d at 233-34.

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

First, the ICSID Convention already obligates Spain to pay ("comply with") the Award, ICSID Convention, art. 53(1), so converting the Award into a U.S. judgment would not "require" Spain to "do" anything new—let alone to do so "in another state," *i.e.*, outside of the United States, Restatement (Third) of Foreign Relations Law § 441(1)(a). The doctrine's "[m]ost important" feature is compulsion of a foreign person by an American court "to violate the laws of a different foreign sovereign on that sovereign's own territory." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987). But a judgment here would merely facilitate enforcement of Spain's existing obligations against its assets in the United States, which the United States has agreed by treaty to facilitate. Any voluntary payment by Spain also could be made outside of the EU using foreign assets.

Second, the doctrine applies to private parties, not governments. *E.g.*, *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). To apply it here—where Spain's own *voluntary* commitments to the EU are the source of the purported compulsion it seeks to avoid—would grant foreign states *carte blanche* to defeat the jurisdiction of U.S. courts under the FSIA simply by enacting laws or entering into treaties that purport to prohibit satisfaction

of U.S. court judgments. There is no room for such a dramatic expansion of foreign state immunity in U.S. court; the FSIA already dictates the "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *NML Capital*, 573 U.S. at 141.

Third, foreign sovereign compulsion applies only where there is a "realistic possibility" that the foreign entity will face severe sanctions for complying with a U.S. court order. *United States v. Brodie*, 174 F. Supp. 2d 294, 301 (E.D. Pa. 2001). A "remote" and "speculative" risk of sanctions does not excuse compliance with U.S. law. *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968). Here it is pure speculation that the Commission would seek sanctions against Spain for paying a U.S. judgment, and even if the CJEU found a violation, EU law merely provides that it "may"—not *must*—impose a sanction. TFEU, art. 258, 260(2). Given this "wide latitude in determining whether to award any damages even in the face of liability," the threat of a sanction is too low to justify denying relief. *First Nat'l City Bank*, 396 F.2d at 905.[15]

C. Paying The Award Or A Judgment Would Not Violate EU State Aid Law

Because Spain's legal ability to pay the Award or a judgment enforcing it has no bearing on the Tribunal's jurisdiction and does not implicate the foreign sovereign compulsion doctrine, this Court need not address that issue. Should it nonetheless reach the issue, however, the Court should hold that EU law does not restrict such payments. EU state aid law protects competition within the EU by ensuring that member states do not unfairly advantage certain entities or industries. *See* TFEU, art. 107(1); Quigley Decl. ¶ 54. A measure is state aid if it: (1) confers a "selective economic advantage"; (2) "distort[s] or threaten[s] to distort competition"; (3) has the "potential" to affect trade between Member States; and (4) is "imputable to the [S]tate." European

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

Commission, Decision on State Aid S.A. 38517 (2014/C) (ex 2014/NN), Arbitral Award, *Micula v. Romania*, 2015 O.J. L 232/43 ¶ 79 (Sept. 4, 2015), ECF No. 12-68; Quigley Decl. ¶ 55. If these conditions are met, the measure cannot go into effect before the Commission reviews it to determine whether the aid is "compatible" with the EU internal market. TFEU, art. 108(1), (2).

Spain's theory is that the renewable energy incentives at issue in the underlying arbitration are unlawful state aid, and therefore the Award is unlawful state aid too. Spain Br. 10-11. But each of Spain's premises is flawed. No authority has held that the incentives here were illegal state aid. *See* Quigley Decl. ¶ 33. Spain's own authority (at 10) suggests they were not. In its Decision on State Aid SA.40348 (2015/NN), *Spain*: *Support for electricity generation from renewable energy sources, cogeneration and waste*, 2017 O.J. (C442) (Nov. 10, 2017), ECF No. 12-67, the Commission held that a separate Spanish regulatory regime—the one that replaced the incentives at issue here—was "compatible with the internal market" and therefore not illegal. *Id.* at 34; *see also id.* ¶ 156; *id.* § 2.1; Quigley Decl. ¶ 27. This confirms that a renewable energy regime (and thus an Award enforcing it) may be lawful even if they are state aid.

The Award and a U.S. judgment enforcing it would be even farther from the definition of state aid. The Award does not give Petitioners an economic advantage; it *compensates* them for damages caused by Spain's violation of the ECT. Award ¶ 124; Quigley Decl. ¶ 61. Once compensated, Petitioners will be no better off than they would have been but for Spain's violation. The Award thus cannot distort competition or affect trade in the EU. Quigley Decl. ¶¶ 64-66. Nor can paying an Award or judgment *mandated* by a tribunal or court be "imputed" to Spain. An externally imposed legal obligation is not voluntary state aid. *Id.* ¶ 68. As the CJEU has recognized, therefore, state aid is "fundamentally different . . . from damages" ordered by "competent national authorities" as "compensation" for injuries caused by the state. Joined Cases 106-120/87, *Asteris*

v. Greece, 1988 E.C.R. 5531 (Sept. 27, 1988), ¶ 23, bit.ly/3uzgjt4; *see also id.* ¶ 24, *dispositif* 3.

Spain cites no authority for the startling proposition that it could be *unlawful* for an EU member to pay a U.S. court *judgment*. Nor has it shown that it would violate EU law for Spain to meet its treaty commitment under the ICSID Convention to "abide by" and "comply with" the Award. Spain merely cites the European Commission's views on the subject. Spain Br. 11-12; *see also* EC Br. 5, 24-25. But the Commission does not speak authoritatively on EU law—the CJEU does—and it has overturned the Commission's aid decisions a number of times. *See* Quigley Decl. ¶ 80. As an executive body, not a court, the Commission's views of EU law—much less its "litigating positions" as an *amicus*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)—lack "conclusive effect," *Animal Sci. Prods.*, 138 S. Ct. at 1869. And even if the Award or a judgment enforcing it were state aid, that would not mean Spain could never pay (or the Tribunal or this Court could not issue) the Award or a judgment enforcing it. It would merely require Spain to obtain Commission approval before paying. TFEU, art. 108. Spain cites nothing suggesting such approval would be denied. EU state aid law thus does not preclude payment of the Award.[16]

D. Forum Non Conveniens Does Not Apply

Spain's final defense—*forum non conveniens*, Spain Br. 26-29—is squarely foreclosed in this Circuit. As the D.C. Circuit first held in *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005)—and has recently and repeatedly reaffirmed—"'*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award.'" *Tatneft v. Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021) ("*Tatneft II*"); *Stileks*, 985 F.3d at 876 n.1; *accord BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17, 19 (D.C. Cir. 2016); *Newco*, 650 F. App'x at 16;

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

TMR, 411 F.3d at 303-04.[17] Spain may prefer out-of-circuit authorities that expressly "disagree[d]" with *TMR*, *see Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011); Spain Br. 27, but *TMR* and the many D.C. Circuit decisions reaffirming it are binding on this Court.

Forum non conveniens allows dismissal only where "an adequate alternative forum for the dispute is available." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008). But a foreign court is no substitute for "enforc[ing] [an] arbitration award" against a foreign state in U.S. court because "no other forum . . . c[an] reach [a foreign state's] property . . . in the United States." *TMR*, 411 F.3d at 303-04. "[O]nly a court in the United States" can grant that relief, *id*., so *forum non conveniens* simply "does not apply to actions in the United States to enforce arbitral awards against foreign nations," *BCB Holdings* 650 F. App'x at 19.

Far from establishing a "limited restriction," Spain Br. 28, these decisions categorically bar a foreign state from "*ever* obtaining dismissal of a petition to enforce an arbitration award . . . based on *forum non conveniens*" in this Court, *Entes Indus. Plants, Constr. & Erection Contracting Co. v. Kyrgyz Republic*, 2019 WL 5268900, at *5 (D.D.C. Oct. 17, 2019) (emphasis added). That rule applies not just in "execut[ing] a judgment," Spain Br. 29, but also "in proceedings to *confirm* a foreign arbitral award," *Tatneft II*, 21 F.4th at 840 (emphasis added), including where the right to a judgment is disputed, *e.g.*, *id.*; *Stileks*, 985 F.3d at 876 n.1; *BCB Holdings*, 650 F. App'x at 19; *Newco*, 650 F. App'x at 16; *TMR*, 411 F.3d at 303-04.

Spain claims this case is different because it presents a "threshold" question of this Court's "jurisdiction" that purportedly turns on the "interpretation of EU law." Spain Br. 27, 29. But

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

Petitioners brought this action to enforce the Award against Spain's U.S. assets, not to resolve issues of EU law. This Court's jurisdiction turns exclusively on the FSIA and international law—not EU law—and this Court can find jurisdiction, reject Spain's "merits" defenses, and enforce the Award without deciding *any* question of EU law. *See supra*, at 11-34. Further, Spain's attempt to raise EU law obliquely—as an issue of this Court's jurisdiction under the FSIA—does not *strengthen* Spain's *forum non conveniens* defense. It undercuts that defense. The EU is not a more convenient forum to decide whether a *U.S. court* has jurisdiction under *U.S. law*. And even if it was, a foreign action would not substitute for enforcement *in the U.S.* against Spain's *U.S. assets*.

It is irrelevant, moreover, that Spain may have property in other forums. That was true in *Tatneft II* too. *See* 21 F.4th at 840. If *forum non conveniens* applied simply because "the ordinary place to find Spanish assets is in Spain," Spain Br. 26, no ICSID award could ever be enforced in this country. That is not the choice the political branches made in signing and implementing the ICSID Convention. Indeed, the ICSID Convention's entire purpose is to protect investors like Petitioners from having to pursue their claims and enforce any resulting awards against a foreign state in that state's home forum. Bjorklund Decl. ¶¶ 48-49. The Convention thus guarantees Petitioners the right to enforce the Award in "[e]ach Contracting State." ICSID Convention, art. 54(1). And Congress implemented the Convention in mandatory terms: ICSID awards "shall" be enforced in U.S. court. 22 U.S.C. § 1650a(a); *cf. Alabama*, 533 U.S. at 153 (use of "shall" "militates against an implicit exception"). In doing so, Congress necessarily recognized this country's interest in fulfilling its binding treaty commitment to enforce ICSID awards in U.S. court. *Forum non conveniens* is "not a principle of universal applicability," and cannot be used to overcome this "right of choice" of a U.S. forum guaranteed by Congress. *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 596-97 (1948).

IV. The Court Should Deny Spain's Alternative Motion For A Stay

A. The ICSID Convention Provides For Enforcement Of The ICSID Award Absent An ICSID-Imposed Stay Of Enforcement

Spain's alternative request for a stay should also be denied. In light of the Committee's decision denying a stay, issuing a judicial stay would undermine the streamlined enforcement procedures that are critical to the ICSID Convention's comprehensive scheme. *See* ICSID Convention, art. 53(1). ICSID awards are final by design. *Supra*, at 5-6; ICSID Convention, arts. 53(1), 54(1). While either party to an award may apply to ICSID to "request annulment of the award" on limited grounds, ICSID Convention, art. 52(1), the submission of an annulment application does not stay enforcement of the award pending a final decision unless the committee constituted to decide the annulment application determines that "the circumstances so require," *id.*, art. 52(5). Unless enforcement is "stayed *pursuant to . . . th*[*e*] *Convention*," the parties must "abide by and comply with the terms of the award," *id.*, art. 53(1) (emphasis added), and the Contracting States to the ICSID Convention (including the United States) must "enforce the pecuniary obligations imposed by that award" without allowing "any other remedy except those provided for in th[e] Convention," *id.*, arts. 53(1), 54(1).

The ICSID Convention thus contemplates that ICSID awards will be immediately enforceable in absent a stay, and that the annulment committee—not a court—will be responsible for determining whether a stay of enforcement is appropriate. "[A]nnulment proceedings that are not accompanied by a stay of enforcement . . . are neither a justification for non-compliance with the award nor a basis for domestic courts to withhold recognition or refuse enforcement." C. Schreuer, *The ICSID Convention: A Commentary*, art. 52 ¶ 581 (2nd ed., CUP: 2009). "The fact alone that annulment proceedings are pending has no suspensive effect." *Id.* Instead, "if the [annulment] committee . . . declines to continue or to grant a stay, the award is fully binding and enforceable."

Id.; *see also TECO Guat. Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 108 (D.D.C. 2019) (explaining that respondent "should have applied to [the ICSID] tribunal for a stay," and "[a]bsent such a stay, Guatemala must 'abide by and comply with the terms of the award'").

Congress incorporated these principles when it implemented the United States' treaty obligations under the ICSID Convention in Section 1650a. Beyond directing courts to treat ICSID awards as "final judgment[s]" entitled to "the same full faith and credit as" the judgments of a state court, Section 1650a specifies that the FAA's grounds for vacating or refusing confirmation of other arbitration awards do not apply to the enforcement of ICSID awards.

The "perfunctory role" that Section 1650a thus envisions "for federal district courts," *Tide-water*, 2018 WL 6605633, at *6, is inconsistent with imposing a stay on enforcement where the ICSID annulment committee has refused to do so. Indeed, Section 1650a omits the equivalent provisions of the FAA that allow courts to stay enforcement of a foreign commercial arbitration award issued pursuant to the New York Convention. Unlike the New York Convention—which allows courts to decide whether to stay enforcement pending proceedings to "se[t] aside" an award, N.Y. Convention, art. VI—the ICSID Convention unequivocally assigns that task to the committee overseeing the annulment proceedings. *See* ICSID Convention, art. 52. And unlike the FAA provision implementing the New York Convention—which allows a district court to "defe[r] . . . recognition or enforcement of [an] award" under the grounds specified in that convention, 9 U.S.C. § 207, federal law implementing the ICSID Convention does not provide for a judicial stay, *see* 22 U.S.C. § 1650a. Both the ICSID Convention and Section 1650a(a) thus require this Court to expeditiously enforce an ICSID award in the absence of an ICSID-imposed stay.

Spain's retort misses the point. That courts have "inherent" power to control their dockets, Spain Br. 30, is not a reason to *exercise* that power without regard to the mandate that two branches

of our government endorsed by joining and implementing the ICSID Convention. Decisions that likewise miss this nuance—and give no weight to treaty principles in granting a stay, *e.g.*, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, 2020 WL 2996085, at *4 (D.D.C. June 4, 2020); *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain,* 2020 WL 5816238, at *3 (D.D.C. Sept. 30, 2020); *9REN Holding S.A.R.L. v. Kingdom of Spain*, 2020 WL 5816012, at *2 (D.D.C. Sept. 30, 2020)—thus lack persuasive value. Indeed, many of the stay orders Spain cites are unreasoned minute orders that fail to even engage with these principles. Spain Br. 30-31.

Whatever power a court may generally have to stay its proceedings to await the outcome of other litigation, that power is not properly exercised where a treaty provides for unobstructed enforcement of foreign arbitral awards. Even in the more permissive context of the New York Convention, where the courts have a role in reviewing awards on the limited grounds set out in that Convention, the D.C. Circuit has made clear that a "carefully structured scheme for the enforcement of foreign arbitral awards" leaves no room for an open-ended stay request. *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733 (D.C. Cir. 2012). In *Belize*, the D.C. Circuit issued a writ of mandamus to compel a district court to proceed with enforcement of a New York Convention award, holding that the district court exceeded its authority by staying enforcement outside of the narrow circumstances provided by the Convention and its implementing legislation. *Id.* at 731-33. Emphasizing the federal courts' "'virtually unflagging obligation'" to "'exercise the jurisdiction given them,'" the court explained that the FAA alone "defined the district court's task: . . . to confirm the Final Award absent a finding that an enumerated exception to enforcement specified in the New York Convention applied." *Id*. The mandatory language of Section 1650a—providing without *any* exception that an ICSID award "shall be enforced," 22 U.S.C. § 1650a—makes this Court's duty to proceed with enforcement of Petitioners' ICSID Award even clearer

than the obligation that the D.C. Circuit enforced by writ of mandamus in *Belize*.

The case against a stay is even clearer under the ICSID Convention than under the New York Convention, because unlike the New York Convention, the ICSID Convention assigns the question of a stay of enforcement to an annulment committee, not to the courts. *See* ICSID Convention, art. 52(5). While Spain suggests that proceeding in this Court would interfere with the Committee's role, in fact the opposite is true: Staying proceedings in this Court would interfere with the Committee's authority to decide if enforcement should be stayed pending annulment proceedings. *See id.* There is no reason for this Court to stay enforcement proceedings given that the Committee itself failed to see a reason to stay enforcement pending its own determination on the merits. Petitioners ask nothing more than the right to proceed to enforcement now that the Committee has determined that such enforcement is proper.

B. Spain Fails To Demonstrate Its Entitlement To A Stay

Even if the ICSID Convention left room for a judicial stay of enforcement, Spain has not met its heavy "burden"—as movant—"of showing that the stay is needed and warranted." Mem. Op. & Order at 6, *Infrastructure Servs. Luxembourg S.A.R.L. v. Kingdom of Spain*, No. 1:18-cv-1753 (D.D.C. Aug. 28, 2019), ECF No. 36 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). The Committee already considered Spain's arguments for a stay and, in a comprehensively reasoned 38-page decision, determined that a stay was unwarranted. Spain effectively asks this Court to ignore the Committee's decision. There is no reason to do so.

No harm will befall Spain if this Court proceeds to expeditiously resolve Spain's objections to the entry of judgment. This action seeks only the conversion of the Award into an enforceable judgment. Execution of that judgment against Spain can only begin after this Court determines, upon a separate motion pursuant to 28 U.S.C. § 1610(c), that a reasonable time has elapsed but Spain has not voluntarily satisfied the Court's judgment. Moreover, as directed by the Committee,

Petitioners have provided a written undertaking (to the Committee's satisfaction) to ensure that any actions it may take in aid of execution are readily reversible, by placing any execution proceeds into escrow (under the Committee's control) until the Committee decides Spain's annulment application. Stay Denial, ¶ 90. As the Committee recognized, this carefully crafted directive from the Committee distinguishes this case from past cases granting stays, none of which involved the imposition of protective conditions even approaching those at issue here. These protections are meant to safeguard Petitioners from any attempts by Spain to delay Petitioners from recovering, while also protecting Spain by preserving any execution proceeds until the annulment petition is denied. Spain has offered no basis for this Court to disregard the Committee's decision. To nonetheless provide Spain the benefit of a stay of U.S. enforcement proceedings would contravene the Committee's decision and further reduce Petitioners' likelihood of recovery.

1. An Indefinite Stay Will Not Materially Advance The Interests Of The Court Or Conserve The Parties' Resources

Contrary to Spain's assertion, a stay will not advance the Court's interest in judicial economy. Spain Br. 30. ICSID annulment applications are rarely granted, in no small part because the grounds for annulment are narrow. The ICSID annulment proceeding is not an appeal. Spain's argument that there is a likelihood of conflicting results asks this Court to ignore ICSID's very purpose and structure. Article 53(1) of the ICSID Convention enshrines the finality of an ICSID award. The Convention provides narrow, limited remedies once an award is issued—full or partial annulment (either of which allows for the recommencement of proceedings)—but expressly forbids any appeal of the merits of the parties' dispute. *See* ICSID Convention, arts. 52, 53(1). As one ICSID annulment committee noted, an annulment proceeding "in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or

rectification. Those sorts of proceedings are *simply not provided for in the ICSID system*." *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the *Ad Hoc* Committee on the Request for Supplementation and Rectification of Its Decision Concerning Annulment of the Award, ¶ 11 (May 28, 2003), bit.ly/3rdKowd (emphasis added, footnote omitted). As ICSID itself reports, of the 228 ICSID awards rendered between 1966 and 2016, 90 annulments were sought, only 15 annulments were granted, and only 5 of those were granted in full.[18] "Annulment" is therefore "unlikely," and as this Court recently recognized in denying a stay pending annulment proceedings in *Tethyan*, "a stay would not benefit judicial economy." 2022 WL 715215, at *4-5. In all likelihood, annulment proceedings only postpone the inevitable.

Spain also vastly overstates the risk of "duplicative litigation in multiple fora." Spain Br. 30. While Spain endeavors to complicate this action by raising issues decided in the arbitration, the ICSID Convention and its implementing legislation make clear that these issues are not properly before this Court, and under the correct interpretation of those statutes and the FSIA, this Court need not and should not decide any issue raised by Spain's annulment application. *See supra*, at 11-23. There is thus no "possibility of conflicting results." Spain Br. 30. For that reason, decisions that stay ICSID enforcement because of the risk that foreign states will "hav[e] to attack the validity of [an] arbitral award in two forums," *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019), misunderstand the ICSID Convention, and merit no weight. Besides, any potential burden from briefing these purportedly overlapping issues is a sunk cost. The issues will be fully briefed once Spain files its reply brief before this Court.

[18] ICSID Updated Background Paper on Annulment for the Administrative Counsel of ICSID (May 5, 2016), ¶ 31, bit.ly/3DRKWwY. "The rate of annulment for 2011–present is 3 percent, . . . for 1971–2000 was 13 percent and for 2001–2010 was 8 percent." *Id.* ¶ 32.

2. A Stay Would Unduly Prejudice Petitioners' Right To Recover For Spain's Misconduct

Spain downplays the delay in compensating Petitioners for Spain's bad acts in arguing that "[n]o injury will result to Petitioners." Spain Br. 30. But the Committee has already squarely rejected this assertion, finding that Petitioners would suffer adverse economic consequences from a stay because the value of an Award is "measured by its enforceability," which a stay will "inevitably" affect. Stay Denial ¶ 96. Spain is in ongoing breach of its obligation under the ICSID Convention to pay the Award. "A stay only prolongs justice denied" by denying Petitioners the relief they are due. *Tethyan*, 2022 WL 715215, at *5.

Spain has made no payment on the Award, has made no indication that it intends to honor the Award voluntarily, and has offered no guarantee that its U.S. assets will be preserved while the annulment proceedings continue. Indeed, the Committee underscored the "14 outstanding arbitral awards" against Spain and the "real risk" that granting a stay would push Petitioners "to the back of a long line of award-creditors." Stay Denial ¶ 99. In U.S. courts alone, claimants are now seeking enforcement of ten separate awards against Spain. *See* Rozen Decl. ¶ 11. It is black-letter law that "'the first in time is the first in right,'" and thus "'a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds.'" *United States v. City of New Britain*, 347 U.S. 81, 85 (1954). That similar actions before this district court are stayed, *see* Spain Br. 30-31, counsels for, not against, denying a stay. Any delay in the entry of judgment jeopardizes Petitioners' ability to obtain priority liens on Spain's assets that are available for execution and prejudices Petitioners' hard-fought right to recover damages for Spain's misconduct.

Under these circumstances, the mere accrual of prejudgment interest is not sufficient to protect Petitioners unless that interest is readily recoverable. *Contra* Spain Br. 30. And even if recoverable, "once compensatory post-award interest has become payable, the award creditor has

already suffered adverse consequences as a result of delayed recovery." Stay Denial ¶ 96. As the Committee explained, interest provides some compensation for the time value of money, but it "would not remedy [Petitioners'] inability to choose how to apply those monies in their own discretion." *Id*. Petitioners would thus plainly suffer hardship from a stay.

3. Spain Offers No Argument That The Recognition Of The ICSID Award Will Cause It Any True Hardship

Finally, Spain offers no serious argument that it will suffer hardship in the absence of a stay, suggesting only that "granting relief under the Petition . . . would compel Spain to violate EU law." Spain Br. 30. That repackaged merits argument is question-begging: It "puts into issue the substantive grounds in its Annulment Application in the application for a stay of enforcement." Stay Denial ¶ 114. And as explained above, Spain's arguments are wrong on their own terms.

But even if there were a conflict between Spain's obligations under the ECT and EU law (there is not), "it would be the underlying Award that potentially gave rise to any conflict," and not the directive to *enforce* the Award. Stay Denial ¶ 117. The alleged conflict is the very ground on which Spain seeks to have *the Award* itself annulled before the Committee. Thus, as the Committee correctly explained, a stay of enforcement proceedings "would not resolve the ill that concerns . . . Spain," which "ultimately" stems from the Award itself. *Id.* ¶ 118. Spain would suffer no cognizable hardship from the denial of a stay.

CONCLUSION

The Court should deny Spain's Motion to Dismiss and alternative Motion to Stay and enter judgment on the Award in Petitioners' favor in the amount and currency specified in the Award.

Dated: April 25, 2022

Respectfully submitted,

/s/ Matthew McGill

Matthew McGill, D.C. Bar #481430
mmcgill@gibsondunn.com
Matthew S. Rozen, D.C. Bar #1023209
mrozen@gibsondunn.com
Ankita Ritwik, D.C. Bar #1024801
aritwik@gibsondunn.com
Luke Zaro, D.C. Bar #1670941
lzaro@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Attorneys for Hydro Energy 1, S.à.r.l., and Hydroxana Sweden AB

CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2022, I caused the foregoing Response to Spain's Motion to Dismiss, and exhibits thereto, to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Matthew McGill
Matthew McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mmcgill@gibsondunn.com