IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., *Petitioners*, v. Kingdom of Spain, *Respondent*.	Civil Action No. 1:21-cv-03249-RJL

Expert Declaration of Andrea K. Bjorklund

1. My name is Andrea K. Bjorklund. I am the Associate Dean of Graduate Studies and the L. Yves Fortier Chair in International Arbitration and International Commercial Law, as well as a Full Professor, at the McGill University Faculty of Law in Montreal, Canada.

2. This report has four parts. The first offers a summary of my conclusions. The second outlines my qualifications. The third discusses the development of the international investment regime, and in particular the conclusion of investment protection agreements that contain investment arbitration provisions. The fourth looks more particularly at the relationship between the Energy Charter Treaty (the "ECT")[1] and the treaties of the European Union ("EU") from the perspective of public international law.

I. Summary of Conclusions

3. Intra-EU investment disputes are arbitrable under the plain language of the ECT. Article 26 of the Treaty contains the Contracting Parties' clear offer to arbitrate claims made by an investor from another Contracting State that the host State failed to abide by the protections

[1] Energy Charter Treaty, 2080 U.N.T.S. 95 (Dec. 17, 1994), ("ECT"), ECF No. 1-3.

found in Part III of the ECT. The Netherlands and Spain are both unquestionably Contracting Parties to the ECT.

4. The petitioners here, incorporated in the Netherlands, accepted the offer extended by Spain to arbitrate their ECT dispute under the framework of the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules").[2]

5. By the plain terms of the ECT, its dispute settlement provisions are available to investors from all Contracting Parties who make an investment in the territory of another Contracting Party. No implicit understandings or subsequent agreements between a small subset of ECT Member States changes that fundamental fact. The ECT also contains no disconnection clause or other provision that would negate Article 26's clear offer to arbitrate as between intra-EU disputing parties.

6. Treaties may not be modified implicitly; any suggestion that the ECT's terms do not apply between EU Member States because of a tacit incompatibility with EU law must fail as a matter of international law.

7. Neither Spain nor any other EU Member State, nor the EU itself, has explicitly modified the ECT. It is valid under international law and its Contracting Parties must in good faith honor their obligations under it pursuant to the principle of *pacta sunt servanda*.

8. Contrary to Spain's arguments, principles of public international law dictate that the ECT prevails over EU law. First, the ECT contains a hierarchical clause (Article 16) specifically providing that if there are conflicts between the ECT and other treaties (such as the EU Treaties) to which the Contracting Parties adhere regarding protection of investments and

[2] UNCITRAL Arbitration Rules, G.A. Res. 76/108, U.N. Doc. A/RES/76/108 (Dec. 9, 2021), http://tiny.cc/qonsuz.

dispute settlement, investors under the ECT may choose whichever regime is more favorable to them. Here the investors chose arbitration under the ECT.

9. Second, the ECT would prevail over inconsistent EU law even without applying its hierarchical clause. Under the principle of *lex posterior*, later treaties can displace earlier treaties if they cover the same subject matter. The ECT is the later-in-time treaty, as the treaty provisions which concerned the CJEU in *Achmea* predate the ECT.

10. Third, the autonomy of EU law is a principle of EU law, but not of international law. States may not invoke domestic law as justification for failing to abide by their international legal obligations. Spain has obligations under both the ECT and the New York Convention. The fact that EU law is itself treaty-based does not lead to a different conclusion. International law is what renders EU law enforceable on the international plane, and EU law is thus also governed by the principles of good faith and *pacta sunt servanda*.

II. Qualifications

11. I am a U.S. citizen, born on January 22, 1965.

12. I am the Associate Dean of Graduate Studies, a Full Professor, and the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. Prior to joining the faculty at McGill, I was a Professor at the University of California, Davis, School of Law. I teach or have taught public international law, conflict of laws, international investment law, international trade law, international civil litigation, international commercial arbitration, and contracts.

13. I earned a Juris Doctor (J.D.) from Yale Law School in 1994. I also hold an M.A. in French Studies from New York University and a B.A. (with High Honors) in History and French

from the University of Nebraska, Lincoln. I clerked for Judge Sam J. Ervin, Jr., on the U.S. Court of Appeals for the Fourth Circuit.

14. I am admitted to practice in Maryland and the District of Columbia. I am a member of the bar of the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. District Court for the District of Columbia.

15. My experience with international investment law started approximately 27 years ago when I was still in private practice at Miller & Chevalier, Chartered, in Washington, DC. As a member of the firm's international group I worked on arbitrations, on trade remedies cases, on a constitutional challenge to Chapter XIX of the North American Free Trade Agreement ("NAFTA"), on the then-ongoing negotiations for a multilateral agreement on investment that occurred under the auspices of the Organisation for Economic Co-operation and Development, and on a variety of other matters.

16. In 1999, I was hired as an inaugural member of the NAFTA Arbitration Division of the Office of the Legal Adviser in the U.S. Department of State, where I defended the U.S. Government in NAFTA Chapter XI investment arbitrations and also monitored cases submitted against Canada and Mexico.

17. Since I entered the academy, I have published many articles, books, and book chapters on international investment law. The treatise on NAFTA that I authored with Meg Kinnear and John Hannaford, which was first published in 2006, has been updated twice, and a second edition is underway.

18. I am a recognized expert in international investment law and in public international law. I was a Vice President of the American Society of International Law. I have served as an expert for international organizations. In 2014, I was named the inaugural ICSID Scholar in

Residence. I consulted with the United Nations Conference on Trade and Development (UNCTAD) to prepare the updated volume of their "pink series" manuscript on investor-State dispute settlement, which was published in 2014. I have served as consulting or testifying expert, for both claimants and respondents, in several investment cases.

19. I am currently an editor of Cambridge University Press's International Trade and Economic Law Series. I am a visiting professor at Tsinghua University in Beijing, where I teach international investment law in Tsinghua's International Arbitration and Dispute Settlement program. For three years, I was editor-in-chief of the Yearbook on International Investment Law and Policy, published by Oxford University Press. I am on the advisory board of the British Institute for International and Comparative Law's Investment Treaty Forum. I am an adviser to the American Law Institute's project on restating the law of U.S. international commercial arbitration. From 2012 to 2015, I was Chair of the Academic Council of the Institute for Transnational Arbitration. In 2022, the Government of Canada appointed me to its roster of ICSID arbitrators. My detailed *curriculum vitae* is attached (Ex. 1 hereto).

20. I have been retained by AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. (hereinafter "Petitioners") to provide an expert opinion on the relationship between public international law, EU Law, and the ECT. Specifically, I was asked to consider as a matter of international law:

(a) whether EU law has any effect on the enforceability in the United States of the Final Award in *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. v. Kingdom of Spain*, Permanent Court of Arbitration ("PCA") Case No. 2012-14;

(b) whether the ECT applies to intra-EU Disputes; and

(c) whether the ECT is displaced by the Treaty on the Functioning of the European Union ("TFEU") and related EU treaties.

21. In addition to basing my opinion on my existing knowledge of the topics of public international law and international investment law, Petitioners have provided me with the following materials:

(a) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (Oct. 13, 2014);

(b) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, PCA Case No. 2012-14, Award (Feb. 28, 2020);

(c) Bundesgericht [BGer] [Federal Supreme Court] Feb. 23, 2021, 4A_187/2020, Swiss Federal Supreme Court Decision;

(d) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Civil Action No. 1:21-cv-03249, Petition to Enforce Arbitral Award (Dec. 10, 2021);

(e) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Civil Action No. 1:21-cv-03249-RJL, Memorandum of Law in Support of the Kingdom of Spain's Motion to Dismiss the Petition (May 6, 2022);

(f) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Civil Action No. 1:21-cv-03249-RJL, Declaration of Professor Steffen Hindelang (May 6, 2022); and

(g) *AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Civil Action No. 1:21-cv-03249-RJL, Brief for the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of the Kingdom of Spain (May 20, 2022).

22. I am being compensated at a rate of $700 per hour for my work on this matter.

23. I have no familial or business relationship or affiliation with any of the parties in the above-captioned matter. I have never provided legal advice to them or represented them in any capacity. I have provided a legal opinion on similar matters in four other enforcement proceedings regarding awards in ECT cases brought by EU investors against the Kingdom of Spain: *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, No. 1:18-cv-1686 (D.D.C); *Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar B.V. v. Kingdom of Spain*, No. 1:18-cv-1753 (D.D.C.); *RREEF Infrastructure (G.P.) Limited et al.*

v. Kingdom of Spain, No. 1:19-cv-03783-CJN (D.D.C.); and *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, No. 1:21-cv-02463-RJL (D.D.C.).

III. The Law of International Investment Protection

24. The modern regime of investment protection can be traced to the law of "State Responsibility for Injuries to Aliens," a branch of public international law that developed primarily in the nineteenth and early twentieth centuries. In the parlance of that time, "aliens" doing business in a foreign jurisdiction were obliged to follow the laws in that jurisdiction, but were also entitled to some protections under international law.

A. Customary International Law Development of the Law of State Responsibility for Injuries to Aliens

25. In the early twentieth century, capital-exporting States argued for the development of customary international law standards to protect both the property and personal integrity of "aliens"—their investors—abroad. Some attempts were made to codify this law; it was initially regarded as sufficiently developed to be ripe for codification by the Committee of Experts for the Progressive Codification of International Law in the late 1920s. As part of that project, Professor Edwin Borchard and his colleagues produced the Harvard Research Draft of 1929.[3]

26. The Commission dealing with State Responsibility, however, was not able to agree on a draft Convention due to the dissent of primarily capital-importing States.[4] Further attempts

[3] Research in International Law at Harvard Law School, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. SPEC. SUPP. (i) 133 (1929).

[4] Edwin M. Borchard, *Responsibility of States,* at the Hague Codification Conference, 24 Am. J. Int'l L. 517, 518 (1930) (Ex. 2 hereto).

were made to codify the law of State responsibility once the International Law Commission was established after the Second World War.

27. Debates about multiple issues, including the exact content of customary international law, stymied the successful completion of a codification.[5] In fact, in the early 1960s, the U.S. Supreme Court recognized the uncertainty surrounding the definition of expropriation in the *Sabbatino* case.[6]

28. This uncertainty was later reflected in the attempt by many developing States to form a "New International Economic Order," which was characterized by a lack of special protections afforded to foreign-owned property. In the early and mid-1970s a series of U.N. General Assembly Resolutions rejected the idea, traditionally championed by developed, capital-exporting countries, that expropriations need to be accompanied by prompt, adequate, and effective compensation.[7]

B. The Era of International Investment Agreements

29. Against this uncertain background, States sought to develop treaties that would clarify the existence and content of those customary international law obligations and turn them into conventional obligations that would protect foreign investors. Western European countries

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[5] Eventually the International Law Commission revised the scope of the codification project to address "secondary rules" of State responsibility—those provisions that apply once the breach of a "primary rule" has been established. These Articles on State Responsibility were adopted by the United Nations General Assembly in 2001. Responsibility of States for Internationally Wrongful Acts, II (2) Y.B. Int'l L. Comm'n, U.N. Res. 56/83 (Dec. 12, 2001), as corrected by A/56/49(Vol. I)/Corr 4) ("Articles on State Responsibility"), https://tiny.cc/mkpirz.

[6] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").

[7] *See* M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 477-85 (Cambridge University Press, 2d ed., 2004) (Ex. 3 hereto).

were the first to negotiate significant numbers of bilateral investment treaties ("BITs") with such obligations. The German-Pakistan treaty of 1959, for example, is generally described as the first BIT. Other European countries, including the United Kingdom, Germany, and France, also developed active investment treaty programs.[8] The United States' investment treaty program gained momentum in the 1980s; prior to that time the United States had negotiated Treaties of Friendship, Commerce, and Navigation, which are often viewed as the precursors to modern BITs.[9]

30. International investment agreements today include BITs, investment chapters in free trade agreements, and sectoral treaties. While most often bilateral, they can be multilateral. NAFTA has an investment chapter (Chapter 11), as does the Comprehensive and Progressive Trans-Pacific Partnership. UNCTAD now counts 2,231 investment agreements in force.[10]

31. Investment treaties are important tools both to promote and to protect investments. Essentially, they are a "grand bargain" whereby host States seek foreign direct investment to facilitate their economic development. In return for that investment they offer protections in investment treaties so that investors can safely and securely invest knowing they have rights conferred by the treaties that can be vindicated in arbitration.

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[8] According to UNCTAD's Investment Policy Hub, Germany has 115 International Investment Agreements in force; France has 84; and the United Kingdom has 90. https://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited June 16, 2022).

[9] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158-59, 170-75 (2005) (Ex. 4 hereto).

[10] United Nations Conference on Trade and Development, Investment Policy Hub, International Investment Agreements Navigator, https://tiny.cc/wc2jrz (last visited, June 16, 2022).

Substantive Protections

32. Protections typically included in investment treaties include the obligation not to discriminate against foreigners in favor of domestic entities (national treatment); the obligation to accord equal treatment to all foreign investors (most-favored-nation treatment); the obligation to accord fair and equitable treatment and full protection and security (due process obligations); and the obligation not to expropriate property except in accordance with due process, on a non-discriminatory basis, for a public purpose, and upon payment of prompt, adequate, and effective compensation (expropriation).[11]

33. The protections in investment treaties are often more extensive than those found in national laws. For example, Canada does not have a constitutional protection against expropriation. The scope of investment protection in investment treaties such as the ECT is wider than that found in the EU treaties, though there is some overlap.[12]

Access to Arbitration

34. The existence of substantive protections is not the only benefit of investment treaties. Most treaties permit investors to commence arbitration against the host State for violations of the investment treaty. The ability to seek relief in a neutral arbitral forum is one of the principal advantages of investment treaties.

35. Arbitration as a means of resolving disputes between States, and of resolving disputes between citizens of one State and another State, has a long pedigree. The Jay Treaty of 1794 established a mixed claims commission composed of arbitrators from the United States and

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[11] Other obligations include permitting the transfer of currency and profits and agreeing not to impose performance requirements on foreign investors.

[12] Opinion of Advocate General Wathelet, ¶¶ 179-228, Case No. C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C 2017:699 (Sept. 19, 2017), https://tiny.cc/sdpirz.

Great Britain to determine whether claims for redress by U.S. persons against Great Britain for British seizures of American ships (or other property), and for redress by British persons whose property was seized by captures within the United States, would be resolved by arbitration.[13]

36. The first BIT to offer investors the possibility of investment arbitration was the Dutch-Indonesia BIT of 1968, while the first to offer unconditional investment arbitration was the Chad-Italy BIT of 1969.[14]

37. Investment treaty arbitration is slightly different from commercial arbitration in that it is forward looking. The treaty acts as a standing offer by the States party to the treaty to arbitrate disputes covered by the treaty—disputes relating to investments in the territory of the host State. Investors who have the nationality of one of the other parties to the treaty (usually referred to as the "home" State) can accept the offer by commencing an arbitration. The investment treaty will usually contain several options from which the investor may choose with respect to the arbitration, including, for example, arbitration under the ICSID Convention, which entered into force in 1966 and had 164 State parties as of June 2022,[15] or ad hoc arbitration under the UNCITRAL Rules.[16]

38. Arbitration is attractive for many reasons, but one of them is the robust international mechanism for the enforcement of arbitral awards. The New York Convention is one such regime; the ICSID Convention is the other significant treaty with global reach.

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[13] Treaty of Amity, Commerce and Navigation, London, U.S.-U.K., 8 Stat. 116 (Nov. 19, 1794), https://avalon.law.yale.edu/18th_century/jay.asp.

[14] Andrew Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 44-45 (Kluwer Law Int'l 2009) (Ex. 5 hereto).

[15] Database of ICSID Member States, available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

[16] UNCITRAL is the United Nations Commission on International Trade Law. UNCITRAL has promulgated frequently used arbitration rules, but UNCITRAL itself does not administer arbitrations.

C. The Energy Charter Treaty

39. The investment treaty in this case—the ECT—represents the same type of bargain as other modern international investment agreements. It is a multilateral, sectoral agreement that seeks to facilitate long-term cooperation in the energy field, which would "not take place without a massive transfer of capital and technology, particularly to the [S]tates with significant energy resources but insufficient means to develop them."[17]

40. The ECT was finalized on December 17, 1994; it entered into force in April 1998.[18] The EU itself is a Contracting Party, along with more than 50 other countries, including every EU Member State except Italy (whose withdrawal was effective January 1, 2016).[19]

41. The ECT started with the negotiation of the non-binding European Energy Charter, a process initiated by a proposal from the Dutch government.[20] While it involved many European states, it was not solely a European project. Russia, Canada, and the United States, to name just a few countries, were instrumental in influencing the treaty's negotiation. Graham Coop, the former General Counsel to the ECT Secretariat, noted:

> The negotiating partners consisted of more than fifty delegations with very different backgrounds and divergent perceptions and interests. To reflect this, and in particular the interest shown by countries such as the United States, Canada, Japan

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[17] Jeswald Salacuse, *The Energy Charter and Bilateral Investment Treaty Regime*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 321, 328 (Thomas Wälde ed., Kluwer Law International 1996), ("Salacuse") (Ex. 6 hereto).

[18] The International Energy Charter Consolidated Energy Charter Treaty with Related Documents at 8, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf (last updated Jan. 15, 2016).

[19] *Jordan is the 51st Contracting Party to the ECT*, International Energy Charter, (Dec. 12, 2018), https://tiny.cc/rh2jrz; International Energy Charter, The Energy Charter Treaty, https://tiny.cc/ij2jrz (last visited June 29, 2020).

[20] Graham Coop, *The Energy Charter Treaty: More than a MIT*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 3, 4-5 (Clarisse Ribeiro, ed., Juris, 2006) (Ex. 7 hereto).

> and Australia, the term "European," which had formed part of the title of the Charter, was dropped from the title of the Treaty.[21]

42. One of the ECT's primary negotiators has emphasized the difficulties in completing the negotiations due to the divergent interests of the negotiating parties: "The slightly more than three years that it took to agree the Treaty is a relatively modest period within which to complete a treaty of such scope, complexity, novelty and political sensitivity among so many parties having divergent interests."[22] Some of those divergent interests were among Western states; others showed fundamental differences in ideas between Western and non-Western states.[23] The resulting ECT is thus a multilateral instrument, which imposes international law disciplines on its Member States, not European law disciplines. Although it is a multilateral agreement, the provisions of BITs are the most relevant precedent for the protections for investors found in the ECT, and the practice of (and negotiators from) the United States and European countries influenced the investment protection provisions in the treaty.[24]

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[21] Coop, *supra* n.20 at 5. The ECT Secretariat's website shows the large number of successive drafts of the European Energy Charter, which later evolved into the Energy Charter Treaty—22 different iterations—suggesting that coming to an agreement was not an easy matter. International Energy Charter, Drafts of the Energy Charter Treaty (Dec. 1, 2016), https://tiny.cc/kk2jrz.

[22] Craig S. Bamberger, "Chapter 1. Overview," IN THOMAS W. WÄLDE (ED), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE AT 2 (Kluwer Law International 1996) (Ex. 8 hereto).

[23] Julia Doré, "Chapter 5, Negotiating the Energy Charter Treaty," in THOMAS W. WÄLDE (ED), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE, (Kluwer Law International 1996), pp. 140-41; 143-44 (Ex. 9 hereto), (noting differences between the U.S. and Norway, and between the US and France, among others, during the negotiations); 145-46 (noting Eastern countries' dissatisfaction with proposals for investment protection in particular).

[24] *Salacuse, supra* n.17 at 322 (the "concepts, principles, and terminology of the Energy Charter Treaty owe an undeniable debt to the concepts, terminology and principles employed in bilateral investment treaties").

IV. The Public International Law View of the Intersection of Investment Arbitration under the ECT and EU Law

43. The ECT requires its Member States to provide certain protections to investments of investors of other Member States and offers arbitration under the UNCITRAL Rules as a remedy should the State have allegedly violated those protections.

44. Over 120 investment arbitrations have now been brought under the ECT. More than half of those arbitrations have been intra-EU—i.e., cases in which the home State of the investor and the host State were both Member States of the EU.

45. The decision of the CJEU in *Achmea v. Slovak Republic*[25] determined that investment arbitration in the Netherlands-Slovak Republic BIT was incompatible with the European legal order. *Komstroy v. Moldova*[26] extended that incompatibility to ECT arbitrations between EU member states, notwithstanding the EU's and Spain's clear obligations under the ECT itself. Spain and the European Commission argue that these decisions negate the validity of the multiple awards rendered against Spain, including the one in this case. They argue that no investor from a European Union member state has ever been able to initiate an arbitration under the ECT against an EU member state due to limitations ostensibly imposed on them by EU law.[27]

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[25] *Slowakische Republic (Slovak Republic) v. Achmea BV*, Case No. C-284/16, ECLI:EU:C:2018:158 (Mar. 6, 2018), ECF No. 15-9.

[26] *Republic of Moldova v. Komstroy*, Case No. C-741/19, Judgment of the Court (Mar. 3, 2021), ECF No. 15-15.

[27] In *European Commission v. European Food SA,* ECLI:EU: C:2022:50 (Judgment of the Court, Jan. 25, 2022), ECF No. 15-69, the CJEU held that once Romania acceded to the European Union its consent to arbitrate disputes under the Romania–Sweden BIT lacked any legal force but was instead replaced by the system of remedies provided for in the TFEU and TEU treaties. While consistent with the *Achmea* decision, this argument also fails as a matter of international law for the reasons described below.

46. These arguments ignore the terms of the ECT, an international treaty adhered to by Spain and the European Union, and under which they undertook clear obligations. They dismiss the obligation undertaken by the EU and its member states under this multilateral treaty. They also misapprehend the relationship between the ECT and the EU treaties as dictated by principles of public international law.

A. The *Achmea* and *Komstroy* Decisions

47. The starting point of the discussion must be the CJEU decisions themselves, starting with *Achmea*. The CJEU's involvement arose when the Slovak Republic asked the Federal Court of Justice in Germany (Germany was the place of arbitration) to set aside an award rendered in favor of the claimant, *Achmea*, by an arbitral tribunal convened under the Netherlands-Slovak Republic BIT. The Slovak Republic argued that the arbitration clause in the BIT was void due to its incompatibility with Articles 267 and 344 of the TFEU.[28]

48. Article 344 of the TFEU prohibits EU Member States from referring disputes concerning the interpretation or application of the EU treaties to any method of dispute settlement aside from those methods found in the treaties. Article 267 of the TFEU outlines the preliminary reference procedure whereby courts and tribunals of Member States can refer questions of interpretation of EU law to the CJEU. Arbitral tribunals that are not considered courts and tribunals of the Member States are not able to seek preliminary rulings from the CJEU.[29]

49. The CJEU found that the arbitration clause in the BIT was incompatible with the European legal order because arbitral tribunals convened under the treaty could potentially

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[28] Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2008 O.J. C 326/47 ("TFEU"), ECF No. 15-6.

[29] *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97, ¶ 40 (June 1, 1999) ("EcoSwiss"), https://tiny.cc/9aqirz.

interpret and apply EU law, in violation of the principle of autonomy of the EU legal order and the obligation in Article 344 of the TFEU. Additionally, because the arbitral tribunal was not a court or tribunal of a Member State, it was not authorized to refer questions to the CJEU under Article 267 of the TFEU. The CJEU thus had no way to control any interpretation or application of EU law in which the BIT tribunal might engage.

50. The CJEU did not, in fact, rule out the possibility that the EU could sign a treaty and agree to refer matters regarding compliance with that treaty to independent dispute settlement.[30] Notwithstanding recognition of the EU's need to have this capacity, in *Komstroy* the CJEU extended the conclusions it had reached in *Achmea* to intra-EU disputes brought under the Energy Charter Treaty.[31]

B. Intra-EU Disputes are Arbitrable under the Plain Terms of the ECT

51. Contrary to the arguments advanced by Spain, the European Commission, and Professor Hindelang, neither the *Achmea* and *Komstroy* decisions nor the EU treaties render it impossible for an investor from an EU Member State to submit a claim against Spain under the ECT for the following reasons:

(a) The plain language of the ECT permits investors from one Contracting Party (such as the Netherlands) to submit arbitral claims against another Contracting Party (such as Spain);

(b) There is no disconnection clause, or other treaty provision, limiting the Applicability of Article 26, and its offer to arbitrate disputes, in the case of intra-EU claims;

(c) There is no evidence that any of the contracting parties to the ECT (whether EU member states or not) understood Article 26 to contain implicit limitations at the time the ECT was drafted;

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[30] *Achmea, supra* n.12, ¶ 57.

[31] *Komstroy*, *supra* n.26, ¶ 66.

(d) The ECT is a multilateral instrument reflecting the interests of *all* ECT States parties; and

(e) ECT Contracting Parties have not entered into subsequent agreements to change the interpretation of or modify the ECT to preclude intra-EU arbitration.

The Plain Language of the ECT Authorizes Intra-EU Arbitration

52. The ECT clearly provides for arbitration between "a Contracting Party" and "an investor of another Contracting Party." In Article 1(7)(a)(ii), it defines an investor as "a company . . . organized in accordance with the law applicable in that Contracting Party."

53. Here, there is no question that Spain is a Contracting Party to the ECT. AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. are organized in accordance with the laws of the Netherlands, also a Contracting Party to the ECT.

54. Article 26 of the ECT authorizes an investor of a Contracting Party to submit a dispute against another Contracting Party to a number of dispute resolution forums, including under the UNCITRAL Rules.

55. Thus, the straightforward interpretation of this language is that Petitioners have standing under the ECT to submit a claim against Spain under the UNCITRAL Rules.

There is No Provision in the ECT Precluding Intra-EU Arbitration

56. Nothing in the ECT suggests that a special regime exists as between the EU Member States who are also Party to the ECT. For example, there is no "disconnection clause" in the Treaty that makes the Treaty, or dispute settlement under it, inapplicable to intra-EU disputes.

57. The Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT") sets out the canons of treaty interpretation for international treaties.[32] In addition to being a treaty adhered to by 116 States, it is regarded as customary international law and thus is utilized to interpret treaties entered into by States who have not ratified it.[33]

58. The Vienna Convention provides that treaties be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[34] The context of the treaty comprises the entire treaty and its annexes.[35]

59. Here, the ordinary meaning of the ECT's provisions on investment protection is that investors from one Contracting Party can submit claims against other Contracting Parties for violations of the Treaty. According to the Preamble, the object and purpose of the treaty were, *inter alia*, "to catalyse economic growth by means of measures to liberalize investment and trade in energy." Encouraging investment by promising protections to those investments and assuring investors of the ability to vindicate those rights in arbitration are means of fulfilling the goals of the treaty. The ultimate goal of the ECT was and is to create and maintain a stable and efficient energy market that would facilitate long-term cooperation in the energy field, which would "not

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[32] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1115 U.N.T.S. 331 ("VCLT" or "Vienna Convention") (Ex. 10 hereto).

[33] The United States has called it "a primary source of reference for determining what are the customary principles of treaty law." Written Statement of the Government of the United States of America, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1970 I.C.J. Pleadings 843, 855 (Nov. 12, 1970) (Ex. 11 hereto).

[34] VCLT, *supra* n.32, art. 31(1).

[35] *Id.*, art. 31(2).

take place without a massive transfer of capital and technology, particularly to the States with significant energy resources but insufficient means to develop them."[36]

60. Nothing in the context of the ECT suggests a different conclusion. The ECT contains no "disconnection" clause applicable to Article 26 and its provisions regarding investors' ability to submit their claims to arbitration under UNCITRAL Rules. A disconnection clause serves the purpose of "ensur[ing] the primacy of Union law obligations in relations between the Member States themselves and to render this more transparent to other parties."[37] By contrast, the ECT does contain a disconnection clause applicable to Article 16, which gives investors the ability to elect protections under the ECT if they conflict with provisions relating to the same subject matter but that are less favorable to them. That disconnection clause ensures that Article 16 does not operate vis-à-vis the Svalbard Treaty.[38] Yet, the ECT does not contain a disconnection clause applicable to Article 26. As observed by the tribunal in this case:

> It would seem striking that the Contracting Parties made an express exception for the Svalbard Treaty, which concerns an archipelago in the Arctic, but somehow omitted to specify that the ECT's dispute settlement system did not apply in all of the EU member states' relations. Compared to the Svalbard Treaty exception, an exception with regard to the intra-EU relations would be of much greater significance. It would be extraordinary that an essential component of the Treaty,

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[36] Salacuse, *supra* n.17 at 328.

[37] Marise Cremona, DISCONNECTION CLAUSES IN EU LAW AND PRACTICE, MIXED AGREEMENTS RE-VISITED – THE EU AND ITS MEMBER STATES IN THE WORLD 160, 161 (C. Hillion and P. Koutrakos eds., 2010) (Ex. 12 hereto).

[38] Final Act of the European Energy Charter Conference, Annex 2 (Ex. 13 hereto); *see also Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (Aug. 31, 2018) ("*Vattenfall*") ¶ 204 n.123, https://tiny.cc/xjqirz; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.À.R.L. v. Kindgom of Spain*, ICSID Case No. ARB/13/36, Award (May 4, 2017), ¶ 187 & n.187 , https://tiny.cc/pkqirz; *Antin Infrastructure Services Luxembourg S.À.R.L. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), ¶¶ 215-216, https://tiny.cc/flqirz.

such as investor-state arbitration, would not apply among a significant number of Contracting Parties without the Treaty drafters addressing this exception.[39]

61. The ECT also includes a limitation in Article 25, which provides that parties to an economic integration agreement are not obliged by the most-favored-nation clause in the ECT to extend the privileges of the economic integration agreement to ECT Contracting Parties. These examples are part of the context that informs the proper interpretation of Article 26; it demonstrates that the Parties to the ECT were capable of including a disconnection clause when they wanted to preclude the application of a particular article due to potential incompatibility with other commitments. Yet there is simply no such disconnection clause applicable to Article 26.

62. Normally, the VCLT does not permit recourse to negotiating history unless interpretation under Article 31 is ambiguous or unclear, which is not the case here. If such recourse were necessary, however, the negotiating history of the ECT reveals that the EU proposed to add a disconnection clause with respect to the EU treaties, but the clause was not included in the final treaty.[40]

63. The Vienna Convention requires that treaties be interpreted in good faith; a corollary principle is that treaty negotiators act in good faith. Professor Hindelang's and Spain's assertions, however, would require the conclusion that Spain and other EU Member States violated this principle.

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[39] *PV Investors v. Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (Oct. 13, 2014), ¶ 183 (Ex. 14 hereto).

[40] Draft Treaty, Basic Agreement for the European Energy Charter, at 84 (Aug. 12, 1992), https://tiny.cc/3evirz.

64. In his declaration, Professor Hindelang states that the *Achmea* decision has retroactive effect, and sets "the content and meaning of a given rule *ab initio*."[41]

65. What is now Article 344 of the TFEU was previously Article 292 of the Treaty Establishing the European Community of 1992, and was Article 219 of the Treaty of Rome. The same can be said of Article 267, which was Article 234 of the TEC and Article 177 of the Treaty of Rome.[42] These provisions were thus extant at the time the ECT was negotiated and ratified.

66. Thus, according to Professor Hindelang and Spain, none of the EU Member States, nor the EU itself, has ever been, consistent with EU law, able to comply with Article 26 and agree to submit disputes to arbitration under Part V of the treaty for intra-EU disputes. Yet they did in fact agree to do so. Ratifying a treaty with which a country cannot comply violates the principle of good faith found in VCLT Article 26.[43] Thus, under settled treaty interpretation principles under international law, the ECT and TFEU must be read in a manner that do not render "void *ab initio*," as Professor Hindelang claims, the content and meaning of the ECT. There is no evidence that any of the contracting parties to the ECT (whether EU member states or not) understood Article 26 to contain implicit limitations at the time the ECT was drafted.

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[41] Hindelang Decl. ¶ 61, ECF No. 15-2.

[42] Articles 267 and 344 of the TFEU were originally Articles 177 and 219 of the 1956 Treaty establishing the European Economic Community (the "Rome treaty" or "EEC"). *See* Treaty Establishing the European Economic Community, 298 U.N.T.S. 11 (Mar. 25, 1957) (Ex. 15 hereto). The 1992 Treaty on the European Union, usually called the "Maastricht Treaty" or the "TEU," renamed the Rome Treaty the Treaty Establishing the European Community ("TEC"), and renumbered Articles 177 and 219 of the Rome Treaty as Articles 234 and 292. *See* Treaty on European Union (Consolidated version 2016), June 7, 2016, 2016 O.J. (C 202), https://tiny.cc/z3tirz. *See generally Vattenfall*, *supra* n.38, ¶¶ 205-06 & n.124.

[43] VCLT, *supra* n.32, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

67. Whatever view the Commission, Spain, and Professor Hindelang may take today about the validity of intra-EU arbitration under the ECT, no one questioned at the time the ECT was concluded that EU members could bind themselves to arbitration regarding intra-EU disputes. The ECT negotiations took place in the 1990s. It was not clear in the 1990s that intra-EU investment arbitration was impermissible, whether it occurred under the auspices of the ECT or under BITs. Instead, it was not until the 2000s that scholars began to question the availability of intra-EU investment arbitration. Anticipating many of the arguments that would subsequently be made by the Commission and by certain Member States, they nonetheless concluded that intra-EU investment arbitration, including arbitration under the ECT, was possible. "In conclusion, the legal character of the ECT as a mixed agreement under EC law does not influence the comprehensive legally-binding effect of the treaty in view of the EC and its Member States from the perspective of public international law. Similarly, the ECT's legally-binding effect as public international law extends to the *inter se* relationship of the EU Member States."[44]

68. Notable as well is that well into the 2000s, some EU Member States remained of the opinion that their EU obligations did not preclude investment treaty obligations. In 2010, for example, the Netherlands took the position that:

> "the BIT in question in this dispute [The Netherlands – Slovak Republic BIT] continues to be fully in force. Consequently, there is also no reason to doubt the

[44] Christian Tietje, *The Applicability of the Energy Charter Treaty, in ICSID Arbitration of EU Nationals vs. EU Member States*, Inst. of Econ. Law 8-9 (Sept. 2008), http://tiny.cc/5d8btz. Further, Tietje notes, "Consequently, from a public international law perspective, an *inter se* modification of the ECT by EC law is not possible. This is particularly the case if such a modification would have a negative impact on the substantive and procedural legal rights of investors." *Id.* at 13; *see also* Markus Burgstaller, *European Union Law and Investment Treaties*, 26 J. Int'l Arb. 181, 211 (2009) (Ex. 16 hereto) ("The conclusion that EU nationals may bring claims under the ECT against other Member States is reinforced by the notion that *inter se* agreements are generally considered to be precluded once the respective treaty has an individual rights dimension.").

> jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal."[45]

69. Thus, even in 2010, EU Member States themselves were not uniformly of the opinion that intra-EU investment arbitration, whether under a BIT or under the ECT, was impermissible as a matter of EU law. Some 15 years earlier third states negotiating the ECT could not have been expected to understand that the obligations they were undertaking were not in fact being undertaken as between the EU member states themselves absent a disconnection clause making that point clear.[46]

70. Indeed, through its actions, the European Commission has acknowledged that intra-EU investment agreements remained binding notwithstanding the accession of formerly non-EU countries to EU membership.[47] In 2015, the European Commission asked EU Member States to abrogate their intra-EU BITs.[48] When most failed to do so, the Commission launched infringement proceedings against several of those States.[49] Infringement proceedings against EU Member States for their failure to terminate their intra-EU BITs would not be necessary were the

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[45] *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction (Oct. 26, 2010), ¶ 161, http://tiny.cc/kbh8tz.

[46] Tietje, *The Applicability of the ECT*, *supra* n.44, at 11.

[47] It is also notable that the EU did not take any kind of steps to seek modification of Article 26 in 2004, when a number of eastern European states acceded to the European Union. Had that act changed those states' obligations under the ECT one might have expected the EU to take steps to modify the jurisdictional clause in article 26. *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ICSID Case No. ARB/15/20 (Feb. 19, 2019) ("*Cube*"), ¶¶ 136-137, https://tiny.cc/suchrz.

[48] European Commission, Commission asks Member States to terminate their intra-EU bilateral investment treaties (June 18, 2015), http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last visited Jan. 11, 2018).

[49] *Id.*

treaties themselves negated simply by their incompatibility with EU law. No similar infringement proceedings have been brought regarding the ECT.

71. Article 26(1) refers to "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." The European Commission would ignore the plain meaning of this provision and the facts of conclusion of the ECT. The EU Member States (aside from Italy, which withdrew in 2016) are all "Contracting Parties" to the ECT in their own right. The European Commission suggests that because, as a Regional Economic Integration Organisation ("REIO"), it can make binding decisions for its Member States, the EU Member States should be treated as a unit for all ECT purposes; thus, a reference to the "Area" of "another" contracting party would not refer to an area within the EU. Yet this provision merely defines a REIO, and in no way implies that where the EU can bind its members, they cease being Contracting Parties in their own right.

72. The European Commission also suggests that by entering the ECT together, the EU and its Member States acted as a single entity of public international law, "bound by treaty obligations to other contracting parties but not as between themselves." ECF No. 18-1 ("EC Br.") 9. Yet this argument, again based solely on the definition of REIO, ignores the fact that, at the time of the signing of the ECT, the EU did not have competence over all matters covered by the ECT.[50] Neither the EU nor its Member States could have intended, or anticipated, that the EU eventually would have competence over foreign direct investment or dispute resolution matters. The former came about only with the Lisbon Treaty in 2008, and the latter is still a subject of

[50] *See* EC Br. at 9 n.5: "The ECT was signed by the EU as well as its Member States because at the time, the EU did not possess full, exclusive external competence over all matters to which the ECT applied."

mixed competence. Thus, the fact that the EU joined the ECT as an REIO did not mean that the EU functionally replaced the Member States for all matters.

73. Furthermore, even now the EU does not act as a bloc with respect to the ECT. For example, Italy has withdrawn from the ECT, but none of the other Member States have, nor has the EU itself. Article 26(3(b)(i) of the ECT permits ECT contracting states to refuse their consent to arbitration if the investor had previously submitted its claim to domestic courts. This is colloquially known as a "fork-in-the-road" requirement. The ECT contracting states who have refused their consent are listed in Annex 1D to Article 26; only 14 of the 27 EU Member States, and the EU itself, have elected this option, again demonstrating the failure of the EU to act as a single entity under the ECT.[51]

74. The Commission's arguments, made in 2022, ignore the historical context in which the ECT negotiations took place in the mid-1990s. It was understood by all Parties that the Commission lacked competence over all of the areas covered by the ECT. There was no expectation either of a change in competence as between the EU Member States and the European Union or of a change in the obligations they undertook vis-à-vis third parties or vis-à-vis each other.

75. The understanding that the EU and its Member States will work together to implement "mixed agreements" to which they are all parties is indeed essential, especially given potential uncertainty about the boundaries of their respective competences. The European Commission was present as a negotiating party and was negotiating on its own behalf during the

[51] The Member States that require investors to elect a fork in the road are Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Greece, Hungary, Ireland, Poland, Portugal, Romania, Slovenia, Spain, and Sweden.

ECT negotiations. All of the EU Member States participated fully in the negotiations and did not always agree with the Commission.[52] Moreover, the talks were characterized by "constant rifts between France and the United States."[53] The European Commission was not, therefore, the sole mouthpiece of the Union during the negotiations.

76. To this day, the EU and its Member States have continuing separate obligations under the ECT due to their respective competences. Even after the entry into force of the Treaty of Lisbon, the EU still does not have full competence over dispute resolution with respect to foreign direct investment; the CJEU has held that dispute settlement in trade agreements is a matter of shared competence.[54] Only individual Member States have ever been respondents in ECT cases; the European Commission has never elected to have the Union serve as the Respondent.

77. There is no reason to think that the states negotiating the ECT, whether they were outside the EU (and of course many current EU Member States were not Member States at the time of the negotiations) or inside it, expected that the ECT disciplines were not binding among all contracting Parties.[55] The European Commission quotes a book chapter written by Bleckmann for the proposition that when the EU and its Member States cooperate in the conclusion of mixed

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[52] Julia Doré & Robert De Bauw, The Energy Charter Treaty 6 (1995) (Ex. 17 hereto) ("Some EU countries opposed to the Commission's proposals on the internal market for electricity and gas fought against an alleged clandestine introduction of third party access (TPA) to transportation networks.").

[53] *Id.* at 30.

[54] Opinion 2/15 of the Court (May 16, 2017), ¶¶ 285-93, https://tiny.cc/8crirz.

[55] Writing in 1995, Doré and De Bauw note that "An unprecedented dispute settlement procedure then gives an investor or a government the possibility of arbitration if it feels its rights . . . have been disregarded. Again, this holds for Western investment in other countries of the West as much as for investment in the East, and dispute settlement provisions might have a notable impact on intra-Western practices." Doré & Robert De Bauw, *supra* n. 52, at 67.

agreements, they act "as a unity vis-à-vis the third States";[56] yet on the very next page, Bleckmann writes: "[T]he principle of equality of all States of the international community leads to the conclusion that all mixed agreements must be interpreted in a way which attributes equal rights and duties to all parties to the Treaty."[57] Bleckmann, thus, confirms that even in mixed agreements all contracting states have equal status, including equal rights and duties.

78. It is indeed possible, depending on the type of treaty and the manner in which it is concluded, for a treaty to be constructed so as to be between the EU on the one hand and another state party (or parties) on the other. For example, the Comprehensive Economic and Trade Agreement Between Canada and the EU ("CETA") is drafted in such as a way as to make clear that Canada is one "Party" and the EU or its Member States are the other "Party" to the treaty; investors from one of the Parties can submit claims in arbitration against the other Party.

79. The ECT, on the other hand, explicitly defines each state as a "Contracting Party." Spain and the Netherlands are thus each discrete Contracting Parties under the ECT. Individual EU Member States thus were, and are still, essential actors in the ECT universe.

The ECT Is A Multilateral Instrument Reflecting The Interests Of All ECT States Party

80. The ECT is a multilateral instrument with 51 Contracting parties.[58] The EU's suggestion that EU Member States have no interests vis-à-vis each other is not a matter of indifference to the other Contracting Parties. The ECT imposes international law disciplines on

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[56] EC Br. at 9 n.6 (internal quotation marks omitted).

[57] Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, in David O'Keeffe & Henry G. Schermers, Mixed Agreements 155, 159 (1983) (Ex. 18 hereto) (footnote omitted).

[58] International Energy Charter, *Jordan Is the 51st Contracting Party to the ECT* (Dec. 12, 2018), https://energycharter.org/media/news/article/jordan-is-the-51st-contracting-party-to-the-ect/; International Energy Charter, *The Energy Charter Treaty* (Feb. 18, 2019), https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

the states that are party to it, not European law disciplines. This is important because of the manner in which differences in obligations might distort the treatment given to aspiring investors.

81. For example, the ECT requires host states to accord fair and equitable treatment to investors from Contracting Parties. The European Commission posits that EU investors can only receive recompense if paying them does not constitute unlawful "state aid" under EU Law. EC Br. at 24-25. The implication is that the standard might be interpreted differently in an extra-EU situation. Or to put it in a more straightforward manner, it is that an extra-EU investor could in fact submit a claim for a breach of fair and equitable treatment, as permitted by the ECT.

82. While on the surface this possibility might seem to confer a benefit on the non-EU investor as compared to the EU investor, and to preserve the rights of that investor, in practice that is not necessarily the case. The ECT was meant to ensure security of investments and uniformity of treatment of investors, regardless of their country of origin, in all of the Contracting Parties. Thus questions of national origin are not supposed to influence a host state that is deciding, for example, to which investors it should award preferential contracts for the exploitation of natural resources. Yet if that state owes international law obligations to some investors, and does not owe those obligations to other investors, the state might have an incentive to award the contract to the investor to whom it *does not* owe any international law obligations, and to whom it does not need to answer in international arbitration.

83. To put it more plainly, using the facts of this case, Spain might well favor EU investors over non-EU investors in future similar situations if in fact the ECT provided no redress to EU investors but did provide redress to investors from non-EU Contracting Parties.

84. It is true that the national-treatment or most-favored-nation obligation might be pressed into service by a non-EU investor denied a contract, yet proving discrimination on the

basis of nationality is difficult given the myriad considerations that dictate decisions such as the awarding of concession agreements.

85. Similar concerns are illustrated in disciplines on "performance requirements" that are found in some investment treaties and in the ECT. A performance requirement is usually an obligation not to require the use of local content in return for permission to invest. While most obligations in investment treaties apply only to investors from states party to the treaty, a state that agrees not to impose performance requirements on investors generally agrees not to do so for all investors, not just for investors from states party to the treaty.[59]

86. The reason for this is the concern that if a state could impose performance requirements on a non-covered investor, the state might prefer that investor over the investor from the state party to the treaty. Thus, agreeing to forego imposing performance requirements on all investors negates the advantage that non-protected investors might enjoy.

87. Thus, it is not the case that interpreting the ECT as imposing no intra-EU obligations would have no effect on non-EU Parties. It is clear that it can affect non-EU parties, and that the ECT negotiations would likely have been different had such a disparity in obligation been understood to exist.

The Contracting Parties Have Not Modified the ECT to Preclude Intra-EU Arbitration

88. Spain and the European Commission point to a statement by some EU Member States issued on January 15, 2019, where 22 Member States, including the home state of Petitioners

[59] *See, e.g.*, North American Free Trade Agreement ("NAFTA"), art. 1106(1), http://tiny.cc/wbh8tz ("No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory . . . .").

(the Netherlands) agreed to terminate intra-EU BITs and took the position that Article 26 of the ECT is incompatible with the EU treaties.[60] However, the EU Member States' statement, without more, has no legal effect under international law. It does not constitute subsequent agreement between parties regarding the interpretation of the Treaty and does not modify the Treaty even as between the EU Member States.

89. As a preliminary matter, the EU Member States did not adopt a unanimous position on the interpretation of ECT Article 26. Six EU Member States made separate statements, five together, and one (Hungary) writing separately. While these six Member States agreed to attempt to terminate their intra-EU BITs, these countries correctly noted that the impact of *Achmea* was limited to BITs with arbitration clauses "such as the one described in the *Achmea* judgment."[61] Notably, these six countries refrained from declaring that EU law takes precedence over the international law obligations of the EU Member States. Additionally, the six Member States disagreed that the ECT was incompatible with EU law, noting that "it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with [EU] law of the intra EU application of the [ECT]."[62]

90. Further, Hungary wrote: "[T]he *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the [ECT] and it does not concern any pending or prospective arbitration proceedings initiated under the ECT."[63] While the issuance of *Komstroy* means that the CJEU has now issued a

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[60] 22 Member States' Decl. at 2, ECF No. 15-11.

[61] Declaration of the Representatives of the Government of the Member States (Jan. 16, 2019) ("Five Member States' Decl.") at 1, ECF No. 15-12.

[62] *Id.* at 3.

[63] Declaration of the Representative of the Government of Hungary, (Jan. 16, 2019) ("Decl. of Hungary"), ¶ 8, ECF No. 15-13.

judgment specific to the ECT, these statements nonetheless demonstrate a lack of agreement about the effect of *Achmea* and *Komstroy* and still more disagreement about their scope of application.

91. The six EU Member States also declined to inform ECT investment arbitration tribunals about the legal consequences of the *Achmea* judgment as set out in the 22 Member States Declaration, or to direct their investors not to initiate arbitrations under the ECT.[64]

92. The disparity in views demonstrated by the three statements negates any suggestions that these statements could be viewed as a subsequent agreement between the parties regarding the interpretation of the ECT or the application of Article 26, pursuant to Vienna Convention Article 31(3)(a) or (b).[65]

93. Additionally, of course, the ECT is in a different posture than intra-EU BITs, given that its membership includes non-EU Member States. Thus, there can be no question of a subsequent agreement between only some of the parties that would provide interpretive guidance on the ECT, which applies between all States that are party to it. As Professor Richard Gardiner has stated, "[t]he key issue is whether the interpretive instrument is one to which the parties have given their *concordant* blessing."[66] The World Trade Organization ("WTO") Appellate Body has similarly held:

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[64] *Compare* Decl. of Hungary, *supra* n.63, ¶¶ 1, 3 *and* Five Member States' Decl., *supra* n.61, ¶¶ 1, 3, *with* 22 Member States' Decl., *supra* n.60, ¶¶ 1, 3.

[65] VCLT, *supra* n.32, art. 31(3) provides that a treaty interpreter shall "take into account, together with the context:

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision; [and]
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"

[66] Richard Gardiner, TREATY INTERPRETATION 231 (OUP, 2d ed. 2016) (emphasis added) (Ex. 19 hereto).

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.[67]

The ECT is not a "bilateralizable" treaty. It is a multilateral treaty which, by its plain terms, cannot be modified *inter se* absent adherence to strict provisions.

94. Moreover, as a matter of international law, the declaration by some EU Member States does not modify the ECT. VCLT Article 41 (Agreements to Modify Multilateral Treaties Between Certain of the Parties Only) first asks whether the treaty (the ECT, in this case) provides for the possibility of such a modification. In this case, the ECT has a specific article that addresses amendments, including modifications that would apply only as between some Member States. Article 42 of the ECT provides that the text of proposed amendments must first be adopted by the Charter Conference, and that they thereafter be distributed to all Contracting Parties for ratification, acceptance, or approval. Amendments enter into force between Contracting Parties that have ratified, accepted, or approved them on the 90th day after instruments showing ratification, acceptance, or approval by at least *three-quarters* of the Contracting Parties have been submitted to the Depository.

95. Thus, any implicit understanding by the EU Member States and the EU itself that some provisions of the ECT, including the ability to submit claims to arbitration, did not or do not apply as between themselves would be simply ineffective to change the Treaty. Moreover, parties to a treaty cannot amend the treaty only as between themselves without complying with the amendment process specified in the treaty.

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[67] Appellate Body Report, EC – Customs Classification on Certain Computer Equipment, ¶ 84, WTO Doc., WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R (adopted June 5, 1998), (emphasis in original), https://tiny.cc/tk9jrz.

96. Even assuming *arguendo* that Article 42 of the ECT could be read to permit *inter-se* modification (*i.e.* only between EU Member States), the parties in question must "notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[68] This has never been done. Moreover, while agreements concluded by all of the parties to a treaty in connection with the conclusion of a treaty can be considered in the interpretation of a treaty, as can instruments made by one party in connection with the conclusion of a treaty and accepted by all of the other parties to a treaty as an instrument related to the treaty, no such collective agreements have been entered into by all ECT Member States.[69]

97. As the Permanent Court of International Justice ("PCIJ") said in the *Eastern Greenland* case, "[w]hat the Court cannot regard as being in accordance with the undertaking of July 22nd, 1919 is the endeavour to replace an unconditional and definitive undertaking by one which was subject to reservations."[70] Article 26 of the ECT, and indeed the entire ECT itself, is an unconditional undertaking.

98. Accordingly, without the agreement of all the Parties to the ECT, the declarations do not constitute binding subsequent interpretations of or modifications of the ECT so as to prohibit intra-EU arbitration under the Treaty.

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[68] VCLT, *supra* n.32, art. 41(2). This provision also requires that the modification not be incompatible with the execution and purpose of the treaty as a whole; arguably such a modification would be incompatible with the execution and purpose of the Energy Charter Treaty given that "Article 16 ECT prevents the EU Treaties from being construed so as to derogate from the more favourable rights of the Investor in Parts III and V [of the] ECT, including the right to dispute resolution." *Vattenfall*, *supra* n.38, ¶ 221.

[69] VCLT, *supra* n.32, art. 31(2)(b), 3(a).

[70] *Denmark v. Norway*, PCIJ General List No. 43, Judgment No. 20, ¶ 200 (Sept. 5, 1933), http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm.

99. Moreover, the EU Member States' actions acknowledge that the declarations, by themselves, lacked legal force. As noted above, the EU Member States in the January 2019 declaration agreed to terminate intra-EU BITs, and on May 5, 2020, twenty-three EU Member States entered into a treaty to do so.[71] That agreement is still subject to ratification, approval or acceptance, and thus has not yet entered into force. Termination of the intra-EU BITs would not be necessary were those treaties simply inoperable by virtue of the declarations. Termination would not be necessary if the CJEU decisions in *Achmea*, *European Commission v. European Foods SA*, and *Komstroy*, without more, sufficed to render any treaty void *ab initio*.

C. The EU Treaties Do Not Displace the ECT under International Law

100. The ECT is compatible with the EU treaties as a matter of international law. As demonstrated above, it is entirely possible for them to co-exist and for the Parties to each treaty to fulfill their obligations under them. To the extent they are regarded as being in conflict, under the terms of the Energy Charter itself, and the relevant rules of international law, the ECT prevails.

101. It is not uncommon that States will be parties to multiple treaties and that the relationship between the treaties, and the obligations contained therein, can be complex. As noted above, public international law, and the Vienna Convention in particular, have rules governing the interaction between treaties.[72]

102. Vienna Convention Article 30(2) provides that 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. The converse is also true.

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[71] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (May 29, 2020), https://tiny.cc/w8qirz.

[72] *See supra* ¶ 57

103. Thus, one must look to the treaties themselves to ascertain whether the parties have given any indication as to their views of the hierarchy among treaty obligations. Frequently parties have not done this, but in this particular case, the ECT has a very explicit clause asserting its supremacy when the same subject matter is at issue. In the case of conflict, Article 16 provides that:

> When two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
>
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, *where any such provision is more favourable to the Investor or Investment.*

104. This is a clear statement of both retrospective and prospective supremacy of the ECT to the extent it is more favorable to the investor or the investment.

105. Article 16 is only applicable insofar as there is a conflict between the subject matter of Part III (obligations) and Part V (investor-State dispute settlement).

106. All of the relevant countries were parties to the EU at the time they signed the ECT. They did not take reservations as to Article 16. Indeed, Article 46 of the ECT, in fact, prohibits the taking of reservations, suggesting that the Contracting Parties viewed the terms of the Treaty as essential to ensure its full and desired implementation. Article 16 is thus applicable in the event of a conflict between the ECT and the EU treaties.

107. Nor, as noted above, did ECT Parties include a "disconnection" clause providing that Article 16 not apply as between EU Member States.[73] There is no basis to support the idea that the Parties signed on to the ECT knowing that many of its key provisions were inapplicable between more than a dozen of the treaty parties, but they did not amend the treaty to indicate this significant limitation in its reach.[74] In a multilateral treaty, in the absence of a disconnection clause, "a corresponding treaty has supremacy of application over Union law. That is not a particularity, but it is imperative for international law."[75]

108. Article 16 is thus applicable in the event of a conflict between the Energy Charter Treaties and the EU treaties. As the tribunal in *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain* stated, "in case of any contradiction between the ECT and EU law, the Tribunal would have to ensure the full application of its '*constitutional*' instrument, upon which its jurisdiction is founded. . . . [I]f there must be a '*hierarchy*' between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore,

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[73] *See supra* ¶ 62.

[74] The Commission refers to *Commission v. Ireland*, colloquially known as *Mox Plant*, to show that the ECJ held that an inter-state arbitration provision found in the U.N. Convention on the Law of the Sea ("UNCLOS") could not be applied in the intra-EU context. EC Br. 8, 21; *see also Commission v. Ireland* ("*Mox Plant*"), Case No. C-459/03 ECLI:EU:C:2006:345, Judgment (May 30, 2006), http://tiny.cc/5ch8tz. In fact, however, dispute settlement under UNCLOS is remarkably different from dispute settlement under the ECT. Unlike Article 26 of the ECT, in which States bind themselves to arbitrating disputes under the treaty, Article 280 of UNCLOS says that States Party to the treaty retain the right "to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."

[75] Christian Tietje, *Bilateral Investment Treaties Between EU Member States (Intra-EU BITs) – Challenges in the Multilevel System of Law*, 10:2 Transnational Dispute Management 1, 10 (March 2013) (Ex. 20 hereto).

the ECT prevails over any other norm (apart from those of *[j]us cogens* – but this is not an issue in the present case)."[76]

109. Even without Article 16's clear directive, the principle of *lex posterior* still requires that the ECT be given precedence.

110. *Lex posterior* is the principle that the later-in-time treaty covering the same subject matter controls.[77] Under this principle, the ECT prevails over conflicting provisions of EU law. The ECT was adopted in 1998, after the predecessor provisions to Articles 267 and 344 of the TFEU were originally enacted as Articles 177 and 219 of the Treaty of Rome.[78] Thus, as the later-in-time treaty, the ECT would control over those provisions of the TFEU to the extent they address the same subject matter.

111. Ultimately, however, *lex posterior* cannot be used to replace Article 16's clear directives due to another principle of international law—that of *lex specialis*—the proposition that the more specific rule overrides the general one. In this case, the ECT is unquestionably more specific regarding the relationship between it and competing agreements than are the far more general provisions of the TFEU. A general principle of incompatibility with EU law cannot displace this specific provision that was agreed to by the EU itself and the EU Member States. Accordingly, even if Articles 267 and 344 of the TFEU were considered later enactments, Article 16 of the ECT would still control.

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[76] *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (June 6, 2016), ¶ 75, Case No. 1:19-cv-03783, ECF No. 1-1, Ex. B.

[77] VCLT, *supra* n.32, art. 30(3) ("the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty").

[78] *See supra*, ¶ 65 and n.42.

112. Thus, even if there is a conflict between the ECT and the EU treaties, the former's provisions authorizing intra-EU arbitration prevail under settled interpretation principles of international law.

113. In addition, the ECT does not permit an arbitral tribunal to *apply* EU law, and instead calls for arbitration under generally applicable principles of international law, with the law applied to be the obligations found in the ECT itself. The ECT confers specific authority on tribunals to hear "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III" – if the dispute cannot be settled amicably. Part III of the ECT contains the obligations undertaken by Contracting States to other States and to their investments. A tribunal convened under the ECT can only hear claims of an alleged breach of an obligation under the Treaty. Those provisions limit the authority of the tribunal. Thus, the tribunal can decide if there is a violation of the national treatment standard, or of the fair and equitable treatment standard, or the other provisions laid out in Part III. These specific treaty obligations are the only issues to be determined by the tribunal. In short, these provisions are the law applicable to the merits of the dispute—the rules of decision in an ECT case. An ECT tribunal thus does not have the authority to "apply" EU law to the merits of the dispute. This conclusion is supported by the plain text of Article 26(6) of the ECT, which directs tribunals to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

E. Primacy of International Law

114. Autonomy of EU law is a principle of EU law, not of public international law. Neither the EU nor its Member States are permitted to derogate from public international law on the basis of the "autonomy" of the EU legal order. There is additionally no rule in public

international law that EU law is "superior [in] rank" to other public international law applicable between the EU Member States.[79]

115. The fact that the EU is constituted by a set of interlocking treaties does not mean that EU law is inevitably superior to, or displaces, any other international law. The fact that EU treaties are international legal instruments does not change the fact that the principles of primacy and autonomy are principles of EU law, not international law. These two principles have been used to constitutionalize EU law.[80] Because the EU is comprised of a federation of different nation states with independent sovereignty, they do not have a domestic constitution uniting the 27 Member States as a matter of domestic law.

116. But the mere fact that the legal relationship between the EU Member States is effectuated by international treaties does not make those treaties superior to other international agreements as a matter of international law. In effect, the principle of the primacy of EU law operates as a Supremacy Clause. Within the EU legal order, the EU and its Member States can determine how much effect they want to give EU law, including ensuring that it prevails over any other obligation. This decision does not, however, negate their obligations on the international plane.

117. On the contrary, the very principles that make international law binding, and that make the EU treaties binding, lead to a different conclusion. EU law cannot be part of international law yet also act in a manner that is completely self-contained and divorced from any other principle of international law. EU law is indeed often viewed as a subset of international law. It is not on that basis superior to other international law regimes.

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[79] Hindelang Decl., *supra* n.41, ¶ 36.

[80] Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, ILC, A/CN.4/L.682 (Apr. 13, 2006), ¶ 218, https://tiny.cc/h0rirz.

118. Professor Hindelang points to three cases decided by the Court of Justice of the European Union where the Court concluded that the EU could not become a party to an international convention (the draft European Free Trade Association, the proposed European and Community Patent Court, and the European Court of Human Rights), due to the incompatibility of those Conventions and their associated dispute settlement mechanisms with the principle of primacy of EU law. Hindelang Decl. ¶¶ 71-73. Yet those cases all differ from this one in one key respect: the decisions in those cases came *before* the EU had ratified the agreement in question, not more than twenty years later. Thus, in each of those cases the European Union decided not to move forward with the agreement on the grounds that to do so would mean undertaking obligations inconsistent with EU law. That is the appropriate approach. In this case, the decision in *Komstroy* came more than 20 years *after* the EU and its member states had ratified the ECT.

119. The desire to preserve the autonomy of EU law might lead the EU or its Member States not to take on international obligations, but if they do take on those obligations they are obliged to perform them in good faith[81] and they will be held internationally responsible if they breach them.[82] The desire to preserve that autonomy might even cause them to breach their international obligations, but that choice does not excuse them from the international obligation;

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[81] Article 26 of the Vienna Convention, *supra* n.32, enshrines the principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[82] Articles on State Responsibility, *supra* n.5, art. 1 ("Every internationally wrongful act of a State entails the international responsibility of that State."); art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.").

it simply places them in breach on the international plane, regardless of the effect on the EU plane.[83]

120. The appropriate approach, therefore, is for the European Union and its Member States either to withdraw from the Energy Charter Treaty or to renegotiate it so that its provisions accurately reflect the commitments that the EU and its member states are willing to make. The same principle holds for investment treaties, whether they be intra- or extra-EU. The suggestion in the recent *European Food* case that "with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure" in the Romania-Sweden BIT might be true as a matter of EU law, but it is not true as a matter of international law. The appropriate course of action would be for Romania and Sweden to terminate the BIT between them, as in fact they have done. Absent that termination, the treaty, including its arbitration provisions, would remain in force and constitute a binding international obligation between the two states. Indeed, if the treaty were not binding, but had been superseded or amended merely as a result of Romania's accession to the EU, there would have been no need to terminate the treaty.

121. Article 27 of the VCLT sets forth the bedrock principle of international law that a treaty party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

122. Article 46 of the VCLT confirms this conclusion in the case of EU Member States:

> A State may not 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 unless that

[83] *Id.*, art. 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by international law.").

> violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> * * *
>
> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

123. Spain here is arguing that its consent to be bound by the ECT, at least insofar as the ECT pertains to other EU Member States and investors from those Member States, was a violation of its internal law (in this case EU law) which invalidated its consent. In order to excuse Spain from its obligation, however, that violation had to be manifest. Spain's ratification of the ECT comported with all formal requirements, and all requirements of Spanish law. Articles 267 and 344 of the TFEU existed, albeit with different numbering, in the TEU, yet Spain ratified the ECT anyway. In such a case, Spain's authority (or lack thereof) to ratify the provision was not "manifest."

124. Likewise, the EU is an international actor. It can and does enter into international agreements, as it did with the ECT. To do so effectively, it must be able to bind itself, as recognized by the CJEU in *Achmea*. When it binds itself and holds itself out to other nations as having bound itself, it must honor that decision. To find otherwise would be to make it impossible for the EU to act internationally. The EU has bound itself to the ECT.

125. That the European Commission might regard Spain's act of paying the Award, even when done to comply with a U.S. court judgment enforcing the Award, to be unlawful state aid does not negate Spain's obligation to honor its commitments under both the ECT and the New York Convention. Asserting that the failure to comply with Spain's obligations stems from EU law in its guise as international law is equally unavailing under Articles 27 and 46 of the VCLT.

126. The difficulty surrounding apparent conflicts between EU Member States' EU law obligations and other international obligations is not specific to ECT arbitration. It has also arisen before the European Court of Human Rights. In *Matthews v. the United Kingdom*, for example, the violation alleged to have been committed by the United Kingdom originated in primary EU law. The United Kingdom argued that its violation was required (and excused) due to authority it had transferred to the EU. The European Court was not moved: While nothing in the European Convention of Human Rights precluded a transfer of authority to an international organization (in this case the EU), Convention rights needed to remain secured, and the responsibility of Member States therefore continued after the transfer.[84]

127. Thus, Spain cannot escape its obligations under international law by invoking EU law or *Achmea*. For these reasons, over 40 ECT investor-State arbitration tribunals, to date, have unanimously concluded that EU Member States, including Spain, must honor their obligation under the ECT to arbitrate disputes and pay resulting awards to protected investors, even if they are from other EU Member States.[85]

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[84] *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361 (Feb. 18, 1999), ¶¶ 26-35, https://tiny.cc/6dakrz.

[85] *See Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012), ¶¶ 4.111-4.199, https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf; *EDF Int'l S.A. v. Republic of Hungary*, UNCITRAL, Award (Dec. 4, 2014) (not public); *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Final Award (Jan. 21, 2016), ¶¶ 424-447, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (June 6, 2016), ¶¶ 71-90, https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf; *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Final Award and Dissenting Opinion (July 12, 2016), ¶¶ 622-660, http://tiny.cc/4qnsuz; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award (Dec. 27, 2016), ¶¶ 277-309, https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg),*

SICAR v. The Kingdom of Spain, SCC Case No. 2015/063, Final Award (Feb. 15, 2018), ¶¶ 449-466, https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), ¶¶ 204-230, https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf; *Greentech Energy Sys. A/S v. Italian Republic*, SCC Arbitration V (2015/095), Final Award (Dec. 23, 2018), ¶¶ 336-55, 388-403, https://tiny.cc/eg0jrz; *CEF Energia B.V. v. Italian Republic*, SCC Case No. V2015/158, Award (Jan. 16, 2019), ¶¶ 57-102, https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf; *Foresight Lux. Solar 1 S.a.r.l. v. Kingdom of Spain,* SCC Arbitration V (2015/150), Final Award (Nov. 14, 2018), ¶ 220, https://tiny.cc/h75irz; *Vattenfall*, *supra* n.38, ¶¶ 163-64; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), ¶ 679, https://tiny.cc/tk0jrz; *Cube*, *supra* n.47, ¶¶ 118-60; *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection (Feb. 25, 2019), ¶¶ 88-194, https://tiny.cc/tn0jrz; *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (May 7, 2019), ¶¶ 167-77, https://tiny.cc/xq3irz; *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (Mar. 12, 2019), ¶¶ 332-57, https://tiny.cc/4w3irz; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019), ¶¶ 168-73, https://tiny.cc/t03irz; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection (June 26, 2019), ¶¶ 141-97, https://tiny.cc/o33irz; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (July 31, 2019), ¶¶ 223-53, https://tiny.cc/9a4irz; *InfraRed Environmental Infrastructure GP Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award (Aug. 2, 2019), ¶¶ 256-274, https://www.italaw.com/sites/default/files/case-documents/italaw11360.pdf; *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019), ¶¶ 288-340, https://tiny.cc/de4irz; *OperaFund Eco-Invest SICAV PLC v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award (Sept. 6, 2019), ¶¶ 378-388, https://tiny.cc/u71jrz; *BayWa r.e. Renewable Energy GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (Dec. 2, 2019), ¶¶ 244-83, https://tiny.cc/uo4irz; *Stadtwerke München GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (Dec. 2, 2019), ¶¶ 123-46, https://tiny.cc/es4irz; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (Dec. 30, 2019), ¶¶ 309-74, https://tiny.cc/av4irz; *Watkins Holdings SARL et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award (Jan. 21, 2020), ¶¶ 180-226, https://tiny.cc/t14irz; *PV Investors*, *supra* n.39, ¶¶ 174-191; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, Decision on Jurisdiction, Liability, and Directions on Quantum (Mar. 9, 2020), ¶¶ 446-502, https://tiny.cc/kd5irz; *Sun Reserve Luxco Holdings SARL et al. v. The Italian Republic*, SCC Arbitration V (2016/32), Final Award (Mar. 25, 2020), ¶¶ 350-464, https://tiny.cc/5j5irz; *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Jurisdiction (Aug, 20, 2020) (not public); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (Aug. 31, 2020), ¶¶ 301-371, http://tiny.cc/

9qnsuz; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award (Sep. 14, 2020), ¶¶ 266-339, https://www.italaw.com/sites/default/files/case-documents/italaw11827.pdf; *STEAG GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (Oct. 8, 2020), ¶¶ 227-298, https://www.italaw.com/sites/default/files/case-documents/italaw11900.pdf; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award (Feb. 26, 2021), ¶¶ 191-238, https://www.italaw.com/sites/default/files/case-documents/italaw16138.pdf; *ČEZ, a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/16/24, Decision on Jurisdiction (Mar. 2, 2021) (not public); *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award (Mar. 8, 2021), ¶¶ 309-335, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/112_FREIF_Eurowind_Holdings_Ltd_v._Spain/2021.03.08_Award.pdf; *Eurus Energy Holdings Corporation v. Kingdom of Spain,* ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (Mar. 17, 2021), ¶¶ 213-215, 226-236, https://www.italaw.com/sites/default/files/case-documents/italaw16123.pdf; *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility (Apr. 19, 2021), ¶¶ 280-295, https://jusmundi.com/en/document/pdf/decision/en-frank-schumm-joachim-kruck-jurgen-reiss-and-others-v-kingdom-of-spain-decision-on-jurisdiction-friday-16th-april-2021; *Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH v. Kingdom of Spain*, ICSID Case No. ARB/16/17, Award (Jun. 22, 2021) (not public); *Festorino Invest Limited et al. v. Republic of Poland*, SCC Case No. 2018/098, Award (Jun. 20, 2021), ¶¶ 462-473, https://www.italaw.com/sites/default/files/case-documents/italaw170046.pdf; *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (Sep. 13, 2021), ¶¶ 211-228, 283-307, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/99_Infracapital_F1_S.a_r.l._and_Infracapital_Solar_B.V._v._Spain/2021.09.13_Decision_on_Jurisdiction__Liability_and_Directions_on_Quantum.pdf; *Amlyn Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/16/28, Award (Oct. 22, 2021) (not public); *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum (Feb. 11, 2022), ¶¶ 613-678, https://www.italaw.com/sites/default/files/case-documents/italaw170038.pdf.

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

Executed on June 17, 2022
Montreal, Quebec, Canada

Andrea K. Bjorklund

CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2022, I caused the foregoing Expert Declaration of Andrea K. Bjorklund, 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, D.C. Bar #481430
mmcgill@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Attorney for AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.