**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AES SOLAR ENERGY COÖPERATIEF U.A. AND AMPERE EQUITY FUND B.V.,<br><br>Petitioners,<br><br>v.<br><br>KINGDOM OF SPAIN,<br><br>Respondent. | Civil Action No. 1:21-cv-03249 (RJL) |

**DECLARATION OF PROFESSOR STEFFEN HINDELANG**

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## I. INTRODUCTION AND BACKGROUND

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

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

3. I am Professor at the Faculty of Law of Uppsala University in Sweden. I teach and research in the areas of EU law, international economic law, international investment law, and German public law. Previously, I was Professor at the Department of Law of the University of Southern Denmark in Odense where I hold a part-time position now. Further, I was guest professor at the Faculty of Law of the University of Uppsala as a Swedish Prize Laureate (2018), Professor at the Freie Universität Berlin (2011-2017), senior research associate and senior lecturer at Humboldt-Universität zu Berlin (2010-2011), and research associate and lecturer at the Universität Tübingen (2004-2009). I am also a senior fellow at the Walter Hallstein Institute of European Constitutional Law at Humboldt-Universität zu Berlin. My CV and the list of my publications are attached hereto as **Exhibit 1** and **Exhibit 2**, respectively.

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

5. I have previously submitted a number of reports on EU law, including rebuttal reports, in support of the Kingdom of Spain's motions in enforcement proceedings in the United States District Court for the District of Columbia. These include: (1) *Novenergia II – Energy & Environment (SCA) v. Spain*, Case No. 1:18-cv-1148; (2) *Eiser Infrastructure Limited et al. v.*

*Spain*, Case No. 1:18-cv-1686-CKK; (3) *Infrastructure Services Luxembourg S.à.r.l. et al. v. Spain*, Case No. 1:18-cv-1753-EGS; (4) *Masdar Solar & Wind Cooperatief U.A. v. Spain*, Case No. 1:18-cv-02254-JEB; (5) *NextEra Energy Global Holdings B.V. et al. v. Spain*, Case No. 1:19-cv-01871-TSC; (6) *9REN Holding S.À.R.L. v. Spain*, Case No. 19-cv-1871-TSC; (7) *RREEF Infrastructure (G.P.) Limited et al. v. Spain*, Case No. 1:19-cv-03783-CJN; (8) *Cube Infrastructure Fund SICAV et al. v. Spain*, Case No. 1:20-cv-01708-EGS; (9) *Infrared Environmental Infrastructure GP Limited et al. v. Spain*, Case No. 1:20-cv-00817-JDB; (10) *Hydro Energy 1 S.à.r.l. et al. v. Spain,* Case No. 1:21-cv-2463 (RJL).

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

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

8. I have also submitted expert opinions in the ICSID proceedings in *European Solar Farms A/S v. Spain*, ICSID Case No. ARB/18/45, in *Portigon AG v. Spain*, ICSID Case No. ARB/17/15, in the ICSID annulment proceedings in *Spain v. 9REN Holding S.à.r.l.*, ICSID Case No. ARB/15/15, and *Spain v. RWE Innogy GmbH et al.*, ICSID Case No. ARB/14/34, as

well as in SCC proceedings in *Green Power Partners K/S, SCE Solar Don Benito APS v. Spain*, SCC Case No. V. 2016/135. Further, I was nominated by the respondent and acted as arbitrator in *Donatas Aleksandravicius v. Denmark*, ICSID Case No. ARB/20/30.

9. I have been asked by counsel for Respondent, the Kingdom of Spain ("Spain"), in this matter to give my expert opinion on whether European Union ("EU") law precludes the application of Article 26 of the Energy Charter Treaty ("ECT"), in particular its paragraph 3, to disputes between an investor from one EU Member State and another EU Member State, as well as other issues relevant to this case, such as state aid issues, as set out below.

10. The Tribunal in the underlying *PV Investors* arbitration[1] had to apply the Treaty on European Union ("TEU") (**Ex. 3**) and the Treaty on the Functioning of the European Union ("TFEU") (**Ex. 4**) (collectively, the "EU Treaties") as well as the legal order flowing therefrom. Its purported jurisdiction on the basis of Article 26 of the Energy Charter Treaty ("ECT") (**Ex. 5**) conflicts with the EU Treaties. The EU Treaties enjoy primacy over any conflicting international law obligation between EU Member States, including an offer to arbitrate purportedly contained in Article 26 of the ECT. By virtue of the principle of primacy, the said Tribunal was therefore not only entitled, but legally *obliged* – like any public body created by one or more EU Member States, to prevent conflict by declining its jurisdiction. Despite such clear and unambiguous instruction by law, the tribunal chose to render an award in absence of an arbitration agreement, and consequently, despite a lack of jurisdiction.

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

[1] (AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. being among the group of claimants to which the tribunal referred to as "PV Investors") *v. Kingdom of Spain*, PCA Case No. 2012-14 ("*AES Solar v. Spain*")

- Petition to Enforce Arbitral Award, dated 10 December 2021, in the matter of PCA Case No. 2012-14*, AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. v. Kingdom of Spain* ("Petition for Enforcement").

- Preliminary Award on Jurisdiction, dated 13 October 2014, in the matter of PCA Case No. 2012-14, *PV Investors v. Kingdom of Spain* ("Award on Jurisdiction").

- Final Award, dated 28 February 2020, in the matter of PCA Case No. 2012-14, *PV Investors v. Kingdom of Spain* ("Award").

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

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

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

15. This matter concerns an investment arbitration that arose between investors and a country within the European Union. Thus, to assist this Court in understanding the question presented to me, I first set out the legal history of investment treaties in the European Union (**Part I)**. In the second part of this declaration, I review and analyse the relevant rules and principles of the EU legal order (**Part II**). Next, I apply these rules and principles to the present case (**Part III)**. Finally, I briefly address the issue of state aid under EU law with regard to the payment of the Award (**Part IV)**.

## II. THE GENESIS OF THE CONFLICT BETWEEN INVESTMENT ARBITRATION AND THE EU TREATIES

### A. International Investment Agreements

16. International investment agreements are instruments of public international law. These agreements typically create reciprocal obligations between signatory States that protect the

nationals of one contracting party ("the home state") when they invest in the territory of another party ("the host state"). International investment agreements take the form of both bilateral and multilateral treaties and also generally include dispute-resolution mechanisms, by which investors can bring claims for breaches of the States' substantive obligations in fora outside the domestic courts of the host state (commonly referred to as investor-State dispute settlement, or "ISDS").

**B. Investment Agreements in Europe**

17. Investment agreements have a long history in Europe. Currently, around 180 bilateral investment agreements – i.e., a treaty between one State and another State – still exist between EU Member States ("Intra-EU BITs"). Most were concluded after the end of the Cold War in 1989 and before the Central and Eastern European countries joined the EU. They essentially link "old" EU Member States and those in Central and Eastern Europe that acceded to the EU later in 2004, 2007, and 2013. The intra-EU BITs were intended to protect much needed Western European investments into Central and Eastern Europe, as the domestic standard of protection of investment was deemed inadequate at that time.

18. The ECT is a multilateral investment treaty that was designed to facilitate and protect investment in the energy sector. The contracting parties contemplated investments primarily between Western European, on the one hand, and Central and Eastern European and certain former Soviet states, on the other hand. At that time, a substantial number of state parties to the ECT were also EU Member States. That number increased further with the accession of Central and Eastern European states to the EU. The ECT, like the intra-EU BITs, also contains substantive standards of protection referred to above and, in Article 26 of the ECT, provides for investor-State arbitration.

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

19. Investments in EU Member States are also regulated by the EU Treaties. Tribunals constituted under intra-EU investment agreements to resolve disputes between an EU-investor and an EU Member State interpret and apply the EU Treaties and the legal order they establish. Under such treaty-based dispute-resolution mechanisms, the tribunal's conclusions on matters of EU law are essentially unreviewable. This quickly caused significant obstacles to the equal and effective application of EU law, as tribunals and EU courts were both interpreting the same body of law.

20. This tension poses a significant problem: Under the foundational EU Treaties, the Court of Justice of the European Union ("CJEU" or "Court of Justice") is the final arbiter of questions related to the interpretation and application of the EU Treaties and the legal order based on them. A situation in which an arbitral tribunal can sideline the CJEU and apply its own (perhaps erroneous) understanding of EU law fundamentally undercuts the EU's ability to ensure a level legal playing field, i.e., equality before its own laws. From around 2006 onwards, the EU represented by the European Commission[2] as well as various defendant EU Member States have argued that intra-EU investment agreements are incompatible with EU law ("intra-EU objections").

21. On 6 March 2018, the CJEU rendered its landmark decision on the "intra-EU objection" in *Achmea v. Slovak Republic*.[3] The *Achmea* litigation arose out of an investment arbitration in which the tribunal rejected the intra-EU objection made by the Slovak Republic.

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[2] *See, e.g.*, *Eastern Sugar B.V. v Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) ¶ 119 (**Exhibit 6**).

[3] CJEU, Case C-284/16, ECLI:EU:C:2018:158 – *Achmea B.V. v. Slovak Republic ("Achmea")* (**Exhibit 7**).

The Slovak Republic challenged the tribunal's decision in an EU Member State court, in Germany, which in turn referred the case to the CJEU for a so-called "preliminary ruling" on a question of EU law.

22. The CJEU's holding was clear and unambiguous: A Member State may not enter into a "treaty by which [it] agree[s] to remove from the jurisdiction of [its] own courts . . . disputes which may concern the application or interpretation of EU law."[4] Such an agreement would be incompatible with EU law as expressed in the foundational EU Treaties. Agreeing to a process by which an arbitral tribunal may render an unreviewable interpretation of EU law violates "the autonomy of the EU and its legal order," which the EU Member States obligated themselves to uphold when they acceded to the EU.[5]

23. Following the CJEU's decision in *Achmea*, the German Federal Court of Justice annulled the award, holding that there was no valid arbitration agreement.[6] The Slovak Republic never made an offer to arbitrate which could be accepted and, thus, there was no resulting agreement to arbitrate.

24. In the wake of the CJEU's *Achmea* decision, the EU and its Member States expressed their agreement with the view that provisions under intra-EU investment agreements which purportedly contain an offer to arbitrate, were unlawful, and consequently, never had any legal effect. On 15 January 2019, twenty-two EU Member States, Spain and the Netherlands among them, signed a joint declaration acknowledging the CJEU's *Achmea* decision and noting, among other things, that it applies to intra-EU arbitrations on the basis of both bilateral

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[4] *Id.* ¶ 55.

[5] *Id.* ¶ 57.

[6] Bundesgerichtshof [BGH] [Federal Court of Justice], 31 October 2018, I ZB 2/15, *Slovak Republic v. Achmea B.V.* (**Exhibit 8**).

investment agreements and multilateral agreements, such as the ECT. At that time, certain other EU Member States chose not to comment until the CJEU rendered a judgment explicitly referring to the ECT.[7]

25. Last year, the Court of Justice of the European Union in the *Komstroy v. Moldova* case unambiguously and conclusively determined that *Achmea* applies to the ECT as well.[8] "In the precisely same way as the arbitral tribunal at issue in the case giving rise to the judgment [in . . .] *Achmea*,"[9] Article 26 of the ECT, "according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union,"[10] would "call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU."[11]

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[7] *See Declaration of the Representatives of the Governments of the Member States* (15 January 2019) (**Exhibit 9**). The other EU Member States chose not to comment on the status of Article 26 of the ECT in an intra-EU context, and instead decided to wait until further consideration, including of an eventual decision by the CJEU on this issue. *See Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019) (**Exhibit 10**); *Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (16 January 2019) (**Exhibit 11**). Following the declarations made by the EU Member States, the European Commission reaffirmed that the application of the arbitration provisions in the ECT in intra-EU disputes is "incompatible with EU law." European Commission, Press Release – Daily News, at 1 (17 January 2019) (**Exhibit 12**).

[8] CJEU, Case C-741/19, ECLI:EU:C:2021:655 – *Komstroy LLC, successor in law to the company Energoalians v. Republic of Moldova ("Komstroy")* (**Exhibit 13**).

[9] *Id.* ¶ 52.

[10] *Id.* ¶ 62.

[11] *Id.* ¶ 63.

26. Therefore, any such provision in an international agreement that is incompatible with EU law would be precluded by EU law from having any legal effect.[12] This includes Article 26 of the ECT, which "must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[13] Therefore, a putative offer to arbitrate extended by an EU Member State to an investor *from another EU Member State*, like Article 26 of the ECT, is rendered inapplicable and cannot be accepted to form an agreement to arbitrate.

27. Despite overwhelming evidence supporting lack of jurisdiction, the intra-EU arbitral tribunals have been reluctant to acknowledge the inapplicability of Article 26 of the ECT to intra-EU disputes, and have also responded unsympathetically to the defending Member States' jurisdictional objections, thus continuing to render patently unlawful awards under the EU Treaties.[14] EU Member States responded by taking the following actions: (1) On 5 May 2020, twenty-three EU Member States signed an agreement for the termination of intra-EU bilateral investment treaties.[15] On 14 May 2020, the Commission put Member States failing to sign the aforesaid agreement on notice and threatened to initiate proceedings in the CJEU for violating the EU Treaties by not removing intra-EU investment agreements from their legal

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[12] *Achmea* ¶ 60 (**Exhibit 7**); *Komstroy* ¶ 66 (**Exhibit 13**).

[13] *Komstroy* ¶ 66 (**Exhibit 13**).

[14] The Court is certainly aware that intra-EU investment arbitration accounts for roughly twenty percent of the case load in the legal services market for investor-State dispute settlement, much (if not all) of which would disappear if the intra-EU objection were accepted. *See* UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, p. 3 (**Exhibit 14**).

[15] Agreement for the Termination of Bilateral Investment Treaties Between the EU Member States (5 May 2020) (**Exhibit 15**). This agreement entered into force on 29 August 2020.

orders.[16] On 2 December 2021, the Commission opened infringement proceedings against Austria, Sweden, Belgium, Luxembourg, Portugal, Romania, and Italy for failing to effectively remove from their legal orders the Intra-EU BITs to which they are contracting parties.[17]

28. As explained below, the holding in *Achmea* and *Komstroy* is a direct consequence of the foundational legal order in the EU.

## III. RELEVANT RULES AND PRINCIPLES OF THE EU LEGAL ORDER

29. To better understand the question presented, it may be of assistance to the Court to briefly set out the relevant rules and principles of the EU legal order.

30. The EU is comprised of 27 Member States that have ceded to the EU aspects of sovereignty to establish one integrated Europe characterized by common laws, values, and a single internal market. The European Union is therefore a federal system, with Member States retaining certain powers, while also being bound by law made at the European Union level. EU law enjoy primacy over contrary law passed at the level of the Member States. The two main foundational instruments of the EU are the TEU and the TFEU, signed and ratified by all EU Member States. The EU's institutions include the European Parliament, the European Council, the Council of the European Union (in the EU Treaties simply called the "Council"), the European Commission (also called the "Commission"), the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.[18]

31. The most important primary sources of EU law are the EU Treaties and the Charter of Fundamental Rights of the European Union ("CFREU") (**Exhibit 18**). EU law also

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[16] European Commission, "May Infringements Package: Key Decisions" (14 May 2020) (**Exhibit 16**).

[17] European Commission, "December Infringements Package: Key Decisions" (2 December 2021) (**Exhibit 17**).

[18] *See* TEU, Art. 13(1) (**Exhibit 3**).

includes secondary legislation based on the EU Treaties adopted by the EU's institutions, including regulations, directives, and decisions. In the EU legal order, the EU Treaties take precedence over any other EU law, including international agreements concluded by the EU.[19] In addition, EU law incorporates the jurisprudence of the CJEU.[20]

32. Several features of the EU legal order are relevant to the present case.

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

33. The EU's legal order is both a highly elaborate legal regime in public international law between Member States and a constitutional framework creating law applicable within Member States. This dual legal order enables Member States, including Spain and the Netherlands, to work to achieve "an ever closer union among the peoples of Europe."[21]

34. In *Achmea*, the CJEU explained:

> Given the nature and characteristics of EU law . . . [EU] law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.[22]

Thus, in addition to being instruments of international law, the EU Treaties, together with other EU law, form part of the national law of each EU Member State.[23]

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[19] *See* CJEU, Case 26/78, ECLI:EU:C:1978:172, ¶ 9 – *Viola* (*"Viola"*) (**Exhibit 19**); CJEU, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, ¶ 285 – *Yassin Abdullah Kadi, Al Barakaat International Foundation* ("*Kadi*") (**Exhibit 20**).

[20] The CJEU functions in accordance with the EU Treaties and its statute. *See* Statute of the Court of Justice of the European Union (**Exhibit 21**).

[21] TFEU, Preamble (**Exhibit 4**); *see also* TEU, Preamble and Art. 1(2) (**Exhibit 3**).

[22] *Achmea* ¶ 41 (**Exhibit 7**).

[23] *See, e.g.*, CJEU, Case 6/64, ECLI:EU:C:1964:66, 3. Ruling – *Costa v. ENEL* (**Exhibit 22**); CJEU, Case 106/77, ECLI:EU:C:1978:49, ¶ 21 – *Simmenthal II ("Simmenthal II")* (**Exhibit 23**).

35. The EU Treaties can be seen as limiting the Members States' sovereignty more significantly than "typical" founding instruments of international organizations. This is evidenced by the fact that in case of a conflict between a rule created by the EU Member States and EU law, EU law takes precedence and overrides such a rule.[24] This all-encompassing conflict rule is known in EU law parlance as the principle of primacy of EU law. As discussed below, no derogation is permitted from this rule, save through a formal amendment procedure required to change the terms of the EU Treaties.[25]

36. The fact that the EU Treaties may be more limiting on the Member States' sovereign powers than other international agreements does not change the fact that EU law is public international law when applied between the EU Member States, albeit with a *superior rank* in relation to other public international law applicable between the EU Member States.[26]

**B. The EU Judicial System and Its Governing Principles**

37. The EU judicial system is governed by the EU Treaties.[27] It is made up of the courts and tribunals of the EU Member States and the CJEU. While each EU Member State establishes its own courts and tribunals, all such courts and tribunals must apply and interpret EU law.[28]

38. The CJEU has exclusive jurisdiction in ultimately determining the content and scope of EU law. Its mandate is to ensure that "in the interpretation and application of the

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[24] *See Simmenthal II* ¶¶ 21-22 (**Exhibit 23**).

[25] *See* TEU, Art. 48 (**Exhibit 3**).

[26] *See Achmea* ¶ 41 (**Exhibit 7**); CJEU, Case C-478/07, ECLI:EU:C:2009:521, ¶ 98 – *Budějovický Budvar ("Budějovický Budvar")* (**Exhibit 24**).

[27] *See* TEU, Art. 19 (**Exhibit 3**); TFEU, Art. 251 *et seq.* (**Exhibit 4**).

[28] *See* TEU, Art. 19(1) (**Exhibit 3**); CFREU, Arts. 47, 51(1) (**Exhibit 18**); CJEU, Case 26/62, ECLI:EU:C:1963:1 – *van Gend & Loos* (**Exhibit 25**).

Treaties the [EU] law is observed."[29] The CJEU reviews the legality of the acts of the institutions of the EU, ensures that the Member States comply with obligations under the EU Treaties, and interprets EU law at the request of national courts and tribunals.[30] In so doing, the CJEU preserves the unique characteristics of EU law and guarantees equality under the law.[31] In EU law terminology, it preserves the autonomy of EU law.[32]

**1. The principle of autonomy of EU Law**

39. The principle of autonomy is of fundamental importance to the EU legal order. In accordance with this principle, the CJEU's exclusive authority may not be circumvented or hampered by the action of EU Member States or other EU institutions. For example, the jurisprudence of the CJEU establishes that "an international agreement cannot affect the allocation of powers fixed by the [EU] Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the [CJEU]"[33] and, further, the EU itself does not enjoy the competence to permit, "in an international agreement, a provision according to which a

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[29] *See* TEU, Art. 19(1) (**Exhibit 3**).

[30] *See* TEU, Art. 19 (**Exhibit 3**); TFEU, Art. 251 *et seq.* (**Exhibit 4**).

[31] *See* TEU, Preamble, Arts. 2, 9 (**Exhibit 3**).

[32] The principle of autonomy of EU law has been set out in a series of decisions and opinions of the CJEU. *See, e.g.*, CJEU, Opinion 1/91, ECLI:EU:C:1991:490, ¶ 35 – *EEA* ("Opinion 1/91") (**Exhibit 26**); CJEU, Opinion 1/00, ECLI:EU:C:2002:231, ¶¶ 11-12 – *European Common Aviation Area* ("Opinion 1/00") (**Exhibit 27**); CJEU, Opinion 1/09, ECLI:EU:C:2011:123, ¶¶ 77 *et seq*. - *European and Community Patents Court* ("Opinion 1/09") (**Exhibit 28**); CJEU, Opinion 2/13, ECLI:EU:C:2014:2454 – *ECHR* ("Opinion 2/13") (**Exhibit 29**); CJEU, Case C-196/09, ECLI:EU:C:2011:388 – *Paul Miles e.a. v. Écoles européennes* (**Exhibit 30**); CJEU, Opinion 1/17, ECLI:EU:C:2019:341 – *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part* ("CETA") ("Opinion 1/17") (**Exhibit 31**).

[33] Opinion 2/13 ¶ 201 (**Exhibit 29**); *see also, e.g.* Opinion 1/91 ¶ 35 (**Exhibit 26**); Opinion 1/00 ¶¶ 11, 12 (**Exhibit 27**); CJEU, Case C-459/03, ECLI:EU:C:2006:345, ¶¶ 123, 136 – *Commission v. Ireland ("Mox Plant*") (**Exhibit 32**); CJEU, Joined Cases C-402/05 P and C-415/05 P, ¶ 282 – *Kadi* (**Exhibit 20**); Opinion 1/17 ¶¶ 110, 111 (**Exhibit 31**).

dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union."[34]

40. The principle of autonomy is also reflected in the provisions of the TFEU. Article 267 establishes a preliminary ruling procedure that permits national courts and tribunals to obtain rulings from the CJEU on questions concerning the interpretation and validity of EU law. The CJEU has described this "keystone of the [EU] judicial system"[35] as providing national courts with "the most extensive power, or even the obligation, to make a reference to the [CJEU] if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of EU law and requiring a decision by them."[36] The preliminary ruling procedure is designed to promote equality under the law by preventing discrepancies in the interpretation of EU law and to ensure that EU law is given its full effect within the framework of the judicial system of the EU Member States.[37]

41. Article 344 of the TFEU prohibits EU Member States from submitting a dispute concerning the interpretation or application of the EU Treaties "to any method of settlement other than those provided for therein."[38] This ensures that the EU Member States submit questions which may touch upon the interpretation and application of EU law only to such courts and tribunals which are able to refer questions to the CJEU under Article 267 of the TFEU – i.e., the national courts and tribunals of the EU Member States.[39] As the CJEU has explained, the

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[34] *Komstroy* ¶ 62 (**Exhibit 13**).
[35] *Id.* ¶ 46.
[36] Opinion 1/09 ¶ 83 (**Exhibit 28**); *see also* Opinion 1/17 ¶ 111 (**Exhibit 31**).
[37] Opinion 1/09 ¶ 83 (**Exhibit 28**); *Komstroy* ¶ 46 (**Exhibit 13**).
[38] *See* Opinion 2/13 ¶ 201 (**Exhibit 29**); *Komstroy* ¶ 42 (**Exhibit 13**).
[39] Opinion 2/13 ¶ 210 (**Exhibit 29**).

relationship between the EU Member States is "governed by EU law to the exclusion . . . of any other law," if EU law so requires.[40]

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

> cannot confer the jurisdiction to resolve . . . disputes on a court created by an international agreement which would deprive [national] courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.[41]

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

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

[40] *Id.* ¶ 212. This has just recently been reconfirmed by the Paris Court of Appeal, when it stated that "the Achmea decision, confirmed by the PL Holdings decision, [showed] that the CJEU has ruled in general terms on the violation of EU law by BIT settlement clauses between Member States without making a distinction according to whether or not the clause contains a reference to the applicable law" (translation by the undersigned as the official translation, at the time of writing, had not been available yet) Cour d'Appel de Paris (Paris Court of Appeal), *Republique de Pologne v. Société CEC Praha, Société Slot Group AS c/o M. David Janosik*, N° RG 20/14581, 19 April 2022, ¶ 67 **(Exhibit 77)**.

[41] Opinion 1/09 ¶ 80 (**Exhibit 28**); *see also Komstroy* ¶ 59 (**Exhibit 13**).

> *do everything necessary to ensure that that interpretation of EU law is applied*.[42]

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

> The interpretation which, in the exercise of the jurisdiction conferred on it by [Article 267 of the TFEU], the Court of Justice gives to a rule of Community [now Union] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought *to have been understood and applied from the time of its coming into force*. It follows that the rule as thus interpreted may, and *must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation*.[43]

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

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

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[42] CJEU, Case C-689/13, ECLI:EU:C:2016:199 – 3. Ruling (emphasis added)– *Puligienica Facility Esco SpA (PFE) v. Airgest SpA* (**Exhibit 33**).

[43] CJEU, Joined Cases 66, 127 and 128/79, ECLI:EU:C:1980:101, ¶ 9 (emphasis added)– *Salumi* (**Exhibit 34**). *See also* CJEU, Case C-109/20, ECLI:EU:C:2021:875, ¶¶ 57-61 – *Republiken Polen v. PL Holdings Sàrl* ("*PL Holdings*") (**Exhibit 35**).

> *jurisdiction of the arbitration body before which the matter was brought.*[44]

46. In sum, the CJEU's rulings in the preliminary ruling procedure are binding as to EU law, setting the content and meaning of a given rule *ab initio*. As I will explain in more detail below, the ruling in *Achmea*—as confirmed in *Komstroy*—means in terms of its temporal effect that intra-EU investment arbitration has been incompatible with the EU Treaties from the moment they, or their respective predecessor treaties, entered into force. Indeed, there has never been a moment in time for an EU Member State when intra-EU investment arbitration was lawful.

**2. The principle of primacy of EU law**

47. As noted, another fundamental principle of EU law is that of the "primacy" of EU law. According to the principle of primacy, in case of a conflict between a rule created by one of the EU Member States and EU law, EU law takes precedence and overrides such a rule. This fundamental principle is reflected in the Treaties[45] and was succinctly described in the CJEU's landmark *Simmenthal II* judgement:

> [E]very national court must, in a case within its jurisdiction, apply [EU] law in its entirety … and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule.
>
> Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair

[44] *PL Holdings*, ¶ 50 (emphasis added) (**Exhibit 35**).

[45] The principle of primacy is reflected, among others, in Article 351 TFEU which provides a narrow exception for "rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, [which] shall not be affected by the provisions of the Treaties.". *See also* Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy, 2008 O.J. (C 115) 335 at 344 ("Declaration concerning primacy") (**Exhibit 36**).

> the effectiveness of [EU] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [EU] rules from having full force and effect are incompatible with those requirements which are the very essence of [EU] law.[46]

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

> would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules . . . where they infringe the fundamental rights guaranteed by that [EU Member] State's constitution.[47]

49. The principle of primacy of EU law does not need be pleaded by concerned parties; it must be applied by the competent court or tribunal on its own motion.[48]

50. The principle of primacy of EU law is not limited to EU Member States' courts and tribunals but requires any competent authority to both apply and give full effect to EU law.[49] Thus, any competent authority applying EU law must disregard any rule created by an EU Member State that conflicts with EU law. Moreover, it falls upon all concerned EU Member State authorities to correct the incompatibility and align their laws with EU law.[50]

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[46] *Simmenthal II* ¶¶ 21-22 (**Exhibit 23**).

[47] CJEU, Case C-399/11, ECLI:EU:C:2013:107, ¶ 58 – *Stefano Melloni v. Ministerio Fiscal* (**Exhibit 37**).

[48] *Simmenthall II* ¶ 24 (**Exhibit 23**).

[49] *See, e.g.*, CJEU, Joined Cases 205 to 215/82, ECLI:EU:C:1983:233, ¶¶ 17, 22 – *Deutsche Milchkontor* (**Exhibit 38**); CJEU, Case C-231/96, ECLI:EU:C:1998:401 – *Edis* (**Exhibit 39**).

[50] *See* CJEU, Joined Cases No. C-231/06 to C-233/06, ECLI:EU:C:2007:373, ¶¶ 38, 41 – *Jonkman et al.* (**Exhibit 40**).

51. The principle of primacy of EU law also applies to any *international agreement or treaty applicable between EU Member States*. EU law therefore takes precedence over the rules created by EU Member States in international agreements or treaties concluded between them.[51] The CJEU expressly held this, for example, in relation to agreements in public international law between the Republic of Austria and the Czechoslovak Socialist Republic relating to agricultural and industrial products:

> Since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the [EU Treaties].[52]

52. The principle of primacy of EU law is of such fundamental importance to the proper functioning of the EU that no derogation is permitted. Moreover, the EU cannot exempt the Member States from observing this principle.[53] Nor can the EU Member States agree among each other on any other conflict rule to override the one established by the EU Treaties.[54] The only way for the EU Member States to change this rule is formally to amend the EU Treaties by following the amendment procedure set out in Article 48 of the TEU.

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

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[51] *See, e.g.,* CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of Italian Republic* (**Exhibit 41**); CJEU, Case C-3/91, ECLI:EU:C:1992:420, ¶ 8 – *Exportur* (**Exhibit 42**); CJEU, Case C-469/00, ECLI:EU:C:2003:295, ¶ 37 – *Ravil* (**Exhibit 43**); *Budějovický Budvar* ¶ 98 (**Exhibit 24**); CJEU, Case C-546/07, ECLI:EU:C:2010:25, ¶ 44 – *Commission v. Germany* (**Exhibit 44**).

[52] *Budějovický Budvar* ¶ 98 (**Exhibit 24**).

[53] *See Viola* ¶ 9 (**Exhibit 19**).

[54] *See Kadi* ¶ 285 (**Exhibit 20**); CJEU, Case C-266/16, ECLI:EU:C:2018:118, ¶ 46 – *Western Sahara Campaign UK* (**Exhibit 45**).

### 3. Protection of EU Member State investors under EU law

54. EU law covers a number of subjects, including the EU's common commercial, agricultural, and transport policies, and its rules governing competition and the free movement of goods, persons, services, and capital.[55]

55. In respect of investors from one EU Member State with investments in another EU Member State, EU law guarantees that capital can circulate freely throughout the EU, and that investors enjoy freedom to establish a business, to invest in companies, and to provide services across the EU's internal borders.[56] EU investors enjoy the fundamental rights protected by the CFREU, which guarantees the rights to property, access to justice, and non-discrimination.[57] EU investors are also protected by general principles of EU law, such as proportionality, legal certainty, and the protection of legitimate expectations.[58]

56. Investors have access to the EU Member States' national courts to vindicate these rights under EU law. Under Article 19(1) of the TEU, Member States are obliged to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.[59] EU Member States are liable for damage or loss caused to any legal or natural persons as a result of

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[55] L. Woods *et al.*, STEINER AND WOODS EU LAW (14th ed. 2020) at 53-56, 327-330 ("Steiner and Woods EU Law") (**Exhibit 46**).

[56] *See* TFEU, Arts. 49, 56, 57, 63(1) (**Exhibit 4**).

[57] *See* CFREU, Arts. 17, 21, 47-50 (**Exhibit 18**); CJEU, Case C-235/17, ECLI:EU:C:2019:432, ¶¶ 59, 67 *et seq.* – *Commission v. Hungary* (**Exhibit 47**).

[58] *See id.*, Arts. 17, 21, 47; CJEU, Case C-8/55, ECLI:EU:C:1956:7 – *Fédération Charbonnière de Belgique v. High Authority* (**Exhibit 48**); CJEU, Case T-115/94, ECLI:EU:T:1997:3, ¶¶ 14 *et seq.* – *Opel Austria v. Council* (**Exhibit 49**); CJEU, Case 120/86, ECLI:EU:C:1988:213 – *Mulder* (**Exhibit 50**); *see also* Paul Craig & Gráinne de Búrca, EU LAW at 266-267 (7th ed. 2020) ("Craig & de Búrca") (**Exhibit 51**).

[59] *See* CJEU, Case C-64/16, ECLI:EU:C:2018:117, ¶¶ 29, 34 – *Associação Sindical dos Juízes Portugueses* (**Exhibit 52**); Craig & de Búrca at 276-278 (**Exhibit 51**).

violations of EU law for which the State can be held responsible; and an aggrieved individual or company can bring a suit against an EU Member State in national courts.[60]

57. In all these cases, if a court of an EU Member State is in doubt concerning the precise content and meaning of EU law, it can refer the question to the CJEU. The CJEU's rulings must then be observed by the courts across the EU Member States, ensuring that all EU investors within the EU enjoy the same rights under EU law.[61]

## IV. THE PRINCIPLES OF AUTONOMY AND PRIMACY AS ARTICULATED BY THE CJEU IN *ACHMEA* AND CONFIRMED IN *KOMSTROY* APPLIED TO *AES SOLAR V. SPAIN*

58. Under *Achmea*, as confirmed in *Komstroy*, Member States are precluded from extending an offer to arbitrate to matters that may require the interpretation or application of EU law where such interpretation or application is insufficiently reviewable by the CJEU. The consequence of that rule of EU law is that Article 26 of the ECT cannot validly be invoked to initiate arbitration over claims such as those in *AES Solar v. Spain*.

### A. The Reasoning in *Achmea*

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

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[60] *See* CJEU, Joined Cases C-6/90 and 9/90, ECLI:EU:C:1991:428, ¶¶ 28 *et seq.* – *Francovich* (**Exhibit 53**); Craig & de Búrca at 288-290, 298-299 (**Exhibit 51**).

[61] Investors also have recourse to the European Court of Human Rights, which has jurisdiction to address claims of unjust treatment or a lack of due process in EU courts.

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[62]

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

> [T]he possibility of submitting those disputes to a body which is not part of the judicial system of the EU . . . call[s] into question . . . the preservation of the particular nature of the law established by the [EU] Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and . . . has an adverse effect on the autonomy of EU law.[63]

60. Based on this, in a decision published on 8 November 2018, the German Federal Court of Justice applied the CJEU's decision in *Achmea* and set aside the arbitral award. The German Federal Court of Justice, the supreme court (court of last resort) in private and criminal matters, ruled that "[a]ccording to the decision of the [CJEU] . . . there is no arbitration agreement between the parties" and "the Final Award made in these proceedings [between the Slovak Republic and Achmea] must be overturned."[64]

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

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[62] *Achmea* ¶ 60 (**Exhibit 7**).

[63] *Id.* ¶¶ 58-59.

[64] Bundesgerichtshof [BGH] [Federal Court of Justice], 31 October 2018, I ZB 2/15, *Slovak Republic v. Achmea B.V.,* ¶¶ 14, 15, 25, 27 (**Exhibit 8**).

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

### B. *Komstroy* Confirms that *Achmea* Applies to Multilateral Treaties, Like the ECT

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

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

> Articles 267 and 344 TFEU must be interpreted as *precluding a provision in an international agreement concluded between Member States, such as* Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[65]

[65] *Achmea* ¶ 60 (emphasis added) (**Exhibit 7**).

This holding is preceded by the CJEU's references to a line of cases involving *multilateral* agreements that reach the same conclusion as *Achmea* regarding the violation of the EU Treaties by the dispute resolution clauses in those agreements.[66]

65. While the ECT is a multilateral treaty, the specific provision at issue, Article 26, is analogous to Article 8 of the Dutch-Slovak BIT, because it creates bilateral undertakings among the Contracting Parties to submit investment disputes to arbitration.[67] The CJEU found that Article 8 of the Dutch-Slovak BIT was precluded by the EU Treaties because:

> [T]he *Member States parties to it* established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[68]

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

> "despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the

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[66] *Id.* ¶ 57.

[67] CJEU, Case C-741/19, ECLI:EU:C:2021:164, Opinion of Advocate General *Maciej Szpunar,* ¶ 41 – *Komstroy, the successor in law to the company Energoalians v. Republic of Moldova* (**Exhibit 13**): "[T]he ECT, although a multilateral agreement, consists of a set of bilateral obligations between the Contracting Parties, including the European Union and the Member States. The obligations established by the ECT essentially allow the protection of investments made by investors from one Contracting Party in another Contracting Party. The infringement of one of those obligations therefore does not mean that all the Contracting Parties are always able to claim compensation, as those obligations apply only bilaterally, between two Contracting Parties." Moreover, the CJEU addressed the situation where a multilateral treaty contains bilateral relationships whereby Member States make certain undertakings inter se also, e.g., in CJEU, Case 10/61, ECLI:EU:C:1962:2 – *Commission v. Government of the Italian Republic* (**Exhibit 41**) (addressing the situation of bilateral rights and obligations in a multilateral treaty in respect of the General Agreement on Tariffs and Trade (GATT); holding that GATT tariffs rules cannot be applied between the EU Member States to the extend they contradict obligations in EU law).

[68] *Achmea* ¶ 56 (emphasis added) (**Exhibit 7**).

> Contracting Parties, *in an analogous way* to the provision of the bilateral investment treaty at issue in the case giving rise to the judgment of 6 March 2018, Achmea"[69]

67. Further, the key factors that caused the CJEU to declare inoperative the dispute resolution provision of Article 8 of the Dutch-Slovak BIT apply squarely to Article 26 of the ECT: it creates arbitral tribunals that are plainly not courts or tribunals within the EU legal system.[70] These tribunals not only "may be called on" to interpret and apply EU law but they are required to do so[71] and cannot refer questions of EU law to the CJEU under Article 267 of the TFEU.[72] The CJEU's findings in *Achmea* on these key factors had nothing to do with the bilateral nature of the Dutch-Slovak BIT, as *Komstroy* confirms.

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

69. This results from the Court of Justice's statement in *Achmea* and the cases in support of it:

> The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail

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[69] *Komstroy* ¶ 64 (emphasis added) (**Exhibit 13**).

[70] *Id.* ¶ 53.

[71] *Id.* ¶ 50.

[72] *Id.* ¶ 53; *See also Achmea* ¶¶ 42, 49, 56 (**Exhibit 7**).

> the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*.[73]

The CJEU cites three cases in support of this general rule: Opinion 1/91, Opinion 1/09, and Opinion 2/13.[74]

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

71. Opinion 1/91, referred to above, addressed the compatibility of the dispute settlement bodies established by a draft international agreement between the EU and its Member States, on the one hand, and the four countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. The CJEU found such bodies to be "incompatible" with the TFEU because they would impinge on the CJEU's exclusive jurisdiction to make final determinations of EU law.[75]

72. Opinion 1/09 involved a multilateral agreement intending to create a European and Community Patent Court to which the EU was a party. There, too, the CJEU found that the envisaged European and Community Patent Court was not compatible with EU law. The CJEU focused on the fact that the European and Community Patent Court had the effect of removing disputes from the domestic judiciary of the EU Member States. Precisely because the European and Community Patent Court deprived domestic courts of the EU Member States of their rights

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[73] *Achmea* ¶ 57 (emphasis added) (internal citations omitted) (**Exhibit 7**).

[74] Opinion 1/91 ¶¶ 40, 70 (**Exhibit 26**); Opinion 1/09 ¶¶ 74, 76 (**Exhibit 28**); and Opinion 2/13 ¶¶ 182-183 (**Exhibit 29**).

[75] *See* Opinion 1/91 ¶¶ 31-36, 40, 70-72 (**Exhibit 26**).

and obligations to request preliminary rulings from the CJEU under Article 267 of the TFEU, the CJEU concluded that the agreement in question was in violation of the principle of autonomy of the EU legal order.[76]

73. Finally, in Opinion 2/13, the CJEU addressed the draft agreement of the EU's accession to the ECHR, another multilateral international agreement to which the EU was supposed to become a party. Again, the CJEU found that the accession agreement's dispute resolution provisions were not compliant with EU law.[77] It reasoned that the agreement interfered with the judicial dialogue established by Article 267 of the TFEU, and was therefore "liable adversely to affect the specific characteristics of EU law and its autonomy."[78] The CJEU also concluded that it was "liable to affect Article 344 of the TFEU in so far as it does not preclude the possibility of disputes between Member States or between Members States and the EU" concerning matters of EU law.[79]

74. *Achmea* simply applies these precedents to the bilateral investment treaty between Slovakia and the Netherlands. It extends their holdings on the preclusive power of Articles 344 and 267 of the TFEU to any investor-state dispute resolution clauses that purport to operate as between EU Member States.[80] The holdings in *Achmea* and the preceding cases extend to *any* international agreement which contains dispute settlement mechanisms incompatible with

[76] Opinion 1/09 ¶¶ 80, 83, 89 (**Exhibit 28**).
[77] Opinion 2/13 ¶ 258 (**Exhibit 29**).
[78] *Id*. ¶¶ 199-200, 236-248.
[79] *Id*. ¶¶ 214, 224-225, 258.
[80] *Achmea* ¶ 58 (**Exhibit 7**).

Articles 267 and 344 of the TFEU,[81] including the ECT.[82] In *Komstroy*, the CJEU therefore stated the obvious with regard to the EU's participation in the ECT:

> The "exercise of *the European Union's competence* in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union . . . [as] [s]uch a possibility would . . . call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.[83]

75. The EU's participation in the ECT is thus irrelevant to the question of whether the EU Member States violated the principles of autonomy and primacy of EU law by circumventing the preliminary ruling procedure of Article 267 of the TFEU when providing for intra-EU investment arbitration in Article 26 of the ECT.

76. Therefore, for the very same reasons as set out in *Achmea*, Article 26 of the ECT does not contain a valid offer by any Member State to arbitrate matters of EU law in an intra-EU context. Such an offer is precluded by the principles of primacy and autonomy and particularly by Articles 267 and 344 of the TFEU. Article 26 of the ECT runs afoul of the EU Treaties, circumventing the EU Member States' national courts and the preliminary ruling procedure

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[81] *Id.* ¶ 60. *See also* Opinion 1/17 ¶¶ 107, 119 (**Exhibit 31**). The Court of Justice applied its reasoning developed in previous case law, observing that a dispute-resolution mechanism in an international treaty is incompatible with EU law if it has an "adverse effect on the autonomy of the EU legal order" and, in particular, if an arbitral tribunal is empowered to interpret or apply EU law outside the structure of the EU judicial system. The fact that CETA had more than two contracting parties and that the EU was a party to the said agreement was of no consequence for the CJEU's analysis.

[82] *See Komstroy* ¶ 66 where the Court of Justice held the dispute settlement mechanism in Article 26 of the ECT to be incompatible with EU law (**Exhibit 13**).

[83] *Komstroy* ¶¶ 62-63 (**Exhibit 13**). *See also* CJEU, Case C-741/19, ECLI:EU:C:2021:164, Opinion of Advocate General *Maciej Szpunar*, ¶¶ 81, 83 – *Komstroy, the successor in law to the company Energoalians v. Republic of Moldova* (**Exhibit 13**).

under Article 267 of the TFEU and interfering with the CJEU's exclusive authority to ultimately determine the content and validity of EU law under Articles 267 and 344 of the TFEU. Thus, Article 26 has been inoperative *ab initio* for intra-EU disputes, as just confirmed by the Court of Justice itself in *Komstroy*.[84]

77. Accordingly, Spain did not make a legally valid offer under Article 26(3) of the ECT to arbitrate disputes that concern matters of EU law—including, as relevant here, the dispute with AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V..

**C. EU Law as Applicable Law**

78. A tribunal purportedly constituted under Article 26 of the ECT in relation to a dispute between an EU Member State would be required to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[85] EU law is public international law. The "applicable rules and principles of international law" between EU Member States therefore comprise the entire EU legal order. This includes the EU Treaties, as interpreted by the CJEU, and specifically the principle of primacy and the principle of autonomy as reflected in Articles 267 and 344 of the TFEU.

79. Without explicitly changing the EU Treaties in accordance with the procedure provided for therein, the EU Member States, furthermore, cannot derogate from EU law by simply agreeing in an international agreement to not apply EU law among each other. The CJEU made the point abundantly clear that "the very nature of EU law . . . requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of *any* other law."[86] In intra-EU matters, every judicial authority created by the EU Member States

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[84] *Komstroy* ¶¶ 63-66 (**Exhibit 13**).

[85] ECT, Art. 26(6) (**Exhibit 5**).

[86] Opinion 2/13 ¶ 212 (emphasis added) (**Exhibit 29**).

must (also) apply EU law – no matter whether there was no explicit reference to EU law or even if explicitly excluded in an international agreement to which the Member States are a party to – and is responsible that EU law is fully respected.[87]

80. A tribunal purportedly constituted under Article 26 of the ECT is therefore required to apply and duly observe the rules of EU law that limit or conflict with its own jurisdiction. A tribunal, however, which recognises that "[a] non-EU court may […] have to apply EU law […] under the relevant conflict of law rule"[88] but which atno point explicitly addresses the question of whether EU law falls within the scope of the "applicable rules and principles of international law" according to Art. 26(6) of the ECT fails to discharge this very duty.

81. If it had engaged in a proper analysis of the EU Treaties and the relevant CJEU's jurisprudence,[89] a tribunal would be aware that it has to observe the principle of autonomy of EU

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[87] *See Simmenthal II* ¶ 21 (**Exhibit 23**); CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315, ¶¶ 16, 18 – *Zwartveld* (**Exhibit 54**).

[88] Award on Jurisdiction ¶ 191.

[89] The EU Treaties impose comprehensive obligations on the EU Member States to apply and give full effect to the EU Treaties with respect to all areas falling within their ambit. This includes *specific rules of interpretation* which dictate that, in an intra-EU context, any rule created by the EU Member States, irrespective of "whether the provisions in question were adopted before or after the [respective rule in the EU Treaties…] or derive from international agreements entered into by the Member State," must be interpreted, "as far as possible, in the light of the wording and the purpose of [the EU Treaties …], in order to achieve the result pursued by the [EU Treaties …]." CJEU, Case C-188/07, ECLI:EU:C:2008:359, ¶ 84 – *Commune de Mesquer* (**Exhibit 55**). Indeed, in accordance with these specific rules of (treaty) interpretation, i.e., the so-called principle of "interpretation in conformity with European law" which reflects standing case law established in CJEU, Case 157/86, ECLI:EU:C:1988:62, ¶ 11 – *Murphy* (**Exhibit 56**), any provision in the ECT must be interpreted in a way that accords with the requirements of the EU Treaties. To the extent this is not possible any such provision must be held "inapplicable." *Id.* ¶ 11. Thus, it follows that, upon accession to the EU, EU Member States agreed to interpret and apply international agreements in their *inter se* relations in conformity with the rules and principles arising out of the EU Treaties. The Tribunal does not account for the fact that States can readily deviate from the default rules on interpretation in the VCLT as

law as well as the primacy of EU law over any conflicting rule created by the EU Member States. Application of these rules would require the tribunal to determine that no legally permissible offer was made by an EU Member State to arbitrate with nationals of other EU Member States under the ECT because an arbitration tribunal constituted under Article 26 of the ECT, like the intra-EU investment tribunal in *Achmea*, lacks the required "links with the judicial systems of the Member States" and follows procedures that are not "a step in the proceedings before the national courts."[90]

82. Moreover, an arbitral tribunal established under Article 26 of the ECT "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital."[91] In that regard, the CJEU stressed in *Achmea* that to violate EU law, it is not necessary that a tribunal actually applies and interprets any of the substantive provisions of EU law in the case before it. Rather, it suffices that such a tribunal "*may*" do so. The German Federal Court of Justice, in its ruling in proceedings to overturn the Final Award in *Achmea*, explained the CJEU's ruling:

> [I]t does not matter whether the arbitration tribunal in fact did not apply and did not have to apply European Union law in this case. To

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they chose to do with regards to the EU Treaties. [*see*, e.g., Int'l Law Comm'n, Rep. of the Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (2006), ¶ 470 (**Exhibit 57**); Schmalenbach, Kirsten, in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 1, ¶ 2 (**Exhibit 58**)]. And even despite this, the rules on treaty interpretation under the VCLT would have included a consideration of "any relevant rules of international law applicable in the relations between the parties" in accordance with Article 31(3)(c) of the VCLT – which includes the EU Treaties. Interestingly, littera (c) of Article 31(3) of the VCLT seems to be the only one of the said Article which the Tribunal did not consider relevant in its analysis. Award on Jurisdiction ¶¶ 174-202.

[90] *Achmea* ¶ 48 (**Exhibit 7**).

[91] *Id.* ¶ 42.

> determine whether an arbitration agreement exists between the parties, the only relevant issue is whether the Petitioner was able to make an effective offer to the Respondent to conclude an arbitration agreement . . . The decision of the European Court of Justice indicates that this was not the case, irrespective of whether the arbitration tribunal had to apply European Union law in this case.[92]

83. A tribunal formed under Article 26 of the ECT may be called upon to interpret or apply EU law regarding a range of issues. For example, in an arbitration in which the claimant alleges that the respondent State has breached the requirement under Article 10(1) of the ECT to provide its investment with fair and equitable treatment, the tribunal would need to assess the investor's assertion of its "legitimate expectations" vis-à-vis its investment. The content of those "expectations" is normally assessed by reference to the prevailing legal regime, which includes the applicable EU regulatory framework. More broadly, a tribunal might have to address the provisions of EU law that govern such matters as the movement of goods, capital, freedom of establishment and to provide services, competition, non-discrimination, or any restrictive measures in relation to foreign investment.[93] At a minimum, a tribunal constituted under Article 26 of the ECT would have to decide whether and how EU law affects its jurisdiction to arbitrate an intra-EU investment dispute—a decision that itself requires the interpretation and application of EU law. The CJEU in *Komstroy* deemed it sufficient for the conclusion that a tribunal constituted on the basis of Article 26 of the ECT "is required to interpret, and even apply, EU law"[94] that the ECT was signed and ratified, among others, by the EU. The EU being a party to

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[92] Bundesgerichtshof [BGH] [Federal Court of Justice], 31 October 2018, I ZB 2/15, *Slovak Republic v. Achmea B.V.,* ¶ 32 (**Exhibit 8**).

[93] *See, e.g.*, Steiner and Woods EU Law at 417-421, 470-475, 479 (**Exhibit 46**); Craig & de Búrca at 756-758, 839-843, 847, 860-861 (**Exhibit 51**); CJEU, Case C-299/02, ECLI:EU:C:2004:620, ¶ 15 – *Commission v. Netherlands* (**Exhibit 59**).

[94] *Komstroy* ¶ 50 (**Exhibit 13**).

the ECT—according to the settled case law—renders the treaty for the EU and its Member State, *i.e.* in an intra-EU context, into an act of EU law.[95]

**D. Circumvention of the Court of Justice of the European Union**

84. In addition, like the tribunal formed under Article 8 of the Netherlands-Slovak Republic investment treaty in *Achmea*, a tribunal constituted under Article 26 of the ECT is unable to refer questions concerning EU law to the CJEU under Article 267 of the TFEU.[96] According to Article 267(2) of that treaty, only a "court or tribunal of a Member State" may refer questions of interpretation and validity of EU law to the CJEU. This, in turn, means that questions of interpretation and application of EU law would not reach the CJEU, depriving national courts of the EU Member States of part of their jurisdiction and the CJEU of its exclusive authority over the ultimate interpretation and lawful application of EU law. This is incompatible with the EU Treaties and puts the uniform interpretation of EU law at risk, undermines the full effect and autonomy of EU law, and transgresses the level legal playing field that is central to the EU legal regime.[97]

85. Finally, *Achmea* makes clear that a possible review of an arbitral award by a national court of an EU Member State in a set aside or annulment proceeding does not cure the problem. Reference of disputes to resolution by investor-State arbitration is barred by the EU Treaties even where set aside or annulment proceedings might be available. Review of an award by national courts in the context of set aside proceedings is limited in scope under national laws, even if the seat of arbitration is an EU Member State, as was the case in *Achmea*[98] and in

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[95] *Id.* ¶¶ 23 (with further references), 49.
[96] *Id.* ¶¶ 52-53.
[97] *See Achmea* ¶ 37 (**Exhibit 7**); *Komstroy* ¶¶ 52-53 (**Exhibit 13**).
[98] *Achmea* ¶¶ 52-53 (**Exhibit 7**).

*Komstroy*[99]. Such review will not cover *all* issues decided by the arbitration tribunal, and the tribunal itself cannot refer questions to the CJEU. Thus, arbitral tribunals cannot ensure the primacy of EU law and the autonomy of its legal order as required by Articles 267 and 344 of the TFEU on this basis.[100]

86. As just recently confirmed by the Court of Justice in *Komstroy*, the CJEU's reasoning in *Achmea* fully applies to the ECT and the situation in *AES Solar v. Spain*. As with the treaty in *Achmea,* in the ECT,

> the Member States [sic] parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[101]

87. Hence, a tribunal constituted under Article 26 of the ECT to arbitrate an intra-EU investment dispute violates core principles of EU law and is thus not empowered to resolve the dispute.[102] Consequently, as in *Achmea*, "Articles 267 and 344 TFEU must be interpreted as precluding" the application of Article 26 of the ECT between EU Member States.[103] The CJEU in *Komstroy* put it in almost identical words: Article 26 of the ECT "must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[104] An investment

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[99] *Komstroy* ¶ 57 (**Exhibit 13**): "However, such judicial review can be carried out by the referring court only in so far as the domestic law of its Member State so permits".

[100] *Achmea* ¶¶ 54-56 (**Exhibit 7**) and, "by analogy", *Komstroy* ¶ 60 (**Exhibit 13**).

[101] *Achmea* ¶ 56 (**Exhibit 7**).

[102] My analysis is also consistent with the EU Commission's position as reaffirmed following *Achmea*, *see Communication from the Commission to the European Parliament and the Council*: *Protection of intra-EU investment*, COM (2018) 547 at 26 (19 July 2018) (**Exhibit 60**).

[103] *Achmea* ¶ 60 (**Exhibit 7**).

[104] *Komstroy* ¶ 66 (**Exhibit 13**).

tribunal established on the basis of the ECT, such as the one in *AES Solar v. Spain*, must decline jurisdiction in an intra-EU dispute.[105] This is because there has never been and, indeed, never could have been a valid offer to arbitrate from one EU Member State to an investor from another EU Member State from the moment the ECT was concluded. The CJEU's ruling in *Achmea* that the applicable principles of EU law preclude such references to arbitration has retroactive effect to the time of inception of the EU. No arbitration agreement could exist between an investor from one EU Member State and another EU Member State based on Article 26 of the ECT; a conclusion that is also readily reached by CJEU in *Komstroy*[106].[107]

[105] This declaration does not address the question of whether the proper construction of Article 26 of the ECT in accordance with the EU law principle of interpretation in conformity with European law, *see* CJEU, Case 157/86, ECLI:EU:C:1988:62, ¶ 11 – *Murphy* (**Exhibit 56**), must lead to the same result as the non-application of Article 26 of the ECT.

[106] *Komstroy* ¶ 66 (**Exhibit 13**).

[107] Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") (**Exhibit 61**) provides that the "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, […] if [t]he parties to the agreement […] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it". The relationship between the parties in an intra-EU investment dispute, such as the one in *AES Solar v. Spain,* is governed by EU law, which enjoys primacy over any other law in this relationship. According to EU law, Spain in the case at hand, at no time, could have made a valid offer to arbitrate. Thus, no valid arbitration agreement has ever or, indeed, could have existed between Spain and AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. under Art. 26 of the ECT. This, in turn, means that an award rendered despite Spain's incapacity under EU law to enter into an arbitration agreement in the given situation and, in any event, despite an obvious lack of a valid arbitration agreement, is not enforceable under the New York Convention.

## V. THE PAYMENT OF THE AWARD RENDERED IN *AES SOLAR V. SPAIN* AND THE VIOLATION OF EU STATE AID LAW

88. The EU Treaties prohibit EU Member States from granting any subsidies to private actors ("State aid") that might disrupt or threaten to distort competition within the EU. The relevant provision of the TFEU provides as follows:

> [A]ny aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be *incompatible with the internal market*.[108]

State aid is a measure conferring a selective economic advantage on private operators. To be considered such aid, the measure must be imputable to the EU Member State and financed through State resources; it must distort or threaten to distort competition and have the potential to affect trade between EU Member States.[109]

89. Under the EU Treaties, subject to a few unrelated exceptions, State aid is permissible only when first notified to and approved by the European Commission. According to Article 108(3) of the TFEU, the Commission

> shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107 [of the TFEU], it shall without delay initiate the procedure provided for in paragraph 2 [of Article 108 of the TFEU]. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

90. To establish whether a particular measure constitutes State aid, the CJEU has adopted a broad reading of the notion:

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[108] TFEU, Art. 107(1) (emphasis added) (**Exhibit 4**).

[109] *See*, *e.g.*, CJEU, Case C-39/94, EU:C:1996:285, ¶¶ 58 *et seq.* – *SFEI et al.* (**Exhibit 62**).

> According to settled case-law, the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking.[110]

The intention or justification of an EU Member State are irrelevant to whether a measure is considered State aid. It is the effects of the measure in question that are dispositive.[111]

91. In its Decision 7384, the European Commission applied these factors in connection with arbitrations that have been commenced against Spain, such as the one initiated by AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., which seek compensation for the impact of governmental regulatory reforms that Spain adopted in its energy sector with respect to subsidies for renewable energy production.[112] It stated that awards which require the government of Spain to pay compensation to investors in these cases would constitute State aid. The Commission concluded that because such "Arbitration Tribunals are not competent to authorize the granting of State aid . . . [i]f they award compensation, . . . this compensation would be notifiable State aid" that cannot be paid by Spain, a EU Member State, unless authorized by the Commission.[113] This would mean that the damages awarded by the PCA arbitral tribunal in this case, purporting to compensate AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. for their alleged losses resulting from governmental regulatory

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[110] CJEU, Case C-310/99, ECLI:EU:C:2002:143, ¶ 51 – *Commission v. Italian Republic* (**Exhibit 63**).

[111] CJEU, Case C-382/99, ECLI:EU:C:2002:363, ¶¶ 60-61 – *Commission v. Netherlands* (**Exhibit 64**).

[112] *See* European Commission, Decision 7384 on State Aid, Case No. SA.40348 (2015/NN) (10 November 2017) ¶ 165 – Spain's support for electricity generation from renewable energy sources, cogeneration and waste (**Exhibit 65**).

[113] *Id.* ¶ 165.

reforms in Spain's renewable energy sector, cannot be paid by Spain without the European Commission's prior approval.

92. The view taken in Decision 7384 is consistent with a previous decision by the European Commission that determined that payment by Romania of an arbitral award rendered by a tribunal constituted under an investment treaty with another EU Member State, constituted unauthorized State aid to an investor.[114]

93. Furthermore, the CJEU has indicated in a recent judgment concerning the Decision 7384 of the Commission that EU State aid law may well be violated by the payment of an award in an intra-EU context.[115] The CJEU did not *explicitly* find on whether the payment of an award in the intra-EU context constitutes State aid, as this was outside the scope of appeal.[116] However, it made clear that *Achmea* was relevant to the judgement under appeal.[117] "[D]amages which national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals" are fundamentally different from intra-EU arbitral awards such as this one in the case at hand and consequently only the former are outside the scope of review under the EU State aid regime. Accordingly, the EU Treaties, and thus also State aid law, are applicable to intra-EU arbitral awards and the payment of an intra-EU arbitral award without prior approval by the Commission would violate EU State aid law.

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[114] *See* European Commission Decision 1470 on State Aid, Case No. SA.38517 (2014/C) (30 March 2015), OJ L 232, 43, ¶¶ 94 *et seq.* – arbitral award *Micula v. Romania* of 11 December 2013 (**Exhibit 66**).

[115] *See* CJEU, Case C-638/19 P, ECLI:EU:C:2022:50, ¶¶ 131 in connection with, 137-145 – *Commission v. European Food and others* ("*European Food and Others*") (**Exhibit 67**).

[116] *Id.* ¶ 131.

[117] *Id.* ¶ 137.

94. Just recently the European Commission opened an in-depth investigation into the arbitration award in favour of Antin[118] to be paid by Spain.[119] That means that the European Commission, at this stage of the proceedings on a preliminary basis, perceives the payment of the award to constitute State aid.

95. Payment of the Award in the present case to AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., even though issued by the Tribunal, would have to be financed through Spain's state resources and is imputable to the State,[120] and such payment would qualify as State aid to an investor. It is therefore subject to the obligation imposed by Article 108(3) of the TFEU that an EU Member State cannot put in effect any measures that constitute State aid unless and until approved by the European Commission. The payment of an award would therefore be in violation of EU law.[121]

96. The enforcement of an award that violates EU law would *also* be illegal in any EU jurisdiction. As explained above, EU law precludes the application of the rules created by the EU Member States which conflict with EU law. This includes situations where the application of such rules would prevent the respective court "from drawing all the consequences of a breach of [EU State Aid rules] . . . because of a decision of a national court, which is *res*

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[118] *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, dated 15 June 2018 ("*Antin*") (**Exhibit 68**).

[119] European Commission, Case No. SA.54155 (2021/C) (19 July 2021) – *Arbitration award to Antin – Spain* (**Exhibit 69**), *see also* European Commission, Press Release IP/21/3783 (19 July 2021) (**Exhibit 70**).

[120] *See* European Commission, Decision 1470 on State Aid, Case No. SA.38517 (2014/C) (30 March 2015), OJ L 232, 43, ¶¶ 93 *et seq.* – arbitral award *Micula v. Romania* of 11 December 2013 (**Exhibit 66**). *See also European Food and Others* ¶¶ 131 in connection with, 137-145 – (**Exhibit 67**).

[121] *See id.* ¶ 116. *See also European Food and Others* ¶¶ 131 in connection with, 137-145 – (**Exhibit 67**)

*judicata* . . . A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of res judicata or by the principle of legal certainty."[122] This effect of EU law results equally in situations where the conflicting rule is contained in the domestic law of an EU Member State or was agreed to by EU Member States in an international agreement or treaty.[123]

97. When the claimants in *Micula* referenced above sought to enforce the ICSID award constituting illegal State aid in Luxembourg, Belgium, and Sweden, the Luxembourg Court of Appeal and the Swedish Nacka District Court refused to enforce the award because to do so would violate EU law on State aid.[124] The Brussels Court of Appeal stayed the enforcement of the award and referred questions on the lawfulness of its enforceability under the EU law to the CJEU.[125]

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[122] CJEU, Case C-505/14, ECLI:EU:C:2015:742, ¶ 45 – *Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen* (**Exhibit 71**).

[123] For example, the European Commission, just recently, referred the United Kingdom to the CJEU after its Supreme Court decided to allow the enforcement of an award under the ICSID Convention (an international treaty) although the European Commission found that the payment of compensation resulting thereof would violate EU State aid law. *See* European Commission, Press Release, Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid (9 February 2022) (**Exhibit 72**).

[124] *See* Cour Supérieure de Justice, Cour d'Appel, Case No. 71/18-VII-REF, at 21 – *State of Romania v. Viorel Micula* (21 March 2018) (Lux.) (**Exhibit 73**) ("[T]he [EU Commission's State Aid] Decision resulted in the Award losing its relevancy and efficacy and therefore its enforceability."); Nacka District Court, Case No. A 2550-1, Decision, p. 14 – *Romania v. Micula* (23 January 2019) (**Exhibit 74**) ("Sweden's commitments pursuant to Article 4(3) [of the] TEU, therefore, entail that there are impediments to the enforcement [of the ICSID award] sought."). It has also been reported that the Warsaw Court of Appeal set aside an arbitral award on the grounds of a breach of Article 108(3) of the TFEU. *See* Sąd Apelacyjny w Warszawie (Warsaw Court of Appeal), 1st Civil Division, File Ref. ACa 457/18, Decision of 26 November 2019 (**Exhibit 75**).

[125] Cour d'appel Bruxelles, Judgment (12 March 2019), *Romania v. Micula* (**Exhibit 76**); Although, the CJEU in its recent judgement *European Food and Others* (**Exhibit 67**) did not explicitly comment on whether the payment of an arbitral award in an intra-EU context

98. Because payment of an award in favour of AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. without prior approval by the European Commission would also breach EU law on State aid, the enforcement of such an award in this matter would be in violation of EU law.

* * *

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

Executed on 6 May 2022, in Berlin, Germany.

Steffen Hindelang

constitutes State aid, it indicated that EU State aid law may well be violated by the payment of such award (*see* above ¶ 93).

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| **Ex. 52** | CJEU, Case C-64/16, ECLI:EU:C:2018:117, ¶¶ 29, 34 – *Associação Sindical dos Juízes Portugueses* |
| **Ex. 53** | CJEU, Joined Cases C-6/90 and 9/90, ECLI:EU:C:1991:428, ¶¶ 28 *et seq.* – *Francovich* |
| **Ex. 54** | CJEU, Case C-2/88-IMM, ECLI:EU:C:1990:315, ¶¶ 16, 18 – *Zwartveld* |
| **Ex. 55** | CJEU, Case C-188/07, ECLI:EU:C:2008:359, ¶ 84 – *Commune de Mesquer* |
| **Ex. 56** | CJEU, Case 157/86, ECLI:EU:C:1988:62, ¶ 11 – *Murphy* |
| **Ex. 57** | Int'l Law Comm'n, Rep. of the Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (2006) |
| **Ex. 58** | Schmalenbach, Kirsten, in: Dörr/Schmalenbach, Vienna Convention on the law of Treaties – A Commentary (2nd ed. 2018), Article 1 |
| **Ex. 59** | CJEU, Case C-299/02, ECLI:EU:C:2004:620, ¶ 15 – *Commission v. Netherlands* |
| **Ex. 60** | *Communication from the Commission to the European Parliament and the Council*: *Protection of intra-EU investment*, COM (2018) 547 at 26 (19 July 2018) |
| **Ex. 61** | Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") |
| **Ex. 62** | CJEU, Case C-39/94, EU:C:1996:285, ¶¶ 58 *et seq.* – *SFEI et al.* |
| **Ex. 63** | CJEU, Case C-310/99, ECLI:EU:C:2002:143, ¶ 51 – *Commission v. Italian Republic* |
| **Ex. 64** | CJEU, Case C-382/99, ECLI:EU:C:2002:363, ¶¶ 60-61 – *Commission v. Netherlands* |
| **Ex. 65** | European Commission, Decision 7384 on State Aid, Case No. SA.40348 (2015/NN) (10 November 2017) |
| **Ex. 66** | European Commission Decision 1470 on State Aid, Case No. SA.38517 (2014/C) (30 March 2015), OJ L 232, 43, ¶¶ 94 *et seq.* – arbitral award *Micula v. Romania* of 11 December 2013 |
| **Ex. 67** | CJEU, Case C-638/19 P, ECLI:EU:C:2022:50, ¶¶ 131 in connection with, 137-145 – *Commission v. European Food and others* ("*European Food and Others*") |
| **Ex. 68** | *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, dated 15 June 2018 ("*Antin*") |
| **Ex. 69** | European Commission, Case No. SA.54155 (2021/C) (19 July 2021) – *Arbitration award to Antin – Spain* |
| **Ex. 70** | European Commission, Press Release IP/21/3783 (19 July 2021) |
| **Ex. 71** | CJEU, Case C-505/14, ECLI:EU:C:2015:742, ¶ 45 – *Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen* |
| **Ex. 72** | European Commission, Press Release, Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid (9 February 2022) |
| **Ex. 73** | Cour Supérieure de Justice, Cour d'Appel, Case No. 71/18-VII-REF, at 21 – *State of Romania v. Viorel Micula* (21 March 2018) (Lux.) |
| **Ex. 74** | Nacka District Court, Case No. A 2550-1, Decision, p. 14 – *Romania v. Micula* (23 January 2019) |

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| **Ex. 76** | Cour d'appel Bruxelles, Judgment (12 March 2019), *Romania v. Micula* |
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