ORAL ARGUMENT NOT YET SCHEDULED
No. 23-7031

In the United States Court of Appeals for the District of Columbia Circuit

NEXTERA ENERGY GLOBAL HOLDINGS B.V. and NEXTERA ENERGY SPAIN HOLDINGS B.V.,

Petitioners-Appellees,

v.

KINGDOM OF SPAIN,

Respondent-Appellant.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:19-cv-1618 (Hon. Tanya S. Chutkan)

BRIEF FOR THE EUROPEAN COMMISSION ON BEHALF OF THE EUROPEAN UNION AS *AMICUS CURIAE* IN SUPPORT OF THE KINGDOM OF SPAIN AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Except for *amicus curiae* the European Commission, which files this *amicus* brief in support of Appellant the Kingdom of Spain, all parties and intervenors appearing before the district court and in this Court are listed in the Brief of Appellant the Kingdom of Spain.

B. Rulings under Review

References to the rulings under review appear in the Brief of Appellant the Kingdom of Spain.

C. Related Cases

This case has not previously been before this Court. The case was previously before the U.S. District Court for the District of Columbia, captioned *NextEra Energy Global Holdings B.V. et al. v. Kingdom of Spain*, No. 1:19-cv-01618-TSC.

The following cases present the same or similar issues and involve the Kingdom of Spain:

- *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032 (D.C. Cir.), *on appeal from* No. 19-cv-1871 (D.D.C.)

- *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 23-7038 (D.C. Cir.), *on appeal from* No. 21-cv-3249 (D.D.C.)
- *InfraStructure Services Luxembourg SARL v. Kingdom of Spain*, No. 18-cv-1753-EGS-MAU (D.D.C.)
- *Novenergia II-Energy & Environment (SCA) v. Kingdom of Spain*, No. 18-cv-01148-TSC (D.D.C.)
- *RREEF Infrastructure (G.P.) Limited v. Kingdom of Spain*, No. 19-cv-03783-CJN (D.D.C.)
- *Watkins Holdings S.R.L. v. Kingdom of Spain*, No. 20-cv-01081-BAH (D.D.C.)
- *Infrared Environmental Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-cv-00817-JDB (D.D.C.)
- *Foresight Luxembourg Solar 1 S.A. R.L. v. Kingdom of Spain*, No. 20-cv-00925-TSC (D.D.C.)
- *Cube Infrastructure Fund Sicav v. Kingdom of Spain*, No. 20-cv-01708-EGS-MAU (D.D.C.)
- *BayWa R.E. AG v. Kingdom of Spain*, No. 22-cv-02403-APM (D.D.C.)
- *Hydro Energy 1, S.A.R.L. v. Kingdom of Spain*, No. 21-cv-02463-RJL (D.D.C.)
- *RWE Renewables GMBH v. Kingdom of Spain*, No. 21-cv-03232-JMC (D.D.C.)
- *Swiss Renewable Power Partners S.A.R.L. v. Kingdom of Spain*, No. 23-cv-00512-RJL (D.D.C.)

/s/ Sally L. Pei
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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties consent to the European Commission's participation as *amicus curiae*. Fed. R. App. P. 29; Cir. R. 29(b).

Pursuant to Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. Under the EU Treaties, the Commission is responsible for ensuring the proper application of EU law. It is the institution authorized to represent the EU in judicial proceedings outside the EU. The Commission is therefore uniquely positioned to provide perspective and insight on the questions of EU law implicated by this dispute.

/s/ *Sally L. Pei*
Sally L. Pei

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(e).

/s/ *Sally L. Pei*
Sally L. Pei

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

U.S. Cases

Statutes and Rules

* Authorities on which this brief chiefly relies are marked with an asterisk.

Treaties and International Agreements

European Union Cases

Foreign and International Cases

Other Authorities

GLOSSARY OF ABBREVIATIONS

Commission	European Commission
CJEU	Court of Justice of the European Union
EU	European Union
FSIA	Foreign Sovereign Immunities Act
ICSID Convention	Convention on the Settlement of Investment Disputes

STATUTES, TREATIES, AND FOREIGN JUDICIAL OPINIONS

Applicable statutes, etc., are contained in the addendum to the Brief of Appellant the Kingdom of Spain.

The Commission attaches an addendum containing foreign judicial opinions that are cited in this brief but not readily accessible. For the Court's convenience, the Commission has prepared and provided courtesy English translations.

IDENTITY AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The European Commission is an institution of the European Union (the "EU"), a treaty-based international organization comprising 27 Member States.[1] The Commission is independent and acts in the interests of the EU as a whole, not those of individual Member States. Under Article 17(1) of the Treaty on European Union, the Commission is responsible for, inter alia, representing the EU in proceedings outside the EU. The Commission submits this brief in this function on behalf of the EU.

The EU has a significant interest in this case and in ensuring that this

[1] These Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

Court proceeds based on a correct understanding of the EU law principles that it raises. Appellees are Dutch entities and hence EU companies subject to EU law. They seek to enforce an arbitral award that they obtained against Spain, an EU Member State, under the Energy Charter Treaty.[2] That treaty is an investment-protection agreement conceived and negotiated by the EU in the early 1990s as part of the EU's external energy policy.

The Commission submits this brief to describe developments within the EU that have a direct and substantial bearing on this case. Most notably, in *Republic of Moldova v. Komstroy LLC*, 2 Sept. 2021, EU:C:2021:655, the Court of Justice of the EU ("CJEU") confirmed that arbitration under the Energy Charter Treaty between a Member State and an investor of another Member State contravenes fundamental principles of EU law. Intra-EU arbitral awards like the one at issue here are thus invalid and unenforceable anywhere in the EU.

As the EU institution responsible for ensuring the proper application and administration of EU law, the Commission is uniquely situated to explain the context of the CJEU's decisions and to describe the destabilizing

[2] Energy Charter Treaty and its Protocol on Energy Efficiency and Related Environmental Aspects, *adopted* Dec. 17, 1994, *entered into force* April 16, 1998, 2080 U.N.T.S 95 (1995).

consequences that enforcing Appellees' award would have for the EU legal order.

RELEVANT BACKGROUND

A. The nature and characteristics of the EU legal order

The EU is a treaty-based international organization. The EU retains an international character: its 27 Member States remain the "masters" of the EU Treaties and have collectively determined the terms of their membership in the EU. But the EU also represents the most ambitious project of economic, political, legal, and social integration hitherto known in international law. European integration began in the 1950s as a reaction to the economic, political, and military destruction of World War II. Under the EU Treaties,[3] the Member States have transferred legislative, regulatory, and enforcement competences to the EU and its institutions. European integration has "given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other." Opinion 2/13, 18 Dec. 2014, EU:C:2014:2454, ¶ 167; *see*

[3] Namely, the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter "TEU"], the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter "TFEU"], and the Treaty establishing the European Atomic Energy Community, Oct. 26, 2012, 2012 O.J. (C 327) 1.

Slovak Republic v. Achmea BV, 6 March 2018, EU:C:2018:158, ¶ 33; *Komstroy* ¶ 43.

One of the central purposes of the EU Treaties was the establishment of the "internal market," defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured … ." TFEU art. 26(2). The internal market rules are contained in the EU Treaties and EU legislation, as interpreted by the CJEU. These rules cover all cross-border economic activities in the EU, including investment activities. They secure to EU investors directly enforceable rights throughout the investment cycle. *See generally* Commission Communication to the European Parliament and Council on Protection of intra-EU investment (July 19, 2018), COM(2018) 547, https://bit.ly/2XtniBb (explaining how internal market rules achieve comprehensive investment protection). They also impose obligations, including the obligation to comply with EU law and with regulatory standards designed to ensure that the internal market functions as a level, integrated playing field.

The European Commission is the "Guardian of the Treaties." Under Article 17(1) of the Treaty on European Union, the Commission is responsible for ensuring the proper application of the EU Treaties and measures that EU

institutions adopt under them. Among other things, the Commission issues decisions enforcing EU competition law, including by ensuring that public subsidy or subsidy-like schemes enacted by Member States (known as "State aid") do not distort or threaten to distort competition in the internal market. TFEU arts. 107 & 108.

As the CJEU has explained, the EU Treaties have created "[their] own legal system which, on the entry into force of the Treat[ies], became an integral part of the legal systems of the Member States and which their courts are bound to apply." *Costa v. E.N.E.L.*, 15 July 1964, EU:C:1964:66, at 593. Through the EU Treaties, "the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves." *Id.* The concept of a self-standing, independent legal order is often referred to as the principle of "autonomy."

The EU legal system rests on a clear hierarchy of norms. At the top is primary EU law, *i.e.*, the EU Treaties and general principles of EU law. International agreements that are an integral part of the EU legal order, like the Energy Charter Treaty, *see Komstroy*, ¶ 23, come below primary EU law in this hierarchy, *see Kadi v. Council & Commission*, 3 Sept. 2008, EU:C:2008:461, ¶ 285.

The relationship between EU law and national law (including international agreements to which EU Member States, but not the EU, are party), is governed by the principle of "primacy" of EU law. Primacy requires that conflicts between EU and national law be resolved by disapplying national-law provisions that are inconsistent with EU law. *Primacy of EU law (precedence, supremacy)*, EUR-Lex (last accessed June 6, 2023), http://bit.ly/40AyfSj.

Lower-ranking norms (including international agreements) and national law must be interpreted, as far as possible, to avoid a conflict with primary EU law. *See, e.g.*, *Productores de Música de España v. Telefónica de España SAU*, 29 Jan. 2008, EU:C:2008:54, ¶¶ 60, 68. This principle, known as "interpretation in conformity," serves to discern whether a conflict between primary EU law and lower-ranking rules exists in the first place.

The EU judicial system, comprising Member State courts and the CJEU, safeguards the EU legal order's autonomy and integrity. *See Komstroy*, ¶¶ 43-46. Its keystone is the preliminary-ruling procedure in Article 267 of the Treaty on the Functioning of the EU. National courts may (and, where they are courts of final instance, must) refer any relevant question of interpretation of EU law raised in proceedings before them to the CJEU

for a preliminary ruling.

Furthermore, Article 344 of the Treaty on the Functioning of the EU prohibits Member States from creating dispute-settlement mechanisms other than those set out in the EU Treaties on any matters implicating EU law. Such matters include the application of international agreements to which the EU and its Member States are a party, insofar as their intra-EU application is concerned. *See Commission v. Ireland* ("*Mox Plant*"), 30 May 2006, EU:C:2006:345, ¶¶ 121-133.

Articles 267 and 344 grant the CJEU exclusive jurisdiction to issue final and binding interpretations of EU law, thereby guaranteeing the correct and uniform application of EU law. These provisions thus "ensure that the specific characteristics and the autonomy of [the EU] legal order are preserved." Opinion 2/13, ¶ 174; *Achmea*, ¶ 35; *Komstroy*, ¶ 45.

Finally, relations between EU Member States are governed by "mutual trust," including the trust in each other's judiciaries, which, in the CJEU's words, is what "allows an area without internal borders to be created and maintained." Opinion 2/13, ¶ 191.

B. The Energy Charter Treaty

The Energy Charter Treaty is an investment-protection agreement

initiated, negotiated, and signed in the 1990s by the EU and its Member States, on the one hand, and third countries, particularly of the former Communist bloc, on the other. The treaty—concluded as part of a conference convened at the EU's initiative, *see* Final Act of the European Energy Charter Conference, 1998 O.J. (L69) 5—was intended to facilitate those third countries' transition to the market economy; prepare them for eventual accession to the EU; and enhance energy security, efficiency, and cooperation throughout Europe and its vicinity by extending the free-market principles of the EU's nascent internal gas and electricity markets and its energy policy beyond EU borders. The treaty was thus an instrument of the EU's external energy policy, in which the EU and its Member States acted together as a single block.[4]

The Energy Charter Treaty expressly provides that, in addition to States, "Regional Economic Integration Organisations" may accede to and consent to be bound by it. Energy Charter Treaty arts. 1(2), (3), (10). The international community has long accepted and understood the technique of the EU joining a treaty as a Regional Economic Integration Organisation as

[4] The Energy Charter Treaty 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 treaty applied.

allowing the EU and its Member States to act as a single entity of public international law, bound by treaty obligations to other contracting parties but not between themselves.[5] It signals the Energy Charter Treaty's contracting parties' acknowledgement of the EU's special features, including the fact that the EU and its Member States assume no *inter se* obligations when they enter into that treaty together.

SUMMARY OF ARGUMENT

This case presents a question of immense consequence to the EU. Appellees are EU investors seeking to enforce an arbitral award rendered in their favor against Spain, an EU Member State, by a private tribunal convened pursuant to the Energy Charter Treaty and the ICSID Convention.

Article 26 of the Energy Charter Treaty contains a standing offer from the EU and its Member States to arbitrate disputes. But as the CJEU—the EU's highest court—has explained, that offer applies only to investors from

[5] *See, e.g.*, Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, *in* David O'Keeffe & Henry G. Schermers, *Mixed Agreements* 155, 158 (1983) (noting that when "the EEC and its Member States cooperate in the conclusion of … mixed agreements … [they] act as a unity vis-à-vis the third States"); *id.* at 163; Eleftheria Neframi, *The Duty of Loyalty*, 47 Common Market L. Rev. 323, 335 n.45 (2010) (noting that "the European group (EU and Member States) appears as a single contracting party").

countries outside the EU. In *Republic of Moldova v. Komstroy*, EU:C:2021:655, the court explained that foundational principles of EU law require that Article 26 be interpreted as not applying to disputes between a Member State and an investor of another Member State. That conclusion flows from the nature of the EU legal order, as well as the need to ensure the integrity of the EU judicial system and the uniformity of EU law. Put simply, the CJEU has made clear that the treaty contains no valid offer of arbitration from the EU and its Member States to investors of other Member States.

The CJEU's judgment in *Komstroy* warrants the highest degree of deference as a matter of international comity. And as Spain explains, its holding is fatal to subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). Spain. Br. 30. It also means that the award is not entitled to full faith and credit, precluding enforcement under 22 U.S.C. § 1650a. Spain Br. 52.

As the CJEU has since confirmed, an undisputed practical consequence of *Komstroy* is that intra-EU awards like the one here are unenforceable anywhere in the EU. Appellees have nevertheless persisted in seeking enforcement *outside* the EU, including through this action. Even apart from the award's invalidity, enforcement would be highly problematic under EU

law. Applying established EU law principles, the Commission, as the institution responsible for enforcing EU competition law, has determined that an award like the one here constitutes "State aid," *i.e.*, a public subsidy, that Spain may not pay absent the Commission's approval. TFEU arts. 107 & 108. The Commission's analysis of whether to authorize payment is ongoing. But in the meantime, if Spain were to make unauthorized payments (whether pursuant to the award or a judgment enforcing it), it would violate its EU law obligations.

Spain therefore sought injunctive relief in the Netherlands—Appellees' home jurisdiction—to restrain Appellees from seeking recovery of sums that Spain cannot lawfully pay at this time. *See* Dutch Writ, ¶¶ 14.1-14.5 [Dist.Ct.Dkt.78-3]. But the district court here took the highly unorthodox step of preliminarily enjoining Spain, a foreign sovereign and EU Member State, from pursuing that relief.

Anti-suit injunctions are a drastic remedy in any context. But against foreign states they are virtually unheard of, in the United States or elsewhere. *See* Spain Br. 56. In the EU, the notion that a national court could enjoin a foreign state from pursuing litigation in foreign courts—much less litigation that concerns the sovereign's own rights and interests under foreign law and

a situation entirely internal to a foreign legal system—appears to be without precedent. The serious reciprocity and comity concerns that flow from the district court's dramatic departure from international practice are reason enough for this Court to vacate the injunction, even apart from the fatal jurisdictional defect identified above.

ARGUMENT

I. Article 26 of the Energy Charter Treaty must be interpreted as not applying to intra-EU disputes

Whether intra-EU arbitration under the Energy Charter Treaty and its dispute-resolution provision, Article 26, is compatible with EU law has been an issue of substantial controversy.

In 2018, the CJEU issued a landmark judgment in *Slovak Republic v. Achmea BV*, EU:C:2018:158, confirming that Articles 267 and 344 of the Treaty on the Functioning of the EU "must be interpreted as precluding a provision in an international agreement concluded between Member States" that permits "an investor from one of those Member States … in the event of a dispute concerning investments in the other Member States, [to] bring proceedings against the latter Member State before an arbitral tribunal … ." *Achmea*, ¶ 60.

The Commission and most Member States understood from the outset

that *Achmea*'s underlying principles (found in the EU Treaties themselves) preclude intra-EU arbitration not only under bilateral investment treaties, but also under the Energy Charter Treaty. *See* Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/3HfJszu. As a consequence, those Member States—which included Spain and the Netherlands—agreed (among other things) to contest the recognition or enforcement of intra-EU investment awards. But a few Member States took no position, considering that the issue should be resolved in "a specific judgment on this matter."[6] The question thus remained the subject of debate.

On September 2, 2021, the CJEU, sitting as a Grand Chamber of fifteen distinguished judges—a configuration reserved for matters of high importance—dispelled any remaining doubt: it held in *Komstroy* that Article 26 of the Energy Charter Treaty must be interpreted as not applying to intra-

[6] Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/3AAVVu2; *see also* Declaration of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/3hFXcWg.

EU disputes. *Komstroy*, ¶ 66. As a consequence, EU law is clear that EU Member States cannot validly have agreed to arbitrate claims brought by EU nationals under the Energy Charter Treaty.

A. The CJEU has confirmed that intra-EU arbitration under Article 26 of the Energy Charter Treaty conflicts with the EU Treaties and fundamental EU law principles

Komstroy was a case referred to the CJEU by the Paris Court of Appeal, which requested a preliminary ruling on questions about the interpretation of the term "investment" in the Energy Charter Treaty. Several EU Member States and the Commission urged the CJEU also to address whether Article 26 applies intra-EU, particularly given the many pending arbitrations and enforcement proceedings worldwide—including in the United States—that implicated this issue. Courts in this Circuit had recognized that "the issue is of importance to the EU and better suited for initial review in their courts." *CEF Energia, B.V. v. Italian Republic*, No. 19-cv-3443, 2020 WL 4219786, at *7 (D.D.C. July 23, 2020) (Jackson, J.) (quoting *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-cv-1148, 2020 WL 417794, at *4 (D.D.C. Jan. 27, 2020)).

In *Komstroy*, the CJEU addressed the issue, holding that "Article 26(2)(c) … 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." *Komstroy*, ¶ 66. That conclusion flowed from two important principles.

The first is the settled principle, "enshrined … in Article 344 [of the Treaty on the Functioning of the EU]," that "an international agreement cannot affect the allocation of powers laid down by the Treaties, and hence the autonomy of the EU system, observance of which is ensured by the Court." *Id.* ¶ 42. The court recalled that the Treaties themselves establish a special judicial system "to ensure consistency and uniformity in the interpretation of EU law." *Id.* ¶ 45. That system's critical features include the court's own "exclusive jurisdiction to give the definitive interpretation of [EU] law," and the Article 267 preliminary-ruling process (described above), which channels all questions of EU law to the CJEU. *Id.* ¶¶ 45-46; *see supra* pp.6-7.

Arbitral tribunals convened under Article 26 of the Energy Charter Treaty are necessarily called upon to interpret and even apply EU law, not least because the treaty itself—as an agreement to which the EU and its Member States are party—is part of EU law. *See Komstroy* ¶ 50. But such tribunals are not courts or tribunals of a Member State within the meaning of Article 267 of the Treaty on the Functioning of the EU, and therefore are not

"subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union." *Id.* ¶ 51; *see id.* ¶¶ 48-59.

If Article 26 of the Energy Charter Treaty applied intra-EU, EU investors could opt out of the EU judicial system and seek resolution of EU-law questions elsewhere. *See id.* ¶ 62. Allowing such a result would violate the obligation, flowing from Article 344 of the Treaty on the Functioning of the EU, to submit all EU-law disputes to the EU judicial system, and would upend the institutional structure laid down in the EU Treaties.

Thus, the CJEU held that intra-EU arbitration under the Energy Charter Treaty would violate the essential features of the EU legal order described above—effectively clarifying that the logic of *Achmea* (which concerned intra-EU bilateral investment treaties) extends to intra-EU arbitration under the Energy Charter Treaty. *Id.* ¶¶ 42-63.

The second important principle underlying *Komstroy* is that, "despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 [of the Energy Charter Treaty] is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in [*Achmea*]." *Id.* ¶ 64. The CJEU's reasoning echoed the analysis of Advocate-

General Maciej Szpunar,[7] who noted that the Energy Charter Treaty's investment-protection obligations "apply only bilaterally, between two Contracting Parties." Opinion of Advocate General Maciej Szpunar, *Republic of Moldova v. Komstroy*, 3 March 2021, EU:C:2021:164, ¶ 41 & n.22. Numerous scholars have explained that Article 26 of the Energy Charter Treaty creates bilateral relationships.[8]

The bilateral nature of the obligations in Article 26 means that when, in a given dispute, the intra-EU interpretation of that provision is at stake, the matter may be resolved between those contracting parties alone. Put differently, the question of Article 26's intra-EU application is a matter internal to the EU and does not implicate the rights of third countries that are also contracting parties to the Energy Charter Treaty.

As explained *supra* pp.5-6, within the EU legal order, international

[7] Advocates General are appointed to the CJEU and tasked with providing impartial, independent submissions in certain cases before the court. TFEU art. 252.

[8] *E.g.*, Julian Scheu & Petyo Nikolov, *The Incompatibility of Intra-EU Investment Treaty Arbitration with European Union Law*, 62 German Y.B. Int'l L. 475, 492-493 (2019); Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* 132 (2015); Thomas W. Wälde, *International Investment Law: An Overview of Key Concepts and Methodology*, Transnat'l Disp. Mgmt., July 2007, at 48-49 n.104.

agreements to which the EU is a party must be interpreted to be consistent with higher-ranking norms of primary EU law. The interpretation set forth in *Komstroy* may not be the only possible construction of Article 26. But it is the only interpretation that prevents a conflict with primary law (*i.e.*, the EU Treaties), and therefore must be preferred under the principle of interpretation in conformity.

Komstroy has already had significant repercussions for intra-EU Energy Charter Treaty disputes. At least one arbitral tribunal, citing *Komstroy*, has declined jurisdiction over such a dispute. *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V 2016/135 (16 June 2022), ¶¶ 477-478, https://bit.ly/3NfHfaV. The Higher Regional Court of Cologne, likewise relying on "the jurisprudence of the Court of Justice," has granted two requests by the Netherlands for a declaration that EU law precludes arbitration claims brought by German companies against the Netherlands under the Energy Charter Treaty. *Kingdom of the Netherlands v. RWE AG*, 19 SchH 15/21, Oberlandsgericht Köln [Higher Regional Court of Cologne], Sept. 1, 2022, A033; *Kingdom of the Netherlands v. Uniper*, 19 SchH 14/21, Oberlandsgericht Köln [Higher Regional Court of Cologne], Sept. 1, 2022, A079.

Importantly, the interpretation of Article 26 that the CJEU announced in *Komstroy* has effect from the moment EU law entered into force for the Parties involved. It is well-established that the CJEU's judgments apply *ex tunc*. *Blaizot v. University of Liège*, 2 Feb. 1988, EU:C:1988:43, ¶ 27; *Gollnisch v. European Parliament*, 12 Nov. 2020, EU:C:2020:916, ¶ 48. Only "exceptionally" will the CJEU impose temporal limitations on an interpretation of EU law, *Blaizot* ¶ 28, and no such circumstances existed in *Komstroy*. U.S. courts take a similar approach: "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-313 (1994); *see also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56 (2015).

Finally, the CJEU's decisions on the interpretation and application of EU law, including the Energy Charter Treaty, are binding in all Member States. *See* TFEU art. 344. Under *Komstroy*, intra-EU Energy Charter Treaty awards, like the one at issue here, contravene fundamental rules of EU law and cannot be recognized or enforced in any EU court.

Subsequent CJEU cases confirm this fundamental point. In *Republiken Polen v. PL Holdings Sàrl*, 26 Oct. 2021, EU:C:2021:875, the court emphasized

that *Achmea* and its underlying principles not only foreclose Member States from removing EU-law disputes from the EU judicial system, but also "*require*[]" them, "where a dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law … *to challenge, before that arbitration body or before the court with jurisdiction, the validity of the arbitration clause … on the basis of which the dispute was brought before that arbitration body*." EU:C:2021:875, ¶ 52. That is, EU law requires Member States to resist intra-EU arbitration and the recognition and enforcement of intra-EU arbitral awards—as many Member States already had committed to do in the wake of *Achmea*. *See supra* p.13.

The CJEU has also confirmed that EU courts must decline to enforce such awards. In an order issued in *DA v. Romatsa*, 21 Sept. 2022, EU:C:2022:749, the CJEU addressed a request for a preliminary ruling from a Belgian court regarding whether EU law precludes enforcement of an intra-EU award (obtained by Swedish investors against Romania) in Member State courts. A103. The CJEU held that EU law, in particular Articles 267 and 344 the Treaty on the Functioning of the EU, must be interpreted to mean that a national court of a Member State where enforcement is sought "is required to set aside that award and … may not, in any event, enforce it in order to enable

its beneficiaries to obtain payment of the damages which it awards them." *Id.* ¶ 46, A113.

EU courts are heeding this obligation. A Swedish appellate court has set aside an intra-EU Energy Charter Treaty award rendered against Spain, reasoning that the CJEU's decisions mean that the parties could not have validly agreed to arbitrate the dispute. *Kingdom of Spain v. Novenergia II - Energy & Environment (SCA), SICAR*, T 4658-18, Svea Court of Appeal (13 Dec. 2022), A194-196. The Supreme Court of Sweden and the Paris Court of Appeal have reached the same conclusion with regard to intra-EU awards against Poland. *Republic of Poland v. PL Holdings* [Supreme Court] 2022-12-14 T 1569-19 (Swed.), A233-235; *Strabag SE v. Republic of Poland*, Cour d'appel [Court of Appeal] Paris, 16e ch., Apr. 19, 2022, 48/2022, A260; *Slot Group a.s. v. Republic of Poland*, Cour d'appel [Court of Appeal] Paris, 16e ch., Apr. 19, 2022, 49/2022, A280-283.

B. *Komstroy* applies as an interpretation of international law binding on all EU Member States

Appellees may attempt to argue that the CJEU's rulings do not preclude enforcement in the United States, on the theory that EU law is internal law that does not affect Spain's international-law obligations under the Energy Charter Treaty. But the EU legal order itself derives from international

treaties that create obligations between Member States on the international plane.

Even within the EU, while the CJEU has treated the EU legal order as special given the far-reaching goals of the EU Treaties, it has never denied its international character. *See, e.g.*, *Van Gend & Loos*, 5 Feb. 1963, EU:C:1963:1, at 12 ("the Community constitutes a new legal order of international law"); *Achmea*, ¶ 41 (EU law "deriv[es] from an international agreement between the Member States").

EU law is thus public international law binding on and applicable between all Member States. The Member States have entrusted the CJEU with the authority to interpret that international law in a final and binding manner. TEU art. 19; TFEU art. 344. That authority includes construing international agreements to which the EU is a party, insofar as their application between EU Member States is concerned. *See Mox Plant*, ¶¶ 82, 121-133.

As an arbitral tribunal chaired by Judge James Crawford recognized,

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

> bind the Member States on issues of international law affecting them.

BayWa r.e. Renewable Energy GmbH v. Kingdom of Spain, Decision on Jurisdiction, Liability, and Directions on Quantum, ICSID Case No. ARB/15/16 (2 Dec. 2019), ¶ 280 (emphasis added), https://bit.ly/45H7RbW.[9]

Moreover, a purported distinction between international law and EU law assumes that the Energy Charter Treaty creates only multilateral international obligations that supersede Spain's EU-law obligations. But as explained above, the CJEU squarely rejected that assumption in *Komstroy*. *See supra* pp.16-17; *Komstroy* ¶ 64.

International law authorities confirm the point. The International Court of Justice has recognized the "essential distinction … between the obligations of a State towards the international community as a whole, and those [like protections for foreign investments or foreign nationals] arising vis-à-vis another State in the field of diplomatic protection." *Barcelona Traction, Light & Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 3, 32-33 ¶ 33 (Feb. 5); *id.* ¶ 35. *See also* Report of the Study Group of the Int'l Law Comm'n, *Fragmentation*

[9] James Crawford was an eminent academic and practitioner of public international law who served on the International Court of Justice from 2015 until his death in 2021.

of International Law, UN Doc. No. A/CN.4/L.682 (2006), ¶¶ 295-313; *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, art. 42, cmts. 5-10, U.N. Doc. A/56/10 (2001).[10]

II. The CJEU's decision in *Komstroy* merits deference

As noted, *Komstroy*, as well as *Achmea* and its progeny, mean that intra-EU arbitral awards like the one here are unenforceable in any EU Member State. But the CJEU's decision, which confirms that Spain had not validly offered to arbitrate its dispute with Appellees, is also fatal to subject-matter jurisdiction over this action.

As Spain explains, whether an arbitration agreement exists is a key jurisdictional fact that this Court must determine. Spain Br. 31-39. In analyzing that issue, this Court should accord the highest level of deference to the CJEU's decision in *Komstroy* on the interpretation of the Energy Charter Treaty and the EU Treaties. *See Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 21-cv-3249 (D.D.C.) (Leon, J.), Op. 14 n.6.

As the Supreme Court has indicated, U.S. courts "should give respectful

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[10] *See also* Joost Pauwelyn, *Conflict of Norms in Public International Law* 74-75 (2003) (discussing the bilateral nature of international treaty obligations); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 Int'l & Comp. L.Q. 279, 313-315 (2005) (discussing the interpretation of such bilateral obligations).

consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam). The CJEU undoubtedly has such jurisdiction: It is the EU's highest judicial body, with exclusive competence to issue binding, authoritative interpretations of EU law, of which the Energy Charter Treaty is an integral part.

The EU Member States have also charged the CJEU with issuing authentic and authoritative interpretations of the Energy Charter Treaty, at least insofar as it applies in intra-EU relations. *See* TFEU art. 344. The Energy Charter Treaty itself does not entrust any particular international court with the authority to issue binding interpretations of it; instead, it foresees state-to-state arbitration. Thus, with respect to the Energy Charter Treaty's intra-EU application, the EU Treaties provide a mechanism for obtaining authoritative interpretations. *See id.*; *cf. Mox Plant*, ¶¶ 121-133 (similar analysis regarding the UN Convention on the Law of the Sea).

Deferring to the CJEU's decisions comports with international comity. Federal courts defer to foreign courts' decisions on the meaning of the laws that such courts are charged with interpreting and applying, as a matter of the mutual respect that characterizes relationships between sovereigns. *See, e.g.*,

Hilton v. Guyot, 159 U.S. 113, 163-64, 202-03 (1895); *Animal Sci. Prods. Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018) (analogizing to the rule that "[i]f the relevant state law is established by a decision of the State's highest court, that decision is binding on the federal courts" (cleaned up)). Such deference "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). *See also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987) (discussing comity).

Deference is particularly warranted here given the issue's importance to the EU. Whether Spain could have validly agreed to arbitrate Appellees' claims has consequences far beyond this case. The question implicates the structure of the EU legal order, the role and jurisdiction of EU courts, the interpretation of EU law by non-EU adjudicatory bodies, and the future of the Energy Charter Treaty and investor-State arbitration within the EU.

The *Komstroy* judgment was the culmination of nearly two years of proceedings, which included extensive briefing by the parties and submissions

by multiple Member States, the Commission, the Council of the EU,[11] and an Advocate General of the CJEU. For a U.S. court now to second-guess the CJEU's considered decision on a question of such magnitude for the EU legal order would contradict the principles of comity and mutual respect that govern U.S. courts' approach to legal issues that affect the interests of foreign governments.

III. Enforcement would subject Spain to conflicting legal obligations and interfere with the EU State aid framework

The district court took the extraordinary measure of enjoining Spain, an EU Member State, from pursuing legal proceedings in EU courts regarding its rights and obligations under EU law. That decision was far out of step with international practice and raises serious comity concerns. As far as the Commission has been able to discern, at least within the EU, there appears to be no precedent for a national court to restrain a foreign sovereign from pursuing litigation in a foreign jurisdiction.

The district court apparently believed that, by initiating litigation in Dutch courts to suspend U.S. enforcement proceedings, Spain was "actively seeking to frustrate the operation of U.S. law." Op. 20. That characterization

[11] The Council of the EU is an institution composed of government ministers from each EU Member State.

overlooks the complex questions of EU law that enforcing this award would raise—and the serious consequences that Spain would face were it to make any payment to Appellees before those questions have been resolved. It was those consequences that Spain sought to avoid by seeking relief in Appellees' home jurisdiction. Dutch Writ, ¶¶ 14.1-14.5. Comity weighs heavily against enjoining Spain from pursuing such redress.

Appellees' claims in the underlying arbitration concerned Spain's revised financial support for renewable energy. This revised support was designed to implement the EU's Renewable Energy Directive, which set a common EU framework for promoting energy from renewable sources. Appellees claimed that, by introducing the revised support measures, Spain breached the Energy Charter Treaty by denying them a prior level of support to which they claimed to be entitled. *See* Award ¶ 391 [Dist.Ct.Dkt.1-1, PDF p.156].

EU law forbids Member States from providing businesses *any* public support ("State aid"). TFEU art. 107(1). The intention to provide such support can be notified to the Commission and specifically approved by it on defined public policy grounds and in compliance with the principles of necessity and proportionality. State aid control is critical to the proper functioning of the EU

internal market. The Commission investigates potential aid measures and renders binding decisions under the EU Treaties. TFEU arts. 107 & 108. Member States must not implement potential aid measures before the Commission has provided authorization. TFEU art. 108(3); *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*, 21 Nov. 2013, EU:C:2013:755, ¶¶ 34-42.

The CJEU has held that the support scheme at issue is State aid. *Elcogás SA v. Administración del Estado*, 22 Oct. 2014, EU:C:2014:2314. The Commission has acknowledged that holding, Decision on State Aid, SA.40348, ¶ 84 (Nov. 10, 2017), https://bit.ly/3OOLAmC, and has determined that compensation awarded by an arbitral tribunal in connection with this support scheme "would constitute in and of itself State aid" that Spain cannot pay without the Commission's authorization, *id.* ¶¶ 160, 165.

Spain has notified the award to the Commission. Dutch Writ, ¶ 3.6. The Commission will decide—after an investigation that will include hearing from all interested parties, including Spain, Appellees, and Member States—whether payment of the award is compatible with the internal market. *See, e.g.*, Decision on State Aid, SA.54155 (2021/NN) (July 19, 2021) (opening investigation into similar award), https://bit.ly/3CaCOHH. If the Commission

declines to allow payment, Appellees may seek redress before the CJEU.

Meanwhile, if Spain makes unauthorized payments—whether pursuant to the award or a judgment from an enforcement court—Spain will be in violation of Article 108(3) of the Treaty on the Functioning of the EU and subject to potential infringement proceedings brought by the Commission. Courts in Spain may also be faced with claims by competitors of Appellees who have not benefited from such unauthorized subsidies and thus are placed at a competitive disadvantage. *CELF v. SIDE*, 12 Feb. 2008, EU:C:2008:79, ¶ 55.

And if the Commission ultimately decides, at the end of its investigation, that payment is incompatible with the internal market, the Commission will, in principle, order Spain to recover (i.e., claw back) those payments. *See* Commission Notice on the recovery of unlawful and incompatible State aid, 2019 O.J. C 247/2, ¶ 17. The recovery process entails close monitoring and coordination between the Commission and the Member State. *Id.* ¶ 65. But it may also lead to national-court litigation, such as if the beneficiary refuses to pay back the aid or challenges the recovery decision, *id.* ¶¶ 141-142, or if recovery requires resort to insolvency proceedings, *id.* ¶¶ 127-135. Failure to recover funds would expose Spain to legal action by the Commission and possible financial penalties. *Id.* ¶¶ 1148-158.

Forcing this elaborate EU legal machinery into motion—requiring action by the Commission as well as Spain, and potentially spawning ancillary litigation in national courts—by ordering enforcement of the award would be all the more anomalous given the invalidity of the underlying award as a matter of EU law. Spain would be placed in the impossible position of being ordered by a U.S. court to satisfy an award that, under EU law, it cannot pay.

The district court granted the anti-suit injunction to protect what it viewed the United States' interest in enforcing arbitral awards. Op.19, 27. But the U.S. interest in enforcing awards under the ICSID Convention is at its nadir where, as here, both sovereigns involved (Spain and the Netherlands) agree that the award is unenforceable due to lack of valid consent to arbitration. And that minimal interest is far outweighed by the interest of Spain, the Commission, and the EU legal system in the orderly resolution of the complex questions of EU law that payment of the award would raise.

CONCLUSION

For the foregoing reasons, and those set forth in Spain's brief, this Court should reverse the district court's decisions and dismiss the case for lack of jurisdiction or on the merits. The preliminary injunction should be vacated.

Dated: June 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief contains 6,500 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Office 365 in 14-point Century Expanded BT font.

Dated: June 6, 2023

/s/ *Sally L. Pei*
Sally L. Pei

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on June 6, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: June 6, 2023

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