UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CEF Energia, B.V., Petitioner, v. The Italian Republic, Respondent.	
Greentech Energy Systems A/S (now known as Athena Investments A/S), Novenergia General Partner S.A. (acting as liquidator of Novenergia II Energy & Environment (SCA) SICAR) Novenergia II Italian Portfolio Petitioners, v. The Italian Republic Respondent.	**Case No. 19-cv-3443-KBJ**

Second Expert Report of Marc Bungenberg in Support of the Italian Republic's Motion to Dismiss and Opposition to the Petition to Enforce Arbitral Award

I. Introduction and General Remarks

1. I, Marc Bungenberg, make this declaration upon my own personal knowledge, except as to those statements made upon information and belief, and I believe all such statements, and the information upon which they are based to be true

2. With reference to the above-captioned cases, I have been asked by counsel to the Italian Republic to provide an opinion responding to the points of EU law raised in the Petitioners Memorandum of Law in Response to the Italian Republic's Motion to Dismiss and Opposition to Enforce the Arbitral Awards (ECF No. 35, hereinafter "**Petitioners' Memorandum of Law**"), together with the Declaration of Piet Eeckhout (ECF No. 35-1, hereinafter "**Eeckhout Decl**.").

3. All legal authorities I have relied upon are cited in this opinion, or in my previously-submitted opinion (Expert Report of Marc Bungenberg in Support of the Italian Republic's

Motion to Dismiss and Opposition to the Petition to Enforce Arbitral Award, ECF No. 26-20, hereinafter "**First Expert Declaration**").

4. I have been compensated 650 EUR per hour to prepare this expert testimony.
5. In this declaration, I will address the concerns raised by the Petitioners in their Memorandum of Law and by Professor Eeckhout in his Expert Declaration. I will clarify the aspects of the former, where the Petitioners have misunderstood the contents of my declaration and simultaneously, explain comments from my first declaration disputed by Professor Eeckhout. To do so, I will briefly recall the observations in my first opinions in the CEF and Greentech disputes and subsequently elaborate my remarks following the same order as presented in Professor Eeckhout's summary,[1] since this summary paints an inaccurate picture of my declaration.
6. To clarify my position and submissions on EU Law's continued applicability to the underlying arbitrations – as *lex arbitri* as well as applicable substantive law – I will proceed in the following manner:
    a. *First*, detail certain incontrovertible facts for this Court's benefit (below at II.);
    b. *Second*, elaborate on the following points already addressed in my first expert declaration, namely:
        i. EU Law is part of the *lex arbitri* for the underlying arbitrations (below at III.1.)
        ii. The CJEU's decision in *Achmea* is not novel but reflects settled jurisprudence on EU law's foundational principles and applies them in the context of intra-EU investor-state dispute settlement (ISDS) (below at III.2.);
        iii. Applying these principles to any intra-EU international agreement, even those that the EU itself has ratified, calls for a calibrated approach, if applicable substantive law before an institution set up by such an agreement *might* be EU Law (below point at III.3.); and

[1] Expert Declaration of Professor Piet Eeckhout, dated February 5, 2020, ECF No. 35-1 ("Eeckhout Decl."), ¶¶9 – 24.

iv. EU Law is not only applicable as *lex arbitri*, but also to the merits of the case (below point III.4.).

c. In the penultimate section (below at IV.), I will address the legal fortitude of certain remarks made by Professor Eeckhout and the Petitioners.

II. The incontrovertible facts presented to this Court

7. There are several "undisputed" and "clear" facts that the Petitioners and Professor Eeckhout rely upon in their respective submissions before this Court.[2] I believe that that certain similarly incontrovertible statements are especially relevant to this Court's analysis:

- The "Greentech" and "CEF" disputes are "intra-EU investor-state-dispute-settlement" disputes between investors from EU Member States (Denmark, Luxembourg and Netherlands) on the hand and an EU Member State (the Italian Republic) on the other hand;[3]

- The underlying arbitrations in this case are Stockholm Chamber of Commerce (SCC) arbitrations, not ICSID;[4]

- The Claimants in the underlying arbitrations opted in favour of SCC arbitration instead of other alternatives, for example, ICSID arbitration available under Article 26(4) ECT, and therefore, knowingly opted for a seat of arbitration in Stockholm/Sweden (and consequently, the EU);[5]

- No Court outside the EU – to the best of my knowledge – has ever enforced a non-ICSID intra-EU-investor-state-dispute-settlement award.

- The autonomy of EU law has been recognised over decades and is not an invention of the CJEU's decision in *Achmea*;[6]

- EU Law forms the corpus of domestic laws of all EU Member States.[7]

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[2] Eeckhout Decl., ¶¶58, 75 and 77; Petitioners' Memorandum of Law in Response to The Italian Republic's Motion to Dismiss and Opposition to the Petition to Enforce Arbitral Award, dated February 6, 2020, ECF No. 35 ("Petitioners' Memorandum of Law") pp. 2 – 3.
[3] Petitioners' Memorandum of Law, p. 3.
[4] Petitioners' Memorandum of Law, p. 4.
[5] Petitioners' Memorandum of Law, p. 4.
[6] Eeckhout Decl., ¶51.
[7] Eeckhout Decl., ¶50.

- Only that national law is applicable in an EU Member State that is in conformity with EU law.[8]

III. Clarifications from the First Declaration

1. Lex Arbitri in Swedish arbitration proceedings is Swedish arbitration law – as well as EU Law

8. As indicated in Section II above, Article 26(4) ECT presents a petitioner with a number of options to pursue investment arbitration, such as arbitration under the ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Rules, or SCC arbitration. The Petitioners *in casu* knowingly opted in favour of SCC arbitration, which – unlike the ICSID Convention[9] – does not have a self-contained regime for enforcement of awards. In this light, the New York Convention 1958 does and must govern the recognition and enforcement of the underlying awards.[10]

9. Article V(1)(a) of the New York Convention 1958 guides an enforcing court to check the validity of the arbitration agreement with the *lex loci arbitri*, given that the parties have not explicitly subjected the arbitration agreement to any other governing law in Article 26 ECT.[11]

10. Crucially, the Petitioners' memorandum fails to mention EU Law as *lex loci arbitri*, and only draws on Swedish arbitration law for its analysis of the validity of the arbitration agreement.[12] However, based on the "direct effect" principle,[13] EU law is just as much a component of its Member States' domestic laws as other national laws. The National law of EU Member States has to be applied in conformity with EU law.[14] Swedish arbitration law cannot be used to enforce arbitral awards in Sweden in contradiction to EU law. As a fundamental principle, all national courts in the EU are obliged to give full effect to EU law (see Article 4 par. 3 TEU[15]).

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[8] Eeckhout Decl., ¶95.
[9] **Exhibit 1**, Articles 53 – 55, Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").
[10] First Expert Declaration, ¶ 13-15, 54.
[11] First Expert Declaration, ¶ 55.
[12] Petitioners' Memorandum of Law, pp. 19 – 20.
[13] First Expert Declaration, ¶ 33; Eeckhout Decl., ¶50.
[14] **Exhibit 2**, *Costa v E.N.E.L.*, p. 594; **Exhibit 3**, *Deutsche Milchkontor,* ¶22; **Exhibit 4**, *Simmenthal II,* ¶21.
[15] ECF No. 35-1, Art. 4 par. 3 TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the

11. Hence, if the seat of an arbitral tribunal is within the EU, the *lex loci arbitri* will also include EU law.[16] Unlike ICSID arbitrations,[17] SCC arbitrations are not delocalised. As explicitly acknowledged in the underlying awards, the seat of these arbitrations was Sweden,[18] whose domestic law includes EU law. Thus, the *lex loci arbitri* governing this *ad hoc* Swedish arbitration is both Swedish and EU law. This has two essential implications for the present enforcement proceedings:

    (i) It follows that any non-EU court tasked with enforcement of the awards would have to check Article 26 ECT for its conformity with fundamental principles of EU Law to conclude that there is a valid agreement within the meaning of Article V(1)(a) New York Convention 1958. Such an assessment would be entirely opposed to the autonomy of the EU legal order which vests exclusive interpretative monopoly over EU law with the CJEU and reserves the right to seek preliminary references from the CJEU for domestic courts within the EU. As a result, a non-EU court should decline the enforcement of the underlying awards at this stage and instead wait for further action from the Swedish courts and the CJEU.

    (ii) The foregoing paragraphs also indicate that tribunals seated in Sweden and established under Article 26 ECT could only derive jurisdiction from consent validly given in accordance with the Swedish law, which in turn incorporates EU law. To check the validity of this consent, tribunals would *have to* interpret and apply EU law – this follows from an arbitral tribunal's duty to render enforceable awards.[19] Leaving the determination of EU law to non-EU courts such as *ad hoc* arbitration tribunals is incontrovertibly opposed to the autonomy of EU law.[20]

Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[16] First Expert Declaration, ¶ 55.

[17] **Exhibit 5**, *See* Articles 21 – 22, 26 – 27, 49 – 55 and 62 – 63, ICSID Convention.

[18] **Exhibit 45** CEF Energia BV v. Italian Republic, SCC Case No. 2015/158, Award, p. 1 (16 January 2019); **Exhibit 46**, Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Award, ¶15 (23 December 2018).

[19] **Exhibit 6**, Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards,' (2003) 20 Journal of International Arbitration, Issue 3, pp. 307-313, 308 – 309.

[20] First Expert Declaration, ¶ 62-67.

Ensuring the autonomy of the EU legal order prevails over any conflicting norm, including ISDS clauses contained in an intra-EU Investment Treaty.[21]

12. For these two reasons, not only is Article 26 ECT opposed to EU law and its autonomy, but also the recognition and enforcement of awards rendered by tribunals constituted under this Article is best left to the CJEU and courts of EU Member States.

13. Admittedly, this does not mean that Article 26 ECT stands terminated and void in intra-EU relations – neither have I suggested anything to this effect in my first declaration. This only means that, in light of *Achmea,* its application between EU Member States (and investors from such states) will now be conditioned upon either bringing Article 26 ECT in conformity with EU law or terminating the same.[22] Notably, neither of these outcomes will compromise the right of investors from non-EU ECT parties or EU-investors investing in non-EU ECT parties.

14. It is important to recall here that EU law has a dual role in the underlying arbitrations: it applies at the level of international law as applicable law (see below at ¶¶ 31-37) and operates within the arbitration as part of the *lex loci arbitri*, Swedish law. As will be explained subsequently, Article 26 of the ECT does not protect against the possible application of EU law by a tribunal without "any links to the judicial systems of [EU] Member States,"[23] which is a distinct basis for its invalidity under the *lex loci arbitri*. *Achmea* is not a novel judicial creation but continues *jurisprudence constante.*

15. In his declaration, Professor Eeckhout writes that the EC and I "make the extraordinary and wholly unwarranted claim that intra-EU arbitration under the Energy Charter Treaty is contrary to EU law, because the judgment of the EU Court of Justice in *Achmea* governs such arbitration."[24] This is a mischaracterisation of my position. I do not believe the decision in *Achmea* applies *stricto sensu* to ECT arbitration. I maintain, for reasons I will explain below, that arbitration under the ECT is governed *inter alia* by fundamental

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[21] **Exhibit 7**, Julian Scheu and Petyo Nikolov, 'The Incompability of Intra-EU Investment Treaty Arbitration with European Union Law – Assessing the Scope of the ECJ´s Achmea Judgement' (2019) Draft Version, forthcoming in the German Yearbook of International Law, Vol. 62, manuscript p. 9 (downloadable at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545811); ECF No. 26-51, *Achmea* ¶ 33.

[22] First Expert Declaration, ¶ 68-69, 77-78.

[23] ECF No. 26-51, *Achmea*, ¶¶32 – 33.

[24] Eeckhout Decl., ¶10.

principles of EU Law – settled principles that were simply applied in the specific context of ISDS by the CJEU in *Achmea*. In fact, as the CJEU itself in *Achmea* notes,

> "In order to answer [questions concerning validity of the treaty provision in dispute], it should be recalled that, according to *settled case-law of the Court*, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court.
>
> ... *Also according to settled case-law of the Court*, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves."[25]

16. As indicated in my first opinion,[26] over 60 years of legislative and judicial developments along similar lines as *Achmea* have heralded the autonomy of EU law as a cornerstone of the community system. Here, "autonomy" indicates that relations between Member States are governed by EU law to the exclusion of any other law and, importantly, extends to both internal and external autonomy.[27] To preserve this autonomy, the CJEU has been entrusted with the final word on interpretation of EU law.[28] Article 344 TFEU imposes a concordant obligation upon EU Members States to refrain from submitting disputes on EU law to any method of dispute settlement barring those provided in the EU Treaties.[29]

17. In choosing to ignore this settled principle as laid down by the CJEU over time[30], the Petitioners and Professor Eeckhout narrowly focus on the alleged clarity (or lack thereof) in the *Achmea* judgement – but ignore that *Achmea* is a decision that is an outcome of the

[25] ECF No. 26-51, *Achmea,* ¶¶32 – 33.
[26] First Expert Declaration, ¶ 52.
[27] *Id.*, ¶ 17, 35-41.
[28] *Id.*, ¶ 28, 43-45.
[29] *Id.*, ¶ 45.
[30] *Id.*, ¶ 52.

jurisprudence constante developed by the CJEU since 1991. Most enlightening of these past decisions are perhaps the following:

a) The *Commission v Ireland* judgement: In the context of the UNCLOS, "concluded by the Community and all of its Member States on the basis of shared competence"[31] and bearing "the same status in the Community legal order as purely Community agreements,"[32] the Court found that "an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system."[33] This consequence was said to flow from Article 344 TFEU (ex Article 292 TEC) and not Article 282 of the UNCLOS, which merely "makes it possible to avoid such a breach occurring, in such a way as to preserve the autonomy of the Community legal system."[34] This decision reinforces the external autonomy of EU law; specifically in the context of mixed agreements concluded by the EU and its Member States.

b) *Opinion 2/13 of 18 December 2014* on the EU's accession to the ECHR: The Court of Justice held that with "an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, *in principle*, incompatible with EU law".[35] However, "an international agreement *cannot* affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court."[36] In the case in question, the draft agreement on the EU's accession to the ECHR did not (unlike the UNCLOS) preclude the *possibility* that the ECHR may be called upon to interpret and apply EU law.[37] The Court found that the "*very existence of such a possibility* undermines the requirement set out in Article 344 TFEU,"[38] since the CJEU's exclusive jurisdiction precludes "any

[31] **Exhibit 8**, *Commission v Ireland*, ¶83.
[32] *Id.*, ¶84.
[33] *Id.*, ¶123.
[34] *Id.*, ¶132.
[35] **Exhibit 9**, *Opinion 2/13 of 18 December 2014*, ¶182.
[36] *Id.*, ¶201.
[37] *Id.*, ¶207.
[38] *Id.*, ¶208.

prior or subsequent external control".[39] Again, it is important to emphasize here that these conclusions were based on the very "nature" of the community legal order.[40] The provisions in the TEU that make the EU's accession to the ECHR subject to compliance with various conditions simply reinforce this nature.[41]

18. Compelling conclusions become clear from the extracts mentioned above: (a) the external autonomy of EU law is protected just as enduringly for mixed agreements as it is in the case of any other agreement involving EU Member States; and (b) the mere "possibility" that this autonomy (and the consequent exclusive jurisdiction of the CJEU) may be jeopardised is inconsistent with Article 344 TFEU.

19. Finally and most recently, the CJEU in *Achmea* and *Opinion 1/17 of 30.04.2019* on the CETA (both of which the Petitioners and Professor Eeckhout rely on)[42] has made clear that its exclusive jurisdiction is essential to safeguard the fundamental principles of EU Law, uniformity in their interpretation and application. The following extracts in this regard are relevant:

    a) The CJEU in *Achmea*: The CJEU was concerned that "the arbitral tribunal referred to in Article 8 of the BIT *may* be called on to interpret or indeed to apply EU law."[43] Since such a tribunal was "not part of the judicial system of the Netherlands or Slovakia"[44] or "have any such links with the judicial systems of the Member States",[45] Article 8 of the Netherlands – Slovakia BIT was found to establish a final and binding dispute settlement system "which *could* prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law".[46]

    It is worth quoting in full that the CJEU found: "*...apart from the fact* that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and

[39] *Id.*, ¶210.
[40] *Id.*, ¶158.
[41] *Id.*, ¶159.
[42] Eeckhout Decl., ¶¶48 – 76; Petitioners' Memorandum of Law, pp. 5 – 8.
[43] ECF No. 26-51, *Achmea,* ¶42
[44] *Id.,* ¶45.
[45] *Id.,* ¶48.
[46] *Id.,* ¶56.

of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question *not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties*, ensured by the preliminary ruling procedure provided for in Article 267 TFEU."

Hence, the possible interpretation of EU law under Article 8 of the Netherlands – Slovakia BIT was an independent and distinct ground for the CJEU to hold that Article 8 was opposed to the autonomy of EU law. Nothing in this decision indicates that for agreements concluded by the EU in addition with the Member States (in other words, *mixed agreements*), such requirement of respect for EU law's autonomy is waived. If anything, it only suggests that (i) there may be additional concerns when such agreements impeding EU law's autonomy are concluded *inter se* Member States and (ii) the reference to a treaty concluded not by the EU but by Member States operates to distinguish the situation in Achmea from the extra-EU context which concerns a treaty concluded between solely the EU on one hand and a non-Member State on the other hand.

b) *CETA Opinion 1/17 of 30.04.2019* of the CJEU: Professor Eeckhout correctly points out that in paragraph 131 of its opinion, the CJEU found that CETA tribunal is insulated against the risk of tendering final interpretations of EU law.[47] However, he omits that this finding was based on "Article 8.31.2 of the CETA, which provides, that 'in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact' and further states that, 'in doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party', adding that 'any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party'."[48] The two factors material to the CJEU's Opinion were that the CETA tribunals

[47] Eeckhout Decl., ¶70.
[48] **Exhibit 10**, *Opinion 1/17 of 30.04.2019,* ¶130.

stand outside the EU judicial system and that "their powers of interpretation are confined to the provisions of the CETA."[49]

Article 26 ECT has no safeguards against possible interpretation of EU law by arbitral tribunals built into its text, leading to the *Electrabel v. Hungary* tribunal's decision to find EU law applicable as part of "relevant rules and principles of international law".[50] Professor Eeckhout fails to acknowledge this completely.

20. Hence, in any case where EU law *might* be of relevance as applicable law and in the absence of any built-in safeguards in the text of an international agreement to prevent this, the right to seek a preliminary reference to the CJEU must be preserved. This is premised on the understanding that even the possibility that EU Law *might* (see above at par. 17(b)) be applied by a dispute settlement system outside the EU and EU Member State Court system undermines the external autonomy of EU Law.

21. In this regard, the only crucial takeaway from the *Achmea* decision and the *CETA Opinion* is that *international investment agreements* (both those concluded by Member States and those to which the EU is a party) must be scrutinized for their consistency with fundamental principles of EU law, just as any other international agreement to which EU or its Member States are parties. Given the reflective nature of these CJEU decisions and their reflection of consistent and long-standing principles, the question of them being used retroactively to invalidate Article 26 ECT, as suggested by the Petitioners,[51] does not arise. Decisions applying long-standing, recognised principles of EU law to a different context do not innovate novel jurisprudence.

22. In international dispute settlement outside the EU Treaties, the EU and its Member States are free to use other such modes of dispute settlement that do not violate the autonomy of the EU legal order. In this process, however, no judicial body other than the CJEU is capable of interpreting and applying EU law, even indirectly.

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[49] *Id. Opinion 1/17 of 30.04.2019,* ¶134.
[50] **Exhibit 11**, *Electrabel v. Hungary*, ¶4.126.
[51] Petitioners' Memorandum of Law, p. 20.

3. There is no difference between intra-EU BITs and ECT in regard to respect for fundamental principles of EU Law

23. Here, it is helpful to recall that the fundamental principles of supremacy and autonomy of EU Law are derived from EU primary law and therefore, even trump agreements that are ratified by the EU itself. International agreements that the EU joins "would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law."[52] The EU cannot enter into agreements that do not respect the fundamental principles of EU Law.[53] This is made clear by Article 218(11) TFEU. Furthermore, all agreements rank in a hierarchy of norms below the general principles of EU Law.[54] As the CJEU notes in its decision in *Commission v. Ireland* with respect to mixed agreements, "an international agreement such as the [UNCLOS] cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law."

24. Professor Eeckhout and the Petitioners argue that the fundamental difference between the treaty in question in *Achmea* decision and the ECT is that *Achmea* concerned a bilateral investment treaty between two EU Member States whereas the ECT additionally binds EU itself.[55]

25. *First,* as explained in paragraph 19 above, at no point does the CJEU's decision indicate that the primacy and autonomy of EU law operate to restrain *only* those international agreements concluded *inter se* Member States. *Second,* this distinction does not hold any relevance in the present case. Whether the agreement in question is an intra-EU bilateral agreement (as in the *Achmea* case) or a multilateral agreement with the participation of EU along with its Member States (like the ECT), both treaties must comply with EU primary law and respect its fundamental principles of autonomy and primacy. The CJEU has expressly noted this with respect to the EU's accession to the ECHR, a treaty that all EU Member States are party to, and that the EU is obliged to accede to (see Article 6 TEU),

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[52] **Exhibit 9**, *Opinion 2/13 of 18 December 2014*, ¶180; **Exhibit 12**, *Opinion 1/91 of 14.12.1991*, ¶37; *see also,* **Exhibit 13**, *Haegeman*, ¶5.

[53] **Exhibit 14**, Van Vooren and RA Wessel, EU External Relations Law (CUP, 2014), p. 209; **Exhibit 12**, *Opinion 1/91 of 14.12.1991*, ¶71; **Exhibit 15**, *Opinion 1/92 of 10.04.1992*, ¶¶ 23–25.

[54] **Exhibit 16**, *Kadi*, ¶¶ 5-6.

[55] Eeckhout Decl., ¶¶ 58, 77; Petitioners' Memorandum of Law, p. 6.

stating that such an international agreement "*may affect its own powers only if* the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, *there is no adverse effect on the autonomy of the EU legal order*."[56]

26. Autonomy of the EU legal order has also been deliberated in relation to mixed agreements in the past. One of the questions that arose in 1991 in relation to the European Economic Area (EEA) Agreement was whether the Court of the European Economic Area, established by this agreement, would be interpreting and applying EU law. In this agreement – were it ratified – the EU and its Member States would have been parties alongside one another. The EEA Court would have had the power to determine who would be the correct "Contracting Party" in a given dispute under the EEA Agreement,[57] amounting to a determination of competences between the EU and Members States[58] and this would be *"likely adversely to affect the allocation of responsibilities defined in the Treaties* and the *autonomy* of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty.*"*[59] The CJEU ruled that to conclude such an agreement would be incompatible with EU law.[60]

27. Hence, all intra-EU disputes applying or capable of applying EU law must obey the aforestated fundamental principles of autonomy and primacy – whether they are mixed (EU and its Member States are Party to such an agreement in line with their division of competences), or, an international agreement concluded by and between the EU Member States, or, a so called EU-only Agreement (an agreement that is concluded by only the EU, but not the EU Member States, with a third State). Calling for a distinction between mixed and intra-EU in the present case is even more artificial, since investment treaties with EU as a party nevertheless contain bundles of bilateral relationships[61] of the kind discussed in the *Achmea* decision.

28. As indicated in paragraph 17 above (relying on *Opinion 2/13 of 18 December 2014*), this does not mean that *in principle* the EU or its Member States lack the competence to set up

[56] **Exhibit 9**, *Opinion 2/13 of 18 December 2014*, ¶183.
[57] **Exhibit 12**, *Opinion 1/91 of 14.12.1991*, ¶34.
[58] *Id.*, ¶34.
[59] *Id.*, ¶35.
[60] *Id.*, ¶36.
[61] **Exhibit 7**, Scheu and Nikolov, p. 16.

international dispute settlement bodies – however, their right to do is circumscribed by the principles of EU law's autonomy and primacy. This is also addressed in the CJEU's *Opinion 1/17 of 30.04.2019* on the CETA, where it notes:

> "It must be recalled, at the outset, that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, *in principle*, compatible with EU law...*provided, however, that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order*."[62]

29. Professor Eeckhout is correct in stating that the CJEU has never declared an international treaty signed and ratified by the EU inapplicable in a certain dispute; nevertheless, this inapplicability follows from Article 218(11) TFEU. There is no case law explicitly recognising the position I am taking, but support for this position derived from the constitutional framework of the EU itself.[63]

30. So far, the CJEU has never been asked for a preliminary opinion in regard to the conformity of the ECT with the EU Treaties. Moreover, the CJEU does not have any *ex officio* competence to discuss legality and consistency of international treaties under EU primary law. However, what is important to note is that if the ECT is found inconsistent with EU primary law in the future, the effect will be such as to suggest that the ECT should never have been ratified,[64] since CJEU interpretations are declaratory statements of the correct interpretation of EU law *ab initio*.[65] Thus, there is all the more reason to await decisions from the CJEU and EU Member States' Courts.

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[62] **Exhibit 10**, *Opinion 1/17 of 30.04.2019*, ¶¶106 – 107.

[63] On this, see also, **Exhibit 17,** Simon Burger, 'Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation', (2019) 6 Yearbook on International Arbitration, pp. 139 – 140, 121; **Exhibit 7**, Scheu and Nikolov, p. 18.

[64] ECF No. 26-20, *Denkavit*, ¶16: "The interpretation which...the Court of Justice gives to a rule of Community 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."

[65] First Expert Declaration, ¶ 44

4. The ECT does include EU Law as the applicable law

31. Professor Eeckhout's declaration as well as the Petitioner's memorandum states that under the ECT, EU law does not operate as applicable law.[66] The contrary is true; EU law is omnipresent in this case.

32. To reduce the applicable international law to customary international law and general principles of public international law, as Professor Eeckhout suggests,[67] finds no basis in the wording of Article 26 ECT. As noted in paragraph 19 above, there are no textual limitations in Article 26 ECT commensurate to Article 8.31.2 CETA. The consequence of lack of such textual limitations is already demonstrated by the tribunal's decision in *Electrabel v Hungary* – as cited in my first opinion[68] – that has held EU Law to be applicable law *specifically* in the context of ECT arbitration.[69]

33. As indicted in paragraph 13(b) above, the mere *possibility* of EU law being subject to external control by a mechanism that has no link with the EU judicial system infringes upon the EU's autonomous legal order. For example, the CJEU in *Achmea* was guided by the *possibility* of EU law being applied by an arbitral tribunal ("may be called upon") "as forming part of the law in force in every Member State and <u>as deriving from an international agreement between the Member States</u>" in concluding that Article 8 of Netherlands – Slovakia BIT endangered the autonomy of EU law.[70] This dangerous possibility is just as tangible in the case of Article 26 ECT, as demonstrated by the tribunal's reasoning in *Electrabel v. Hungary.*

34. The Petitioners and Professor Eeckhout contend that EU law was not applied or discussed during the Greentech and CEF arbitrations.[71] This is not pertinent. By simple virtue of the fact that EU Law has been recognised as international law applicable to ECT disputes in the past,[72] an agreement to potentially arbitrate EU law undermines the principle of autonomy of EU Law. EU Law applies to such disputes as an international agreement

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[66] Eeckhout Decl., ¶75; Petitioners' Memorandum of Law, p. 25.
[67] Eeckhout Decl., ¶75.
[68] First Expert Declaration, ¶ 56
[69] **Exhibit 11**, *Electrabel v. Hungary*, ¶4.126 .
[70] ECF No. 26-51, *Achmea*, ¶¶41 – 42.
[71] Eeckhout Decl., ¶19; Petitioners' Memorandum of Law, p. 8.
[72] See above at ¶ 32 and First Expert Declaration, ¶ 56.

between EU Member States;[73] it is in the eyes of the EC relevant as a "relevant rule of international law applicable in the relations between the parties" in the sense of Art. 31 (3)(c) VCLT.[74] It is very likely that therefore the CJEU would consider EU Law as part of "applicable rules and principles of international law" pursuant to Art. 26 (6) ECT.[75]

35. Even if the facts of this case are considered: the basis for the Greentech and CEF arbitration is EU law. It is clear that the EU Renewable Energy Directive is the background for the underlying Italian energy law measures. Energy policy is among the fields where the EU and its Member States share competences (*see* Art. 4(2)(i) TFEU[76]). Thus, the provisions fall into the EU`s competences and are part of the EU legal order. Furthermore, provisions of the ECT, a mixed agreement, also constitute an integral part of the EU legal order, as the CJEU has confirmed multiple times.[77]

36. To summarize, in a case where the claimants are from the EU and the Respondent is an EU Member State, the subject matter of the dispute has an EU Law background (EU Renewable Energy Directive), the underlying treaty itself is a part of the European legal order and whose applicable law has been *known* to include EU Law according to investment arbitration jurisprudence, it is difficult to argue that EU Law is of no relevance. As will be

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[73] ECF No. 26-51, *Achmea*, ¶41; **Exhibit 10**, *Opinion 1/17 of 30.04.2019*, ¶127.

[74] **Exhibit 18**, *Eskosol v. Italy*, ¶ 124; **Exhibit 19**, Thomas Roe and Matthew Happold, Settlement of Investment Disputes under the Energy Charter Treaty (CUP, 2011), p. 95.

[75] **Exhibit 7**, Scheu and Nikolov, p. 20.

[76] ECF No. 35-1, Article 2, TFEU: "1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

Id. Article 4, TFEU: "1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) ***energy***; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs." (emphasis added)

[77] **Exhibit 8**, *Commission v. Ireland*, ¶ 126; **Exhibit 9**, *Opinion 2/13 of 18 December 2014*, ¶ 180 with references to prior case law.

laid out in further detail below (par. 45-48) and discussed in paragraph 19(b) above, in the CETA *Opinion 1/17 of 30.04.2019,* the explicit limitation of the Investment Court System's jurisdiction to interpret and apply rules of EU Law – other than the provisions of the CETA – was a crucial determinant in finding the CETA investment chapter compatible with EU Law.[78] Insofar as the same cannot be said for Article 26 ECT, arbitration under this Article envisages the very real possibility of application of EU law and consequently affects the autonomy of EU law.

5. Interim Conclusion

37. The fundamental principles of EU Law apply to all dispute settlement systems the EU or its Member States intend to adhere to, irrespective of the nature of the underlying international agreement. Therefore, the principles developed in the past by the CJEU and applied in the *Achmea* decision and the *Opinion 1/17 of 30.04.2019* on CETA must be respected. Article 26 ECT fails to do so: ECT arbitral tribunals could apply EU Law as applicable law, but stand outside the judicial system of the EU and thus cannot make references to the CJEU, safeguarding its monopoly over final interpretations of EU law. This renders such arbitration agreements invalid under EU law.

IV. Clarifications on other remarks by Professor Eeckhout and arguments in the Petitioners' Memorandum

1. Other awards enforced in US Courts cannot be compared with the CEF and Greentech awards or their enforcement

38. In its memorandum,[79] the Petitioners argue that on various occasions, the United States Courts have enforced similar investments awards in the past. All the awards cited in support of this position[80] are non-intra EU awards. The *BG Group*, *Chevron Corp*., and *Stati* awards involve non-EU respondents, whereas the *Micula* award is an ICSID arbitration award (which as indicated in paragraph 8 above is subject to a distinct self-contained enforcement regime). Therefore, it is incorrect to state that "[t]here is nothing unique or novel about the arbitration agreements in these cases."

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[78] **Exhibit 10**, *Opinion 1/17 of 30 April 2019,* ¶¶120 – 136.
[79] *For example,* see Petitioners' Memorandum of Law, p. 1.
[80] *See* Footnote 1 in Petitioners' Memorandum of Law.

39. On the contrary, the novelty of the awards under consideration in the present case has been illustrated on several counts: they are intra-EU awards, arising out of an arbitral agreement that envisages EU law as possibly applicable law, and seated in an EU Member State so as to render EU law applicable as *lex arbitri*. An intra-EU (and non-ICSID) award has to my knowledge never been enforced in the United States' Courts. Intra-EU dispute settlement – especially after the *Achmea* decision, but also before[81] – has been a vociferously debated topic in investment arbitration, with almost endless case annotations[82], Ph.D. dissertations, academic contributions in journals as well as books[83], and court proceedings[84] at all different levels. Everything about such cases, the awards and their enforcement is unique and novel.

2. *There is no retroactive application of the CJEU's decision in Achmea*

40. The Petitioners also argue that the *Achmea* Judgement is being applied in the present enforcement proceedings with a retroactive effect.[85] As pointed out above at paragraph 15 (*see also*, First Declaration, ¶60-72) it is not the *Achmea* decision itself that invalidates Italy's offer to arbitrate under Article 26 ECT, but fundamental principles of EU law – the principles of autonomy and primacy of EU Law. Therefore, this is not an issue of retroactive effect of a judgement, but simply the application of fundamental principles of EU law to a particular set of facts and circumstances.

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[81] **Exhibit 20**, Markus Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States' in Marc Bungenberg, Jorn Griebel and Steffen Hindelang (eds.), International Investment Law and EU Law (Springer, 2011) pp. 55-77.

[82] **Exhibit 21**, Emanuele Cimiotta, 'The First ever interpretative preliminary ruling concerning the validity of an international agreement between EU Member States: The *Achmea* Case,' (2018) 3 European Papers, No. 1, pp. 337-344; **Exhibit 22**, John Hillebrand Pohl, 'Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?' 2018 (14) European Constitutional Law review, pp. 767-791; **Exhibit 23**, Laurens Ankersmit, '*Achmea*: The Beginning of the End for ISDS in and with Europe?' (2018) 9 Investment Treaty News, Issue 1, pp. 3-6.

[83] **Exhibit 24**, April Lacson, 'What Happens Now? The future of Intra-EU investor-state dispute settlement under the energy charter treaty,' (2019) 51 NYU Journal of International Law and Politics, pp. 1327-1345; **Exhibit 25**, Csongor Nagy, 'Intra-EU BITs after *Achmea*: a Cross-Cutting Issue', in Csongor Nagy (ed.); **Exhibit 26**, Christina Eckes, 'Some Reflections on *Achmea's* Broader Consequences for Investment Arbitration,' (2019) 4 European Papers, No. 1, pp. 79-97; **Exhibit 27**, Burkhard Hess, 'The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice,' (2018) 19 Revista Eletrônica de Direito Processual, No. 3, pp. 114-137.

[84], *Novenergia II-Energy & Environment v. The Kingdom of Spain,* (D.D.C. No. 18-cv-01148 (TSC); *Foresight Luxembourg Solar 1 S.A.R.L., et al., v. The Kingdom Of Spain* (S.D.N.Y. No. 19-cv-3171-ER).

[85] *For example,* see Petitioners' Memorandum of Law, p. 22 and *footnote* 17.

41. It is precisely for this reason that investors are often advised to choose – even in ECT arbitrations – a seat of arbitration outside the EU.[86] This should also have been obvious for Petitioners and their counsel since the discussion of the potential conflict between intra-EU investment awards and EU law has been ongoing for over 10 years now.

3. Only limited non-applicability of the ECT

42. It must be clarified that the effects of this analysis (resulting from the primacy of autonomy of EU law) are limited to non-ICSID arbitration under Article 26 ECT and do not concern the compatibility of the entire ECT with EU law. The substantive standards of the ECT itself remain preserved,[87] since the validity of the arbitration agreement is a separate legal issue from the validity of the underlying treaty or contract itself.[88] Even the availability of the arbitration agreement to investors from third states is preserved.

43. Here, it must also be noted that the CJEU and EU domestic courts are expressly recognised as available fora in the ECT as "a court or administrative tribunal" of contracting parties within the meaning of Article 26(2)(a) ECT. As confirmed by the EU on the occasion of ratification of the ECT,

"The Court of Justice of the European Communities, as the judicial institution of the Communities, *is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder*, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice. *Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty*. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation."[89]

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[86] **Exhibit 28**, Anna Stanic, 'Enforcement of awards and other implications of the *Achmea* case,' p. 20.
[87] **Exhibit 7**, Scheu and Nikolov, p. 4.
[88] **Exhibit 29**, *Malicorp*, ¶119; **Exhibit 30**, Nigel Blackaby et al., Redfern and Hunter on International Arbitration, 6th ed. (OUP, 2015), p. 104
[89] **Exhibit 31**, Statement of 9.3.1998, OJ L 69, p. 115 (emphasis added).

44. Cumulatively with the fact that ECT forms an integral component of the EU legal order,[90] this indicates that the substantive standards of the ECT remain applicable and available to EU investors such as CEF and Greentech and might be invoked within the EU judicial system for their protection. There is no basis to conclude that EU investors such as the Petitioners are being deprived of any rights.

4. *Misunderstanding in regard to Opinion 1/17 of 30.04.2019 of the CJEU, on the CETA allowing international dispute settlement in general*

45. When the Petitioners and Professor Eeckhout argue based on the *Achmea* decision and *Opinion 1/17 of 30.04.2019* respectively that the EU has competence to enter into treaties that would allow multilateral dispute settlement mechanisms such as ECT arbitration,[91] they fail to mention the elaborate conditions laid down by the CJEU in *Opinion 1/17 of 30.04.2019* that must be met by such an international dispute settlement to be in conformity EU primary law. I discussed these criteria in my first opinion;[92] therefore I will only summarize these key conditions here. The CJEU holds, that any international dispute settlement system must:

   a. respect the right to regulate of the EU;

   b. respect the external autonomy of EU Law (on this see par. 28 above) and thus cannot apply and interpret EU Law outside the CETA itself; and

   c. guarantee access to impartial and independent adjudicators.[93]

46. Only when all these conditions are fulfilled, can the EU itself participate in such an international dispute settlement system. The ECT contains no such safeguards, and neither the Petitioners nor Professor Eeckhout have identified any.

47. Especially in regard to the applicable law under CETA ISDS, the text of CETA includes a "domestic law clause" (Article 8.31(2) CETA on 'Applicable Law and Interpretation') under which the proposed Investment Court System "*shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party*." The inclusion of such a clause is motivated largely

[90] First Expert Declaration, ¶ 60 and cases cited therein.
[91] Petitioners' Memorandum of Law, pp. 24 – 25; Eeckhout Decl., ¶66.
[92] First Expert Declaration, ¶ 51, 58-63, 75, 76, 79.
[93] **Exhibit 10**, *Opinion 1/17 of 30.04.2019*, ¶¶105 – 244.

in order to preserve the judicial monopoly of the CJEU to interpret EU law and thus, to respect the autonomy of the EU legal order. EU Law is *assuredly* not applicable substantive law under the CETA investment chapter before the proposed (permanent) Investment Court System. The same cannot be said for the ECT, whose applicable law clause in Article 26 is more similar to Article 8 of the Netherlands-Slovakia BIT (both allow reference to applicable "principles of international law" without any limitation) and has been interpreted in the past to include EU law (see above on applicable law par. 31-37; *see also* First Expert Declaration, ¶ 56-63).

48. In summary, there are three reasons I disagree with the submissions in the Professor Eeckhout's declaration that ECT and the CETA-Investment Chapter are analogous. *First*, the standards of protection in CETA are formulated more restrictively compared to the ECT in order to explicitly safeguard the EU and its Member States' right to regulate in public interests; *second*, the dispute settlement system under CETA will be provided through a (permanent) Investment Court System, where investors cannot appoint "their" arbitrator any longer and independence of adjudicators is ensured, and thirdly, and perhaps most importantly, EU law (outside the CETA itself) explicitly is not applicable law under the CETA (see on this above par. 36, 47).

5. *Reliance on AG Wathelet's statement on the ECT is of no practical consequence*

49. The Petitioners rely on AG Wathelet statement that the ECT and *ad hoc* arbitration based on the ECT are in conformity with EU Law.[94] This argument by Petitioners is without any relevance for this dispute. An opinion rendered by any Advocate General in proceedings before the CJEU is without any binding force.[95] These opinions are to be seen and judged as non-binding statements.

50. It is also important to note here that AG Wathelet's statement in the *Achmea* case: a) was made without any connection of the underlying case to the ECT (and thereby constitutes unnecessary *obiter dictum*) and b) was not followed by the CJEU, which differed in all material aspects from his reasoning – when discussing it at all. Not only did the CJEU

[94] Petitioners' Memorandum of Law, pp. 26 – 27.

[95] **Exhibit 32**, Damian Chalmers, Gareth Davies & Giorgio Monti, European Union Law- Text and Materials, 4th ed. (CUP, 2019), p. 162; **Exhibit 33**, Takis Tridimas, 'The Court of Justice of the European Union' in Robert Schütze and Takis Tridimas (eds.), Oxford Principles of European Union Law Vol. I (OUP 2017) pp.581-609, 589.

refrain from addressing intra-EU-disputes under the ECT (which were not at issue in *Achmea;* also see above at par. 30) – but the CJEU also did not address other issues brought up by the Advocate General.[96] The outcome of the examination by AG Wathelet is diametrically different from the conclusion of the CJEU; therefore, his Opinion is not and should not be material to the position advocated by Petitioners.

6. *The 'Mutual Trust' principle is not only applicable to bilateral instruments between EU Member States, but also to multilateral treaties*

51. Professor Eeckhout suggests that the principle of mutual trust between EU Member States, as addressed in my first opinion,[97] is not relevant to an agreement like the ECT, concluded by the EU itself.[98] Here it is enough to point to the CJEU's *Opinion 2/13 of 18 December 2014* on the EU's accession to the ECHR, as I did in my first opinion.[99] The CJEU has discussed the principle of mutual trust to a large extent in its opinion,[100] even though the ECHR is an international agreement that has – comparable to the ECT – EU Member States, non-EU-Member States and (hopefully in the future) the EU as parties (the EU is compelled to join as a party to the ECHR). The CJEU held that the draft accession agreement of the EU to the ECHR in its erstwhile form "does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined"[101] and for this reason, the EU's accession agreement to the ECHR was not found compatible with its constitutional treaties.

52. Thus, the mutual trust principle is also applicable in intra-EU-Member States relations in multilateral agreements to which the EU may be a party. Investors from one EU Member State must trust the system of legal protection of other EU Member States. Although the ECT is a multilateral treaty, the specific intra-EU- disputes would remain bilateral ones between EU-Member States and EU-investors; no multilateral treaty could transform a bilateral dispute into anything else. Within intra-EU relations, no doubts can be cast upon the judicial efficacy of another Member State's courts (*Achmea*, ¶34). Domestic law rules, international arrangements, or dispute resolution mechanisms within the EU – regardless

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[96] **Exhibit 17**, Burger, p.128
[97] First Expert Declaration, ¶ 42.
[98] Eeckhout Decl., ¶¶13, 70.
[99] First Expert Declaration, ¶ 42.
[100] **Exhibit 9**, *Opinion 2/13 of 18 December 2014*, ¶¶191 – 194.
[101] *Id.*, ¶258.

of whether the EU is involved in their creation – must not undermine the mutual trust that forms the foundation of EU law.

7. Importance of European Commission (EC) Declarations

53. Finally, it is necessary to briefly explain the significance of EC declarations that both the Petitioners and Professor Eeckhout disregard as immaterial. In the European legal order, the EC is tasked with overseeing the application of the corpus of EU law and respect for the foundational treaties, poised and obliged to prevent infringements of EU law in various ways. Therein lies its role as guardian of the Treaties.[102]

54. Its role requires the EC to act as a watchdog, doing what it can to ensure that European law is applied and respected. In investment arbitrations, this role extends to the clarification of issues concerning the scope and content of EU law that is somehow connected to a dispute whenever there is a direct European interest at stake in the outcome of the dispute.[103]

55. EU Member States that agree to a judicial mechanism outside the EU judicial system for matters partially covered by EU law are in breach of Article 344 TFEU. This is what the EC clarifies by submitting *amicus* briefs in virtually all intra-EU arbitrations as well as in the enforcement proceedings for the consequent awards. It is only natural in this process that the EC elucidates the risk that the arbitral award may be unenforceable, at least when the investors in the underlying arbitration proceedings choose Stockholm as the seat of arbitration.

56. Since the EC assists the CJEU's mandate to ensure that EU law is interpreted consistently in all forums and owing to its subject matter expertise, it seems justified to give a great weight to its submissions in the systemic development of international investment law. This was also recognised by the *Electrabel* tribunal in inviting the EC's *amicus* brief on issues at the intersection of EU and international investment law.[104]

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[102] ECF No. 35-1, Article 258 TFEU; **Exhibit 34**, Fernando Dias Simoes, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration,' (2017) 25 Michigan State International Law Review, Issue 2, p. 233-303, 265; **Exhibit 35**, C.E. Koops, 'Contemplating compliance: European compliance mechanisms in international perspective' (University of Amsterdam 2014), p. 89, 105.

[103] **Exhibit 34**, Simoes, p. 265.

[104] **Exhibit 11**, *Electrabel*, ¶ 1.6

8. No explicit disconnection clauses in EU Treaties

57. As Professor Eeckhout and the Petitioners correctly analyse,[105] there is no *explicit* "disconnection clause" in the ECT that precludes the application of a multilateral treaty *inter se* certain parties to the treaty and allows them to apply other rules and principles between them. However, nowhere do they mention that EU primary law takes precedence over the ECT (which is also a part of EU legal order – see par. 44 above) in cases of conflict. In my opinion, the absence of an explicit disconnection clause in the ECT is of little consequence owing to the inherent or implicit disconnection carving out intra-EU ISDS from the ECT.

58. The applicable law in the present case – which includes EU Law (*See* Section III. 4 above) – contains a conflict of law rule in form of the principle of primacy.[106] As discussed in my first declaration,[107] the principle of primacy of EU law applies to rules created by Member States in international agreements concluded between them as well as agreements concluded by the Union itself.[108] Thus, rules of international dispute settlement potentially contradicting the constitutional principle of primacy are non-applicable under EU law. The CJEU's exclusive competence over final interpretation of EU law is an expression of the autonomy of EU law. Article 16 ECT (and any potential conflict of law rule therein) as well as Article 26(4) ECT contradict the same, and consequently cannot apply in intra-EU-disputes.

59. In fact, this is potentially the reason why very few agreements that the EU and its Member States have concluded in the past contain explicit disconnection clauses. The practice of including such clauses is an exception rather than the norm. Especially noticeable is that EU agreements in the field of trade and investment – similar to the ECT – do not contain such clauses. Examples here are the WTO Agreement and its annexes, the UNCLOS, and the above discussed CETA. The EU has concluded dozens if not hundreds of "mixed

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[105] Petitioner's Memorandum of Law, p. 22; Eeckhout Decl., ¶37.

[106] **Exhibit 36**, M. Happold and M. de Boeck, 'The European Union and the Energy Charter Treaty: What Next After *Achmea*?,' in M.A. Andenas, M. Happold and L. Pantelo (eds.), The European Union as an Actor in International Economic Law, forthcoming 2019.

[107] First Expert Declaration, ¶ 35-41.

[108] **Exhibit 37**, *Exportur*, ¶8; **Exhibit 38**, *Ravil*, ¶37; **Exhibit 39**, *Budějovický Budvar*, ¶98; **Exhibit 40**, *Commission v. Germany*, ¶44.

agreements" (agreements to which a parallel membership of the EU and its Member States exists) and isolating a few instances from these does not constitute general practice.

60. Under the above mentioned agreements, the CJEU never validates the possibility of intra-EU-disputes outside the judicial system of the EU; there are no WTO-cases between EU Member States, there were no GATT disputes between EU Member States before the entry into force of the WTO Agreement in 1995, even though there is no disconnection clause. Under the UNCLOS, the EC and the CJEU made clear that disputes between EU Member States under the UNCLOS dispute settlement mechanism are in violation of EU law. Again, as noted above at par. 17(a), this was not solely a result of the "declaration of competences" in the UNCLOS as Professor Eeckhout suggests but instead based on the CJEU's decision to assume a disconnection clause inherent in Article 344 TFEU on the international level, as clarified by the following extract:[109]

> "123 The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. *That exclusive jurisdiction of the Court is confirmed by Article 292 EC*, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, *Opinion 1/91 of 14.12.1991*, paragraph 35, and *Opinion 1/00 of 18.04.2002*, paragraphs 11 and 12).
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> 124 It should be stated at the outset that the Convention *precisely makes it possible to avoid such a breach of the Court's exclusive jurisdiction* in such a way as to preserve the autonomy of the Community legal system."[110]

61. Under Article 26 ECT, investors "may choose to submit" but are not obliged to use *ad hoc* arbitration; this discretion here is qualified and limited by EU Law operating in intra-EU-disputes as *lex arbitri* and applicable law. Application of rules and principles of international law to Article 26(4) ECT in addition to EU law (both are applicable; *see* paragraph 32 above) will lead to the same outcome. Customary principles of treaty

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[109] **Exhibit 41**, Inge Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order', in Christophe Hillion and Panos Koutrakos (eds.), Mixed Agreements Revisited (Hart Publishing 2010), pp. 187-207, 199.

[110] **Exhibit 8**, *Commission v. Ireland*, ¶¶123 – 124.

interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties direct that provisions of treaties be accorded harmonious and balanced interpretation. In the context of the ECT, these necessitate an "interpretative strategy of reciprocal consistency" in circumstances where both the ECT and another international treaty apply, "i.e., to interpret the [two treaties] to minimise conflict and enhance consistency."[111]

62. Thus, the provisions of Article 26(4) ECT must be interpreted harmoniously with Article 344 TFEU. Article 344 TFEU excludes parallel dispute settlement systems that curtail the CJEU's final authority to interpret EU law in any manner. Applied cumulatively with Article 26(4) ECT, this would mean that EU Member States have only offered to arbitrate disputes with non-EU investors.

63. To investors from the EU, the national and European judicial mechanisms provide redress. Article 26(2) ECT provides them access to national courts without compromising the interpretative monopoly of CJEU,[112] since national courts may make preliminary references to the CJEU. Hence, interpreting the ECT based on the foregoing customary treaty interpretation principles restricts ECT arbitration to investments from non-EU members.

64. This would also be consistent with the interpretation of treaties according to their ordinary meaning and purpose. Article 26 ECT allows arbitration of investment "disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." However, as notified by the predecessor of the EU – the European Communities – to the Secretariat of the Energy Charter (pursuant to Article 26(3)(b)(ii) ECT, see 1998 O.J. L 69/11), the EU is to be seen as one "area". Therefore, investors from the EU investing in other EU countries are not foreign investors, but investing in their own economic area. Such investors are not permitted to initiate investor-state arbitration under Article 26 ECT.

65. Thus, the autonomy of EU law creates an inherent disconnection clause within the Union's legal order – that is, a clause which renders parallel dispute settlement systems for EU law invalid. This is because a dispute resolution system that ignores this autonomy disrupts "the

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[111] **Exhibit 11**, *Electrabel v. Hungary*, ¶4.132.

[112] **Exhibit 42**, Anna Bilanová & Jaroslav Kudrna, '*Achmea*: The End of Investment Arbitration as We Know It?' (2018) 3 European Investment Law & Arbitration Review, Issue 1, pp. 261-281.

particular nature of the law established by the [EU] Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU." (*Achmea,* ¶59).

9. Conflicts clause in Article 16 ECT

66. Professor Eeckhout points to the allegedly "more favourable" treatment available to investors under Article 26 ECT than the TFEU and uses the conflict clause in Article 16 ECT to indicate that for this reason, Article 26 ECT would prevail in cases of conflict.[113] However, to apply this conflict of law clause, he presumes that investment arbitration is more favourable than European judicial remedies – on the contrary, there is no way to undertake a fair comparison of the EU's internal judicial mechanism and ISDS under the ECT without entering into an interpretation of EU law. This is because (a) investors from EU states are granted significant substantial and procedural rights under TEU, TFEU and ChFR;[114] and (b) as a result of direct effect of EU law, both natural and legal persons are entitled to invoke their substantive and procedural rights directly before a national court.[115]

67. Moreover, the CJEU has noted in the *Commission v. Ireland* decision with respect to UNCLOS Annex VII arbitration: "*As the jurisdiction of the Court is exclusive and binding on the Member States, the arguments put forward by Ireland concerning the advantages which arbitration proceedings under Annex VII to the Convention would present in comparison with an action brought before the Court under Article 227 EC cannot be accepted*."[116] Based on these considerations, it seems that the only interest the Petitioners have in convincing this Court not to recognise the implications of EU law in this enforcement proceeding is to obtain compensation from an arbitral tribunal rather than undertake potentially risky litigation before EU courts and the consequences that might flow from the same.

10. Potential conflict between EU law and ECT

68. The Petitioners suggest that there is no conflict between ECT and EU law,[117] while Professor Eeckhout takes the position that I suggest a conflict between ECT standards and

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[113] Eeckhout Decl., ¶90.
[114] *See* First Expert Declaration, ¶ 29-33.
[115] *See* First Expert Declaration, ¶ 33.
[116] **Exhibit 8**, *Commission v. Ireland,* ¶ 136.
[117] Petitioner's Memorandum of Law, p. 22.

EU internal market norms.[118] Neither position is correct. As for the latter, my first opinion clearly clarifies the parallel and similar substantive standards of protection available to investors under the ECT and internal market rules.[119] With respect to the former, the fundamental difference is under the EU internal market's substantive norms and their procedural counterparts, the autonomy of the EU legal order is preserved, the principle of mutual trust is respected and the CJEU's final interpretative authority is safeguarded. The same cannot be said for Article 26 ECT.

69. Intra-EU-ISDS under the ECT ignores fundamental principles of the EU legal order.[120] In such a scenario, there is no room for the EU to "create a regime which involves 'shared competencies' where the EU Treaties and the mixed agreement (like the ECT) concern similar or related matters."[121] The EU legal order only knows shared competences leading to the conclusion of mixed agreements that nevertheless remain subordinate to fundamental principles of EU primary law and all manifestations of the same.

11. Little value can be ascribed to past arbitral tribunals that have rejected the intra-EU jurisdictional objection

70. In their memorandum of law,[122] the Petitioners argue that almost 30 arbitral tribunals so far have rejected objections to jurisdiction based on the *Achmea* rationale. However, a large part of all intra-EU arbitration awards resulted from ICSID arbitrations – disputes where the arbitral tribunal did not have a seat within the EU since the arbitrations are delocalised (see above at par. 11). Moreover, to my knowledge, none of these arbitrations discuss the applicable *lex arbitri* clearly – and it is on this fundamental basis that any enforcing court's decision should turn under Article V(1)(a) New York Convention 1958. Simply because the tribunals have ignored the *lex arbitri* does not mean a Court should do the same.

71. That the relevance of the *lex arbitri* cannot be ignored is clear from the *I.C.W. Europe Investments Limited v. Czech Republic* arbitration, where the seat of the tribunal was moved outside the EU explicitly because of the EC starting to intervene. It is worth quoting the recognition of this fact by the tribunal: "[T]he Claimant submitted its Motion to Transfer

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[118] Eeckhout Decl., ¶39.
[119] *See* First Expert Declaration, ¶ 29-31.
[120] *Id.*, ¶60-72.
[121] Petitioner's Memorandum of Law, p. 22.
[122] *Id.*, pp. 23 – 24.

the Seat of Arbitration, from Paris to Geneva, citing the request of the European Commission for leave to intervene, as well as actions taken by it and EU courts in other unrelated arbitrations as presenting grounds for transferring the seat of arbitration to a non-EU country."[123]

72. In ISDS that implicates EU law, arbitrators are not under an obligation equivalent to EU Member States' domestic courts' obligation to refer questions of EU law's final interpretation to only the CJEU. Hence, the CJEU cannot guide these tribunals to apply EU law as *lex arbitri,* as they should rightly do. An example here is the *Novenergia II-SICAR v. Spain* award that, without accounting for the *lex arbitri,* notes: "[T]his Tribunal's jurisdiction is based exclusively on the explicit terms of the ECT. As is evident, the Tribunal is not constituted on the basis of the European legal order and it is not subject to any requirements of such legal order."[124]

73. Hence, of the cases that the Petitioners allude to, if ICSID based arbitrations or arbitrations seated outside the EU are excluded, only the following adequate comparisons remain: 1) *Foresight-Greentech-GWM v. Spain* and 2) *Novenergia II-SICAR v. Spain. Isolux v. Spain* and *Charanne v. Spain* were decided in favor of the state, this might have also been influenced by the jurisdiction. None of the cases above have discussed the issue of *lex arbitri* – the starting point for all of my examination. This means that there are only two awards that remain available to the Petitioners as a point of comparison, none of which discuss the issue of *lex arbitri* – the starting point for all of my analysis. An enforcing Court guided by Article V(1)(a) New York Convention 1958 while considering the arbitration agreement according to the *lex arbitri* ought not to follow such misplaced reasoning as adopted by past tribunals.

V. Summary

74. Applying the aforementioned principles, reasoning and jurisprudence to the ECT, especially Article 26 ECT, can only lead to one conclusion: that a(ny) *de novo* examination of the jurisdiction of the arbitral tribunals in the CEF and Greentech arbitrations under Article V(1)(a) New York Convention 1958 yields definitive outcomes as follows:

[123] **Exhibit 43**, *ICW Europe,* ¶24.
[124] **Exhibit 44**, *Novenergia II-SICAR v. Spain*, ¶ 461.

a. The seat of the arbitral tribunal is in the EU;

b. The *lex arbitri* includes EU Law;

c. The law applicable before the constituted tribunal could include EU law;

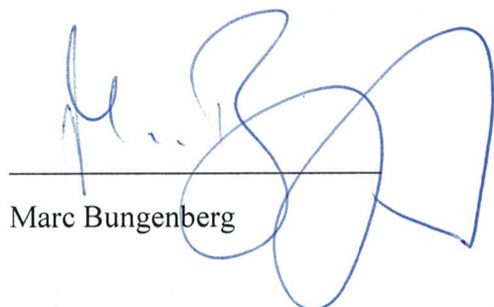
d. Intra-EU-ISDS tribunals based on the ECT may apply EU law, but arbitral tribunals stand outside the EU judicial system and therefore cannot make any preliminary references to the CJEU – the preliminary ruling mechanism. The CJEU is however the pillar that safeguards the autonomy of EU law and its uniform interpretation and application.

e. The possibility of an extra-EU court or tribunal applying EU law either as *lex arbitri* or substantive law should lead to an invalidity of the consent to arbitrate and thus to an invalid arbitration clause, due of the supremacy of primary EU law over all other law within the EU, including mixed agreements concluded by the EU.

75. Therefore, any arbitration tribunal seated in the EU when established under the ECT should in all intra-EU-cases where EU law might be applicable law has to deny its jurisdiction.

76. Similarly, competent enforcing courts should refuse enforcement at the request of the defending EU state due to the invalidity of the arbitration agreement and in recognition of the propriety of seeking recognition and enforcement within the EU judicial system.

I declare under penalty of perjury under the laws of the United States of America and the Republic of Germany that the foregoing is true and correct. Signed on March 4, 2020 in Saarbrücken, Germany.



Marc Bungenberg

Index of Exhibits for Second Expert Report of Marc Bungenberg in Support of the Italian Republic's Motion to Dismiss and Opposition to the Petition to Enforce Arbitral Award

Tab/Ex. No.	Description
1.	Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Articles 53-55
2.	CJEU, Case 6/64, Flaminio Costa v E.N.E.L., ECLI:EU:C:1964:66 (15.07.1964) ("*Costa v E.N.E.L.*)
3.	CJEU, Joined Cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, ECLI:EU:C:1983:233 (21.09.1983) ("*Deutsche Milchkontor*")
4.	CJEU, Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA, ECLI:EU:C:1978:49 (09.03.1978) ("*Simmenthal II*")
5.	Convention on the Settlement of Investment Disputes Between States and Nationals of other States Articles 21 – 22, 26 – 27, 49 – 55 and 62 – 63
6.	Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards', (2003) 20 Journal of International Arbitration, Issue 3 ("Platte")
7.	Julian Scheu and Petyo Nikolov, 'The Incompability of Intra-EU Investment Treaty Arbitration with European Union Law – Assessing the Scope of the ECJ´s Achmea Judgement' (2019) ("Scheu and Nikolov")
8.	CJEU, Case C-459/03, Commission of the European Communities v Ireland, ECLI:EU:C:2006:345 (30.05.2006) ("*Commission v Ireland*").
9.	CJEU, Opinion 2/13 of the Court, ECLI:EU:C:2014:2454 (18.12.2014) ("*Opinion 2/13 of 18.12.2014*")
10.	CJEU, Opinion 1/17 of the Court, ECLI:EU:C:2019:341 (30.04.2019) ("*Opinion 1/17 of 30.04.2019*")
11.	ICSID, Case No. ARB/07/19, Electrabel S.A. v Hungary, Decision on Jurisdiction, Applicable Law and Liability (30.11.2012) ("*Electrabel v. Hungary*") (excerpted)
12.	CJEU, Opinion 1/91 of the Court, ECLI:EU:C:1991:490 (14.12.1991) ("Opinion 1/91 of 14.12.1991")
13.	CJEU, Case 181/73, R. & V. Haegeman v Belgian State, ECLI:EU:C:1974:41 (30.04.1974) ("*Haegeman*")

14.	Van Vooren and RA Wessel, EU External Relations Law (CUP, 2014) (excerpted)
15.	CJEU, Opinion 1/92 of the Court, ECLI:EU:C:1992:189 (10.04.1992) ("Opinion 1/92 of 10.04.1992")
16.	CJEU, Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, ECLI:EU:C:2008:461 (03.09.2008) ("*Kadi*")
17.	Simon Burger, 'Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation,' (2019) 6 Yearbook on International Arbitration
18.	ICSID, Case No. ARB/15/50, Eskosol S.p.A in Liquidazione v. Italian Republic, , Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, (07.05.2019) ("*Eskosol v. Italy*") (excerpted)
19.	Thomas Roe and Matthew Happold, Settlement of Investment Disputes under the Energy Charter Treaty (CUP, 2011) (excerpted)
20.	Markus Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States' in Marc Bungenberg, Jorn Griebel and Steffen Hindelang (eds.), International Investment Law and EU Law (Springer, 2011)
21.	Emanuele Cimiotta, 'The First ever interpretative preliminary ruling concerning the validity of an international agreement between EU Member States: The Achmea Case,' (2018) 3 European Papers, No. 1
22.	John Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' 2018 (14) European Constitutional Law Review
23.	Laurens Ankersmit, '*Achmea*: The Beginning of the End for ISDS in and with Europe?' (2018) 9 Investment Treaty News, Issue 1
24.	April Lacson, 'What Happens Now? The future of Intra-EU investor-state dispute settlement under the energy charter treaty,' (2019) 51 NYU Journal of International Law and Politics
25.	Csongor Nagy, 'Intra-EU BITs after *Achmea*: a Cross-Cutting Issue', in Csongor Nagy (ed.), Investment Arbitration in Central and Eastern Europe: Law And Practice (Edward Elgar Publishing, 2019)
26.	Christina Eckes, 'Some Reflections on *Achmea's* Broader Consequences for Investment Arbitration', (2019) 4 European Papers, No. 1

27.	Burkhard Hess, 'The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice,' (2018) 19 Revista Eletrônica de Direito Processual, No. 3
28.	Anna Stanic, 'Enforcement of awards and other implications of the *Achmea* case'
29.	ICSID, Case No. ARB/08/18, Malicorp Limited v. The Arab Republic of Egypt, Award (07.02.2011) ("*Malicorp*")
30.	Redfern and Hunter on International Arbitration, 6th ed. (OUP, 2015), p. 104 (excerpted)
31.	Statement of 9.3.1998, OJ L 69
32.	Damian Chalmers, Gareth Davies & Giorgio Monti, European Union Law-Text and Materials, 4th ed. (CUP, 2019) (excerpted)
33.	Takis Tridimas, 'The Court of Justice of the European Union' in Robert Schütze and Takis Tridimas (eds.), Oxford Principles of European Union Law Vol. I (OUP 2017)
34.	Fernando Dias Simoes, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration,' (2017) 25 Michigan State International Law Review, Issue 2 ("Simoes")
35.	C.E. Koops, 'Contemplating compliance: European compliance mechanisms in international perspective' (University of Amsterdam 2014)
36.	M. Happold and M. de Boeck, 'The European Union and the Energy Charter Treaty: What Next After *Achmea*?,' in M.A. Andenas, M. Happold and L. Pantelo (eds.), The European Union as an Actor in International Economic Law, forthcoming 2019
37.	CJEU, Case C-3/91, Exportur SA v LOR SA, ECLI:EU:C:1992:420 (10.11.1992) ("Exportur")
38.	CJEU, Case C-469/00, Ravil SARL v Bellon import SARL and Biraghi SpA., ECLI:EU:C:2003:295 (20.05.2003) ("*Ravil*")
39.	CJEU, Case C-478/07, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH, ECLI:EU:C:2009:521 (08.09.2009) ("*Budějovický Budvar*").
40.	CJEU, Case C-546/07, European Commission v Federal Republic of Germany, ECLI:EU:C:2010:25 (21.01.2010) ("*Commission v Germany*")
41.	Inge Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order', in Christophe Hillion and Panos Koutrakos (eds.), Mixed Agreements Revisited (Hart Publishing 2010)

42.	Anna Bilanová & Jaroslav Kudrna, '*Achmea*: The End of Investment Arbitration as We Know It?' (2018) 3 European Investment Law & Arbitration Review, Issue 1
43.	PCA, Case No. 2014-22, I.C.W. Europe Investments Limited v. Czech Republic, Award (15 May 2019) ("*ICW Europe*") (excerpted)
44.	SCC Arbitration, Case No. 2015/063, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, Award (15.2.2018) ("*Novenergia II-SICAR v. Spain*")
45.	*CEF Energia BV v. Italian Republic*, SCC Case No. 2015/158, Award (16 January 2019)
46.	Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Award, (23 December 2018)