

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

JGC Holdings Corporation,

Petitioner,

v.

Kingdom of Spain,

Respondent.

Civil Action No. 23-cv-02701 (RC)

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

EXHIBIT 3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BLASKET RENEWABLE INVESTMENTS :
LLC, :
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Appellant, :
:
v. : No. 23-7038
:
KINGDOM OF SPAIN, :
:
Appellee. :
:
----- X

No. 23-7038

Wednesday, February 28,
2024
Washington, D.C.

The above-entitled matter came on for oral
argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES PILLARD, PAN and ROGERS

APPEARANCES:

ON BEHALF OF THE APPELLANT BLASKET RENEWABLE
INVESTMENTS LLC:

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ON BEHALF OF THE APPELLEE KINGDOM OF SPAIN:

SARAH M. HARRIS, ESQ.

ON BEHALF OF THE AMICUS CURIAE THE EUROPEAN
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ON BEHALF OF THE AMICUS CURIAE UNITED STATES OF AMERICA :

SHARON SWINGLE (DOJ) , ESQ.

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P R O C E E D I N G S

THE CLERK: Case No. 23-7038, Basket Renewable Investments, LLC, Appellant v. Kingdom of Spain. Mr. McGill for the Appellant Basket Renewable Investments, LLC; Ms. Harris for the Appellee Kingdom of Spain; Ms. Pei, Amicus Curiae for the European Commission; Ms. Swingle, Amicus Curiae for the United States of America.

JUDGE PILLARD: Good morning, Mr. McGill. You may proceed when you're ready.

MR. MCGILL: Thank you.

JUDGE PILLARD: Technically, good afternoon.

ORAL ARGUMENT OF MATTHEW D. MCGILL, ESQ.

ON BEHALF OF THE APPELLANT BASKET RENEWABLE INVESTMENTS, LLC

MR. MCGILL: Good afternoon, Judge Pillard. Is Judge Rogers joining us?

JUDGE PILLARD: Oh, good question. I believe --

JUDGE ROGERS: I've been here during the entire --

JUDGE PILLARD: There she is. Excellent.

JUDGE ROGERS: But I muted myself and I turned off the video.

JUDGE PILLARD: Thank you.

MR. MCGILL: Thank you, Judge Pillard, and may it please the Court, Matthew McGill for Basket. In this round two, I would like to start with the arbitration exception.

1 The Supreme Court's decision in BG Group, and this
2 Court's decision in Stileks demonstrate that there is
3 jurisdiction in this case through the arbitration exception.
4 The central lesson of the Supreme Court's decision in BG
5 Group is that an investment treaty is more than just a
6 unilateral standing offer to investors. It is, quote, "An
7 already formed arbitration contract among the signatory
8 states."

9 In the language of the FSIA then, that investment
10 treatment is an agreement to arbitrate I states made for the
11 benefit of private investors. The Energy Charter Treaty is
12 such an investment treaty. In Stileks, Moldova argued it
13 did not consent to arbitrate with the investor before the
14 court; but this Court held that Moldova's signature on the
15 treaty itself sufficed to establish the arbitrator's
16 jurisdiction. If the, that was because in BG Group, energy,
17 under BG Group, excuse me, the Energy Charter Treaty itself
18 was a contract. If the arbitrator's jurisdiction had
19 depended on the existence of an agreement to, with that
20 particular investor, then the existence dispute would have
21 needed to have been resolved before the court could have
22 determined that Moldova agreed to delegate arbitrability
23 questions to the tribunal. For the

24 JUDGE PILLARD: Isn't this different, though,
25 because that had to do with the issue as opposed to the

1 party?

2 MR. MCGILL: No, because Spain's argument here is
3 similar. It says it did not consent to arbitrate. Just as
4 in BG Group, its argument was it did not consent to
5 arbitrate. The argument is about the scope of the consent
6 by the investor state; and here, this is, the foreign state
7 here argued it didn't agree to arbitrate this dispute, but
8 not others, that's Stileks; and this Court says that's a
9 question of arbitrability.

10 JUDGE PILLARD: But they're saying we didn't agree
11 to arbitrate with any EU investors. That's a different
12 question. That's who we're arbitrating with as opposed to,
13 yeah, we agreed to arbitrate with Basket's predecessors --

14 MR. MCGILL: But --

15 JUDGE PILLARD: -- but only on, you know, green
16 energy and not on fossil fuel. It's not a question of the
17 parties have an agreement and we're trying to figure out the
18 details of it. It's, I mean as --

19 MR. MCGILL: Well --

20 JUDGE PILLARD: -- as Spain is saying, no, no, no,
21 no agreement with Spain and its counterparty at all.

22 MR. MCGILL: I, I understand; so, I, I guess I
23 have two points in response. First, is that they are both
24 questions about the scope of consent, you know, different;
25 but they are both questions about the scope of consent. In

1 BG Group, it was we did not consent to arbitration with
2 people who do not fulfill, fulfill the location litigation
3 requirement. That's a class of investors. In Stileks, it's
4 we don't consent to class with this type of investors; but
5 Stileks actually does involve who because the, Moldova's
6 argument in Stileks was that it did not agree to arbitrate
7 with EnerGeo Alliance because the investment actually came
8 through the BVI entity, (unintelligible). So, there was a
9 who issue in Stileks itself. It's not as neatly
10 compartmentalized as, as Spain would have it.

11 So, under BG Group, if you view the agreement here
12 as the agreement to arbitrate, the Energy Charter Treaty
13 itself is the agreement to arbitrate. It is within the
14 meaning of the FSIA, an agreement for the benefit of a
15 private, of private parties. That accords, of course, with
16 the whole purpose of the 1988 amendments. In the 1998
17 amendments that padded the arbitration exception, it was,
18 too, as the United States says in its amicus brief, it was
19 to, to streamline, to make easier the enforcement of New
20 York Convention Arbitral Award in U.S. courts. That was the
21 purpose of adding this exception. It was to eliminate doubt
22 that there was, that there was subject matter jurisdiction
23 to enforce arbitral awards in this Court.

24 So, that, when you have, or looking at the
25 language --

1 JUDGE PILLARD: So, so, I think this is a
2 hypothetical from your opponent's brief. If, if North Korea
3 comes in and says, you know, standing agreement to
4 arbitrate; we want to arbitrate against Spain; and the
5 arbitrators wanting ever more business say, great, we'll
6 arbitrate that; and it's just not the case that any offer
7 was ever made to those investors, but the arbitrators say
8 there was, done.

9 MR. MCGILL: Under the ICSID Convention, that
10 doesn't get out of the, out of the gate because ICSID itself
11 would not initiate a proceeding. Under the New York
12 Convention, you would require a, under UNCITRAL Rules, a,
13 there would have to be an arbitral panel that would quickly
14 conclude that there's no jurisdiction here. These panels
15 are not staffed by, you know, by, by hacks. They are
16 respected international law experts.

17 The second point I wanted to make is that even if
18 you viewed the arbitration agreement as Spain does here, at
19 the level of the particular investor, Spain is raising a
20 question of validity or enforceability, not one of capacity
21 or formation. Spain is arguing, in essence, that EU-law
22 preempts its decision to enter into the Energy Charter
23 Treaty on the, on the text of its plain terms. Those types
24 of questions of preemption are questions of validity and
25 enforcement. I would point to the Ninth Circuit's case in

1 Unite Here Local and the Eleventh Circuit's decision in
2 Addicts. These are not questions that go to formation that
3 must be for the court. They can be delegated to
4 arbitrators. The question of whether federal law preempts
5 arbitration can be delegated to arbitrators because it is
6 one of validity; and under the Supreme Court's decision in
7 Buckeye Check Cashing, footnote 1, validity is not
8 formation.

9 So, more, what is more when an EU member state
10 violates EU-law, the action of that member state is not void
11 ab initio. EU-law does not, in fact, have preemptive force
12 like U.S. law. Instead, under Article 260 of the Treaty for
13 the Functioning of the European Union, it requires the
14 member state to take steps to comply or face an infringement
15 action from the European Commission. That is why you have
16 all the EU member states saying, we're, we're going to
17 withdraw from the Energy Charter Treaty. You know, Spain
18 has not yet taken that step; but they have indicated their
19 intention at some point in the future to withdraw for the,
20 from the Energy Charter Treaty in order to comply with the
21 court of justices' mandate as set down in Komstroy.

22 JUDGE PILLARD: And is that a prolonged process?

23 MR. MCGILL: I, if the, you mean the, the
24 withdrawal itself? The withdrawal, it's effective one year
25 after the date of the, the notice to the Energy Charter

1 Treaty; but the treaty obligations have a 20-year sunset.
2 So, finally, the, the, I guess the next point I, I would
3 make is that even if you rejected my validity argument, even
4 if you were viewing this as an issue of formation, it's not
5 obvious to me that Spain should not be bound by its own
6 voluntary submission of this question to arbitrators. Spain
7 itself invited the arbitrators to decide this. And I am
8 aware of, while this is a jurisdictional fact that this
9 Court must, it must find an agreement to arbitrate, I'm
10 aware of no precedent that would precluded this Court from
11 saying you are bound by your litigation choice to pursue
12 this in front of the arbitrators.

13 JUDGE PILLARD: Isn't most of the U.S. cases on,
14 on this are, are pre-arbitration; but wasn't First Options
15 v. Kaplan was a case afterwards where they went through
16 arbitration, but they're allowed to look back and say, no,
17 no, no, this person wasn't --

18 MR. MCGILL: So --

19 JUDGE PILLARD: -- bound?

20 MR. MCGILL: And I think that --

21 JUDGE PILLARD: It wasn't a signatory?

22 MR. MCGILL: Right, so, I, I, and I, I'm not
23 disputing that formation questions generally are for the
24 court under the FAA framework. The question is, what is
25 necessary to find a jurisdictional fact under the FSIA?

1 What is necessary to find a jurisdictional fact? And my
2 submission would be that when a party chooses to arbitrate
3 the issue without reservation, they never said arbitral
4 panel, you cannot raise this; you cannot decide this issue.
5 You, you, you --

6 JUDGE PILLARD: They said it within there.

7 MR. MCGILL: They, they said that they, they
8 raised their intra-EU objection; but they raised no
9 objection to the delegation of that precise question to the
10 tribunal, far from it. They invited the tribunal to decide
11 it. So, this is different from other cases where the
12 jurisdictional fact has, it has not been passed upon before.
13 This is one that's invited the arbitrators to decide and now
14 it wants a second bite at the apple in enforcement courts.

15 JUDGE PAN: Does that have to be a factual, I
16 guess, finding by the arbitral tribunal to work?

17 MR. MCGILL: Yeah, I, so the way I was thinking of
18 it, Judge Pan, is that it would also apply to mixed
19 questions of law, in fact; but this is, I'm just using the
20 Court's terminology of the existence of an arbitration
21 agreement as to jurisdiction fact; and that, that question
22 clearly was litigated before the tribunal at Spain's
23 invitation; and now they want a different result in this
24 Court.

25 JUDGE PAN: So, you're saying even if we're

1 responsible for determining contract formation, we can just
2 adopt what the tribunal said if the parties agreed that
3 that's --

4 MR. MCGILL: I am not saying that as a matter of
5 arbitration law generally. I'm saying that as, with respect
6 to the very precise and narrow question of what, what is
7 sufficient to demonstrate a jurisdictional fact to obtain
8 jurisdiction under the FSIA. And I'm not aware of any case
9 that says you cannot, you cannot conclude a jurisdictional
10 fact from a prior litigation in which you voluntary,
11 voluntarily participated and, indeed, invited.

12 JUDGE PILLARD: Arbitration?

13 MR. MCGILL: An, well, or, or a litigation for
14 that matter; but in this case, it was an arbitration.

15 JUDGE PILLARD: I have a choice of law question
16 for you. So, the New York had mentioned, authorizes actual
17 courts to decline to enforce an arbitral award if the
18 arbitral award was, if the agreement, I'm sorry, was not
19 valid under the law to which the parties have subjected it;
20 or if there's no indication about that under the law that's
21 cited of the arbitration itself, and so that's on the merits
22 we have choice of law spelled out --

23 MR. MCGILL: Uh-huh.

24 JUDGE PILLARD: -- in the New York Convention.

25 And I guess in, you know, evaluating whether there's an

1 agreement in the first place, do we use that same choice of
2 law analysis --

3 MR. MCGILL: I think I, I --

4 JUDGE PILLARD: -- at the bottom? I'm trying to
5 figure --

6 MR. MCGILL: No, I will, I would think not, Your
7 Honor. I would think that under the FSI -- because you're
8 interpreting the FSIA here. So, I, I would think that the
9 question of whether there is an agreement to arbitrate would
10 be one that would be decided under federal law.

11 JUDGE PILLARD: Well, under, I mean like under the
12 FAA, we look to state law because it's a contract question.
13 So, under the FSIA in terms of the contract law that would
14 apply here --

15 MR. MCGILL: Well, I --

16 JUDGE PILLARD: -- what is the analogous, to the
17 extent that there's the same kind of question?

18 MR. MCGILL: Well, then I, I mean I, I think you
19 would look to the Energy Charter Treaty itself which,
20 because that is the document under which arbitration was
21 conducted here; and Article 26 says that you interpret the
22 Energy Charter Treaty in accordance with its terms and
23 international law. So, the, the question of whether there
24 is an agreement, I suppose, would fold back onto one of
25 international law; but I don't see that as, there's no

1 dispute that the Energy Charter Treaty exists. So, if you
2 take my, my frontline argument that that is sufficient to
3 establish subject matter jurisdiction, then --

4 JUDGE PILLARD: Okay. And, and the, and Spain has
5 an argument that the Energy Charter Treaty means something
6 different than what you think it means?

7 MR. MCGILL: Yes.

8 JUDGE PILLARD: And if that's a question about the
9 nature of an agreement, I understand that we look for some
10 text; we look to international law; but international law
11 doesn't typically have a lot of contract law in it.

12 MR. MCGILL: So, let me take, I mean --

13 JUDGE PILLARD: Nor does even EU-law.

14 MR. MCGILL: I mean this goes straight to the, to
15 the merits of, of Spain's argument; and so, let me just
16 address, address the merits analysis here. I would start
17 first with the United States' submission that at least some
18 deference is due to the arbitrator's conclusion here; and,
19 second, Spain has based this argument before 30 different
20 arbitral tribunals against it and it has lost every one. It
21 has lost this argument, indeed, with 28 of its own appointed
22 arbitrators voting against it. So, it's asking this Court
23 to be really an outlier.

24 JUDGE PILLARD: Except that, I mean Ms. Harris
25 will say courts, every court look at this issue; every court

1 agrees with the EU?

2 MR. MCGILL: That's, that's simply not true. The
3 U.K. certainly does not agree. The U.K. held that this --

4 JUDGE PILLARD: Right, every point in the EU?

5 MR. MCGILL: Well, even, even that is of quite
6 recent vintage. It is simply not true that the EU has, EU
7 member states have always understood this to be the case
8 since the founding of the Energy Charter Treaty in 1994. I
9 would point to Joint Appendix 398. This is the
10 jurisdictional decision in this case which is from 2014. In
11 there it talks, it is addressing the Commission's amicus
12 brief in, it was the Achmea case. It's called Eureko, but
13 that's Achmea. And it says, what is more, the views
14 expressed by the European Commission are not shared by the
15 majority of EU member states who, in fact, have expressed
16 different views on this matter. Suffice it to say that the
17 stance taken by the Dutch government in the same Eureko
18 case in which the Dutch government, taking a diametrically
19 opposed position as the one held by the Commission,
20 supported jurisdiction of the tribunal. It is not true that
21 all EU member states always understood that they were not
22 allowed to arbitrate under EU-law.

23 They, you raised a question, Judge Pillard, that I
24 think it's important to address that, but what, what about,
25 what importance does it have to non-EU members? The

1 importance is that if arbitration is unavailable within the
2 EU, then EU member states have an incentive to choose EU-
3 based investors over non-EU-based investors who could invoke
4 arbitration. That is why it has to be horizontally fair.

5 JUDGE PILLARD: And all the EU investors will go
6 overseas and all the overseas investors --

7 MR. MCGILL: right.

8 JUDGE PILLARD: -- will go to the EU?

9 MR. MCGILL: The, I would add that the, the
10 implications of, of, the implications of Spain's argument
11 are quite stunning. It would mean that any decision of the
12 court of justice for the European Union could alter the
13 treaty obligations of all EU member states for any number of
14 treaties, the New York Convention, ICSID; the, just a
15 decision of the EU, of the EU, the court of justice for the
16 EU would just take the, take the entire European Union out
17 of these treaties which is, of course, contrary to the terms
18 of those treaties which provide its methods for amending
19 them, methods for withdrawing from them, methods for
20 modifying them.

21 JUDGE PILLARD: I wonder, you pointed to, you
22 know, an earlier time, I think it was 2014, when there
23 wasn't the kind of consensus that seems to be emerging today
24 within the EU; and we, we were discussing earlier this
25 morning Article 46 of the Vienna Convention on which a state

1 may not invoke its internal law and its being applied to the
2 EU may not invoke EU-law as invalidating its consent to a
3 treaty unless the violation is manifest and concerns a rule
4 of internal law of fundamental importance. The example in
5 the briefing was if, you know, the President tries to sign a
6 treaty and doesn't have Senate consent, that would be
7 manifest to the world that that was not binding; and so, and
8 I guess my question is, given the coalescence now of, of the
9 EU, do you have a view on whether moving forward the Vienna
10 Convention at some point precludes EU investors from relying
11 on the ECT to form arbitrational agreements with Spain --

12 MR. MCGILL: Well, I, first of all, I think that's
13 --

14 JUDGE PILLARD: -- now?

15 MR. MCGILL: -- that would be a different argument
16 than the one Spain is --

17 JUDGE PILLARD: I --

18 MR. MCGILL: -- facing. It's --

19 JUDGE PILLARD: Oh.

20 MR. MCGILL: That, that Spain is not saying that
21 it has permission under the Vienna Convention to --

22 JUDGE PILLARD: Right.

23 MR. MCGILL: -- abrogate it.

24 JUDGE PILLARD: Right.

25 MR. MCGILL: It's saying that it never meant what

1 it said.

2 JUDGE PILLARD: Right, but I'm saying, as their
3 view of coalescence, I'm trying to appreciate, you know,
4 what wiggle room other than --

5 MR. MCGILL: I, I --

6 JUDGE PILLARD: -- rewriting a --

7 MR. MCGILL: The main, I mean most that the, the
8 EU is en masse in withdrawing from the, from the Energy
9 Charter Treaty; and that is, that is its, that is its
10 remedy. If it, if it wants to actually remedy it today, it
11 can get the other member states to agree to the modification
12 that it says has always existed.

13 JUDGE PILLARD: Right. And my question is really,
14 does, is there a way under the Vienna Convention that that
15 occurs without sort of positive treaty --

16 MR. MCGILL: I'm not aware of any, of, I'm not
17 aware of the, the Article 46 caselaw that would permit or
18 would preclude that possibility.

19 JUDGE PILLARD: On the injunction, are you still
20 seeking an anti-suit injunction against Spain?

21 MR. MCGILL: No, so the, the, it's, so as, as the
22 Court is aware, our, the district court denied our motion
23 for, motion for preliminary injunctive relief as moot
24 because it found no subject matter jurisdiction. Since the
25 briefing, the primary briefing on this appeal concluded,

1 Spain has withdrawn its request for anti-suit relief against
2 us in the Netherlands; and that makes sense because we're
3 now a Delaware entity. So, there, there, we don't have an
4 anti-suit issue at this point anymore.

5 I do want to address the, the fundamental basis
6 for the district court's decision below here which was that
7 Article, under Article 26, paragraph 6 of the treaty, EU-law
8 is international law that supervenes and alters the meaning
9 of the Energy Charter Treaty itself. That is not correct.

10 The, if, if it were correct that EU-law could
11 modify the meaning of the treaty, so could any bilateral
12 investment treatment between two member states. That is
13 obviously not what the EU, what the members of the Energy
14 Charter Treaty signed up to address. Instead, I would point
15 this Court to Medellin v. Texas, this, the Supreme Court's
16 decision in that case where it says that, you know, even if
17 the treaty violates U.S. law, that means that the treaty
18 cannot operate within the U.S. It does not mean that you,
19 that the United States does not have obligations within the
20 international law domain. EU-law operates within its own
21 domain. It operates on that plane alone. It does not
22 change the meaning or content of international law that, in
23 a treaty that governs not just the EU and its member states,
24 but 56 different member states.

25 If there are no further questions, I hope I

1 reserved a little bit of time for rebuttal as I had
2 requested.

3 JUDGE PILLARD: You requested three minutes?

4 MR. MCGILL: I did.

5 JUDGE PILLARD: Do my colleagues have further
6 questions? Thank you --

7 MR. MCGILL: Thank you.

8 JUDGE PILLARD: -- Mr. McGill. And we will hear
9 again from Ms. Harris for Spain.

10 ORAL ARGUMENT OF SARAH M. HARRIS, ESQ.

11 ON BEHALF OF THE APPELLEE KINGDOM OF SPAIN

12 MS. HARRIS: Thank you and may it please the
13 Court, Sarah Harris for the Kingdom of Spain. I'd just like
14 to briefly touch on three points that Blasket addressed.
15 First of all, it doesn't matter how you view the energy
16 charter or the punitive agreement, however you slice or dice
17 it, even if you thought that the Energy Charter Treaty
18 itself was somehow an agreement to arbitrate among the
19 members, Spain couldn't and didn't consent with other EU
20 members to arbitrate.

21 Now the other side seems to treat, to assume that
22 agreeing with anyone is good enough to agree with everyone;
23 but, notably, their answer to the hypothetical of
24 (unintelligible) appeared to be, don't worry about that;
25 arbitrators are smart and we'll deal with that on the

1 backend. That is not a satisfying answer either with
2 respect to the sort of, this Court's precedence saying that
3 whether you agreed with someone or not is a fundamental
4 question of formation or other circuit's cases; and I would
5 specifically point to the Lloyd's decision from the Eleventh
6 Circuit and the Al-Qarqani decision for the Fifth Circuit.
7 Both of those cases also involve fact patterns where the
8 question is, did someone form an agreement with someone
9 else? Yes, there might be an agreement with one person, but
10 not the person who is relevant to the consent. So, you
11 know, you can't just sort of say, oh well, you know,
12 agreeing with everyone will be enough.

13 And, and, anyways, the United States has pointed
14 out it would be pretty strange to think that the Energy
15 Charter itself is sort of a self-encompassing agreement to
16 arbitrate among member states given that the text of the
17 Foreign Sovereign Immunities Act, Arbitration Act exception,
18 refers to the parties having an agreement to arbitrate. The
19 parties really are talking about like the people before the
20 court trying to sue the Foreign Sovereign Immunities courts.

21 Second of all --

22 JUDGE PILLARD: So, but you do have the provision
23 about the parties agreeing to arbitrate or on behalf of
24 others?

25 MS. HARRIS: Yes. And so, it's the second part

1 that I'm focusing on. It's not just an agreement made by
2 the foreign stage with, or for the benefit of a private
3 party to submit to arbitrational differences. It's
4 differences between the parties. So, the parties here are
5 investors in Spain; and I think that text shows that our
6 interpretation has to be correct in terms of the relevance.

7 JUDGE PILLARD: Except it seems like the, I mean
8 the FSIA, we've been talking about this all morning, but it
9 seems like it pivots, it's a little inexact in its wording
10 that the agreement between the parties, something, or for
11 the benefit of; and it's, if the parties to the treaty are
12 states of the nature of the, of the beast; but for the
13 benefit of are not states; and then the disagreement or the
14 dispute between the parties, it appears that the FSIA is
15 using parties in the, in the later clause describing parties
16 in dispute not to be the same parties as the parties to the
17 treaty?

18 MS. HARRIS: But it's, I think under, I think the
19 better view of the FSIA is it's more naturally talking about
20 the people actually before the U.S. court. So, you could
21 have a potential agreement maybe for the benefit of third
22 parties; but the parties we're actually talking about like
23 have to have some sort of consent; and I think that also
24 just more --

25 JUDGE PILLARD: So, what is your sort of classic

1 case that you think that for the benefit of it is
2 referencing?

3 MS. HARRIS: I think for the benefit of, you could
4 have an --

5 JUDGE PILLARD: Could that beneficiary arbitrate
6 under that agreement or no?

7 MS. HARRIS: I mean let's say you had like, I
8 think the, the person would probably have to have consented
9 because, otherwise, they are not actually agreeing to
10 arbitrate at all. Like they could be hailed before they
11 could be subjected to arbitration they didn't agree to would
12 be kind of strange. I think this just tracks the nature of
13 the Foreign Sovereign Immunities Act itself, the idea that
14 foreign sovereigns actually have to have consented to be in
15 like courts in a pretty clear way; or had done through their
16 contact that sort of consent.

17 Anyway, regardless, just looking at the Energy
18 Charter Treaty one way or another, the baseline concern
19 remains. Under the other side's view, they seem to think
20 that everything reduces to a question of scope that is
21 always arbitrable. I'm not sure what would remain of this
22 Court's decision in Belize, in this Court's decision in
23 Mikula, even the distinction drawn in Stileks itself, their,
24 their piece that they rely on over and over again, it would
25 make no sense for this Court to have said, wait a minute,

1 Moldova's argument is not really an argument about the
2 formation of an agreement. What they're trying to do there
3 is backdoor a question of scope, was this an investment or
4 not, to try to say, oh, we didn't agree to that type of
5 dispute; but we agreed to this one. Everyone agreed there
6 because there was no issue of intra-EU issues with the
7 parties there; that there was some sort of agreement.
8 Again, the only question was did they agree to this
9 particular investment or not? And that is what the Supreme
10 Court has said the dividing line is in the domestic
11 arbitration context in cases like Buckeye and that's what
12 this Court has done in the Foreign Sovereign Immunities Act
13 context.

14 So, again, it would be really hard to explain what
15 this Court has actually done in Foreign Sovereign Immunities
16 Act pieces if it just didn't matter; and if all you could do
17 is say any sort of dispute over who can sign an agreement or
18 whether they had a power to do so always reverts to
19 arbitrability. Just look what the arbitrator did and we're
20 done here.

21 Third of all, just the view that you should look
22 at the arbitrator's win-loss record and the votes for
23 investors as somehow probative of what treaties mean is a
24 crazy way to review, to, to understand what treaties mean,
25 certainly not the way the Supreme Court or this Court has

1 ever interpreted a treaty; and not a good road to go down.
2 What a treaty means is a matter of both text and
3 signatories' understandings; and this is not a question for
4 the EU treaties of some sort of national law, like some sort
5 of Belize constitution at issue in Belize. This is
6 international law. It is the stuff of treaties between EU
7 members.

8 Now, of course, it doesn't govern relations
9 between, you know, non-EU members; but between EU members,
10 investors included that is the supreme law above all in
11 international law; and that is what the investors should
12 have known as the sort of, sort of clearest rule of the EU
13 system for all time. And so, the idea that you should
14 discount how the treaty signatories have understood the
15 Energy Charter Treaty, again, there is no principle of, of,
16 or caselaw that would suggest throw the signatories'
17 understandings out the window because they're at this point
18 in time versus the other one.

19 JUDGE PILLARD: Is your position that the Vienna
20 Convention Article 46(1) condition has been met since this
21 investment was made; or, you know, the, the provision
22 allowing, saying that, that internal law, here internal EU-
23 law invalidates consent to enter a treaty because it was
24 manifest and concerned a rule of the EU's internal law of
25 fundamental importance? You mentioned that this morning and

1 I'm --

2 MS. HARRIS: So, our fundamental position is that
3 rule doesn't even apply because it involves internal law.
4 EU-law is emphatically international law and that is --

5 JUDGE PILLARD: But it's both.

6 MS. HARRIS: -- talking about domestic --

7 JUDGE PILLARD: It's really both.

8 MS. HARRIS: Yes, and their position discounts the
9 (unintelligible) which is if it's international law, you
10 look at other treaty conflict rules under which I think we
11 clearly win; however, you apply the other Vienna Convention
12 rules. And, look, I think we would say even if you wanted
13 to apply the internal law rule, we could satisfy it; but I
14 don't think that's the right way of looking at it because,
15 again, the relevant conflict rules, first and foremost,
16 should be the specific governing the general; or the EU
17 primacy principle, which is you have a dispute. One hand is
18 an EU member, on the other hand is an EU national, the order
19 of priority under international law as set forth in the EU
20 treaties is specifically the EU-law takes precedence, first
21 and foremost, over other international agreements. And,
22 again, if you want to look for notice of that, that is not
23 some sort of principle that just emerged recently. There
24 are a ton of European court of justice decisions
25 establishing that like way, way, way before these investors

1 even stepped foot in trying to invest.

2 JUDGE PILLARD: And I have the same question for
3 you that I had for Mr. McGill, that choice of law, the New
4 York Convention says national courts should evaluate the
5 validity of an arbitration agreement under the law the
6 parties have agreed to; or barring that under the law of
7 (unintelligible) of the arbitration, do you agree that that
8 provision also should govern our choice of law analysis for
9 purpose of the threshold FSIA question or no?

10 MS. HARRIS: We think that what governs first and
11 foremost would still be EU-law. That is the law, first and
12 foremost, that the parties --

13 JUDGE PILLARD: So, we apply different choice of
14 law analysis to the same question when it arises under the
15 FSIA as a jurisdictional question than we would in the
16 merits?

17 MS. HARRIS: You might, but let me just sort of
18 back-up and say I don't think it matters in this case
19 because, first of all, I think the relevant choice of law
20 question is, did Spain have the power to agree to the
21 agreement under the FSIA? I think that's your first point
22 of decision because you're asking is there an agreement; and
23 so, under the FSIA inquiry you question would be, what law
24 tells me if Spain had the power to agree or not? We say,
25 first and foremost, EU-law, I took Blasket's brief to be

1 saying you apply different Vienna Convention principles like
2 look to, you know, what's more specific; look to what's
3 later in time. Our position is if you applied those
4 conflict rules, we still win because, again, the EU treaties
5 are international law; they are more specific; and also,
6 they are later in time given the re-ratification of the
7 treaty on the functioning of the EU. So, those seem to us
8 to be the relevant rules that have been argued in the case
9 that would apply to this specific question.

10 Now, again, if we then pivoted to their other
11 alternative which is start off from the world where you look
12 at the Energy Charter Treaty, we then just get back into all
13 the arguments about what does it mean that the EU itself
14 signed this treaty?

15 JUDGE PILLARD: I, I think I asked you in the last
16 case whether the, the EU, the EU Court of Justice cases
17 actually spoke of Spain's incapacity as opposed to the
18 invalidity of, of actions taken; and I'm not sure I heard a
19 clear answer whether, whether there's, those are really
20 property understood as capacity questions.

21 MS. HARRIS: Our position is, yes, they are; and
22 let me just give you some specific language. European
23 Foods, I think, is the clearest in just emphasizing the line
24 of cases; and it talks about sort of consent, quote,
25 "lacking force." The German high court's decision in Achmea

1 2 is also a good way of looking at this because it's
2 obviously applying the relevant EU decisions and trying to
3 figure out what does that mean in the posture of a court
4 trying to figure out like what happens to confirming the
5 award or not; and they are, the court said the agreement is,
6 quote, "Void ab initio." That's the kind of language that
7 means you didn't have an agreement at all, not some sort of
8 enforceability argument.

9 The other side is comparing this preemption, and I
10 think that's just the wrong analogy. This is much more like
11 do states that purport to enter into a treaty with Mexico,
12 is that a treaty or not? No, it's not a treaty. States
13 gave up the power to form treaties as part of the
14 Constitutional Convention; and in terms of other --

15 JUDGE PILLARD: That is not true with respect to
16 the EU.

17 MS. HARRIS: Respectfully, that actually, with
18 respect to the EU treaties, what happened is Spain and other
19 member states are saying they do not have the power anymore;
20 they're giving it to the EU to have a system in which
21 disputes are exclusively resolved by the European Court of
22 Justice when they are between members and involve EU laws.
23 The EU will not submit, cannot submit disputes to implicate
24 EU-law other ways; and that sort of distinguishes the
25 question we had earlier, what happens if Spain is in a forum

1 against its will trying to deal with questions of EU-law?
2 The obligation there isn't just sort of throw up Spain's
3 hands and say, we no longer want to defendant EU-law; we no
4 longer want the European Court of Justices' decisions to be
5 bound. When Spain is in this forum, Spain is saying, apply
6 European law; but the obligation is, don't try to circumvent
7 the EU treaties that Spain agreed to follow as paramount
8 law; don't try to do side deals. Don't try to do side
9 agreements. You can't do that as part of the price of being
10 a member of the European Union which is a really novel
11 enterprise in its respect of shared sovereignty in the EU.

12 JUDGE PILLARD: I have a sort of practical
13 question. What do you make of the arbitral panels
14 uniformly, or almost uniformly, rejecting this view,
15 including international law, jurists chosen by Spain or
16 other EU countries? I mean this is a, you know, this is not
17 the kind of dispute we hear every day. So, it's helpful to
18 have bearings on some of these more practical questions.
19 What's going on there in your view?

20 MS. HARRIS: In our view, again, I can't speculate
21 like what is motivating the arbitrators in these panels to
22 say we, you know, essentially like we think we can keep
23 arbitrating because we don't want to pay attention to
24 European Court of Justice law. I think the problem is on
25 their side they have, they're pointing to a lot of

1 arbitrator's decisions; and on our side, we're saying what
2 you should be looking at is what the signatories understood
3 and the way that the treaties play together; and I think you
4 just can't credit like what a bunch of arbitrators are
5 saying in like the free market for evaluating for how you
6 interpret treaties. That's just not one of the tools that
7 people normally turn to ever as a matter of treaty
8 interpretation.

9 So, no, I think you can say, yes, these --

10 JUDGE PILLARD: But those arbitrators, if they're
11 presumptively acting in good faith and on their best reading
12 of the law, they're looking at the same materials you're
13 looking at.

14 MS. HARRIS: Yes and, again, I think this shows
15 like in the international community, there might be like,
16 among law professors, an arbitrator disputes on these
17 questions; but it would be really strange to say you credit
18 those views over, in a treaty that is, has a bunch of
19 signatories over what the signatories themselves are
20 understanding the treaty to be, especially because the U.S.
21 isn't a signatory to that. Like that's pretty disruptive to
22 the treaty framework. If all of a sudden people who didn't
23 expect to have intra-EU arbitration, who didn't see it under
24 this treaty, even attempted until 2007, suddenly see, oh
25 well, you know, I'll, you know, what do we do with this?

1 The European Court of Justice said this is not a thing and,
2 but we're supposed to defer to arbitrators and supposed to
3 sort of --

4 JUDGE PILLARD: Defer, I'm just asking you for a
5 sort of a, just a real world take on --

6 MS. HARRIS: And I --

7 JUDGE PILLARD: -- what universe are they
8 operating and from your perspective --

9 MS. HARRIS: I, honestly --

10 JUDGE PILLARD: -- so --

11 MS. HARRIS: And I really think it is just a
12 dispute among international scholars over like what to do
13 with EU-law; but to me, the more salient point is, has this
14 been a feature that the EU has done with treaties in the
15 past? Yes, that is now the, the EU has approached other
16 treaties, like the WTO, the U.N. Convention on the Law of
17 the Sea, those are treaties like 1995, one of them; and so,
18 for this Court to say, sorry, you know, if the EU joined
19 those treaties, it doesn't matter. You should have known
20 that you agree to arbitrate under those as well or had other
21 dispute resolutions outside of the EU system, that's a real
22 problem both in terms of how those treaties currently
23 operate and what signatories (unintelligible).

24 JUDGE PILLARD: Did you argue about those, those
25 treaties in your brief?

1 MS. HARRIS: We argued about the WTO and then the
2 U.N. Convention on the Law of the Seas as subject of the
3 Ireland decision, which we do rely on --

4 JUDGE PILLARD: Right.

5 MS. HARRIS: -- extensively. It's from 2006.

6 JUDGE PILLARD: Right.

7 MS. HARRIS: So, yes, those are, those are
8 important sort of in context in terms of what people are
9 thinking and what might happen, and why is Spain, it
10 appears, really struggling about the arguments here.

11 JUDGE PILLARD: Thank you.

12 MS. HARRIS: Thank you.

13 JUDGE PILLARD: Questions? Judge Rogers?

14 (No affirmative response.)

15 JUDGE PILLARD: Great. Thank you very much, Ms.

16 Harris.

17 ORAL ARGUMENT OF SALLY L. PEI, ESQ.

18 ON BEHALF OF THE AMICUS CURIAE THE EUROPEAN COMMISSION

19 MS. PEI: Thank you, may it please the Court,
20 Sally Pei for the European Commission. I have just three
21 points to make at this, at this stage. The first is that EU
22 law is absolutely international law and I just wanted to make,
23 make sure that there's no confusion about the European
24 Commission's position on this point.

25 It's well-accepted that EU member states can enter

1 into agreements regulating the relationships between present
2 and future treaties; and that is precisely what they have
3 done in the EU treaties. The relevant principle is that of
4 primacy; and that's what governs the relationship between EU
5 law and any contrary international agreements. And this is
6 very important to the structure and the integrity of the EU
7 legal order because if the, if the rule were otherwise,
8 member states could simply enter into other international
9 agreements that would undermine and circumvent EU-law
10 itself.

11 JUDGE PILLARD: So, if the EU-law, if the EU came
12 up with principles that were in variance with the Vienna
13 Convention, those would be primary over the principles of
14 the Vienna Convention; or in --

15 MS. PEI: So, this, we're discussing here an
16 intra-EU situation; so, as --

17 JUDGE PILLARD: When you say primacy, it's, it's
18 like, not only is it international law, but it's, it's above
19 all international law? I'm just having trouble
20 understanding --

21 MS. PEI: Yeah, so, so EU law and the EU treaties
22 have primacy over other international law as far as they,
23 insofar as they are regulating intra-EU --

24 JUDGE PILLARD: So, that would be true of the
25 Vienna Convention?

1 MS. PEI: -- circumstances. That would be true of
2 the Vienna Convention with respect to internal EU
3 application of it; but that's, that's the, the whole way
4 that the, the European system has been constituted.

5 JUDGE PAN: So, what about your friend on the
6 other side's hypothetical about NATO? What if the EU
7 decided that it violates internal EU policy and norms for
8 members to be in NATO? Would that just take them out of
9 NATO?

10 MS. PEI: Well, I think that in that case there
11 would be potentially a question about the rights and
12 obligations of third parties that are not EU member states
13 to, to that, to the NATO agreement; and so, just to be
14 clear, the primacy of international, of EU-law is with
15 respect to the international obligations owed to, to,
16 between member states. It's --

17 JUDGE PAN: But I guess under the ECT, you agreed
18 in a multi-lateral treaty which included people not living
19 in the EU, that there would be this unconditional consent to
20 arbitration? So, isn't it like NATO in that respect, that
21 you agree to a multi-lateral, international treaty --

22 MS. PEI: So, with --

23 JUDGE PAN: -- to do something?

24 MS. PEI: -- with respect to the, the Energy
25 Charter Treaty, yes, it has, it has implications for

1 relations outside the EU; and that is, in fact, the, that
2 was the sole purpose of the Energy Charter Treaty. It was
3 never intended to govern intra-EU relations; and so, it's
4 within those intra-EU relationships that EU-law has primacy.

5 JUDGE PAN: So, I guess my question is, if the EU
6 and EU countries agree to something in the context of an
7 international, multi-lateral treaty to do something that
8 affects intra-EU relations, you're saying that they're not
9 bound by those international treaty obligations; that they
10 can trump it?

11 MS. PEI: So, I would put it instead by, by saying
12 that when the EU and member states enter into multi-lateral
13 treaty, they are not creating obligations between themselves
14 under the treaty. Instead, the rules that govern are EU
15 law. So, so, the EU's position on this is that the Energy
16 Charter Treaty's substantive provisions do not have any
17 effect with respect to intra-EU relations. So, intra, so,
18 EU investors are supposed to bring actions if they think
19 that they've been wronged by, you know, an EU member state.
20 The remedies are in EU national courts under EU law causes
21 of action.

22 JUDGE PAN: No, I understand your position; I'm
23 just trying to understand how that relates to your
24 obligations under international bilateral treaties that
25 involve parties that are not just within the EU?

1 MS. PEI: Yes, and so with respect to parties that
2 are outside the EU, the, there are obligations under the
3 Energy Charter Treaty and that's why non-EU member --

4 JUDGE PAN: No, but I'm trying to sort of zero-in
5 on if you commit in an international, multi-lateral treaty
6 to do things, including with respect to people within the
7 EU, you think you can abrogate that? Like just
8 hypothetically, say you did commit to that within the ECT,
9 you made commitments to people outside of the EU that you
10 would do certain things, including within the EU, you think
11 you can abrogate that based on EU-law?

12 MS. PEI: So, I do think that EU-law would have
13 primacy within the EU if, if it's not affecting the rights
14 of third countries or third country parties. The rule of
15 primacy really is about the, the, the --

16 JUDGE PAN: So, what if it does affect the third-
17 party countries because there was an argument that it
18 creates incentives for EU states to favor EU investors
19 because you don't have to arbitrate them?

20 MS. PEI: So, if we're talking about the rights of
21 third countries or the rights of third country investors,
22 those, those rights are, are valid and they're alive within
23 the treaty.

24 JUDGE PAN: So, so what if your position
25 contradicts the rights of these third-party investors?

1 MS. PEI: The primacy would not, would not apply
2 in that particular situation.

3 JUDGE PILLARD: But it's, wouldn't, so it's, it's
4 not, I think what Judge Pan is arguing is, is, arguably,
5 it's not fair and equal treatment as between potential,
6 within EU investors and foreign investors. They're coming
7 to Spain to invest on, with different, different procedural
8 recourse; and that that itself might have implications to
9 the, not to --

10 MS. PEI: Right.

11 JUDGE PILLARD: -- to the non-EU parties?

12 JUDGE PAN: Yeah, I think you just conceded that
13 your position would not hold if it affects non-EU parties;
14 and I gave you the hypothetical where it does; and you're
15 saying then --

16 JUDGE PILLARD: Under this very treaty?

17 JUDGE PAN: -- under this very treaty, and so now
18 you're saying that EU-law isn't, doesn't have primacy?

19 MS. PEI: So, I just want to make sure that I
20 actually, that I am understanding the question that, that
21 you're asking.

22 JUDGE PAN: The, the issue is, I said, what if you
23 make promises that affect people who are not within the EU
24 in the context of this multi-lateral, international treaty,
25 and you've promised to do things under this treaty that do

1 affect intra-EU relations, but that would affect the third
2 parties? And you said then EU-law wouldn't have primacy.

3 MS. PEI: And so who in this hypothetical, the,
4 the parties that are trying to invoke the protections of the
5 Energy Charter Treaty are the third country investors, or
6 are they --

7 JUDGE PAN: No, that what your friend on the other
8 side said was that if there's, if your view is true, it does
9 affect the non-EU members of the treaty because EU nations
10 will favor EU investors because they don't have arbitrate
11 with them. So, that is detrimental to all the other non-EU
12 parties to the treaty and they're affected. And I believe
13 you just said then EU-law would not have primacy?

14 MS. PEI: So, I think that's not the kind of
15 situation where, where we are talking, where that would be
16 an issue of a right or obligation owed to third country
17 investors under the Energy Charter Treaty itself.

18 JUDGE PAN: So, what's the answer to my
19 hypothetical?

20 MS. PEI: So, under the hypothetical where you
21 have an EU investor that is saying that, that they should be
22 --

23 JUDGE PAN: No, I'm just saying as a general
24 matter, EU primacy will hurt the members of the treaty who
25 are not from the EU

1 MS. PEI: In a, in a more attenuated sense than,
2 than, you know, the, the idea that the EU and its member
3 states have not, you know, they, they must respect primacy
4 as it applies within the European Union to intra-EU
5 relations.

6 JUDGE PAN: No, but I --

7 MS. PEI: I can see that there are --

8 JUDGE PAN: -- I guess the focus of my question is
9 why is it that the EU can abrogate terms of a treaty that
10 affect people who are not within the EU? It's an
11 international, multi-lateral treaty.

12 MS. PEI: So, the, they, it, in terms of how they
13 are, how it is affecting members, other member states that
14 are, other members of that treaty that are not --

15 JUDGE PAN: So, you agree that they can't do that
16 if it is affecting members who are not part of the treaty?

17 MS. PEI: If, if it is affecting member states --

18 JUDGE PAN: Right, that are not part of the EU?

19 MS. PEI: So, if it is going to affect the, the
20 treaty rights and obligations owed to those member states,
21 then primacy is not (unintelligible); but I don't, I don't
22 understand your hypothetical to be a situation where the EU
23 rules would, would be affecting the rights and obligations
24 owed under the --

25 JUDGE PAN: I'm just trying to get to a basic

1 premise which I think you agree with, which is that if the
2 EU has obligations under an international, multilateral
3 treaty, it cannot unilaterally abrogate them?

4 MS. PEI: Yes, I think that's correct.

5 JUDGE PAN: Okay.

6 MS. PEI: All right. Moving on to the, the second
7 point that I have wanted to make at this stage is just
8 really about the, this theme of, of unfair surprise and
9 unfairness to the investors here. The notion that the
10 investors are somehow being treated unfairly and have been
11 surprised by developments in the EU is a false narrative for
12 at least three reasons. First of all, I think it's
13 important to recognize the intra-EU investor state
14 arbitration is a very recent phenomenon. The first intra-EU
15 bilateral investment treaty case was brought in 2005 and the
16 first intra-EU Energy Charter Treaty case was brought in
17 2007. That's a case called Electrabel v. Hungary. And so,
18 when these cases started emerging, the Commission acted
19 immediately to raise questions about at least a potential
20 incapability between this type of dispute resolution and the
21 EU treaties; and you can see references to some of those
22 statements at page 477 of the Basket Joint Appendix that's
23 in Spain's declaration.

24 Regardless, at least as early as 2006, and that's
25 already, you know, five years before any of the investors in

1 these cases attempted to invoke Article 26, investors would
2 have been aware and on notice of the potential incapability
3 between intra-EU arbitration and EU-law, even based on the
4 jurisprudence of the Court of Justice. That's the MOX Plant
5 case involving Ireland where the Court of Justice held that
6 Ireland had breached the EU treaties by initiating
7 arbitration under the U.N. Convention of the Law of the Sea
8 against the United Kingdom which, of course, at that point
9 in time was an EU member state. And so, EU investors should
10 have been on notice of the content of the decisions of the
11 EU's highest court on this matter.

12 And, finally, there's just the, the basic point
13 that Achmea and (unintelligible), while they are, of course,
14 decisions of more recent vintage, they were applying
15 principles that flow from the EU treaties themselves that
16 have been shrined, have been enshrined in those instruments
17 for many decades; and, of course, also the, the decisions of
18 the Court of Justice are retroactive much in the same way as
19 when the, when a U.S. court issues a decision about the
20 meaning of the statute, it is saying what the statutes means
21 and, and what it always meant.

22 JUDGE PAN: So, the issue about, I mean I really,
23 this is kind of all new to me, this, all this EU law. I'm
24 trying to understand the incentives of the EU in this case.
25 It seems like the EU has an interest in, I guess, keeping

1 the financial assets of its member states within the
2 government, isn't that the whole point of this, it's a state
3 subsidy argument? It's like I'm just trying to understand
4 why the EU thinks it's important that things be ruled on the
5 way you say; and I don't see the importance of uniformity in
6 laws because it's not precedential; and I'm wondering if
7 there's some other motivating reason for the EU to be here;
8 and is it in the, isn't it in the EU's interests to allow
9 these EU member states to avoid paying these judgments
10 because it keeps the money with the governments which is
11 better for the EU than letting it go to private parties that
12 are energy companies and other investors?

13 MS. PEI: So, I, I don't think that the issue for
14 the EU is, is exactly keeping money within the governments.
15 For the Commission, the question really is one of exclusive
16 competence to regulate state aid within the EU. State aid
17 is a principle that, that, under which governments cannot
18 provide subsidies to businesses or, or companies operating
19 in the EU without --

20 JUDGE PAN: Isn't that one of the premises of the
21 ECT, though, like to encourage investment they were giving
22 deals to people to come --

23 MS. PEI: Only, only with respect to its, to, to
24 investors who are outside the European Union. The, the
25 Energy Charter Treaty --

1 JUDGE PAN: But you're putting aside to who? The
2 ECT was to encourage investment, and that included
3 incentives.

4 MS. PEI: Correct, but never, it was never
5 intended to apply with respect to intra-EU investors. It
6 was never intended to create rights to EU, people already
7 within the EU to --

8 JUDGE PAN: So, why would the EU enter the ECT if
9 the purpose of it was to provide this state aid that's not
10 authorized?

11 MS. PEI: So, it was, it was in order to extend
12 the EU's energy policy beyond the EU's borders. So, it was
13 creating sort of a framework that would essentially try to
14 encourage members, non-member states who eventually might
15 exceed to the union to bring their legal protection, their,
16 their laws in, in line with, with the EU's internal policy;
17 but it was never intended to authorize the granting of state
18 aid.

19 JUDGE PAN: Can you explain that? Like what, what
20 was supposed to happen from the EU's --

21 MS. PEI: So --

22 JUDGE PAN: -- perspective?

23 MS. PEI: So, from the EU's --

24 JUDGE PAN: If they signed the ECT, it's going to
25 do what; it's going to encourage --

1 MS. PEI: So, so --

2 JUDGE PAN: -- non-EU nations to join the EU?

3 MS. PEI: That, that was part of the picture.

4 The, so in the 1990s, this when the Energy Charter Treaty
5 was negotiated. The idea was that already within the EU
6 there were certain, there, there was an existing energy
7 policy and investment protection for EU investors; and the,
8 the EU wished to, to try to extend some of those policies
9 outside the EU; and then the way to do that was by
10 negotiating an agreement with countries that were not part
11 of the EU --

12 JUDGE PAN: But I thought that you said that the
13 investment protections were unlawful state aid? So, you're
14 saying you --

15 JUDGE PILLARD: There were, there were different
16 pre-existing protections?

17 MS. PEI: There were, there were different, there
18 are different rules that govern investment protection within
19 the, within the European Union; and, and the Energy Charter
20 Treaty was simply never intended to supplant or displace
21 those. And so, going back to the question of, of state aid,
22 the reason why the Commission is so concerned about these
23 awards is that an enforcement court outside the EU, or for
24 that matter within the EU, does not have the ability or
25 competence to order an, to order a state to provide aid.

1 Subsidies can only be paid to investors if the Commission
2 has specifically authorized that; and the Commission has not
3 authorized to date the, the payment of these awards.

4 So, from the, from the Commission's perspective,
5 it's very important that, that, that it be able --

6 JUDGE PAN: So, it's not really, it's not really
7 the judgments that are unlawful; it's the fact that your EU
8 members ever gave any of these investment incentives; they
9 weren't allowed to do that, but they did it --

10 MS. PEI: It is, it --

11 JUDGE PAN: -- and now the investors are trying to
12 collective what was promised to them; and you're saying they
13 never were allowed to, to do that to begin with?

14 MS. PEI: So, it is, it is both to the extent
15 that, that EU member states such as Spain, but also other
16 countries, to the extent that they offered and paid
17 subsidies to EU or, or other, to companies without first
18 getting approval from the Commission, that is unlawful state
19 aid.

20 JUDGE PILLARD: And do you think they believe the
21 ECT was the permission?

22 MS. PEI: The, to, that the investors believed the
23 ECT was permission?

24 JUDGE PILLARD: Spain did?

25 MS. PEI: I don't, I don't know what Spain

1 believed at that point. I think Spain should have been on
2 notice of its obligations under EU state aid law to notify
3 the Commission.

4 JUDGE PILLARD: But it did a lot of this?

5 MS. PEI: It did a lot of this, the payment of
6 subsidies?

7 JUDGE PILLARD: The giving of subsidies?

8 MS. PEI: Yes, and the Commission's position is
9 that Spain should not have done that without, without first
10 notifying the Commission and obtaining permission to do so.

11 JUDGE PAN: But it's not state aid if you pay a
12 subsidy to a non-EU investor?

13 MS. PEI: It also may be a question of state aid
14 in that, and that would affect the, the identity of the
15 beneficiary of the aid is not dispositive of the state aid
16 analysis. It's really whether the, the payment of an amount
17 would potentially cause distortion of competition within
18 the, within the EU.

19 JUDGE PAN: Then why can Spain pay subsidies to
20 non-EU people? It still, doesn't that still violate the
21 state aid, I guess, doctrine?

22 MS. PEI: So, the question of, I think the
23 Commission's position is that, is that there are state aid
24 implications also for, for non-EU investors investing in, in
25 the EU, they also should be on notice that the content of EU

1 law and should be --

2 JUDGE PAN: But I just don't understand the divide
3 that you're drawing between EU and non-EU investors. They -
4 -

5 JUDGE PILLARD: Is it that the ECT, as you read it
6 and as Spain reads it, was EU authorization, notice and
7 authorization for state aid to non-EU investors; and the
8 mistake was Spain extending that to EU investors?

9 MS. PEI: So, I, I don't think that the Commission
10 would, would agree that that's the ECT itself constitutes
11 authorization to pay state aid.

12 JUDGE PILLARD: Okay.

13 MS. PEI: There needs to be a formal process by
14 which the, the member state notifies the Commission of its
15 intent to pay and, and receives a decision. And just going
16 back to Judge Pan's question about --

17 JUDGE PAN: So, then why isn't your position that
18 Spain didn't have the authority to enter any of these
19 investment decisions within EU or external to EU investors
20 because it's state aid?

21 MS. PEI: So, I think the, the state aid analysis
22 would, would need to, if, if you're, if there's an award
23 against Spain that's been obtained by an EU investor, I
24 think there would still need to be a state investigation
25 and, and analysis of whether they can actually --

1 JUDGE PAN: But why not for the non-EU?

2 MS. PEI: I think there would also, I think there
3 would also need to be an analysis of that because of the,
4 because the state aid --

5 JUDGE PAN: Then why are these, why are these
6 awards enforceable as to non-EU investors, but not EU
7 investors?

8 MS. PEI: At least as, as far as the Court of
9 Justice has, has, has left the question, and it has not yet
10 definitively ruled on the, the scope of, you know, the
11 principles in, as far as they apply to third country
12 investors; but there is, the Court has left that open, but
13 it would be something that the Court would need to address
14 in the future.

15 JUDGE PAN: You know, I'm just confused by the
16 EU's position because it just doesn't seem -- I don't
17 understand that we're trying to keep the cases in alignment
18 because these have no precedential value; and now I don't
19 understand the, you know, it's important for EU order
20 because of state aid, et cetera, because there's no reason
21 to distinguish between intra-EU and outside of EU investors.
22 Like --

23 MS. PEI: Yes, so --

24 JUDGE PAN: -- your position, I don't understand -
25 -

1 MS. PEI: Yeah.

2 JUDGE PAN: -- the reasons for your positions.

3 MS. PEI: Yes. So, I'm sorry about the confusion.
4 I mean I think that the, the fundamental point here is that
5 the Commission is the, the Union's state aid regulator and
6 it has an interest in making sure that its ability to
7 evaluate and, and decide on these questions of state aid,
8 whether they, they pertain to, especially where they pertain
9 to EU investors where the law seems to have been focused;
10 but also, in future cases, it's important that the EU
11 Commission be, be the party that is able to exercise its
12 obligations and its regulatory mandate that flow from the EU
13 treaties itself.

14 JUDGE PAN: It just seems that also your interests
15 can be vindicated by allowing these things to happen; and
16 then moving for a stay of any execution of the judgment in
17 the United States; and then preceding with your, what you're
18 doing already which is determining whether Spain is allowed
19 to pay any of these judgments.

20 MS. PEI: So, I think with, with respect to that,
21 there are a couple of problems. First of all, the, the mere
22 idea of a body other than the European Commission
23 authorizing or ordering an EU member state to pay aid is
24 problematic from, from the perspective of the Commission's
25 exclusive authority in this area.

1 With respect to what should happen in, in the
2 hypothetical world in which these awards are permitted to be
3 enforced, there would be a complicated cascade of litigation
4 and, and other proceedings that would need to happen in the
5 EU. So say, for example, Spain were to pay in compliance
6 with a U.S. order, or say even that, that Spain had some of
7 its assets attached in execution --

8 JUDGE PAN: No, my thought was say that's all
9 stayed pending whatever you all decide about whether, what
10 Spain can do, what would happen?

11 MS. PEI: So, you know, then, you know, that,
12 that, then the, the EU would, would still be, I think the
13 basic point about another entity having ordered the payment
14 of aid, I think that is still fundamentally a problem for
15 the, for the Commission and one that it would, it, it takes
16 strong issue with; but I, also to your point that if, if
17 further proceedings were to be stayed, the practical
18 consequences might not be the same; but I, I just wanted to
19 lay out for the Court some of the practical consequences and
20 what they could be because if Spain were actually to, to pay
21 anything, it would, the Commission would be required to
22 order it to recover and claw back any such amounts. A
23 recovery decision itself would be in principle subject to
24 further challenge and appeal within the EU system; and that
25 I think you can take a look at the Micula decision, and that

1 case is an example of, of the very complicated machinations
2 that, that result from a state actually paying, or being
3 made to pay an award that, that is indisputably
4 unenforceable within the EU as a matter of, of both EU-law
5 and, and impermissible state aid --

6 JUDGE PAN: Well --

7 MS. PEI: -- so --

8 JUDGE PAN: -- I thought that the EU is deciding
9 whether or not it's permissible?

10 MS. PEI: Correct, but, but was, until, unless and
11 until the Commission actually issues a decision authorizing,
12 it is impermissible to --

13 JUDGE PAN: It puts Spain in a difficult position
14 because assuming that their assets in the United States are
15 seized to pay the judgment, then within the EU they would be
16 required to claw back those assets --

17 MS. PEI: Correct.

18 JUDGE PAN: -- through more litigation against
19 the, the petitioners in this case, or the investors in this
20 case?

21 MS. PEI: Correct. And, and, unfortunately, that,
22 that is, that is the, the bind that Spain would find itself
23 in; and that's, the Commission does not really have
24 discretion not to order recover; and I think that's again,
25 highlighting why, why Spain actually went to the, to the

1 courts in the EU.

2 JUDGE PAN: So, I'm sorry, what are the
3 proceedings going on to decide whether or not Spain can pay
4 these judgments or not? Like how does that work?

5 MS. PEI: So, Spain has, has notified the EU, the
6 Commission of these awards; and just, I think this goes back
7 to an earlier question you had about what is, when is, what
8 is the aid here? The aid, it's not only the, the, the
9 original subsidies, but the court has also held that the
10 payment of, or the, and the Commission understands that the
11 payment of an award, an award itself, would constitute aid.
12 So, Spain has notified the, the awards to the Commission.
13 The Commission is, is reviewing those. While it is
14 reviewing, it is impermissible and unlawful for Spain to pay
15 anything. That's the, that's the law --

16 JUDGE PAN: But does the EU just have discretion
17 to say you can pay these awards?

18 MS. PEI: It would, there are laws on, you know,
19 factors for when it would be permissible to pay state aid.
20 I think given the way that the, the, the Commission's
21 decisions and the Court's jurisprudence has developed on
22 this point, I think probably it would be quite unlikely
23 that, that these awards could be paid just based on, on the
24 way that the principles have been developing. And I also
25 would, would point out that there is no principle of state

1 aid law under which an order from, you know, a national
2 court, whether it's in the EU or outside the EU, would be a
3 reason to excuse Spain from a recovery obligation. So,
4 again, I think the, that simply is to underscore the, the
5 complicated questions that are posed by, by these particular
6 awards and the notion that --

7 JUDGE PAN: Can this law be settled? Can the EU,
8 and Spain, and these investors all get into a room and just
9 settle this?

10 MS. PEI: In terms of, in terms of settlement, I,
11 I, I think that that, too, and once again this all comes
12 back to state aid, I think that, too, could, could pose some
13 serious questions. I, I, I don't know what the, the
14 contours of all this would be; but --

15 JUDGE PAN: But does --

16 MS. PEI: -- you know --

17 JUDGE PAN: -- I'm just wondering, can the EU
18 actually, does it have authority to enter settlement
19 negotiations along with Spain and these investors, and just
20 work this out?

21 MS. PEI: In terms of the, the authority, I, I, I,
22 I don't know for sure the answer to that, to that question;
23 but --

24 JUDGE PAN: Because I guess the EU could come to
25 the table and say, well, we'd be willing to waive or, I

1 guess, allow payment of this much as state aid as part of
2 the settlement and withdraw the claw back requirement --

3 MS. PEI: Under the --

4 JUDGE PAN: -- et cetera, or --

5 MS. PEI: -- under, under existing state aid law,
6 I don't know whether that would actually be possible given
7 the, the, the content of state aid law as it stands. I
8 mean, you know, whether, whether the law would be, or could
9 be amended, I mean I think then we are really straying into
10 things that are --

11 JUDGE PAN: I'm only asking because it just seems,
12 like I'm not an expert on international law, but this case
13 cries out settlement just looking at just the complexities
14 involved in different --

15 MS. PEI: I, I agree with you about, about the,
16 the, the very high-degree of complexity of this case; and I
17 think that, that really underscores why, again, it would be
18 extraordinary for, I think, this Court to take the, the bold
19 step that the investors are inviting, particularly given
20 that the United States is not a party to the Energy Charter
21 Treaty, in particular, in just --

22 JUDGE PAN: And what's the bold step we're talking
23 about?

24 MS. PEI: The bold step of, of allowing the, the
25 enforcement of these awards, and, and seeking an anti-suit

1 injunction. I, I understand that Blasket is no longer
2 seeking an anti-suit injunction; but enjoining a foreign
3 sovereign and, and preventing the European Commission from
4 being able to enforce and carry out its regulatory mandate
5 under the state aid regime.

6 JUDGE PAN: But it's not extraordinary to just
7 enforce an award under the ICSID, which the, you know, Spain
8 is a party to? That's an extraordinary --

9 MS. PEI: Well --

10 JUDGE PAN: I understand the injunction --

11 MS. PEI: Right.

12 JUDGE PILLARD: But why is it a bold step,
13 especially in this case where if it continues in the
14 district court, the court will have a chance, you know, that
15 there, there are more bases under the New York Convention to
16 hold that an award is invalid on its merits even if
17 jurisdiction is recognized? So, what would be bold about
18 allowing this to go forward and have the arguments about
19 validity or not be vetted before the Court?

20 MS. PEI: So, I think that the, the Court still
21 needs to, even before you get to the questions about the,
22 the merits and whether enforcement could be permitted or not
23 under the New York Convention, you know, there's still, of
24 course, the threshold jurisdictional question of, of whether
25 there is an arbitration agreement. And here, where the

1 Court of Justice has spoken, has, has reached that
2 conclusion based on long-standing principles of EU law, and
3 these are principles also that are fundamental to the EU
4 legal order; and where, you know, I think that if, if you
5 are choosing between two positions and two interpretations
6 of this treaty language, one of which is consistent with the
7 views of the European courts and every relevant sovereign
8 here, including the home countries of the investors, if
9 you're choosing between that and, and on the other hand an
10 interpretation that would go against that uniform consensus,
11 that would open the door to all sorts of disruption within
12 the European Union. I think there is a, a role for, for
13 deference here.

14 JUDGE PILLARD: You don't think Stileks
15 effectively and Chevron effectively require us to hold that
16 there's jurisdiction?

17 MS. PEI: I don't. I, I think that those cases
18 all, in none of those cases was there a dispute about
19 whether there was an arbitration agreement. There, nobody
20 was arguing that there hadn't been an offer made and that,
21 and that the offer was not to, to the, you know, that there
22 hadn't been an agreement created between the people who were
23 trying to arbitrate; and now here, that, the question is
24 fundamentally different. It's a question whether Spain
25 actually could ever have entered into an agreement with

1 these people --

2 JUDGE PILLARD: Although --

3 MS. PEI: -- with these, with these parties.

4 JUDGE PILLARD: -- Stileks said the treaty, the
5 award, the, you know, the ECT, the award and the ICSID, is
6 it ICSID, or New York Convention?

7 MS. PEI: I think it was a New York Convention --

8 JUDGE PILLARD: Yeah.

9 MS. PEI: -- case, but --

10 JUDGE PILLARD: So, so there's, there, the ECT was
11 the agreement to arbitrate in that case?

12 MS. PEI: Well, I think bear in mind that, that
13 Stileks, of course, was not an intra-EU case; so, there was
14 no argument being made there that Moldova had not, did not
15 have the, the power to agree to arbitrate the dispute with
16 the relevant investor.

17 JUDGE PILLARD: No, but the move was that you
18 don't have to have, you don't need to get into Moldova and
19 the investor, the intent there, the agreement to arbitrate
20 there because the, the ECT was itself.

21 MS. PEI: So, I think that in the, in the Stileks
22 case there was, in fact, you know, the, the, the, there was,
23 there was an offer and it had been accepted by the investor;
24 and that's, you know, simply not what the argument is here.
25 I think it's the, they, the question there was the scope of

1 the dispute that was being submitted to arbitration and
2 whether the investment that was being sued about was an
3 investment that was covered by the treaty; and that, again,
4 I think, is, is a fundamentally different question from the
5 one that we're facing here about whether there was ever an
6 ability on the part of, of Spain and sovereign to agree to
7 this, to arbitrate with an intra-EU investor.

8 JUDGE PAN: Can I ask you, I guess it was
9 represented to us that this argument that you're making, or
10 Spain has made, has been run up the flagpole in a bunch of
11 different arbitration settings and has been shot down; and
12 so, I'm just wondering, those awards, have they been paid
13 and have you been trying to claw them back; or what has
14 happened in those 30 other --

15 MS. PEI: So, in those, in those other cases, I
16 mean I think the position is probably similar with respect
17 to the, to the, the Spanish awards. You know, they, I don't
18 believe that Spain has actually paid any of them yet because
19 of the state aid implications; and the Commission will need
20 to evaluate and issue its decision about whether or not the
21 awards can be paid.

22 JUDGE PAN: All right. So, the, it's not
23 extraordinary then because they're the other awards are out
24 there?

25 MS. PEI: But they're, they haven't, there,

1 there's, they are not, they haven't been enforced.

2 JUDGE PAN: Oh, you mean they haven't been
3 confirmed?

4 MS. PEI: They, yes, that's correct. Yeah --

5 JUDGE PAN: You know --

6 MS. PEI: -- I mean, they're, I think these are
7 the first three cases that have made it up to the --

8 JUDGE PAN: I see.

9 MS. PEI: -- Court of Appeals and I think you, you
10 raise a good point that there are multiple other cases
11 involving these same kind of facts. I think there are
12 probably about a dozen others in the district court at the
13 moment. They implicate not just Spain, but here are cases
14 against Italy as well; cases also against, I think, Croatia
15 and Poland. So, this is not just a, an issue that's
16 confined to the three cases that the Court is hearing today.

17 JUDGE PAN: I see. Thank you.

18 MS. PEI: If the Court has no further questions, I
19 thank the Court for the opportunity to present the
20 Commission's views.

21 JUDGE PAN: Thank you.

22 JUDGE PILLARD: Thank you very much.

23 ORAL ARGUMENT OF SHARON SWINGLE (DOJ), ESQ.

24 ON BEHALF OF THE AMICUS CURIAE UNITED STATES OF AMERICA

25 MS. SWINGLE: I know it's been a long morning, if

1 the Court has questions, I'm welcome to answer them; but,
2 otherwise, we would just rest on our briefs.

3 JUDGE PILLARD: I had a question about, so, so the
4 United States filed an amicus brief in the Nigeria case,
5 Process & Industrial Development v. Republic of Nigeria, and
6 you argued that it wasn't required that there be a valid
7 arbitral award under the Foreign Sovereign Immunities Act
8 because the New York Convention in its implementing
9 legislation only require an arbitration award, not a valid
10 one; and I wondered whether, you know, here the question is
11 whether there's a valid agreement, not a valid award. Does
12 the same principle apply or no?

13 MS. SWINGLE: I don't think so, Your Honor. I
14 think there, there does need to be an actual agreement to
15 arbitrate formed as a precondition whether to compel
16 arbitration or to enforce a resulting award. I mean I think
17 the point is somewhat different and I, I think it, it is
18 consistent with and flows from the text of the FSIA as well
19 --

20 JUDGE PILLARD: Oh.

21 MS. SWINGLE: -- which provides for an action to
22 confirm an award made pursuant to such an agreement to
23 arbitrate; and, you know, obviously, under the New York
24 Convention, it retains the discretion to enforce an award
25 that is no longer valid in the sense that it's been

1 nullified perhaps by a court of the primary jurisdiction.
2 So, I think that that is the distinction we've addressed in
3 our --

4 JUDGE PILLARD: Thank you again for --

5 MS. SWINGLE: Thank you, Your Honor.

6 JUDGE PILLARD: -- appearing at our request. Mr.
7 McGill.

8 REBUTTAL ARGUMENT OF MATTHEW D. MCGILL, ESQ.

9 ON BEHALF OF THE APPELLANT BASKET RENEWABLE

10 INVESTMENTS, LLC

11 MR. MCGILL: Big finish. There's been no answer
12 presented to BG Group and its holding that there is an
13 investment treaty and already formed arbitration contract.
14 That holding is the basis for Chevron's conclusion that the
15 issue there in that case was a scope question to be
16 addressed at the merits. Stileks, Chevron and BG Group all
17 dealt with challenges to the scope of consent. To be sure,
18 this one comes in a little different packaging, but they all
19 were about the scope of the state's consent; and in each
20 case this Court and the Supreme Court held that those were
21 arbitrability issues meant for the merits. Belize, Al-
22 Qarqani and Lloyds, none of those cases involve investment
23 treaties. They are, instead, commercial arbitration, bi-
24 lateral commercial arbitration agreements, and that makes
25 all the difference. If the Prime Minister of Belize didn't

1 have authority to enter into an agreement at all, this
2 bilateral treaty, then that is indication that there would
3 be no agreement to arbitrate. That's not the case here.
4 There is no dispute that Spain entered into the ECT and that
5 it remains in force and effective at least as to non-EU
6 states.

7 The EU itself, apparently the CJEU that is, does
8 not view this as a capacity or formation problem. We heard
9 counsel for Spain say that this consent is, quote, "Lacking
10 force," or is void ab initio. Those are not formation
11 issues. Those are validity issues under Buckeye Check
12 Cashing. They are arbitrable.

13 Judge Pillard, you asked about first options and
14 the first opinion rule. I would point to the Second
15 Circuit's case in Olin where it's 73 F.4th at 107; and it
16 says there that the first options rule doesn't apply where
17 Libya, quote, "Independently urged the tribunal to decide
18 issues of arbitrability." That is exactly what happened
19 here. The oddity here is that Spain is seeking a level of
20 view at the jurisdictional phase that it cannot possibly
21 obtain at the merits phase. That turns the whole purpose of
22 the 1988 amendments on their head. It was supposed to
23 streamline the path to enforcement, ensure that there was
24 jurisdiction, not make it more difficult.

25 On the merits here, of course, arbitration

1 decisions are highly relevant to international law
2 arbitration. What is going on here is an overwhelming
3 consensus that EU law does not diminish member states'
4 treaty commitments. It's an overwhelming consensus
5 rejecting this idea of the premises of EU-law within the
6 international law domain.

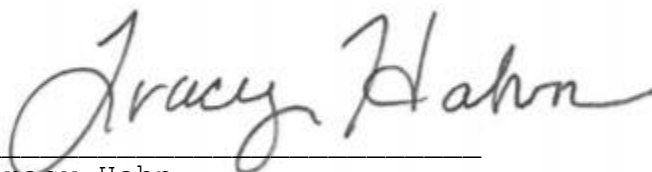
7 Finally, on state aid, this court, of course, has
8 an unflagging obligation to exercise subject matter
9 jurisdiction where it exists, whatever the European
10 Commission says about state aid. Treat, it also has, the
11 United States has a treaty obligation to enforce awards;
12 there's a statutory obligation of this Court to enforce
13 awards; and there's been no finding that the awards in our
14 case are state aid at all. Thank you, Your Honors.

15 JUDGE PILLARD: Thank you. The case is submitted.

16 (Whereupon, the proceedings were concluded.)
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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script that reads "Tracy Hahn". The signature is written in black ink and is positioned above a horizontal line.

Tracy Hahn

March 11, 2024

Date

eScribers, LLC