IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOL HUNGARIAN OIL AND GAS PLC, *Petitioner*, v. **THE REPUBLIC OF CROATIA,** *Respondent*.	Civil Action No. 23-cv-218 (AHA)

EXPERT DECLARATION OF ANDREA K. BJORKLUND

TABLE OF CONTENTS

Page

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

2. This report has five parts. The first offers a summary of my conclusions. The second outlines my qualifications. The third discusses the development of the international investment regime, and in particular the conclusion of investment protection agreements that contain investment arbitration provisions. The fourth addresses the enforcement of awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").[1] The fifth looks more particularly at the relationship between the Energy Charter Treaty (the "ECT")[2] and the treaties of the European Union ("EU") from the perspective of public international law.

I. Summary of Conclusions

3. States party to the ICSID Convention created a system of robust enforcement of arbitral awards to encourage foreign direct investment and ensure that foreign investors whose property was injured or taken in violation of international law could gain redress easily. Thus, each ICSID Member State must enforce awards of tribunals convened under that Convention as if they were final judgments of the courts of that State. The award may not be reviewed by the enforcing court for any reason; the only recourse against the award is found in the ICSID system itself. Consequently, recognition and enforcement in a U.S. court of an ICSID award such as the one in this case is essentially automatic.

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 U.S.T. 1270 (Mar. 18, 1965), Ex. I to First Losco Declaration, ECF 1-10.

[2] Energy Charter Treaty, 2080 U.N.T.S. 95 (Dec. 17, 1994), Ex. H to First Losco Declaration, ECF 1-9.

4. The United States has undertaken obligations under the ICSID Convention to enforce awards rendered pursuant to that treaty. Respect for the United States' obligations under the ICSID Convention thus dictates enforcement of the award in this case.

5. Intra-EU investment disputes are arbitrable under the plain language of the ECT. Article 26 of the Treaty contains the Contracting Parties' clear offer to arbitrate claims made by an investor from another Contracting Party that the host State failed to abide by the protections found in Part III of the ECT. Hungary and Croatia—the relevant States here—are both unquestionably Contracting Parties to the ECT. They entered into an agreement—the ECT—for the benefit of investors from Contracting Parties.

6. The Petitioner here, incorporated in Hungary, accepted the offer extended by Croatia to arbitrate their ECT dispute under the framework of the ICSID Convention.

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

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

9. Neither Croatia nor any other EU Member State, nor the EU itself, has explicitly modified the ECT, though several states (not including Croatia or Hungary) have submitted their notices of withdrawal. At all times relevant for the purposes of this dispute Croatia was a party to

the ECT. It remains valid under international law, and its Contracting Parties must in good faith honor their obligations under it pursuant to the principle of *pacta sunt servanda*.

10. Contrary to Croatia's arguments, principles of public international law dictate that the ECT prevails over EU law. First, the ECT contains a hierarchical clause (Article 16) specifically providing that if there are conflicts between the ECT and other treaties (such as the EU Treaties) to which the Contracting Parties adhere regarding protection of investments and dispute settlement, investors under the ECT may choose whichever regime is more favorable to them. Here, the investors chose arbitration under the ECT.

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

12. Third, the autonomy of EU law is a principle of EU law, but not of international law. States may not invoke domestic law as justification for failing to abide by their international legal obligations. Croatia has obligations under both the ECT and the ICSID Convention. The fact that EU law is itself treaty-based does not lead to a different conclusion.

13. Fourth, the principle of "primacy" of EU law cannot be invoked to render international law, and the EU member states' international commitments, meaningless. International law is what renders EU law enforceable on the international plane, and EU law is thus also governed by the principles of good faith and *pacta sunt servanda*.

II. Qualifications

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

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

16. I earned a Juris Doctor (J.D.) from Yale Law School in 1994. I also hold an M.A. in French Studies from New York University and a B.A. (with High Honors) in History and French from the University of Nebraska, Lincoln. I clerked for Judge Sam J. Ervin, Jr., on the U.S. Court of Appeals for the Fourth Circuit.

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

18. My experience with international investment law started approximately 29 years ago when I was still in private practice at Miller & Chevalier, Chartered, in Washington, DC. As a member of the firm's international group, I worked on arbitrations, on trade remedies cases, on a constitutional challenge to Chapter XIX of the North American Free Trade Agreement ("NAFTA"), on the then-ongoing negotiations for a multilateral agreement on investment that occurred under the auspices of the Organisation for Economic Co-operation and Development, and on a variety of other matters.

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

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

21. I am a recognized expert in international investment law and in public international law. I am a Vice President of the American Society of International Law. I have served as an expert for international organizations. In 2014, I was named the inaugural ICSID Scholar in Residence. I consulted with the United Nations Conference on Trade and Development ("UNCTAD") to prepare the updated volume of their "pink series" manuscript on investor-State dispute settlement, which was published in 2014. I have served as a consulting or testifying expert, for both claimants and respondents, in several investment cases. I frequently sit as an arbitrator in investment treaty disputes.

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

23. I have been retained by MOL Hungarian Oil and Gas PLC to provide an expert opinion on the relationship between public international law, EU Law, and the ECT. Specifically, I was asked to consider as a matter of international law:

(a) whether EU law has any effect on the enforceability in the United States of the Final Award in *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, ICSID Case No. ARB/15/16, Award (July 5, 2022);

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

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

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

(a) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, No. 1:23-cv-00218 (RDM), Petition to Enforce Arbitration Award (Jan. 25, 2023), ECF 1 (the "Petition");

(b) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, No. 1:23-cv-00218 (RDM), Arbitral Award (Jan. 25, 2023), Ex. A to First Losco Declaration, ECF 1-2 (the "Award");

(c) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, No. 1:23-cv-00218 (RDM), Memorandum of Points and Authorities in Support of the Republic of Croatia's Renewed Motion to Dismiss the Petition (Oct. 14, 2024), ECF 31-1 (the "Renewed Motion to Dismiss");

(d) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, Civ. Action No. 1:23-cv-00218 (RDM), Expert Declaration of Professor Steffen Hindelang (Oct. 14, 2024), ECF 31-22 ("Hindelang Declaration");

(e) *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, No. 23-7031 ("NextEra"); *9Ren Holdings S.A.R.L. v. Kingdom of Spain*, No. 23-7032 ("9Ren"); *Blasket Renewable Investments v. Kingdom of Spain*, No. 23-7038 (D.C. Cir. Aug. 16, 2024) ("Blasket");

(f) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, ICSID Case No. ARB/13/32, Opinion of Sir Alan Dashwood (Oct. 12, 2016), attached hereto as Exhibit 2; and

(g) *MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, ICSID Case No. ARB/13/32, Opinion of Paul Craig (Jan. 30, 2017), attached hereto as Exhibit 3.

25. I am being compensated at a rate of US $800 per hour for my work on this matter.

26. I have no familial or business relationship or affiliation with any of the parties in the above-captioned matter. I have never provided legal advice to them or represented them in any capacity. I have provided a legal opinion on similar matters in seven other enforcement proceedings regarding awards in ECT cases brought by EU investors against the Kingdom of Spain: *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, No. 1:18-cv-1686 (D.D.C.); *Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar B.V. v. Kingdom of Spain*, No. 1:18-cv-1753 (D.D.C.); *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, No. 1:19-cv-03783-CJN (D.D.C.); *Hydro Energy 1, S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, No. 1:21-cv-02463-RJL (D.D.C.); *AES Solar Energy Coöperatief U.S. and Ampere Equity Fund B.V. v. Kingdom of Spain*, No. 1:21-cv-03249-RJL (D.D.C.); *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, No. 1:2-cv-01708-EGS (D.D.C.); *Infrared Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, No. 1:20-cv000817-JDB (D.D.C.); *BayWa r.e. A.G. v. Kingdom of Spain*, No. 1:22-cv-2403-APM (2023); and *Mercuria Energy Group Limited v. Republic of Poland*, No. 1:23-cv-03572 (TNM).

III. The Law of International Investment Protection

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

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

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

29. The Commission dealing with State Responsibility, however, was not able to agree on a draft Convention due to the dissent of primarily capital-importing States.[4] Further attempts were made to codify the law of State responsibility once the International Law Commission was established after the Second World War.

30. Debates about multiple issues, including the exact content of customary international law, stymied the successful completion of a codification.[5] In fact, in the early 1960s,

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[3] Research in International Law at Harvard Law School, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. SPEC. SUPP. (i) 133 (1929), attached hereto as Exhibit 4.

[4] Edwin M. Borchard, *Responsibility of States*, at the Hague Codification Conference, 24 AM. J. INT'L L. 517, 518 (1930), attached hereto as Exhibit 5.

[5] Eventually the International Law Commission revised the scope of the codification project to address "secondary rules" of State responsibility—those provisions that apply once the breach of a "primary rule" has been established. These Articles on State Responsibility were adopted by the United Nations General Assembly in 2001. *Responsibility of States for Internationally Wrongful Acts*, Y.B. INT'L L. COMM'N, Vol. II, Part 2 (2001) ("Articles on State Responsibility"), https://tinyurl.com/bdfmecs2.

the U.S. Supreme Court recognized the uncertainty surrounding the definition of expropriation in the *Sabbatino* case.[6]

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

B. The Era of International Investment Agreements

32. Against this uncertain background, States sought to develop treaties that would clarify the existence and content of those customary international law obligations and turn them into conventional obligations that would protect foreign investors. Western European countries were the first to negotiate significant numbers of bilateral investment treaties ("BITs") with such obligations. The German-Pakistan treaty of 1959, for example, is generally described as the first BIT. Other European countries, including the United Kingdom, Germany, and France, also developed active investment treaty programs.[8] The United States' investment treaty program

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

[7] *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 477-85 (Cambridge Univ. Press, 2d ed., 2004), attached hereto as Exhibit 6.

[8] According to UNCTAD's Investment Policy Hub, Germany has 174 International Investment Agreements in force; France has 144; and the United Kingdom has 106. *Investment Policy Hub, International Investment Agreements Navigator*, UNCITAD, https://tinyurl.com/ye2436mm.

gained momentum in the 1980s; prior to that time the United States had negotiated Treaties of Friendship, Commerce, and Navigation, which are often viewed as the precursors to modern BITs.[9]

33. International investment agreements today include BITs, investment chapters in free trade agreements, and sectoral treaties. While most often bilateral, they can be multilateral. NAFTA had an investment chapter (Chapter 11), as do its successor the United States – Mexico – Canada - Agreement and the Comprehensive and Progressive Trans-Pacific Partnership. UNCTAD now counts 2,616 investment agreements in force.[10]

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

Substantive Protections

35. Protections typically included in investment treaties include the obligation not to discriminate against foreigners in favor of domestic entities (national treatment); the obligation to accord equal treatment to all foreign investors (most-favored-nation treatment); the obligation to accord fair and equitable treatment and full protection and security (due process obligations); and the obligation not to expropriate property except in accordance with due process, on a non-

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[9] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158-59, 170-75 (2005), attached hereto as Exhibit 7.

[10] *Investment Policy Hub, International Investment Agreements Navigator*, UNCITAD, https://tinyurl.com/ye2436mm (2221 BITs and 395 treaties with investment provisions).

discriminatory basis, for a public purpose, and upon payment of prompt, adequate, and effective compensation (expropriation).[11]

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

Access to Arbitration

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

38. Arbitration as a means of resolving disputes between States, and of resolving disputes between citizens of one State and another State, has a long pedigree. The Jay Treaty of 1794 established a mixed claims commission composed of arbitrators from the United States and Great Britain to determine whether claims for redress by U.S. persons against Great Britain for British seizures of American ships (or other property), and for redress by British persons whose property was seized by captures within the United States, would be resolved by arbitration.[13]

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

[12] Case No. C-284/16, *Slowakische Republik v. Achmea BV*, Opinion of Advocate General Wathelet (Sept. 19, 2017), ECLI:EU:C 2017:699, https://tinyurl.com/3hsncraj.

[13] Treaty of Amity, Commerce and Navigation, London, U.S.-U.K., 8 Stat. 116 (Nov. 19, 1794), https://tinyurl.com/5c8sewze.

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

40. Investment treaty arbitration is slightly different from commercial arbitration in that it is forward looking. The treaty acts as a standing offer by the States party to the treaty to arbitrate disputes covered by the treaty—disputes relating to investments in the territory of the host State. Investors who have the nationality of one of the other parties to the treaty (usually referred to as the "home" State) can accept the offer by commencing an arbitration. The investment treaty will usually contain several options from which the investor may choose with respect to the arbitration, including, for example, arbitration under the ICSID Convention, which entered into force in 1966 and had 158 State parties as of November 22, 2024,[15] or ad hoc arbitration under the UNCITRAL Rules.[16]

41. Arbitration is attractive for many reasons, but one of them is the robust international mechanism for the enforcement of arbitral awards. The ICSID Convention is one such regime; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[17] (popularly known as the "New York Convention") is the other significant treaty with global reach.

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[14] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 44-45 (Kluwer Law Int'l 2009), attached hereto as Exhibit 8.

[15] *Database of ICSID Member States*, ICSID, https://tinyurl.com/3rwmbar8.

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

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), 21 U.S.T. 2517.

C. The Energy Charter Treaty

42. The investment treaty in this case—the ECT—represents the same type of bargain as other modern international investment agreements. It is a multilateral, sectoral agreement that seeks to facilitate long-term cooperation in the energy field, which would "not take place without a massive transfer of capital and technology, particularly to the States with significant energy resources but insufficient means to develop them."[18]

43. The ECT was finalized on December 17, 1994; it entered into force in April 1998.[19] The EU itself is a Contracting Party, as were more than 50 other countries at its zenith. Croatia became a Contracting Party to the ECT in 1998, when it was not yet an EU Member State.[20] It joined the EU on July 1, 2013.[21]

44. For most of its duration every EU Member State was a party to the ECT. In more recent years, many EU Member States have withdrawn from the ECT: Italy withdrew effective January 1, 2016; France (effective December 8, 2023), Germany (effective December 20, 2023), Poland (effective December 29, 2023), and Luxembourg (effective June 17, 2024) have also withdrawn.[22] Other states, and the European Union, have notified their intent to withdraw but

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18 Jeswald Salacuse, *The Energy Charter and Bilateral Investment Treaty Regime*, in Thomas Wälde (ed.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 321, [322], 328 (Kluwer Law Int'l 1996), attached hereto as Exhibit 9.

19 ECT at 8.

20 *Members and Observers: Croatia*, INT'L ENERGY CHARTER, https://tinyurl.com/2w6cbz9z.

21 *Membership Status: Croatia* (as of July 1, 2013), EUROPEAN COMM'N, https://tinyurl.com/37ws4ywx.

22 *News: Jordan is the 51st Contracting Party to the ECT*, INT'L ENERGY CHARTER (Dec. 12, 2018), https://tinyurl.com/yvchjj6n; *What's New*, INT'L ENERGY CHARTER, https://tinyurl.com/yetn4xp6.

remain parties until one year after their notice of withdrawal is deposited: the United Kingdom, Spain, Ireland, Denmark, Portugal, Slovenia, the Netherlands, and the European Union.[23]

45. Neither Croatia nor Hungary has withdrawn from the Energy Charter Treaty; they thus remain bound to uphold the investment protections provided in the treaty. Even those states that have withdrawn remain bound to uphold those obligations and to arbitrate disputes arising from them with respect to existing investments for 20 years after their exit from the treaty.[24]

46. The ECT started with the negotiation of the non-binding European Energy Charter, a process initiated by a proposal from the Dutch government.[25] While it involved many European states, it was not solely a European project. Russia, Canada, and the United States, to name just a few countries, were instrumental in influencing the treaty's negotiation. Graham Coop, the former General Counsel to the ECT Secretariat, noted:

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

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[23] *News: Written notification of withdrawal from the Energy Charter Treaty*, INT'L ENERGY CHARTER (May 17, 2024), https://tinyurl.com/35x7pdkb (regarding Spain); *News: Written notification of withdrawal from the Energy Charter Treaty*, INT'L ENERGY CHARTER (May 28, 2024), https://tinyurl.com/2dd3pxbr (regarding the United Kingdom); *News: Written notification of withdrawal from the Energy Charter Treaty*, INT'L ENERGY CHARTER (May 28, 2024), https://tinyurl.com/2wa7f2br (regarding the Portuguese Republic and Slovenia); *News: Written notification of withdrawal from the Energy Charter Treaty*, INT'L ENERGY CHARTER (July 12, 2024), https://tinyurl.com/y8mck9de (regarding the European Union and the Kingdom of the Netherlands); "Ireland confirms withdrawal from Energy Charter Treaty," IRISH LEGAL NEWS (June 4, 2024), https://tinyurl.com/mscm8p8a; *see also* European Parliament, Plenary Sitting (2019–2024), Recommendation on the Draft Council Decision on the Withdrawal of the Union from the Energy Charter Treaty, A9-0176/2024 (Apr. 11, 2024), https://tinyurl.com/murwnxwu.

[24] ECT art. 47(3).

[25] Graham Coop, *The Energy Charter Treaty: More than a MIT*, in Clarisse Ribeiro (ed.), INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 3, 4-5 (Juris 2006), attached hereto as Exhibit 10.

term "European", which had formed part of the title of the Charter, was dropped from the title of the Treaty.[26]

47. One of the ECT's primary negotiators has emphasized the difficulties in completing the negotiations due to the divergent interests of the negotiating parties: "The slightly more than three years that it took to agree the Treaty is a relatively modest period within which to complete a treaty of such scope, complexity, novelty and political sensitivity among so many parties having divergent interests."[27] Some of those divergent interests were among Western states; others showed fundamental differences in ideas between Western and non-Western states.[28] The resulting ECT is thus a multilateral instrument, which imposes international law disciplines on its Member States, not European law disciplines. Although it is a multilateral agreement, the provisions of BITs are the most relevant precedent for the protections for investors found in the ECT, and the practice of (and negotiators from) the United States and European countries influenced the investment protection provisions in the treaty.[29]

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[26] *Id.* at 5. The ECT Secretariat's website shows the large number of successive drafts of the European Energy Charter, which later evolved into the Energy Charter Treaty—22 different iterations—suggesting that coming to an agreement was not an easy matter. *Drafts of the Energy Charter Treaty* (as of Dec. 1, 2016), INT'L ENERGY CHARTER, https://tinyurl.com/2p9pdh7h.

[27] Craig S. Bamberger, *Overview*, in Thomas Wälde (ED.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 2 (Kluwer Law Int'l 1996), attached hereto as Exhibit 11.

[28] Julia Doré, *Negotiating the Energy Charter Treaty*, in Thomas W. Wälde (ED.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 140-41, 143-44 (Kluwer Law Int'l 1996), attached hereto as Exhibit 12 (noting differences between the U.S. and Norway, and between the US and France, among others, during the negotiations); *id.* at 145-46 (noting Eastern countries' dissatisfaction with proposals for investment protection in particular).

[29] Salacuse, *supra* n.18, at 322 (the "concepts, principles, and terminology of the Energy Charter Treaty owe an undeniable debt to the concepts, terminology and principles employed in bilateral investment treaties").

IV. Enforcement of Awards under the ICSID Convention

48. The ICSID Convention was drafted in the early 1960s, was finalized in 1965, and entered into force in 1966. The moving force behind it was the then-General Counsel of the World Bank, Aron Broches. Although attempts to codify substantive international law were not proving successful, Mr. Broches and others thought there was an appetite for dispute settlement mechanism given the number of times the then-President of the World Bank was asked to mediate or arbitrate investment disputes.[30]

49. The ICSID Convention thus established a framework for the settlement of investment disputes. It contains provisions on both conciliation and arbitration, though the arbitration rules have been invoked much more frequently than the conciliation rules. As of mid-2024, ICSID reported having registered 897 ICSID Convention arbitration cases, 80 ICSID Additional Facility Arbitration cases, 12 Convention conciliation cases, and 2 ICSID Additional Facility conciliation cases over the course of its existence.[31] In cases brought under the ICSID Convention and under ICSID's Additional Facility Rules that have been decided by tribunals (as opposed to settled) tribunals have declined jurisdiction in 20% of cases.[32]

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[30] ANTONIO R. PARRA, THE HISTORY OF ICSID 22-26 (Oxford 2012), attached hereto as Exhibit 13.

[31] *See The ICSID Caseload—Statistics, Issue 2024-2*, ICSID 2 (June 30, 2024), https://tinyurl.com/mr37bdec. Until July 2022, cases brought under the additional facility involved one ICSID Convention party, or an investor from one ICSID Convention party, and one non-ICSID Convention party, or an investor from a non-ICSID Convention party. Those cases are not decided under the ICSID Convention are not subject to its enforcement obligations.

[32] *Id.* at 13.

50. The ICSID Convention is available for the resolution of investment disputes so long as both the host State of the investment and the home State of the investor are parties to the ICSID Convention.

A. Purpose and Design of the ICSID Convention

51. The object and purpose of the ICSID Convention was to create a more stable environment for foreign investment by ensuring that investment disputes would be subject to neutral dispute settlement resulting in an award enforceable in all States party to the ICSID Convention. This would help ensure that the prevailing party would not be obliged to enforce the judgment only in the respondent State, which might frustrate such enforcement efforts for political or public policy reasons.

52. While States have frequently voluntarily complied with their obligations under the ICSID Convention, where they have not, the ability of investors to enforce the award in any of the States party to the ICSID Convention is of utmost importance. One of the goals of the ICSID Convention was to reassure investors that they need not depend on the host State, with which they were already in dispute, should voluntary payment not be forthcoming. As Stefan Kröll has observed, a state's refusal to pay an award "is usually coupled with an inability of the investor to find judicial or administrative support for enforcement in that country itself. In such cases the only opportunity for a successful party to benefit from the orders made in the award is to get it enforced and executed in a different country."[33]

53. With this context, the ICSID Convention was designed to provide access to arbitration that is both self-contained and "a-national." An arbitral tribunal is convened to hear an

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[33] Stefan Kröll, *Enforcement of Awards*, in Marc Bungenberg et al. (eds.), INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1483 (C.H. Beck 2015), attached hereto as Exhibit 14.

individual dispute. There is no "place" of arbitration in ICSID Convention arbitration the way that there is in non-ICSID arbitrations, where a link to a national jurisdiction confers authority on the courts of that jurisdiction to assist the arbitration and to police the integrity of the proceedings.

54. In an ICSID arbitration, the only recourse against an award is annulment under Article 52 of the ICSID Convention. In an annulment proceeding, an *ad hoc* committee, comprised of three ICSID panel members selected to hear the dispute by the Chairman of the World Bank, decides whether annulment should be permitted, in whole or in part. The ICSID panel is composed of individuals nominated by States party to the ICSID Convention and 10 members chosen by the Chairman of the World Bank.

55. One of the fundamental features of arbitration is that decisions are final and binding and not subject to iterative appeals and remands. Control mechanisms, such as ICSID's annulment regime, ensure that the arbitral process is fair but do not permit review of the merits outside ICSID itself.

56. In keeping with the prioritization of finality, ICSID awards are fully enforceable when rendered unless one of the parties applies to annul the award, resulting in an automatic provisional stay of enforcement until the *ad hoc* annulment committee is constituted and rules on whether to continue the stay. If the *ad hoc* annulment committee lifts the provisional stay of enforcement, the award becomes immediately enforceable again.

B. Recognition, Enforcement, and Execution of ICSID Convention Awards

57. In a non-ICSID arbitration, a losing party can seek to have the award set aside in the courts of the place of arbitration on grounds found in the applicable arbitration law. That is not the case under the ICSID Convention.

58. Instead, the States party to the ICSID Convention made reciprocal promises to each other that they would recognize an arbitral award rendered by a tribunal convened under the ICSID

Convention "as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[34] The United States, as a Party to the ICSID Convention, thus has an obligation to enforce this award under the terms of the Convention.

59. This process contrasts markedly with the enforcement scheme under the New York Convention, which permits the judgment debtor to resist enforcement on five enumerated grounds; it also gives the enforcing court the discretion not to enforce the award if (1) the subject matter of the dispute is not considered arbitrable in the enforcing State or (2) if enforcement would violate the public policy of the enforcing State.[35]

60. Unlike the New York Convention, the ICSID Convention does not permit challenges to an ICSID award on the basis of public policy, or, indeed, on any other ground.[36] Post-award review of ICSID awards in national courts is not permitted by the Convention. As the ALI Restatement of the U.S. law of International Commercial and Investor-State Arbitration notes: "The ICSID Convention drastically curtails post-award review of ICSID Convention awards. . . .

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[34] ICSID Convention art. 54(1).

[35] New York Convention art. V. Note that under the New York Convention the question is whether the award violates the public policy of the enforcing State, here the United States, and not the public policy of the party seeking to resist enforcement. In other words, the New York Convention does not ask whether enforcement of an investment treaty arbitral award violates the public policy of the European Union or one of its Member States, but only whether enforcement would violate the public policy of the United States itself.

[36] To this effect, the American Law Institute has approved the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, which provides that "the Convention identifies in Article 54 no grounds on the basis of which recognition or enforcement of such awards may be denied," and that "Articles 53 and 54 of the Convention make it clear that the national courts are to enforce ICSID Convention awards as rendered and exclude resort to any remedies other than those provided for in the Convention itself." *Restatement (Third) U.S. Law of Int'l Comm. Arb.* §§ 5.5, cmt. (b), 5.6 cmt. a(vii) (2019). The draft has been approved by the ALI Membership and Council subject to minor editorial changes.

The ICSID Convention imposes on courts of contracting States an obligation to recognize and enforce such awards. It identifies no grounds on which a court may decline to do so."[37] In *NextEra v. Republic of Spain*, the D.C. Circuit rightly noted that Spain's objections to the existence (or lack thereof) of an arbitration agreement were properly categorized as review of the merits of the case, rather than as a jurisdictional objection.[38] The ICSID Convention, however, does not permit enforcing courts to engage in that review. "If States could always argue that this particular tribunal lacked jurisdiction, whether because of an incompatibility with EU law or for some other reason, they could effectively mount a challenge to any ICSID Convention award." [39] Only annulment committees convened under the ICSID Convention have the authority to assess whether an ICSID Convention tribunal engaged in a "manifest excess of power" and thus should be annulled.

C. The ICSID Convention's Effect on Sovereign Immunity

61. The ICSID Convention's recognition and enforcement provisions embody the Contracting Parties' agreement to waive immunity to the jurisdiction of domestic courts for the recognition and enforcement of ICSID awards.

62. While foreign states are presumptively immune from the jurisdiction of national courts, unless an exception applies, municipal laws generally distinguish between jurisdictional immunity and execution immunity, a distinction that finds support in both customary international law and international treaties on immunity.[40] Jurisdictional immunity has to do with the obligation

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37 *Id.* § 5.5, cmt. (b).

38 NextEra at 25-27.

39 On recent cases involving enforcement of ICSID awards, *see* Andrea K. Bjorklund et al., *State Immunity as a Defense to Resist the Enforcement of ICSID Awards*, 35(3) ICSID REV.—FILJ 1, 13 (2020), attached hereto as Exhibit 15.

40 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 601-03 (Oxford Univ. Press 2013), attached hereto as Exhibit 16.

of a foreign state to appear before a court, whereas execution immunity refers to the immunity possessed by a State's assets. A State can waive jurisdictional immunity without waiving its execution immunity. The U.S. Foreign Sovereign Immunities Act ("FSIA") recognizes this distinction and contains provisions on immunity from execution separate from its provisions on immunity from suit.[41] The ICSID Convention also makes this distinction.

63. The ICSID Convention embodies a waiver of the first type of immunity, jurisdictional immunity, as Contracting Parties agree that ICSID awards are final and will be subject to enforcement against all Contracting Parties in the courts of any other Contracting Party. Specifically, Article 53 of the ICSID Convention provides that the "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[42] Moreover, "[e]ach party shall abide by and comply with the terms of the award."[43] Under Article 54 of the Convention, State Parties further agree to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[44]

64. The Parties' agreement to enforce final awards as binding in the courts of any other Contracting Party does not depend on domestic courts' assessment of matters already decided by the tribunal, such as whether the tribunal has jurisdiction over the dispute. Indeed, under Article 41 of the ICSID Convention, Contracting Parties have already assigned to the tribunal authority to determine its own jurisdiction, which is final and binding, subject only to remedies within the

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41 *See* 28 U.S.C. §§ 1609, 1610 (statutes regarding immunity from attachment and execution and exceptions therefrom).

42 ICSID Convention art. 53(1).

43 *Id.*

44 *Id.* art. 54(1).

Convention. The ICSID Convention thus avoids any impediments to enforcement found in treaties or domestic laws applicable to the enforcement of foreign judgments or awards.[45]

65. A number of courts have therefore recognized that Contracting Parties waive their immunity to enforcement of ICSID awards against them under the Convention.

66. In one of the first cases on this issue, *Benvenuti & Bonfant v. The People's Republic of the Congo*, the French appellate court upheld its jurisdiction for purposes of recognition and enforcement under Article 54 of the ICSID Convention.[46]

67. In 1986, the Southern District of New York came to a similar conclusion in *LETCO v. Liberia*, holding that "Liberia, as a signatory to the [ICSID] Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention."[47] Although the dispute was between a French entity and Liberia, the court further determined that "Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award."[48] More recent U.S. cases have come to the same conclusion. In *Blue Ridge Investments, LLC v. Republic of Argentina*, for example, the Second Circuit noted that "Argentina waived its sovereign immunity by becoming a party to the ICSID Convention."[49] And, of course, the DC Circuit has just determined in *NextEra* that the Energy

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45 CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION, A COMMENTARY 1117-18 (2d ed. 2009), attached hereto as Exhibit 17.

46 *Benvenuti & Bonfant v. The People's Republic of the Congo*, Cour D'appel de Paris (1e Ch. Suppl.) (June 26, 1981), attached hereto as Exhibit 18.

47 *Liberian E. Timber Corp. v. Gov't of Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986).

48 *Id*. at 76-77.

49 *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013).

Charter Treaty is an investment treaty that contains an agreement for the benefit of the investor, such that U.S. courts may exercise jurisdiction over the enforcement proceedings when there is an arbitral award resulting from those proceedings.[50] There, since the court found an agreement to arbitrate, it did not need to reach the waiver issue.

68. The High Court of New Zealand has come to the same conclusion with respect to an arbitral award rendered under the France-Hungary BIT. Hungary argued, *inter alia*, that the New Zealand court lacked jurisdiction because Hungary had not expressly consented to its exercise of authority over Hungary. The High Court dismissed this argument, noting that Hungary had no ability to claim state immunity from the recognition of the award, even if it retained the ability to argue immunity from execution under Article 55 of the ICSID Convention.[51] The High Court further emphasized New Zealand's international obligation to recognize the award, an obligation flowing from New Zealand's adherence to the ICSID Convention.[52]

69. This recent New Zealand decision is congruent with a decision of the High Court of Australia, which rejected Spain's invitation to take cognizance of the *Komstroy* decision, but found that by ratifying the ICSID Convention, Spain had agreed to submit itself to the jurisdiction of the Court and the subsequent recognition of the arbitral award.[53]

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[50] NextEra at 27.

[51] *Sodexo Pass Int'l SAS v. Hungary*, [2021] NZHC 371, ¶ 25 (Dec. 10, 2021), https://tinyurl.com/4ssrfvk7.

[52] *Id.* ¶ 55 ("Under [ICSID Convention] art 54(1), which has legal force in New Zealand in accordance with s 4(2) of the ICSID ACT, the High Court 'shall recognize an award rendered pursuant to [the ICSID] Convention.' New Zealand has promised that it will do so, and pursuant to s 4 of the ICSID Act Parliament has identified the High Court as the designated body for the purposes of fulfilling New Zealand's obligations under art 54.").

[53] *Kingdom of Spain v. Infrastructure Servs. Lux. S.a.r.l.* [2023] HCA 11, ¶ 79 (April 12, 2023), https://tinyurl.com/2at72c4d. In the Court of Federal Appeal decision, this submission to jurisdiction was found to be independent of any consideration of Spain's accession to Article 26 of the ECT.

70. These outcomes are altogether consistent with the purpose of the ICSID Convention to create a stable foreign investment environment in which the prevailing party may enforce their judgment not only in the Respondent State, which may be inclined to frustrate enforcement efforts for political or other reasons, but in any other ICSID Contracting Party. This carefully designed regime would be frustrated by the ability of a State to claim jurisdictional immunity before the courts of other ICSID Convention Member States. In this case, for example, were Croatia allowed to invoke sovereign immunity, it could effectively prevent the United States from honoring its obligation to recognize and enforce the award rendered in this case, thereby rendering nugatory the ICSID Convention's recognition and enforcement provisions.

71. Croatia suggests that MOL should have sought enforcement in European courts.[54] There is no requirement in the ICSID Convention or in the ECT that a judgement creditor seek enforcement in any particular venue; indeed the strength of the ICSID Convention lies in the possibility for an investor to enforce an award in any of the contracting states. Yet this suggestion ignores the United States' obligations under the ICSID Convention. By signing the ICSID Convention, the United States promised the other ICSID Member States that it would honor its obligations under that agreement. The United States, and every one of the other ICSID Member States, has a connection to the dispute when they are asked to honor their obligations under the ICSID Convention, as is the case here. In keeping with this enforcement obligation, ICSID Convention awards are not subject to challenge on grounds of *forum non conveniens*.[55]

72. So long as both the State hosting the investment and the investors' home State are party to the ICSID Convention, ICSID Convention arbitration is one of the choices of which

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[54] Renewed Motion to Dismiss at 3.

[55] NextEra at 29; *Restatement (Third), supra* n.36, § 5.6(a)(4) ("Actions to enforce an ICSID Convention award are not subject to stay or dismissal on forum non conveniens grounds.").

investors can avail themselves when submitting a claim under the ECT. Croatia and Hungary are each contracting Parties to the ICSID Convention; Petitioner here made that choice and won the Award against Croatia. The United States is obligated under the terms of the ICSID Convention to enforce that Award.

73. As the United States itself has recognized, "The procedural requirements outlined in Article 54—including enforcement of an award 'as if it were a final judgment of a court in that State' and execution as 'governed by the laws concerning the execution of judgments in force in the State'—certainly do not allow a losing State to avoid its obligation under Article 53 to satisfy an ICSID award in full."[56]

74. In sum, an award rendered by an ICSID Convention tribunal is binding and must be recognized and enforced by all States party to the ICSID Convention as if it were a final judgment of a court of the enforcing State. Unlike an award enforceable under the New York Convention, there are no defenses to enforcement that a judgment debtor may raise. The recognition and enforcement process should thus be virtually automatic; arguments based on the ECT and its relationship to EU law are not properly the subject of consideration by an enforcing court.

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

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

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[56] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, U.S. Department of State Letter 2 (May 1, 2008), https://tinyurl.com/msepwx28.

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

77. The decision of the CJEU in *Achmea v. Slovak Republic*[57] determined that investment arbitration in the Netherlands-Slovak Republic BIT was incompatible with the European legal order. *Komstroy v. Moldova*[58] extended that incompatibility to ECT arbitrations between EU member states, notwithstanding the EU's and Croatia's clear obligations under the ECT itself. Croatia argues that these decisions negate the validity of all intra-EU investment awards, including the one in this case. They argue that no investor from a European Union member state has ever been able to initiate an arbitration under the ECT against an EU member state due to limitations ostensibly imposed on them by EU law.[59]

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

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[57] Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:108:158 (Mar. 6, 2018), https://tinyurl.com/475jw83a.

[58] Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sep. 2, 2021), https://tinyurl.com/p9pz5up6.

[59] In *European Commission v. European Food SA*, the CJEU held that once Romania acceded to the European Union its consent to arbitrate disputes under the Romania-Sweden BIT lacked any legal force but was instead replaced by the system of remedies provided for in the TFEU and TEU treaties. While consistent with the *Achmea* decision, this argument also fails as a matter of international law for the reasons described below. Case C-638/19 P, *European Commission v. European Food SA*, ECLI:EU:C:2022:50 (Jan. 25, 2022), https://tinyurl.com/4xudavwf.

A. The *Achmea* and *Komstroy* Decisions

79. The starting point of the discussion must be the CJEU decisions themselves, starting with *Achmea*. The CJEU's involvement arose when the Slovak Republic asked the Federal Court of Justice in Germany (Germany was the place of arbitration) to set aside an award rendered in favor of the claimant, Achmea, by an arbitral tribunal convened under the Netherlands-Slovak Republic BIT. The Slovak Republic argued that the arbitration clause in the BIT was void due to its incompatibility with Articles 267 and 344 of the TFEU.[60]

80. Article 344 of the TFEU prohibits EU Member States from referring disputes concerning the interpretation or application of the EU treaties to any method of dispute settlement aside from those methods found in the treaties. Article 267 of the TFEU outlines the preliminary reference procedure whereby courts and tribunals of Member States can refer questions of interpretation of EU law to the CJEU. Arbitral tribunals that are not considered courts and tribunals of the Member States are not able to seek preliminary rulings from the CJEU.[61]

81. The CJEU found that the arbitration clause in the BIT was incompatible with the European legal order because arbitral tribunals convened under the treaty could potentially interpret and apply EU law, in violation of the principle of autonomy of the EU legal order and the obligation in Article 344 of the TFEU. Additionally, because the arbitral tribunal was not a court or tribunal of a Member State, it was not authorized to refer questions to the CJEU under Article 267 of the TFEU. The CJEU thus had no way to control any interpretation or application of EU law in which the BIT tribunal might engage.

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[60] Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2008 O.J. (C 326) 47, https://tinyurl.com/53m8z4ay ("TFEU").

[61] Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV* ¶ 40 (June 1, 1999), https://tinyurl.com/2s48t2ae ("*Eco Swiss*").

82. The CJEU did not, in fact, rule out the possibility that the EU could sign a treaty and agree to refer matters regarding compliance with that treaty to independent dispute settlement.[62] Notwithstanding recognition of the EU's need to have this capacity, in *Komstroy* the CJEU extended the conclusions it had reached in *Achmea* to intra-EU disputes brought under the Energy Charter Treaty.[63]

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

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

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

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

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

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

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

The Plain Language of the ECT Authorizes Intra-EU Arbitration

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[62] *Achmea, supra* n.57, ¶ 57.

[63] *Komstroy*, *supra* n.58, ¶ 66.

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

85. Here, there is no question that Croatia is a Contracting Party to the ECT. MOL Hungarian Oil and Gas PLC is a Hungarian company.

86. Article 26 of the ECT authorizes an investor of a Contracting Party to submit a dispute against another Contracting Party to a number of dispute resolution forums, including ICSID arbitration.

87. Thus, the straightforward interpretation of this language is that Petitioner has standing to submit a claim against Croatia under the ECT to ICSID arbitration.

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

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

89. The Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT") sets out the canons of treaty interpretation for international treaties.[64] In addition to being a treaty adhered to by 116 States, it is regarded as customary international law and thus is utilized to interpret treaties entered into by States who have not ratified it.[65]

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[64] Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331 (1980) ("VCLT" or "Vienna Convention").

[65] The United States has called it "a primary source of reference for determining what are the customary principles of treaty law." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Written Statements (India, United States of America, Nigeria), 1970 I.C.J. 843, 855 (Nov. 12, 1970), https://tinyurl.com/4uk9kcyw.

90. The Vienna Convention provides that treaties be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[66] The context of the treaty comprises the entire treaty and its annexes.[67]

91. Here, the ordinary meaning of the ECT's provisions on investment protection is that investors from one Contracting Party can submit claims against other Contracting Parties for violations of the Treaty. According to the Preamble, the object and purpose of the treaty were, *inter alia*, "to catalyse economic growth by means of measures to liberalise investment and trade in energy." Encouraging investment by promising protections to those investments and assuring investors of the ability to vindicate those rights in arbitration are means of fulfilling the goals of the treaty. The ultimate goal of the ECT was and is to create and maintain a stable and efficient energy market that would facilitate long-term cooperation in the energy field, which would "not take place without a massive transfer of capital and technology, particularly to the States with significant energy resources but insufficient means to develop them."[68]

92. Nothing in the context of the ECT suggests a different conclusion. The ECT contains no "disconnection" clause applicable to Article 26 and its provisions regarding investors' ability to submit their claims to arbitration under the ICSID Convention. A disconnection clause serves the purpose of "ensuring the primacy of Union law obligations in relations between the Member States themselves and to render this more transparent to other parties."[69] By contrast, the

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66 VCLT art. 31(1).

67 *Id*. art. 31(2).

68 Salacuse, *supra* n.18, at 328.

69 M. Cremona, *Disconnection Clauses* in C. Hillion & P. Koutrakos (eds.), EU LAW AND PRACTICE, MIXED AGREEMENTS RE-VISITED – THE EU AND ITS MEMBER STATES IN THE WORLD 160 (2010), attached hereto as Exhibit 19.

ECT does contain a disconnection clause applicable to Article 16, which gives investors the ability to elect protections under the ECT if they conflict with provisions relating to the same subject matter but that are less favorable to them. That disconnection clause ensures that Article 16 does not operate vis-à-vis the Svalbard Treaty.[70] Yet, the ECT does not contain a disconnection clause applicable to Article 26. As observed by the tribunal in *PV Investors v. Spain*:

> It would seem striking that the Contracting Parties made an express exception for the Svalbard Treaty, which concerns an archipelago in the Arctic, but somehow omitted to specify that the ECT's dispute settlement system did not apply in all of the EU member states' relations. Compared to the Svalbard Treaty exception, an exception with regard to the intra-EU relations would be of much greater significance. It would be extraordinary that an essential component of the Treaty, such as investor-state arbitration, would not apply among a significant number of Contracting Parties without the Treaty drafters addressing this exception.[71]

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

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[70] Final Act of the European Energy Charter Conference, Annex 2, attached hereto as Exhibit 20; *see also Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue ¶ 204 n.123 (Aug. 31, 2018), https://tinyurl.com/29vv2yx8; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.À.R.L. v. Kindgom of Spain*, ICSID Case No. ARB/13/36, Award ¶ 187 & n.187 (May 4, 2017), https://tinyurl.com/2wyx28ef; *Antin Infrastructure Services Luxembourg S.À.R.L. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award ¶¶ 215-16 (June 15, 2018), https://tinyurl.com/mw3zcysa.

[71] *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction ¶ 183 (Oct. 13, 2014), https://tinyurl.com/ycykkmr4.

94. Normally, the VCLT does not permit recourse to negotiating history unless interpretation under Article 31 is ambiguous or unclear, which is not the case here. If such recourse were necessary, however, the negotiating history of the ECT reveals that the EU proposed to add a disconnection clause with respect to the EU treaties, but the clause was not included in the final treaty.[72]

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

96. In his declaration, Professor Hindelang states that the *Achmea* decision has retroactive effect, and sets "the content and meaning of a given rule *ab initio*."[73]

97. What is now Article 344 of the TFEU was previously Article 292 of the Treaty Establishing the European Community of 1992, and was Article 219 of the Treaty of Rome. The same can be said of Article 267, which was Article 234 of the TEC and Article 177 of the Treaty of Rome.[74] These provisions were thus extant at the time the ECT was negotiated and ratified.

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[72] *Drafts of the Energy Charter Treaty: Basic Agreement (BA-15)*, INT'L ENERGY CHARTER 84 (Aug. 12, 1992), https://tinyurl.com/5xwbzf8v.

[73] Hindelang Declaration ¶ 47.

[74] Articles 267 and 344 of the TFEU were originally Articles 177 and 219 of the 1956 Treaty establishing the European Economic Community (the "Rome treaty" or "EEC"). *See* Treaty Establishing the European Economic Community (Mar. 25, 1957), 298 U.N.T.S. 11. The 1992 Treaty on the European Union, usually called the "Maastricht Treaty" or the "TEU," renamed the Rome Treaty the Treaty Establishing the European Community ("TEC"), and renumbered Articles 177 and 219 of the Rome Treaty as Articles 234 and 292. *See* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (June 7, 2016), 2016 O.J. (C 202) 1; *see generally Vattenfall*, *supra* n.70, ¶¶ 205-06 & n.124.

98. Thus, according to Professor Hindelang and Croatia, none of the EU Member States, nor the EU itself, has ever been, consistent with EU law, able to comply with Article 26 and agree to submit disputes to arbitration under Part V of the treaty for intra-EU disputes. Yet they did in fact agree to do so. Ratifying a treaty with which a country cannot comply violates the principle of good faith found in VCLT Article 26.[75] Thus, under settled treaty interpretation principles under international law, the ECT and TFEU must be read in a manner that do not render "void *ab initio*," as Professor Hindelang claims, the content and meaning of the ECT. There is no evidence that any of the contracting parties to the ECT (whether EU member states or not) understood Article 26 to contain implicit limitations at the time the ECT was drafted.

99. Whatever view Croatia and Professor Hindelang may take today about the validity of intra-EU arbitration under the ECT, no one questioned at the time the ECT was concluded that EU members could bind themselves to arbitration regarding intra-EU disputes. The ECT negotiations took place in the 1990s. It was not clear in the 1990s that intra-EU investment arbitration was impermissible, whether it occurred under the auspices of the ECT or under BITs. Instead, it was not until the 2000s that scholars began to question the availability of intra-EU investment arbitration.[76] Anticipating many of the arguments that would subsequently be made by the Commission and by certain Member States, they nonetheless concluded that intra-EU investment arbitration, including arbitration under the ECT, was possible. "In conclusion, the legal character of the ECT as a mixed agreement under EC law does not influence the comprehensive legally-binding effect of the treaty in view of the EC and its Member States from the perspective

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

[76] Indeed, Croatia, in its Renewed Motion to Dismiss (at 25), dates to 2018 the objections of the EU to intra-EU objections under the ECT. Thus, Croatia acknowledges that this position was not contemporaneous with the negotiation and ratification of the ECT.

of public international law. Similarly, the ECT's legally-binding effect as public international law extends to the *inter se* relationship of the EU Member States."[77]

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

> the BIT in question in this dispute [The Netherlands–Slovak Republic BIT] continues to be fully in force. Consequently, there is also no reason to doubt the jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal.[78]

101. Thus, even in 2010, EU Member States themselves were not uniformly of the opinion that intra-EU investment arbitration, whether under a BIT or under the ECT, was impermissible as a matter of EU law. Some fifteen years earlier third states negotiating the ECT could not have been expected to understand that the obligations they were undertaking were not in fact being undertaken as between the EU member states themselves absent a disconnection clause making that point clear.[79]

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[77] Christian Tietje, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, INST. OF ECON. LAW 8-9 (Sept. 2008), attached hereto as Exhibit 21. Further, Tietje notes, "Consequently, from a public international law perspective, an *inter se* modification of the ECT by EC law is not possible. This is particularly the case if such a modification would have a negative impact on the substantive and procedural legal rights of investors." *Id.* at 13; *see also* Markus Burgstaller, *European Union Law and Investment Treaties*, 26 J. INT'L ARB. 181, 211 (2009), attached hereto as Exhibit 22 ("The conclusion that EU nationals may bring claims under the ECT against other Member States is reinforced by the notion that *inter se* agreements are generally considered to be precluded once the respective treaty has an individual rights dimension.").

[78] *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction ¶ 161 (Oct. 26, 2010), https://tinyurl.com/3v2sfpks.

[79] Tietje, *The Applicability of the ECT* (Ex 21), *supra* n.77, at 11.

102. Indeed, through its actions, the European Commission has acknowledged that intra-EU investment agreements remained binding notwithstanding the accession of formerly non-EU countries to EU membership.[80] In 2015, the European Commission asked EU Member States to abrogate their intra-EU BITs.[81] When most failed to do so, the Commission launched infringement proceedings against several of those States.[82] Infringement proceedings against EU Member States for their failure to terminate their intra-EU BITs would not be necessary were the treaties themselves negated simply by their incompatibility with EU law.

103. It is also notable that the EU did not take any kind of steps to seek modification of Article 26 in 2004, when a number of eastern European states acceded to the European Union. Had that act changed those states' obligations under the ECT one might have expected the EU to take steps to modify the jurisdictional clause in article 26.[83] Indeed, in a 2006 letter sent from the Commission to the Czech Republic in the context of the *Eastern Sugar* case, in which the Czech Republic argued that its accession to the EU meant it could not engage in an arbitration under an intra-EU BIT, the Commission noted that even if there were a conflict between EU law and a BIT, this would not entail the automatic termination of the concerned BIT, but that Member States

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80 It is also notable that the EU did not take any kind of steps to seek modification of Article 26 in 2004, when a number of eastern European states acceded to the European Union. Had that act changed those States' obligations under the ECT one might have expected the EU to take steps to modify the jurisdictional clause in Article 26. *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, ICSID Case No. ARB/15/20 Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 136-37 (Feb. 19, 2019), https://tinyurl.com/yk2hddnd.

81 *Press Release: Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties*, EUROPEAN COMM'N (June 18, 2015), https://tinyurl.com/4pau43ce.

82 *Id.*

83 *Cube*, *supra* n.80, ¶¶ 136-137.

would have to follow the relevant procedures and that "[s]uch termination cannot have a retroactive effect."[84]

104. There is no reason to think that the states negotiating the ECT, whether they were outside the EU (and of course many current EU Member States, including Croatia, were not Member States at the time of the negotiations) or inside it, expected that the ECT disciplines were not binding among all contracting Parties.[85] Albert Bleckmann, writing in 1983, explained that even when the EU and its member states cooperate in the conclusion of mixed agreements: "[T]he principle of equality of all States of the international community leads to the conclusion that all mixed agreements must be interpreted in a way which attributes equal rights and duties to all parties to the Treaty."[86] Bleckmann, thus, confirms that even in mixed agreements all contracting states have equal status, including equal rights and duties.

105. It is indeed possible, depending on the type of treaty and the manner in which it is concluded, for a treaty to be constructed so as to be between the EU on the one hand and another state party (or parties) on the other. For example, the Comprehensive Economic and Trade Agreement Between Canada and the EU ("CETA") is drafted in such as a way as to make clear

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84 *Eastern Sugar B.V. v. Czech Republic*, SCC No. 088/2004, Partial Award ¶ 119 (Mar. 27, 2007), https://tinyurl.com/225pfzmk.

85 Writing in 1995, Doré and De Bauw note that an "unprecedented dispute settlement procedure then gives an investor or a government the possibility of arbitration if it feels its rights . . . have been disregarded. Again, this holds for Western investment in other countries of the West as much as for investment in the East, and dispute settlement provisions might have a notable impact on intra-Western practices." Julia Doré & Robert De Bauw, THE ENERGY CHARTER TREATY 67 (1995), attached hereto as Exhibit 23.

86 Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, in DAVID O'KEEFFE & HENRY G. SCHERMERS, MIXED AGREEMENTS 155, 159 (1983), attached hereto as Exhibit 24 (footnote omitted).

that Canada is one "Party" and the EU or its Member States are the other "Party" to the treaty; investors from one of the Parties can submit claims in arbitration against the other Party.

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

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

107. The ECT is a multilateral instrument with 53 signatories and Contracting Parties.[87] The EU's suggestion that EU Member States have no interests vis-à-vis each other is not a matter of indifference to the other Contracting Parties. The ECT imposes international law disciplines on the states that are party to it, not European law disciplines. This is important because of the manner in which differences in obligations might distort the treatment given to aspiring investors.

108. The ECT was meant to ensure security of investments and uniformity of treatment of investors, regardless of their country of origin, in all of the Contracting Parties. Questions of national origin are not supposed to influence a host state that is deciding, for example, to which investors it should award preferential contracts for the exploitation of natural resources. Yet if that state owes international law obligations to some investors, and does not owe those obligations to other investors, the state might have an incentive to award the contract to the investor to whom it *does not* owe any international law obligations, and to whom it does not need to answer in international arbitration.

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87 *Contracting Parties and Signatories of the Energy Charter Treaty*, INT'L ENERGY CHARTER, https://tinyurl.com/bddxkpc4.

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

110. It is true that the national-treatment or most-favored-nation obligation might be pressed into service by a non-EU investor denied a contract, yet proving discrimination on the basis of nationality is difficult given the myriad considerations that dictate decisions such as the awarding of concession agreements.

111. Similar concerns are illustrated in disciplines on "performance requirements" that are found in some investment treaties and in the ECT. A performance requirement is usually an obligation not to require the use of local content in return for permission to invest. While most obligations in investment treaties apply only to investors from states party to the treaty, a state that agrees not to impose performance requirements on investors generally agrees not to do so for all investors, not just for investors from states party to the treaty.[88]

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

113. Thus, it is not the case that interpreting the ECT as imposing no intra-EU obligations would have no effect on non-EU Parties. It is clear that it can affect non-EU parties,

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[88] *See, e.g.*, North American Free Trade Agreement art. 1106(1) (1992) ("NAFTA"), https://tinyurl.com/3wnteubb ("No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory . . . .").

and that the ECT negotiations would likely have been different had such a disparity in obligation been understood to exist.

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

114. Croatia and Professor Hindelang point to a statement by some EU Member States issued on January 15, 2019, where 22 Member States agreed to terminate intra-EU BITs and took the position that Article 26 of the ECT is incompatible with the EU treaties.[89] However, the EU Member States' statement, without more, has no legal effect under international law. It does not constitute subsequent agreement between parties regarding the interpretation of the Treaty and does not modify the Treaty even as between the EU Member States.

115. As a preliminary matter, the EU Member States did not adopt a unanimous position on the interpretation of ECT Article 26. Six EU Member States made separate statements, five together and one (Hungary – the home state of the investor in this case) writing separately. While these six Member States agreed to attempt to terminate their intra-EU BITs, these countries correctly noted that the impact of *Achmea* was limited to BITs with arbitration clauses "such as the one described in the *Achmea* judgment."[90] Notably, these six countries refrained from declaring that EU law takes precedence over the international law obligations of the EU Member States. Additionally, the six Member States disagreed that the ECT was incompatible with EU law, noting that "it would be inappropriate, in the absence of a specific judgment on this matter,

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[89] Declaration of the Representatives of the Government of the Member States at 2 (Jan. 15, 2019) ("22 Member States' Decl."), ECF 31-34; Renewed Motion to Dismiss at 15; Hindelang Declaration ¶ 109.

[90] Declaration of the Representatives of the Government of the Member States at 1 (Jan. 16, 2019) ("Five Member States' Decl."), ECF 31-35.

to express views as regards the compatibility with [EU] law of the intra EU application of the [ECT]."[91]

116. Further, Hungary wrote: "[T]he *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the [ECT] and it does not concern any pending or prospective arbitration proceedings initiated under the ECT."[92] While the issuance of *Komstroy* means that the CJEU has now issued a judgment specific to the ECT, these statements nonetheless demonstrate a lack of agreement about the effect of *Achmea* and *Komstroy* and still more disagreement about their scope of application.

117. The six EU Member States also declined to inform ECT investment arbitration tribunals about the legal consequences of the *Achmea* judgment as set out in the 22 Member States Declaration, or to direct their investors not to initiate arbitrations under the ECT.[93]

118. After *Komstroy*, on June 26, 2024, the European Union and 26 Member States signed a declaration that, in their opinion, the ECT does not apply, and has never applied, in disputes between an EU investor and another EU Member State. Hungary, however, did not sign on to that statement, but issued its own understanding that Article 26(2)(c) of the ECT would *no longer* serve as a basis for intra-EU arbitration; this understanding differs from the EU position that intra-EU ECT arbitration was void *ab initio*. The European Union has now started

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91 *Id*. at 3.

92 Declaration of the Representative of the Government of Hungary ¶ 8 (Jan. 16, 2019) ("Decl. of Hungary") ECF 31-36.

93 *Compare* Decl. of Hungary, *supra* n.92, ¶¶ 1, 3, *and* Five Member States' Decl., *supra* n.90, ¶¶ 1, 3, *with* 22 Member States' Decl., *supra* n.89, ¶¶ 1, 3.

infringement proceedings against Hungary, currently President of the Council of the European Union.[94]

119. The disparity in views demonstrated by the three statements negates any suggestions that these statements could be viewed as a subsequent agreement between the parties regarding the interpretation of the ECT or the application of Article 26, pursuant to Vienna Convention Article 31(3)(a) or (b).[95]

120. Additionally, of course, the ECT is in a different posture than intra-EU BITs, given that its membership includes non-EU Member States. Thus, there can be no question of a subsequent agreement between only some of the parties that would provide interpretive guidance on the ECT, which applies between all States that are party to it. As Professor Richard Gardiner

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[94] The Commission finds that Hungary's unilateral declaration contradicts the decision of the Court of Justice, as well as the Union's position vis-à-vis arbitration tribunals and courts of third countries. In addition, the Commission finds that by openly expressing a unilateral, different position, Hungary is in breach of the duty of sincere cooperation enshrined in Article 4(3) of the Treaty of the European Union, which requires Member States to abstain from undermining the Union position on the international stage. Furthermore, by contradicting an interpretation given by the Court, Hungary seems to disrespect the final, authoritative and binding nature of judgments of the Court of Justice. These principles are enshrined in Article 19 of the Treaty of the European Union and Article 267 and 344 of the Treaty on the Functioning of the European Union, as well as the general principles of autonomy, primacy, effectiveness, and uniform application of Union law.

The Commission has therefore decided to send Hungary a letter of formal notice. Hungary now has two months to respond and address the shortcomings raised by the Commission. In the absence of a satisfactory response, the Commission may decide to issue a reasoned opinion. *See* Infringement Decisions, July Infringement Package: Key Decisions, European Comm'n, (July 24, 2024), https://tinyurl.com/yc523279.

[95] VCLT art. 31(3) provides that a treaty interpreter shall "tak[e] into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and]

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"

has stated, "[t]he key issue is whether the interpretive instrument is one to which the parties have given their *concordant* blessing."[96] The World Trade Organization ("WTO") Appellate Body has similarly held:

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.[97]

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

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

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96 RICHARD GARDINER, TREATY INTERPRETATION 231 (OUP, 2d ed. 2016) (emphasis added), attached hereto as Exhibit 25.

97 Appellate Body Report, EC – Customs Classification on Certain Computer Equipment, ¶ 84, WTO Doc., WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R (adopted June 5, 1998), https://tinyurl.com/58z5be5u (emphases in original).

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

123. Second, Article 41 of the VCLT further provides that any modification must "not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." VCLT, art. 41(1)(b)(ii). As the *BayWa* tribunal (with Judge James Crawford presiding) noted, "it is very doubtful whether the abrogation *inter se* of the ECT as between EU Member States is compatible 'with the effective execution of the object and purpose of the [ECT] as a whole'. Article 16 of the ECT suggests that it is not, since it evinces an intent, even as between treaties on the same subject matter, to preserve the rights of investors and investments, which constitute a major plank of that multilateral treaty."[98]

124. Even assuming *arguendo* that Article 42 of the ECT could be read to permit *inter-se* modification (i.e., only between EU Member States), the parties in question must "notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[99] This has never been done, including by Croatia when it joined the EU in 2013.

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[98] *BayWa R.E. Renewable Energy GmbH and Bay Wa R.E. Asset Holding GmbH v. Republic of Spain*, ICSID Case No. ARB/15/16, Award ¶ 276 (Jan. 25, 2021), https://tinyurl.com/jhyr4ynx.

[99] VCLT art. 41(2). This provision also requires that the modification not be incompatible with execution and purpose of the treaty as a whole; arguably such a modification would be incompatible with the execution and purpose of the Energy Charter Treaty given that "Article 16 ECT prevents the EU Treaties from being construed so as to derogate from the more favourable rights of the Investor in Parts III and V of the ECT, including the right to dispute resolution." *Vattenfall*, *supra* n.70, ¶ 221.

125. Moreover, while agreements concluded by all of the parties to a treaty in connection with the conclusion of a treaty can be considered in the interpretation of a treaty, as can instruments made by one party in connection with the conclusion of a treaty and accepted by all of the other parties to a treaty as an instrument related to the treaty, no such collective agreements have been entered into by all ECT Member States.[100]

126. As the Permanent Court of International Justice ("PCIJ") said in the *Eastern Greenland* case, "[w]hat the Court cannot regard as being in accordance with the undertaking of July 2nd, 1919, is the endeavour to replace an unconditional and definitive undertaking by one which was subject to reservations."[101] Article 26 of the ECT, and indeed the entire ECT itself, is an unconditional undertaking.

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

128. Moreover, the EU Member States' actions acknowledge that the declarations, by themselves, lacked legal force. As noted above, the EU Member States in the January 2019 declaration agreed to terminate intra-EU BITs, and on May 5, 2020, twenty-three EU Member States entered into a treaty to do so.[102] That agreement is still subject to ratification, approval, or acceptance, and thus has not yet entered into force. Termination of the intra-EU BITs would not be necessary were those treaties simply inoperable by virtue of the declarations. Termination

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[100] VCLT art. 31(2)(b), (3)(a).

[101] *Legal Status of Eastern Greenland (Denmark v. Norway)*, PCIJ General List No. 43, Judgment No. 20, ¶ 200 (Sept. 5, 1933), https://tinyurl.com/4p4b6zbf.

[102] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (May 5, 2020), 2020 O.J. (L 169) 1, https://tinyurl.com/5nhnunut.

would not be necessary if the CJEU decisions in *Achmea*, *European Commission v. European Food SA*, and *Komstroy*, without more, sufficed to render any treaty void *ab initio*.

129. A similar argument holds with respect to the recent agreement in principle on the modernization of the Energy Charter Treaty itself. Following years of negotiations, on June 24, 2022, the Contracting Parties of the ECT reached a tentative agreement to modify the text, with an opportunity for the parties to formally adopt the language in November. This "clarification" to the ECT would have specified that Article 26 ECT does not apply as between Contracting Parties that are members of the same REIO (i.e., the EU).[103] This change to the ECT would not be necessary if, as argued by Croatia, Article 26 was understood by all ECT members not to apply as between EU Member States. Several EU Member States have now determined that the modernization agreement did not go far enough to serve their interest in light of the changes in the energy sphere due to climate change; they thus refused to support it and, as noted above, several EU States have announced their intention to withdraw from the ECT.[104]

130.

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

131. The ECT is compatible with the EU treaties as a matter of international law. As demonstrated above, it is entirely possible for them to co-exist and for the Parties to each treaty to

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[103] Decision of the Energy Charter Conference, CCDEC 2022, 10 GEN (June 24, 2022), https://tinyurl.com/4hknp7p5.

[104] *See* Beatrice Tridimas, *EXPLAINER-Why Might the EU Pull out of the Energy Charter Treaty?*, REUTERS (Nov. 24, 2022), https://tinyurl.com/5bnmr7kr. Even if those EU States succeed in withdrawing from the ECT, however, they will remain bound by its "sunset clause." Under Article 47, the parties to the ECT agreed to abide by its terms for another twenty years as to any investments entered into prior to withdrawal. The ECT's Secretary-General emphasized in 2021 that any withdrawals from, as opposed to modifications to, the treaty would lock Member States into the ECT's "current investment protection provisions for 20 years." Urban Rusnák, *Comment: Quo Vadis Energy Charter Treaty?*, INT'L ENERGY CHARTER (Apr. 12, 2021), https://tinyurl.com/mvayauzb.

fulfill their obligations under them. To the extent they are regarded as being in conflict, under the terms of the Energy Charter Treaty itself, and the relevant rules of international law, the ECT prevails.

132. It is not uncommon that States will be parties to multiple treaties and that the relationship between the treaties, and the obligations contained therein, can be complex. As noted above, public international law, and the Vienna Convention in particular, have rules governing the interaction between treaties.[105]

133. Vienna Convention Article 30(2) provides that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. The converse is also true.

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

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

[105] *See supra*, Paragraph 89.

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

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

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

138. Nor, as noted above, did ECT Parties include a "disconnection" clause providing that Article 16 not apply as between EU Member States.[106] There is no basis to support the idea that the Parties signed on to the ECT knowing that many of its key provisions were inapplicable between more than a dozen of the treaty parties, but they did not amend the treaty to indicate this significant limitation in its reach.[107] In a multilateral treaty, in the absence of a disconnection

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[106] *See supra*, Paragraph 92.

[107] Professor Hindelang refers to *Commission v. Ireland*, colloquially known as *Mox Plant*, to show that the ECJ held that an inter-state arbitration provision found in the U.N. Convention on the Law of the Sea ("UNCLOS") could not be applied in the intra-EU context. Hindelang Declaration n.10; *see also* Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, Judgment (May 30, 2006), https://tinyurl.com/mpkjes5w. In fact, however, dispute settlement under UNCLOS is remarkably different from dispute settlement under the ECT. Unlike Article 26 of the ECT, in which States bind themselves to arbitrating disputes under the treaty, Article 280 of UNCLOS says that States Party to the treaty retain the right "to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."

clause, "a corresponding treaty has supremacy of application over Union law. That is not a particularity, but it is imperative for international law."[108]

139. Article 16 is thus applicable in the event of a conflict between the Energy Charter Treaties and the EU treaties. As the tribunal in *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain* stated, "in case of any contradiction between the ECT and EU law, the Tribunal would have to ensure the full application of its '*constitutional*' instrument, upon which its jurisdiction is founded. . . . [I]f there must be a '*hierarchy*' between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore, the ECT prevails over any other norm (apart from those of *[j]us cogens* – but this is not an issue in the present case)."[109]

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

141. *Lex posterior* is the principle that the later-in-time treaty covering the same subject matter controls.[110] Under this principle, the ECT prevails over conflicting provisions of EU law. The ECT was adopted in 1998, after the predecessor provisions to Articles 267 and 344 of the TFEU were originally enacted as Articles 177 and 219 of the Treaty of Rome.[111] Thus, as the later-in-time treaty, the ECT would control over those provisions of the TFEU to the extent they address the same subject matter.

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[108] Christian Tietje, *Bilateral Investment Treaties Between EU Member States (Intra-EU BITs) – Challenges in the Multilevel System of Law*, 10:2 TRANSNAT'L DISPUTE MGMT. 1, 10 (Mar. 2013), attached hereto as Exhibit 26.

[109] *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction ¶ 75 (June 6, 2016), https://tinyurl.com/mrxyxu43.

[110] VCLT art. 30(3) ("the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty").

[111] *See supra* Paragraph 97 & n.72.

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

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

144. Professor Hindelang suggests that there are rules of treaty interpretation that are not encompassed in the VCLT, and that one of them is found in EU law itself, which prohibits states from entering into a treaty that conflicts with EU law.[112] He terms this a "special conflict" rule applicable as between the EU Member States and a derogation from the customary international law rules of treaty interpretation.[113] With respect, this is simply inaccurate. While it is not impossible for states to enter into treaty interpretation rules as between themselves, they cannot do so in such a way as to negate the very treaty obligations they purport to be interpreting. This "conflicts rule" is simply another way of trying to argue that EU law supersedes all other international law, even if EU Member States have clearly signed on to specific obligations, such as those found in the ECT.

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[112] Hindelang Declaration ¶ 66.

[113] Hindelang Declaration ¶ 70.

E. Primacy of International Law

145. Autonomy of EU law is a principle of EU law, not of public international law. Neither the EU nor its Member States are permitted to derogate from public international law on the basis of the "autonomy" of the EU legal order. There is additionally no rule in public international law that EU law is "superior [in] rank" to other public international law applicable between the EU Member States.[114]

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

147. But the mere fact that the legal relationship between the EU Member States is effectuated by international treaties does not make those treaties superior to other international agreements as a matter of international law. In effect, the principle of the primacy of EU law operates as a Supremacy Clause. Within the EU legal order, the EU and its Member States can

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[114] Hindelang Declaration ¶ 30. Professor Hindelang cites the *Kadi* case for its argument that international agreements come below primary EU law in the hierarchy of EU norms. Hindelang Decl. ¶ 72. Yet in *Kadi* itself the European Court recognized that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law." Joined Cases C-402/05 P and C-415/05 P, *Kadi et al. v. Commission*, Judgment ¶ 288 (Sep. 3, 2008), ECLI:EU:C:2008:461, https://tinyurl.com/5e6pvbzk.

[115] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, ¶ 218 (Apr. 13, 2006), https://tinyurl.com/3pm8nabf.

determine how much effect they want to give EU law, including ensuring that it prevails over any other obligation. This decision does not, however, negate their obligations on the international plane.

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

149. Professor Hindelang points to three cases decided by the Court of Justice of the European Union where the Court concluded that the EU could not become a party to an international convention (the draft European Free Trade Association, the proposed European and Community Patent Court, and the European Court of Human Rights), due to the incompatibility of those Conventions and their associated dispute settlement mechanisms with the principle of primacy of EU law. Hindelang Decl. ¶¶ 103-05. Yet those cases all differ from this one in one key respect: the decisions in those cases came *before* the EU had ratified the agreement in question, not more than twenty years later. Thus, in each of those cases the European Union decided not to move forward with the agreement on the grounds that to do so would mean undertaking obligations inconsistent with EU law. That is the appropriate approach. In this case, the decision in *Komstroy* came more than twenty years *after* the EU and its member states had ratified the ECT.

150. The desire to preserve the autonomy of EU law might lead the EU or its Member States not to take on international obligations, but if they do take on those obligations they are

obliged to perform them in good faith[116] and they will be held internationally responsible if they breach them.[117] The desire to preserve that autonomy might even cause them to breach their international obligations, but that choice does not excuse them from the international obligation; it simply places them in breach on the international plane, regardless of the effect on the EU plane.[118]

151. The appropriate approach, therefore, is for the European Union and its Member States either to withdraw from the Energy Charter Treaty or to renegotiate it so that its provisions accurately reflect the commitments that the EU and its member states are willing to make. The same principle holds for investment treaties, whether they be intra- or extra-EU. The suggestion in the *European Food* case that "with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure" in the Romania-Sweden BIT might be true as a matter of EU law, but it is not true as a matter of international law.[119] This Court recently recognized that distinction in *Micula v. Romania*, holding that "[t]he fact that EU law, as interpreted by the CJEU, bars EU Member State courts from enforcing" an award is irrelevant for purposes of enforcing the award outside the EU

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

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

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

[119] *Supra* n.57, Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:108:158 (Mar. 6, 2018), https://tinyurl.com/475jw83a.

because "Romania had agreed to arbitrate under the Sweden-Romania BIT."[120] The appropriate course of action would be for Romania and Sweden to terminate the BIT between them, as in fact they have done. Absent that termination the treaty, including its arbitration provisions, would remain in force and constitute a binding international obligation between the two states. Indeed, if the treaty were not binding, but had been superseded or amended merely as a result of Romania's accession to the EU, there would have been no need to terminate the treaty.

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

153. Article 46(1) of the VCLT confirms this conclusion in the case of EU Member States:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

154. Furthermore, in Article 46(2):

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

155. Croatia here is arguing that its offer to arbitrate under the ECT became null and void when it joined the European Union, at least insofar as the ECT pertains to other EU Member States and investors from those Member States. In order to excuse Croatia from its obligation, however, that inability to consent had to be manifest. Croatia's ratification of the ECT comported

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[120] *Micula v. Gov't of Romania*, No. 1:17-cv-02332, Memorandum Opinion and Order, ECF No. 203, at 19 (D.D.C. Dec. 12, 2022).

with all formal international law requirements, and all requirements of Croatian law. Croatia joined the European Union in 2013, yet upon doing so sent no notice to Hungary, or to any other ECT State Party, that its obligations under that treaty would now be different. In such a case, Croatia's authority (or lack thereof) to ratify the provision was not "manifest."

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

157. Croatia has also ratified the ICSID Convention, and is thereby obligated to pay any awards rendered by an ICSID Convention arbitral tribunal. ICSID Convention Article 53(1) provides that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." In fact, the failure to comply with an award equates to an international wrong that entitles the home State of the investor to engage in diplomatic protection, or bring an international claim, on the investor's behalf.[121]

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

[121] ICSID Convention art. 27(1).

not invoke its internal law to justify its failure to perform its treaty obligations) and 46 (a party may not disclaim its consent to be bound by a treaty on the basis of a violation of its internal law unless that violation is manifest and objectively evident).

159. The difficulty surrounding apparent conflicts between EU Member States' EU law obligations and other international obligations is not specific to ECT arbitration. It has also arisen before the European Court of Human Rights. In *Matthews v. United Kingdom*, for example, the violation alleged to have been committed by the United Kingdom originated in primary EU law. The United Kingdom argued that its violation was required (and excused) due to authority it had transferred to the EU. The European Court was not moved: While nothing in the European Convention of Human Rights precluded a transfer of authority to an international organization (in this case the EU), Convention rights needed to remain secured, and the responsibility of Member States therefore continued after the transfer.[122]

160. Thus, Croatia cannot escape its obligations under international law by invoking EU law or *Achmea* or *Komstroy*. For these reasons, over 40 ECT investor-State arbitration tribunals, to date, have concluded that EU Member States, including Croatia, must honor their obligation under the ECT to arbitrate disputes and pay resulting awards to protected investors, even if they are from other EU Member States.[123] This includes all but two ICSID tribunals that have considered the issue (over 35 so far).[124] An outlier tribunal, in an UNCITRAL case, accepted the

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[122] *Matthews v. United Kingdom*, App. No. 24833/94, 28 Eur. Ct. H.R. 361 (1999), ¶¶ 26-35, https://tinyurl.com/bdze8a69.

[123] *See infra*, Appendix 1.

[124] *Id.* (ICSID decisions are shaded beige). Two tribunals, recently reported in the trade press but not yet publicly available, apparently decided to uphold the EU objection. Lisa Bohmer, *ICSID Tribunal Majorities Uphold Intra-EU Objection in Duo of ECT Arbitrations Against Spain*, IA REP. (Oct. 12, 2024), attached hereto as Exhibit 27.

intra-EU jurisdictional objection.[125] While Croatia points to a few recent rulings from courts in the European Union that have accepted the intra-EU objection,[126] those decisions merely reflect a rote application of EU law by EU courts that are bound to follow the CJEU. International tribunals that are *not* bound by the CJEU on issues of international law, by contrast, have consistently rejected the intra-EU objection.

161. Most recently the Swiss Supreme Court held that the jurisprudence of the CJEU binds only EU Member States, and rejected any invitation to follow that Court's lead on the grounds that the EU institutions have been leading a "crusade" against intra-EU investment arbitration.[127] The Swiss Supreme Court noted that Article 26 of the ECT was clear and unconditional, and did not carve out intra-EU disputes.[128] It gave no credence to the argument that the EU Member States had agreed to exclude intra-EU arbitration from their consent under Article

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[125] *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Arbitration V (2016/135), Award (June 16, 2022), https://tinyurl.com/5n6f98df. The *Green Power* tribunal expressly distinguished arbitrations in the ICSID context, and it relied heavily on the fact that the arbitration was seated in an EU Member State and therefore bound, according to the tribunal, by EU law in a manner not applicable to ICSID tribunals. Specifically, the tribunal stated that EU law is "applicable" in part because "[t]he seat of the arbitration [is] Sweden, *i.e.* an EU Member State." *Id.* ¶ 412. The *Green Power* tribunal's argument for applying EU law to arbitrations seated in the EU is questionable. But whatever the merits of that argument, it does not apply to ICSID arbitrations, as the tribunal recognized in *Green Power*. It is thus irrelevant to this case. And at a minimum, it is an outlier and therefore unpersuasive.

[126] *See Republic of Poland v. PL Holdings S.á.r.l.*, Case No. T 1569-19, Judgment (Dec. 14, 2022) (Swedish Supreme Court), https://tinyurl.com/m76eb72a; *Kingdom of Spain v. Novenergia II – Energy & Environment (SCA), SICAR*, Case No. T 4658-18, Judgment (Dec. 13, 2022) (Svea Court of Appeal), https://tinyurl.com/yhhm6rek; Case C-333/19, *DA v. Romatsa et al.*, Order of the Court (Sep. 21, 2022), CELEX:62019CO0333, https://tinyurl.com/3va3yu4s.

[127] *Spain v. A*, 4A_244/2023, ¶¶ 7.6.5 & 7.8.2 (April 3, 2024), attached hereto as Exhibit 28.

[128] *Id.* ¶¶ 7.7.1 & 7.7.2.

26, noting that the EU statements were not uniform; furthermore they had not been signed by all parties to the ECT.[129] The Swiss Supreme Court also noted the absence of a disconnection clause in the ECT itself.[130] Finally the Court held that the CJEU did not have exclusive jurisdiction over the interpretation of the ECT, which is what was at issue in the case, thereby negating any notion of conflict between the ECT and EU law. Moreover, even if there were such a conflict, EU law would not prevail over the ECT because Article 16 of the ECT provided that the ECT would prevail over other treaties in the event of a conflict.[131]

162. The UK Court of Appeal, in the *Micula v. Romania* case, held that enforcement of an ICSID award is intended to be automatic, highlighting "the importance of ease of enforcement of ICSID awards under the Convention and the significance of the exclusion of any public policy exception."[132] The Court further noted that "[e]nforcement cannot be resisted on the basis that the award was wrongly decided or improperly obtained. It must be taken as it stands."[133]

163. When asked to reject the Court of Appeal's ruling, the UK Supreme Court declined and, tasked with considering the relationship between EU law and the ICSID Convention, held decisively that the UK was bound by its ICSID Convention obligations:

> The first step in the analysis should be to ask whether the United Kingdom has relevant obligations arising from the ICSID Convention which, by operation of article 351 TFEU, preclude the application of the [EU] Treaties. … In any event, the proper interpretation of the Convention is given by principles of international law applicable to all Contracting States and it cannot be affected by EU law.[134]

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[129] *Id.* ¶¶ 7.7.5 & 7.8.3.3.

[130] *Id.* ¶ 7.7.2.

[131] *Id.* ¶¶ 7.8.2 & 7.8.3.2

[132] *Viorel Micula v. Romania and European Commission*, [2018] EWCA Civ 1801, ¶ 148 (July 27, 2018), https://tinyurl.com/msramryp.

[133] *Id.*

[134] *Micula v. Romania*, [2020] UKSC 5, ¶ 87 (Feb. 19, 2020), https://tinyurl.com/5n9bjfsf.

164. The UK Supreme Court's statement makes clear that recognition and enforcement process should be automatic; arguments based on the ECT and its relationship to EU law are not properly the subject of consideration by an enforcing court.[135] Thus, regardless of what happens internally within the EU, the United States has an obligation to enforce an ICSID award presented to it.

165. In a subsequent case, the UK High Court of Justice, in *Infrastructure Services Luxembourg et al. v. Spain*, rejected Spain's arguments about 'the treaty conflict rule of EU primacy.'[136] As Mister Justice Fraser put it:

> that is simply a different way of Spain maintaining that both the ECT and the ICSID Convention – both of which clearly have signatories who are not Member States of the EU – should be interpreted by ignoring their clear terms regarding dispute resolution, in preference to granting the decisions of the CJEU complete primacy over those pre-existing treaty obligations of all states. I do not accept that is the correct approach, and I do not consider that such a result can be achieved by applying international law principles to conflicting treaty provisions.[137]

166. Mr. Justice Fraser also rejected Spain's argument that the offer of arbitration in the ECT did not extend to the claimants based on the *Achmea* and *Komstroy* cases: "there is no justification for interpreting their effect as, in some way, creating within the ECT itself, only a partial offer of arbitration to some investors, but not others, depending upon whether those investors were resident within Member States or elsewhere. Spain cannot rely upon any particular

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[135] The European Commission has launched an infringement procedure against the UK on the grounds that the UK Supreme Court failed to honor the primacy of EU law by enforcing the UK's obligations under the ICSID Convention. *Press Release: Sincere Cooperation and Primacy of EU Law: Commission refers UK to EU Court of Justice over a UK Judgment Allowing Enforcement of an Arbitral Award Granting Illegal State Aid*, EUROPEAN COMM'N (Feb. 9, 2022), https://tinyurl.com/4thc8yum.

[136] *Infrastructure Services Luxembourg SARL ea v Kingdom of Spain*, [2023] EWHC 1226 (Comm), ¶ 87 (May 24, 2023), https://tinyurl.com/2745v3xb.

[137] *Id.* ¶ 87.

wording within the treaty itself that could accomplish such an extraordinary result. There is no such wording."[138]

167. Croatia is a Contracting Party to the ECT. Under the ECT Croatia has promised to "carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."[139] Croatia is obliged to perform all of its obligations under these Treaties in good faith. Silent modifications to the ECT applicable only between some of the Contracting Parties are permitted neither by the terms of the ECT itself nor by public international law.

168. Croatia and the United States have obligations under the ICSID Convention; Croatia's obligation is to pay the award rendered by the tribunal, while the United States' obligation is to enforce the award in the event of Croatia's violation of its clear obligations under the ICSID Convention. The EU principles of primacy and autonomy referred to in the recent decisions by the CJEU do not relieve Croatia (or any other Member State of the EU or the EU itself) of its public international law obligations in the ECT and given effect by the tribunal in this case. The overwhelming majority of investment treaty tribunals to have considered the matter (unanimous before the decision of one outlier tribunal last year) concur with my opinion that this is the outcome required by public international law.[140]

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[138] *Id.* ¶ 101.

[139] ECT art. 26(8).

[140] *See infra*, Appendix 1.

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

Executed on December 2, 2024
Montreal, Quebec, Canada

Andrea K. Bjorklund

APPENDIX 1

Table of Arbitral Tribunals and ICSID Annulment Committees That Have Dismissed the Intra-EU Objection Argument

Decisions from ICSID tribunals are shaded beige.

Arbitral Tribunals

No.	Decision	Date	Link
	Pre-*Komstroy*		
1.	*Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability	November 30, 2012	https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf
2.	*PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction; *see also PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award (February 28, 2020)	October 13, 2014	https://pcacases.com/web/sendAttach/9368
3.	*EDF International S.A. v. Republic of Hungary*, UNCITRAL, Award	December 4, 2014	(not public)
4.	*Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Final Award	January 21, 2016	https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf

No.	Decision	Date	Link
5.	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction; *see also RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum	June 6, 2016	https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf; *see also* https://www.italaw.com/sites/default/files/case-documents/italaw10455_0.pdf
6.	*Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Final Award and Dissenting Opinion	July 12, 2016	https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/49_Isolux/Isolux_v._Spain_-_award_dis._opinion_unofficial_translationEN.pdf
7.	*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award	December 27, 2016	https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf
8.	*Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award[141]	February 15, 2018	https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf
9.	*Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Final Award	May 16, 2018	https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/54_Masdar_Solar/Award.pdf
10.	*Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award	June 15, 2018	https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf

[141] Although the arbitral tribunal in *Novenergia* rejected the intra-EU objection, the Svea Court of Appeals—a Swedish court seated in the EU and thus bound to follow the CJEU—ultimately accepted the objection and declared the award invalid on that basis. *See Novenergia*, *supra* n.126. Novenergia has appealed that ruling to the Swedish Supreme Court. *Novenergia II – Energy & Environment (SCA) v. Kingdom of Spain*, No. 1:18-cv-01148, ECF No. 93 (D.D.C. Jan. 12, 2023).

No.	Decision	Date	Link
11.	*Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue	August 31, 2018	https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf
12.	*Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. Kingdom of Spain*, SCC Arbitration V (2015/150), Final Award and Partial Dissenting Opinion of Arbitrator Raül Vinuesa[142]	November 14, 2018	https://www.italaw.com/sites/default/files/case-documents/italaw10142.pdf
13.	*Greentech Energy Systems A/S (now Athena Investments A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V (2015/095), Final Award[143]	December 23, 2018	https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf
14.	*CEF Energia B.V. v. Italian Republic*, SCC Case No. V2015/158, Award	January 16, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf
15.	*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability, and Partial Decision on Quantum	February 19, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf

[142] In the Swedish set-aside proceedings relating to this award, the Svea Court of Appeal rejected Spain's request that certain questions relating to the compatibility of intra-EU ECT arbitration with EU law be submitted to the CJEU for a preliminary ruling. *See Kingdom of Spain v. Foresight Luxembourg Solar 1 S.à r.l. et al.*, Case No. T 1626-19, Decision (Oct. 26, 2020) (Svea Court of Appeal), https://tinyurl.com/yau739jm.

[143] In the Swedish set-aside proceedings relating to this award, the Svea Court of Appeal initially granted Italy's request that certain questions relating to the compatibility of intra-EU ECT arbitration with EU law be submitted to the CJEU for a preliminary ruling. However, in a November 24, 2021 decision, the Svea Court of Appeal acknowledged that, in light of the CJEU's *Komstroy* and *PL Holdings* judgments, there was no need to maintain its request for a preliminary ruling. Accordingly, the court decided to withdraw its request for a preliminary ruling.

No.	Decision	Date	Link
16.	*Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on Objection to Jurisdiction	February 25, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10834.pdf
17.	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles	March 12, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10569.pdf
18.	*Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection	May 7, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf
19.	*9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award	May 31, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf
20.	*Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection	June 26, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10646_0.pdf
21.	*SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award	July 31, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf
22.	*InfraRed Environmental Infrastructure GP Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award	August 2, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw11360.pdf
23.	*Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award	August 6, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw10759.pdf
24.	*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award	September 6, 2019	http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C4806/DS12832_En.pdf

No.	Decision	Date	Link
25.	*BayWa r.e. Renewable Energy GmbH and Baywa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum	December 2, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw15000.pdf
26.	*Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award	December 2, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw11056.pdf
27.	*RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum	December 30, 2019	https://www.italaw.com/sites/default/files/case-documents/italaw11004.pdf
28.	*Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award	January 21, 2020	https://www.italaw.com/sites/default/files/case-documents/italaw11234_0.pdf
29.	*Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum	March 9, 2020	https://www.italaw.com/sites/default/files/case-documents/italaw11282.pdf
30.	*SunReserve Luxco Holdings S.À.R.L. et al. v. Italian Republic*, SCC Arbitration V (2016/32), Final Award	March 25, 2020	https://www.italaw.com/sites/default/files/case-documents/italaw11475.pdf
31.	*Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Jurisdiction	August 20, 2020	(not public)
32.	*Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum	August 31, 2020	https://jusmundi.com/en/document/decision/en-cavalum-sgps-s-a-v-kingdom-of-spain-decision-on-jurisdiction-liability-and-directions-on-quantum-monday-31st-august-2020#decision_12145
33.	*ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award	September 14, 2020	https://www.italaw.com/sites/default/files/case-documents/italaw11827.pdf

No.	Decision	Date	Link
34.	*STEAG GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum	October 8, 2020	https://www.italaw.com/sites/default/files/case-documents/italaw11900.pdf
35.	*Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award	February 26, 2021	https://www.italaw.com/sites/default/files/case-documents/italaw16138.pdf
36.	*ČEZ, a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/16/24, Decision on Jurisdiction	March 2, 2021	(not public)
37.	*FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award	March 8, 2021	https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/112_FREIF_Eurowind_Holdings_Ltd_v._Spain/2021.03.08_Award.pdf
38.	*Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability	March 17, 2021	https://www.italaw.com/sites/default/files/case-documents/italaw16123.pdf
39.	*Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility	April 19, 2021	https://jusmundi.com/en/document/pdf/decision/en-frank-schumm-joachim-kruck-jurgen-reiss-and-others-v-kingdom-of-spain-decision-on-jurisdiction-friday-16th-april-2021
40.	*Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Kingdom of Spain*, ICSID Case No. ARB/16/17, Award	June 22, 2021	(not public)
41.	*Festorino Invest Limited et al. v. Republic of Poland*, SCC Case No. 2018/098, Award	June 30, 2021	https://www.italaw.com/sites/default/files/case-documents/italaw170046.pdf

Post-*Komstroy*			
42.	*Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum	September 13, 2021	https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/99_Infracapital_F1_S.a_r.l._and_Infracapital_Solar_B.V._v._Spain/2021.09.13_Decision_on_Jurisdiction__Liability_and_Directions_on_Quantum.pdf
43.	*Amlyn Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/16/28, Award	October 22, 2021	(not public)
44.	*Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum	February 11, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw170038.pdf
45.	*RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award	May 6, 2022	https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/60_RENERGY/2022.05.06_Award.pdf
46.	*MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award	July 5, 2022	(not public)
47.	*LSG Building Solutions and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation	July 11, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw170316.pdf

ICSID Annulment Committees

No.	Decision	Date	Link
	Pre-*Komstroy*		
48.	*Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21, Decision on Annulment	March 9, 2020	(not public)
49.	*Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment	May 7, 2021	(not public)
50.	*Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Annulment	July 16, 2021	(not public)
51.	*Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment	July 30, 2021	https://www.italaw.com/sites/default/files/case-documents/italaw16546.pdf
52.	*UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment	August 11, 2021	(not public)
	Post-*Komstroy*		
53.	*Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Decision on Annulment	November 16, 2021	(not public)
54.	*SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment	March 16, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw170064.pdf
55.	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment	March 18, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw16524.pdf

No.	Decision	Date	Link
56.	*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment	March 28, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw16538.pdf
57.	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment	June 10, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw170299.pdf
58.	*InfraRed Environmental Infrastructure GP Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment	June 10, 2022	https://jusmundi.com/en/document/pdf/decision/en-infrared-environmental-infrastructure-gp-limited-and-others-v-kingdom-of-spain-decision-on-annulment-friday-10th-june-2022
59.	*9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment	November 17, 2022	https://www.italaw.com/sites/default/files/case-documents/italaw170813.pdf

LIST OF EXHIBITS

Exhibit No.	Citation
1	*Curriculum Vitae*
2	*MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, ICSID Case No. ARB/13/32, Opinion of Sir Alan Dashwood (October 12, 2016)
3	*MOL Hungarian Oil and Gas PLC v. Republic of Croatia*, ICSID Case No. ARB/13/32, Opinion of Paul Craig (January 30, 2017)
4	Research in International Law at Harvard Law School, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. SPEC. SUPP. (i) 133 (1929)
5	Edwin M. Borchard, Responsibility of States, at the Hague Codification Conference, 24 AM. J. INT'L L. 517, 518 (1930)
6	M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 477-85 (Cambridge University Press, 2d ed., 2004)
7	Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158-59, 170-75 (2005)
8	ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 44-45 (Kluwer Law Int'l 2009)
9	Jeswald Salacuse, *The Energy Charter and Bilateral Investment Treaty Regime*, in Thomas Wälde (ed.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 321, 328 (Kluwer Law Int'l 1996)
10	Graham Coop, *The Energy Charter Treaty: More than a MIT*, in Clarisse Ribeiro (ed.), INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 3, 4-5 (Juris 2006)
11	Craig S. Bamberger, *Overview*, in Thomas W. Wälde (ED.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 2 (Kluwer Law Int'l 1996))
12	Julia Doré, *Negotiating the Energy Charter Treaty*, in Thomas W. Wälde (ed.), THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 140-41, 143-44 (Kluwer Law Int'l 1996)
13	ANTONIO R. PARRA, THE HISTORY OF ICSID 22-26 (Oxford 2012)
14	Stefan Kröll, *Enforcement of Awards*, in Marc Bungenberg et al. (eds.), INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1483 (C.H. Beck 2015)
15	Andrea K. Bjorklund et al., *State Immunity as a Defense to Resist the Enforcement of ICSID Awards*, 35(3) ICSID REV.—FILJ 1, 13 (2020)

Exhibit No.	Citation
16	HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 601-03 (Oxford Univ. Press 2013)
17	CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION, A COMMENTARY 1117-18 (2d ed. 2009)
18	*Benvenuti & Bonfant v. The People's Republic of the Congo*, Cour D'appel de Paris (1e Ch. Suppl.) (June 26, 1981)
19	Marise Cremona, *Disconnection Clauses* in C. Hillion and P. Koutrakos (eds.), EU LAW AND PRACTICE, MIXED AGREEMENTS RE-VISITED – THE EU AND ITS MEMBER STATES IN THE WORLD 160, 161 (2010)
20	Final Act of the European Energy Charter Conference, Annex 2
21	Christian Tietje, *The Applicability of the Energy Charter Treaty, in ICSID Arbitration of EU Nationals vs. EU Member States*, INST. ECON. L. 8-9 (Sept. 2008)
22	Markus Burgstaller, *European Union Law and Investment Treaties*, 26 J. INT'L ARB. 181, 211 (2009)
23	Julia Doré & Robert De Bauw, THE ENERGY CHARTER TREATY 6 (1995)
24	Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, in DAVID O'KEEFFE & HENRY G. SCHERMERS, MIXED AGREEMENTS 155, 159 (1983)
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27	Lisa Bohmer, *ICSID Tribunal Majorities Uphold Intra-EU Objection in Duo of ECT Arbitrations Against Spain*, IA REP. (Oct. 12, 2024)
28	*Spain v. A*, 4A_244/2023 (Apr. 3, 2024)

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all attorneys of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Steven A. Engel
Steven A. Engel