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. 1:23-cv-00218 (AHA) **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF
PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT AND
OPPOSITION TO RESPONDENT'S RENEWED MOTION TO DISMISS

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Petitioner MOL Hungarian Oil and Gas Plc ("MOL") hereby submits this Memorandum of Law in Support of its Cross-Motion for Summary Judgment and Opposition to Respondent the Republic of Croatia's ("Croatia") Renewed Motion to Dismiss (ECF 31).

PRELIMINARY STATEMENT

This is a simple action to enforce an arbitration award under a federal law requiring such enforcement pursuant to a treaty of the United States. Congress adopted that law because the United States has ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 U.S.T. 1270 (the "ICSID Convention"), and because United States investments in foreign countries depend on the efficient and fair resolution of disputes—particularly in the many countries, like Croatia, that do not provide for fair and impartial justice in their own courts.

Croatia's treatment of MOL and the former Croatian Prime Minister proves the wisdom of that judgment. But this Court need not wade into the facts of Croatia's politicized and repeatedly discredited prosecutions of the country's former Prime Minister and the Chairman of MOL, its largest foreign investor. Here, it is undisputed that Croatia acceded to the Energy Charter Treaty, 2080 U.N.T.S. 95 (1995) (the "ECT"); the ECT unambiguously provides for arbitration under ICSID; and Croatia lost the resulting ICSID arbitration against MOL. *See* First Declaration of Michael A. Losco, Jan. 25, 2023 ("First Losco Decl."), Ex. A (Award, July 5, 2022), ECF 1-2 (the "Award"). That being the case, this Court "give[s] the same full faith and credit" to the ICSID Award "as if the award were a final judgment of a court of general jurisdiction of one of the several States." *See* 22 U.S.C. § 1650a(a).

As this Court has recognized, under Section 1650a, a federal court is not "'permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award;' all the court may do is 'examine the judgment's authenticity and

enforce the obligations imposed by the award.'" *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 97-98 (D.D.C. 2019) (Moss, J.) (quoting *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 102 (2d Cir. 2019)). Such deference further applies where, as here, the arbitral tribunal (the "Tribunal") expressly decided and rejected the jurisdictional challenges that Croatia now raises on its Motion to Dismiss.

On July 5, 2022, the Tribunal awarded MOL approximately $235 million as compensation for Croatia's breaches of its obligations under the ECT. MOL was granted this Award against Croatia after nine years of effort to obtain redress for harm that Croatia inflicted on MOL's investments starting in 2009. Despite failing to seek annulment of the Award at ICSID, Croatia refused to comply with its obligations under that final and binding Award, and instead sought to obstruct MOL's legal right to confirmation in the United States. Like many respondents seeking to avoid their pecuniary obligations under U.S. law, Croatia's sole legal strategy is to delay and to obfuscate.

Croatia has filed a "Renewed Motion to Dismiss," but admits that binding D.C. Circuit precedent forecloses the bulk of its arguments. *See* ECF 31-1 at 11. That includes Points I through III of Croatia's brief, which total 21 of 27 pages of argument and all its jurisdictional objections. *See id.* at 18-39. Croatia's principal argument rests upon the proposition that European Union ("EU") law bars its Member States from arbitrating investment disputes under the ECT. But the D.C. Circuit rejected the relevance of EU law to confirmation of an ICSID award in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (2024). Just as in *NextEra*, this Court has the "jurisdiction to confirm" an ICSID Convention award arising under the ECT, based under the "arbitration exception" of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *Id.* at 1103, 1111. Nothing further is required.

Croatia also admits that D.C. Circuit precedent disposes of its second and third arguments. This Court has personal jurisdiction over Croatia under *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002). *See* ECF 31-1 at 37. And the doctrine of *forum non conveniens* "is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." *SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021); *see also NextEra*, 112 F.4th at 1105. Therefore, those three arguments should be summarily denied.

With those three arguments unavailable, Croatia's Renewed Motion to Dismiss devotes its remaining pages to advancing a smattering of other defenses on the merits. But none fare any better than its principal arguments. Croatia can hardly sidestep *NextEra* by invoking the act of state doctrine, which does not apply here. The act of state doctrine precludes U.S. courts "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory," such as a foreign sovereign's expropriation of property within its jurisdiction. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). But this action to enforce an arbitration award under 22 U.S.C. § 1650a does not call upon the Court to decide upon the validity of any qualifying act of a foreign sovereign. To the contrary, a treaty of the United States obliges the federal courts to enforce the Award of the ICSID Tribunal.

In addition, Croatia invokes the "foreign sovereign compulsion" doctrine, which applies to prevent individuals from being compelled to place themselves in violation of a foreign state's law; it has never been read to relieve a foreign sovereign from its obligations to comply with its own treaty obligations. Even so, the "foreign compulsion defense" would apply only where the defendant shows that it is likely to suffer severe sanctions under foreign law and has acted in good faith to avoid the conflict—neither of which Croatia can show here. And because this is a defense

on the merits of the judgment, this Court does not consider it under § 1650a. Croatia may not avoid the full faith and credit owed to the ICSID Award by advancing a new merits defense.

At bottom, this Court's role in enforcing the ICSID Award is straightforward: This Court must recognize the Award as binding and enforce its pecuniary obligations. *NextEra* confirms, consistent with international law and the United States' obligations under the ICSID Convention, that Croatia cannot use its own internal law to collaterally attack the Award. 112 F.4th at 1104. The Court therefore should deny Croatia's motion to dismiss and grant MOL's cross-motion for summary judgment to enforce the Award.

BACKGROUND

I. THE INTERNATIONAL INVESTMENT TREATIES AT ISSUE

Because MOL seeks to enforce an ICSID Award that arose pursuant to the ECT, MOL outlines here the key substantive provisions of these two international treaties. MOL's experience in Croatia demonstrates why the international arbitration framework provided under these treaties is essential to protect and promote foreign investment. That framework protects investors from national governments who invite necessary foreign investments and then illegitimately seek to break their promises at the expense of their treaty obligations and the rule of law.

A. The ICSID Convention

The ICSID Convention "is a 'multilateral treaty aimed at encouraging and facilitating private foreign investment in developing countries.'" *TECO*, 414 F. Supp. 3d at 96 (quoting *Mobil Cerro Negro*, 863 F.3d at 100)). The Convention has been ratified by 158 nations, including the United States, Croatia, and Hungary. *List of Contracting States and Other Signatories of the Convention (as of Aug. 25, 2024)*, INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, https://tinyurl.com/5fnk2dha. The United States was among the first nations to ratify the ICSID Convention, doing so on June 10, 1966, nearly sixty years ago. *Id.* at 5.

"The ICSID Convention provides an international framework for adjudicating and enforcing investor-state disputes." *TECO*, 414 F. Supp. 3d at 96. To allay concerns that foreign courts will unduly favor their own governments against claims by foreign investors, the framers of the Convention established the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"), based in Washington, D.C., which provides an entirely self-contained arbitration center under the auspices of the World Bank, with its own arbitration rules and award annulment procedures. *See Mobil Cerro Negro*, 863 F.3d at 100–01; *TECO*, 414 F. Supp. 3d at 96–98.

"Under the Convention, any 'Contracting State or any national of a Contracting State' may request that ICSID convene an arbitration tribunal." *TECO*, 414 F. Supp. 3d at 96 (quoting ICSID Convention art. 36(1)). Article 41 of the Convention provides that "[t]he Tribunal shall be the judge of its own competence." ICSID Convention art. 41(1). "Any objection" to the "jurisdiction of the Centre" over a dispute shall be considered and decided by the Tribunal. *Id*. art. 41(2). That jurisdictional determination is binding, subject only to the remedies set forth within the Convention. *See id.* art. 41; *see also* Expert Declaration of Andrea K. Bjorklund ("Bjorklund Decl.") ¶ 64. At the conclusion of the proceedings, the Tribunal must issue a written award that addresses "every question submitted to the Tribunal" and that states "the reasons upon which [the award] is based." ICSID Convention art. 48; *see also Mobil Cerro Negro*, 863 F.3d at 101; *TECO*, 414 F. Supp. 3d at 97.

The ICSID arbitration system contains a self-contained mechanism for a losing party to challenge an award. *See* Bjorklund Decl. ¶¶ 53-56. Article 52 provides that a party may challenge an award on specified grounds, but it "may do so only through proceedings at the Centre and not collaterally in the courts of member states." *Mobil Cerro Negro*, 863 F.3d at 101 (footnote

omitted). Croatia did not seek annulment of the Award pursuant to the ICSID Convention. *See id.* art. 52(2). Croatia's motion here is precisely the kind of collateral challenge that the ICSID Convention was designed to avoid.

The Convention also provides a framework to ensure that ICSID awards shall be enforced in the courts of each Contracting State in a manner that ensures neutrality and protects against interference by the local courts of the states in which the investment was made. Article 54(1) of the Convention provides that each Contracting State "shall recognize an award rendered pursuant to this 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***." *Id.* art. 54(1) (emphasis added). Article 54 of the Convention thus "affords ICSID arbitral awards the status of final state court judgments, and was included in the Convention ***at the insistence of the United States***." *Mobil Cerro Negro*, 863 F.3d at 117 (emphasis added).

The Convention provides that Contracting States with a federal constitution, such as the United States, may enforce an ICSID award "through its federal courts and . . . provid[ing] that such courts shall treat the award as if it were a final judgment of the courts of a constituent state." ICSID Convention art. 54(1). Congress adopted that approach in the Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, 80 Stat. 344 (codified at 22 U.S.C. §§ 1650 and 1650a). *See TECO*, 414 F. Supp. 3d at 96. Section 1650a provides that the district courts shall have exclusive jurisdiction to enforce ICSID awards, and that "[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). The statute further specifies that the FAA, which permits courts to vacate FAA awards on certain limited grounds, "shall ***not*** apply to enforcement of awards rendered pursuant

to the [ICSID] convention." *Id.* (emphasis added). "[A]ll the court may do is 'examine the judgment's authenticity and enforce the obligations imposed by the award.'" *TECO*, 414 F. Supp. 3d at 97–98 (quoting *Mobil Cerro Negro*, 863 F.3d at 102).

Under Section 1650a, this Court does not review the merits of an ICSID Convention award but "shall" enforce it and extend it full faith and credit. 22 U.S.C § 1650a(a). Indeed, "a domestic court has no power to review ICSID proceedings *de novo*. Under both the ICSID Convention and the U.S. implementing legislation, a U.S. court is not 'permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award . . . .'" *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, No. 1:19-cv-00046-ACR-RMM, 2023 WL 3453633, at *5 (D.D.C. May 15, 2023), *aff'd*, 87 F.4th 510 (D.D.C. 2023); *see also TECO*, 414 F. Supp. 3d at 98 (quoting *Mobil Cerro Negro*, 863 F.3d at 102); *see* Bjorklund Decl. ¶ 60. The Court's sole role is to enforce the Award, just as it would give full faith and credit to enforce the judgment of a federal or state court.

B. The ECT

Like the ICSID Convention, the ECT is a multilateral investment treaty designed to promote and protect international investment—specifically in the energy sector. *See, e.g.*, *Stileks*, 985 F.3d at 874. The ECT arose at the end of the Cold War, when the crumbling energy infrastructure of the former Communist states desperately needed investment from more prosperous nations. *See* C. S. Bamberger, *An Overview of the Energy Charter Treaty*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE 1–3 (T. W. Wälde ed., 1996). Today, the ECT has been ratified by numerous countries, including many outside of the EU. *Members and Observers to the Energy Charter Conference*, INT'L ENERGY CHARTER, https://tinyurl.com/z8jt7jvf. As such, the ECT is a multilateral treaty with the effect that each Member State accepts that it owes and expects that it will be accorded equal, non-

discriminatory and reciprocal treatment by every other Member State. Further, as a multilateral instrument, it does not vary in its meaning based on the identity of the parties to the dispute.

Under the ECT, the Contracting Parties expressly consented to arbitrate disputes regarding breaches of the treaty's investment protections with investors from all other Contracting Parties. ECT art. 26(1), (3). Article 26 permits investors to choose to arbitrate such disputes at ICSID. *Id.* art. 26(4). Further, "[t]he consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention." *Id.* art. 26(5)(a)(i). Regardless of the arbitral regime chosen by the investor, tribunals constituted under the ECT must decide disputes "in accordance with this Treaty and applicable rules and principles of international law." *Id.* art. 26(6). Article 26 expressly applies to all of the ECT's Contracting Parties. There is no exception to arbitration for members of the EU, even though such a so-called "disconnection clause" has been adopted in other treaties and could have been proposed by the EU members of the treaty as a condition of their ratification. Bjorklund Decl. ¶ 7.

Both Croatia and Hungary have ratified the ECT, which entered into force for Croatia on April 16, 1998, and for Hungary on July 7, 1998. Croatia thus agreed with the ECT's other Contracting Parties to provide a standing and irrevocable offer to arbitrate at ICSID for any treaty violation alleged by an investor from another Contracting Party as of October 22, 1998. ECT art. 26(3)(a); ICSID Convention art. 25(1).

On November 26, 2013, MOL submitted a Request for Arbitration against Croatia at ICSID ("ICSID Arbitration") and therefore formed an irrevocable arbitration agreement with Croatia. *See, e.g.*, *InfraRed Env't Infrastructure GL Ltd. v. Kingdom of Spain*, No. 20-817 (JDB), 2021 WL 2665406, at *2 (D.D.C. June 29, 2021) ("[T]he state consent provision in paragraph 3 of Article

26 [ECT] acts as a standing offer by state parties to arbitrate disputes which investors may accept by submitting their consent to arbitrate," including through a notice of arbitration submitted to ICSID). Under the ICSID Convention, where each party has given its consent to arbitration, "no party may withdraw its consent unilaterally." ICSID Convention art. 25(1).

C. ECT and EU Law

This Court's role in confirming the ICSID Award does not require the Court to reconcile the ECT with the EU treaties. The EU treaties are multilateral treaties like just the ECT. Even if Croatia's commitments in the EU treaties conflict with its arbitration commitment under the ECT, Croatia still remains obliged under the ECT.[1] Croatia's counterparties under the EU treaties may have remedies under those treaties if Croatia breached them, but those actions would have no impact upon Croatia's separate ECT commitments. And critically here, Croatia's EU commitments have no impact upon the obligations of the United States under the ICSID Convention and federal law to recognize and enforce international arbitration awards.

Even so, although the Court need not address this issue, Croatia is quite wrong on the international law (and lost the question before the ICSID Tribunal). As a multilateral investment treaty, the interpretation and application of the ECT is governed by public international law, including those principles codified in the Vienna Convention on the Law of Treaties, May 23,

[1] Croatia has not withdrawn from the ECT. *See* Bjorklund Decl., ¶ 45. Even if Croatia had withdrawn from the ECT, that would be immaterial. The ECT's "sunset" clause continues to bind Contracting Parties for 20 years following such withdrawal. ECT, art. 47(3) ("The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.").

1969, 1155 U.N.T.S. 331 (1980) ("Vienna Convention").[2] *See, e.g., id.* art. 1; Bjorklund Decl. ¶ 10. The Contracting Parties to the ECT must comply with their obligations in good faith, Vienna Convention art. 26, "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," Vienna Convention art. 31. EU law, which is just the law applicable under other international treaties, provides no basis to vary the ECT Contracting Parties' agreement to arbitrate disputes with ***all*** investors from other ECT Contracting Parties. Bjorklund Decl. ¶ 12.

First, the arbitration provision of Article 26 of the ECT has not been amended by the ECT Contracting Parties. The EU and its Member States comprise only a fraction of the ECT Contracting Parties. *Id.* ¶¶ 40, 121. The ECT permits modifications only when all the ECT Contracting Parties adopt an amendment and, subsequently, three-quarters of them have ratified, accepted, or approved it. ECT art. 42; Bjorklund Decl. ¶¶ 7-9, 124. No such process has taken place to exclude the intra-EU application of the ECT. *Id.* ¶¶ 8-9.

Second, the ECT expressly provides that, in the event of a conflict between the ECT and another international agreement, the investment protections and dispute resolution provisions of the ECT prevail. ECT art. 16; Bjorklund Decl. ¶ 11. Article 16 provides that "nothing in such terms of [another] 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." ECT art. 16. When a treaty specifies that it prevails over inconsistent treaties, that treaty takes precedence. Bjorklund Decl. ¶ 11; *cf.* Vienna Convention art. 30(2). Even if EU law prohibits intra-EU

[2] This Court, like others, has referred to the Vienna Convention to interpret treaties. *See United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) (noting that the Vienna Convention source of "[b]asic principles of treaty interpretation[.]").

arbitration, this prohibition would have no legal effect on investors' rights under the ECT.[3]

Third, even if Article 16 did not expressly provide that the ECT's obligations take precedence, the later-in-time treaty would prevail. Bjorklund Decl. ¶ 11; Vienna Convention art. 30(3). The ECT postdates the provisions of the EU treaties on which the Court of Justice of the European Union ("CJEU") relied in holding intra-EU arbitrations under the ECT to be impermissible.[4] "The ECT was adopted in 1998, after the predecessor provisions to Articles 267 and 344 of the [EU Treaties] were originally enacted as Articles 177 and 219 of the Treaty of Rome." Bjorklund Decl. ¶¶ 43, 157. Because Croatia did not, on accession to the EU, acquire different rights and obligations than other EU member states, the relevant provisions of the EU Treaties are earlier in time than the ECT. *Id.* ¶ 157; Award ¶ 476. As such, the ECT would prevail over these supposedly incompatible provisions of EU law, even if the ECT contained no express agreement to the same effect.

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[3] Croatia argues that under *Achmea* and *Komstroy*, courts and international arbitral tribunals would be required to apply or interpret EU law to resolve the merits of the dispute. That argument conflicts with binding Circuit precedent, *see Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 279 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020), and, in any event, is incorrect under international law. Bjorklund Decl. ¶ 83.

Croatia further argues that EU law preempts the ECT because an international agreement may not affect the autonomy of EU law. Renewed Mot. to Dismiss at 33. That argument is likewise misplaced in light of binding international principle. Assuming *arguendo* that EU law applies to the underlying dispute, Croatia ignores a fundamental principle of international law—that EU law does not have primacy over international law. *See* Bjorklund Decl. ¶¶ 12-13. Indeed, based on the international law principle of *pacta sunt servanda* treaties are binding upon the parties and must be performed in good faith. Vienna Convention art. 26. Thus, states, including Croatia, may not invoke domestic laws to escape their obligations under international law. Bjorklund Decl. ¶¶ 7-9; Vienna Convention art. 27.

[4] Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:108:158 (Mar. 6, 2018), https://tinyurl.com/475jw83a ("*Achmea*") and Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sep. 2, 2021), https://tinyurl.com/p9pz5up6 ("*Komstroy*").

II. THE ICSID ARBITRATION AND AWARD

MOL is a vertically integrated oil and gas company with operations in over 30 countries, including in the Middle East, Africa, and in European countries both within and outside of the EU. MOL began as Hungary's state-owned energy company, and following the fall of the Soviet Union, became a pioneer in European privatization and energy development. MOL is publicly traded with most of its stock owned by private investors, including about 15% by North American investors. *See Investor Relations*, MOL GROUP, https://tinyurl.com/2urv2wdh. MOL was one of the first energy companies in Central and Eastern Europe to make significant investments in the energy companies of its neighboring States, acquiring large ownership stakes in companies in Croatia, Bosnia and Herzegovina, and Slovakia.

A. MOL's Investment in INA and the Commercial Agreements Between MOL and Croatia

In 2002, Croatia's Parliament enacted the INA Privatization Act, under which it began privatizing Croatia's state-owned energy company, INA-Industrija nafte d.d. ("INA"). Award ¶ 352. Croatia solicited bids from foreign energy companies for about 25% of INA shares. *Id.* ¶ 353. In 2003, MOL submitted the winning bid and paid $505 million, entering into a Shareholders' Agreement ("SHA") with Croatia on July 17, 2003. *Id.* ¶¶ 352, 355–56. From 2003 to 2008, Croatia gradually decreased its ownership of INA, and by 2008, had privatized more than half of the company. *Id.* ¶¶ 357–60. In summer 2008, MOL made a public bid for additional INA shares and paid over EUR 1 billion to raise its stake to 47.16%. *Id.* ¶¶ 361–62. MOL later increased its interest to over 49%. *Id.* ¶ 608.

Because of these ownership changes, in early 2008, MOL and Croatia commenced negotiations over a First Amendment to the Shareholders' Agreement ("FASHA"), to increase MOL's management rights in INA. The two parties also negotiated a Gas Master Agreement

("GMA"), to liberalize Croatia's national gas market. *Id.* ¶¶ 358–63. Among other things, the GMA provided for Croatia to acquire both INA's profitable gas storage business alongside its gas trading business ("PP"), which lost money due to government-imposed price caps set at "artificially low levels." *Id.* ¶¶ 364, 621. The financial crisis in September 2008 put INA in serious financial peril and required "a substantial further injection of funds to rescue INA from potential collapse." *Id.* ¶ 630. Since MOL was prepared to invest approximately half a billion dollars into INA under the GMA, MOL sought additional operational control (which was consistent with MOL's increased ownership stake). *Id.* ¶¶ 618, 623.

In January 2009, the Croatian government unanimously approved the FASHA and GMA. *Id.* ¶ 558. MOL and Croatia executed both agreements on January 30, 2009. *Id.* ¶ 363. MOL proceeded to make the significant investments into INA. Croatia, however, while immediately acquiring INA's profitable gas storage operation, did not acquire the money-losing trading business PP. *Id.* ¶ 636, n.389. Although Croatia recommitted to acquiring the gas trading business in the First Amendment to the Gas Master Agreement ("FAGMA," together with the SHA, FASHA, and GMA, the "Agreements"), the deadline for Croatia to do so (December 1, 2010) came and went. *Id.* ¶ 364; *see also* FAGMA, § 2.2 (First Losco Decl., Ex. G). To this day, Croatia has refused to acquire PP, despite its agreement to do so. Award ¶ 364.

In July 2009, Prime Minister Sanader resigned from office. Dr. Sanader's political opponents began to assert, without evidence, that the Agreements were "detrimental" to Croatian interests and must have been procured unlawfully. *See id.* ¶¶ 377, 381. The Croatian authorities began a criminal investigation of the former Prime Minister, as well as MOL's Chairman. *Id.* ¶ 396. Two international arbitration tribunals, including the ICSID Tribunal, later considered Croatia's fabricated allegations and concluded that they were based upon incredible and unreliable

testimony.[5]

With a politicized criminal investigation underway in Croatia, and the government refusing to comply with its contractual obligations, on November 26, 2013, MOL submitted its Request for Arbitration at ICSID. *Id.* ¶ 412. It thereby accepted Croatia's unconditional offer to arbitrate disputes under the ECT:

> Article 26 of the ECT sets forth Croatia's consent to arbitrate disputes before the International Centre for Settlement of Investment Disputes ("ICSID"). The present Request for Arbitration serves as MOL's consent to arbitrate its disputes concerning the Government's breach of its obligations under the ECT.

Second Declaration of Michael A. Losco, Sep. 1, 2023 ("Second Losco Decl."), Ex. B, ECF 16-3, at 6.

B. The ICSID Tribunal Rejected Croatia's Argument That *Achmea* and *Komstroy* Invalidated the Arbitration Agreement

During the course of the ICSID Arbitration, the CJEU issued its judgments in *Achmea* and *Komstroy*. Croatia invoked those decisions to argue that no valid arbitration agreement was formed between MOL and Croatia, and so the ICSID Tribunal had no jurisdiction. Both sides fully litigated the question with the assistance of "eminent" authorities in EU law, both of whom testified before the Tribunal. Award ¶ 456.[6]

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[5] On January 17, 2014, Croatia separately requested arbitration under the SHA, FASHA, GMA, and FAGMA, before an UNCITRAL arbitration seated in Switzerland (the "UNCITRAL Arbitration"). Award ¶ 413. In the UNCITRAL Arbitration, Croatia sought a declaration that the agreements were procured by bribery and so were null *ab initio* and that they violated Croatian corporate law; Croatia also sought monetary damages. *Id.* ¶ 502. The UNCITRAL Tribunal found Croatia's bribery allegations to be not credible and so, rejected Croatia's claims for nullification and awarded MOL approximately $15 million in fees and costs. *Id.* ¶¶ 489–90. The ICSID Tribunal later conducted its own examination of same the evidence and likewise categorically rejected Croatia's bribery allegations. *Id.* ¶¶ 523–27.

[6] *Komstroy* was decided after the experts testified, but Croatia submitted the judgment to the ICSID Tribunal, Award ¶ 338, and the Tribunal specifically addressed it with *Achmea*. *Id.* ¶¶ 454–89.

The ICSID Tribunal found that it had jurisdiction under ICSID and the ECT. The Tribunal recognized that both sides' experts agreed on the following:

> (i) The extent of the Tribunal's jurisdiction is a question of international law, and does not fall for determination under the law of the EU.
>
> (ii) The judgments of the CJEU are not binding on the Tribunal.
>
> (iii) The EU and its Member States signed and ratified the ECT pursuant to a collective decision that they would each do so.
>
> (iv) The policy behind the decision was at no time, either then or since, referred to the CJEU for a formal Opinion as to its compatibility with the EU treaties.
>
> (v) The accession to the ECT by the EU, re-emphasized quite explicitly by its formal declaration as to the division of competences in respect of dispute settlement with investors, pledge the EU's full faith to all of its terms, including Articles 26 & 27 with their reference to international arbitration.
>
> (vi) No competent expert, asked at the time, or subsequently when Croatia acceded to the EU [on July 1, 2013], would have raised any doubt as to the competence of the EU to enter into those obligations, or as to their lawfulness.

Id. ¶ 468.

The ICSID Tribunal then concluded that "the question is to be decided by the application of international law, and more specifically the law of treaties. No other conclusion is permitted by the terms of Article 26(6) of the ECT, with their exclusive reference to 'in accordance with this treaty and applicable rules and principles of international law.'" *Id*. ¶ 469 (quoting ECT art. 26(6)). As stated by the Tribunal, "the essential question it has to answer is whether Croatia did or did not give a standing and unconditional consent to arbitration which MOL could in turn accept." *Id*. ¶ 470. The Tribunal held "that consent of that kind was given by and became binding on Croatia at the time of its ratification of the ECT." *Id*. No EU Member State has "any right under international law" to claim that its consent to the ECT has been rendered invalid because of its

own "internal law" (here, EU law). *Id*. ¶¶ 482–83. To the contrary, a Contracting Party may withdraw ***only*** by invoking the ECT's withdrawal provisions. ECT art. 47.[7]

Croatia also argued in the Arbitration that *Achmea* and *Komstroy* should be applied retroactively—in short, that those decisions invalidated Croatia's prior consent to arbitrate under the ECT, even though they were rendered years later. The ICSID Tribunal rejected that assertion, because such retroactive application "would smack of bad faith, directly contrary to the fundamental rule in the Vienna Convention, under the title *Pacta sunt servanda*: "'[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'" Award ¶ 487 (quoting Vienna Convention art. 26). The Tribunal concluded that Croatia's "EU objection must therefore be rejected," and the Tribunal had jurisdiction over MOL's claims. *Id*. ¶ 488.[8]

C. The ICSID Tribunal Ruled for MOL on the Merits

The ICSID Tribunal concluded that Croatia had breached its obligations under the ECT and awarded damages of $183.94 million to MOL (exclusive of interest).

First, the Tribunal concluded that Croatia breached its obligation to acquire PP. *Id.* ¶ 364(b). *Second*, Croatia failed to secure a price increase for PP's industrial customers in 2010. *Id.* ¶¶ 379–80. *Third*, Croatia failed to grant PP's reasonable requests for gas price increases to tariff customers in 2010. *Id.* For these breaches of the GMA and the FAGMA, the Tribunal awarded

[7] Even after a State has formally withdrawn from the ECT, the Treaty contains a twenty-year sunset provision, during which time the State remains bound by its obligations under the Treaty. ECT art. 47(3); *see supra* at 9 n.1.

[8] The ICSID Tribunal also rejected the assertion in *Komstroy* that EU law encompasses international law rather than the other way around. Award ¶ 489 (citing *Komstroy*, ¶¶ 23, 62, and 66). As the Tribunal stated, "taken to its logical extreme, this proposition is self-defeating. One of its consequences would presumably be that an international court or tribunal, seized with a dispute, need go no further than to verify whether questions of EU law might arise – or perhaps even simply whether the EU itself is a party to the underlying treaty – from which point all that would be left for it to do would be to pack up its tents and depart. ***But that is a proposition that no international court or tribunal could possibly accept***." *Id*. (emphasis added).

MOL damages of $157.1 million. *Id.* ¶ 650.

Fourth, beginning in 2014, Croatia forced INA and PP to sell gas to a state-owned wholesale gas supplier at a loss. *Id.* ¶¶ 632–34. The Tribunal awarded MOL principal damages of $10.74 million for that breach. *See id.* ¶ 650.

Fifth, in April and May 2014, Croatia "radically restructure[d]" the regime for gas storage in Croatia in order to force INA and PP to sell stored gas at firesale prices. *Id.* ¶ 639. The ICSID Tribunal awarded MOL damages of $16.1 million for that breach. *Id.* ¶ 655.

Croatia did not seek annulment of the Award under the ICSID Convention, and its deadline to do so expired on November 5, 2022. *See* ICSID Convention art. 52(2).

III. THIS ACTION TO ENFORCE THE ICSID AWARD

On January 25, 2023, MOL filed a Petition to Enforce Arbitration Award pursuant to 22 U.S.C. § 1650a (ECF 1) (the "Petition"). On July 7, 2023, Croatia filed its First Motion to Dismiss. Croatia asserted defenses based on subject matter jurisdiction, the foreign sovereign compulsion doctrine, and *forum non conveniens*. *See generally* First Mot. to Dismiss. On September 1, 2023, MOL filed its Opposition to Croatia's First Motion to Dismiss, ECF 16-1, together with a Notice of Intent to File Motion for Summary Judgment (ECF 17), pursuant to § 10(a)(i) of the Court's Standing Order in Civil Cases (ECF 4, at 4). Shortly thereafter, on September 11, 2023, Croatia filed its Response to MOL's Notice of Intent to File Motion for Summary Judgment (ECF 19), and on October 13, 2023, Croatia filed a Reply in support of its Motion to Dismiss (ECF 20).

In *Nextera Energy Glob. Holdings B.V. v. Kingdom of* Spain, 2023 WL 2016933 (D.D.C. Feb. 15, 2023), and *9REN Holding S.À.R.L. v. Kingdom of Spain*, 2023 WL 2016933 (D.D.C. Feb. 15, 2023), Judge Chutkan upheld jurisdiction to enforce two intra-EU ICSID awards under the FSIA. The district court rejected Spain's argument that the *Achmea* and *Komstroy* judgments rendered null and void Spain's standing offer to arbitrate under the ECT, reasoning that establishing

the *existence* of an agreement to arbitrate was sufficient to uphold jurisdiction under the FSIA. By contrast, in *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023), Judge Leon accepted Spain's jurisdictional objections regarding an UNCITRAL ECT award. The opposing decisions, which raised similar jurisdictional questions under the FSIA, resulted in consolidated appeals in the D.C. Circuit (Nos. 23-7031, 23-7032, and 23-7038) on March 20, 2023.

Croatia and MOL recognized that the outcome of the consolidated appeals would be relevant to this case and agreed to a stay pending the D.C. Circuit's decision. Joint Mot. to Enter Scheduling Order, Oct. 31, 2023, ECF 22, at 1-2. The Court stayed the proceedings pending resolution of the consolidated appeals. Minute Order, Oct. 31, 2023.

On August 16, 2024, the D.C. Circuit issued its decision resolving the consolidated appeals under the caption *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*. 112 F.4th 1088 (D.C. Cir. 2024). The Court held that district courts have jurisdiction under the FSIA's arbitration exception to enforce intra-EU awards issued under the ECT. *Id.* at 1105. It rejected Spain's jurisdictional objections based on the CJEU's *Achmea* and *Komstroy* judgments. *Id.* at 1102. Today, December 2, 2024, the D.C. Circuit denied rehearing *en banc*, with no judge requesting rehearing. *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 23-7031, (D.C. Cir. Dec. 2, 2024) (en banc) (per curiam).

On September 13, 2024, the Court held an initial scheduling conference (Tr. Initial Scheduling Conf., ECF 28 ("Tr.")). During the conference, Respondent argued for continuing the stay of enforcement and claimed for the first time that the act of state doctrine negated the Court's jurisdiction. As observed by the Court, Respondent's intent to raise the act of state defense as a jurisdictional threshold issue contradicted its earlier motion to dismiss. Tr. at 11:22–12:24; *see generally* Renewed Mot. to Dismiss. Indeed, the Court highlighted the inconsistency in

Respondent's positions and the potential for prolonged delays. Tr. at 11:22–12:24. Over Croatia's objection, the Court set a briefing schedule for a renewed motion to dismiss and for MOL's cross-motion for summary judgment.

On October 15, 2024, Croatia filed its Renewed Motion to Dismiss (ECF 31-1).

STANDARD OF REVIEW

I. SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "In reviewing cross-motions for summary judgment, the Court applies the Rule 56 standard . . . ." *Valores Mundiales*, 2023 WL 3453633, at *4. "The Court reviews each cross-motion 'separately on its own merits to determine whether either of the parties deserves judgment as a matter of law.'" *Id.* (quoting *McMullen v. Synchrony Bank*, 300 F. Supp. 3d 292, 300 (D.D.C. 2018)).

In an action to enforce an ICSID Convention award, summary judgment is appropriate "where the party seeking recognition or enforcement provides a copy of the award to the relevant court . . . and where there are no defenses to enforcement." *See Koch Mins. Sàrl v. Bolivarian Republic of Venezuela*, No. 17-cv-2559-ZMF, 2021 WL 3662938, at *2 (D.D.C. Aug. 18, 2021) (citation omitted); *see also TECO*, 414 F. Supp. 3d at 101-02, 108 (granting summary judgment and enforcing an ICSID award after ensuring the Award was authentic and entitled to full faith and credit); *Tethyan Copper Co. Pty. Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 275–77 (D.D.C. 2022) (confirming award and entering judgment after denying respondent's motion to dismiss).

II. MOTION TO DISMISS

In its Renewed Motion to Dismiss, Croatia moves to dismiss the Petition pursuant to Rules

12(b)(1), 12(b)(2), and 12(b)(6).

Croatia's facial challenge to the Petition attacks "the legal sufficiency of [MOL]'s jurisdictional allegations," *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006), rather than "the underlying facts contained in the complaint." *Al–Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003). In resolving a facial challenge, "the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." *Erby*, 424 F. Supp. 2d at 182. Thus, despite Croatia's suggestion to the contrary Renewed Mot. to Dismiss at 27, the Court "must accept as true the allegations in the [Petition] and consider the factual allegations of the [Petition] in the light most favorable to" MOL. *Erby*, 424 F. Supp. 2d at 182; *see also Kursar v. Transp. Sec'y Admin.*, 581 F. Supp. 2d 7, 7, 14 (D.D.C. 2008), *aff'd*, 442 F. App'x 565 (D.C. Cir. 2011) (same); *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 232 (D.D.C. 2007) (recognizing that the factual allegations in the complaint will not lose their presumption of truthfulness except when "under factual attack . . . .").

In resolving a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "accept all the well-pleaded factual allegations of the [Petition] as true and draw all reasonable inferences from those allegations in the [Petitioner's] favor." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). The Court may consider only "the facts alleged in the [Petition], documents attached as exhibits or incorporated by reference in the [Petition], and matters about which the Court may take judicial notice." *Ridley v. VMT Long Term Care Mgmt., Inc.*, 68 F. Supp. 3d 88, 90 (D.D.C. 2014) (citation omitted).

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER THE FSIA'S ARBITRATION EXCEPTION

The FSIA grants district courts the jurisdiction to enforce arbitration awards "in any

case . . . in which the action is brought" "to confirm an award made pursuant to" "an agreement made by the foreign state with or for the benefit of a private party." 28 U.S.C. § 1605(a)(6); *NextEra*, 112 F.4th at 1100. "To proceed under this clause of the FSIA's arbitration exception . . . a district court must find three 'jurisdictional facts': (1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing award enforcement." *NextEra*, 112 F.4th at 1100 (*quoting Chevron*, 795 F.3d at 204).

MOL has established those jurisdictional facts. Together with its Petition, MOL submitted copies of: (i) the Energy Charter Treaty, which contained Croatia's unconditional offer to arbitrate disputes with investors of other Contracting States; (ii) MOL's Request for Arbitration, accepting Croatia's unconditional offer; (iii) an authenticated copy of the Tribunal's Award; and (iv) the ICSID Convention. This evidence establishes the three jurisdictional facts. *See NextEra*, 112 F.4th at 1100. The Court therefore has subject matter jurisdiction under the arbitration exception to the FSIA to enforce the ICSID Award against Croatia. Indeed, Croatia accepts that *NextEra* is dispositive on this score. Renewed Mot. to Dismiss at 11.

A. *NextEra* Conclusively Resolved Croatia's Jurisdictional Objection

In *NextEra*, the D.C. Circuit held that this Court has jurisdiction, pursuant to the FSIA's arbitration exception, to enforce an arbitral award rendered in an ECT dispute between an EU national and an EU Member State. *NextEra*, 112 F.4th at 1099. As the D.C. Circuit concluded, the ECT's arbitration provision itself constitutes an arbitration agreement among the Contracting Parties to the ECT "for the benefit of" EU nationals. *Id.* at 1102. This arbitration agreement exists even though the relevant Contracting Party to the ECT may be an EU Member State. *Id.* The court thus concluded that the arbitration agreement contained in the ECT, by itself, suffices for the FSIA arbitration exception to apply and for jurisdiction to exist. *Id.*

In reaching its holding, the D.C. Circuit first determined that "an arbitration provision in

an investment treaty can both (1) constitute an agreement 'for the benefit' of a private party; and (2) give rise to a separate agreement 'with' a private party." *Id.* at 1101. "Under the plain terms of the FSIA's arbitration exception, ***either*** type of agreement may support the exercise of jurisdiction over a foreign sovereign." *Id.* It is thus irrelevant whether a State "entered into separate arbitration agreements 'with' private parties" so long as "it entered into an arbitration agreement—the Energy Charter Treaty itself—that is arguably 'for the[ir] benefit.'" *Id.* at 1102. If the State by ratifying the ECT entered into an arbitration agreement for the benefit of the private party, the FSIA arbitration exception applies and a district court has jurisdiction to enforce the resulting award. The inquiry starts and stops with the ECT itself.

The D.C. Circuit held that the ECT contains an agreement among the signatory nations—including EU Member States—"'for the benefit' of the signatory's investors" that "satisfies the FSIA's arbitration exception." *Id.* at 1103. There were "powerful reasons to conclude that the standing offer to arbitrate contained in the ECT's arbitration provision extends to EU nationals." *Id.* at 1102. The ECT's arbitration provision covers "[d]isputes between a Contracting Party and an Investor of another Contracting Party." *Id.* This is sufficient for jurisdiction pursuant to the FSIA's arbitration exception even in disputes between an EU national and an EU Member State.

Here, as in *NextEra*, Croatia "is undeniably a 'Contracting Party,'" and MOL is "undeniably [an] Investor[] of another Contracting Party." *Id.* The ECT therefore contains an arbitration agreement with Croatia that is "for the benefit" of MOL. *Id.* As a result, this Court has jurisdiction pursuant to the FSIA's arbitration exception.

B. *NextEra* Rejected Croatia's Supposedly Distinguishing Factors

Croatia acknowledges that *NextEra* is binding on this Court: "The Republic of Croatia . . . recognizes that this Court currently is bound by the D.C. Circuit's panel decision in *Nextera*." Renewed Mot. to Dismiss at 11. Yet, in its next breath, Croatia suggests that *NextEra*

may not apply because, in the present case, there is no arbitration agreement due to EU law. Croatia's arguments conflict with *NextEra*. In short, Croatia relitigates the very same arguments that were fully litigated and rejected by the D.C. Circuit. *See* Award ¶ 487; *NextEra*, 112 F.4th at 1102.[9]

Although *NextEra* is dispositive and renders EU law irrelevant, jurisdiction would exist even if EU law barred Croatia from arbitrating an investor-State dispute with MOL. Croatia is simply mistaken that EU law—including the *Achmea* and *Komstroy* decisions—applies to the arbitration agreement in the ECT, to the arbitration agreement between MOL and Croatia, and to any of the other matters in dispute in the present proceeding. *See infra* at 24-25. That is, ***even if*** EU law does not permit intra-EU investor-State arbitration, (1) the ECT would still contain an arbitration agreement among its contracting parties "for the benefit" of EU nationals, (2) MOL's arbitration agreement with Croatia would still exist, and (3) the Tribunal's Award would remain valid.

1. There Is an Arbitration Agreement

Croatia disputes the existence of an arbitration agreement "with" or "for the benefit of" MOL and argues that, under *Achmea* and *Komstroy*, no arbitration agreement was formed. Renewed Mot. to Dismiss at 21-24. But the D.C. Circuit expressly rejected Croatia's argument in *NextEra*. It does not matter whether there was an agreement "with" the Petitioner, so long as there was an agreement "for the benefit" of the Petitioner. It further held that the ECT contains precisely such an agreement. And, because an arbitration agreement undeniably ***exists***, a district court has

[9] In the final Award, the Tribunal noted that "any argument for [reading in an intra-EU carveout] *ex post facto* in respect of a treaty project very largely promoted by the EU itself would smack of bad faith, directly contrary to the fundamental rule in the Vienna Convention, under the title *Pacta sunt servanda*." Award ¶ 487.

jurisdiction to enforce the Award. 22 U.S.C § 1650a; *see NextEra*, 112 F.4th at 1102.

Recognizing the undeniable relevance of *NextEra*, Croatia adds that "[t]he panel in NextEra addressed *Komstroy* only in connection with Spain's argument that no arbitration agreement 'with' the companies existed." Renewed Mot. to Dismiss at 33. This is simply incorrect. Spain argued in *NextEra*, just as Croatia does here, that "the ECT was made 'for the benefit' of some investors" but "that the standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals []; it extends only to the nationals of ECT signatories outside the European Union, like Japan." *NextEra*, 112 F.4th at 1103. Spain reasoned that "the standing offer to arbitrate contained in Article 26 of the ECT did not and could not 'extend' to the companies because, under the [CJEU's] *Komstroy* opinion, 'the Energy Charter Treaty does not permit intra-EU arbitration.'" *Id.* at 1102.

NextEra rejected Spain's argument. It held that this argument concerned only "the *scope* of the Energy Charter Treaty, not its *existence*" and "goes to whether the ECT's arbitration provision applies to these disputes." *Id.* at 1103. And "our binding precedent holds that the question '[w]hether the ECT applies to [a] dispute' is not 'a jurisdictional question under the FSIA.'" *Id.* (quoting *Stileks*, 985 F.3d at 878–79 (emphasis omitted) (citing *Chevron*, 795 F.3d at 205-06)). The D.C. Circuit underscored that "[i]t does not matter why the ECT may not apply to the dispute." *Id.* at 1104. It then concluded that the ECT's arbitration provision is sufficient in intra-EU cases to establish subject matter jurisdiction under the FSIA arbitration. *Id.*

2. There Is an Arbitration Award

Croatia also argues that no arbitration award exists because "the tribunal could not have even 'purported to make an award pursuant to the ECT,' as *Stileks* requires" because of *Achmea* and *Komstroy*. Renewed Mot. to Dismiss at 42 (citing *Stileks*, 985 F.3d at 878). But Croatia's argument that its ECT dispute with MOL was not arbitrable, and therefore that no award exists, is

simply irrelevant under the FSIA. The D.C. Circuit held in *NextEra* that "the FSIA's arbitration exception requires that the arbitral tribunal 'purported to make an award pursuant to the ECT, not that it in fact did so.'" *NextEra*, 112 F.4th at 1104 (citing *Stileks*, 985 F.3d at 878). And the D.C. Circuit further held in *Stileks* that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Stileks*, 985 F.3d at 878 (citing *Chevron*, 795 F.3d at 205–06).

In any event, Croatia's assertion that the Tribunal did not even "purport to make an award pursuant to the ECT" flies in the face of the facts. After rejecting Croatia's defense to the Tribunal's jurisdiction based on *Achmea* and *Komstroy*, the Tribunal issued the ICSID Convention Award pursuant to the ECT. The Tribunal's Award upheld several of MOL's claims and ordered Croatia to pay MOL $235 million in compensation. Award ¶ 708. Croatia never brought ICSID annulment proceedings (or any other ICSID Convention remedy) against the Award. ICSID Convention arts. 52(2), 53(1). And the ICSID Secretary-General has issued a signed and sealed certificate that the arbitral tribunal's Award is authentic. Award at 1. There is nothing further a Tribunal or ICSID could possibly do to "purport to make an award pursuant to the ECT."

Croatia argues that, contrary to all appearances, the Award is not actually an arbitral award because the Tribunal incorrectly rejected its *Achmea* and *Komstroy* defense. But again, that argument runs right into binding D.C. Circuit precedent: the courts of Contracting States "are thus not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela, Ministerio del Poder Popular para Relaciones Exteriores*, 87 F.4th 510, 515 (D.C. Cir. 2023) (quoting *Mobil Cerro Negro*, 863 F.3d at 102); *see also Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 23-2701 (RC), 2024 WL

4298808, at *6 (D.D.C. Sept. 26, 2024) (*Blasket II*) (same). The only time and place for Croatia to challenge the Award was in an ICSID annulment proceeding. ICSID Convention art. 52(2). It may not now use this enforcement proceeding to collaterally attack the Award.

II. THE COURT ALSO HAS SUBJECT MATTER JURISDICTION BECAUSE CROATIA WAIVED ITS SOVEREIGN IMMUNITY

Because *NextEra* conclusively establishes that the Court has subject matter jurisdiction over this action under the FSIA's arbitration exception, the Court need not consider whether it also has subject matter under the FSIA's waiver exception. *See NextEra*, 112 F.4th at 1100 ("leav[ing] clarification of the waiver question for another day because we conclude that the district courts have jurisdiction under the FSIA's arbitration exception"). Nevertheless, the Court also has subject matter jurisdiction because Croatia waived its sovereign immunity. Under Section 1605(a)(1) of the FSIA, a foreign state may waive its foreign sovereign immunity "either explicitly or by implication." *Mobil Cerro Negro*, 863 F.3d at 105; 28 U.S. § 1605(a)(1). Here, Croatia waived its immunity both implicitly and explicitly.

A. Croatia Implicitly Waived Sovereign Immunity by Acceding to the ICSID Convention

As the Second Circuit has held, a sovereign "waive[s] its sovereign immunity by becoming a party to the ICSID Convention." *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013); *accord Mobil Cerro Negro*, 863 F.3d at 113; *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1, 6 (D.D.C. 2020), *aff'd on other grounds*, 27 F.4th 771 (D.C. Cir. 2022) (finding that Nigeria implicitly waived its sovereign immunity when it agreed to be bound by the New York Convention); *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, 628 F. Supp. 3d 1, 7 (D.D.C. 2022) ("Venezuela implicitly waived its sovereign immunity with respect to suits to recognize and enforce ICSID awards by becoming a Contracting State to the ICSID Convention."); *see also* Bjorklund Decl., § IV.C (explaining that "[t]he ICSID

Convention's recognition and enforcement provisions embody the Contracting Parties' agreement to waive immunity").

All Contracting States to the ICSID Convention agreed in Article 54 that they "shall recognize" an ICSID award "as binding and enforce the pecuniary obligations imposed by that award . . . as if it were a final judgment of a court in that State." *Blue Ridge*, 735 F.3d at 84. "In light of th[at] enforcement mechanism," Croatia, "must have contemplated enforcement actions in other Contracting States, including the United States." *Id.* (cleaned up). The Second Circuit reached the same conclusion with regard to the New York Convention in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993).

Courts in this Circuit have cited *Seetransport* approvingly. *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (*Seetransport* "correctly" held that a foreign sovereign waives sovereign immunity when it joins the New York Convention); *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) ("[A] sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states."). In *NextEra*, the DC Circuit observed that, despite citing *Seetransport*, this Circuit has not "formally adopted it." *NextEra*, 112 F.4th at 1100 (citing *Process & Indus. Devs.*, 27 F.4th at 774). Its reasoning is nevertheless compelling. As in *Blue Ridge*, that reasoning applies with even greater force to ICSID Convention awards for the reasons described above.[10] *See supra* at 6-7.

[10] The structure and content of Section 6 of the ICSID Convention ("Recognition and Enforcement of the Award") confirm this interpretation. Whereas Article 54 addresses recognition, enforcement, and execution of ICSID awards, Article 55 preserves sovereign immunity only as to execution. ICSID Convention art. 55 ("Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."). By contrast, nothing in the Convention preserves immunity from (continued…)

B. Croatia Explicitly Waived Sovereign Immunity

Here, Croatia also explicitly waived its sovereign immunity. The agreements between MOL and Croatia contained explicit, *unconditional* and *irrevocable* waivers of sovereign immunity. SHA (First Losco Decl., Ex. D, ECF 1-5) at § 15.3; GMA (First Losco Decl., Ex. F, ECF 1-7) at § 4.10.

Croatia argues that these contractual waivers do not apply because each of the contracts contains a separate arbitration clause. This ignores the plain language of Croatia's waivers in Section 4.10 the GMA, which plainly extend to this enforcement action:

> each Party is not entitled to claim immunity from legal proceedings with respect to itself or any of its assets on the grounds of sovereignty or otherwise under any applicable law or in ***any jurisdiction*** where an action may be brought for the enforcement of any of the obligations arising under ***or relating to*** this Agreement. To the extent that any of the Parties or their assets have or hereafter may acquire any right to immunity from set-off, ***proceedings***, attachment prior to judgement, other attachment or execution of judgement on the grounds of sovereignty or otherwise, each of the Parties hereby ***irrevocably*** waives such rights to immunity in respect of its obligations arising under or ***relating to*** this Agreement.

GMA, ECF 1-7, at § 4.10 (emphasis added).

This is undeniably such an action to enforce obligations *relating to* the GMA. As the ICSID Tribunal concluded, the Agreements reflected "the concretisation of understandings and commitments that had already come into existence" between MOL and Croatia. Award ¶ 628. Croatia "consciously and deliberately" breached those "understandings and commitments." *Id.* ¶ 630. By doing so, it breached Article 10(1) of the ECT, leading the Tribunal to award damages in MOL's favor. *Id.* ¶¶ 630, 641, 708.

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recognition and enforcement. Indeed, it would be unnecessary for Article 55 to preserve immunity from execution if Contracting States had not waived immunity from enforcement in Article 54. Bjorklund Decl. ¶¶ 63-66.

Croatia argues that it nevertheless "withdrew" those waivers by objecting to the validity of the Agreements during the Arbitration. Renewed Mot. to Dismiss at 45. But a party cannot revoke an irrevocable waiver of immunity simply by renouncing it during a later dispute. As Croatia correctly observes, under Section 1605(a)(1) of the FSIA, a foreign state's purported withdrawal of a sovereign-immunity waiver is only valid if it is made "***in accordance with the terms of the waiver***."[11] *Id.* Here, Croatia's explicit waivers were ***irrevocable***: in short, the terms precluded Croatia from revoking them. SHA, ECF 1-5, at § 15.3; GMA, ECF 1-7, at § 4.10. Thus, because Croatia expressly and irrevocably waived its sovereign immunity as set forth above, subject matter jurisdiction exists under Section 1605(a)(1).

III. THE COURT HAS PERSONAL JURISDICTION OVER CROATIA

Under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C.Cir.1987); 28 U.S.C. § 1330(b). In other words, "[i]f service of process has been made under § 1608, personal jurisdiction over a foreign state exists for every claim over which the court has subject matter jurisdiction." *Price*, 294 F.3d at 89.

Here, both elements of the personal-jurisdiction equation are met. For the reasons set forth below, *infra* at 30, this Court has subject matter jurisdiction under the FSIA's arbitration exception. MOL properly effected service on Croatia, Certificate of Service, Jan. 31, 2023, ECF 6; Ex. C (Letter from Croatia Ministry of Justice and Public Administration, Mar. 15, 2023), ECF 6-3, and Croatia has not challenged the sufficiency of service. Accordingly, this Court has personal jurisdiction over Croatia. *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 230 (D.D.C.

[11] Section 1605(a)(1) specifically addresses a circumstance in which a foreign state may "purport to" withdraw a sovereign-immunity waiver and only gives effect to such withdrawals if made "in accordance with the terms of the waiver." 28 U.S.C §1605(a)(1).

2002); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300 (D.D.C. 2005); 28 U.S.C. § 1330(b).

As Croatia acknowledges, in this Circuit, minimum contacts are not required for a district court to exercise personal jurisdiction over a foreign state. Renewed Mot. to Dismiss at 47; *see Price*, 294 F.3d at 99. Rightly so, since foreign states are not "persons" within the meaning of the Fifth Amendment's Due Process Clause. "Unlike private entities, foreign nations are the juridical equals of the government that seeks to assert jurisdiction over them," and they have "a panoply of mechanisms in the international arena through which to seek vindication or redress" if they believe they have been wrongly "haled into court" here.[12] *Id.* at 98. Croatia too recognizes that this argument is foreclosed by binding Circuit precedent and asserts it merely to preserve it. Renewed Mot. to Dismiss at 48.

IV. MOL HAS SATISFIED THE STATUTORY REQUIREMENTS FOR ENFORCEMENT

"Summary judgment to confirm and enforce an ICSID arbitration award should be granted where the party seeking recognition or enforcement provides a copy of the award to the relevant court . . . and where there are no defenses to enforcement." *Koch*, 2021 WL 3662938, at *2 (quoting *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venezuela*, No. 20-129 (RC), 2021 WL 326079, at *4 (D.D.C. Feb. 1, 2021)); *see* ICSID Convention art. 54(2) ("A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a

[12] As the D.C. Circuit has observed, allowing foreign sovereigns to invoke the protections of the Due Process Clause would grant them greater protections than those afforded to U.S. states, *TMR Energy*, 411 F.3d at 300 (quoting *Price*, 294 F.3d at 98), and could hamstring the ability of Congress and the President "to respond to foreign policy crises." *Price*, 294 F.3d at 99. Separately, to require minimum contacts for actions against sovereigns in this District would eviscerate Title 28's venue statute, which provides that "[a] civil action against a foreign state . . . may be brought . . . in the United States District Court for the District of Columbia," regardless of whether venue is proper in another district. 28 U.S.C. § 1391(f)(4).

competent court . . . a copy of the award certified by the Secretary-General.").

The language of Section 1650a is clear. Once the jurisdictional elements are established, courts *shall* enforce the pecuniary obligations set forth in the Award and *shall* give it full faith and credit. 22 U.S.C. § 1650a. Indeed, "the language of § 1650a appears to envision no role for this Court beyond ensuring its own jurisdiction over this action and the validity of [petitioner's] entitlement to any unpaid claims under the Award." *Tidewater Inv. SRL v. Bolivarian Republic of Venezuela*, No. 17-1457, 2018 WL 6605633, at *6 (D.D.C. Dec. 17, 2018).

MOL has met the requirements for enforcement of the Award under Section 1650a and the ICSID Convention. As demonstrated above, this Court has jurisdiction to enforce the Award under the arbitration exception to FSIA. *See* 28 U.S.C §1605(a); *NextEra*, 112 F.4th at 1100. MOL has presented the Court with an authentic copy of the Award, certified by the ICSID Secretary-General. Award at 1. Croatia does not challenge that the Award is a final and authentic award, nor does it challenge the existence of a treaty governing enforcement. As explained below in Section V, each of Croatia's purported merits defenses is unavailing. Therefore, all that is left to comply with the mandate of the ICSID Convention and its enabling statute is for this Court to enter judgment confirming the Award and enforcing the pecuniary obligations contained therein.

V. CROATIA'S OTHER REQUESTS FOR DISMISSAL FAIL, AND IT HAS NO DEFENSES TO ENFORCEMENT

Croatia's request for dismissal fails as a matter of law. The Award is entitled to full faith and credit because all the relevant issues were fully and fairly litigated during the arbitration. This Court is thus obliged to give the Award full faith and credit and enforce it. *See* 22 U.S.C. § 1650a; ICSID Convention art. 54(a). Indeed, the United States has an obligation under international law to enforce the Award.

In an effort to avoid this obvious conclusion, Croatia asserts several objections under the

act of state doctrine, the foreign compulsion doctrine, and *forum non conveniens*. Yet none may be advanced to avoid full faith and credit, the *forum non conveniens* objection is foreclosed by Circuit precedent, and the ICSID Tribunal correctly rejected Croatia's EU law objections and properly determined that it had jurisdiction.

A. The Award Is Entitled to Full Faith and Credit

Binding precedent establishes that the Award is entitled to full faith and credit. "'[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.'" *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706–07 (1982); *Valores Mundiales*, 87 F.4th at 519–20. The second court may assess ***only*** whether the original court "fully and fairly considered the question of subject matter jurisdiction." *Underwriters*, 455 U.S. at 706–07. So long as "the matter was fully considered and finally determined," the decision is "entitled to full faith and credit." *Id.* at 706–07.

These principles apply with all the more force to ICSID awards. Section 1650a "expressly forecloses collateral attack on ICSID awards in federal courts by excluding ICSID enforcement actions from the purview of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. *Valores Mundiales*, 87 F.4th at 520 (citing 22 U.S.C. § 1650a(a)); *see* Bjorklund Decl., ¶¶ 59-60. By removing ICSID awards from the FAA's purview, Congress rejected the possibility that the FAA's grounds for vacatur could apply to an ICSID award, thus reducing the scope of judicial review of ICSID awards below even the "'extremely limited'" review available under the FAA. *Valores Mundiales*, 87 F.4th at 520. Critically, Section 1650a, unlike the FAA, does not permit collateral attacks against ICSID awards even "where the arbitrators exceeded their powers"—*i.e.*, where the arbitrators lacked jurisdiction to render the award. *Compare* 22 U.S.C. § 1650a(a) *with* 9 U.S.C.

§ 10(a)(4). In adopting Section 1650a, Congress complied with the international legal requirement that an ICSID award "shall not be subject to any appeal or to any other remedy except those provided for in this Convention." ICSID Convention art. 53(1).

Here, there is no question that the Tribunal "fully considered and finally determined" its jurisdiction. Croatia presented its jurisdictional objection based on EU law, including *Achmea* and *Komstroy*, to the *MOL* Tribunal. This objection "was the subject of extended debate between the Parties at the 2018 Hearings and since, on the basis of detailed written as well as oral evidence from the eminent legal experts on both sides." Award ¶ 457. In resolving the objection, the Tribunal had before it and commented upon both the *Achmea* and *Komstroy* judgments. *E.g.*, *id.* ¶¶ 161, 331, 457, 460, 467, 477, 480, 489. Based on this extensive record, the Tribunal—composed of esteemed experts in international law—analyzed Croatia's EU law jurisdictional objection in its Award across a full 35 paragraphs and 14 written pages. *Id.* ¶¶ 454-489. The Tribunal then rejected the EU objection and held that it had jurisdiction to resolve Claimant's claims on their merits. *Id.* ¶ 488.

Following the issuance of the Award, Croatia declined to pursue annulment at ICSID. It is possible to challenge an award in ICSID annulment proceedings for a manifest excess of powers (*i.e.*, the tribunal lacked or exceeded its jurisdiction), for a serious departure from a fundamental rule of procedure (*i.e.*, a due process violation), and for a failure to state reasons (*i.e.*, a failure to decide on an argument). ICSID Convention art. 52(1). Croatia made no such challenges. The MOL Tribunal "fully and fairly" considered and "finally determined" Croatia's EU law objection before upholding its jurisdiction. *Underwriters*, 455 U.S. at 706–07. The Tribunal's Award is entitled to full faith and credit.

B. The Act of State Doctrine Is Irrelevant to Enforcement of an ICSID Award

After obliquely referencing the act of state doctrine in its First Motion to Dismiss, Croatia

makes a direct appeal to that doctrine in its Renewed Motion to Dismiss. First Mot. to Dismiss at 25. Croatia argues the Court's hands are tied: it cannot reach any other conclusion than the one reached by the CJEU in *Komstroy*, because to do otherwise would impermissibly pronounce on the validity of a sovereign act. Croatia's invocation of the doctrine is meritless.

The act of state doctrine precludes U.S. courts "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Sabbatino*, 376 U.S. at 401. The doctrine applies only when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Env't. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). "Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Id.* at 406.[13] "The act of state doctrine is an affirmative defense, and thus [Croatia] bear[s] the burden of demonstrating that the undisputed facts support application of the defense." *United States v. Sum of $70,990,605*, 234 F. Supp. 3d 212, 242 (D.D.C. 2017) (citations omitted).

Croatia's argument fails for many reasons, but the threshold failure is that this Court's enforcement of the Award does not require a decision, either explicitly or implicitly, that *Achmea* and *Komstroy* are legally erroneous under EU law.[14] As the D.C. Circuit held in *NextEra*, this

[13] Indeed, "even [where] the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *Kirkpatrick*, 493 U.S. at 409.

[14] Croatia's reliance on *Sabbatino* and *Lloyd's*, among others, is unavailing. In *Lloyd's*, the U.S. courts were asked to decide upon the validity of foreign acts and law. *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102 (D.C. Cir. 2006) ("But the question of whether the Lloyd's Byelaws were valid under English law is itself a question of English—not District of Columbia—law. And it is a question that the English courts have already answered, concluding that the pertinent Byelaws are indeed valid."). And, in *Sabbatino*, the U.S. courts had to decide whether a foreign expropriation decree was valid. *Sabbatino*, 376 U.S. at 439. By contrast, here, the Court has no need to decide (continued…)

Court has subject matter jurisdiction under the FSIA to enforce the Award ***even if*** *Achmea* and *Komstroy* are entirely correct. *Achmea* and *Komstroy* are, at most, relevant to "the *scope* of the Energy Charter Treaty, not its *existence*" and "to whether the ECT's arbitration provision applies" to intra-EU disputes. *NextEra*, 112 F.4th at 1103. But, as the D.C. Circuit also held, the *existence* of the arbitration agreement contained in the Energy Charter Treaty is, by itself, sufficient to establish jurisdiction of this Court pursuant to the FSIA. *Id.* at 1104.

EU law is simply irrelevant to the enforcement of an award; there is no need for the Court to decide any question of EU law, including the validity of *Achmea* and *Komstroy*.[15] Put differently, EU law, including *Achmea* and *Komstroy*, does not provide "a rule of decision for the courts of this country" in this enforcement action. *Kirkpatrick*, 493 U.S. at 406 (quotation marks omitted).

Indeed, another court in this district recently rejected Spain's act of state defense under similar circumstances following the D.C. Circuit's decision in *NextEra*. *See Blasket*, 2024 WL

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the validity of EU law, including *Achmea* and *Komstroy* decisions, because that question is irrelevant to enforcement.

Moreover, in *Sabbatino*, "the Court was careful to distinguish between judicial adjudication of the validity of a foreign act *when there are no standards for adjudication* from those cases in which United States treaties or international law provide specific guidance to the Judiciary in a particular area of foreign relations." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1540 (D.D.C. 1984) (emphasis added); *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 409 (D.D.C. 2014). This action involves precisely the circumstances under which the act of state doctrine would not apply. The United States is a party to the ICSID Convention, which "governs the legal merits" of this action. *Ramirez de Arellano*, 745 F.2d at 1540.

[15] It is equally true that, if this Court has jurisdiction to enforce an ICSID Convention award under the FSIA, the actual enforcement of that award does not depend on EU law or the validity or invalidity of *Achmea* and *Komstroy*. Section 1650a provides that "[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the awards were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Thus, the enforcement of an ICSID Convention award does not depend on any assessment of EU law; it is automatic and without exception.

4298808, at *11. There, Spain unsuccessfully argued that confirming an award against it in favor of the petitioner "would require the Court to pass on the validity of the Award under EU law"—specifically EU law concerning State aid. *Id.* The *Blasket II* court unequivocally rejected that assertion, noting that "the act of state doctrine does not tie its hands here." *Id.* The Court emphasized that "the act of state doctrine is relevant only when 'a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.'" *Id.* Indeed, the Court noted that it "need not examine the validity" of EU law because the "'outcome of the case' does not 'turn[ ] upon" the validity of EU law. *Id.* at *12 (quoting *Kirkpatrick*, 493 U.S. at 406).

The *Blasket II* court highlighted that each of the three jurisdictional requirements were met, and "'Petitioner [ ] ha[s] not challenged the acts or decisions of a foreign sovereign,' but rather 'ha[s] merely sought to enforce a decision rendered by a forum for international arbitration to which [Spain] has voluntarily submitted itself.'" *Id.* at 12 (quoting *Micula v. Gov't of Romania*, No. 20-7116, 2022 WL 2281645, at *2 (D.C. Cir. June 24, 2022)). In rejecting Spain's argument, the Court stated that, "[t]he narrow issue here is the recognition of the Petitioners' ICSID Award. In recognizing that award, no act of any sovereign has been deemed either relevant or invalid." *Id.* (quoting *Micula v. Gov't of Romania*, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at *8 (S.D.N.Y. Aug. 5, 2015)).

In any event, even if this Court were required to assess the validity of *Achmea* and *Komstroy* (which it is not), the act of state doctrine would not bar this Court from enforcing the Award. *First*, the act of state doctrine is a defense on the merits, not a jurisdictional limitation, and so, it cannot prevent enforcement. Croatia itself admits that "the act of state doctrine ordinarily is a defense on the merits." Renewed Mot. to Dismiss at 37. Indeed, the act of state doctrine is "a

rule of judicial restraint in decisionmaking, not a jurisdictional limitation." *Hourani v. Mirtchev*, 796 F.3d 1, 12 (D.C. Cir. 2015) (The act of state doctrine "is a substantive rule of law" that applies only after jurisdiction is established."); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002); *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir.1998) [*rev'd on other grounds*]. Although invoking the act of state doctrine in support of dismissal under 12(b)(6), not 12(b)(1), Croatia half-heartedly argues that the doctrine may be jurisdictional in this case only, since this Court cannot find an "agreement to arbitrate" under the FSIA's arbitration exception without invalidating *Achmea*, *Komstroy*, and the EU Member State declarations. But *NextEra* recognized that the Court has jurisdiction, and Croatia cannot invoke a merits defense as a way of running back uphill on jurisdiction.

Second, there is no qualifying "act" for purposes of the doctrine. Croatia cites no authority for the proposition that the CJEU (or the EU) would constitute a qualifying sovereign under the doctrine. To the contrary, Croatia's own authority, *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds*, *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016) Renewed Mot. to Dismiss at 35, holds that the EU is an organ of its Member States. To the extent Croatia invokes the doctrine based on its own sovereignty, it does not apply because this action concerns property interests outside of Croatia's territory.

Indeed, the CJEU decisions in *Achmea* and *Komstroy* and the EU Member State declarations are precisely the sorts of conduct that do not constitute "acts" for purposes of the doctrine. A party invoking the act of state doctrine must "identify an *act*" the validity—or legality—of which the Court must decide.[16] A foreign state does not "act" merely by declaring its

[16] A foreign state acts, for example, when a military commander orders that someone be detained; when it seizes and sells, nationalizes, or appropriates property, *Kirkpatrick*, 493 U.S. at 405–06; (continued…)

position on an issue that reaches beyond its borders. *Sum of $70,990,605*, 234 F. Supp. 3d at 242. Nor does it "act" when its courts rule on a legal issue. *Blasket I*, 2024 WL 4298808, at *12 n.8 (citing *Restatement (Fourth) of Foreign Relations Law* § 441 cmt. c (Am. L. Inst. 2018)) ("The act of state doctrine does not apply to the judgments of foreign courts, which are governed by the rules" regarding enforcement of foreign judgments).

Finally, Croatia cannot rely upon the act of state doctrine, because as a merits defense, it cannot be raised to avoid this Court's obligation to enforce the Award. Section 1650a demands that "[t]he pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a); *accord* ICSID Convention art. 54(1). It admits of no exceptions or grounds for non-enforcement. In particular, Section 1650a does not permit a district court to deny the enforcement of an ICSID award based on its status under EU law. Similarly, the ICSID Convention does not permit the United States to deny the enforcement of an ICSID award for any reason. *Id.* arts. 53(1), 54(1). It is the unqualified obligation of U.S. courts to fulfill the United States' treaty obligation to enforce ICSID awards. *Id.* art. 54(1); 22 U.S.C. § 1650a; *Weinberger*, 745 F.2d at 1540.

As such, "the act of state doctrine does not tie [the Court's] hands here. *See Blasket*, 2024 WL 4298808, at *11. EU law, including *Achmea* and *Komstroy*, does not provide "a rule of decision for the courts of this country" in this enforcement action, *Kirkpatrick*, 493 U.S. at 406

when it requires a bank to pay tax on a transaction, *Riggs Nat'l Corp. v. Comm'r of Internal Revenue Service*, 163 F.3d 1363, 1366–68 (D.D.C. 1999); or when it publishes allegedly defamatory material on an embassy website, *Hourani*, 796 F.3d at 15.

(internal ellipsis omitted); the sole "rule of decision" comes from Section 1650a.[17] The Court need not, indeed, should not, decide upon or declare invalid any act of a foreign sovereign to properly resolve this Petition. Since the Court has jurisdiction under the FSIA, it is required to enforce the Award with no further review.

C. Foreign Sovereign Compulsion Does Not Apply to ICSID Award Enforcement

Croatia also gets nowhere by invoking the "foreign sovereign compulsion" defense. The foreign sovereign compulsion doctrine is a comity-based doctrine that allows courts to exercise discretion to avoid forcing individuals to violate foreign law. *Blasket*, 2024 WL 4298808, at *1; *Restatement (Fourth)* § 442. Thus, Croatia cites cases involving individuals and corporations invoking the doctrine in the context of bank secrecy regulations and discovery obligations. Unsurprisingly, none involves sovereign defendants.

The foreign sovereign compulsion doctrine does not apply "where Petitioner seeks recognition of an ICSID award." *Blasket*, 2024 WL 4298808, at *13. In enacting Section 1650a, Congress "intended for ICSID awards to be strictly enforced, deliberately excluding the statute from further remedies under the FAA." *Id.* Indeed, "comity concerns are essentially 'baked in' to the ICSID Convention and its implementing statute." *Id.* (relying on *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). Additionally, Croatia, as a sovereign, voluntarily acceded to the ICSID Convention. Any conflict that may arise between Croatia's obligation to satisfy the Award and its obligations under EU law is of Croatia's own making.

[17] In addition, Croatia waived its act of state defense by acceding to the ICSID Convention, which provides that an award rendered thereunder is "binding on the parties," art. 53(1), and requires each Contracting State to recognize such an award as binding "and enforce the pecuniary obligations imposed by" the award "as if it were a final judgment of a court in that State," art. 54(1). Accordingly, Croatia's act of state defense fails for this reason as well.

Even if the Court considered the foreign sovereign compulsion doctrine, Croatia cannot possibly satisfy its requirements. The foreign sovereign compulsion doctrine applies only where an applicable domestic statute accords broad discretion to the Court, as in the antitrust or discovery context. *Restatement (Fourth)* § 442 cmt. d, n.7.[18] A party invoking the doctrine must show that it is likely to suffer severe sanctions if it complies with an eventual judgment, and that it has acted in good faith to avoid a conflict between an eventual judgment and contradictory foreign law. *Id.* § 442. Croatia cannot do either thing.

First, as a foreign sovereign, Croatia is not subject to "compulsion" by any other foreign sovereign—much less by the EU. *RJR Nabisco*, 764 F.3d at 148 (The EU "qualifies as an organ and agency of a foreign state"). Croatia voluntarily acceded to the EU and chose to accept the jurisdiction of its constituent bodies through a treaty. Croatia cites no case where a foreign state invoked this defense to avoid its obligations under an arbitration award. Even the cases upon which Croatia relies have recognized that the foreign sovereign compulsion doctrine protects private parties caught between conflicting legal responsibilities; no case allows a foreign sovereign to invoke it to escape its treaty obligations. *See In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987).

Second, dismissal on foreign sovereign compulsion grounds would only be appropriate where the applicable statute grants the Court broad discretion. *See Restatement (Fourth)* § 442 cmt. c (the doctrine may excuse "compliance with federal law, if that law permits such

[18] The *Restatement (Fourth) of Foreign Relations Law* delineates the foreign sovereign compulsion doctrine as follows. "To the extent permitted by statute, regulation, or procedural rule, courts in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's law, if: (a) the person in question appears likely to suffer severe sanctions for failing to comply with foreign law; and (b) the person in question has acted in good faith to avoid the conflict." *Restatement (Fourth)* § 442.

discretion."); s*ee also NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 219 (D.D.C. 2023) ("[T]his is not an antitrust case, and therefore the doctrine is inapplicable; the court is unaware of any authority extending this doctrine outside of the antitrust context."). Section 1650a (and the ICSID Convention) leave no room for discretion. To the contrary, they require this Court to enforce the Award without addressing the merits.

Third, the foreign sovereign compulsion doctrine "applies only to the scope of conduct actually compelled under threat of severe sanctions."[19] *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 147 (2d Cir. 2021). Croatia has not demonstrated that it is "likely" to face sanctions if this Court enters judgment enforcing the Award, nor that such sanctions would be "severe." Croatia acknowledges that it only faces the mere possibility of civil sanctions ***if*** the European Commission were to render a "negative decision" that paying an arbitration award would constitute unlawful "State aid." Renewed Mot. to Dismiss at 54. As other courts in this District have recognized, the threat of such consequences is speculative. *Blasket*, 2024 WL 4298808, at *14 ("Yet just because the European Commission 'would be able' to bring Spain before the CJEU does not mean that it would do so in this case, where Spain is compelled to pay an award under the ICSID Convention."). The mere prospect of such a (highly speculative) civil penalty does not constitute a "severe" sanction as required by the foreign sovereign compulsion doctrine. *United States v. First Nat. City Bank*, 396 F.2d 897, 905 (2d Cir. 1968).

Fourth, foreign sovereign compulsion requires that a defendant "make[] serious efforts to secure a release from or waiver of a foreign prohibition." *Restatement (Fourth)* § 442 cmt. c.

[19] As Croatia's own authority makes clear, the doctrine only applies to conduct that is compelled within a foreign sovereign's own territory. *In re Sealed Case*, 825 F.2d at 497–99. This proceeding only involves enforcement of the Award within the United States, and a judgment enforcing the Award would not obligate Croatia to do anything that it is not already obliged to do under Article 53 of the ICSID Convention.

Croatia concedes that EU Member States may lawfully grant State aid provided that they obtain permission from the European Commission to do so. Renewed Mot. to Dismiss at 54. Croatia has shown neither that the European Commission would refuse to grant such permission in this case, nor that it has attempted to seek such permission. Accordingly, Croatia cannot seriously invoke this doctrine.

D. Circuit Law Bars Croatia's *Forum Non Conveniens* Objection

As Croatia concedes, binding Circuit precedent forecloses its *forum non conveniens* argument. Renewed Mot. to Dismiss at 48; Tr. at 17:24–18:4; *NextEra*, 112 F.4th at 1105. Courts in this Circuit have consistently held that "*forum non conveniens* does not apply to confirmation of ICSID awards." *Blasket*, 2024 WL 4298808, at *10 (relying on *NextEra*, 112 F.4th at 1105); *Stileks*, 985 F.3d at 876 n.1 ("*[F]orum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States.). This rule applies even if the defendant "currently has no attachable property in the United States, [as] it may own property here in the future . . . ." *TMR Energy*, 411 F.3d at 303.

CONCLUSION

For the foregoing reasons, MOL respectfully requests that the Court deny Croatia's Renewed Motion to Dismiss and grant summary judgment in favor of MOL.

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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.

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