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 (RDM) **Oral Argument Requested**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

THE REPUBLIC OF CROATIA'S RENEWED MOTION TO DISMISS THE PETITION

John A. Burlingame (DC Bar No. 455876)
Stephen P. Anway (DC Bar No. 100729)
Christina M. Lamoureux (DC Bar No. 1658743)
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315
john.burlingame@squirepb.com
stephen.anway@squirepb.com
christina.lamoureux@squirepb.com

Raúl B. Mañón (*pro hac vice*)
SQUIRE PATTON BOGGS (US) LLP
200 South Biscayne Boulevard, Suite 3400
Miami, FL 33131
Telephone: (305) 577-7055
Facsimile: (305) 577-7001
raul.manon@squirepb.com

Counsel for the Republic of Croatia

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INTRODUCTION

The Republic of Croatia ("Croatia") recognizes that this Court currently is bound by the D.C. Circuit's panel decision in *NextEra Energy Global Holdings B.V., et al v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024) ("*NextEra*"). Pursuant to this Court's October 13, 2024 Minute Order authorizing Croatia to re-brief its sovereign immunity arguments, Croatia files this brief both to preserve its arguments in the event the D.C. Circuit, *en banc*, or the Supreme Court, reverses or otherwise modifies *NextEra* and to distinguish certain aspects of the *NextEra* holding from this case.

Barred from relief in its native Europe, Petitioner MOL Hungarian Oil and Gas Plc ("MOL") seeks to an enforce in the United States an alleged arbitration award that it knows is invalid and unenforceable because no underlying arbitration agreement existed under European Union ("EU") law. Although *NextEra* answered certain questions raised in Croatia's original motion to dismiss (ECF No. 14-1), it left several unanswered. *NextEra* held only that the Energy Charter Treaty, under which MOL purported to invoke arbitration, may "itself" be deemed an agreement "for the benefit" of a private party, without resolving whether there was an arbitration agreement "with" a private party. It did not resolve the issue, however, that no underlying arbitration "agreement"—whether "with" or "for the benefit of" a private party—could have been formed when European Union ("EU") law conclusively holds to the contrary.

Even if this Court finds the jurisdictional threshold met, moreover, the *NextEra* decision left open several grounds under which courts should deny petitions to confirm arbitral awards like the one at issue. Dismissal is warranted here, including because the absence of a valid arbitration agreement manifestly deprived the arbitral tribunal of jurisdiction, precluding the award from receiving full faith and credit. Additionally, compelling performance under the arbitration award

would require Croatia to violate EU law in violation of the act of state and foreign sovereign compulsion doctrines. Accordingly, this Court should dismiss MOL's Petition.

RELEVANT BACKGROUND

I. The factual background

The Republic of Croatia is an EU Member State and a "foreign state" for purposes of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603. Pet. ¶ 8, ECF No. 1.

Petitioner MOL Hungarian Oil & Gas PLC ("MOL") is a company organized under the laws of the Republic of Hungary, which is another EU Member State. *Id.* ¶ 7. MOL is an oil and gas company, headquartered in Budapest, Hungary that is publicly traded on exchanges in its native Hungary and in Poland (another EU Member State). *Id.* ¶ 7. While MOL focuses its activities in Hungary and neighboring countries in the Central and Eastern Europe region—many of which, like Croatia, Romania, and Slovakia, are also EU Member States.[1] MOL does not appear to carry out any material business in this District or the United States.

The underlying dispute concerns MOL's alleged investment in Croatia. *Id.* ¶ 19 ("The underlying dispute between the Parties arose out of the privatization of Croatia's formerly state-owned energy company, INA-Industrija Nafte, d.d."). On November 26, 2013, MOL purportedly invoked an arbitration provision in Article 26 of the Energy Charter Treaty, 2080 U.N.T.S. 95 ("ECT," ECF No. 1-9), to commence arbitration against Croatia. *Id.* ¶ 18. The ECT is a multilateral investment treaty among fifty-three signatories, including the EU and its Member States, as well as non-EU states.

[1] "MOL Group Worldwide," *available at* https://molgroup.info/en/about-mol-group/mol-group-worldwide (last accessed Oct. 11, 2024).

Croatia timely and repeatedly contested the arbitral tribunal's jurisdiction, including because the ECT did not provide for arbitration between Croatia and MOL and because EU law prohibits any such arbitration. *Id.* ¶ 29. For its jurisdictional objections, Croatia relied on the Court of Justice of the European Union's ("CJEU") seminal opinions in C-284/16, *Slovak Republic v. Achmea B.V.*, ECLI:EU:C:2018:158 (Mar. 6, 2018) ("*Achmea*") and C-741/19, *Republic of Moldova v. Komstroy*, ECLI:EU:C:2021:655 (Sep. 2, 2021) ("*Komstroy*"). Award ¶ 460, ECF No. 1-2 (conceding that *Achmea* and *Komstroy* "define authoritatively the obligations under EU law of one EU Member State towards another"). Nonetheless, the arbitral tribunal proceeded with the arbitration and issued the Award on July 5, 2022, granting MOL $183.94 million in damages, plus costs, fees, and interest. *Id.* ¶ 708; Pet. ¶ 38.

Rather than seek to enforce the Award in the EU—where the parties reside, where the dispute arose, and where the arbitration occurred—on January 25, 2023, MOL petitioned this Court to enforce the Award pursuant to 22 U.S.C. § 1650a(a). *See generally* Pet. Croatia timely moved to dismiss the Petition for lack of subject-matter jurisdiction and failure to state a claim. ECF No. 14-1. After that motion was fully briefed, at the parties' joint request, *see* ECF No. 22, this Court stayed the case pending the D.C. Circuit's decision in *NextEra*, which the parties agreed was likely to be relevant to this case. 10/31/23 Minute Order.

On August 16, 2024, a panel of the D.C. Circuit issued its opinion in *NextEra*. This Court then held a scheduling conference on September 13, 2024, during which Croatia argued that the *NextEra* decision does not resolve all of Croatia's jurisdictional defenses. ECF No. 28 (Transcript of Sept. 13, 2024 Scheduling Hearing). After the hearing, the Court entered a Minute Order

denying Croatia's motion to dismiss but allowing Croatia to refile it in light of *NextEra*. 9/13/24 Minute Order.[2] Croatia files this renewed motion to dismiss.

II. The applicable legal framework

The Petition and the instant motion implicate the interplay between, on the one hand, United States law, including the FSIA, and, on the other hand, international law, including the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the "ICSID Convention"), and the law of the EU. Each is discussed in turn below.

A. The applicable U.S. Law: the FSIA and the ICSID Convention

The FSIA provides the exclusive basis for establishing jurisdiction over a foreign state in the United States. Jurisdiction under the FSIA is premised on the applicability of an exception to sovereign immunity. MOL advances two such exceptions: the arbitration exception in Section 1605(a)(6)(B) and the waiver exception in Section 1605(a)(1) of the FSIA.[3] Pet. ¶¶ 11–14.

The ICSID Convention is "a treaty or other international agreement" covered by Section 1605(a)(6)(B) of the FSIA and establishes a mechanism for resolving investment disputes between contracting states and nationals of other contracting states through arbitration. ICSID Contracting States must enforce an ICSID award as if it were a final judgment of their domestic courts, except that "nothing in [the Convention] 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." ICSID Convention, art. 55; *see also* Christoph Schreuer, *The ICSID Convention* 1103, 1154 (2d ed. 2009)

[2] On October 13, 2024, upon Croatia's motion for relief from the Minute Order (ECF No. 30), the Court clarified its Minute Order. *See* 10/13/2024 Minute Order.

[3] While the Petition identifies *three* alleged exceptions under Section 1605(a), two of those are waiver under subsection (1). This memorandum addresses those two alleged instances of waiver together, as they implicate the same statutory provision.

("The Convention does not enjoin the courts of States parties to the Convention to enforce ICSID awards if this would be contrary to their law governing the immunity from execution of judgments and arbitral awards."). The ICSID Convention therefore leaves domestic laws of sovereign immunity undisturbed. *Id*. Schreuer ("[A] State whose courts refuse execution of an ICSID award for reasons of State immunity is not in violation of Art. 54.").

The United States is a signatory to the ICSID Convention. In 1966, Congress passed legislation implementing the ICSID Convention, providing for the enforcement of an ICSID award in federal court "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). During congressional hearings for the enactment of Section 1650a, Andreas Lowenfeld, Deputy Legal Advisor to the State Department and a member of the United States delegation to the ICSID Convention, testified:

> As to whether [a district court] has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity. If somebody wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity.

Convention on the Settlement of Investment Disputes: Hearing on S. 3498 Before the Subcomm. on Int'l Orgs. & Movement of the H. Comm. on Foreign Affairs, Hearing of the House Subcomm., 89th Cong. 18 (Jan. 15, 1966).

In 1976, Congress passed the FSIA, codifying the grant of immunity to foreign states in all cases except where the requirements of any of the exceptions to immunity applied, such as the arbitration and waiver exceptions. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602 *et seq*.).

B. The EU legal order and the applicable EU Law

Croatia acceded to the EU on July 1, 2013.[4] Hungary acceded to the EU in May 2004.[5] Upon joining the EU, both countries became bound to comply with EU law and to enforce it on their nationals and within their borders. Croatia's arguments thus require a fundamental understanding of EU law, which governs Croatia and MOL (a Hungarian company) and their relationship.

The EU is a political and economic union of 27 Member States that have ceded to it aspects of sovereignty, to establish one integrated Europe characterized by common laws, values, and a single internal market. *See* accompanying Declaration of Prof. Steffen Hindelang ¶ 24 ("Hindelang Decl."). The EU's foundational instruments are the Treaty on the European Union (the "TEU," Hindelang Decl. Ex. 04) and the Treaty on the Functioning of the European Union (the "TFEU," Hindelang Decl., Ex. 05) (collectively, the "EU Treaties"). *Id*. The EU has its own institutions that include the European Council, which defines the EU's overall political direction and priorities (*see* TEU, Art. 15(1), Hindelang Decl., Ex. 04);[6] the European Parliament, which enacts legislation (*id*. at Art. 14(1)); the European Commission, which "oversee[s] the application of Union law under the control of the Court of Justice of the European Union" (*id*. at Art. 17(1));

[4] *Croatia*, *European Union Country Profiles*, available at https://european-union.europa.eu/principles-countries-history/country-profiles/croatia_en (last accessed: Oct. 10, 2024 at 2:22 pm ET).

[5] *Hungary*, *European Union Country Profiles*, available at https://european-union.europa.eu/principles-countries-history/eu-countries/hungary_en (last accessed: Oct. 10, 2024 at 2:24 pm ET).

[6] The European Council is composed of the heads of state of the 28 EU Member States, the President of the European Council, and the President of the European Commission. *See* TEU, Art. 15(2) (Hindelang Decl., Ex. 04).

and the EU Court of Justice (the "CJEU"), which is the final authority on issues of EU law. *Id.* at Art. 19.

1. The primacy of EU law and the CJEU

EU law applies throughout the EU and within each Member State. EU law prevails over any Member State's conflicting domestic laws: "The principle of the primacy (also referred to as 'precedence' or 'supremacy') of European Union (EU) law is based on the idea that where a *conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail.*"[7] *See also* Hindenlang Decl. ¶ 48. The CJEU has repeatedly affirmed the principle of primacy of EU law, and primacy is also recognized by the EU Member States through, *inter alia*, the Declaration Concerning Primacy annexed to the Treaty of Lisbon. *Id.* ¶ 49 (citing Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration concerning primacy ("Declaration Concerning Primacy") (signed 13 December 2007) 2008 O.J. (C 115) 335 at 344 (Hindelang Decl., Ex. 51) ("[I]n accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States")).

EU law prevails over not only the domestic laws of EU Member States, but also over treaties and international agreements among Member States that would conflict with EU law. *See id.* ¶ 56 (citing five cases for support). The CJEU has held that, as a matter of the Member States' delegation of sovereignty and the primacy of the EU Treaties, "an international agreement cannot affect the allocation of power fixed by the EU [Treaties] or, consequently, the autonomy of the EU

[7] *Primacy of EU law (precedence, supremacy)*, available at https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html (last accessed Oct. 13, 2024) (emphasis added).

legal system." CJEU, Opinion 2/13, ECLI:EU:C:2014:2454 ¶ 201 – *ECHR* ("Opinion 2/13, *ECHR*") (Hindelang Decl., Ex. 45). Thus, treaty provisions that "concern two Member States … cannot apply in the relations between those States if they are found to be contrary to the rules of the [EU Treaties]." CJEU Case C-478/07, *Budějovický Budvar*, ECLI:EU:C:2009:521, ¶ 98 (Sep. 8, 2009) (Hindelang Decl. Ex. 28); *see also* Hindelang Decl. ¶ 56 (citing additional cases for support).

The interpretation and application of EU law, and EU Member States' compliance with it, is ultimately reviewable by the CJEU, which comprises 27 judges, one from each Member State, appointed for renewable 6-year terms. *See* TFEU, Art. 253 (Hindelang Decl., Ex. 05). To ensure the consistent, uniform interpretation of EU law, the CJEU ultimately maintains exclusive jurisdiction to determine the content and scope of EU law. *See* Hindelang Decl. ¶ 34. As mandated by the TEU, the CJEU "shall ensure that in the interpretation and application of the Treaties the law [EU law] is observed." TEU, Art. 19(1) (Hindelang Decl., Ex. 04). As the guardian of EU law, the CJEU's exclusive authority may not be circumvented or hampered by the action of EU Member States or other EU institutions. *See* Hindelang Decl. ¶ 39 (quoting Opinion 2/13, *ECHR* ¶ 201: "an international agreement cannot affect the allocation of power fixed by the EU [Treaties] or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court") (Hindelang Decl., Ex. 45).

The EU Treaties foreclose the possibility that disputes on issues of EU law will evade review by the CJEU. This is accomplished in two ways. *First*, Article 267 of the TFEU requires the highest court of each EU Member State to refer questions on EU law to the CJEU for a

preliminary ruling (the "Preliminary Ruling Procedure").[8] *See* Hindelang Decl. ¶ 40. The CJEU's decision is "binding on the national court," which is further "required to do everything necessary to ensure that that interpretation of EU law is applied." CJEU Case C-689/13, *Puligienica Facility Esco SpA (PFE) v. Airgest SpA*, ECLI:EU:C:2016:199, ¶¶ 37–38, 42 (Hindelang Decl., Ex. 49). As explained by the Court in an earlier case, this "keystone [] preliminary ruling procedure" allows for a dialogue between it and the national courts that "has the object of securing uniform interpretation of EU law." Opinion 2/13, *ECHR* ¶ 176 (Hindelang Decl., Ex. 45). *Second*, Article 344 of the TFEU forbids EU Member States from submitting "a dispute concerning the interpretation or application of the Treaties [EU law] to any method of settlement other than" their national courts.[9] TFEU, Art. 344 (Hindelang Decl., Ex. 05). As a result, EU Member States cannot establish or refer cases to dispute resolution bodies, including arbitral tribunals, existing outside the EU judicial system that might interpret or apply EU law. *See* Opinion 2/13, *ECHR* ¶¶ 212–13 (Hindelang Decl., Ex. 45). This ensures that only courts or tribunals that can refer questions on issues of EU law to the EU Court of Justice under Article 267 of the TFEU may be called upon to interpret EU law. *See id.* ¶ 210; *see also* Hindelang Decl. ¶ 41.

EU law also prohibits Member States from granting unauthorized State aid. *See* TFEU Article 107(1) ("any aid granted by a Member State … shall … be incompatible with the internal market"); TFEU Article 108(3) ("The Commission shall be informed … of any plans to grant or alter aid … The Member State concerned shall not put its proposed measures into effect until this

[8] Article 267 of the TFEU provides: "Where any such question [on EU law] is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court [EU Court of Justice]." (emphasis added) (Hindelang Decl., Ex. 05).

[9] Article 344 of the TFEU states in full: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." (Hindelang Decl., Ex. 05).

procedure has resulted in a final decision"); TFEU Article 108(2) ("[the Commission] shall decide that the State concerned shall abolish … such aid") (Hindelang Decl., Ex.05). Where unauthorized State aid is rendered, the implicated Member State must take all necessary measures to recover that aid. *See also* Council Regulation 2015/1589, art. 16(1), O.J. (L 248) 99 (July. 13, 2015) ("Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ('recovery decision').").

2. The CJEU's opinions in *Achmea* and *Komstroy*: EU law precludes alternative fora arbitration agreements for disputes concerning EU law

In its seminal 2018 decision in *Achmea* (Hindelang Decl., Ex. 10), the CJEU addressed head-on the prohibition on EU Member States, under Articles 267 and 344 of the TFEU, from establishing or referring cases to dispute resolution bodies outside the EU judicial system that might interpret or apply EU law. The CJEU considered whether an arbitration provision in a bilateral investment treaty between a Dutch investor, Achmea, and the Slovak Republic conferred jurisdiction to the arbitral tribunal. Because the Slovak Republic became a member of the EU before Achmea initiated arbitration, the CJEU held that the dispute resolution provision was invalid. Specifically, it held that an EU Member State cannot bind itself to a "treaty by which [it] agree[s] to remove from the jurisdiction of [its] own courts … disputes which may concern the application or interpretation of EU law." *Achmea* ¶ 55.

Consistent with *Achmea*, the European Commission informed the European Parliament and the European Council that investors governed by EU law "cannot have recourse to arbitration tribunals established" under investment treaties, including "under the Energy Charter Treaty." European Commission, *Communication from the Commission to the European Parliament and the*

Council: Protection of intra-EU investment at 26, COM (2018) 547 (July 19, 2018) ("EC Investment Protection Communication") (Hindelang Decl., Ex. 91).

Since *Achmea*, the CJEU has confirmed that its ruling extends to all other investment treaties. As it pertains to the ECT, for example, on September 2, 2021, the Grand Chamber of the CJEU, a 15-member configuration akin to an *en banc* panel, issued its decision in *Komstroy* (Hindelang Decl., Ex. 11), holding that EU Member States cannot form arbitration agreements under the ECT that allow non-EU adjudicative bodies to decide disputes implicating EU law. *See Komstroy* ¶ 52 (finding that ECT arbitral tribunals lack jurisdiction over such disputes "[i]n the precisely same way as the arbitral tribunal … in *Achmea*").[10] Thus, the Grand Chamber held *en banc* that the dispute-resolution mechanism in Article 26 of the ECT is incompatible with EU law and thus "not … applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State." *See id.* ¶ 66. Because no arbitration agreement can form under the ECT for these types of disputes, any purported offer by an EU Member State to arbitrate such disputes is void *ab initio* and incapable of acceptance by an investor.

[10] Another example is the CJEU's 2019 Opinion 1/17, ECLI:EU:C:2019:341, ("*CETA Opinion 1/17*," Hindelang Decl., Ex. 47)), which confirms that the governing principles in *Achmea* also applies to the Comprehensive Economic and Trade Agreement between Canada, the European Union and the EU Member States. The CJEU reiterated that "Article 19 TEU, it is for the national courts and tribunals and the [EU] Court to ensure the full application of that law in all the Member States and to ensure effective judicial protection, the Court having exclusive jurisdiction to give the definitive interpretation of that law." *Id.* ¶¶ 108–11. Thus, the CJEU held that tribunals outside the EU judicial system "cannot have the power to interpret or apply provisions of EU law." *Id.* ¶ 118.

The European Commission (as representative of the European Union) has consistently adopted this very position before US courts.[11]

3. EU law and its interplay with the dispute resolution provisions of the ECT

The ECT, a multilateral investment treaty, is designed to create "a legal framework in order to promote long-term cooperation in the energy field." ECT art. 2, ECF No. 1-9. The ECT allows for resolution of disputes between investors of a contracting state and another contracting state through arbitration under various arbitral rules, including those set forth in the ICSID Convention. Article 26 of the ECT governs the formation of any arbitration agreement for disputes arising under the treaty. The arbitration agreement forms when an investor accepts a contracting state's offer to arbitrate. Article 26(3) contains the contracting states' "unconditional consent to the submission of a dispute to international arbitration"—i.e., their offer—which under Article 26(4) investor

[11] *See, e.g.*, Brief for the European Commission on Behalf of the European Union as *Amicus Curiae*, *Novenergia II – Energy & Environment (SCA) EU v. Kingdom of Spain*, No. 18-1148 (D.D.C. Sep. 24, 2019) (ECF No. 30-1) at 20 (asserting that *Achmea* means that "as between EU Member States, Article 26 of the ECT is inapplicable … and *therefore cannot have given rise to a valid arbitration agreement*") (emphasis added) ("*Novenergia Amicus* Brief"), attached as Exhibit A to the accompanying Declaration of Raúl B. Mañón ("Mañón Decl."); Brief for the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of the Kingdom of Spain and Rehearing *En Banc*, *NextEra Energy Global Holdings B.V., et al v. Kingdom of Spain*, No. 23-7031, Document #2076387, at 2 (D.C. Cir. Sept. 24, 2024) ("Intra-EU arbitral awards … are invalid and cannot be enforced anywhere in the EU") ("*NextEra* Rehearing *Amicus* Brief," Mañón Decl., Ex. B); *see also id.* at 6 ("No agreement to arbitrate disputes with these investors could ever have been formed …"); Brief for the European Commission on Behalf of the European Union as *Amicus Curiae*, *Hydro Energy 1 S.À.R.L. v. Kingdom of Spain*, No. 1:21-cv-02463-RJL, at 16 (D.D.C. March 17, 2022) (ECF No. 17) (similar) ("*Hydro Energy Amicus* Brief," Mañón Decl., Ex. C); Brief for the European Commission on Behalf of the European Union as *Amicus Curiae*, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, No. 1:18-cv-1686, at 14 (D.D.C. March 18, 2019) (ECF No. 33) (following *Achmea*, "any offer of intra-EU arbitration contained in the ECT is therefore invalid and ineffective and cannot have given rise to a valid arbitration agreement") ("*Eiser Amicus* Brief," Mañón Decl., Ex. D); Brief for the European Commission on Behalf of the European Union as *Amicus Curiae*, *Watkins Holdings S.À.R.L. v. Kingdom of Spain*, No. 1:20-cv-01081-BAH, at 14 (D.D.C. Apr. 27, 2023) (ECF No. 48-1) (similar) ("*Watkins Amicus* Brief," Mañón Decl., Ex. E).

"shall" accept by "provid[ing] its consent in writing for the dispute to be submitted to" arbitration, thereby forming the arbitration agreement, as set forth in Article 26(5)(a):

> The 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 … written consent of the parties*** to a dispute for purposes of Chapter II of the ICSID Convention[.]

ECT, art. 26(5)(a), ECF No. 1-9 (emphasis added).

Under Article 26(6) of the ECT, an ICSID tribunal is bound to decide the dispute in accordance with the ECT "and applicable rules and principles of international law." *Id*. at Art. 26(6); *see also* ICSID Convention art. 42(1) (requiring tribunals to decide disputes "in accordance with such rules of law as may be agreed by the parties"). In respect of MOL and Croatia, as decided by *Komstroy*, these "rules and principles of international law" include EU law because EU law is a product of international treaties among EU Member States and because EU law governs the relationship between Croatia and MOL—both European parties. *See Komstroy* ¶ 48 (since the "ECT itself is an act of EU law" it "follows that an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law"). Accordingly, the CJEU has made clear that dispute resolution provisions in international treaties, like Article 26 of the ECT, are inapplicable between EU Member States *ab initio*. *See* Hindelang Decl. ¶¶ 47, 108.

On the ECT specifically, *Komstroy* found Article 26 of the ECT inconsistent with EU foundational law because through it Member States seek to "agree to remove from the jurisdiction of their own courts and, hence, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law." *Komstroy* ¶ 59. *Komstroy* reasoned that EU law prohibits "a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness

of that law is not guaranteed" because "[s]uch a possibility would … *call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties,* ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU." *Id.* at ¶¶ 62–63. The Court then held:

> In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

Id. at ¶ 66. This is the same conclusion the European Commission reached earlier in 2018 in the EC Investment Protection Communication at 4 (Hindelang Decl., Ex. 91):

> Given the primacy of Union law, that clause [Article 26 of the ECT], if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in *Achmea* applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion[.]

The CJEU ratified *Achmea* and *Komstroy* in at least two subsequent rulings, including *Republic of Poland v. PL Holdings Sàrl,* C-109/20, ECLI:EU:C:2021:875 (Oct. 26, 2021) ¶ 47 ("To allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body … referred to in an invalid arbitration clause … would in fact entail a circumvention of the obligations arising for that Member State under … Article 4(3) TEU and Articles 267 and 344 TFEU") (Hindelang Decl., Ex. 17) and *European Commission v. European Food SA*, C-638/19, ECLI:EU:C:2022:50 (Jan. 25, 2022) ¶ 145 (same, concluding that Romania's "***consent***" to arbitration under an investment treaty "***lacked any force***" "since, 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***") (emphasis added) (Hindelang Decl., Ex. 76).

Consistent with the CJEU and the EU Commission, nearly all EU Member states have confirmed that the ECT does not form an arbitration agreement to resolve disputes implicating issues of EU law. On January 15, 2019, following *Achmea*, 22 Member States—including Croatia—jointly declared that an "arbitral tribunal established on the basis of investor-State arbitration clauses" in investment treaties between EU Member States "lacks jurisdiction, due to a lack of a valid offer to arbitrate," adding: "For the Energy Charter Treaty, its systemic interpretation in conformity with the [EU] Treaties *precludes intra-EU investor-State arbitration*." *Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (Jan. 15, 2019) (the "2019 Joint Declaration") at 1 & 2 n.2 (emphasis added) (Hindelang Decl., Ex. 13). It further notes: "Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied." *Id*. at 2.

Following *Komstroy*, on June 26, 2024, the EU and 26 of its Member States—including Croatia—jointly declared:

> SHARING the common understanding expressed in this Declaration that, as a result, a clause such as Article 26 of the Energy Charter Treaty ***could not in the past, and cannot now or in the future serve as legal basis for arbitration proceedings*** initiated by an investor from one Member State concerning investments in another Member State.

Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings (Jun. 26, 2024) (the "2024 Joint Declaration") at 4 (emphasis added) (Hindelang Decl., Ex. 122). It contains the signatory's agreement to "ensure that the existence of this Declaration is brought to the attention of … [future] arbitral tribunal[s],

allowing the appropriate conclusion to be drawn that Article 26 of the Energy Charter Treaty cannot serve as a legal basis for such proceedings." *Id*. at 5. Critically, the declaration expressed "***regret***" that arbitral awards violative of *Komstroy*—like MOL's Award—"are the subject of *enforcement proceedings*, including in third countries … purportedly based on Article 26 of the Energy Charter Treaty." *Id*.

Moreover, in addition to numerous other EU Member States, Croatia and Hungary (MOL's place of incorporation) individually have adopted the same position in defending ICSID arbitration claims. Croatia has raised the *Achmea* defense in this and six other ICSID arbitrations[12] and Hungary in four[13]. Hungary's position in one of those arbitrations summarizes exactly the status of EU law:

> The preliminary rulings of the CJEU—including the *Achmea* Decision—are (1) considered part of the *acquis communautaire*, (2) are binding in the same way as statutory law, (3) have *erga omnes* effect, extending the consequences of such rulings to all EU Member States and to private entities, like Claimants, and (4) have retroactive effect. This retroactive effect is part of the nature of preliminary rulings, which do not create new rules but rather clarify the meaning of preexisting EU law

[12] *See* Award ¶ 161 (ECF No. 1-2); *Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/20/6, Decision on Intra-EU Jurisdictional Objection, Oct. 31, 2023, ¶ 66 (Mañón Decl., Ex. F); *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d. v. Republic of Croatia (II)*, PCA Case No. 2020-15, Decision of German Federal Court of Justice, Nov. 17, 2021, ¶ 7 (Mañón Decl., Ex. G); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection, June 12, 2020, ¶ 39 (Mañón Decl., Ex. H); *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, Judgment of the Federal Court of Justice, Nov. 17, 2021, ¶ 7 (Mañón Decl., Ex. I); *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award, Apr. 5, 2019, ¶ 69, 76-77 (Mañón Decl., Ex. J); *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, ¶ 75 (Mañón Decl., Ex. K).

[13] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, Nov. 13, 2019, ¶ 173-74 (Mañón Decl., Ex. L); *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021, ¶¶ 46-51 (Mañón Decl., Ex. M); *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, Oct. 9, 2018, ¶ 230-244 (Mañón Decl., Ex. N); *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Applicant's Request for the Continued Stay of Enforcement of the Award, Dec. 25, 2018, ¶ 2 (Mañón Decl., Ex. O).

> "as it must be or ought to have been understood and applied from the time of its coming into force." This is consistent with international law. In the *Achmea* Decision, the CJEU concluded that international agreements that allow an investor from one Member State to arbitrate disputes against another Member State are incompatible with EU law because such agreements adversely affect the autonomy of EU law and are contrary to Arts. 267 and 344 of the TFEU.

UP and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award ¶ 232 (quoting Hungary's various written submissions) (Mañón Decl., Ex. N).

Given this wealth of unequivocal authority, no EU Member State court has enforced an arbitral award covered by *Achmea* or *Komstroy*, which explains why MOL ran to the United States.

STANDARD OF REVIEW

When ascertaining jurisdiction under Rule 12(b)(1), "a court is not limited to the allegations in the Petition, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 90 (D.D.C. 2005) (collecting cases), *aff'd*, 452 F.3d 883 (D.C. Cir. 2006). "Because subject matter jurisdiction focuses on the Court's power to hear a claim, however, the Court must give the plaintiff's factual assertions closer scrutiny when reviewing a motion to dismiss for lack of subject matter jurisdiction" and "no presumption of truthfulness applies to the factual allegations" in the Petition. *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 231–32 (D.D.C. 2007) (internal quotation marks omitted). "The plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998) (citation omitted).

Under Rule 12(b)(6), the Court must accept well-pleaded allegations in the Petition as true, but need not accept asserted inferences or conclusory allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court may also consider documents that are "referred to in the" complaint or are "central to plaintiff's claim." *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999)

(considering materials produced and pleadings submitted in underlying administrative proceeding), *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002). The Court may grant a motion to dismiss under Rule 12(b)(6) based on an affirmative defense "when the facts that give rise to the defense are clear from the face of the" complaint. *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998).

ARGUMENT

I. The Petition fails for lack of subject-matter jurisdiction

Before this Court may decide whether to recognize the Award under the ICSID Convention, there must be an independent basis for subject matter jurisdiction over Croatia. Croatia is a foreign state as defined in the FSIA. *See* 28 U.S.C. § 1603(a). As such, the FSIA provides "the sole basis for obtaining jurisdiction" in any action against Croatia. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The federal statute implementing the ICSID Convention, 22 U.S.C. § 1650a, does not provide a separate basis of jurisdiction in an action to enforce an ICSID award against a foreign state. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112, 113 (2d Cir. 2017); *Micula v. Gov't of Romania*, 714 F. App'x 18, 21 (2d Cir. 2017) (summary order); *accord Micula v. Gov't of Romania*, 104 F. Supp. 3d 42, 44 (D.D.C. 2015) (holding that ICSID awards must be enforced by "plenary action" in accordance with the FSIA).

"[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the limited exceptions enumerated in Sections 1605 to 1607A of the FSIA applies. 28 U.S.C. § 1604 (emphasis added). If no exception applies, courts in the United States are without subject matter jurisdiction. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (citation omitted); *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015) (the FSIA's "terms are absolute: Unless an enumerated exception applies, courts of this country lack

jurisdiction over claims against a foreign nation"); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) ("If no exception applies, a foreign sovereign's immunity under the FSIA is complete: The district court lacks subject matter jurisdiction over the plaintiff's case."). Absent one of the statutorily-defined exceptions, a foreign sovereign "has an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Phoenix Consulting*, 216 F.3d at 39 (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)).

"In order to preserve the full scope of that immunity, the district court must make the critical preliminary determination of its own jurisdiction as early in the litigation as possible; to defer the question is to frustrate the significance and benefit of entitlement to immunity from suit." *Phoenix Consulting*, 216 F.3d at 39. "Because 'subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity' listed in the FSIA, as a 'threshold' matter in every action against a foreign state, a district court 'must satisfy itself that one of the exceptions applies.'" *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 150–51 (D.D.C. 2018) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)). MOL asserts two of the FSIA's exceptions to immunity: the arbitration exception under Section 1605(a)(6) and the waiver exception under Section 1605(a)(1). Pet. ¶¶ 11–14. Neither applies.

A. The Court lacks jurisdiction under the FSIA because no arbitration agreement exists and no award issued under the ECT

MOL invokes the arbitration exception to immunity under Section 1605(a)(6) of the FSIA, *see id.* ¶ 12, which allows federal court jurisdiction over an action brought:

> [E]ither to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party … or to confirm an award made pursuant to such an agreement to arbitrate, if … the agreement or award is or may be governed by a treaty … in force

> for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6). This Circuit has established a three-part test for the arbitration exception. A plaintiff must establish three jurisdictional facts, including that: "(1) a foreign state has agreed to arbitrate; (2) there is an award based on that agreement; and (3) the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards." *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). A "non-frivolous claim involving an arbitration award" is not enough to sustain jurisdiction; the Court must determine that each of these requirements has actually been met.[14] *Id*. While these jurisdictional questions can sometimes overlap with the merits, a court must still answer them before it takes jurisdiction under the FSIA. *Id*. at 205 n.3, 207.

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[14] The *MOL* arbitral tribunal's decision to exercise jurisdiction over the dispute does not satisfy the necessary jurisdictional inquiry and, in any event, is immaterial. Under the FSIA, the Court must "satisfy itself that the party challenging immunity has presented prima facie evidence of an agreement between the parties and that the sovereign asserting immunity has failed to sufficiently rebut that evidence." *Chevron*, 795 F.3d at 205 n.3. Where parties "disagree as to whether they ever entered into any arbitration agreement at all, the court must resolve that dispute," because "if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) (internal quotations omitted); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) ("To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) ("the court determines whether a valid arbitration agreement exists").

Accordingly, issues involving the formation of the arbitration agreement "must always be decided by the courts." *Nat'l R.R. Passenger Corp.*, 850 F.2d at 761; *see also Oxford Health Plans v. Sutter*, 569 U.S. 564, 569 n.2 (2013) (absent clear, unmistakable evidence that the issue was intended to be decided by arbitrators, the validity of an arbitration agreement is for the court to decide). Croatia logically could not have intended for the arbitration tribunal to decide the validity of the arbitration agreement because EU law, as explained in *Komstroy* and *Achmea*, precluded Croatia from agreeing to arbitration in the first place. *See* EC Investment Protection Communication at 3 (explaining that, under *Achmea*, "any arbitration tribunal established on the basis of [arbitration clauses in intra-EU investment treaties] lacks jurisdiction due to the absence of a valid arbitration agreement") (Hindelang Decl., Ex. 91).

1. No arbitration agreement exists "with" or "for the benefit of" MOL

In *NextEra*, the D.C. Circuit panel distinguished an arbitration agreement entered by a sovereign "*with*" a private party from one entered "*for the benefit*" of that party, and concluded that "either type of agreement may support the exercise of jurisdiction over a foreign sovereign" under the FSIA. 112 F.4th at 1101 (emphasis added). It then concluded that the ECT itself constituted an agreement "arguably" "for the benefit" of a private party. *Id*. at 1102. Croatia acknowledges that this conclusion binds this Court. Here, however, Croatia submits that no arbitration agreement formed at all, whether "with" MOL or "for its benefit," as confirmed by *Achmea*, *Komstroy*, and the consistent statements of the European Commission and EU Member States, including Croatia and Hungary, requiring this Court to reach a different result in this case.

Accordingly, jurisdiction is unavailable because no arbitration agreement binds Croatia to MOL, and, consequently, the Award is invalid and cannot be based on that non-existent agreement to arbitrate. *Chevron*, 795 F.3d at 204 ("If there is no arbitration agreement or no award to enforce, the District Court lacks jurisdiction over the foreign state and the action must be dismissed."); *see also Belize Soc. Dev.*, 794 F.3d at 102 (the arbitration exception "requires a valid agreement … to submit to arbitration" and noting that jurisdiction would be improper if a party "lacked authority to enter into the arbitration agreement") (internal quotation omitted); *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) (section 1605(a)(6) of the FSIA does not apply where parties have not entered into an arbitration agreement); *DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201, 207–08 (D.D.C. 2014) (dismissing for lack of jurisdiction because no arbitration agreement existed between the parties); *Aurum Asset Managers, LLC v. Banco Do Estado Do Rio Grande Do Sul*, No. 08-102, 2010 WL 4027382, at *13–18 (E.D. Pa. Oct. 13, 2010) (dismissal for lack of jurisdiction because the parties "did not agree to arbitrate anything related to this case"), *aff'd*, 441 F. App'x 822 (3d Cir. 2011).

No arbitration agreement exists under Achmea and *Komstroy*. These decisions render inexistent any arbitration agreement—and thus any precedent offer to arbitrate—that Croatia could have attempted to form under investment treaties (like the ECT) that purport to allow non-EU adjudicative bodies to decide issues of EU law. *See* Hindelang Decl. ¶¶ 15–18. The CJEU has been emphatic: EU courts have exclusive jurisdiction to decide issues of EU law and any EU Member State's attempt to deviate from that mandatory and exclusive jurisdiction is null and void, retroactive to when that Member State joined to the EU. *See id*. ¶¶ 47, 108. Croatia joined the EU on July 1, 2013,[15] thereby rendering inexistent any purported arbitration agreement—and its antecedent offer—that Croatia could have attempted to form under the ECT "with" or "for the benefit" of MOL, which filed for arbitration on November 26, 2013. *See* Pet. ¶ 18; Award, ECF No. 1-2:13.

The holding and scope of *Achmea* and *Komstroy* rests not on MOL's nationality but on the applicability of EU law to its dispute with Croatia and on EU law being the supreme law governing the relation between Croatia and Hungary. And the CJEU settled in *Achmea* and *Komstroy* that EU law applies to the dispute at hand because, as noted, Croatia and Hungary are EU Member States; MOL is an EU company incorporated in Hungary; and the dispute centers on MOL's alleged investments in Croatia. As a matter of EU law, no agreement exists under the ECT requiring Croatia to arbitrate "with" or "for the benefit" of MOL. The CJEU was unequivocal and its holding bears repeating:

[15] This was the culmination of a decadeslong process that began on February 21, 2003, with Croatia's application for EU membership. On January 22, 2012, an EU voters' referendum gave final approval for Croatia to join the EU. *See* Interactive Timeline of Croatia's EU Membership Status, available at https://neighbourhood-enlargement.ec.europa.eu/croatia_en#:~:text=Croatia%20applied%20for%20EU%20membership,country%20on%201%20July%202013 (last visited: Oct. 10, 2024).

> [T]he exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.
>
> […] It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, ***preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves***.
>
> In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as ***not being applicable*** *to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State*.

Komstroy ¶¶ 62–66 (emphasis added).

The above distinguishes this case from *NextEra*. The panel in *NextEra* addressed *Komstroy* only in connection with Spain's argument that no arbitration agreement "with" the companies existed. *See NextEra*, 112 F.4th at 1102 ("[f]or its part, Spain insists that it did not enter into an agreement 'with' the companies" because "under the Court of Justice's *Komstroy* opinion, the 'Energy Charter Treaty does not permit intra-EU arbitration'") (quoting Spain's Brief on Appeal). The panel declined to resolve *that* issue, instead holding "that [Spain] entered into an arbitration agreement—the Energy Charter Treaty itself—that is arguably 'for the[] benefit'" of investors. *Id.* (quoting FSIA Section 1605(a)(6)).[16] This holding does ***not*** address *Komstroy* or *Achmea*.

Here, however, Croatia argues that the CJEU's decisions in *Komstroy* and *Achmea* negate the existence of *any* arbitration agreement under the ECT, either "with" *or* "for the benefit" of MOL. As the supreme authority on issues of EU law, the CJEU's decisions are controlling for determining the content of EU law. *See Baxter Int'l Inc. v. Axa Versicherung AG*, 908 F. Supp.

[16] Croatia preserves its argument that this holding was erroneous.

2d 920, 925 (N.D. Ill. 2012) (refusing enforcement of a forum selection clause because a "binding [CJEU] decision" precluded its enforcement); *Al Tech Specialty Steel Corp. v. United States*, 28 Ct. Int'l Trade 1468, 1503 (C.I.T. 2004) (affording conclusive weight on the issue of EU law to a decision of the CJEU); *see also Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 44 (2018) (analogizing the process of determining foreign law to the rules for ascertaining state law, and observing that the decisions of a State's highest court are "binding on the federal courts" in deciding the content of state law); *Instrumentation Assocs. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 8 (3d Cir. 1988) (following a decision of the Supreme Court of Canada in determining the substance of Canadian law); *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102 (D.C. Cir. 2006) (deferring to English courts for resolution of questions of English law).

This Court should honor and enforce *Achmea* and *Komstroy*, treating them as if they were decisions from a "State's highest court … binding on the federal courts." *Animal Sci.*, 585 U.S. at 42 (discussing how Federal Rule of Civil Procedure 44.1 seeks to align the process of determining alien law with the process of determining domestic law to the extent possible). A foreign "government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight," *id*. at 46, and to "respectful consideration" by federal courts," *id*. at 36. Relevant considerations include the "statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." *Id*. at 43. These considerations all weigh in Croatia's favor. In its prior briefing, MOL did not dispute the binding nature of *Achmea* or *Komstroy*, did not meaningfully dispute their application to the purported arbitration agreement at issue, and did not question the CJEU's authority or the consistency of its position. Accordingly, this Court should give effect to *Achmea* and *Komstroy*

and hold, consistent with those decisions, that no arbitration agreement exists under the ECT "with" or "for the benefit" of MOL.

No arbitration agreement exists according to the European Commission and EU Member States, including Croatia and Hungary. As early as 2018, the European Commission informed the European Parliament and Council, that companies with claims under the ECT that implicate EU law—like MOL—cannot "have recourse to arbitration tribunals established … under the Energy Charter Treaty" against EU Member States. EC Investment Protection Communication at 26. The European Commission's views of EU law[17] are entitled to "respectful consideration." *Animal Sci. Prods.*, 585 U.S. at 36.

Furthermore, the EU and a majority the EU Member States have twice declared—first in 2019 and then in 2024—that Article 26 of the ECT is "incompatible with the [EU] Treaties and thus would have to be disapplied," *see* 2019 Joint Declaration at 2 (Hindelang Decl., Ex. 13), and "could not in the past, and cannot now or in the future serve as legal basis for arbitration proceedings initiated by an investor from one Member State concerning investments in another Member State," *see* 2024 Joint Declaration at 4 (Hindelang Decl., Ex. 122). The EU, itself a party to the ECT, has similarly explained in *amicus* briefing that: "[t]he interpretation of Article 267 and 344 of the TFEU adopted in *Achmea* applies … under the ECT." *Novenergia Amicus* Brief at 13 (Mañón Decl., Ex. A); *see also id.* ("any offer of intra-EU arbitration contained in the ECT is … ineffective and cannot have given rise to a valid arbitration agreement"); *Eiser Amicus* Brief at 15 ("the interpretation of Article 267 and 344 of the TFEU adopted in *Achmea* applies to intra-EU

[17] The EU, the successor of the European Community, "*is an organ of a foreign state, and thus an agency or instrumentality of a foreign state*" under the FSIA. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 144 (2d Cir. 2014), *rev'd on other grounds*, 579 U.S. 325 (2016). The European Commission is the EU's principal executive body.

investor-State arbitration under the ECT with at least the same force as it does to intra-EU investor-state arbitration under a BIT") (Mañón Decl., Ex. D).

Croatia and Hungary too have individually taken the position, as explained above, that no arbitration agreement forms under Article 26 of the ECT in situations precisely like this one. *See* Hindelang ¶ 22 (citing declarations by Croatia and Hungary).

Where parties to a treaty, here the EU and its Member States, including Croatia and Hungary, "agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [a court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982); *see also Medellin v. Texas*, 552 U.S. 491, 507 (2008) ("'postratification understanding' of signatory nations" to a treaty aids its interpretation); *Air France v. Saks*, 470 U.S. 392, 396 (1985) (to ascertain the parties' intent, courts look "beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (quoting *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423, 431–32 (1943)). The fact that *Komstroy* has now confirmed the EU and its Member States' interpretation of the ECT makes it even more compelling. *See Abbott v. Abbott*, 560 U.S. 1, 16–19 (2010) (in interpreting the Hague Convention on the Civil Aspects of International Child Abduction, citing decisions by courts of England, Israel, Austria, South Africa, Germany, Australia, and Scotland, all Convention signatories); *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175, n.16 (1999) (considering "[d]ecisions of the courts of other Convention signatories," including from courts in England, Canada, New Zealand, and Singapore, in interpreting the Warsaw Convention); *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–51 (1991) ("[w]e must also consult the opinions of our sister signatories" in interpreting the Warsaw Convention).

Achmea, Komstroy, and the statements of the EU and its Member States are acts of state that preclude the requisite jurisdictional finding of an arbitration agreement. While the act of state doctrine ordinarily is a defense on the merits, on these facts it presents a threshold FSIA issue, because declaring that an arbitration agreement exists as a jurisdictional fact requires this Court to invalidate *Achmea*, *Komstroy*, and the repeated declarations of the EU and its Member States.

The act of state doctrine "requires American courts to presume the validity of an official act of a foreign sovereign performed within its own territory." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 87 (D.D.C. 2014) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004)) (internal quotation marks omitted). The Supreme Court has emphasized on more than one occasion that the "act of state doctrine is not some vague doctrine of abstention but a principle of decision binding on federal and state courts alike." *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (emphasis in original) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 427 (1964)). The foreign sovereign's act of state "becomes a rule of decision for the courts of this country." *Kirkpatrick*, 493 U.S. at 406 (internal ellipsis omitted). This doctrine has "constitutional underpinnings" and "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

An "act of state" is an "official action" that is "by nature distinctly sovereign." *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012). It may include, for instance, when a sovereign "pass[es] a law, issue[s] an edict or decree, or engage[s] in formal governmental action." *Id*. at 1074. Foreign court judgments are treated as acts of state when they

"give effect to the public interest of the government," as *Achmea* and *Komstroy* do here. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1152 (9th Cir. 2018) (quotation and citation omitted); *see also In re Philippine Nat'l Bank*, 397 F.3d 768, 773 (9th Cir. 2005). And the EU Member States's declarations in 2019 and 2024 are precisely the type of edicts and decrees to which the act of state doctrine would apply. *See Sabbatino*, 376 U.S. at 439 (challenge to validity of sovereign decree barred by act of state doctrine). Indeed, the D.C. Circuit has appropriately recognized that where a sovereign has ruled on the validity of its own laws, such is not subject to review by United States courts. *See Soc'y of Lloyd's*, 457 F.3d at 102 ("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. We cannot reconsider that decision here."). As the D.C. Circuit explained, "the act of state doctrine bars us from even asking" whether an act would be unlawful under English law because it is "a question that only the English courts can answer," and a question they already did answer. *Id.* at 102–03. The EU's orders, official positions, and declarations are thus acts of state that this Court cannot reconsider.

To conclude that the FSIA grants jurisdiction and that Section 1650a(a) permits enforcement, this Court would need to deny the validity of multiple sovereign acts. This includes not only the acts of Croatia and Hungary, but also the EU as "an agency or instrumentality of a foreign state" under the FSIA. *See European Cmty.*, 764 F.3d at 133; *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 281 (D.D.C. 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020) (accepting that the European Commission, the EU's principal executive body, qualifies as a "sovereign" for act-of-state purposes). Indeed, to find the FSIA's arbitration exception applicable, this Court would need to find that Croatia had a valid arbitration agreement "with" or "for the benefit" of MOL,

notwithstanding the contrary holdings by the CJEU in *Achmea* and *Komstroy*,[18] the European Commission in State Aid Decision 2017/7384 and the Investment Protection Communication, as further supported by both the 2019 Joint Declaration and 2024 Joint Declaration of EU Member States. In the 2024 Joint Declaration, for instance, the EU and its Member States (including Croatia) expressly declared that "Article 26 of the [ECT] does not apply as a basis for intra-EU arbitration proceedings and that, in that respect, Article 47(3) of the [ECT] will not produce legal effects in the intra-EU relations." *See* 2024 Joint Declaration at 8, Hindelang Decl., Ex. 122. In its most recent *amicus* briefs in *NextEra*, the EU affirmed the importance of *Komstroy* and *Achmea*, highlighting that these opinions are entitled to deference and "made clear that the [ECT] contains no valid offer of arbitration from the EU and its Member States to investors of other Member States." Brief for the European Commission on Behalf of the European Union as *Amicus Curiae*, *NextEra Global Holdings B.V. v. Kingdom of Spain*, No. 23-7031, Document #2002511 (D.C. Cir. June 6, 2023), at p. 10 ("*NextEra Amicus* Brief," Mañón Decl., Ex. P). In supporting Spain's petition for rehearing *en banc* of *NextEra*, the EU further affirmed: "Under EU law (which governs the capacity of Spain, an EU Member State, to contract with EU nationals), Spain could never have offered to arbitrate disputes with the investors here. ***No agreement to arbitrate disputes with these investors could ever have been formed,*** which precludes jurisdiction under the arbitration exception." *NextEra* Rehearing *Amicus* Brief at p. 6 (Mañón Decl., Ex. B).

This Court cannot make the findings necessary to confirm the Award without "question[ing] the validity" of those foreign acts of state, *Altmann*, 541 U.S. at 700, which are "rule[s] of decision" on this Court, *Kirkpatrick*, 493 U.S. at 406. *See also Underhill v. Hernandez*,

[18] *Achmea* and *Komstroy* did not merely declare the position of the CJEU, instead they gave effect to the mandate contained in the EU Treaties. The relevant provisions of the EU Treaties above analyzed are too acts of state, whose scope the CJEU ratified in *Achmea* and *Komstroy*.

168 U.S. 250, 254 (1897) (holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States"); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918) (denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, legally ineffective); *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918) (same); *Sabbatino*, 376 U.S. at 438–39 (upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void).

Application of the act of state doctrine is here even more necessary given that *Achmea*, *Komstroy*, the 2019 Joint Declaration, and the 2024 Joint Declarations all rest on foundational principles of EU law arising under the EU Treaties and give effect to the EU's public interests. *See Sabbatino*, 376 U.S. at 428 ("the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches").

NextEra's inapposite finding is wrong, in any event.[19] *NextEra's* finding that the ECT "itself" is "arguably" an arbitration agreement "for the benefit" of companies contradicts established law. The panel relied on its own interpretation of Article 26 of the ECT, *see* 112 F.4th

[19] Given the pending *en banc* petition, Croatia preserves the argument for potential further review and maintains that the ECT is not "itself" an arbitration agreement and that the Court must determine the validity of an arbitration agreement between the sovereign and the party seeking to enforce an award before exercising jurisdiction. *See BG Group Plc v. Republic of Argentina*, 572 U.S. 25, 46 (2014) (an investment treaty "is *not an already agreed-upon arbitration provision* between known parties, but rather a nation-state's standing offer to arbitrate with an amorphous class of private investors" (Sotomayor, J., concurring); *id*. at 53 (the treaty "constitutes only a unilateral standing *offer* by Argentina with respect to U.K. investors," which "offer must be accepted for a legally binding contract to be formed") (emphasis in original) (Roberts, C.J., dissenting).

at 1102–03,[20] ignoring both the postratification common understanding of the ECT's signatories (including that of the EU and its Member States), which a U.S. court "must, absent extraordinarily strong contrary evidence, defer to," *see Sumitomo*, 457 U.S. at 185, and the CJEU's decisions in *Achmea* and *Komstroy*, which a court must "consult," *see Floyd*, 499 U.S. at 550–51.

The clear language of the ECT also confirms that the treaty is not "itself" an agreement to arbitrate. As noted, Article 26(3) of the ECT contains Croatia's unconditional offer to arbitrate, which MOL must accept pursuant to Article 26(4) by "provid[ing] its *consent in writing* for the dispute to be submitted to" arbitration. ECF No. 1-9 (emphasis added). Article 26(5) clarifies that the "consent given in paragraph (3) [Article 26(3)] ***together*** with the written consent of the Investor given pursuant to paragraph (4) [Article 26(4)]," is what forms the arbitration agreement required by the ICSID Convention. *Id*. (emphasis added). *NextEra* ignores that crucial language.

Nor is *NextEra* consistent with *Chevron* or *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021). Those cases found valid arbitration agreements to begin with, whose scope Ecuador and Moldova challenged by raising objections that fell within the discretion of the underlying arbitration tribunals. *See Stileks*, 985 F.3d at 877–78; *Chevron*, 795 F.3d at 205–06. The situation here is different. As noted, by operation of EU law and the declarations of numerous

[20] The panel also cited to Prof. Christopher Dugan to say that the ECT "itself 'contains the consent of the contracting parties to submit disputes'" to arbitration, *id*. at 1103, but Mr. Dugan clarifies that such "[e]xpression of consent by a state, however, is insufficient to bestow jurisdiction on a tribunal" because "the *investor must perform some reciprocal act to perfect the consent*. Consent of a government in a law or a treaty is merely an ***offer to agree to arbitration***, ***rather than a full contractual compromis*** as one would find in an investment contract. *The government's unilateral offer is consummated as a binding obligation to arbitrate only with the investor's acceptance of that offer*." Christopher Dugan *et al.*, *Investor-State Arbitration* 220–21 (2008) (emphasis added) (Mañón Decl., Ex. Q); *see also* Christoph Schreuer, *The ICSID Convention: A Commentary*, 191–224, ¶ 276 (Cambridge University Press 2001) ("[T]he treaty on its own cannot amount to consent to [ICSID] jurisdiction by the parties to the dispute," but it "may constitute the host State's offer to do so.") (Mañón Decl., Ex. R).

EU authorities and ECT signatories no arbitration agreement existed to begin with and Croatia did not extend an offer under Article 26(3) that MOL could have accepted under Article 26(4), thereby precluding the formation of an arbitration agreement under Article 26(5).

* * *

The dangers the CJEU identified in *Achmea* and *Komstroy* manifest themselves in the Award. The *MOL* arbitration tribunal (mis)interpreted and (mis)applied EU law in deciding its jurisdiction, and it did so by rejecting the CJEU's reasoning and holding in *Achmea and Komstroy*. *See* Award ¶ 488. This is the very peril that the CJEU sought to prevent: a non-EU tribunal ruling on issues of EU law, arising in disputes within the EU, involving European parties bound and matters governed by EU law, having effects within the EU.

The above makes clear that, as a matter of EU law, no valid arbitration agreement existed "with" or "for the benefit" of MOL under the ECT. Consistent with *Achmea* and *Komstroy*, Croatia did not extend an offer to arbitrate MOL's claims under the ECT. Absent such an offer, no arbitration agreement could have formed.[21] "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotations omitted). For these reasons, this Court lacks subject matter jurisdiction under the FSIA's arbitration exception, section 1605(a)(6)(B). *Id*.

[21] As mentioned, investment treaties that provide for arbitration contain a standing offer by states to arbitrate that investors can accept later when a dispute arises. *See* United Nations Conference on Trade and Development, *Investor-State Dispute Settlement: United Nations Conference on Trade and Development (UNCTAD) Series on Issues in Investment Agreements II* 37 (2014), at 31–32 (Mañón Decl., Ex. S); *Chevron*, 795 F.3d at 205 n. 3 (explaining that the US-Ecuador bilateral investment treaty is not an ordinary contract between private parties to arbitrate, but rather "includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty").

2. No arbitration award exists under the ECT

This case is also distinguishable from *NextEra* because Spain there did not dispute that an arbitration award existed. *See NextEra*, 112 F.4th at 1101. Because no arbitration agreement exists here and the *MOL* arbitration tribunal knew of *Komstroy* before issuing its Award, *see* Award ¶ 459 (analyzing *Komstroy*), the tribunal could not have even "purported to make an award pursuant to the ECT," as *Stileks* requires. 985 F.3d at 878.[22] In contrast, in *NextEra* the awards in the three consolidated appeals were issued before *Komstroy* was decided on September 2, 2021. *See Nextera Energy Global Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 207 (D.D.C. 2023) (award issued in 2019); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-CV-01871 (TSC), 2023 WL 2016933, at *2 (D.D.C. Feb. 15, 2023) (award issued in 2019); *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1, 5 (D.D.C. 2023), *rev'd and remanded sub nom. NextEra*, 112 F.4th 1088 (award issued in 2020). Thus, arguably those tribunals like the *Stileks* tribunal purported to issue their awards under the ECT, which is not true for the Award here, depriving this court of jurisdiction.

B. The Court lacks jurisdiction under the FSIA because Croatia did not waive its sovereign immunity

MOL also seeks to rely on the FSIA's waiver exception. It claims that Croatia waived its immunity both explicitly (through two contracts entered with MOL) and implicitly (by entering the ICSID Convention). Pet. ¶¶ 13–14. *NextEra* did not reach the waiver argument, finding it unnecessary because the arbitration exception was satisfied. 112 F.4th at 1100. Here, because the

[22] Though the holding in *Stileks* that a tribunal need only "purport" to issue an award pursuant to a relevant treaty binds this Court, Croatia maintains and preserves its argument that *Stileks* was wrongly decided.

arbitration exception does not apply for the reasons previously stated, the Court should address Croatia's arguments as set forth in its original motion and now restated.

No express waiver occurred. Under Section 1605(a)(1) of the FSIA, an exception to immunity exists only "in any case … in which the foreign state has waived its immunity." The two contracts MOL relies on to argue waiver are irrelevant to this "case" and thus cannot be the basis for the exception. The contracts have nothing to do with MOL's claims under the ECT that resulted in the Award. Instead, they are commercial agreements governed by Croatian law that provide for arbitration in Switzerland under the UNCITRAL Rules. An arbitration was, in fact, conducted under those two contracts—but, again, it is not the arbitration that resulted in the Award at issue. Pet. ¶¶ 1, 40, 46. That other commercial arbitration resulted in a 2017 UNCITRAL arbitration award that MOL already sought to enforce in this District through a separate action. *See* Petition to Confirm Arbitration Award, *MOL Hungarian Oil & Gas Plc v. Republic of Croatia*, Case 1:17-cv-02339 (D.D.C. Nov. 6, 2017) (ECF No. 1). MOL voluntarily dismissed that other petition and no longer seeks to enforce that 2017 UNCITRAL award. *See* Notice of Voluntary Dismissal Without Prejudice, *MOL Hungarian Oil & Gas Plc v. Republic of Croatia*, Case 1:17-cv-02339 (D.D.C. Sep. 24, 2018) (ECF No. 18).

Whatever the question of express waiver for that 2017 UNCITRAL award that may have arisen in the separate 2017 litigation, such a waiver cannot extend to the ICSID Award to which this Petition pertains. Both awards are separate and distinct, as are the underlying arbitration agreements. In fact, the ICSID tribunal did not rest its jurisdiction on those two agreements, but instead *disavowed* any reliance on them:

> The Claimant [MOL] submits that it [*i.e.* a provision of the ECT] extends so far as to confer on the present Tribunal jurisdiction over alleged breaches of various contractual arrangements entered into in respect of the management of MOL's investment in INA, notably the FASHA, the GMA and the FAGMA. The Respondent disputes this, not merely

> on the more fundamental grounds discussed above, but also because it alleges that those agreements are invalid in law (the law of Croatia).
>
> The Tribunal cannot accept the Claimant's proposition … The Tribunal has not been accorded jurisdiction under the ECT to sit in judgment over the essential validity of the SHA, FASHA, GMA or FAGMA, or over alleged breaches of them, in place of the dispute settlement provisions laid down in those agreements themselves.

Award ¶¶ 450–453, ECF No. 1-2. As such, any waiver cannot extend beyond the express terms of those contracts to encompass proceedings under an entirely separate instrument (the ECT).

In any event, Croatia withdrew any purported waiver in those two contracts pursuant to Section 1605(a)(1) (which refers to "any withdrawal of the waiver which the foreign state may purport to effect … in accordance with the terms of the waiver"). Croatia contended throughout the ICSID arbitration that the agreements in question are invalid under Croatian law. Award ¶ 450 (Croatia "alleges that those agreements are invalid in law (the law of Croatia)"). Consequently, they are not capable of constituting a valid waiver, still less when MOL filed the Petition before this Court in 2023.

No implied waiver occurred. In the prior round of briefing, MOL argued that Croatia implicitly waived its sovereign immunity by becoming a party to the ICSID Convention in 1998. ECF No. 16 at 31. This would mean that Croatia waived its sovereign immunity fifteen years prior to the very initiation of arbitration by MOL, concerning a dispute and counterparty that did not yet exist. But waivers of foreign sovereign immunity require an "exacting showing." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014) (Kavanaugh, J.), *abrogated on other grounds by Rosenkrantz v. Inter-American Development Bank*, 35 F.4th 854, 863 & n.3 (D.C. Cir. 2022). And implicit waivers require a showing that the foreign state must "have intended to waive its sovereign immunity." *Khochinsky v. Republic of Poland*, 1 F.4th 1, 8 (D.C. Cir. 2021). This Circuit has recognized implicit waiver in "only three circumstances: (i) the state's executing a contract containing a choice-of-law clause designating the laws of the United States as applicable;

(ii) the state's filing a responsive pleading without asserting sovereign immunity; or (iii) the state's agreeing to submit a dispute to arbitration in the United States." *Broidy Capital Management LLC v. Muzin*, 61 F.4th 984, 995 (D.C. Cir. 2023) (internal quotations omitted). "Courts are loathe to 'stray beyond these examples.'" *Id.* (quoting *Khochinsky*, 1 F.4th at 9). Here, (1) the ICSID Convention is not an agreement to arbitrate because it requires an additional instrument to form an agreement to arbitrate, such as ECT Article 26 (which is inapplicable here); (2) Croatia has not agreed that the laws of the United States apply to the contracts with MOL; and (3) Croatia has contested jurisdiction in this Court and before the ICSID tribunal.

To support its bright-line argument of waiver through the ICSID Convention, MOL previously looked to out-of-circuit precedent. ECF No. 16 at 32 (citing *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013)). In *Blue Ridge*, the Second Circuit held that a state waives its immunity in the United States by becoming a party to the ICSID Convention. 735 F.3d at 84. But this Circuit has not applied such a bright-line rule to the ICSID Convention, nor should it because the ICSID Convention states that it "shall [***not***] 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." ICSID Convention, Art. 55 (emphasis added). The closest this Circuit has come is in the context of the New York Convention, but still requiring two elements: (1) that the foreign state is a party to the New York Convention and (2) has agreed to arbitrate in a Convention state. *See Process and Industrial Developments Limited v. Fed. Repub. of Nigeria*, 27 F.4th 771, 774 (D.C. Cir. 2022) (citing *Tatneft v. Ukraine*, 771 F. App'x 9, 9–10 (D.C. Cir. 2019)). Thus, an implied waiver requires a valid arbitration agreement, and here there is none but, even if one existed, it is not contained in the ICSID Convention. *See Blasket*, 665 F. Supp. 3d at 13 (citing *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 122-23 (D.C. Cir. 1999)).

A foreign state's accession to the ICSID Convention—without more— does not waive that foreign state's immunity from suit in a U.S. court with respect to any and all future ICSID awards, for any and all claimants (known and unknown) asserting rights thereunder. Croatia did not waive its immunity from suit in a U.S. court by ascending to the ICSID Convention.

II. The Court lacks personal jurisdiction over Croatia

A circuit split exists between the D.C. Circuit and the Ninth Circuit regarding whether the "minimum contacts" test applies to foreign states. In this Circuit, a showing of minimum contacts is not required to establish personal jurisdiction over a foreign state, but the Ninth Circuit recently held that plaintiffs must satisfy a "minimum contacts" analysis to establish personal jurisdiction over a foreign state, which plaintiffs could not do under facts similar to those at issue in this case. *See Devas Multimedia Priv. Ltd. v. Antrix Corp.*, No. 20-36024, 2023 WL 4884882, at *2–3 (9th Cir. Aug. 1, 2023); *cf. Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002) (holding that a showing of minimum contacts is not required to establish personal jurisdiction over a foreign sovereign, because a sovereign is not a "person" under the Due Process Clause of the Fifth Amendment).

On October 4, 2024, the Supreme Court granted a petition for a writ of certiorari on this issue. *See CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, No. 23-1201 (Oct. 4, 2024); *see also* Pet. for Writ of Cert., *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, No. 23-1201 (May 6, 2024) (QP: "Whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under the [FSIA].").

Croatia preserves this argument for further review pending the Supreme Court's opinion on the issue. Croatia is under no obligation to raise this issue in anticipation of a future Supreme Court decision. *See United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 211-12 (D.D.C. 2018) (explaining that a party's "failure to raise an argument anticipating the Supreme Court's decision

to change the law does not waive an argument relying on that change"). However, given that the Supreme Court has granted the petition for a writ of certiorari, Croatia preserves the argument and maintains that the District Court lacks personal jurisdiction over Croatia because MOL cannot satisfy the "minimum contacts" test. Croatia is not "essentially at home" in the United States, has not "purposefully availed itself of the privilege of conducting activities" within the United States, and neither the underlying dispute that gave rise to the Award nor this ensuing Award-enforcement proceeding arise from Croatia's contacts with the United States. Croatia, thus, does not have the requisite minimum contacts for personal jurisdiction.

III. The Petition should be dismissed under the doctrine of *forum non conveniens*

The D.C. Circuit in *NextEra* held that "*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." 112 F.4th at 1105. Unless vacated, that decision binds this Court. Nonetheless, because of the pending *en banc* petition, Croatia preserves its argument that this Court should dismiss this case under the doctrine of *forum non conveniens*. Specifically, and as fully set forth in Croatia's original motion to dismiss, the EU provides adequate fora for resolving this dispute, and the *Gulf Oil* factors favor dismissal. *See* ECF 14-1:19–24. To avoid needless repetition, Croatia incorporates its prior arguments as if restated herein, and preserves those argument for appeal or further consideration should the D.C. Circuit or Supreme Court vacate *NextEra*.

IV. The Petition should be dismissed for failure to state a claim[23]

NextEra stated its limitations, holding "only that the district courts have jurisdiction to enforce these arbitration awards" but noting that "does not mean [courts] must [enforce these arbitration awards] or should do so." 112 F.4th at 1104 (the panel did "not address the merits question whether [the ECT's] arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies").

Accordingly, even if the Court makes it past the jurisdictional threshold, it can still conduct the "analytically distinct" inquiry of "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994). Several grounds exist to dismiss this case because MOL fails to state a claim for enforcement.

A. The Award is not entitled to full faith and credit

Assuming *arguendo* that this Court has jurisdiction under the FSIA—it does not—the Award is not entitled to full faith and credit and its recognition should be denied. Article 54(1) of the ICSID Convention states: "A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide 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 implemented Article 54(1) by enacting 22 U.S.C. § 1650a(a). That statute provides:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID Convention] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be

[23] This Court must resolve the jurisdictional issues before Croatia is required to defend itself on the merits. *See Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020) ("Because the immunity protects foreign sovereigns from suit, it must be decided '[a]t the threshold of every action' in which it is asserted.") (citing *Verlinden*, 461 U.S. at 493–94). Croatia respectfully requests that the Court determine whether it has jurisdiction as a threshold matter and prior to requiring Croatia to respond to MOL's expected motion for summary judgment under the current briefing schedule. *See* ECF No. 30.

> 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) (emphasis added); *see also Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1103 n.14 (D.C. Cir. 1982) ("ICSID arbitrations [*sic*, awards] are to be enforced as judgments of sister states."); *Mobil*, 863 F.3d at 117 ("Article 54 affords ICSID arbitral awards the status of final state court judgments, and was included in the Convention at the insistence of the United States.").

State court judgments are generally entitled to recognition and enforcement in federal court under the Constitution's full faith and credit clause. The Supreme Court has emphasized, however, "some basic limitations on the full-faith-and-credit principles." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982). "Chief among these limitations is the caveat, consistently recognized by this Court, that a 'judgment of a court in one State is conclusive upon the merits in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.'" *Id.* (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)). "It is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over the relevant parties." *Id.* at 704 n.10. "Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court *did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given*." *Id.* at 705 (citing *Nevada v. Hall*, 440 U.S. 410, 421 (1979)) (emphasis added); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 386 (1996) ("where the rendering forum lacked jurisdiction over the subject matter or the parties, full faith and credit is not required").

Pursuant to Section 1650a(a), these "same full faith and credit" principles apply to enforcement of an ICSID award's pecuniary obligations. Full faith and credit should be denied to

the Award because no arbitration agreement exists between Croatia and MOL. As established above, pursuant to *Komstroy*, *Achmea*, and the statements of the EU and its Member States, no arbitration agreement exists between Croatia and MOL. That consistent authority "disprove[s]" the arbitral tribunal's jurisdiction over the parties and the subject matter such that full faith and credit should be denied. *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (foreign court's "jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself").

Because no arbitration agreement exists, the *MOL* arbitral tribunal lacked adjudicative authority over Croatia and MOL and over the subject matter, *i.e.*, a dispute between two European parties, implicating EU law, that is subject to the exclusive jurisdiction of EU courts. Like a state court judgment rendered by a court without jurisdiction, the Award is not entitled to full faith and credit and may not be enforced under Section 1650a(a). *See Underwriters Nat'l Assurance Co.*, 455 U.S. at 704; *Durfee*, 375 U.S. at 110; *Matsushita Elec. Indus. Co.*, 516 U.S. at 386; *see also Gargallo v. Merrill Lynch, Pierce, Fenner & Smith*, 918 F.2d 658, 664 (6th Cir. 1990) (judgment from Ohio state court that "lacked subject matter jurisdiction to resolve the claims brought under the federal securities laws, a body of statutes and regulations over which federal courts have exclusive jurisdiction" not entitled to claim-preclusive effect in federal court under full faith and credit principles); *In re Newport Creamery, Inc.*, 293 B.R. 293, 296 (Bankr. D.R.I. 2003) (state court judgment purporting to authorize execution on debtor's property declared void and refused full faith and credit "[b]ecause 28 U.S.C. 1334(e) gives [district courts] exclusive jurisdiction over the [bankruptcy debtor's] property and any proceeds related thereto"); *Conlon v. Heckler*, 719 F.2d 788, 798 (5th Cir. 1983) ("[b]ecause the Texas court did not have personal jurisdiction over [husband], its decree would not be entitled to full faith and credit by the Vermont courts").

Moreover, the *MOL* arbitral tribunal lacked discretion to determine its own jurisdiction. As explained, Article 26(5) of the ECT requires a signatory state's offer to arbitrate under paragraph (3), "together with" an investor's acceptance of that offer under paragraph (4), for the formation of an arbitration agreement that "shall be considered to satisfy the requirement for … written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention." ECF No. 1-9. Here, no such offer or acceptance occurred because the CJEU has held that Croatia's purported offer was void *ab initio* and MOL could not accept any such inexistent offer. Accordingly, on these facts, the ECT does not invoke the ICSID Convention because the ECT's prerequisites for forming an agreement did not exist. Lacking an arbitration agreement under the ECT, the ICSID tribunal also lacked jurisdiction over the dispute, including to decide its own jurisdiction. *Cf. Andresen v. IntePros Fed., Inc.*, 240 F. Supp. 3d 143, 149 (D.D.C. 2017) ("when a delegation provision is invalid or unenforceable, that opens the door for judicial resolution of the question of arbitrability").

B. The act of state doctrine bars enforcement of the Award on the merits, as well

While the act of state doctrine precludes the requisite jurisdictional finding that an arbitration agreement exists, as noted, to the extent the Court considers the argument a defense on the merits, it similarly bars enforcement of the Award. As explained above, the doctrine precludes this Court from enforcing the Award because doing so would fail to recognize as valid the sovereign acts of the EU, Croatia, and Hungary. *See Kirkpatrick*, 493 U.S. at 409. Specifically, by enforcing the Award and ordering Croatia to pay it, this Court would be declaring invalid the many acts of the EU, Croatia, and Hungary holding that no arbitration agreement formed under the ECT between MOL and Croatia.

C. The foreign sovereign compulsion doctrine bars enforcement of the Award

The foreign sovereign compulsion doctrine also bars enforcement of the Award. This doctrine holds that U.S. courts should abstain from granting relief that would compel parties to take actions that would violate the laws of a foreign sovereign. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana S.A.*, 830 F.2d 449, 453 (2d Cir. 1987) (defendant "entitled to assert the defense of foreign government compulsion" where its "conduct … has been compelled by [a] foreign government"). It proceeds from the broader principle that where a foreign party is required to act in a certain manner by a foreign sovereign, an order from a U.S. court compelling it to act differently would be a direct affront to the laws of the foreign sovereign. *See FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980) (U.S. courts must "not take action that may cause the violation of another nation's laws"); *cf. In re Sealed Case*, 825 F.2d 494, 498–499 (D.C. Cir. 1987) ("We have little doubt … that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders."). The doctrine thus provides a "foreign party" with "protection from being caught between the jaws of [a U.S. court] judgment and the operation of laws in foreign countries." RESTATEMENT (3D) OF THE FOREIGN RELATIONS LAW OF THE UNITES STATES § 441 (1987), reporters' notes 1.

For the reasons described above, the doctrine applies here. The EU is a sovereign entity, which makes laws and issues judgments that have the force of law on Croatia. *See RJR Nabisco Inc.*, 764 F.3d at 144–45. Ordering Croatia to comply with the Award would violate EU law in two ways.

First, ordering Croatia to pay a judgment resulting from the Award would force Croatia to make unlawful payments in violation of EU State-aid law. *See* TFEU Article 107(1) ("any aid granted by a Member State … shall … be incompatible with the internal market"); TFEU

Article 108(3) ("The Commission shall be informed … of any plans to grant or alter aid … The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision"). The European Commission has held that payments made pursuant to an award, like the one here, constitute illegal state aid and subject Croatia to the EU legal obligation to *recover* such payments from Petitioner, as well as significant financial sanctions before EU courts. *See* TFEU Article 108(2) ("[the Commission] shall decide that the State concerned shall abolish … such aid"); *see also* Council Regulation 2015/1589, art. 16(1), O.J. (L 248) 99 (July. 13, 2015) ("Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ('recovery decision').").

Second, the CJEU and the European Commission consistently have held that EU law prohibits EU Member States from arbitrating outside of the EU disputes like the one brought by MOL under the ECT. Ordering Croatia to comply with the Award would force Croatia to contravene the EU Treaties, the CJEU and European Commission's mandates, and recognize and validate an award that contravenes EU law. That would expose Croatia to infringement proceedings under Article 258 of the TFEU and eventually to millions in "financial sanctions for failing to fulfill obligations under the Treaties." (Hindelang Decl. ¶ 19).

Thus, granting the Petition would effectively require Croatia to either ignore this Court's decision (to abide by its EU legal obligations); or to abide by this decision (but breach its EU legal obligations). This untenable outcome is precisely the situation that the foreign sovereign compulsion doctrine was meant to avoid. That Croatia is a foreign sovereign itself renders application of the foreign sovereign compulsion doctrine even more necessary here. As observed by the D.C. Circuit in a case involving "an entity owned by the government" of a foreign country,

"it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825 F.2d at 498 ("Most important to our decision is the fact that [the relief ordered by the district court] represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory.").

CONCLUSION

Croatia recognizes that the D.C. Circuit's *NextEra* decision, unless reversed by the D.C. Circuit *en banc* or the United States Supreme Court, binds this Court on certain matters raised in this motion. Croatia, as stated herein, preserves its position on those matters and further contends that *NextEra* left open several grounds for dismissal of MOL's Petition. This Court should exercise its authority under those grounds and dismiss this Petition rather than order Croatia to violate EU law. It should defer to the decisions of the CJEU—the highest authority on EU law—which has held in cases identical to this one that no arbitration agreement forms under the ECT.

For the foregoing reasons, Croatia respectfully requests that the Court dismiss the Petition for lack of subject-matter jurisdiction, for lack of personal jurisdiction, or for failure to state a claim. Croatia further preserves its argument under the doctrine of *forum non conveniens*. Given the importance of these issues to Croatia and the EU legal order, Croatia respectfully requests an oral hearing on this motion to dismiss, and its opposition to the Petition, pursuant to LCvR 7(f).

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Respectfully submitted,

/s/ John A. Burlingame

John A. Burlingame (DC Bar No. 455876)
Stephen P. Anway (DC Bar No. 100729)
Christina M. Lamoureux (DC Bar No. 1658743)
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW

Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315
john.burlingame@squirepb.com
stephen.anway@squirepb.com
christina.lamoureux@squirepb.com

Raúl B. Mañón (*pro hac vice*)
SQUIRE PATTON BOGGS (US) LLP
200 South Biscayne Boulevard, Suite 3400
Miami, FL 33131
Telephone: (305) 577-7055
Facsimile: (305) 577-7001
raul.manon@squirepb.com

Counsel for the Republic of Croatia

CERTIFICATE OF SERVICE

I certify that on October 14, 2024, the foregoing was served through the Court's CM/ECF System on all counsel of record.

/s/ John A. Burlingame
John A. Burlingame