UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACF RENEWABLE ENERGY LIMITED, *Plaintiff*, v. THE REPUBLIC OF BULGARIA, *Defendant*.	Case No. 24-cv-01715-DLF

DECLARATION OF LAZAR TOMOV

1. My full name is Lazar Vladimirov Tomov. I am an attorney duly authorized to practice law in the Republic of Bulgaria ("Bulgaria").

2. I graduated in 1984 from the Faculty of Law of the University St. Clement of Ohrid, Sofia with a diploma in law with distinction. In 1993, I received an LL.M. degree in International Business Law (*magna cum laude*) from the Faculty of Law of the Katholike Universiteit, Leuven, Belgium. In 1994, I studied international and comparative law at the Academy of American and International Law, Dallas, USA, and European Union ("EU") law at the Academy of European Law, Florence, Italy, and in 1995 financial law and arbitration at Queen Mary and Westfield College, University of London, United Kingdom.

3. I am the founding partner of Tomov & Tomov, a law firm located in Sofia, Bulgaria. I am the head of my firm's arbitration practice and have served as counsel in domestic and international arbitration proceedings. I have been appointed as a co-arbitrator and presiding arbitrator in more than 100 cases, including in disputes under investment treaties, disputes involving matters of public international law, and in cases before the International Centre for

Settlement of Investment Disputes ("ICSID") and various other arbitral institutions. In addition to my work as arbitrator, I have served as an expert witness on points of Bulgarian law in international arbitrations and litigations.

4. I also have experience with matters of EU law and have served as counsel in proceedings before the European Commission concerning State aid.

5. I am a member of ICSID's Panel of Arbitrators; a member of the Permanent Court of Arbitration in the Hague, Netherlands; a member of the International Advisory Board of the Vienna International Arbitral Centre and of its Investment Arbitration Committee, Energy Arbitration Committee, and the Post-Mergers and Acquisitions Arbitration Committee; and a member of the Panel of Arbitrators of the Arbitration Court of the Bulgarian Chamber of Commerce and Industry.

6. My curriculum vitae is attached as Exhibit 1. Attached as Exhibit 2 is a list of all other documents cited in and attached to this Declaration as Exhibits.

7. I make this declaration in support of Bulgaria's Motion to Dismiss in this Case No. 24-cv-1715, in which ACF Renewable Energy Limited ("ACF"), a company incorporated in the EU Member State of the Republic of Malta ("Malta"), seeks to enforce the arbitral award of January 5, 2024 ("the Award")[1] rendered in *ACF Renewable Energy Limited v. Republic of Bulgaria*, ICSID Case No. ARB/18/1 (the "Arbitration"), an arbitration proceeding before ICSID in which ACF pursued claims against Bulgaria under the Energy Charter Treaty ("ECT"),[2] a multilateral treaty concerning foreign investments in the energy sector.

8. I served as co-counsel to Bulgaria in the Arbitration.

[1] *ACF Renewable Energy Limited v. Republic of Bulgaria*, ICSID Case No. ARB/18/1, Award of January 5, 2024 (ACF's Exhibit A).

[2] Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95, entered into force Apr. 16, 1998 (ACF's Exhibit C).

9. In this declaration, I explain that, consistent with the rules of international law, the offer to investors to submit certain disputes arising under the ECT to arbitration was not applicable as between Bulgaria and Malta as a consequence of the agreement between Bulgaria and Malta in the foundational treaties that established the EU. For that reason, there was no basis for ACF, a Maltese company, to seek to consent to ICSID arbitration with Bulgaria, and therefore no arbitration agreement applicable in this case.

10. I also explain that Bulgaria's compliance with the Award would place Bulgaria in violation of the EU treaties and EU law, specifically with EU rules concerning State aid.

I. IN LIGHT OF THE EU TREATIES, THERE WAS NO AGREEMENT BETWEEN BULGARIA AND ACF TO ICSID ARBITRATION OF THE DISPUTE ADDRESSED IN THE AWARD

A. As a Matter of International Law, States Are Free to Agree Upon a Hierarchy of Their *Inter Se* Treaty Relations

11. As a matter of international law, States may arrange their mutual treaty relations in any manner they wish, as long as they respect peremptory norms of international law (also referred to as *jus cogens*, which addresses matters such as the prohibition of genocide, slavery, and torture, not at issue here). Specific agreements among States, reflected in their treaties, are considered as *lex specialis*, and thus take precedence over general rules, such as apply to the interpretation and interaction of treaties as reflected in the Vienna Convention on the Law of Treaties. As such, general rules apply only to the extent that the relevant States have not expressly or implicitly agreed something else.[3]

[3] *See, e.g.*, *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of Feb. 20, 1969, I.C.J. Reports 1969 (Exhibit 3) at 42, ¶ 72 (the International Court of Justice ("ICJ") stating that "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on the Merits of June 27, 1986, I.C.J. Reports 1986 (Exhibit 4) at 137, ¶ 274 (ICJ stating that "[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim"); *Case concerning the Continental Shelf*

12. States therefore may agree in a "master treaty" to rules that will govern all of their mutual relations and that other treaties between them will be subordinated to the master treaty. Accordingly, States also may agree that where a court established pursuant to the master treaty

(Tunisia/Libyan Arab Jamahiriya), Judgment of Feb. 24, 1982, I.C.J. Reports 1982 (Exhibit 5) at 38, ¶ 24 (ICJ observing that "it would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea . . . and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*"); *Amoco Int'l Fin. Corp. v. Iran*, Partial Award of July 14, 1987, 15 Iran-U.S. Cl. Trib. Rep. 189 (Exhibit 6) ¶ 112 ("As a *lex specialis* between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law."); UN International Law Commission, Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, Apr. 13, 2006 (Exhibit 7) ¶¶ 79-81 (observing that as "the International Court of Justice has pointed out 'it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties'" and that in such instances "the Court accepted that general international law may be subject to derogation by agreement and that such agreement may be rationalized as *lex specialis*"); Sir Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed., 1984) (Exhibit 8) at 6 ("[M]any of the provisions of the [Vienna Convention on the Law of Treaties] are expressed as residual rules which are to operate unless the treaty otherwise provides, or it is otherwise agreed by the parties, or a different intention is otherwise established. By means of this device, a considerable degree of liberty of action is left to the parties to any particular treaty; in large measure, the principle of the autonomy of the parties is preserved, and allowance is made for variations in treaty-making practice."); Vaughan Lowe, INTERNATIONAL LAW (2007) (Exhibit 9) at 64 ("Customary international law is in essence the body of law that applies by default; and within the limits set by the doctrine of *jus cogens* . . . States are free to vary its rules by agreement. It is in this respect similar to the body of tort law or the law of obligations, which individuals are free to vary by contract. Thus, treaties supersede customary international law: if States have made an agreement, the rights and duties of the parties are determined by the treaty, not by customary international law."); Shabtai Rosenne, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 (1989) (Exhibit 10) at 251 (observing that "functional derogations of this kind from the general law of treaties for these particular classes of treaties are fully justified"); David Heywood Anderson, *Article 5*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Olivier Corten & Pierre Klein eds., 2011) (Exhibit 11) at 97-98 (noting that the rules set forth by the Vienna Convention "are residual in character in the sense that States remain free to agree upon their own rules in a particular treaty if they so wish"); Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, 60 BRITISH YEARBOOK OF INT'L LAW (1989) (Exhibit 12) at 143-144 ("International conventions in force between the parties, as *lex specialis*, exclude the application of rules of customary law covering the same ground as the treaties. An exception to this which has become recognized in more recent years is the concept of *jus cogens* . . . [I]t is universally accepted that, for example, as between the parties to a treaty the rules of the treaty displace any rules of customary law on the same subject. If it were not so, if treaty rules were powerless to modify the relationship resulting from customary law, there would indeed be no point in entering into treaties at all."); Joost Pauwelyn, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003) (Exhibit 13) at 212 ("It might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from those rules of interpretation in Articles 31 and 32 of the Vienna Convention."); *id*. at 213 ("To discover the 'extent' to which a treaty has contracted out of general international law, each and every treaty norm must be examined pursuant to normal rules of treaty interpretation and each time the extent of conflict and contracting out must be determined.").

finds provisions of other treaties incompatible with the master treaty, such provisions of the other treaties shall be inapplicable *ab initio* as between and among the States parties to the master treaty.

13. An example is found in Article 103 of the Charter of the United Nations, which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[4] As the International Court of Justice ruled in the *Lockerbie* judgment, this provision has the effect of rendering incompatible provisions of other treaties inapplicable.[5]

14. Likewise, States establishing an international organization ("IO"), such as the EU, "might, by means of the IO's charter, alter the general international law rules that would otherwise apply between themselves and the IO."[6] That is because "states enjoy wide latitude to create *lex specialis* and to adjust the legal obligations that bind the IOs [(international organizations)] they establish" and "can exercise that discretion to create IOs that are free to ignore certain international

[4] Charter of the United Nations (Exhibit 14) Art. 103.

[5] *See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of Apr. 14, 1992 (Exhibit 15) at 16, ¶ 41. *See also* Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009) (Exhibit 16) at 404 ("Article 103 is a hierarchical conflict clause . . . propounding the overriding character of the UN Charter as the constitution of the international legal community *vis-à-vis* all other (conflicting) treaties, including the [Vienna] Convention and its Article 30."); Sir Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed., 1984) (Exhibit 8) at 217 (stating that a treaty between two member States of the United Nations that is incompatible with the UN Charter "would therefore be unenforceable by virtue of Article 103"); James Crawford, *The "Sources" of International Law as Sources of Multilateral Rights and Obligations*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 2006 (2007) (Exhibit 17) at 420 ("[I]nto the horizontal system of international law and treaties which was assumed by the classical paradigm, there have been introduced what one might call vertical elements, elements of a hierarchy of norms and values. This has happened both in the context of treaties and of general international law. In the context of treaties its most important manifestation is the priority given to the United Nations Charter by Article 103, which was the subject of the decision in the *Lockerbie* case."); UN International Law Commission, Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, Apr. 13, 2006 (Exhibit 7) ¶ 333 ("What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not of validity but of priority. The lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103.").

[6] Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARVARD INT'L L. J. (2016) (Exhibit 18) at 367.

rules vis-à-vis their member states."[7] States also are free to agree to structure an international organization in any manner they wish and to transfer to it their competence with respect to agreed areas.

B. Treaty Relations Between and Among EU Member States Are Hierarchically Organized, with the EU Treaties Placed at the Apex

15. The EU is a supranational organization that in contrast to many international organizations established a federal-like structure as part of which the EU Member States agreed to exercise certain aspects of their sovereignty jointly through the EU institutions, transferred to the EU significant portions of their competences with respect to a number of areas such as competition and trade, and subordinated their national legal regimes to EU law enacted by the EU.[8]

16. The EU has as its legal foundation two international treaties, the Treaty on the Functioning of the European Union ("TFEU") and the Treaty on the European Union ("TEU"), referred jointly to as the "EU Treaties."[9]

17. The EU Treaties seek to implement an ever closer integration among the EU Member States through the creation of an internal market and an economic union, and establish

[7] *Id*. at 329. *See also, e.g.*, *Legality of Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of July 8, 1996 (Exhibit 19) at 74-75 (the ICJ stating that "the constituent instruments of international organizations are multilateral treaties," that "their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals," that "[s]uch treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional," and that in interpreting such treaties, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation must be taken into account).

[8] *See, e.g.*, James Crawford, *Chapter 11: Unions and Federations of States*, *in* THE CREATION OF STATES IN INTERNATIONAL LAW (2006) (Exhibit 20) at 496 (stating with respect to the EU that "a 'federal plan' is clearly in evidence"); *id*. at 495 (stating that the EU contains "marked confederal features" that go "well beyond the model of an international organization coordinating the areas of State policy"); *id*. at 499 (observing that a "machinery for an unprecedented degree of functional unification exists under the [EU] Treaties, and this has been developed, if not to the fullest extent possible, then certainly to an extent greater than has been seen under other unions of States"). *See also generally* Koen Lenaerts, *The Autonomy of European Law*, AISDUE, No. 1, Oct. 28, 2018 (2019) (Exhibit 21).

[9] For simplicity, the TFEU (Exhibit 22) and the TEU (Exhibit 23) and their predecessor treaties are referred to herein jointly as the "EU Treaties."

the EU's organs and their competencies.[10] The EU's decision- and rule-making processes are based on majority voting with binding outcomes for all EU Member States.[11]

18. Among the key constitutional principles upon which the EU is founded and that are embodied in the EU Treaties are the principles of primacy and autonomy of the EU Treaties and EU law as well as the principle of direct effect of EU law. As such, the EU Treaties created a new legal order of international law which at the same time became an integral and overriding part of the legal systems of the EU Member States.[12]

19. As elaborated further below, in the context of the interaction between the EU Treaties and other treaties to which the EU Member States are parties, these principles mean that the EU Treaties prevail over and render *ab initio* inapplicable as between and among the EU Member States the provisions of other treaties to the extent that the Court of Justice of the European Union finds the provisions of the other treaties incompatible with the EU Treaties.

20. In short, the treaty relations between and among the EU Member States are hierarchically organized, with the EU Treaties placed at the apex as the "master treaties."

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[10] *See, e.g.*, TFEU (Exhibit 22), Preamble (referencing ever-closer union); *id*. Art. 3 (providing that the EU shall have "exclusive competence" in areas including customs union, competition rules necessary for the functioning of the internal market, and monetary policy, among other things); TEU (Exhibit 23), Preamble and Art. 1 (referencing ever-closer union); *id*. Title III (provisions concerning the EU's institutions).

[11] *See, e.g.*, TFEU (Exhibit 22) Art. 294 (ordinary legislative procedure for adoption of EU legislation with participation by the European Commission, the European Parliament, and the EU Council); *id*. Art. 114 (qualified majority voting for measures concerning the establishment and functioning of internal market, binding on all EU Member States); *id*., Art. 207 (same regarding common commercial policy).

[12] *See, e.g.*, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Treaty on the Functioning of European Union, No. 17 Declaration concerning primacy (Exhibit 24), at 107 ("It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law"); *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Internal Revenue Administration*, Case 26/62, Judgment dated Feb. 5, 1963 (Exhibit 25), at 12 (ruling that the "Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals"); *Costa v. ENEL*, Case 6/64, Judgment dated July 15, 1964 (Exhibit 26), at 593 ("By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.").

C. The EU Treaties Have the Meaning and Operate in Such Manner as Decided by the Court of Justice of the European Union

21. The EU Treaties established an international court, the Court of Justice of the European Union ("CJEU"), as the body with the sole authority to rule in the final instance upon the meaning of the EU Treaties, including the compatibility of other international undertakings between and among EU Member States with the EU Treaties.[13]

22. The CJEU pronounces upon the meaning of the EU Treaties by way of interpretative judgments. In that regard, Articles 267 and 344 TFEU provide, respectively, that the CJEU has "jurisdiction to give preliminary rulings concerning . . . the interpretation of the Treaties" and that the EU 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."[14]

23. Such judgments pronounce upon the meaning of the EU Treaties as it must always have been understood, rather than creating new legal rules. As the CJEU put it in its 1980 judgment in *Denkavit Italiana*:

> The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 [of the EEC Treaty (now Article 267 TFEU)], the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule *as it must be or ought to have been understood and applied from the time of its coming into force*. It follows that *the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation*.[15]

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[13] *See* TFEU (Exhibit 22) Section 5 (The Court of Justice of the European Union).

[14] *See id.*, Arts. 267, 344.

[15] *Denkavit Italiana*, Case 61/79, Judgment dated Mar. 27, 1980 (Exhibit 27) ¶ 16 (emphasis added). *See also, e.g.*, *Association Vent de Colère! Fédération nationale and Others*, Case 262/12, Judgment dated Dec. 19, 2013 (Exhibit 28) ¶ 39 ("[A]ccording to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts to legal

24. The CJEU's interpretative judgments become an integral part of the provisions of the EU Treaties which they interpret.[16]

25. The CJEU's interpretative judgments have *erga omnes* effect and are binding on all EU Member States, including State authorities as well as courts, private entities, and individuals.[17] The *erga omnes* binding effect of the CJEU's interpretative judgments follows also from the principle of sincere cooperation arising from Article 4(3) TEU, which requires Member States and their authorities to ensure the application of and compliance with EU law and to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the EU.[18]

26. The CJEU's interpretative function in this regard is consistent with the operation of international courts tasked with determining the meaning of treaties, whose rulings have similar effects.[19]

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relationships arising and established before the judgment ruling on the request for interpretation . . . ."); Koen Lenaerts, Ignace Maselis & Kathleen Gutman, EU PROCEDURAL LAW (2014) (Exhibit 29) ¶ 6.33 ("In principle, the interpretation simply expresses what was contained *ab initio* in the provisions and principles of Union law to which it relates. Consequently, its temporal effects are the same as the effects of those provisions and principles; in other words, it is effective as from their entry into force or *ex tunc*."). Koen Lenaerts is the President of the CJEU.

[16] *See* Koen Lenaerts, Ignace Maselis & Kathleen Gutman, EU PROCEDURAL LAW (2014) (Exhibit 29) ¶ 6.31 ("[T]he interpretation [of the CJEU] is declaratory; *it does not lay down any new rule*, but *is incorporated into the body of provisions and principles of Union law on which it is based*.") (emphasis added).

[17] *See id.* ¶ 6.30 ("The binding effect . . . also applies outside the specific dispute in respect of which it was given to all national courts and tribunals . . . . In other words, the judgment of a preliminary ruling on interpretation . . . is said to have *erga omnes*, as opposed to merely *inter partes*, effect.").

[18] *See* TEU (Exhibit 23) Art. 4(3); *see also, e.g.*, *Caterpillar Financial Services sp. z o.o.*, Case C-500/16, Judgment dated Dec. 20, 2017 (Exhibit 30) ¶ 28 ("First of all, it must be noted that the Member States are obliged, under, inter alia, the principle of sincere cooperation, laid down in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territory, the application of and compliance with EU law and that, under the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union . . . ."); *Kühne & Heitz*, Case C-453/00, Judgment dated Jan. 13, 2004 (Exhibit 31) ¶ 28 ("[T]he principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court . . . .").

[19] *See, e.g.*, *Access to German Minority Schools in Upper Silesia*, Advisory Opinion of May 15, 1931, P.C.I.J. (Ser. A./B.) (Exhibit 32) at 19 (Permanent Court of International Justice stating in connection with its interpretation of a German-Polish treaty that "in accordance with the rules of law, the interpretation given by the

D. The Provisions of Other Treaties Are *Ab Initio* Inapplicable Intra-EU to the Extent the CJEU Has Pronounced Them Incompatible with the EU Treaties

27. The EU Treaties contain a conflicts of treaties rule at TFEU Article 351, which provides as follows:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.[20]

28. According to the CJEU's constant jurisprudence, the meaning of this provision is such that (i) only the rights and obligations of EU Member States towards non-EU countries under treaties concluded prior to the relevant EU Member State's accession to the EU are exempt from being affected by the provisions of the EU Treaties; (ii) this is the only exception to the supremacy of the EU Treaties over incompatible provisions of other treaties; and (iii) the exception does not apply to treaties concluded between and among countries that subsequently became EU Member States.

Court to the terms of the Convention has retrospective effect — in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation").

[20] TFEU (Exhibit 22). TFEU Article 351 formerly was Article 234 of the Treaty Establishing the European Community.

29. Accordingly, as regards treaty rights and obligations between and among the EU Member States, irrespective of whether they predate or postdate the relevant EU Member States' accession to the EU, the primacy of the EU Treaties applies.

30. That the EU Treaties operate in this manner has been reiterated by the CJEU in a decades-long, consistent line of jurisprudence with respect to *inter se* rights and obligations of EU Member States under a variety of treaties, including (i) both bilateral and multilateral treaties; (ii) treaties to which third (non-EU) countries also were parties; (iii) treaties which pre-dated the relevant EU Member States' EU accession as well as treaties which post-dated the relevant EU Member States' EU accession; and (iv) treaties falling outside of the field of application of the EU Treaties.[21]

[21] *See, e.g.*, *Matteucci*, Case 235/87, Judgment dated Sept. 27, 1988 (Exhibit 33) ¶ 22 (stating that the CJEU "has consistently held . . . that, in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force"); *id*. ¶ 19 (stating that if "the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under community law"); *Independent Television Publications Ltd. v. Commission*, Case T-76/89, Judgment of the Court of First Instance dated July 10, 1991 (Exhibit 34) ¶ 76 (stating that a treaty provision "ratified subsequent to its [the United Kingdom's] accession to the Community . . . cannot affect a provision of the EEC Treaty" and that "Member States may not set aside the rules arising out of the Treaty by concluding an international agreement or convention"); *Exportur*, Case C-3/91, Judgment dated Nov. 10, 1992 ("*Exportur*") (Exhibit 35) ¶ 8 (stating that the "provisions of a convention concluded after 1 January 1958 by a Member State with another State could not, from the accession of the latter State to the Community, apply in the relations between those States if they were found to be contrary to the rules of the Treaty"); *Gottardo*, Case C-55/00, Judgment dated Jan. 15, 2002 (Exhibit 36) ¶ 33 ("[W]hen giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect."); *Ravil*, Case C-469/00, Judgment dated May 20, 2003 ("*Ravil*") (Exhibit 37) ¶ 37 ("It should be observed, first, that the provisions of a convention between two Member States cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods."); *Commune de Mesquer*, Case C-188/07, Judgment dated June 24, 2008 (Exhibit 38) ¶ 84 (ruling that the requirement of compatibility with EU law applies "whether the provisions in question were adopted before or after the directive or derive from international agreements entered into by the Member State"); *Budějovický Budvar*, Case C-478/07, Judgment dated Sept. 8, 2009 ("*Budějovický Budvar*") (Exhibit 39) ¶¶ 97-98 ("[S]ince the Court delivered its judgment . . . the Czech Republic has acceded to the European Union . . . . It follows that, since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods."); *Commission v. Germany*, Case C-546/07, Judgment dated Jan. 21, 2010 (Exhibit 40) ¶ 44 (stating that the "application of the German-Polish Agreement concerns, since the accession of the

31. An example of a treaty that was rendered inapplicable intra-EU in the foregoing manner is the General Agreement on Tariffs and Trade ("GATT"), a multilateral trade treaty to which non-EU countries also were parties, which according to the CJEU's seminal 1962 judgment in *Commission v. Italy* was incompatible with the EU Treaties and as such could not be applied *inter se*.[22]

32. Other examples include the multilateral Stresa Convention,[23] the Berne Convention,[24] the European Convention on Establishment,[25] the European Convention on the Equivalence of Diplomas leading to Admission to Universities,[26] the Convention on the

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Republic of Poland to the Union, two Member States, with the result that the provisions of that agreement can apply to relations between those Member States only in compliance with Community law, in particular with the Treaty rules on the free provision of services").

[22] *Commission v. Italy*, Case 10/61, Judgment dated Feb. 27, 1962 (Exhibit 41) at 10, 11 (observing that "in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT," that consequently "different tariffs are applied to Member States and third countries, even though they are parties to the same Geneva Agreement of 1956 [GATT]" and that "[t]his is the normal effect of the Treaty establishing the EEC").

[23] *Ministere Public v. Deserbais*, Case 286/86, Judgment dated Sept. 22, 1988 (Exhibit 42) ¶¶ 2, 16-18; *id*. ¶ 18 ("[P]rovided that, as in the present case, the rights of non-member countries are not involved, a Member State cannot rely on the provisions of a pre-existing convention of that kind in order to justify restrictions on the marketing of products coming from another Member State where the marketing thereof is lawful by virtue of the free movement of goods provided for by the Treaty.").

[24] *RTE and ITP v. Commission*, Joined Cases C-241/91 P and C-242/91 P, Judgment dated Apr. 6, 1995 ("*RTE and ITP v. Commission*") (Exhibit 43) ¶ 84 ("It is, however, settled case-law that the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved.").

[25] *Commission v. Luxembourg*, Case C-473/93, Judgment dated July 2, 1996 (Exhibit 44) ¶ 40 ("[I]t is settled case-law that, whilst the first paragraph of Article 234 of the Treaty allows Member States to honour obligations owed to non-Member States under international agreements preceding the Treaty, it does not authorize them to exercise rights under such agreements in intra-Community relations. . . . the Grand Duchy of Luxembourg cannot therefore rely on the former provision in order to escape its Community obligations.").

[26] *Commission v. Austria*, Case C-147/03, Judgment dated July 7, 2005 ("*Commission v. Austria*") (Exhibit 45) ¶¶ 72-74 ("[T]he rights and obligations arising from agreements concluded for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the Treaty. However, and to the extent that such agreements are not compatible with the Treaty, the Member State or States concerned must take all appropriate steps to eliminate the incompatibilities established. It is settled case-law that, whilst Article 307 EC allows Member States to honour obligations owed to non-member States under international agreements preceding the Treaty, it does not authorise them to exercise rights under such agreements in intra-Community relations. . . . Consequently, the Republic of Austria may not invoke by way of justification either the 1953 Convention or *a fortiori* the 1997 Convention, which was concluded after the Republic of Austria acceded to the Union.").

Recognition of Qualifications concerning Higher Education in the European Region,[27] and the Single Convention on Narcotic Drugs.[28]

33. The CJEU's jurisprudence also indicates that the provisions of a treaty that the CJEU has found incompatible with the EU Treaties are inapplicable not only *ab initio* but also immediately, meaning that no further act such as the termination of the treaty is needed in order for the inapplicability of the affected treaty provisions to take effect.[29]

34. The primacy of the EU Treaties over incompatible provisions of other *inter se* treaties stems also from the principle of sincere cooperation set forth at Article 4(3) of the TEU[30]

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[27] *Id*. ¶¶ 71-74. *See also* Opinion 1/91 dated Dec. 14, 1991 (Exhibit 46) ¶¶ 35-36, 46 (stating that the system of judicial supervision proposed under a draft agreement between the EU and the EU Member States and the members of the European Free Trade Association to create a European Economic Area was incompatible with the EU Treaties because it was likely to adversely affect the autonomy of the EU legal order and "the very foundations" of the EU).

[28] *Evans Medical*, Case C-324/93, Judgment of Mar. 28, 1995 (Exhibit 47) ¶ 24 (finding that the multilateral 1961 Single Convention on Narcotic Drugs, which included as signatories EU Member States and non-EU countries, was incompatible with Articles 30 and 36 of the EEC Treaty, and concluding that Article 30 of the EEC Treaty prevails and "applies to a national practice prohibiting importation of narcotic drugs covered by the Convention and marketable under it"); *id*. ¶ 23 (observing that "[t]he fact that such a measure may have been adopted under an international agreement predating the Treaty or accession by a Member State and that the Member State maintains the measure pursuant to Article 234, despite the fact that it constitutes a barrier, does not remove it from the scope of Article 30, since Article 234 takes effect only if the agreement imposes on a Member State an obligation that is incompatible with the Treaty"). *See also* Single Convention on Narcotic Drugs of Mar. 30, 1961 (Exhibit 48).

[29] *See, e.g.*, *RTE and ITP v. Commission* (Exhibit 43) ¶ 84 ("It is, however, settled case-law that the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved."); *Budějovický Budvar* (Exhibit 39) ¶¶ 97-98 (stating that "since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods"); *Exportur* (Exhibit 35) ¶ 8 (stating that the "provisions of a convention concluded after 1 January 1958 by a Member State with another State could not, from the accession of the latter State to the Community, apply in the relations between those States if they were found to be contrary to the rules of the Treaty"); *Ravil* (Exhibit 37) ¶ 37 ("It should be observed, first, that the provisions of a convention between two Member States cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods.").

[30] TEU (Exhibit 23) Art. 4(3) ("Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.").

and the prohibition of modification of the EU Treaties outside of the procedure set forth at Article 48 of the TEU.[31]

35. Furthermore, the CJEU consistently has held that EU law applies to new EU Member States *ab initio* and *in toto* as from the date of accession, except for derogations (if any) expressly set forth in the relevant EU accession treaty.[32]

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[31] *See id*. Art. 48(1) (providing that the EU Treaties "may be amended in accordance with an ordinary revision procedure" or the "simplified revision procedures" and setting forth these procedures in the subsequent paragraphs); *see also, e.g.*, *Defrenne v. Sabena*, Case 43/75, Judgment of Apr. 8, 1976 (Exhibit 49) ¶¶ 56-58 (holding that the TFEU's predecessor treaty "can only be modified by means of the amendment procedure" set forth therein); *Ravil* (Exhibit 37) ¶ 37 (observing with respect to a treaty subsequent to the EU Treaty at issue that "the provisions of a convention between two Member States cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods"); *Gilly v. Directeur*, Case C-336/96, Judgment of May 12, 1998 (Exhibit 50) ¶¶ 30-35 (similar); James Crawford, *The "Sources" of International Law as Sources of Multilateral Rights and Obligations*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 2006 (2007) (Exhibit 17) at 405 (stating that State parties to a multilateral treaty "can exclude the possibility of subsequent variation of the treaty *inter se* by some States only, and enforce the exclusion by compulsory dispute settlement procedures made available to all other parties. The law of treaties permits States to enter into rigorous bargains of this kind – witness the European Union, a treaty-based regime widely considered self-contained").

[32] *See, e.g.*, *Czech Republic v. Commission*, Case T-465/08, Judgment of Apr. 15, 2011 (Exhibit 51) ¶¶ 95-96 (referring to Articles 2 and 10 of the Act of Accession, which provide that "from the date of accession to the European Union, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank (ECB) before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in the Act of Accession," and that "the application of the original Treaties and acts adopted by the institutions are, as a transitional measure, subject to the derogations provided for in the Act of Accession"); *id*. ¶ 97 ("It follows from Articles 2 and 10 of the Act of Accession that the Act is based on the principle that the provisions of Community law apply *ab initio* and *in toto* to new Member States, derogations being allowed only in so far as they are expressly provided for by transitional provisions."); *id*. ¶ 99 (observing that exceptions to the application of Community law "must therefore be interpreted restrictively"); *KappAhl Oy*, Case C-233/97, Judgment of Dec. 3, 1998 (Exhibit 52) ¶ 15 ("It follows from Articles 2 and 10 of the Act of Accession that it is based on the principle that the provisions of Community law apply *ab initio* and *in toto* to new Member States, derogations being allowed only in so far as they are expressly laid down by transitional provisions."); *id*. ¶ 24 ("The answer to the question must therefore be that Article 99 of the Act of Accession is to be interpreted as not having permitted the Republic of Finland to levy, for a period of three years from its accession to the Community on 1 January 1995, customs duties on imports of products which had already been released into free circulation in another Member State."); *Metallurgiki Halyps v. Commission*, Case 258/81, Judgment of Dec. 9, 1982 (Exhibit 53) ¶ 7 (taking into account the relevant provisions from the Act of Accession, and observing that "Article 2 of the Act [of Accession] provides that 'from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities shall be binding on the Hellenic Republic and shall apply in that State under the conditions laid down in those Treaties and in this Act.' Article 9(1) states that 'the application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.'"); *id*. ¶ 8 ("It appears from those provisions that the Act of Accession is based on the principle that the provisions of Community law apply *ab initio* and *in toto* to new Member States, derogations being allowed only in so far as they are expressly laid down by transitional provisions. None of the provisions mentioned by the applicant has the effect of derogating from Article 58 of the ECSC Treaty.").

36. Here, by way of the 2005 Treaty of Accession and the corresponding Act Concerning the Conditions of Accession, the EU Member States including Bulgaria and Malta[33] expressly agreed that the principles and rules of EU law, as well as the entire body of EU law as it existed at the time of Bulgaria's accession—which notably at that time already included the rules discussed above—are applicable and binding as between Bulgaria and the EU Member States as from Bulgaria's accession to the EU.[34]

37. Neither the 2005 Treaty of Accession nor the Act Concerning the Conditions of Accession provide for any derogations with respect to investor-State arbitration under ECT Article 26, whether as regards Bulgaria, Malta, or any other EU Member State.[35]

[33] Malta became an EU Member State on May 1, 2004 and Bulgaria became an EU Member State on January 1, 2007. *See* EUROPEAN UNION: BULGARIA, *available at* https://europa.eu/european-union/about-eu/countries/member-countries/bulgaria_en (Exhibit 54); EUROPEAN UNION: MALTA, *available at* https://europa.eu/european-union/about-eu/countries/member-countries/malta_en (Exhibit 55).

[34] *See* Treaty of Accession of the Republic of Bulgaria and Romania 2005 (Exhibit 56) Art. 2(2) ("The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, which will apply from the date of accession until the date of entry into force of the Treaty establishing a Constitution for Europe, are set out in the Act annexed to this Treaty. *The provisions of that Act shall form an integral part of this Treaty*.") (emphasis added); Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded dated Apr. 25, 2005 (Exhibit 57) Preamble ("In accordance with Article 2 of the Treaty of Accession, this Act shall be applicable in the event that the Treaty establishing a Constitution for Europe is not in force on 1 January 2007 until the date of entry into force of the Treaty establishing a Constitution for Europe."); *id*. Art. 2 ("From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession *shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act*.") (emphasis added); *see also* Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Treaty on the Functioning of European Union, No. 17 Declaration concerning primacy (Exhibit 24) at 107 (all EU Member States declaring that "in 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, under the conditions laid down by the said case law," and attaching as an annex an Opinion of the Council Legal Service stating that "[i]t results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law")).

[35] *See generally* Treaty of Accession of the Republic of Bulgaria and Romania 2005 (Exhibit 56); Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded dated Apr. 25, 2005 (Exhibit 57).

E. In Light of the CJEU's Judgment in *Komstroy*, ECT Article 26 Has Been Inapplicable as Between Bulgaria and Malta as from Bulgaria's Accession to the EU on January 1, 2007

38. Article 26 of the ECT sets forth an offer of investor-State arbitration by ECT Contracting Parties to investors of other ECT Contracting Parties to which the ECT is applicable.[36]

39. Consistent with its jurisprudence discussed above, the CJEU, sitting as its Grand Chamber of fifteen judges, addressed in its judgment of September 2, 2021 in the *Komstroy* matter the applicability of the investor-State arbitration provisions of ECT Article 26 to disputes between EU investors and EU Member States and ruled as follows:

> 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.[37]

40. The CJEU based the *Komstroy* Judgment on considerations similar to those it had articulated in its earlier judgment in the *Achmea* matter, in which it pronounced that investor-State arbitration provisions of bilateral investment treaties were inapplicable intra-EU,[38] including because the EU Treaties are constitutional in nature;[39] because an international agreement cannot affect the allocation of powers under the EU Treaties or the autonomy of EU law, including in light of TFEU Article 344,[40] which as noted provides that the EU Member States "undertake not

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[36] *See* ECT (ACF's Exhibit C) Art. 26.

[37] *Republic of Moldova v. Komstroy LLC*, Case C-741/19, Judgment (Grand Chamber) of Sept. 2, 2021 ("*Komstroy* Judgment") (Exhibit 58) ¶ 66 (emphasis added). *See also id.* ¶ 41 (stating with respect to ECT Article 26 that "it cannot be inferred that that provision of the ECT . . . applies to a dispute between an operator from one Member State and another Member State.").

[38] *See Slovak Republic v. Achmea BV*, CJEU Case No. C-284-16, Judgment (Grand Chamber) of Mar. 6, 2018 ("*Achmea* Judgment") (Exhibit 59).

[39] *Komstroy* Judgment (Exhibit 58) ¶ 43 (pointing out the constitutional nature of the EU Treaties and that in accordance with "settled case-law . . . the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law."); *id.* ¶ 44 (stating that the "autonomy . . . flows from the fact that the European Union possesses a constitutional framework" including the EU Treaties).

[40] *Id.* ¶ 42 ("[The CJEU] has consistently held that an international agreement cannot affect the allocation of powers laid down by the Treaties and, hence, the autonomy of the EU legal system, observance of which is ensured by

to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein;"[41] and because the preliminary ruling procedure under TFEU Article 267 of the TFEU is the "keystone" of the EU judicial system that secures the "uniform interpretation of EU law, thereby ensuring its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties."[42]

41. The CJEU also observed that notwithstanding the "multilateral nature" of the ECT, to which a number of States are parties, the provisions of Article 26 of the ECT "govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty" at issue in the *Achmea* Judgment.[43]

42. For these reasons, the CJEU concluded that ECT Article 26 established a dispute resolution mechanism that "concerns the interpretation or application of EU law" but that "could exclude the possibility . . . that that dispute . . . would be resolved in a manner that guarantees the full effectiveness of that [EU] law," including through the CJEU's preliminary ruling procedure under TFEU Article 267.[44]

43. Accordingly, the CJEU concluded that ECT Article 26 threatened the autonomy and the particular nature of the law established by the EU Treaties and ruled that Article 26 of the

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the Court. That principle is enshrined in particular in Article 344 TFEU, under which the 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 in the Treaties.") (citing to *Achmea* Judgment (Exhibit 59) ¶ 32 and cases cited therein).

[41] TFEU (Exhibit 22) Art. 344.

[42] *Komstroy* Judgment (Exhibit 58) ¶ 46 (citing to *Achmea* Judgment (Exhibit 59) ¶ 37 and cases cited therein). *See also id.* ¶ 45 (observing that "the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law," and that "system includes, in particular, the preliminary ruling procedure provided for in Article 267 TFEU") (citing to *Achmea* Judgment (Exhibit 59) ¶¶ 35-36 and cases cited therein); Opinion 1/17 dated Apr. 30, 2019 (Exhibit 60) ¶ 111.

[43] *Komstroy* Judgment (Exhibit 58) ¶ 64. *See also id.* ¶ 63 (citing to Opinion of Advocate General Szpunar dated Mar. 3, 2021, *Republic of Moldova v. Komstroy*, Case C-741/19 (Exhibit 61)).

[44] *Id.* ¶ 60 (citing to *Achmea* Judgment (Exhibit 59) ¶ 56).

ECT was incompatible with the EU Treaties and as such was *ab initio* inapplicable in disputes under the ECT between EU investors and EU Member States.[45]

44. As noted above, CJEU interpretative judgments become an integral part of the provisions of the EU Treaties which they interpret, with *ab initio* and *erga omnes* effects. The only exception to the *ab initio* effect of a CJEU judgment is where the CJEU expressly indicates that the judgment does *not* apply to pre-existing legal relationships.[46] The CJEU did not include such exception in the *Komstroy* Judgment.[47]

45. The CJEU reconfirmed the inapplicability of intra-EU investor-State arbitration provisions in its judgment in *PL Holdings*,[48] ruling that the *inter se* inapplicability of intra-EU investor-State investment treaty arbitration cannot be bypassed via national legislation allowing an EU investor and an EU Member State to conclude an *ad hoc* arbitration agreement replicating the investor-State arbitration provisions of an intra-EU investment treaty and thereby enabling the continuation (on the basis of the *ad hoc* arbitration agreement) of an investor-State arbitration that had been initiated on the basis of investor-State arbitration provisions contained in the investment treaty.[49] The CJEU emphasized that such *ad hoc* arbitration agreement would "entail a

[45] *Id*. ¶ 63 (citing to *Achmea* Judgment (Exhibit 59) ¶ 58). *See also id*. ¶¶ 64-66.

[46] *See* Koen Lenaerts, Ignace Maselis & Kathleen Gutman, EU PROCEDURAL LAW (2014) (Exhibit 29) ¶ 6.34 (explaining that the CJEU limits the retrospective temporal application of its preliminary judgments only expressly and in exceptional circumstances).

[47] *See generally Komstroy* Judgment (Exhibit 58).

[48] *Republiken Polen v. PL Holdings Sàrl*, Case C-109/20, Judgment (Grand Chamber) of Oct. 26, 2021 ("*PL Holdings* Judgment") (Exhibit 62) ¶ 44 (citing *Achmea* Judgment (Exhibit 59) ¶ 60).

[49] *PL Holdings* Judgment (Exhibit 62) ¶ 56 ("Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles."). *See also generally id*. ¶¶ 44-55.

circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU."[50]

46. The CJEU thus made it clear in *PL Holdings* that the *inter se* inapplicability of investor-State arbitration provisions of investment treaties cannot be bypassed through a subsequent agreement.

47. The CJEU denied PL Holdings' request that existing arbitration proceedings be exempted from the temporal applicability of the CJEU's judgment,[51] reconfirming once again that the CJEU's interpretation of the EU Treaties "clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the date of its entry into force."[52]

48. Here, because both Bulgaria and Malta are EU Member States, as between Bulgaria and ACF's home State of Malta, the ECT is an *inter se* treaty, and not a preexisting agreement between an EU Member State and a third country exempt under TFEU Article 351 from the impact of the EU Treaties.

49. Accordingly, in light of the EU Treaties as interpreted by the *Komstroy* Judgment, the investor-State arbitration provisions of ECT Article 26 have been inapplicable as between Bulgaria and Malta since Bulgaria's accession to the EU on January 1, 2007, with the consequence that no offer of arbitration by Bulgaria to investors of Malta such as ACF existed from that time, and therefore no arbitration agreement existed under ECT Article 26 between Bulgaria and ACF.

[50] *Id.* ¶ 47.
[51] *Id.* ¶¶ 57, 62.
[52] *Id.* ¶ 58.

F. The EU Member States' Joint Declaration and Constant Practice Reconfirm the Intra-EU Inapplicability of the ECT's Investor-State Arbitration Provisions

50. On June 26, 2024, the EU Member States including Bulgaria and Malta have adopted a 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 (the "2024 Declaration").[53]

51. The 2024 Declaration observes that according to the jurisprudence of the Permanent Court of Justice and the International Court of Justice, parties to a treaty have the right to agree upon an *inter se* authoritative interpretation of the treaty.[54] As the 2024 Declaration also explains, in light of the TFEU and the TEU, as regards treaties to which the EU Member States are parties, the EU Member States have assigned such right to the CJEU.[55]

52. The 2024 Declaration further states that in light of the CJEU's judgments in *Achmea* and *Komstroy*, the ECT's investor-State arbitration provisions have been *ab initio* inapplicable as between and among the EU Member States[56] and that the EU Member States "shar[e] 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."[57]

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[53] 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 of June 26, 2024 (Exhibit 63).

[54] *Id*. at 1, 2.

[55] *Id*. at 2.

[56] *Id*.

[57] *Id*.

53. Noting that intra-EU investment treaty arbitrations under the ECT nevertheless continue to be pursued by investors and that investment treaty tribunals have affirmed jurisdiction in such cases, the EU Member States in the 2024 Declaration "reaffirm[ed], for greater certainty, that they share a common understanding on the interpretation and application of the Energy Charter Treaty, according to which Article 26 of that Treaty cannot and never could serve as a legal basis for intra-EU arbitration proceedings"[58] and that "Article 26 of the Energy Charter Treaty, Article 47(3) of the Energy Charter Treaty cannot extend, and could not have been extended, to such proceedings."[59]

54. The 2024 Declaration also expressly confirms that it is applicable to arbitrations conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[60]

55. The 2024 Declaration is consistent with the practice of the EU Member States after the CJEU rendered its judgments in *Achmea* and *Komstroy*, as the EU Member States consistently have adopted the position in dozens of intra-EU investment treaty arbitrations and court enforcement proceedings that investor-State arbitration under intra-EU investment treaties has been *ab initio* inapplicable in intra-EU investor-State disputes.[61] Similarly, national courts of EU Member States have set aside or declined to enforce intra-EU investor-State awards, including not

[58] *Id*. at 7.

[59] *Id*. at 8.

[60] *Id*. at 6.

[61] *See id.* at 5 (EU Member States including Bulgaria and Malta "[r]egretting that arbitral awards have already been rendered, continue to be rendered and could still be rendered in a manner contrary to the rules of the European Union and EURATOM, including as expressed in the interpretations of the CJEU, by arbitral tribunals in intra-EU arbitration proceedings initiated with reference to Article 26 of the Energy Charter Treaty"); *id*. (EU Member States including Bulgaria and Malta "[r]egretting that such arbitral awards are the subject of enforcement proceedings, including in third countries").

only awards in favor of investors but also awards of costs in favor of the respondent State where the investor's claims were dismissed by the arbitral tribunal.[62]

G. Consequently, There Has Been No Agreement between ACF and Bulgaria to Arbitrate the Dispute Addressed in the Award

56. In summary, as ECT Article 26 has been inapplicable as between Bulgaria and ACF's home State of Malta since Bulgaria's EU accession on January 1, 2007, since that date ECT Article 26 was not applicable to Maltese investors such as ACF and so there was no offer by Bulgaria to submit disputes to arbitration available to be accepted by ACF.

57. Consequently, ACF's request to submit a dispute to ICSID arbitration did not have the effect of forming an agreement between Bulgaria and ACF, a Maltese investor, to arbitrate any dispute arising under the ECT, such as the dispute addressed in the Award.

58. It follows that there has been no arbitration agreement between Bulgaria and ACF to arbitrate the dispute addressed in the Award.

II. PAYMENT OF THE AWARD WOULD PLACE BULGARIA IN VIOLATION OF THE EU TREATIES AND THE EU STATE AID RULES

A. To Protect Competition and Provide a Level Playing Field within the EU, the EU Treaties and EU Law Prohibit State Aid

59. To maintain a level playing field and prevent unfair competition within the EU's internal market, the TFEU and EU law set forth stringent rules concerning the provision of financial support or advantages by EU Member States to businesses, referred to as State aid.

[62] *See, e.g.*, German Constitutional Court, Judgment of July 23, 2024 in Case 2 BvR 557/19 (Exhibit 64) at ¶ 71 (dismissing a challenge against a decision of Germany's Supreme Court setting aside the arbitral award rendered in the *Achmea* investment treaty arbitration based on the CJEU's *Achmea* judgment); Bavarian Higher Regional Court, Judgment of Sept. 13, 2024 (Exhibit 65) at ¶¶ 68-74 (refusing to enforce an arbitral award of costs to the Czech Republic on the ground that the underlying investment treaty arbitration, which was based on the ECT and a bilateral investment treaty, was an intra-EU dispute); Svea Court of Appeal, Judgment of June 28, 2024 (Exhibit 66) at 12-16 (setting aside an intra-EU arbitral award rendered under the ECT in light of the CJEU's judgments in *Achmea*, *Komstroy*, and *PL Holdings*).

60. Specifically, Article 107(1) of the TFEU prohibits "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods [] in so far as it affects trade between Member States."[63]

61. TFEU Article 108 confers exclusive competence upon the European Commission ("Commission") to review aid schemes and determine their compatibility with the internal market.[64]

62. Articles 107(2) and (3) of the TFEU establish limited exceptions from the prohibition of State aid where the aid may be compatible with the internal market, subject to the Commission's approval.[65]

63. In the area of environmental protection, including State aid schemes to support the production of electricity from renewable energy sources ("RES") such as the one at issue in the Arbitration, the Commission issued regulations ("EU State Aid Guidelines") pursuant to TFEU Articles 107 and 108 setting forth the conditions under which such aid may be authorized by the Commission.[66]

64. As set forth in the EU State Aid Guidelines, subject to the Commission's approval, State aid may be permitted in order to compensate RES producers for the difference between the

[63] TFEU (Exhibit 22) Art. 107(1), (3).

[64] *See id.*, Art. 108. *See also, e.g.*, *Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio Genova 1*, Case C-148/04, Judgment dated Dec. 15, 2005 (Exhibit 67) ¶ 107; *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri*, Case C-140/09, Judgment dated June 10, 2010 (Exhibit 68) ¶ 22; *A-Fonds v Inspecteur van de Belastingdienst*, Case C-598/17, Judgment dated May 2, 2019 (Exhibit 69) ¶ 46.

[65] For example, Article 107(3)(c) provides: "The following may be considered to be compatible with the internal market . . . aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."). TFEU (Exhibit 22) Art. 107(3)(c).

[66] *See, e.g.*, Community Guidelines on State aid for environmental protection dated Apr. 1, 2008 ("2008 EU State Aid Guidelines") (Exhibit 70) ¶ 19 ("These Guidelines lay down the conditions for authorizing the granting of State aid to address those market failures which lead to a sub-optimal level of environmental protection").

cost of producing RES energy and the market price.[67] Such aid must be (i) proportionate and (ii) cost-reflective. The requirement of proportionality means that the aid must correspond to the minimum level necessary to incentivize investments in renewable energy.[68] The requirement of cost reflectivity means that the aid must be set at a level that provides to efficient investments the recovery of their operating costs and no more than a reasonable or "normal" rate of return.[69] Aid schemes that are inconsistent with these fundamental principles constitute unlawful State aid.[70]

B. The Award Reinstates to ACF the Benefit of Unlawful State Aid and As Such Payment of the Award Would Be Contrary to the EU Treaties and EU State Aid Rules

65. In the Arbitration, ACF contended that Bulgaria changed in several ways a RES support scheme that existed in 2012 at the time of ACF's investment in a Bulgarian solar photovoltaic power plant, damaging the value of ACF's investment in the plant.[71] ACF's main

[67] 2008 EU State Aid Guidelines (Exhibit 70) ¶ 109(a) ("Member States may grant operating aid to compensate for the difference between the cost of producing energy from renewable sources, including depreciation of extra investments for environmental protection, and the market price of the form of energy concerned."); 2014 Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (2014/C200/01) dated June 28, 2014 ("2014 EU State Aid Guidelines") (Exhibit 71) ¶ 131(a) ("For energy from renewable sources other than electricity, operating aid will be considered compatible with the internal market if the following cumulative conditions are met: (a) the aid per unit of energy does not exceed the difference between the total levelised costs of producing energy ('LCOE') from the particular technology in question and the market price of the form of energy concerned."); European Commission Decision on State Aid SA.44840 (2016/C) (ex 2016/NN) dated Aug. 4, 2016 (Exhibit 72) ¶ 80 (In line with the requirements of point 131 a) and b) of the EEAG the level of aid is limited to the difference between the LCOE, including a normal rate of return, and the market price (see tables 1 and 2). Any investment aid received by beneficiaries is duly deducted from the asset base, used for the calculation of the LCOE (see section 2.8).").

[68] 2008 EU State Aid Guidelines (Exhibit 70) ¶ 30 ("Aid is considered to be proportional only if the same result could not be achieved with less aid."), ¶ 174 (stating that the amount of aid must be kept to the minimum needed to achieve the level of environmental protection); 2014 EU State Aid Guidelines (Exhibit 71) ¶ 69 ("Environmental and energy aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection or energy objective aimed for.").

[69] 2008 EU State Aid Guidelines (Exhibit 70) ¶ 109(a) ("[T]he aid may also cover a normal return on capital."), ¶ 174 (stating that the amount of aid must be kept to the minimum needed to achieve the level of environmental protection).

[70] *See* TFEU (Exhibit 22) Art. 108(2) ("If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.").

[71] *See* Award § III(A) (ACF's Exhibit A).

claim was that Bulgaria imposed an annual ceiling (the "Annual Production Cap") on the number of production hours qualifying for preferential prices.[72]

66. Subsequent to ACF's 2012 investment, the Commission issued on November 5, 2013 Guidance for the Design of Renewable Support Schemes, which stated among other things that as regards the EU Member States' support schemes for RES, "[r]eform is indispensable, as support schemes should adjust to the falling cost of renewables," that reform was "necessary . . . for compliance with State aid rules and in order to minimise costs to consumers," and that "as circumstances change, support schemes need to be reformed."[73]

67. Bulgaria subsequently revised its RES support scheme with effect from January 1, 2014, including by introducing the Annual Production Cap.[74]

68. The arbitral tribunal concluded that the Annual Production Cap as well as certain other measures implemented by Bulgaria were inconsistent with Bulgaria's obligations under the ECT, and awarded ACF damages on that basis in the amount of EUR 61.04 million, plus interest and a portion of costs.[75] The Annual Production Cap accounted for 87.5% of the awarded damages, or EUR 53.4 million out of the awarded damages of EUR 61.04 million.[76]

69. However, the RES support scheme which formed the basis of ACF's claims in the arbitration had not been notified to the Commission. Rather, Bulgaria notified to the Commission the RES support scheme which incorporated the Annual Production Cap and utilized a reference plant with a 9% rate of return as the way to set the preferential prices.[77]

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[72] *See id*. ¶¶ 243-250.

[73] European Commission Guidance for the Design of Renewable Support Schemes dated Nov. 5, 2013 (Exhibit 73) at 4, 6.

[74] *See* Award ¶ 243.

[75] *See id*. § V(C); *id*. ¶ 1843.

[76] *See id*. ¶ 1809.

[77] *See generally* European Commission Decision of Aug. 4, 2016 on State Aid SA.44840 (2016/C) (ex 2016/NN) (Exhibit 72).

70. On August 4, 2016, the Commission issued its decision concerning Bulgaria's notified RES support scheme. In the decision, the Commission reviewed the scheme's compatibility with the EU State aid rules, including specifically with respect to "[p]hotovoltaic power plants," and noted that the scheme incorporated a "reduction of the mandatory offtake quantity," *i.e.*, the Annual Production Cap.[78] The Commission concluded that the RES scheme "constitutes State aid within the meaning of Article 107(1)" of the TFEU.[79]

71. In analyzing the preferential prices, the Commission noted that these were calculated using a "representative business entity" (*i.e.*, the reference plant) and a 9% rate of return for 2011, which corresponded to the reference plant's "weighted average cost of capital" and its production costs calculated using the levelized cost electricity ("LCOE").[80] Noting that the 2008 EU State Aid Guidelines limited the amount of permissible aid to the "difference between the costs of production and the market price . . . until plant depreciation" and no more than a "normal return on capital," the Commission concluded that, consistent with the Guidelines, "all preferential purchase prices under [Bulgaria's] support scheme are equal to the LCOE of the relevant installations."[81]

72. The Commission also concluded that the 9% rate of return "correspond[ed] to the level of the estimated weighted average cost of capital for renewable investors" and that "[i]n view of the evidence provided, the included rate of return is considered reasonable." It reached the same conclusion under the 2014 EU State Aid Guidelines.[82]

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[78] *Id.* ¶¶ 6, 98.
[79] *Id.* ¶ 56.
[80] *Id.* ¶¶ 17, 19.
[81] *Id.* ¶ 62.
[82] *Id.* ¶¶ 63, 81.

73. The Commission also considered complaints by RES producers that the "profitability level of installations is . . . negatively affected" by the Annual Production Cap and found the complaints meritless, stating that "the most relevant rules in this respect are the proportionality (and cumulation) rules" of Article 109 of the 2008 EU State Aid Guidelines, and that "the Commission has concluded that the aid scheme is compatible with the rules laid down in both the EAG [the 2008 EU State Aid Guidelines] and EEAG [the 2014 EU State Aid Guidelines]."[83]

74. The Commission accordingly decided not to raise objections against Bulgaria's notified RES support scheme,[84] allowing it to remain in place.

75. In contrast to the notified RES scheme subject to the Commission's foregoing decision, the RES support scheme not including the Annual Production Cap on which the Award is based was not notified to or approved by the Commission. Moreover, the unlimited number of production hours thereunder would have provided to RES producers a higher return than that considered reasonable by the Commission in its approval of the notified RES scheme incorporating the Annual Production Cap. For each of these reasons, the unnotified RES support scheme was inconsistent with the TFEU's prohibition of State aid and the EU rules on State aid.

76. This means in turn that the Award has the effect of compensating ACF for the withdrawal of unlawful aid. The EU Treaties and the EU State aid rules, however, do not permit the circumvention of the EU State aid rules through an arbitral award granting compensation for the repeal of a State aid scheme.[85] As such, satisfaction of the Award would place Bulgaria in violation of its obligations under the EU Treaties and EU law concerning State aid.

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[83] *Id.* ¶ 98.

[84] *See generally id.*

[85] *See European Food and Others v Commission*, Judgment of the General Court of June 18, 2019, Case T-624/15, ECLI:EU:T:2019:423 (Exhibit 74) ¶ 103 ("compensation for damage suffered cannot be regarded as aid *unless it*

77. Finally, the Award is substantially similar to the arbitral award concerning Spain's RES support scheme rendered in the ECT arbitration in *Antin v. Spain*, which is subject to the Commission's decision to initiate the procedure laid down in Article 108(2) TFEU.[86]

78. The *Antin* arbitration concerned Spain's changes to its RES regime introduced after the claimants in *Antin* had made their investments in Spain's RES sector. The *Antin* tribunal concluded that Spain's changes to the RES regime were inconsistent with the ECT and awarded the claimants approximately EUR 101 million in compensation.[87]

79. Similar to Bulgaria, Spain notified to the Commission its revised RES support scheme but not the preceding RES support scheme on which the *Antin* award was based. The Commission approved Spain's notified RES support scheme as compatible aid, including because it considered that the return of 7.398% provided by the notified scheme was reasonable in light of estimated costs and market prices and of similar previously approved schemes.[88]

80. The Commission applied the usual State aid criteria and concluded that the *Antin* award constituted State aid, including because the award compensation was above market, was

has the effect of compensating for the withdrawal of unlawful or incompatible aid") (emphasis added); *European Food SA and Others v. European Commission*, Judgment of the General Court (Second Chamber, Extended Composition) of Oct. 2, 2024 (Extracts), Cases T-624/15 RENV and T-694/15 RENV (Exhibit 75) ¶¶ 139-157 (concluding that where an investment treaty award granted damages to the claimants calculated based on the financial consequences of the host State's repeal of a tax incentive scheme, the award cannot be said to compensate the claimants only for a violation of the investment treaty rather than for the repeal itself); *id*. ¶¶ 164, 165 (stating that the economic advantage at issue before the Court was the "payment of the compensation granted pursuant to the arbitral award," that an "action for damages, such as that brought by the arbitration applicants before the arbitral tribunal, cannot lead to circumvention of the effective application of the rules on State aid," and that "[d]amages paid as compensation . . . for any loss resulting from the repeal of an aid scheme cannot therefore escape classification as State aid where those damages meet the definition of an economic advantage for the purposes of those rules").

[86] State aid Case SA.54155 (2021/NN), Arbitration Award to Antin – Spain, Opening Decision of Nov. 5, 2021 (Exhibit 76).

[87] *See id*. at 1-3.

[88] *Id*. ¶¶ 11, 12, 35.

selective, was imputable to the State, involved State resources, distorted competition due to the fact that electricity is widely traded across the EU, and had not been approved by the EC.[89]

81. The Commission also indicated that the internal rate of return for the claimants' two RES plants resulting from payment of the *Antin* award, which amounted to 8.84% and 8.96%, exceeded the 7.398% reasonable return which the Commission approved in its State aid decision concerning Spain's revised RES scheme,[90] a difference of 1.442% to 1.562%.

82. Accordingly, the Commission concluded that the aid resulting from the *Antin* award was disproportional and that it had doubts that the aid was compatible with the EU State aid rules.[91]

83. Similarly to *Antin*, as noted above, Bulgaria notified to the Commission and the Commission approved the RES support scheme which incorporated the Annual Production Cap, whereas ACF obtained an award of damages on the basis of the unnotified RES scheme which did not incorporate the Annual Production Cap. Furthermore, the rate of return for the RES plant at issue in the arbitration resulting from the Award would appear to be at least 10.4%[92] as compared to the 9% reasonable rate of return approved by the Commission, a difference of 1.4%, similar to the 1.442% to 1.562% difference in *Antin*.

84. These considerations reinforce the conclusion that the payment of the Award would place Bulgaria in breach of the TFEU and the EU State aid rules.

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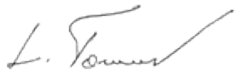
[89] *Id*. ¶ 76.

[90] *Id*. ¶¶ 123, 124, 147.

[91] *Id*. ¶¶ 150-154.

[92] This figure is calculated based on the fact that the tribunal granted ACF 78.2% of the claimed damages (*i.e.*, EUR 61.04 million out of the EUR 78.1 million claimed) and in light of the calculation by Bulgaria's expert in the arbitration of the lower bound of the Karad Plant's internal rate of return without damages as 6.8% and the upper bound with all claims granted as 11.4%. *See* Award (ACF's Exhibit A) ¶¶ 314, 1264 n.1893 (indicating that the project internal rate of return in the actual scenario, *i.e.*, without damages, was "6.8%-8.6% in the calculations of the Respondent's expert" and that the "highest figure . . . appears to be 11.4%, being, according to the Respondent, the project IRR if the Claimant were to be awarded its full claim"). The 10.4% figure corresponds to 78.2% of the difference between the 6.8% and the 11.4%, calculated as 0.782*(11.4-6.8) + 6.8.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements of fact are true and correct and that all opinions expressed here are in accordance with my sincere belief. Executed on November 18, 2024.



Lazar Tomov