UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FORESIGHT LUXEMBOURG SOLAR 1 S.A.R.L., et al.,

Petitioners,

v.

THE KINGDOM OF SPAIN,

Respondent.

Civil Action No. 19-cv-3171-ER

BRIEF OF THE EUROPEAN COMMISSION ON BEHALF OF THE EUROPEAN UNION AS *AMICUS CURIAE* IN SUPPORT OF THE KINGDOM OF SPAIN

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INTEREST OF AMICUS CURIAE

The European Commission ("Commission") is an institution of the European Union (the "EU"), a treaty-based international organization composed of 28 Member States.[1] Known as the "Guardian of the Treaties," the Commission is responsible, inter alia, for ensuring the proper application of the EU treaties—including the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU")—and of measures EU institutions adopt under those treaties. The Commission is also tasked with representing the EU in legal proceedings before the Court of Justice of the EU ("Court of Justice"), national and international courts (including the WTO dispute settlement bodies) and arbitration tribunals, and has special expertise in matters of EU law and public international law. The Commission appears before the Court of Justice of the EU in more than one thousand cases per year. The Commission is an independent institution and acts in the interests of the Union as a whole, rather than individual Member States.

The Commission submits this amicus brief on behalf of the EU. The Council of the EU—an EU institution composed of government ministers from each EU Member State—in expressing its unanimous agreement with the Commission's intention to file an amicus brief, has endorsed the Commission's views as the official position of the European Union pursuant to TFEU Article 218(9) on the matters addressed in this submission.[2]

The EU has a substantial interest in this case. Petitioners are EU companies—entities formed under the laws of Luxembourg, Italy, and Denmark—who seek enforcement of an

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[1] These Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

[2] Six Member States—Finland, Hungary, Malta, Luxembourg, Slovenia, and Sweden—did so while referring to their declaration of 16 January 2019 on the enforcement of the judgment of the Court of Justice in *Achmea* and investment protection in the EU. *See infra* n.9 and accompanying text.

investment arbitration award they have obtained against Spain, an EU Member State, on the basis of the Energy Charter Treaty, a multilateral treaty negotiated and signed in the 1990s to govern the EU's external energy policy. This award is premised on a fundamental misinterpretation of the ECT and a disregard for the EU laws that form part of the international obligations of Spain, Luxembourg, Italy, and Denmark and that should have governed the dispute.

The EU has a critical interest in ensuring that this Court proceeds based on a correct understanding of the EU law rules and principles at stake. Accordingly, the Commission submits this brief to explain the EU's official position that the ECT does not have intra-EU application. In any event, EU law precludes investor-State arbitration for intra-EU disputes. Such arbitration is contrary to Articles 267 and 344 of the TFEU and the fundamental principles of autonomy, full effectiveness, and mutual trust, which constitute the cornerstones of the EU legal order, as the Court of Justice confirmed in the judgment in *Slovak Republic v. Achmea B.V.*, Case C-284/16, 6 March 2018, ECLI:EU:C:2018:158. Thus, even if—contrary to the view taken in this brief—the ECT were to be interpreted as applying intra-EU, its investor-State arbitration provision (and hence any arbitration award issued under that provision) would violate higher-ranking and more recently reaffirmed norms of EU law in force between EU Member States, and would, consequently, be inapplicable as between those Member States under international law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission understands that Spain argues here that any standing offer of arbitration in ECT Article 26 is invalid under prevailing EU law. That conclusion deprives this Court of subject-matter jurisdiction under the Foreign Sovereign Immunities Act. It also means that the award is invalid and should not be enforced under the New York Convention. The Commission agrees that there was no valid offer of arbitration in Article 26, for three reasons.

First, customary international law rules of treaty interpretation compel the conclusion that the ECT (including Article 26, its dispute-settlement provision) does not apply intra-EU. *Second*, even if Article 26 could be interpreted to encompass intra-EU disputes, such an interpretation would conflict with the EU Treaties. That conflict—as a matter of international law—must be resolved in favor of EU law. Because EU law is part of international law binding on all EU Member States, the inapplicability of Article 26 means that Spain has made no valid offer for arbitration to investors from other EU Member States, and no valid arbitration agreement exists between Petitioners and Spain. *Third*, principles of international comity favor dismissal. This dispute has no connection with the United States, and the United States thus has no interest in the adjudication of this controversy in its courts. By contrast, the EU has an overwhelming interest in this dispute and the fundamental questions of EU law that it raises.

That is particularly so because the Commission, exercising its authority to enforce EU competition law, has issued a binding decision regarding Spain's EU law obligations relating to this dispute. The Commission observed that the ECT does not apply intra-EU and that, in any event, Spain may not pay the arbitration award unless and until the Commission decides to authorize such payment. Petitioners could have challenged that decision in the European courts, but did not. They are thus bound to respect the Commission's decision, which is *res judicata* vis-à-vis Petitioners, and Spain is precluded as a matter of EU law from implementing the award.

Rather than insert itself into the EU's internal affairs, this Court should permit the compatibility of intra-EU investor-State arbitration with the EU Treaties, and the lawfulness of the payment of arbitration awards that may implicate EU competition law, to be decided within the EU judicial system, which offers a complete and effective system of judicial redress before an international court—i.e., the Court of Justice.

RELEVANT LEGAL BACKGROUND

A. The nature and special characteristics of the EU legal order

At present, the EU Treaties are the Treaty on the Functioning of the European Union ("TFEU"), Oct. 26, 2012, 2012 O.J. (C 326) 47 and the Treaty on European Union ("TEU"), Oct. 26, 2012, 2012 O.J. (C 326) 13 (collectively, the "EU Treaties"). While the EU retains an international character—the 28 Member States remain the "masters of the Treaties"—the EU also represents the most ambitious project of economic, political, and social integration hitherto known in international law. Under the EU Treaties, the Member States have transferred legislative, regulatory, and enforcement competences in many fields to the EU and its institutions. This process of integration has "given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other." Court of Justice Opinion 2/13, 18 December 2014 (ECLI:EU:C:2014:2454), ¶ 167, https://bit.ly/2SouafF; *Achmea*, ¶ 33.

A central purpose of the EU Treaties is the establishment and proper functioning of the "internal market," defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." TFEU art. 26(2). The EU's internal market rules are contained in the Treaties, EU legislation, and the case law of the Court of Justice. These rules cover all cross-border economic activities, including investment. The internal market secures to EU investors directly enforceable rights throughout the investment cycle, but also imposes obligations, including compliance with EU competition law and various regulatory standards designed to ensure that the internal market functions as a level, integrated playing

field.[3] Importantly for present purposes, the EU Treaties charge the Commission with the enforcement of EU competition law, including investigation and control of any public subsidy schemes of Member States (known as "State aid") that distort or threaten to distort competition in the internal market. TFEU arts. 107 & 108.

The integrity of the EU legal order and the internal market is safeguarded by the EU judicial system, which consists of Member State courts and the Court of Justice. The keystone of that system is the preliminary ruling procedure set forth in TFEU Article 267. National courts may (and, where they are courts of final instance, must) refer any relevant question of interpretation and application of EU law raised in proceedings before them to the Court of Justice for a preliminary ruling. In addition, TFEU Article 344 prohibits Member States from creating dispute settlement mechanisms other than those set out in the EU Treaties on any matters implicating EU law. The Court of Justice thus has exclusive jurisdiction to issue final and binding interpretations of EU law and guarantee the correct and uniform application of EU law in all the numerous areas in which it is applicable. TFEU Articles 267 and 344 thus "ensure that the specific characteristics and the autonomy of the EU legal order are preserved." Opinion 2/13, ¶ 174; *Achmea*, ¶ 35.

In accordance with doctrines established by the Court of Justice as far back as the 1960s, EU law enjoys primacy over any competing rules generated by EU Member States, whether by domestic legislation or international treaty. The primacy of EU law, recognized and accepted by all Member States, is fundamental to achieving the ambitious goals set out in the EU Treaties. Permitting Member States to deviate from the Treaties through conflicting domestic measures or

[3] For an overview of the EU internal market rules, see Commission Communication to the European Parliament and Council on Protection of intra-EU investment (July 19, 2018), COM(2018) 547, at 3–4, https://bit.ly/2XtniBb [hereinafter "*Protection of intra-EU investment*"].

inter se international agreements would severely undermine those goals. In other words, EU law has a mandatory character for EU Member States and their nationals (such as Petitioners), and can only be changed in the manner set forth in the EU Treaties.

Finally, relations between EU Member States are governed by the principle of "mutual trust," including trust in each other's judiciaries, which, in the words of the Court of Justice, is what "allows an area without internal borders to be created and maintained." Opinion 2/13, ¶ 191. The principles of autonomy, primacy, effective implementation of EU law, and mutual trust are central to a proper understanding of the issues in dispute in this case.

B. The Energy Charter Treaty ("ECT")

As set out in detail in the Commission's Amicus Curiae Brief to the *Foresight* tribunal, *see* ECF No. 11, Ex. 3, at 7–11, the ECT[4] was essentially the brainchild of the EU, concluded on the EU's initiative, based on the European Energy Charter prepared by the EU, at an energy conference convened and funded by the EU. The ECT's purpose was to create a framework for energy cooperation between the EU on the one hand, and the former communist countries of Central and Eastern Europe on the other. That framework was intended to facilitate those countries' transition to the market economy, to prepare them for eventual accession to the EU, and to enhance energy security, efficiency and cooperation throughout Europe and its immediate vicinity by extending the free-market principles of the EU's existing internal market and energy policy beyond the Union's borders.[5]

The ECT was thus an instrument of the EU's external energy policy, in which the EU and

[4] Energy Charter Treaty and its Protocol on Energy Efficiency and Related Environmental Aspects, *adopted* Dec. 17, 1994, *entered into force* April 16, 1998, 2080 U.N.T.S 95 (1995) ("ECT").

[5] *See generally* Johann Robert Basedow, *The European Union's international investment policy* 135-65 (Nov. 2014) (unpublished Ph.D. dissertation, London School of Economics), https://core.ac.uk/download/pdf/46519956.pdf.

its Member States acted as a single block.[6] But they never intended the ECT to affect intra-EU relations. The EU's internal energy policy consists of an elaborate system of rules, based on the EU Treaties and EU legislation, designed to create a single internal market for energy, including full protection for energy investors under the EU's internal market rules. The elaboration of those rules had begun before the negotiation of the ECT—as recognized in the objectives of the European Energy Charter, the precursor to the ECT and to which the ECT refers.[7]

EU law does not permit EU Member States (or, indeed, the EU itself) to modify or replace those rules by an international treaty such as the ECT; nor was it ever the Member States' intention to do so. On the contrary, the ECT makes clear that acts of EU law are binding on EU Member States as a matter not only of EU law, but also of the ECT itself. Specifically, Article 1(3) of the ECT recognizes that certain contracting states have "transferred competence" to a "Regional Economic Integration Organization" such as the EU, "over certain matters a number of which are governed by [the ECT], including the authority to take decisions binding on them in respect of those matters." Art. 1(3). In other words, it was clear from the outset that EU Member States had already delegated authority to the EU to regulate the internal energy market, as well as competition law and "State aid" control.[8]

Article 1(3) also recognizes the dynamic nature of contracting states' transfer of competences and decision-making to regional organizations like the EU. EU Member States are

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[6] The ECT was signed by the EU as well as its Member States because at the time, the EU did not possess full external competence over all matters to which the ECT applied.

[7] The preamble to the European Energy Charter, a nonbinding declaration now signed by 66 countries, states that the parties are: "Assured of support from the European Community, particularly through completion of its internal energy market; Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy cooperation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter." Concluding Document of the Hague Conference on the European Energy Charter, 17 Dec. 1991. ECT Article 2 specifically acknowledges the central relevance of the Charter's objectives and principles.

[8] For more on State aid, see *infra* pp. 16–17.

subject to and bound by an evolving body of EU law. In this regard, the Court of Justice has recognized that, as a result of the Renewable Energy Directive—Spain's implementation of which forms the basis of the arbitration underlying this case—the EU has exclusive external competence for renewable energy policy. Case C-66/13, *Green Network SpA v. Autorità per l'energia elettrica e il gas*, 26 Nov. 2014, EU:C:2014:2399, ¶ 65.

In sum, it was always understood that the ECT created rights and obligations vis-à-vis third countries, not within the internal energy market, which is governed by the EU Treaties.

C. The *Achmea* Judgment

Intra-EU investor-state arbitration is a relatively recent phenomenon that arose as a result of the 2004 accession to the EU of ten Central and Eastern European States that had bilateral investment treaties ("BITs") with existing EU Member States—as well as certain EU investors' ability to convince private arbitral tribunals that investor-State arbitration provisions like ECT Article 26 entitled them to initiate such arbitration against other EU Member States. Intra-EU investor-State arbitration essentially channels disputes concerning the acts of EU Member States and involving EU law to private arbitrators, who "cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the EU Court of Justice." *Protection of intra-EU investment*, at 2.

From the outset, the Commission considered that the EU Treaties precluded intra-EU investment treaties in general as well as intra-EU investment arbitration in particular, because such arbitration undermined the integrity of the EU's judicial system secured in TFEU Articles 267 and 344, and the effectiveness and mandatory nature of EU law. The Commission intervened in numerous intra-EU investment proceedings arguing accordingly. One such proceeding was *Achmea B.V. v. Slovak Republic*. The *Achmea* arbitral tribunal rejected those arguments and adopted its own interpretation of EU law, denying any such conflict. It thus

exercised jurisdiction and awarded damages against the State.

The Slovak Republic challenged the award in Germany, where the arbitration was seated. Pursuant to TFEU Article 267, the *Bundesgerichtshof* (Federal Court of Justice, the highest civil court in Germany) sought a ruling from the EU Court of Justice clarifying whether TFEU Articles 267 and 344 precluded the arbitration provision at issue.

The Court of Justice, sitting as a Grand Chamber of fifteen distinguished judges—a configuration reserved for matters of high precedential importance—answered that question in the affirmative. Drawing on settled case law and the general principles of autonomy and mutual trust discussed above, the Court concluded that disputes before intra-EU investor-state tribunals may well give rise to questions of EU law. However, because such tribunals are deliberately placed outside the EU judicial system—and thus cannot refer any questions of EU law that may arise to the Court of Justice—there is no mechanism to ensure that the disputes brought before them will be "resolved in a manner that ensures the full effectiveness of EU law." *Achmea*, ¶ 56. Accordingly, the Court of Justice held that TFEU Articles 267 and 344 "must be interpreted as precluding a provision in an international agreement concluded between Member States" that permits "an investor from one of those Member States … in the event of a dispute concerning investments in the other Member States, [t]o bring proceedings against the latter Member State before an arbitral tribunal … ." *Achmea*, ¶ 60. In other words, the Court confirmed that the TFEU had always prohibited EU Member States from offering to resolve intra-EU investor-State disputes before arbitral tribunals.

Following the *Achmea* judgment, the German *Bundesgerichtshof* duly annulled the underlying *Achmea* award at its seat, on the grounds that no valid arbitration agreement existed.

D. EU Member States' declarations on the legal consequences of the *Achmea* Judgment

On January 15 and 16, 2019, all EU Member States issued, in substance, the same declaration setting forth the EU's position on the legal consequences of the *Achmea* judgment as regards intra-EU BITs. In particular, they confirmed the long-standing principle of primacy of EU law over intra-EU agreements and explained that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable." Ex. A; *see also* Exs. B & C.[9]

Twenty-two out of 28 Member States further noted that "[a]rbitral tribunals have interpreted the [ECT] as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the [EU] Treaties and thus would have to be disapplied." Ex. A. The Member States thus undertook to inform investment tribunals about the legal consequences of the *Achmea* judgment in all pending intra-EU investment arbitrations (whether based on BITs or the ECT), and to request all state courts—including courts outside the EU—to set aside or decline to enforce intra-EU investment arbitration awards due to lack of valid consent to arbitration. Ex. A.

Five Member States issued a separate declaration, refraining from taking a position on the status of the ECT, given that the issue was being litigated in national courts in the EU. Ex. B. One Member State (Hungary) issued an individual declaration opining that "the *Achmea*

[9] Attached as Exhibits A, B, and C are true and correct copies of the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/2QXx36m; the Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/2Xi4C7H; and the Declaration of the Government of Hungary, of 16 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://bit.ly/2Et8wTD.

judgment concerns only intra-EU bilateral investment treaties" and "is silent on the investor-state arbitration clause in" the ECT. Ex. C.

ARGUMENT

I. The Energy Charter Treaty, properly interpreted under the rules of customary international law on treaty interpretation, does not apply intra-EU.

Customary international law requires the ECT to be "interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("VCLT"). Furthermore, the law *requires* the interpreter to take into account (i.e., prohibits the interpreter to disregard) "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" and "any relevant rules of international law applicable in the relations between the parties." *Id.* art. 31(3)(c). Any remaining ambiguities or obscurities in the meaning of the treaty may be resolved by recourse to, inter alia, the circumstances of the treaty's conclusion. *Id.* art. 32. Treaty interpretation is a "single combined operation" without any hierarchy between interpretative elements. Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186 and Add.1-7, [1966] 2 Y.B. Int'l L. Comm'n, 95 & 219.

As described *supra* pp. 6–8, the ECT's historical context clearly indicates that it was not intended to bind EU Member States *inter se*. *See also* Commission Amicus Brief, ECF No. 11, Ex. 3, at 7–11. This also follows from the ECT's text, which, among other things, acknowledges the EU's powers to make binding decisions in respect of its Member States, ECT art. 1(3), and provides that the EU and its Member States shall vote at the Energy Charter Conference as a single block, *id.* art. 36(7). *See supra* pp. 7–8.

Furthermore, with specific regard to investor-State arbitration under the ECT, the EU and its Member States submitted a declaration showing that they envisaged that provision would be used for claims by *third-country* investors (in which case, the EU and the Member States reserved the right to designate the proper respondent, depending on the internal division of competences between the Member States and the Union). Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26(3)(b)(iii) of the Energy Charter Treaty, [1998] O.J. L69/115. The vast majority of the Member States reconfirmed this position in the declarations issued on 15 and 16 January 2019, *see supra* n.9, as did the Council of the EU in authorizing the filing of this brief, *see supra* p.1. The Contracting Parties' post-ratification interpretations of an international treaty are entitled to deference. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).[10]

Against this backdrop, ECT Article 26 creates jurisdiction over "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." Article 1 defines the terms "Investor," "Contracting Party," and "Area." In light of the ECT's context, object, and purpose, *see supra* pp. 6–8, these provisions must be understood to exclude EU "Investors" investing in the "Area" of the EU. Such investors are not "Investor[s] of another Contracting Party." Rather, they are "Investors" of one "Contracting Party" (the EU), making investments in the "Area" of that same Contracting Party. Such investors thus invest in "their own economic area," Opinion of Advocate General Bot, Court of Justice Opinion 1/17, Request for an opinion by the Kingdom of Belgium (ECLI:EU:C:2019:72), ¶ 207, and are not "foreign" investors for whom the ECT's investor-State

[10] That the ECT, properly interpreted, does not apply intra-EU disposes of any perceived incongruity in the fact that the Commission has not commenced any proceedings charging that Member States that refuse to withdraw from the ECT are in violation of EU law. Such proceedings are unnecessary because, properly interpreted, the ECT presents no conflict with EU law.

mechanism was intended.[11]

That the ECT does not specifically provide that Article 26 is inapplicable to intra-EU disputes (by means of a so-called "disconnection clause") is irrelevant. Disconnection clauses are often included in multilateral treaties that include EU Member States and third countries and serve to notify the non-EU parties that EU law will apply as between EU Member States that are parties to the same treaty. They have no bearing on intra-EU relations. The "failure to [include a disconnection clause in a multilateral treaty] would not alter the Union law obligation whereby Union law takes precedence as regards Member States' relations *inter se*." M. Cremona, *Disconnection Clauses in EU Law and Practice*, in *Mixed Agreements Revisited* 166 (2010). This is particularly so in "mixed agreements," *i.e.*, agreements concluded jointly by the EU and its Member States, like the ECT.[12] The WTO Agreement—like the ECT, a "mixed agreement" that lacks a disconnection clause—illustrates the point. Despite its lack of a disconnection clause, because intra-EU trade is governed by the EU's internal market rules, "there can hardly have been any misunderstanding about the intention of the Community and its Member States to negotiate exclusively obligations with third States and not between Member States *inter se*." Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 Eur. J. Int'l L. 222, 228 (1995).

The text, history, and context of the ECT thus make clear that Article 26, properly interpreted, does not apply to intra-EU disputes. None of the contracting parties envisaged that Article 26 would permit EU investors to initiate arbitration against another Member State.

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[11] The Advocate General provides impartial, independent submissions in certain cases brought before the Court of Justice in order to assist the Court in its judicial task.

[12] *See* Maja Smrkolj, *The Use of the 'Disconnection Clause' in International Treaties* 9 (May 14, 2008) (paper presented at GARNET Conference), https://bit.ly/2IYldIT (disconnection clauses are "completely unnecessary" in mixed agreements).

Indeed, the contrary interpretation requires assuming that, by signing the ECT, individual Member States not only acted in complete disregard of the fact that they had already transferred competence to the EU in the area of energy, but also intended to sign away the primacy of EU law in their relations *inter se*, even though they have always viewed this principle as fundamental to the EU legal order. That cannot be correct.

II. The EU Treaties preclude Member States from offering to arbitrate intra-EU disputes under the Energy Charter Treaty

In the alternative, even assuming the ECT could be interpreted to apply intra-EU, applying ECT Article 26 to intra-EU disputes would be contrary to the TFEU as interpreted by the Court of Justice in *Achmea*. Given the prevalence of the TFEU over all other international agreements between EU Member States, any offer of intra-EU arbitration in the ECT is invalid and ineffective and cannot have given rise to a valid arbitration agreement.

A. Intra-EU application of ECT Article 26 conflicts with the EU Treaties and fundamental principles of EU law

The *Achmea* judgment is not limited to the BIT at issue in the *Achmea* dispute, or, indeed, any specific treaty. In accordance with its mandate under TFEU Article 267, the Court of Justice in *Achmea* was only concerned with the interpretation of *EU law*—specifically, TFEU Articles 267 and 344. That binding interpretation is not (and cannot, as matter of EU law) be "limited" to the particular facts in the case which gave rise to it. It applies *erga omnes*, and how it affects a particular set of factual circumstances—including a particular treaty at issue in a given case—is a matter for the adjudicator of fact. Here, the interpretation of TFEU Articles 267 and 344 adopted in *Achmea* applies to intra-EU ECT arbitration with at least the same force as it does to intra-EU investor-state arbitration under a BIT.

As the Court of Justice Advocate General recently observed in his opinion concerning the EU/Canada Comprehensive Economic and Trade Agreement (CETA), the *Achmea* judgment is

primarily based on

> the idea that the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law.

Bot, Opinion 1/17, ¶ 105. The Court of Justice agreed, underscoring that investor-State dispute settlement is only permissible in treaties between the EU and third countries where, unlike in the intra-EU situation of *Achmea*, the principle of mutual trust does not apply.[13] Court of Justice Opinion 1/17, 30 April 2019 (ECLI:EU:C:2019:341), ¶¶ 120–129. Even then, such dispute settlement is only permissible if the interpretation and application of EU law is expressly excluded from the tribunals' jurisdiction and such jurisdiction is specifically limited to preserve the EU's right to legislate in the public interest without investor-State tribunals interfering with its functions, especially in the field of competition law. *Id.* ¶¶ 106–161, 184–18.

Like disputes arising from intra-EU investments under a BIT, disputes arising from intra-EU investments under the ECT do not involve third-country investors. They are also "liable to relate to the interpretation or application of EU law," which forms part of the international law applicable in any such dispute. *Achmea*, ¶ 39; ECT art. 26(6).[14] But ECT tribunals are no more a part of the EU judicial system than are BIT tribunals. Their pronouncements on EU law (or failure to take EU law into account) threaten the integrity of the EU legal order and the principles of sincere cooperation and mutual trust between the EU and its Member States.

[13] Thus, the Court of Justice clarified that ¶¶ 57 and 58 of the *Achmea* judgment (on which arbitration tribunals have previously relied to hold that the *Achmea* judgment does not apply to the ECT), carve out from *Achmea*'s scope only relations with third countries, not a possible intra-EU application.

[14] This is in contrast to, for example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States. Given that Canada is not party to the EU Treaties, in CETA context, EU law is merely "domestic law of a Party" and may only be considered as a matter of fact, in accordance with the prevailing interpretation of EU courts. Opinion 1/17 (CETA), ¶¶ 21, 130-134.

The *Foresight* dispute itself is a case in point. *First*, Petitioners' arbitration claims concerned Spain's measures to support renewable energy intended to achieve the renewable energy targets laid down in the EU's Renewable Energy Directive, which itself forms part of the EU's internal market legislation. Petitioners' complaint under the ECT was that Spain "unfairly and inequitably" denied it a level of support to which it claimed to be entitled.[15] But to ensure fair competition in the internal market, TFEU Article 107 prohibits Member States from providing undertakings with *any* public support (known as "State aid"), unless such support was first notified to the Commission and specifically approved by it on defined public policy grounds. In its capacity as the EU's State aid regulator and the sole authority on whether a given measure constitutes compatible State aid, the Commission investigates potential State aid measures and renders legally binding decisions for Member States and investors based on the provisions of the EU Treaties.

In its binding decision on the matter, the Commission pointed out that, in accordance with established EU State aid law, an investor cannot rely on legitimate expectations to receive State aid that had not been notified to and approved by the Commission before being granted. Ex. F ¶¶ 155-58.10.[16] This rule could not be circumvented by relying on Article 10 of the ECT, because, in an intra-EU situation, the fair and equitable treatment standard in that provision must be interpreted in conformity with EU law. *Id.* ¶ 164. The Commission further reiterated that any provision for investor-State arbitration between two Member States is contrary to EU law, including "the general principles of Union law of primacy, unity and effectiveness of Union law, of mutual trust and of legal certainty." *Id.* ¶ 160. Finally, the Commission pointed out that any

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[15] Petitioners' claims are based on Article 10 of the ECT, which provides that Contracting Parties shall accord "fair and equitable treatment" to investments of investors of other Contracting Parties.

[16] Attached as Exhibit F is a copy of the Commission's Decision on State Aid, SA.40348, slip op. (Nov. 10, 2017).

compensation based on an arbitral award granted to an EU investor under the ECT on the basis that Spain has modified its support scheme would in itself amount to State aid, and that any payment of such awards by Spain without prior notification to, and approval by, the Commission would itself be unlawful as a matter of EU law. *Id.* ¶ 165. This conclusion flows from the Commission's assessment that payment of the arbitral award against Spain would constitute State aid, combined with the operation of TFEU art. 108(3), which requires a State to refrain from implementing any State aid measures pending a final Commission ruling. Investors could have challenged this decision in European courts but did not. The Commission's State aid decision is thus binding EU law.

Spain drew the Commission's decision to the tribunal's attention and argued that any award ordering Spain to pay compensation would constitute State aid, which the tribunal lacks the competence to authorize. *See* Award ¶ 217. But the tribunal dismissed this argument on the theory that "the Tribunal is not an institution of the European legal order, and it is not subject to the requirements of this legal order." Award ¶ 218. The tribunal proceeded to rule as though EU State aid law (which is also binding under ECT Article 1(3)) did not exist, ordering Spain to pay Petitioners compensation for the subsidies they had claimed. As a result of Petitioners' request for enforcement in this Court, Spain now faces extra-EU judicial proceedings to enforce the tribunal's award—which could place Spain in the impossible position of having to choose between complying with the order of an enforcing court or violating legally binding fundamental principles, legally binding treaty provisions, and legally binding decisions of EU law.

Second, Spain argued before the tribunal that EU law deprived the tribunal of jurisdiction, because the arbitration provision in ECT Article 26 (when applied intra-EU) would conflict with TFEU Article 344. While the case was pending, the Court of Justice confirmed in

Achmea that TFEU Articles 267 and 344 "preclud[e] a provision in an international agreement between Member States" authorizing resolution of disputes concerning intra-EU investments before an arbitral tribunal. *Achmea ¶* 60. But the tribunal found *Achmea*—and indeed EU law and the principle of primacy— "irrelevant" to its own jurisdiction. Award ¶¶ 218–20.

The tribunal thus both disregarded and manifestly misinterpreted binding rules of EU law. Given the impossibility of rectifying this failure through the EU's judicial system, this outcome constitutes the precise challenge to the autonomy and effectiveness of EU law that the Court of Justice in the *Achmea* judgment sought to prevent.

Questions of retroactivity are no obstacle to applying *Achmea*'s reasoning here. The judgments of the Court of Justice generally apply *ex tunc*. Case 262/12, *Vent de Colère!*, 19 Dec. 2013, ECLI:EU:C:2013:851, ¶ 39. Only in "exceptional[]" circumstances will the Court impose temporal limitations on an interpretation of EU law, *id.* ¶ 40, and the Court found no such circumstances in the *Achmea* case.[17]

B. The conflict between ECT Article 26 and the EU Treaties must be resolved in favor of EU law.

The issue of treaty conflict is an issue of international law. Where two or more treaties impose conflicting obligations, customary international law governs the resolution of those conflicts. While customary international law provides residual rules for the resolution of treaty conflict, *see* VCLT arts. 30 & 59, it is well recognized that that sovereign States may regulate the relationship between present and future international treaties between those same States by special rules, including by entering into a treaty that takes precedence over all others. *See, e.g.*, Report of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law*, UN

[17] The government of one Member State sought the imposition of such a limitation in the *Achmea* proceedings, but the Court of Justice did not grant that request.

Doc. No. A/CN.4/L.682 (2006), ¶ 470; O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 546 (2012).

Member States' obligations under EU law are themselves international in nature. The EU legal order derives from international treaties that create binding obligations between their Member States on the international plane. While the Court of Justice has treated the EU legal order as "special" given the far-reaching goals of the treaties, it never denied its international character. *See, e.g.*, Case 26-62, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, [1963] E.C.R. 1, 12 (the EU is a "new legal order of international law"); *Achmea*, ¶ 41 (EU law "deriv[es] from an international agreement between the Member States"). International courts and tribunals have consistently confirmed that EU law is international law applicable between EU Member States. *See, e.g.*, Order No. 3, Ireland v. United Kingdom ("Mox Plant"), UNCLOS Arbitral Tribunal, June 23, 2003, ¶ 28.

Thus, where Member States' commitments under the EU Treaties conflict with other international obligations between those same Member States, customary international law permits the Member States to formulate special rules to resolve those conflicts, including by providing that a particular treaty shall have primacy over others. EU Member States have done precisely that by means of the EU Treaties, which establish the primacy of EU law over Member States' other international obligations *inter se* (whenever concluded). In other words, primacy of EU law is a special rule of conflict pursuant to international law. As explained *supra* pp. 5–6, the principle of primacy applies equally to domestic law and intra-EU international treaties. *See* TFEU art. 351.[18] Indeed, for that purpose, "rules resulting from international agreements by

[18] Consistent Court of Justice case law confirms that TFEU Article 351 (which safeguards the effects of international obligations of EU Member States vis-à-vis third countries where such obligations predate the EU Treaties' entry into force) means that EU Member States' international obligations *inter se* are not protected from the effects of the EU

which the Member State concerned is bound" form part of "domestic law." Opinion of Advocate General Mazák, *Bogiatzi v. Deutscher Luftpool et al.*, Case C-301/08, [2009] E.C.R. I-10185, ¶ 55; Marcus Klamert, *The Principle of Loyalty in EU Law* 180 (2014). And in Declaration No. 17 to the 2007 Lisbon Treaty (amending the EU Treaties), the Member States expressly confirmed the primacy of EU law over "domestic legal provisions, *however framed.*" Ex. D.[19]

To be clear, primacy is not an escape hatch that allows the EU and Member States to evade other international obligations. Rather, in the context of intra-EU disputes like this one, primacy is a principle for resolving conflicts between Member States' obligations under the EU Treaties and any other international obligations in force between the those same Member States, at least where the rights of third countries are not affected. *See* TFEU art. 351. That such conflicts are resolved in favor of the TFEU is uncontroversial. The International Law Commission has recognized the TFEU's "absolute precedence" over any intra-EU international agreements. Fragmentation of International Law, UN Doc. No. A/CN.4/L.682 (2006), ¶ 283. The German Federal Supreme Court was likewise clear in setting aside the *Achmea* award:

> [B]y acceding to the EU the Member States have limited their discretionary powers under international law and have mutually agreed to renounce the exercise of any international treaty rights which conflict with EU law. In view of this, the primacy of the provisions of EU law has the consequence that a rule in an intra-EU agreement between Member States which is incompatible with EU law is also inapplicable as a rule in an international treaty. The nationals of the Member States concerned cannot rely on the Member States' prior international law obligations that are contrary to EU law.

Ex. E, ¶ 41.[20] The tribunal in *Electrabel v. Hungary* (to the Commission's knowledge, the only

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Treaties and are subject to their primacy. *See infra* p. 21 (discussing *Commission v. Italy* and subsequent cases); *see also, e.g.*, Case 478/07, *Budějovický Budvar v. Rudolf Ammersin GmbH*, [2009] E.C.R. I-07721, ¶¶ 97–99; Case 121/85, *Conegate Ltd. v. HM Customs & Excise*, [1986] E.C.R. 01007, EU:C:1986:114, ¶ 25.

[19] Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon signed on 13 December 2007, 2008 O.J. C115/335, at 344.

[20] *Bundesgerichtshof* Order, *Slovak Republic v. Achmea B.V.* (Oct. 31, 2018), I ZB 2/15 (English translation).

investor-State tribunal to have engaged in a detailed and comprehensive analysis of the issue) also concluded that EU-inconsistent treaties "do not survive" within the EU. *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015, ¶ 4.183.

The principle of primacy extends to any intra-EU application of multilateral treaties, even where third countries are also parties to those treaties. Based on Article 351 of the TFEU, the Court of Justice has held in a number of judgments—beginning with the 1962 case of *Commission v. Italy*, Case 10-61, [1962] E.C.R. 1—that such treaties do not apply within the EU if they are contrary to any rule of EU law, unless they affect the rights of third countries. *Commission v. Italy* concerned the General Agreement on Tariffs and Trade ("GATT"), a multilateral treaty to which non-EU Member States were also party. In later cases, the Court applied the rule set forth in *Commission v. Italy* to numerous other multilateral treaties.[21] All obligations contained in these treaties, to the extent they conflicted with the EU Treaties, were not applicable and had to be set aside within the EU.

There is no reason to exempt the ECT from this rule. Indeed, the *Achmea* judgment expressly applies to "international agreements concluded between the Member States" —the exact same term that was used in *Commission v. Italy* to refer to the intra-EU application of GATT. *Compare Achmea ¶* 62 *with Commission v. Italy*, [1962] E.C.R. at 10. Multilateral treaties providing for intra-EU investment arbitration such as the ECT are thus clearly within the scope of the *Achmea* judgment, for the purposes of which they are no different from purely bilateral agreements. For the same reason, EU law would, if necessary, also prevail over the

[21] Case 286/86, *Ministère Public v. Deserbais*, [1988] E.C.R. 4907 (Stresa Convention on Cheeses); Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, [1995] E.C.R. I-743 (Berne Convention for the Protection of Literary and Artistic Works); Case 147/03, *Commission v. Austria*, [2005] E.C.R. I-5969 (Council of Europe Convention on the Equivalence of Diplomas); Case C-301/08, *Bogiatzi v. Deutscher Luftpool et al.*, [2009] E.C.R. I-10185 (Warsaw Convention on International Carriage by Air).

ICSID Convention as applied among EU Member States.

Article 16(2) of the ECT, which provides that other treaties concerning investment promotion and protection and dispute resolution shall not "be construed to derogate" from the ECT, does not reverse the primacy of EU law and give precedence to the ECT instead.

First, by its own terms, Article 16(2) of the ECT is a rule of "construction," not conflict resolution. The applicable rule on resolving a conflict between the ECT and the EU Treaties is the primacy of EU law. *Second*, even if Article 16(2) could be interpreted as a conflict rule, it would yield to the primacy of the EU Treaties, which is a special and mandatory conflict rule applicable to all conflicting treaties, whenever concluded. EU law forbids Member States from "set[ting] aside the rules arising out of the [EU Treaties] by concluding an international agreement or convention."[22] The suggestion that they have nonetheless done so by agreeing to Article 16 is not a reasonable interpretation of either Article 16 or EU law. As the *Electrabel* tribunal correctly observed, Article 16 is itself subject to the primacy of EU law and cannot trump EU law. ICSID Case No. ARB/07/19, ¶ 4.178. In any event, the principle of primacy, which the Member States confirmed in Declaration No. 17 to the 2007 Lisbon Treaty, is later in time than any conflict rule in the ECT.

That the EU itself is a party to the ECT (whereas the BIT in *Achmea* involved only individual Member States) does not obviate the conflict between EU law and the ECT or render *Achmea* inapposite. The judgment of the Court of Justice in Case C-459/03, *Commission v. Ireland* ("*Mox Plant*"), 30 May 2006, ECLI:EU:C:2006:345, demonstrates the point. There, the Court held that an inter-State arbitration provision in the UN Convention on the Law of the Sea

[22] Case T-76/89, *Independent Television Publications Ltd v Commission of the European Communities*, 10 July 1991, ECLI:EU:T:1991:41, ¶ 76.

could not be applied in a dispute between two EU Member States, because (as in *Achmea*) such application would violate TFEU Article 344 and the principle of autonomy of EU law. That the EU was party to UNCLOS (just as it is party to the ECT) did not resolve the incompatibility.

In short, as regards intra-EU relations, the TFEU regulates its relationship with EU Member States' other *inter se* international obligations in favor of the absolute precedence of EU law in case of any conflict. This includes Member States' obligations under multilateral treaties (to the extent the rights of non-Member States remain unaffected). As the *Achmea* judgment confirmed, any international treaty provision permitting intra-EU investment arbitration is contrary to the TFEU. Article 26 of the ECT is precisely such a provision. Therefore, under the well-established conflict rules in force between EU Member States, Article 26 of the ECT cannot apply in intra-EU relations. This dispute concerns purely intra-EU relations and does not concern any third countries or their investors. Article 26 of the ECT is thus inapplicable here and cannot have given rise to a valid arbitration agreement.

III. At a minimum, international comity favors allowing the compatibility of intra-EU arbitration under the ECT to be decided within the EU judicial system.

Whether intra-EU arbitration pursuant to ECT Article 26 is compatible with the EU Treaties raises significant questions that implicate not just EU law but also the structure of the EU legal order. International comity—which permits U.S. courts to dismiss or stay domestic action based on the interests of the United States, a foreign government, and the international community in resolving a dispute in a foreign forum—strongly favors permitting these questions to be addressed within the EU judicial system. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

The EU's position is that intra-EU investment arbitration under the ECT is fundamentally incompatible with EU law—a conclusion that clearly follows from the Court of Justice's recent

pronouncement in *Achmea*. Nevertheless, controversy over this conclusion remains, within academic circles as well as in arbitral practice, as this case shows. Resolving that controversy touches on matters of vital importance to the EU, including the role and jurisdiction of EU courts, the interpretation and application of EU law by non-EU adjudicatory bodies, and the future of investor-State arbitration within the EU.

These questions are best decided by EU courts, within the EU judicial system. Proper respect for foreign sovereigns counsels strongly in favor of permitting the enforceability of the Award to be debated and decided by the courts of the EU Member States and ultimately the Court of Justice of the EU. Questions about the enforceability of an award rendered by an intra-EU ECT tribunal are already percolating through the EU judicial system. In this very case, Spain has requested that the Swedish courts (the seat of the arbitration) set aside the award, including because no valid arbitration existed, and further requested that the court refer the matter to the Court of Justice for a preliminary ruling. The Swedish courts have suspended enforcement of the award. *See* Decl. of James Hope, ECF No. 12. Even if the Swedish court of appeal denies Spain's request for a preliminary ruling from the Court of Justice at this juncture, ultimately, the Swedish Supreme Court will be obliged to refer the matter to the Court of Justice—which will then be in a position to provide an authoritative, final, and specific decision on the compatibility of intra-EU arbitrations under the ECT with EU law.

In addition, as mentioned above, during the pendency of the *Foresight* arbitration, the Commission issued a State aid decision regarding Spain's 2013 and 2014 support measures in the field of renewable energy, determining that as a matter of EU competition law, Spain has a legal obligation not to pay the compensation awarded by any ECT tribunal unless and until the

Commission authorizes such payment in accordance with the applicable State aid rules.[23] Petitioners' failure to challenge that decision in the European courts—which could have brought the question of the intra-EU applicability of the ECT swiftly before the forum best placed to address it—means that Petitioners must respect that decision, and Spain is precluded as a matter of EU law from implementing the award, absent authorization from the Commission. *See* TFEU art. 108(3). If the Commission refuses authorization, Petitioners may seek redress in EU courts.

While the EU's interests in these issues are immense, the United States has no interest in the answers to these questions, nor even in the outcome of individual intra-EU investor-State disputes. None of the parties to the underlying dispute between Petitioners and Spain are U.S. citizens, no U.S. property is at issue, and none of the underlying events took place on U.S. territory. U.S. law is only implicated to the extent that the Petitioners have asserted jurisdiction under the Foreign Sovereign Immunities Act and seek to enforce the award in the United States under the New York Convention. Rather than embroil itself in the EU's internal affairs, this Court should dismiss the petition—or at a minimum, stay enforcement pending resolution of the proceedings in Sweden—so that the questions implicated by this dispute may be decided by the courts of the Member States and the EU Court of Justice, all of which have an infinitely greater stake in these issues than U.S. courts.

CONCLUSION

For the foregoing reasons and those set forth in Spain's submissions, the Court should grant Spain's motion to dismiss the petition and deny enforcement of the award.

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[23] Ex. F ¶¶ 160, 165; *see also* Decision on State Aid, SA.38517, 2015 O.J. (L 232) 43 (same regarding Romania); Decision on State Aid, SA.40171, slip op. (Nov. 28, 2016) (same regarding Czech Republic).

Dated: May 3, 2019

Respectfully submitted,

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LIST OF EXHIBITS

A Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union

B Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union

C Declaration of the Government of Hungary, of 16 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union

D Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon signed on 13 December 2007, 2008 O.J. C115/335, at 344

E Order, *Slovak Republic v. Achmea B.V.* (Oct. 31, 2018), I ZB 2/15 (English translation)

F Commission Decision on State Aid, SA.40348, slip op. (Nov. 10, 2017)

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Kent A. Yalowitz
Kent A. Yalowitz