**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| WATKINS HOLDINGS S.À R.L. & WATKINS (NED) B.V., | : | |
| | : | Civil Action No. 1:20-CV-01081 (TFH) |
| *Petitioners*, | : | |
| | : | |
| v. | : | |
| | : | |
| KINGDOM OF SPAIN, | : | |
| | : | |
| *Respondent*. | : | |
| | : | |

**EXPERT DECLARATION OF PROFESSOR PIET EECKHOUT**

## A. INTRODUCTION

1. I, Piet Eeckhout, make this declaration based upon my personal knowledge, except as to those statements where I have expressly stated that my opinion is made upon information and belief, and I believe all such statements, and the information upon which they are based, to be true.

2. I am a Belgian citizen, born on January 30, 1962.

3. I am currently Professor of European Union ("EU") Law and Executive Dean of the Faculty of Laws at University College London ("UCL"). I am also Academic Director of the UCL European Institute. Before joining UCL in 2012, I taught at the Universities of Ghent and of Brussels (Belgium), and was Professor of European Law at King's College London, where I directed the Centre of European Law between 1998 and 2012. I also worked as a *référendaire* (law clerk) in the chambers of Advocate General Francis G. Jacobs at the European Court of Justice (the "ECJ"), between 1994 and 1998.

4. My academic interests revolve around EU law generally, and EU external relations law (including the interaction between EU law and public international law) more particularly. I have published extensively in this field. I am the sole author of a leading monograph that is widely used in the field: *EU External Relations Law*.[1] I am further co-editor of the Oxford EU Law Library, a series of monographs published by Oxford University Press aimed at both academics and practitioners. I am co-founder and co-editor of an open-access journal, *Europe and the World – A Law Review*. I have also taught international trade law and have written on questions of public international law, particularly those connected to the relationship between EU law and public international law.

5. Next to my academic work, I regularly advise barristers and law firms in the context of litigation involving questions of EU law. Most of that litigation is before the ECJ. The most noteworthy cases in which I have been involved are *Kadi v Council*,[2] on the relationship between United Nations ("UN") law and EU law in the context of counterterrorism, and *Wightman v Secretary of State for Exiting the European Union*,[3] on the question of whether the United Kingdom can unilaterally revoke its notification to withdraw from the EU. In both cases, the ECJ fully endorsed the arguments I contributed to, and rejected the positions of the EU Council of Ministers and the European Commission.

6. My full curriculum vitae, together with a list of my publications, is attached hereto as Exhibit 1.

7. I am being compensated at a rate of £500 per hour to prepare this expert declaration and, if required, to testify in this case.

8. I have no familial or business relationship or affiliation with any of the parties in the above-captioned matter. I have never provided legal advice to them or represented them in any capacity.

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[1] Piet Eeckhout, EU External Relations Law (2d ed. 2011) [Ex. 14].
[2] Nos. C-402/05, C-415/05, ECLI:EU:C:2008:461 (E.C.J. 2008) [Ex. 42].
[3] No. C-621/18, ECLI:EU:C:2018:999 (E.C.J. 2018) [Ex. 2].

9. I have been asked by counsel for the Petitioners in the above-captioned action, Watkins Holdings S.à r.l. and Watkins (NED) B.V., to provide an expert declaration on certain legal issues in the Petitioners' action to enforce the arbitral award entered in their favor against the Kingdom of Spain ("Spain") in *Watkins Holdings S.à.r.l. v. Kingdom of Spain*[4] (the "Award"). In particular, I have been asked to give my expert opinion on the following issues:

(i) the effect, if any, of the March 6, 2018, judgment of the ECJ in *Slowakische Republik v Achmea BV*[5] (the "*Achmea* Judgment") on the arbitration of intra-EU disputes under Article 26 of the Energy Charter Treaty[6] ("ECT");

(ii) the effect, if any, of the *Achmea* Judgment on the validity of the arbitration agreement between the Petitioners and the Kingdom of Spain under the ECT;

(iii) the effect, if any, of the following two documents on the interpretation that must be given to the ECT: (i) a communication of the European Commission (the "EC") addressing intra-EU investment dated July 19, 2018[7] (the "EC Communication"); and (ii) the joint declaration of twenty-two EU Member States on the *Achmea* Judgment dated January 15, 2019[8] (the "First Declaration");

(iv) whether payment or enforcement of the Award would violate EU law on the basis that it would constitute unauthorized "State aid";[9] and

[4] No. ARB/15/44 (ICSID Jan. 21, 2020) [ECF No. 1-2].
[5] No. C-284/16, ECLI:EU:C:2018:158 (E.C.J. 2018) [ECF No. 7-51].
[6] Dec. 17, 1994, 2080 U.N.T.S. 100 [ECF No. 1-4].
[7] Eur. Comm'n, Communication from the Commission to the European Parliament and the Council, COM (2018) 547 (July 19, 2018) [ECF No. 7-55].
[8] Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* & on Investment Protection in the European Union (Jan. 15, 2019) [ECF No. 7-57] [hereinafter Declaration of Twenty-Two EU Member States].
[9] EU law regulates certain EU Member State subsidies, referred to as "State aid."

(v) whether, if the Award did constitute unauthorized State aid, that would impact the validity of the Award.

10. In addressing these topics, and having reviewed the arguments made by Spain and the EC in this case, I consider that it may assist this Court to provide some background on the relationship between EU law and international law and on the operation of agreements to which the EU and its Member States are all parties (so called mixed agreements), such as the ECT.

11. In addition to basing my opinion on my knowledge of the topics of international law, EU law, and international investment law, I have reviewed the relevant parts of the documents listed below, including the Expert Declaration of Professor Steffen Hindelang dated December 2, 2020,[10] (the "Hindelang Declaration") that was submitted in support of Spain's motion to dismiss the Petitioners' petition to enforce the Award. I have been asked to comment, where appropriate, on the views expressed in the Hindelang Declaration, in addressing the above questions in this Declaration. I have also commented, where I have considered it appropriate, on arguments made in Spain's briefing in support of its motion to dismiss and the EC's brief of amicus curiae.

1. Petition to Confirm Arbitral Award, dated April 24, 2020, in *Watkins Holdings S.à r.l. v. Kingdom of Spain*, No. 1:20-CV-01081 (D.D.C.);[11]
2. The Kingdom of Spain's Memorandum of Points and Authorities in Support of Motion to Dismiss, or Stay, the Petition, dated December 2, 2020, in *Watkins Holdings S.à r.l. v. Kingdom of Spain*, No. 1:20-CV-01081 (D.D.C.);[12]

[10] Expert Declaration of Prof. Dr. Steffen Hindelang, LLM, in Support of the Kingdom of Spain's Motion to Dismiss, or Stay, the Petition to Enforce Arbitral Award, *Watkins Holdings S.à r.l. v. Kingdom of Spain*, No. 1:20-CV-01081 (D.D.C.) [ECF No. 7-5] [hereinafter Hindelang Declaration].
[11] ECF No. 1.
[12] ECF No. 7 [hereinafter Spain Br.].

3. Expert Declaration of Prof. Dr. Steffen Hindelang, LLM, in Support of the Kingdom of Spain's Motion to Dismiss, or Stay, Petition to Enforce Arbitral Award, dated December 2, 2020, in *Watkins Holdings S.à r.l. v. Kingdom of Spain*, No. 1:20-CV-01081 (D.D.C.);
4. Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of the Kingdom of Spain, dated January 4, 2020, in *Watkins Holdings S.à r.l. v. Kingdom of Spain*, No. 1:20-CV-01081 (D.D.C.);[13]
5. Expert Declaration of Professor Catherine Kessedjian, dated December 1, 2018, in *Novenergia II – Energy & Environment (SCA), Société d' Investissement à Capital Risque v. Kingdom of Spain*, No. 1:18-CV-01148 (D.D.C.);[14]
6. Expert Declaration of Andrea K. Bjorklund, dated January 14, 2019, in *Eiser Infrastructure Limited v. Kingdom of Spain*, No. 1:18-CV-01686 (D.D.C.);[15]
7. Second Expert Declaration of Andrea K. Bjorklund, dated April 22, 2019, in *Eiser Infrastructure Limited v. Kingdom of Spain*, No. 1:18-CV-01686 (D.D.C.);[16]
8. Expert Declaration of Sir Alan Dashwood, dated January 14, 2019, in *Eiser Infrastructure Limited v. Kingdom of Spain*, No. 1:18-CV-01686 (D.D.C.);[17]
9. Second Expert Declaration of Sir Alan Dashwood, dated April 22, 2019, in *Eiser Infrastructure Limited v. Kingdom of Spain*, No. 1:18-CV-01686 (D.D.C.);[18] and
10. Expert Declaration of Conor Quigley, dated April 22, 2019, in *Eiser Infrastructure Limited v. Kingdom of Spain*, No. 1:18-CV-01686 (D.D.C.).[19]

[13] ECF No. 12 [hereinafter EC Br.].
[14] Ex. 36.
[15] Ex. 37.
[16] Ex. 38.
[17] Ex. 39.
[18] Ex. 40.
[19] Ex. 41.

## B. EXECUTIVE SUMMARY

In summary, my views are as follows:

(i) I do not consider the *Achmea* Judgment to have any effect on the arbitration of intra-EU disputes under Article 26 of the ECT. The objections in the *Achmea* Judgment to intra-EU arbitration are expressly confined to bilateral agreements between EU Member States that have not been concluded by the EU; they therefore do not extend to the ECT.

(ii) Even if the *Achmea* Judgment were to extend to the ECT, that would not preclude intra-EU arbitration under the ECT. The validity of ECT Article 26 under international law would not be affected, nor would its interpretation and effect.

(iii) If there were any conflict between the ECT and EU law as regards the permissibility of intra-EU arbitration under the ECT, the ECJ case law on the primacy of EU law would not regulate such a conflict. It would be governed by ECT Article 16, which gives precedence to the ECT. There is no merit to the argument that ECT Article 16 is, itself, displaced by EU law.

(iv) In light of my conclusions (i)–(iii) above, the *Achmea* Judgment has no bearing on the validity of the arbitration agreement between the Petitioners and the Kingdom of Spain under the ECT.

(v) As a matter of international law, the EC Communication and the First Declaration have no bearing on the interpretation to be given to the ECT.

(v) Payment of the Award would not violate EU law. There is no basis to the contentions of Professor Hindelang and the EC in this proceeding that the Award constitutes "State aid" under EU law that would require notification to the EC before it could be paid or enforced.

(vi) Even if the Award did constitute unauthorized EU State aid, that would not affect the validity of either the arbitration agreement between the Petitioners and Spain or the Award, which, unless annulled, remains binding on Spain.

## C. BACKGROUND

12. As explained above, I consider it may assist the Court in following my analysis if I were to provide some background information on: (i) the relationship between EU law and international law; and (ii) the operation of agreements to which the EU and its Member States are all parties (so called mixed agreements), such as the ECT. Those topics are addressed in turn in this section.

### i. Relationship Between EU Law and International Law

13. The European Union is an organization created by the conclusion of a series of international treaties—chiefly the Treaty on European Union[20] ("TEU") and the Treaty on the Functioning of the European Union[21] ("TFEU"). In that sense, the law of the European Union has its foundations in public international law, particularly treaty law.

14. The EU respects international law. TEU Article 3(5) provides that the EU shall, in its relations with the wider world, contribute to "the strict observance and the development of international law."[22] The EU has legal personality,[23] which encompasses international legal personality. It therefore has the capacity to act under international law, particularly by means of the negotiation and conclusion of international agreements.[24] TFEU Article 216(2) provides that "[a]greements concluded by the Union

[20] Feb. 7, 1992, 2012 O.J. (C-326/15) [ECF No. 7-14] [hereinafter TEU].
[21] Mar. 25, 1957, 2012 O.J. (C-326/47) [ECF No. 7-13] [hereinafter TFEU].
[22] TEU art. 3(5) [ECF No. 7-14]; *see also id.* art. 21(2).
[23] *Id.* art. 47.
[24] *See* TFEU art. 216(1) [ECF No. 7-13]. EU law uses the term "agreements" in a generic sense, as encompassing any conventional instruments such as treaties, conventions, agreements, etc.

are binding upon the institutions of the Union and on its Member States."[25] This provision ensures that the EU complies with its international commitments, and respects international law.

15. The EU institutions are bound by any agreements the EU has concluded, including in their legislative function. The ECJ has confirmed, on numerous occasions, that acts of the institutions, including legislative acts, need to comply with the EU's international obligations.[26] The Member States are equally bound, simply because agreements concluded by the EU are an integral part of EU law.[27] These points are significant for the present case because the ECT is an agreement concluded by the EU (together with its Member States), in contrast with the bilateral investment treaty ("BIT") which was at issue in the case of *Achmea*.

16. The fact that international agreements concluded by the EU prevail over acts of the EU institutions, including legislative acts, does not mean that such agreements take priority over the EU's founding treaties (TEU and TFEU)—at least not as a matter of EU law. In this respect, the TEU and the TFEU are functionally equivalent to most States' constitutions, which do not allow the State's institutions to conclude international agreements which derogate from, or conflict with constitutional norms. The ECJ has, on occasion, established that the provisions of a particular international agreement violate EU constitutional norms.[28] In such cases, it will, as a matter of internal EU law, annul the act by which the

[25] *Id.* art. 216(2).
[26] *See, e.g.*, *Int'l Air Transp. Ass'n v Dep't for Transp.*, No. C-344/04, ECLI:EU:C:2006:10, ¶ 35 (E.C.J. 2006) [Ex. 3]; *Int'l Ass'n of Indep. Tanker Owners v Sec'y of State for Transp.*, No. C-308/06, ECLI:EU:C:2008:312, ¶ 42 (E.C.J. 2008) [Ex. 4].
[27] *Haegeman v Belgium*, No. C-181/73, ECLI:EU:C:1974:41, ¶ 5 (E.C.J. 1974) [Ex. 5].
[28] *See, e.g.*, *Federal Republic of Germany v Council*, No. C-122/95, ECLI:EU:C:1998:94 (E.C.J. 1998) [Ex. 6].

agreement was concluded, or declare that act invalid.[29] It cannot, however, annul the agreement itself, quite simply because that is beyond its jurisdiction.[30]

17. The ECJ's jurisdiction is confined to EU law. In broad brushstrokes, it is within the court's jurisdiction: to determine the Member States' obligations and those of private parties bound by EU law; to interpret the founding treaties (the "EU Treaties") and any other EU law acts or instruments; to annul acts of the institutions, or declare them invalid as a matter of internal EU law; and to determine the EU's non-contractual (i.e. tortious) liability. International agreements concluded by the EU, or non-conventional international norms such as general principles and customary international law which are relevant to the EU's international activities, can be interpreted and relied upon by the ECJ. However, in full compliance with the relevant norms of international law (in particular Article 46 of the Vienna Convention on the Law of Treaties), the ECJ cannot, as the court of one of the parties to an international agreement, annul that agreement as a matter of public international law. Where a breach of the EU Treaties is found, the EU institutions need to either renegotiate the EU's commitments, or terminate them, so as to remove the breach.

18. In order to avoid such difficulties, the drafters of the EU Treaties have, with great foresight, created a special procedure in TFEU Article 218(11). This provision allows any Member State, as well as the European Parliament, the European Council, and the EC, to ask the ECJ whether an agreement which the EU *envisages* to conclude, but has not yet concluded, "is compatible with the Treaties."[31] As the ECJ has stated, this procedure aims "to forestall complications which would result

[29] Those two remedies—annulment and a declaration of invalidity—are equivalent. The difference lies in the judicial procedure by which the agreement is challenged before the ECJ: either in a (direct) action for annulment (TFEU Article 263); or on a reference from a Member State court asking whether the act concluding an agreement is invalid (indirect action, TFEU Article 267).
[30] *French Republic v Comm'n*, No. C-327/91, ECLI:EU:C:1994:305, ¶¶ 13–17 (E.C.J. 1994) [Ex. 7].
[31] TFEU art. 218(11) [ECF No. 7-13].

from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community [now the EU]."[32] It has been used for the Comprehensive Economic and Trade Agreement between the EU and Canada,[33] resulting in Opinion 1/17,[34] an ECJ ruling which is highly relevant to some of the issues to which the present case gives rise.

19. It is also worth noting that TFEU Article 218(11) confirms that the EU Treaties cannot, on the international plane, override any treaties or agreements the EU concludes. It does so by stating that "[w]here the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."[35] In other words, any incompatibilities need to be removed before the agreement can be concluded, and this may include a revision of the EU Treaties. This is necessary because there would otherwise be a conflict between the EU's international commitments and the EU Treaties, a conflict which could be difficult to resolve if the third countries concerned were not amenable to renegotiating those commitments.

20. The EU Member States continue to be international actors, capable of concluding international agreements with other States (including other EU Member States) or with international organizations, independently from the EU. It is only in matters of so-called exclusive EU treaty-making competences[36] that the Member States have lost this capacity. Trade policy (the "common commercial policy") is the most significant area of exclusive EU competence.[37]

21. The EU Member States must comply with their EU-law obligations when concluding international agreements, acting on their own. There is in this respect no difference between what the

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[32] *In re Understanding on a Local Cost Standard*, Op. No. 1/75, ECLI:EU:C:1975:145, at 1360 (E.C.J. 1975) [Ex. 8].
[33] Oct. 30, 2016.
[34] *In re CETA*, Op. No. 1/17, ECLI:EU:C:2019:341 (E.C.J. 2019) [Ex. 9].
[35] TFEU art. 218(11) [ECF No. 7-13].
[36] *See id.* art. 3.
[37] *See id.* art. 3(1)(a), (e).

Member States do within the four corners of their domestic laws, and what they commit to internationally. The ECJ may therefore establish that certain provisions in treaties or agreements concluded by one or more Member States violate EU law.[38] The *Achmea* Judgment is one such instance. Again, however, the ECJ is incapable of annulling or invalidating such a treaty or agreement on the international plane. Where a breach is established, the relevant Member State is simply under an EU-law obligation to remove the breach, by either renegotiating the relevant terms, or by denouncing the agreement in issue.

22. A closer reading of the *Achmea* Judgment confirms this: the ECJ established only that the dispute-settlement system in the Netherlands-Slovakia BIT was not in conformity with EU law.[39] It is therefore understandable that the EC has advised the Member States to terminate all intra-EU BITs: the *Achmea* Judgment, in and of itself, cannot have any effect on the existence and validity of such agreements under international law.

23. Moreover, the *Achmea* Judgment, delivered pursuant to a preliminary reference from the German *Bundesgerichtshof* (Federal Court of Justice), could not, on its own, invalidate even that particular BIT. All the ECJ did was to interpret EU law, in such a way as to assist the referring court when deciding whether to give effect to the set-aside application before it. The ECJ ruled that the arbitration provisions of an agreement "such as" the Netherlands-Slovakia BIT are in breach of EU law.[40] The *Bundesgerichtshof* then applied that EU-law finding to the actual BIT, and more specifically to the application for the set aside of the award made under that BIT. It ensured that EU law was complied with, and that the award was not enforced, by ruling that there was no valid agreement to arbitrate. (The

[38] *See, e.g.*, *Comm'n v Republic of Austria*, No. C-205/06, ECLI:EU:C:2009:118 (E.C.J. 2009) [Ex. 10]; *Comm'n v Kingdom of Sweden*, No. C-249/06, ECLI:EU:C:2009:119 (E.C.J. 2009) [Ex. 11]; *Comm'n v Republic of Finland*, No. C-118/07, ECLI:EU:C:2009:715 (E.C.J. 2009) [Ex. 12].
[39] *See Achmea*, ECLI:EU:C:2018:158 ¶ 7(i) [ECF No. 7-51].
[40] *Id.*

*Bundesgerichtshof* was empowered to consider and rule upon the matter because the arbitration was conducted under the UNCITRAL Rules and was seated in Frankfurt, Germany. The same is not true of the Petitioners' arbitration against Spain, which was conducted under the ICSID Convention.[41]) That was the German court's ruling, in that particular case, which involved the BIT that had been addressed by the ECJ specifically. It was not the ECJ's ruling, nor could it have been, as the ECJ's jurisdiction did not extend to the BIT as such.

24. The fact that the EU's founding treaties, or EU law more generally, cannot invalidate treaties or agreements which the Member States have concluded, on their own, is confirmed by TFEU Article 351. That provision states, in relevant part:

> The rights and obligations arising from agreements concluded before 1 January 1958 [the date of entry into force of the original EEC Treaty] 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.

As Advocate General Mischo established in *Commission v Portugal*,[42] the first paragraph of this provision is merely declaratory, in the sense that it confirms the international-law principle of *pacta sunt servanda*. It is obvious that the EU Treaties cannot modify the obligations which Member States have entered into towards third countries.

25. There is extensive case law on TFEU Article 351.[43] It is worth highlighting that the provision does not apply to agreements between two Member States ("intra-EU agreements"), simply

[41] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [ECF No. 1-3] [hereinafter ICSID Convention].
[42] Opinion of Advocate Gen. Mischo, *Commission v Portuguese Republic*, Nos. C-62/98, C-84/98, ¶ 56 (E.C.J.) [Ex. 13].
[43] *See* Eeckhout, *supra* note 1, at 421–34 [Ex. 14].

because those agreements are—from an EU law perspective[44]—superseded by the EU Treaties and do not confer any rights on third countries.[45] However, as Advocate General Warner pointed out in *Regina v Henn*,[46] a multilateral agreement concluded by Member States and third countries may create multilateral obligations between all the parties to it, so that third countries have a right to have its provisions observed, even in relations between EU Member States.[47] The ECJ itself has never ruled on this point. The ECT is of course a multilateral agreement concluded by Member States and third countries—and indeed by the EU itself.

26. At any rate, TFEU Article 351 is not applicable to this case. The ECT is later in time than the EU Treaties, for both Spain and the EU Member States whose investors are involved in these proceedings. Nor does Article 351 concern agreements to which the EU is itself a party, and which are themselves an integral part of EU law. Lastly, TFEU Article 351 is a provision of EU law, and not of general international law, even if it aims to give effect to general international law principles on successive agreements. The ECJ case law on Article 351 is therefore internal to EU law.

**ii. Mixed Agreements and the ECT**

27. It may also assist this Court to say a few words about the reasons for so-called mixed agreements (such as the ECT), and about some of the characteristics and effects of such agreements.

28. Mixed agreements, i.e. agreements which have the EU, its Member States, and third countries as contracting parties, are a prevalent phenomenon in the EU's international activities. The need for such agreements arises because the EU is not a sovereign State with full and complete treaty-making powers. The EU's competences are limited by the principle of conferral: "[T]he Union shall act

[44] Not necessarily from an international law perspective.
[45] *See e.g.*, *Commission v Federal Republic of Germany*, No. C-546/07, ECLI:EU:C:2010:25, ¶ 44 (E.C.J. 2010) [ECF No. 7-43].
[46] No. C-34/79, ECLI:EU:C:1979:295 (E.C.J. 1979).
[47] Opinion of Advocate Gen. Warner, *R. v Henn*, No. C-34/79, at 3833 (E.C.J.) [Ex. 15].

only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[48] This principle extends to the EU's external action (as it is called), including its treaty-making activities. A mixed agreement is needed where the matters covered by the agreement do not all come within the EU's competence.

29. The ECT is such a mixed agreement. At the time of its conclusion, it was considered that not all of its provisions came within the EU's external competences. In my opinion, that continues to be the case, notwithstanding the further development of the EU's competences in the field of energy. It is a fact that, since the conclusion of the ECT, the EU has adopted extensive legislation in energy matters, regulating its internal energy market. It has also been conferred specific legislative competences.[49] However, those competences are not exclusive of Member States' competences, but shared with them (TFEU Article 4(2)(a), (i)).[50] What that means is that the EU is able to claim an exclusive treaty-making competence in the field of energy only where an international agreement affects EU legislation in such a way as to trigger TFEU Article 3(2).[51] It is clear that a range of aspects of international energy policy

[48] TEU art. 5(2) [ECF No. 7-14].
[49] *See* TFEU art. 194 [ECF No. 7-13].
[50] Spain's brief fails to recognize the shared nature of these competences. The EC's brief also appears to presuppose exclusive EU competence in the field of energy, when it states that the Member States, when becoming parties to the ECT, "had already transferred competence to the EU in the area of energy." EC Br. 14 [ECF No. 12].
[51] TFEU Article 3(2) provides that "[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." TFEU art. 3(2) [ECF No. 7-13]. In *Green Network SpA v Autorità per l'Energia Elettrica e il Gas*, No. C-66/13, ECLI:EU:C:2014:156 (E.C.J. 2014) [Ex. 16], the ECJ established exclusive EU competence on the basis of EU Directive 2001/77, as regards the purchase of green electricity certificates. Contrary to what the EC's brief suggests at page 8, this is a narrow, specific area of exclusive competence. The judgment can in no sense be characterised as establishing "exclusive external competence for renewable energy policy." EC Br. 6 [ECF No. 12].

do not come within the EU's exclusive treaty-making competence, and that the ECT, if it were concluded today, would again be concluded as a mixed agreement.

30. Moreover, the ECJ recently established that provisions in an international agreement on investor-State dispute settlement which have the effect of excluding the jurisdiction of the ordinary courts of the Member States, in favor of international arbitration, are not within EU competence.[52] It made that finding in its opinion on the EU-Singapore Free Trade Agreement.[53] The dispute-settlement provisions of that agreement in the sphere of investment protection are, in this respect, equivalent to those of the ECT. This means that the dispute settlement provisions of the ECT continue to be a matter of mixed competence.

31. When the EU and its Member States conclude a mixed agreement, there are, in theory, a number of options open to them. They could identify, in the agreement itself, the parts or provisions which are concluded by, respectively, the EU, and by the Member States. That option is rarely used, if at all. They could also indicate the scope of their respective competences in some other way, for example by means of a "declaration of competences." That is an option which the EU and the Member States regularly employ.[54] They have done so, for example, when concluding the UN Convention on the Law of the Sea[55] ("UNCLOS").[56] It is also open to the EU and the Member States to negotiate a mixed agreement which operates in an essentially bilateral way. This is the case for most of the trade agreements which the EU concludes. Such agreements usually provide that they apply, on the one hand,

[52] *In re EU-Singapore FTA*, Op. No. 2/15, ECLI:EU:C:2017:376, ¶ 292 (E.C.J. 2017) [Ex. 17].
[53] Oct. 19, 2018, EU-Sing.; *see* Op. No. 2/15, ECLI:EU:C:2017:376, ¶ 292 [Ex. 17].
[54] *See* Marise Cremona, *Disconnection Clauses in EU Law and Practice*, *in* Mixed Agreements Revisited 160, 160–86 (Christophe Hillion & Panos Koutrakos eds., 2010) [Ex. 18].
[55] Dec. 10, 1982, 1833 U.N.T.S. 397.
[56] See, for the ECJ's analysis of this declaration of competences, *Federal Republic of Germany*, ECLI:EU:C:2010:25, ¶¶ 99–120 [ECF No. 7-43].

in the territory of the third country (say Canada), and on the other, in the territory of the EU and its Member States.[57]

32. None of those options was used in the case of the ECT. The EC's claim that the ECT was negotiated and concluded by the EU as "a single block"[58] is unsupported by the terms of the ECT itself. Giving meaning to the ordinary meaning of those terms, in their context and in the light of a treaty's object and purpose, is the first customary international law rule of treaty interpretation.[59] A simple reading of the terms of the ECT, in their ordinary meaning, confirms that all of the Contracting Parties are bound by all of the ECT's provisions, and have entered into obligations towards all other Contracting Parties. In other words, nothing suggests that the ECT does not apply in an intra-EU context.

33. There is nothing extraordinary about this. The EU and its Member States are parties to a range of mixed agreements which regulate, not only the relations between the EU and third countries, but also between EU Member States. UNCLOS is again an example. Many of its provisions (for example on territorial waters, exclusive economic zones, rights of passage, etc.) apply in an intra-EU context. This is implicitly confirmed by the *MOX Plant* case.[60] In that case, Ireland started UNCLOS proceedings against the United Kingdom for breach of a number of environmental provisions in UNCLOS. The Commission then brought a successful action against Ireland in the ECJ, on the basis that Ireland had sought to include violations of EU environmental legislation in the UNCLOS dispute. That constituted a breach of the autonomy of EU law, and of TFEU Article 344, which provides for the ECJ's exclusive jurisdiction over disputes between Member States on EU-law matters. However, at no

[57] *See e.g.*, Council of the Eur. Union, Decision No. 2017/13 (Oct. 26, 2016) [Ex. 19].
[58] EC Br. 6 [ECF No. 12].
[59] See Article 31(1) of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [Ex. 20] [hereinafter Vienna Convention], which is regarded as codifying the relevant customary international law rules.
[60] *Comm'n v Ireland*, No. C-459/03, ECLI:EU:C:2006:345 (E.C.J. 2006) [ECF No. 7-39].

point did the Court suggest that Ireland could not have brought an UNCLOS dispute against the United Kingdom on UNCLOS provisions which are entirely within Member State competence—for example a dispute on territorial waters. The Court's reasoning was carefully confined to UNCLOS provisions which are within EU competence and to Ireland's reliance on relevant EU legislation.

34. Where a mixed agreement does not in any way apportion the obligations it imposes to, respectively, the EU and the Member States, and does not contain a declaration of competences, the EU and the Member States would appear to be jointly responsible for the performance of the agreement. That at least is the prevailing academic opinion.[61] There is an alternative view, advocated by the European Commission, according to which the division of competences between the EU and its Member States should determine their international responsibility.[62] However, it is difficult to reconcile that approach with the relevant international-law principles, which are focused on actual conduct.[63] At any rate, in the context of the present case it is undisputed that Spain was responsible, and not the EU, for the actions which harmed the investors, including the Petitioners.

35. As regards the ECT specifically, there is no inherent conflict between the application of EU law, particularly internal market law, in the relations between EU Member States, and the application of the ECT. The objectives of the ECT are broadly aligned with the basic policy principles that guide EU economic regulation. The ECT provisions on investment protection are complementary to EU internal market law, in the sense that they provide an investor with additional protection. Between the Member States, the right of establishment, the freedom to provide services, and the free movement of

[61] *See* Eeckhout, *supra* note 1 [Ex. 14].
[62] *See* Gracia Marín Durán, *Untangling the International Responsibility of the European Union and its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model*, 28 Eur. J. Int'l L. 697, 702–03 (2017) [Ex. 21].
[63] *See, e.g.*, G.A. Res. 66/100, UN Doc. A/Res/66/100 annex, Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations art. 4 (Feb. 27, 2012) [Ex. 22].

capital offer significant guarantees against discriminatory treatment and unwarranted regulatory restrictions. Those basic freedoms also underpin sector-specific legislation. EU competition and State-aid policy ensure that distortions of competition caused by anti-competitive behavior or government subsidies are combatted. But none of this means that there is no room left for the ECT provisions, particularly those on investor protection. The additional protection of those provisions is complemented by strong remedies, particularly as regards financial compensation. Those remedies are arguably stronger than the ones EU law provides: it is only where a Member State has committed a "sufficiently serious" breach of EU law that an investor from another Member State is entitled to compensation.[64] It is not at all clear on what basis the Petitioners would have been able to obtain compensation in the Spanish courts pursuant to the EU-law principles governing Member State liability.

36. Thus, when the EC contends that the "EU Treaties do not permit the EU Member States (or, indeed, the EU itself) to modify or replace EU law by an international treaty such as the ECT,"[65] it fails to articulate in what way the ECT would constitute such modification or replacement. Moreover, the ECT, as an agreement binding on the EU, prevails over any inconsistent EU legislation or other acts of the EU institutions.[66]

37. As a matter of policy, it is of course open to the EU to advocate for the exclusive application of EU law in an intra-EU investment context. The EU can ask the Member States not to conclude *inter se* agreements, and to terminate existing BITs; and it could ensure that multilateral agreements on investment protection do not apply within the European Union, even when they are mixed. A simple disconnection clause—i.e. a clause confirming that the agreement does not create rights and

[64] *See e.g.*, *Francovich v Italian Republic*, Nos. C-6/90 & C-9/90, ECLI:EU:C:1991:428 (E.C.J. 1991) [ECF No. 7-28].
[65] EC Br. 8 [ECF No. 12].
[66] *See supra* ¶¶ 14–15.

obligations in the relations between the Member States—would achieve that objective. But the ECT does not contain such a clause. The glaring absence of a disconnection clause is striking and undermines the EC's interpretation of the obligations which the ECT imposes.[67]

## D. THE *ACHMEA* JUDGMENT AND THE ECT

38. In this Section, I address whether the *Achmea* Judgment precludes intra-EU arbitration under the ECT. In my view, it does not. First, the *Achmea* Judgment does not address the ECT. Secondly, even if the *Achmea* Judgment were to prohibit intra-EU arbitration under the ECT, that would not affect the consent to arbitration provided by EU Member States in Article 26 of the ECT under international law. It is international law which governs the jurisdiction of a tribunal established under the ECT. Therefore, any arbitration agreement formed between an EU Member State and an EU investor under the ECT would still be valid.

39. My analysis is divided as follows: *first*, I address the scope of the *Achmea* Judgment's findings; *second*, I discuss another—more recent—ECJ ruling, which has clarified the position of EU law on investor-State arbitration; *third*, in light of the findings of both that ruling and the *Achmea* Judgment, I explain my view that intra-EU arbitration under Article 26 of the ECT remains possible under EU law; and *fourth*, I explain why, even if EU law were to preclude intra-EU arbitration, the consent to arbitration provided by EU Member States in Article 26 of the ECT would remain valid (which is because international law—not EU law—is the applicable law).

### i. Scope of the ECJ's Findings in the *Achmea* Judgment

40. The *Achmea* Judgment is one of the latest ECJ rulings in a series in which the ECJ has imposed significant restrictions on the extent to which (a) the Member States can participate in, and (b) the EU can conclude an agreement setting up, systems of international dispute settlement which concern

[67] EC Br. 11–14 [ECF No. 12].

the interpretation or application of EU law.[68] Those restrictions are aimed at safeguarding what the court describes as the "autonomy of EU law": an autonomy both from the law of the Member States and from international law. This autonomy includes the protection of the essential characteristics of EU law and of the essential powers of the EU institutions.

41. As far as the ECJ itself is concerned, it has highlighted its own role of ensuring the observance of EU law.[69] The preliminary-rulings system is aimed at guaranteeing such observance, particularly in the law of the Member States. Pursuant to TFEU Article 267, any court or tribunal of a Member State may refer questions of interpretation or validity of EU law to the ECJ, and courts or tribunals against whose decisions there is no judicial remedy under national law are obliged to refer questions of EU law.

42. It is further worth noting that the principles of the direct effect and primacy of EU law oblige national courts and tribunals to give domestic effect to EU law. In addition to the preliminary-rulings procedure, TFEU Article 344 instructs the Member States "not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."[70]

43. In *Achmea*, the ECJ further expanded its case law on the autonomy of EU law. It is important to highlight that the case concerned a BIT between the Netherlands and Slovakia, concluded before Slovakia's accession to the EU; and that Article 8(6) of this BIT provides that the arbitral tribunal

[68] See in particular *In re Creation of Eur. Econ. Area*, Op. No. 1/91, ECLI:EU:C:1991:490 (E.C.J. 1991) [ECF No. 7-29]; *In re ECAA Agreement*, Op. No. 1/00, ECLI:EU:C:2002:231 (E.C.J. 2002) [Ex. 23]; *Ireland*, ECLI:EU:C:2006:345 [ECF No. 7-39]; *In re Unified Patent Convention*, Op. No. 1/09, ECLI:EU:C:2011:123 (E.C.J. 2011) [ECF No. 7-44]; *In re Accession to the ECHR*, Op. No. 2/13, ECLI:EU:C:2014:2454 (E.C.J. 2014) [ECF No. 7-47].
[69] *See* TEU art. 19(1) [ECF No. 7-14].
[70] TFEU art. 344 [ECF No. 7-13].

"shall decide on the basis of the law", taking into account *inter alia* "the law in force of the Contracting Party concerned" and any "other relevant agreements between the Contracting Parties."[71]

44. In the *Achmea* Judgment, the ECJ first reiterated a number of general principles and past judicial statements about the autonomy of EU law and the principle of mutual trust. It then applied those principles to the BIT in issue, and divided its analysis in three parts.

45. First, and crucially, the ECJ examined whether an arbitral tribunal set up pursuant to Article 8 of the BIT was liable to rule on the interpretation or application of EU law.[72] It found that EU law is both "the law in force of the Contracting Party" (as EU law is an integral part of the domestic laws of the Member States) and constitutes an agreement between the Parties. It followed that "on that twofold basis the arbitral tribunal . . . may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital."[73] This sentence is particularly significant, in light of the differences between the definition of the applicable law in the BIT at issue and that definition in the ECT. I return to that difference further below. The insertion of the adverb "indeed" is noteworthy, as it shows that the ECJ was particularly concerned about a non-EU tribunal *applying* EU law to the relations between two Member States, and outside the EU judicial system.

46. In the second part of its reasoning, the ECJ established that a BIT arbitral tribunal is not situated within the EU judicial system: it is not a court or tribunal of the Member States, capable of making a reference to the ECJ pursuant to TFEU Article 267.[74]

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[71] *Achmea*, ECLI:EU:C:2018:158, ¶ 4 [ECF No. 7-51].
[72] *Id.* ¶¶ 39–42.
[73] *Id.* ¶ 42.
[74] *Id.* ¶¶ 43–49.

47. In the third part, the ECJ examined to what extent an arbitral award giving effect to the BIT was "subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling."[75] The ECJ established that this was not the case, in light of the limits which German arbitration law imposed on such review in the case at hand. The ECJ concluded by finding that the dispute settlement system of this BIT could not guarantee the full effectiveness of EU law. But the ECJ did not stop there. It added two further paragraphs, which are crucial for the present case.

48. First, the ECJ recalled the principle that "an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the [ECJ], is not in principle incompatible with EU law."[76] The EU's external competence "necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected."[77]

49. Second, and this finding is worth quoting in full:

> In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation . . . .[78]

[75] *Id.* ¶ 50.
[76] *Id.* ¶ 57.
[77] *Id.*
[78] *Id.* ¶ 58.

50. In other words, the ECJ made a clear distinction between intra-EU BITs such as the one in issue in *Achmea*, and a system of dispute settlement set up by an agreement which the EU itself has concluded. That distinction means that the court sought to confine its ruling to intra-EU BITs between Member States, and did not rule on an agreement like the ECT. It cannot sensibly be argued that, in making that distinction, the ECJ was only considering investment protection agreements between the EU and third countries, and not agreements with intra-EU application: the ECJ's own Advocate General had pointed out in his opinion in *Achmea* that the ECT applies in an intra-EU context.[79] The court was therefore clearly aware of the existence and potential intra-EU application of the ECT and had the opportunity to address it. It nevertheless distinguished Member State BITs from agreements concluded by the EU.

51. I agree with the *Watkins* tribunal as to the significance of this.[80] It is therefore in my opinion wholly incorrect to state, as do Spain, the EC, and Professor Hindelang, that "there is no colorable

[79] Opinion of Advocate Gen. Wathelet, *Slowakische Republik v Achmea BV*, No. C-284/16, ¶ 43 (E.C.J.) [Ex. 24]. I further note that Spain, the EC, and Professor Hindelang place undue weight on Advocate General Henrik Saugmandsgaard Øe's obiter dictum. *See* Opinion of Advocate General Øe, *Anie v Ministero dello Sviluppo Economico, Gestore dei Servizi Energetici (GSE) SpA*, Nos. C-798/18, C-799/18, ¶ 93 n.55 (E.C.J.) [ECF No. 7-71]. First, an Advocate General's opinion is not binding and does not reflect the position of the ECJ unless the ECJ expressly adopts such opinion in its decision in a particular matter. This *obiter dictum* can bear even less of the weight Spain seeks to place upon it because the *Anie* dispute is an *intra-Italy* dispute not governed by the ECT, as Advocate General Saugsmansgaard Øe acknowledged in the same *dicta*. *Id.* The Italian court in that case asked the ECJ to clarify whether a particular domestic law was compatible with EU law, but did not seek any guidance concerning the enforceability of Article 26 of the ECT. Accordingly, Advocate General Saugsmansgaard Øe's obiter dictum concerning Article 26 of the ECT was wholly unnecessary. The Advocate General did not offer any reasons for this obiter dictum, and, with due respect, misconstrued the findings in *Achmea* as he applied them to the ECT. The Advocate General considered that ECT Article 26 would "not [be] applicable to intra-Community disputes." *Id.* However, in *Achmea* the ECJ did not decide that intra-EU arbitration was "not applicable"; it found that *EU* law precluded such arbitration. Accordingly, the ECJ's judgment was confined to EU law, whereas the Advocate General's statement suggests that EU law governs the interpretation and effect of the ECT under international law.

[80] *Watkins Holdings S.à.r.l.*, No. ARB/15/44, ¶ 221 [ECF No. 1-2].

basis for distinguishing between the *Achmea* rule as applied to tribunals formed under the ECT."[81] It is further remarkable to see that neither Spain, nor the EC, nor Professor Hindelang even mention the express distinction which the ECJ made in *Achmea*, let alone attempt to explain it.

52. The distinction is in my view explained, not just as an exercise in judicial economy or a desire to confine the ruling to the facts of *Achmea*, but by the ECJ's emphasis on mutual trust. Where the Member States set up a system of dispute settlement which sits outside the EU Treaties and is nevertheless capable of interpreting and "*indeed applying*" EU law, they undermine the principle of mutual trust between them. They undermine the principle that they must trust their respective domestic courts and tribunals to guarantee the full effectiveness of EU law. Where the EU itself is a contracting party to an agreement it takes a conscious decision to participate in, and to be bound by a new dispute-settlement system. That is not to say that this system cannot be contrary to the autonomy of EU law. However, this does mean that the ruling in *Achmea* cannot be extended to the ECT, in the absence of a further ECJ ruling which is focused on the particular characteristics of that agreement. There are moreover other, highly relevant differences between the *Achmea*-type BIT and the ECT, including, for example, the law applicable to disputes under those treaties. I address those differences further below.

53. It is also important to note that in *Achmea* the ECJ did not invalidate the Netherlands-Slovakia BIT, contrary to what Spain suggests.[82] What it established was that "Articles 267 and 344 must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement . . . ."[83] As analyzed above, the ECJ's jurisdiction is limited to EU law, and the ECJ fully recognized this in the formulation of its final ruling. The ECJ is incapable of making findings under international law as to the validity of an international agreement between two

[81] Spain Br. 31 [ECF No. 7]; EC Br. 15, 22 [ECF No. 12]; Hindelang Declaration ¶ 56 [ECF No. 7-5].
[82] Spain Br. 12 [ECF No. 7].
[83] *Achmea*, ECLI:EU:C:2018:158, ¶ 62 [ECF No. 7-51].

Member States. In fact, the EC also recognizes that "the Court of Justice in *Achmea* was concerned with the interpretation of *EU law* . . . ."[84]

**ii. Opinion 1/17 on CETA and the ECT**

54. The above analysis of the distinction in *Achmea* between a BIT between Member States to which the EU is not a party, and an investment agreement concluded by the EU, is wholly confirmed and strengthened by the recent ECJ ruling in Opinion 1/17 on the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the EU. That opinion (pursuant to TFEU Article 218(11)[85]) was requested by Belgium, which raised a number of concerns about the compatibility of CETA's investment-protection provisions, and the dispute-settlement system which CETA sets up, with EU law. One of those concerns related to the *Achmea* issue: the extent to which a CETA tribunal could be called upon to interpret or apply EU law.

55. CETA Article 8.31 defines the applicable law. Article 8.31.1 provides that CETA must be applied, "as interpreted in accordance with the Vienna Convention on the Law of Treaties . . . and other rules and principles of international law applicable between the Parties."[86] Article 8.31.2 clarifies:

> The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or authorities of that Party.[87]

56. Belgium argued that these provisions were inadequate for safeguarding the autonomy of EU law.[88] It submitted that a CETA tribunal would still, when ruling on whether an EU measure is

[84] EC Br. 15 [ECF No. 12] (emphasis in original).
[85] *Supra* ¶ 18.
[86] Op. No. 1/17, ECLI:EU:C:2019:341, ¶ 21 [Ex. 9].
[87] *Id.*
[88] *Id.* ¶ 48.

compatible with CETA, "be compelled to interpret the effect of that measure," and would not necessarily be able to rely on a previous ECJ interpretation.[89] Further, a CETA tribunal would be empowered "to engage in the assessment of issues of substantive law that involve . . . EU primary law."[90] Belgium further pointed out that a CETA tribunal could not seek a preliminary ruling from the ECJ.

57. The ECJ did not accept Belgium's objections. Its reasoning shows the limits of its ruling in *Achmea*, in the sense that it does not extend to agreements which the EU itself concludes, with third countries, provided that the tribunals set up by those agreements do not have the power to interpret and apply EU law. As further analyzed below, the ECT is much more similar to CETA than to the Netherlands-Slovakia BIT in issue in *Achmea*.

58. In Opinion 1/17, the ECJ first reiterated the relevant principles, revolving around the concept of the autonomy of EU law. It then accepted that the CETA dispute-settlement mechanism "stands outside the EU judicial system."[91] However, that "does not mean, in itself, that that mechanism adversely affects the autonomy of the EU legal order."[92]

59. The ECJ started its analysis of why that is the case by pointing out that the jurisdiction of the EU courts and tribunals (the ECJ itself and Member State courts, as referred to in TEU Article 19) to interpret and apply an agreement concluded by the EU "does not take precedence over either the jurisdiction of the non-Member States with which those agreements were concluded or that of the international courts and tribunals that are established by such agreements."[93] Even if such agreements

[89] *Id.*
[90] *Id.* ¶ 49.
[91] *Id.* ¶ 113.
[92] *Id.* ¶ 115.
[93] *Id.* ¶ 116.

may be the subject of preliminary references, "they concern no less those non-Member States and may therefore also be interpreted by the courts and tribunals of those States."[94]

60. The ECJ then added that it is "precisely because of the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations that it is open to the Union . . . to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties."[95] EU law therefore does not preclude the setting up of CETA tribunals (or indeed the CETA appellate tribunal). But on the other hand, "since those Tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework."[96] These findings further articulate the ECJ's fundamental acceptance of EU participation in international agreements providing for binding dispute settlement.

61. In a subsequent section of the Opinion, the ECJ established that the CETA tribunals do not have jurisdiction to interpret and apply rules of EU law other than the provisions of CETA itself.[97] It first pointed out that a CETA tribunal does not have jurisdiction to determine the legality of a measure under the domestic law of a party.[98] In that respect, CETA was distinguished from the draft agreement which was in issue in Opinion 1/09, which included directly applicable Community law (now EU law) in the applicable law. It was also distinguished from the investment agreement at issue in *Achmea*: "that agreement established a tribunal that would be called upon to give rulings on disputes that might concern

[94] *Id.* ¶ 117.
[95] *Id.*
[96] *Id.* ¶ 118.
[97] *Id.* ¶¶ 120–36.
[98] *Id.* ¶ 21.

the interpretation or application of EU law."[99] And the ECJ also recalled that *Achmea* concerned an agreement between Member States, and this must be distinguished from agreements concluded "between the Union and a non-Member State."[100] The principle of mutual trust applies between the Member States, and it implies that Member States accept that all the other Member States comply with EU law, including the right to an effective remedy before an independent tribunal. That principle of mutual trust is not, however, "applicable in relations between the Union and a non-Member State."[101]

62. The ECJ then accepted the limitations which CETA places on the extent to which a CETA tribunal may take the domestic law of the Parties (and therefore EU law) into account.[102] The relevant section is worth quoting in full:[103]

> Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.[104]

63. The ECJ further found that, as the jurisdiction of the CETA tribunals and appellate tribunal is limited to the interpretation of CETA, no provision needs to be made for preliminary

[99] *Id.* ¶ 126.
[100] *Id.* ¶ 127.
[101] *Id.* ¶ 129.
[102] *Id.* ¶ 21.
[103] *Id.* ¶ 131.
[104] *Id.*

references to the ECJ.[105] It also found that it is consistent with EU law for CETA not to allow for any re-examination of awards by domestic courts (including the ECJ), and not to allow the investor to bring parallel or subsequent proceedings before such courts.[106]

64. The ECJ subsequently analyzed other objections against CETA, discarding all of them, but those parts of the opinion are less relevant to the issues that arise in the present proceedings.

65. The ECT is analogous to CETA in the following respects.

66. First, the ECT is, like CETA, an agreement between the EU and one or more third countries. The ECT and CETA are both mixed agreements, with the EU and the Member States as contracting parties. There is a difference here, because CETA is an essentially bilateral agreement, "between Canada, of the one part, and the European Union and its Member States, of the other part."[107] I have been conscious of that difference in drawing conclusions from the ECJ's opinion.

67. Second, the ECT defines the applicable law in an analogous way. ECT Article 26(6) makes no reference whatsoever to the domestic laws of the Parties, nor to other treaties or agreements applicable between the Parties. Its formulation is more succinct than the CETA provisions, but the underlying principle is clearly the same: the jurisdiction of an ECT tribunal is limited to interpreting and applying the ECT. That follows from the phrase: "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[108] The "issues in dispute" are, according to Article 26(1), investment disputes "concern[ing] an alleged breach of an obligation . . . under Part III" of the ECT.[109] EU law says nothing on the interpretation of the obligations under Part III of the ECT. The only rules and principles of international law "applicable" to determining a dispute

[105] *Id.* ¶ 134.
[106] *Id.* ¶ 135.
[107] Council of the Eur. Union, Decision No. 2017/13 (Oct. 26, 2016) [Ex. 19].
[108] Energy Charter Treaty art. 26(6) [ECF No. 1-4].
[109] *Id.* art. 26(1).

under the ECT are general principles and customary rules of international law, such as the customary international law rules on treaty interpretation. EU law also cannot have been intended to form part of the "applicable rules and principles of international law," because it is not binding on the non-EU Contracting Parties.

68. Opinion 1/17 clearly shows that the EC's submission in these proceedings that 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"[110] is far too wide. The CETA tribunals will be able to take EU law into account, as an issue of fact, in the same way as an ECT tribunal.

**iii. Article 26 of the ECT Is Valid as a Matter of EU Law**

69. The ECJ judgment in *Achmea* establishes that arbitration provisions in BITs between Member States "such as" Article 8 of the Netherlands-Slovakia BIT are contrary to EU law. The judgment applies *erga omnes*, and courts and tribunals in the EU Member States need to give effect to this finding, in any cases involving such BITs. However, the ECJ clearly distinguished these kinds of BITs, which do not have the EU itself as a contracting party, from agreements which do. The clear and express distinction which the ECJ made in *Achmea* is confirmed by Opinion 1/17, in which it accepted the lawfulness of the CETA dispute-settlement system. CETA is a mixed agreement, like the ECT.

70. To this date, the ECJ has not been asked to rule on the validity of the act by which the EU concluded the ECT.[111] Acts of the EU institutions can be annulled or declared invalid only by the EU

[110] EC Br. 4 [ECF No. 12] (emphasis added).

[111] What the ECJ has now been asked, by Belgium, is whether the envisaged modernization of the ECT should preclude intra-EU arbitration. *See* Press Release, Kingdom of Belgium, Belgium Requests an Opinion on the Intra-European Application of the Arbitration Provisions of the Future Modernised Energy Charter Treaty (Dec. 3, 2020), https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions. The request was made pursuant to TFEU Article 218(11) (*see supra* ¶ 18). If the ECJ were to rule in response that intra-EU arbitration under the ECT is incompatible with EU law, the EU and the Member States would need to renegotiate the ECT in such a way as to exclude such intra-EU arbitration. If such renegotiation were to fail, the EU

General Court (the "GC") and by the ECJ.[112] Annulment actions need to be brought within a two-month period after their adoption,[113] and that period has obviously expired in the case of the Council Decision concluding the ECT.[114] However, any court or tribunal of a Member State may at any time ask the ECJ whether a particular act is invalid, and the ECJ could therefore still be asked to rule on the validity of the ECT under the EU Treaties. But it is important to add that in the *Foto-Frost v Hauptzollamt Lübeck-Ost*[115] judgment the ECJ established that it and the General Court have sole authority to declare an EU act invalid; Member State courts cannot make such a declaration.[116] There is therefore a presumption of validity. It is in my opinion most remarkable that, in the present proceedings, this Court in a non-EU Member State is, effectively, asked to do what a court in a Member State could never do, on its own: to rule on the invalidity of the ECT under EU law.

71. The above means that there is no judicial authority whatsoever, in EU law, in support of the proposition that the ECT investment-arbitration provisions are invalid insofar as intra-EU investments are concerned, or that such provisions are precluded.

72. How the ECJ would rule on the validity of the ECT's provisions on investment arbitration, insofar as they apply between Member States, is a matter of conjecture. In my opinion, the court would be unlikely to issue a ruling of invalidity, for the following reasons.

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would need to withdraw from the ECT. However, the ECJ's opinion would not, of itself, invalidate the act through which the EU concluded the ECT, and cannot affect the validity of the ECT under international law.

[112] The General Court has jurisdiction over certain types of direct actions for annulment; its judgments can be appealed to the ECJ. Together the GC and the ECJ form the Court of Justice of the European Union ("CJEU") (although there is variable use of this terminology: the abbreviation CJEU is often used for the ECJ).

[113] *See* TFEU art. 263 [ECF No. 7-13].

[114] *See* Council of the Eur. Union & Comm'n of the Eur. Communities, Decision No. 98/181/EC (Sept. 23, 1997) [Ex. 25].

[115] *Foto-Frost v Hauptzollamt Lübeck-Ost*, No. C-314/85, ECLI:EU:C:1979:295 (E.C.J. 1979) [Ex. 26].

[116] *Id.* ¶ 17.

73. First, the ECT defines the applicable law in essentially the same way as does CETA. ECT investment disputes do not extend to any violations of EU law, because the ECT does not include agreements between the parties, or the parties' domestic law, in the applicable law.[117] An ECT tribunal must therefore treat EU law in the same way as a CETA tribunal: as a factual matter.

74. This is confirmed by the reference, in ECT Article 26(6), to "the issues in dispute," which constitutes a cross-reference to Article 26(1), which is limited to "breach of an obligation under Part III," i.e., the ECT provisions on Investment Promotion and Protection.[118] As explained above, EU law is not relevant to the determination of whether there has been a violation of Part III of the ECT. As Professor Bjorklund points out in her Expert Declaration in a comparable case, the extension of the scope of the applicable law under Article 26(6) to any agreements between two EU Member States would lead to the absurd finding that any and all such agreements would need to be taken into account—not just the EU Treaties.[119] That is clearly not what the ECT Contracting Parties intended, nor is it the practice of ECT investment tribunals.

75. Tribunals have looked at EU law in cases where their very jurisdiction was challenged (and so did the *Watkins* tribunal).[120] It cannot be the case, however, that a challenge to a tribunal's jurisdiction as being contrary to EU law is sufficient to conclude that any decisions by such a tribunal violate EU law, because they interpret or apply it. That would mean that, in any investment cases

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[117] I leave to one side the question whether, even if this finding were wrong, any use of "agreements between the parties" would need to be construed as the parties to the ECT rather than the parties to the dispute. In the former case, the EU Treaties would of course not constitute applicable law either, as they do not bind the ECT Contracting Parties that are not EU Member States.

[118] See the reasoning of the tribunal in *Vattenfall AB v. Federal Republic of Germany*, No. ARB/12/12, Decision on *Achmea* Issue, ¶ 116 (ICSID Aug. 31, 2018) [Ex. 27].

[119] Professor Bjorklund mentions human rights law, the WTO, and UNCLOS as examples. *See* Expert Declaration of Andrea K. Bjorklund, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, No. 1:18-CV-01686, ¶ 122 (D.D.C. Jan. 24, 2019).

[120] *Watkins Holdings S.à.r.l.*, No. ARB/15/44, at 39–63 [ECF No. 1-2].

involving the EU or any of its Member States, it would be sufficient for these parties to challenge the tribunal's jurisdiction as being contrary to EU law for such a violation becoming the necessary outcome. Such jurisdictional circularity or tautology can never be a good-faith interpretation of the relevant international law provisions.

76. Moreover, and in line with the analysis above, there is in my opinion no inherent or necessary incompatibility between the ECT provisions, on the one hand, and EU internal market and EU energy law, on the other. Both sets of provisions aim at free and open markets, and at undistorted competition. Spain, the European Commission, and Professor Hindelang are unable to point to any actual conflicts. The EC appears to suggest that the investment benefits which Petitioners received in Spain, prior to the challenged Spanish measures which curtailed those benefits, constituted unlawful State aid.[121] However, the EC never issued a State-aid decision on the 2007 Spanish regime. It is only in its State-aid decision on the 2014 regime that the EC included some observations, not on the 2007 regime, but on arbitral awards that may be rendered under the ECT as a result of the modification of that regime.[122] For the reasons set out below,[123] those observations are wholly inadequate, and do not constitute a proper EC State-aid decision.

77. Nor is there an inherent or necessary incompatibility between the remedies available under the ECT and those which EU law offers. As mentioned above, EU investors may claim damages for a Member State's sufficiently serious breach of EU law, including the TFEU provisions on the right of establishment or the free movement of capital. An ECT tribunal may of course also award compensation. It is moreover remarkable that Professor Hindelang points out, rightly, that even the

[121] EC Br. 16 [ECF No. 12].
[122] European Comm'n, SA.40348 (2015/NN), Spain Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, No. C(2017)7384 (Nov. 11, 2017) [ECF No. 7-54].
[123] *See infra* Part G.

European Court of Human Rights ("ECtHR") may award compensation in an investment case.[124] The ECtHR is not an EU institution, and the convention which it enforces has been concluded by the EU Member States, together with non-Member States, but not by the EU itself. Professor Hindelang therefore appears to accept intra-EU investment dispute settlement in Strasbourg by the ECtHR, but not in the framework of the ECT, notwithstanding the fact that the EU is itself an ECT Contracting Party, and is *not* a party to the European Convention.

78. Nor is it easy to see in what way the non-applicability of the ECT in an intra-EU context would make sense from the perspective of avoiding any conflicts between the ECT's investment protection provisions and EU law. The ECT would continue to bind the EU and its Member States in relation to claims by investors from non-EU Contracting Parties. Those claims could give rise to the exact same conflict issues, e.g. with EU State-aid law, as any intra-EU claims. The nationality of an investor plays no role here. Moreover, an investor from an EU Member State, such as a company which has invested in another Member State, may well be owned or controlled by a national from a non-EU ECT Contracting Party. To illustrate this further, if the Dutch Petitioners were owned or controlled by such a non-EU national from an ECT Contracting Party, any claims by the latter investor would presumably not come within the intra-EU non-application—even if, in substance, the claim would be identical to the one which led to the present Award.

**iv. Under International Law, Article 26 of the ECT Is Valid Regardless of Whether It Complies with EU Law**

79. Even if there were a conflict between the EU Treaties and the ECT (which, as I have explained above, there is not), that would not affect the validity of an EU Member State's offer to

[124] Hindelang Declaration ¶ 42 [ECF No. 7-5].

arbitrate under Article 26(3) of the ECT. First, as I have explained, the *Achmea* ruling cannot change the fact that the ECT is still in force.

80. Secondly, EU law cannot affect the application of the offer to arbitrate extended by Contracting Parties to the ECT in Article 26(3) of that treaty. EU law is simply not applicable to that offer. As explained above, the applicable law provision in the ECT (Article 26(6)) does not address EU law. Even if it did, however, it is relevant only to the determination of "issues in dispute" which, as I have also noted, constitutes a cross-reference to Article 26(1), and, as such, is limited to "breach of an obligation under Part III," i.e. the ECT provision on Investment Promotion and Protection.[125] Article 26(3) is in Part V of the ECT, on the "Settlement of Disputes Between an Investor and a Contracting Party."[126] Article 26(6) therefore has no relevance to it.[127]

81. Thirdly, in the event of any conflict between the ECT and EU law (deriving from the EU Treaties), the ECT would prevail.

82. Customary international law rules govern the resolution of conflicts between treaties. These are enshrined in Article 30 of the Vienna Convention. The general rule is: (i) that the provisions of the later treaty prevail (the *lex posterior* principle),[128] unless (ii) the treaties themselves indicate which one should take precedence.[129] In the case of the ECT and the EU Treaties it is difficult to see how this rule could favor the EU Treaties. The ECT contains an express conflict rule in Article 16(2), which states that where two or more Contracting Parties have entered into another treaty, whose terms "concern the subject matter of Part III or V of this Treaty," the terms of Part III and Part V prevail, provided they

[125] *Supra* ¶ 67.
[126] Energy Charter Treaty art. 26 [ECF No. 1-4].
[127] In the absence of any relevant choice-of-law clause, any questions regarding the interpretation of Article 26 would be considered applying international-law principles of treaty interpretation.
[128] Vienna Convention art. 30(3), (4)(a) [Ex. 20].
[129] *Id.* art. 30(2).

are "more favourable to the Investor or Investment."[130] As explained above, I disagree that the EU Treaties (or EU law) conflict with Part III or Part V of the ECT (i.e. that there is subject-matter coincidence). If Spain and the EC were correct as to their interpretation of the *Achmea* Judgment, and there were such a conflict, EU law is clearly not more favorable to the investor, as it removes the opportunity for intra-EU arbitration.

83. The EC makes two arguments against the interpretation of Article 16 that I have just described: first, it claims that Article 16 is not, in fact, a conflict rule;[131] and second, it contends that, even if it were, it would need to yield to the primacy of EU law.[132] Both of these arguments are unfounded.

84. The first argument is undermined by the clear terms of Article 16 of the ECT. As to the second argument, there is no rule that EU law prevails, or has primacy, over treaties concluded between EU Member States. Even if there were, it would not take precedence over Article 16 of the ECT.

85. Professor Hindelang,[133] Spain[134] and the EC[135] all argue that EU law prevails, or has primacy, over treaties concluded between EU Member States. There is, however, no authority for that proposition.

86. First, the ECJ has never used the term "primacy" for any such conflicts. As described above, the ECJ's jurisdiction is limited to matters of EU law. All parties in these proceedings agree that the EU Treaties form part of international law, even if according to the ECJ they set up an autonomous legal order. The ECJ is the ultimate interpreter of those EU Treaties, and needs to ensure that they are

[130] Energy Charter Treaty art. 16(2) [ECF No. 1-4].
[131] EC Br. 22 [ECF No. 12].
[132] *Id.*
[133] Hindelang Declaration ¶ 25 [ECF No. 7-5].
[134] Spain Br. 11, 28–29 [ECF No. 7].
[135] EC Br. 22–23 [ECF No. 12].

properly enforced. But the ECT does not give the ECJ jurisdiction to rule on any conflicts between its provisions and the EU Treaties, under international law, as opposed to EU law. The ECJ is, for the purpose of interpreting and applying the ECT, simply not an international court. It has the function of a supreme domestic court, no more. It is, for purposes of the ECT, the highest court of one of the Contracting Parties, not the court tasked with enforcing the treaty between the Contracting Parties.

87. The ECJ has never, to the best of my knowledge, made any statements to the opposite effect—in relation to the ECT, or to any other agreement to which the EU is a party, or to any agreements between EU Member States. It has in fact confirmed the limits on its own jurisdiction, in the seminal *Kadi* case, on the relationship between the UN Charter and EU law. That case (which, as I mention above, I was involved in) concerned a UN Security Council Resolution, imposing sanctions on Mr. Kadi post 9/11, for purposes of counterterrorism. The ECJ established that Mr. Kadi's fundamental rights under EU law had been violated by the EU's attempt to implement the sanctions. Crucially, however, it stated that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a [UN] resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."[136]

88. Instead, the ECJ characterizes any conflicts between a Member State's international commitments and EU law as a breach of EU law, thereby imposing on the relevant Member State an obligation to remove that breach,[137] for example by renegotiating the agreement or denouncing it.

89. By contrast, the "principle of the primacy of EU law" (which does exist as a principle under EU law) is exclusively concerned with the relationship between EU law and the *domestic* laws of

[136] *Kadi*, ECLI:EU:C:2008:461, ¶ 288 [Ex. 42].
[137] *See supra* ¶ 17.

the Member States. That is clear from the block citation from *Simmenthal II* provided in Professor Hindelang's opinion.[138]

90. Neither Professor Hindelang nor Spain points to any international-law authorities for their proposition that the primacy of EU law is a conflict rule applicable to resolve conflicts between treaties to which EU Member States are parties.[139]

91. The EC refers to one sentence in an International Law Commission report on fragmentation, which states that: "[t]he EC Treaty takes absolute precedence over agreements that Member States have concluded between each other."[140] Read in context, however, this addresses treaties between EU Member States only, and the effect of TFEU Article 351. It does not refer to a general rule of the primacy of the EU treaties over any other treaties to which EU Member States are parties. The ECT is, of course, an agreement concluded between EU Member States and other States, and the EU. In this particular case, TFEU Article 351 is inapplicable because that provision addresses treaties concluded between EU Member States and non-EU Member States before 1958, or, for EU Member States that have acceded to the EU, before the date of their accession.[141] The ECT was concluded by Spain in 1998, *after* it acceded to the EU in 1986.

[138] Hindelang Declaration ¶ 22 [ECF No. 7-5], referring to *Administrazione delle Finanze dello Stato v Simmenthal S.p.A.*, No. C-106/77, ECLI:EU:C:1978:49 (E.C.J. 1978) ("*Simmenthal II*").
[139] Spain Br. 28 [ECF No. 7]; Hindelang Declaration ¶¶ 25–28 [ECF No. 7-5].
[140] Int'l Law Comm'n Study Grp., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682, ¶ 283 (2006) [ECF No. 7-60]; EC Br. 21 [ECF No. 12].
[141] *See supra* ¶ 25.

92. The EC's reference to the award in *Electrabel S.A. v. Hungary*[142] is also inapposite. The paragraph of the award cited by the EC again does not confirm a general conflict-of-treaties principle based on the primacy of EU law. It refers to the operation of TFEU Article 351.[143]

93. I also do not accept the EC's argument that the EU-law primacy principle (which in any event, as I have explained, does not apply as a rule on the conflict of treaties) is later in time than the ECT;[144] at least not in this case. The EC refers to a declaration attached to the 2007 Lisbon Treaty (which is one of the EU Treaties), but that declaration is simply a confirmation that EU law (adopted on the basis of the EU Treaties) has primacy over the laws of the Member States. That rule is one of the oldest rules of EU law; it was established in the 1964 *Costa v Enel*[145] case. As noted above, Spain acceded to the EU in 1986; the principle of the primacy of EU law has, therefore, been binding on it since then. The Netherlands and Luxembourg are of course founding EU Member States. The ECT entered into force in 1998, and Spain was an ECT Contracting Party at that time. Thus, if the EU law primacy principle were to conflict with Article 16 of the ECT, the latter would prevail according to the *lex posterior* principle.

94. The Commission cites *Electrabel* in support of its position.[146] Again, however, the tribunal's reasoning on this issue does not apply here. First, as noted above, the tribunal was addressing Article 351 of the TFEU, not a general rule of EU-law primacy. Secondly, in *Electrabel*, the EU Treaties were later-in-time than the ECT, as Hungary, the respondent in that case, joined the EU after having become a Contracting Party to the ECT. In contrast to this case, therefore, it was a case in which the *lex posterior* principle pointed towards EU law.

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[142] No. ARB/07/19 (ICSID Nov. 25, 2015) [Ex. 28], cited in EC Br. at 21 [R. 12].
[143] I would note that, elsewhere in its Award, the *Electrabel* tribunal concluded that EU law did not prevent it from exercising its functions under Article 26 of the ECT. *See Electrabel*, No. ARB/07/19, ¶¶ 4.166, 5.32 [Ex. 28].
[144] EC Br. 23 [ECF No. 12].
[145] No. C-6/64, ECLI:EU:C:1964:66 (E.C.J. 1964) [ECF No. 7-21].
[146] EC Br. 21 [ECF No. 12].

## E. THE ACHMEA JUDGMENT HAS NO EFFECT ON THE VALIDITY OF THE ARBITRATION AGREEMENT BETWEEN THE PETITIONERS AND SPAIN

95. For the reasons explained above, I do not consider that the *Achmea* Judgment has any bearing on intra-EU arbitration under the ECT. As such, it has no effect on the validity of the arbitration agreement concluded between the Petitioners and Spain, and therefore on the enforcement of the Award which is the subject of these proceedings.

## F. THE EC COMMUNICATION AND THE FIRST DECLARATION HAVE NO EFFECT ON THE ECT'S INTERPRETATION

96. In this section, I address the effect, if any, that the following two communications have on the interpretation to be given to the ECT:

(i) the EC Communication issued to the European Parliament and European Council on July 19, 2018, on intra-EU investment.[147] In that communication, the EC expressed its opinion that the reasoning of the ECJ in the *Achmea* Judgment applied to the dispute resolution clause of the ECT;[148] and

(ii) the First Declaration, which was signed on January 15, 2019, by twenty-two EU Member States concerning the consequences of the *Achmea* Judgment.[149] The First Declaration expressed the view that, in light of the *Achmea* Judgment, were the ECT to contain an investor-State arbitration clause applicable between Member States, it "would have to be disapplied."[150] The twenty-two EU Member States agreed to inform tribunals in all pending intra-EU investment arbitration proceedings under the ECT of that position.[151] In addition, they agreed to "discuss without undue delay whether any additional steps are

[147] Eur. Comm'n, *supra* note 7 [ECF No. 7-55].
[148] *Id.* at 4.
[149] Declaration of Twenty-Two EU Member States [ECF No. 7-57].
[150] *Id.* at 2.
[151] *Id.* at 3 ¶ 1.

necessary to draw consequences from the Achmea judgment in relation to the intra-EU application of the Energy Charter Treaty."[152]

97. For the reasons explained above, I consider the views expressed in the EC Communication and the First Declaration to go far beyond the ECJ's findings in the *Achmea* Judgment.[153] I have seen that Spain claims that those views must be given effect.[154] I understand Spain's argument to be that, in light of the EC Communication and the First Declaration, intra-EU arbitration under the ECT should be interpreted as being precluded. I disagree with that proposition. In my opinion, the EC Communication and the First Declaration have no such effect.[155]

98. The views of State signatories to a treaty on the interpretation of that treaty may be taken into account in the interpretation of a treaty.[156] However, they need to be agreed by all the parties to that treaty.[157]

99. Neither the EC Communication nor the First Declaration represent interpretative declarations on the ECT agreed by all parties to the ECT. The EC Communication is nothing more than a position paper, presenting the EC's opinion on the *Achmea* Judgment to other organs of the EU. It

[152] *Id.* at 4 ¶ 9.
[153] This was also the finding of the tribunal in *Eskosol S.p.A. v. Italian Republic*, No. ARB/15/50 (ICSID May 7, 2019) [Ex. 31].
[154] Spain Br. 12–13 [ECF No. 7].
[155] Spain cites various U.S. authorities in support of its analysis. I am not qualified to comment on those. My view is from the perspective of international and EU law.
[156] Pursuant to customary international law rules of treaty interpretation, as enshrined in Vienna Convention Articles 31(2) and 31(3)(a). They remain, however, only a factor to be considered in the treaty's interpretation. *See* Int'l Law Comm'n, Report of the International Law Commission, U.N. Doc. A/66/10/Add.1, at 560 (2011) [Ex. 29].
[157] Vienna Convention art. 31(2), (3)(a) [Ex. 20]; *see also* Int'l Law Comm'n, Guide to Practice on Reservations to Treaties ¶ 4.7.3. (2011) [Ex. 30] ("An interpretative declaration that has been approved by *all* the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.").

does not even represent the view of one Contracting Party to the ECT,[158] let alone all the Contracting Parties.

100. The First Declaration is of the same nature as the EC Communication. It presents the views of a group of EU Member States on the *Achmea* Judgment. It has not been agreed by all EU Member States,[159] let alone all parties to the ECT. Accordingly, neither the EC Communication nor the First Declaration is relevant in interpreting the ECT.[160]

## G. PAYMENT OF THE AWARD WOULD NOT VIOLATE EU LAW

101. The EC claims that the Award in issue before this Court constitutes unlawful State aid,[161] and that as such Spain is prohibited by EU law from paying it without authorization from the EC. Professor Hindelang supports that claim.[162] I disagree. In order to constitute unauthorized State aid, the Award must first constitute State aid which requires authorization. There is no authority confirming that that is the case, nor could there be because the Award does not meet the definition of a State aid under EU law.

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[158] The EU is a party to the ECT; the EC (which is merely an organ of the EU) is not.

[159] Indeed, I am aware that six other EU Member States have issued declarations on the *Achmea* Judgment in which they have either declined to comment on its significance for the ECT, or rejected any significance entirely. *See* Declaration of the Representatives of the Governments of the Republic of Finland, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Slovenia & the Kingdom of Sweden on the Enforcement of the Judgment of the Court of Justice in *Achmea* & on Investment Protection in the European Union (Jan. 16, 2019) [ECF No. 7-58]; Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* & on Investment Protection in the European Union (Jan. 16, 2019) [ECF No. 7-59].

[160] As regards the First Declaration, the same view was expressed by the tribunal in *Eskosol S.p.A.*, No. ARB/15/50, ¶¶ 219–21 [Ex. 31]. As the tribunal did in that case, I also question whether the First Declaration could properly be construed as presenting an interpretation of the ECT in any event. I do not need to consider that issue, however, since the fact that the First Declaration is not agreed by all members of the ECT is sufficient to conclude that it has no bearing on the ECT's interpretation. The *Eskosol* tribunal was not required to address the EC Communication.

[161] EC Br. 16–17 [ECF No. 12].

[162] Hindelang Declaration, at 23–26 [ECF No. 7-5].

102. The EC and Professor Hindelang refer to the Commission's State-aid decision concerning the 2014 support scheme for electricity generation from renewable energy sources, cogeneration, and waste in Spain (hereafter the "State-aid Decision").[163] That State-aid Decision cannot, however, be construed as authority for their position. The part cited is not binding under EU law and contains no reasoning for the position advanced. Furthermore, applying principles established in a recent judgment of the EU General Court, one can only find that the Award does not constitute State aid requiring notification to the Commission.

103. The State-aid Decision, as its name indicates, concerned the 2014 support scheme for electricity generation from renewable energy sources, cogeneration, and waste in Spain. In it, the Commission found the 2014 scheme to be aid which is compatible with the internal market pursuant to Article 107(3)(c) of the TFEU.[164] However, it also opined about any awards which arbitral tribunals could potentially issue in relation to the 2007 scheme (*not* the 2014 scheme which was the object of the State-aid Decision), under either the ECT (*e.g.*, in cases such as *Watkins*) or under intra-EU BITs. At the time of the State-aid Decision, no awards had been made yet. Nevertheless, the Commission concluded that "any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme [i.e. the 2007 scheme] would constitute in and of itself State aid" and "would be notifiable . . . pursuant to Article 108(3) TFEU."[165] That is the part of the State-aid Decision relied on by Spain and the Commission and Professor Hindelang.[166]

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[163] EC Br. 16–17 [ECF No. 12]; and Hindelang Declaration ¶ 60 [ECF No. 7-5], referring to European Comm'n, SA.40348 (2015/NN), No. C(2017)7384 [ECF No. 7-54].
[164] Article 107(3)(c) covers "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 art. 107(3)(c) [ECF No. 7-13.]
[165] European Comm'n, SA.40348 (2015/NN), No. C(2017)7384 ¶ 165 [ECF No. 7-54].
[166] *See* EC Br. 16–17 [ECF No. 12]; Hindelang Declaration ¶ 60 [ECF No. 7-5].

104. The Commission suggests that this statement in the State-aid Decision is binding.[167] That is wrong as a matter of EU law. The State-aid Decision is binding insofar as it relates to the 2014 scheme. The comments made regarding arbitral awards are not, since they do not comply with EU State-aid rules.

105. Articles 107 to 109 of the TFEU contain the basic provisions governing EU State-aid policy. Article 107(1) declares that "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." Article 107(2) and (3) define certain types of aid which, respectively, "shall be compatible with the internal market" and "may be considered to be compatible with the internal market." Article 108 lays down the essence of the powers of the Commission as regards State aid. Article 108(3) provides that the Commission must be informed by Member States "of any plans to grant or alter aid." If the Commission "considers that any such plan is not compatible with the internal market . . . it shall without delay initiate the procedure provided for in paragraph 2."[168] The latter provides that "[i]f, 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 . . . it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission."[169] Further detail on this review procedure can be found in EU Regulation 2015/1589.[170]

106. It is clear that, insofar as it addressed arbitral awards under the ECT, the State-aid Decision was not adopted in accordance with TFEU Article 108 and Regulation 2015/1589. There was,

[167] EC Br. 16–17 [ECF No. 12].
[168] TFEU art. 108(3) [ECF No. 7-13].
[169] *Id.* art. 108(2).
[170] Council of the Eur. Union, Regulation (EU) 2015/1589, 2015 O.J. (L 248) at 9 [Ex. 32].

at the time of the State-aid Decision, no "aid granted" (TFEU Article 108(2)) by virtue of an arbitral award. The Commission has no authority to issue State-aid decisions in purely hypothetical cases.

107. The State-aid Decision is, in any case, wrong that the Award constitutes State aid requiring authorization. Notably, the State-aid Decision did not provide any analysis of the issue.[171] Professor Hindelang has sought to justify it by reference to the Commission decision on another arbitration award in the case of *Micula v Romania*.[172] The circumstances underlying that decision would make it inapposite in these proceedings. It is not necessary to go into detail on that, however, since in any case, the decision has been recently annulled by the EU General Court, in a judgment which articulates the requirements which need to be satisfied in order for an arbitral award to constitute State aid.[173]

108. Specifically, the GC confirmed an older ECJ judgment, *Asteris AE v Hellenic Republic*.[174] In that judgment, the ECJ stated that "State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals."[175] The GC built on this finding, by establishing that "compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid."[176] The GC noted that, in its impugned decision, the Commission had indicated its awareness of that principle. However, the GC held that it had been applied incorrectly, because there was no authority for the proposition that the measure in respect of which

[171] European Comm'n, SA.40348 (2015/NN), No. C(2017)7384, ¶ 165 [ECF No. 7-54].
[172] Hindelang Declaration, at 24 [ECF No. 7-5], referring to EC Decision 2015/1470.
[173] Eur. Comm'n, Decision No. (EU) 2015/1470, 2015 O.J. (L 232/43) [ECF No. 7-53].
[174] Nos. C-106, 120/87, ECLI:EU:C:1988:457 (E.C.J. 1988) [Ex. 33].
[175] *Id.* ¶ 23.
[176] *European Food SA v Comm'n*, No. T-624/15, ECLI:EU:T:2019:423, ¶ 103 (Gen. Ct. 2019) [Ex. 34].

compensation was allegedly granted in fact constituted State aid (indeed, it could not have done, because the measure was in place before the relevant State entered the EU, i.e before that State became subject to EU State-aid law).[177]

109. This judgment, therefore, establishes two principles. First, it is only where an arbitral award compensates for unlawful or incompatible State aid that it comes within EU State-aid law. Second, the Commission cannot simply assume that State measures, the cancellation of which are compensated through an award, constitute State aid. It needs to show this. Both these principles need to be complied with, and that is not the case insofar as this Award is concerned. First, the Award does not offer compensation directly equivalent to the benefits that Petitioners would have received under the 2007 regime (i.e. it does not compensate for State aid). It provides for compensation to the Petitioners reflecting the losses they suffered as a result of Spain's breach of its obligations under Article 10(1) of the ECT.[178] Secondly, even if the Award did compensate for withdrawn State aid, there has never been any ruling that the 2007 regime constituted unlawful or incompatible State aid (indeed, the 2007 regime has never been reviewed under EU State-aid law at all).[179] Accordingly, there is no basis for concluding that the Award is notifiable State aid.

110. The analysis above addresses the question of whether the Award constitutes unauthorized State aid. I would additionally like to address another point raised by the EC in its amicus brief, namely that the Petitioners could have challenged the State-aid Decision.[180] That is wrong. Article 263 of the TFEU governs challenges to State-aid decisions. A sentence to the effect that compensation pursuant to

[177] *Id.* ¶¶ 104–06.
[178] *Watkins Holdings S.à.r.l.*, No. ARB/15/44, § VIII [ECF No. 1-2].
[179] This Court is, in effect, being asked, in a case on the enforcement of an ICSID Award, to be the first judicial or other authority to rule on whether either the Award or the 2007 regime constitutes unlawful State aid.
[180] EC Br. 17 [ECF No. 12].

arbitral awards "would constitute in and of itself State aid" is not challengeable under that provision. Pursuant to the fourth paragraph of Article 263, "[a]ny natural or legal person may . . . institute proceedings against an act addressed to that person or which is of direct and individual concern to them . . . ."[181] The State-aid Decision is not addressed to the Petitioners, and it is definitely not of individual concern to them. The concept of individual concern is interpreted restrictively. As the current President of the ECJ has written, extrajudicially: "This means that the applicant must prove that the contested act, which, in terms of form, is not addressed to him, affects him substantively as if the act were addressed to him. This is a particularly strict requirement, and it extensively curtails the ability of natural or legal persons to bring actions for annulment."[182] There is no doubt in my mind that the Petitioners could not have brought an admissible action for annulment against the Decision, as they would have failed to show individual concern. It is also bordering on the nonsensical to suggest that they should have tried, as the actual Award was made outside the two-month period, provided for by Article 263 TFEU, which followed the State-aid Decision.[183]

111. Nor was there any need for the Petitioners to bring such an action, as the State-aid Decision concerns the 2014 regime, and does not, as analyzed above, constitute a State-aid decision concerning the Petitioners' or any other arbitral awards.

**F. THE AWARD IS NOT VOID**

112. If, notwithstanding the position above, the Award were to constitute unauthorized State aid, I do not agree with any suggestion that this would mean the Award is "void." First, I do not agree with Spain's argument that the tribunal's jurisdiction was restricted by EU law, for the reasons explained

[181] The next, non-quoted part of this provision refers to regulatory acts, and a State-aid decision is not regulatory in nature.
[182] Koen Lenaerts et al., EU Procedural Law 324 (Janek Tomasz Nowak ed., 2014) [Ex. 35].
[183] The date of the Award was January 21, 2020.

above. Second, even if it were, and the tribunal had exceeded its jurisdiction, that would not render the Award void. It may mean the Award could be subject to an application for annulment under Article 52(1)(b) of the ICSID Convention (on the basis that the tribunal had manifestly exceeded its powers). Whether or not that application was valid would, however, be for the determination of an ICSID *ad hoc* committee constituted under Article 52 of the ICSID Convention. Unless and until such a determination is made by an ICSID *ad hoc* committee, the Award remains binding on the parties under ICSID Article 53(1).

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

Dated: January 25, 2021

Executed at Ghent, Belgium

Piet Eeckhout