No. 24-1130

In the Supreme Court of the United States

KINGDOM OF SPAIN, PETITIONER,

v.

BLASKET RENEWABLE INVESTMENTS, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE EUROPEAN COMMISSION ON BEHALF OF THE EUROPEAN UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the European Commission is an institution of the European Union (the "EU" or "Union"), a treaty-based international organization composed of 27 Member States.[2] The Commission is an independent

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and no one other than amicus curiae or its counsel contributed money to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of amicus curiae's intent to file this brief.

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

institution and acts in the interests of the Union as a whole, rather than individual Member States. Under Article 17(1) of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13, the Commission "shall ensure the Union's external representation"—*i.e.*, it is responsible for, *inter alia*, representing the Union in proceedings outside the EU. The Commission submits this amicus brief in this function on behalf of the European Union.

The EU has a substantial interest in this case. Respondents seek to enforce arbitration awards that EU companies obtained against Spain, an EU Member State, under the Energy Charter Treaty, *adopted* Dec. 17, 1994, 2080 U.N.T.S 95 (1995) (entered into force Apr. 16, 1998) (ECT). The Energy Charter Treaty is an investment protection agreement conceived and negotiated by the EU in the early 1990s as part of the EU's external energy policy.

The Court of Justice of the EU—the EU's highest judicial body—has confirmed that arbitration under the Energy Charter Treaty between an EU Member State and an investor of another EU Member State contravenes the very structure of the EU legal order. EU Member States have not, and never could have, consented to arbitrate disputes under the Energy Charter Treaty with EU investors. "Intra-EU" arbitral awards like those at issue here are invalid and cannot be enforced anywhere in the EU.

Numerous investors have nevertheless sought to evade EU law by pursuing enforcement of such awards outside the EU. The D.C. Circuit has now permitted them to do so in the United States, holding that—whether or not the State actually agreed to arbitrate the underlying disputes (Spain did not)—foreign sovereign immunity is no bar to seeking enforcement of arbitral awards here.

The Commission seeks to emphasize the exceptional importance to the EU of the questions that this case

implicates, and to highlight the consequences for the EU, its Member States, and U.S. courts that will ensue from the decision below, absent this Court's intervention.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is of immense consequence for the European Union. At issue is whether EU investors may seek enforcement in the United States of arbitral awards that EU investors obtained under the Energy Charter Treaty against an EU Member State, even though the Member State never offered to arbitrate the underlying disputes with those investors. No court in the EU—not even the courts of the investors' home jurisdictions—would enforce such awards. But the decision below holds that EU investors may come to the United States to pursue enforcement here instead.

The stakes for the EU could scarcely be higher. The integrity of the EU legal system depends on EU Member States' trust in each others' judiciaries to adjudicate claims by EU nationals fairly and in accordance with EU law. It also depends on Member States' and EU nationals' respect for the role of the Court of Justice as the final arbiter of EU law questions. Allowing Member States to resolve EU law disputes with EU investors before private tribunals would undermine the basic structure of the EU. That is why, as the Court of Justice has repeatedly made clear, EU Member States simply cannot offer to arbitrate disputes like the ones that gave rise to the awards at issue in this case. Likewise, the EU and 26 of its Member States have formally reaffirmed their understanding that the Energy Charter Treaty cannot serve as the basis for intra-EU arbitration proceedings.

Yet the D.C. Circuit punted all these fundamental issues to the merits, on the theory that jurisdiction under

the Foreign Sovereign Immunities Act's (FSIA) arbitration exception, 28 U.S.C. §1605(a)(6), does not require the existence of an agreement to arbitrate disputes between the parties. Instead, according to the D.C. Circuit, jurisdiction can arise from the Energy Charter Treaty itself.

That holding should not escape this Court's review. The D.C. Circuit's decision rests on a misreading of the arbitration exception and a misapprehension of the characteristics of modern investment treaties. But it will also fuel decades of disruption for the EU. It incentivizes EU investors to continue bringing intra-EU arbitration claims under the Energy Charter Treaty. The very existence of such arbitrations is an affront to the EU legal order. They impose severe burdens on EU Member States. And many of these arbitrations also create intractable legal and practical complications under the EU's complex regulatory framework governing State aid (*i.e.*, public subsidies), which the Commission is charged with administering.

The decision below has consequences for U.S. courts as well. It entrenches the D.C. Circuit as a heavily favored award enforcement forum, inviting a deluge of actions against EU Member States brought by intra-EU award holders hoping to collect on billions of dollars' worth of awards that the investors' own home jurisdictions agree are invalid and unenforceable.

In short, the D.C. Circuit's decision will have immediate and lasting consequences for the EU, its Member States, and U.S. courts. The Court should grant review.

ARGUMENT

I. This case implicates issues of extraordinary importance to the European Union

The disputes that gave rise to this case are part of a wave of what are known as intra-EU investment arbitrations: arbitrations brought by EU investors against EU Member States under investment treaties. Intra-EU investment arbitration is fundamentally incompatible with the structure of the EU legal order. Whether EU investors may pursue enforcement in the United States of investment awards that they have obtained against EU Member States is thus a question of exceptional importance to the EU.

Investment treaties are international agreements between sovereign States. They may be bilateral agreements or multilateral treaties like the Energy Charter Treaty. Each contracting State agrees to specific rules governing investments made in its territory by nationals of the other contracting States. Jeswald W. Salacuse, *The Law of Investment Treaties* 141 (2015). To enable the peaceful enforcement of these treaty obligations without the need to resort to diplomatic protection, many investment treaties include an arbitration provision. Christoph Schreuer, *Investment Protection and International Relations*, in *The Law of International Relations* 345, 346-347 (A. Reinisch & U. Kriebaum eds., 2007).

The typical arbitration provision in an investment treaty contains a unilateral standing offer by the contracting States to arbitrate a defined set of disputes with a defined set of investors from other contracting States. "Unlike the arbitration clauses used in contracts, these treaty provisions could not be considered an arbitration agreement with the investor because the investor, while a national of a contracting state, was not party to a treaty."

Salacuse 422-423. Instead, an agreement to arbitrate a particular dispute is formed only if and when a qualifying investor accepts the standing offer. *Id.* at 423; see *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 50, 53 (2014) (Roberts, C.J., dissenting). See also, *e.g.*, Zachary Douglas, *The International Law of Investment Claims* 75 (2009). Thus, even in a multilateral treaty, the arbitration provision governs *bilateral* relationships between two particular contracting States: the home State of the investor, and the State against which the investor has initiated arbitration.

The Energy Charter Treaty's arbitration provision is found in Article 26. The signatories offer to submit "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former" to arbitration. ECT arts. 26(1), 26(2)(c), 26(3). In turn, an aggrieved investor may accept that offer in writing, thereby forming an arbitration agreement. ECT arts. 26(4)-(5).

The D.C. Circuit recognized that, under its own precedent, the "existence of an arbitration agreement" is a jurisdictional fact that must be established as a threshold question under the FSIA's arbitration exception. Pet. App. 17a-18a. Yet it held that whether "[Spain's] standing offer to arbitrate contained in [Article 26] extends to EU nationals," including the investors who obtained the awards at issue here—and thus whether an arbitration agreement *between Spain and the investors* could have been formed—is a "merits question," not a jurisdictional one. Pet. App. 26a.

But whether the sovereign agreed to arbitrate the dispute that led to the award at issue—thereby abrogating its presumptive immunity—is a fundamental question that should be decided as a jurisdictional matter.

This case illustrates why. The Court of Justice has made clear that, as a consequence of principles enshrined in the EU's foundational instruments, EU Member States cannot agree to arbitrate investment disputes with EU investors, and did not agree to do so in the Energy Charter Treaty. As such, Spain could never have agreed to arbitrate the disputes that gave rise to the awards that respondents seek to enforce here. Yet the D.C. Circuit sidestepped these weighty issues, asserting that the existence of an agreement between Spain and the investors is a "merits question." Pet. App. 26a.

The result is that EU Member States can now be haled into U.S. court to defend against enforcement of intra-EU awards here. That prospect will galvanize further intra-EU investment disputes for years to come, not only saddling EU Member States with protracted and costly arbitration proceedings, but also sowing disruption within the EU legal system. This Court's intervention is needed to ensure that questions of such fundamental importance to the EU legal order are addressed at the threshold.

A. The Court of Justice has confirmed that EU Member States cannot and did not consent to arbitrate investment disputes with EU investors

1. Whether EU Member States' standing offer to arbitrate in Article 26 of the Energy Charter Treaty extends to EU nationals (and thus, whether any intra-EU agreement to arbitrate disputes under the Energy Charter Treaty can be formed) implicates bedrock precepts of EU law. At its core, the question concerns whether an EU investor that believes that an EU Member State has treated its investment unfairly must seek recourse within the EU legal system, or whether EU Member States can agree to resolve such disputes before private arbitral tribunals instead. The Court of Justice has addressed this

question on several occasions, and has made clear that the EU legal order's basic structure precludes resolution of intra-EU investment disputes outside the EU judicial system.

The EU legal order is founded on the EU Treaties.[3] Under the EU Treaties, the EU Member States have transferred legislative, regulatory, and enforcement powers to the EU and its institutions. As the Court of Justice has put it, the EU Treaties have created "[their] own legal system which, on the entry into force of the Treat[ies], became an integral part of the legal systems of the Member States and which their courts are bound to apply." Case C-6/64, *Costa* v. *E.N.E.L.*, ECLI:EU:C:1964:66, 593 (July 15, 1964). By acceding to the EU Treaties, "the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves." *Ibid.*

EU law protects EU investors and their cross-border investments within the EU. See *Communication from the Commission to the European Parliament and Council on Protection of intra-EU investment*, at 1-2, COM (2018) 547 final (July 19, 2018), https://bit.ly/4kQSjZW. In particular, EU law safeguards the free movement of capital and prohibits measures that unduly prevent or discourage cross-border capital movement and payments. *Id.* at 1. Protections include rights under the EU Treaties, the EU Charter, general principles of EU law, and "extensive sector-specific legislation." *Id.* at 3, 5-17. These rights are enforceable through EU administrative processes and

[3] At present, the EU Treaties are the Treaty on the Functioning of the European Union, Oct. 26, 2012, 26 O.J. (C 326) 47 (TFEU), Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 (TEU), and the Treaty establishing the European Atomic Energy Community, Oct. 26, 2012, 2012 O.J. (C 327) 1.

judicial review in national and EU courts. The EU Treaties require, and the EU Charter guarantees, effective remedies before national courts. TEU, art. 19; Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391, art. 47.

Against this backdrop, the Court of Justice has made clear that intra-EU investment arbitration is and has always been incompatible with the very structure of the EU legal order. See Case C-741/19, *Republic of Moldova* v. *Komstroy LLC*, ECLI:EU:C:2021:655 ¶¶ 42-66 (Sep. 2, 2021); Case C-284/16, *Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018:158, ¶¶ 31-60 (Mar. 6, 2018). Specifically, the EU Treaties establish a judicial system "to ensure consistency and uniformity in the interpretation of EU law." *Komstroy*, ¶ 45. Three features of that system are key here.

First is the principle of "mutual trust," which includes Member States' trust in each others' legal systems. Opinion 2/13, ECLI:EU:C:2014:2454, ¶¶ 168, 191 (Dec. 18, 2014). The cohesion of the EU judicial system presupposes that Member States have faith in the fairness of other Member States' courts and their respect for EU law and common EU values.

Second is the Court of Justice's "exclusive jurisdiction to give the definitive interpretation of [EU] law." *Komstroy*, ¶ 45. Article 267 of the TFEU channels all EU law questions to the Court of Justice: Member State courts may (and, where they are courts of final instance, must) refer any relevant question of EU law raised in proceedings before them to the Court of Justice. *Id.* ¶¶ 45-46; TFEU art. 267.

Third is the designation of the EU legal system as the forum for EU law disputes between Member States. Article 344 of the TFEU prohibits Member States from

creating dispute-settlement mechanisms other than those set out in the EU Treaties on matters implicating EU law, including by entering into other international agreements. TFEU art. 344. To do so would "affect the allocation of powers laid down by the [EU] Treaties and, hence, the autonomy of the EU legal system, observance of which is ensured by the Court [of Justice]." *Komstroy*, ¶ 42; *Achmea*, ¶¶ 17, 32.

As the Court of Justice has explained, interpreting Article 26 of the Energy Charter Treaty as reflecting EU Member States' offer to engage in intra-EU arbitration would undermine these pillars of the EU legal system. *Komstroy*, ¶ 63. Arbitral tribunals convened under Article 26 are necessarily called upon to interpret and even apply EU law, not least because the Energy Charter Treaty itself—as an agreement to which the EU and its Member States are party—is part of EU law. See *id.*, ¶¶ 23, 50. But such tribunals are not courts or tribunals of a Member State for purposes of Article 267 of the TFEU, and hence are not subject to Court of Justice's supervision. *Id.* ¶ 51; see *id.* ¶¶ 48-59.

If Article 26 of the Energy Charter Treaty applied intra-EU, that would mean that Member States (in violation of Article 344 of the TFEU) have allowed EU investors to opt out of the EU judicial system and seek resolution of EU law questions before arbitral tribunals. The implication would be that Member State courts do not offer adequate redress for EU investors—a notion squarely at odds with the principle of mutual trust.

Thus, just as U.S. statutes susceptible to more than one interpretation should be "construe[d] * * * to avoid not only the conclusion that they are unconstitutional, but also grave doubts upon that score," *United States* v. *Palomar-Santiago*, 593 U.S. 321, 328-29 (2021), the Court of

Justice held that the Energy Charter Treaty's standing offer of arbitration must be interpreted as not extending to intra-EU disputes, to avoid placing the Energy Charter Treaty in conflict with the EU Treaties, *Komstroy*, ¶ 66.

On June 26, 2024, the EU and 26 Member States signed a formal declaration, expressly reaffirming their "common understanding" that "Article 26 [of the ECT] cannot and never could serve as a legal basis for intra-EU arbitration proceedings." Declaration on the legal consequences of the judgment of the Court of Justice in *Komstroy* and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings, June 26, 2024, O.J. (L 2024/2121), § 1 (2024 Declaration). This declaration reflects the "postratification understanding" of the relevant signatory nations regarding the meaning of Article 26. *Medellín* v. *Texas*, 552 U.S. 491, 507 (2008). Accord Vienna Convention on the Law of Treaties, art. 31(3)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (in interpreting a treaty, "[t]here shall be taken into account * * * any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"). No non-EU signatory to the Energy Charter Treaty has disputed this interpretation, which concerns only the non-applicability of Article 26 as between EU Member States in their bilateral relations. See p. 6, *supra*.

In short, it is crystal clear that the EU Treaties precluded the formation of any arbitration agreement under Article 26 between Spain and the investors here. Spain did not—and could not—offer to arbitrate the disputes that led to the awards in these cases. No arbitration agreement was ever formed.

2. The D.C. Circuit recognized that jurisdiction under the FSIA's arbitration exception requires "the existence of an arbitration agreement." Pet. App. 18a. Yet the court sidestepped the structural EU law issues that question implicates, including express pronouncements from the EU's highest court that leave no doubt that no arbitration agreement existed.

The court did so on the theory that, rather than determine whether an arbitration agreement between Spain and the investors here existed, the court could "look to the investment treaty itself to identify the scope of the sovereign's consent and the relevant agreement for purposes of the FSIA's arbitration exception." Pet. App. 21a. The court stated that it "need not and d[id] not resolve whether Spain entered into separate arbitration agreements 'with' private parties because we conclude that it entered into an arbitration agreement—the Energy Charter Treaty itself—that is arguably 'for the[ir] benefit.'" Pet. App. 22a. The court declined to address Spain's argument that it had not entered into the Energy Charter Treaty for the benefit of EU investors, characterizing that argument as one "regarding the *scope* of the Energy Charter Treaty, not its *existence*." Pet. App. 22a-23a.

The D.C. Circuit's reasoning was misguided. "[A] sovereign's consent to arbitration is important," *BG Grp.*, 572 U.S. at 43, and doubly so when that consent is the basis for abrogating the sovereign's presumptive immunity. Thus, for jurisdiction to lie under the arbitration exception, the FSIA requires not only that a foreign sovereign have signed an agreement "with or for the benefit of a private party," but also that the agreement be "to submit to arbitration all or any differences which have arisen or which may arise between [the foreign sovereign and the private party] * * *." 28 U.S.C. §1605(a)(6). Moreover, identifying a relevant agreement for the benefit of a

private party requires determining that the party invoking Section 1605(a)(6) is one for whose benefit the agreement was made. It cannot be enough, for purposes of asserting jurisdiction over a foreign sovereign, that the sovereign consented to arbitrate some disputes with some other private parties. The court must satisfy itself that the sovereign actually consented to arbitrate disputes with the specific private party that is trying to sue it in U.S. court.

And here, as explained above, there is no question that, as a consequence of the EU Treaties, Spain could not have entered into any such agreement. Even assuming that, by signing the Energy Charter Treaty, Spain entered into an agreement for the benefit of *some* private parties, it did not (and could not) enter into that agreement for the benefit of EU investors to arbitrate disputes that arise between Spain and those investors.

But the decision below makes this all irrelevant. Under the D.C. Circuit's rule, a private party can drag a foreign sovereign into court, forcing it to defend against enforcement of an arbitration award—even if it is clear, as it is here, that the sovereign did not (and could not) agree to arbitrate the specific dispute that gave rise to the award. Whether the FSIA allows that outcome warrants this Court's review.

B. The D.C. Circuit's decision encourages intra-EU arbitration, notwithstanding its incompatibility with the EU legal order

The decision below also carries significant consequences for the EU legal order.

1. The Court of Justice has expressly confirmed, in a series of rulings binding on all EU Member States, that the same fundamental EU law principles that foreclose intra-EU investment arbitration also require EU courts to

refuse to enforce intra-EU arbitral awards. See Case C-109/20, *Republiken Polen* v. *PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶ 52 (Oct. 26, 2021); Case C-333/19, *DA* v. *Romatsa*, ECLI:EU:C:202:749 (Sep. 21, 2022).[4] In other words, intra-EU investment awards are invalid and categorically unenforceable within the EU. Courts in EU Member States are consistently setting aside and declining to enforce intra-EU investment awards, including Energy Charter Treaty awards.[5]

But as long as there remains a possibility of enforcing intra-EU awards elsewhere, EU investors will likely continue to bring investment claims against EU Member States, in the hope that they will be ultimately be able to collect on any awards tribunals issue in their favor, even if no EU court will enforce them. Indeed, despite the Court of Justice's unequivocal confirmation in *Komstroy* that the Energy Charter Treaty's arbitration provision cannot apply intra-EU, EU investors have continued to initiate new arbitrations against EU Member States under that provision.[6]

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[4] A courtesy English translation of the *Romatsa* decision is available at page A91 of the addendum to the Commission's amicus briefs in the D.C. Circuit, filed on June 6, 2023.

[5] See, *e.g.*, *Kingdom of Spain* v. *Novenergia II - Energy & Environment (SCA), SICAR*, T 4658-18, Svea Court of Appeal (Dec. 13, 2022); *Italian Republic* v. *CEF Energia*, T 4236-19, Svea Court of Appeal (May 27, 2024); *Republic of Poland* v. *PL Holdings*, T 1569-19, Supreme Court, Sweden (Dec. 14, 2022); *Slot Group a.s.* v. *Republic of Poland*, Cour d'appel [Court of Appeal] Paris, 16e ch., Apr. 19, 2022, 49/2022; *Strabag SE* v. *Republic of Poland*, Cour d'appel [Court of Appeal] Paris, 16e ch., Apr. 19, 2022, 48/2022; *Republic of Poland* v. *Mercuria Energy Group*, T 2613-23, Svea Court of Appeal (Dec. 23, 2024).

[6] See, *e.g.*, *WOC Photovoltaik Portfolio GmbH & Co. KG* v. *Kingdom of Spain*, ICSID Case No. ARB/22/12 (German investor)

Even withdrawing from the Energy Charter Treaty—though unnecessary, since Article 26 does not apply intra-EU to begin with—would not solve the problem. The Energy Charter Treaty contains a sunset provision requiring contracting parties to comply with its terms for 20 years after a withdrawal takes effect. ECT art. 47(3). Numerous EU Member States (including Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, and Spain), as well as the EU itself, have already withdrawn from the Energy Charter Treaty, primarily out of concern that its protection of fossil-fuel investments is no longer compatible with the EU's climate policy. See Press Release, Council of the European Union, *Energy Charter Treaty: EU notifies its withdrawal* (June 27, 2024), https://bit.ly/4jkrTyr. Despite having specifically expressed their understanding that Article 26 does not authorize intra-EU investment arbitration, see 2024 Declaration, *supra*, even these EU Member States will remain exposed to further intra-EU Energy Charter Treaty claims for many years to come. This Court can help stem the tide.

2. Beyond imposing substantial burdens and litigation costs on EU Member States, intra-EU arbitrations are highly disruptive for the EU itself.

(registered Apr. 5, 2022); *Vasilisa Ershova and Jegor Jeršov* v. *Republic of Bulgaria*, ICSID Case No. ARB/22/29 (Lithuanian investors) (registered Nov. 11, 2022); *ExxonMobil Petroleum & Chemical BV* v. *Kingdom of the Netherlands*, ICSID Case No. ARB/24/44 (Belgian investor) (registered Oct. 21, 2024); *Suomi Power Networks TopCo B.V. et al.* v. *Republic of Finland*, ICSID Case No. ARB/24/37 (Dutch and Swedish investors) (registered Aug. 23, 2024).

A significant proportion of intra-EU Energy Charter Treaty cases (including the cases here) concern EU Member States' incentive schemes for energy producers. These cases implicate the complex EU law framework that governs State aid, *i.e.*, subsidies to private actors. State aid control is critical to the proper functioning of the EU internal market. It prevents the distortion of competition and ensures a level playing field for companies across the EU.

The Commission is the EU's State aid regulator. The EU Treaties generally prohibit the provision of any State aid. But a Member State that wishes to provide State aid can notify the Commission of that intention, and the Commission can approve payment of aid on defined public policy grounds, and in compliance with the principles of necessity and proportionality. TFEU art. 107. Member States must not implement potential aid measures unless and until the Commission has provided authorization. TFEU art. 108(3); Case C-284/12, *Deutsche Lufthansa AG* v. *Flughafen Frankfurt-Hahn GmbH*, ECLI:EU:C:2013:755, ¶¶ 34-42 (Nov. 21, 2013).

The Commission has determined that compensation awarded by an arbitral tribunal in connection with a Member State subsidy scheme "would constitute in and of itself State aid" that cannot be paid without the Commission's authorization. Decision on State Aid, SA.40348, ¶ 165 (Nov. 10, 2017), https://bit.ly/43pbUdO.

As a result, in a significant proportion of cases, Member States cannot pay intra-EU arbitral awards, whether pursuant to the award or a judgment from an enforcement court, unless and until the Commission has authorized payment. The Commission must evaluate each potential aid measure, including arbitral awards, separately. But the Commission has recently declined to allow payment of

one arbitral award against Spain arising from Spain's support scheme for renewable energy, finding that the award in and of itself is State aid: it "contravenes provisions or general principles of EU law" and therefore, as the Court of Justice has held, "cannot be declared compatible with the internal market." Commission Decision of 24 March 2025 on the measure State Aid SA.54155, ¶¶ 254-264 & p. 57, https://bit.ly/4mC9lfT.

If a Member State does make unauthorized payments, it will be in violation of EU law and subject to potential infringement proceedings brought by the Commission. Moreover, the Commission is required, in principle, to order the Member State to recover (*i.e.*, claw back) any unauthorized payments made. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), art. 16, 2015 O.J. (L 248). The recovery process entails close monitoring and coordination between the Commission and the Member State. See *Commission Notice on the recovery of unlawful and incompatible State aid*, 2019 O.J. C 247/1, ¶ 65 (July 23, 2019). It may also lead to national-court litigation, such as if the beneficiary refuses to repay the aid or challenges the recovery decision, *id.* ¶¶ 141-142, or if recovery requires resort to insolvency proceedings, *id.* ¶¶ 127-135. Failure to recover funds would expose the Member State to legal action by the Commission and possible penalties. *Id.* ¶¶ 148-158.

In short, attempts to satisfy or enforce intra-EU investment awards generate a morass of legal and practical problems for EU Member States and the Commission. Those problems are likely to persist as long as investors continue to bring intra-EU claims under the Energy Charter Treaty—and the D.C. Circuit's decision only encourages them to do so.

II. The decision below invites a deluge of award enforcement actions against EU Member States in the D.C. Circuit

As a result of the decision below, courts in the D.C. Circuit face a flood of intra-EU award enforcement actions.

Notwithstanding the impermissibility of intra-EU arbitration, investment tribunals have issued more than 30 intra-EU awards against EU Member States under the Energy Charter Treaty.[7] The sums involved are staggering: the awards in this case alone total approximately 360 million euros. See Pet. App. 11a. As of 2022, intra-EU Energy Charter Treaty cases had resulted in awards or settlements worth a total of nearly $3 billion. See *Investor-state protection disputes involving EU Member States: State of play*, European Parliamentary Research Service, Nov. 2022, fig. 5, https://bit.ly/3T4Xvxj. That figure only continues to increase.

By clearing the way for actions to enforce awards issued in arbitral proceedings that, as a matter of both EU and international law (as the investors' own home states agree, see 2024 Declaration, *supra*), were invalid from the start, the decision below signals that the courthouse doors in the D.C. Circuit are open for EU investors to attempt to enforce these awards here.

That will only cement the D.C. Circuit's status as the enforcement forum of choice for parties seeking to collect on intra-EU awards. Even before the decision below, the United States was an attractive forum for award

[7] The UN Conference on Trade and Development (UNCTAD) maintains information about known investor-State cases. *See* Investment Dispute Settlement Navigator, Investment Policy Hub, UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement.

enforcement actions. Reducing an arbitral award to a U.S. judgment gives an award holder access to unusually powerful post-judgment discovery tools. See Fed. R. Civ. P. 69(a)(2). Lower courts have allowed litigants to obtain worldwide post-judgment discovery into foreign sovereign's assets. *E.g.*, *Tatneft* v. *Ukraine*, No. 17-cv-582, 2021 WL 5353024 (D.D.C. Oct. 18, 2021); *Stati* v. *Republic of Kazakhstan*, No. 14-cv-1638, 2020 WL 13144317 (D.D.C. May 18, 2020).

Perhaps for this reason, most of the known intra-EU Energy Charter Treaty awards against EU Member States are already the subject of enforcement actions in the D.C. Circuit.[8] At least twelve district judges in the D.C. Circuit have one or more such cases pending before them. While most of these actions were stayed pending

[8] Those cases are *InfraStructure Services Luxembourg SARL* v. *Kingdom of Spain*, No. 18-cv-1753 (D.D.C.); *Novenergia II-Energy & Environment (SCA)* v. *Kingdom of Spain*, No. 18-cv-01148 (D.D.C.); *RREEF Infrastructure (G.P.) Ltd.* v. *Kingdom of Spain*, No. 19-cv-03783 (D.D.C.); *Watkins Holdings S.R.L.* v. *Kingdom of Spain*, No. 20-cv-01081 (D.D.C.); *Infrared Environmental Infrastructure GP Ltd.* v. *Kingdom of Spain*, No. 20-cv-00817 (D.D.C.); *Foresight Luxembourg Solar 1 S.A. R.L.* v. *Kingdom of Spain*, No. 20-cv-00925 (D.D.C.); *Cube Infrastructure Fund Sicav* v. *Kingdom of Spain*, No. 20-cv-01708 (D.D.C.); *BayWa R.E. AG* v. *Kingdom of Spain*, No. 22-cv-02403 (D.D.C.); *Hydro Energy 1, S.A.R.L.* v. *Kingdom of Spain*, No. 21-cv-02463 (D.D.C.); *RWE Renewables GMBH* v. *Kingdom of Spain*, No. 21-cv-03232 (D.D.C.); *Swiss Renewable Power Partners S.A.R.L.* v. *Kingdom of Spain*, No. 23-cv-00512 (D.D.C.); *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 25-cv-1756 (D.D.C.); *CEF Energia B.V.* v. *Italian Republic*, No. 19-cv-03443 (D.D.C.); *Greentech Energy Sys. A/S* v. *Italian Republic*, No. 19-cv-03444 (D.D.C.); *MOL Hungarian Oil & Gas PLC* v. *Republic of Croatia*, No. 23-cv-000218 (D.D.C.); *Mercuria Energy Grp. Ltd.* v. *Republic of Poland*, No. 23-cv-03572 (D.D.C.); and *ACF Renewable Energy Ltd.* v. *Republic of Bulgaria*, No. 1:24-cv-01715 (D.D.C.).

the D.C. Circuit's decision in this case on Spain's immunity under the FSIA, most are now proceeding individually to the merits. And more than 30 intra-EU investment disputes are still in the arbitration phase.[9] Any awards rendered in EU investors' favor in those cases, too, are highly likely to make their way to the D.C. Circuit.

Absent this Court's intervention, EU Member States will be forced to defend against dozens of award enforcement actions, even though they agree—whether as respondents or the investors' home countries—that the Member State did not consent, and indeed could never have consented, to the underlying arbitration, and that the resulting awards are therefore invalid. This Court should grant review to prevent that intolerable situation.

III. Under the decision below, most modern investment treaties on their own constitute a basis for jurisdiction under the FSIA's arbitration exception

The D.C. Circuit's reasoning that the Energy Charter Treaty itself represents a completed agreement sufficient to abrogate sovereign immunity has repercussions far beyond this case, for the EU and its Member States as well as other foreign sovereigns.

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[9] These cases can be identified through an advanced search in the UNCTAD database, https://investmentpolicy.unctad.org/investment-dispute-settlement, using the following parameters: (1) Under "Nationality of the Parties," drag and drop "EU (European Union)" from "Country Groupings" for both "Respondent's Nationality" and "Claimant's Nationality"; (2) under "Applicable IIA," select "The Energy Charter Treaty" from the "selector of individual IIAs" dropdown menu; and (3) under "Status/Outcome of original proceedings," check the box for "pending." To locate intra-EU cases under bilateral investment treaties, use the same parameters, but under "Applicable IIA," check the box for "bilateral investment treaties."

The D.C. Circuit sought to minimize the breadth of its holding by asserting that "not all investment treaties 'supply the requisite state consent to arbitration,'" and pointing to the 1979 Sweden-Malaysia bilateral investment treaty as a contrary example. Pet. App. 25a. But even the source on which the court relied correctly notes that investment treaties that contain a "mere agreement to agree," rather than completed consent to arbitration, are today the exception, not the rule: "[i]n most modern investment protection treaties, contracting states expressly consent to the mandatory submission of certain investment disputes to arbitration * * *." Christopher Dugan, *Investment Arbitration* 236 (2008). See also Kenneth J. Vandevelde, *Bilateral Investment Treaties* 358-359 (2010) ("A very few BITs provide that consent is subject to agreement between the investor and the host state, without specifically requiring that consent be given.").

That is, most investment treaties contain a provision expressing the State's consent to submit disputes to arbitration—a unilateral offer that a qualifying investor may accept by submitting a claim to arbitration, in accordance with any procedures the treaty sets forth. Vandevelde 358-359. EU Members States' bilateral investment

treaties follow this longstanding practice.[10] So do those of numerous other countries, including the United States.[11]

Under the decision below, all such investment treaties (which number in the hundreds), in and of themselves, now constitute valid "agreements to arbitrate" for purposes of the FSIA, even without a showing that the foreign state and the investor seeking to hale it into court actually agreed to arbitrate the underlying dispute. There is no reason to think that foreign sovereigns entering into investment treaties understood that they were thereby abrogating their immunity from suit in U.S. courts brought by untold numbers of investors.

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[10] *E.g.*, Agreement between the Portuguese Republic and the United Arab Emirates on the Reciprocal Promotion and Protection of Investments, art. 11, Nov. 19, 2011; Agreement between the Government of the Republic of Finland and the Government of the Socialist Republic of Viet Nam on the Promotion and Protection of Investments, art. 9, Feb. 21, 2008; Agreement between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, art. 8, June 6, 2005.

[11] *E.g.*, Treaty between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, art. X, July 13, 1996, S. Treaty Doc. 106-29; Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, art. 9, Sep. 29, 1999, S. Treaty Doc. 106-25; Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a Related Exchange of Letters, art. VI, Aug. 27, 1993, S. Treaty Doc. 103-15. See also United States 2012 Model BIT, art. 25.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JUNE 2025