IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mercuria Energy Group Limited

Petitioner,

v.

Republic of Poland

Respondent.

Civil Action No. 1:23-cv-03572 (TNM)

Declaration of Martin Wallin

1. My name is Martin Wallin and I am a founding partner of the law firm Wallin & Partners in Stockholm, Sweden. Please see my *curriculum vitae* attached as **Exhibit A**.

2. I am counsel to the Republic of Poland in Swedish proceedings before the Svea Court of Appeal concerning the annulment of the award rendered by the arbitral tribunal on December 29, 2022 in SCC Case No. V 2019/126 in the arbitration between *Mercuria Energy Group Limited v. the Republic of Poland* ("the Award" and "the Swedish Annulment Proceedings").

A. Procedural overview of the Swedish Annulment Proceedings

3. Poland filed its Petition to annul the Award ("the Annulment Petition") on February 28, 2023, pursuant to Article 33(1) (a) and (b) of the Swedish Arbitration Act (1999:116) (the Arbitration Act).[1] Those articles provide that an award is invalid "if the award includes

[1] In Sweden, rules on *annulment* of awards are separate from rules on the *set aside* of awards. Rules on annulment (Section 33 of the Arbitration Act) concern issues of public policy etc., i. e. issues which the court has to consider regardless of the parties' contentions. Rules on setting-aside of awards (Section 34 of the Arbitration Act) concern procedural errors which *could* be reason for not upholding an award, but which are not necessarily so. A party can, for instance, waive its right to rely on a procedural error in accordance with Section 34 of the Arbitration Act. A party also needs to apply for a setting-aside of the award within a time limit. No time limit exists for annulment of

determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators" and/or "if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system." In its Petition, Poland included a request for the suspension/stay of execution of the Award until the Court of Appeal issues a final judgment. A translation of the Annulment Petition, including the Request for suspension/stay of execution of the Award, is attached hereto as **Exhibit B**.

i. The Svea Court of Appeal stays enforcement of the Award

4. On March 6, 2023, the Svea Court of Appeal issued an order staying the enforcement of the Award. The Court's order stated that "the continued enforcement of the arbitral award rendered in Stockholm between the parties on 29 December 2022, SCC case no. V 2019/126, may not take place until further notice." The Court of Appeals' order explained that under "Chapter 3, section 18 of the Swedish Enforcement Code, an arbitral award may be enforced as a final judgement, unless otherwise ordered by the court where the action against the award is brought. The Court of Appeal finds reason to now order that the arbitral award may not be enforced until further notice." A copy of the decision is attached hereto as **Exhibit C**.

5. Decisions to stay the execution of an arbitral award are not routinely granted by courts in Sweden. On the contrary, a request for stay of the execution of an arbitral award will only be granted pursuant to Chapter 3, section 18 of the Swedish Enforcement Code if (1) it appears likely to the court that the applicant for a request for a stay of the execution of the award will succeed in the main proceedings; and (2) the stay applicant's interest in avoiding the damage caused by execution of the award outweighs the counter-party's interest in having the award immediately executed. The legal requirements for a court's decision to stay the execution of an

---

an award in accordance with Section 33 of the Arbitration Act. An annulment on an award is thus a far more profound and serious matter than the setting-aside of an award.

award is not explicitly stated in a statute but follows from general procedural principles which are addressed in the Swedish legal literature in clear and uncontroversial notations, see *inter alia* Stefan Lindskog, Skiljeförfarande—en kommentar ("Arbitration proceedings – a commentary"), 2020, version 3, JUNO, section IV:0 under 5.3.7, Lars Heuman, Arbitration Law of Sweden: Practice and Procedure, 2003, p. 655 – 656) and International Arbitration in Sweden, A practitioner's Guide, 2nd edition, ed: Annette Magnusson, Jakob Ragnwaldh and Martin Wallin, Chapter 1 para. 30). Relevant excerpts are attached hereto as **Exhibits D, E and F**. The decision on staying the execution of the Award remains valid and is not limited in territorial scope. As of the date of this declaration, and to my knowledge, Mercuria has not attempted any enforcement of the Award in Sweden.

ii. Subsequent proceedings before the Svea Court of Appeal

6. On 22 June, 2023, Mercuria filed its statement of defense in response to the Annulment Petition.

7. The Svea Court of Appeal then allowed further rounds of briefing on Mercuria's request. Poland filed its second brief on August 15, 2023, and Mercuria filed its second response on October 20, 2023.

8. On December 6, 2023, Poland filed its third brief and Mercuria filed its third response on February 5, 2024.

9. On March 22, 2024, Poland filed its fourth and final brief and Mercuria filed its fourth and final response on May 2, 2024, with an additional submission on May 10, 2024. The Parties have now made their final submissions on the merits, and no hearing is scheduled in the case. The Parties expect that the court will issue a ruling "on the papers" in the second half of 2024.

B. Poland's substantive arguments in the Swedish Annulment Proceedings

10. Poland raised two grounds in its Annulment Petition: First, that the Award involves the determination of a question which, under Swedish law, may not be decided by an arbitrator; and second, that the Award and the manner in which it was made are manifestly incompatible with the public policy of Sweden (pursuant to Article 33(1) (a) and (b) of the Swedish Arbitration Act). Both of Poland's arguments are premised on the fundamental incompatibility of intra-EU arbitration with European Union law, as expressed in final and binding judgments of the Court of Justice of the European Union in case 284/16 ("*Achmea*"), case C-741-19 ("*Komstroy*") and case C-109/20 ("*PL Holdings*"). See Exhibit A at para. 19. It should also be noted that both arguments (in principle) correspond to art. V(2) (a) and (b) of the New York Convention regulating when recognition and enforcement of an award may be refused.

11. The Swedish courts — including the Svea Court of Appeal — have already established the unlawful nature of intra-EU investment arbitration in precedents on both these grounds, as I discuss below. In all, the Swedish courts have now annulled *six* intra-EU investment arbitration awards.

12. ***PL Holdings v. Republic of Poland***. On December 14, 2022, the Swedish Supreme Court in case no. T 1569-19 (*PL Holdings v. Republic of Poland*)[2] annulled two arbitral awards rendered on the basis of an arbitration clause in a bilateral investment treaty ("BIT") concluded between, *inter alia*, Luxembourg and the Republic of Poland. See **Exhibit G**. *PL Holdings*, a company registered in Luxembourg, acquired shares between 2010-2013 in two Polish banks that merged in 2013. Shortly after the merger, Komisja Nadzoru Finansowego

[2] *PL Holdings* is referred to in the Annulment Petition as "the Investment Agreement" case.

(KNF), a financial authority in Poland, decided to suspend *PL Holdings*' voting rights on the shares in the bank and concluded that they should be compulsorily sold. *PL Holdings* subsequently sold the shares. *PL Holdings* then initiated arbitration proceedings against Poland before the Arbitration Institute of the Stockholm Chamber of Commerce and invoked an arbitration clause in the investment agreement in support of the arbitral tribunal's jurisdiction. The arbitral tribunal issued a separate award on 28 June 2017 and a final award on 28 September 2017 (see Supreme Court in case no. T 1569-19 para. 1–4).

13. In its judgment, the Supreme Court found—in accordance with the interpretative guidance given by the Court of Justice of the European Union—that the arbitration clause in the BIT was incompatible with the principle of sincere cooperation in the first subparagraph of Article 4(3) of the Treaty on European Union and undermined the autonomy of EU law, as enshrined in Article 344 in the Treaty of the Functioning of European Union, among others. Exhibit G, at para. 58–59. According to the Supreme Court, upholding the two arbitral awards would be manifestly incompatible with the public policy of Sweden. Exhibit G, at para. 60. The arbitral awards were therefore annulled pursuant to Section 33(1) (b) of the Act. Exhibit G, at para. 60–61. This is the same basis on which Poland has requested annulment of the Award in this case.

14. ***Kingdom of Spain v. Novenergia* (II)**. In its judgment rendered on December 13, 2022, in case no T 4658-18 (*Kingdom of Spain v. Novenergia* (II)*),* the Svea Court of Appeal annulled an arbitral award rendered in an arbitration proceeding based on Article 26 of the Energy Charter Treaty ("ECT"). See **Exhibit H**. According to the Court of Appeal (see in particular section 6.2.3 "The Court of Appeal's judgment"), it was clear from the case law of the European Court of Justice that disputes based on the ECT may not be excluded from the national

courts of the Member States and that Article 26(2)(c) of the ECT therefore does not apply to an investment dispute between a Member State and an investor from another Member State. The Court of Appeal concluded that the arbitral award included the examination of a question which, under Swedish law, could not be decided by arbitrators. Accordingly, the Court of Appeal concluded that "Spain's action should be upheld in that the arbitral award should be declared invalid" and annulled the arbitral award pursuant to section 33(1) (a) of the Swedish Arbitration Act. Exhibit H, at p. 44. The Court of Appeal's judgment became final on 10 July 2023.

15. ***Festorino Invest Limited v. Republic of Poland***. Subsequently, in its judgment of 20 December 2023 in case no. T 12646-21 (*Festorino Invest Limited and others v. Republic of Poland)*, the Svea Court of Appeal annulled yet another arbitral award issued in arbitration proceedings based on Article 26 of the ECT. See **Exhibit I**. The Court of Appeal found that it is clear from the case law of the European Court of Justice that the arbitration clause in the Energy Charter Treaty is not applicable to intra-EU disputes. Furthermore, the Court of Appeal has noted that it follows from the Supreme Court's case law that an arbitration award that has nevertheless been issued in an intra-EU investment dispute on the basis of this arbitration clause must be considered to have been obtained in an unlawful manner, since it is incompatible with the fundamental provisions and principles that regulate the legal system in the Union and thus also in Sweden. On the basis of this case law, the Court of Appeal has found that upholding the arbitral award rendered between the parties would be manifestly incompatible with the fundamentals of the legal system in Sweden, which is why the arbitral award must be declared invalid pursuant to Section 33, first paragraph, 2 of the Arbitration Act." Exhibit I at Section 5.5, p. 37.

16. ***Kingdom of Spain v. Triodos***. Furthermore, the Svea Court of Appeal in its judgment of 27 March 2024 in case no. T 15200-22 (*Kingdom of Spain v. Triodos)* annulled

another intra-EU award arising out of the ECT, stating that "[t]he arbitral award in question was made in an investment dispute between a Member State and an investor from another Member State on the basis of Article 26 of the Energy Charter Treaty. Upholding the award would thus be manifestly incompatible with the public policy of Sweden. The arbitral award shall thus be declared invalid." **Exhibit J,** p. 11.

17. ***Republic of Italy v. CEF Energia B.V.*** Most recently, on 27 May 2024 in case no. T 4236-19 (*Republic of Italy v. CEF Energia B.V.*), the Svea Court of Appeal annulled one more ECT award. The court in that judgment repeated what had already been stated in the previous judgments concerning ECT. To paraphrase "[…] the aforementioned preliminary rulings of the Court of Justice of the European Union concern, in particular, the question whether Member States are able to exclude disputes concerning the application of European Union law by public authorities from the European Union's court system. Such an arbitration award between a Member State and an investor from another Member State, made on the basis of an arbitration clause in an international investment agreement, may be considered to have been made unlawfully, since it is incompatible with the fundamental rules and principles governing the legal system of the European Union and thus also of Sweden." **Exhibit K**, at p. 16. "Upholding the arbitral award would thus be incompatible with the public policy of the Swedish legal system." Thus, in both cases, the Svea Court of Appeal did annul the awards with reference to Section 33(1)(b) of the Swedish Arbitration Act.

18. The Swedish courts have thus consistently confirmed that EU law does not permit the enforcement of arbitral awards rendered in intra-EU investment disputes. Such awards are invalid pursuant to section 33 of the Swedish Arbitration Act.

19. I briefly address Poland's arguments on the points of non-arbitrable matters and public policy below.

20. ***The Award involves determination of non-arbitrable matters***. Poland requested that the court annul the Award pursuant to Article 33(1)(a) of the Arbitration Act because the Award involves the determination of a matter which, under Swedish law, may not be decided by arbitration. The rulings of the CJEU in the *Achmea, Komstroy* and *PL Holdings* cases mean that an EU Member State and an investor of another EU Member State could not have agreed to submit an investment dispute — like the one Mercuria purported to bring against Poland — to international investment arbitration. As a member State of the European Union since 1995, Sweden is bound to faithfully apply EU law — including the judgments of the CJEU — to all annulment and challenges proceedings under the Swedish Arbitration Act, covering arbitral proceedings that are seated in Sweden, and which are subject to the scrutiny of the Swedish courts (see *inter alia* The Supreme Courts' ruling in NJA 2022 p. 965 para. 35). Even more so, the CJEU has mandated that EU Member State courts must "uphold an application which seeks the setting aside of an arbitration award made on the basis of an arbitration agreement infringing Articles 267 and 344 TFEU and the principles of mutual trust, sincere cooperation and autonomy of EU law." See Exhibit H, at para. 55. This case is analytically no different from the Svea Court of Appeals' precedent on 13 December 2022 in case no T 4658-18 (*Kingdom of Spain v. Novenergia* (II)) discussed above, and the Award in the underlying arbitration here should also be declared null and void on this basis. *See* Exhibit A at paras. 31-35.

21. ***Violation of public policy***. Second, Poland argued in the alternative that the Award must be set aside in accordance with the rules of procedural public policy as set out in Article 33(1)(b) in the Arbitration Act. Swedish Courts have previously held that arbitral awards

issued pursuant to Article 26 of the ECT are rendered void based on an invalid offer to arbitrate. Such an arbitration award between a Member State and an investor from another Member State, made based on an arbitration clause in an international investment agreement, must be regarded as having been rendered unlawfully, since it is incompatible with the fundamental rules and principles governing the legal order of the European Union and, consequently, of Sweden. Furthermore, it follows from clear case law from the Svea Court of Appeal (see above mentioned judgments on 20 December 2023 in case no. T 12646-21; on 27 March 2024 in case no T 15200-22; and on 27 May 2024 in case no T 4236-19) that the Supreme Court case law is relevant also with reference to the ECT. The Swedish courts have concluded that upholding these arbitral awards would be manifestly incompatible with the public policy of the Swedish legal system.

22. In my opinion, this case is analytically no different from the Svea Court of Appeals' precedents discussed above, and the Award in the underlying arbitration here should also be declared null and void on this basis.

* * *

Executed on June 14, 2024, in Stockholm, Sweden

Martin Wallin