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)

MEMORANDUM OF LAW IN SUPPORT OF THE REPUBLIC OF POLAND'S MOTION TO DISMISS THE PETITION OR STAY THE PROCEEDINGS

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INTRODUCTION

This case is the latest installment in what by now is a familiar effort by European companies to enforce arbitral awards against European States related to European investment projects in the courts of the United States. The motivation behind these efforts—including here—is the same: to avoid the consequences of European Union law, under which investment arbitration proceedings between an EU Member State and an investor from another EU Member State are prohibited.

The prohibition on so-called "intra-EU" investment arbitration is rooted in longstanding foundational and quasi-constitutional principles of European Union law that has been conclusively affirmed in various holdings of the Court of Justice of the European Union—the EU's highest court. National courts of EU Member States have set aside arbitral awards issued by tribunals in intra-EU arbitrations. And just last year, this Court's opinion in *Blasket Renewables v. Kingdom of Spain* held squarely that an investor from an EU Member State lacks the power to conclude an arbitration agreement with an EU Member State for the purpose of instituting an investment arbitration claim, recognizing that such purported agreements to arbitrate are unlawful under EU law.[1]

The Court should decline Mercuria's invitation to enforce the Petition and should have no fear that doing so will leave Mercuria out in the cold. Petitioner unquestionably went into the underlying arbitration with eyes wide open and assumed the risk of ending up with an unenforceable award. Approximately a year-and-a-half before Mercuria filed the arbitration, the Court of Justice of the European Union had ruled conclusively in the *Achmea v. Slovak Republic* case that intra-EU arbitration was unlawful. Then in the wake of the Court of Justice's ruling,

[1] *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023).

numerous EU Member States including Poland and Cyprus—Petitioner's home jurisdiction—issued a declaration affirming the unlawful nature of intra-EU investment arbitration and alerted the European investor community that "no new investment arbitration proceeding should be initiated." Finally, when Mercuria began the arbitration, it did so by choosing to bring its claims under the auspices of the arbitral center of the Stockholm Chamber of Commerce. In so doing, Mercuria submitted—by default—any potential award arising out of the proceedings to the scrutiny of the Swedish courts, which have an obligation to faithfully apply European Union law to the arbitration. That scrutiny is ongoing following Poland's filing of a petition to annul the Award in February 2023. Significantly, the Svea Court of Appeal has issued a suspension order against the enforcement of the Award during the annulment procedure—a order which the filing of Mercuria's Petition in this Court plainly violates—and which is strong indication that the Swedish courts will indeed annul the Award.

Poland asks the Court to dismiss Mercuria's Petition. *First*, Poland enjoys sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. (the "**FSIA**") and has not waived that immunity. See Section I. *Second*, confirmation and enforcement of the Award should be denied under Article V of the New York Convention. See Section II. *Third*, the Court should dismiss this action pursuant to the doctrine of *forum non conveniens* for resolution in the national courts of EU Member States. See Section III. *Fourth*, in the alternative, the Court should stay this litigation. See Section IV.[2]

[2] Mercuria requests that the Court grant Petitioner "the costs of this proceeding." Pet., at 1. Poland objects to Mercuria's request as unfounded and premature. If any party might have a claim for attorney's fees and costs, it would be Poland, given Petitioner's violation of the Swedish suspension order staying enforcement of the Award. *See* Background Section E. 1. Poland reserves its right to make a request for attorney's fees and costs against Mercuria and to

BACKGROUND

A. The Parties

Petitioner Mercuria Energy Group Limited is a limited liability company organized and existing under the laws of the Republic of Cyprus. Pet. ¶ 2. Cyprus is a Member State of the European Union. *Id.* ¶ 21; *see also* Award ¶ 374. Defendant is the Republic of Poland, a foreign sovereign State and a Member State of the European Union. *Id.* ¶ 21; *see also* Award ¶ 374. Poland is not a signatory to the ICSID Convention.

B. The Energy Charter Treaty

The Energy Charter Treaty ("ECT") is an agreement among fifty current contracting parties.[3] The ECT was signed in 1994 against the backdrop of the transition of Central and Eastern European States from socialist to market economies. Decl. of Prof. Steffen Hindelang ("Hindelang Decl.") (June 17, 2024) ¶ 17.[4] Poland, Cyprus, the EU, and many of its Member States were among the original signatories to the Treaty.[5] The United States is not a signatory. The ECT aims to promote economic development and growth in the European and Eurasian energy markets by ensuring security of energy supply through the operation of more open and competitive markets. *See* ECT Art. 2. Among others, the ECT incorporated provisions to enhance trade in energy materials, products and equipment (ECT Part II) and investment protection obligations (ECT Part

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oppose Mercuria's basis for its own request once that basis has been articulated and the issue is ripe for briefing by both Parties.

[3] Energy Charter, Members & Observers, Energy Charter https://www.energycharter.org/who-we-are/members-oberservers/ (last visited June 15, 2024).

[4] Steffen Hindelang is a Professor at Uppsala University in Sweden, where he specializes in EU and public international law. He has written extensively on the relationship between EU law and international investment treaties. His resume is attached to his declaration as Exhibit 1.

[5] Numerous Member States (including Poland and Cyprus) are now in the process of exiting the ECT. Hindelang Decl. ¶ 27.

III) that required signatories to protect investments in their domestic territories made by investors from other signatory states.[6]

The ECT includes a framework for the resolution of disputes related to cross-border energy projects between foreign investors and States. Article 26(1) of the Treaty provides that "[disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of [the State] […] shall, if possible, be settled amicably" and "[i]f such disputes cannot be settled according to paragraph (1) […] the Investor party to the dispute may choose to submit it for resolution." ECT, Art. 26. Pursuant to Article 26(2)(c), international investment arbitration is *one of three* available mechanisms to resolve disputes between an investor and a host State. The other two are: (1) submission of the dispute to the national courts of the host State; and (2) dispute resolution in accordance with a previously negotiated agreement. ECT, Art. 26(2)(a)-(b). An investor can trigger international arbitration by submitting a request to one of *four* arbitral institutions listed Article 26(4), including but not limited to the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"). ECT, Art. 26(4)(c). Sweden is a Member State of the EU. Wallin Decl. ¶ 19.

Critically, Article 26 itself is not an arbitration *agreement* between a State and an investor.[7] The Treaty was signed only by States; not States and investors. It is only a *standing offer* to arbitrate. *See, e.g., Chevron Corp. v. Ecuador,* 795 F.3d 200, 202 (D.C. Cir. 2015)(explaining that investment treaties contain "standing offers" to arbitrate, which a claimant must separately accept);

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[6] *See, e.g.*, ECT, Art 10. (Promotion, Protection and Treatment of Investments); Art. 13 (Expropriation); and Art. 14 (Transfers related to Investments).

[7] In this respect, the ECT—and other investment treaties—are fundamentally different from a commercial contract containing an arbitration clause, which is typically signed by both counterparties to the arbitration, and thereby gives rise to an actual arbitration agreement.

Blasket Renewable Invs., LLC v. Kingdom of Spain, 665 F. Supp. 3d 1, 8 (D.D.C. 2023). If an investor decides to initiate an investment arbitration pursuant to Article 26(2)(c) of the ECT, the arbitral tribunal established must, pursuant to Article 26(6) of the Treaty, "settle the matters in dispute in accordance with this Agreement and *the applicable rules and principles of international law*." ECT, Art. 26(6) [emphasis added]. This includes EU law. Hindelang Decl. ¶¶ 81-83.

C. The European Union

The EU is an economic and political federation of twenty-seven Member States premised on common values of freedom, democracy, equality and the rule of law aiming over time toward "an ever-closer union." Hindelang Decl. ¶ 32. To realize these objectives, the European Union created one single economic territory without internal borders or internal tariffs. Hindelang Decl. ¶ 29. The EU confers European citizenship to natural and legal persons—including with respect to a common passport—signaling that there are *no* internal borders, only a unified external border. Hindelang Decl. ¶36. Goods, services and people move freely throughout the Union, and Member States must grant all rights, freedoms and legal protections provided under EU law to citizens of other EU Member States living, working or investing in their territory. *Id*. These rights also extend to legal entities—such as corporations—established within the EU. *See* Hindelang Decl. ¶¶ 37-38.

1. The Legal Order of the European Union

The legal framework of the European Union might best be compared to the constitutional structure of other federal systems. *See* Hindelang Decl. ¶ 65. As the Member States transferred certain powers to the EU, they limited their own sovereign rights. *See* e.g. *Costa Enel* ¶ 3 (Hindelang Decl. Ex. 26), *Van Gend & Loos* ¶ 3 (Hindelang Decl. Ex. 41), *Simmenthal II* ¶¶ *21–22* (Hindelang Decl. Ex. 27). The EU has a hierarchy of laws. At the top of that hierarchy sit

sources of quasi-constitutional law—in EU terms "primary law"—which consist of (1) the founding treaties, i.e. the Treaty on the European Union (the "TEU," Hindelang Decl. Ex. 3) and the Treaty on the Functioning of the European Union (the "TFEU," Hindelang. Dec. Ex. 4); (2) accession treaties and protocols which the Member States sign when they become members of the EU; and (3) the Charter of Fundamental Rights (the "CFREU," Hindelang. Dec. Ex. 5). *See also* Hindelang Decl. ¶¶ 29-30. Based on these constitutional documents, a wealth of sector-specific law (in EU terms "secondary law," (Hindelang Decl. ¶30)), has emerged, consisting of regulations, directives, decisions, recommendations and opinions. In some fields, EU law makes up seventy to eighty percent of the law applicable in the EU Member States. Hindelang Decl. ¶ 103.

This body of secondary law touches on virtually all aspects of economic activity in the Member States, including energy, trade, transit, cross-border investments and energy efficiency. *See* Hindelang Decl. ¶ 36. The EU Treaties outline the areas in which the European Union would have exclusive competence; and others in which the European Union would share competence with the Member States. *See* Hindelang Decl. ¶ 30; TFEU Arts. 3(1), 4(1)-(2).[8] Relevant to this dispute, energy is a field over which the EU and Member States (including Poland and Cyprus) share competence. *See* TFEU Art. 4(2) TFEU. The EU and its Member States are both able to legislate and adopt legally binding acts, but Member States may *only* exercise their own exclusive competence where the EU does not exercise—or has decided not to exercise—its own competence. *See* TFEU Art. 2(2).

The EU Treaties also provide the primary legal framework governing cross-border investments among EU Member States, and EU law gives investors a cause of action before

[8] Competences not conferred upon the Union in the Treaties remain with the Member States. Only national security and law enforcement remain explicitly the sole responsibility of each Member State. *See* Article 4(1) TEU).

national courts of the Member States to enforce those rights. *See* TEU Art. 19; Hindelang Decl. ¶ 38. The EU Treaties thus provide for a sophisticated set of investment protection standards that apply between EU Member States and their nationals. For example, Article 49 of the TFEU ("Right of establishment") prohibits *any* cross-border restrictions on intra-EU investors. This includes unjustified administrative barriers, discriminatory regulations, or differential treatment compared to domestic investors. *See* Hindelang Decl. ¶ 37. Similarly, Article 63 of the TFEU provides for the free movement of capital within the EU. This includes the free transfer of funds and assets across borders without capital controls, discriminatory taxation, or other financial restrictions. *See* Hindelang Decl. ¶ 37.

EU law applies directly in all the Member States,[9] and EU law preempts the laws of the Member States to the extent that such laws contradict EU law. *See* Hindelang Decl. ¶ 35. This principle of preemption is reflected in the EU Treaties and is known as the "primacy of EU law." Hindelang Decl. ¶ 34. This principle ensures that EU citizens are uniformly protected by Union law across the entirety of the EU. *See* Hindelang Decl. ¶ 54. Where Union law conflicts with the *domestic* law of a Member State, EU law preempts and displaces that law, consistent with the principle of the primacy of Union law. *See* Hindelang Decl. ¶ 54. Where EU law conflicts with an *international* obligation that a Member State has undertaken, two outcomes are possible. Where the international obligation involves a *non-EU country*, EU law does not—in principle—affect those obligations. *See* Article 351 TFEU; *see also* Hindelang Decl. ¶¶ 56-57. However, in international obligations *between* EU Member States, EU law supersedes those international obligations to the extent of any incompatibility. As the Court of Justice of the European Union

[9] "According to the spirit, the general scheme and wording of the [EU Treaties] [these Articles] must be interpreted as producing direct effects and creating individual rights which national courts must protect." *See Van Gend & Loos* ¶¶ 3, 5 (Hindeland Decl. Ex. 41).

explained, international agreements between EU Member States "cannot apply in the relations between those States" if the agreements contravene EU law. *Budějovický Budvar v. Rudolf Ammersin GmbH* ¶ 98 (Hindelang Decl. Ex. 28); accord *In re ECHR*[10] ¶ 201 (Hindelang Decl. Ex. 45); accord *Commission v. Ireland*[11] ¶ 125 (Hindelang Decl. Ex. 48). This is a specialized conflict of laws rule applicable to the Member States of the European Union. As the Member States affirmed, "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law." Declaration concerning primacy annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon (Hindelang Decl. Ex. 51). As Professor Hindelang demonstrates, the Member States cannot deviate from this principle. *See* Hindelang Decl. ¶¶ 76-80.

2. The EU's governing institutions and the Court of Justice

The EU's principal governing institutions are: (1) the European Parliament; (2) the European Commission; and (3) the Court of Justice of the European Union. Hindelang Decl. ¶ 29. The Court of Justice is the highest court of the European Union. *See* Hindelang Decl. ¶ 29. The Court has exclusive jurisdiction to determine the content, scope, and application of the EU Treaties, and is the final arbiter of EU legislation and regulations. *See* Hindelang Decl. ¶ 19. It is composed of twenty-seven judges, one from each Member State. TFEU Art. 253. Rulings of the EU Court of Justice are binding on the Member States and on individuals subject to EU law. *See* Hindelang Decl. ¶ 52. If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. TFEU, Art. 264.

[10] CJEU Opinion 2/13, ECLI:EU:C:2014:2454 (18 Dec. 2014).
[11] CJEU Case No. C-459/03, ECLI:EU:C:2006:345 (30 May 2006).

The EU Treaties oblige the Member States to support the jurisdiction of the Court of Justice and require that they do nothing to circumvent or undermine its authority. Under Article 19 of the TEU, the national courts of the Member States—under the supervision of the EU Court of Justice—together have the task of adjudicating breaches of EU law and working to ensure uniform interpretation and application of that law.[12] A critical tool to realize those objectives is the obligation for courts of the Member States to ask for preliminary review from the Court of Justice on questions concerning the interpretation and validity of EU law under Article 267 of the TFEU. *See* Hindelang Decl. ¶¶ 45-49. Article 344 of the TFEU provides that "Member States [may not] submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided herein." *See* Hindelang Decl. ¶ 44-51. This means that Member States must resolve *any* dispute that arises in relation to an issue that is governed under EU law in a manner consistent with the system of judicial oversight by the EU Treaties.[13] In addition, the Member States are obliged to give full effect to EU law and adhere to the principle of sincere cooperation, which requires EU Member States to ensure their fulfillment of obligations under EU law. Article 4(3) TFEU; *see* Hindelang Decl. ¶ 94.

[12] The courts in the United States and those in the European Union function differently with respect to U.S. federal law on the one hand, and EU law on the other. In the U.S., there are lower federal district and appellate courts, which have jurisdiction to hear claims arising under federal law. This is not the case in the European Union: even where a cause of action is premised on the violation of EU law, the claim must be heard in a national court of a Member State. That court is then obliged to decide the claim under EU law. For this reason, ensuring the availability of referral of EU law questions to the Court of Justice is imperative.

[13] This principle has been applied in numerous areas where the EU has shared or exclusive competences: international trade (Opinion 1/91), *see* Hindelang Decl. Ex. 42; aviation (Opinion 1/100), *see* Hindelang Decl. Ex. 43; maritime environment (*Commission v. Ireland), see* Hindelang Decl. Ex. 48*;* and intellectual property (Opinion 1/09), *see* Hindelang Decl. Ex. 44.

3. Poland and Cyprus' Accession to the European Union in 2004

In 2004, ten States joined the European Union—including Poland and Cyprus. *See* Hindelang Decl. ¶ 16. This was the largest wave of expansion since the founding of the European Union in 1957. The purpose of the 2004 enlargement was to bring formerly socialist Central and Eastern European States into the EU. The States joining the EU in 2004 were obliged to adopt EU law and limit their sovereignty in areas that are now governed by EU law. *See* Hindelang Decl. ¶ 65.

This required a process of harmonization with the Member State's existing national laws—and prior international commitments. *See* Hindelang Decl. ¶ 57. Poland and Cyprus' ratification of the EU Treaties impacted the standing offers to arbitrate investment disputes that they had previously made under bilateral or multilateral investment treaties such as the ECT. Consistent with Articles 267 and 344 of the TFEU, the new EU Member States could no longer resolve disputes related to issues that implicated EU law *outside* the EU's legal framework. *See* Hindelang Decl. ¶¶ 53-70. Following EU accession, each State's standing offer became invalid *with respect to investors of other EU Member States*. *See* Hindelang Decl. ¶¶ 51-52. That is, Poland could no longer engage in investment arbitration with Cypriot investors, and Cyprus could no longer engage in arbitration with Polish investors—or indeed, investors from any other EU Member State.[14]

The invalidity of Article 26's standing offer in the context of intra-EU investment arbitration following EU accession is unequivocally clear. In *Slovak Republic v. Achmea B.V.,* CJEU Case No. C-284/16, (Hindelang Decl. Ex. 10), the Court of Justice addressed the ability of Member States to submit investment disputes to international arbitration. The Court of Justice

[14] Indeed, this was true with respect to all States that joined the EU in 2004, and which were also ECT signatory States.

held that the EU Treaties "preclud[e] a provision in an international agreement concluded between Member States, such as Article 8 of the [applicable bilateral investment treaty], under which an investor from one of those Member States may . . . bring proceedings against [another] Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept." *Achmea* ¶ 62.

The Court of Justice then confirmed in *Republic of Moldova v. Komstroy,* CJEU Case No. 741/19 (Hindelang Decl. Ex. 11) that *Achmea*'s central holding also applies to the Energy Charter Treaty, affirming that the offer to arbitrate contained in Article 26 ECT cannot apply between an EU Member State and an investor of another EU Member State. *Komstroy* ¶ 66. The Court explained that arbitral tribunals lack jurisdiction over such disputes "[i]n the precisely same way as the arbitral tribunal at issue . . . in *Achmea*." *Id*. ¶ 52. As decided in *Achmea* and confirmed in *Komstroy*, "a putative offer to arbitrate extended by an EU Member State to an investor from another EU Member State, like Article 26 of the ECT, is rendered inapplicable and cannot be accepted to form an agreement to arbitrate." *See* Hindelang Decl. ¶ 23. The ruling of the EU Court of Justice in *Komstro*y is a final and binding interpretation of the ECT as it applies between EU Member States.

To avoid any doubt, the EU Court of Justice then clarified on October 26, 2021 in *PL-Holdings v. Republic of Poland,* CJEU Case No. 109/20*,* (Hindelang Decl. Ex. 17) that the same reasoning applies to intra-EU arbitration proceedings based on *ad-hoc* arbitration agreements. *See* Hindelang Decl. ¶ 25. In addition, *PL-Holdings* imposed an obligation on EU Member States to challenge the validity of purported arbitration agreements before arbitral tribunals in cases where investors continued to initiate claims even after the EU Court of Justice's *Achmea* ruling. *PL-Holdings,* ¶ 52-54 (Hindelang Decl. Ex. 17).

Importantly, the invalidity of the offer to *arbitrate* under Article 26 of the ECT did not impact the ability of allegedly aggrieved intra-EU investors to bring claims under the ECT in *national courts* as provided for by Article 26(2)(a). Thus, intra-EU investors could still seek relief under the Treaty for alleged violations of the ECT's investment protection standards in courts of the EU Member States, in accordance with Article 19 of the TEU. Poland and Cyprus' accession to the EU only limited the *dispute resolution method* available to such investors. *See* Hindelang Decl. ¶ 98.

On January 15, 2019, twenty-two EU Member States including Cyprus and Poland issued a joint Declaration affirming that "Union law takes precedence over bilateral investment treaties concluded between Member States." *Declaration of the Representatives of the Governments of the Member States* (Hindelang Decl. Ex. 13). Expressly referring to the Court of Justice's *Achmea* decision, the Member States affirmed that an "arbitral tribunal established on the basis of investor-State arbitration clauses" in international agreements between EU Member States "lacks jurisdiction, due to a lack of a valid offer to arbitrate." *See* Declaration, p. 1. As to standing offers to arbitrate disputes, the Member States agreed that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States *are contrary to Union law and thus inapplicable*." *Id,* p. 1 [emphasis added]. The Member States explicitly extended this conclusion to multilateral treaties such as the ECT. *Id,* p. 2. More directly, the Member States instructed their own investor communities that "*no new intra-EU investment arbitration proceeding should be initiated.*" *Id,* ¶ 3 [emphasis added].

D. The Arbitration

Mercuria's business in Poland was conducted through its affiliate, JSE. That company was incorporated in Poland in 1995. *See* Award ¶ 174. JSE's business focused on importing and

trading petrochemicals from the Russian Federation and Eastern Europe. *See* Award ¶ 174-5. By 2001, JSE became the largest independent petrochemical and oil product trader and marketer in Poland and was also the largest independent importer of fuel into the country. *See* Award ¶ 175.

1. The Materials Reserves Agency imposes a regulatory penalty on JSE

The underlying dispute is based on an administrative decision taken on 16 October 2007 by the President of the Polish agency Agencja Rezerw Materiałowych (in English, The Materials Reserves Agency ("MRA"), now Governmental Strategic Reserves Agency). The decision imposed an administrative fine on JSE for failure to establish and maintain compulsory stocks of liquid fuels as prescribed by Polish law, which in turn implements EU Directives 68/414/EEC and 2006/67/EC. *See* Award ¶ 176.

2. JSE challenges the penalty in the Polish courts—and wins

JSE and Mercuria challenged the administrative fine in the Polish courts. In short order, the Polish administrative court ruled in favor of JSE and repealed the administrative fine.[15] JSE, however, continued litigation before the Polish courts, claiming accumulated interest on the administrative fine.

On July 24, 2008, Mercuria initiated an SCC arbitration against Poland alleging that the State's conduct from February 2006 onwards constituted a breach of Article 10(1) of the ECT (the "First SCC Arbitration"). While Mercuria's claim centered on the alleged unfairness of the fine

[15] On December 23, 2008, the Polish Administrative Court rendered a judgement that repealed the MRA's decision imposing the Penalty on JSE. This was affirmed by the Supreme Administrative Court on October 20, 2009. In contrast to what Petitioner claims, the administrative fine was adjudicated in JSE's favor and had been *fully* returned to JSE. *See* Petition para. 7.

imposed, the final award in the First SCC Arbitration dated 22 December 2011, found that Poland's conduct did not violate the Treaty. *See* Award, ¶ 245.

3. Mercuria initiates the underlying arbitration

On September 12, 2019, Mercuria notified Poland of a new arbitration initiated at the Arbitration Institute of the Stockholm Chamber of Commerce. These were the proceedings that gave rise to the underlying Award that Mercuria is now asking this Court to confirm. Mercuria sought damages related to an internal loan agreement concluded between JSE and Mercuria, which JSE purportedly relied on to the pay the administrative fine imposed by Poland. *See* Award ¶ 843. The case was registered on September 16, 2019 as SCC Case No. V 2019/126 and conducted under the 2017 SCC Rules. Award ¶ 14. Claimant relied on Article 26(2)(c) of the ECT as the basis for the arbitral tribunal's jurisdiction. On January 9, 2020, a three-member tribunal was constituted. As the Parties could not agree on a legal seat for the arbitration, the SCC Board decided that the seat of the arbitration would be Stockholm, as provided for by default in the SCC Arbitration Rules. Award, ¶ 26.

The subject of the arbitration was limited to the question of whether Mercuria was entitled to receive accrued interest on the amount of the (refunded) administrative fine. Mercuria asserted that Poland had breached its obligations regarding the promotion and protection of investments under Articles 10(1) and 10(12) of the ECT through its decision not to pay Mercuria the interest it had requested.[16] Award, ¶ 164.

From the start of the proceedings, Poland consistently raised objections to the Tribunal's jurisdiction, including on the basis that no arbitration agreement had been formed between the

[16] Claimant claimed a total amount of 152 862 917.25 złoty (equivalent to approximately 39,001,169.55 USD at today's exchange rate).

parties.[17] Poland asserted that since its accession to the EU, the State's purported offer to arbitrate under Article 26 of the ECT had become null and void as to intra-EU investors such as Mercuria, and that it was contrary to fundamental principles of EU law for the Tribunal to have declared itself competent to hear the dispute in question. *See* Award, Section G. II. 1.[18]

On December 29, 2022, the Tribunal issued its Award. The Tribunal found that Poland had breached its obligations under Articles 10(1) and 10(12) of the ECT. The Tribunal granted Mercuria damages, together with interest, up to PLN 145,094,420.20 (equivalent to USD 36,998,424.23) plus simple interest on a part of this amount. The Tribunal also awarded Mercuria its share of the costs of the Arbitration amounting to EUR 289,650.39 (equivalent to USD 314,547.29) and the legal expenses and Mercuria's other costs incurred in the Arbitration amounting to EUR 212,328.14 (equivalent to USD 230,578.81). *See* Award ¶ 930.

E. The Swedish Annulment Proceedings

On February 28, 2023, Poland filed an application before the Svea Court of Appeals in Sweden to annul the Award. (Wallin Declaration Ex. B). The Swedish annulment proceedings remain pending. The Parties have submitted four rounds of written submissions, and recently finalized their submissions with statements on costs. A decision of the Swedish Court of Appeal is expected within the next six months. *See* Wallin Declaration, ¶ 9.

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[17] In addition to the intra-EU objection, Poland had raised seven other preliminary objections.

[18] In addition, Poland made other jurisdictional objections, including the fact that an intra-group recapitalization agreement, is not an "investment" under the ECT. *See* Award para. 491. And that the subject matter has been litigated exhaustively in more than *nine* domestic legal procedures. *See* Award para. 580.

1. The Swedish court's suspension order

On March 6, 2023, the Swedish Court of Appeal "order[ed] 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."* [Emphasis added]. Wallin Decl. Ex. C. The Court reasoned that "according to Chapter 3, section 18 of the 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." Wallin Decl. Ex. C. The Swedish Court of Appeal may only grant a request for a suspension order upon the request of one of the parties (1) if the Court finds it likely that the party requesting set aside of the award will succeed on the merits in the main proceedings and hence, has reason to believe that the arbitral award is invalid under Section 33 of the Swedish Arbitration Act ("LSF"), *and* (2) if the applicant's interests for a stay outweighs the counter-party's interest in having the award immediately executed. *See* Wallin Declaration, ¶ 5.

2. The Swedish courts' consistent annulment and set aside of intra-EU awards

Following *Achmea,* Swedish courts have consistently—and with no exception—annulled and set aside intra-EU arbitral awards in which the seat of arbitration was Stockholm, Sweden. The first among these decisions were (1) the judgment of the Swedish Court of Appeal of December 13, 2022 in the *Spain v. Novenergia* case (Wallin Decl. Ex. H); and (2) the judgment of the Swedish Supreme Court of December 14, 2022 in the *Poland v. PL-Holdings* case (Wallin Decl. Ex. G). In both cases, the Swedish courts set aside the awards on two grounds consistent with the applicable grounds for the set-aside of an arbitral award in line under the New York Convention. *See* Wallin Decl. ¶ 10.

First, the Swedish courts found that a putative offer to arbitrate between (1) an EU Member State; and (2) an investor of an EU Member State in an investment agreement is incompatible with the fundamental rules and principles governing the legal order in the European Union and therefore violates Sweden's public policy as defined in Section 33(1)(b) of the LSF. *See* Wallin Decl. ¶ 12. Referring to judgments of the EU Court of Justice in *Achmea, Komstroy* and *PL-Holdings,* Swedish Courts have consistently confirmed that EU law does not permit the enforcement of arbitral awards rendered in intra-EU investment disputes. *See* Wallin Decl. Wallin Decl. ¶ 17. According to the Swedish courts, upholding such awards would be manifestly incompatible with the foundations of the legal order in Sweden. *See Swedish Supreme Court PL-Holdings* ¶¶ 60-61 (Wallin Decl. Ex. G). *See also Republic of Poland v. Festorino Invest Limited,* p. 37 (Wallin Decl. Ex. I); *Kingdom of Spain v. Triodos,* p. 11 (Wallin Decl. Ex. J); and *Republic of Italy v. CEF Energia B.V.,* p. 16 (Wallin Decl. K). Awards have therefore been declared null and void pursuant to Article 33(1)(2) of the LSF, which provides that an award is invalid "if the award includes 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." Wallin Decl. ¶ 3.

Second, Swedish courts have also found that a putative offer by an EU Member State to arbitrate in an investment agreement is invalid as to an investor from another EU Member State because those parties lack the capacity to conclude an arbitration agreement. The Swedish courts have interpreted the *Achmea, Komstroy* and *PL-Holdings* decisions as precluding EU Member States from being able to agree to intra-EU investment arbitration. "What the EU Court of Justice has expressed in its rulings means that there are both *ex ante* and *ex post* obstacles to the resolution of the dispute in question by arbitration." *See Swedish Court of Appeal Novenergia,* p. 39 (Wallin

Decl. Ex. H). In later cases,[19] Swedish courts have consistently confirmed and refined this line of argumentation, continuing to annul intra-EU awards. In total, the Swedish courts have now annulled *six* intra-EU awards.[20]

STANDARD OF REVIEW

Poland moves to dismiss the Petition for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). When ascertaining jurisdiction under Rule 12(b)(1), "a court is not limited to the allegations in the Petition, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 90 (D.D.C. 2005) (collecting cases), aff'd, 452 F.3d 883 (D.C. Cir. 2006). "Because subject matter jurisdiction focuses on the Court's power to hear a claim, however, the Court must give the plaintiff's factual assertions closer scrutiny when reviewing a motion to dismiss for lack of subject matter jurisdiction" and "no presumption of truthfulness applies to the factual allegations" in the Petition. *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 231–32 (D.D.C. 2007) (internal quotation marks omitted). "The plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998).

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[19] *See, inter alia*, Judgement of Swedish Court of Appeal on December 23, 2023 in *Poland v. Festorino Invest Limited and others* (Wallin Decl. Ex. I); Judgment of the Swedish Court of Appeal on March 27, 2024 in *Spain v. Triodos* (Wallin Decl. Ex. J), and Judgement of the Swedish Court of Appeal on May 27, 2024 in *Italy v. CEF Energi,* (Wallin Decl. Ex. K).

[20] In later judgments, the Svea Court of Appeals has clarified that grounds for set-aside of awards pertaining to a violation of public policy serve a different purpose than the rules for set-aside due to the lack of a valid arbitration agreement. Rules of public policy must be applied by a court *sua sponte*, even absent a request from the parties. Only if the award is in line with these public policy rules, may the Court proceed to examine other grounds for set-aside. *See, e.g.*, *Italy v. CEF*, at 13 (Wallin Decl. Ex. K).

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE POLAND ENJOYS SOVEREIGN IMMUNITY

The Court should dismiss the Petition for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1330(a) as this case does not fall under the exception to immunity set forth in 28 U.S.C. § 1605(a)(6).[21] As a sovereign State, Poland is "presumptively immune from the jurisdiction of United States courts" under the Foreign Sovereign Immunities Act ("the FSIA"). *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Moreover, "[i]n the absence of an applicable exception, the foreign sovereign's immunity is complete—[t]he district court lacks subject matter jurisdiction over the plaintiff's case." *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 474 (D.C. Cir. 2007) (alterations in original) (internal quotation marks omitted).

Mercuria argues that Poland has waived its immunity to suit under the FSIA pursuant to the so-called "arbitration exception" in 28 U.S.C. Section 1605(a)(6). That provision provides for the abrogation of sovereign immunity where a Petitioner seeks "to confirm an award made pursuant to […] an agreement to arbitrate, if […] the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . . ." The arbitration exception does not apply because

[21] Nor has Poland waived its immunity explicitly or implicitly. "An express waiver under section 1605(a)(1) must give a clear, complete, unambiguous, and unmistakable manifestation of the sovereign's intent to waive its immunity." *World Wide Minerals, LTD v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002). There is no allegation of any such manifestation here. Similarly, Poland has not waived sovereign immunity by implication. *Creighton Ltd. v. Government of State of Qatar.* 181 F.3d 118 (D.C. Cir. 1999)(finding that instances of implied waiver arose from "the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity"). There was no agreement to arbitrate between Poland and Mercuria, and the other instances enumerated in *Creighton* do not apply.

Mercuria and Poland never concluded an agreement to arbitrate intra-EU investment disputes. Indeed, they could not have done so for the simple reason that such agreements are—and always have been—invalid following Poland and Cyprus' accession to the EU. *See* Background Section C. 3.

As a threshold matter, it is for this Court to decide the question of whether Mercuria and Poland entered into an arbitration agreement because "if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration." *Nat'l R.R. Passenger Corp. v. B&M Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) (quoting *Bhd. of Teamsters Loc. No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 832 (9th Cir. 1987)); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 530 (2019) ("the court determines whether a valid arbitration agreement exists"). It is well established that "challenges specifically [to] the validity of the agreement to arbitrate" are presumptively heard by courts. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444-46 (2006) (citations omitted); *see also Granite Rock Co. v. Int'/ Bhd. of Teamsters,* 561 U.S. 287, 296 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.") (citations omitted).[22]

Where a petitioner presents *prima facie* evidence of an arbitration agreement, the burden of proof shifts to the defendant to demonstrate why the agreement is invalid. *Chevron Corp. v. Ecuador,* 795 F. 3d 200, 204 (D.C. Cir. 2015). As the DC Circuit affirmed, "[i]f there is no arbitration agreement or no award to enforce, the District Court lacks jurisdiction over the foreign

[22] This question is distinct from those related to the scope of an arbitration agreement. That inquiry assumes that arbitration between two parties is possible and focuses instead on the question of *which specific disputes* the parties agreed to submit to arbitration. Here, Poland and Mercuria could not arbitrate *any* disputes between them under the ECT because doing so would have violated EU law. The issue therefore is one of whether an agreement to arbitrate was ever formed—and none was.

state and the action must be dismissed." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). Here, there was no arbitration agreement because the standing offer in Article 26 of the ECT lacked legal effect as to Mercuria following Poland and Cyprus' accession to the EU in 2004—fifteen years before Mercuria purported to accept the offer by filing the arbitration. Accordingly, no arbitration agreement was ever formed between Poland and Mercuria.

Petitioner rests on the words of the ECT alone in its effort to demonstrate the validity of Poland's offer to arbitrate. But as the Supreme Court has instructed, "[t]reaties are construed more liberally than private agreements, and, to ascertain their meaning, *[courts] may look beyond the written words* to the history of the treaty, the negotiations, and *the practical construction adopted by the parties*." *Choctaw Nation of Indians v. United States,* 318 U. S. 423, 318 U. S. 431-432 (1943) [emphasis added]. Courts may also refer to the "conduct of parties to [a treaty] and subsequent interpretation of the signatories" to clarify the meaning of the treaty's terms. *Air France v. Saks* 470 U.S. 392, 403 (1985); *see also Medellin v. Texas,* 552 U.S. 491, 507 (2008). The plain meaning of words controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov v. United States,* 373 U. S. 49, 373 U. S. 54 (1963). "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must, absent extraordinarily strong contrary evidence, defer to that interpretation*." *Sumitomo Shoji Am., Inc. v. Avalgliano,* 457 U.S. 176, 185 (1982) [emphasis added].

These principles are similarly reflected in the Vienna Convention on the Law of Treaties ("the VCLT")—an international agreement which embodies foundational principles of treaty law

and interpretation.[23] (Hindelang Decl. Ex. 06). Article 31 of the VCLT requires that "a treaty [be] interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." According to Art. 31(3), "there *shall* be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." The use of the term "shall" signifies that the consideration of these factors is mandatory, and not only permissive.

There are, in essence, two agreements at issue here for the Court to examine. The first agreement is the ECT, which contains the standing offer to arbitrate in Article 26. This agreement is, of course, only between States—as relevant to this dispute, Cyprus, Poland and the other EU Member States. The interpretation of the standing offer under Article 26 of the ECT is thus properly limited to the provision's text, as well as the expectations, intentions and understanding of the treaty Parties—that is, Poland and Cyprus—on that question. Mercuria was not a signatory to the ECT; therefore, its views and arguments are entitled to little weight.

The second agreement is the purported—but invalid—arbitration agreement between Mercuria and Poland, which is made up of (1) the standing offer from the ECT; and (2) the attempted acceptance by Mercuria. As Poland demonstrates, no such agreement was formed because Poland's offer to arbitrate under Article 26 of the ECT lacked legal effect as to intra-EU investors—and therefore could not be accepted—by Mercuria.

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[23] Although the United States has not ratified the Vienna Convention on the Law of Treaties, courts rely upon it "as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices." *Mora v. New York*, 524 F.3d 183, 196 (2d Cir. 2008).

Poland and Cyprus are Member States of the European Union, and are subject to EU law, which operates as domestic law internally within a Member State, and as international law (1) as between Member States; and (2) as between Member States and third (non-EU) States. *See* Hindelang Decl. ¶¶ 32-35. Based on the principle of the primacy of EU law, any domestic legislation in the Member States, or any international commitments made *between Member States* must be compatible with EU law. It follows that, where an international obligation *between one Member State and another* is in conflict with EU law, that international obligation must yield to EU law, and be rendered inapplicable *as between the Member States*.[24] As Professor Hindelang explains, this is a rule of interpretation (*lex specialis*) binding on the Member States and constitutes a bedrock "relevant rule[] of international law applicable in the relations between the parties" under Article 31(3)(c) of the Vienna Convention. Hindelang Decl. ¶10; *see generally* Background Section C.1.

The Court of Justice, which is the final arbiter of EU law, has held conclusively in the *Achmea*, *Komstroy* and *PL Holdings* cases that the offer to arbitrate disputes under Article 26 of the ECT is inapplicable to intra-EU investors because an investment arbitration between an EU Member State and an investor of another EU Member State would contravene Articles 267 and 344 of the TFEU. Background Section C. 3. Accordingly, the conflict rule requires that Article 26 of the ECT yield to the EU Treaties *as between the Member States*. Hindelang Decl. ¶ 10. The rights of third (non-EU) countries are unaffected.[25] This means that an offer to arbitrate investment

[24] Similarly, two U.S. States cannot not assume obligations with respect to one another that would violate the U.S. Constitution, or federal law. Indeed, the Constitution requires Congress to approve any such contemplated agreement before it takes effect—as a sensible prophylactic measure to avoid a scenario in which the proposed agreement would run afoul of federal law or impinge on the federal government's authority. *See* Hindelang Decl. ¶ 65.

[25] This rule of interpretation is also consistent with the Vienna Convention. Under Article 31 of the VCLT, where an earlier and later treaties cover the same subject matter, an "earlier treaty

disputes under Article 26 lacks legal effect *only* as between a Member State and an investor of another Member State.[26]

Petitioner intimates that EU law is irrelevant to this Court's interpretation of the ECT. That is incorrect. Article 26(6) of the ECT explicitly mandates that a "tribunal […] *shall* decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." [Emphasis added]. The rule that *as between Member States* international obligations must be interpreted in conformity with EU law is an "applicable rule[] and principle[]" of international law between Poland and Cyprus, and all other EU Member States. *See* Vienna Convention Article 31(3)(c); Hindelang Decl. ¶¶ 72-76.

Beyond the text of the ECT, the following demonstrate that the Member States' "intent and expectation […]" with respect to Article 26 of the ECT has always been that the offer to arbitrate under Article 26 is invalid as to intra-EU investors.

First, the Court of Justice's prior case law has confirmed on more than one occasion that EU Member States are not allowed to submit disputes to international courts or tribunals arising in fields where the European Union has exclusive or shared competence with the Member States. Hindelang Decl. ¶ 103. Examples of such "fields" include maritime environment, patents, aviation, and international trade. Hindelang Decl. ¶ 103. The basis for the Court of Justice's holding was that the operation of these tribunals would undermine the proper application of Article 19 TEU, Article 267 and 344 of the TFEU. Hindelang Decl. ¶¶ 44- 50. This is the precise line of

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applies only to the extent that its provisions are compatible with those of the later treaty." Here, the earlier treaty is the ECT (which Poland ratified in 1994 and the later treaties are the EU Treaties, which the parties ratified in 2004.

reasoning that was later extended to the international investment protection context in the *Achmea*, *Komstroy* and *PL Holdings* decisions. Hindelang Decl. ¶ 43.

Second, following the CJEU's ruling in *Achmea*, the Member States issued the 2019 Member States' Declaration affirming that the offer to arbitrate in Article 26 of the ECT is inapplicable to intra-EU investors, and no arbitration agreement can be formed through a purported acceptance of the offer. (Hindelang Decl. Ex. 13). Further, the Member States warned their investors that they should not initiate new intra-EU investment arbitration proceedings. *Id*.

Consistent with the Member States' joint undertaking in the Declaration, they made numerous submissions in arbitration proceedings initiated by intra-EU investors—submissions that were further accompanied by *amicus curiae* interventions by the European Commission—confirming the Member States' view that intra-EU arbitration was unlawful. This demonstrates the "practical construction" emphasized by the Supreme Court in *Choctaw Nation of Indians* and embodies "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31(3)(b) of the Vienna Convention.

The foregoing compels the conclusion that the Member States—including Poland and Cyprus—never intended, nor understood the offer to arbitrate in Article 26 of the ECT as being applicable to intra-EU investors. Reliance on Petitioner's reading of Article 26 would impermissibly "effect[] a result inconsistent with the intent or expectations of [the ECT's] signatories"—and should be rejected. *Maximov v. United States,* 373 U. S. 49, 373 U. S. 54 (1963). Indeed, Mercuria's attempted acceptance of an invalid offer to arbitrate was patently unreasonable given the Treaty Parties' numerous statements and acts that plainly demonstrated their understanding that Article 26 of the ECT did not apply to intra-EU investment disputes well before Mercuria initiated the underlying arbitration.

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When Mercuria purported to accept Poland's offer to arbitrate in September 2019—fifteen years after both Poland and Cyprus had become EU member States—there was no valid offer for Mercuria to accept, and no arbitration agreement was formed. Consequently, there is no "award made pursuant to […] an agreement to arbitrate" that would abrogate Poland's sovereign immunity under Section 1605(a)(6) the FSIA. Poland continues to be immune to suit in U.S. courts, and the Petition should be dismissed for lack of subject-matter jurisdiction.

II. THE COURT SHOULD DECLINE ENFORCEMENT OF THE AWARD UNDER ARTICLE V OF THE NEW YORK CONVENTION

The Court should dismiss Mercuria's Petition because Poland enjoys sovereign immunity. Consequently, the Court lacks subject matter jurisdiction to entertain Mercuria's claim. If the Court finds that it does have subject matter jurisdiction in this case, Poland asks the Court to nevertheless decline enforcement of the Award under Article V of the New York Convention. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007); *see also* 9 U.S.C. § 207 (implementing Article V).

While the DC Circuit recently reaffirmed that merits arguments under Article V of the New York Convention need not be briefed by a defendant until after a determination on sovereign immunity has been made (*Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020)), a more recent decision from this Court has cast that in doubt. *Deutsche Telekom AG v. Republic of India*, No. CV 21-1070 (RJL), 2024 WL 1299344, at *4 (D.D.C. Mar. 27, 2024). Out of an abundance of caution, Poland articulates its New York Convention arguments here, but respectfully requests that the Court grant it leave to update its arguments in the future if new developments so warrant.

A. The Court Should Decline Confirmation Under Article V(1)(e)

Poland asks the Court to dismiss the Petition because it is in direct contravention of the March 6, 2023 order issued by the Svea Court of Appeals prohibiting enforcement of the Award. Wallin Decl. Ex. C. On March 6, 2023, the court "order[ed] 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." *Id*. Despite this suspension order, Mercuria commenced this action in November 2023. Mercuria's efforts to confirm the Award before this Court violate the Swedish court's order.

The Svea Court of Appeals' suspension order serves an important purpose: the Swedish courts are currently hearing the parties' submissions and Poland has a considerable likelihood of success in setting aside the Award. *See* Background Section E. The order is not only designed to avoid conflicting decisions in different jurisdictions but is also intended to protect Poland from vexatious—and expensive—enforcement litigation based on an unlawful arbitral award under EU law. Poland has already been put to considerable cost to defend this action and should not be put to more. Nor is the order a mere formality. To the contrary—under Swedish law the default assumption is that enforcement will be allowed even when a set-aside proceeding is pending. *See* Wallin Decl. ¶ 5. Here, the Svea Court of Appeals made an *affirmative finding* that a suspension order against enforcement is necessary and warranted. Wallin Decl. ¶ 5; (Ex. 5). Petitioner's attempt to enforce the Award in this Court in contravention of the Svea Court of Appeals' ruling is an affront to a court of the arbitral seat.

This Court should give the suspension order full effect and dismiss Mercuria's Petition. As the Supreme Court instructs, "[i]t is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be

obeyed until the injunction is vacated or withdrawn." *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757, 766-67 (1983). Here, the suspension order has an injunctive character, and the New York Convention recognizes the propriety of a dismissal in such circumstances. Article V(1)(e) of the Convention permits this Court to refuse "recognition and enforcement of the [Award]" where "the [Award] […] has been […] *suspended* by a competent authority of the country in which, or under the law of which, that award was made." [Emphasis added]. The Svea Court of Appeals is a "competent authority" under the meaning of the provision and Sweden is the country in which the Award was rendered, and to the laws of which it has been made subject. *See* Award ¶ 26. In determining whether an arbitral award has been suspended, the court must refer to the "regimen or scheme of arbitral procedural law under which the arbitration was conducted"—here, that of Sweden. *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial,* 745 F. Supp. 172, 178 (S.D.N.Y. 1990). The Swedish court's order prohibiting enforcement serves as a "suspension."[27] This stands in contrast to Article VI of the Convention, which allows a court to "adjourn the decision on the enforcement of the award" where "an application for the setting aside […] of the award has been made." Thus, while Article VI permits a court to *stay* an enforcement proceeding when a set aside petition is pending in parallel, Article V(1)(e) expressly permits the Court to *decline* enforcement of the Award where it has already been "suspended."[28]

[27] As a Swiss court interpreting Article V(1)(e) explained, "suspension" under Article V(1)(e) applies to a situation in which a court "notic[es] that a fault is likely to impact the award [and] prevents its enforcement until such time as the issue is settled substantively by the court examining the action to set aside the award." Swiss Federal Tribunal, Switzerland, 21 March 2000, 5P.371/1999.

B. The Court Should Decline Enforcement Under Article V(1)(a)

The Court should decline enforcement under Article V(1)(a) because "[t]he parties to the agreement […] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[29] Based on the plain text of the New York Convention, this is a determination left squarely in the hands of the Court.

The law of the seat of the arbitration governs the validity of the arbitration agreement. *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 152 (D.D.C. 2018). Unquestionably, one source of law "applicable" to both Poland and Mercuria is EU law: Poland is a Member State of the European Union, and Mercuria is a legal entity registered in Cyprus. Pet. ¶¶ 2, 21.

First, pursuant to EU law, no valid arbitration agreement could have been made between Mercuria and Poland. Therefore, "[t]he parties to the agreement […] were, under the law applicable to them, under some incapacity" to conclude an arbitration agreement.

Second, the arbitration agreement is similarly invalid under the "under the law to which the parties have subjected it." Article 26(6) of the Energy Charter Treaty provides that a "tribunal established […] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." As Poland has shown, the commitments made by Poland and Cyprus to preserve the primacy of EU law under the EU Treaties come later-in-time to the ECT, and the ECT therefore only applies to the extent there is no incompatibility with Poland's

[29] Poland maintains that no valid arbitration agreement was ever formed between Mercuria and Poland. The request to decline enforcement of the Award under Article V of the New York Convention is an argument in the alternative, applicable if the Court finds (1) that the Parties did conclude a valid arbitration agreement; and (2) that Poland no longer enjoys sovereign immunity under the FSIA.

obligations under the EU Treaties. See Background Section C. 1.; VCLT Art. 30. This is recognized under widely accepted "rules and principles of international law." An intra-EU award under the ECT that fails to take account of EU law "is, by definition, *ultra vires*." *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1, 14 (D.D.C. 2023).

Finally, "the said agreement is not valid […] under the law of the country where the award was made." The Award was unambiguously made under the laws of Sweden, which is a Member State of the European Union, and which must apply European Union law to arbitral proceedings seated in its territory. See Background Section E. After *Achmea,* Swedish courts have consistently set aside intra-EU arbitral awards because "a putative offer by an EU Member State to arbitrate in an investment agreement is invalid as to an investor from another EU Member State because the parties lacked the capacity to conclude an arbitration agreement." *See* Hindelang Decl. ¶ 23. Swedish courts have held that "EU Member States simply could not have agreed, either beforehand or afterwards, to resolve *intra-EU* disputes through arbitration instead of legal avenues provided for by the EU Treaties." Swedish courts have consistently confirmed and refined this line of argumentation, continuing to annul intra-EU awards issued after *Achmea*. See Background Section E. 2.

C. The Court Should Decline Enforcement Under Article V(2)(b)

Under Article V(2)(b) of the New York Convention, the Court may decline to enforce an arbitral award when doing so would be contrary to public policy. A judgment is unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Ackermann v. Levine,* 788 F.2d 830, 837 (2d Cir. 1986) (emphasis in original). Enforcing the Award here is against public policy because it would violate the foreign sovereign compulsion doctrine and offend principles of comity.

The foreign sovereign compulsion doctrine promotes the dismissal of cases where granting the petitioner the relief it seeks would result in a United States court effectively compelling a foreign sovereign to violate its own laws. *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980); *see also In re Sealed Case*, 825 F.2d 494, 498–99 (D.C. Cir. 1987) ("We have little doubt […] that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders."); *see also Motorola Credit Corp.v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004) ("a state may not require a person to do an act in another state that is prohibited by the law of that state or the law of the state of which he is a national"). The doctrine thus provides a "foreign party" with "protection from being caught between the jaws of [a U.S. court] judgment and the operation of laws in foreign countries." Restatement of the Foreign Relations Law of the United States 3d § 441 (1987), reporters' notes 1.

European Union law applies to Poland. Moreover, EU law—as confirmed by the Court of Justice in the *Achmea* and *Komstroy* decisions—prohibits the underlying arbitration. Background Section C. 3. Confirmation of the Award would therefore have the effect of coercing Poland to pay money pursuant to an underlying arbitration which was unlawful under the law to which Poland—and Mercuria—are both subject, and which would further frustrate the European Union's prerogative of ensuring the development and application of European Union law. Allowing enforcement of the Award here would stand in particularly stark contrast to Sweden—the arbitral seat. Swedish Courts have consistently annulled intra-EU awards because they violate Swedish public policy, as an offer to arbitrate in an intra-EU context is incompatible with the fundamental rules and principles governing the legal order in the Union and thus also in Sweden. See Background Section E. 2. Upholding the Award would be manifestly incompatible with the

foundations of the legal order in Sweden. *See* Wallin Decl. ¶ 20 (referring to the decision of the Swedish Supreme Court in *PL-Holdings* ¶¶ 35-37). In fact, to avoid such outcomes, the CJEU has specifically instructed EU Member State national courts to annul intra-EU awards rendered in their jurisdictions. *See PL-Holdings*, ¶ 55 (Hindelang Decl. Ex. 17).

Second, enforcing the award would violate principles of comity that the United States should accord to Poland and the EU's constitutional order and judicial system. "[C]omity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Compania de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 445–46 (10th Cir. 2023) quoting *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1066–67 (10th Cir. 2007) (quotations omitted). Awards that "undermine the public interest" and "public confidence in the administration of the law" should be denied confirmation under Article V(2)(b). *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 844 F.3d 281, 289 (D.C. Cir. 2016) (internal quotation omitted). Confirmation of the Award here would undermine the EU's prohibition on using investment arbitration to settle intra-EU disputes between investors and States. This would, in turn, contravene the well-established principle that courts in the U.S. must "respect the independence of every other sovereign State." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1987).

III. THE PETITION SHOULD BE DISMISSED UNDER THE *FORUM NON CONVENIENS* DOCTRINE

The Court should dismiss the Petition pursuant to the doctrine of *forum non conveniens*. Poland acknowledges that courts in this Circuit have interpreted the *forum non conveniens* doctrine as being unavailable in the context of enforcement proceedings because a foreign forum would not

give access to a defendant's assets in the United States. Poland respectfully submits, however, that this interpretation of the doctrine is unduly restrictive and appears irreconcilable with the D.C. Circuit's instruction that "the doctrine of *forum non conveniens* remains fully applicable in FSIA cases." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002); *Simon v. Republic of Hungary*, 911 F.3d 1172, 1182 (D.C. Cir. 2018).

The *forum non conveniens* doctrine generally allows for the dismissal of actions where there is an adequate, alternative forum that is better situated to hear the claim in question. Dismissal pursuant to the doctrine is proper where a petitioner would have *some* remedy available to it in the foreign forum. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.11 (1981) ("An alternate forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute."). The remedy, however, need not be identical. *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011).

As the United States Court of Appeals for the Second Circuit has explained:

> Where adequacy of an alternative forum is assessed in the context of a suit to obtain a judgement and ultimately execution on a defendant's assets, the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there.

See also In Re Monegasque de Réassurance S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002) (affirming the district court's dismissal of an enforcement action against a Ukrainian state-owned company for *forum non conveniens* where the litigation had no connection to the United States). Moreover, "the fact that a plaintiff might recover less in an alternate forum does not render that forum inadequate." Poland submits that the Second Circuit's approach is more in line with the contours of the doctrine as it is generally understood.

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The DC Circuit has established a two-part test to determine the propriety of *forum non conveniens dismissal*. A court may dismiss a claim where "(1) there is an available and adequate alternative forum, and (2) the balance of various public and private interest factors indicates that maintaining the case in the current forum is comparatively inconvenient." *In re Air Crash Over S. Indian Ocean*, 352 F. Supp. 3d 19, 35 (D.D.C. 2018) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Both these factors counsel dismissal in this case.

First, alternate venues exist for Mercuria to attempt enforcement of the Award. EU Member State courts are available fora and are sophisticated, impartial and capable of considering Mercuria's petition to enforce.

Second, the balance of public and private interests similarly favors dismissal. "The public interest factors to consider are the desirability of clearing foreign controversies from congested dockets, the extent of any local interest in resolving the controversy, and the ease with which the present forum will be able to apply the laws of an unfamiliar jurisdiction." *Atl. Tele-Network v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 137 (D.D.C. 2003). Although a plaintiff is entitled to some deference in its choice of forum, that deference is limited where the dispute has no connection to the chosen forum—in this case, the United States. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 605 (D.C. Cir. 1983); *Irwin v. WWF, Inc.*, 448 F. Supp. 2d 29, 33 (D.D.C. 2006). It is indisputable that the underlying arbitration has no connection whatsoever to the United States. It arises out of a dispute between Poland (an EU Member State) and Mercuria, an EU-based company, and was based on the Energy Charter Treaty, an instrument to which the United States is not a signatory.

Against these private interests weigh substantial public interests. European Union law—which binds both Mercuria and Poland—considers that the Parties never concluded a valid arbitration award. *See* Background Section C. 3. To the extent there remain questions with respect to this issue, those should be resolved by national courts of EU Member States, which are well-versed in—and well-placed to resolve—questions of EU law, and treaty practice among EU Member States. Among the strongest public interests in a *forum non conveniens* dismissal are "a local interest in having localized controversies decided at home" and "the interest in having foreign law interpreted by a foreign court." *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390 (2d Cir. 2011); *see also Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) ("the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference [it] commands"). Both factors are relevant here, and both suggest that the evaluation and resolution of these issues is more proper in Europe.

Finally, the seat of the arbitration is Sweden, where annulment proceedings are currently pending, and are likely to lead to the annulment of the Award. *See* Background Section E. Poland hastens to remind the Court that *Mercuria* chose Sweden as the arbitral seat by invoking arbitration under the Rules of the arbitral center of the Stockholm Chamber of Commerce. *See* Background Section D. 3. These proceedings run the risk of interfering with—and possibly contradicting—the findings that the Swedish courts may render. Moreover, the filing of Mercuria's petition directly contravenes the Svea Court of Appeal's explicit and unambiguous order that no enforcement efforts may be undertaken by Mercuria. *See* Background Section E. 1.

While Poland recognizes that the United States is a member of the New York Convention and may have an interest in promoting international arbitration and the enforceability of arbitral awards as a general matter of public policy, Poland respectfully submits that this consideration is

outweighed by the manifold countervailing public factors enumerated above. *See Figueiredo*, 665 F.3d at 392 ("Although enforcement of such awards is normally a favored policy of the United States […], that general policy must give way to the significant public factor of [the State's internal legislation].)" Accordingly, Poland requests that the Court dismiss this action on grounds of *forum non conveniens*.

IV. IN THE ALTERNATIVE, THE COURT SHOULD STAY THESE PROCEEDINGS

For the reasons explained in Sections I – III, the Court should dismiss Mercuria's Petition. In the alternative, the Court should stay this case pending the resolution of concurrent legal proceedings which are likely to inform the Court's consideration of (1) sovereign immunity under the FSIA; (Section I) and (2) further grounds for non-enforcement of the Award under the New York Convention on account of the pending annulment proceedings before the Svea Court of Appeals. (Section II). Poland requests that the Court stay this case pending the outcome of *both* proceedings.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). When determining whether to stay proceedings, a court must "'weigh competing interests and maintain an even balance' between the court's interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724,732–33 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254–55). The Court may consider and rule on Poland's request for a stay before reaching a determination of subject matter jurisdiction. *CEF Energia, B.V. v. Italian Republic*, No. 19-CV-3443 (KBJ), 2020 WL 4219786, at *4 (D.D.C. July 23, 2020)(collecting cases).

A. The annulment proceedings are still ongoing in Sweden and are likely to result in the annulment of the arbitral Award

If the Court declines to dismiss this case for violating the Swedish court's suspension order against enforcement of the Award, (See Section II. A.) Poland asks that the Court stay the case pending the resolution of the Swedish annulment proceedings.

As demonstrated, it is probable that the Svea Court of Appeals will annul the Award. *See* Background Section E. *First*, by enjoining the enforcement of the Award, the court has already indicated that it believes annulment of the Award to be the most likely outcome of the proceedings. Background Section E. 1. *Second*, the Swedish courts have already annulled at least *six* intra-EU investment arbitration awards on the ground that they were unlawfully rendered under EU law. *See* Wallin Decl. ¶ 11. Moreover, the text of the New York Convention itself permits a stay under these circumstances. Article VI of the Convention provides that "[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon *may, if it considers it proper, adjourn the decision on the enforcement of the award*." [Emphasis added].

If the Swedish courts annul the Award, these proceedings will become moot. Article V of the New York Convention explicitly allows a court to decline enforcement where "[t]he award has […] been set aside […] by a competent authority of the country in which, or under the law of which, that award was made." And the D.C. Circuit has confirmed that an award previously set aside is not then subject to enforcement in the courts of the United States unless the set aside violated the "most basic notions of morality and justice." *See, e.g.*, *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007); *Getma Int'l v. Republic of Guinea*, 862 F.3d 45, 48 (D.C. Cir. 2017). Once again, judicial economy and the risk posed by allowing two parallel

proceedings involving the same subject matter to continue—particularly where the outcome of the first might render the later proceeding moot—counsel in favor of a stay.

In two cases, this Court has stayed the confirmation of intra-EU investment arbitration awards in identical circumstances, including with reference to the factors enumerated by the United States Court of Appeals for the Second Circuit in *Europcar Italia, S.p.A. v. Maiellano Tours*, Inc., 156 F.3d 310 (2d Cir. 1998). In *CEF Energia, B.V. v. Republic of Italy*, another judge of this Court stayed the petitioner's request to confirm an intra-EU arbitral award where a set aside petition was pending before the Svea Court of Appeals in Sweden. *CEF Energia, B.V. v. Italian Republic*, No. 19-CV-3443 (KBJ), 2020 WL 4219786, at *5 (D.D.C. July 23, 2020)("This Court has no doubt that judicial economy favors a stay in this case."). As the Court in *CEF Energia* explained:

> "Litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests." *Novenergia II*, 2020 WL 417794, at *3 (quoting *Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005)). Such interests are "especially strong where a [foreign] parallel proceeding is ongoing" and when "there is a possibility that the [arbitral] award will be set aside[,] since a court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings."

CEF Energia, B.V. v. Italian Republic, No. 19-CV-3443 (KBJ), 2020 WL 4219786, at *5 (D.D.C. July 23, 2020). Indeed, the Svea Court of Appeals set aside the underlying arbitral award in the *CEF Energia* case just a few weeks ago on May 27, 2024, thereby demonstrating the propriety of the Court's earlier stay order. *See also Novenergia II - Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-CV-01148 (TSC), 2020 WL 417794, at *3 (D.D.C. Jan. 27, 2020) (staying confirmation of arbitral award where set aside proceedings were ongoing in Sweden). This case is no different, and the circumstances presented here similarly warrant a stay of these proceedings.

B. The *Blasket*, *NextEra* and *9Ren* cases are pending on appeal before the DC Circuit and are likely to have a direct bearing on Poland's sovereign immunity arguments in this case

The United States Court of Appeals for the District of Columbia Circuit is currently considering three cases that squarely present the question of whether an EU Member State can conclude a valid arbitration agreement with an investor from another EU Member State to submit a dispute to international investment arbitration. *See NextEra Energy Global Holdings B.V. v. Kingdom of Spain,* No. 23-7031 (DC Cir.); *9REN Holdings S.A.R.L. v. Kingdom of Spain,* No. 23-7038 (DC Cir.); and *Blasket Renewable Investments LLC, v. Kingdom of Spain,* No. 23-7031 (DC Cir.). The DC Circuit held consolidated oral argument in the case in February 2024.

In the *Blasket* case, this Court found that Spain (an EU Member State) lacked the capacity to make an offer to arbitrate an investment dispute with an investor of another EU Member State, concluding that no arbitration agreement had ever been formed between the Parties. *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1, 8 (D.D.C. 2023). Accordingly, the court dismissed the investor's petition to enforce the underlying arbitral award because Spain continued to enjoy sovereign immunity and the petitioner had failed to demonstrate waiver under the arbitration (or any other) exception. *Id*. In the *9Ren* and *NextEra* cases, however, another judge of this court made a contrary finding. *See 9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-CV-01871 (TSC), 2023 WL 2016933 (D.D.C. Feb. 15, 2023); *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023). These cases therefore present the D.C. Circuit with contrary rulings on a substantially similar legal question under the FSIA.

Poland believes that the DC Circuit's resolution of these appeals will likely have a direct bearing on Poland's sovereign immunity arguments in these proceedings. A stay pending the DC Circuit's resolution of the appeals would reduce the possibility of inconsistent judgments and

would favor judicial economy. Accordingly, Poland asks the Court to stay these proceedings until the issuance of the DC Circuit's opinion in these cases and respectfully asks this Court's leave to update its motion to dismiss as appropriate following issuance of the DC Circuit's opinion.

While Poland cannot predict the remaining length of the D.C. Circuit and Swedish proceedings, Poland nevertheless believes that the proceedings are likely to resolve reasonably soon. The D.C. Circuit may rule within a few weeks of Poland's filing, and the Svea Court of Appeal could reasonably be expected to rule within the next six months. Neither of these delays would work an undue prejudice on Mercuria. Petitioner received its Award only 18 months ago, and a stay pending the outcome of the parallel proceedings would result in only modest delay. Moreover, the Court could impose a requirement that the Parties file periodic status reports with the Court to ensure that the imposition of a stay—if ordered—remains justified.

CONCLUSION

Consent forms the cornerstone of arbitration, and where consent to arbitrate is lacking, the enforcement of an invalid award harms the cause of arbitration rather than promotes it. Mercuria asks the Court to enforce an arbitral award that is unlawful under well-settled law applicable to Poland and Mercuria—and which the text of the Energy Charter Treaty explicitly required the Tribunal to apply. This key predicate means that Poland continues to enjoy sovereign immunity because it never waived that immunity by agreeing to arbitrate disputes with Mercuria, and it further empowers this Court to decline enforcement of the Award on multiple grounds enumerated in Article V of the New York Convention. It also means that the Award is highly likely to be annulled at the arbitral seat in Sweden where the Swedish courts are obliged to apply EU law; have already annulled five intra-EU awards in the last few years; and have expressly prohibited the enforcement of this Award pending the conclusion of those proceedings. Therefore—and on the

bases numerated above—Poland respectfully asks the Court to dismiss Mercuria's Petition and decline confirmation of the Award, or in the alternative, to stay the case.

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Respectfully submitted,

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