UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACF RENEWABLE ENERGY LIMITED, *Plaintiff*, v. THE REPUBLIC OF BULGARIA, *Defendant*.	Case No. 1:24-cv-01715-DLF

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE REPUBLIC OF BULGARIA'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO STAY

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The Republic of Bulgaria ("Bulgaria") respectfully submits this statement of points and authorities in support of its motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6), and under the doctrines of foreign sovereign compulsion and *forum non conveniens*, seeking dismissal of the complaint (the "Complaint," ECF No. 3-1) of Plaintiff ACF Renewable Energy Limited ("ACF") for enforcement of a foreign arbitral award under 22 U.S.C. § 1650a (the "Motion"). This statement of points and authorities is further submitted in support of Bulgaria's motion, in the alternative, to stay this action pending the resolution of other ongoing proceedings before the U.S. Court of Appeals for the D.C. Circuit and the U.S. Supreme Court that concern related legal questions, any of which would be outcome determinative for Bulgaria's Motion. Bulgaria's Motion is also supported by the accompanying declaration of Lazar Tomov ("Tomov Decl.") with attached exhibits.

Pursuant to Local Civil Rule 7(m), counsel for Bulgaria conferred with counsel for ACF with respect to Bulgaria's alternative request for a stay of these proceedings pending the resolution of other ongoing proceedings in the D.C. Circuit and the Supreme Court. ACF opposes a stay.

PRELIMINARY STATEMENT

Plaintiff ACF asks this Court to confirm an ICSID arbitration award issued in January 2024 purportedly under the investor-state arbitration provision of the Energy Charter Treaty ("ECT"). Bulgaria vigorously maintains its immunity from this action and from the jurisdiction of the U.S. courts.

The ECT's arbitration provision has been *ab initio* inapplicable as between Bulgaria and European Union ("EU") investors, including Maltese investors such as ACF, since Bulgaria acceded to the EU on January 1, 2007, as discussed *infra* and in the accompanying declaration of Lazar Tomov. Consequently, and as Bulgaria maintained throughout the arbitration proceeding,

there was no offer to arbitrate under the ECT available to ACF, and therefore ACF's notice of ICSID arbitration did not form an agreement to arbitrate. Without an agreement to arbitrate, there is no basis to overcome Bulgaria's immunity from this action. ACF's Complaint must be dismissed.

First, ACF has not shown (and cannot show) an applicable exception to Bulgaria's presumptive immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1605-07, and thus this Court lacks subject-matter jurisdiction to adjudicate ACF's claim. There is no jurisdiction under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), because Bulgaria never offered—via the ECT or otherwise—to arbitrate disputes with EU nationals, including ACF, and therefore no agreement to arbitrate was ever formed between Bulgaria and ACF. Whether Bulgaria offered to arbitrate with Maltese investors is not a question of the scope of the ECT's arbitration provision, but rather a question of whether those provisions of the ECT (vis-à-vis Bulgaria) could be accepted by Maltese investors at all.

The FSIA's waiver exception, 28 U.S.C. § 1605(a)(1), does not apply, as Bulgaria did not expressly waive its immunity from ACF's award-enforcement claim. Nor do any of the narrow circumstances under which courts in this Circuit find an implied waiver of immunity apply, particularly given the lack of an agreement to arbitrate in the United States (or anywhere else). Absent any exception to Bulgaria's sovereign immunity, this Court should dismiss the Complaint for lack of subject-matter jurisdiction under the FSIA.

Second, without subject-matter jurisdiction, there is no personal jurisdiction over Bulgaria under the FSIA, 28 U.S.C. § 1330(b). Bulgaria expressly preserves any challenge to this Court's personal jurisdiction based on ACF's failure to allege the requisite minimum contacts with the United States necessary to satisfy constitutional due process pending the Supreme Court's

consideration of this issue. Although the D.C. Circuit has disclaimed the minimum contacts analysis as to foreign states, the Ninth Circuit has held to the contrary, and the Supreme Court has granted certiorari in *Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd. ("Antrix")*, 2024 WL 4394120 (U.S. Oct. 4, 2024), to resolve this question in its current term.

Third, granting the relief ACF seeks—*i.e.*, confirming the award—creates a conflicting legal obligation for Bulgaria that runs afoul of Bulgaria's fundamental obligations as an EU member. Specifically, the EU's stringent rules barring "State aid" prohibit and deem unlawful the payment of the award absent express authorization from the European Commission. The doctrine of "foreign sovereign compulsion" and related principles of international comity strongly caution U.S. courts to avoid forcing foreign sovereigns to violate their own laws. Those principles compel dismissal of this action, as this Court should not cause Bulgaria to violate EU law by requiring payment of unlawful State aid arising from an award that was issued without the requisite consent to arbitration.

Fourth, the doctrine of *forum non conveniens* requires dismissal of this case, because the EU courts provide an available and adequate forum and the balance of public and private interest factors weigh in favor of dismissal of this action before this Court. This is especially the case given the centrality of EU law and court decisions to this case. ACF, an EU company, should not be permitted to circumvent the EU legal system, including bedrock principles pertaining the functioning of the EU, to enforce an award in U.S. courts concerning a dispute arising out of EU-specific regulatory issues.

Finally, in the alternative, Bulgaria respectfully requests that this Court exercise its sound discretion and enter a stay of proceedings pending the resolution of ongoing appellate review of important (and dispositive) issues of subject-matter jurisdiction and personal jurisdiction in

NextEra Energy Global Holdings B.V. v. Kingdom of Spain, No. 23-7031 (D.C. Cir.), and the Supreme Court's *Antrix* case noted above, respectively. All of the traditional factors counsel in favor of a stay. A stay will promote judicial economy and preserve this Court's and the Parties' resources, allowing the appellate courts to provide guidance on critical legal issues in this case before this Court must rule. Absent a stay, Bulgaria may face the irreparable harms of (i) confronting conflicting legal obligations and (ii) potentially needing to repossess any assets that ACF may ultimately be able to seize. By contrast, any delay incurred by ACF in receiving payment under the award, if enforced, will be duly compensated through the accrual of interest.

This Court should dismiss the action or else grant Bulgaria's request for a stay. Should this Court deny each of Bulgaria's threshold arguments for dismissal, Bulgaria expressly reserves all applicable defenses to summary judgment, including but not limited to the applicable rate of any pre- or post-judgment interest under U.S. law.

BACKGROUND

A. The Parties

Defendant is the Republic of Bulgaria, a foreign state as defined in the FSIA, 28 U.S.C. § 1603(a), and a member of the EU. *See* Compl. ¶ 3. Plaintiff ACF Renewable Energy Limited is a company incorporated under the laws of the Republic of Malta, another EU Member State. Compl. ¶ 2.

B. Background on the Legal Framework

The EU has its legal foundation in two international treaties: the Treaty on the Functioning of the European Union ("TFEU") and the Treaty on the European Union ("TEU") (together, the "EU Treaties"). *See* Tomov Decl. Ex. 22 (TFEU); Tomov Decl. Ex. 23 (TEU); Tomov Decl. ¶ 16. Among other things, the EU Treaties established an international court, the Court of Justice of the European Union ("CJEU"), as the body with the sole authority to rule in the final instance upon

the meaning of the EU Treaties. Tomov Decl. ¶ 21. The CJEU issues interpretative judgments pronouncing upon the meaning of the EU Treaties. Tomov Decl. ¶¶ 22-23. These judgments are binding on all EU Member States, as well as courts, private entities, and individuals. Tomov Decl. ¶ 25.

Concluded as a multilateral investment treaty, portions of the Energy Charter Treaty ("ECT") in practice operate as a collection of bilateral treaties among the State Parties, which include EU Member States as well as other States outside the EU. *See Contracting Parties and Signatories*, Energy Charter Treaty, https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/. The United States is not a party to the ECT, *id.*, and the EU recently has taken steps to exit the ECT. *See EU notifies exit from Energy Charter Treaty and puts an end to intra EU arbitration proceedings*, European Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513. The ECT includes provisions permitting arbitration under various arbitral rules, including tribunals convened pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"). ECT arts. 26(2)(c), 26(4)(a). This includes a provision that allows an investor of one ECT State Party to submit a dispute concerning its investments in another ECT State Party to arbitration. *See* ECT art. 26(1). These provisions related to investment protection and arbitration of investment disputes are, in effect, a bundle of bilateral investment treaties; Article 26 of the ECT is not a single standing offer to arbitrate by contracting States but rather a collection of separate offers of arbitration by parties to the ECT to other State Parties individually. *See* Tomov Decl. ¶ 41; *see also* Tomov Decl. Ex. 58 (*Republic of Moldova v. Komstroy LLC*, Case C-741/19, Judgment (Grand Chamber) of Sept. 2, 2021 ("*Komstroy* Judgment") ¶ 64); Br. for the European Comm'n on Behalf of the EU as Amicus Curiae 16-17, *NextEra Energy Glob. Holdings*

B.V. v. Kingdom of Spain, No. 23-7031 (D.C. Cir. June 6, 2023).

However, such an offer to arbitrate by any EU Member State to investors from another EU Member State does not exist under the ECT. As confirmed by the CJEU, the ECT provisions regarding arbitration of investment disputes are and have been inapplicable as between EU Member States, such as Bulgaria and Malta. *See* Tomov Decl. Ex. 59 (*Slovak Republic v. Achmea B.V.*, CJEU Case No. C-284/16, Judgment (Grand Chamber) of Mar. 6, 2018 ("*Achmea* Judgment")); Tomov Decl. Ex. 58 (*Komstroy* Judgment). In 2018, the Grand Chamber of the CJEU confirmed with final, binding effect in the *Achmea* Judgment that investor-State arbitration provisions in international agreements between EU Member States are incompatible with and thus are and have always been precluded by the TFEU. *See* Tomov Decl. Ex. 59 (*Achmea* Judgment) ¶¶ 31-60, 62. Three years later, in 2021, the Grand Chamber of the CJEU specifically confirmed that Article 26 of the ECT (the investor-State arbitration provision of that treaty) is *ab initio* inapplicable as between EU Member States. *See* Tomov Decl. Ex. 58 (*Komstroy* Judgment) ¶ 66; *see also* Tomov Decl. ¶¶ 38-49. Earlier this year, Bulgaria and Malta, along with the other EU Member States, adopted a Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings (Tomov Decl. Ex. 63), which expressly states that in light of the CJEU's judgments in *Achmea* and *Komstroy*, the ECT's investor-State arbitration provisions have been, from the beginning, inapplicable as between EU Member States. Tomov Decl. ¶¶ 50-55.

C. The Underlying Arbitration and Bulgaria's Objections

ACF, a company incorporated under the laws of Malta, submitted a Request for Arbitration to ICSID on February 7, 2018. Compl. ¶ 33. ACF's claims concerned an alleged investment in a photovoltaic (*i.e.*, solar energy) plant (the "Karad Plant") in Bulgaria, which ACF purchased on

June 28, 2012. Compl. Ex. A (the "Award") ¶¶ 5, 90, 97, ECF No. 1-1. ACF contended that Bulgaria's alleged failure to uphold legislative and regulative commitments with respect to the Karad Plant breached its obligations under Article 10 of the ECT. Award ¶ 5.

On June 1, 2018, the ICSID Tribunal (the "Tribunal"), composed of three arbitrators, was constituted. Compl. ¶ 34. On August 6, 2018, Bulgaria filed a Request for Bifurcation, notifying the Tribunal of its preliminary objection to the Tribunal's jurisdiction over ACF's claims based on the CJEU's decision in *Achmea*, among other grounds. Compl. Ex. E (Decision on the *Achmea* Preliminary Objection, the "*Achmea* Objection Decision") ¶ 16, ECF No. 1-5.

Bulgaria contended, and has always maintained, that as between Bulgaria and Malta, the investor-State arbitration provisions of the ECT are: (1) incompatible with the TFEU; (2) have been incompatible with the TFEU at least since Bulgaria's accession to the EU on January 1, 2007; and (3) do not extend to EU nationals and entities such as ACF since Bulgaria's accession to the EU on January 1, 2007. *See Achmea* Objection Decision ¶ 89; *see also* Award ¶¶ 734-735. Accordingly, there was no offer of investor-State arbitration by Bulgaria under ECT Article 26 extended to or capable of being accepted by ACF, an investor of Malta. *See Achmea* Objection Decision ¶ 89. Because there was no agreement between ACF and Bulgaria to ICSID arbitration, the Tribunal lacked jurisdiction over the dispute. *See id.* In a decision issued on December 20, 2019, the Tribunal rejected Bulgaria's jurisdictional objection under *Achmea*. *Id.* ¶ 236.

The parties then proceeded to brief the merits, along with further jurisdictional objections raised by Bulgaria, and the Tribunal held a hearing. Award ¶¶ 20-54, 71. Following the CJEU's September 2, 2021 decision in *Komstroy*, on October 15, 2021, Bulgaria submitted to the Tribunal its comments regarding the implications of the *Komstroy* Judgment on the Tribunal's jurisdiction. Award ¶ 84.

On January 5, 2024, the Tribunal issued the Award. Compl. ¶ 40. The Tribunal held that it had jurisdiction on the majority of ACF's claims, notwithstanding the CJEU's rulings in *Achmea* and *Komstroy*. Award ¶¶ 1455-1515. On the merits, the Tribunal concluded that Bulgaria failed to accord ACF fair and equitable treatment, breaching Article 10(1) of the ECT. Award ¶¶ 1516-1793. The Tribunal awarded ACF EUR 61,040,000 in damages, plus interest and costs. Award ¶ 1843.

D. The Current Action

On June 13, 2024, ACF filed its Complaint in this Court seeking recognition and enforcement of the Award and a judgment against Bulgaria in the amount of EUR 61,040,000, in addition to legal costs of EUR 264,833.90 and US$ 5,209,865.05, arbitration costs of US$ 480,766.49, and pre- and post-award interest as ordered by the Tribunal (Compl. ¶ 45); ACF subsequently filed a corrected Complaint on June 17, 2024. This motion follows.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION

Bulgaria is a "foreign state" within the meaning of the FSIA, 28 U.S.C. § 1603(a). The FSIA provides the "sole basis" for obtaining subject-matter jurisdiction in a civil action against a foreign state in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *see also Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 277 (2023) (confirming that the FSIA applies in civil actions). "The FSIA's 'terms are absolute': Unless a plaintiff shows that a statutorily enumerated exception to sovereign immunity applies, 'courts of this country lack jurisdiction over claims against a foreign nation.'" *Zhongshan Fucheng Indus. Inv. Co. Ltd. v. Fed. Republic of Nigeria*, 112 F.4th 1054, 1058 (D.C. Cir. 2024) (quoting *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015)); *see also* 28 U.S.C. §§ 1604-

05, 1607. "[T]he FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). "If no [FSIA immunity] exception applies, then the court lacks subject-matter jurisdiction" and dismissal is required. *Jerez v. Republic of Cuba*, 775 F.3d 419, 423-24 (D.C. Cir. 2014).

Here, ACF alleges that two FSIA exceptions apply to overcome Bulgaria's immunity: (i) the "arbitration exception" under 28 U.S.C. § 1605(a)(6), and (ii) the "waiver" exception under 28 U.S.C. § 1605(a)(1). Compl. ¶ 4. Neither exception is satisfied in this case.

A. The FSIA Arbitration Exception, 28 U.S.C. § 1605(a)(6), Does Not Apply

Bulgaria denies the existence of an agreement to arbitrate with ACF. As from Bulgaria's accession to the EU on January 1, 2007, Bulgaria never offered to arbitrate disputes with EU nationals, including Maltese investors such as ACF, under Article 26 of the ECT or in any other instrument. Because there was no offer to arbitrate for ACF to accept, there is no "valid arbitration agreement between the parties," as required under the D.C. Circuit's controlling precedent in *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 (D.C. Cir. 2015) (emphasis added). Without a valid arbitration agreement, ACF cannot satisfy the exception to immunity in 28 U.S.C. § 1605(a)(6).

1. Whether an Agreement to Arbitrate Existed Between Bulgaria and ACF is a Jurisdictional Question Under the FSIA, 28 U.S.C. § 1605(a)(6)

In relevant part, the FSIA's arbitration exception provides that:

> A foreign state shall not be immune . . . in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, . . . or to confirm an award made pursuant to such an agreement to arbitrate.

28 U.S.C. § 1605(a)(6) (emphases added). The arbitration exception applies only when the court

finds three "'jurisdictional facts:'" (1) an "arbitration award;" (2) a "treaty potentially governing award enforcement;" and (3) "an arbitration agreement." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain ("NextEra II")*, 112 F.4th 1088, 1100 (D.C. Cir. 2024) (quoting *Chevron*, 795 F.3d at 204 & n.2). A district court therefore "lacks jurisdiction over the foreign state and the action must be dismissed" if there is no "valid arbitration agreement between the parties." *Chevron*, 795 F.3d at 204-05.

The FSIA "requires the [d]istrict [c]ourt to satisfy itself" that a "valid arbitration agreement" exists "between" the foreign state and "the party challenging immunity." *Id.* at 205 & n.3. It would be "error" for a court to "eschew[] making this determination as part of its jurisdictional analysis." *Id.*; *see also Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 699 (D.C. Cir. 2022) (describing "the established ongoing duty of a [U.S.] court to determine its own jurisdiction"). For instance, in *Belize Social Development Ltd.*, the D.C. Circuit reasoned that the foreign sovereign respondent (Belize) could have raised successfully a jurisdictional objection under § 1605(a)(6) by demonstrating "that [its] Prime Minister lacked authority to enter the agreement to arbitrate," and therefore the agreement was "void *ab initio*." 794 F.3d at 103. Although the D.C. Circuit ultimately concluded that Belize's "bare allegation" regarding the Prime Minister's lack of capacity in that particular circumstance was insufficient to "carry its burden" under the FSIA, the takeaway is that the D.C. Circuit addressed Belize's lack-of-capacity argument as a jurisdictional question of the existence of an agreement to arbitrate under § 1605(a)(6). *Id.* By contrast, the FSIA does not require courts to resolve questions about the scope of a valid arbitration agreement, which are not "jurisdictional question[s] under the FSIA." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021).

This Court must assess *de novo* (*i.e.*, without deference to the arbitral tribunal) its own

jurisdiction to hear ACF's claim. *See Wye Oak*, 24 F.4th at 699; *NextEra II*, 112 F.4th at 1097 (declining to give deference to the arbitrators' denial of Spain's jurisdictional objections); *see also id.* at 1101-03 (considering *de novo* the "existence" of an agreement to arbitrate). This Court therefore must assure itself of the existence of "an agreement" by Bulgaria "with or for the benefit" of ACF. 28 U.S.C. § 1605(a)(6); *Chevron*, 795 F.3d at 205 & n.3; *see also Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 385-86 (4th Cir. 2013) (explaining that whether defendant agreed to arbitrate with claimant "relates to the existence of a contract to arbitrate, not the scope of that potential agreement") (cleaned up); *Lloyd's Syndicate 457 v. FloaTEC, LLC*, 921 F.3d 508, 515 (5th Cir. 2019) (similar). Here, it was effectively as if Bulgaria lacked "capacity" to offer arbitration to ACF, because, as discussed below, under EU and international law, ECT Article 26 was inapplicable *ab initio* as to Maltese investors since Bulgaria's accession to the EU.

2. Bulgaria Did Not Agree to Arbitrate Disputes with EU Investors, Including Maltese Investors Such As ACF

ACF alleges that "ACF's submission of the Parties' dispute to ICSID arbitration coupled with Bulgaria's consent set forth in Article 26(3)(a)" of the ECT "constituted an agreement to arbitrate." Compl. ¶ 32. Not so. As detailed in the accompanying declaration of EU-qualified legal expert Lazar Tomov, under applicable principles of international law and decisions of the CJEU, which are binding upon all EU Member States, including Bulgaria and Malta, "the ECT's investor-State arbitration provisions have been *ab initio* inapplicable as between and among the EU Member States." Tomov Decl. ¶ 52. Accordingly, Article 26 of the ECT "has been inapplicable as between Bulgaria and ACF's home State of Malta since Bulgaria's EU accession on January 1, 2007." *Id.* at ¶ 56. Consequently, since that date, "there was no offer by Bulgaria [under the ECT] to submit disputes to arbitration available to be accepted by ACF." *Id.* Put succinctly, there was no offer from Bulgaria to Maltese investors like ACF to arbitrate any disputes

under the ECT, and ACF's purported consent to ICSID arbitration did not (and could not) have the effect of forming an agreement to arbitrate, as required under *Chevron* to satisfy § 1605(a)(6). *See* 795 F.3d at 205; *see also* Tomov Decl. ¶¶ 56-58.

Bulgaria acknowledges that in *NextEra II*, 112 F.4th at 1103, the D.C. Circuit panel construed Spain's arguments under Article 26 of the ECT as raising a question of the "scope" of an agreement to arbitrate rather than the "existence" of an agreement to arbitrate under the FSIA. The *NextEra II* panel concluded that Spain, in signing the ECT, had "entered into an arbitration agreement" for the "benefit" of Netherlands and Luxembourg investors. *See id.* at 1102 (quotation marks and citation omitted). Unlike Spain, Bulgaria argues that, given the supremacy of the EU Treaties (Tomov Decl. §§ I.A-B) and the binding (*erga omnes*) effect of the CJEU's interpretation of those Treaties (*id.* § I.C), the investor-state dispute resolution provisions of the ECT have been *ab initio* inapplicable as between Bulgaria and Malta since January 1, 2007. *See* Tomov Decl. ¶ 49. As a result, there was no offer by Bulgaria to arbitrate any disputes with Maltese investors, such as ACF, and the question of whether Maltese investors such as ACF could form an agreement to arbitrate with Bulgaria by noticing an ICSID arbitration is not a question of the "scope" of Article 26 of the ECT, but rather an issue of the interpretation of the EU Treaties and their effects on EU Member States and their nationals.

Further, § 1605(a)(6) by its terms makes a jurisdictional question of the issue of whether Bulgaria's purported offer to arbitrate in the ECT was "with or for the benefit of" ACF. This Court must consider *de novo* this issue in interpreting the jurisdictional element of § 1605(a)(6). *See Chevron*, 795 F.3d at 205 & n.3. In a similar vein, the Second and Fifth Circuits have applied traditional contract/agency doctrines as a jurisdictional matter in determining whether an agreement to arbitrate existed "with or for the benefit of" a party under § 1605(a)(6). *See, e.g.*,

Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 67-70 (2d Cir. 2021) (no agreement to arbitrate "between the parties" under the theory of "direct benefits estoppel"); *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 801-02 (5th Cir. 2021) (rejecting plaintiffs' theory that an agreement to arbitrate existed under a third-party beneficiary theory).

To the extent *NextEra II* forecloses, at least for now, Bulgaria's argument as a question of immunity—notwithstanding the clear instruction in *Chevron* that courts must independently determine whether the jurisdictional elements of § 1605(a)(6) are satisfied—Bulgaria respectfully disagrees with *NextEra II* and expressly preserves its § 1605(a)(6) argument for potential further review, including in view of Spain's pending petition in *NextEra II* for rehearing *en banc* or any grant of certiorari on this issue under Supreme Court Rule 10(a). In this respect, Bulgaria notes that on October 1, 2024, the D.C. Circuit took the significant step of ordering petitioners in the *NextEra II* case to file a response to Spain's petition for rehearing *en banc*, suggesting at least some interest in rehearing this issue before the full court. *See* Clerk's Order, *NextEra II*, No. 23-7031 (D.C. Cir. Oct. 1, 2024). At a minimum, given the pending developments in *NextEra II* and the lack of Supreme Court precedent on this issue, this Court should hold in abeyance any decision on Bulgaria's immunity pending resolution of *NextEra II*, as discussed *infra* § V.

B. The FSIA Waiver Exception, 28 U.S.C. § 1605(a)(1), Does Not Apply

ACF also makes a fleeting reference to the FSIA's "waiver" exception. Compl. ¶ 4. The waiver exception applies only where a foreign state waived its immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). ACF alleges no facts (nor could it allege any facts) that Bulgaria expressly or impliedly waived its immunity from ACF's award-enforcement claim. As a result, there also is no subject-matter jurisdiction under 28 U.S.C. § 1605(a)(1).

In this Circuit, both express and implied waivers of immunity are construed "narrowly." *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002)

(explaining that "explicit waivers of sovereign immunity are narrowly construed in favor of the sovereign") (quotation marks and citation omitted). "A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so." *Id.*; *see also Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999) (noting "virtually unanimous precedents construing the [FSIA's] implied waiver provision narrowly") (quotation marks and citation omitted).

ACF fails to identify any explicit waiver of immunity. *See* Compl. ¶ 4. Even reading the threadbare Complaint in a light favorable to ACF, any suggestion of an implied waiver of immunity must also be rejected, as none of the three limited circumstances where courts have found an implied waiver exists here. The D.C. Circuit "has recognized that a foreign state implicitly dispenses with its immunity in only three circumstances: by (1) executing a contract containing a choice-of-law clause designating the laws of the United States as applicable; (2) filing a responsive pleading without asserting sovereign immunity; or (3) agreeing to submit a dispute to arbitration in the United States." *Ivanenko v. Yanukovich*, 995 F.3d 232, 239 (D.C. Cir. 2021) (collecting cases). The FSIA's legislative history also demonstrates that Congress anticipated only these three scenarios for finding an implied waiver. *See* H.R. Rep. No. 94-1487, at 18 (1976); S. Rep. No. 94-1310, at 17-18 (1976). In all events, "the touchstone of the waiver exception remains the same: 'that the foreign state have intended to waive its sovereign immunity.'" *Ivanenko*, 995 F.3d at 240 (quoting *Creighton*, 181 F.3d at 122).

ACF alleges no contract between ACF and Bulgaria containing a U.S. choice-of-law clause; nor has Bulgaria filed a responsive pleading without asserting its immunity—in fact, Bulgaria maintains its immunity and vigorously objects to the existence of FSIA subject-matter jurisdiction in this case. To the extent that ACF seeks to rely upon the third scenario—agreeing

to submit a dispute to arbitration in the United States—that circumstance likewise does not apply. Under this scenario, ACF must show "an agreement to arbitrate in the United States." *Ivanenko*, 995 F.3d at 240 (holding that the "lawsuit [could not] proceed under the FSIA's waiver exception" where there was no agreement between the parties "to arbitrate in the United States"). As discussed above, Bulgaria never agreed to arbitrate with ACF under the ECT. Without an agreement to arbitrate, the third scenario cannot apply.

Any suggestion that Bulgaria's accession to the ICSID Convention is sufficient to create an implied waiver must also be rejected. It is settled that the "ICSID Convention establishes an arbitration regime and commits its members to abide by arbitral awards issued under the regime, but the Convention does not constitute an agreement to arbitrate in any particular case." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain ("NextEra I")*, 656 F. Supp. 3d 201, 210 n.1 (D.D.C. 2023) (emphasis added), *aff'd in part and rev'd in part on other grounds*, 112 F.4th 1088 (D.C. Cir. 2024); *see also* ICSID Convention, Preamble ("Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration[.]"). To the extent the Second Circuit has held that by ratifying the ICSID Convention, a foreign state implicitly waives its immunity in actions seeking to confirm awards issued under the Convention, *see Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013), it has not disavowed the prerequisite of a valid agreement to arbitrate. *NextEra I*, 656 F. Supp. 3d at 210 n.1 (discussing the Second Circuit's cases and explaining that "an agreement to arbitrate is still necessary for implied waiver of immunity"). In any event, the *NextEra II* panel expressly confirmed that this Circuit has not adopted the Second Circuit's position on implied waiver. *See* 112 F.4th at 1100 ("The waiver issue remains 'unsettled' in our Circuit.") (internal

citation omitted). In sum, because it lacks "a specific arbitration agreement," ACF has not satisfied "a jurisdictional prerequisite under the waiver exception." *NextEra I*, 656 F. Supp. 3d at 210 n.1.

II. THIS CASE SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

The Court lacks personal jurisdiction over Bulgaria because (1) without subject-matter jurisdiction (*supra* § I), there also is no personal jurisdiction over Bulgaria under the FSIA, *see* 28 U.S.C. § 1330(b); and (2) personal jurisdiction over Bulgaria does not comport with due process requirements, as Bulgaria lacks the necessary "minimum contacts" with the United States. There is a well-recognized circuit split between the D.C. Circuit and the Ninth Circuit regarding whether the due process minimum contacts test applies to foreign states. Though the D.C. Circuit has held that a showing of minimum contacts, consistent with due process, is not required to establish personal jurisdiction over a foreign sovereign, the Ninth Circuit recently held that claimants are required to satisfy the minimum contacts analysis to establish personal jurisdiction over a foreign sovereign, which the claimants in that case could not do. *See Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd.*, 2023 WL 4884882, at *1-3 (9th Cir. Aug. 1, 2023), *cert. granted*, 2024 WL 4394120 (U.S. Oct. 4, 2024), and *cert. granted sub nom. CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 2024 WL 4394121 (U.S. Oct. 4, 2024); *cf. Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (holding that a showing of minimum contacts is not required to establish personal jurisdiction over a foreign sovereign, because a sovereign is not a "person" under the Due Process Clause of the Fifth Amendment).

Although the Supreme Court has never definitively ruled on this precise issue, it has in at least one instance presumed that a foreign state constitutes a "'person' for purposes of the Due Process Clause" and assessed the sovereign's minimum contacts with the forum for purposes of establishing personal jurisdiction. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-

20 (1992). More broadly, the Supreme Court has stated that Congress intended the exercise of jurisdiction under the FSIA to comply with due process principles. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (emphasizing that Congress passed the FSIA in order to "'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process'" (quoting H.R. Rep. 94-1487, at 7 (1976)); *see also Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 n.18 (D.C. Cir. 1982) (noting that Congress intended the FSIA "to comport with the demands of due process").

The Supreme Court has recently granted a writ of certiorari in *Devas v. Antrix*, indicating that the Supreme Court now intends to rule expressly on this issue. *See* 2024 WL 4394120 at *1; Pet. for Writ of Cert., *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 2024 WL 2093966, at *i (May 6, 2024) (presenting the question of "[w]hether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under the [FSIA]").

Respectfully, the D.C. Circuit's decision in *Price* is wrong, and Bulgaria preserves this argument pending the Supreme Court's decision in *Antrix*. Bulgaria has no obligation to raise this issue in anticipation of a potential future Supreme Court decision. *See United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 211-12 (D.D.C. 2018), *aff'd in part and rev'd in part on other grounds*, 41 F.4th 608 (D.C. Cir. 2022) (explaining that a party's "failure to raise an argument anticipating the Supreme Court's decision to change the law does not waive an argument relying on that change"). However, given that the Supreme Court has granted a writ of certiorari in *Antrix*, Bulgaria maintains that the District Court lacks personal jurisdiction over it because ACF does not and cannot show that Bulgaria has the requisite minimum contacts with the United States.

Bulgaria is not subject to general personal jurisdiction, as it is not "'at home'" in the United States. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quoting *Goodyear Dunlop Tires*

Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)); *id.* (for general personal jurisdiction, requiring the defendant's "'affiliations with the State [must be] so continuous and systematic as to render [it] essentially at home in the forum State'" (quoting *Goodyear*, 564 U.S. at 919)). Accordingly, personal jurisdiction is consistent with due process only if Bulgaria has the minimum contacts necessary to establish specific personal jurisdiction. It does not.

For this Court to exercise specific jurisdiction over Bulgaria, Bulgaria must have purposefully directed its activities towards the United States and ACF's claims must have arisen from or were related to those activities. *See Fawzi v. Al Jazeera Media Network*, 273 F. Supp. 3d 182, 187 (D.D.C. 2017) (specific jurisdiction requires that the nonresident defendant "'purposefully directed his activities at residents of the forum'" and "'the litigation result[ed] from alleged injuries that ar[o]se out of or relate[d] to those activities'" (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Here, as in *Antrix*, because the investment at issue occurred "outside of the United States" and "did not require" Bulgaria "to conduct any activities or create ongoing obligations in the United States," Bulgaria does not have the requisite minimum contacts for the Court to establish personal jurisdiction over it. *See* 2023 WL 4884882 at *2-3.

III. THIS CASE SHOULD BE DISMISSED UNDER THE FOREIGN SOVEREIGN COMPULSION DOCTRINE

Under the foreign sovereign compulsion doctrine, a court may dismiss an action or claim where it finds that the defendant is subject to separate and conflicting legal obligations under the laws of two sovereign states. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) (explaining that the doctrine provides a shield from liability for "the acts of parties carried out in obedience to the mandate of a foreign government"); *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 281 (D.D.C. 2019) (same); *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 544 (E.D.N.Y. 2011) ("The defense of foreign sovereign compulsion focuses on

the plight of a defendant who is subject to conflicting legal obligations under two sovereign states . . . where compliance with one country's laws results in violation of another's.") (quotation marks and citation omitted); *see also* Restatement (Third) of Foreign Relations Law § 441, reporters' notes 1 (1987) (describing dismissal on foreign sovereign compulsion grounds as protecting foreign litigants "from being caught between the jaws of [a U.S. court] judgment and the operation of laws in foreign countries").

Accordingly, defendants have raised a valid defense under the doctrine of foreign sovereign compulsion where enforcement of U.S. law results in "an actual and material conflict" with restrictions under foreign law. *See, e.g.*, *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997). For example, in *Trugman-Nash, Inc. v. New Zealand Dairy Board*, New Zealand law required that parties seeking to export dairy from New Zealand first apply to the defendant regulatory board for permission and mandated that the defendant board disallow direct exports to nations like the United States that restricted import quantities of dairy. *See id.* The court concluded that the plaintiffs' antitrust claims, which were predicated on a theory that the defendants (including the regulatory board) conspired to restrain trade and monopolize the sale of New Zealand cheese in the United States, conflicted with the defendant board's obligations under New Zealand law and that this conflict was "sufficient to entitle defendants to invoke" the foreign sovereign compulsion doctrine as a basis for dismissal of the U.S. action. *See id.*

As detailed below, enforcement of the Award under 22 U.S.C. § 1650a would require Bulgaria to violate EU law that restricts the provision of "State aid" by EU Member States, based upon an award for which EU law dictates there was no agreement to arbitrate the underlying dispute in the first place—precisely the type of "conflicting legal obligations" the foreign

sovereign compulsion doctrine is intended to prevent. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 544.

A. EU Law Prohibits Bulgaria from Paying Unlawful State Aid

To protect competition within the EU's internal market and create an equitable playing field among Member States, the TFEU and EU law have created stringent rules regarding the provision of financial support or advantages by EU Member States to businesses, referred to as "State aid." Tomov Decl. ¶¶ 59-64. Under the TFEU, any State aid that "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." TFEU art. 107(1); *see also* Tomov Decl. ¶ 60. The TFEU further requires that EU Member States notify the European Commission "of any plans to grant or alter aid," and prohibits Member States from implementing any such proposed measures until the European Commission renders a final decision on whether the proposed aid is compatible with the internal market. TFEU art. 108(3) (describing the process of notifying the European Commission and stating that "[t]he Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision" (emphasis added)).

Only the European Commission may determine whether State aid by an EU Member State is compatible or incompatible with the internal market, and thus whether such State aid is lawful or unlawful. TFEU art. 108; Tomov Decl. ¶¶ 61-62. In the event that a Member State fails to comply with a determination by the European Commission, the Commission may "refer the matter" to the CJEU. TFEU art. 108(2). With respect to renewable energy, such as the photovoltaic plant at issue in the underlying arbitration, the European Commission has issued regulations pursuant to TFEU Articles 107 and 108 that provide specific conditions under which the Commission may authorize State aid. *See* Tomov Decl. ¶¶ 63-64 (citing Community

Guidelines on State aid for environmental protection dated Apr. 1, 2008). State aid schemes that are inconsistent with these conditions set out by the European Commission constitute unlawful State aid. *See* TFEU art. 108(2); Tomov Decl. ¶ 64.

As described by Bulgaria's EU-qualified legal expert, Lazar Tomov, Bulgaria's payment of the Award would contravene EU treaties and State aid restrictions in several ways, all based on an award that lacked consent to arbitration in the first place. *See* Tomov Decl. § II.B.

First, as Mr. Tomov explains, ACF's underlying claims in the arbitration came about as a result of changes Bulgaria made starting in 2014 to conform its support scheme for renewable energy production with new guidance from the European Commission regarding State aid to this sector, specifically through the introduction of an annual ceiling (the "Annual Production Cap") on the number of production hours qualifying for preferential prices in Bulgaria. *See* Tomov Decl. ¶¶ 65-67. The Tribunal concluded that the Annual Production Cap, among other measures, was inconsistent with Bulgaria's obligations under the ECT, and awarded ACF damages on that basis. *Id.* ¶ 68. Critically, the European Commission was never notified of, nor did it approve, the prior renewable energy support scheme in place before 2014—*i.e.*, what was in effect in 2012 at the time of ACF's purchase of the Karad Plant, and for which the result of the Award itself is based. *Id.* ¶ 75. In addition, the pre-2014 scheme did not adhere to State aid rules particular to the renewable energy sector, as it allowed for an annual rate of return beyond what the Commission would consider reasonable. *Id.* ¶¶ 64, 75. Consequently, the Award has the effect of compensating ACF for Bulgaria's withdrawal of unlawful aid. *Id.* ¶ 76. The EU Treaties and the EU State aid rules, however, do not permit the circumvention of the EU State aid rules through an arbitration that itself does not comply with EU law granting compensation for the repeal of a State aid scheme

(much less one that does not comply with EU law). *Id.* Payment of the Award would therefore place Bulgaria in violation of its obligations under the EU Treaties and EU law. *See id.*

Second, under the TFEU, no State aid may be provided without a determination by the European Commission as to whether the proposed aid is compatible with the internal market. TFEU art. 108(3). Aside from requiring Bulgaria to reinstate for ACF the benefit of unlawful State aid, a judgment that orders payment under the Award would require Bulgaria to provide State aid that has not been, and may not ever be, approved by the European Commission. Such a risk creates more than a hypothetical "rock and a hard place" for Bulgaria (*In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 544); Bulgaria would be in direct contravention of the State aid restrictions that first require, at a minimum, a determination by the European Commission.

The European Commission has reinforced this requirement to first obtain a determination on State aid. In a pending European Commission investigation, which concerns whether Spain's payment of a similar ICSID award for claims under the ECT brought by investors from the Netherlands and Luxembourg is compatible with EU rules on State aid, the European Commission has stated that payment of the award "would violate rules of international law," and that Spain has an "obligation not to pay the compensation pending the Commission's formal investigation." Tomov Decl. Ex. 72 (*State aid SA.54155 (2021/NN) — Arbitration award to Antin — Spain: Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union*, Official Journal of the European Union, C 450/5 (Nov. 5, 2021)); *see also* Tomov Decl. ¶¶ 77-82.

Here too, payment of the Award would violate EU law, certainly unless and until the European Commission makes a determination as to whether such State aid is "incompatible with the internal market." TFEU art. 107(1); *see also id.* art. 108(3); Tomov Decl. ¶¶ 83-84. Bulgaria's

failure to comply with any such determination by the European Commission likely would result in a referral to the CJEU and significant financial sanctions awarded against Bulgaria, as well as an obligation for Bulgaria to recover any payments made to ACF. *See* TFEU art. 108(2).

B. Foreign Sovereign Compulsion's Inherent Comity Concerns Compel Dismissal

Denying dismissal of the Complaint and entering a judgment to enforce the Award would put Bulgaria in a position where it either must violate EU law—in particular EU competition law on the provision of State aid and the specific EU rules set out regarding State aid for the renewable energy sector—or defy an order from this Court, based on an Award from a dispute it never agreed to arbitrate. This is precisely the scenario the foreign sovereign compulsion doctrine, and principles of comity more broadly, seek to avoid. The foreign sovereign compulsion "defense reflects the practice of states in the interests of comity," Restatement (Fourth) of Foreign Relations Law § 442 (2018), reporters' note 10, which itself serves as "a 'golden rule among nations—that each must give the respect to the laws, policies and interests of others that it would have others give to its own in the same or similar circumstances.'" *Usoyan v. Republic of Turkey*, 6 F.4th 31, 48 (D.C. Cir. 2021). Indeed, "[p]rinciples of international comity require that domestic courts not take action that may cause the violation of another nation's laws." *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980). Thus, the foreign sovereign compulsion "defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments," particularly as "[t]he fact that a foreign government compels certain activity ordinarily indicates that the activity implicates its 'most significant interests.'" *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 544.

The EU has such a "significant interest" in regulating competition within the internal market, including by ensuring compliance with the rules and restrictions governing the provision

of State aid by Member States, including Bulgaria. A U.S. court should not, therefore, "cause the violation of" EU law by entering an order enforcing the Award. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1327. Those risks are particularly acute in this case because, in addition to violating EU law on State aid, the Award itself is premised upon a violation of EU law, including the CJEU's decisions in *Achmea* and *Komstroy*. *See* Tomov Decl. ¶¶ 39-43, 52; *supra* § I.A.2. This Court should not compel Bulgaria to violate EU law by requiring Bulgaria to pay an award that compensates ACF for the withdrawal of unlawful State aid, especially where there was no agreement to arbitrate in the first place, given that the ECT's investor-State arbitration provisions were *ab initio* inapplicable to Bulgaria, Malta, and the rest of the EU Member States. *See supra* § I.A.

IV. THIS CASE SHOULD BE DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*

Courts may dismiss an action for *forum non conveniens* when "(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 the S. Indian Ocean*, 352 F. Supp. 3d 19, 35 (D.D.C. 2018). Notably, this Court may dismiss under *forum non conveniens* without first resolving either of the "threshold objection[s]" to subject-matter jurisdiction or personal jurisdiction. *Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). Dismissal for *forum non conveniens* is warranted here.

A. EU Courts Provide an Available and Adequate Forum

"A foreign forum is available and adequate when it provide[s] the plaintiff with some remedy, even if the damages available to the plaintiff would be less than those available in the United States, and even if certain theories of liability are not recognized." *In re Air Crash*, 352 F. Supp. 3d at 36 (quotation marks and citations omitted). Under the ICSID Convention, a claimant

can seek enforcement of an arbitral award in any Contracting State. *See* ICSID Convention art. 54(1). Accordingly, as a Contracting State under the ICSID Convention, Bulgaria is an available forum for ACF to seek enforcement of ICSID Awards arising, like this one, from disputes in Bulgaria. And not only is Bulgaria—or any other EU Member State that also is a Contracting Party to the ICSID Convention—an adequate forum, but it also is the only proper forum to rule on the complicated questions under EU law regarding State aid and the implications of the CJEU's rulings in *Achmea* and *Komstroy*, as Bulgarian courts (and the courts of other EU Member States) are supervised by the CJEU, and the CJEU is entrusted with jurisdiction to decide any challenges on these dispositive issues. *See* Tomov Decl. ¶¶ 22, 25, 51; TFEU art. 108; TEU art. 19. Moreover, the European Commission "oversee[s] the application of [EU] law under the control of the" CJEU. TEU art. 17(1).

"[I]n the context of a suit to obtain a judgment and ultimately execution on a defendant's assets" like this one, "the adequacy of the alternative forum depends on whether there are some assets of the defendant in the alternate forum." *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390-91 (2d Cir. 2011). Bulgaria is also an adequate alternative forum for enforcing ICSID awards against Bulgaria, because that is the most ordinary and natural place to locate Bulgarian assets. *See id.* (finding that in an action to enforce a foreign arbitral award, Peru was an adequate forum because, among other factors centering the underlying claim abroad, assets were available in Peru).

B. The Public and Private Interests All Support Dismissal

The balance of public and private interests in this action likewise favors dismissal. Public interest factors include "'having localized controversies decided at home,'" "unnecessarily burdening courts with 'problems in choice-of-law and the application of foreign law,'" and "minimizing 'administrative difficulties' such as court congestion." *See In re Air Crash*, 352 F.

Supp. 3d at 36 (quoting *D & S Consulting, Inc. v. Kingdom of Saudi Arabia*, 322 F. Supp. 3d 45, 49-50 (D.D.C. 2018)). Private interest factors include "'the relative ease of access to sources of proof,'" accessibility of witnesses, judgment enforceability, and "'all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *See In re Air Crash*, 352 F. Supp. 3d at 36 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994)). In this case, the public interest factors—in particular deciding questions of EU law in EU courts and avoiding undue burdens on judicial resources—weigh overwhelmingly in favor of dismissal.

Questions of EU law, such as those pertaining to unlawful State aid and the CJEU's decisions in *Achmea* and *Komstroy* and on related issues, should be decided by EU courts. *See MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 35 (D.D.C. 2008) ("[T]his Court's lack of familiarity with Cameroonian law, and other issues involved with the application of foreign law, weighs heavily in favor of dismissal."). As explained, the EU Commission is currently considering whether the payment of a similar ICSID award rendered against an EU Member State (Spain) for ECT claims brought by investors from other EU Member States (the Netherlands and Luxembourg) is compatible with EU rules on State aid. *See supra* § III.A. Recognizing and enforcing the Award necessarily requires this Court to grapple with the CJEU's decision in *Achmea* and its progeny, and to wade in to "'localized controversies'" that should be "'decided at home.'" *See In re Air Crash*, 352 F. Supp. 3d at 36.

To the extent ACF has sought confirmation of the Award in this Court in order to sidestep the application of EU law in EU courts, an order from this Court to enforce the Award will risk conflict between U.S. and EU courts regarding EU law and will compel Bulgaria to act contrary to EU law. This is exactly the type of conflict that the doctrine of *forum non conveniens*, and principles of international comity, aim to prevent. *E.g.*, *Nygard v. DiPaolo*, 753 F. App'x 716,

728 (11th Cir. 2018) ("[T]he possibility of inconsistent rulings with foreign countries raises international comity concerns that should be considered in the *forum non conveniens* analysis."). By dismissing this action for *forum non conveniens*, the Court will thus avoid unnecessary "problems in choice-of-law and the application of foreign law." *See In re Air Crash*, 352 F. Supp. 3d at 36, 40 (quotation marks and citation omitted). Further, as the United States has no interest in addressing complex questions of EU law, especially concerning a treaty to which it is not a party (the ECT), there is no reason to unnecessarily burden the Court with such a task. *See D&S Consulting*, 322 F. Supp. 3d at 52 (recognizing that where claims were governed by foreign law, the foreign jurisdiction "has the predominant interest in litigating this dispute in its local court whereas" the plaintiff "has no connection to the District of Columbia forum," and dismissing for *forum non conveniens*).

C. Dismissal for *Forum Non Conveniens* Is Appropriate in Actions to Enforce Arbitral Awards

Bulgaria acknowledges the D.C. Circuit's decision in *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, in which the court held that *forum non conveniens* was unavailable as a remedy in an action to enforce a foreign arbitral award. 411 F.3d 296, 303-04 (D.C. Cir. 2005). To the extent that case creates a categorical bar on the availability of *forum non conveniens* in award-enforcement proceedings, respectfully, Bulgaria contends that *TMR Energy* was wrongly decided, and Bulgaria preserves the issue for further review.

To begin with, several other circuits have dismissed lawsuits in award enforcement proceedings on the ground of *forum non conveniens*. *See Monegasque De Reassurance S.A.M. (monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495, 499, 501 (2d Cir. 2002) (finding that *forum non conveniens* is procedural and affirming dismissal of an enforcement proceeding against a Ukrainian state-owned company on this ground where the litigation had no connection to the

United States); *Figueiredo Ferraz*, 665 F.3d at 393 (ordering dismissal of an enforcement proceeding for *forum non conveniens* where the contract was executed and performed outside the United States and a Peruvian judgment-cap law affected Peru's ability to pay the award); *Melton v. Oy Nauror AB*, 1998 WL 613798, at *1 (9th Cir. Sept. 4, 1998) (affirming dismissal of a foreign arbitral award-enforcement action for *forum non conveniens*).

Moreover, courts in this District have recognized that there is "'substantial flexibility in evaluating a *forum non conveniens* motion.'" *E.g.*, *In re Air Crash*, 352 F. Supp. 3d at 35-36 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)). In line with this view, the Supreme Court has "repeatedly rejected the use of *per se* rules in applying the doctrine" of *forum non conveniens*. *Am. Dredging Co.*, 510 U.S. at 450, 455 (finding that "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible" and rejecting a black line approach to *forum non conveniens* in admiralty cases). To the extent *TMR Energy* creates a categorical rule that courts may not dismiss an award enforcement proceeding for *forum non conveniens*, it disregards the Supreme Court's declaration that the doctrine is not subject to such *per se* rules. *See Am. Dredging Co.*, 510 U.S. at 455.

Additionally, the posture and relevant legal questions here are distinguishable from those in *TMR Energy*. In *TMR Energy*, the court declined to apply *forum non conveniens*, finding that the claimant's cause to litigate in the United States was the potential availability of the respondent's commercial assets within the United States. *See* 411 F.3d at 303-04. The respondent in *TMR Energy* never disputed subject-matter jurisdiction under the FSIA, and thus did not raise the inadequacy of the U.S. courts to adjudicate issues other than asset attachment. *See id.* at 299. By contrast, this Court has yet to decide jurisdiction in the current action, and Bulgaria challenges

this Court's jurisdiction on various grounds, including under §§ 1605(a)(6) and (a)(1), which deeply implicate complicated questions of EU law. *See supra* § I. If the mere intention to secure U.S.-based assets could defeat a claim of *forum non conveniens*, *TMR Energy* would in effect render the concept of *forum non conveniens* virtually useless in any actions arising under the FSIA. However, this is not possible, as the D.C. Circuit has repeatedly declared that "the ancient doctrine of *forum non conveniens* is not displaced by the FSIA." *Simon v. Republic of Hungary*, 911 F.3d 1172, 1181-82 (D.C. Cir. 2018); *see Price*, 294 F.3d at 100 ("[T]he doctrine of *forum non conveniens* remains fully applicable in FSIA cases."). Given key distinctions between *TMR Energy* and the current action, this Court should exercise its "substantial flexibility" to make a different determination on *forum non conveniens* in this case. *See In re Air Crash*, 352 F. Supp. 3d at 35-36.

V. IN THE ALTERNATIVE, THIS CASE SHOULD BE STAYED PENDING THE SUPREME COURT'S RESOLUTION OF *ANTRIX* AND THE D.C. CIRCUIT'S RESOLUTION OF *NEXTERA II*

Given the ongoing appellate review of several questions dispositive to Bulgaria's motion to dismiss, this Court at a minimum should hold the motion to dismiss in abeyance and stay these proceedings to await resolution of those questions. "The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (recognizing "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"). In evaluating whether to stay proceedings, a court may "find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 71 (D.D.C. 2010) (granting stay pending the D.C. Circuit's resolution of an appeal in a related case); *University of Colorado Health at*

Memorial Hospital v. Burwell, 233 F. Supp. 3d 69, 87 (D.D.C. 2017) (same); *see also, e.g.*, *Fonville v. District of Columbia*, 766 F. Supp. 2d 171, 173 (D.D.C. 2011) (staying action "pending final resolution" of separate state court proceedings that would "provide guidance on a question of law which is dispositive in this case"). Courts must thus "weigh competing interests and maintain an even balance between the court's interests in judicial economy and any possible hardship to the parties" in deciding whether to grant a stay. *Belize Soc. Dev. Ltd.*, 794 F.3d at 732-33. Those interests all weigh in favor of a stay here.

First, judicial economy weighs strongly in favor of a stay, as several dispositive questions at issue in this case currently are under review by the Supreme Court and the D.C. Circuit. As explained, *see supra* § II, the Supreme Court in *Devas v. Antrix* will rule on whether the due process "minimum contacts" test for personal jurisdiction applies to foreign sovereigns. If the Supreme Court finds, as it should, that the minimum contacts test does apply to foreign sovereigns like Bulgaria, then this Court would lack personal jurisdiction over Bulgaria because Bulgaria does not have sufficient minimum contacts with the United States. Staying these proceedings will prevent duplicative litigation across multiple courts and a potentially inconsistent decision with the Supreme Court's determination in *Antrix*. *See, e.g.*, *Campaign Legal Ctr. v. Correct the Record*, 2023 U.S. Dist. LEXIS 61942, at *11 (D.D.C. Apr. 7, 2023) (conserving judicial resources by granting stay where "common legal question[s]" on appeal in another action "would necessarily influence [the instant] litigation"); *Burwell*, 233 F. Supp. 3d at 87 ("[A] stay may serve the interests of efficiency by allowing the D.C. Circuit to provide guidance on issues affecting the disposition of this case."). A decision in *Antrix* conclusively resolving that issue is expected by the end of the Supreme Court term in June 2025.

Moreover, as noted above (*supra* § I.A.2), Spain's petition for rehearing *en banc* in

NextEra II remains pending as of the date of Bulgaria's Motion, and the D.C. Circuit has ordered the award-creditors in that appeal to file a response to Spain's petition, indicating the exceeding importance and complexity of the issues presented. If Spain's *en banc* petition is granted, the full D.C. Circuit may hear multiple questions also at issue in this case. These issues include: (1) whether EU parties' ECT Article 26 argument is a jurisdictional question of "existence" or non-jurisdictional question of "scope" of an arbitration agreement; and (2) whether courts may dismiss arbitral award enforcement actions against foreign sovereigns under the doctrine of *forum non conveniens*—both of which may be dispositive to Bulgaria's motion. *See* Pet. for Reh'g at 1-2, *NextEra II*, No. 23-7031 (D.C. Cir. Sept. 16, 2024). Courts in this District have granted stays in several other similar cases pending the conclusive resolution of *NextEra II*. *See, e.g.*, Min. Order, *RWE Renewables Gmbh v. Kingdom of Spain*, No. 1:21-cv-03232 (D.D.C. Aug. 13, 2024); Min. Order, *Baywa R.E. AG v. Kingdom of Spain*, No. 1:22-cv-02403 (D.D.C. Aug 24, 2024); Min. Order, *CEF Energia, B.V. v. Italian Republic*, No. 1:19-cv-03443 (D.D.C. Sept. 10, 2024). Thus, a stay will be in the best interests of the Court, counsel, and litigants in terms of preserving the "economy of time and effort," and will avoid potential conflicting judgments between this Court and the D.C. Circuit. *See Landis*, 299 U.S. at 254.

Second, Bulgaria could be irreparably harmed in the absence of a stay. If the Court declines to stay the proceedings and allows enforcement without waiting for resolution of these critical questions, this risks improperly subjecting Bulgaria—a foreign sovereign—to this Court's jurisdiction before those issues have been fully resolved in the D.C. Circuit and Supreme Court (*supra* §§ I, II). Moreover, if the Award is enforced and any of the above issues reversed, Bulgaria also could "face the arduous task of trying to recover seized assets" back from ACF. *See RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, 2021 U.S. Dist. LEXIS 63261, at *8 (D.D.C. Mar.

31, 2021).

In contrast, ACF will not be harmed by any delay, because the Award will continue to accrue interest until it is paid. *See* Compl. ¶ 45; Award ¶¶ 1812-1814. Should the Award ultimately be enforced, any delay thus will be compensated. *See, e.g.*, *Infrared Envt'l Infrastructure GP Ltd. v. Kingdom of Spain*, 2021 U.S. Dist. LEXIS 120489, at *20 (D.D.C. June 29, 2021) (finding that hardship is diminished because the "award will continue to collect interest"); *Hulley Enters. Ltd. v. Russian Fed'n*, 502 F. Supp. 3d 144, 163 (D.D.C. 2020) (observing that any hardship from delayed payment "is tempered . . . by the fact . . . that post-award interest will compensate for any delay"). Courts consistently have held that the importance of "quickly collecting [an] arbitral award" is "less acute" where, as here, the arbitral award continues to accrue post-award interest. *See RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261 at *8-9; *see also Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, 2020 WL 417794, at *3-4 (D.D.C. Jan. 27, 2020) (finding that set-aside proceedings lasting more than four years did not outweigh hardships on foreign state and that any delay in obtaining the award could be compensated with interest). Further, potential economic injury itself is generally insufficient to show that a party would be harmed as result of a stay. *See Cobell v. Zinke*, 2017 U.S. Dist. LEXIS 231149, at *16 (D.D.C. May 9, 2017) (on a motion to stay pending appeal, recognizing the "well settled proposition that economic loss does not, in itself, constitute irreparable harm" and granting stay of judgment enforcement proceedings) (quotation marks and citation omitted).

Additionally, as a foreign sovereign, Bulgaria is "presumably solvent," and therefore there is no risk of the dissipation of assets during any delay brought by the stay. *See Novenergia II*, 2020 WL 417794 at *6 (quoting *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 76 (D.D.C. 2011)) (observing that "courts in this Circuit generally have not required foreign

sovereigns to post security because they are 'presumably . . . solvent'" and granting the foreign sovereign's motion to stay pending award set-aside proceedings). Consequently, the balance of hardships also supports a stay, which is the "fairest course" for the parties and the Court. *See Sheet Metal Workers' Int'l Ass'n v. United Transp. Union*, 767 F. Supp. 2d 161, 177 (D.D.C. 2011).

CONCLUSION

For the foregoing reasons, Bulgaria respectfully requests that the Court dismiss Plaintiff's Complaint and deny enforcement of the Award, or, in the alternative, stay this action pending the resolution of ongoing proceedings in the D.C. Circuit and Supreme Court.

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Washington, DC

Respectfully submitted,

WHITE & CASE

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