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

REPLY IN SUPPORT OF THE REPUBLIC OF BULGARIA'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO STAY, AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS OR SUMMARY JUDGMENT

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As set out in Bulgaria's opening Motion to Dismiss (the "Motion"), there are multiple bases on which this Court should dismiss ACF's complaint and deny confirmation of the Award, or at a minimum, stay this action pending resolution of proceedings involving related, dispositive issues that are (or very soon will be) before the Supreme Court. First, Bulgaria is immune from the jurisdiction of this court, as ACF cannot meet the requirements of any exception to immunity under the FSIA. The arbitration exception, 28 U.S.C. § 1605(a)(6), is not satisfied because, as from its January 1, 2007 EU accession, Bulgaria never offered to arbitrate disputes with ACF or any other EU national, and thus no agreement to arbitrate was ever formed between Bulgaria and ACF, pursuant to the ECT. Specifically, Article 26 of the ECT is not an arbitration agreement between or among States party to the ECT in favor of a third party or otherwise, but rather a bundle of bilateral treaty relations between pairs of the ECT Contracting Parties analogous to bilateral investment treaties. Each pair of bilateral treaty relations constitutes *an offer* of arbitration by the relevant host State to an investor of the respective ECT State. Such offers must be analyzed bilaterally as to the individual States party—here, Bulgaria and Malta.

ACF ignores the Court's obligations under *Chevron Corp. v. Republic of Ecuador*, which "requires the District Court to satisfy itself" that a "valid arbitration agreement" exists "between" the foreign state and "the party challenging immunity" in order for § 1605(a)(6) to apply. 795 F.3d 200, 205 & n. 3 (D.C. Cir. 2015). Likewise, in the absence of an agreement to arbitrate, ACF has not shown, and cannot show, that Bulgaria implicitly waived its immunity for purposes of § 1605(a)(1) merely by ratifying the ICSID Convention. Without an applicable exception to Bulgaria's sovereign immunity, this Court should dismiss the Complaint (and deny ACF's cross-motion) for lack of subject-matter jurisdiction under the FSIA.

The lack of personal jurisdiction over Bulgaria, foreign sovereign compulsion doctrine, and doctrine of *forum non conveniens* also all require dismissal. Nothing about Bulgaria's legal obligations to comply with the EU's stringent rules barring State aid are "voluntary commitments," as ACF suggests, and this Court should not cause Bulgaria to violate EU law by requiring payment of unlawful State aid or elsewise risk disobeying an order from this Court. The EU's restrictions on State aid, as well as the intra-EU legal framework that establishes the primacy of the EU Treaties, are far from pretextual attempts by Bulgaria to avoid its treaty obligations; they long predate not only ACF's claims but also the ECT and the ICSID Convention. Finally, and in the alternative, the Court should use its discretion to stay this case until the forthcoming Supreme Court proceedings in *Antrix* and *NextEra* are resolved, as those cases are highly likely to impact Bulgaria's dispositive jurisdictional and *forum non conveniens* defenses.

The Court should dismiss this action and deny ACF's cross-motion for judgment on the pleadings or summary judgment, or else grant Bulgaria's request for a stay. In further support of its Motion, Bulgaria attaches the accompanying Second Declaration of Lazar Tomov ("Second Tomov Declaration") responding to ACF's positions on issues of EU and international law.

ARGUMENT

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

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

1. Bulgaria Did Not Agree to Arbitrate Disputes with EU Investors Such As ACF

Bulgaria explained in its Motion that, as from Bulgaria's accession to the EU on January 1, 2007, Bulgaria never offered to arbitrate disputes under the ECT with EU nationals, including Maltese investors such as ACF. *See* Mot. § I.A. Because there was no offer for ACF to accept, there is no "valid arbitration agreement between the parties," and ACF cannot satisfy the

FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6). *Chevron*, 795 F.3d at 205 (emphasis added). In *Chevron*, the D.C. Circuit instructed that the FSIA "requires the District Court to satisfy itself" that a "valid arbitration agreement" exists "between" the foreign state and "the party challenging immunity." *Id.* at 205 & n.3 (finding "error" where the district court "eschewed making this determination as part of its jurisdictional analysis"). This jurisdictional inquiry as to the formation of a valid agreement to arbitrate falls within "the established ongoing duty of a [U.S.] court to determine its own jurisdiction." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 699 (D.C. Cir. 2022). Under *Chevron* and the plain text of § 1605(a)(6), this Court therefore must assure itself of the existence of "an agreement" by Bulgaria "with or for the benefit" of ACF. *Chevron*, 795 F.3d at 205 & n.3. In its Opposition, however, ACF does not discuss or even cite *Chevron*. ACF's omission is an apparent attempt to end run around this Court's duty to assure itself of jurisdiction based on the existence of "an agreement" to arbitrate by Bulgaria "with or for the benefit" of ACF, as required under § 1605(a)(6).

ACF's suggestion that its claim to enforce an award rendered under the ECT nonetheless falls under § 1605(a)(6) does not withstand scrutiny. First, ACF's wholesale reliance on *NextEra Energy Global Holdings B.V. v. Kingdom of Spain ("NextEra II")*, 112 F.4th 1088 (D.C. Cir. 2024), is misguided. *See* Opp'n 11-12. *NextEra II* 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, concluding that Spain had agreed to arbitrate disputes under the ECT with Dutch and Luxembourgish investors. *See* 112 F.4th at 1102-05. *NextEra II*, however, did not disavow the requirement under *Chevron* and § 1605(a)(6) that this Court assure itself of an agreement to arbitrate as between Bulgaria and ACF. *See id.* at 1101 (citing *Chevron* and explaining that "[t]he first step in the analysis . . . is to identify the relevant

arbitration agreement"). Notwithstanding the *NextEra II* panel's decision as to Spain, this Court must independently consider whether an agreement to arbitrate exists by Bulgaria "with or for the benefit of" ACF. 28 U.S.C. § 1605(a)(6).

Second, ACF states that Spain's argument under the ECT is "indistinguishable" from "Bulgaria's position." Opp'n 13. ACF misconstrues Bulgaria's argument, suggesting that Bulgaria's position is that the ECT does not apply to ACF's "dispute" with Bulgaria. *Id.* ("Spain argued in *NextEra II* that 'the standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals like companies; it extends only to the nationals of ECT signatories outside the European Union, like Japan.'") (quoting *NextEra II*, 112 F.4th at 1103)). By contrast, Bulgaria argues that it never agreed to arbitrate with ACF, about anything, nor could it. This is because, by operation of the EU Treaties as the hierarchically superior treaties in intra-EU relations, ECT Article 26 was inapplicable *ab initio* as to Maltese investors since Bulgaria's 2007 accession to the EU, as Bulgaria explained in its Motion. Mot. § I.A.2; First Tomov Decl. ¶¶ 11, 15-16, 18. Unlike Spain's offeree argument in *NextEra II*, which the D.C. Circuit construed as a scope issue of "whether the ECT's arbitration provision applie[d] to the[] disputes" with the EU investors specifically before the court, 112 F.4th at 1103, Bulgaria's argument presents a jurisdictional question under § 1605(a)(6) because it requires this Court to decide whether, after 2007, Bulgaria could offer arbitration to any EU nationals (including Maltese investors, such as ACF) at all. *See Raymond James Fin. Servs., Inc. v. Cary,* 709 F.3d 382, 385-86 (4th Cir. 2013) (whether defendant agreed to arbitrate with plaintiff "relates to 'the existence of a contract to arbitrate,' not the 'scope' of that potential agreement"); *see also Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (explaining that "[i]n order to succeed in its claim that

there was no 'agreement made by the foreign state . . . to submit to arbitration,'" Belize "must show [it] lacked authority to enter into the arbitration agreement").

Third, ACF contends (Opp'n 13-14) that because Bulgaria offered to arbitrate under Article 26 of the ECT "with or for the benefit of" some, non-EU investors, Bulgaria offered its "unconditional consent" to arbitrate with any private investor of all ECT Member States, including EU investors such as ACF. ACF's position cannot be reconciled with traditional principles of contract formation in the context of arbitration provisions contained in investment treaties. ECT Article 26 is not itself an agreement to arbitrate. An "'investment treaty is [] a contract between nations.'" *NextEra II*, 112 F.4th at 1101 (quoting *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014)). Sovereign parties to such treaties do not agree to arbitrate between themselves; rather, courts understand such provisions as evincing the foreign sovereign's "unilateral offer to arbitrate," which qualifying investors may accept under particular circumstances. *Id.* at 1102. Because ECT Article 26 is not itself an agreement to arbitrate, this Court must consider whether any standing offer by Bulgaria to arbitrate under Article 26 was made "with or for the benefit of" Maltese investors, such as ACF. There was no offer for ACF to accept here, as Article 26 was inapplicable *ab initio* as to Maltese investors since Bulgaria's accession to the EU.

ACF's attempts to distinguish *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 67 (2d Cir. 2021), and *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 801-02 (5th Cir. 2021), are unpersuasive.[1] *See* Opp'n 15 n.4 These authorities support Bulgaria's argument that traditional

[1] ACF further contends (Opp'n 14) that the CJEU's *Komstroy* Judgment addressed ECT Article 26's "applicab[ility] . . . which is a question of that article's scope" but "not its existence." But, as Mr. Tomov explains, "in light of the *Komstroy* Judgment's ruling that according to the EU Treaties the investor-State arbitration provisions of the ECT have been *ab initio* inapplicable intra-EU, there never was an offer of arbitration by Bulgaria to ACF." Second Tomov Decl. ¶ 19. "This plainly is a matter of the existence of the arbitration agreement, not its scope." *Id.*

contract formation doctrines inform the jurisdictional existence of an agreement to arbitrate under § 1605(a)(6). In *Gater Assets*, the Second Circuit concluded that a petitioner seeking to enforce a default judgment confirming a Russian arbitration award could not rely on the theory of direct benefits estoppel to establish the existence of an agreement to arbitrate with Moldova under § 1605(a)(6). 2 F.4th at 67-70. Moreover, in *Al-Qarqani*, the Fifth Circuit found that the alleged award-creditors were not third-party beneficiaries to an arbitration agreement. 19 F.4th at 801-02. "Because there exists no agreement among the parties to arbitrate, th[e] FSIA [arbitration] exception does not apply." *Id.* at 802.

To the extent *NextEra II* forecloses entirely Bulgaria's argument that the Court lacks jurisdiction under § 1605(a)(6) because Bulgaria did not agree to arbitrate under the ECT with EU investors including ACF, Bulgaria maintains that *NextEra II* is inconsistent with *Chevron* and *BG Group*. Respectfully, and as discussed below (*infra* § V), Bulgaria preserves its § 1605(a)(6) argument for any potential grant of certiorari on this issue under Supreme Court Rule 10(a).

2. Bulgaria Did Not Exclusively Delegate Jurisdictional Questions to the Tribunal

ACF states (Opp'n 16) that "Bulgaria's EU law argument was squarely rejected by the [arbitral] Tribunal" and the Tribunal's "decision on this issue is binding on [this] Court." Not so. Under § 1605(a)(6), this Court's "jurisdictional task" is to determine whether Bulgaria extended any "standing offer" under Article 26 of the ECT, and if so, whether ACF was eligible to "accept []" any such offer. *Chevron,* 795 F.3d at 205-06 & n.3. The treaty parties could not have delegated to the Tribunal questions of this Court's subject-matter jurisdiction. *See NextEra II*, 112 F.4th at 1101-05 (analyzing under § 1605(a)(6) whether an agreement to arbitrate existed without deference to the ICSID tribunal); *see also Wye Oak Tech.*, 24 F.4th at 699 (noting, in the FSIA context, "the established ongoing duty of a [U.S.] court to determine its own jurisdiction").

3. ACF's EU and International Law Arguments Fail

ACF's arguments (Opp'n 16-18) concerning international law and the interpretation of treaties are unavailing, including because they fail to consider that the

> EU Member States derogated from general international law and agreed to organize their treaty relations *hierarchically*, with the EU Treaties placed at the apex as the master treaties which prevail over and render inapplicable intra-EU the provisions of other treaties to the extent that the CJEU has found them incompatible with the EU Treaties, and that this derogation is permissible and lawful because the rules of general international law are residual in nature.

Second Tomov Decl. ¶ 5. ACF's contention (Opp'n 17-18) that international law prohibits the ECT from "mean[ing] different things" with respect to EU Member States and non-EU signatories also is wrong, as "international law allows a subset of States party to a multilateral treaty to modify the treaty *inter se* as well as to agree that the treaty will have a different meaning *inter se*." Second Tomov Decl. ¶ 14. ACF's reliance on various provisions of the ECT misses the mark as well. ACF is wrong that Article 26 is an "agreement to arbitrate." Opp'n 18. As Bulgaria explained, Article 26 is not an agreement to arbitrate nor a single standing offer to arbitrate to all ECT signatory States. *See* First Tomov Decl. ¶ 41; Second Tomov Decl. ¶ 18. Article 26 is a bundle of bilateral treaty relations between pairs of the ECT Contracting Parties analogous to bilateral investment treaties, constituting where applicable an offer of arbitration by the relevant host State to an investor of another ECT State. *See* Mot. 5-6 (collecting sources). As to ACF's assertion regarding ECT Article 16 (that the ECT "prevails" if "there is any conflict between the ECT and the EU Treaties," Opp'n 18), "the ECT is hierarchically subordinated intra-EU to the EU Treaties, and thus "none of [the ECT's] provisions are capable of taking precedence intra-EU over the EU Treaties and/or primary EU Law." Second Tomov Decl. ¶ 11. Finally, ACF's additional contention (Opp'n 18) that under Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"), "Article 26 of the ECT means what it says and does not contain a carveout for intra-

EU disputes" fails for the same reason. *See* Second Tomov Decl. ¶¶ 6-7 ("[G]eneral rules of public international law concerning the interaction and interpretation of treaties, including [the VCLT], are subsidiary and apply only to the extent that States have not agreed something else.").

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

ACF alleges that Bulgaria impliedly waived its immunity under § 1605(a)(1) merely by ratifying the ICSID Convention. Opp'n 19-23. Implied waivers of immunity under § 1605(a)(1) are construed "'narrowly'" and "'[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so.'" Mot. 13-14 (quoting *World Wide Min., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002)). ACF does not (and could not) allege that Bulgaria's purported implied waiver in ratifying the ICSID Convention falls within any of the three categories of implied waiver recognized in this Circuit. ACF does not allege that Bulgaria waived its immunity by: (1) "executing . . . a choice-of-law clause designating the laws of the United States;" (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); *see also World Wide Min.*, 296 F.3d at 1161 n.11 (describing the same three limited scenarios). This should end the inquiry under § 1605(a)(1).

ACF states that "'a foreign sovereign need only indicate its amenability to suit' in U.S. court" (Opp'n 19) and suggests that "ICSID Convention Contracting States did just that when they ratified" the ICSID Convention because it contains provisions concerning the enforcement of arbitration awards. *Id.* ACF's erroneous proposal should be rejected. As an initial matter, and as ACF recognizes (Opp'n 23), the D.C. Circuit in *NextEra II* expressly stated that the question of whether a foreign sovereign "implicitly waived its immunity by ratifying the ICSID [Convention]" remains "unsettled" in this Circuit. 112 F.4th at 1099-1100 (emphasis added). ACF then makes a confusing reference to "the wealth of precedent in this Circuit confirming that a foreign sovereign

waives immunity under the FSIA in enforcement proceedings in the United States by signing the ICSID Convention." Opp'n 23. ACF cites no authorities for this supposed "wealth of precedent"—nor could it, as the D.C. Circuit has expressly left resolution of this question "for another day." *NextEra II*, 112 F.4th at 1100.

ACF's strained reading of the D.C. Circuit's decisions in *Creighton*, *Tatneft*, and *Ivanenko* also misses the mark. *See* Opp'n 21-23. ACF cites *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999), for the proposition that "the D.C. Circuit endorsed the Second Circuit's holding" that merely signing the ICSID Convention or New York Convention demonstrates a foreign sovereign's contemplation of award-enforcement actions in the courts of other signatory states, sufficient to find an implied waiver under the FSIA. Opp'n 21. ACF ignores that *Creighton* recognized the possibility of an implied waiver only where two distinct requirements were satisfied: (1) "the defendant sovereign was . . . a signatory to the [New York] Convention," and (2) it "had agreed . . . to arbitrate in the territory" of another signatory state. *Creighton*, 181 F.3d at 123. Here, as discussed above, that second requirement is not met because Bulgaria has no agreement to arbitrate with investors from other EU countries, including ACF.

ACF notes that in *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019), the D.C. Circuit opined that "[b]ecause *Creighton* controls, the waiver exception applies" in an award-enforcement action under the New York Convention. *See* Opp'n 21-22. As an unpublished decision, *Tatneft* has "no precedential value." *See* D.C. Cir. R. 36(e). In any case, *Tatneft* did not remove the second requirement articulated under *Creighton*—that, in order to find an implied waiver of immunity, the parties must have agreed to arbitrate. Indeed, in both *Creighton* and *Tatneft*, it was either conceded or decided that the foreign sovereigns had agreed to arbitrate with the award creditor. *See Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 192 (D.D.C. 2018) ("In the instant case, Ukraine

agreed to arbitrate . . . ."); *Creighton*, 181 F.3d at 122 (Qatar did not dispute the existence of an agreement to arbitrate, but only that "a sovereign's agreement to arbitrate in a New York Convention state is not a waiver of immunity to suit" under the FSIA).

ACF contends that *Ivanenko* "endorsed the rule espoused in *Creighton*" that merely signing the New York Convention implicitly waives sovereign immunity. Opp'n 22-23. ACF's interpretation of *Ivanenko* is misguided. *Ivanenko* addressed whether Ukraine waived its immunity by (i) entering a bilateral investment treaty with the United States or (ii) issuing a presidential decree dealing with the resolution of disputes against Ukraine in foreign jurisdictions—both of which the D.C. Circuit found to be insufficient to create a "clear and unambiguous" waiver of immunity. *See* 995 F.3d at 240 (affirming dismissal for lack of subject-matter jurisdiction). *Ivanenko* did not (and could not) displace the two independent requirements for implied waiver—including an agreement to arbitrate—set out in *Creighton*.

ACF also references (Opp'n 19-23) the Second Circuit decisions in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017), *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72 (2d Cir. 2013), and *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993). As Bulgaria explained in its Motion, however, "[t]o 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, . . . it has not disavowed the prerequisite of a valid agreement to arbitrate." Mot. 15 (citing *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain ("NextEra I")*, 656 F. Supp. 3d 201, 210 n.1 (D.D.C. 2023)). ACF has not contested, and thereby concedes, Bulgaria's argument.

In an amicus brief submitted in *NextEra II*, the United States advanced the same position that Bulgaria advocates here: merely ratifying the ICSID Convention is insufficient to create an implied waiver under the FSIA. *See* Br. for the United States as Amicus Curiae 19-25, *NextEra II* (Feb. 2, 2024). Analyzing the text of the ICSID Convention and the FSIA, as well as the D.C. Circuit's decisions in *Creighton* and *Tatneft*, the United States explained: "[b]ecoming a party to . . . the ICSID Convention, without more, does not provide the necessary 'strong evidence' that a foreign state intended to waive its sovereign immunity in United States courts." *Id.* at 20 (quoting *Khochinsky v. Republic of Poland*, 1 F.4th 1, 8 (D.C. Cir. 2021)). As the United States explained, the ICSID Convention does "not commit a foreign state to engage in arbitration and therefore [it] could not implicitly waive sovereign immunity for any enforcement action." *Id.* Accordingly, "a specific arbitration agreement remains a jurisdictional prerequisite when a party attempts to invoke the waiver exception to enforce an arbitral award." *Id.* at 20-21.

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

This Court cannot exercise personal jurisdiction over Bulgaria because it lacks subject-matter jurisdiction under the FSIA and because Bulgaria lacks the minimum contacts with the United States needed for personal jurisdiction consistent with due process. *See* 28 U.S.C. § 1330(b); Mot. 16-18. ACF makes no attempt to address Bulgaria's arguments (Mot. 17-18) that it does not have the necessary minimum contacts with the United States. Instead, ACF focuses solely on whether the due process minimum contacts analysis applies to foreign sovereigns like Bulgaria in the first place. Opp'n 24. Notwithstanding ACF's over-reliance on the inapposite *Pietersen v. U.S. Dep't of State* (Opp'n 24), this Court should refrain from ruling on this issue until it is conclusively resolved by the Supreme Court this term in *Antrix*. *See infra* § V; Mot. 17.

III. THE FOREIGN SOVEREIGN COMPULSION DOCTRINE NECESSITATES DISMISSAL OF THIS CASE

Enforcement of the Award under 22 U.S.C. § 1650a would require Bulgaria to violate the EU Treaties that restrict the provision of State aid by EU Member States. *See* Mot. § III. ACF offers a medley of arguments as to why the Court should not therefore dismiss this action under the foreign sovereign compulsion doctrine, including that the Court would need to reconsider "the merits of the Award," that the foreign sovereign compulsion doctrine does not apply in ICSID award-enforcement cases or to foreign sovereign defendants, and that payment of the Award would not constitute unlawful State aid under EU law. Opp'n 24-31. ACF's arguments all fail.

A. The Foreign Sovereign Compulsion Doctrine Is Available Here

ACF asserts, incorrectly, that the foreign sovereign compulsion doctrine is categorically precluded in this case. First, this Court need not, as ACF suggests (Opp'n 4, 25-26), relitigate any merits of ACF's claims in the underlying arbitration in order to apply the foreign sovereign compulsion doctrine to dismiss this case—an action to enforce the ultimate "pecuniary obligations imposed by" the Award. Neither § 1650a nor the ICSID Convention excludes the application of the foreign sovereign compulsion doctrine in an ICSID award-enforcement action. As ACF recognizes (Opp'n 26), in implementing the ICSID Convention, the United States purposefully reserved the power of federal courts to give ICSID awards no better treatment than state court judgments. *Mobil Cerro*, 863 F.3d at 117; *see also* ICSID Convention, art. 54(1). ACF cites no case law, and Bulgaria is aware of none, that prohibits a U.S. court from declining to afford full faith and credit to a state court judgment on the basis of the foreign sovereign compulsion doctrine.

ACF states that the "categorical directive" in § 1650a that a U.S. court "shall" enforce an ICSID award "'militates against an implicit exception' where a judgment debtor's own laws or treaty commitments purport to prohibit it from abiding by a U.S. judgment." Opp'n 26 (quoting

Alabama v. Bozeman, 533 U.S. 146, 153 (2001)). ACF's reliance on *Bozeman*, which does not concern the foreign sovereign compulsion doctrine or the ICSID implementing statute, nor any competing obligations under international law, is misplaced. Furthermore, the language in § 1650a (*i.e.,* that an award "shall be enforced" and "shall be given the same full faith and credit") is not a "categorical directive" to enforce the Award, but rather a command to treat an ICSID award in the same manner as a state court judgment. Nothing about § 1650a prohibits applying the foreign sovereign compulsion doctrine in this case. In addition, ACF misrepresents Judge Contreras's decision in *Blasket Renewable Invs., LLC v. Kingdom of Spain*. Opp'n 26. Nowhere did the court conclude that the United States' obligation under the ICSID Convention "to recognize and enforce an ICSID award clearly trumps any purported rule of EU law prohibiting an EU Member State from paying the award," as ACF suggests. Opp'n 26 (emphasis added); *see Blasket*, 2024 WL 4298808, at *12-14 (D.D.C. Sep. 26, 2024).

Second, ACF asserts that the "foreign sovereign compulsion doctrine does not" apply here because the "Court's confirmation of the Award would not compel Bulgaria to 'do' anything 'in another state'; it would simply allow ACF to enforce Bulgaria's existing obligations against its U.S. assets." Opp'n 26-27. This argument is nonsensical and misunderstands Bulgaria's legal obligations as an EU Member State. Bulgaria, as an EU Member State, is subject to EU law and its obligations under the EU Treaties regardless of where its assets are located. Converting the Award into a U.S. judgment does not alter those conclusions; if the Court enters judgment on this Award, it would, in essence, compel Bulgaria to either violate the Court's order or violate Bulgaria's obligations under EU law by disregarding the EU Treaties's command to refrain from paying State aid (the Award—which itself has the effect of compensating ACF for Bulgaria's withdrawal of unlawful aid under the pre-2014 renewable energy production support scheme)

without the Commission's prior authorization. *See* Mot. 22; First Tomov Decl. ¶¶ 60-63. The foreign sovereign compulsion doctrine is intended to avoid such an outcome.

Finally, ACF contends that the foreign sovereign compulsion "doctrine applies exclusively to private parties, not sovereigns." Opp'n 27. Nothing in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, on which ACF relies, stands for the proposition that the doctrine is "exclusive[]" to private defendants; the Second Circuit was simply reviewing a district court decision where the appellees' conduct "ha[d] been compelled by the foreign government," and they accordingly "[we]re entitled to assert the defense of foreign government compulsion . . . " 830 F.2d 449, 453 (2d Cir. 1987). Even if the doctrine typically applies to private parties because a foreign state cannot compel itself to act, that is not the situation here. Bulgaria is not merely a foreign state, but also is a Member State of the EU, a supranational organization to which Bulgaria has legal obligations, and Bulgaria is bound by the State aid rules that the EU—and not Bulgaria—enacts in the first instance. ACF claims that allowing those legal obligations "to serve as the foundation for the alleged compulsion [Bulgaria] seeks to avoid would enable foreign states to undermine the jurisdiction of U.S. courts simply by enacting laws or entering treaties that purport to prohibit them from satisfying a U.S. court judgment." Opp'n 27. That outlandish hypothetical is nowhere near the situation in this case; the EU's restrictions on State aid and specific regulations concerning State aid in the renewable energy sector—not to mention the legal framework governing the hierarchically superior treaties in intra-EU relations and the CJEU's jurisdiction to rule on the compatibility of other international undertakings between and among EU Member States with the EU Treaties—long predate both this case and the underlying arbitration, as well as the ECT and the ICSID Convention. *See* First Tomov Decl. ¶¶ 21-22, 27-30, 59-64.

B. Payment of the Award Constitutes Unlawful State Aid

Bulgaria's payment of the Award would contravene EU treaties and State aid restrictions in several ways. Bulgaria's obligations to comply with EU law on State aid are not, as ACF suggests (Opp'n 27), mere "voluntary commitments," but rather are fundamental legal obligations to which Bulgaria is subject as an EU Member State. *See* First Tomov Decl. ¶¶ 59-64; Mot. § III.A. Payment of the Award constitutes unlawful State aid because, as Bulgaria previously explained, (1) the Award effectively compensates ACF for Bulgaria's withdrawal of unlawful aid under the pre-2014 renewable energy support scheme, and (2) a judgment that orders payment under the Award also would require Bulgaria to provide State aid that has not been approved by the European Commission. Mot. 21-23; First Tomov Decl. ¶¶ 65-84. ACF has not established otherwise. *See* Opp'n 30-31.

To start, ACF's reliance on the CJEU's 1988 decision in *Asteris v. Greece* (Opp'n 30) for its assertion that "arbitral awards do not constitute State aid" is misguided. As Mr. Tomov explains, in *European Food SA and Others v. European Commission*, the General Court of the CJEU recently rejected the argument advanced in *Asteris* that the payment of damages by the State to a private party under an intra-EU investment treaty award does not constitute State aid. Second Tomov Decl. ¶ 23. Likewise, ACF's claim that payment of the Award "does not meet the EU's definition of State aid" because it "does not give ACF any economic advantage, nor can it be said to distort competition or affect trade in the EU" (Opp'n 30-31) is contrary to *European Food SA*, which specifically upheld the European Commission's decision that the payment of an intra-EU ICSID investment treaty award constitutes unlawful State aid. *See* Second Tomov Decl. ¶ 24.

ACF also contends that "because the [European Commission] concluded that the ERSA Regime in its form both before and after the introduction of the" post-2014 renewable energy support scheme "did not constitute unlawful State aid, . . . the Award does not have the effect of

compensating ACF for the withdrawal of unlawful State aid." Opp'n 30. But ACF overlooks the fact that the European Commission was never notified of, nor did it approve, the prior support scheme in place at the time of ACF's purchase of the Karad Plant in 2012 on which the result of the Award itself is based. *See* Mot. 21; First Tomov Decl. ¶ 75; *see also* Second Tomov Decl. ¶ 26. Moreover, Bulgaria has notified the Award to the European Commission as State aid. *See* Second Tomov Decl. ¶ 28. Further, ACF is incorrect that there is no risk that Bulgaria might eventually face a severe sanction for paying the Award (Mot. 4, 22-23), as payment of the Award ultimately might expose Bulgaria to an infringement proceeding before the CJEU and financial penalties by the European Commission. Second Tomov Decl. ¶ 30. Finally, ACF does not dispute that the European Commission is presently considering substantially similar issues in the ongoing investigation with respect to the *Antin* award against Spain, which concerns payment of an ICSID award for claims under the ECT brought by EU-national investors. Mot. 22. The European Commission's treatment of the *Antin* award—particularly its doubts that the State aid resulting from the Award is compatible with EU State aid rules, and the clear instruction to Spain regarding its "obligation not to pay the compensation pending the Commission's formal investigation"—strongly cautions against ordering payment of the Award in this case. First Tomov Decl. ¶¶ 77-82; Second Tomov Decl. ¶ 31.

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

Bulgaria is not asking this Court to dismiss the complaint based on some "'general doctrine of international law that requires a state to excuse compliance with its law because of conflict with the law of another state.'" Opp'n 29. The foreign sovereign compulsion doctrine, and the inherent comity principles upon which it is based, is intended for precisely this scenario: under the EU Treaties, EU Member States transferred their competence to the EU with respect to competition regulation; on that basis, the EU has enacted rules that implicate a significant sovereign interest

(on the provision of State aid and specific State aid rules for the renewable energy sector), and as a result, an order from this Court entering a judgment to enforce the Award will put Bulgaria in a position where it either must violate the EU Treaties and the EU legal order or defy an order from this Court. *See, e.g.*, *In re Vitamin C Antitrust Litig.,* 810 F. Supp. 2d 522, 544 (E.D.N.Y. 2011) (foreign sovereign compulsion "accommodat[es] the interests of equal sovereigns and giving due deference to the official acts of foreign governments," and "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"). That result is especially concerning here where payment of the unlawful State aid would satisfy an award for which the EU Treaties dictate there was no agreement to arbitrate the underlying dispute in the first place. *See supra* § I.

Thus, although international comity does generally encourage international cooperation and reciprocity through the recognition of foreign judgments "when possible" (*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (emphasis added)), both ACF and Judge Contreras's decision in *Blasket* are mistaken that comity compels a result in this case that requires Bulgaria to violate EU law. *See* Opp'n 29-30. Nothing about the ICSID Convention's structure "as a multilateral agreement" or § 1650a captures the "comity concerns" at issue, *see Blasket*, 2024 WL 4298808, at *13; Opp'n 29-30, particularly so here where in addition to violating the EU Treaties and EU law on State aid, the Award itself is premised upon a violation of the EU Treaties as they were definitively interpreted in the CJEU's decisions in *Achmea* and *Komstroy*. *See* First Tomov Decl. ¶¶ 39-43, 52; *see also* Mot. 11-12. Entering a judgment to enforce an investment treaty award rendered in favor of a national of an EU Member State against another EU Member State is an affront to the EU Member States' mutually agreed framework of treaty relations—quite the opposite of international comity.

IV. DISMISSAL FOR *FORUM NON CONVENIENS* ALSO IS WARRANTED

ACF argues that EU courts could not provide an adequate alternative forum for its enforcement action, and that dismissal for *forum non conveniens* is categorically precluded in U.S. actions to confirm and enforce a foreign arbitral award. On both accounts, ACF is mistaken.

A. EU Courts Provide an Available and Adequate Forum

ACF contends that "given the all-or-nothing nature of arbitral award enforcement actions," EU courts cannot provide an adequate forum because the outcome may not be the one ACF hopes for, and because an EU court could not attach "Bulgaria's property in the United States." Opp'n 32. Both arguments confuse what makes an adequate forum in the *forum non conveniens* analysis.

First, as Bulgaria previously explained (Mot. 24-25), under the ICSID Convention, a claimant can seek enforcement of an arbitral award in any Contracting State, including many EU Member States, and the EU Member States are the only proper fora to decide the complex issues of EU rules regarding State aid and the CJEU's rulings in *Achmea* and *Komstroy*. Implicit in ACF's assertion that "transfer to an EU Member State court all but guarantees that ACF would have access to *no* remedy, not 'some remedy'" is an admission that EU courts have a legitimate legal basis to decline enforcement of the Award. Opp'n 32. But the fact that the ultimate outcome in another jurisdiction could be different and less desirable than in this Court does not make the other forum inadequate. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (a plaintiff may not defeat a motion to dismiss for *forum non conveniens* "merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum"). Even if "the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery," giving "conclusive or substantial weight" to "the possibility of a change in law" would render the *forum non conveniens doctrine* "virtually useless." *Id.* at 250. Therefore, although it is possible—even likely—that if ACF sought to enforce the

award in EU court, it "would lose" (*NextEra II*, 112 F.4th at 1093), that does not make Bulgarian courts, or the courts of any other EU member state, an inadequate forum for ACF's claims.

Second, ACF claims the "purpose" of this action is to enable ACF to enforce the arbitral award "against Bulgaria's property in the United States," which it asserts that an EU Member State court could not do, thus making those jurisdictions an inadequate alternative forum. Opp'n 32. However, ACF ignores the fact that in a case like this one "to obtain a judgment 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." *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390-91 (2d Cir. 2011); *see also* Mot. 25. ACF does not dispute, nor can it, that Bulgaria is the most logical and natural place to locate Bulgarian assets. Opp'n 32. That ACF seeks enforcement of the Award "against Bulgaria's property in the United States" rather than in the EU does not impact the adequacy of EU courts to resolve ACF's enforcement action. This Court need not countenance ACF's "attempts to win a tactical advantage" by forum shopping under the guise of its contention that Bulgarian or other EU Member State courts are somehow inadequate. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001).

B. *Forum Non Conveniens* Dismissal Is Available in Enforcement Actions

ACF contends that D.C. Circuit precedent in *TMR Energy* "forecloses" the possibility for Bulgaria to dismiss this action based on *forum non conveniens* (Opp'n 31), while altogether ignoring the multiple Supreme Court cases holding that courts have "substantial flexibility" in assessing *forum non conveniens*, and that the Supreme Court itself has "repeatedly rejected the use of *per se* rules in applying the doctrine." *See* Mot. 28 (collecting cases). ACF also tries to excuse the discontinuity between *TMR Energy* and the numerous other instances in which the D.C. Circuit upheld application of *forum non coveniens* in other cases involving foreign sovereigns (Mot. 29)

by making the confused assertion that "[t]he non-award enforcement FSIA cases cited by Bulgaria are irrelevant here, because subject matter jurisdiction" in the "award enforcement cases also was based on the FSIA." Opp'n 31. ACF offers no credible rebuttal to Bulgaria's argument that the *forum non conveniens* doctrine would become virtually useless in any FSIA case if the claimant need only assert an intention to secure U.S. assets in order to defeat it. Mot. 29.

In any event, to the extent that ACF relies on *TMR Energy* (and its application in *NextEra II*), Bulgaria maintains that these cases were wrongly decided and Bulgaria preserves the issue for further review. The substantive issues raised here are distinguishable from *TMR Energy* (Mot. 28-29), and as previously stated, 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); *Figueiredo Ferraz*, 665 F.3d at 393; *Melton v. Oy Nautor Ab*, 1998 WL 613798, at *1 (9th Cir. Sept. 4, 1998). There is a clear circuit split on this issue, which will be part of Spain's forthcoming petition for a writ of certiorari in *NextEra II*. *See* Joint Status Report ¶ 21, *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 21-cv-02463 (D.D.C. Dec. 20, 2024), ECF No. 46 (Spain will "timely file a petition for a writ of certiorari" for the Supreme Court to review the D.C. Circuit's holding "that *forum non conveniens* is categorically unavailable in proceedings to confirm a foreign arbitral award") ("*Blasket* Joint Status Report"). At a minimum, this Court should refrain deciding this issue until the Supreme Court resolves Spain's upcoming petition. *See infra* § V.

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

If the Court declines to grant Bulgaria's Motion, it should nevertheless exercise its discretion to stay this proceeding pending resolution of *Antrix* and *NextEra* in the Supreme Court. ACF acknowledges that the Supreme Court will decide *Antrix*, which is the subject of a clear

circuit split, this term, but also makes the confused assertion that a decision in *Antrix* would "not 'narrow the issues'" pending before this Court or aid "in the determination of the questions of law involved"—*i.e.*, whether the Court may exercise personal jurisdiction over Bulgaria. Opp'n 33-34. As Bulgaria has already explained (Mot. 30-31), judicial economy strongly favors a stay because resolution of *Antrix* would "narrow the [threshold] issue[]" of whether the minimum contacts test for personal jurisdiction applies to Bulgaria in this case, thereby "assist[ing] in the determination of the questions of law involved." *Landis v. N. Am. Co.*, 299 U.S. 248, 253 (1936). Moreover, *Antrix* is not, as ACF asserts (Opp'n 33), the "sole" basis for Bulgaria's motion to stay proceedings. Spain intends to petition for a writ of certiorari in *NextEra*, in which it will ask the Supreme Court to decide that (1) the FSIA's arbitration exception is not satisfied in enforcement proceedings of awards involving intra-EU disputes, and (2) dismissal for *forum non conveniens* is available in award-enforcement actions—two grounds for dismissal that Bulgaria argues here (*supra* §§ I.A.1, IV). *See Blasket* Joint Status Report ¶ 21. Upon Spain's request to stay proceedings in *Blasket* based on the forthcoming petition in *NextEra II*, Judge Leon granted the stay given "the likelihood that respondent will prevail on the merits, the potential harm to respondent, and the public interest." Min. Order, *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 21-cv-02463 (D.D.C. Jan. 8, 2025) ("*Blasket* Jan. 8, 2025 Min. Order").

The Court should take the same approach here. A Supreme Court decision in *NextEra* could abrogate the D.C. Circuit's holdings as to either issue raised by Spain's forthcoming petition, conclusively resolving the extent of this Court's jurisdiction and potential to dismiss this action on *forum non conveniens* grounds. *Pietersen v. U.S. Dep't of State*, upon which ACF extensively relies (Opp'n 5, 12, 15–16, 24, 33, 33 n.9, 34), is both overstated and inapposite. *See* 2024 WL 1239706 (D.D.C. Mar. 21, 2024). In *Pietersen*, the court held that a stay pending the Supreme

Court's decision in a case regarding the refusal of visas to noncitizens would not "narrow the issues in the pending case[]" nor "assist in the determination of the questions of law involved" because there was only one legal question in dispute before the district court (whether the doctrine of consular nonreviewability barred the plaintiffs' claims on the merits). *Id*. at *8-9 (cleaned up). That is not the situation in this case, and the Supreme Court's decision in either *Antrix* or *NextEra* would resolve critical issues that raise significant international comity concerns and impact the rights of all foreign sovereigns in U.S. court. *See* Mot. 30-31.

In addition, the plaintiffs in *Pietersen* failed to show sufficient hardship absent a stay, given that their only assertion of harm was that certain of their legal claims "might be affected by the outcome" of the pending Supreme Court proceeding. *Id.* at *9. As already explained (Mot. 31-32), however, Bulgaria could be irreparably harmed because it could be subjected to this Court's jurisdiction before threshold jurisdictional issues have been fully resolved by the Supreme Court and it could "face the arduous task of trying to recover seized assets" back from ACF. *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, 2021 WL 1226714, at *3 (D.D.C. Mar. 31, 2021). ACF complains of harm due to a "prolong[ed]" temporal delay (Opp'n 37)—which again, would be compensated by interest on the Award (Mot. 32)—but courts have stayed award-enforcement cases involving "far greater expected delays" than the potential delay ACF faces here.[2] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, 2020 WL 2996085, at *5 (D.D.C. June 4, 2020)

[2] ACF's concerns that Bulgaria is "in ongoing breach of its obligation under the ICSID Convention to pay the Award" simply reframes ACF's alleged harm resulting from a possible delay. Opp'n 37. As for ACF's assertion that Bulgaria offered no bond or "other security" during the proposed stay (*id.*), Bulgaria has no obligation to volunteer security in order for this Court to exercise its discretion and temporarily stay these proceedings. Indeed, at least one court in this District has found that it "may not require" a foreign sovereign "to post security" as a condition of a prejudgment stay absent an explicit waiver of immunity from prejudgment attachment under 28 U.S.C. § 1610(d). *See* Order at 5, *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 20-cv-02155 (D.D.C. Jan. 31, 2022). Bulgaria has made no such waiver—explicit or otherwise.

(collecting cases). Any delay while the Supreme Court resolves *Antrix* this term, presumably within the year, and the forthcoming petition in *NextEra*, is not so "prolong[ed]" as to cause ACF any genuine harm. ACF commenced arbitration in 2018, and the Award was issued just a year ago; the possible delay here is nothing like any of the cases on which ACF relies. *See LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 880 (D.C. Cir. 2021) (stay sought over a decade after arbitration commenced); *Tethyan Copper Co. Pty v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 267, 271 (D.D.C. 2022) (stay requested two years after petitioner filed U.S. action and over a decade after arbitration commenced); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 2020 WL 13612440, at *2 (D.D.C. Mar. 6, 2020) (stay requested four years after ad hoc committee terminated automatic enforcement stay and ten years since arbitration commenced).

Abualala v. United States, which ACF cites (Opp'n 33 n.9), likewise misses the mark. There, the court had once before stayed the proceedings, "given the Supreme Court's [then] pending consideration of" a related case, and the Supreme Court conclusively decided the overlapping issues and gave "clear authority to the [c]ourt." 2023 WL 10511381 at *2 (D.D.C. May 8, 2023). Again, here, there are multiple questions pending before the Supreme Court in *Antrix* and in Spain's forthcoming petition in *NextEra*, all of which the Supreme Court has yet to resolve conclusively, many of which currently implicate a circuit split, and any of which would be dispositive for Bulgaria's Motion. Nor is Spain's cert petition a mere possibility, as ACF suggests (Opp'n 33 n.9) and as was the case in *Abualala*; Spain clearly indicated that it intends to petition for review of the D.C. Circuit's decision in *NextEra II*. *See, e.g.*, *Blasket* Joint Status Report.

In addition, ACF's speculation that the Supreme Court's ruling in *Antrix* is "very unlikely" to overturn the D.C. Circuit's decision in *Price* (Opp'n 34) is irrelevant. The likelihood of "prevailing on the merits is considered for a stay pending appeal, not a stay pending resolution of

independent proceedings." *Vallejo Ent. LLC v. Small Bus. Admin.*, 2023 WL 3275634, at *2 (D.D.C. May 5, 2023) (emphasis added). "[W]hat matters" here is that *Antrix* "will very likely decide an issue common to both cases, not that it decides the issue in a particular way." *Id.*

Finally, ACF makes the misguided statement that a stay of these proceedings is "incompatible" with the ICSID Convention, which "permits stays of enforcement only while applications to revise or annul an award are pending, and even then only when the tribunal or annulment committee—and not a court—so orders." Opp'n 35-37. ACF's contention does not accurately reflect the ICSID Convention or the reality of litigating actions to enforce ICSID awards in U.S. court. Even accepting ACF's assertion that the ICSID Convention provides for "streamlined enforcement procedures" (Opp'n 35), ACF has identified nothing in the Convention that deprives a U.S. court of its "inherent" power "to control the disposition of the causes on its docket." *Landis*, 299 U.S. at 254; *see also Tethyan*, 590 F. Supp. 3d at 269 (petitioner identified "no court that has held that it lacks the power to stay enforcement of an ICSID award" and rejecting petitioner's argument "that only ICSID can impose a stay on enforcement of its own awards").

Accordingly, courts in this district routinely stay actions to enforce ICSID awards. *See, e.g.*, *Blasket* Jan. 8, 2025 Min. Order; Order, *Mercuria Energy Grp. Ltd. v. Republic of Poland*, No. 23-cv-03572 (D.D.C. Jan. 2, 2025); Min. Order, *RWE Renewables Gmbh v. Kingdom of Spain*, No. 21-cv-03232 (D.D.C. Aug. 13, 2024); Min. Order, *Baywa R.E. AG v. Kingdom of Spain*, No. 22-cv-02403 (D.D.C. Aug 24, 2023); Min. Order, *CEF Energia, B.V. v. Italian Republic*, No. 19-cv-03443 (D.D.C. Sept. 10, 2024). Although ACF has identified one district court that denied Spain's request for a stay pending its anticipated cert petition in *NextEra* (Opp'n 33 n.9),[3] multiple

[3] Since ACF filed its Opposition, another court in this district denied a request from Spain to stay proceedings pending resolution of the *NextEra* petition. *See* Order at 1, *Infrared Env't. Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-cv-00817 (D.D.C. Jan. 13, 2025). A primary

other courts in this district have taken the opposite approach. *See Blasket* Jan. 8, 2025 Min. Order; Order, *Mercuria Energy Group Limited v. The Republic of Poland*, No. 23-cv-03572 (D.D.C. Jan. 2, 2025). The balance of judicial economy and hardship to the parties all favor a stay pending the Supreme Court's resolution of *Antrix* and *NextEra*.

VI. THE COURT SHOULD DENY PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS OR SUMMARY JUDGMENT

For all the reasons stated above, and in Bulgaria's opening Motion to Dismiss, ACF is not "entitled to judgment as a matter of law" for purposes of Federal Rules of Civil Procedure 12(c) or 56(a). Opp'n 38-39. There are multiple bases to challenge this Court's jurisdiction and other threshold issues that preclude the rubber-stamp enforcement ACF seeks. *See supra* §§ I-IV. Above all, this Court should not enter final judgment against Bulgaria until conclusive resolution of Bulgaria's immunity argument under § 1605(a)(6), which is the subject of Spain's anticipated petition for Supreme Court review. *See supra* § V; *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 583 (D.C. Cir. 2020) (foreign sovereigns are entitled to resolution of a "colorable immunity assertion" before being required to defend the merits).

CONCLUSION

The Court should dismiss Plaintiff's Complaint and deny Plaintiff's cross-motion, or in the alternative, stay this action pending the resolution of ongoing proceedings in the Supreme Court.

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basis for Judge Bates's denial of the stay was that "Spain identified no circuit split on the arbitration exception issue" under § 1605(a)(6). However, there is in fact a circuit split on the crucial issue of whether an argument regarding a lack of offer to arbitrate "with or for the benefit of" the particular claimant may be assessed as a question of subject-matter jurisdiction under § 1605(a)(6). *See, e.g.*, *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 and holding that such question was one of sovereign immunity under § 1605(a)(6)); *see also* Mot. 12-13; *supra* § I.A.

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Washington, DC

Respectfully submitted,

WHITE & CASE

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