UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVENERGIA II – ENERGY & ENVIRONMENT (SCA), Petitioner, v. THE KINGDOM OF SPAIN, Respondent.	Civil Action No. 1:18-cv-1148

RESPONDENT THE KINGDOM OF SPAIN'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND TO DENY PETITION TO CONFIRM FOREIGN ARBITRAL AWARD
(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

The Kingdom of Spain ("Spain") submits this memorandum in support of its motion to dismiss the petition of Novenergia II – Energy & Environment (SCA) ("Novenergia"). By that petition, Novenergia asks this Court to enforce an arbitral award ("Award") (D.E. 2-1) rendered in an arbitration in Sweden and subject to Swedish law, including the law of the European Union ("EU"). Novenergia seeks enforcement despite the fact that the competent court in Sweden, the primary jurisdiction, has ordered that "the arbitral award may not be enforced until further notice." Decision of the Svea Court of Appeal, May 17, 2018, p. 2 ("Svea Court Decision") (Decl. of Pontus Ewerlöf Ex. 2)

The Swedish court had good cause to order the Award's suspension. The arbitral tribunal purported to act pursuant to the dispute resolution provisions of an investment treaty, the Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 (D.E. 2-2), even though the Court of Justice of the European Union ("EU Court of Justice" or "C.J.E.U.") – the supreme judicial authority on matters of EU law – has ruled that such provisions are not applicable between EU Member States, such as Spain and Luxembourg (where Novenergia is incorporated). Specifically, the Court of Justice held in *Slovak Republic v. Achmea* that the treaties governing the EU "must be interpreted as precluding a provision in an international agreement concluded between Member States" under which "an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept." C.J.E.U. Case C-284/16, *Slovak Republic v. Achmea B.V.*, 2018, ECLI:EU:C:2018:158 ¶ 60 ("*Achmea* Judgment") (Decl. of Steffen Hindelang Ex. 39). This precludes Novenergia from arbitrating disputes with Spain under the ECT. The European Commission, which enforces EU law, has determined that Spain would breach its legal obligations under EU law should it pay an

award issued in such an arbitration. *See* European Commission Decision 2017/7384, *State aid Case SA.40348 – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste*, Nov. 10, 2017, C(2017) 7384 final (EC) ¶ 160 ("European Commission Decision 2017/7384") (Hindelang Decl. Ex. 41).

In these circumstances, there are multiple grounds for dismissing the petition. To begin with, the Award has been suspended in the primary jurisdiction. The petition is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), as incorporated in the United States by the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.* Article V of that Convention sets out the grounds for a court to refuse to recognize or enforce an award. These include where an award is "suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e). As explained in the accompanying Expert Declaration of Chief Justice Stefan Lindskog – the immediate past Chief Justice of the Supreme Court of Sweden and author of the treatise on Swedish arbitration law *Arbitration: A Commentary* – that is precisely what the Swedish Court did here.

The Court should independently refuse to recognize and enforce the Award under Article V(1)(a) of the New York Convention because, as the EU Court of Justice ruled in *Achmea*, the purported arbitration agreement upon which the tribunal claimed to base its jurisdiction "is not valid under the law to which the parties have subjected it" or "under the law of the country where the award was made." As explained below, because there was not a valid offer to arbitrate from Spain, no arbitration agreement was ever formed between Spain and Novenergia. The absence of a validly formed arbitration agreement also requires the Court to dismiss the petition for lack of jurisdiction because, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§

1602 *et seq.*, foreign sovereigns like Spain are immune from suit unless one of the enumerated exceptions to immunity apply. Here, neither exception invoked by Novenergia – the arbitration and implied waiver exceptions – abrogates Spain's immunity. In both instances, Novenergia's jurisdictional assertions are based on the false assumption that Spain entered into an enforceable agreement referring its dispute with Novenergia to arbitration.

Even assuming Spain had entered into such an arbitration agreement – which it did not – the Award should still be refused recognition and enforcement under Article V(1)(c) of the New York Convention because it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," or "contains decisions on matters beyond the scope of the submission to arbitration." In particular, the tribunal's award of compensation constitutes impermissible state aid (*i.e.*, subsidies) under EU law. EU law bestows upon the European Commission the exclusive competence to authorize state aid, and prohibits EU Member States from granting state aid without its authorization. The tribunal had no jurisdiction to make an award obligating Spain to provide state aid.

Further, Novenergia's petition should be dismissed under Article V(2)(b) of the New York Convention because recognizing and enforcing the Award would contravene the public policy of the United States. It would order Spain to violate its legal obligations under EU law and would transgress the basic constitutional arrangements that the EU Member States have agreed upon in the EU Treaties. A court of the United States should not issue such an order.

Finally, to the extent the Court is not disposed to dismiss the petition, the Court should stay this litigation pending the outcome of the legal proceedings in Sweden, the primary jurisdiction for this dispute. Spain is asking the competent Swedish court to set aside the award and those proceedings are ongoing.

BACKGROUND

I. The Applicable Legal Framework

A. The EU Legal Order

The European Union is comprised of 28 Member States that have ceded to it aspects of sovereignty to establish an integrated Europe characterized by shared laws, values, and a single internal market. *See* L. Woods *et al*., *Steiner & Woods EU Law* 3-6, 25-26 (13th ed. 2017) ("*EU Law*") (Hindelang Decl. Ex. 44).

The EU's core foundational instruments are two international agreements: the Treaty on European Union and the Treaty on the Functioning of the European Union (collectively "EU Treaties"). "[U]nlike ordinary international treaties," they established a "new legal order, possessing its own institutions." C.J.E.U. Opinion 2/13, *Draft International Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2014, ECLI:EU:C:2014:2454 ¶ 157 ("C.J.E.U. Opinion 2/13, *ECHR*") (Hindelang Decl. Ex. 36). These include the European Parliament and Council, which enact legislation, *see* Consolidated Version of the Treaty on European Union, arts. 14, 16(1), Feb. 7, 1992, 2012 O.J. (C 326) 13 ("TEU") (Hindelang Decl. Ex. 5); the European Commission, which, among other functions, enforces EU law, *id.* art. 17; and the EU Court of Justice, which is the final judicial authority on the interpretation of EU law. *Id*. art. 19. *See EU Law* 26.

EU law is based on the EU Treaties; legislation, directives and decisions adopted by EU organs; and the EU Court of Justice's jurisprudence. *See* Hindelang Decl. ¶ 11. It establishes, among other things, binding rules governing the free movement of goods, persons, and services. *See EU Law* 323-326. EU law protects, *inter alia*, rights to property, access to justice, and non-discrimination, which may be enforced through the national courts of Member States. *See* TEU

art. 19(1); Treaty on the Functioning of the European Union, arts. 28-30 Mar. 25, 1957, 2012 O.J. (C 326) 47 ("TFEU") (Hindelang Decl. Ex. 4).

The EU Court of Justice has made clear that EU Member States are "obliged" to "ensure, in their respective territories, the application of and respect of EU law," and must "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU." C.J.E.U. Opinion 2/13, *ECHR* ¶ 173 (internal citations omitted).

EU law enjoys "primacy over the laws of the Member States." C.J.E.U. Opinion 1/09, *Draft Agreement on Creation of a unified patent litigation system*, 2011 E.C.R. I-1137 ¶ 65 (Hindelang Decl. Ex. 34). Where there is a conflict between EU and national law, EU law prevails. *See* Hindelang Decl. ¶¶ 18-20. "[E]very national court must, in a case within its jurisdiction, apply [EU] law in its entirety" and "must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule." C.J.E.U. Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629 ¶¶ 21-22 (Hindelang Decl. Ex. 12). The EU Court of Justice has emphasized that "the very nature of E.U. law … requires that relations between the Member States be governed by E.U. law to the exclusion … of any other law." C.J.E.U. Opinion 2/13, *ECHR* ¶ 212.

B. The EU Judicial System

The EU Court of Justice is the supreme judicial authority on EU law. *See EU Law* 46. The Court of Justice is composed of 28 judges, one from each Member State, appointed for renewable six-year terms. TFEU art. 253.[1]

[1] The EU Court of Justice also includes the General Court, which, among others hears actions brought by individuals against EU institutions. TFEU art. 256.

The EU judicial system is designed to ensure consistency and uniformity in the interpretation of EU law in two ways. *See* C.J.E.U. Opinion 2/13, *ECHR* ¶ 174; Hindelang Decl. ¶¶ 15-16. *First*, Article 267 of the TFEU permits national courts to obtain from the EU Court of Justice rulings on questions concerning the interpretation of EU law. This is referred to as the preliminary ruling procedure. Once the Court of Justice has rendered such a ruling, or where its case law already provides the answer, a national court is "required to do everything necessary to ensure that that interpretation of EU law is applied." C.J.E.U. Case C-689/13, *Puligienica Facility Esco SpA (PFE) v. Airgest SpA*, 2016, ECLI:EU:C:2016:199 ¶ 37 ("C.J.E.U. Case C-689/13, *Puligienica*) (Hindelang Decl. Ex. 37). This aspect of the EU judicial system, the Court of Justice has explained, allows for interactions between it and national courts that "secur[e] uniform interpretation of EU law." *See* C.J.E.U. Opinion 2/13, *ECHR* ¶ 176.

Second, Article 344 of the TFEU forbids Member States from "submit[ting] a dispute concerning the interpretation or application of the Treaties to any method of settlement other than" their national courts. Member States therefore cannot establish dispute resolution bodies outside the EU judicial system that might interpret or apply EU law. *See* C.J.E.U. Opinion 2/13, *ECHR* ¶ 212. This ensures that only courts which are able to refer questions to the EU Court of Justice under Article 267 may be called upon to interpret EU law. *See id.* ¶ 210.

II. Investment Treaties and EU Law

Investment treaties are a class of treaties that provide protections to foreign investors including, typically, the rights to fair and equitable treatment, non-discrimination, "most-favored-nation" treatment, and protection against expropriation without compensation. Some investment treaties are bilateral; others are multilateral.

Many such treaties include provisions that permit investors in defined circumstances to arbitrate disputes with the States that host their investments. *See* United Nations Conference on

Trade and Development, *Investor-State Dispute Settlement: UNCTAD Series on Issues in Investment Agreements II* 37 (2014) (UNCTAD, *Investor-State Dispute Settlement*).[2] Unlike arbitration clauses in commercial contracts, investment treaties do not themselves constitute arbitration agreements. The investor is not a party to the treaty. Rather, investment treaties may contain offers by States to arbitrate that qualified investors can accept later. *Id.* at 31-32. Under Articles 267 and 344 of the TFEU, however, EU Member States are prohibited from offering to arbitrate disputes with nationals of other Member States that might require interpretation or application of EU law, as arbitral tribunals cannot refer questions of EU law to the EU Court of Justice. *See Achmea* Judgment ¶¶ 39-49, 60.

Like the EU Court of Justice, the European Commission – the institution to which the EU Treaties give the responsibility for enforcing EU law – has confirmed that the principles of EU law enshrined in Articles 267 and 344 of the TFEU prohibit resort to arbitration in such circumstances. On March 30, 2015, for example, after a tribunal rendered an award against Romania under an investment treaty it had entered into with another EU Member State prior to acceding to the EU, the Commission stated that it had:

> consistently taken the view that intra-EU BITs [bilateral investment treaties], such as the BIT upon which the claimants base their claim, are contrary to Union law since they are incompatible with provisions of the Union Treaties and should therefore be considered invalid. The Commission has repeatedly made this view known to the Member States, including to the Member States in question.

European Commission Decision 2015/1470, *State aid Case SA.38517 – Arbitral Award* Micula v. Romania *of 11 December 2013*, Mar. 30, 2015, 2015 O.J. (L 232) 43 (EC) ¶ 102 ("European Commission Decision 2015/1470") (internal citation omitted) (Hindelang Decl. Ex. 40).

[2] https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

The Commission has determined that Member States may not pay arbitral awards rendered by such tribunals because doing so would constitute "state aid," *i.e.*, subsidies, that could only be authorized by the Commission itself. *Id.* ¶ 153 ("[P]ayment of the compensation awarded by the Tribunal to the claimants amounts to the granting of incompatible new aid which is incompatible with the Treaty.").[3] The Commission therefore ordered that "any payment of the compensation awarded to the claimants by the Tribunal must be recovered by Romania … without delay." *Id.* ¶ 160.

III. The Dispute between Novenergia and Spain

A. The Nature of the Dispute

On May 8, 2015, Novenergia, an investor from Luxembourg, an EU Member State, commenced an arbitration against Spain, another Member State, purportedly under an international treaty known as the Energy Charter Treaty ("ECT"). Award ¶ 9. It did so despite the European Commission having determined that the dispute settlement provisions of investment treaties between EU Member States, such as the ECT, are inoperative.

Novenergia's claims concerned Spain's regulation of the solar energy sector, an area falling within the EU's competence. *See* TFEU art. 194. In 2007, Spain established a regime for investments in the field of photovoltaic energy that guaranteed certain producers fixed prices for energy produced through a feed in tariff. *See* Award ¶¶ 95-100. Spain subsequently adopted new decrees in 2013 and 2014 to remedy unsustainable growth of the tariff deficit resulting from this special regime, which had accumulated debt of more than €22 billion. *See id.* ¶¶ 131-52;

[3] Member States may not grant state aid without authorization from the Commission. The Commission must be "informed" of "any plans to grant or alter aid," and a Member State may "not put its proposed measures into effect until this procedure has resulted in a final decision." TFEU art. 108(2).

Statement of Defense and Jurisdictional Objections of the Kingdom of Spain, Apr. 29, 2016, ¶¶ 309, 583 (Decl. of Nicholas Renzler Ex. 2). Novenergia claimed, *inter alia*, that these energy sector reforms violated its right to fair and equitable treatment under Article 10(1) of the ECT to which the EU, Spain, and Luxembourg are parties. Award ¶¶ 551-60.

Novenergia invoked the dispute settlement provisions in Article 26 of the ECT which provides that where "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former" cannot be "settled amicably," an investor may submit such a dispute to arbitration pursuant to certain enumerated arbitral rules. These include the rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") (Renzler Decl. Ex. 1). ECT art. 26(2)-(4). Novenergia purported to submit the dispute to arbitration under the SCC Rules, Award ¶¶ 9-10, and Stockholm was chosen as the "seat of arbitration." *Id.* ¶ 18.

B. Spain's Jurisdictional Objections

Spain objected to the tribunal's jurisdiction on the ground that its offer to arbitrate in Article 26 of the ECT does not apply to investors from other EU Member States and is limited to investors from states that are *not* members of the EU. *See id.* ¶¶ 408- 426.

The European Commission supported Spain's objection, explaining in an *amicus curiae* brief, among other things, that allowing Novenergia to refer the dispute to arbitration would violate Articles 267 and 344 of the TFEU. The Commission explained that arbitration is "outside the complete system created by those articles, and, in particular, does not have the possibility or the obligation to refer preliminary questions to the [EU Court of Justice] pursuant to Article 267 TFEU." *Amicus Curiae* Brief of the European Commission, May 2, 2017 ¶ 98 (Renzler Decl. Ex. 4).

Separately, the European Commission issued a Decision regarding renewable energy policy in Spain dated November 10, 2017. Taking note of the fact that investors had commenced arbitrations against Spain under Article 26 of the ECT, the Commission determined that "any provision" of an investment treaty which "provides for investor-State arbitration between two Member States is contrary to Union law," including Articles 267 and 344 of the TFEU. *See* European Commission Decision 2017/7384 ¶ 160. The Commission further stated that EU law precludes arbitration under Article 26 of the ECT because an "Arbitration Tribunal created on the basis of the Energy Charter Treaty in a dispute between an investor of one Member State and another Member" would "apply Union law" even though the tribunal "cannot make references to the ECJ." *Id.* ¶¶ 162-63. It concluded that the "ECT does not apply to investors from other Member States initiating disputes against another Member State[]." *Id.*

Moreover, the European Commission determined that "any compensation which an Arbitration Tribunal were to grant to an investor" would constitute unlawful state aid that a Member State is barred from paying. *Id.* ¶ 165. The Commission ruled that its Decision is "binding on Arbitration Tribunals." *Id.* ¶ 166.[4] Spain provided this Decision to the arbitral tribunal. *See* Award ¶ 424.

C. The Award

On February 15, 2018, the arbitral tribunal issued its final award. Disregarding the European Commission's Decision and the rules of EU law upon which it is based, the tribunal rejected Spain's jurisdictional objections based on the unfounded and conclusory assertion that the arbitration was "not constituted on the basis of the European legal order and it is not subject

[4] In the same Decision, the Commission also ruled that the energy sector reforms challenged by Novenergia were compatible with EU law. *Id.* at 34.

to any requirements of such legal order." *Id.* ¶ 461. The tribunal partly accepted Novenergia's claim of breach of the ECT and awarded damages in the amount of €53.3 million, plus costs. *Id.* ¶ 860.

IV. The *Achmea* Case

A. Background

Like Novenergia, certain other investors from EU Member States have improperly invoked arbitration provisions in investment treaties to bring claims against Member States. One such arbitration was commenced against the Slovak Republic by Eureko (later Achmea BV), a Dutch company which claimed that reforms to the Slovak health insurance regime breached the Slovak Republic's obligations under its BIT with the Netherlands. *See Achmea* Judgment ¶¶ 6-12. When, despite the Slovak Republic's objection, the tribunal exercised jurisdiction and awarded compensation, the Slovak Republic sought to set aside the award in Germany, the arbitral seat. *Id.* ¶ 12.

Germany's Federal Court of Justice invoked its authority under Article 267 of the TFEU to obtain a ruling from the EU Court of Justice on whether the arbitration clause relied on by Achmea violated EU law. *Id.* ¶ 14. Ordinarily, the EU Court of Justice sits in panels of three or five judges. *See* Consolidated Version of the Statute of the Court of Justice of the European Union art. 16 (Hindelang Decl. Ex. 7). Due to the exceptional importance of the case, however, the matter was assigned to a Grand Chamber of 15 judges, including the Court's President and Vice President. *See id.*

B. The Judgment of the EU Court of Justice

On March 6, 2018, after receiving written and oral argument, including submissions from the European Commission and 16 Member States, the EU Court of Justice rendered its unanimous Judgment. The Court explained that it had to determine:

> whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Achmea Judgment ¶ 31.

The Court of Justice's answer was unambiguous: Articles 267 and 344 "preclude[]" such an arbitration provision in an "international agreement concluded between Member States." *Id.* ¶ 60.

In so ruling, the Court of Justice held that the question referred to it "must be answered in the light of" the following "considerations." *Id.* ¶ 38. *First*, "according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the [EU] Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court." *Id.* ¶ 32. That "principle is enshrined" in Article 344 of the TFEU, "under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties." *Id.* (internal citation omitted).

Second, "the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law." *Id.* ¶ 33. In that regard, "EU law is characterised by the fact that it stems from an independent source of law, the [EU] Treaties, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves." *Id.* Those "characteristics" give "rise to a structured network of principles, rules

and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other." *Id.* (internal citation omitted).

Third, EU law is "based on the fundamental premis[e] that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded." This "implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected." *Id.* ¶ 34. Member States are thus obligated "to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU." *Id.*

Fourth, "to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the [EU] Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law." *Id.* ¶ 35. In "that context," it is "for the national courts and tribunals and the [EU] Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law." *Id.* ¶ 36. This rule is given effect by the EU "judicial system." *Id.* A "keystone" of that system is the "preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue" between "the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the [EU] Treaties." *Id.* ¶ 37.

Applying these considerations, the EU Court of Justice found in *Achmea* that tribunals constituted pursuant to international treaties "may be called on to interpret or indeed to apply EU

law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital." *Id.* ¶ 42. However, they "cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 of TFEU." They are "not therefore entitled to make a reference to the Court for a preliminary ruling" under that provision. *Id.* ¶ 49. As a result, reference to arbitration under such international treaties could "prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation of that law." *Id.* ¶ 56.

The EU Court of Justice therefore determined that arbitration clauses such as that in the Slovak Republic-Netherlands investment treaty are barred by the TFEU. It held: "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States" under which "an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the later member State before an arbitral tribunal whose jurisdiction that Member state has undertaken to accept." *Id*. at Dispositif. *See also id*. ¶ 60.

The Court's Judgment is without qualification and, by its terms, applies to any "international agreement concluded between Member States," including the ECT. As a result of the Judgment, the arbitration clauses in treaties like the ECT are not applicable between EU Member States, *ab initio*. *See* Hindelang Decl. ¶¶ 35-45.

Following the Judgment, the European Commission informed the European Parliament and Council that the EU Court of Justice had confirmed that investors may not "have recourse to arbitration tribunals established … under the Energy Charter Treaty." *Communication from the Commission to the European Parliament and the Council*: *Protection of intra-EU investment*, COM (2018) 547 final (July 19, 2018) ("EC Communication"), p. 26 (Hindelang Decl. Ex. 42).

V. Spain's Action to Set Aside the Award

On May 14, 2018, Spain submitted an application to set aside the Award to the Svea Court of Appeal ("Svea Court"), *see* Ewerlöf Decl. Ex. 1, Sweden's court of first instance for seeking the set aside of arbitral awards, Decl. of Stefan Lindskog ¶¶ 17, 22. In its application, Spain explained that the Award suffers from at least five fatal defects that require its set aside under the Swedish Arbitration Act ("SAA").

First, the Award must be set aside under Section 34(1) of the SAA (Lindskog Decl. Ex. 3), which requires set aside where an award "is not covered by a valid arbitration agreement between the parties." In particular, the tribunal lacked jurisdiction because Article 26 of the ECT does not apply between Spain and other EU Member States, and thus does not contain a valid offer by Spain to arbitrate disputes with investors from EU Member States, such as Novenergia. As a result, there was no enforceable arbitration agreement permitting the arbitral tribunal to take cognizance of the dispute. *See* Summons Application and Request for Suspension of the Kingdom of Spain, May 14, 2018, § 8.2 ("Summons Application and Request for Suspension") (Ewerlöf Decl. Ex. 1).

Second, even if Article 26 were deemed to apply between EU Member States, the Award must still be set aside under Section 34(1) of the SAA because Article 26 would violate higher ranking rules of EU law, including, *inter alia*, the principle of autonomy of EU law and Articles 267 and 344 of the TFEU. *Id.* § 8.3. Under Swedish case law, a finding of invalidity in these circumstances requires a determination by the EU Court of Justice. Accordingly, Spain requested that the Svea Court refer the question to the Court of Justice pursuant to Article 267 of the TFEU. *Id.* ¶¶ 166-69.

Third, the Award is invalid under Section 33(1) of the SAA, which requires the invalidation of an award that "includes determination of an issue which, in accordance with

Swedish law, may not be decided by arbitrators." The Award interprets and applies EU law thereby addressing matters that fall within the exclusive competence of the European Commission and the EU Court of Justice. As a result, the Award purports to resolve matters that are not arbitrable under Swedish law. *Id.* § 9.2.

Fourth, the Award is invalid under Section 33(2) of the SAA, which requires a finding of invalidity "if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system." In particular, the Award was rendered pursuant to a purported arbitration agreement that is contrary to EU law and, by that law's incorporation into Swedish law, the laws of Sweden as well. *Id.* § 9.3.

Fifth, the Award must be declared invalid pursuant to Section 33(1) of the SAA because it is contrary to legal order in Sweden insofar as it awarded damages that qualify as unauthorized state aid in contravention of EU law. The arbitral tribunal was jurisdictionally incompetent to make such an award since the power to authorize state aid falls within the exclusive competence of the European Commission. *Id.* § 9.4.

Spain's application to set aside the Award remains pending with the Svea Court, as does its request that the Svea Court refer the matter to the EU Court of Justice for a preliminary ruling in accordance with Article 267 of the TFEU.

VI. The Svea Court's Order Suspending the Award

With its set aside application, Spain simultaneously requested that the Svea Court order that "the recognition and enforcement of the Award be suspended until the Court of Appeal has given its judgment and this judgment has gained legal force." Summons Application and Request for Suspension ¶ 4. On May 17, 2018, the Svea Court granted Spain's request for suspension, and ordered that "the arbitral award may not be enforced until further notice." Svea Court Decision, p. 2. On September 28, 2018, Novenergia requested the Svea Court to

reconsider the suspension of the award, but the suspension remains in place. Ewerlöf Decl. ¶ 5. As of the date of this memorandum, proceedings on that request are ongoing.[5]

VII. Novenergia's Petition to Enforce the Award in this District

Aware that enforcement of the Award in Europe is impossible, Novenergia has not, as far as Spain is aware, sought to enforce it in any EU Member State. Instead, on May 16, 2018, Novenergia filed the present petition with this Court, D.E. 1, which it has continued to pursue notwithstanding the Svea Court's Order forbidding enforcement "until further notice." Svea Court Decision, p. 2.

ARGUMENT

Novenergia petitions this Court to recognize and enforce the Award even though the competent court in the primary jurisdiction has ordered that it may not be enforced until further notice. Beyond that, the EU Court of Justice has ruled that the EU Treaties preclude arbitration provisions in any "international agreement" between EU Member States that refer to arbitration matters where the tribunal might be called upon to interpret or apply EU law. The Court should accordingly reject Novenergia's request and dismiss the petition under Fed. R. Civ. P. 12(b)(1), (2), and (6) for the following reasons.

First, the Svea Court suspended the Award. Article V(1)(e) of the New York Convention specifies suspension by a competent court in the arbitral seat as a ground for denying recognition and enforcement.

[5] On October 4, 2018 undersigned counsel sought Novenergia's agreement to a modification of the briefing schedule in this case to postpone the initiation of briefing until after the Svea Court rules on Novenergia's motion. Noverengia declined to agree.

Second, the EU Court of Justice ruled in *Achmea* that dispute resolution provisions of the type invoked by Novenergia are precluded by the EU Treaties. They are thus void *ab initio* as between EU Member States like Luxembourg and Spain. Novenergia, a Luxembourg national, therefore could not enter into an arbitration agreement with Spain under Article 26 of the ECT.

As a result, the two exceptions to Spain's sovereign immunity under the FSIA that Novenergia asserts are inapplicable. Both exceptions are predicated on the misapprehension that an arbitration agreement exists. Therefore, the petition must be dismissed for lack of subject-matter and personal jurisdiction, as no exception to sovereign immunity applies. The absence of an arbitration agreement likewise necessitates dismissal pursuant to Article (V)(1)(a) of the New York Convention because the tribunal's jurisdiction was not based on a valid agreement to arbitrate.

Third, dismissal is required under Article V(1)(c) of the New York Convention. Even assuming *arguendo* there had been an enforceable agreement to submit a dispute to arbitration, which there was not, the Award went beyond any conceivable submission. The ECT's choice of law provision places limits on the scope of a submission to arbitration by requiring arbitral tribunals to render awards in conformity with the rules of international law. Those rules include the EU Treaties that permit only the European Commission to authorize state aid. The tribunal, however, rendered an award that constitutes state aid.

Fourth, Spain would violate its obligations under the EU Treaties by paying the Award without the European Commission's prior authorization. Article V(2)(b) of the New York Convention provides for refusal of recognition and enforcement where such actions would contravene United States public policy. Not ordering foreign sovereigns to violate legal obligations is such a policy.

Finally, if the Court is not presently disposed to dismiss the petition, it should stay this action pending the completion of the set aside proceedings in Sweden.

I. Recognition and Enforcement Must be Refused under Article (V)(1)(e) of the New York Convention Because the Award Has Been Suspended by the Svea Court

The New York Convention "provides a carefully crafted framework for the enforcement of international arbitral awards," which "mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004)). Under this framework, a court in the primary jurisdiction – the seat of the arbitration, or under whose laws the award was made – has the exclusive competence to set aside or suspend an award, which it is "free" to do "in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Id*. (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)). The D.C. Circuit has emphasized the "paramount importance" of the "power and authority of the local courts of the rendering state." *Id*. at 939 (internal quotations omitted).

In contrast, courts in secondary jurisdictions where recognition and enforcement is sought consider whether one or more of the grounds for denial of such relief set forth in Article V of the New York Convention are met. *Energoinvest DD v. Democratic Republic of Congo*, 355 F. Supp. 2d 9, 11 (D.D.C. 2004) (citing 9 U.S.C. § 207). *See also Salini Costruttori S.P.A. v. Kingdom of Morocco*, 233 F. Supp. 3d 190, 193 (D.D.C. 2017) (Chutkan, J.).

Article V(1)(e) of the New York Convention recognizes the primacy of the courts in the primary jurisdiction. It provides for the refusal of recognition and enforcement of an award that

has been "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e).

This is precisely what the Svea Court did here. Spain's submission to that court explained that the Award must be set aside because, among other things, it contravenes EU law as pronounced by the EU Court of Justice. Spain's submission included a "Request for suspension" of the Award that sought an order that "enforcement of the Award not be permitted until the [Svea Court] has given a final judgment." Summons Application and Request for Suspension ¶ 170. On May 17, 2018, the Svea Court granted the suspension request; it ordered that "the arbitral award not be enforced until further notice." Svea Court Decision, p. 2.

This Court must respect the Svea Court's decision. In applying Article V(1)(e), the D.C. Circuit has explained:

> for reasons of international comity, we have declined to "second-guess" a competent authority's annulment of an arbitral award absent "extraordinary circumstances." "The standard is high, and infrequently met," such that we cannot enforce an annulled award on a mere showing that the annulment is erroneous or conflicts with the United States's public policy. Instead, we will set aside an annulment only if it violates this country's "most basic notions of morality and justice."

Getma Int'l v. Republic of Guinea, 862 F.3d 45, 48-49 (D.C. Cir. 2017) (quoting *TermoRio*, 487 F.3d at 936-39).

Disregarding the decision of the Svea Court would upset the New York Convention's "carefully crafted framework for the enforcement of international arbitral awards." *TermoRio*, 487 F.3d at 935. It would also transgress the D.C. Circuit's instruction that, when applying Article V(1)(e), a court in a secondary jurisdiction is not "free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award." *Id.* at 937. For that reason, this Court has refused recognition and enforcement in both of the circumstances specified in Article V(1)(e), namely where the award has been set aside and where

it has been suspended. *See Getma Int'l v. Republic of Guinea*, 191 F. Supp. 3d 43 (D.D.C. 2016), *aff'd* 862 F.3d 45; *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 99-103 (D.D.C. 2006), *aff'd* 487 F.3d 928 (citing *Baker Marine, Ltd. v. Chevron, Ltd.*, 191 F.3d 194, 196-98 (2d Cir. 1999)); *Creighton Ltd. v. Government of the State of Qatar*, Case No. 94-1035 RMU (D.D.C. Mar. 22, 1995), *reprinted in* 21 *Yearbook Commercial Arbitration* 751 (A.J. van den Berg ed., 1996) (Ex. 1).

In *Creighton*, this Court held that "[t]o determine whether an award has been set aside or suspended, the Court must look to the laws of the competent authority of the country under which the award was made." *Id*. at 756. This is done by reference to the "regime or scheme of arbitral procedural law under which the arbitration was conducted." *Id.* (quoting *Intern. Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990)). The award in *Creighton* was the subject of set aside proceedings in the arbitral seat – France – and had been suspended under French law. The Court accordingly refused to recognize and enforce it under Article V(1)(e). *Id*. at 758.

Here, the Award has been suspended under the applicable Swedish law. The Svea Court's Order unambiguously "finds reason to now order that the arbitral award not be enforced until further notice." Svea Court Decision, p. 2. Justice Stefan Lindskog, the immediate past Chief Justice of the Supreme Court of Sweden, reviewed the Svea Court's Order and concludes that the "Decision of the Svea Court of Appeal Suspends the Award" under Swedish law. Lindskog Decl. § III(B). *See also id*. ¶¶ 23-25.

In short, recognition and enforcement must be refused, and the petition dismissed pursuant to Fed. R. Civ. P. 12(b)(6), because the Award has been suspended by the competent judicial authority of Sweden.

II. Recognition and Enforcement Must be Refused Because Article 26 of the ECT Does Not Apply between Spain and Luxembourg and No Arbitration Agreement Was Formed between Spain and Novenergia

Since the competent court in Sweden has suspended the Award, Novenergia's petition should be dismissed on that basis alone. If, however, the Court were inclined to delve into the underlying substantive issues of EU law, it would have to conclude that no arbitration agreement was formed between Spain and Novenergia. For the reasons explained by the EU Court of Justice in *Achmea*, Article 26 of the ECT does not apply between EU Member States and does not contain a valid offer by Spain to arbitrate with investors from other EU Member States like Novenergia. Accordingly, there was no valid offer to arbitrate by Spain that Novenergia could accept and, therefore, no enforceable arbitration agreement could have been concluded.

Two consequences flow from the absence of an arbitration agreement between Spain and Novenergia. *First*, this Court lacks jurisdiction under the FSIA because Spain, as a foreign sovereign, is immune from suit unless one of the statute's exceptions to immunity apply. The only exceptions identified by Novenergia – the arbitration and waiver exceptions – depend upon the existence of an enforceable arbitration agreement. Since there is no such agreement, the petition must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (2). *Second*, separate and apart from Spain's sovereign immunity, the petition must be rejected under Article V(1)(a) of the New York Convention because the putative arbitration agreement "is not valid under the law to which the parties have subjected it" or "under the law of the country where the award was made."

A. There is No Arbitration Agreement

Whether Spain entered into an enforceable arbitration agreement with Novenergia must be determined under EU law. The choice of law provision in Article 26(6) of the ECT provides: "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with

this Treaty and applicable rules and principles of international law." ECT art. 26(6). The "applicable rules and principles of international law" include the EU Treaties, as authoritatively interpreted by the EU Court of Justice. It is axiomatic that the EU Treaties – international agreements concluded by Spain and Luxembourg – constitute applicable rules of international law. As explained in the accompanying Expert Declaration of Professor Steffen Hindelang, the EU Treaties are international law and at the same time are the highest law of the EU. Hindelang Decl. ¶¶ 11, 13-14, 54 (citing TFEU, Preamble). *See* TEU at Preamble, art. 1(2); *Achmea* Judgment ¶ 41; C.J.E.U. Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission*, 2008, ECLI:EU:C:2008:461 ¶ 285 (Hindelang Decl. Ex. 3). Thus, any dispute resolved under Article 26(6), including a dispute on the existence or validity of the arbitration agreement, must be decided in accordance with EU law, giving priority to the EU Treaties.

The result is the same if the law of the seat of arbitration is applied to the question of the existence of the arbitration agreement: EU law applies because it is an integral part of Swedish law. Decisions of this Court have indicated that the law of the seat of arbitration governs the existence of any putative arbitration agreement. *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 153 (D.D.C. 2018) ("In this case, because the parties designated in the arbitral clause that The Hague, Netherlands was to serve as the seat of arbitration, Dutch law supplied the law applicable to the arbitration agreement") (citing Jay E. Grenig, *International Commercial Arbitration* § 7.2 (Jan. 2018)); *see also Ukrnafta v. Carpatsky Petro. Corp.*, Case No. H-09-891, 2017 U.S. Dist. LEXIS 163064, at *33 (S.D. Tex. Oct. 2, 2017) (validity of arbitration agreement decided under the law of the seat); *Four Seasons Hotels & Resorts v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1335, 1347 (S.D. Fla. 2003) (the law of the seat governs powers of arbitrators).

Swedish law is the law of the seat and the relevant rules of EU law are incorporated into the law of Sweden. *See* Hindelang Decl. ¶¶ 13-14. Swedish law must be applied in conformity with the jurisprudence of the EU Court of Justice. *See* Hindelang Decl. ¶¶ 11, 16-17, 18-20. *See* TEU art. 19(1); C.J.E.U. Case C-689/13, *Puligienica*; *EU Law* 47. Therefore, EU law, as interpreted by the EU Court of Justice, is part of the law of Sweden, the seat of arbitration. And under *Balkan Energy,* Swedish law governs the determination of the existence of the arbitration agreement. *See* 302 F. Supp. 3d at 153.

In the present case, the relevant rules of EU law are explained in *Achmea* and render Article 26 of the ECT inoperative between EU Member States. As the European Commission informed the European Parliament and Council, *Achmea* confirms that investors may not "have recourse to arbitration tribunals established … under the Energy Charter Treaty." EC Communication 547, at 26.

The reasons that caused the EU Court of Justice to declare inoperative the dispute resolution provisions in the treaty between Slovakia and the Netherlands apply equally to Article 26 of the ECT. *First*, as noted by Professor Hindelang in his Expert Declaration, arbitral tribunals formed under Article 26 are plainly not courts or tribunals within the EU legal system. *See* Hindelang Decl. ¶ 38. In particular, they "lack the requisite 'links with the judicial systems of the Member States' and follow procedures that are not 'a step in the proceedings before the national courts.'" *Id.* (quoting *Achmea* Judgment ¶ 48).

Second, tribunals constituted under the Article 26 "may be called upon" to interpret and apply EU law. Hindelang Decl. ¶¶ 39-40; *see Achmea* Judgment ¶ 42. Indeed, EU law constitutes part of the applicable law under Article 26(6), and, consequently, an arbitral tribunal instituted thereunder might be required to interpret or apply it. *Achmea* Judgment ¶¶ 36-40.

Third, such tribunals cannot refer questions of EU law to the EU Court of Justice under Article 267 of the TFEU. *See* Hindelang Decl. ¶ 41. They therefore cannot avail themselves of the procedural mechanism established by that treaty to ensure the uniform interpretation and application of EU law. *See Achmea* Judgment. ¶¶ 42-49, 50-56. There is thus no assurance that they would resolve those disputes "in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law." *Id.* ¶ 56. As a result, application of Article 26 of the ECT between EU Member States would impermissibly breach Articles 267 and 344 of the TFEU.

This has consequences not just for the validity of the arbitration agreement, but for its formation and existence. Article 26 of the ECT is not itself an arbitration agreement between Spain and Novenergia. It is a clause in a multilateral treaty between States to which Novenergia is not a party. An arbitration agreement between Spain and Novenergia could only be formed if Spain made a legally binding offer to Novenergia and Novenergia validly accepted that offer. *See* UNCTAD, *Investor-State Dispute Settlement*, pp. 31-32. Because Article 26 does not apply between Spain and Luxembourg, Spain made no legally binding offer to arbitrate with Luxemburg nationals, such as Novenergia. Accordingly, as a matter of law, no arbitration agreement was formed. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotations omitted).

The fact that the arbitral tribunal erroneously considered there to be an arbitration agreement between Spain and Novenergia is of no moment. Because arbitration is strictly a matter of consent, whether an arbitration agreement was formed is a matter for the *court* to determine *de novo*. No deference is given to any prior view expressed by an arbitral tribunal. As

the Supreme Court ruled in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, "[t]o satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." 561 U.S. 287, 297 (2010).

In other words, where the parties "disagree as to whether they ever entered into any arbitration agreement at all, the court must resolve that dispute." *National R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988). That is because "[c]learly, if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration. … When there is an issue of formation, the court cannot be sure that the party resisting arbitration ever viewed the arbitrator as competent to resolve any dispute." *Id*. at 761-62. Thus, "issues of formation… must always be decided by the courts." *Id*. at 761; *see also, e.g.*, *KenAmerican Resources v. International Union, UMW*, 99 F.3d 1161, 1163 (D.C. Cir. 1996).[6]

In sum, this Court must decide whether Spain entered into an enforceable arbitration agreement with Novenergia. As *Achmea* establishes, it did not. The arbitral tribunal's mistaken view on that matter is immaterial.

[6] "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). Even if the issue were viewed as validity as distinct from formation, the Court would still need to determine the matter. The validity of an arbitration agreement is presumptively for the court to decide, absent clear and unmistakable evidence that the issue was intended to be decided by arbitrators. *See Oxford Health Plans v. Sutter*, 569 U.S. 564, 569 n.2 (2013). Here, there is no clear and unmistakable evidence to alter that presumption.

B. The Court Lacks Jurisdiction Because Spain is Immune from Suit under the Foreign Sovereign Immunities Act

The absence of an enforceable arbitration agreement between Spain and Novenergia carries the necessary consequence that the Court lacks jurisdiction. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Under § 1604 of the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the limited exceptions enumerated in §§ 1605 to 1607A applies. If none does, courts in the United States are without jurisdiction. *Id.*; *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99 (D.C. Cir. 2015). Moreover, personal jurisdiction over a foreign sovereign will exist only if there is subject-matter jurisdiction and service of process has been effected in accordance with § 1608(a) of the FSIA. 28 U.S.C. § 1330(b); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

Novenergia invokes the arbitration exception to immunity in § 1605(a)(6). This allows a court to exercise jurisdiction over an action brought "to confirm an award made pursuant to… an agreement to arbitrate" if the "award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). The exception, however, only allows jurisdiction where there is a "valid agreement … to submit to arbitration." *Belize Soc. Dev.*, 794 F.3d at 102 (internal quotation omitted). "If there is no arbitration agreement … the District Court lacks jurisdiction over the foreign state and the action must be dismissed." *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015).

Novenergia does not satisfy this requirement because, for the reasons set out in *Achmea*, Article 26 of the ECT does not apply between EU Member States and Spain did not make a valid

offer in Article 26 of the ECT to arbitrate with investors from other EU Member States. *Achmea* Judgment ¶ 60. There was therefore no offer to arbitrate that Novenergia legally could accept, and no arbitration agreement could have been formed. As a result, there was no "valid 'agreement … to submit to arbitration.'" *Belize Soc. Dev.*, 794 F.3d at 102 (quoting 28 U.S.C. § 1605(a)(6)).

Novenergia's alternative reliance on the waiver exception in § 1605(a)(1), D.E. 1 ¶ 6, fails for the same reason. Novenergia appears to rely on a species of implied waiver that permits jurisdiction where the foreign sovereign "agreed to arbitration in another country." *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 188 (D.D.C. 2016) (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990)). Spain, however, did not enter into such an arbitration agreement with Novenergia. It was precluded from doing so under EU law.

C. Recognition and Enforcement Must be Refused under Article V(1)(a) of the New York Convention Because There is No Valid Arbitration Agreement

The absence of a valid arbitration agreement between Spain and Novenergia further requires dismissal of the petition under Article V(1)(a) of the New York Convention because it is based on a putative arbitration agreement that is "not valid under the law to which the parties have subjected it" or "under the law of the country where the award was made." New York Convention art. V(1)(a). *Achmea* confirmed that dispute settlement provisions such as Article 26 of the ECT do not apply between EU Member States. Because there is no legally operative arbitration clause between Luxembourg and Spain by which Spain could have made an offer to arbitrate to Novenergia, no arbitration agreement could have formed between them. Accordingly, the petition must be denied under Article V(1)(a). *See Balkan Energy*, 302 F. Supp. 3d at 157 (finding that Article V(1)(a) would permit denial of recognition and enforcement

of an award rendered pursuant an invalid arbitration agreement); *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26, 39 (D.D.C. 2016) (same); *Four Seasons Hotels & Resorts v. Consorcio Barr S.A.*, 377 F.3d 1164, 1171 (11th Cir. 2004) (noting that Article V(1)(a) applies when the arbitration agreement is invalid).

III. Recognition and Enforcement Must be Refused under Article V(1)(c) of the New York Convention Because the Tribunal Exceeded its Jurisdiction

Article V(1)(c) of the New York Convention provides another ground to dismiss the petition: The award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," and "contains decisions on matters beyond the scope of submission to arbitration," New York Convention art. V(1)(c).

The Award addressed matters that exceed any conceivable submission to arbitration. Had any such submission validly been made – which it was not – the submission would be circumscribed by Article 26(6) of the ECT, a provision that only permits arbitral tribunals to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." ECT art. 26(6). EU law forms part of those "applicable rules and principles of international law," thereby restricting "the scope of submission to arbitration" to matters that are permitted to be arbitrated under that body of law.

The European Commission's functions include regulating the provision of state aid by EU Member States. Only the Commission may authorize Member States to provide such aid. *See* TFEU arts. 107(1), 108(3). Other bodies, such as arbitral tribunals, may not do so. *See id.* arts. 108(2)-(3). Notwithstanding this restriction on the tribunal's competence, it rendered an award that ordered Spain to pay compensation that amounts to unauthorized state aid to Novenergia. Hindelang Decl. ¶¶ 49-51. The European Commission made precisely this point in its November 10, 2017 Decision on Spain's renewable energy policy, when it determined that

"any compensation which an Arbitral Tribunal were to grant to an investor" would be unauthorized state aid that Spain is prohibited from paying. *See* European Commission Decision 2017/7384 ¶ 165.[7]

The tribunal was on notice that "any compensation" it might order Spain to pay for having modified its tariff regime would constitute unauthorized state aid. Spain brought the Commission's Decision to the tribunal's attention. *See* Award ¶¶ 63, 68. The tribunal made such an award anyway. In so doing, it acted *ultra vires*, deciding a matter that the applicable law establishes as beyond any submission to arbitration.

IV. Recognition and Enforcement Must be Refused under Article V(2)(b) of the New York Convention as Contrary to the Public Policy of the United States

The Court should refuse to recognize and enforce the Award under Article V(2)(b) of the New York Convention because recognition and enforcement would be "contrary" to at least two United States "public polic[ies]" of fundamental importance. New York Convention art. V(2)(b). *See Hardy Exploration & Prod. (India) v. Gov't of India*, 314 F. Supp. 3d 95, 109-114 (D.D.C. 2018)

First, the United States must "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). Granting the petition, however, would require Spain to violate legal obligations imposed by EU law. *See Revere Copper & Brass, Inc. v. Overseas Private Inv.*

[7] The European Commission made a similar determination in regard to an award rendered against Romania. *See* European Commission Decision 2015/1470 ¶¶ 153, 160 (determining that "payment of the compensation awarded by the Tribunal to the claimants amounts to the granting of incompatible new aid which is incompatible with the Treaty" and ordering that "any payment of the compensation awarded to the claimants by the Tribunal must be recovered by Romania … without delay").

Corp., 628 F.2d 81, 83 (D.C. Cir. 1980). ("the public policy exception to the enforcement of arbitration awards" extends to awards that "compel[] the violation of law") (internal quotations omitted). *See also Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) ("fundamental principles of international comity" preclude orders that could "cause a violation of the laws of a friendly neighbor"); Restatement (Third) of Foreign Relations Law § 441 (1987) ("a state may not require a person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national"). As the D.C. Circuit has ruled, it would cause "considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987). That "discomfort" is especially acute where, as here, the party subject to the order "is not merely a private foreign entity" but a "[sovereign] entity." *Id.*

Granting the petition would order Spain to violate the EU law on state aid in direct contravention of a Decision of the European Commission stating that "any compensation" that "an Arbitral Tribunal" might "grant to an investor" as a remedy for the regulatory actions Spain undertook in regard to its renewable energy sector is unauthorized state aid. *See* European Commission Decision 2017/7384 ¶ 165. The Court should refuse to order such a violation of law.

Second, recognizing and enforcing the Award would be contrary to the respect owed by the United States to the constitutional order that its closest partners have established in the European Union. The legal regime they created through the EU Treaties carefully divides attributes of sovereignty between the EU Member States and the EU's institutions. They endowed the European Commission with the exclusive competence to authorize state aid and gave the EU judicial system exclusive authority to interpret and apply EU law. The Award

disregards these fundamental pillars of the EU legal system. It violates the foundational underpinnings of the European constitutional system that are reflected in Articles 267 and 344 of the TFEU, as pronounced by its highest judicial authority, and awards a form of compensation that only the European Commission is competent to authorize under Articles 107-108 of the same treaty.

The United States, which is "bound to respect the independence of every other sovereign State," *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), must respect the EU's constitutional choices, and should not enforce an award that transgresses them. To do otherwise would fail to give effect to the paramount values of "predictability and stability through satisfaction of [states'] mutual expectations." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). *See also id.* (holding United States courts are "compel[led] … to act at all times to increase the international legal ties that advance the rule of law within and among nations"). Where an award would "undermine the public interest" and "public confidence in the administration of the law," it should be denied recognition and enforcement under Article V(2)(b). *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 844 F.3d 281, 289 (D.C. Cir. 2016) (internal quotation omitted).

V. In the Alternative, This Action Should be Stayed Pending Resolution of the Set Aside Proceedings in Sweden

If the Court is not inclined to dismiss the petition at this time, it should stay this action under Article VI of the New York Convention pending the resolution of the Swedish proceedings. Novenergia's rush to enforce the Award in the United States creates a serious risk: if the Award is enforced against Spain's assets in the United States, but the Svea Court subsequently sets it aside, Novenergia will have enforced an annulled award. "[W]here a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be

set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings." *Europcar Italia, S.P.A. v. Maiellano Tours*, 156 F.3d 310, 317 (2d Cir. 1998). This Court has stayed proceedings under Article VI where set aside proceedings are ongoing in the arbitral seat. *See, e.g.*, *Stati*, 199 F. Supp. 3d at 181, 191; *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 113-14 (D.D.C. 2015); *CPConstruction Pioneers Baugesellschaft Anstalt v. Republic of Ghana*, 578 F. Supp. 2d 50 (D.D.C. 2008), *vacated on other grounds*, 578 F. Supp. 2d 48 (D.D.C. 2008).

The wisdom of a stay in these circumstances is illustrated by *Getma Int'l*. There, the respondent moved to set aside an adverse award in the jurisdiction in which the award had been made. 142 F. Supp. 3d at 112. While the set-aside proceedings were pending, this Court stayed its own proceedings under Article VI. *Id*. at 119. The award eventually was set aside, and this Court denied the petition for recognition and enforcement. The D.C. Circuit upheld this decision. *See Getma Int'l v. Republic of Guinea*, 191 F. Supp. 3d at 55, *aff'd* 862 F.3d at 50. The Court's judicious stay avoided protracted and expensive litigation, prevented inconsistent decisions, and saved Guinea from a perhaps futile effort to recover improperly seized assets.

The circumstances warranting a stay here are at least as compelling. Spain promptly filed set aside proceedings in Sweden, the primary jurisdiction, and the Svea Court promptly suspended the award. Litigation in this Court concerning recognition and enforcement, while the Swedish set aside proceedings remain pending, would be costly, time-consuming, burdensome, and risks inconsistent decisions. If this case proceeds to recognition and enforcement, and the Svea Court later vacates the Award, Spain would have to seek recovery of any assets obtained by Novenergia in the interval. By then Novenergia, a company with no known presence in the

United States, could have moved those assets outside the United States, creating the need for yet further litigation where the prospects for successful recovery may be dubious.

In determining whether to grant a stay under Article VI, this Court and others have assessed six non-exclusive factors set out by the Second Circuit in *Europcar,* 156 F.3d at 317-18. *See Getma Int'l*, 142 F. Supp. 3d at 113. The first concerns the "expeditious resolution of disputes and the avoidance of protracted and expensive litigation." *Europcar*, 156 F.3d at 317. This supports a stay because "a decision by the [foreign court of primary jurisdiction] may limit or eliminate the need for continued and expensive litigation." *Stati*, 199 F. Supp. 3d at 192. *See also Getma Int'l*, 142 F. Supp. 3d at 114; *Jorf Lasfar Energy Co. v. AMCI Exp. Corp.*, Case No. 05-0423, 2005 U.S. Dist. LEXIS 34969, at *7-8 (W.D. Pa. Dec. 22, 2005); *Alto Mar Girassol v. Lumbermens Mut. Cas. Co.*, Case No. 04 C 7731, 2005 U.S. Dist. LEXIS 7479, at *11-12 (N.D. Ill. Apr. 12, 2005).

The second factor is the "status of the foreign proceedings and the estimated time for those proceedings to be resolved." *Europcar*, 156 F.3d at 317. Both parties have already submitted extensive briefing in the Swedish proceedings. Ewerlöf Decl. ¶¶ 3, 5. There is no reason to anticipate that the proceedings would suffer from any undue delay. This aspect of the test thus weighs in favor of a stay. *See Ukrnafta v. Carpatsky Petro. Corp.*, Case No. H-09-891, 2011 U.S. Dist. LEXIS 160485, at *12 (S.D. Tex. Oct. 12, 2011) (absence of the "specter of unreasonably protracted litigation" in the Swedish courts weighed in favor of a stay); *Jorf Lasfar*, 2005 U.S. Dist. LEXIS 34969, at *8 (finding second factor weighing in favor of a stay when there was "no evidence that the French court will … partake in excessive delay");

The third factor concerns whether "the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review." *Europcar*, 156

F.3d at 317. The Svea Court will apply its greater familiarity with EU law and with recourse to the EU Court of Justice if needed to determine matters of EU law. By contrast, this Court does not normally apply EU law and cannot seek an authoritative interpretation from the EU Court of Justice. Moreover, the Svea Court is considering grounds for setting aside the Award that have no analogues under Article V of the New York Convention and thus are not before this Court, including whether the Award must be declared invalid for violating the Swedish legal order. *See* Summons Application and Request for Suspension, §§ 9, 10.

The fourth factor addresses whether the Swedish proceedings "were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute." *Europcar*, 156 F.3d at 318. That is not the case here. Spain appropriately "exercise[d] its right to post-arbitration review" of the Award. *Getma Int'l*, 142 F. Supp. 3d at 117. Spain did this promptly, within three months after the tribunal rendered the Award. *See* Summons Application and Request for Suspension ¶ 3. Spain cannot be accused of having engaged in an improper attempt to hinder or delay. *See id*.

The fifth factor is "a balance of the possible hardships to each of the parties." *Europcar*, 156 F.3d at 318. This factor favors a stay because the harm to Spain of premature enforcement could be significant and irreversible. In light of such risks, this Court has granted a stay in similar circumstances, holding "there would be very real harm to [Guinea] were [it] to confirm the award, [the petitioner] were [to] take action to execute on the judgment, and … [the foreign] court were to later determine that the award was improper." *Getma Int'l*, 142 F. Supp. 3d at 118 (quoting *Jorf Lasfar*, 2005 U.S. Dist. LEXIS 34969, at *4) (first, second, and fifth alterations in original). By contrast, a stay would not prejudice Novenergia because its ability to collect on the Award – were it ultimately found to be valid – would not be affected by the passage of time.

The sixth and final factor is any other "circumstances that … shift the balance in favor of … adjournment." *Europcar*, 156 F.3d at 318. The validity of the Award implicates a matter of great significance to the European Union. If the Court is not inclined to dismiss the petition, granting a stay as an alternative would accord comity to the European judicial system and avoid potentially causing needless tension with an important partner of the United States.

In short, if the Court does not to dismiss Novenergia's petition, it should stay these proceedings pursuant to Article VI of the New York Convention until the Swedish set aside proceedings are completed.

CONCLUSION

WHEREFORE, Spain respectfully requests that the Court dismiss the petition and deny recognition and enforcement of the Award, or, in the alternative, stay these proceedings.

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Respectfully submitted,

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