UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of

IOAN MICULA,
VIOREL MICULA,
S.C. EUROPEAN FOOD S.A.,
S.C. STARMILL S.R.L and
S.C. MULTIPACK S.R.L

Petitioners,

v.

THE GOVERNMENT OF ROMANIA,

Respondent.

Civil Action No. 17 CV 2332

ROMANIA'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF LEGAL PROCEEDING REGARDING VALIDITY OF INJUNCTION ENTERED BY EUROPEAN COMMISSION AND TO STAY PROCEEDINGS PENDING THE DETERMINATION OF THE PROPER PETITIONERS IN LIGHT OF THE BANKRUPTCY FILINGS OF CERTAIN PETITIONERS

Ioana Salajanu
7620 Kildare Avenue,
Skokie, IL 60076
Telephone: (773.875.5438
sedeidu@yahoo.com
Attorneys for Respondent Government of Romania

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Respondent, the Government of Romania ("Romania"), respectfully submits this Reply Memorandum in Support of its Motion to Stay Proceedings Pending the Resolution of Legal Proceedings Regarding Validity of Injunction Imposed by the European Commission and to Stay Proceedings Pending the Determination of the Proper Petitioners in Light of the Bankruptcy Filings of Certain Petitioners (the "Motion") per Federal Rule of Civil Procedure 7(b)(1), existing case law and this Court's inherent authority, stating as follows:

PRELIMINARY STATEMENT

Petitioners' Opposition to Romania's Motion to Stay Proceedings and to Romania's Motion for Extension of Time to File Responsive Pleadings ("Opposition") [Dkt. No. 63] is a blanket argument – peppered with an astounding level of *ad hominem* attacks (within the first five paragraphs alone, Petitioners accuse Romania of attempting to "delay," "derail" and "overcomplicate" this case, call the Motion to Stay "baseless," "absurd" and "preposterous" and outright accuse Romania of acting in "bad faith") for which they should be sternly admonished – that they are simply entitled to a recognition of the Award as a matter of law. This is wrong. Petitioners fail to meet their burden of demonstrating that they have a valid Award in the first place. In what is known as the Achmea case, the Court of Justice of the European Union ("CJEU") decision of March 6, 2018 declared bilateral investment treaties ("BIT") void as they conflict with European Union ("E.U.") law. *See* a true and accurate copy of such March 6, 2018 Judgment of the Court of High Chambers attached hereto as Exhibit 1 (the "Achmea Judgment").[1] On July 19, 2018, the European Commission (the "Commission") issued a

[1] Although Romania was not a party to the Achmea case, the Court permitted Romania, along with several other states, to submit observations that the CJEU took into consideration. *See* Exhibit 1 at pp. 1, 2. In the Achmea case, Slovakia executed a BIT with the Kingdom of the Netherlands in 1991, prior to it becoming an E.C. state in 2004. *See Id*. at p. 2, at ¶3, and p. 5, at ¶6. The ICSID Arbitration Court entered an Award in favor of Achmea and against Slovakia in December 2012. Despite this, the CJEU found that the Arbitration Award arising out of the BIT

communication related to the Achmea Judgment in which it declared that any arbitration clauses arising out of a BIT, such as the one upon which Petitioners here relied in obtaining their Award, as void and hence any awards deriving from such BITs are invalid ("Commission Opinion"). *See* a true and accurate copy of the July 19, 2018 European Commission Communication to European Parliament and the Council, attached hereto as Exhibit 2, at p. 3. Because the arbitration clause upon which Petitioners obtained their Award is contained in the Sweden-Romania BIT and, pursuant to the Achmea Judgment, all such BITs (and all Awards made under the auspices of such BITs) have been declared to be invalid, the Award is unenforceable. Accordingly, this Court lacks subject-matter jurisdiction in this case under the Foreign Sovereign Immunities Act ("FSIA"). *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 203-205 (D.C. Cir. 2015). Petitioners' argument that the arbitration exception laid down in 28 U.S.C. §1605(a)(6)(B) applies fails, because the Sweden-Romania BIT itself (and, necessarily, the arbitration clause contained therein) is invalid as a result of the Achmea Judgment. The Award is thus unenforceable, by this or any other Court. *See id*.

Petitioners' argument, such as it is, blatantly disregards the undeniable fact that Romania is bound by the Commission's rules, regulations and opinions, the decisions and orders of the European Courts and E.U. laws, rules and regulations. Petitioners also ignore the fact that Romania is compelled and restricted by the Achmea Judgment (rendered by the CJEU, the highest court in the E.U.) and, worse yet, ignore the Achmea Judgment entirely. They also disregard the Commission Opinion about the Achmea Judgment, which (at the risk of repetition, but in the hope of clarity) declared that any arbitration clauses arising out of a BIT, such as the one upon which Petitioners relied in obtaining their Award, were and are void and hence any

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was and is contrary to E.U. law and therefore void. *See Id.* at p. 13. Similarly, here, Romania was not part of the E.C. when it executed the BIT with Sweden or when it later revoked the BIT, and the Award was entered in favor of Petitioners on December 13, 2013.

awards deriving from such BITs are invalid. And, Petitioners ignore that Romania is bound by the injunction that has been issued directly against it. As also noted in Romania's Motion, on March 30, 2015 the Commission issued its decision (the "Decision") requiring Romania to recoup any amounts it had already paid to Petitioners under the ICSID Award and enjoining Romania from making any other payments on the Award. *See* a true and accurate copy of Commission Decision (EU) 2015/1470, Decision on State Aid 38517 (2014/C) (ex 2014/NN), attached hereto as Exhibit 3. Petitioners dismiss the fact that they filed a case (Case Nos. T-624/15, 694/15 and 704/15 – the "Injunction Litigation") against the Commission challenging the validity of the Decision and seeking to annul it before the CJEU ***precisely because*** Petitioners recognize that the Decision compels Romania to recoup any amounts paid on the Award and prohibits Romania from making any further payments. *See* a true and accurate copy of the March 20, 2018 Report on Hearing attached hereto as Exhibit 4. They pay no heed to the clear fact that a ruling in the Injunction Litigation will be determinative as to whether, under E.U. law (to which Romania is unquestionably bound), Romania is permitted to make any payment toward the Award or whether any such payment would constitute illegal state aid and be prohibited under E.U. law.

Petitioners also sweep under the rug the fact that Courts in Europe have stayed all litigation that Petitioners have brought[2] pending the ruling in the Injunction Litigation. *See* a true and accurate copy of the Declaration of Dana Vilaia attached hereto as Exhibit 5.

Even more disturbing than their own disregard of the Achmea Judgment, the Commission Opinion, the Decision, the Injunction Lawsuit and the rules and regulations of the E.U. is Petitioners' demand that this Court likewise treat those authoritative decisions as though they do

[2] Petitioners have filed suits in the courts of each of those countries seeking, as they have here, recognition and enforcement of the ICSID Award.

not exist or have no meaning. Petitioners request that this Court close its eyes to fact that European courts have appropriately reacted to the Injunction Litigation by staying Petitioners' recognition/enforcement actions in Europe.

With respect to the other ground for the Motion, Petitioners do little other than make a play on words, stubbornly refusing to equate "insolvency" and the institution of an insolvency proceeding against the corporate Petitioners with a "bankruptcy." Irrespective of how Petitioners would characterize what is indisputably a pending proceeding against the corporate Petitioners[3] in Romania arising out of a claim by a creditor of those Petitioners that those Petitioners lack the financial wherewithal to make good on debts owed to the creditor, there is no question that the filing of that proceeding raises a question of whether the corporate Petitioners continue to own their assets, including the claim at issue. This, in turn, raises an issue of Petitioners' standing, or at least their ability, to even maintain this action before this Court. For all of their wordplay, Petitioners do not dispute (because they cannot) that Banca Comerciala Romana S.A. ("BCR"), a Romanian banking institution, initiated an involuntary insolvency petition against two of the corporate Petitioners. *See* a true and accurate copy of the Romanian Petition and its English translation attached as Exhibit 6. The insolvency proceeding is the first step in the equivalent of a U.S. Chapter 11 bankruptcy proceeding, which can result in a reorganization or a liquidation. *See* a true and accurate copy of the affidavit of Claudiu Toma attached hereto as Exhibit 7 at ¶2.

The fact that the Bihor District Court has not yet issued a final ruling declaring the entities legally insolvent, does not mean that a procedure claiming their insolvency does not exist, nor that the entities are not insolvent. *See Id*. at ¶¶6, 15-19.

[3] Romania inadvertently identified Multipack SRL as an entity in the insolvency proceedings in its initial Motion.

Petitioners' further argument that Romania has delayed these proceedings is wholly disingenuous. Had it not been for Petitioners' repeated motion practice and consistent objections to Romania's reasonable and short requests for extension of time to file pleadings (cooperation with which is codified in the D.C. Bar Voluntary Standards for Civility in Professional Conduct, which are found as Appendix B to the Rules of the United States District Court for the District of Columbia[4], this case would not have been delayed. This is especially true given that counsel for Petitioners has previously represented the Romanian government and therefore is familiar with the approval process that is required prior to filing any pleadings.

FACTS AND PROCEDURAL BACKGROUND[5]

A. Arbitral Award.

On December 13, 2013 the Arbitration Tribunal ordered Romania to pay Petitioners the collective amount of RON 367,433,229 as damages for failing to ensure a fair and equitable treatment of Petitioners' investments, in violation of Article 2(3) of the BIT Treaty, plus interest, inter alia, until full payment of the Award ("Award").

B. Romania's Payment of the Award and Commission's Action.

As of March 9, 2015, Romania made various payments and/or asserted a set-off against the Award by virtue of the following: (i) a set-off against European Food's pre-existing tax debts owed to Romania; (ii) a partial, forced execution of the Award by a bailiff in Romania who

[4] The referenced Standard provides, in pertinent part, that all counsel "will agree to reasonable requests for extension of time and for waiver of procedural formalities provided our clients' interests will not be adversely affected." *See* Appendix B to the Rules of the United States District Court for the District of Columbia, No. 10, at p. 132. For the sake of brevity, Romania attaches, as Exhibit 8 to this Reply, only the first three pages of the Voluntary Standards, which comprise the Preamble and the numbered Standards through no. 16 (which of course includes no. 10).

[5] The facts recited herein are repeated in large part from the facts set forth in Romania's Motion and its Memorandum of Law in Support of its Motion [Dkt. Nos. 57 and 57-1, respectively].

seized certain Romanian government funds; and (iii) a voluntary transfer by Romania of additional funds into a Treasury account.[6] *See* a true and accurate copy of the Declaration of Romanian Secretary of State of the Ministry of Public Finance Atilla György ("György Affidavit") attached as Exhibit 7 to Romania's Memorandum of Law in Opposition to Petition to Confirm ICSID Arbitration Award and Enter Judgment [Dkt. No. 53-7].

On January 14, 2014, Romania, through the Ministry of Public Finance, offsetting the sum of RON 337,492,864 (ca EUR 76 million) of the ICSID Award against pre-existing tax debts owed by European Food. *See Id.*

On January 31, 2014, the Commission advised Romania that any implementation of the ICSID Award would constitute new aid about which the Commission would have to be notified. In February 2014, Viorel introduced the first court proceedings in Romania to enforce the Award. On May 7, 2014, the Commission intervened in those proceedings. On May 28, 2014 Viorel withdrew his action before any judgment was rendered. On March 18, 2014 the other four claimants (European Food, Starmill, Multipack, and Ioan) initiated court proceedings in Romania to enforce the Award pursuant to Article 54 of the ICSID Convention requesting the payment of 80% of the outstanding amount (i.e. RON 301,146,583) and the corresponding interest.

On March 12, 2014, the Commission requested further information from Romania regarding foreseen further implementation or execution of the Award, which Romania provided by letter of March 26, 2014.

On March 24, 2014, the Bucharest Tribunal allowed the execution of the Award as requested by the four claimants. On March 30, 2014, an executor started the enforcement

[6] This transfer was made via the mechanism provided for under Romanian Law No. 20/2015 establishing the approval of Government Emergency Ordinance No. 77/2014 regarding the national procedures in the field of State aid, as well as for the amendment and completion of Competition Law No. 21/1996 (hereafter "Law No. 20/2015").

procedure by setting the Romanian Ministry of Finance a deadline of 6 months to pay to the four claimants 80% of the Award plus the interests and other costs. Romania challenged the execution of the Award before the Bucharest Tribunal and asked for a temporary suspension of execution until the case had been decided on the merits.

On April 1, 2014, the Commission alerted Romania to the possibility of issuing a suspension injunction. On April 9, 2014, Romania filed an appeal for the annulment of the Award on the basis of Article 52 of ICSID before an *ad hoc* committee.

On May 14, 2014, the Bucharest Tribunal temporarily suspended the execution of the Award until a decision on the merits of Romania's appeal of the Award was granted and granted its request to suspend the execution. On May 26, 2014, the Commission intervened in those proceedings requesting that the Bucharest Tribunal suspend and annul the execution of the Award. In the alternative, the Commission requested that the Bucharest Tribunal issue a preliminary question to the Court of Justice of the European Union ("CJEU").

The May 26, 2014 Decision also issued an injunction against Romania:

> The Commission therefore finds it is necessary to issue a suspension injunction in accordance with Article 11(1) of the Council Regulation (EC) No 659/1999. The Commission warns Romania that failing to comply with the present suspension injunction; it may refer the matter direct to the Court of Justice pursuant to Article 12 of Regulation No. 659/1999. …The Commission therefore finds it is necessary to issue a suspension injunction in accordance with Article 11(1) of the Council Regulation (EC) No 659/1999. The Commission warns Romania that failing to comply with the present suspension injunction; it may refer the matter direct to the Court of Justice pursuant to Article 12 of Regulation No. 659/1999.

On August 7, 2014, the *ad hoc* committee of ICSID granted a stay of enforcement of the Award under the condition that Romania deposit, within one month, the following assurances:

> Romania commits itself subject to no conditions whatsoever (including those related to [EU] Law or decisions) to effect the full payment of its pecuniary obligation imposed by the Award in ICSID Case No. ARB/05/20 - and owed to Claimants - to the extent that the Award is not annulled - following the notification of the Decision on annulment.

Romania informed the Commission of such order. The Commission responded to Romania that it could not provide the unconditional commitment that it would pay the compensation awarded under the Award even if that entailed a violation of its obligations under E.U. law and regardless of any decision of the Commission. Romania replied accordingly to the *ad hoc* committee, which lifted the stay of enforcement of the Award as of September 7, 2014.

On September 23, 2014, the Bucharest Tribunal, lifted the suspension and rejected Romania's request for a suspension of the execution of the Award. The primary reason for that rejection was the lifting of the stay of enforcement of the Award by the ICSID *ad hoc* committee on September 7, 2014. On September 30, 2014, Romania appealed the September 23, 2014 decision of Bucharest Tribunal.

On May 26, 2014, the Commission adopted Decision C (2014) 3192, which required Romania, pursuant to Article 11(1) of Regulation No. 659/1999, immediately to suspend any action which may lead to the implementation or execution of the Award on the ground that such action did appear to constitute unlawful State aid, until the Commission reached a final decision on the compatibility of that State aid with the internal E.U. market.

By letter dated October 1, 2014, the Commission informed Romania that it had decided to initiate the procedure set forth in Article 108(2) TFEU (the "Formal Investigation Procedure") concerning the partial implementation of the Award by Romania that took place in early 2014, as well as any further implementation or execution of the Award.

On October 15, 2014, the Commission submitted an application to the *ad hoc* committee for leave to intervene as a non-disputing party in the annulment proceedings. Leave to intervene was granted by the *ad hoc* committee on December 4, 2014 and the Commission submitted its *amicus curiae* brief in those proceedings on January 9, 2015.

The Commission decision to initiate the Formal Investigation Procedure was published in the Official Journal of the European Union on November 7, 2014. The Commission invited interested parties to submit their comments.

On October 17, 2014, the Commission commenced an investigation to open the formal investigation procedure before the Bucharest Tribunal to determine if the payments made by Romania executing the Award constitute state aid and were therefore illegal. On October 31, 2014 the executor appointed by the Bucharest Tribunal issued orders to seize the accounts of Romania's Ministry of Finance and seek the execution of 80% of the Award. The Ministry of Finance's state treasury and bank accounts were frozen. On November 24, 2014, the Bucharest Tribunal also rejected Romania's main action against the execution orders, including the request for interim measures. On January 14, 2015, Romania appealed the decision of the Bucharest Tribunal.

On November 26, 2014, Romania submitted its comments on the decision to open the Formal Investigation Procedure. On December 8, 2014, Petitioners submitted their comments as interested parties. Petitioners' comments were sent to Romania, which was given the opportunity to respond. Romania's response to Petitioners' comments was submitted on January 27, 2015.

By letters dated March 9 and March 11, 2015, Romania informed the Commission that in the period from February 5 through February 25, 2015, the court appointed executor in Romania had seized an additional amount of RON 9,197,482 from the Romanian Ministry of Finance for the benefit of Petitioners and that a voluntary payment of RON 466,760,066 was made by the Ministry of Finance into an escrow account opened in the name of the Petitioners, representing the balance of the amount due under the Award.

On February 3, 2017, the Bucharest Court of Appeal (Case No. 15755/3/2014) stayed the appeal the decision of Bucharest Tribunal of November 24, 2014 until the CJEU shall render a decision in the Injunction Litigation.

On January 5, 2015, the court executor seized RON 36,484,232 (ca. EUR 8.1 million) from the Ministry of Public Finance's account. Of this sum, the court executor subsequently transferred RON 34,004,232 (ca. EUR 7.56 million) as follows to three of the five Petitioners: RON 11,334,744.16 to Ioan, RON 11,334,744.14 to Multipack and RON 11,334,744.14 to Starmill. The executor kept the remainder as compensation for execution costs in the amount of ROM 2,480,000. Between February 5, 2015 and February 25, 2015, the court executor seized an additional RON 9,197,482 (ca. EUR 2 million) from the Ministry of Public Finance.

On March 9, 2015 the Ministry of Public Finance, pursuant to Law number 20/2015, voluntarily transferred the remaining amount of RON 472,788,675 (ca. EUR 106.5 million) (including the costs of court executor of RON 6,028,608) into an escrow account in the name of Petitioners in order to implement the Award. However, Petitioners can withdraw the money only if the Commission decides that the State aid granted on the basis of the Award is compatible with the internal market.

Viorel also initiated further enforcement proceedings against Romania before the Romanian courts on October 3, 2014, but the Bucharest Tribunal rejected that claim on November 3, 2014.

C. Commission Decision Enjoins Romania to Recoup Payment on Award and Prohibits any Payments on Award as They Constitute State Aid.

On March 30, 2015, following the completion of its Formal Investigation Procedure, the Commission issued its "Decision on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by

Romania – Arbitral Award Micula v Romania of 11 December 2013" (the "Decision"). In its Decision, the Commission held, *inter alia*:

- The payment of the compensation awarded by the Tribunal constitutes State aid;
- Romania shall not pay out any incompatible aid;
- Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., S.C. Multipack, European Drinks S.A., Rieni Drinks S.A., Scandic Distilleries S.A., Transilvania General Import-Export S.R.L., and West Leasing S.R.L shall be jointly liable to repay the State aid received by any one of them;
- Recovery of the compensation awarded by the Tribunal shall be immediate and effective; and
- Romania shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

See Exhibit 3, pp. 40, 41.

D. Petitioners Challenge the Decision by Filing Suit Against the Commission.

On November 28, 2015, Petitioners filed the Injunction Litigation seeking to annul the Decision. Petitioners sought the annulment of the Decision and "alternatively [to] annul the decision as far as it prevents Romania from complying with the Award, orders Romania to recover any incompatible aid." *See* Exhibit 2 to Romania's Memorandum of Law in Support of Motion to Stay [Dkt. No. 57-1], p. 11, ¶¶ 49, 50.

A hearing was held in the Injunction Litigation on March 20, 2018. *See* Exhibit 2 to Memorandum of Law in Support of Motion to Stay. No ruling has yet been issued, though one is expected in the next several months, based on the average amount of time it generally takes a judgment to be rendered after a hearing before the CJEU.

The ruling in the Injunction Litigation will be determinative as to whether, under E.U. law – to which Romania is unquestionably bound – Romania (or any other E.U. member nation, for that matter) is permitted to pay under an ICSID award or whether such payments are flatly prohibited as illegal State aid.

E. European Courts Have Stayed Petitioners' Enforcement Proceedings in Europe Pending the Ruling in the Injunction Litigation.

Given the importance of the decision in the Injunction Litigation, European Courts before whom Petitioners have brought enforcement actions have either stayed those proceedings pending the final ruling in the Injunction Litigation or denied such suits entirely.

Thus, on January 25, 2016, the Court of First Instance of Brussels in Case Number 15/7241/A, 15/7241/A (the "Brussels Case") entered an Order rejecting execution of the Award as commenced by the Petitioners. An appeal against this decision is pending. *See* Exhibit 5 (Vilaia Affidavit) at ¶10.

On March 3, 2016, the Swedish Enforcement Authority in Case Number U 25445-160103 (the "Sweden Case") entered an Order rejecting the enforcement against Romania. The decision of the Swedish Enforcement Authority is also pending an appeal. *See Id.* at ¶11 attaching a true and accurate copy of Swedish order (an English translation shall be produced subsequently).

On January 20, 2017, the High Court of Justice Queen's Bench Division Commercial Court, Case No: CL-2014-000251 (the "UK Case") entered a judgment staying the order approving the execution of the Award. The Stay Appeal was dismissed by the Court of Appeal, Civil Division on Appeal from The Commercial Court Queen's Bench Division of The High Court of Justice on July 27, 2018 and by the Supreme Court of the United Kingdom on October 31, 2018. *See Id.* at ¶9 attaching a true and accurate copy of said English Order.

On March 21, 2018, the Supreme Court of Justice Grand Duchy of Luxembourg in Case Number 45337 (the "Luxembourg Case") entered an Order stating, in pertinent part:

> *admits the appeal as to form;*
> *declares it well founded in part;*
> *varies order No 272/2017 of 10 May 2017 as follows:*
> *approves the request of the State of Romania for the lifting of the garnishee*

> *order and finds this request grounded on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure;*
> *orders the annulment of the garnishee order served on 28 and 29 July 2015;*
> *releases the State of Romania from the Award made against it under Article 240 of the New Code of Civil Procedure;*
> *upholds the interim order in so far as it dismissed the application made by the State of Romania under Article 6-1 of the Civil Code;*
> *orders Mr. Micula to pay the State of Romania a procedural indemnity of €2 000 in respect of the proceedings at first instance and €3 000 in respect of the proceedings on appeal;*
> *grants Natixis Bank SA a declaration that it holds no account for the State of Romania;*
> *aggregates the costs of the proceedings at first instance and on appeal, and orders Mr. Micula to pay them.*

See Id. at ¶12 attaching a true and accurate copy of said Luxembourg (an English translation shall be produced subsequently).

In Romania, the following Petitioners' civil actions challenging the execution of the Award or related issues, have been stayed according to Art. 267 par. (3) of TFUE and Art. 412 par. (7) of the Romanian Civil Code until the CJEU shall enter a judgment in the Injunction Litigation: a) the Court Case No. 378/35/2014 opened before the High Court of Cassation and Justice of Romania; b) the Court Case No. 15755/3/2014 opened before the Bucharest Court of Appeal; c) the Court Case No. 1099/187/2015 opened before the Tribunal of Bihor County; d) the Court Case No. 3088/187/2017 opened before the First Instance Court of Beiuș; and e) the Court Case No. 1089/187/2015 opened before the First Instance Court of Beiuș. *See Id.* at ¶7.

F. Petitioners European Foods S.A. and S.C. Starmill S.R.L. are in Insolvency Proceedings in Romania and May Not Even Have Standing to Proceed in this Suit.

Banca Comerciala Romana S.A., a Romanian banking institution, initiated an involuntary insolvency petition against, among other entities, Petitioners, S.C. EUROPEAN FOOD S.A., and S.C. STARMILL S.R.L. *See* Exhibit 6. Petitioners Ioan and Viorel Micula are the majority shareholders in each entity. *See* Exhibit 5 to Romania's Memorandum of Law in Support of its Motion to Stay [Dkt. No. 57-1]. Until Romania filed this Motion, thus forcing Petitioners to

acknowledge the insolvency proceeding, Petitioners failed to disclose the insolvency proceeding to this Court. Instead, these Petitioners purported to, and continue to purport to, proceed as parties to this litigation in their own name, when in fact there is a significant question as to whether, in light of the insolvency proceeding, they have any right to assert any claims they had before the insolvency proceeding was initiated.

ARGUMENT

I. PER THE ACHMEA JUDGMENT, THIS COURT LACKS SUBJECT MATTER JURISDICTION, AS PETITONERS DO NOT HAVE A VALID AWARD.

This Court lacks subject-matter jurisdiction in this case under the Foreign Sovereign Immunities Act ("FSIA"). Although Petitioners argue that the arbitration award exception set forth in 28 U.S.C. §1605(a)(6)(B) applies, they are wrong. Accordingly, the Award is unenforceable. *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 203-205 (D.C. Cir. 2015).

As a general matter, the FSIA grants foreign states immunity from the jurisdiction of the courts of the United States. 28 U.S.C. §1604. In enacting the FSIA, however, Congress enumerated several exceptions to this jurisdictional restriction. These exceptions "provide[] the ***sole basis*** for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (emphasis added); *see also Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 488-89, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Here, Petitioners have raised the arbitration exception, which provides for federal court jurisdiction "in any case ... in which the action is brought, either to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party ... or to confirm an award made pursuant to such an agreement to arbitrate, if ... the

agreement or award is or may be governed by a treaty ... in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

There are two types of jurisdictional authorizations: (1) "jurisdiction [that] depends on particular factual propositions" and (2) "jurisdiction [that] depends on the plaintiff's asserting a particular type of claim." *Id.* at 205 *citing Agudas Chasidei Chabad of U.S. v. Russian Fed'n,* 528 F.3d 934, 940 (D.C. Cir. 2008). A claimed §1605(a)(6) exception requires the District Court to make three findings: "(1) a foreign state has agreed to arbitrate; (2) there is an award based on that agreement; and (3) the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards."

In most instances, the existence of an arbitration agreement is a "purely factual predicate[] independent of the plaintiff's claim." *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 203, 205 (D.C. Cir. 2015) *citing Chabad,* 528 F.3d at 940. Likewise, the existence of an award is a factual question that the District Court must resolve in order to maintain jurisdiction. If there is no arbitration agreement or no award to enforce, the District Court lacks jurisdiction over the foreign state and the action must be dismissed. *Id.*

Petitioners bear the burden of producing evidence supporting their claim that the FSIA exception applies. *Id.* Petitioners cannot meet this burden.

Under the *Chevron* test, Petitioners' argument that the arbitration exception laid down in 28 U.S.C. §1605(a)(6)(B) applies fails, because the arbitration clause in the Sweden-Romania BIT has been declared invalid in the Achmea Judgment and, thus, the Award made pursuant to that clause in the invalid BIT is unenforceable. *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 203-205 (D.C. Cir. 2015); *see also* Exhibit 1 (Achmea Judgment).

The last two steps of that three-step test require a finding of the existence of a valid arbitration agreement and the existence of an enforceable award, neither of which are present here. Indeed, in the Achmea Judgment, the Court of Justice held the following:

> 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 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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.

See Exhibit 1 (emphasis added).

By the same reasoning, the clause in the Sweden-Romania BIT providing for ICSID arbitration, on which Petitioners obtained the Award, is invalid as of Romania's accession to the E.U. As regards the Petitioners' arguments that the Achmea Judgment does not apply to their case (pp. 33-34 of Petitioners' Opposition), Petitioners cite the Advocate General's opinion, but that opinion was and is non-binding (as explicitly stated in ¶27 of the Achmea Judgment) and the court did not follow the Advocate General's opinion in its judgment.

While it is true that Petitioners' arbitration proceeding was commenced prior to Romania's accession to the E.U., the ICSID tribunal only declared that it had jurisdiction ***after*** Romania was a full E.U. member and it rendered its award ***seven years after*** Romania had acceded to the E.U. Most important, the compensation awarded by the tribunal covers, for the most part, the subsidies the Miculas would have received after Romania acceded to the E.U. had the investment scheme not been abolished.

Finally, Petitioners argue that Achmea Judgment does not mention the ICSID arbitration. While that is an accurate statement, it is immaterial. The Achmea Judgment's considerations

concern any "*mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law*" (¶56). That is precisely the case here as the tribunal decided on the compatibility of the investment scheme with the E.U. State aid rules, which is the exclusive competence of the Commission. The Court's dictum is drafted in general terms referring to "*[…] a provision in* ***an*** *international agreement concluded between Member States […]*" (emphasis added). It is not UNCITRAL specific.

II. A STAY PENDING A RULING IN THE INJUNCTION LITIGATION IS THE ONLY REASONABLE AND JUDICIALLY EFFICIENT RESULT.

Petitioners begin their stay argument by noting the controlling standard, that a federal court should only stay a suit pending the outcome of parallel foreign proceedings "in exceptional cases." Romania respectfully submits that where the subject of the proceedings before this Court is the recognition (and thus, the enforceability) of the arbitral Award Petitioners obtained from the ICSID panel and (a) there have already been multiple rulings and opinions in the E.U. that have decided that arbitral awards such as Petitioners' Award here are ***not*** enforceable and may not be satisfied; ***and*** (b) Petitioners' Injunction Litigation – which raised a direct, facial challenge to the Commission Decision that also held that the BIT under which the Award was made is not valid – is awaiting a final decision from the CJEU, the E.U.'s highest court, this is a textbook example of just such an "exceptional case." They then cite a case (*Royal & Sun*, 466 F.3d 88 (2d Cir. 2006), on p. 4 of the Opposition) that considered a request to dismiss a case – as opposed to the request to stay made here – so the standard they cite from that case is wholly inapposite to this Court's consideration of this Motion.

A. The Multi-Factor Balancing Test Strongly Supports the Requested Stay.

1. Similarity of the Parties

Despite their penchant for disputing everything Romania asserts, Petitioners concede, as they must, for it is indisputable, that they are parties to both the Injunction Litigation and this case. Indeed, they ***filed*** both cases. And, while they seem to take great pride in pointing out that Romania is technically not a party to the Injunction Litigation, there can be no real argument that because the subject matter of the Injunction Litigation is the very Award of which they are seeking recognition and enforcement here, Romania is indeed a real party in interest in the Injunction Litigation. So, at the outset, Petitioners are elevating form over substance simply to support their argument. Clearly, should the CJEU rule that payment by on the Award would constitute illegal State aid, Romania would be directly affected by such a ruling, irrespective of whether it was named as a party to the Injunction Litigation.[7]

2. Similarities of the Issues[8]

On this critical factor, the very recent case Petitioners cite from Judge Moss of this Court demonstrates precisely why the Court must stay this action pending the decision of the CJEU in the Injunction Litigation. Seemingly misapprehending at its most basic level the nature of Romania's argument here, Petitioners cite Judge Moss' ruling in *TECO Guat. Holdings, LLC v. Guat.*, No. 17-102, 2018 WL 4705794, *2 (D.D.C. Sept. 30, 2018), in which he observed that:

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[7] Inasmuch as it was Petitioners who initiated the Injunction Litigation in the first place, Romania had no say as to whether it was named as a party in that case. It should not be penalized under this factor for what was in effect Petitioners' unilateral decision not to formally name Romania in the Injunction Litigation, particularly where there is no disputing that Romania will be directly affected by the ruling there.

[8] It is not only curious, but highly problematic, that Petitioners cite so liberally from the judgment of the U.S. District Court for the Southern District of New York in the litigation they initiated there several years ago (*see* the lengthy descriptions of the New York District Court decision on p. 4 n.2 and p. 5 n.3 of the Opposition), for the judgment of that court was ***reversed on appeal*** by the Second Circuit.

> [a] member state [before whom an ICSID award recognition action is filed] is 'not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award;' all it may do is 'examine the judgment's authenticity and enforce the obligations imposed by the award.' (Citations omitted).

In this case, however, Romania has ***never*** asked this Court to "examine [the Award's] merits, its compliance with international law or the ICSID tribunal's jurisdiction to render the award." Rather, all the Motion to Stay has ever raised is the clear and straightforward point that until the CJEU's final decision on whether the "obligations imposed by the award" are enforceable at all, there is no way for this Court to take any action to "enforce the obligations imposed by the award." This is precisely what Judge Moss held is squarely within a member state's authority in a recognition proceeding. And, inasmuch as the very enforceability – or not – of Petitioners' Award is the central issue of both the Injunction Litigation and this case (enforcement being, as Petitioners point out, per Judge Moss' ruling, one of the ***only*** things this Court may do in this case), it is nothing short of astounding – and quite clearly wrong – that Petitioners conclude that the issues in the Injunction Litigation and this case "are not similar."

3. Order in Which the Actions Were Filed

So committed are Petitioners to quarreling with Romania that, even on this factor, which involves nothing but looking at a calendar, they cannot bring themselves to concede an undeniable fact: the date this case was filed was not only after, but well after the date this case was filed. Petitioners' discussion of when other enforcement actions were filed is completely irrelevant to when ***this action***, the one Romania is requesting be stayed, was filed.[9]

[9] Even were this Court to consider the New York enforcement action, Petitioners conveniently forget that the reason the Second Circuit reversed the judgment entered by the District Court there was because Petitioners dispensed with the basic requirement of properly serving Romania with process, improperly treating the New York action as a plenary proceeding. They have no one but themselves to blame for the time wasted time by their failed strategy in New York.

4. Adequacy of the Alternate Forum

On this factor, Petitioners' analysis again entirely misses the mark. As noted in Romania's discussion of the Similarity of the Issues factor, because the question of whether the Award is enforceable at all – the salient issue in the Injunction Litigation before the CJEU – must be determined before this Court can even know whether there are obligations under the Award that are capable of being enforced, not only is the CJEU an "adequate" forum, it is the ***only*** forum where this case-determinative issue can be decided. And, that decision is forthcoming, the Injunction Litigation having been argued before the CJEU in 2018.

5. Fairness to Litigants/Potential Prejudice to Either Party

Because all Petitioners have ever wanted to, and tried to, do is rush to judgment at breakneck speed (even if that meant failing for months on end to correctly serve Romania through the proper channels), it is not surprising that they take the position that anything short of the entry of judgment in their favor here works a prejudice on them. Of course, they are again wrong, for before this Court can even be in a position to do the one thing it is permitted to do in a proceeding like this – enforce the obligations under the Award – the CJEU must be permitted to decide, once and for all, whether there are any enforceable obligations under the Award. And, with the CJEU decision pending and imminent, it will prejudice all parties for this Court to impulsively act without first receiving this critical guidance from the CJEU. Not only will the relatively short stay requested herein no prejudice any of the parties, it will actually ensure the fairness of the ultimate decision this Court makes.

6. Convenience of Parties

The reason Romania did not discuss this factor in its Motion is simple. Because all parties are foreign to the U.S. and this Court, all parties are being equally inconvenienced by being before this Court. A stay will thus inure to the benefit of all parties equally, because no party will

be forced to litigate here for any more time than is necessary as they await the CJEU's ruling in the Injunction Litigation.

7. Connection Between United States Litigation and Foreign Jurisdiction

Continuing to talk past, rather than address, Romania's arguments, Petitioners sound the same alarm in their discussion of this last factor. They continue to discuss this Court's "obligation" to simply enforce this award per Section 1650, wholly ignoring that until the CJEU rules on the Injunction Litigation, there are no enforceable obligations under the Award for this Court to even consider enforcing. And, if (as Romania expects it will) the CJEU affirms the injunction against payment under the Award, there will be a definitive determination by the E.U.'s highest court that the Award may not be enforced. So, at the most fundamental level, this proceeding is wholly contingent on the CJEU's decision. A closer connection, and a clearer case for a stay, would be hard to conjure up.

B. While Not Binding on This Court, It is Significant and Persuasive That the European Courts Before Whom Petitioners Have Filed Enforcement Actions Have Stayed Those Actions Pending a Ruling in the Injunction Litigation.

Not surprisingly, Petitioners – faced with evidence of the veritable tidal wave of other courts throughout Europe who, pending the resolution of the Injunction Litigation, have wisely decided to stay Petitioners' enforcement proceedings before them – claim that the decisions by those courts have no bearing on this court. Of course, they offer no reason for their statement, other than they do not want this Court to consider those other stays. And, the timing of either the E.U. courts' decisions to stay the enforcement actions before them or of Romania having raised this is wholly irrelevant to whether those decisions were reasonable and whether it would be equally reasonable for this Court to make the same decision. The timing of Romania's mention of these other courts' decisions to stay has nothing to do with whether the reference to the decisions "rings hollow." Had Romania raised the actions of E.U. courts on matters other than

the very matter before this Court at this time, ***that*** might "ring hollow." But that is not the case here. As Romania argued in its Memorandum in Support of its Motion [Dkt. No. 57-1] (at p. 22), it would be both reasonable and practical for this Court to enter the requested stay order here, just as all the E.U. courts have done.

III. THIS COURT SHOULD STAY PROCEEDINGS GIVEN THE PENDING INSOLVENCY ACTION INVOLVING EUROPEAN FOODS S.A. AND STARMILL S.R.L. AND THE RELATED ISSUE OF STANDING.

This Court should stay the action because there is an issue of whether European Food S.A., and S.C. Starmill S.R.L have standing to proceed in this lawsuit given their pending insolvency proceedings in Romania.

Nothing in Petitioners' Opposition about the nature and effect of the insolvency proceedings alters the fact that Petitioners are in a proceeding that raises a question of whether these corporate Petitioners continue to own their assets, including the claim at issue, and that this question presents an issue of standing here. It is undisputed that BCR initiated an involuntary insolvency petition. *See* Exhibit 6. According to Romanian law, after the opening of the insolvency proceedings, any company subject to the procedure may either enter into a judicial reorganization (if certain conditions provided by the law are met and the creditors will agree in the majority provided by the law), or liquidation. *See* Exhibit 7 (Toma Opinion) at ¶8. The opening of an insolvency proceedings by the Court results in a loss of control of the operation and administration of the companies – in whole or in part – by the shareholders. *See Id*. at ¶10. According to Law 85/2014, upon the opening of such proceedings, the Bihor District court appoints a judicial administrator/receiver, who is later confirmed or replaced by the creditors. *See Id*. Thereafter, the judicial administrator/receiver then either will take the full control of the companies or will have to supervise the activity of the shareholder's representative and, as the case may be, may target and approve certain operations. *See Id*. at ¶12. One of the reasons for the

appointment of a judicial administrator/receiver is because there is a question of whether the shareholders controlling the companies are going to protect the interest of the creditors during these proceedings. *See Id*. at ¶13. In the insolvency proceedings involving the corporate Petitioners, there is a high probability that the Bihor District Court will appoint a judicial administrator/receiver. *See Id*. at ¶14.

The fact that the Bihor District Court has not yet rendered a ***final*** decision that the corporate Petitioners are legally insolvent does not mean that those entities are not insolvent. *See Id*. at ¶¶15-19. The definition of Law 85/2014 on Insolvency and Insolvency Prevention Procedures in 5th Article, point 29 is as follows: "*insolvency is the state of the debtor's assets characterized by insufficient funds available for the payment of certain debts, liquid and exigible, as follows: a) the insolvency of the debtor is presumed when the debtor, after 60 days from maturity, has paid his debt to the creditor; the assumption is relative; b) insolvency is imminent when it is proven that the debtor will not be able to pay the due debts incurred at maturity with the available funds at maturity.*" *See Id*. at ¶16. BCR's petition to the court was made because the entities are financially insolvent; and as a creditor, BCR is seeking a court ruling permitting it to act upon this financial insolvency to protect its creditor position. *See Id*. at ¶17.

In addition, in light of the filing and pendency of the insolvency proceedings, the Miculas' fiduciary duties in their capacity(ies) as owners, officers and/or directors of European Food S.A. and S.C. Starmill S.R.L's have shifted to the creditors of those companies, which will include not only BCR, but Romania as well. *See* Exhibit 7 at ¶¶ 25-26. This puts Ioan Micula and Viorel Micula in an irrevocable conflict situation with their insolvent companies, in the event that a receiver is not placed in the insolvency proceedings.

Because European Food S.A. and S.C. Starmill S.R.L have failed to disclose to this Court their insolvency proceeding in Romania, this Court does not know whether they continue to own their assets, including the claim at issue. And Petitioners do not shed any light on this critical question in their Opposition, choosing only to make generalized statements about how Romania misunderstands its own insolvency law. Nor does Petitioners' Opposition address the conflict situation described above between the Miculas as owners of the insolvent Petitioners, who now owe fiduciary duties to the creditors of those Petitioners (including Romania), and the Miculas in their individual capacities as Petitioners.

The next date of the insolvency trial is set on 7 February 2019 at the Bihor Court; on this date Bihor District Court will either judge BCR's application or set a new date for the trial; the judgment to be given by the Bihor District Court (on 7 February 2019 or at a later date) will be enforceable – meaning that regardless of whether one of the parties will appeal against it to the higher court, it will produce its effects upon pronouncement. *See Id*. at ¶22.

Thus, at the very least, further proceedings in this case should be stayed until to allow the insolvency proceeding to bring clarity of European Food S.A. and S.C. Starmill S.R.L's status, and that of the Miculas as well in their conflicted positions as owners of these corporate Petitioners and themselves individual Petitioners seeking to obtain, and then share, a collective award.

CONCLUSION

For each and all of the reasons set forth herein, and for the reasons set forth in its Motion for Stay and Supporting Memorandum, Respondent, The Government of Romania, respectfully prays that this Court enter an Order staying all further proceedings in this matter pending the final decision by the Court of Justice for the European Union in the Injunction Litigation brought by Petitioners challenging the Decision decreeing that Romania shall recoup any amounts paid

towards the Award, declaring that any payments made towards the Award constitute illegal state aid and prohibiting it from further paying any other amounts on the Award. Romania also respectfully prays that this Court enter an Order staying all further proceedings in this matter at least through the next status conference to be held on February 7, 2019 in the Romanian insolvency proceeding involving Petitioners, European Food S.A. and S.C. Starmill S.R.L. Finally, Romania respectfully prays that this Court enter such other and further relief this Honorable Court deems necessary, just and proper.

Dated: January 11, 2019

Respectfully submitted,

THE GOVERNMENT OF ROMANIA

By: */s/ Ioana Salajanu*
Ioana Salajanu

Ioana Salajanu
7620 Kildare
Skokie, IL 60076
Telephone: 773.875.5438
sedeidu@yahoo.com