UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASDAR SOLAR & WIND COOPERATIEF U.A., **Petitioner,** **v.** **KINGDOM OF SPAIN,** **Respondent.**	**Civil Action No. 18-2254 (JEB)**

MEMORANDUM OPINION

Petitioner Masdar Solar & Wind Cooperatief U.A. seeks this Court's enforcement of a €64.5 million arbitral award issued by the International Centre for the Settlement of Investment Disputes against Respondent, the Kingdom of Spain. Spain has moved to dismiss the Petition or, in the alternative, to stay the case until the resolution of its annulment application before the ICSID. While deciding this case may eventually demand resolving a thorny dispute over the implications of multiple treaty obligations and a shifting legal landscape in the European Union, the Court agrees it is wiser to leave those intricate issues for another day. It will instead stay these proceedings pending the opinion of the ICSID regarding Spain's petition to annul. The Court will therefore grant Spain's Petition in part, without addressing its arguments to dismiss the suit.

I. Background

Petitioner Masdar is a limited-liability corporation based in the Netherlands that focuses on developing renewable-energy sources. In 2007, Spain began offering financial inducements and regulatory incentives to companies such as Masdar in order to encourage investment in its

renewable-energy sector. See ECF No. 23 (Pet. Response) at 4. Relying on these enticements, Masdar invested €79.37 million in three solar-power projects in Spain. Id. In 2012, however, the country changed course and began to revoke those same incentives that had attracted Masdar's investments in the first place. See ECF No. 1 (Petition to Confirm Arbitration Award), ¶ 17. Instead, the Spanish government began issuing new decrees that reformed the energy sector in ways that ran directly counter to Masdar's interests. Id.

Petitioner's investments in Spain are governed by two treaties of central significance to this dispute. First, the Energy Charter Treaty — a multilateral agreement signed by 52 states including Spain and the Netherlands — establishes "a legal framework . . . to promote long-term cooperation in the energy field." Petition, ¶¶ 18–19; id., Exh. 3 (Energy Charter Treaty), art. 2. The ECT obligates signatories to, *inter alia*, protect investments made in their domestic territories by investors from foreign signatory states. See ECT art. 10(1). Crucially, Article 26 of the ECT provides that "[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" may be submitted to the "ICSID." Id. art. 26(1), (4)(a)(i). The ICSID, in turn, was established via the second treaty at issue, the "ICSID Convention," a multilateral agreement signed by 163 states — including Spain, the Netherlands, and the United States — that was created to "facilitat[e] private foreign investment in developing countries." Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96, 100 (2d Cir. 2017); see also Petition, Exh. 2 (ISCID Convention). The Convention promotes such cross-border investment by "providing a legal framework to resolve disputes between private investors and governments." TECO Guatemala Holdings, LLC v. Republic of Guatemala, No. 17-102, 2018 WL 4705794, at *1 (D.D.C. Sept. 30, 2018) (internal alterations and quotations omitted). This framework includes the ICSID, which "has the

authority to convene arbitration panels 'to adjudicate disputes between international investors and host governments in 'Contracting States.'"" Id. (quoting Mobil Cerro Negro, Ltd., 863 F.3d at 101).

Following Spain's alleged bait and switch regarding the promised investment incentives, Masdar cried foul and filed a request for arbitration against Spain with the ICSID in February 2014. See Petition, ¶ 20. In filing this request, Masdar claimed that Spain's actions had violated its obligation under the ECT to accord investors from signatory states "fair and equitable treatment." Id.; ECT art. (10)(1). In response, the ICSID constituted a three-member arbitral panel, which conducted a five-day hearing on the matter. See Petition, ¶¶ 21–22. In the period between the hearing and the Tribunal's issuance of its decision, Spain made additional submissions, arguing that a recent decision of the European Court of Justice divested the Tribunal of jurisdiction over the Spain-Masdar dispute. See ECF No. 13 (Resp. MTD) at 10 (citing Case C-284/16 Slovak Republic v. Achmea B.V., 2018 E.C.R.). On May 16, 2018, the Tribunal issued its decision, which rejected Spain's jurisdictional argument and concluded that it was liable for €64.5 million in damages plus interest to Masdar. See Petition, Exh. 1 (ICSID Award), ¶¶ 522, 655, 680. Spain then filed a request for a supplementary decision and to stay enforcement of the Order, which the Tribunal denied. Id., Exh. 4 (Decision on Application to Stay), ¶¶ 2, 29.

Masdar then jumped across the Atlantic and filed the present action here to enforce the Tribunal's judgment on September 28, 2018. On March 28, 2019, however, Spain sought an annulment of the Tribunal's award before an ICSID annulment committee. See ECF No. 14 (Affidavits in Support of Resp. MTD), Exh. 3 (Notice of Registration of Application for Annulment) at 2. Pursuant to the requirements of the ISCID Convention, the enforcement of the

award has been stayed pending the decision of the annulment committee. See ICSID Convention art. 52(5). Spain has now moved here to dismiss the Petition on jurisdictional grounds; alternatively, it asks the Court to stay the matter until the annulment committee acts. The European Commission has also filed an *Amicus* Brief in support of Spain's Motion.

II. Jurisdiction

The ICSID Convention requires the United States to "recognize an award rendered pursuant to th[e] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." ICSID Convention art. 54(1). Accordingly, 22 U.S.C. § 1650a(a) — the enabling statue for United States participation in the ICSID Convention — provides:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

Subsection (b) of § 1650a further grants the federal district courts "exclusive jurisdiction over actions and proceedings under subsection (a) . . . regardless of the amount in controversy."

III. Analysis

Spain moves to dismiss Masdar's Petition on several bases, most prominent among them that this Court lacks subject-matter jurisdiction because the action does not satisfy any of the exceptions to immunity outlined in the Foreign Sovereign Immunities Act. Spain also moves, in the alternative, to stay the suit pending the conclusion of the annulment proceedings in the ICSID.

The FSIA provides that, "[s]ubject to existing international agreements to which the United States is a party," foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States and of the States" subject to the FSIA's enumerated exceptions to this grant of immunity. See 28 U.S.C. §§ 1604, 1605. Relevant here, the FSIA's "waiver exception" applies where a foreign sovereign "has waived its immunity either explicitly or by implication." Id. § 1605(a)(1). In addition, the FSIA's "arbitration exception" governs where an action is brought "to confirm an award made pursuant to . . . an agreement to arbitrate" between a foreign state and a private party. Id. § 1605(a)(6). Courts appear to be unanimous in their assessment that petitions brought against foreign sovereigns seeking to enforce ICSID awards qualify for either the arbitral exception or the waiver exception. See, e.g., Mobil Cerro Negro, Ltd., 863 F.3d at 105 ("FSIA's immunity provisions do not shield a foreign sovereign from federal courts' exercise of jurisdiction over a civil action to enforce an ICSID award: the waiver and arbitration exceptions to immunity . . . apply."). Spain argues, however, that unlike the sovereigns in those prior cases, it never entered into a valid agreement to arbitrate before an ISCID Tribunal. According to the country, recent developments in EU law clarify that Article 26 of the ECT (which, again, permits dispute resolution under the auspices of the ICSID) does not apply to disputes between EU member states — such as Spain — and investors from other EU member states — such as Masdar. Therefore, Spain argues, the ICSID Tribunal never enjoyed the jurisdiction necessary to issue the award, and this Court consequently does not have jurisdiction to enforce it.

In the ordinary course, courts begin by assuring themselves of their own jurisdiction. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998). In rare cases, however, they may avoid a jurisdictional analysis and render a decision on a non-jurisdictional ground. Rather

than delve prematurely into EU case law, international treaties, and sovereign constitutions, this Court decides to take door number two and issue a stay in the present matter.

A. Addressing Stay First

Although a court must establish its jurisdiction to hear a case before analyzing any merits issue, see Foster v. Chatman, 136 S. Ct. 1737, 1745 (2016), it may — "when considerations of convenience, fairness, and judicial economy so warrant" — "deny[] audience to a case on the merits" on a non-jurisdictional "threshold ground[]." Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 423, 431–32 (2007) (citations omitted); see also Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia, 486 F.3d 1342, 1348 (D.C. Cir. 2007) ("[C]ertain non-merits, nonjurisdictional issues may be addressed preliminarily, because 'jurisdiction is vital only if the court proposes to issue a judgment on the merits.'") (quoting Sinochem, 549 U.S. at 431) (internal alterations omitted).

The stay of a petition to enforce an arbitration award is one such threshold issue that the Court may properly consider before jurisdiction. Indeed, without first resolving outstanding questions about their jurisdiction, both the D.C. Circuit and other courts in this district have determined it appropriate to stay such a petition where there were ongoing proceedings related to the award in a foreign jurisdiction. See Telcordia Technologies, Inc. v. Telkom SA, Ltd., 95 F. App'x 361, 362–63 (D.C. Cir. 2004); Hulley Enterprises, Ltd. v. Russian Fed'n, 211 F. Supp. 3d 269, 277–80 (D.D.C. 2016) ("A stay of proceedings in this case is exactly the type of nonmerits action the Sinochem decision contemplates."). This Court will follow their leads, as it has done previously. See Gretton Ltd. v. Republic of Uzbekistan, No. 18-1755, 2019 WL 464793, at *3 (D.D.C. Feb. 6, 2019) ("The stay of a petition to enforce an arbitration award . . . is a threshold issue that the Court may properly consider before jurisdiction.").

B. Merits of Motion to Stay

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). In deciding whether to grant a stay, courts generally "'weigh competing interests and maintain an even balance' between the court's interests in judicial economy and any possible hardship to the parties." Belize Soc. Dev. Ltd. v. Gov's of Belize, 668 F.3d 724, 732–33 (D.C. Cir. 2012) (quoting Landis, 299 U.S. at 254–55). This Court is mindful that adjournment of proceedings to enforce arbitral awards may "impede[] the goals of arbitration – the expeditious resolution of disputes and the avoidance of protracted and expensive litigation." Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998). As other courts have recognized, a motion to stay enforcement of an arbitral award pending the outcome of a foreign proceeding presents unique concerns. "On the one hand," such a motion may implicate federal courts' obligations under international treaties to promptly recognize these awards, but "[o]n the other hand," premature enforcement risks "conflicting results and [a] consequent offense to international comity." Id.

Predictably, Spain believes a stay is warranted, while Masdar urges this Court to barrel ahead. Respondent argues in support of its Motion to Stay that if the Court considers the merits of this dispute today, it risks a "protracted and expensive litigation" over a matter that might be settled — or complicated — by the ongoing ICSID annulment proceeding. See Resp. MTD at 37–38. Masdar, having initiated the underlying action over five years ago, remains eager to proceed. It promises to "comply in full with the temporary stay that was automatically triggered by Spain's annulment application," but hopes to progress with this action in the meantime. See

Pet. Response at 43. The Court is sympathetic to Masdar's concerns, but it ultimately believes a stay to be the better course.

First, given the circumstances of this case, considerations of judicial economy favor a stay. "Although a stay would immediate[ly] delay the resolution of the parties' dispute, it would still likely be shorter than the possible delay that would occur if this Court were to confirm the award and the [ICSID] were to then set it aside." Matter of Arbitration of Certain Controversies Between Getma Int'l & Republic of Guinea, 142 F. Supp. 3d 110, 114 (D.D.C. 2015) (internal quotation marks and alterations omitted). In other words, "more expensive litigation involving more complex issues would result" should this Court confirm an award that the ICSID committee annuls or modifies. Id. (internal quotation marks omitted). Such an outcome is precisely the opposite of what arbitration attempts to promote: the swift and (relatively) simple disposition of litigation. Even if the committee denies Spain's application to annul, moreover, the same result would obtain. Given that the country's application to annul the award raises many of the same arguments that it offers to this Court, "it is clear that the outcome of [those] proceedings . . . may affect this Court's determinations, at a minimum, by virtue of the[ir] persuasive value." Hulley Enterprises, Ltd., 211 F. Supp. 3d at 284. At bottom, "litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests." Naegele v. Albers, 355 F. Supp. 2d 129, 141 (D.D.C. 2005) (internal quotation marks omitted).

In addition, the international character of this action and the intricacies of the issues involved support the issuance of a stay. In particular, interests of "comity, judicial efficiency, and the convenience of the parties and the courts — are especially strong 'where a [foreign] parallel proceeding is ongoing . . . and there is a possibility that the award will be set aside[,]

since a court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings.'" Higgins v. SPX Corp., No. 5-846, 2006 WL 1008677, at *4 (W.D. Mich. Apr. 18, 2006) (quoting Europcar, 156 F.3d at 317) (internal alterations omitted and emphasis added). These considerations of comity are particularly resonant here, given that resolving this case mandates addressing a conflict between decades-old treaties and newly minted EU case law. The Court is loath to wade into this territory unnecessarily.

Finally, the balancing of the hardships to each party favors Spain. Respondent will undeniably be burdened by having to attack the validity of the arbitral award in two forums, and perhaps in ultimately having to recover assets seized during this action should the annulment proceeding go its way. The Court recognizes that Masdar has an interest in expeditiously collecting an award, but this litigation will be prolonged regardless of whether the Court issues a stay because the award is subject to the ICSID's temporary stay pending Spain's annulment petition. That stay will persist until the termination of the annulment proceedings. See ICSID Convention art. 51(4). Framed this way, it becomes clear that hasty enforcement of the award would, for Spain, present a "clear case of hardship or inequity," Landis, 299 U.S. at 255, while the hardship to Masdar may prove negligible.

In sum, given the pendency of the ICSID annulment proceeding, this Court will stay the instant case in the interest of avoiding cross-border, piecemeal litigation. Many courts have reached the same conclusion in similar circumstances. See, e.g., Telcordia Technologies, Inc., 95 F. App'x at 362 (affirming district court's decision to stay enforcement of arbitral award pending appeal of decision in the High Court of South Africa); Hulley Enterprises, Ltd., 211 F. Supp. 3d at 287 (granting stay of proceedings to determine validity of arbitral awards pending appeal of a decision setting aside those awards in The Hague); Getma Int'l & Republic of

Guinea, 142 F. Supp. 3d at 114 (issuing a stay of action to enforce arbitral award pending outcome of appeal in foreign jurisdiction); Gretton Ltd., 2019 WL 464793, at *4 (same). Indeed, another court in this district recently determined as much in staying a case involving Spain and another private investor that raised the identical issues presented here. See Infrastructure Servs. Luxembourg S.A.R.L. & Energia Termosolar B.V. v. Spain, No. 18-1753 (D.D.C. Aug. 28, 2019).

The Court, however, does not wish to unduly delay these proceedings. In fact, "a court abuses its discretion in ordering a stay of indefinite duration in the absence of a pressing need." Belize Soc. Dev. Ltd., 668 F.3d at 732 (internal quotation marks omitted). The Court notes that the circumstances justifying this stay will be reviewed with regularity and confirms that it will promptly turn to the merits of Masdar's Petition upon the conclusion of those foreign proceedings if Spain does not prevail.

IV. Conclusion

For the foregoing reasons the Court will grant Respondent's Motion and stay proceedings until the ICSID committee has issued its ruling. A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: September 18, 2019