UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

9REN HOLDING S.À.R.L.	:	
Petitioner,	:	
	:	Civil Action No. 19-cv-01871 (TSC)
v.	:	
KINGDOM OF SPAIN	:	
Respondent	:	

MEMORANDUM IN SUPPORT OF PETITIONER'S
MOTION FOR PRELIMINARY INJUNCTION

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Petitioner 9REN Holding S.À.R.L. ("9REN") respectfully submits this Memorandum in Support of Petitioner's Motion for Preliminary Injunction (1) to prevent Respondent the Kingdom of Spain ("Spain") from pursuing a claim in a court action it recently filed in Luxembourg that improperly seeks to enjoin 9REN from pursuing the present action in this Court, and (2) to direct Spain to cease and desist from pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of 9REN's Petition to Confirm Arbitral Award Pursuant to the 1965 ICSID Convention filed on June 3, 2019 ("Petition") (ECF No. 1).

I. PRELIMINARY STATEMENT

On December 22, 2022, Spain filed an action before the District Court of Luxembourg (the "Luxembourg Action" and the "Luxembourg Court," respectively) seeking, *inter alia*, an anti-suit injunction against the instant proceedings before this Court to enforce an arbitral award (the "Award") issued against Spain pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Nov. 18, 1965, 575 U.N.T.S. 159 (the "ICSID Convention"). Spain's complaint in the Luxembourg Action (the "Luxembourg Complaint") includes a summary of the proceedings before this Court. The principal relief sought by Spain in the Luxembourg Complaint is an order that 9REN either "cease . . . *any* enforcement of the [Award]" or be subject to a penalty of 100,000 EUR per day until "the cessation by [9REN] of *all* actions or judicial or administrative proceedings which violate this ruling." *See* Declaration of Thomas C.C. Childs ("Childs Decl.") Ex. 1 ("Luxembourg Compl."), at 21 (emphases added).

The Luxembourg Action constitutes a brazen collateral attack by Spain on this Court's jurisdiction to enforce the Award under the ICSID Convention's implementing legislation, 22 U.S.C. § 1650(a). Under 22 U.S.C. § 1650(a), ICSID awards are entitled to "full faith and credit" and U.S. federal courts must enforce the pecuniary obligations therein "as if the award were a final

judgement of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650(a). Under well-established case law in this Circuit, Spain's collateral attack on this Court's jurisdiction to resolve 9REN's Petition justifies a narrow preliminary injunction enjoining Spain from seeking any relief in the Luxembourg Action that would require 9REN to cease or suspend the instant proceedings before this Court. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–934 (D.C. Cir. 1984).

As this Court is aware, Spain's challenge to this Court's jurisdiction in the Luxembourg Action is a part of a broader collateral assault on this Court's jurisdiction to fulfill its statutory duty to recognize and enforce other ICSID awards against Spain. On December 22, 2022, the same day that Spain filed the Luxembourg Action against 9REN, it filed a similar action in the Netherlands seeking an anti-suit injunction against enforcement proceedings before this Court initiated by NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (collectively, "NextEra"). *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, Case 1:19-cv-01618-TSC, ECF No. 78-1 at 4 (Jan. 12, 2023).[1] 9REN understands that Spain has filed similar actions in Luxembourg against other ICSID award-creditors, including at least two that have enforcement cases pending against Spain in this District. *See Cube Infrastructure Fund SICAV v. Kingdom of Spain*, Case No. 1:20-cv-01708-EGS-MAU; *Infrastructure Serv. Luxembourg S.A.R.L. v. Kingdom of Spain*, Case 1:18-cv-01753-EGS-MAU. If Spain succeeds in obtaining an anti-suit

[1] As this Court is aware, NextEra seeks a temporary restraining order ("TRO") in addition to a preliminary injunction against Spain's collateral attack on this Court's jurisdiction to decide NextEra's petition to confirm the ICSID award it obtained against Spain. *See NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, Case 1:19-cv-01618-TSC, ECF No. 78-1 at 23 (Jan. 12, 2023). 9REN does not presently seek a TRO because, unlike the complaint filed by Spain against NextEra in the Netherlands, the Luxembourg Complaint does not seek any urgent interim relief against the enforcement proceedings pending before this Court. Additionally, while a court date has been set in the Netherlands proceedings against NextEra for January 25, 2023, a date has not yet been set in the Luxembourg Action against 9REN. Should Spain seek interim relief from the Luxembourg Court before this Court decides the present motion for a preliminary injunction, or should a court date be set in the Luxembourg Action, 9REN reserves the right to seek a TRO from this Court pending its decision on the present motion.

injunction against 9REN from the Luxembourg Court, it will likely replicate this strategy in all of the other ICSID award enforcement proceedings pending against it in this District.

The preliminary injunction requested by 9REN in the instant motion is necessary to prevent grave and irreparable harm to 9REN's ability to enforce the Award and to protect this Court's jurisdiction and duty to apply United States law implementing the ICSID Convention.

II. FACTUAL BACKGROUND

9REN's instant motion was precipitated by Spain's December 22, 2022 service of a summons and complaint on 9REN, initiating proceedings in the District Court of Luxembourg. *See* Luxembourg Compl. The principal relief sought by Spain in the Luxembourg Action is an order that 9REN "cease . . . *any* enforcement of the ICSID Arbitral Award" it obtained against Spain in May 2019. *Id.* at 21 (emphasis added). This Court's present enforcement proceedings, which Spain discusses in the Luxembourg Complaint, *id.* at 4, are squarely within the ambit of the anti-suit order that Spain seeks in the Luxembourg Action.

Spain's request for an anti-suit order in the Luxembourg Action is a direct assault on this Court's jurisdiction to decide 9REN's Petition, justifying the preliminary injunction sought by 9REN in the instant motion. The procedural history of this case underscores the egregiousness of Spain's tactics in the Luxembourg Action.

A. 9REN's Investment and the ICSID Convention

The underlying dispute arises out of modifications that Spain made to its regulatory regime governing renewable energy investment incentives, which caused damages to 9REN's investments in solar energy projects in Spain. EFC No. 13 at 4. In 2007, Spain implemented an incentive program designed to attract investment in renewable energy generation, including solar projects. *Id.* 9REN, a Luxembourg-based company, relied on those measures, which guaranteed subsidies

for the lifetime of its renewable energy facilities, and invested €211 million in solar projects in Spain. *Id.* 9REN's investments in Spain are protected by two treaties: the Energy Charter Treaty ("ECT"), Dec. 17, 1994, 2080 U.N.T.S. 95 (ECF No. 1-3), and the ICSID Convention (ECF No. 1-2). *Id.*

The ECT is a multilateral treaty designed to promote cross-border cooperation in the energy industry and to provide an arbitration forum for disputes arising thereunder. *Id*. It has 54 signatories (also known as "Contracting Parties"), including both Spain and Luxembourg. *Id.*; Compl., ¶ 13, ECF No. 1. Under the ECT, disputes arising between investors of one contracting party and the State in which they have invested may, at the investor's election, be resolved through arbitration pursuant to the ICSID Convention. ECT, art. 26(3), 26(4). Article 26(3)(a) of the ECT provides that "[s]ubject only to subparagraphs (b) and (c), each Contracting Party hereby gives its *unconditional consent* to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article." ECT, art. 26(3)(a) (emphasis added). Spain thus gave its "unconditional consent" to the submission of this dispute to ICSID arbitration when it ratified the ECT.

The ICSID Convention is a multilateral treaty to which the United States, Luxembourg, and Spain are parties. ECF No. 13 at 5. It provides a comprehensive framework for resolving investment disputes between its signatory nations and private investors of other signatory nations. *Id.* By signing the ICSID Convention, States undertake to treat arbitral awards issued pursuant to the ICSID Convention as "binding," "final judgement[s]" that are not "subject to any appeal or to any other remedy except for those provided for in th[e] Convention." ICSID Convention, arts. 53(1), 54(1).

In the United States, arbitral awards issued pursuant to the ICSID Convention are subject to recognition and enforcement under the ICSID Convention's implementing legislation, 22 U.S.C. § 1650a(a). Under 22 U.S.C. § 1650a(a), ICSID awards are entitled to "full faith and credit" and U.S. federal courts must enforce the pecuniary obligations therein "as if the award were a final judgement of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Further, under the implementing legislation, "the Federal Arbitration Act shall not apply to enforcement" of ICSID Awards, which means that ICSID awards are not subject to any of the defenses to confirmation that are ordinarily available to other arbitral awards. 22 U.S.C. § 1650a(a).

U.S. federal courts have confirmed that this statute imposes on them a duty to recognize and enforce ICSID awards, and that their role is limited to ensuring they have jurisdiction over the enforcement action and that the award-creditor has an unpaid claim under the award. *See, e.g.*, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019) ("Congress expressly precluded courts from engaging in the more robust—although still 'extremely limited' . . . form of judicial review applicable under the Federal Arbitration Act . . . ." (citations omitted)); *Tidewater Invt. SRL v. Bolivarian Republic of Venezuela*, No. 17-1457 (TJK), 2018 WL 6605633, at *6 (D.D.C. Dec. 17, 2018) ("[T]he language of § 1650a appears to envision no role for this Court beyond ensuring its own jurisdiction over this action and the validity of [petitioner]'s entitlement to any unpaid claims under the Award.").

B. The ICSID Arbitration

Between 2010 and 2014, after 9REN had already invested in solar projects in Spain, Spain implemented measures that substantially undercut the benefits it had previously guaranteed renewable energy investors like 9REN. ECF No. 14-1 at 4. This led 9REN to commence an ICSID

arbitration against Spain on March 31, 2015, alleging that Spain's actions harmed its investments and violated the ECT. ECF No. 13 at 6.

Spain raised a number of jurisdictional challenges in the arbitration, including that the Tribunal lacked jurisdiction to resolve the dispute because Article 26 of the ECT is not applicable to intra-EU disputes (the "intra-EU objection"); ECF No. 1-1, ¶ 141(a). As noted by the Tribunal, Spain's objection in this regard broadly fell into three categories of arguments:

- EU law governs the Tribunal's determination of its own jurisdiction under Article 26(6) of the ECT and Article 42(1) of the ICSID Convention;
- EU law does not permit the existence of any international dispute mechanism (including an ECT tribunal) other than an institution established by the EU treaties to resolve their investment disputes; and
- the Tribunal has no jurisdiction under the ECT to apply EU law to determine the rights of intra-EU investors, including alleged ECT violations arising from Spain's participation in the EU Internal Market in Electricity including rules governing State aid, because to do so would inevitably infringe on the exclusive competence of the judicial system of the EU to interpret EU law. *Id.* ¶ 144.

On May 19, 2019, the Tribunal issued a unanimous Award rejecting Spain's arguments, including its intra-EU objection, and finding that Spain breached its obligation to provide 9REN fair and equitable treatment under Article 10(1) of the ECT. ECF No. 1-1, ¶¶ 449(1)–(2). It further ordered Spain to pay 9REN €41.76 million in compensation, plus interest, until Spain's final satisfaction of the award. ECF No. 1-1, ¶ 449(3).

C. Spain's Annulment Application

The ICSID Convention directs that the only process by which a final award of an ICSID tribunal may be reviewed is an ICSID annulment proceeding. ICSID Convention art. 52; *see also*

id. art. 53(1) (precluding domestic courts and other institutions from reviewing final awards). On April 3, 2020, Spain filed an application for annulment of the award with ICSID. ECF No. 45-1, ¶ 6. Spain based its request for annulment on two grounds: (1) the Tribunal had manifestly exceeded its powers; and (2) the Tribunal had failed to state reasons that would show the Tribunal's reasoning in reaching its conclusion. *Id.* ¶ 45. As part of its case for annulment, Spain raised the same arguments concerning the Tribunal's lack of jurisdiction under Article 26 of the ECT that it raised in the underlying arbitration. *See id.* ¶¶ 47–62; 75–79.

Spain's application for annulment was heard by three committee members appointed by ICSID. *Id.* ¶ 13. On November 17, 2022, following further written submissions by the parties, oral arguments, and a non-disputing party submission by the European Commission, the Annulment Committee issued a unanimous 98-page decision rejecting Spain's application for annulment. *Id.* ¶¶ 233–261, 281–289, 331.

D. 9REN's Petition in This Court

On June 25, 2019, before Spain filed its annulment application, 9REN filed the instant Petition seeking to recognize and enforce the Award as provided by 22 U.S.C. § 1650a(a). *See* Compl., ECF No. 1. In response, Spain filed a motion to dismiss raising the same intra-EU objection previously rejected by the Tribunal, apparently hoping to relitigate the same arguments before this Court. *See* ECF No. 11-1, Argument, § III. In the alternative, Spain moved to stay the proceedings until the ICSID Annulment Committee decided its petition to annul. ECF No. 11, Argument, § III.F. The Court granted Spain's motion to stay the proceedings, entering the stay on September 30, 2020. ECF No. 21 at 1.

On December 1, 2022, the Parties filed a Joint Status Report informing the Court of the Annulment Committee's dismissal of Spain's annulment application on November 17, 2022. ECF

No. 45. 9REN requested that the Court lift the stay and proceed, as expeditiously as possible, to rule on 9REN's request to enforce the award. *Id.* at 1-2. Spain indicated that, after the stay was lifted, it intended "to renew its motion to dismiss for lack of jurisdiction and, in the alternative, to request that this Court issue a new stay of these proceedings pending an investigation by the European Commission concerning the legality of potential payments by Spain pursuant to an ICSID award relating to the same measures that were at issue in the underlying award in the present case." *Id.* at 2.

On December 7, 2022, the Court issued a Minute Order lifting the stay and directing that the Parties "confer on a briefing schedule and propose it to the court by February 6, 2023."

E. The Luxembourg Action

On December 22, 2022, without prior notice, Spain initiated the Luxembourg Action and served a summons and complaint on 9REN. The summons required 9REN to make a formal appearance before the Luxembourg Court within 15 days. Spain's intent behind the Luxembourg Action is clear: Spain seeks to force 9REN to terminate this proceeding and block all future efforts to enforce the Award.

The Luxembourg Complaint alleges that it is "clearly contrary . . . to European Union law and to Luxembourg public policy" that 9REN, as a Luxembourgian company, is attempting to "enforce the Arbitral Award" and "obtain payment of the amount of the award." Luxembourg Compl., ¶ 13. Spain alleges that it was "compelled" to bring the Luxembourg Action to "preserve its present and future rights" and deter "significant" damage. *Id.* Spain asserts several purported legal bases for these allegations:

- Intra-EU investment arbitration is incompatible with European Union law, and accordingly, "any sum awarded within the scope of an intra-EU investment arbitration procedure could not be recovered";
- Any "intra-EU investment arbitration award awarding damages to an investor constitutes illegal State aid" under EU law; and
- 9REN's efforts to enforce the arbitral award constitute an "abuse of rights."

Luxembourg Compl. at 7–8.

Based on these claims, and to accomplish its goal of forcing 9REN to abandon its Petition before this Court, Spain requests that the Luxembourg Court order 9REN to "cease . . . *any* enforcement of the ICSID Arbitral Award" or be subject to a penalty of *100,000 EUR per day* until 9REN ceases "*all* actions or judicial or administrative proceedings which violate the terms of this ruling." Luxembourg Compl. at 21 (emphases added). If 9REN does not cease all enforcement proceedings, Spain requests that the Luxembourg Court order that the penalty continue to accrue until it equals the amount of the Award, *i.e.*, €41.76 million.[2] *Id.* Spain's arguments in support of its requested injunction are a repetition of the arguments it raised and lost in the underlying arbitration and during the annulment proceedings, and that it has raised yet again before this Court. *See* Luxembourg Compl. at 7, 9-11 (concerning EU law on state aid); ¶¶ 5-7, 11-12 (concerning the intra-EU objection).

If the Luxembourg Court does not grant the injunction sought by Spain, Spain seeks a declaration that 9REN "can not, as an entity subject to compliance with European Union law, decide to: (i) [p]ursue the decisions taken by the statutory body of [9REN] initiating the

[2] Spain offers another alternative, which is that the penalty run until the European Commission issues a final decision declaring that the Award complies with European law, including the law on State aid. Luxembourg Compl.at 21. This is extremely unlikely to occur, effectively meaning that the penalty will run until either 9REN stops seeking enforcement of the Award or until the penalty equals the damages to which 9REN is entitled.

proceedings to obtain the enforcement of [the] ICSID Arbitral Award . . . or (ii) [t]ake any new or subsequent action to obtain such enforcement." Luxembourg Compl. at 22. Additionally, Spain requests declarations from the Luxembourg Court that (i) "any decision by the Board of Directors of [9REN] to enforce the ICSID Arbitral Award . . . violates Luxembourg and European public policy" and (ii) "any decision by the Board of Directors of [9REN] to mandate its counsel to enforce [the] ICSID Arbitral Award" is "null and void." *Id.* Here, too, Spain relies on the same recycled arguments in support of its request. *Id.* at 14-15 (legality of state aid), 15-18 (intra-EU objection).

III. LEGAL ARGUMENT

In this Circuit, it is "well settled" that a federal court may "control the conduct of persons subject to [its] jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (citing *Cole v. Cunningham*, 133 U.S. 107 (1890)). The Luxembourg Action seeks to render 9REN helpless to enforce the Award that it spent years to obtain by usurping this Court's jurisdiction to recognize and enforce the arbitral Award. Spain's actions are contrary to the ICSID framework—to which it expressly consented—as well as United States pro-arbitration and pro-enforcement public policy. This Court should exercise its authority to issue an anti-suit injunction enjoining Spain from circumventing this Court's jurisdiction, in order to preserve 9REN's right to seek enforcement of the Award in the United States.

A. An Anti-Suit Injunction Is Warranted to Preserve This Court's Jurisdiction and Uphold the Congressional Mandate That U.S. Courts Recognize and Enforce ICSID Awards

In the seminal decision *Laker Airways Ltd. v. Sabena*, the D.C. Circuit found that an injunction forbidding a party from bringing suit in foreign courts may be necessary "to prevent an

irreparable miscarriage of justice," most often either "[1] to protect the jurisdiction of the enjoining court, or [2] to prevent the litigant's evasion of the important public policies of the forum." *Laker Airways*, 731 F.2d at 927. Both factors are present here.[3]

1. The Luxembourg Action Threatens the Jurisdiction of this Court to Recognize and Enforce the Award

The D.C. Circuit has found that "Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants." *Laker Airways Ltd.*, 731 F.2d at 927. Notably, "when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court," the court may invoke its authority to "issu[e] an injunction against the litigant's participation in the foreign proceedings." *Id. See also BCB Holdings Ltd. v. Gov't of Belize*, 232 F. Supp. 3d 28, 34–35 (D.D.C. 2017) ("Anti-suit injunctions are intended to protect the Court's jurisdiction.").

In *Laker Airways*, the D.C. Circuit affirmed an order issued by the District Court for the District of Columbia prohibiting foreign defendants in an antitrust suit from instituting preemptive suits in England seeking to terminate the U.S. action. In doing so, the D.C. Circuit focused on the interdictory nature of the relief that the defendants intended to seek in England—the "sole purpose of [which was] to terminate [the U.S.] action." 731 F.2d at 930.

[3] Certain courts have required, as a threshold matter, that the foreign proceeding sought to be enjoined implicate the same parties and issues as in the enjoining court, *see, e.g.*, *Jolen, Inc.v. Kundan Rice Mills, Ltd.*, No. 19-cv-1296 (PKC), 2019 WL 1559173, at *2 (S.D.N.Y. Apr. 9, 2019) (noting that "the threshold requirements for an anti-suit injunction are that the parties are the same in both matters and resolution of the case before the enjoining court is likely dispositive of the action to be enjoined"). 9REN's applications also meet those requirements. The parties to the Luxembourg Action are identical to the parties in this case. This proceeding and the Luxembourg Action relate to the same "underlying dispute" regarding the recognition and enforcement of the Award, such that the requested injunction is wholly appropriate. *See id.* (noting that element was met where both a proceeding before the U.S. court to confirm an arbitral award and a foreign proceeding exclusively related to the "validity and enforceability of the Partial Award"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 121 (2d Cir. 2007) ("*KBC*") (finding element met to support district court's injunction of defendant's foreign proceeding challenging validity of arbitral award).

Spain's Luxembourg Action, by its express terms, threatens to paralyze the Court's proceedings here in precisely that way. The Luxembourg Complaint requests that the Luxembourg Court "order [9REN] to cease … any enforcement of the ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019)." Luxembourg Compl. at 21. An injunction issued by the Luxembourg Court against 9REN would prevent this Court from performing its congressionally-mandated duty to recognize and enforce the Award, and it would result in an "irreparable miscarriage of justice" by rendering 9REN entirely powerless to enforce the ICSID Award that it spent years litigating. *See Laker Airways, Ltd.*, 731 F.2d at 927. *See also*, *e.g.*, *KBC*, 500 F.3d at 125 (affirming anti-suit injunction barring suit in Cayman Islands alleging arbitral award was premised on fraud, noting that foreign court had "no power to modify or annul the Award" pursuant to the applicable arbitral regime, and thus concluding that the district court's anti-suit injunction was appropriate "to prevent [defendant] from engaging in litigation that would tend to undermine the regime established by the [New York] Convention for recognition and enforcement of arbitral awards"); *Jolen,* 2019 WL 1559173 at *4 (granting motion of petitioner, in action seeking to enforce partial arbitral award, to enjoin action challenging arbitral award in the courts of India, explaining that although "there has been no federal judgment in this case to date . . . there is no legitimate jurisdiction over a suit seeking to vitiate the arbitration award in India" and any ruling by the Indian court "threaten[ed] to undermine the jurisdiction of this Court to confirm or enforce the Partial Award").

By initiating the Luxembourg Action, Spain not only seeks to circumvent this Court's jurisdiction to enforce the ICSID Award, but also the ICSID jurisdiction and processes which both Parties agreed would govern this dispute. *See* ECT art. 26(3)(a), 26(4)(a), 26(8). The ICSID Tribunal conducted proceedings and issued the Award. *See* ECF No. 1-1. 9REN now seeks

confirmation and recognition of the Award pursuant to the U.S. statute that *guarantees* that ICSID Awards "*shall* be enforced and 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." 22 U.S.C. § 1650a(a) (emphasis added). Spain also had the opportunity to challenge the Award through the ICSID annulment process—which it did (unsuccessfully). *See* ECF No. 45-1. The ICSID annulment panel denied Spain's challenge, rejecting many of the same arguments Spain raises in this matter and in the Luxembourg Action. *Compare* ECF No. 45-1, §§ VII *with* Luxembourg Compl., § II.1.

Spain also initiated the Luxembourg Action in contravention of the clear mandates of the ICSID Convention (to which Spain is party), which provides that a binding consent to ICSID arbitration "shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*." ICSID Convention art. 26 (emphasis added). Article 53 furthers this same intent:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

ICSID Convention art. 53(1). Under Article 54, "each Contracting State"—including each of Spain, the United States, and Luxembourg—"*shall recognize an award rendered pursuant to this 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) (emphasis added).

Accordingly, Spain had the opportunity to defend its case during the arbitration and to exercise its right to seek annulment of the resulting Award. The only remaining thing that this Court, or any national court, has the power to do is recognize the Award and enter a final judgment

enforcing it. *See* 22 U.S.C. § 1650a(a); ICSID Convention art. 54(1). No court of any ICSID contracting state (including Luxembourg) may interfere with this scheme.

Rather than following the framework to which it expressly consented, Spain commenced the Luxembourg Action, in which it seeks to thwart this Court's ability to perform its statutory duty to recognize and enforce the Award. *See* Luxembourg Compl. at 21-22. Spain's Luxembourg Action is also in plain derogation of Articles 26, 53, and 54 of the ICSID Convention. ECF No. 1-2. Spain seeks to circumvent not only this Court's own adjudicative authority but also that of the ICSID Convention itself and the arbitral awards which form the bedrock of the Convention and which Congress has required this Court to enforce.

Nor can Spain appeal to principles of comity to protect the Luxembourg Action. The D.C. Circuit has ruled that "[n]o foreign court can supersede the right and obligation of the United States courts to decide whether Congress has created a remedy[.]" *Laker Airways*, 731 F.2d at 936–37 (discussing antitrust remedies affecting U.S. interests). Further, in the context of an arbitral award, comity considerations are greatly reduced where, as here, the foreign action purportedly challenging the award is not one "contemplated" by the arbitral regime but instead is "intended to undermine" the U.S. court's clearly-defined role within that regime. *KBC*, 500 F.3d at 127.

Importantly, unlike Spain's Luxembourg Action, the injunction 9REN requests here is "purely defensive": a response to a litigant's attempt to seek an offensive injunction in a foreign court. *Laker Airways*, 731 F.2d at 938. The D.C. Circuit has found that a "purely defensive" injunction would "seek[] only to preserve the district court's ability to arrive at a final judgment adjudicating [the party's] claims under United States law." *Id.* 9REN only seeks a defensive injunction entered by this Court that (1) is narrowly tailored to address only the specific part of the Luxembourg Action that immediately threatens this Court's jurisdiction, and (2) would preserve

the authority this Court has by statute to effectuate and enforce the Award. *Id.* The injunction 9REN seeks would reach no further than to prevent another proceeding from restraining this Court's authority. *See Teck Metals Ltd. v. Certain Underwriters at Lloyd's, London*, No. CV-05-411-LRS, 2009 WL 4716037, at *3 (E.D. Wash. Dec. 8, 2009) (applying anti-suit injunction test and granting "the less intrusive relief of enjoining [respondents] from seeking an anti-suit injunction").

Spain's status as a foreign sovereign does not provide Spain cover to circumvent this Court's jurisdiction to enforce the Award and the ICSID framework. As described above, the Parties litigated the underlying arbitration under the exclusive jurisdiction and processes of ICSID, a neutral body to which Spain voluntarily submitted. This Court both exercises jurisdiction over Spain and is tasked with the duty under federal law to recognize and enforce the Award against Spain.

Any comity considerations are inherently diminished where, as here, the foreign suit initiated by Spain was filed in the court of another country as an attempt to collaterally attack the Award and "paralyze the jurisdiction of the court." *See Laker Airways*, 731 F.3d at 954 n.175 (noting the reduced comity considerations where Dutch and Belgian defendants "attempt[ed] to use the law and courts of a third country . . . to frustrate a previously commenced action in the United States"). An anti-suit injunction narrowly prohibiting Spain from seeking to enjoin this action, and from pursuing any similar collateral challenges to this Court's jurisdiction abroad, is both appropriate and necessary to safeguard this Court's ability to exercise its authority under U.S. law. *See BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 195 F. Supp. 3d 776 (D. Md. 2016) (granting preliminary anti-suit injunction restraining Republic of Korea from taking further action to prosecute related proceeding in Korea).

2. This Court Should Enjoin Spain's Evasion of Important Public Policies of the United States

A preliminary injunction is also necessary in light of Congress's strong public policy interests in recognizing and enforcing awards of ICSID tribunals. A preliminary anti-suit injunction is warranted where it would "prevent the litigant's evasion of the important public policies of the forum." *Laker Airways*, 731 F.2d at 927. Comity does not require the Court "to acquiesce in pre- or postjudgment conduct by litigants which frustrates the significant policies of the domestic forum." *Id.* at 915. Indeed, "deference to the foreign proceeding may be denied because of the litigant's *unconscionable evasion of the domestic laws*[.]" *Id.* at 927 n.71 (emphasis added).

Here, an anti-suit injunction is necessary to preserve the United States' policy of supporting the integrity and enforceability of ICSID awards. That policy is apparent in the governing statute itself, where Congress confirmed that an ICSID award "shall create a right arising under a treaty of the United States," 22 U.S.C. § 1650a(a), thereby bringing it within the Court's jurisdiction, *see* 28 U.S.C. § 1331; *see also* 28 U.S.C. § 1650a(b). Congress mandated that ICSID awards "shall be enforced" by the Court and "given the same full faith and credit" as a judgment of any state court. 22 U.S.C. § 1650a(a). Accordingly, "[a] federal court 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.'" *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 275 (D.D.C. 2019) (quoting *Mobil Cerro Negro*, 863 F.3d at 118). Instead, a federal court's role in enforcing an ICSID award is "perfunctory" and does **not** go "beyond ensuring its own jurisdiction over th[e] action and the validity of [the award-creditor's] entitlement to any unpaid claims under the [a]ward." *Tidewater Invt.*, 2018 WL 6605633, at *6. This limited role upholds the ICSID Convention's purpose that

"the courts of a member nation will treat the award as final." *Micula,* 404 F. Supp. 3d at 276 (quoting *Mobil Cerro Negro*, 863 F.3d at 121).

Spain's collateral attack on this Court's authority flouts Congress's public policy of ensuring that ICSID awards are final. Spain, a party to the ICSID Convention and the ECT,[4] has already challenged the validity of the Award through ICSID's established procedures, and those challenges have been rejected. ECF No. 45. All that is left is for this Court to recognize and enforce the Award. *See* 22 U.S.C. § 1650a. Spain's attempt to thwart 9REN's enforcement of the Award by invoking another jurisdiction's judicial authority therefore frustrates the policy codified by Congress with respect to ICSID. *See Laker Airways*, 731 F.2d at 932 n.73 ("When the primary purpose of the foreign action is to avoid the regulatory effect of the domestic forum's statutes, then an injunction is more readily issued."). More broadly, Spain's efforts also subvert the United States' "public policies encouraging arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *Jolen*, 2019 WL 1559173, at *4 (granting anti-suit injunction). Tactics like these amount to the kind of "evasion" of the law of the United States that an anti-suit injunction should prevent. *See Laker Airways*, 731 F.2d at 927.

The Luxembourg Action appears to be part of a broad campaign by Spain to use the courts of friendly EU Member States to prevent the courts in this District from exercising their jurisdiction to enforce ICSID awards rendered against Spain. As this Court is aware, on the same date that Spain filed the Luxembourg Action against 9REN, it filed a similar action in the Netherlands against NextEra. In that action, Spain seeks, *inter alia*, an order from the District Court of Amsterdam compelling NextEra and its affiliates "to take all actions necessary to suspend

[4] While Spain has moved to withdraw from the ECT, withdrawal would take one year to take effect. Regardless, under the ECT's sunset provision, Spain would remain bound by the ECT for twenty years after withdrawal to existing investments (such as 9REN's investment). ECT, art. 47.

and hold in abeyance the [enforcement] proceedings currently pending before the United States District Court for the District of Columbia under case number 1:19-cv-01618." *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, Case 1:19-cv-01618-TSC, ECF No. 78-1 at 4 (Jan. 12, 2023). 9REN understands that Spain has filed similar actions in Luxembourg against other award-creditors, including at least two that have enforcement cases pending against Spain in this District. *See Cube Infrastructure Fund SICAV v. Kingdom of* Spain, Case No. 1:20-cv-01708-EGS-MAU; *Infrastructure Serv. Luxembourg S.A.R.L. v. Kingdom of Spain*, Case 1:18-cv-01753-EGS-MAU. If Spain succeeds in obtaining an anti-suit injunction against 9REN from the Luxembourg Court, it will likely replicate this strategy in all of the other enforcement proceedings pending against it in this District.[5]

Protection of the Court's authority is therefore critical not only to enforcing the United States' pro-enforcement and pro-arbitration policies in this case but also to head off even broader challenges to the jurisdiction of U.S. courts to recognize and enforce awards issued by ICSID tribunals, threatening the entire ICSID system and Congress's manifest policy goals.

B. This Matter Also Satisfies the Traditional Requirements for Preliminary Injunctive Relief

9REN has shown that this Circuit's jurisprudence warrants an anti-suit injunction. Further, should the Court look to the traditional requirements for preliminary injunctive relief, 9REN's application also meets these elements.

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[5] *See* Petition to Enforce Arbitral Award, *BayWa r.e. AG v. Spain*, 1:22-cv-02403 (Mehta, J.) (D.D.C.) (petitioning to enforce ICSID award rendered against Spain in 2021 concerning claims made under the ECT); Petition to Enforce Arbitral Award, *Hydro Energy 1 S.à.r.l. v. Spain*, 1:21-cv-02463 (Leon, J.) (D.D.C.) (same; award issued in 2020); Complaint, *InfraRed Env't Infrastructure GP Ltd. v. Spain*, 1:20-cv-00817 (Bates, J.) (D.D.C.) (same; award issued in 2019); Petition to Enforce Arbitral Award, *RREEF Infrastructure (G.P.) Ltd. v. Spain*, 1:19-cv-03783 (Nichols, J.) (D.D.C.) (same; award issued in 2019); Petition to Enforce Arbitral Award, *RWE Renewables GMBH v. Spain*, 1:21-cv-03232 (Cobb, J.) (D.D.C.) (same; award issued in 2020); Petition to Enforce Arbitral Award, *Watkins Holdings S.à r.l. v. Spain*, 1:20-cv-01081 (Hogan, J.) (D.D.C.) (same; award issued in 2020).

To obtain a preliminary injunction, a movant must show (1) a strong likelihood of success on the merits; (2) irreparable harm absent the injunction; (3) the absence of substantial harm to other interested parties; and (4) that an injunction serves the public interest. *Rich v. Butowsky*, No. 18-681 (RJL), 2020 WL 7016436, at *1 (D.D.C. Mar. 31, 2020). Within this framework, courts have recognized that "the most compelling reason in favor of entering a Rule 65(a) order is *the need to prevent the judicial process from being rendered futile by defendant's action* or refusal to act." *Am. Horse Prot. Ass'n v. Lyng*, 690 F. Supp. 40, 42 (D.D.C. 1988) (citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2947 (Supp. 1986)) (emphasis in original). Spain attempts to "render[] [this enforcement proceeding] futile" through initiating the Luxembourg Action. *See id.* Accordingly, an anti-suit injunction is appropriate and indeed necessary to allow this Court to perform its statutory duty to recognize and enforce 9REN's Award.

1. An Anti-Suit Injunction Is Likely to Succeed

9REN's application is likely to succeed on the merits. *See Rich*, 2020 WL 7016436, at *1. In the context of anti-suit injunctions, 9REN would satisfy this element if it can "demonstrate that the factors specific to an anti-suit injunction weigh in favor of granting the injunction." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006); *see also Rich*, 2020 WL 7016436, at *1 (explaining that "factors relevant to the likelihood-of-success prong" as applied to anti-suit injunction related to suitability of the injunction as opposed to underlying merits of the claim); *Am. Horse Prot. Ass'n*, 690 F. Supp. at 42–43. As 9REN has explained above, "the factors . . . weigh in favor of granting the injunction," because the narrow, defensive injunction it seeks is necessary to prevent Spain from thwarting this Court of its jurisdiction and statutorily-granted authority to recognize and enforce the Award.

2. The Luxembourg Action Threatens Irreparable Harm to 9REN and This Court

9REN will suffer irreparable harm absent a preliminary injunction. *Rich*, 2020 WL 7016436, at *1. Here, the harm that 9REN faces is both imminent and irreparable. Although it has prevailed under the arbitral processes and procedures that the parties agreed would govern this dispute, 9REN cannot enforce the Award in the United States absent a judgment from a federal court. 9REN thus seeks such a judgment from this Court, on the basis of explicit Congressional authority that directs federal courts to enforce ICSID Awards. 22 U.S.C. § 1650a(a). The anti-suit order sought by Spain in the Luxembourg Action would indefinitely enjoin 9REN from attempting to enforce the Award, not only in this Court but anywhere in the world. *See* Luxembourg Compl, at 21. As a result, 9REN would be unable to enforce an Award that it legitimately obtained and that should rightfully be afforded full faith and credit under U.S. law.

The irreparable harm is further compounded by the fact that 9REN has already faced substantial roadblocks to enforcing this Award, which was first handed down by ICSID—pursuant to procedures assented to by both parties—nearly four years ago. Courts have recognized the harm associated with efforts to indefinitely delay and prolong attempts to enforce valid arbitral awards, including by way of purported collateral challenges such as this one. *See*, *e.g.*, *Hulley Enters. Ltd. v. Russian Federation*, Civil Action No. 14-1996 (BAH), 2022 WL 1102200, at *5 (D.D.C. Apr. 13, 2022) (denying motion to stay based on pending proceedings before a Dutch court challenging an arbitral award, noting that hardship to petitioners associated with delays in enforcement of the award "only increases with each passing year"); *Micula*, 404 F. Supp. 3d at 283 (confirming that under 22 U.S.C. § 1650a "actions to enforce ICSID awards would not be protracted" (citation omitted)).

The imminent and direct challenge that the anti-suit order sought by Spain in the Luxembourg Action poses both to 9REN's ability to recover under the Award and to this Court's established jurisdiction threatens irreparable harm. *See*, *e.g.*, *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1137–38 (D.D.C. 1983), *aff'd* sub nom. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (finding harm to plaintiff irreparable because, absent requested injunction restraining defendants from seeking anti-suit injunction from British court, plaintiff could lose any ability to advance its U.S. claims against defendants). If the Luxembourg Court issues the injunction requested by Spain, "it may very well be too late for [9REN] ever to find its way back to the American judicial system." *Id.* at 1137 n. 58. And given the imminence and significance of this risk, here, as in *Laker Airways*, "[l]ess than absolute certainty concerning the [Luxembourg] court's intentions" regarding Spain's requested relief "suffices to support a finding of irreparable injury." *Id.*

3. A Preliminary Injunction Would Not Substantially Harm Other Parties' Interests

The preliminary injunction 9REN seeks would not substantially harm other interested parties. *Rich*, 2020 WL 7016436, at *1. The balance of equities here falls in 9REN's favor—a Luxembourg injunction would effectively eliminate any possibility for 9REN to recover under the Award, as well as the jurisdiction of this Court to enforce that codified right. Further, 9REN does not request that the Luxembourg Action be terminated in its entirety, but instead only seeks "an order that . . . will preserve the rights of the parties to proceed before this Court as well." *Teck Metals*, 2009 WL 4716037, at *4.

Nor is it a cognizable hardship for Spain to face enforcement of the Award. The award is valid under ICSID procedures and Spain consented to ICSID arbitration in the first instance. *Jolen*, 2019 WL 1559173, at *5. "[S]uch an agreement creates awards that are recognizable and

enforceable." *Id.* Given the imminent threat posed both to 9REN and this Court's jurisdiction, the benefits of a preliminary injunction far outweigh the inconveniences it might cause to Spain's litigation positions. It is also worth noting that absent Spain's "foreign petition calculated to generate interference with an ongoing American case," this Court "would have had no need to issue a defensive injunction" to "adjudicate the claims before it according to the law of the United States." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 20-21 (1st Cir. 2004).

4. An Anti-Suit Injunction Would Serve the Public Interest As Set Forth in Federal Law

Finally, 9REN's anti-suit injunction would serve the public interest because it is consistent with the public interest in "encouraging arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *Rich*, 2020 WL 7016436, at *1; *Jolen*, 2019 WL 1559173, at *5; *see also KBC*, 500 F.3d at 125. 9REN's requested injunction would reinforce the federal courts' duty to exercise the authority granted to them by Congress to recognize and enforce awards of ICSID tribunals free from foreign interference. Recognition and enforcement of such awards is the express policy of the United States as reflected in both statute and case law. *See* Sections II.A; III.B.4 above.

The traditional factors applicable to the Court's consideration of a motion for preliminary injunction thus all favor the entry of an anti-suit injunction in this matter. For all these reasons, 9REN respectfully requests that the Court grant this Motion.

IV. CONCLUSION

9REN respectfully requests that the Court grant a preliminary injunction: (1) enjoining Spain from (a) seeking any relief in the Luxembourg Action or in other Luxembourg proceedings

requiring 9REN to cease, suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of 9REN's Petition to Confirm the Award, and (b) pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of Petitioner's Petition to Confirm the Award; and (2) directing Spain to withdraw its request for relief in the Luxembourg Action requiring 9REN to "cease . . . any enforcement" of the Award insofar as it relates to the proceedings before this Court.

Pursuant to Local Civil Rule 65.1(d), 9REN respectfully requests oral argument on this Motion at a date and time convenient to the Court within the required 21-day period.

Dated: January 17, 2023
New York, NY

/s/ *Thomas C.C. Childs*

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