

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AES SOLAR ENERGY COÖPERATIEF U.A.
and AMPERE EQUITY FUND B.V.,

Petitioners,

v.

KINGDOM OF SPAIN,

Respondent.

Civil Action No. 1:21-cv-3249-RJL

Hon. Richard J. Leon

**THE KINGDOM OF SPAIN’S OPPOSITION
TO PETITIONERS’ MOTION FOR SUBSTITUTION**

The Kingdom of Spain opposes the Motion for Substitution (ECF No. 31), by which Petitioners AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. seek to remove themselves from this case and from the effective jurisdiction of the Dutch courts. The Court should deny the Motion for at least four reasons.

First, Petitioners are attempting to escape the jurisdiction of the Dutch courts, which stretches Rule 25(c) beyond its intended function. Rule 25(c) is a procedural vehicle that is designed to have no bearing on the substantive rights of the parties. Substitution would prejudice Spain’s rights in the Dutch proceedings and threaten to leave both Spain and the Dutch courts without recourse in the application of EU law.

Second, the Motion for Substitution would not facilitate the conduct of the litigation. The entity that Petitioners seek to substitute, Blasket Renewable Investments LLC (“Blasket”), is a stranger to these proceedings. Blasket knows nothing of the underlying arbitration or issues in dispute. It has no expertise in the application of EU law, which lies at the heart of this case. Spain’s motion to dismiss is fully briefed, argued, and ripe for decision.

Third, substitution is unnecessary for Blasket to vindicate whatever interest it may have in the Award. The Deeds of Assignment require Petitioners to transfer any funds they may receive to Blasket. If the Court were ultimately to grant the Petition, Blasket and the Petitioners can resolve their claims between themselves without any participation from Spain or this Court.

Fourth, allowing Gibson, Dunn & Crutcher LLP (“Gibson Dunn”) to represent both Petitioners and Blasket in this action may create conflicts that complicate, rather than facilitate, the conduct of this litigation. Petitioners, by their own admission, are seeking, through the requested substitution, to place the Award “beyond the jurisdictional reach of the Dutch courts.” Emergency Mot., ECF No. 32, at 2. In so doing, they are willfully avoiding binding EU state-aid laws, thereby potentially exposing Petitioners and their directors to both criminal and civil liability under Dutch law, which is the subject of a pending proceeding in the Dutch courts. *See* ECF No. 33-1 at 3–4. While substitution may be in Blasket’s interest, it may well not be in Petitioners’, thereby creating a conflict for the counsel that, while representing Petitioners, has just noticed its appearance for Blasket as well.

LEGAL STANDARD

Federal Rule of Procedure 25(c) governs substitution when a party transfers its interest in the outcome. “If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.” Fed. R. Civ. P. 25(c). Rule 25(c) is “wholly permissive” and “does not require [that] transferees . . . be substituted.” *Commissions Imp. Exp., S.A. v. Republic of Congo*, 118 F. Supp. 3d 220, 231 (D.D.C. 2015). The “decision whether to grant or deny a Rule 25(c) motion is a matter within the district court’s discretion.” *Stewart Title Guar. Co. v. Lewis*, 2018 WL 1964870, at *1 (D.D.C. Feb. 16, 2018).

I. THE COURT SHOULD DENY THE MOTION BECAUSE ITS PURPOSE IS TO EVADE EU LAW.

Petitioners are Dutch companies; their owners chose to incorporate under the laws of the Kingdom of the Netherlands for the protections those laws offered, including those provided by the Energy Charter Treaty. There is no dispute that EU law applies to and governs these Dutch Petitioners, including the mandatory provisions of the EU’s state-aid regime that govern certain payments between EU Member States and EU companies. Yet Petitioners concede that the purpose of the Motion for Substitution is to evade the application of EU law. *See* Emergency Mot., ECF No. 32, at 2 (seeking to place the Award “beyond the jurisdictional reach of the Dutch courts”), 4 (same).

The EU state-aid question exists independently of the issues before this Court. Assuming *arguendo* that the Court were to grant the Petition and recognize the Award, the question of whether EU state-aid law would permit the Dutch Petitioners to receive, and the Kingdom of Spain to pay, any amount in connection with that Award would remain.¹ And resolution of that issue is a matter that must be resolved in the EU, through process among the Kingdom of Spain, the courts of the EU Member States, the European Commission, and these EU Petitioners.

In December 2022, Spain began the processing of resolving those issues with respect to a number of EU petitioners that are seeking enforcement in this District. With respect to these Petitioners, Spain filed an action in the Netherlands—their home jurisdiction—requesting that the Dutch court order Petitioners to comply with EU state-aid law and withdraw their efforts to enforce the Award. *See* Dutch Compl., ECF No. 31-1, at 46. As Spain explained to the Dutch court, “an arbitral tribunal award ordering a Member State to pay compensation to a company

¹ The obligations that the EU state-aid regime impose on Petitioners and Spain are related to, but distinct from, the question of whether the Tribunal exceeded its powers by issuing an award of unlawful state aid. *See* Mem., ECF No. 11-1, at 22.

operating in the European Union is subject to State aid supervision” by the courts of the European Union. *Id.* at 55. The European Commission has determined that payment of the Award at present would violate state-aid law. *See* EC Amicus Brief, ECF No. 19, at 24. EU law “requires national courts to take effective measures to prevent the grant of unlawful aid,” including by requiring entities incorporated under their domestic laws to cease and desist from pursuing any enforcement that would result in the payment of unlawful state aid. Dutch Compl, ECF No. 31-1, at 61.

On January 12, 2023, the petitioners in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, Case No. 19-cv-1618 (D.D.C.), filed a motion for preliminary injunction and temporary restraining order, requesting that the court enjoin the proceedings that Spain had initiated with respect to those petitioners in the Netherlands. Petitioners here did not seek any injunctive relief. Rather, on January 14 and 17, 2023, Petitioners executed Deeds of Assignment that purport to restructure their rights in the Award to be held by Blasket Renewable Investments LLC (“Blasket”).² They did so because Blasket is “a United States entity presumably beyond the jurisdictional reach of the Dutch courts[.]” Emergency Mot., ECF No. 32, at 1–2.

On February 15, 2023, the *NextEra* court entered a preliminary injunction, ordering Spain to withdraw its request before the Dutch courts that the petitioner suspend or withdraw the enforcement proceeding. *See NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 2023 WL 2016932 (D.D.C. Feb. 15, 2023). The court’s injunction was unprecedented and erroneous. Undersigned counsel is unaware of any decision in which a U.S. court has purported to enjoin a

² Spain does not know the relationship between Petitioners and Blasket or whether the alleged assignment was an arms’-length transaction. It is notable that Petitioners do not appear to have received any consideration for the assignment, which did not require Blasket to pay anything for the putative assignment. Spain believes the Deeds may be subject to annulment because they violate Dutch law.

foreign sovereign from litigating questions of foreign law in foreign courts. And the *NextEra* court has effectively enjoined two—barring Spain from pursuing relief in the Netherlands and preventing the Dutch courts from applying EU law to Dutch entities. Comity concerns “are near their peak . . . where an injunction would bar a foreign sovereign (rather than a private party) from litigating a dispute in its own courts.” *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea’s Def. Acquisition Program Admin.*, 884 F.3d 463, 480 (4th Cir. 2018). As the Seventh Circuit has observed, “the action of an American judge” enjoining France “from litigating a suit on a French insurance policy in a French court” would constitute “an extraordinary breach of international comity.” *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993).

In response to that extraordinary ruling, Spain petitioned the Dutch court to impose conservatory measures on Petitioners, requiring that they not seek an anti-suit injunction that would interfere with the Dutch proceedings. On March 1, 2023, the Dutch court entered an order “that temporarily restrains Petitioners and Blasket from requesting an anti-anti-suit injunction in this Court, pending a March 13 hearing on Spain’s request for a preliminary injunction against an anti-anti-suit injunction.” Emergency Mot., ECF No. 32, at 3.

Petitioners responded with a flurry of motions, seeking to substitute Blasket and remove Petitioners from this case on an expedited basis. That effort has nothing to do with the merits or resolution of this case. The Deeds of Assignment were executed only in January 2023, years after the arbitration was initiated, the Award was issued, and this action was filed. Petitioners are attempting to escape the jurisdiction of their home courts and the application of EU law. The Court should not sanction that effort. “Rule 25(c) . . . is a procedural vehicle,” *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003), that is designed to have “no bearing on the substantive rights of the parties,” *Commissions Imp. Exp., S.A.*, 118 F. Supp. 3d at 231.

“While framed as request for a technical ‘substitution’ of a party,” Petitioners’ motion is an attempt to leave Spain—and the Dutch courts—“without recourse” in the Dutch litigation. *Fashion G5 LLC v. Anstalt*, 2016 WL 7009043, at *3 (S.D.N.Y. Nov. 29, 2016). The Dutch courts should be allowed to determine under EU law whether these two Dutch entities should be required to withdraw their efforts to enforce the Award. But if the Court were to grant the Motion for Substitution, the Dutch court would be left without recourse over the Dutch entities in its application of EU law. Substitutions that “substantively prejudice[]” another party to the litigation “stretch[]” Rule 25(c) “beyond its intended function.” *Id.* Because this Court “must take care” to ensure that a Rule 25(c) substitution does “not . . . impair the substantive rights of the parties,” Petitioners’ motion should be denied. *Great W. Cas. Co. v. Kirsch Transp. Servs., Inc.*, 2022 WL 4182377, at *3 (S.D. Iowa June 3, 2022).

II. THE COURT SHOULD DENY THE MOTION BECAUSE SUBSTITUTION WOULD NOT PROMOTE THE EFFICIENT RESOLUTION OF THE CASE.

“The primary basis for deciding [a Rule 25(c)] motion is whether substitution would facilitate the conduct of the litigation.” *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 247 F. Supp. 3d 76, 86 (D.D.C. 2017) (internal quotation marks omitted). Courts typically “focus on considerations of convenience and economy” in this context because Rule 25(c) is a discretionary, procedural mechanism. *Id.*; *see also Branch Banking & Tr. Co. v. Morehouse*, 2011 WL 13257608, at *3 (D.D.C. Oct. 11, 2011).

The Court should deny the Motion for the additional reason that it would not promote the efficient resolution of the case. Substituting Basket into this action would not “facilitate the conduct” of this litigation. *Paleteria La Michoacana*, 247 F. Supp. 3d at 86 (internal quotation marks omitted). Basket was not a party to the underlying arbitration; it has no first-hand knowledge of those proceedings or the issues relevant to this case. Spain’s motion to dismiss is

fully briefed and argued. For the reasons advanced by Spain in its briefing, the Court should grant the pending motion to dismiss, which would “bring[] this litigation to a close” and render “substitution . . . unnecessary.” *Commissions Imp. Exp., S.A.*, 118 F. Supp. 3d at 231.

III. THE COURT SHOULD DENY THE MOTION BECAUSE SUBSTITUTION IS UNNECESSARY.

Petitioners’ Motion for Substitution is not necessary to the resolution of Spain’s Motion to Dismiss or the Petition. Petitioners filed this action to recognize and enforce the Award; if they prevail, the Deeds of Assignment provide that they must pay an amount they receive “under or in connection with the [Award]” to Blasket. ECF No. 31-1 at 10 (Section 3.1). Petitioners and Blasket can resolve between themselves their respective claims over any future judgment. Nothing in the Petition or the Deeds of Assignment requires Blasket’s presence in this action or any interference with the Dutch proceedings.

IV. THE COURT SHOULD DENY THE MOTION BECAUSE OF THE APPARENT CONFLICTS OF INTEREST.

Gibson Dunn purports to represent both Petitioners and Blasket in this action and suggests that having the same counsel means “the litigation can continue apace without any disruption or any need for rebriefing.” Mot., ECF No. 31, at 3. Respectfully, the opposite may be true: Gibson Dunn’s clients have competing interests in the resolution of the Motion for Substitution.

Petitioners have stated explicitly that they are seeking to place the Award “beyond the jurisdictional reach of the Dutch courts.” Emergency Mot., ECF No. 32, at 2. As Spain explained in its letters to Petitioners’ directors:

If this plan succeeds, Blasket Renewable Investments LLC is able to obtain the enforcement judgment in the United States and will, in violation of EU laws and thus through an illegal route, collect state aid from a European Member State. By doing so, AES and its directors are deliberately acting in violation of EU laws and Dutch

laws, which may lead to damages in the amount of [the Award] or even more, considering interests and lawyer's fees.

ECF No. 33-2 at 2. While substitution may be in Blasket's interest, it is not in Petitioners' interest, as pursuit of enforcement of the Award may expose them to civil and criminal liability in the Netherlands. Thus, granting the Motion for Substitution would only complicate these proceedings by exposing them to conflicts of interest that threaten the resolution of the case.

CONCLUSION

For the foregoing reasons, Spain respectfully requests that the Court deny Petitioners' Motion for Substitution.

Dated: March 6, 2023

Respectfully submitted,

/s/ Jonathan M. Landy

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2023, I caused the foregoing to be filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered participants.

/s/ Jonathan M. Landy
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