

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In the Matter of the Application of

EISER INFRASTRUCTURE LIMITED and  
ENERGIA SOLAR LUXEMBOURG S.À R.L.,

Petitioners,

For Recognition and Enforcement of an  
Arbitration Award

- against -

KINGDOM OF SPAIN,

Respondent.

Civil Action No.  
17-CV-

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS’  
EX PARTE PETITION TO RECOGNIZE ARBITRATION AWARD**

ALLEN & OVERY LLP  
Jacob S. Pultman  
Bradley S. Pensyl  
1221 Avenue of the Americas  
New York, New York 10020  
Tel: 212-610-6300

*Attorneys for Petitioners EISER  
Infrastructure Limited and Energia Solar  
Luxembourg S.à r.l.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 2

ARGUMENT ..... 4

    I.    PETITIONERS ARE ENTITLED TO RECOGNITION OF THE  
          AWARD AND ENTRY OF JUDGMENT IN THEIR FAVOR  
          PURSUANT TO 22 U.S.C. § 1650a ..... 4

        A.    The Court Is Required To Give Full Faith And Credit To  
              The ICSID Award ..... 4

        B.    Sovereign Immunity Does Not Apply ..... 8

CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Blue Ridge Invs., L.L.C. v. Republic of Argentina</i> , 735 F.3d 72 (2d Cir. 2013).....	9, 10
<i>Enron Corp. &amp; Ponderosa Assets L.P. v. Argentine Republic</i> , No. M-82 (S.D.N.Y. Nov. 20, 2007) (Buchwald, J.).....	6
<i>Funnekotter v. Republic of Zimbabwe</i> , No. 09 Civ. 8168 (CM) (S.D.N.Y. Feb. 1, 2010); .....	6
<i>Grenada v. Grynberg</i> , No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011) (Batts, J.) .....	6
<i>Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia</i> , 650 F. Supp. 73 (S.D.N.Y. 1986).....	6
<i>Micula v. Gov't of Romania</i> , No. 15 Misc. 107 (Part I), 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015).....	5, 7
<i>Mobil Cerro Negro Ltd. v. Bolivian Republic of Venezuela</i> , No. 14 Civ. 8163 (SD.N.Y. Oct. 10, 2014) .....	6
<i>Mobil Cerro Negro Ltd. v. Bolivian Republic of Venezuela</i> , 87 F. Supp. 3d 573 (S.D.N.Y. 2015).....	<i>passim</i>
<i>Sempre Energy Int'l v. Argentine Republic</i> , No. M-82 (S.D.N.Y. Nov. 14, 2007) (Buchwald, J.).....	6
<i>Siag v. Arab Republic of Egypt</i> , No. M-82 (PKC), 2009 WL 1834562 (S.D.N.Y. June 19, 2009).....	6, 7, 8
<b>Statutes and Rules</b>	
22 U.S.C. § 1650.....	6
22 U.S.C. § 1650a.....	<i>passim</i>
22 U.S.C. § 1650a(a).....	5
28 U.S.C. § 1605(a)(1).....	9,10
28 U.S.C. § 1605(a)(6).....	8, 9
28 U.S.C. § 1605(a)(6)(B) .....	9

N.Y.C.P.L.R. Article 54..... *passim*  
N.Y.C.P.L.R. § 5401 ..... 8  
N.Y.C.P.L.R. § 5402(a) ..... 8  
N.Y.C.P.L.R. § 5403 ..... 8

**Other Authorities**

David D. Siegel, N.Y. Practice § 435 (4th ed.)..... 8  
H.R. 11315 — 94th Congress: Foreign Sovereign Immunities Act  
www.GovTrack.us. 1975. May 19, 2017  
<https://www.govtrack.us/congress/bills/94/hr11315>..... 8, 9  
ICSID Convention, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 (Mar. 18, 1965) ..... *passim*

Petitioners EISER Infrastructure Limited (“EIL”) and Energia Solar Luxembourg S.à r.l. (“ESL” and, together with EIL, the “Petitioners”) respectfully submit this memorandum of law in support of their *Ex Parte* Petition to Recognize an ICSID Arbitration Award pursuant to 22 U.S.C. § 1650a (the “Petition”) filed contemporaneously herewith.<sup>1</sup>

### **PRELIMINARY STATEMENT**

Petitioners seek recognition of an arbitration award issued in their favor on May 4, 2017 (the “Award”) against Respondent Kingdom of Spain (the “Respondent” or “Spain”) following an arbitration conducted under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes (“ICSID”) in ICSID Case No. ARB/13/36 (the “ICSID Arbitration”). Pultman Decl., Ex. 1.

ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”)<sup>2</sup> with over 150 member states. Pultman Decl., Exs. 3, 7. The ICSID Convention is an international treaty designed to stimulate economic development by removing major impediments to the free international flow of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. Pultman Decl., Ex. 6. To further that goal, ICSID provides a neutral arbitral forum to facilitate the resolution of investment disputes between sovereign states and foreign investors.

Article 54(1) of the ICSID Convention provides that any arbitration award issued

---

<sup>1</sup> Petitioners have also filed herewith the Declaration of Jacob S. Pultman (“Pultman Decl.”) and the accompanying exhibits offered in support of the Petition, including the Declaration of Jeffrey Sullivan (Ex. 9), and a Proposed Order and Judgment (Ex. 10).

<sup>2</sup> ICSID Convention, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 (Mar. 18, 1965).

pursuant to the ICSID Convention must be recognized and enforced by each of the Contracting States. Pultman Decl., Ex. 3. Both the United States and Spain are Contracting States to the ICSID Convention. Pultman Decl., Ex. 7. To meet its obligations as a signatory to the ICSID Convention, the United States has enacted an enabling statute – 22 U.S.C. § 1650a – that requires federal district courts to recognize and enforce ICSID awards. Pultman Decl., Ex. 2. As set forth in 22 U.S.C. § 1650a, an ICSID award is entitled to the same full faith and credit in the federal courts as a judgment issued by a state court.

Moreover, the courts of this District have repeatedly confirmed that an ICSID award creditor may convert an ICSID award into a federal court judgment by using the *ex parte* judgment recognition procedure set out in Article 54 of the New York CPLR. Recognition under this mechanism is intended to be an “automatic” process, and the court’s review of a recognition petition is limited to determining the authenticity of the award. An *ex parte* petition to recognize an award must be granted so long as the petitioner submits a true and correct copy of the award and an affidavit attesting that the award was not obtained by default, that the award has not been satisfied, and that the enforcement of the award has not been stayed.

Petitioners here have submitted all of the materials required by CPLR Article 54, and have fully satisfied all of the criteria for recognition of the Award in this Court. As such, the Court should recognize the Award as a final judgment of this Court.

### **STATEMENT OF FACTS**

The Award entered in Petitioners’ favor arises out of Petitioners’ investments in concentrated solar power (“CSP”) projects in Spain. In 2007, Spain enacted legislation to attract investments in CSP plants and other forms of renewable energy. Pultman Decl., Ex. 1 (Award) ¶¶ 97-113. In reliance upon certain financial incentives and inducements offered by Spain

pursuant to this regime, Petitioners made substantial investments in three CSP projects in Spain. *Id.* ¶¶ 114-43. Between 2007 and 2011, Petitioners invested more than €126 million to develop these projects. *Id.* ¶ 121. Following a change of government in 2012, Spain abruptly shifted its stance on renewable energy and began cutting back its support of CSP programs. *Id.* ¶¶ 137-54, 365. Between 2012 and 2014, Spain enacted a series of measures revoking the economic benefits extended to CSP investors under the 2007 legislation. *Id.* Spain's policy reversal culminated in the implementation of an entirely new regime in 2014 that dismantled the 2007 legislation upon which Petitioners had relied in making their investments. *Id.* The drastic changes made by Spain in the new legislation eliminated virtually all of the value of Petitioners' investments in the CSP projects. *Id.* ¶ 365.

On December 13, 2013, Petitioners filed a Request for Arbitration against Respondent with ICSID. Pultman Decl., Ex. 1 (Award) ¶ 6. In the Request for Arbitration, Petitioners brought claims against Spain for breaches of Spain's obligations under the Energy Charter Treaty (the "ECT") adopted in 1994 between various countries, including Spain, the United Kingdom (where petitioner EIL is incorporated) and Luxembourg (where petitioner ESL is incorporated). *Id.* ¶¶ 99, 349. Among other claims, Petitioners alleged that Spain's eradication of the legislative framework upon which Petitioners' investments depended violated Spain's obligation under Article 10(1) of the ECT to provide Petitioners with fair and equitable treatment. *Id.* ¶ 349.

On December 23, 2013, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention. *Id.* ¶ 7. On July 8, 2014, the ICSID arbitration tribunal (the "Tribunal") was duly constituted. *Id.* ¶ 10. A Hearing on Jurisdiction and the Merits was held in Paris, France from February 15-20, 2016. *Id.* ¶ 73.

Both Respondent and Petitioners were represented by counsel and fully participated in the hearing. *Id.* Each party presented substantial documentary evidence, witness testimony and arguments to the Tribunal at the hearing. *Id.* ¶¶ 73-78. On April 13, 2017, the Tribunal declared the proceeding closed. *Id.* ¶ 93.

On May 4, 2017, the Tribunal issued the Award, unanimously ruling in favor of Petitioners and finding Spain liable. In the Award, a comprehensive 156-page decision, the Tribunal found that Spain had violated Article 10(1) of the ECT by failing to accord fair and equitable treatment to Petitioners' investments in Spain. *Id.* ¶¶ 365, 418, 486. The Tribunal awarded Petitioners monetary damages in the amount of 128 million Euro, together with interest from June 20, 2014 to May 4, 2017 at the rate of 2.07%, compounded monthly, and interest from May 4, 2017 to the date of payment at the rate of 2.50%, compounded monthly. Award ¶ 486. Petitioners have not been paid on the Award. Pultman Decl., Ex. 9.

## ARGUMENT

### **I. PETITIONERS ARE ENTITLED TO RECOGNITION OF THE AWARD AND ENTRY OF JUDGMENT IN THEIR FAVOR PURSUANT TO 22 U.S.C. § 1650a**

#### **A. The Court Is Required To Give Full Faith And Credit To The ICSID Award**

The ICSID Convention and 22 U.S.C. § 1650a require that the Award be recognized and entered as a final judgment of this Court. Article 54(1) of the ICSID Convention provides that:

Each Contracting State 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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

Pultman Decl., Ex. 3 (ICSID Convention, Article 54).



The United States is a Contracting State. Pultman Decl., Ex. 7. As a Contracting State, the United States has adopted implementing legislation that provides the federal district courts with exclusive jurisdiction over actions to enforce ICSID awards. *See* 22 U.S.C. § 1650a (Pultman Decl., Ex. 2). As set forth in this enabling statute, codified at 22 U.S.C. § 1650a, federal district courts are required to give full faith and credit to ICSID awards and to accord them the same treatment that is provided to final judgments rendered by state courts. *Id.* Specifically, 22 U.S.C. § 1650a(a) provides that “[t]he 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.” *Id.*

Although 22 U.S.C. § 1650a on its face requires the federal courts to recognize and enforce ICSID awards, the statute does not designate the process by which an ICSID award creditor is to obtain such judicial recognition. As the Court thoroughly explained in *Mobil Cerro Negro Ltd. v. Bolivian Republic of Venezuela*, 87 F. Supp. 3d 573, 582-83 (S.D.N.Y. 2015), this “statutory gap” should be “filled” by applying the judgment recognition procedures provided for under the law of the forum state. Thus, the courts in this District have consistently ruled that the recognition of an ICSID award may be obtained using the *ex parte* procedure set forth in Article 54 of the New York CPLR, which governs judgment recognition in the State of New York. *See, e.g., id.* at 586 (holding that award creditor was entitled to recognition of ICSID award through the use of CPLR Article 54 procedure); *Micula v. Gov’t of Romania*, No. 15 Misc. 107 (Part I),

2015 WL 4643180, at \*3 (S.D.N.Y. Aug. 5, 2015) (same); *Siag v. Arab Republic of Egypt*, No. M-82 (PKC), 2009 WL 1834562, at \*3 (S.D.N.Y. June 19, 2009) (same).<sup>3</sup>

For example, in *Mobil*, the petitioners filed an *ex parte* petition in this Court under the procedure outlined in CPLR Article 54, seeking recognition of a \$1.6 billion ICSID arbitration award issued in the petitioners' favor against the Bolivian Republic of Venezuela ("Venezuela"). *Mobil Cerro Negro*, 87 F. Supp. 3d at 575. On the same day the *ex parte* application was filed, the Court granted the petition and entered final judgment in the full amount of the ICSID award. *Id.* at 586; Order and Judgment, *Mobil Cerro Negro Ltd. v. Bolivian Rep. of Venezuela*, No. 14 Civ. 8163 (S.D.N.Y. Oct. 10, 2014) (Pultman Decl. Ex. 8). After receiving notice that the judgment had been entered, Venezuela filed a motion to vacate the judgment, arguing that 22 U.S.C. § 1650a does not permit *ex parte* recognition procedures and instead requires the commencement of a plenary action in order to obtain recognition of an ICSID award. *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 575. In a decision issued by Judge Engelmayer, the Court squarely and thoroughly rejected this position and denied Venezuela's motion to vacate. *Id.* at 586, 602. The Court ruled that "a federal district court, asked to recognize and convert an ICSID award to judgment, may use the forum state's recognition procedure." *Id.* at 586. Therefore, the Court held, "the recognition procedure set out in New York CPLR Article 54" may be used to obtain recognition of an ICSID award in the New York federal district courts. *Id.*

---

<sup>3</sup> *Ex parte* applications to recognize ICSID awards have also been granted by this Court on other occasions. *Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986); Order and Judgment, *Grenada v. Grynberg*, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011) (Batts, J.); Judgment, *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168 (CM) (S.D.N.Y. Feb. 1, 2010); Order and Judgment, *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 20, 2007) (Buchwald, J.); Order and Judgment, *Sempra Energy Int'l v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007) (Buchwald, J.). True and correct copies of decisions and orders of this Court in which a judgment on an ICSID award has been entered pursuant to 22 U.S.C. § 1650 are submitted herewith as Exhibit 8 to the Pultman Declaration. Pultman Decl. Ex. 8.

In so finding, the court in *Mobil* relied on an earlier decision in *Siag v. The Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. Jun. 19, 2009), where Judge Castel similarly ruled that an ICSID award may be converted to judgment through the use of the *ex parte* method set forth in CPLR Article 54. See *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 581-82 (“*Siag* thus identified CPLR Article 54 as a mechanism available for converting ICSID awards into judgments in this District.”). In *Siag*, the Court explained that, because federal district courts in New York may apply Article 54 of the CPLR to register an out-of-state court judgment, and because 22 U.S.C. § 1650a requires federal courts to treat an ICSID award as a sister state judgment, a federal district court may recognize an ICSID award using the procedures set forth in CLPR Article 54. *Siag*, 2009 WL 1834562, at \*2-3.

The Court reaffirmed its approval of the use of the procedures set forth in CPLR Article 54 to effectuate the entry of judgment for an ICSID award in the decision issued by Judge Schofield in *Micula*, which was decided approximately six months after the *Mobil* decision was rendered. In *Micula*, like in *Mobil*, the Court entered final judgment recognizing an ICSID award on the same day the petitioners’ *ex parte* petition was submitted, and then denied the Government of Romania’s subsequent motion to vacate the judgment. *Micula v. Gov’t of Romania*, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at \*2 (S.D.N.Y. Aug. 5, 2015). Relying on *Mobil*, the Court held that “the *ex parte* procedure used here pursuant to Article 54 of New York’s CPLR” was the appropriate mechanism for converting an ICSID award into a federal court judgment. *Id.* at \*3. The Court further emphasized that recognition of an ICSID award is an “automatic” process and “a matter in which a court has no discretion once it determines that an award is authentic.” *Id.* at \*4; accord *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 600 (“Registration of ICSID awards was intended to be automatic.”).

By its terms, CPLR Article 54 applies to “any judgment . . . of a court of the United States or any other court which is entitled to full faith and credit in this state.” CPLR § 5401. Pursuant to Article 54, judgment creditors are required to submit a true and accurate copy of the arbitration award,<sup>4</sup> together with an affidavit (i) stating that award was not obtained by default and has not been satisfied; (ii) setting forth the total amount of the award that remains outstanding; and (iii) attesting that enforcement of the award has not been stayed. CPLR § 5402(a) (Pultman Decl. Ex. 4); *Siag*, 2009 WL 1834562, at \*3.

Article 54 does not require advance notice to the debtor. Rather, after the entry of a judgment, notice to the debtor must be provided within thirty days. CPLR § 5403 (Pultman Decl., Ex. 5), *Siag*, 2009 WL 1834562 at \*3; David D. Siegel, N.Y. Practice § 435 (4th ed.) (“Article 54 of the CPLR sets up a procedure for the simple New York registration of an out-of-state judgment, obviating an action on the judgment.”). Here, Petitioners have satisfied all of these requirements of CPLR Article 54 and have thus complied with the procedures for registering an out-of-state court judgment in the courts of New York. *See* Pultman Decl. Ex. 9 (Sullivan Decl.).

**B. Sovereign Immunity Does Not Apply**

Recognition of the Award against Spain does not implicate Spain’s sovereign immunity because Spain has clearly waived immunity from suit under at least two exceptions to the Foreign Sovereign Immunities Act (“FSIA”). The first exception that applies here is the “arbitral award” exception set forth in 28 U.S.C. § 1605(a)(6), which provides, in relevant part:

---

<sup>4</sup> Article 54(2) of the ICSID Convention also requires that “a party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General.” Pultman Decl., Ex. 3.

A foreign state shall not be immune from the jurisdiction of courts of the United States or of States in any case . . . in which the action is brought . . . to confirm an [arbitration] award . . . if . . . the . . . award is . . . governed by a treaty or international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6)(B).

That provision squarely applies here because the Award is governed by a treaty, the ICSID Convention, “calling for the recognition and enforcement of arbitral awards.” *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 85 (2d Cir. 2013). In *Blue Ridge Investments*, the Second Circuit noted that “every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIA has concluded that they do.” *Id.* The Second Circuit confirmed that it agreed with that conclusion, and held that ICSID awards fall within the arbitral award exception of 28 U.S.C. § 1605(a)(6). *Id.*; *see also Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 588 (holding that the arbitral award exception to the FSIA applied “because the ICSID award against Venezuela was governed by a treaty, the ICSID Convention, ‘calling for the recognition and enforcement of arbitral awards’”).

The second exception to sovereign immunity that applies here is the “implied waiver exception.” As set forth in the FSIA, “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or implicitly or by implication.” 28 U.S.C. § 1605(a)(1). In *Blue Ridge Investments*, the Second Circuit held that the implied waiver exception to sovereign immunity also applies in the context of recognizing an ICSID award against a foreign sovereign. 735 F.3d at 84; *see also Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 588

(ruling that the implied waiver exception to sovereign immunity applied to ICSID award against Venezuela).<sup>5</sup> Article 54 of the ICSID Convention contemplates such an implied waiver, as each Contracting State is obligated to “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories.” *Blue Ridge Invs.*, 735 F.3d at 84; *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 588. Thus, by signing onto the ICSID Convention, Spain “must have contemplated enforcement actions in other [Contracting] States,” including the United States, and has waived sovereign immunity with respect to the recognition of ICSID awards under the implied waiver exception described in 28 U.S.C. § 1605(a)(1). *Blue Ridge Invs.*, 735 F.3d at 84 (quotation omitted).

### **CONCLUSION**

For all of the foregoing reasons, the Court should grant Petitioners’ petition and enter the Proposed Order and Judgment submitted in connection with the Petition, recognizing the Award as a judgment of this Court pursuant to 22 U.S.C. § 1650a and Article 54 of the ICSID Convention and directing the Clerk of the Court to enter judgment against Respondent Kingdom of Spain in the amount of 128 million Euro, together with interest from June 20, 2014 to May 4, 2017 at the rate of 2.07%, compounded monthly, and interest from May 4, 2017 to the date of payment at the rate of 2.50%, compounded monthly.

---

<sup>5</sup> In *Mobil*, in addition to confirming that exceptions to sovereign immunity in the FSIA applied in an action seeking to recognize an ICSID award against a foreign sovereign, the Court also held that the service of process, venue, and personal jurisdiction requirements under the FSIA did not apply. 735 F.3d at 602. The court held that the imposition of such requirements in an ICSID award judgment recognition proceeding would be contrary to intentions of the ICSID Convention and its enabling statute, which contemplated that “award recognition would be automatic and not subject to contest.” *Id.* at 599-600.

Dated: New York, New York  
May 19, 2017

Respectfully submitted,

**ALLEN & OVERY LLP**

By: /s/ Jacob S. Pultman  
Jacob S. Pultman  
Bradley S. Pensyl

1221 Avenue of the Americas  
New York, NY 10020  
(212) 610-6300

*Attorneys for Petitioners EISER  
Infrastructure Limited and Energia  
Solar Luxembourg S.à r.l.*