

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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MASDAR SOLAR & WIND COOPERATIEF	:	X	
U.A.,	:		Civil Action No. _____
	:		
<i>Petitioner,</i>	:		
	:		
v.	:		
	:		
KINGDOM OF SPAIN,	:		
	:		
<i>Respondent.</i>	:		

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PETITION TO ENFORCE ARBITRAL AWARD

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Cooperatief U.A.*

For its Petition, Petitioner Masdar Solar & Wind Cooperatief U.A. (“Petitioner” or “Masdar”) states as follows:

NATURE OF THE ACTION

1. Masdar brings this action to enforce an arbitral award (the “Award”) of €64.5 million, plus interest, issued on May 9, 2018 in the International Centre for the Settlement of Investment Disputes (“ICSID”) Case No. ARB/14/1 against Respondent, the Kingdom of Spain (“Spain”). A certified copy of the Award is attached as Exhibit 1 to the Declaration of John Roberti (“Roberti Decl.”), which is filed herewith.

2. The Award was rendered in Masdar’s favor following arbitration proceedings conducted in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). A copy of the ICSID Convention is attached as Exhibit 2 to the Roberti Declaration. The Award imposed pecuniary obligations on Spain in the amount of €64.5 million, together with interest from June 20, 2014 to May 9, 2018 at the rate of 0.906 percent per annum, compounded monthly, and interest from May 9, 2018 to the date of payment in full at the rate of 1.60 percent per annum, compounded monthly (with the total interest due amounting to over €2.5 million as of the date of the filing of this Petition).

3. To date, Spain has not paid any portion of the Award.

4. Pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650a, arbitral awards issued under the ICSID Convention are not subject to collateral attack and must be enforced in the same manner and given the same full faith and credit as if the award were a final judgment of a court in the United States.

5. Accordingly, Masdar requests that this Court: (i) enter an order enforcing the Award in the same manner as a final judgment issued by a court in the United States, and (ii) enter judgment in

Masdar's favor in the amount of €64.5 million, together with interest from June 20, 2014 to May 9, 2018 at the rate of 0.906 percent per annum, compounded monthly, and interest from May 9, 2018 to the date of payment in full at the rate of 1.60 percent per annum, compounded monthly.

THE PARTIES

6. Petitioner Masdar is a private limited liability company incorporated under the laws of the Netherlands.

7. Respondent, the Kingdom of Spain, is a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1602–11. Spain signed the ICSID Convention on March 21, 1994 and deposited its instrument of ratification on August 18, 1994. The ICSID Convention entered into force for Spain on September 17, 1994.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action under the FSIA because this action is a "nonjury civil action against a foreign state" on a claim "with respect to which the foreign state is not entitled to immunity" under the FSIA. 28 U.S.C. § 1330(a).

9. Pursuant to Section 1605(a)(1) of the FSIA, Spain is not entitled to immunity from this Court's jurisdiction in an action to enforce an award issued pursuant to the ICSID Convention because Spain has waived any such immunity by agreeing to the ICSID Convention. *See Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (holding that a foreign country waives sovereign immunity under the FSIA "by becoming a party to the ICSID Convention").

10. Further, pursuant to Section 1605(a)(6) of the FSIA, Spain is not immune from suit because this is an action to enforce an arbitral award governed by the ICSID Convention, which is a treaty in force in the United States for the recognition and enforcement of arbitral awards. *Id.* at 85 ("To our knowledge, every court to consider whether awards issued pursuant to the ICSID

Convention fall within the arbitral award exception [set forth in Section 1605(a)(6) of the FSIA] has concluded that they do.”).

11. In addition, this Court also has subject matter jurisdiction pursuant to 22 U.S.C. § 1650a(b), which provides that “[t]he district courts of the United States . . . shall have exclusive jurisdiction over actions and proceedings” to enforce awards entered under the ICSID Convention.

12. This Court has personal jurisdiction over Spain pursuant to the FSIA, 28 U.S.C. § 1330(b).

13. Venue is proper in this Court pursuant to the FSIA, 28 U.S.C. § 1391(f)(4).

14. The Federal Arbitration Act (the “FAA”), 9 U.S.C. §§ 1-307, does not apply to “enforcement of awards rendered pursuant to the [ICSID] convention.” 22 U.S.C. § 1650a(a). As such, the FAA’s jurisdictional requirements do not apply to this Action.

THE DISPUTE AND THE AWARD

15. The Award arises out of Masdar’s investments in concentrated solar power (“CSP”) projects in Spain.

16. Beginning in 2007, Spain enacted legislation to attract investments in CSP plants and other forms of renewable energy. Award ¶ 84 (Roberti Decl. Ex. 1). In reliance upon certain financial incentives and inducements offered by Spain pursuant to this system, Masdar made substantial investments in three CSP plants in Spain. *Id.* ¶¶ 5, 344, 355. Between 2008 and 2009, Masdar invested EUR 79.37 million in these projects, and obtained project financing, in reliance upon the regime. *Id.* ¶¶ 91–95, 361.

17. Following a change of government leadership, Spain adopted a series of laws between 2012 and 2014 revoking the economic incentives extended to CSP investors such as Masdar. *Id.* ¶¶ 100, 130–37. Spain’s policy reversal culminated in the implementation of an entirely new system in

2014 that dismantled the legislation upon which Petitioners had relied in making their investments. The rescission of these incentives caused substantial harm to the value of the investments that Masdar had made based on the system adopted by Spain. *Id.* ¶¶ 5, 379–389.

18. Masdar’s investments in solar power projects were governed by the Energy Charter Treaty (“ECT”), which is meant to establish a “legal framework in order to promote long-term co-operation in the energy field.” *Id.* ¶ 234. Masdar is incorporated under the laws of the Netherlands, which is a contracting party to both the ECT¹ and the ICSID Convention.²

19. Spain is also a contracting party to both the ECT³ and the ICSID Convention.⁴ Spain consented to submit disputes arising under the ECT to arbitration under the ICSID Convention. *See* ECT, art. 26(3)(a), (4)(a)(i) (Roberti Decl. Ex. 3).

20. On February 4, 2014, Masdar filed its request for arbitration (the “Request for Arbitration”), dated January 30, 2014, against Spain with ICSID. Award (Roberti Decl. Ex. 1) ¶ 6. In the Request for Arbitration, Masdar claimed that Spain’s displacement of the legislative framework upon which Masdar’s investments depended violated Spain’s obligation under Article 10(1) of the ECT to provide Masdar’s investments with fair and equitable treatment. *Id.* ¶ 138.

21. On February 11, 2014, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention. *Id.* ¶ 7. On July 18, 2014, a three-arbitrator ICSID arbitral tribunal (the “Tribunal”) was duly constituted. *Id.* ¶ 10.

¹ <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/>.

² <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

³ <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/>.

⁴ <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

22. A Hearing on Jurisdiction and Merits (the “Hearing”) was held before the Tribunal in Paris, France from September 19 to 23, 2016. *Id.* ¶ 62. Both Spain and Masdar were represented by counsel and fully participated in the hearing.

23. On February 7, 2018, the Tribunal declared the proceeding closed. *Id.* ¶ 80.

24. On May 16, 2018, the Tribunal issued the Award, ruling in favor of Masdar and finding Spain liable. In the Award, a comprehensive 219-page decision, the Tribunal found that Spain breached its obligations under Article 10(1) of the ECT by failing to accord fair and equitable treatment to Masdar’s investments in Spain. *Id.* ¶ 522. The Tribunal awarded Masdar damages in the amount of €64.5 million, together with interest from June 20, 2014 to May 9, 2018 at the rate of 0.906 percent per annum, compounded monthly, and interest from May 9, 2018 to the date of payment in full at the rate of 1.60 percent per annum, compounded monthly. *Id.* ¶ 697.

25. After the Award was issued, on June 19, 2018, Spain filed a Request for Supplementary Decision in respect of the Award with ICSID and requested a stay of enforcement of the Award. On August 24, 2018, the Tribunal issued a decision denying Spain’s application for a stay of enforcement of the Award. Decision on the Respondent’s Application to Stay Enforcement of the Award ¶ 29 (Roberti Decl. Ex. 4). Thus, in accordance with the ICSID Convention, the Award is immediately enforceable. ICSID Convention, art. 53 (Roberti Decl. Ex. 2) (providing that “[t]he award shall be binding on the parties,” and that in the absence of a stay, “[e]ach parties shall abide by and comply with the terms of the award”).

LEGAL BASIS FOR RELIEF

26. Article 54 of the ICSID Convention requires contracting states to “recognize an award rendered pursuant to the 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.” (Roberti Decl. Ex. 2).

The ICSID Convention also provides that 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.” *Id.*

27. The United States is a contracting state to the ICSID Convention⁵ and is therefore obligated to recognize and enforce the pecuniary obligations imposed by the Award as if it were a final judgment of a court of the United States. This obligation is set out in 22 U.S.C. § 1650a, which provides in relevant part:

(a) 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.

28. Arbitral awards issued against a foreign state pursuant to the ICSID Convention may be enforced by bringing a plenary action in federal court in compliance with the requirements for commencing a civil action under the Federal Rules of Civil Procedure, and with the personal jurisdiction, service, and venue requirements of the FSIA. *See Micula v. Gov’t of Romania*, 104 F. Supp. 3d 42, 49–50 (D.D.C. 2015); *see also Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 100, 117–18, 119–20 (2d Cir. 2017).

29. Awards issued pursuant to the ICSID Convention are not subject to collateral attack in enforcement proceedings under 22 U.S.C. § 1650a. “Member states’ courts are . . . not permitted to examine an ICSID award’s merits, its compliance with international law, or the ICSID tribunal’s jurisdiction to render the award; under the Convention’s terms, they may do no more than examine the judgment’s authenticity and enforce the obligations imposed by the award.” *Mobil Cerro*, 863 F.3d at

⁵ <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

102. The ICSID Convention therefore “reflects an expectation that the courts of a member nation will treat the award as final.” *Id.*; *see also id.* at 118 (noting that an “ICSID award-debtor . . . [is] not . . . permitted to make substantive challenges to the award”); ICSID Convention, arts. 53(1), 54(1) (Roberti Decl. Ex. 2).

30. Consistent with this mandate, 22 U.S.C. § 1650a(a) provides that the FAA “shall not apply to enforcement of awards rendered pursuant to the convention,” thereby “mak[ing] [the FAA’s defenses] unavailable to ICSID award-debtors in federal court proceedings.” *Mobil Cerro*, 863 F.3d at 120–21.

31. District courts thus enforce ICSID awards without allowing substantive challenges to enforcement of the awards. *See, e.g. Duke Energy Int’l Peru Investments No. 1, Ltd. v. Republic of Peru*, 904 F. Supp. 2d 131, 132–34 (D.D.C. 2012); *Republic of Panama v. Jurado*, No. 8:12-cv-1647 (M.D. Fla. June 13, 2013), ECF No. 18.

CAUSE OF ACTION AND REQUEST FOR RELIEF

32. Masdar restates and incorporates paragraphs 1 through 31 of the Petition as set forth fully herein.

33. Arbitral awards issued pursuant to the ICSID Convention are subject to mandatory enforcement in the courts of the United States, which must give those awards the same full faith and credit as a final judgment issued by a state court. 22 U.S.C. § 1650a(a).

34. The Award was rendered in accordance with the ICSID Convention against Spain and in Masdar’s favor.

35. Accordingly, Masdar is entitled to an order (a) enforcing the Award in the same manner as a final judgment issued by a court of one of the several states, and (b) entering judgment in Masdar’s favor in the amount specified in the Award.

36. Masdar requests that the Court enter the judgment in euros, which is the currency specified in the Award. Award ¶ 697 (Roberti Decl. Ex. 1). The Court has authority to enter judgment in euros without conversion to American dollars. *See Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 220 (D.C. Cir. 2018); *Cont'l Transfert Technique Ltd. v. Federal Gov't of Nigeria*, 932 F. Supp. 2d 153, 158 (D.D.C. 2013), *aff'd*, 603 F. App'x 1 (D.C. Cir. 2015); *Liberty Media Corp. v. Vivendi Universal, S.A.*, No. 03 Civ. 2175 (SAS), 2013 WL 105776, at *2-3 (S.D.N.Y. Jan. 9, 2013).

37. Masdar is thus entitled to an order enforcing such arbitral award as a judgment pursuant to Article 54 of the ICSID Convention, 22 U.S.C. § 1650a, and entering judgment thereon in the amount of amount of €64.5 million, together with interest from June 20, 2014 to May 9, 2018 at the rate of 0.906 percent per annum, compounded monthly, and interest from May 9, 2018 to the date of payment in full at the rate of 1.60 percent per annum, compounded monthly.

WHEREFORE, Masdar respectfully request that the Court enter judgment in favor of Petitioners and against Respondent and request that the Court issue an order:

- (a) Enforcing the Award in the same manner as a final judgment issued by a court of one of the several states; and
- (b) Entering judgment against Spain and in Masdar's favor in the amount of €64.5 million, together with interest from June 20, 2014 to May 9, 2018 at the rate of 0.906 percent per annum, compounded monthly, and interest from May 9, 2018 to the date of payment in full at the rate of 1.60 percent per annum, compounded monthly.

Dated: Washington, D.C.
September 28, 2018

Respectfully submitted,

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By: /s/ John Roberti

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