UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RWE RENEWABLES GMBH & RWE RENEWABLES IBERIA S.A.U.,	:	
Petitioners,	:	
v.	:	Civil Action No. 1:21-CV-03232-JMC
KINGDOM OF SPAIN,	:	
Respondent.	:	

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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Petitioners[1] RWE Renewables GmbH and RWE Renewables Iberia, S.A.U. ("Petitioners" or "RWE") by and through their undersigned counsel, respectfully submit this Memorandum in Support of Petitioners' Motion for Preliminary Injunction and Temporary Restraining Order ("Motion"). Petitioners bring this motion (1) to put a stop to Respondent the Kingdom of Spain's ("Spain") (together with Petitioners, the "Parties") wrongful pursuit of the court action it filed in Germany that seeks to enjoin Petitioners from pursuing their rights before this Court, and (2) to direct Spain to cease and desist from pursuing any other foreign litigation in any foreign court that interferes with, obstructs, or delays resolution of Petitioners' Petition to Enforce Arbitral Award pursuant to the ICSID Convention filed on December 9, 2021 ("Petition") (ECF No. 1).

I. PRELIMINARY STATEMENT

Petitioners commenced this proceeding on December 9, 2021 to enforce an arbitral award (the "Award") issued in their favor and 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"). The Award compensates Petitioners for Spain's unlawful acts. Spain has refused to pay the Award, leading Petitioners to bring this enforcement proceeding. An award issued by an ICSID tribunal, such as the Award here, is binding and is not subject to appeal or review by the courts of any state. The merits of the Petition have been briefed by the Parties in the context of Spain's Motion to Dismiss (ECF No. 16).

The Court has jurisdiction and must recognize and enforce the Award as required by federal statute and the United States' treaty obligations. However, on December 22, 2022, without prior notice, Spain filed an action before a German court, the Regional Court Essen (the "German

[1] Capitalized terms have the meanings assigned to them in Petitioners' Memorandum of Law in Opposition to the Kingdom of Spain's Motion to Dismiss or Stay the Action ("Opp."), dated October 28, 2022. ECF No. 21.

Action" and the "German Court," respectively) seeking, *inter alia*, an anti-suit injunction against the enforcement action before *this* Court. Spain's complaint in the German Action includes a summary of the proceedings in this action and seeks an order directing Petitioners to "refrain from seeking recognition or declaration of enforceability or equivalent action in relation to the arbitral award" including in "pending proceedings" or "enforce[ing] any recognition or declaration of enforceability already obtained or other equivalent measures against [Spain]" in "which [Spain] is directly or indirectly caused by court or official order to pay the arbitral award." *See* Declaration of Bradley S. Pensyl ("Pensyl Decl."), Ex. 1 ("German Summons"), at 2. If Petitioners do not "refrain" from or drop this enforcement action, Spain has asked that the German Court enter "a fine of up to EUR 250,000 for each case of infringement, alternatively imprisonment for up to . . . two years." *Id.* On March 3, 2023, Spain filed a request for interim relief in the German Court. Pensyl Decl., Ex. 2 ("German Procedural Order") at 1. The substance of that request is unknown to Petitioners, who are unable to view the filing. The fact that Spain has requested interim relief and the fact that as of the date of this filing, Petitioners are unaware of the content of the application, bolster the urgency of Petitioners' request.

Spain's German Action and its pattern of obstruction is a brazen attack on this Court's jurisdiction to recognize and enforce awards under the ICSID Convention's implementing legislation, 22 U.S.C. § 1650a(a), and is only the latest of Spain's cross-continental efforts to evade enforcement of the Award. *See* ECF No. 1 (Petition to Enforce Arbitral Award); ECF No. 21 (Opposition to Spain's Motion to Dismiss). Spain's wrongful efforts seeking to strip away Petitioners' rights and to interfere with ICSID award enforcement proceedings in a United States court require a narrow preliminary anti-suit injunction to prevent the irreparable harm that Spain seeks to cause. Specifically, the Court should do as other courts in this District have done under

substantially similar circumstances and enjoin Spain from seeking any relief in the German Action that would require Petitioners to cease or suspend the enforcement action before this Court. Given the immediate threat posed by Spain's actions, the Court should also, in the interim, enter a temporary restraining order that would preserve the status quo of this enforcement action. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–934 (D.C. Cir. 1984) (granting anti-suit preliminary injunction to restrain party from taking part in a foreign action designed to prevent district court from hearing claims); *see also Barrow v. Graham*, 124 F. Supp. 2d 714, 715–16 (D.D.C. 2000) (purpose of temporary restraining order is to preserve status quo pending the court's determination of the preliminary injunction request); *M.G.U. v. Nielsen*, 316 F. Supp. 3d 518, 520 (D.D.C. 2018) (same). Specifically, due to the irreparable harm that Petitioners would face if Spain's wrongful German Action succeeds, *see infra* 20–21, this Court should enter a temporary restraining order to prevent Spain from obtaining relief in a foreign court that would undermine this Court's jurisdiction before the Court has the opportunity to rule on Petitioners' request for an anti-suit injunction.

Spain's challenge to this Court's jurisdiction in the German Action is part of a sweeping, and wrongful, campaign in this District to strip Petitioners and other awards-creditors of their rights under fully-enforceable ICSID awards. For example, in nearly identical circumstances, Spain similarly sought to enjoin two of Spain's other award-creditors under the ICSID Convention from continuing to pursue their U.S. enforcement of their awards by instituting similar anti-suit proceedings in other nations. *See NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-CV-01618 (TSC), 2023 WL 2016932, at *1 (D.D.C. Feb. 15, 2023) (granting preliminary injunction and temporary restraining order against Spain to enjoin collateral proceeding in the Netherlands); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-CV-01871 (TSC), 2023 WL

2016933, at *1 (D.D.C. Feb. 15, 2023) (granting preliminary injunction against Spain to enjoin collateral proceeding in Luxembourg). Recognizing that Spain's arguments against the Court's jurisdiction were baseless and even "verge[d] on disingenuous," *NextEra*, 2023 WL 2016932, at *14, those Courts ordered injunctive relief to prevent Spain's wrongful efforts to evade its obligations under the ICSID Convention and the ECT.

Specifically, in a carefully-reasoned opinion, Judge Chutkan found that the materially identical case in *NextEra* "present[ed] sufficiently unusual circumstances to warrant a preliminary, anti-suit injunction against a foreign sovereign" because "the express and primary purpose of Spain's suit in the Netherlands is to *terminate* [this] action . . . ." *NextEra*, 2023 WL 2016932, at *9 (quoting *Laker Airways*, 731 F.2d at 930 (emphasis in original) (quotation marks omitted)). Those "unusual circumstances" are the same circumstances presented here, and compel the exact same result.

Indeed, the very fact that Spain sought relief from the German Court reveals Spain's expectation that both this Court and the D.C. Circuit will reject its arguments. Spain's collateral proceedings in German and other European courts places Petitioners' enforcement action before this Court in grave jeopardy. The ICSID Tribunal has already decided that the Award is valid and final, ECF No. 1-5 ("Decision"), and thus there is no impediment to enforcement of the ICSID Award here. The Award must be enforced pursuant to the federal implementing statute for the ICSID Convention and the United States' treaty obligations. Injunctive relief is therefore needed to preserve this Court's jurisdiction and to prevent grave and irreparable harm to Petitioners' ability to enforce the Award.

II. FACTUAL BACKGROUND

Petitioners were forced to bring this motion after: (1) Spain's December 22, 2022 initiation of proceedings in the German Court, and (2) Spain's subsequent request for interim relief to that

Court on March 3, 2023. *See* German Summons; *see also* German Procedural Order. The principal relief sought by Spain in the German Action is an order that Petitioners cease *all* enforcement of the ICSID Arbitral Award it obtained against Spain in December 2020, including the enforcement proceedings in this Court. German Summons at 2–3, 13 (emphasis added). This Court's present enforcement proceedings, which Spain discusses in the German Summons, *id.* at 13, 19, 38, are squarely within the ambit of the anti-suit order that Spain seeks in the German Action. The procedural history of this case leading up to the German Action underscores the egregiousness of Spain's litigation tactics.

A. Petitioners' Investment and the ICSID Convention

The underlying dispute in this action arose out of large investments that Petitioners made in sixteen wind farm projects and four hydroelectric plants in Spain between 2001 and 2011. ECF No. 1 ("Pet.") ¶ 18; ECF No. 1-5 ("Decision") ¶¶ 190−94, 205−10, 227, 468. Spain had sought to attract this type of foreign investment through a series of legislative initiatives designed to encourage investment in its renewable energy sector. Pet. ¶ 18; Decision ¶¶ 129−58. In reliance on that pro-investment regulatory regime, and corresponding assurances by Spanish officials, Petitioners invested over €513 million in the project. Pet. ¶ 18; Decision ¶¶ 190−94, 205−10, 227, 468.

Petitioners' investment was governed by the Energy Charter Treaty ("ECT"), Dec. 17, 1994, 2080 U.N.T.S. 95 (ECF No. 1-4), a multinational treaty ratified by both Spain and Germany. *See* ECF No. 21 ("Opp.") at 4. The ECT provides that disputes can, at the investor's election, be resolved through arbitration pursuant to the ICSID Convention. *See* ECT art. 26(3), 26(4). By ratifying the ECT, Spain "unconditional[ly] consent[ed]" to the jurisdiction of ICSID

(among other enumerated arbitral regimes) to adjudicate any disputes that arise under the ECT, such as the dispute here. *See* ECT art. 26(3)(a), 26(4)(a), 26(8).

The ICSID Convention is a multilateral treaty to which Spain, Germany, and the United States are parties. Opp. at 5; ECF No.1-3 (copy of ICSID Convention). It provides that any dispute arising from an investment may be arbitrated before an ICSID tribunal at the consent of the host state and the investor. *See* ICSID Convention art. 25. The ICSID regime is a robust arbitral system that is expressly designed to be independent of and insulated from interference by national courts. An award issued by an ICSID arbitral tribunal is therefore "binding" and not subject to appeal to or review by the courts of any state. *Id.*, art. 53(1). Rather, each state party to the ICSID Convention is bound to recognize and enforce each ICSID award "as if it were a final judgment of a court in that State." *Id.*, art. 54(1).

In the United States, Congress has implemented the ICSID Convention in the Convention on the Settlement of Investment Disputes Act of 1966, which provides as follows:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] 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 . . . shall not apply to enforcement of awards rendered pursuant to the convention.

22 U.S.C. § 1650a(a) (emphasis added). U.S. federal courts recognize that this statute, with its mandatory language, confers on federal courts a duty to recognize and enforce ICSID awards without engaging in an independent substantive review of their merits. *See TECO Guatemala Holdings, LLC v. Rep. 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 Rep. of Venezuela*, Civil Action 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."); *Mobil Cerro Negro, Ltd. v. Bolivarian Rep. of Venezuela*, 863 F.3d 96, 118 (2d Cir. 2017) ("The ICSID award-debtor . . . would not be permitted to make substantive challenges to the award."). U.S. treaty obligations and U.S. statutory law thus require the enforcement of final ICSID awards.

B. The ICSID Arbitration

After Petitioners made their investments, Spain enacted a series of laws from 2012 to 2014 that fundamentally and radically changed the investment regime on which Petitioners had relied, inflicting substantial harm on Petitioners. Opp. at 4; Pet. ¶ 20; Decision ¶¶ 211−27, 611−12, 617. Petitioners initiated an ICSID arbitration against Spain on December 19, 2014 to rectify that harm, alleging that Spain's actions harmed its investments and thus violated the ECT. Opp. at 4; Pet. ¶ 23; Decision ¶ 5. An ICSID tribunal (the "Tribunal") was constituted to hear those claims on November 4, 2015, with proceedings beginning as of that date. Opp. at 7; Pet. ¶ 24; Decision ¶ 10.

Over the course of the next *four* years, the Tribunal received substantial briefing, evidentiary submissions both on the Tribunal's jurisdiction and on the merits, with Petitioners submitting four witness statements and two expert reports, and Spain submitting two witness statements and two expert reports, and oral argument from both Petitioners and Spain. Opp. at 8–9; Decision ¶¶ 16, 23, 38, 44, 74–75. In total, the Parties together submitted over one thousand exhibits and legal authorities. *See id.* Among other arguments, Spain contended that the Tribunal lacked jurisdiction to resolve Petitioners' claims because European Union ("EU") law precludes the arbitration of ECT

claims brought by investors of European Union member states against other member states (its "intra-EU objection"). Opp. at 8–9.

On December 30, 2019, the Tribunal ruled in Petitioners' favor, issuing a Decision on Jurisdiction, Liability, and Certain Issues of Quantum (the "Decision"), rejecting the same jurisdictional arguments that Spain has reargued in both this enforcement action and in the German action. Opp. at 9; German Summons at 35–36 (intra-EU objection), 36–43 (state aid). That Decision "constitutes an integral part" of the Tribunal's Award, which was issued on December 18, 2020. *Id*. The Tribunal awarded Petitioners damages in the amount of €28,080,000 together with (1) interest on the award from June 30, 2014 to date of payment at the rate of 2.07 percent per annum, compounded monthly; (2) 50 percent of the Petitioners' legal fees and disbursements incurred in connection with the proceedings in the amount of €2,373,909.24; and (3) 100 percent of the total arbitrator fees and administrative expenses incurred in connection with the proceedings, totaling $623,886.96. Opp. at 10; Pet. ¶ 29.

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 on its merits 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 the merits). On April 17, 2021, in accordance with Article 52(1)(b) of the ICSID Convention, Spain applied to ICSID to annul the Award. ECF No. 1-6. Under Article 52(5) of the ICSID Convention, Spain's filing triggered an automatic preliminary stay of enforcement until the ICSID *ad hoc* Committee (the "Annulment Committee") ruled on Spain's request for a stay pending the outcome of the annulment proceedings. On November 22, 2021, the Annulment Committee issued an order lifting that stay of enforcement, conditioned on the provision of written

undertakings by Petitioners. Pet. ¶ 30. The Petitioners issued the written undertakings to the satisfaction of the Annulment Committee, which in a Decision dated February 28, 2022, ordered the lifting of the stay of enforcement to be effective. *Id.* The Annulment Committee held a hearing on Spain's annulment application on July 5-6, 2022 and the Parties are now awaiting the Annulment Committee's decision.

D. The Petition in This Court

On December 9, 2021, after securing its arbitral Award, Petitioners filed this Petition seeking to recognize and enforce the Award pursuant to 22 U.S.C. § 1650a(a) (providing that an ICSID 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"). Spain attempted to use the ensuing proceedings in this Court to relitigate the same arguments that were previously rejected by the ICSID tribunal, moving to dismiss the Petition based on the same EU law arguments that the Tribunal had already squarely rejected. *See* MTD, 16–21. On September 16, 2022, Spain moved to dismiss and/or stay the Petition arguing that, among other meritless theories, this Court lacks subject-matter jurisdiction over this action because Spain is immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). *See id.* Petitioners opposed that motion on October 28, 2022, demonstrating that each of those arguments are baseless. *See* Opp. Spain's motion to dismiss was fully briefed as of November 11, 2022, and remains pending. *See* ECF No. 22.

E. The German Action

On December 22, 2022, without prior notice, Spain filed a summons and complaint initiating proceedings in the Regional Court Essen. The German Summons alleged that it is "an abuse of rights" and "a violation of mandatory European law" that Petitioners, as a German company, are attempting to "give effect to the Arbitral Award through payment or enforcement."

German Summons at 20, 39. Spain claimed that its arguments apply "regardless of the place of payment, i.e. whether the payment is made or enforced in Europe or outside Europe." *Id*. at 39. Spain asserts several purported legal bases for these allegations:

- Intra-EU investment arbitration is incompatible with EU law, and accordingly, "this Arbitral Award may not be recognized and enforced";
- Any "[e]nforcement of the Arbitral Award would constitute further implementation of State aid, which has not yet been declared compatible" with EU law; and
- Petitioners' efforts to enforce the arbitral award constitute an "abuse of right."

German Summons at 35–36 (intra-EU objection), 36–43 (state aid), 43–44 (abuse of right). None of these claims is permissible under the ICSID Convention or U.S. federal law.

In yet another effort to force Petitioners to abandon enforcement of their valid Award before this Court, Spain requests that the German Court order Petitioners to "refrain from seeking recognition or declaration of enforceability or equivalent action in relation to [the Award]," to continue or "pursue" any "pending proceedings relating thereto and/or enforcing or having enforced any recognition or declaration of enforceability already obtained or other equivalent measures against [Spain]" or be subject to a penalty of "up to EUR 250,000 for each case of infringement, alternatively imprisonment, or imprisonment for up … a total of two years." German Summons at 2.

In the alternative, Spain asks for an injunction against enforcement of the Award pending the determination by the European Commission whether enforcement of the Award would constitute state aid, *id*. at 3, or, alternatively an injunction limited to the territory of the European Union and a declaration that enforcement attempts outside the European Union are unlawful, *id*. at 3, 45. Spain's arguments in support of its requested injunction are a repetition of the arguments

it raised and lost in the underlying arbitration, and that it has raised yet again before this Court. *See* German Summons at 36–43 (concerning EU law on state aid); 35–36 (concerning the intra-EU objection).

III. ARGUMENT

Petitioners ask that this Court put an end to Spain's attempts to circumvent this Court's jurisdiction. This Court plainly has jurisdiction over this enforcement action. As other courts in this District have also found in nearly identical circumstances, injunctive relief is warranted here—whether considered through the lens of an anti-suit injunction or through the traditional test for preliminary relief—to protect the Court's jurisdiction and to preserve Petitioners' right to proceed before this Court.

A. An Anti-Suit Injunction Is Necessary to Protect Petitioners' Award and to Uphold the Specific Congressional Mandate That U.S. Courts Recognize and Enforce ICSID Awards

The D.C. Circuit has recognized that "American courts have power to control the conduct of persons subject to their 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); *see also NextEra*, 2023 WL 2016932, at *8 (citing *Laker Airways*). Applying *Laker Airways*, Judge Chutkan halted Spain's effort to collaterally attack other petitioners' awards. *See NextEra*, 2023 WL 2016932, at *15; *9REN*, 2023 WL 2016933, at *13. This Court should similarly enjoin Spain from seeking an interlocutory decree or any other relief in the German Action that might require Petitioners to suspend, hold in abeyance, or withdraw proceedings before this Court, or pursue any other foreign litigation with that same purpose.

As the Circuit Court held in *Laker Airways*, an injunction forbidding a party from bringing suit in foreign courts is appropriate 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. Here, an injunction is warranted on both counts. It is well established that federal courts have the power to enjoin foreign proceedings that are "specifically intended to interfere with and terminate" proceedings in the United States. *Id.* at 938. The German Action expressly seeks to strip this Court of its jurisdiction to recognize and enforce the Award, frustrating the intent and policies of the ICSID Convention, to which the United States is a party.[2]

1. *The German Action Improperly Threatens the Jurisdiction of this Court to Recognize and Enforce the Award Pursuant to U.S. Federal Statute*

It cannot be seriously questioned that the Parties to this case consented to ICSID jurisdiction and procedure. *See* ECT art. 26(3)(a), 26(4)(a), 26(8). Nor is there any question that the ICSID Tribunal conducted proceedings and issued the Award. *See* ECF No. 1-2. Petitioners now seek confirmation and recognition of the Award pursuant to the statutory authority that guarantees such recognition in the U.S. federal courts. 22 U.S.C. § 1650a(a) (providing that ICSID awards "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 ICSID Convention does not permit a foreign national court, such as the German court, to interfere with this system. Pursuant to the ICSID Convention, to which Spain, Germany, and

[2] Some 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.*, 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"). Those elements are readily met here. The parties to the German Action are identical to the parties in this case. And both this and the German Action relate to exactly 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 a proceeding before the U.S. court was to confirm an arbitral award and a foreign proceeding was 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).

the United States are all parties, 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). Under Article 54, "each Contracting State"—including Spain, Germany, and the United States—"*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).

By joining the ICSID Convention, Spain (and Germany) accepted this exclusive post-award remedy under the Convention and waived recourse to collateral attacks in national courts. Spain thus has exhausted its avenues for relief, and the only remaining step that this Court, or any national court, has the power to take is to recognize the Award and enter a final judgment enforcing it. *See* 22 U.S.C. § 1650a(a); ICSID Convention art. 54(1).

Instead of respecting the treaty and the finality of the Award, however, Spain commenced the German Action. In derogation of the ICSID Convention, Articles 26, 53, and 54, the German Action explicitly seeks to suspend this Court's ability to recognize and enforce the Award as required by federal statute. *See* German Summons at 13, 19, 38. Spain therefore attempts to circumvent not only the Court's own adjudicative authority but also that of ICSID and the arbitral awards that Congress has required this Court to enforce.

An injunction here is necessary to preserve the Court's ability to exercise its jurisdiction and to recognize and enforce the Award as required by statute and treaty. A preliminary anti-suit injunction is warranted where it would "protect the jurisdiction of the enjoining court" from nullification in a competing ruling. *Laker Airways*, 731 F.2d at 927. Indeed, this is the most

common justification for such relief. *See 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.").

The circumstances that led the D.C. Circuit to affirm an anti-suit injunction in *Laker Airways* are also present here. There, the Circuit affirmed an order prohibiting foreign defendants in an antitrust suit from instituting preemptive suits in the United Kingdom that sought to terminate the U.S. action. In reaching this ruling, the D.C. Circuit emphasized the obstructive nature of the relief sought by the defendants, the "sole purpose of [which was] to *terminate* [the U.S.] action." *Laker Airways*, 731 F.2d at 930.

Here, Spain's German suit, by its express terms, threatens to paralyze the Court's proceedings here in precisely that way. The German Summons requests that the German Court order Petitioners to "refrain from seeking recognition or declaration of enforceability or equivalent action in relation to the arbitral award ICSID Case No. ARB/14/34 Award of 18 December 2020." German Summons at 2. The German Summons specifically identifies this very action initiated December 9, 2021 in the U.S. District Court for the District of Columbia as a proceeding that Spain seeks to wipe out. *Id*. at 13; *see also id.* at 19, 38. If the German court grants Spain that relief, its necessary effect would be to prevent this Court from recognizing and enforcing the Award as mandated by United States law.

As the Circuit Court has held, where a litigant "threatens to paralyze the jurisdiction" of the Court via a collateral attack in a foreign forum, the Court has a "duty to protect [its] legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants." *Laker Airways*, 731 F.2d at 927. Just so here.

Like in *Laker Airways*, the injunction Petitioners requests here is "purely defensive," as it is a necessary measure responding to Spain's request for an *offensive* injunction in a foreign court.

731 F.2d at 938; *NextEra*, 2023 WL 2016932, at *10. A defensive injunction entered by this Court is needed to preserve the statutory authority of the Court to enforce the Award. *See NextEra*, 2023 WL 2016932, at *10. A defensive injunction would reach no further than to prevent another proceeding from obstructing that 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").

As other courts in this District have recognized, Spain's status as a foreign sovereign does not change that analysis. *See NextEra*, 2023 WL 2016932, at *12 (rejecting Spain's "foreign sovereign compulsion" and act of state arguments). The Parties litigated the underlying arbitration under the exclusive jurisdiction and processes of ICSID, a neutral body to which Spain voluntarily submitted. Any comity considerations are inherently diminished where, as here, the foreign suit initiated by Spain was filed in the court of another country as a transparent attempt to attack the Award outside of the bounds of the ICSID Convention. *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"); *NextEra*, 2023 WL 2016932, at *10, 12–13 (rejecting Spain's comity arguments).

An anti-suit injunction prohibiting Spain from seeking to enjoin this action, and from pursuing any similar collateral challenges abroad to the Court's jurisdiction, is both appropriate and necessary to safeguard the Court's ability to exercise its authority under U.S. law. *See BAE Systems Tech. Sol. & Servs., Inc. v. Republic of Korea's Defense 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). No principle of comity

or law requires the Court "to acquiesce in pre- or postjudgment conduct by litigants which frustrates the significant policies of the domestic forum." *Laker Airways*, 731 F.2d at 915. Indeed, "deference to the foreign proceeding may be denied because of the litigant's unconscionable evasion of the domestic laws." *Laker Airways* at 927, n.71.

2. *This Court Should Enjoin Spain's Attempt to Evade Important Public Policies of the United States*

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. 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 on the face of the governing statute itself, where Congress confirmed that an ICSID award is considered "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. U.S. law requires that such an award "shall be enforced" by the Court, without further argument or exercise of discretion. 22 U.S.C. § 1650a(a); *see TECO Guatemala*, 414 F. Supp. 3d at 101; *Tidewater Invt.*, 2018 WL 6605633, at *6; *Mobil Cerro Negro*, 863 F.3d at 118. Congress's clear policy upholds the ICSID Convention's purpose "that the courts of a member nation will treat the award as final." *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 276 (D.D.C. 2019) (quoting *Mobil Cerro Negro*, 863 F.3d at 121).

Spain's collateral attack on this Court's authority flouts U.S. public policy of ensuring that ICSID awards are final. The policy reflected in the governing U.S. statute requires the Court to enter the Award as a judgment. *See* 22 U.S.C. § 1650a. Spain's attempt in another jurisdiction to thwart the enforcement of the Award under United States law 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 those employed by Spain here constitute "evasion" of the law of the United States that must be halted by an anti-suit injunction. *See Laker Airways*, 731 F.2d at 927–28, 931.

The German Action is part of Spain's far-reaching campaign to use any means available to prevent the courts in this District from exercising their jurisdiction to enforce ICSID awards rendered against Spain. Spain's German action is just one of many similar anti-suit actions brought overseas to try to circumvent enforcement. *See NextEra*, 2023 WL 2016932, at *15; *9REN*, 2023 WL 2016933, at *13; *see also Blasket Renewable Investments LLC v. Kingdom of Spain*, Case No. 1:21-cv-03249-RJL (formerly *AES Solar Energy Cooperatief U.A. v. Kingdom of Spain*); *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, Case No. 1:20-cv-01708-EGS-MAU; *see also Infrastructure Serv. German S.A.R.L. v. Kingdom of Spain*, Case 1:18-cv-01753-EGS-MAU. If Spain is able to deprive Petitioners of their right to enforce their Award by obtaining an anti-suit injunction against Petitioners in the German Court, Spain will likely replicate this strategy in all pending enforcement proceedings it faces in this District.[3]

[3] In addition to this proceeding, *NextEra*, and *9REN*, *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); Complaint, *Cube Infrastructure Fund SICAV v. Spain*, 1:20-cv-01708 (Sullivan, J.) (D.D.C.) (same; award issued in 2019); 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, *Infrastructure Servs. Luxembourg S.A.R.L. v. Spain,* 1:18-cv-01753 (Sullivan, J.) (D.D.C.) (same; award issued in 2018); 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, *Watkins Holdings S.A.R.L. et al. v. Spain*, 1:20-cv-01081-BAH (Howell, J.) (D.D.C.) (same; award issued in 2020); *see also* Petition to Confirm Arbitration

B. The Traditional Requirements for Injunctive Relief Are Also Met

The factors generally applicable to requests for preliminary injunctions further support an anti-suit injunction in this action. To obtain a preliminary injunction, a movant must show (1) a 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. *Mills v. D.C.*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). Courts in the D.C. Circuit "have typically applied a sliding scale approach in analyzing these four factors" in which the movant bears the burden to show that "all four factors, taken together, weigh in favor of the injunction." *NextEra*, 2023WL 2016932, at *3 (internal quotations and citations omitted). 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 Protection Ass'n v. Lyng*, 690 F. Supp. 40, 42 (D.D.C. 1988) (citing 11 Wright & A. Miller, *Fed. Prac. & Proc.* 2947 (Supp. 1986)).

Here, Petitioners meet each of the four requirements. The express purpose of Spain's German Action is to render this Court's proceedings futile, thus making an anti-suit injunction necessary to allow this Court to recognize and enforce Petitioners' Award in accordance with the directives of the ICSID implementing statute.

Award, *Swiss Renewable Power Partners S.A.R.L. v. Kingdom of Spain*, 1:23-cv-00512 (Leon, J.), (D.D.C.) (petitioning to confirm an ECT award issued by the Permanent Court of Arbitration in 2020 under the auspices of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"); *Blasket Renewable Investments LLC v. Kingdom of Spain*, Case No. 1:21-cv-03249-RJL (formerly *AES Solar Energy Cooperatief U.A. v. Kingdom of Spain*) (same).

1. *Petitioners' Request for An Anti-Suit Injunction Meets The Applicable Likelihood of Success Standard*

Petitioners' application meets the equivalent standard to a showing of a "likelihood of success." While the traditional test for a preliminary injunction requires that the movant show that they are likely to succeed on the merits of its underlying claims, the test for an *anti-suit* injunction asks whether the movant 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 v. Butowsky*, No. 18-681 (RJL), 2020 WL 7016436, at *1 (D.D.C. Mar. 31, 2020) (explaining that "factors relevant to the likelihood-of-success prong" as applied to anti-suit injunction related to whether injunctive relief is appropriate as opposed to underlying merits of the claim); *Am. Horse Protection Ass'n*, 690 F. Supp. at 42–43. Thus, Petitioners "need not meet our usual test of a likelihood of success on the merits of the underlying claim to obtain an anti-suit injunction against [Respondent] to halt the [foreign] proceedings." *E. & J. Gallo Winery*, 446 F.3d at 990–91. Instead, the controlling question is whether an anti-suit injunction is suitable—a question that is answered in the affirmative where, as here, the parties or issues in the foreign action are the same, *see id.* at 991, where the foreign litigation would "frustrate a policy of the forum issuing the injunction," *id.* (quotations omitted), or where "[w]ithout an anti-suit injunction" an agreement between the parties would "effectively become[] a nullity." *Id.* at 992 (holding an anti-suit injunction was necessary to preserve a forum selection clause).

As Petitioners have explained above, the defensive injunction that Petitioners seek here is wholly appropriate to prevent Spain from stripping this Court of its proper jurisdiction and statutorily-mandated authority to recognize and enforce the Award. Moreover, that Judge Chutkan

issued an anti-suit injunction under materially identical circumstances counsels that Petitioners' application is likely to succeed. *NextEra*, 2023 WL 2016932, at *15.[4]

2. *The German Action Threatens Irreparable Harm to Petitioners and This Court*

The Court next considers whether the movant will suffer irreparable harm absent a preliminary anti-suit injunction. *Mills*, 571 F.3d at 1308. Here, the harm that Petitioners face is both imminent and irreparable. Although Petitioners prevailed under the ICSID processes and procedures that the Parties agreed would govern this dispute, Petitioners cannot enforce the Award in the United States absent a judgment from a federal court. Petitioners thus seek such a judgment recognizing the Award from this Court, on the basis of explicit Congressional authority that directs federal courts to afford final ICSID awards full faith and credit. 22 U.S.C. § 1650a(a). Spain's claims in the German Action threaten to enjoin Petitioners from attempting to enforce the Award for an indefinite period of time. *See* German Summons at 2. Such a result would wrongfully deprive Petitioners of their ability to recover under an Award that must be recognized and enforced in this Court under federal law.

Courts have recognized the irreparable harm associated with efforts to obstruct the enforcement of arbitral awards, including by way of purported collateral challenges such as that employed by Spain. *See, e.g., Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-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

[4] Even if traditional preliminary injunction standards applied here, Petitioners readily meet that requirement. As Petitioners have shown, ECF No. 21, Spain is subject to suit under both the arbitration and waiver exceptions to the FSIA. Opp. at 11, 16–21. As was the case in *NextEra*, "neither party raises any reason to believe that the Award is not authentic, or that the court's enforcement order will not be able to successfully track the Award's terms." *NextEra*, 2023 2016932, at *11. As Judge Chutkan put it: "[t]hat ends the inquiry; the Award must be enforced." *Id.*

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 challenges that Spain's claims in the German Action pose to Petitioners' ability to recover under the Award and to this Court's established jurisdiction threaten 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). Spain, through the German action, seeks to thwart all enforcement of the Award worldwide. If Spain succeeds, Petitioners' valid and final Award would be entirely worthless. Given the imminence and magnitude of this risk, and the "[l]ess than absolute certainty concerning the [German] court's intentions" regarding Spain's requested relief, the irreparable harm standard is satisfied here. *Laker Airways*, 559 F. Supp. at 1137 n.58.

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

The preliminary anti-suit injunction that Petitioners seek presents no harm to other parties' interests. *Mills*, 571 F.3d at 1308. The balance of such equities here tips heavily in Petitioners' favor. Through its requested injunction in the German court, Spain seeks to avoid paying a fully-enforceable ICSID award by extinguishing Petitioners' right to recover under the Award, and by wiping out this Court's jurisdiction to enforce that right. Petitioners do not request that the German Action be terminated in its entirety, but instead seek "an order that . . . will preserve the rights of the parties to proceed before this Court as well." *Teck Metals*, 2009 WL 4716037, at *4.

It is not a cognizable hardship that Spain might 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 Petitioners and to this Court's jurisdiction, the benefits of a preliminary anti-suit injunction far outweigh the inconveniences it might cause to Spain's litigation posture. *See Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 20–21 (1st Cir. 2004) (noting that absent defendant's "foreign petition calculated to generate interference with an ongoing American case, the district court would have had no need to issue a defensive injunction that sought only to preserve the court's ability to adjudicate the claims before it according to the law of the United States"). Nor would the requested relief harm Germany or its courts. As a party to the ICSID Convention, Germany is also bound to recognize and enforce valid ICSID awards, such as this one, in accordance with the ICSID Convention.

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

Finally, Petitioners' anti-suit injunction would serve the public interest because it would "encourag[e] arbitration and the enforcement of international arbitration law as an efficient means of settling disputes." *Jolen*, 2019 WL 1559173, at *5; *see also KBC*, 500 F.3d at 125. Spain's conduct threatens to undermine that national interest. The injunction would also reinforce the federal courts' duty 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* Section III.A.2 *supra*.

C. A Temporary Restraining Order is Necessary to Maintain the Status Quo Pending the Court's Ruling on the Instant Motion

For all of the reasons above, a temporary restraining order is also necessary here to prevent the harm threatened by Spain's wrongful litigation tactics in foreign courts. A temporary restraining order "preserve[s] the status quo for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction." *Barrow v. Graham*, 124 F. Supp. 2d 714, 715–16 (D.D.C. 2000). The standards applicable to a temporary restraining order are analogous to those applicable to preliminary injunctions. *Id.* at 716.

The reasons and analysis warranting a preliminary injunction here directly support the need for this Court to also issue a temporary restraining order, because Petitioners' need for a temporary restraining order is urgent and immediate. *See supra* Section III.A-B. Spain filed another application with the German Court on March 3, 2023, requesting interim relief without prior notice, and despite the pendency of the proceedings before this Court for over two years. Then, on March 6, 2023, the German Court decided that Spain's request should be heard by a "detailed" chamber of judges, rather than by a single judge. *See* German Procedural Order at 1. That same day, the German Court requested the file to be "resubmit[ted] immediately." *Id.* Then, on March 15, 2023, Spain's Counsel in the German Action sent a letter to counsel for Petitioners, asking Petitioners to warrant that they will not seek injunctive relief to protect their U.S. claim and right to enforcement in the U.S. *See* Pensyl Decl. Ex. 3. Based on these facts, Petitioners have reached the understanding that Spain has requested emergency relief from the German Court. *See* Pensyl Decl. ¶ 6; *see also id.*, German Procedural Order. Without immediate relief from this Court that directs the Parties to preserve the status quo and to take no further steps to suspend this action, Petitioner's ability to enforce their valid Award and this Court's jurisdiction are in jeopardy. A temporary restraining order is needed to ensure that Spain's proceedings before the German Court

do not interfere with this Court's ability to exercise its jurisdiction pending resolution of this Motion and the Petition. Petitioners therefore respectfully request that this Court issue a temporary restraining order to preserve the status quo until such time as the Court has an opportunity to rule on Petitioners' motion for an anti-suit injunction.

CONCLUSION

Petitioners respectfully request that the Court grant a preliminary anti-suit injunction (1) enjoining Spain from (a) seeking any relief in the German Action or in other German proceedings requiring Petitioners to cease, suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of Petitioners' Petition to Enforce Arbitral Award, and (b) pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of Petitioners' Petition to Enforce Arbitral Award; and (2) directing Spain to withdraw its requests for relief in the German Action requiring Petitioners to "refrain from seeking recognition or declaration of enforceability" or continuing to "pursue" such recognition and enforcement of the Award insofar as it relates to the proceedings before this Court. *See* German Summons at 2.

Petitioners also respectfully request that this Court issue a temporary restraining order to preserve the status quo until the Court has an opportunity to rule on Petitioners' motion seeking an anti-suit injunction.

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

Dated: March 24, 2023

Respectfully submitted,

/s/ *Bradley S. Pensyl*

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