

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AES Solar Energy Coöperatief U.A.,

Prins Bernhard Plein 200, 1097 JB
Amsterdam, The Netherlands

Ampere Equity Fund B.V.,

Schiphol Boulevard 269, 1118 BH
Schiphol, The Netherlands

Petitioners,

v.

The Kingdom of Spain,

Abogacia General del Estado
Calle Ayala, 5
28001 - Madrid
Spain

Respondent.

Civil Action No. _____

Petition to Enforce Arbitral Award

Petitioners AES Solar Energy Coöperatief U.A. (“AES”) and Ampere Equity Fund B.V. (“Ampere”) (collectively, “Petitioners”) bring this action to confirm their EUR 26.5 million plus interest share of an arbitral award (the “Award”) issued on February 28, 2020, in Permanent Court of Arbitration (“PCA”) Case No. 2012-14 against Respondent, the Kingdom of Spain (“Spain”), following arbitration proceedings seated in Geneva, Switzerland and conducted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”). Pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (the “New York Convention”) (Ex. 1 hereto), and its implementing legislation, the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-

208, Petitioners request that this Court confirm the Award and enter judgment in Petitioners' favor in the amount of their share of the Award.

Parties

1. Petitioner AES is a cooperative with excluded liability incorporated under the law of The Netherlands.

2. Petitioner Ampere is a private company with limited liability incorporated under the law of The Netherlands.

3. Respondent Spain is a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1602-1611.

Jurisdiction and Venue

4. This Court has subject-matter jurisdiction over this action pursuant to the FSIA, 28 U.S.C. § 1330(a), because this is a "nonjury civil action against a foreign state" on a claim "with respect to which the foreign state is not entitled to immunity" from jurisdiction under the FSIA, *id.* § 1605(a)(1), (6).

5. Pursuant to Section 1605(a)(1) of the FSIA, 28 U.S.C. §1605(a)(1), Spain is not entitled to immunity from jurisdiction because this is a proceeding to confirm an arbitral award pursuant to the New York Convention, and Spain implicitly waived its immunity from jurisdiction over such proceedings by becoming a party to that Convention. *See Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999); *Tatneft v. Ukraine*, 771 F. App'x 9, 9-10 (D.C. Cir. 2019) (per curiam).¹

¹ *See also Contracting States, New York Arbitration Convention*, <http://www.newyorkconvention.org/countries> (listing Spain as a party to the New York Convention).

6. In addition, pursuant to Section 1605(a)(6) of the FSIA, 28 U.S.C. § 1605(a)(6), Spain is not entitled to immunity from jurisdiction over this action because this is an action to confirm an arbitral award governed by the New York Convention, which is a treaty in force in the United States for the recognition and enforcement of arbitral awards.

7. This Court also has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a “proceeding falling under the [New York] Convention,” and is therefore “deemed” by the FAA “to arise under the laws and treaties of the United States,” 9 U.S.C. § 203.

8. This Court has personal jurisdiction over Spain pursuant to the FSIA, 28 U.S.C. § 1330(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(f)(4).

The Underlying Dispute

9. In 2007, Spain adopted legislation with the goal of attracting investment in renewable energy production, including photovoltaic installations, within its territory. Award ¶¶ 181-94 (Ex. A to Decl. of Matthew S. Rozen (“Rozen Decl.”) (Ex. 2 hereto)). In reliance on the financial incentives and inducements provided by these legislative measures, Petitioners invested in photovoltaic installations in Spain’s territory. *Id.* ¶ 195. Spain subsequently adopted a series of laws between 2010 and 2014 retrenching on, and eventually revoking, the economic incentives on which Petitioners had relied in investing in photovoltaic installations. *Id.* ¶¶ 198-212. The rescission of these incentives substantially reduced Petitioners’ return on their investments. *Id.* ¶¶ 845-48; *see also id.* ¶ 648.

10. Petitioners’ investments in photovoltaic installations were protected by the Energy Charter Treaty (“ECT”), which “establishes a legal framework in order to promote long-term cooperation in the energy field.” Award ¶¶ 517-18, 568; *see generally* ECT (Ex. 3 hereto).

11. Spain is a contracting party to the ECT,² and consented to submit disputes arising under that treaty to arbitration under the UNCITRAL Rules. *See* ECT, art. 26(3)(a), (4)(b).

12. Article 26(3)(a) of the ECT provides that “each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration . . . in accordance with the provisions of this Article.” Article 26(4)(b) further provides that the Investor may elect to submit the dispute to “a sole arbitrator or ad hoc arbitration tribunal established under the [UNCITRAL] Rules.”

13. On November 16, 2011, Petitioners and other investors jointly submitted a Notice of Arbitration to Spain for arbitration under the UNCITRAL Rules. Preliminary Award on Jurisdiction (“Jx. Dec.”) ¶ 11 (Ex. B to Rozen Decl.). Petitioners contended that Spain’s legislative actions that resulted in reducing the returns on Petitioners’ investments constituted a breach of Spain’s obligations under the ECT. Award ¶¶ 213-14, 481-82.

14. An arbitral tribunal (the “Tribunal”) was constituted on May 1, 2012. Jx. Dec. ¶ 12.

15. On July 4, 2012, the parties to the arbitration agreed that the PCA would act as Registry in the arbitration proceedings. Jx. Dec. ¶ 13.

16. On November 16, 2012, the Tribunal determined that the arbitration would be seated in Geneva, Switzerland. Jx. Dec. ¶ 17.

17. The Tribunal conducted a hearing on jurisdiction in The Hague, The Netherlands on January 31, 2014. Jx. Dec. ¶ 28. On October 13, 2014, the Tribunal issued its Preliminary Award on Jurisdiction rejecting all of Spain’s objections to the Tribunal’s jurisdiction with respect to Petitioners. *Id.* ¶¶ 114, 116, 207, 238, 289, 342. The Tribunal thus determined that it had

² *Signatories/Contracting Parties*, Energy Charter Treaty, <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/>.

“jurisdiction over the present dispute involving the Respondent [Spain]” and Petitioners. *Id.* ¶ 375(a).

18. The Tribunal conducted a Hearing on Liability in The Hague, The Netherlands, from March 14 through March 21, 2016. Award ¶ 73.

19. On February 28, 2020, the Tribunal issued the Award, finding that Spain had breached its obligations, under Article 10(1) of the ECT, to accord fair and equitable treatment to Petitioners’ investments within Spain’s territory, by failing to ensure a reasonable rate of return on those investments. Award ¶ 847; *see also id.* ¶¶ 561, 565, 647-48, 909(a).

20. The Award requires Spain to pay Petitioners a total of EUR 26.5 million as damages, in the following amounts: EUR 15.4 million to AES and EUR 11.1 million to Ampere. Award ¶ 909(b). The Award further requires Spain to pay interest on the damages award at the Spanish 10-year bond rate, compounded semiannually, from June 30, 2014, until the Award is paid in full. *Id.* ¶ 909(c).³

21. On April 27, 2020, Spain filed an appeal against the Award before the Swiss Federal Supreme Court. Bundesgericht [BGer] [Federal Supreme Court] Feb. 23, 2021, 4A_187/2020, slip op. at 4 (Switz.) (Ex. C to Rozen Decl.). On February 23, 2021, the Swiss Federal Supreme Court dismissed that appeal. *See id.* at 8.

Legal Basis for Relief

22. The New York Convention is a multilateral international treaty between 168 nations governing “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” New York

³ The Award also requires Spain to pay damages and interest to other investors. Those other investors have not joined in this Petition. Their interests under the Award accordingly are not at issue in this litigation.

Convention, art. I(1). The Convention provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” *Id.*, art. III.

23. The United States is a contracting party to the New York Convention and has agreed to apply the Convention to disputes arising out of a “commercial” relationship. New York Convention, 21 U.S.T. at 2560. Congress codified the New York Convention in the FAA, 9 U.S.C. §§ 201-208.

24. In the United States, an arbitral award issued pursuant to arbitration conducted in the territory of a party to the Convention falls under the Convention and the FAA provisions implementing it if the award “aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial.” 9 U.S.C. § 202. An exception is that an award “arising out of . . . a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.” *Id.* As a result, the FAA applies when (1) “there is a written agreement”; (2) “[t]he arbitration occurred in a territory of a signatory”; (3) “the subject matter is commercial”; and (4) “the subject matter is not entirely domestic in scope.” *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 184, 186 (D.D.C. 2016).

25. Enforcement of an arbitral award that is subject to the New York Convention is governed by Section 207 of the FAA, which provides that “any party to the arbitration may apply . . . for an order confirming the award as against any other party to the arbitration” within three years after the arbitral award has been issued. 9 U.S.C. § 207. The party seeking confirmation of the award must submit the “duly authenticated original award or a duly certified copy thereof” and

the “original agreement [to arbitrate] . . . or a duly certified copy thereof.” New York Convention, art. IV(1).

26. Upon submission of an application for confirmation, the court “*shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” 9 U.S.C. § 207 (emphasis added). “Federal courts in the United States have minimal discretion to refuse to confirm an arbitration award under the FAA.” *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 184 (D.D.C. 2018) (citing 9 U.S.C. § 207). Indeed, “confirmation proceedings are generally summary in nature” because the New York Convention “provides only several narrow circumstances when a court may deny confirmation of an arbitral award.” *Int’l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (citing cases); *see id.* (“[T]he showing required to avoid summary confirmation is high.” (alteration in original)).

Cause of Action and Request for Relief

27. Petitioners repeat and re-allege the allegations in paragraphs 1 through 26 as if set forth fully herein.

28. The Award falls under the New York Convention because: (1) the Award is based on an arbitration agreement, reflected in Article 26 of the ECT; (2) the Award resulted from arbitration seated in Switzerland, a signatory of the New York Convention;⁴ (3) the subject matter of the dispute was commercial in nature because it concerned transactions and investments in the energy sector and economic incentives for, and rates of return on, those investments, *see* Award ¶¶ 181, 647; and (4) the arbitration relates to a foreign state and is not entirely domestic in scope

⁴ *Contracting States*, New York Arbitration Convention, <http://www.newyorkconvention.org/countries>.

because none of the parties to the arbitration is a United States citizen and the arbitration concerned investments within the territory of Spain.

29. As required by Article IV of the New York Convention, the Petition attaches a duly certified copy of the Award, *see* Rozen Decl., Ex. A, and the official reporter publication of the treaty (the ECT) that contains the agreement to arbitrate, *see* Ex. 3.

30. Pursuant to Section 207 of the FAA, therefore, the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the New York Convention. None of the New York Convention grounds for denying recognition and enforcement of an award apply in this case.

31. For the foregoing reasons, Petitioners are entitled to an order (a) confirming pursuant to the New York Convention the portion of the Award awarded to Petitioners, and (b) entering judgment in Petitioners' favor in the amount specified in that portion of the Award.

WHEREFORE, Petitioners request that the Court enter an order:

(a) confirming against Spain the portion of the Award owed to Petitioners; and

(b) entering judgment against Spain and in favor of Petitioners, ordering Spain to pay EUR 15.4 million as damages to AES, and EUR 11.1 million as damages to Ampere, plus interest calculated at the Spanish 10-year bond rate, compounded semiannually, from June 30, 2014 until the Award is paid in full.

Dated: December 10, 2021

Respectfully submitted,

/s/ Matthew D. McGill

Matthew D. McGill, D.C. Bar #481430

mmcgill@gibsondunn.com

Matthew S. Rozen, D.C. Bar #1023209

mrozen@gibsondunn.com

Ankita Ritwik, D.C. Bar #1024801

aritwik@gibsondunn.com

Luke Zaro, D.C. Bar #1670941

lzaro@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

Telephone: (202) 955-8500

Facsimile: (202) 467-0539

Attorneys for AES Solar Energy Coöperatief
U.A. and Ampere Equity Fund B.V.