IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWISS RENEWABLE POWER PARTNERS S.À.R.L., in its capacity as assignee of (1) CECONAT ENERGY GMBH, (2) EOXIS HOLDING S.A., (3) IMPAX NEW ENERGY INVESTORS S.C.A., and (4) IMPAX SOLAR INVESTMENT S.À.R.L., 14 rue Edward Steichen L-2540 Luxembourg G.D. Luxembourg Petitioner, v. KINGDOM OF SPAIN, Abogacia General del Estado Calle Ayala, 5 28001 – Madrid Spain Respondent.	:	Civil Action No. 23-512

PETITION TO CONFIRM ARBITRATION AWARD

Petitioner Swiss Renewable Power Partners S.à.r.l., in its capacity as assignee of Ceconat Energy GmbH ("Ceconat"), Eoxis Holding S.A. ("Eoxis"), Impax New Energy Investors S.C.A. ("Impax New Energy"), and Impax Solar Investments S.à.r.l. ("Impax Solar" and, together with Ceconat, Eoxis, and Impax New Energy, the "Investors"), brings this action to confirm its share of a final arbitration award (the "Award") issued in Geneva, Switzerland, on February 28, 2020, by the Permanent Court of Arbitration (the "PCA") in favor of the Investors and against Respondent, the Kingdom of Spain. The Award was issued following arbitration proceedings conducted under the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules").

A duly certified true and correct copy of the Award is attached as Exhibit 1 to accompanying Declaration of Marcus J. Green, dated February 24, 2023 ("Green Decl."). Petitioner respectfully requests that the Court confirm the Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (the "New York Convention") and enter judgment for Petitioner in the amount of the present value of the Investors' share of the Award as of the date of judgment. In support of this Petition, Petitioner respectfully states as follows:

PARTIES

1. Petitioner Swiss Renewable Power Partners S.à.r.l. is a limited liability company incorporated under the laws of Luxembourg. On July 13, 2021, Petitioner and the Investors entered into a Deed of Assignment by which the Investors transferred "all of the[ir] rights, title and interest . . . in the Award." A true and correct copy of the Deed of Assignment is attached as Exhibit 2 to the Green Declaration.

2. Respondent Kingdom of Spain ("Spain") is a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (the "FSIA"). *See* 28 U.S.C. § 1603(a).

JURISDICTION AND VENUE

3. This proceeding arises under Chapter 2 of the Federal Arbitration Act, codified at 9 U.S.C. § 201 *et seq.*, which applies the New York Convention to recognition actions brought in the courts of the United States.

4. This Court has jurisdiction over the subject matter of this proceeding under 9 U.S.C. § 203, which provides that "[t]he district courts of the United States . . . have original jurisdiction over" any "action or proceeding falling under the [New York] Convention," which are "deemed to arise under the laws and treaties of the United States." *See also* 28 U.S.C. § 1331.

5. The Court also has jurisdiction over the subject matter of this proceeding under 28 U.S.C. § 1330(a), because Spain is not entitled to sovereign immunity in connection with Petitioner's cause of action. First, 28 U.S.C. § 1605(a)(6) creates an exception to sovereign immunity from jurisdiction for cases brought to confirm arbitration awards "governed by a treaty or other international agreement in force for the United States calling for recognition and enforcement" of such award. As noted above, the Award in this case is governed by the New York Convention, an international agreement of the type contemplated by Section 1605(a)(6). Second, Spain waived its immunity from jurisdiction for an action to confirm the Award by its agreement to arbitrate. *See* 28 U.S.C. § 1605(a)(1).

6. This Court has personal jurisdiction over Spain under 28 U.S.C. § 1330(b), which confers "[p]ersonal jurisdiction over a foreign state . . . as to every claim for relief" for which the foreign state does not enjoy sovereign immunity under 28 U.S.C. §§ 1605–1607, and over which the Court has subject matter jurisdiction.

7. Venue is proper in this District under 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(4). Section 1391(f)(4) provides that venue lies in this District for any action "brought against a foreign state or political subdivision thereof."

BACKGROUND

The Underlying Dispute

8. In 2007, Spain adopted legislation designed to help transform its energy infrastructure by "guaranteeing . . . a reasonable return" to investors in renewable energy production. Green Decl. Ex. 1 ¶ 190. Instead of selling their electricity on the open market, the

owners of qualifying energy-generation facilities would be permitted under this program to assign their electricity to existing distributors for a fixed, subsidized "feed-in tariff." *Id.* ¶ 191.

9. Relying on the incentives created by this legislation, the Investors made significant investments in photovoltaic installations in Spain. *Id.* ¶ 195.

10. In 2010, however, Spain began to cut back on the legislatively promised subsidies. Although feed-in tariffs had originally been guaranteed throughout the operational life of qualifying facilities (with reductions to occur according to a predetermined schedule), Spain passed new legislation eliminating the availability of those payments after 30 years. *Id.* ¶¶ 191–92, 200. Spain also imposed an annual cap on the number of hours for which the owners of qualifying facilities could receive feed-in tariffs, forcing those facilities to sell the remainder of their electricity at the market rate. *Id.* ¶ 201.

11. In 2013 and 2014, Spain passed additional laws that further reduced, and eventually eliminated, the financial incentives promised in its 2007 legislation. *Id.* ¶¶ 203–12. As a result, the profitability of the Investors photovoltaic installations was reduced by tens of millions of euros. *Id.* ¶¶ 845–48.

The Arbitration and the Award

12. Spain is a contracting party to the Energy Charter Treaty (the "ECT"), which "establishes a legal framework in order to promote long-term cooperation in the energy field." *Id.* ¶ 568. Among other things, the ECT requires that member states provide "fair and equitable treatment" to foreign direct investment originating from other member states. *Id.* ¶ 561. As

companies based in Germany, Luxembourg, and the United Kingdom—all ECT member states—the Investors' investments in Spain were covered by the ECT's protections.

13. Like other ECT contracting parties, Spain gave "its unconditional consent" to submit disputes arising under the ECT to arbitration under the UNCITRAL Rules. ECT art. 26(3)(a). The ECT permits investors to submit their disputes to "a sole arbitrator or ad hoc arbitration tribunal established under the [UNCITRAL] Rules." *Id.* art. 26(4)(b).

14. Based on Spain's failure to adhere to the incentive structures it used to induce their investments, and consistent with the requirements of the ECT, the Investors and other claimants commenced the arbitration by serving Spain with a Notice of Arbitration on November 16, 2011.

15. An arbitral tribunal (the "Tribunal") was duly constituted according to the ECT. It included, as presiding arbitrator, Professor Gabrielle Kaufmann-Kohler, who has since served as president of the International Council for Commercial Arbitration. The other arbitrators were the Honorable Charles Brower, a former legal adviser to the United States Department of State and judge for the Iran-United States Claims Tribunal and the International Court of Justice (appointed by the Investors and other claimants), and the Honorable Bernardo Sepúlveda Amor, a former official in Mexico's Department of Foreign Affairs who has since served as a judge for the International Court of Justice (appointed by Spain). Green Decl. Ex. 1 ¶ 6.

16. The parties agreed that the arbitration would be conducted through the PCA, and the Tribunal determined that the seat of the arbitration would be Geneva, Switzerland. *Id.* ¶ 516.

17. On October 13, 2014, after written submissions from the parties and a hearing in The Hague, the Netherlands, the Tribunal issued its Preliminary Award on Jurisdiction (the "Jurisdiction Decision"). A true and correct copy of the Jurisdiction Decision is attached as Exhibit 3 to the Green Declaration.

18. In the Jurisdiction Decision, the Tribunal rejected all of Spain's objections to the Tribunal's jurisdiction over the Investors' claims and concluded that it had "jurisdiction over the present dispute involving the Respondent [Spain]." Green Decl. Ex. 3 ¶ 375.

19. In March 2016, the Tribunal conducted a week-long hearing on liability in The Hague. Green Decl. Ex. 1 ¶ 73.

20. On February 28, 2020, following multiple written submissions, the Tribunal issued the 283-page Award. There, it found that Spain had breached its obligations, under Article 10(1) of the ECT, to accord fair and equitable treatment to the Investors' investments. *Id.* ¶ 847.

21. To compensate the Investors for their losses, the Award requires Spain to pay them a total of €48.1 million (€5.4 million to Ceconat, €6.1 million to Eoxis, €29.3 million to Impax Solar, and €7.3 million to Impax New Energy). *Id.* ¶ 909(b). In addition, the Award imposes interest on those damages "at the Spanish 10-year bond rate, compounded semiannually, from 30 June 2014 until payment in full." *Id.* ¶ 909(c).

22. On April 27, 2020, Spain appealed the Award to the Federal Supreme Court of Switzerland. That court dismissed Spain's appeal on February 23, 2021.

BASIS FOR CONFIRMATION OF THE AWARD

23. The Award is a well-reasoned award, issued by prominent jurists, in a proceeding in which all parties actively participated. There is no reason why the award should not be confirmed.

24. Under the New York Convention, as incorporated into United States law through the Federal Arbitration Act, an arbitration award must be confirmed unless one of a limited number of grounds for refusal or deferral applies: "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.

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.

25. The party opposing confirmation has the burden of showing that such a ground applies. *See Int'l Trading Indus. Inv. Co. v. DynCorp Aero. Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011). (Under the New York Convention, "confirmation proceedings are generally summary in nature. . . . The showing required to avoid summary confirmation is high and the burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation."). Spain cannot meet that burden.

26. The grounds on which a court can refuse or defer confirmation are:

- the lack of a valid arbitration agreement between the parties;
- that the award resolves a dispute outside the scope of the parties' arbitration agreement;
- that the award resolves a dispute that, under the laws of the country where confirmation is sought, cannot be resolved through arbitration;
- that the award debtor had no notice of the arbitration proceedings or was unable to meaningfully participate;
- that the tribunal was composed and/or the arbitration used procedures inconsistent with the parties' arbitration agreement;
- that the award is not yet binding or has been set aside by a competent authority of the country in which, or under the law of which, the award was made; or
- that confirming the award would contravene the public policy of the country where confirmation is sought.

See New York Convention art. V.

27. None of these grounds applies here. The plain language of the ECT makes clear that member states like Spain have consented to arbitration to resolve disputes arising under that treaty. The arbitration that produced the Award concerned precisely such a dispute: one concerning Spain's unfair treatment of foreign direct investment in its energy infrastructure. Nothing in the laws of the United States prohibits resolving this type of dispute through arbitration; to the contrary, the United States has long favored arbitration for the resolution of international

commercial disputes. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (noting Supreme Court's endorsement of "an emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce") (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). Spain had notice of the arbitration and actively participated in each of its stages. The Tribunal was composed according to and followed UNCITRAL Rules, as required by the ECT. The Award is binding on the parties, and Spain's appeal attempting to set aside the Award at the seat of arbitration (Switzerland) was dismissed two years ago. Finally, confirming the Award would offend no public policy of the United States.

28. Accordingly, the New York Convention requires confirmation of the Award.

COUNT I
(CONFIRMATION OF AWARD UNDER 9 U.S.C. § 207)

29. Petitioner incorporates each and every allegation in the preceding paragraphs as if set forth fully herein.

30. The Award is governed by the New York Convention (made applicable in this proceeding by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*) because the Award arises out of a valid arbitration agreement (reflected in Article 26 of the ECT), and resolved a commercial dispute between the Investors and Spain, none of which is a citizen of the United States. *See* 9 U.S.C. § 202. In addition, the seat of the arbitration was Switzerland, a nation that is a State party to the New York Convention, and which is a State other than the State where recognition and enforcement is hereby sought.

31. In an action to confirm an award governed by the New York Convention, the Federal Arbitration Act provides that 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.

32. None of the New York Convention's enumerated grounds for refusing or deferring recognition apply to the Award. Under 9 U.S.C. § 207, the Award must therefore be confirmed.

33. Petitioner respectfully requests that the Court confirm the Award by entering judgment in favor of Petitioner and against Spain in the amount of the Award, with interest as provided therein, plus the costs of this proceeding.

PRAYER

WHEREFORE, Petitioner Swiss Renewable Power Partners S.à.r.l. respectfully requests:

a. an order of this Court pursuant to 9 U.S.C. § 207 confirming the Award and entering judgment thereon;

b. a money judgment in favor of Petitioner and against Spain that conforms to the Award, including interest at the interest rate for Spanish 10-year bonds, compounded semiannually, to be calculated from June 30, 2014 until the date of the judgment, and costs;

c. an order of this Court retaining jurisdiction over the matter for any further proceedings as may be necessary to enforce the judgment on the Award; and

d. any other relief that this Court, in the interests of justice, deems necessary and proper.

Dated: February 24, 2023
Washington, D.C.

/s/ Marcus J. Green
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