IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., *Petitioners*, v. The Kingdom of Spain, *Respondent*.	**Civil Action No. 1:21-cv-03249-RJL**

Reply in Support of Motion for Substitution

Federal Rule of Civil Procedure 25(c) provides that "[i]f an interest is transferred," the Court may "orde[r] the transferee to be substituted in the action *or joined with the original party*." Fed. R. Civ. P. 25(c) (emphasis added). Respondent the Kingdom of Spain ("Spain") does not dispute that Petitioners AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V. ("Petitioners") have transferred their entire interests in the Award to Blasket Renewable Investments LLC ("Blasket," and together with Petitioners, "Movants").[1] And Spain offers no argument that Blasket cannot or should not at a minimum "be joined with the original part[ies]," Fed. R. Civ. P. 25(c)—as Movants requested, ECF No. 31 ("Opening Br.") at 5 n.2. By failing to address this request for relief, Spain has waived any opposition to joinder. *See Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014). Spain's failure to oppose joinder thus provides a sufficient basis for this Court to join Blasket as a petitioner in this action.

[1] Spain speculates in a footnote that the assignments "may be subject to annulment" under Dutch law, ECF No. 37 ("Opp Br."), at 4 n.2, but it does not explain how or why. Nor has Spain suggested any reason why or how the assignments could be disregarded by *this* Court.

As to substitution of Blasket in place of Petitioners, Spain agrees with Movants that substitution of parties under Rule 25(c) is appropriate whenever it would facilitate the conduct of the litigation. Opp Br. 6. But Spain offers no response to the legion cases making clear that this standard is satisfied whenever "a transfer [of a legal interest] gives another party ownership of the relevant property." *Stewart Title Guar. Co. v. Lewis*, 2018 WL 1964870, at *1 (D.D.C. Feb. 16, 2018) (collecting cases). That is undisputedly the case here. Because Petitioners lawfully assigned all their rights under the Award to Blasket, it is beyond question that Blasket—not Petitioners—now holds "the sole interest in the outcome of the litigation." *Id.* Substitution of Blasket as petitioner is therefore warranted. Indeed, Spain identifies no decision from any court denying substitution to the transferee of an arbitral award or judgment, and Movants are aware of none.

Rather than address the relevant legal standard under Rule 25(c), Spain's principal strategy for opposing substitution is to cast this motion as an attempt to "evade the application of EU law." Opp Br. 3-4. These insinuations have nothing to do with the standard for substitution, and they are also flatly incorrect. The assignments were made in the ordinary course of business, pursuant to a "Funded Participation Agreement" Petitioners entered with an unaffiliated financier nearly three years ago. *See* ECF No. 31-1, at 8-9, 25-26 ("This is the Assignment Agreement referred to in the Funded Participation Agreement"). Valid business reasons entirely unrelated to Spain's recent barrage of anti-suit injunctions support the assignments: The transfers facilitate enforcement efforts in the United States by consolidating multiple claims against a single debtor (Spain) in a single United States entity (Blasket). Accordingly, Blasket has been assigned a number of other claims against Spain in enforcement actions pending before this Court—assignments initiated well before Spain launched its anti-suit injunction campaign. *See, e.g.*, *InfraRed Env't Infrastructure GP Ltd. v. Kingdom of Spain*, No. 1:20-cv-0817 (D.D.C. Feb. 6,

2023), ECF No. 56 at 1 (assignment by Infrared Environmental Infrastructure GP Limited to Blasket on September 29, 2022); *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-cv-03783 (D.D.C. Feb. 6, 2023), ECF No. 51 at 1 (assignment by RREEF Infrastructure (G.P.) Limited to Blasket on October 27, 2022).

Moreover, just hours after Spain filed its opposition in this Court, the Dutch Court held a hearing on Spain's emergency request for an injunction prohibiting Petitioners from proceeding with the substitution, based on Spain's false contention that Movants' substitution motion in this Court is part of an effort to evade EU law. The Dutch court, however, was not persuaded by Spain's argument. It issued an order rejecting Spain's request, and awarded costs against Spain. Judgment in Summary Proceedings of 6 March 2023 (attached hereto as Ex. 1).[2] If the Dutch court did not view Movants' substitution motion as an impermissible means to evade EU law, there is no reason for this Court to do so.

Instead, it is *Spain* that is engaged in an effort to "evade" the jurisdiction of *this Court* by seeking orders intended only to frustrate the progress of this litigation. This Court should reject that effort and grant the motion for substitution.

I. Substitution Would Facilitate The Conduct Of This Litigation

As to the actual legal standard for a motion to substitution—whether substitution would "facilitate the conduct of the litigation," *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 247 F. Supp. 3d 76, 86 (D.D.C. 2017) (citation omitted)—Spain's cursory arguments fall flat.

[2] Movants have attached a machine translation of the Dutch court's decision and will submit a certified translation of the entire decision in advance of tomorrow's status conference.

Spain first speculates that Blasket lacks "first-hand knowledge" of the arbitration proceedings that produced the Award and thus cannot adequately step into Petitioners' shoes. Opp. Br. 6-7. That is incorrect—Blasket did its due diligence in purchasing the Award from Petitioners, and it is fully familiar with the underlying arbitration. But Blasket's knowledge of the arbitration is entirely irrelevant in any event.

As explained in the motion for substitution, Opening Br. 3, neither the Petition to Enforce Arbitral Award, ECF No. 1, nor Spain's Motion to Dismiss, ECF No. 15-1, raises any issue of fact that turns on the particular details of the arbitration. This case turns solely on the application of provisions of federal and international law—namely, the Foreign Sovereign Immunities Act ("FSIA"), the New York Convention, and its implementing legislation. Blasket is thus fully equipped to prosecute this action to final judgment, and thereafter to enforce that judgment. *See Cessna Fin. Corp. v. Al Ghaith Holding Co. PJSC*, 2021 WL 603012, at *3 (S.D.N.Y. Feb. 16, 2021) (ordering substitution "given that [petitioner] has assigned its interest in, title and rights to the Award and Judgment to [assignee]," since "substitution of [assignee] as Petitioner for purposes of enforcement of the Judgment is likely to simplify the action" (citations omitted)); *Cessna Fin. Corp. v. Gulf Jet LLC*, 2021 WL 7447793, at *2 (S.D.N.Y. June 2, 2021) (same). Spain offers no response to this dispositive point.

Spain also argues that substitution is unnecessary because the matter has been fully briefed and is ripe for decision. Opp. Br. 7. But that is not a reason to deny substitution; substitution instead will ensure that judgment can be entered in the name of the correct party—Blasket—who will own all rights in and bear all responsibility for enforcing that judgment. Courts often grant substitution in such circumstances. *See, e.g.*, *Sullivan v. Running Waters Irrigation, Inc.*, 739 F.3d 354, 356 (7th Cir. 2014); *Luxliner P.L. Exp., Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir.

1993); *Greater Potater Harborplace, Inc. v. Jenkins,* 935 F.2d 267 (4th Cir. 1991) (per curiam) (noting that it is "well established" that substitution can be appropriate even after final judgment "where [it] is necessary for enforcement of the judgment"). In the sole case Spain cites, by contrast, the court denied a peculiar motion of the *respondent* seeking to substitute the petitioner for a government-appointed liquidator; substitution was deemed by the Court unnecessary because it had contemporaneously decided to enter judgment and no further litigation remained. *Comm'ns Imp. Exp., S.A. v. Republic of Congo*, 118 F. Supp. 3d 220, 230-31 (D.D.C. 2015). And the decision to deny substitution was driven at least in part by the respondent's failure to demonstrate that the petitioner's interest had actually been lawfully transferred. *Id.* at 232 ("As Commisimpex has persuasively shown, the judgment was not the product of a 'full and fair trial,' but instead appears to have arisen from fundamentally unfair proceedings that were not likely to 'secure an impartial administration of justice.'" (citation omitted)).

Here, Spain's motion to dismiss remains pending, and the parties have continued to actively engage on the issues through notices of supplemental authority. *See* ECF Nos. 26-30. It should be Blasket—which, again, now has the sole interest in seeing the Award enforced—that takes this action through to final judgment. *See ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186, 191 (8th Cir. 1995) (Rule 25(c) was "designed to allow an action to continue unabated when an interest in a lawsuit changes hands" (citation omitted)).

Finally, Spain claims that substitution is "unnecessary" because Blasket is entitled to the proceeds of any recovery Petitioners obtain in this action. Opp. Br. 7. That argument is disingenuous at best. Spain admits that it is actively seeking to *prevent* Petitioners from ever recovering *anything* in this Court: The anti-suit injunction it seeks in the Dutch court—which remains pending despite the Dutch court's ruling earlier this morning—would force Petitioners to

"withdraw their efforts to enforce the Award" here. *Id.* at 3. That is precisely why substitution of Blasket is essential at this juncture. If Spain prevails in the Netherlands and Petitioners are forced to withdraw from this case, Blasket—the party who "own[s] . . . the relevant property" and thus has "the sole interest in the outcome of the litigation"—is entitled to continue to enforce its own rights under the Award. *Stewart Title Guar. Co.*, 2018 WL 1964870, at *1.

In fact, substitution of Blasket as petitioner remains the most expedient path forward regardless of what happens in the Dutch Action. Under any circumstances, Blasket is the rightful owner of an award that was properly obtained through arbitration proceedings under the New York Convention, and it is entitled to proceed with the enforcement of the Award in one manner or another irrespective of any injunction that may be entered against Petitioners. If, for example, this Court were to deny substitution and Spain were to prevail in the Netherlands, rendering Petitioners unable to prosecute this suit, that would simply entitle Blasket to intervene in this case as of right to protect its undisputed legal interest in the Award. *See Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (intervention as of right is warranted if (1) it is sought in a timely manner, (2) the would-be intervenor asserts "a legally protected interest," (3) the action "impairs or impedes that interest," and (4) "no party to the action can adequately represent the potential intervenor's interest"); *accord* Fed. R. Civ. P. 24(a)(2). The most straightforward path to enforcement is to substitute Blasket now, rather than to force it to litigate this case as an intervenor or in a new action. Substitution would thus best serve the "considerations of convenience and economy" that undergird Rule 25(c). *Paleteria La Michoacana*, 247 F. Supp. 3d at 86 (citation omitted).

II. Spain's Improper Effort To Deprive This Court Of Jurisdiction Does Not Justify A Denial Of Substitution

With no persuasive argument relevant to the legal standard for substitution, Spain pivots to baseless speculation that Movants are seeking to "evade" the jurisdiction of the Dutch courts. Opp. Br. 3-6. But it is the Dutch Action that seeks to "evade" *U.S.* law through an illegitimate assault on this Court's jurisdiction, *id.*—not the other way around. And in any event, Spain's interests in other jurisdictions are irrelevant under Rule 25(c).

First, any prejudice Spain may experience from the substitution is attributable to its own extraordinary and rapidly escalating effort to deprive this Court of jurisdiction and undermine its authority. Spain makes no secret of the fact that "the Dutch Action is specifically intended to interfere with and terminate [Petitioners'] petition before this [C]ourt." *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 2023 WL 2016932, at *10 (D.D.C. Feb. 15, 2023) (cleaned up) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984)); *accord 9Ren Holding S.À.R.L. v. Kingdom of Spain*, 2023 WL 2016933, at *9 (D.D.C. Feb. 15, 2023) (same); Opp. Br. 3-4 (describing the Dutch Action here in identical terms). Spain is thus "actively seeking" to "frustrate the operation of U.S. law" and "deprive this [C]ourt of jurisdiction" by barring Petitioners from proceeding here. *NextEra*, 2023 WL 2016932, at *10. Its latest maneuvers—seeking and obtaining an *ex parte* order restraining Petitioners from moving for an anti-anti-suit injunction of the kind issued in *NextEra* and *9Ren*, and then (unsuccessfully) asking the Dutch court to force Petitioners to withdraw this substitution motion—only further demonstrate Spain's disregard for this Court's authority, the laws of the United States, and its own international-treaty obligations.

The fact that substituting Blasket as petitioner could thwart Spain's ambitions, therefore, is a problem of Spain's "own making." *NextEra*, 2023 WL 2016932, at *10. Spain falls back on

an invocation of comity, claiming that it is entitled to pursue its anti-suit actions abroad without interference from this Court. Opp. Br. 4-5. But the D.C. Circuit has made clear that Spain cannot rely on comity when it is "attempting to use the law and courts of a third country . . . to frustrate a previously commenced action in the United States." *Laker Airways*, 731 F.2d at 954 n.175. In *9Ren* and *NextEra*, this Court "refused to countenance" that kind of "hypocrisy," rejecting Spain's "strenuous[]" invocations of comity in light of its "zealous[] pursui[t]" of relief that would interfere with this Court's validly exercised jurisdiction and the "operation of U.S. law." *NextEra*, 2023 WL 2016932, at *10; *9Ren*, 2023 WL 2016933, at *8-9. So too here—particularly because Spain initiated the Dutch Action *more than four years* after Petitioners brought suit in this Court. *See Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 887 (9th Cir. 2012) ("[t]he order in which the domestic and foreign suits were filed" is "relevant" to the comity inquiry).

In fact, granting the substitution motion here would *promote* comity by diminishing any perceived need for the court of one nation to interfere with the jurisdiction of a court of another nation. Spain decries Judge Chutkan's anti-anti-suit injunctions in *NextEra* and *9Ren* as an "extraordinary breach of international comity," saying nothing of its own anti-suit injunction applications in those cases. Opp Br. 5. Substitution of Blasket eliminates any need for such measures in either the Netherlands or this Court.

Second, any prejudice Spain may experience *elsewhere*—to its illegitimate and misdirected lawsuit in the Netherlands—is simply irrelevant to the substitution standard in this Court. The analysis under Rule 25(c) depends purely on whether substitution would "facilitate the conduct of the litigation" at issue. *Paleteria La Michoacana*, 247 F. Supp. 3d at 86, 89 (citation omitted); *see also Danaher Corp. v. Travelers Indem. Co.*, 2020 WL 6712193, at *5 (S.D.N.Y. Nov. 16, 2020) (ordering substitution because it would not "delay [or] complicate *this litigation*" (emphasis

added)). It is thus of no moment that substitution might interfere with Spain's schemes to undercut this Court's authority through a rogue collateral attack in a foreign court. Indeed, Spain cannot point to a single case supporting its view; all its authorities involve some risk of prejudice in the very action where substitution was sought. *See* Opp Br. 6 (citing *Great W. Cas. Co. v. Kirsch Transp. Servs., Inc.*, 2022 WL 4182377, at *3 (S.D. Iowa June 3, 2022) (substitution of defendant "may impair [plaintiff's] ability to prove its claim" in the same case); *Fashion G5 LLC v. Anstalt*, 2016 WL 7009043, at *3 (S.D.N.Y. Nov. 29, 2016) (substitution of defendant would make it "considerably more unwieldy" for plaintiff to obtain needed discovery in the same case)). And because Spain has not identified any concrete way that it would be injured in *this* action if Blasket were substituted, "it is proper and necessary to substitute [Blasket] so that it can protect its interest" in the Award. *Crown Point Partners LLC v. Crown Point Plan Comm'n*, 275 F.R.D. 279, 282 (N.D. Ind. 2011).

III. Spain's Attempt To Manufacture A Conflict of Interest Between Petitioners And Blasket Is Irrelevant And Incorrect

Spain finally falls back on a brief argument—without citing any authority—that the undersigned counsel's representation of both Petitioners and Blasket creates "apparent conflicts of interest." Opp Br. 7. But that self-serving argument is neither relevant to substitution under Rule 25(c) nor accurate as to Movants' interests.

For purposes of Rule 25(c), all that matters is that Petitioners' entire "interest" in the Award was "transferred" to Blasket, Fed. R. Civ. P. 25(c), and "substitution [is] appropriate when a transfer [of a legal interest] gives another party ownership of the relevant property and the sole interest in the outcome of the litigation," *Stewart Title Guar. Co.*, 2018 WL 1964870, at *1. Which attorneys will represent Blasket once it is substituted has no bearing on whether substitution should be permitted.

Nor should Spain be heard to speculate about the interests of AES and Ampere. "[I]t is questionable at best" whether Spain even "has standing to raise a conflict of interest between [the opposing] parties and their counsel." *Plouffe v. Cevallos*, 777 F. App'x 594, 601 (3d Cir. 2019); *see also Alexander v. FBI*, 186 F.R.D. 21, 32 (D.D.C. 1998) (expressing doubt that a party had standing to object to an "alleged conflict between [opposing] counsel and the represented parties"); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 n.2 (4th Cir. 1982) ("doubt[ing]" that a plaintiff had standing to raise "any question of a conflict of interest between" the defendant and its insured). And allowing Spain to raise a purported conflict of interest here would be particularly inappropriate where the supposed conflict it conjures is a product of Spain's own litigation strategy. The Court should view Spain's assertion of AES's and Ampere's interests with the utmost skepticism.

In any event, there is no conflict. AES and Ampere, having sold their entire interest in the Award, naturally seek an opportunity to remove themselves from a costly enforcement action in which they no longer have any interest. Substituting Blasket, "the owner of the relevant [property], as the sole [Petitioner]," is thus clearly in the interests of all three Movants. *Paleteria La Michoacana*, 247 F. Supp. 3d at 90.

CONCLUSION

For the foregoing reasons and for those stated in their Motion for Substitution, Movants respectfully request that the Court substitute Blasket as the petitioner in this action. In the alternative, the Court should, at minimum, join Blasket as an additional petitioner, so that it can prosecute this action regardless of any events in the Dutch Action.

Dated: March 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2023, I caused a true and correct copy of the foregoing Reply in Support of Motion for Substitution to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Matthew McGill
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