UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of	:	
	:	
EISER INFRASTRUCTURE LIMITED *et al.*,	:	
	:	
Petitioners,	:	
	:	
For Recognition and Enforcement of an Arbitration Award	:	No. 17 CV 3808 (LAK)
	:	
- against -	:	
	:	
KINGDOM OF SPAIN	:	
	:	
Respondent.	:	

MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT'S MOTION TO VACATE *EX PARTE* JUDGMENT

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Respondent Kingdom of Spain respectfully submits this memorandum in support of its motion pursuant to Fed. R. Civ. P. 60(b) to vacate the Order and Judgment entered by this Court on June 27, 2017 (D.E. 11) (the "*Ex Parte* Judgment") which granted the *Ex Parte* Petition to Recognize Arbitration Award (the "Petition") of Petitioners EISER Infrastructure Limited and Energia Solar Luxembourg S.á r.l. (the "Petitioners") and ordered the Kingdom of Spain to pay € 128 million plus interest to the Petitioners.

PRELIMINARY STATEMENT

The Petition represents an impermissible attempt to have a judgment entered against a foreign state by circumventing the exclusive jurisdictional and procedural requirements of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f) and 1602 *et seq*. (the "FSIA"). Petitioners are two foreign corporations who seek to enforce an arbitral award issued on May 4, 2017 (the "Award") in an arbitration (the "Arbitration") conducted under the auspices of the World Bank's International Centre for Settlement of Investment Disputes ("ICSID").[1] Respondent Kingdom of Spain is indisputably a "foreign state" under the FSIA. The Arbitration was conducted in Paris, France and concerned a dispute between the Petitioners and the Kingdom of Spain over certain legislative changes in the Kingdom of Spain and the alleged impact of those changes on the Petitioners' investments in Spanish solar power projects. For the reasons discussed below, the *Ex Parte* Judgment is void for want of subject matter and personal jurisdiction under the FSIA and therefore must be vacated.

The FSIA is the sole and exclusive source of subject matter jurisdiction over actions against foreign states in U.S. courts – and that statute does not permit *ex parte* summary proceedings against foreign sovereigns. Rather, the FSIA only confers subject matter

[1] ICSID was created by international convention. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1966) (the "ICSID Convention").

jurisdiction over "nonjury civil actions" against foreign states in which a statutory exception to foreign sovereign immunity applies. And the Supreme Court has held that the phrase "civil action" is a defined term under the Federal Rules of Civil Procedure which does not encompass summary proceedings initiated under state law. The *ex parte* summary registration proceeding initiated by Petitioners pursuant to Article 54 of New York's CPLR is not a "civil action" and therefore this Court lacked subject matter jurisdiction under the FSIA to entertain that proceeding regardless of whether a statutory exception to immunity applies. Accordingly, the *Ex Parte* Judgment is void for want of subject matter jurisdiction.

The *Ex Parte* Judgment is also void for lack of personal jurisdiction. Under the FSIA, personal jurisdiction exists only where the court has subject matter jurisdiction and the foreign sovereign defendant is served in accordance with the FSIA's exclusive procedures for serving foreign states, 28 U.S.C. § 1608. Here, the Kingdom of Spain was not served at all prior to the entry of judgment, let alone served in accordance with the FSIA's formal service requirements.

Petitioners nevertheless argue that the ICSID implementing statute, 22 U.S.C. § 1650a, permits, and confers subject matter jurisdiction over, *ex parte* summary proceedings to enforce ICSID awards in federal courts. Petitioners are wrong on both accounts.

First, while Section 1650a provides federal courts with exclusive jurisdiction over actions to enforce ICSID awards, the FSIA, as the later-enacted and more specific statute, trumps Section 1650a with respect to actions against foreign sovereign defendants. Indeed, the Supreme Court has repeatedly held that the FSIA is the sole basis of subject matter jurisdiction over actions against foreign states to the exclusion of any pre-existing jurisdictional statutes, such as Section 1650a. Accordingly, any action to enforce an ICSID award against a foreign state must comply with the jurisdictional and procedural requirements of the FSIA.

Second, the plain language of Section 1650a requires ICSID awards to be enforced in federal courts as if they were state court judgments, and the only procedure to enforce a state court judgment in federal court is through the commencement of a plenary action with its attendant requirement of service of process. Nothing in the ICSID Convention or Section 1650a provides for, or even contemplates, *ex parte* summary enforcement of ICSID awards.

Finally, Petitioners rely heavily on *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela ("Mobil")*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015), which held that Section 1650a permits *ex parte* summary enforcement of ICSID awards without regard for the FSIA. However, Petitioners failed to apprise this Court that the district court's decision in *Mobil* is currently on appeal before the Second Circuit and that the United States government filed an *amicus* brief that rejects the very arguments advanced by the Petitioners in this proceeding. The Second Circuit in *Mobil* directly solicited the views of the United States following oral argument. The United States took the positions that (1) the FSIA is the sole basis for exercising subject matter jurisdiction over any action against a foreign state, including an action to enforce an ICSID award; (2) an ICSID award can only be enforced through a plenary action that complies with all of the jurisdictional and procedural requirements of the FSIA; and (3) the district court in *Mobil* erred in concluding that Section 1650a permits, and provides jurisdiction over, an *ex parte* summary proceeding to enforce an ICSID award against a foreign state. The views of the United States government on such issues are entitled to "great weight," and they are consistent with the holdings of other courts outside of this district, including courts in the District of Columbia, which is the FSIA's default venue. Accordingly, while the Second Circuit has yet to rule on the appeal in *Mobil*, this Court should adopt the positions of the United States government and

vacate the *Ex Parte* Judgment as void for want of subject matter and personal jurisdiction under the FSIA.

FACTUAL AND PROCEDURAL BACKGROUND

The Arbitration concerns a dispute arising out of Petitioners' investments in solar power projects in the Kingdom of Spain. Petitioners allegedly made these investments to take advantage of certain financial incentives provided under legislation enacted by the Kingdom of Spain in 2007. *See* D.E. 1 ¶ 9. Between 2012 and 2014, the Kingdom of Spain enacted a series of changes to the 2007 legislation, due to the protection of the public interest. *See* D.E. 2 at p. 3. Petitioners assert that these legislative changes reduced the value of their investments in Spanish solar power projects. *See id.* None of the events at issue in the Arbitration occurred in the United States. (Pizzurro Decl. ¶ 3.)[2]

On December 13, 2013, Petitioners submitted a Request for Arbitration against the Kingdom of Spain with ICSID pursuant to, and alleging violations of, the Energy Charter Treaty (the "ECT") adopted by several states, including the Kingdom of Spain. D.E. 1 ¶¶ 9-10. An ICSID arbitration tribunal (the "Tribunal") was constituted on July 8, 2014 and a hearing on jurisdiction and the merits was held in Paris, France from February 15-20, 2016. *Id.* ¶ 10.

On May 4, 2017, the Tribunal issued the Award, which dismissed certain of Petitioners' claims, but awarded €128 million to Petitioners as compensation on their remaining claims. *See* D.E. 3-1 at pp. 155-56. The Award also provides for pre-award interest at a rate of 2.07% compounded monthly for the period between June 20, 2014 and the date of the Award as well as

[2] References in the form of "Pizzurro Decl." are to the Declaration of Joseph D. Pizzurro, dated June 28, 2017.

post-award interest at a rate of 2.50% compounded monthly from the date of the Award to the date of payment. *Id.* at p. 156.[3]

On May 19, 2017, Petitioners commenced this proceeding under New York CPLR § 5402 by filing their *ex parte* Petition. *See* D.E. 1 ¶ 5. Petitioners alleged that the ICSID implementing statute, 22 U.S.C. § 1650a, confers subject matter jurisdiction over state law *ex parte* summary proceedings to enforce ICSID awards against foreign states. *Id.* ¶ 2. Petitioners also allege that this Court could enter an *ex parte* judgement against a foreign state, such as the Kingdom of Spain, in the absence of personal jurisdiction and without regard for any of the protections and procedural safeguards afforded to foreign states under the FSIA. *See id.* at ¶ 5; D.E. 2 at p. 10 n.5.

On June 27, 2017, this Court granted the Petition and entered the *Ex Parte* Judgment pursuant to 22 U.S.C. § 1650a and Article 54 of New York's CPLR. The *Ex Parte* Judgment states that "Spain shall pay to Petitioners the sum of 128 million Euros, together with interest from June 20, 2014 to May 4, 2017 at the rate of 2.07%, compounded monthly, and interest from May 4, 2017 to the date of payment at the rate of 2.50%, compounded monthly." D.E. 11 at p. 2. The *Ex Parte* Judgment does not include any finding that subject matter or personal jurisdiction exists under the FSIA. Nor does it provide direction as to when Petitioners should give notice of the entry of judgment to the Kingdom of Spain or whether Petitioners' notice should comply with the service provisions of the FSIA, 28 U.S.C. § 1608(a). And the *Ex Parte* Judgment was entered without considering the applicability of the federal statutory rate mandated by 28 U.S.C. § 1961.

[3] Under Article 52 of the ICSID Convention, a party may request annulment of an award within 120 days of its issuance and request a stay of its enforcement. ICSID Convention, art. 52(1)-(2), (5). The stay of enforcement is automatically granted until an annulment committee is appointed and rules on the request for a stay. *Id.* at art. 52(5). The Kingdom of Spain intends to submit a timely application for annulment, which will trigger the automatic stay of enforcement under Article 52(5).

ARGUMENT

I. THE *EX PARTE* JUDGMENT IS VOID FOR WANT OF JURISDICTION UNDER THE FSIA

A. The FSIA Is the Governing Jurisdictional Statute in this Case

Petitioners allege that 22 U.S.C. § 1650a confers subject matter jurisdiction over actions to enforce ICSID awards against foreign states, such as the Kingdom of Spain. D.E. 2 ¶ 2. But, the FSIA, and not Section 1650a, governs. Indeed, the Supreme Court has repeatedly held that the FSIA supplies the sole and exclusive basis for obtaining subject matter and personal jurisdiction in any action against a foreign state, *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989), and that the FSIA "must be applied by the district courts in every action against a foreign sovereign." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).

The Supreme Court's decision in *Amerada Hess* is instructive. In that case, the Second Circuit had held that the district court could obtain subject matter jurisdiction over Argentina under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), without regard to the FSIA. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 428-29 (2d Cir. 1987). The Supreme Court reversed, holding that the FSIA provides a comprehensive statutory scheme that supersedes the grant of subject matter jurisdiction under the ATS and numerous other pre-existing jurisdictional statutes, such as "[28 U.S.C.] § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust) and § 1338 (patents, copyrights and trademarks)." *Amerada Hess*, 488 U.S. at 437. It concluded that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Id.* at 434. Thus, while Section 1650a grants jurisdiction to federal courts in actions to enforce ICSID awards, that statute, like all other

pre-existing jurisdictional statutes, is subordinate to the FSIA in all cases in which the defendant is a foreign state. *See id.* at 443; *see also* H.R. REP. NO. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 ("[The FSIA] is intended to preempt any other State or Federal law . . . for according immunity to foreign sovereigns . . . .").[4]

Petitioners rely heavily on the holding in *Mobil* that the FSIA does not apply in actions to enforce ICSID awards and that such actions are instead governed by the ICSID Convention and its implementing statute, 22 U.S.C. § 1650a. However, Petitioners failed to apprise this Court that the *Mobil* decision is presently on appeal to the Second Circuit and that the United States government submitted an *amicus* brief that largely rejected the district court's analysis in that case. *See* Brief for the United States as *Amicus Curiae,* (Dkt. No. 87), *Mobil Cerro Negro v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir.) (filed March 30, 2016) (hereinafter "U.S. Br.").[5] In particular, the United States took the position that the FSIA provides the exclusive source of jurisdiction in actions against foreign states and that "[t]he district court [in *Mobil*] erred in holding that the ICSID implementing legislation, 22 U.S.C. § 1650a, provides an

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[4] Neither the ICSID Convention nor its implementing statute contains a single provision displacing or abrogating applicable rules of sovereign immunity. As Andreas Lowenfeld, Deputy Legal Advisor to the State Department and a member of the United States delegation to the ICSID Convention, explained during his testimony before Congress in support of the enactment of Section 1650a:

> As to whether [a district court] has jurisdiction over a party, *there is nothing in the convention that will change the defense of sovereign immunity*. If somebody wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity.

Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int'l Orgs. & Movement of the H. Comm. on Foreign Affairs, *Hearing of the House Subcomm.*, 89th Cong. 57 (June 15, 1966) (hereinafter the "*House Subcomm. Hearing*") (emphasis added). In fact, the only reference to sovereign immunity in the ICSID Convention appears in Article 55, which states that: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." *See* ICSID Convention, art. 55. Far from abrogating sovereign immunity, the ICSID Convention reflects an intention to leave sovereign immunity undisturbed. A true and correct copy of the *House Subcomm. Hearing* is appended as Exhibit 2 to the Pizzurro Declaration.

[5] A true and correct copy of Brief for the United States as *Amicus Curiae* (Dkt. No. 87), *Mobil Cerro Negro v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir.) (filed March 30, 2016) is appended to the Pizzurro Declaration as Exhibit 1.

exception to the FSIA's exclusive grant of subject matter jurisdiction." *Id.* at p. 9. The United States explained that "Section 1650a retains its effect with respect to … supplying … subject matter jurisdiction over actions to enforce ICSID arbitral awards against private parties. But following the enactment of the FSIA, the ICSID enabling statute cannot be the basis for a federal court's exercise of jurisdiction over a foreign sovereign." *Id.* at p.10. Because the United States has a paramount interest in ensuring that the ICSID Convention and its implementing statute are properly construed and that the FSIA is correctly applied, s*ee id.* at p. 1, the views of the United States, which were directly solicited by the Second Circuit, are entitled to significant weight. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982); *Doe v. Holder*, 763 F.3d 251, 255 (2d Cir. 2014).

B. The *Ex Parte* Judgment Is Void for Want of Subject Matter Jurisdiction under the FSIA

Petitioners also asserted that the FSIA provides an alternative basis for subject matter jurisdiction over *ex parte* summary proceedings to enforce ICSID awards because certain statutory exceptions to sovereign immunity apply. *See* D.E. 1 ¶ 3; D.E. 2 at pp. at 8-10. But establishing a statutory exception to sovereign immunity is not enough to satisfy the requirements of the FSIA. Petitioners' argument erroneously conflates the existence of an exception to immunity under 28 U.S.C. §§ 1604-07 with the FSIA's grant of subject matter jurisdiction under 28 U.S.C. § 1330(a).

Section 1330(a) states that federal courts only have subject matter jurisdiction over a "nonjury civil action against a foreign state" in which a statutory exception to immunity applies. Federal courts can therefore only acquire subject matter jurisdiction in a nonjury civil action. *See* 28 U.S.C. § 1330(a); *see also Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872 (2d Cir. 1981) (explaining that the FSIA "by its clear terms provides

only for a non-jury civil action against foreign states"); *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 210 (D.D.C. 2012) ("More precisely, the FSIA grants United States district courts subject-matter jurisdiction over (1) nonjury civil actions (2) against a foreign state . . . (3) as to any claim for relief in personam, (4) provided that the foreign state is not entitled to immunity.").

A "civil action" is a defined term of art under the Federal Rules of Civil Procedure. This is made clear by the Supreme Court in *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406 (1960). In the context of its ruling that federal courts cannot import state court summary procedures in the absence of specific Congressional authorization, the Supreme Court stated:

> [T]he Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature, with certain exceptions stated in Rule 81 none of which is relevant here. Rule 2 directs that "There shall be one form of action to be known as 'civil action.'" Rule 3 provides that "A civil action is commenced by filing a complaint with the court."

Id. (quoting FED. R. CIV. P. 2 and 3). Here, Petitioners sought and obtained the *Ex Parte* Judgment utilizing the *ex parte* summary registration procedures provided for in New York CPLR § 5402. There can be no doubt that such *ex parte* summary state law procedures do not satisfy the requirements of Rules 2, 3 and 4 of the Federal Rules of Civil Procedure and thus do not constitute a "civil action" as required by Section 1330(a).[6] Therefore, this Court lacks subject matter jurisdiction under Section 1330(a) to entertain this summary proceeding.

This reasoning has been employed by courts in analyzing the "nonjury" trial requirement of Section 1330(a). *See Bailey v. Grand Trunk Lines New England*, 609 F. Supp. 48, 51 (D. Vt. 1984) *aff'd in part and, vacated in part on other grounds*, 805 F.2d 1097 (2d Cir. 1986). In *Bailey*, the court was confronted with the argument that the foreign state had waived its right to

[6] In fact, Article 54 of the New York CPLR itself expressly distinguishes between the summary registration procedures under CPLR § 5402 and the commencement of a plenary action on a judgment under CPLR § 5406.

strike the plaintiffs' jury demand. *See* 609 F. Supp. at 52. The court held first that, because Section 1330(a) only confers subject matter jurisdiction over nonjury civil actions, the motion to strike was a challenge to subject matter jurisdiction and therefore could not be waived. *Id*. The court then went on to hold that, in light of Section 1330(a), "this Court does not have jurisdiction to try this case with a jury." *Id.*; *see also Aboeid v. Saudi Arabian Airlines, Inc.*, No. 10- CV-2518, 2011 WL 2222140, at *3 (E.D.N.Y. June 1, 2011) ("Because [Section 1330(a)] is the sole source for subject matter jurisdiction over any action against a foreign state, the only jurisdiction this court enjoys with respect to civil actions against foreign states is the jurisdiction to conduct nonjury trials.") (citations and quotation marks omitted).

That reasoning applies here as well. This Court only has subject matter jurisdiction in a case involving a foreign state defendant if it is a "civil action." The *ex parte* summary proceeding initiated by Petitioners under CPLR § 5402 is not a civil action and therefore this Court lacks subject matter jurisdiction over this proceeding regardless of whether or not an exception to immunity might otherwise apply. *See Bailey*, 609 F. Supp. at 51-52 (holding that Section 1330(a) does not confer subject matter jurisdiction over a jury trial even where the plaintiff can establish an exception to sovereign immunity under Section 1605); *Aboeid*, 2011 WL 2222140, at *3 (same). Accordingly, the *Ex Parte* Judgment is void for want of subject matter jurisdiction and must therefore be vacated.

C. The *Ex Parte* Judgment Is Void for Want of Personal Jurisdiction under the FSIA

The FSIA provides that personal jurisdiction over a foreign state only exists where the court has subject matter jurisdiction under 28 U.S.C. § 1330(a) and service of process has been made in compliance with the FSIA's exclusive procedures for service of process set forth in 28 U.S.C. §1608(a). *See* 28 U.S.C. § 1330(b); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013,

1020 (2d Cir. 1991) ("Under the FSIA … personal jurisdiction equals subject matter jurisdiction plus valid service of process."); *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (stating that 28 U.S.C. § 1608(a) "sets forth the exclusive procedures for service on a foreign state . . . . ") (quoting H.R. REP. NO. 94-1487, at 23 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6622). Litigants must strictly comply with the requirements of Section 1608(a) – it is not sufficient that a plaintiff substantially complied or that the foreign state had actual notice of the dispute. *See Transaero*, 30 F.3d at 154 ("[S]trict adherence to the terms of 1608(a) is required."); *see also Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001) (stating that the FSIA "simply does not support a finding that anything less than strict compliance will suffice under the law"); *Finamar Investors, Inc. v. Republic of Tadjikistan,* 889 F. Supp. 114, 117 (S.D.N.Y. 1995) (requiring "strict adherence" to the terms of Section 1608(a), "not merely substantial compliance").[7]

Here, the Kingdom of Spain was not served at all prior to the entry of the *Ex Parte* Judgment, let alone served in accordance with the exclusive procedures set forth in Section 1608(a). And, as discussed above, the FSIA does not confer subject matter jurisdiction over *ex parte* summary proceedings. *See* Section I.B *supra*. Thus, the absence of subject matter jurisdiction and proper service of process precludes the exercise of personal jurisdiction over the Kingdom of Spain under the FSIA. *See* 28 U.S.C. § 1330(b).

[7] Personal jurisdiction and service of process are also prerequisites to the enforcement of an ICSID award under the plain language of Section 1650a. As discussed below, Section 1650a directs federal courts to enforce an ICSID award as if it were a state court judgment and therefore requires the initiation of a plenary civil action. *See* Section II *supra.* One of the attributes of a plenary action is the requirement of service of process on, and the acquisition of personal jurisdiction over, the defendant. FED. R. CIV. P. 3 and 4. Federal courts cannot enforce a state court judgment unless it has personal jurisdiction over the judgment debtor. *See Threlkeld v. Tucker*, 496 F.2d 1101, 1104 (9th Cir. 1974) ("Inasmuch as the federal courts are not appendages of the state courts, a federal court cannot enforce a state-court judgment without first independently establishing its own jurisdiction over the subject matter and parties."); *Sea Trade Mar. Corp. v. Coutsodontis*, No. 09 Civ. 488 (LGS)(HBP), 2014 U.S. Dist. LEXIS 105693, at *12 (S.D.N.Y. July 30, 2014) ("[A] federal court cannot enforce a state-court judgment without first independently establishing its own jurisdiction over the subject matter and parties."). Thus, federal courts also need to acquire personal jurisdiction over the defendant in an action to enforce an ICSID award.

Relying exclusively on *Mobil*, Petitioners argue that personal jurisdiction is not required in order to enter a judgment against the Kingdom of Spain on the Award. D.E. 1 ¶ 5; D.E. 2 at p. 10 n.5. However, *Mobil* is at odds with the decisions of other courts that have held that personal jurisdiction and proper service of process are required in order to enforce an ICSID award against a foreign sovereign. *See Micula v. Gov. of Romania ("Micula I")*, 104 F. Supp. 3d 42, 47 (D.D.C. 2015); *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168, 2011 WL 666227, at *3 (S.D.N.Y. Feb. 10, 2011). Moreover, in its amicus brief in the Second Circuit, the United States government has taken the position that the district court in *Mobil* erred in concluding that personal jurisdiction and service of process were not required to enforce an ICSID award against a foreign state. *See* U.S. Br. at pp. 12, 15.

II. SECTION 1650a REQUIRES THAT ICSID AWARDS BE ENFORCED THROUGH THE COMMENCEMENT OF A PLENARY ACTION

Petitioners' justification for seeking *ex parte* summary enforcement of the Award is predicated upon their erroneous assertion that there is a "gap" in the federal procedure for enforcement of ICSID awards and that this Court may therefore look to New York state law, specifically the *ex parte* summary registration procedures set forth in CPLR § 5402, to fill the supposed void. *See* D.E. 2 at p. 5. Petitioners are simply wrong. There is no procedural "gap."

Section 1650a unequivocally states that an ICSID award can only be enforced in the federal courts and that "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." 22 U.S.C. § 1650a(a).[8] Petitioners acknowledge that the plain language of

[8] The statute states in full:

> (a) An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award *shall* be enforced and shall be given the same full faith and credit *as if the award were a final judgment of a court of general jurisdiction of one of the several States*. The Federal

Section 1650a requires courts "to accord [ICSID awards] the same treatment that is provided to final judgments rendered by state courts." D.E. 2 at p. 5. And the only procedure available in federal courts for the enforcement of state court judgments, both at the time the ICSID Convention and its implementing legislation were passed and up to the present day, is the institution of a plenary action on the judgment as if it were a debt (albeit, with more limited defenses). *See Caruso v. Perlow*, 440 F. Supp. 2d 117, 119 (D. Conn. 2006) ("[T]he holder of a state-court judgment seeking to have it enforced in federal court must fall back upon the traditional, if rather cumbersome, strategy of bringing a civil action on the state-court judgment by invoking, for example, the diversity jurisdiction of the federal court."); *see also Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 753 (E.D. Va. 2012) ("It is axiomatic that 'the proper form of action on a judgment of a sister state is debt or its statutory equivalent' because 'it is only by an action on such a judgment that it can be enforced in another jurisdiction, since a judgment, as such, has no extraterritorial force or effect.'") (quoting 50 C.J.S. Judgments §§ 1364, 1368 (2012)) (internal citations omitted).[9]

> Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.
>
> (b) The district courts of the United States (including the courts enumerated in title 28, United States Code, section 460) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.

22 U.S.C. § 1650a(a), (b) (emphasis added).

[9] The federal judgment registration statute, 28 U.S.C. § 1963, only applies to the registration of federal judgments and cannot be used to register state court judgments in federal courts. *See Fox Painting Co. v. N.L.R.B.*, 16 F.3d 115, 117 (6th Cir. 1994); *Caruso*, 440 F. Supp. 2d at 118; *Continental Casualty Co.*, 893 F. Supp. 2d at 753. In addition, state law summary procedures for the enforcement of sister state court judgments under the Uniform Enforcement of Foreign Judgments Act (the "UEFJA"), upon which New York CPLR § 5402 is based, cannot be used to enforce a state court judgment in a federal court. *See Caruso*, 440 F. Supp. 2d at 119 ("[W]here, as here, a party has not properly filed a civil action on the state-court judgment, a federal court has no authority to borrow Connecticut's registration shortcut for foreign state-court judgments."); *see also Pinellas Cnty. v. Great Am. Mgmt. & Invest., Inc.,* 762 F. Supp. 221, 224 (N.D. Ill. 1991) ("Nothing in the language or history of the UEFJA indicates that this statute may transmute a foreign state court judgment into federal court judgment for the purposes of collection.").

Accordingly, there is no procedural "gap" with respect to the enforcement of ICSID awards because the plain language of Section 1650a requires ICSID awards to be enforced through a plenary action. *See Micula I*, 104 F. Supp. 3d at 50 ("Because the plain language of the ICSID enabling statute requires arbitral awards and state court judgments to be treated in a parallel manner, it follows that ICSID awards were intended to be enforced by plenary actions."); *Continental Casualty Co.*, 893 F. Supp. 2d at 754 ("Congress mandated that the proper method of enforcement of an ICSID arbitral award is the same as the enforcement of a state court judgment, which is a suit on the judgment as a debt.").

To construe Section 1650a as permitting the use of state law *ex parte* summary procedures would create an irreconcilable conflict with the jurisdictional requirements and procedural safeguards of the FSIA which make clear that the FSIA does not permit *ex parte* summary proceedings against foreign states. *See* Sections I.B and I.C *supra*. But such a conflict is untenable and unnecessary. This Court has an obligation to construe Section 1650a and the FSIA so as to avoid any such potential conflicts and harmonize the statutes. *See Smith v. Robinson*, 468 U.S. 992, 1024 (1984) ("[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes.") (abrogated by statute on other grounds); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). And that obligation is easily fulfilled by recognizing that, in fact, Section 1650a does require the institution of a plenary action to enforce an ICSID award.

Petitioners' argument that they were entitled to utilize the summary procedures of New York's CPLR § 5402 to enforce the Award also directly conflicts with the Supreme Court's decision in *Scanlon*, which held that, absent an explicit authorization by Congress, federal courts may not adopt state law summary procedures.[10] *See Scanlon*, 362 U.S. at 406-07; *see also United States v. Powell*, 379 U.S. 48, 58 n.18 (1964) ("Because [26 U.S.C. §] 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply."); *Application of Howard*, 325 F.2d 917, 919 (3d Cir. 1963) (stating that federal law "precludes the substitution of summary procedure for plenary action except in [the] narrowly defined special situations" specified in *Scanlon*); *United Mut. Houses, L.P. v. Andujar*, 230 F. Supp. 2d 349, 354 (S.D.N.Y. 2002) ("[A]bsent express authorization by statute, federal courts cannot entertain summary proceedings."); *Glen 6 Assoc., Inc. v. Dedaj*, 770 F. Supp. 225, 228 (S.D.N.Y. 1991) (court concluded that it lacked subject matter jurisdiction over a summary proceeding brought under state law). Here, Congress did not graft onto Section 1650a summary procedures for the enforcement of ICSID awards. While Congress could have authorized the use of summary enforcement procedures in Section 1650a, its failure to do so precludes their use.

The ICSID Convention itself does not provide for summary enforcement procedures either. In fact, the drafting history of the ICSID Convention and the legislative history of Section 1650a both demonstrate that the United States never intended, and actively sought to avoid, summary enforcement of ICSID awards in the United States. Those materials, along with the plain language of Section 1650a, establish that, in the United States, ICSID awards must be enforced through the commencement of a plenary action.

[10] Summary proceedings may also be appropriate if such proceedings are ancillary to a pending action. *See Scanlon,* 362 U.S. at 408. Here, there is no other pending action.

During the drafting of the ICSID Convention, the United States delegation made clear that the United States did not intend to provide for automatic enforcement of ICSID awards. *See* 2(2) HISTORY OF THE ICSID CONVENTION 885-86 (ICSID 1968).[11] Initial drafts provided that ICSID awards could only be enforced as though they were judgments of the national courts of the Contracting State. *See* 2(1) HISTORY OF THE ICSID CONVENTION 636 (ICSID 1968). The United States delegation explained that it had "serious difficulty" with the language permitting ICSID awards to be enforced as though they were national court judgments. *See* 2(2) HISTORY OF THE ICSID CONVENTION at 890. If ICSID awards were treated in the United States as judgments of federal courts, they would be subject to the federal judgment registration statute, 28 U.S.C. § 1963. That result was avoided when the United States delegation insisted on the inclusion of an entirely separate provision in Article 54(1) of the ICSID Convention dealing with the enforcement of ICSID awards in countries that have federal constitutions, such as the United States. The United States delegation's proposal permitted those countries to enforce ICSID awards in their federal courts but to treat the awards the same as judgments of the courts of constituent states. *See* 2(2) HISTORY OF THE ICSID CONVENTION at 889-90. The purpose of this amendment was to make clear that, in countries with federal constitutions, ICSID "awards would be subject to the laws relating to the enforcement in federal courts of the judgments of State courts." *Id.* at 889.

The United States delegation's amendment was ultimately adopted and incorporated as the second sentence in the final version of Article 54(1) of the ICSID Convention:

[11] The HISTORY OF THE ICSID CONVENTION is a trilingual, multivolume compilation of the ICSID Convention's drafting history (*travaux préparatoires*), as collected and published by ICSID. The ICSID Convention's drafting history is an important aid that should be considered when interpreting its meaning. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations."). A true and correct copy of portions of the HISTORY OF THE ICSID CONVENTION is appended as Exhibit 3 to the Pizzurro Declaration.

> Each Contracting State 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. *A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state*.

ICSID Convention, art. 54(1) (emphasis added). This language makes no sense if the United States had wanted to establish automatic or summary recognition procedures for ICSID awards.

Not surprisingly, the language of Section 1650a implements the provision of Article 54(1) insisted upon by the United States delegation. Thus, Section 1650a, following the permissive scheme set out in the second sentence of Article 54(1), provides both that only federal courts may entertain actions to enforce ICSID awards and that those awards are to be treated the same as judgments of state courts.

The legislative history of Section 1650a demonstrates that there was no Congressional intent to provide for, or even permit, the use of summary procedures for the automatic enforcement of ICSID awards. As Senator J. William Fulbright, the sponsor of the implementing legislation, explained:

> To give full faith and credit to an [ICSID] arbitral award as if it were a final judgment of a court of one of the several States means that *an action would have to be brought on the award in a United States District court to enforce the final judgment of a State court*.

112 CONG. REC. 13,148-49 (June 15,1966) (statement of Sen. J. William Fulbright) (emphasis added).[12] And, during Congressional hearings, Fred Smith, general counsel of the U.S. Treasury, echoed Senator Fulbright's view, stating:

> To give full faith and credit to an [ICSID] arbitral award as if it were a final judgment of a court of one of the several states means

[12] A true and correct copy of 112 CONG. REC. 13,148-49 (June 15,1966) is appended as Exhibit 4 to the Pizzurro Declaration.

> that *an action would have to be brought on the award in a U.S. district court just as an action would have to be brought in a U.S. district court to enforce the final judgment of a State court*.

House Subcomm. Hearing at 43 (emphasis added). Thus, the legislative record confirms that Congress did not intend to provide for summary enforcement of ICSID awards.[13]

If Congress had wanted to provide for automatic and summary enforcement, notwithstanding the efforts of the United States delegation to ICSID, it could have easily done so. Congress could have drafted the language of Section 1650a to equate ICSID awards to federal judgments, thereby extending to those awards the *ex parte* registration procedures of 28 U.S.C. § 1963. It did not. Congress also could have amended 28 U.S.C. § 1963 to include ICSID awards. It did not. Congress could have granted state courts concurrent jurisdiction over ICSID enforcement proceedings so those courts could utilize their own summary registration procedures modeled on the UEFJA, such as New York's CPLR § 5402. It did not. Finally, Congress could have specifically included summary procedures in the ICSID implementing statute, as it had done with the Federal Arbitration Act with respect to actions to enforce awards governed by that statute. It did not. *See* 9 U.S.C. §§ 6, 9 and 13; *see also Micula I*, 104 F. Supp. 3d at 50 ("[W]hen enacting the ICSID Convention's enabling statute, Congress was keenly

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[13] In addition, legal scholars writing at the time of the adoption of the ICSID Convention and the enactment of Section 1650a recognized that Congress's failure to provide for summary enforcement of ICSID awards meant that such awards could only be enforced through the commencement of a plenary action in accordance with the Federal Rules of Civil Procedure. As one commentator explained:

> A party seeking implementation of a state court judgment, and therefore also a[n ICSID] Convention award, must institute an original action on the award and obtain a new judgment in the federal court … As a consequence of [Congress'] failure to provide a summary procedure, the party seeking enforcement of the [ICSID] Convention award must file a complaint on the award, obtain jurisdiction pursuant to rule 4 of the Federal Rules of Civil Procedure, and comply with the venue provisions of [28 U.S.C. §§ 1391 and 1392.]

Comments, *A New Approach to United States Enforcement of International Arbitration Awards*, 1968 Duke L. J. 258 (1968); *see also* Richard J. Coll, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 Harv. Int'l L. J. 401, 411, 413 (1976) (stating that Section 1650a requires the initiation of "an original federal action" and "preclude[s] the simple registration and execution of ICSID awards").

aware that domestic arbitration awards could be confirmed, but elected not to use that procedure for ICSID awards.").

By insisting on the inclusion of the second sentence of Article 54(1) of the ICSID Convention and by implementing that provision in Section 1650a, the United States delegation and Congress consciously threaded the needle to avoid both the use of the summary procedures set forth in Section 1963, which applies to the registration of federal court judgments in federal courts, and the UEFJA, which applies in many states to the registration of sister state court judgments. Thus, the only conclusion that can be drawn is that Congress, rather than embracing automatic summary enforcement of ICSID awards, deliberately rejected such procedures.

Petitioners do not address the text or drafting histories of the ICSID Convention or Section 1650a. Instead, Petitioners rely on a line of cases in this district that permitted ICSID award creditors to enforce their awards through *ex parte* summary proceedings under New York CPLR § 5402. *See* D.E. 2 at pp. 6-7 (citing *Micula v. Gov't of Romania ("Micula II")*, No. 15 Misc. 107 (Part I), 2015 WL 46431180, at *2 (S.D.N.Y. Aug. 5, 2015); *Mobil*, 87 F. Supp. 3d at 586-602; *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).[14] These cases are not persuasive.

The decisions in *Mobil* and *Micula II* are both predicated on the erroneous assumption that the ICSID Convention and Section 1650a contemplate the use of summary enforcement procedures. As explained above, neither the ICSID Convention nor Section 1650a provides for, or even contemplates, the use of summary enforcement procedures. *See supra* at pp. 15-19. Indeed, the United States government in its *amicus* brief in *Mobil* reached the same conclusion

[14] Petitioners also cite instances in which proposed judgments on ICSID awards that were drafted by counsel for the award creditors were entered by courts in this district on an *ex parte* basis without any opposition from the award debtor and without any opinion or analysis. *See* D.E. 2 at p. 6 n.3. Those *ex parte* judgments should have no precedential value and are irrelevant.

that nothing in the ICSID Convention or Section 1650a even suggests that enforcement of ICSID awards must be "automatic" or *ex parte*. *See* U.S. Br. at pp. 15-17. In its view, ICSID awards can only be enforced in the United States against foreign states through the commencement of a plenary action with notice to the foreign sovereign debtor. *See id.* at pp. 15-20. Accordingly, the United States has taken the position that "the district court [in *Mobil*] was not permitted to 'borrow' state-law procedures that permit *ex parte* proceedings to recognize an arbitral award against a foreign state and enter a U.S. judgment against a foreign state." *Id.* at p. 15.

The United States government also took the position in its *amicus* brief in *Mobil* that the district court's decision in *Siag* was erroneous. *See id.* at p.15 n. 3. In *Siag*, the district court recognized that it was required to enforce an ICSID award as if it were a state court judgment but faulted the plaintiffs in that case for failing to provide any relevant authority as to the procedures to be used by a federal court to enforce a state court judgment. *See Siag*, 2009 WL 1834562, at *1. Thus, while the court in *Siag* ultimately concluded that state law summary registration procedures, such as CPLR § 5402, can be adopted by federal courts to enforce an ICSID award, the anomalous result in that case is no doubt the result of the fact that the only argument before the court was set forth in the plaintiffs' unopposed brief, which failed to apprise the court that the commencement of a plenary action on a judgment as a debt is the only procedure for enforcing state court judgments in federal courts.[15] The plaintiffs in *Siag* also failed to apprise the court of, and the court failed to address, the FSIA, which provides the exclusive basis for obtaining jurisdiction in cases against foreign states and expressly "prescribes procedures for commencing lawsuits against foreign states." *Verlinden*, 461 U.S. at 495, n.22.

[15] *Siag* relied on *Keeton v. Hustler Magazine, Inc.*, 815 F.2d 857 (2d Cir. 1987) as support for the adoption of New York's CPLR. But the issue in *Keeton* was whether Article 54 of the New York CPLR could be used in *state* court to recognize a *federal* court judgment. *See id.* at 860. That case simply has nothing to do with the issue in this case, which is whether the New York CPLR can be used by a *federal court* to register a *state court* judgment. *See* U.S. Br. at 15 n.3.

Finally, *Micula II* relied heavily on the decisions in *Siag* and *Mobil* and therefore suffers from all the same analytical defects in those decisions. Moreover, the dubious conduct of the award creditors in *Micula II* reveals the practical reasons for requiring ICSID awards to be enforced through a plenary action with the attendant requirement of service of process. In *Micula I*, the United States District Court for the District of Columbia rejected the reasoning in *Mobil*, denied the petitioner's *ex parte* application and held that the petitioner had to bring a plenary action to enforce its ICSID award against Romania. *See Micula I*, 104 F. Supp. 3d at 49-51. Thereafter, the petitioner's brother, who was also an award creditor, initiated a separate action in the Southern District of New York – *Micula II* – without apprising the New York court of the decision of the D.C. court in *Micula I*. *See Micula II*, 2015 WL 4643180, at *2. The petitioner in *Micula I* was allowed to join the proceedings in New York and was added to the *ex parte* judgment issued in *Micula II*, thus effectively circumventing the D.C. court's decision.

No doubt aware of the decision in *Micula I*, the Petitioners initiated an *ex parte* summary proceeding in this Court even though the United States District Court for the District of Columbia is the default venue under the FSIA for actions against foreign states that otherwise have no substantial connection to the United States. *See* 28 U.S.C. § 1391(f)(4). Thus, Petitioners' decision to bring this proceeding in New York was nothing more than a blatant attempt at forum shopping.[16]

[16] If this Court upholds the *Ex Parte* Judgment, the award of post-judgment interest in the *Ex Parte* Judgment should nevertheless be modified to conform to 28 U.S.C. § 1961, which provides the mandatory post-judgment interest rate that applies to all judgments entered in a district court, including judgments entered on arbitral awards. *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 100 (2d Cir. 2004); *see also Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004). Section 1961 applies even if the arbitral award specifies a different interest rate to apply until the date of payment. *See Tricon Energy Ltd.*, 718 F.3d at 459; *Westinghouse Credit Corp.*, 371 F.3d at 102; *but see* U.S. Br. at pp. 21-22 (taking the position that Section 1961 does not apply to judgments entered on ICSID awards).

CONCLUSION

For at least the reasons discussed above, this Court should grant the Kingdom of Spain's motion and vacate the *Ex Parte* Judgment.

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Respectfully submitted,

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