

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X	:	
WATKINS HOLDINGS S.À R.L. &	:	
WATKINS (NED) B.V.,	:	Civil Action No. 1:20-CV-01081-BAH
<i>Petitioners,</i>	:	
	:	
v.	:	
	:	
KINGDOM OF SPAIN,	:	
	:	
<i>Respondent.</i>	:	
-----X	:	

**JOINT SUBMISSION IN RESPONSE TO THE COURT’S  
JUNE 2, 2023 MINUTE ORDER**

ALLEN & OVERY LLP

Patrick W. Pearsall  
David Ingle  
Craig D. Gaver  
Michael Rodríguez Martínez  
*(pro hac vice to be requested)*  
1101 New York Avenue, NW  
Washington, DC 20005  
Tel: 202 683 3800

Bradley S. Pensyl *(admitted pro hac vice)*  
Laila Delimustafic *(admitted pro hac vice)*  
Gideon Duke-Cohan *(admitted pro hac vice)*  
1221 Avenue of the Americas  
New York, NY 10020  
Tel: 212 610 6300

*Attorneys for Petitioners Watkins Holdings  
S.à r.l. & Watkins (Ned) B.V.*

Petitioners together with Spain<sup>1</sup> (together, the “Parties”) respectfully submit this joint report in response to the Court’s order dated June 2, 2023 requesting that the Parties inform the Court of their position on whether a stay of the above-captioned action is warranted in light of the appeals *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 23-7031, and *9REN Holding S.Á.R.L v. Kingdom of Spain*, No. 23-7032, currently pending in the D.C. Circuit. The Parties set forth their respective positions below.

### **PETITIONERS’ POSITION**

Nearly eight years ago, Petitioners initiated an international arbitration against Spain at ICISD. After successfully litigating that arbitration, Petitioners sought to enforce their Award in this Court against Spain’s U.S. assets. Petitioners then defended the Award in another ICSID proceeding in which Spain sought to annul the Award. Now, after two separate, fully-litigated ICSID proceedings, Petitioners continue to defend the Award here, where Spain seeks to evade its obligations to pay the damages owed, and in Luxembourg, where Spain has requested that a foreign court strip *this* Court of its ability to recognize and enforce the Award under U.S. law.

Now Spain is trying to delay enforcement with a desperate attempt to get the original tribunal to “revise” the Award. Spain knows that this attempt, no matter how manifestly without merit, forces ICSID to call for a stay of enforcement. To date, all of Spain’s attempts to evade its obligations to Petitioners have failed. This attempt will also fail. Petitioners submit that no more than a partial stay is warranted under these circumstances. Specifically, the Court should stay Spain’s motion to dismiss and Petitioners’ cross-motion for summary judgment. But it *should not* stay Petitioners’ motion for preliminary injunction.

The issuance of a stay in one proceeding during the pendency of another proceeding is “an extraordinary remedy.” *Nat’l Indus. for Blind v. Dep’t of Veterans Affs.*, 296 F. Supp. 3d 131, 137 (D.D.C.

---

<sup>1</sup> Capitalized terms not herein defined have the same meaning ascribed to them in the Parties’ pleadings.

2017). “*Only in rare circumstances* will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (emphasis added). To determine whether a specific case constitutes such a rare circumstance, courts must balance (1) any benefit to judicial economy with (2) the possible hardships to the parties. *See Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012); *National Industries*, 296 F. Supp. 3d. at 137. The party favoring a stay bears the burden of showing that the stay is warranted *and* needed. *See National Industries*, 296 F. Supp. 3d. at 137.<sup>2</sup>

Given the issuance of a provisional stay of the enforcement of the Award by ICSID, *see* Respondents’ Exhibit A, Petitioners do not object to staying Spain’s motion to dismiss and Petitioners’ cross-motion for summary judgment. Petitioners, however, object to a stay of their motion for preliminary injunction, as Spain cannot meet the high threshold for obtaining such a stay.

*First*, there is no judicial efficiency gained by staying Petitioners’ motion for preliminary injunction. If Spain’s motion to dismiss and Petitioners’ cross-motion for summary judgment are stayed, there is no risk that the Court will issue a ruling that will later be contradicted by a D.C. Circuit opinion in *NextEra* and *9REN*. There will be no fractured and unnecessary litigation. On the judicial-economy prong, therefore, the situation here is the opposite of the one present in *Hulley Enterprises Ltd. v. Russian Fed’n*, 211 F. Supp. 3d 269 (D.D.C. 2016) and *Hulley Enterprises Ltd. v. Russian Fed’n*, 502 F. Supp. 3d 144 (D.D.C. 2020).

*Second*, the balance of hardships weighs heavily in favor of Petitioners. Staying Petitioners’ preliminary injunction motion would cause them irreparable harm. As explained in Petitioners’ motion, Spain has filed an action before a court in Luxembourg seeking, among other things, an anti-suit injunction against the enforcement action before this Court. *See* ECF No. 45-1 at 2, 9–11. That action is

---

<sup>2</sup> While Respondent has not filed a motion seeking a stay, it is the stay applicant party given that it is seeking a stay in response to the Court’s June 2, 2023 order.

a continuation of Spain’s wrongful efforts to strip Petitioners’ of their rights under U.S. law and this Court of its jurisdiction to enforce the Award. *Id.* at 11–18. For that reason, in *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618, 2023 WL 2016932, at \*1 (D.D.C. Feb. 15, 2023) and in *9REN Holding S.Á.R.L. v. Kingdom of Spain*, No. 19-cv-01871, 2023 WL 2016933, at \*1 (D.D.C. Feb. 15, 2023), the court granted the petitioners’ requests for a preliminary injunction to enjoin similar collateral proceedings.

Here, a stay of Petitioners’ motion for defensive injunctive relief would almost certainly preclude them from enforcing the Award against Spain’s U.S. assets. Following the entry of the Court’s June 2, 2023 order, counsel for Petitioners asked counsel for Spain whether Spain would withdraw the Luxembourg Action and abstain from initiating new actions seeking further injunctive relief. Spain refused. Spain’s response is deeply troubling not only because of the already pending Luxembourg Action, but also because, in another matter, Spain has sought and obtained from a German court an anti-anti-suit injunction: An injunction barring the petitioners before Judge Cobb from obtaining a defensive, preliminary injunction against Spain like the one Petitioners seek here. *See* Petitioners’ Exhibit A. If the Court stays Petitioners’ motion for preliminary injunction, Petitioners will likely be enjoined from (i) enforcing the Award, and (ii) pursuing injunctive relief. That result would be unjust, inequitable, and cause irreparable harm to Petitioners.

Because there is more than a “fair possibility that a stay would adversely affect” Petitioners, Spain “must demonstrate a clear case of hardship or inequity in being required to go forward.” *National Industries*, 296 F. Supp. 3d. at 137–38 (citing *Landis*, 299 U.S. at 255) (internal quotation marks omitted). Spain cannot do so. Because the merits motions will be stayed, Spain is not at risk of paying the amount due under the Award or expending resources litigating while the D.C. Circuit considers the appeals before it.

In sum, there is no principled basis to stay Petitioners’ preliminary injunction motion, particularly in light of Spain’s insistence to continue the Luxembourg Action and refusal to agree to refrain from seeking new injunctive relief. *See Landis*, 299 U.S. at 255 (emphasizing the need to “maintain an even balance” between “competing interests”). Petitioners’ motion is fully briefed and ripe for determination. The risk that Spain will obtain a ruling in the Luxembourg Action or initiate similar actions is real, immediate, and consequential to Petitioners’ ability to get relief under U.S. law—relief that they are entitled to seek and entitled to receive. Petitioners respectfully request that the Court grant Petitioners’ motion for preliminary injunction as a matter of urgency.

### **RESPONDENT’S POSITION**

#### Background

As the Court noted in its Minute Order of June 2, 2023, there are appeals currently pending in the D.C. Circuit which directly bear on the fundamental legal questions in this case. While the Court identified two such appeals, *Nextera Energy Global Holdings BV v. Kingdom of Spain*, No. 23-7031, and *9REN Holding SARL v. Kingdom of Spain*, No. 23-7032, there is also third pending appeal, *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 23-7038. All three appeals are aligned, and will be heard and decided together by the D.C. Circuit after a, oral argument that will likely be scheduled in September 2023.

As noted in Spain’s MOL in Support of its Motion to Dismiss dated April 7, 2023, in *Blasket*, Judge Leon found that Spain and the investors in that case, similar to the Petitioners in this case, “were *incapable* of entering into an agreement to arbitrate anything at all.” Opinion (2023 WL 2682013), 12. Judge Leon dismissed the petition, expressly declining “to follow the path taken” by Judge Chutkan in *NextEra* and *9REN*. Opinion, 11. Judge Leon explained that whether “the parties were incapable of entering into an agreement to arbitrate” was a question courts, not arbitrators, must answer under black-letter arbitration law. Opinion, 12. Looking to the European Court of Justice’s decisions, international

practice, and the Energy Charter Treaty’s text, the court concluded that Spain “lacked the legal capacity to extend an offer to arbitrate any dispute” with EU nationals. Opinion, 13-17. Because “there is no arbitration agreement,” the FSIA’s arbitration exception did not apply. Opinion, 17. The court also deemed the FSIA’s waiver exception inapplicable because Spain had not explicitly or implicitly consented to U.S. courts’ jurisdiction. Opinion. 18, 20. Judge Leon accordingly also denied Petitioner’s request for a preliminary injunction.

Further, on May 19, 2023, Spain filed an Application for Revision of the Award at ICSID, which was registered by ICSID over the objection of Petitioners. The Application for Revision will deal with an issue arising because the ad hoc Committee in the Annulment proceedings confirmed that the Watkins tribunal erred in its calculation of damages. In particular, the ad hoc Committee found that the Watkins tribunal failed to properly carve out the amount of damages claimed based on a tax measure passed by Spain, by reference to article 21 of the Energy Charter Treaty. A request for a stay was made in the Application for Revision. Because the Tribunal has not yet been reconstituted, that request for a stay has not been ruled on yet by the Tribunal; however, a provisional stay of the enforcement of the Award was ordered by the Secretary-General of ICSID. See Letter attached hereto as Exhibit A.

Finally, just this week, in respect of the proceedings in Luxembourgish court, Spain agreed to extend the responsive filing deadline for Petitioner 2 months from July 7, 2023. Thus, that proceeding is effectively delayed by at least 2 months.

#### Argument

“The stay of a petition to enforce an arbitration award is one such threshold issue that the Court may properly consider before jurisdiction.” *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 2019 WL 4564533, \*3 (D.D.C. Sept. 18, 2019). “Indeed, without first resolving questions about their jurisdiction, both the D.C. Circuit and other courts in this district have determined it appropriate to stay such a petition where there were ongoing proceedings related to an award in a foreign

jurisdiction.” *Id.* (citing cases).

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In deciding whether to grant a stay, courts generally “‘weigh competing interests and maintain an even balance’ between the court’s interests in judicial economy and any possible hardship to the parties.” *Belize Soc. Dev. Ltd. v. Gov’s of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254–55).

A stay is appropriate here. First, considerations of judicial economy favor a stay. The D.C. Circuit is going to decide three related appeals together, which will directly bear on the key issues in this case. The *Masdar* court highlight the “unique concerns” posed by motions to stay arbitral enforcement:

On the one hand, such a motion may implicate federal court’s obligations under international treaties to promptly recognize these awards, but on the other hand, premature enforcement risks conflicting results and a consequent offense to international comity.

*Id.*, at \*3 (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998)). Although there will be a delay in the ultimate resolution of this case, if this case is not stayed, it is possible that the D.C. Circuit will confirm the findings of *Blasket*, and reject the findings in *Nextera/9REN*, in which case expensive litigation involving more complex issues will result, and once the Court rules in this present case, an appeal is likely to be filed by either Petitioner or Respondent, while the three appeals are still pending. Waiting for the D.C. Circuit to weigh in will save judicial resources, as well as time and effort for the litigants and counsel. In particular, Spain is litigating the issues fundamentally underlying this case in the D.C. Circuit already, and addressing the same issues here as well is an unnecessarily duplication of time and effort.

Second, “the international character of the action and the intricacies of the issues involved support[ed] the issuance of a stay.” *Id.*, at \*4. In this regard, the *Masdar* court noted that “interest of

comity, judicial economy, and the convenience of the parties and the courts . . . are especially strong where a foreign proceeding is ongoing . . . and there is a possibility that the award will be set aside, since a court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings.” *Id.* Here, the court proceeding in this action and deciding these unique of international significance would be imprudent. The most sensible course would be to let the D.C. Circuit decide these issues in the three pending appeals, especially since if the D.C. Circuit decides in Spain’s favor, then these proceedings would infringe on Spain sovereign immunity. Therefore, comity considerations are important and weigh in favor of a stay here. Further, ICSID has provisionally stayed the enforcement of the award, and thus Petitioner cannot rightly pursue the enforcement of the Award at this time.

Finally “the balancing of the hardships” to each party favors Spain because Spain would undeniably be burdened by having to litigate the same matters here and in front of the D.C. Circuit. Many courts have stayed proceeding to avoid piecemeal litigation. For example, in *Hulley Enterprises Ltd. v. The Russian Federation*, Chief Judge Howell explained that the “Supreme Court has expressly held that that a court may, for the sake of efficiency, decline jurisdiction prior to deciding a ‘threshold, nonmerits issue’ presented by a case.” 211 F. Supp. 3d 269, 279-80 (D.D.C. 2016) (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 433 (2007)). See also *Telcordia Technologies, Inc. v. Telkom SA, Ltd.*, 95 F. App’x 361, 362 (D.C. Cir. ) (affirming district court’s decision to stay enforcement of arbitral award pending appeal of decision to high court in South Africa); *Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. v. The Kingdom of Spain*, No. 18-1753 (EGS) (Aug. 28, 2019) (“Given the pendency of proceedings to annul the award the Court is being asked to enforce, and the provisional stay entered by the ICSID, the Court is persuaded, in an exercise of its judgment, after weighing the competing interests cited by the Supreme Court, that this petition should be stayed.”)



To the extent that Petitioner claims that injunctive relief in the Dutch proceeding related to Watkins warrants the Court forging ahead, that case involves more fundamental issues than injunctive relief, and it is not proceeding on an urgent basis. In fact, Spain granted Watkins a greatly extended briefing schedule in that case, and now Watkins will have until September 2023 to make its responsible filing in that case, and the decision in that case would generally take place only after a hearing. The parties can give regular reports to the Court concerning the pace of that proceeding to alleviate any concerns the court may have. Tellingly, Watkins sought to condition its agreement to stay this case on a total withdrawal of the Luxembourg proceedings.

For all the reasons above, Spain submits that this action should be stayed.

Briefing Schedule Issue (Motion to Dismiss / Summary Judgment Motion)

The parties agreed to a briefing schedule as to Spain's replacement motion to dismiss, and the court entered the following scheduling order on March 9, 2023:

**MINUTE ORDER (paperless), upon consideration of the parties' [41] Joint Status Report, STRIKING the previously filed [7] Motion to Dismiss, with leave to refile, and DIRECTING the parties to adhere to the following SCHEDULING ORDER in briefing any replacement motion to dismiss:**

- (1) By April 7, 2023, Spain shall file any replacement motion to dismiss and a set of filings in support of such motion;**
- (2) By May 12, 2023, Petitioners shall file any opposition to the replacement motion to dismiss;**
- (3) By June 9, 2023, Spain shall file any reply in support of its replacement motion to dismiss.**

However, on May 12, 2023, Petitioner also filed a Motion for Summary Judgment in response to the Motion to Dismiss. Thus, on June 1, 2023, Spain requested that Watkins discuss and agree to an adjusted briefing schedule, that would take into account the Motion for Summary Judgment. Despite various communication, Watkins has not confirmed or objected to a revised briefing schedule.

Therefore, if the Court does not stay these proceedings, Spain requests that it have until June 23, 2023 to file a combined Reply in Support of the Motion to Dismiss / Opposition to Motion for Summary

Judgment.

Dated June 7, 2023

/s/ Bradley S. Pensyl

ALLEN & OVERY LLP

Bradley S. Pensyl (admitted *pro hac vice*)

Bradley.Pensyl@allenoverly.com

Laila Delimustafic (admitted *pro hac vice*)

Laila.Delimustafic@allenoverly.com

Gideon Duke-Cohan (admitted *pro hac vice*)

Gideon.Duke-Cohan@allenoverly.com

1221 Avenue of the Americas

New York, NY 10020

Tel: (212) 610-6300

Patrick W. Pearsall

David Ingle

Craig D. Gaver

Michael Rodríguez Martínez (*pro hac vice* to  
be requested)

1101 New York Avenue, NW

Washington, DC 20005

Tel: 202 683 3800

Fax: 202 683 3999

*Attorneys for Petitioners Watkins Holdings*

*S.à r.l. & Watkins (Ned) B.V.*

/s/ Matthew J. Weldon

K&L GATES LLP

Matthew J. Weldon

599 Lexington Avenue

New York, NY 10022

Tel: (212) 536-4042

Matthew.Weldon@klgates.com

Brian D. Koosed

1601 K Street, NW

Washington, DC 20006

Tel: (202) 778-9204

Brian.Koosed@klgates.com

*Attorneys for Defendant Kingdom of Spain*