INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Cube Infrastructure Fund SICAV and others
Respondents on Annulment

v.

Kingdom of Spain
Applicant on Annulment

(ICSID Case No. ARB/15/20) – Annulment Proceeding

DECISION ON THE CONTINUATION OF THE PROVISIONAL STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee
Prof. Dr. Jacomijn van Haersolte-van Hof, President of the *ad hoc* Committee
Mr. Álvaro Castellanos Howell, Member of the *ad hoc* Committee
Mr. Timothy J. Feighery, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Ms. Anna Toubiana

---

17 April 2020

Table of Contents

I. PROCEDURAL HISTORY

1. This Decision addresses the Kingdom of Spain's application for the continuation of a provisional stay of enforcement of the ICSID award rendered on 15 July 2019 in *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20 (the "**Award**").

2. On 12 November 2019, the Kingdom of Spain ("**Spain**") filed an application for annulment of the Award (the "**Application**"). The Application contained a request for a provisional stay of enforcement of the Award until the *ad hoc* Committee ruled on such a request, and further that the stay be maintained until the Application itself is decided by the *ad hoc* Committee (the "**Request**") pursuant to Article 52(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**").

3. The ICSID Secretary-General registered the Application on 18 November 2019 and the *ad hoc* Committee (the "**Committee**") was constituted on 18 December 2019 in accordance with Arbitration Rules 6, 52(2), and 53. The Members of the Committee are Prof. Dr. Jacomijn van Haersolte-van Hof (Dutch), President, Mr. Álvaro Castellanos Howell (Guatemalan), and Mr. Timothy J. Feighery (US, Irish). All members were appointed by the Chairman of ICSID's Administrative Council.

4. On 9 January 2020, Spain filed its Submission in Support of the Continuation of the Stay of Enforcement of the Award (the "**Submission**").

5. On 22 January 2020, the Committee held the first session by telephone conference and issued Procedural Order No. 1 concerning procedural matters along with a procedural calendar.

6. On 23 January 2020, Cube Infrastructure Fund SICAV, Cube Infrastructure Managers S.A., Cube, Energy S.C.A., Demeter Partners S.A., and Demeter 2 FPCI ("**Cube and Demeter**," or the "**Respondents**") filed their Opposition to Spain's Request for Continuation of the Stay of Enforcement of the Award (the "**Response**").

7. On 6 February 2020, Spain filed its Reply in Support of the Continuation of the Stay of Enforcement of the Award (the "**Reply**").

8. On 28 February 2020, Cube and Demeter filed their Rejoinder to Spain's Reply in Support of the Continuation of Stay of Enforcement of the Award (the "**Rejoinder**").

9. On 5 March 2020, pursuant to the procedural calendar, the Committee informed the Parties that a Hearing on the Stay of Enforcement of the Award was not necessary.

10. On 24 February, the European Commission ("**EC**") submitted with the ICSID Secretariat an Application for Leave to Intervene as a Non-Disputing Party dated 21 February 2020 pursuant to Rule 37(2) of the Arbitration Rules. Pursuant to the Committee's instructions, the Parties submitted their observations on the EC's Application on 4 March 2020. The Parties further submitted comments on the opposing Party's observations on 16 March 2020.

11. After reviewing the Parties' submissions, the Committee issued its Decision on the European Commission's Application for Leave to Intervene as a Non-Disputing Party on 2 April 2020, denying the EC's Application.

12. Sections II and III of this Decision summarise the Parties' positions on the stay of enforcement of the Award.[1] Section IV sets out the reasons for the Committee's decision. The Committee's decision is stated in Section V.

II. THE PARTIES' POSITIONS

A. Spain's Position

13. Spain seeks the continuation of the provisional stay of the Award until the Committee renders its decision on the Application for annulment. It argues that the prevailing practice of ICSID *ad hoc* Committees has been to stay enforcement of an award during the pendency of annulment proceedings. Further, according to Spain, there are no circumstances that justify deviating from this practice given (i) the merits and good

[1] The summaries included in this Decision are not intended to be exhaustive descriptions of the Parties' submissions. The objective is to provide the relevant context for the Committee's analysis and findings. The Committee has nevertheless carefully considered all the submissions made by the Parties.

faith of the Application; (ii) the harm to Spain if a stay is denied; and (iii) the absence of harm to Cube and Demeter.

1. The Applicable Legal Standard

14. Spain submits that the Committee is empowered to continue the stay of enforcement "if it considers that the circumstances so require" and that the common practice is to do so unless there are circumstances warranting otherwise. [2] In support, Spain cites to the *ad hoc* Committee's holding in *Occidental v. Ecuador* that "[t]he prevailing practice in prior annulment cases has been to grant the stay of enforcement"[3] and to the statement of the *ad hoc* Committee in *Víctor Pey Casado v. Chile* that "absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic."[4]

15. Spain rejects the notion that a stay of enforcement may only be granted in "exceptional circumstances."[5] For Spain, the ICSID Convention and the ICSID Arbitration Rules do not use the term "exceptional" to qualify the circumstances that justify maintaining a stay of enforcement.[6]

16. Further, using "exceptional circumstances" as the legal standard cannot be reconciled with the common practice of ICSID *ad hoc* Committees.[7] Specifically, Spain notes that of the 55 ICSID annulment cases where stays of enforcement have been sought, 39 stays were granted resulting in a 75% success rate for applicants.[8]

17. Spain also points out that the decisions cited by Cube and Demeter in support of their position do not actually state that "exceptional circumstances" are required to continue

[2] Submission, ¶7, citing Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules.
[3] *Id*., ¶7; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, 30 September 2013 ("***Occidental***"), **Spain Annex-29**, ¶50.
[4] Submission, ¶8; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010 ("***Víctor Pey Casado***"), **Spain Annex-30**, ¶25.
[5] Reply, ¶8.
[6] *Id*., ¶9.
[7] *Id*., ¶3.
[8] *Id*., ¶11.

a stay of enforcement.[9] In fact, the only decision cited by Cube and Demeter which includes the phrase "exceptional circumstances" uses it to refer to the burden on the party opposing the stay and subsequently joins the rest of the decisions cited by Cube and Demeter in referring only to "circumstances" as the requirement for continuation.[10]

18. Noting that neither the ICSID Convention nor the ICSID Arbitration Rules state which factors an *ad hoc* Committee should consider in its decision to continue a stay of enforcement, Spain submits that the Committee should consider (a) whether the annulment application is dilatory or frivolous; (b) the adverse consequences to either party as a result of granting or denying the stay of enforcement; (c) the risk of non-recoupment of the award if it is paid and subsequently annulled; and (d) the risk that the award may not be complied with if the annulment application fails.[11]

19. Regarding the burden of proof, Spain argues that the Committee should evaluate all circumstances and cites the holding of the *ad hoc* Committee in *Standard Chartered Bank v. Tanzania* that "[no] particular party [in a stay application] bears the burden of establishing circumstances requiring a stay" as support.[12]

20. Spain notes that it has nevertheless fully and successfully undertaken to identify the circumstances warranting the stay whereas Cube and Demeter merely object to the Request without further support.[13] Spain submits that although Cube and Demeter do not bear the primary burden, they must establish certain issues including whether they would be prejudiced by the stay and their commitment to return the funds that would be paid under the Award if the Application ultimately succeeds.[14]

[9] *Id*., ¶20.
[10] *Id*., ¶¶21-22.
[11] *Id*., ¶¶6-7.
[12] *Id*., ¶29, citing *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 12 April 2017 ("***Standard Chartered***"), **Spain Annex-40**, ¶53.
[13] Reply, ¶¶26, 30.
[14] *Id*., ¶¶27, 30.

2. Whether the Circumstances Require a Stay

21. Spain, in its Submission and Reply, highlights the following circumstances in support of its request in support of the continuation of the stay:

a. the Application is well-founded, made in good faith, and is not dilatory;

b. Spain's position would be prejudiced if the stay is not continued; and

c. continuing the stay would not prejudice or harm Cube and Demeter.

a) The Application is well-founded, made in good faith and is not dilatory

22. Spain submits that one of the circumstances that *ad hoc* Committees have considered in deciding whether to grant a stay of enforcement is whether the annulment application is frivolous, dilatory, or not made in good faith.[15] Therefore, "[i]f frivolousness of an annulment application is a factor in determining whether to grant or deny a stay, then the seriousness of the annulment application must necessarily be considered."[16]

23. Spain argues that even a cursory analysis of the grounds confirms "the good faith and seriousness of the Application."[17] Spain contends that:

a. "[…] the Tribunal went beyond its jurisdiction by failing to apply the proper law with regard to the intra-EU objection and wrongly interpreting Article 26 of the Energy Charter Treaty […] The Tribunal also failed to apply the proper law by completely disregarding European Union Law when assessing the facts and merits

[15] *Id*., ¶31, citing generally, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005 ("***MTD Decision on the Request for a Continued Stay***"), **Spain Annex-32**, ¶28; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006 ("***CMS Decision on the Request for a Continued Stay***"), **Spain Annex-33**, ¶37.
[16] Reply, ¶33, f. 30, citing *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on the Application to Terminate the Provisional Stay of Enforcement of the Award dated 21 February 2017 ("***Quiborax***"), **Spain Annex-41**, ¶ 58 ("On the other hand, the Request for Annulment and the grounds raised by Respondent are, at first glance, sufficiently serious to convince the Committee that the Request for Annulment is not imprudent.").
[17] *Id.*, ¶33.

of the case. Finally, the wrongful application of the proper law by the Tribunal determined that the Award infringed the most basic principles contained in the European Commission's State Aid Decision on the Spanish renewable energy support scheme;"[18]

b. "[…] the Award incurred in a serious departure from a fundamental rule of procedure and thus prevented the Kingdom of Spain of its right to fully present its case, precisely by denying Spain the introduction into the record of the Declaration of the Representatives of the Governments of the Member States of 15 January 2019, by denying the European Commission's intervention in the arbitral proceeding, by breaching the most basic rules regarding evidence and the Applicant's right to be heard and by providing the Applicant with a treatment which failed to be impartial and equal;"[19] and

c. "[…] the Award failed to state the reasons on which it is based by providing contradictory findings in relation to stabilization commitments and the application of European Union Law."[20]

24. Spain does not suggest that the Committee decide whether to grant the Request solely on the merits of the grounds for the Application.[21] Instead, Spain invokes the *fumus bonii iuris* of the Application and argues that insofar as the Application raises "serious, well-grounded bases for annulment and has been made in good faith," this clearly weighs in favour of the stay.[22]

b) Spain will be harmed if the stay is not continued

25. Spain claims that it would be prejudiced in the absence of a stay.[23] If the Award is annulled after its enforcement, Spain could not recover the funds in light of Cube's and Demeter's cascade structure, which places the most liquid assets in subsidiaries rather

[18] Submission, ¶12.
[19] *Id.*, ¶13.
[20] *Id.*, ¶14.
[21] Reply, ¶34.
[22] *Id.*, ¶¶32-35.
[23] Submission, ¶15.

than in the creditor companies.[24] Spain also raises the possibility of Cube and Demeter becoming insolvent, paying out the Award to shareholders, assigning their interest in the Award to third parties, and dissolving altogether as impediments to its ability to recoup the funds.[25]

26. Spain rejects Cube's and Demeter's argument that a right to immediate enforcement of the Award is the primary guiding principle of the Committee's analysis.[26] The right to seek annulment and a stay of enforcement of an award under the ICSID Convention, as Spain does now, are equally important and should be considered in determining the risk of non-recoupment a State faces.[27] In support, Spain cites the *ad hoc* Committee's holding in *MTD v. Chile* that a State "should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn out to be irrecoverable from an insolvent claimant."[28]

27. In any case, Spain points out that even if the amount could be recouped, Spain should not be forced to commit the taxpayer-provided resources and efforts required for the additional legal proceedings when maintaining the stay could have avoided this burden.[29] This burden would be exacerbated by the fact that Cube and Demeter are based in different EU countries thereby requiring Spain to pursue litigation in various jurisdictions.[30] While Cube and Demeter would be compensated for a potential delay in payment through interest, no similar provision exists to compensate Spain for the hardship of recovering the funds.[31]

28. Furthermore, Spain argues that by lifting the stay, "there is a real prejudice that could be caused to Spain (and third parties)" arising out of Spain's multiple obligations under

[24] *Id.*, ¶¶16-17.
[25] Reply, ¶55.
[26] *Id.*, ¶57.
[27] *Id.*, ¶¶57-58.
[28] *Id.*, ¶58, citing *MTD Decision on the Request for a Continued Stay,* **Spain Annex-32**.
[29] Submission, ¶19.
[30] Reply, f. 47.
[31] *Id.*, ¶53.

international law.[32] Specifically, if the stay is lifted, Spain will be forced to choose between complying with the ICSID Convention or the Treaty on the Functioning of the European Union (the "**TFEU**").[33]

29. Spain submits that under Article 107(1) of the TFEU, it is restricted from providing aid that "distorts or threatens to distort" competition and trade between Member States.[34] Spain also submits that under Article 108(3) of the TFEU, it must inform the EC of "any plans to grant State Aid and must not implement such plans before the European Commission has authorized it."[35] If the EC finds that the State Aid is incompatible with the standards set out in Articles 107(2) and 107(3) of the TFEU, "the State concerned shall abolish or alter such aid within a period of time to be determined by the [EC]."[36]

30. Considering the TFEU's framework, Spain is required to obtain the EC's authorization in order to comply with the Award because it constitutes notifiable State Aid.[37] That the Award constitutes notifiable State Aid was determined by the EC's decision of 10 November 2017 (the "**EC Decision**") regarding Spain's regulatory scheme supporting renewable measures.[38] Accordingly, any payment of the Award by Spain before receiving the EC's authorization constitutes a violation of European Union law.[39]

31. Spain submits that lifting the stay and therefore forcing it to decide prematurely whether to comply with the ICSID Convention or the TFEU would result in undesirable consequences. Specifically, if Spain decides to comply with its obligations under the TFEU, it will have to refrain from paying the Award, thereby violating Article 53 of

[32] *Id.*, ¶86.
[33] *Id.*, ¶95.
[34] *Id.*, ¶100, citing Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights (2012/C/326/02), Official Journal of the European Union C 326/49, 26 October 2012, **Spain Annex-49**, Article 107(1).
[35] *Id.*, ¶102, citing *Id.*, Article 108(3).
[36] *Id.*, ¶103, citing *Id.*, Article 108(2).
[37] *Id.*, ¶100.
[38] *Id.*, ¶106, citing Decision C(2017) 7384 of the European Commission, rendered on 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN))), **Spain Annex-28**.
[39] *Id.*, ¶108.

the ICSID Convention.[40] This could "subject [Spain] to various indirect sanctions" including proceedings before the International Court of Justice.[41]

32. If, on the other hand, Spain decides to comply with the ICSID Convention and the EC determines that the Award is incompatible State Aid after Cube and Demeter have obtained payment, Spain would be required to initiate legal proceedings to recover the amounts paid.[42] If Spain fails to recover these amounts, the EC may impose monetary sanctions on Spain.[43] Further, the Parties may find themselves in additional legal proceedings if Cube and Demeter challenge the EC's determination.[44] Regardless of its choice, however, Spain will be forced to face the consequences of the breach it will have committed.[45]

33. Spain rejects Cube's and Demeter's characterization of Spain's conflicts under international law as "an excuse to avoid complying with the Award."[46] Spain notes that the procedure it must adhere to before the EC does not create an additional opportunity for objections to the jurisdiction of the arbitration proceeding or the Award as Cube and Demeter suggest.[47] Spain also points out that Cube and Demeter are subject to EU law as well and therefore cannot dissociate and benefit from it at the same time.[48]

34. Spain contends that once the Committee has resolved the Application, these issues can be prudently dealt with as Spain's conflicting obligations under international law will become moot, narrowed in scope, or at the least, a certainty.[49] Thus, continuing the stay keeps the Parties from having to engage in proceedings that may turn out to be

[40] *Id.*, ¶¶96, 99.
[41] *Id.*, ¶96, citing *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, **Spain Annex-48**, ¶41.
[42] Reply, ¶¶87, 117.
[43] *Id.*, ¶¶94, 117.
[44] *Id.*, ¶88.
[45] *Id.*, ¶¶95-96.
[46] *Id.*, ¶109, citing Response, ¶19.
[47] *Id.*, ¶¶110-111.
[48] *Id.*, ¶121.
[49] *Id.*, ¶90.

unnecessary[50] as well as from violating any laws or obligations they are each subject to.[51]

35. Lastly, Spain submits that the Vienna Convention on the Law of Treaties (the "**VCLT**") counsels against lifting the stay.[52] This is pursuant to Articles 30(1) and 30(3) of the VCLT, which provide that in the event that successive applicable treaties relate to the same subject matter, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."[53] Because Article 53 of the ICSID Convention and Articles 107 and 108 of the TFEU are applicable to payment under the Award in a conflicting manner, the ICSID Convention, as the earlier treaty to have been adopted,[54] can only apply to the extent that it is compatible with the TFEU.[55] By granting the stay, however, the incompatibility between the ICSID Convention and the TFEU will not materialize, allowing both treaties to be applied without limitation.[56]

c) Cube and Demeter will not be harmed if the stay is continued

36. Spain raises several arguments for why Cube and Demeter will not be prejudiced if the stay is continued. As the fifth-largest economy in the European Union and the 13th in the world in terms of GDP, there is no danger of Spain being unable to pay the Award should the Application ultimately fail.[57] Spain declares that it takes its international commitments under the ICSID Convention seriously and alleges that the fact that there is no history of non-compliance further supports why there is no risk that Cube and Demeter will be unable to obtain payment under the Award.[58]

37. Spain rejects Cube's and Demeter's mischaracterization of the Request as proof of history of non-compliance with arbitral awards and distinguishes the precedent cited by

[50] *Id.*, ¶89.
[51] *Id.*, ¶122.
[52] *Id.*, ¶123.
[53] *Id.*, ¶123, citing Vienna Convention on the Law of Treaties, 23 May 1969, BOE 17 June 1980, **Spain Annex-52**, Article 30.
[54] *Id.*, ¶124.
[55] *Id.*, ¶127.
[56] *Id.*, ¶128.
[57] Submission, ¶25; Reply, ¶47.
[58] *Id.*, ¶26; *Id.*, ¶47.

Cube and Demeter based on the "self-initiated commitment proffered by the Kingdom of Spain."[59] Spain submits that this should be considered sufficient under the circumstances and weigh in favour of the stay.[60]

38. Furthermore, Spain argues that even though various *ad hoc* Committees have recognized that a delay in payment is insufficient to prejudice the party opposing the stay of enforcement,[61] it has also been routinely found that the payment of interest remedies any potential delay in the enforcement of an award.[62] Specifically, Cube and Demeter would be compensated for the delay by the Award's terms, which provide that Cube and Demeter are entitled to interest from 20 June 2014 to the date of payment at the six-month EURIBOR rate compounded semi-annually.[63]

39. Moreover, should the Application fail, Spain will seek the authorization required from the EC to pay the Award in a prompt manner.[64] Further, Spain points out that it has

[59] Reply, ¶¶48-51.
[60] *Id.*, ¶51.
[61] *Id.*, ¶¶41-42, citing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 28 December 2007 ("***Azurix***"), **Spain Annex-31**, ¶22 ("Although the Committee accepts that there may be very exceptional circumstances where a stay ought not be ordered, that is not the situation here."); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, ("***Enron***"), **Spain Annex-35**, ¶52.
[62] Submission, ¶22; Reply, ¶43, citing *MTD Decision on the Request for a Continued Stay*, **Spain Annex-32**, ¶36 ("Delay [in payment] "which is (…) incidental to the Convention system of annulment (…) can be remedied by the payment of interest in the event that the annulment application is unsuccessful."); *Azurix*, **Spain Annex-31**, ¶40 ("Other than by being put to the effort and expense of defending an annulment request and by the receipt of funds being delayed (assuming the annulment application to be unsuccessful), the Committee does not accept that Azurix suffers any prejudice of a kind warranting the provision of security. The provision for interest compensates for the delay."); *CMS Decision on the Request for a Continued Stay*, **Spain Annex-33**, ¶50 ("Argentina had demonstrated that CMS will not be prejudiced by the grant of a stay, other that in respect of the delay which is, however, incidental to the Convention system of annulment and which can be remedied by the payment of interest in the event that the annulment application is unsuccessful. As a consequence, the Committee has decided to grant such a stay without requesting Argentina to provide a bank guarantee."); *Quirobax*, **Spain Annex-41**, ¶64 ("El Laudo otorga a las Demandantes intereses compuestos anualmente. Los comités de anulación han determinado que los intereses compuestos son suficiente compensación por la demora que resulta de una suspensión de ejecución de un laudo."); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Stay of Enforcement of the Award, 12 December 2019, ("***Caratube***"), **Spain Annex-39,** ¶97 (internal citation omitted).
[63] Submission, ¶23; Reply, ¶43.
[64] *Id.*, ¶27; *Id.*, ¶37.

already notified the EC of the Award and in fact, requested the authorization even before filing the Application.[65]

40. Finally, Spain rejects Cube's and Demeter's argument that they would be prejudiced because "their chances to effectively collect any amount on the Award will be dramatically reduced."[66] Spain submits that any prejudice resulting from the stay must be "fully proven" and rest on "unmistakable proof" rather than mere speculation and hypothesis as has been provided by Cube and Demeter.[67] In fact, Cube and Demeter admit that they are not in financial distress or in need of payment of the Award for viability.[68]

d) The United States Courts' Decisions

41. Spain further points out that all of the reasons it now provides as weighing in favour of the stay have also been used by United States courts to deny enforcement of awards against Spain that are still pending annulment.[69] Specifically, Spain cites the decisions of the United States District Court for the District of Columbia in relation to the *Antin* award and the award in *Novenergia II Energy & Environment (SCA) v. The Kingdom of Spain*. [70]

42. In support of its decision to stay enforcement in both cases, the U.S. court – like Spain does now – cited Spain's entitlement to annulment under the ICSID Convention,[71] the efficiency and fairness of staying the enforcement proceedings until resolution of the annulment is reached,[72] the conservation of the parties' resources,[73] the hardship that Spain would face if the award was prematurely enforced,[74] the good faith of Spain's

[65] Reply, ¶49.
[66] *Id.*, ¶36; Response, ¶25.
[67] *Id.*, ¶¶39-40.
[68] *Id.*, ¶38.
[69] *Id.*, ¶61.
[70] *Id.*, ¶¶61, 62.
[71] *Id.*, ¶61, citing Order Granting Motion to Stay from the United States District Court for the District of Columbia, 28 August 2019, **Spain Annex-43**.
[72] *Id.*, ¶61.
[73] *Id.*, ¶61.
[74] *Id.*, ¶61.

annulment proceedings,[75] and the burden on Spain if it were forced to litigate to recover assets.[76]

e) The Eiser and Antin Decisions

43. Finally, Spain argues that Cube's and Demeter's invitation for the Committee to follow the decisions on the stay of enforcement in the *Eiser v. Spain* and *Antin v. Spain* cases should be rejected.[77]

44. Spain maintains that the *ad hoc* Committee in *Eiser* merely followed the decision of the *ad hoc* Committee in *Total v. Argentina* on key issues and in doing so, deviated from the standard practice of ICSID *ad hoc* Committees.[78] These key issues include the interpretation of the word "require" in Article 52(5) of the ICSID Convention,[79] the relevance of statistics in defining the standard practice of *ad hoc* Committees,[80] which party should bear the burden of proof,[81] and whether the merit of the annulment application is a relevant factor to consider.[82] Spain also makes note of the fact that Ms. Teresa Cheng was a member of both Committees.[83]

45. According to Spain, the approach in *Eiser* is problematic because it imposes a "strict and nearly impossible standard" of proof for a stay of enforcement request without providing guidance on the type of circumstances that would suffice.[84] Spain submits that the uncertainty and difficulty created by *Eiser* in understanding the ICSID Convention should dissuade the Committee from adopting the same approach.[85]

[75] *Id.*, ¶61.
[76] *Id.*, ¶63, citing Memorandum Opinion on the Order Granting Motion to Stay from the United States District Court for the District of Columbia, 27 January 2020 in the Civil Action No. 18-cv-01148 (TSC), **Spain Annex-45**, p.8.
[77] *Id.*, ¶65.
[78] *Id.*, ¶67.
[79] *Id.*, ¶68.
[80] *Id.*, ¶69.
[81] *Id.*, ¶70.
[82] *Id.*, ¶71.
[83] *Id.*, ¶67.
[84] *Id.*, ¶74.
[85] *Id.*, ¶¶74-75.

46. Spain further discourages the Committee from using *Eiser* as precedent based on the dissimilar circumstances of that case. Spain points out that while the *ad hoc* Committee in *Eiser* lifted the stay relying, in part, on the undertaking offered by the annulment respondents to repay any amount received under the award, Cube and Demeter have made no such offer.[86] Spain also distinguishes *Eiser* based on the fact that the EC had not been notified of the *Eiser* award at the time the *ad hoc* Committee made its decision, in contrast with the state of affairs of this case.[87] Lastly, Spain submits that the *Eiser* decision did not give adequate consideration to the question of EU law due to the Committee's "difficulty coming to a clear understanding" of the issue.[88]

47. As for the *Antin* decision, Spain contends that the *ad hoc* Committee replicated what was done in *Eiser* to the contrary of the common practice of ICSID *ad hoc* Committees.[89] Spain draws parallels between the two decisions on issues such as the position taken regarding Spain's conflicts,[90] the lack of guidance provided on the role of interest payment,[91] and the disregard for the merits of the annulment application.[92] Regarding its conflicting obligations under international law, Spain notes that the *Antin* decision was "especially flawed" due to the Committee's failure to understand that the conflict existed and suggestion that it had been created by Spain rather than by the annulment respondents.[93]

3. Whether Security Should Be Ordered

48. Spain submits that security should not be a condition for continuing the stay for three reasons. First, such an order would put Cube and Demeter in a better position than they would be in if no annulment proceeding was commenced.[94] Security should only be required in instances where it is shown that the award creditor would be prejudiced by

[86] *Id.*, ¶76.
[87] *Id.*, ¶77.
[88] *Id.*, ¶77.
[89] *Id.*, ¶80.
[90] *Id.*, ¶80.
[91] *Id.*, ¶81.
[92] *Id.*, ¶83.
[93] *Id.*, ¶¶84-85.
[94] Submission, ¶28; Reply, ¶140.

the continuation of the stay.[95] In the present case, Cube and Demeter have failed to prove that security is required.[96]

49. Furthermore, Spain argues that the conditions proposed by Cube and Demeter are "completely unacceptable" as they would force Spain to pay an "exorbitant" commission, which is not foreseen in the ICSID Convention.[97] In fact, Spain submits that this commission is essentially a penalization for requesting annulment, which in turn infringes on its right under Article 52 of the ICSID Convention.[98]

50. Moreover, the EC's authorization would be required in order to place the funds into an escrow account or to obtain a bank guarantee as proposed by Cube and Demeter.[99] Therefore, conditioning the stay would trigger Spain's conflicting obligations under international law and their respective consequences on the Parties.[100]

51. Spain submits that for these reasons, its commitment to comply with the Award, initiated efforts to obtain the EC's authorization, and the provision of interest under the Award are sufficient, thereby making the conditions or securities superfluous.[101]

B. Cube's and Demeter's Position

52. Cube and Demeter ask that the continuation of the provisional stay of enforcement of the Award be denied. They argue that the prevailing practice of ICSID *ad hoc* Committees has been mischaracterized by Spain and that circumstances do not warrant a stay of enforcement of the Award. Further, Cube and Demeter petition for adequate security from Spain if the stay is granted.

[95] *Id.*, ¶23, citing *Víctor Pey Casado*, **Spain Annex-30**, ¶29.
[96] Reply, ¶138.
[97] *Id.*, ¶¶138-139.
[98] *Id.*, ¶139.
[99] *Id.*, ¶141.
[100] *Id.*, ¶141.
[101] *Id.*, ¶¶142-143, citing *Azurix*, **Spain Annex-31**, ¶¶22, 25, 37, 40.

1. The Applicable Legal Standard

53. Cube and Demeter argue that Spain has failed to set out the relevant legal test for the standard used to determine an application for a stay of enforcement. They reject Spain's submission that a permanent stay of enforcement is the norm during the pendency of ICSID annulment proceedings as being outmoded jurisprudence that "mischaracterizes the prevailing practice."[102] Relying on recent ICSID jurisprudence, Cube and Demeter state that "committees have consistently found that stays of enforcement are not automatic and there should be no presumption in favor of a stay."[103] Instead, "there must be some circumstances present that speak in favor of granting [or continuing] a stay"[104] as exemplified by the *ad hoc* Committee in *Occidental v. Ecuador*, a decision used by Spain in support of its Request.

[102] Response, ¶5; Rejoinder, ¶2.

[103] *Id*., ¶8, f. 8, citing *Ioannis Kardassopolous and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award, 12 November 2010 ("***Kardassopolous***"), **Respondents' CL-174**, ¶26 ("Consonant with the extraordinary nature of the annulment remedy, the stay of the enforcement is an exception to the ICSID enforcement regime. Stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant"); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **Respondents' CL-175**, ¶43; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Stay, 22 March 2013, ("***SGS Société***"), **Respondents' CL-176**, ¶82; *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case no. ARB/98/2, Decision on the Republic of Chile's Request for a Stay of Enforcement of the Unannulled Portion of the Award – Supplementary Decision, 16 May 2013, **Respondents' CL-177**, ¶40; *Elsamex SA v Republic of Honduras*, ICSID Case No. ARB/09/4, Decision of the *ad hoc* Committee on the Continuation of the Stay of Enforcement of the Award, 11 March 2014, **Respondents' CL-178**, ¶90 ("This Committee shares the opinion that under the ICSID Convention system, the continuation of the suspension is not automatic, nor is there a presumption in its favor"); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Stay of Enforcement of the Award, 4 December 2014 ("***Total***"), **Respondents' CL-179**, ¶¶70-73, 75; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on the Termination of the Stay of Enforcement of the Award, 11 March 2016 ("***Flughafen***"), **Respondents' CL-180**, ¶56; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay Enforcement of the Award, 4 April 2016 ("***OI European***"), **Respondents' CL-181**, ¶¶87-89; *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on the Request for Continued Stay of the Enforcement of the Award, 27 June 2017 ("***Churchill Mining***"), **Respondents' CL-182**, ¶34; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Stay of Enforcement of the Award, 23 March 2018 ("***Eiser***"), **Respondents' CL-183**, ¶48 ("The Committee fails to see any textual support in the ICSID Convention or in the Arbitration Rules for the notion that there is a presumption in favor of granting a request for stay. (…) In this regard, the Committee does not consider that the stay of enforcement is automatic.").

[104] Response, ¶7, citing *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request or a Continued Stay of Enforcement of the Award, 5 March 2009 ("***Sempra***"), **Respondents' CL-173**, ¶27.

54. Cube and Demeter also contend that even the case law provided by Spain confirms the new trend. Specifically, Cube and Demeter note that out of the eleven public decisions on stay of enforcement requests from 2016 and 2017, only two of the requests were granted unconditionally while five were denied and four were granted with some form of condition. [105]

55. Furthermore, Cube and Demeter point out that a stay of enforcement, like the remedy of annulment itself, is an exception while "immediate enforcement is the rule."[106] In support of its position, Cube and Demeter cite the *ad hoc* Committee's remark in *Burlington v. Ecuador* that "the stay of enforcement is an exception in the context of the remedy of annulment that is itself limited and exceptional"[107] as well as the *SGS v. Paraguay ad hoc* Committee, which noted that "only in very specific cases where the circumstances so require, may enforcement be stayed."[108]

56. It is therefore Cube's and Demeter's position that although the ICSID Convention does not use the word "exceptional," the stay of enforcement is an exceptional measure requiring special circumstances or, in other words, a high threshold to be met.[109]

57. Cube and Demeter contend that the use of the term "require" in Article 52(5) of the ICSID Convention, as opposed to "other less categorical verbs, such as 'recommend,' 'deserve,' 'justify' or similar words"[110] establishes a "high bar for imposing or continuing a stay."[111] Cube and Demeter cite the *ad hoc* Committee's decision in *Border Timbers v. Zimbabwe* stating that "not just any circumstances, even if relevant to the case, may justify a stay; the circumstances must be sufficiently compelling so as to 'require' a stay."[112]

---

[105] Rejoinder, ¶4, citing **Spain Annex-38**.
[106] Response, ¶9; Rejoinder, ¶8.
[107] *Id.*, ¶9; *Id.*, ¶10, citing *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017 ("***Burlington***"), **Respondents' CL-184**, ¶73.
[108] Response, ¶9, citing *SGS Société*, **Respondents' CL-176**, ¶85.
[109] Rejoinder, ¶9.
[110] Response, ¶10, citing *OI European*, **Respondents' CL-181**, ¶89.
[111] *Id.*, ¶10.
[112] *Id.*, ¶10; Rejoinder ¶9, citing *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited*, ICSID Case No. ARB/10/25, Decision on Stay of Enforcement of the Award, 24 April 2017 ("***Border Timbers***"), **Respondents' CL-185**, ¶78.

58. Cube and Demeter state that because there is no presumption in favour of the stay of enforcement of the Award, Spain bears the burden of establishing that "sufficiently compelling circumstances ***require*** continuation of the stay."[113] That Spain bears the burden of proof is established by Article 54(4) of the ICSID Arbitration Rules and confirmed by arbitral case law.[114]

59. Further, Cube and Demeter reject the notion that the burden of proof on certain issues falls onto them as a matter of logic, as stated by Spain, arguing that whether a party bears the burden of proof is only a matter of law that cannot be altered by the discretionary power of an *ad hoc* Committee.[115] The only burden of proof they bear is establishing the veracity of the facts alleged in response to the Request.[116] Thus, according to Cube and Demeter, the award debtor is tasked with identifying the necessary circumstances as well as establishing their compelling nature which in turn justifies granting the stay with the burden shifting to the opposing party only in the event that a request to modify or terminate the stay is filed.[117]

60. In addition, Cube and Demeter point out that statistics actually weigh in favour of rejecting the Request as six of the eight publicly available decisions since 2016 rejected the request to continue the stay and two additional ones were granted but with conditions.[118] Further, Cube and Demeter state that in light of the fact that more than

[113] *Id.*, ¶15 (emphasis in original); Rejoinder, ¶¶6, 12, citing *Occidental*, **Spain Annex-29**, ¶50; *Eiser*, **Respondents' CL-183**, ¶53 ("Consequently, it is for the party requesting the stay to demonstrate that there are circumstances that will justify or merit the granting or continuation of the stay (…) it is clear that the party who is against, or wants to, lift the stay is also entitled to put forward arguments and evidence to support its case. This, in our view, does not affect the proposition that the party requesting the stay bears, in the first instance, the burden to substantiate such request"); *SGS Société*, **Respondents' CL-176**, ¶86 ("Based on the plain language of Rule 54(4) of the ICSID Arbitration Rules, it is also clear to the Committee that the party interested in the continued stay bears the burden of proof to demonstrate the existence of circumstances that warrant said continuation.").
[114] Rejoinder, ¶¶14-16, citing *Sempra*, **Respondents' CL-173**, ¶27; *Víctor Pey*, **Respondents' CL-177**, ¶¶36-37; *SGS Société*, **Respondents' CL-176**, ¶88; *Border Timbers*, **Respondents' CL-185**, ¶80.
[115] *Id.*, ¶¶13,17.
[116] *Id.*, ¶18.
[117] *Id.*, ¶¶10, 14.
[118] Response, ¶11; Rejoinder, ¶4, citing *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Annulment Proceedings, Decision on the Request to Maintain the Stay of Enforcement, 24 March 2017, **Respondents' CL-186**, ¶94; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Annulment Proceedings, Procedural Order No. 2 dated 24 October 2018, **Respondents' CL-187**, ¶25; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, **Respondents' CL-188,** ¶22; *Valores Mundiales, S.L.*

half of annulment cases have not been accompanied by requests for stays of enforcement, "the more informative statistic" is that the majority of annulment cases have not issued stays of enforcement.[119]

61. Ultimately, however, Cube and Demeter argue that statistics should not be viewed in isolation and are not determinative as Spain suggests.[120] Instead, they must be considered together with the legal standard applied as well as the fact-specific circumstances given that all *ad hoc* Committees have reached a decision by conducting a "case-by-case analysis and only refer to case law to determine the relevant legal criteria."[121]

2. Whether the Circumstances Require a Stay

62. In determining whether circumstances warrant approval of the application, Cube and Demeter agree with Spain on three factors that should be considered: (i) the likelihood of compliance with the Award if the annulment application is unsuccessful; (ii) the hardship faced by each party if the Award is immediately enforced or not; and (iii) the risk of non-recoupment following a decision on annulment.[122] Cube and Demeter submit, however, that all factors weigh in favour of Cube and Demeter, not Spain, and therefore, in favour of lifting the stay of enforcement.[123]

63. Further, Cube and Demeter reject Spain's reliance on the merit of the Application as a factor that the Committee should consider in deciding the Request.[124] In their view, "the strength of an application for annulment is normally ***irrelevant*** to decide whether

and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11, Decision on the Request for a Continuation of the Stay of Enforcement of the Award, 6 September 2018, **Respondents' CL-171,** ¶113*; Eiser*, **Respondents' CL-183**, ¶56; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019 ("***Antin***"), **Respondents' CL-189**, ¶85; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Annulment Proceeding, Decision on the Stay of Enforcement of the Award dated 22 February 2018 ("***Karkey***"), **Respondents' CL-190,** ¶¶132-135; *Churchill Mining*, **Respondents' CL-182**, ¶43.

[119] Rejoinder, ¶3.
[120] Rejoinder, ¶¶5-7.
[121] Rejoinder, ¶5.
[122] Response, ¶15; Rejoinder, ¶22.
[123] *Id.*, ¶15.
[124] Rejoinder, ¶21.

a stay of enforcement should be continued."[125] As the *ad hoc* Committee in *Total v. Argentina* noted, "a serious application is the least that can be expected from an applicant, and nowhere in the ICSID Convention – or in the practice of ad-hoc committees – [does] compliance with such minimum duty resul[t] in the extension of the stay."[126] Thus, the annulment application only becomes relevant if it is manifestly devoid of any merit, in which case a stay should not be imposed or continued.[127]

64. Cube and Demeter point out that the cases cited by Spain in support of its argument regarding the seriousness of the Application merely considered whether the annulment application was dilatory or frivolous as a threshold matter "since a finding that the annulment application was dilatory or frivolous would obviate the need of the annulment committee to further consider the question of the stay."[128]

a) Spain is unlikely to comply with the Award if its request for annulment fails

65. Cube and Demeter contend that there is a real risk that Spain would fail to comply with the Award. They dismiss Spain's claim of a strong economy as being irrelevant to the issue and instead point out Spain's (i) reluctance to set unfavourable precedent; (ii) record of non-compliance with past ICSID awards; and (iii) statements regarding the need for the EC's authorization in order to pay as proof of the likelihood of non-compliance.

66. In this context, Cube and Demeter refer to the "dozens of other arbitral awards in relation to the same renewable energy measures that were at issue in this case" as one of the underlying reasons for Spain's reluctance to voluntarily pay the amount due under the Award.[129] They point out that by complying with one award, Spain would probably be forced to comply with all the others as well.[130]

[125] Response, ¶12 (emphasis in original).
[126] *Id.*, ¶13; Rejoinder, ¶27, citing *Total*, **Respondents' CL-179,** ¶¶83-84.
[127] *MTD Decision on the Request for a Continued Stay*, ¶28
[128] Rejoinder, ¶26.
[129] Response, ¶17.
[130] *Id.*, ¶17; Rejoinder, ¶29.

67. Cube and Demeter challenge the accuracy of Spain's statements regarding its history of compliance with ICSID awards. There are currently "over 50 treaty claims filed against Spain at ICSID and other venues – worth a combined US$ 7.3 billion," which have produced at least fourteen final awards against Spain.[131] Cube and Demeter note that Spain has failed to pay the amounts due under these awards even though many are immediately enforceable and cite the *Eiser* and *Antin* awards as recent examples of Spain's non-compliance.[132]

68. Cube and Demeter further maintain that Spain's statement that it would only comply with the Award after obtaining authorization from the EC "creates serious doubts as to whether Spain ultimately will pay" and contradicts the terms of the ICSID Convention as well as Spain's obligations under international law.[133] Cube and Demeter also reject the notion that Spain needs EC-approval in the first place and argue that if requested, the EC would not easily give its authorization.[134]

69. Cube and Demeter argue that the EC has a history of blocking enforcement of ICSID awards against EU Member States in intra-EU disputes and is generally hostile to intra-EU investment arbitration.[135] Coupled with Spain's similar position against intra-EU arbitration expressed in the Application and this case's proceedings, Cube and Demeter contend that "it is difficult to accept Spain's hollow promise that it will pay."[136] In further support of this argument, Cube and Demeter cite *Micula v. Romania*, where the *ad hoc* Committee found that by conditioning the award's enforcement "on the European Commission's interpretation of European Union law," Romania had

[131] *Id.*, ¶18, citing C. Sanderson, *Spain offers incentives to end renewables claims*, GLOBAL ARBITRATION REVIEW, 22 November 2019, **Respondents' CL-192**, p.2.
[132] *Id.*, ¶18; Rejoinder, ¶29, citing *Eiser*, **Respondents' CL-183**; *Antin*, **Respondents' CL-189**.
[133] Response, ¶19.
[134] *Id.*, ¶20; Rejoinder, ¶31.
[135] *Id.*, ¶20; Rejoinder, ¶31, citing Jarrod Hepburn, *Micula brothers score enforcement victory, as EU General Court annuls Commission's decision to prohibit Romania from paying ICSID award*, IA Reporter, 18 June 2019, **Respondents' CL-205** p.1 ("In a judgment rendered on June 18, 2019, the General Court of the European Union has annulled the European Commission's decision to bar Romania from complying with the 2013 ICSID award rendered in favour of Swedish investors Ioan Micula and Viorel Micula and a number of corporate entities controlled by them. The Commission decision, which we covered here, had found that any Romanian payment to the Miculas would breach EU state aid rules. The General Court has now annulled the Commission decision, thereby potentially removing an obstacle to enforcement of the underlying ICSID award.").
[136] Response, ¶22.

indicated a "'probable risk' that the payment obligations would not be complied with."[137]

b) The hardship factor weighs in favour of Cube and Demeter

70. Cube and Demeter submit that *ad hoc* Committees often consider the hardship that would result to the parties if the stay is continued or lifted in deciding whether to grant a request to continue a stay of enforcement. In the present case, this consideration weighs in favour of Cube and Demeter because Spain has not shown that it will suffer material hardship should the stay be lifted but Cube and Demeter would face significant harm without the lift.

71. Cube and Demeter contend that their "chances to effectively collect *any* amount on the Award will be dramatically reduced" if the stay is continued.[138] This effect is attributed to Spain's likely refusal to voluntarily pay the Award thereby creating the need for Cube and Demeter to enforce the Award against those limited assets which are not protected by sovereign immunity of execution.[139] Cube and Demeter note that in this scenario, the strength of Spain's economy is irrelevant.[140]

72. Further, Cube and Demeter submit that this problem is exacerbated by the numerous other awards pending payment from Spain, which total approximately EUR 915 million but is likely to rise by the time the Committee issues a decision on annulment.[141] That these pending awards represent a real risk to Cube's and Demeter's ability to collect any amount under the Award if the stay is continued is demonstrated by the recent enforcement of the *Eiser* and *Antin* awards by the Federal Court of Australia.[142]

[137] Response, ¶22, citing *Ioan Micula, Viorel Micula, and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, **Respondents' CL-207**, ¶35.
[138] Response, ¶25 (emphasis in original).
[139] *Id.*, ¶25; Rejoinder, ¶39.
[140] Rejoinder, ¶39.
[141] Response, ¶25.
[142] Rejoinder, ¶40, citing S. Perry, *Spain solar awards enforced in Australia*, Global Arbitration review, 24 February 2020, **Respondents' CL-210**.

73. In addition, Cube and Demeter state that the notion of interest as compensation for any delay in enforcement is "wholly unfounded."[143] They submit that post-award interest is meant to encourage prompt payment and compensate for the "time value of money Spain should have already paid" rather than for dramatically increased risk of not being paid at all.[144] Interest does not, however, grant the State permission to delay payment as Spain suggests.[145] In support, Cube and Demeter cite the *Antin* Committee's holding that:

> the payment of interest should not be considered a sufficient remedy for any prejudice caused by a delay in the Award's enforcement. … Given that the prejudice complained of by the Claimants directly relates to difficulties in enforcement (and not the loss of use of the funds under the Award), the payment of interest is not an adequate remedy.[146]

74. Furthermore, Cube and Demeter submit that even if they faced no harm as a result of the stay of enforcement, the fact that Spain would not suffer from lifting the stay means that the stay is not required and therefore not justified.[147] This was established by the *Antin* Committee when it noted that lifting the stay is favoured if neither party is seriously affected by whether the stay is continued "because 'Article 52(5) of the ICSID Convention calls for circumstances 'requiring' a stay' and because 'there is no presumption in favour of continuing a stay.'"[148]

75. Thus, Cube and Demeter reject Spain's position that a stay should be lifted only in the face of "unmistakable proof" of hardship to the party opposing the stay as being contradictory to the ICSID Convention.[149] They reiterate that the burden, pursuant to the ICSID Convention, is not for them to establish unmistakable proof of hardship in order for the stay to be lifted but rather for Spain to prove that circumstances require its continuation.[150]

[143] Response, ¶26.
[144] *Id.*, ¶26; Rejoinder, ¶41.
[145] Rejoinder, ¶41.
[146] Response, ¶27, citing *Antin*, **Respondents' CL-189**, ¶82.
[147] *Id.*, ¶28.
[148] Response, ¶28, citing *Antin*, **Respondents' CL-189**, ¶81.
[149] Rejoinder, ¶42, citing Reply, ¶40.
[150] *Id.*, ¶43.

76. Moreover, regarding the potential harm to Spain, Cube and Demeter point out that the Award's "relatively modest" size will not be damaging to Spain, especially since, according Spain itself, it has one of the strongest economies in the world.[151] Further, the only harm that Spain alleged – non-recoupment of sums paid under the Award if it is eventually annulled – is not a real proven risk in this case but rather mere speculation by Spain.[152]

77. Cube and Demeter submit that Spain's reliance on the decisions issued by the United States court is ineffective. Cube and Demeter point out that the standard used by the court differs from the one used by *ad hoc* Committees.[153] Moreover, Cube and Demeter argue that the main reason that the U.S. court decided to stay enforcement in the cases cited by Spain is because the adjudicatory bodies hearing the underlying proceedings – the Svea Court of Appeal and an ICSID *ad hoc* Committee – had each stayed the enforcement of the respective awards.[154] That this was the court's rationale is evidenced by its request in the *Antin* case to remain informed by the parties of the pending ICSID proceedings.[155]

78. Regarding the alleged hardship stemming from Spain's conflicting international obligations, Cube and Demeter submit that the argument is "fundamentally flawed."[156] Cube and Demeter challenge the existence of a conflict and state that Spain "fabricated this alleged conflict, with the help of the EC, for the sole purpose of avoiding its payment obligations for as long as possible."[157]

79. Cube and Demeter contend that Spain was not required to notify the EC of the Award because it does not constitute State Aid as defined by Article 107 of the TFEU.[158] Spain's exclusive reliance on the EC Decision to classify the Award as State Aid is

[151] Response, ¶24.
[152] *Id.*, ¶24.
[153] Rejoinder, ¶44.
[154] Rejoinder, ¶44.
[155] *Id.*, ¶46, citing Order Granting Motion to Stay from the United States District Court for the District of Columbia, 28 August 2019, **Spain Annex-43**, pg.9.
[156] *Id.*, ¶56.
[157] *Id.*, ¶57.
[158] *Id.*, ¶67.

questioned by Cube and Demeter on the basis that the EC Decision did not "address whether the original incentives framework that formed the basis of the underlying arbitration in the present case was state aid at all."[159] Cube and Demeter take further issue with Spain's reliance on the EC Decision because they consider the EC to have improperly exceeded its scope by addressing the arbitrations against Spain under the ECT based on "hypothetical eventual scenarios and without any analysis of an actual situation of purported State aid" or consideration of the criterions necessary for a State Aid determination, thereby exposing the political nature of its statements.[160] Cube and Demeter also note that the Award did not exist at the time the EC Decision was rendered and therefore, could not have been considered by the EC.[161]

80. Additionally, Cube and Demeter compare the EC Decision to the EC's 2015 decision prohibiting Romania from paying an ICSID award and note that in the latter, the EC actually found that the measures underlying that award were incompatible State Aid whereas in the former, no such finding is made.[162]

81. Cube and Demeter point out that the General Court of the European Union (the "**GCEU**") overturned the EC's 2015 decision, notably holding that "under its case-law, compensation for damage suffered did not constitute State aid unless it represented compensation for the withdrawal of aid that was unlawful."[163] Thus, Cube and Demeter argue that because nothing suggests that the compensation in the present case is for withdrawal of unlawful State Aid – to the contrary, the evidence indicates that Spain's original incentive regime, RD 661/2007, was not State Aid given that Spain did not notify the EC of it and the EC itself did not initiate an independent investigation into

[159] *Id.*, ¶68.
[160] *Id.*, ¶¶68-72.
[161] *Id.*, ¶69.
[162] *Id.*, ¶73, citing Jarrod Hepburn, *Micula brothers score enforcement victory, as EU General Court annuls Commission's decision to prohibit Romania from paying ICSID award*, IA Reporter, 18 June 2019, **Respondents' CL-205**, p.1 ("In a judgment rendered on June 18, 2019, the General Court of the European Union has annulled the European Commission's decision to bar Romania from complying with the 2013 ICSID award rendered in favour of Swedish investors Ioan Micula and Viorel Micula and a number of corporate entities controlled by them. The Commission decision, which we covered here, had found that any Romanian payment to the Miculas would breach EU state aid rules.").
[163] *Id.*, ¶74, citing Jarrod Hepburn, *Micula brothers score enforcement victory, as EU General Court annuls Commission's decision to prohibit Romania from paying ICSID award*, IA Reporter, 18 June 2019, **Respondents' CL-205**, p.2.

this issue – the EC Decision, to the extent it concerns RD 661/2007, is grounded on a premise that is inconsistent with EU law.[164]

82. Ultimately, Cube and Demeter maintain that there is no indication that the EC has "ever validly prevented a Member State from complying with the terms of an ICSID Award" and that by informing the EC of the Award, Spain was intentionally establishing the necessary circumstances to raise the alleged conflict as grounds for the Request.[165] The alleged conflict is thus "nothing more than a convenient litigation posture."[166]

83. Cube and Demeter submit, however, that even if the conflict exists, it is a result of Spain's decision to enter into conflicting treaties and the Committee should not allow Spain to rely on "the consequences of resolving this self-inflicted conflict to justify a stay of enforcement."[167] In support, Cube and Demeter cite the *Antin* Committee's finding that "it would it would be unfair to the Claimants if the Award was stayed due to a legal conundrum of the Applicant's own making. Insofar as the Applicant willingly chose to undertake international obligations that may conflict with each other, it cannot thereafter complain of prejudice once these conflicts arise."[168]

84. Further, Cube and Demeter point out that that even if the conflict exists and the Committee decides to consider it as a source of hardship for Spain, the consequences must be acute enough to justify continuance of the stay.[169] In other words, Spain must prove that without the stay, there will be "catastrophic, immediate and irreversible consequences."[170] However, Cube and Demeter argue that Spain has not met this burden.

85. Cube and Demeter contend that Spain would not need to violate any of its international obligations to resolve the conflict because rather than choose between them, as Spain

[164] Rejoinder, ¶74.
[165] *Id.*, ¶¶73, 75.
[166] *Id.*, ¶75.
[167] *Id.*, ¶57.
[168] *Id.*, ¶57, citing *Antin*, **Respondents' CL-189**, ¶76.
[169] *Id.*, ¶58.
[170] *Id.*, ¶58, citing *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, ¶27.

submits, Spain could, and should, reconcile the obligations.[171] Nonetheless, assuming that Spain would in fact have to choose between its international obligations, Cube and Demeter note that the consequences of doing so would not be "catastrophic, immediate and irreversible consequences" and therefore, do not warrant continuing the stay of enforcement.[172]

86. Cube and Demeter submit that Spain would not be forced to expend large sums either to recover amounts paid to Cube and Demeter or to defend itself from their challenge of the EC's future decision.[173] Spain fails to explain how it would incur any significant legal costs to recover those amounts paid if the EC finds that payment to Cube and Demeter constitutes impermissible State Aid before this annulment proceeding concludes, which it is unlikely to do anyways.[174] If, on the other hand, Cube and Demeter were to challenge the EC's findings, Spain's participation in the proceedings would not be required.[175] Regardless, Cube and Demeter point out that incurring legal fees is not within the realm of the kind of hardship that warrants a continued stay of enforcement.[176]

87. In addition, Cube and Demeter reject the notion of a financial sanction on Spain by the EC as a hardship warranting continuance of the stay in light of the fact that a number of hypothetical events – ranging from a decision by the EC that the Award is incompatible State Aid to a decision by the European Court of Justice against Spain – would all need to occur before the end of this annulment proceeding, an unlikely scenario.[177]

88. The allegation that Spain could be subject to a diplomatic protection claim from France and Luxembourg is dismissed by Cube and Demeter as a "fanciful" concern since no such claim is known to exist or is cited by Spain.[178] Cube and Demeter note that because

[171] Rejoinder, ¶59.
[172] *Id.*, ¶60.
[173] *Id.*, ¶61.
[174] *Id.*, ¶62.
[175] *Id.*, ¶62.
[176] *Id.*, ¶62.
[177] *Id.*, ¶63.
[178] *Id.*, ¶64.

France, Luxembourg, and Spain are all EU Member States, a diplomatic protection claim or proceeding before the International Court of Justice is "highly doubtful."[179]

89. Cube and Demeter contend that Spain's concern regarding the reputational damage it would suffer from violating its international obligations is "nothing more than litigation posturing."[180] Cube and Demeter cite the fourteen investment cases in which Spain was found liable and its failure to abide by any of them as evidence of its lack of concern for its reputation.[181]

c) Spain does not face any real risk of non-recoupment

90. Cube and Demeter submit that although risk of non-recoupment may be considered by an *ad hoc* Committee in deciding whether to continue a stay of enforcement, Spain has not established that it faces such a risk.[182] Merely asserting that it will have to recoup the amounts paid, as Spain did, is insufficient.[183] The *SGS v. Paraguay ad hoc* Committee stated that "that the losing party may have to pay the award only later to be reimbursed 'is the natural consequence of the enforcement regime created by the ICSID Convention, where a stay is the exception and not the rule.'"[184] The *Eiser* and *Antin ad hoc* Committees echoed this principle in their respective decisions.[185] Thus, continuance of a stay requires the award-creditor to establish the existence of a real and proven risk of non-recoupment.[186]

91. Cube and Demeter do not argue that Spain's right to seek a stay is subordinate to their right to immediate enforcement.[187] However, they point out that unlike Spain's right to seek a stay, which is conditioned upon proof of circumstances requiring the stay, their

[179] *Id.*, ¶64.
[180] *Id.*, ¶65.
[181] *Id.*, ¶65.
[182] Response, ¶29; Rejoinder, ¶34.
[183] *Id.*, ¶29.
[184] *Id.*, ¶29, citing *SGS Société*, **Respondents' CL-176**, ¶93.
[185] *Id.*, ¶29, citing *Eiser*, **Respondents' CL-189**, ¶72 ("In the Committee's view, the burdens and risks raised by the Applicant are common to virtually all annulment applications. They are, as the Claimants put it, a natural consequence of the annulment proceedings. Such circumstances cannot, as explained at paragraph 67 above, be sufficient to require a stay.").
[186] *Id.*, ¶29; Rejoinder, ¶32.
[187] Rejoinder, ¶33.

right to immediate enforcement is not subject to whether Spain has initiated annulment proceedings.[188]This suggests that the ICSID Convention contemplates that the award-debtor will have to engage in recoupment efforts thereby precluding such efforts from constituting the necessary circumstance for a continued stay.[189]

92. Citing the *Antin* Committee, Cube and Demeter contend that a real risk of non-recoupment would be present if Cube and Demeter were in "financial distress or on the brink of insolvency."[190] Cube and Demeter point out, however, that Spain rightfully did not allege either of these circumstances since they are inapplicable to Cube and Demeter.[191]

93. Further, Cube and Demeter contend that Spain – not them – bears the burden of establishing the risk of non-recoupment and reject the grounds that have been used by Spain to advance its position.[192]

94. Cube and Demeter declare that they have assets outside of the photovoltaic and hydro facilities implicated in these proceedings and, in fact, both companies are "highly-diverse with assets in many industries and areas of the world."[193]

95. In addition, Cube and Demeter point out that Spain's logic regarding the increased liquidity of the plants as opposed to shares of other companies is flawed.[194] They submit that "attaching and selling shares is a fundamentally simpler endeavour than attaching and selling a fixed asset."[195]

96. Furthermore, Cube and Demeter state that their good reputations and financial health negates Spain's assumption that Cube and Demeter would be unwilling to repay the amounts owed.[196] Further, Cube and Demeter describe Spain's string of questions

[188] *Id.*, ¶33.
[189] *Id.*, ¶33.
[190] Response, ¶30, citing *Antin*, **Respondents' CL-189**, ¶73.
[191] *Id.*, ¶30.
[192] *Id.*, ¶30; Rejoinder, ¶35.
[193] *Id.*, ¶31.
[194] *Id.*, ¶31.
[195] *Id.*, ¶31.
[196] *Id.*, ¶32.

regarding its ability to recoup sums paid to Cube and Demeter as insufficient and reiterate that the risk must be established through evidence, not mere enquiry.[197]

97. Cube and Demeter reject the role that compensation plays in the context of the risk of non-recoupment as proposed by Spain.[198] Specifically, Cube and Demeter note that if the ICSID Convention contemplates the possibility that the award-debtor will have to engage in recoupment efforts without more, then the Committee should not consider those same efforts to "constitute a 'hardship' that warrants 'compensation'."[199]

98. For these reasons, Cube and Demeter submit that the core principle of finality under the ICSID Convention combined with Spain's failure to establish compelling circumstances counsel against continuance of the stay of the Award's enforcement.

d) The Eiser and Antin decisions

99. Cube and Demeter submit that the decisions of the *ad hoc* Committees in *Eiser* and *Antin* include "certain legal and factual findings that directly bear" on the Request and reject Spain's analysis of the two cases.[200]

100. Concerning legal findings, Cube and Demeter argue that *Eiser* and *Antin* confirm the trend to deny requests to continue the stay of enforcement.[201] Specifically, the *Eiser* decision stated that there is no presumption in favour of the stay and that the burden to prove that circumstances require the stay falls on Spain.[202] Meanwhile, the *Antin* decision held that unless Spain can establish that it will suffer an "unusual degree of prejudice" without the stay, then the stay must be lifted.[203] Finally, regarding non-recoupment, both decisions found that a real risk of non-recoupment – such as insolvency on behalf of the award-creditor – must be shown by Spain because the mere

[197] Rejoinder, ¶ 36, citing Reply, ¶¶54-55.
[198] *Id.*, ¶37.
[199] *Id.*, ¶37.
[200] *Id.*, ¶48.
[201] *Id.*, ¶49, citing *Eiser*, **Respondents' CL-183**, ¶56; *Antin*, **Respondents' CL-189**, ¶85.
[202] *Id.*, ¶49, citing *Eiser*, **Respondents' CL-183**, ¶¶47-48, 53.
[203] *Id.*, ¶49, citing *Antin*, **Respondents' CL-189**, ¶81.

fact that an award-debtor may need to recoup sums paid is insufficient to justify continuing the stay.[204]

101. On factual findings, Cube and Demeter submit that *Eiser* and *Antin* are illustrative of the circumstances that investors in the renewable energy sector face in enforcing awards against Spain, which in turn counsel against granting the Request.[205] Specifically, Cube and Demeter argue that in light of the fact that the *Eiser* and *Antin* stays have been lifted but remain unpaid, they show that Spain will probably also refuse to comply with the Award if the Application fails.[206] Further, Cube and Demeter contend that *Eiser* and *Antin* highlight the financial hardship they will face as a result of the reduced likelihood of their ability to collect on the Award if the Request is granted and urge the Committee to follow the reasoning in *Antin* regarding the inadequacy of interest as a remedy for difficulty in enforcement.[207]

102. Cube and Demeter find Spain's criticisms of *Eiser* and *Antin* unavailing on several grounds. They argue that "there is nothing remarkable or untoward about an *ad hoc* committee referring to decisions of other *ad hoc* committees, and there is no indication that either committee unduly relied on the findings of the other" as Spain suggests.[208]

103. In addition, Cube and Demeter point out that Spain's repeated arguments regarding the burden of proof, the merit of the Application, and the role of interest as compensation are meritless and have already addressed.[209]

104. Cube and Demeter also note that while Spain describes the legal standard applied in *Eiser* as being "so strictly construed as to make it nearly impossible to obtain a stay" and "extremely high … and strict," it fails to reference specific language in the decision to support this description.[210] Instead, Cube and Demeter submit that the legal standard

[204] *Id.*, ¶49, citing *Eiser*, **Respondents' CL-183**, ¶63; *Antin*, **Respondents' CL-189**, ¶72.
[205] *Id.*, ¶50.
[206] *Id.*, ¶50.
[207] *Id.*, ¶50.
[208] *Id.*, ¶52, citing Reply, ¶¶67-72, 78-83.
[209] *Id.*, ¶53.
[210] *Id.*, ¶53.

applied in *Eiser* is "correct, reasonable, and consistent with that adopted by other committees."[211]

105. Moreover, Cube and Demeter argue that contrary to Spain's position, the concerns regarding EU law are irrelevant to the Committee's analysis of the Request and therefore, so is the treatment given to this issue by *Eiser* and *Antin*.[212]

106. Finally, Cube and Demeter point out that Spain criticizes *Eiser* but then cites it to argue that while the *Eiser* Committee relied on the claimants' undertaking to repay any amount received if the annulment succeeded, no such undertaking has been made by Cube and Demeter.[213] Further, Cube and Demeter distinguish *Eiser* on this point as the claimants there "sold or transferred their rights in the award to a third party, allegedly magnifying the risk of non-recoupment" but no such action by Cube and Demeter has taken place in the present case.[214]

107. For these reasons, Cube and Demeter submit that despite Spain's suggestion, the Committee should not deviate from the analyses and decisions in *Eiser* and *Antin.*

3. Whether Security Should Be Ordered

108. Cube's and Demeter's primary position is that the stay of enforcement should be lifted. However, if the Committee decides to continue the stay of enforcement, Cube and Demeter submit that continuance should be conditioned on Spain providing "adequate security that will safeguard Cube and Demeter's rights in the event Spain's annulment application is rejected."[215] Conditioning the stay of enforcement is a common practice that has become well-established because of the balance it creates between the parties in the "inevitable lapse of time involved in annulment proceedings."[216]

[211] *Id.*, ¶53.
[212] *Id.*, ¶53.
[213] *Id.*, ¶54, citing Reply, ¶76.
[214] *Id.*, ¶54, citing *Eiser*, **Respondents' CL-183**, ¶38.
[215] Response, ¶34.
[216] *Id.*, ¶34, citing Paul D. Friedland, *Provisional Measures and ICSID Arbitration*, Arbitration International, Vol. 2, No. 4, October 1986, **Respondents' CL-208**, pgs. 335-357, 349.

109. Cube and Demeter cite a series of decisions by *ad hoc* Committees as proof of the prevailing trend to condition the stay of enforcement to a guarantee or security by Spain for annulment. Specifically, the conditions imposed by these Committees include posting an unconditional and irrevocable letter of guarantee for the total amount due under the award, plus interest,[217] placing the funds corresponding to a large percentage of the value of the award in escrow,[218] furnishing an unconditional and irrevocable bank guarantee covering the full amount of the award,[219] and posting an unconditional bank guarantee.[220]

110. Cube and Demeter propose that in order to achieve fairness and equilibrium, continuance of the stay should be conditioned upon Spain providing an irrevocable bank guarantee from a reputable international bank for the total amount due under the Award.[221] Alternatively, Spain may also be ordered to place an amount corresponding to the total value of the Award into an escrow account in favour Cube and Demeter at a reputable international bank.[222]

111. Cube and Demeter contend that conditioning the stay would not put them in a better position than they would have been without the annulment proceeding and cite various Committees in support.[223] Cube and Demeter point out that paying the Award was an obligation which Spain should have already fulfilled and that its promises to honour its international obligations are undermined by its lack of payment to the fourteen creditors awaiting payment.[224]

[217] *Id.*, ¶35, citing *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment, 5 February 2002, **Respondents' CL-209**, ¶6.
[218] *Id.*, ¶35, citing *Sempra*, **Respondents' CL-173**, ¶117.
[219] *Id.*, ¶35, citing *Kardassopoulos*, **Respondents' CL-174**, ¶45, pp. 22-23.
[220] *Id.*, ¶35, citing *Flughafen*, **Respondents' CL-180**, ¶69.
[221] *Id.*, ¶36.
[222] *Id.*, ¶36.
[223] *Id.*, ¶37; Rejoinder, ¶86, citing *Flughafen*, **Respondents' CL-180**, ¶76; *Sempra*, **Respondents' CL-173,** ¶95 ("As to whether provision of a guarantee would, as Argentina contends, place the award creditor in 'a better situation', the Committee considers that the appropriate comparison is not with a scenario where the award debtor would not comply with its obligation under Article 53 (where a guarantee would obviously be 'better'), but with one where the debtor would comply. In such case the guarantee would not place the award creditor in a better situation."); *Standard Chartered*, **Spain Annex-40**, ¶87 ("The Committee rejects the argument that security constitutes betterment").
[224] *Id.*, ¶38.

112. Cube and Demeter note that the only scenario in which they are put in a better position by the condition they now propose is that in which Spain refuses or delays payment.[225] However, as the *ad hoc* Committee in *Sempra v. Argentina* stated, "the appropriate comparison is not with a scenario where the award debtor would not comply with its obligation under Article 53 (where a guarantee would obviously be 'better'), but with one where the debtor would comply. In such case the guarantee would not place the award creditor in a better situation."[226]

113. Cube and Demeter reject Spain's position that the cost of obtaining a bank guarantee would be exorbitant as a blanket assertion without any proof.[227] They contend that it is "well established" that conditioning continuance of a stay is not a punishment because, per the *Standard Chartered Bank* decision, "the parties have a procedural right guaranteed by the ICSID Convention that allows them to request the annulment of an award, but this right cannot operate against the presumption of validity of awards rendered under the ICSID Convention." [228] Cube and Demeter reiterate that by conditioning the stay, the parties' rights and interests are accounted for in a balanced manner, which in turn explains why the majority of *ad hoc* Committees choose to do so.[229]

114. While Cube and Demeter state that security should be required in every case where a stay of enforcement is not lifted, they also argue that the need for security is even more essential in certain circumstances including when Spain is unlikely to comply with the award should annulment fail.[230] Cube and Demeter submit that Spain's actions (*i.e.* its refusal to pay pending awards and promise to pay the Award contingent upon EC authorization) indicate its future refusal to comply with the Award if the Application fails and therefore place the present case in the realm of circumstances that make adequate security crucial to a potential continued of the stay of enforcement.[231]

[225] *Id.*, ¶39.
[226] *Id.*, ¶39; Rejoinder, ¶85, citing *Sempra*, **Respondents' CL-173**, ¶95; *Flughafen*, **Respondents' CL- 180**, ¶76.
[227] Rejoinder, ¶78.
[228] *Id.*, ¶79, citing *Standard Chartered*, **Spain Annex-40**, ¶87.
[229] *Id.*, ¶80.
[230] *Id.*, ¶¶81-82.
[231] *Id.*, ¶84.

115. Finally, Cube and Demeter advance that even if conditioning the stay puts them in a better position, the advantage would be warranted given that granting a stay during annulment proceedings intrudes on Cube's and Demeter's right under the ICSID Convention by delaying their ability to receive immediate payment by at least one year.[232] The *Churchill Mining* Committee stated that "on a general plane, the better position which the award creditor obtains by conditioning the stay is made possible by the award debtor having requested a stay of enforcement in the first place," and Cube and Demeter point out that Spain has tellingly chosen not to deal with this issue.[233]

III. THE COMMITTEE'S ANALYSIS

A. The Applicable Legal Standard

116. Article 52(5) of the ICSID Convention establishes the power of the Committee to grant or reject Spain's request for the continued stay of enforcement of the Award:

> The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

117. Rule 54 of the Arbitration Rules further provides as follows:

> (1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.
>
> (2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.
>
> (3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is

[232] Response, ¶40.
[233] Rejoinder, ¶87, citing *Churchill Mining*, **Respondents' CL-182**, ¶38.

> rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).
>
> (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) [for a stay or its modification or termination] shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.
>
> (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

118. The request for a provisional stay was made by Spain on 12 November 2019 in its Application. As noted above, this request included the request that the stay be continued until the *ad hoc* Committee ruled on the Request, and further that the *ad hoc* Committee rule that the stay be maintained until the Application itself is decided. On 18 November 2019, the Secretary General provided notice to the Parties of her registration of Spain's Application, and, pursuant to the mandatory terms of Rule 54(2) of the Arbitration Rules, informed the Parties of the provisional stay.

119. The Committee set a schedule for submissions in relation to Spain's request for continuation of the stay, which was laid down in Procedural Order No. 1. As was communicated to the Parties on 20 December 2019, the Committee decided to maintain the provisional stay of enforcement until it had the opportunity to consider the Parties' submissions and rule on the issue.

120. While the wording in Rule 54(2) of the Arbitration Rules relating to the imposition of a provisional stay is mandatory ("the Secretary-General *shall* […]" (emphasis added)), Article 52(5) of the ICSID Convention is likewise clear that the Committee's decision on the continuation of a stay is discretionary ("the Committee *may* […]" (emphasis added)). In addition, according to the same provision, the Committee's discretionary decision must be based on its appreciation of the specific circumstances of the case ("[…] if it considers that the circumstances so require […]"). There is no guidance in

the Convention or the Rules which circumstances shall be considered in deciding whether or not to continue the stay.

121. Nevertheless, a stay, if issued pursuant to Article 52(2) of the ICSID Convention, is an exception to the normal consequence of an award as provided for in Article 53(1) and Article 54(1) of the ICSID Convention, that an award shall be binding on the parties, and recognized as binding and enforceable by each Contracting State. Consequently, the Committee is of the view that a stay is an exceptional remedy in the context of the ICSID system.[234]

122. The Parties agree that the Committee is empowered to continue the stay of enforcement if the circumstances so require.[235] They are divided on the burden and standard of proof, and the circumstances that meet the standard of Article 52(2) of the ICSID Convention and Rule 54(2) of the Arbitration Rules.

123. Spain contends that rather than requiring a strict burden of proof approach, it is the Committee's task to exercise its discretionary powers to evaluate all circumstances in order to determine whether a stay of enforcement is to be continued. It alleges that it has presented the Committee with an array of circumstances that justify the continuance of the stay of enforcement, and that, in any event, its burden of proof has been discharged by far.[236] Cube and Demeter submit that the discretionary powers of *ad hoc* Committees do not alter the burden of proof. They further contend their proof is limited to demonstrating that facts they allege in response to Spain's Application are true, and that Spain has failed to meet "its own independent burden of proof."[237]

124. The Committee considers that while neither Article 52(2) of the ICSID Convention nor Rule 54 of the Arbitration Rules explicitly provide which party bears the burden of proof, the wording and structure of the Convention and the Arbitration Rules, which distinguish the provisional stay and the ruling by the Committee on the continuation thereof, and only provides mandatory wording in relation to the former, supports the

[234] See, e.g. *Burlington*, ¶73.
[235] Submission, ¶7; Response, ¶15; Rejoinder, ¶6.
[236] Reply, ¶¶28-29.
[237] Rejoinder, ¶¶16-18.

position that the normal approach to burden of proof applies, and that the party making an application bears the burden of proof. This view is confirmed by several Committees, notably in *Karkey*:

> [a] "stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant."[238]

125. Consequently, the Committee is of the view that as the moving party seeking to continue the provisional stay, Spain bears the burden of establishing the circumstances that require the stay of enforcement, albeit that Cube and Demeter are obliged to substantiate and where necessary, prove the positive allegations they rely on to rebut Spain's position.

126. The Parties are also divided on the circumstances that would meet the requirements of Article 52(2) of the ICSID Convention. Spain rejects the notion that a stay may only be granted in exceptional circumstances and argues that the majority of stay decisions demonstrates that a continuing stay is the norm for annulment proceedings.[239] Cube and Demeter, on the other hand, point to more recent jurisprudence tending to show a new trend rejecting "automatic" continuation of stays, and argue that a stay of enforcement is an exceptional measure requiring special circumstances.[240]

127. The Committee is of the view that in assessing the circumstances asserted by each of the Parties, and in determining the appropriate standard of proof, there is no effective presumption either in favour or against continuation of a stay. Rather, and consistent with the view expressed by other, in particular more recent *ad hoc* Committees, the Committee must consider the specific facts and evidence relied on by Spain, and in so far as relevant by Cube and Demeter, whereby "the circumstances must be specific, and allegations of harm must be substantiated by 'specific evidence and data' that give rise to a 'particularized fear of harm.'"[241]

[238] *Karkey*, ¶99 (citing *Kardassopoulos*).
[239] Reply, ¶¶3, 11.
[240] Response, ¶11; Rejoinder, ¶4.
[241] *Karkey*, ¶108.

B. Whether the Circumstances Require the Stay to Be Continued

128. Taking the above into consideration, the Committee will now proceed to evaluate the circumstances invoked by the Parties in order to assess whether a continuation of the stay is justified. Spain's arguments in support of its request for continuation of the stay are effectively two-fold: on the one hand it submits that the application is well-grounded, made in good faith, and is not dilatory. In addition, it submits that (i) Cube and Demeter cannot prove that the stay would not prejudice them; (ii) there is no danger that Spain would not have the resources to pay the Award; and (iii) there is a real risk of non-recoupment of funds in the event the Award is paid and subsequently annulled. While Cube and Demeter basically agree that the numerated factors are relevant to assessing Spain's Application, they stress that the seriousness and good faith nature of an annulment application are not relevant factors for consideration by the Committee. In addition, related to the alleged seriousness and good faith nature of the Application, but addressed separately in the Parties' submissions, are the arguments in relation to Spain's submissions in relation to its obligations under EU law. Each of these arguments are addressed in the sections that follow.

1. Seriousness and Non-Dilatory Nature of the Application

129. Spain submits that its Application is not dilatory or frivolous, and that it raises serious, well-grounded, bases for annulment and has been made in good faith.[242] The Committee considers that the basis for a finding that the basis of a request for annulment is frivolous or dilatory is a high threshold. It also notes, however, that rather than forming a requirement that must be demonstrated positively, the absence of good faith or the dilatory nature of an application serves to rebut a request for a stay. As the Committee in *Total* held "[a] serious application is the least that can be expected from an applicant, and nowhere in the ICSID Convention – or in the practice of ad-hoc committees [does] compliance with such minimum duty resul[t] in the extension of the stay."[243]

[242] Reply, ¶32.
[243] *Total* ¶84.

2. Compliance and Recoupment

130. Fundamentally, Spain argues that not continuing the stay would prejudice it, while continuing the stay would not harm Cube and Demeter. The Committee recalls that the standard for deciding whether or not to continue the stay is whether circumstances "require" a stay. These circumstances might pertain to either Spain, or Cube and Demeter or to both. In so far as Spain has invoked as a relevant circumstance that there is a risk of non-recoupment if the Award is paid at this time and later annulled, this is a circumstance Spain should allege with sufficient specificity and support. Raising questions about recovery[244] is not sufficient to fulfil the criterion of "requiring" a stay. To support an allegation of the risk of non-recoupment, Spain would have to provide more specific information and evidence about the risk of non-payment; it is not for Cube and Demeter positively to prove their financial good-standing.

131. In this light, the Committee recalls that but for the showing of circumstances dictating otherwise, the structure of the Convention provides that awards are binding and enforceable. General considerations that not continuing a stay might result in money to pass back and forth are not sufficient and should be distinguished from the scenario in which the lifting of a stay would result in an appreciable risk that a payment would be irrevocable, such as would be the case of a payment to an insolvent company.[245]

132. The risk of non-recoupment is therefore not a material factor in the Committee's decision whether or not to continue the stay. Consequently, there is no real need to consider whether such risk is outweighed by circumstances pertaining to Spain's financial well-being and willingness and ability to pay, in addition to or apart from limitations arising out of or in relation to Spain's obligations under EU law, which are addressed in the section that follows below. Cube and Demeter submit that Spain is unlikely to comply with the Award as this would create a precedent. The Committee agrees with Cube and Demeter that the lack or not of resources is not relevant *per se*; rather, the issue is the potential failure to enforce in the specific case.

[244] Reply, ¶¶54-55.
[245] *MTD Decision on the Request for a Continued Stay*, ¶29.

133. On this note, the Committee is mindful of the fact that a significant number of ICSID and other awards against Spain have been issued recently in cases similar to the present case, and that some of these have led to (ongoing) enforcement proceedings in national courts, suggesting an unwillingness by Spain to volunteer payment. The application to seek authorization from the EC further suggests that if anything, compliance with the Award is likely to be delayed and potentially frustrated. And while generally the payment of interest is adequate to mitigate the delay in payment, where the chances of enforcement are negatively impacted by a delay in enforcement, interest may not be a sufficient compensation.[246]

134. Nevertheless, and while the circumstances suggest voluntary enforcement is not likely to be imminent, the Committee is not required to make a positive finding of prejudice to Cube and Demeter given that Spain has not established the likelihood of financial hardship or prejudice in the form of risk of non-recoupment.

3. Legal Obligations and Hardship

135. In addition to the balancing of potential prejudices in relation to issues of compliance and recoupment outlined above, Spain invokes another potential prejudice, which it submits should be considered in the balancing of interests and hardship. Namely, it points out that its obligations under EU law effectively conflict with its obligations under international law. Cube and Demeter dispute that Spain's alleged obligations under EU law justify a finding of hardship requiring a continuation of the stay.

136. Spain argues that payment to Cube and Demeter constitutes notifiable State Aid, and that payment is contingent on getting clearance from the Commission. It sets out in considerable detail its submission that payment and enforcement of the Award until such clearance is obtained constitute a breach of EU law, and that a stay would help avoid a conflict with international law and/or at least avoid payment to, and subsequent restitution from Cube and Demeter. It highlights its difficult position, and argues a stay would ensure that not only Spain, but also Cube and Demeter act in compliance with their EU obligations. It also contends that the Vienna Convention on the Law of Treaties

[246] *Antin*, ¶82.

supports its argument that a stay offers a solution to the incompatibility of legal obligations it faces.

137. Cube and Demeter submit, by reference to the [Stay Decision in Antin] that if there is a genuine conflict of legal obligation, this is one of Spain's own making.

138. As the Committees in *Eiser* and *Antin* considered, it is not clear how a stay of enforcement would help to resolve the alleged conflict between Spain's obligations under EU law on the one hand, and international law on the other. At most, a stay would defer the (potential) conflict, and it is far from clear that such a temporary respite would provide any opportunity to resolve the challenges Spain acknowledges that it is facing.[247] Furthermore, as the Committee in *Antin* considered, while appreciative of the legal quagmire Spain finds itself in, this is "a legal conundrum of the Applicant's own making."[248]

139. Moreover, as the brief overview above illustrated, the arguments raised by Spain in support of its submission that it faces conflicting obligations under EU and international law, appear to go to the heart of this annulment proceeding[249] and would require the Committee to consider facts and circumstances that pertain to the merits of the dispute. As several other *ad hoc* Committees, notably *Karkey*, referring to *OIEG v. Venezuela*, have held, "the merits of an annulment application are not relevant for purposes of the decision on whether or not to grant the stay, or the continuation of the stay."[250] Any decision on the question of the continuation of a provisional stay cannot therefore be based on any evaluation of the outcome of these proceedings. For this reason as well, the Committee will not consider the alleged conflict of legal obligations in its balancing of potential prejudice and hardship.

[247] *Antin*, ¶75.
[248] *Id.*, ¶76.
[249] Application, ¶15
[250] *Karkey*, ¶118.

C. Whether Security Should Be Ordered

140. In light of the Committee's view that there are no circumstances requiring the Award to continue to be stayed, there is no need for the Committee to consider Cube's and Demeter's alternative plea that, should the Committee stay the enforcement, the Committee should require "adequate security that will safeguard Cube and Demeter's rights in the event Spain's annulment application is rejected."[251]

IV. DECISION

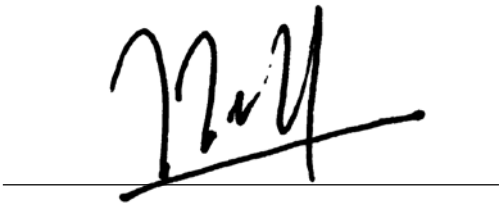
141. For the reasons stated above, the Committee:

a. decides that the stay of enforcement of the Award should not be continued; and

b. reserves the issue of costs on this Request to a further order or decision.

Mr. Timothy J. Feighery
Member of the *ad hoc* Committee

Mr. Álvaro Castellanos Howell
Member of the *ad hoc* Committee



Prof. Dr. Jacomijn van Haersolte-van Hof
President of the *ad hoc* Committee

[251] Response ¶34.