INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

InfraRed Environmental Infrastructure GP Limited and others

v.

Kingdom of Spain

(ICSID Case No. ARB/14/12) – Annulment Proceeding

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

Members of the ad hoc Committee
Prof. José-Miguel Júdice, President of the *ad hoc* Committee
Dr. Karim Hafez, Member of the *ad hoc* Committee
Prof. Yuejiao Zhang, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Mr. Marco Tulio Montañés-Rumayor

October 27, 2020

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I. INTRODUCTION

1. This Decision addresses the request of the Kingdom of Spain ("**Applicant**" or "**Spain**") for the continuation of the provisional stay of enforcement of the award rendered on August 2, 2019 in ICSID Case No. ARB/14/12 ("**Award**"), initiated by InfraRed Environmental Infrastructure GP Limited , European Investments (Morón) 1 Limited, European Investments (Morón) 2 Limited, European Investments (Olivenza) 1 Limited and European Investments (Olivenza) 2 Limited ("**Respondents**" in the annulment or "**Infrared**" and, together with the Applicant, the "**Parties**").

II. PROCEDURAL HISTORY

2. On November 29, 2019, the Applicant filed an application for annulment of the Award ("**Application**"). The Application requested the continuation of the stay of enforcement of the Award ("**Stay Request**") pursuant to Article 52(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

3. On December 5, 2019, the ICSID Secretary-General registered the Application and notified the Parties that, in accordance with ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

4. On February 21, 2020, the *ad hoc* Committee ("**Committee**") was constituted in accordance with ICSID Arbitration Rules 6 and 53. Its members are: José-Miguel Júdice (Portuguese), President; Karim Hafez (Egyptian); and Yuejiao Zhang (Chinese). All members were appointed by the Chairman of the Administrative Council. Mr. Marco Tulio Montañés-Rumayor, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

5. On March 12, 2020, the Committee fixed the written schedule regarding the Applicant's Stay Request. On that same date, the Committee proposed to hold a one-day hearing (with another day in reserve), for oral argument on the Stay Request, subject to the public health advisories of COVID-19.

6. On that same day, the Committee informed the Parties that it had decided to "extend the provisional stay of enforcement of the award until it rules on such request after receiving the parties' submissions to that effect".

7. On March 24, 2020, the Applicant filed a submission in support of the continuation of the stay of enforcement of the Award ("**Stay Submission**").

8. On April 15, 2020, the Committee held the first session with the Parties by video conference. During the session, the Parties confirmed their agreement that the Committee had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules, and that they did not have any objections in this respect. The Parties also agreed on a number of procedural matters concerning the proceedings in the case, including the possibility of holding a virtual instead of an in-person hearing, due to COVID-19 health constraints.

9. On April 16, 2020, the Respondents filed observations on the Applicant's Stay Submission ("**Response**").

10. On April 23, 2020, the Committee issued Procedural Order No. 1 ("**PO1**") concerning procedural matters. Annex A of PO1 contained the Procedural Calendar agreed by the Parties and approved by the Committee. The Calendar provided for an "online hearing on 29 and 30 June 2020 (to be confirmed by the Committee in consultation with the Parties by 21 May 2020)".

11. On April 30, 2020, the Applicant filed a reply to Infrared's Response of April 16, 2020 ("**Reply**").

12. On May 14, 2020, the Respondents filed their rejoinder to the Applicant's Reply of April 30, 2020 ("**Rejoinder**").

13. On May 20, 2020, after receiving the last written submission on the Stay Request, the Committee consulted again with the Parties about holding a virtual hearing pursuant to Annex A of PO1.

14. On May 21, 2020, the Committee decided that a hearing would be held by video conference on June 29 and 30, 2020.

15. On June 22, 2020, a pre-hearing session between the Parties and the Committee was held by video conference to discuss any outstanding procedural, administrative, and logistical matters in preparation for the hearing. Participating were:

Members of the *ad hoc* Committee
- Prof. José-Miguel Júdice, President of the *ad hoc* Committee
- Dr. Karim Hafez, Member of the *ad hoc* Committee
- Prof. Yuejiao Zhang, Member of the *ad hoc* Committee

ICSID Secretariat:
- Mr. Marco Tulio Montañés-Rumayor, Secretary of the Committee
- Ms. Ivania Fernandez, Paralegal

On behalf of the Applicant:
- Mr. Rafael Gil Nievas
- Ms. María del Socorro Garrido Moreno

On behalf of the Respondents:
- Dr. José Ángel Rueda García
- Mr. Borja Álvarez Sanz

16. On June 26, 2020, the Committee issued Procedural Order No. 2 ("**PO2**") concerning the organization of the hearing.

17. On June 29 to 30, 2020, the Committee held a hearing on the Stay Request by video conference ("**Hearing**"). Participating in the Hearing were:

Members of the *ad hoc* Committee
- Prof. José-Miguel Júdice, President of the *ad hoc* Committee
- Dr. Karim Hafez, Member of the *ad hoc* Committee
- Prof. Yuejiao Zhang, Member of the *ad hoc* Committee

ICSID Secretariat:
- Mr. Marco Tulio Montañés-Rumayor, Secretary of the Committee
- Ms. Ivania Fernandez, Paralegal
- Ms. Mayra Alejandra Román, ICSID

On behalf of the Applicant:
- Mr. Rafael Gil Nievas
- Ms. María del Socorro Garrido Moreno
- Mr. Luis Vacas Chalfoun
- Ms. Gloria de la Guardia Limeres

On behalf of the Respondents:
- Mr. Alberto Fortún Costea
- Prof. Miguel Gómez Jene
- Dr. José Ángel Rueda García
- Mr. Borja Álvarez Sanz

18. At the end of the Hearing, the Committee invited the Parties to file, by July 3, 2020, any additional request for document production.[1]

19. On July 3, 2020, each Party filed a request for the Committee to decide on the admissibility of new evidence. The Respondents' communication also proposed an undertaking related to guarantees of recoupment by the Applicant if the stay was not maintained and a situation of recoupment arose in the future.

20. On July 8, 2020, the Applicant objected to the Respondents' letter of July 3 because it "goes beyond that Committee's authorization and includes a point 2 not related at all with the petition to incorporate documents to the record". Consequently, the Applicant requested that:

> "(1) That the paragraph 2 of the Infrared's Letter regarding an "undertaking" is completely dismissed and considered as non-presented.
>
> (2) Subsidiarily, that leave is given to the Kingdom of Spain to respond to the misleading paragraph 2 of said Infrared's Letter".

21. On July 10, 2020, the Committee invited the Applicant to reply to the Respondents' letter of July 3 by July 15, 2020.

22. On July 15, 2020, the Applicant filed observations on the Respondents' letter of July 3, 2020. It first acknowledged that the Respondents had "filed timely a document (the Letter) with a dual content: (1) petition to incorporate documents into the record; and (2) additional allegations regarding the stay of enforcement". The Applicant then argued that "those additional comments improperly made by InfraRed must be completely sidelined, as they are not only out of the scope of Tribunal [sic] suggestion

[1] Hearing Tr., Day 2, 224: 13-15.

but also because they do not respond to any request made by Infrared during the hearing".

23. On July 21, 2020, the Committee informed the Parties that it had taken note of the Parties' communications (of July 3 and 15, 2020), and that it would determine in its Decision on the Stay Request whether and how to consider the content of such letters.

24. On July 22, 2020, the Parties jointly submitted the agreed revisions to the Hearing transcript.

25. On July 30, 2020, the Respondents informed the Committee that the Applicant had lodged on July 22, 2020 an application for revision of the Award ("**Application for Revision**"). In their view, "the circumstances surrounding this request are certainly exceptional, given the fact that Spain's Application for Revision, on one hand, overlaps with its Application for Annulment and, on the other hand, confirms InfraRed's arguments. However, the Application post-dates InfraRed's last written submission and, as a result, it could not have been submitted earlier".

26. Therefore, the Respondents requested that the Committee:

> "(i) accept InfraRed's request for leave to file into the record Spain's Application for Revision of July 22, 2020 together with this letter; (ii) order as soon as practicable the lift of the provisional stay of enforcement of the Award; and (iii) order Spain to bear all costs resulting from its application for stay of the enforcement."

27. On July 31, 2020, the Applicant objected to the Respondents' request by arguing that:

> "[i]n the same way as the *ad hoc* Committee strictly enforced the PO1 when required the Applicant to remove the InfraRed' s publicly available financial statements from the opening presentations in the stay of enforcement hearing, the *ad hoc* Committee must enforce the PO1 and directly and simply reject the InfraRed's Letter that contains confidential information."

28. On August 4, 2020, the Committee took note of the Parties' communications of July 30 and 31, 2020.

29. On August 7, 2020, the Committee issued Procedural Order No. 3 ("**PO3**") regarding the Parties' requests for new documents.

30. On August 10, 2020, the Applicant requested an extension until August 27 to file its submissions pursuant to PO3.

31. On August 11, 2020, the Committee granted the Applicant's request of August 10, 2020.

32. On August 27, 2020, the Parties filed the new documents and/ or submissions pursuant to PO3.

33. In its submission of August 27, 2020, the Applicant asked leave to submit a new legal authority - a decision of August 26, 2020 issued by an *ad hoc* committee in favor of maintaining the stay of enforcement of an award.

34. On August 28, 2020, the Committee invited the Respondents to comment on the Applicant's above request by September 3, 2020.

35. On September 2, 2020, the Respondents filed their comments on the Applicant's request of August 27, 2020.

36. On September 9, 2020, the Committee issued Procedural Order No. 4 ("**PO4**") regarding requests of the Parties not yet decided.

37. On September 10, 2020, the Committee declared the stay of enforcement phase closed.

38. **Section III** of this Decision summarizes the Parties' positions on the Stay Request. **Section IV** sets out the reasons for the Committee's decision. The Committee's decision and orders are stated in **Section V**.

III. THE PARTIES' POSITIONS

39. The Parties' positions are briefly summarized below, which does not mean that the Committee has not analyzed all of the Parties' submissions and any other means of providing evidence, including as the case may be, exhibits, legal authorities and pleadings.

A. The Applicant's Position

40. In its Application, the Applicant requests that:

> "[i]n accordance with article 52(5) of the ICSID Convention and Arbitration Rule (54)1, …that the Secretary General provisionally stays enforcement of the Award until the *ad hoc* Committee rules on such request. The Applicant also requests that the stay be maintained until the Decision of the *ad hoc* Committee is rendered"[2].

41. In its Stay Submission[3], and then in its Reply, Spain requests that:

> "[…] the stay of enforcement of the Award should be continued and maintained in effect, without security or other conditions, until the decision on the Annulment Application is rendered by the Committee in this proceeding"[4].

42. The position of the Applicant is mostly detailed in its Stay Submission, in its Reply, and the Hearing's oral argument ("**Hearing Opening**" and "**Hearing Rebuttal**"). The Committee has summarized the Applicant's position accordingly.

43. The Applicant contends that the continuation of the stay, as requested, is the "prevailing practice"[5] or "general norm"[6], unless exceptional circumstances occur or whenever the Application is "frivolous" or "improper", which it argues is not the case here[7].

44. Even if the continuation of the stay was not the 'general norm', the Applicant argues that the Application has been filed in good faith (which must be presumed[8]) because there are serious grounds for the annulment of the Award, and that the Respondents do not pass the test of "clean hands"[9].

45. Furthermore, the Applicant refers to a number of decisions, mostly from previous *ad hoc* committees, to reinforce its position[10].

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[2] Application, § 73.
[3] Stay Submission, § 27 ("Spain respectfully submits that the stay of enforcement of the Award should be continued and maintained in effect until the decision on the Annulment Application is rendered by the Committee in this proceeding.")
[4] Reply, § 128.
[5] Stay Submission, § 4.
[6] *Id.*
[7] *See* Stay Submission, § 4.
[8] Applicant's Hearing Opening (Presentación), slide 23.
[9] Stay Submission, § 5.
[10] Stay Submission, §§ 7-9.

46. The Applicant emphasizes its good faith and refers to the serious harm that may be caused to it in case of the expected annulment of the Award because of the risks of non-recoupment of the amounts unduly paid. The Applicant further asserts that even if the recoupment ends being possible, it would require huge costs and an excessive burden for it and the taxpayers in its territory[11].

47. Finally, the Applicant concludes that if the Committee weighs the harm to the Parties, there would be no harm for the Respondents if the stay is maintained because (i) the Award ordered the payment of interest, (ii) the Applicant abides by his international obligation, and (iii) Spain is one of the higher ranked countries in the world in terms of GDP and a large European Union ("**EU**") economy[12].

1. The applicable legal standard

48. The Applicant contends that the Committee has "wide discretion"[13] to decide on the Stay Request, and that all the criteria (or legal standard) for the Committee to continue the stay the enforcement of the Award have been met[14].

49. Moreover, the Applicants argue that its Application is:

> "a) Well-grounded and serious, not frivolous or dilatory;
>
> b) There would be no prejudice or harm caused to Infrared if the stay is continued, as they would be richly compensated for any delay in payment by the accrual of interest if the annulment is denied;
>
> c) There is no history of non-compliance with international arbitral awards by the Kingdom of Spain or a risk of financial inability to pay the Award;
>
> d) There would be serious prejudice and harm caused to the Kingdom of Spain if the Award is enforced and paid and later annulled, since Spain faces the risk that it will not recover the amounts obtained by Infrared, and may have to pursue its own enforcement actions in multiple national courts if the money is not voluntarily returned;
>
> e) There would be serious prejudice and harm caused to the Kingdom of Spain if the stay were revoked and Infrared sought immediate payment and

[11] Stay Submission, §§ 15-18.
[12] Stay Submission, §§ 19-26.
[13] Reply, § 29.
[14] Reply, §§ 8 and 29.

> enforcement of the Award, requiring the European Commission (the "**EC**" or the "**Commission**") to carry out an assessment of the Award in its current form, whether it may be considered State Aid incompatible with the European Union's ("**EU**") single market – a determination that could be wholly unnecessary if the Award is annulled in this proceeding;
>
> f) In any case, the Kingdom of Spain offers its commitment in writing in this case, if the Award is not annulled in this proceeding, to seek the authorization of the EC to proceed with payment and will promptly pay it upon receiving such authorization"[15].

50. The Applicant 'strongly' disagrees that the "circumstances" to be assessed by the Committee for a decision in favor of the stay must be "compelling", as the Respondents posit, which it alleges that it is not correct as a matter of law[16].

51. The Applicant also disagrees that the stay must be treated as an exceptional measure, which it considers "plainly wrong"[17].

52. The legal standard for the Applicant to obtain the permanent stay, as requested, shall be obtained taking into account "[t]he sources of International Law… listed in the article 38 of the Statute of the International Court of Justice ("**ICJ**")"[18] and not judicial or arbitral decisions.

53. Taking into account those sources, including "the Treaty on the Functioning of the EU" ("**TFUE**") that forbids the payment of the Infrared Award until the EU Commission authorizes that payment"[19], the International Custom[20] and the General Principles of Law, 'the suspension must be maintained'"[21].

[15] Reply, § 10.
[16] Reply, § 6.
[17] Reply, § 8.
[18] Reply, § 12.
[19] Reply, § 14. See also Applicant's Hearing Rebuttal, slide 6: "Payment to Infrared constitutes notifiable State Aid for the promotion of renewable energy in Spain and may distort competition or affect trade between Member States in the internal market" and therefore "[t]he Award exists but payment cannot be done without EU authorization without sanctions. Spain has already notified the Award to the EU".
[20] "The international custom (that is only created by the States) is to respect the sovereigns and to try to avoid international conflicts. To lift the stay would lead to an international conflict as the decision would go directly against the EU Law" (Reply § 15). Applicant posit that "[t]erminating the stay is not per se a violation of international law but terminating the stay on the basis of the "*arguments*" made by Infrared it is a violation of international law" (Applicants' Hearing Rebuttal, slide 7, and slide 10-1 for the "principle of State Sovereignty").
[21] Reply, § 15.

54. The criteria or legal standard for the Committee to decide to continue or lift a stay of enforcement under Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(2) are not provided by these two legal instruments.

55. Contrary to the Respondents' allegations, the ICSID system is therefore not self-contained, notably in relation to the issues at stake in this stay of enforcement request. But even, *quod no*, in a "silo application of ICSID Convention, its [A]rticle 42 leads to application of the TFUE"[22].

56. The Applicant further contends than in any event:

> "ICSID *ad hoc* annulment committees have commonly considered a number of circumstances as relevant to the determination of whether to stay enforcement, including: (a) whether the annulment application is dilatory or frivolous; (b) the adverse consequences that may be caused to either party by the granting or denial of a stay of enforcement; (c) the risk of non-recoupment of the award, if it is paid and later annulled; and (d) the risk that the award may not be honored if the annulment application is unsuccessful"[23].

57. This standard is acceptable for the Applicant under the ICSID Convention, provided that the Committee in exercise of its discretion does not apply an inexistent rule of the burden of the proof[24] and does not request the relevant "circumstances" to be "compelling"[25] or "exceptional", as the applicable rules (Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(2)) make no mention to this admittedly higher threshold[26].

58. The Applicant asserts that "[e]ven if the judicial decisions are not source of International Law, the prevailing practice of *ad hoc* annulment committees shows that stays have been granted in the vast majority of cases in which they have been requested"[27], which is relevant to confirm that the stay is for sure not exceptional (but

[22] Applicants' Hearing Rebuttal, slide 7.
[23] Reply, § 17. Other risks would be the reputational and damage to public/general interest (Applicants' Hearing Opening Statement - Presentación), slide 22. Also slides 32 for General Interest and slide 33 for Reputational Damages.
[24] Reply, § 14.
[25] This expression is only used, as referred by the Applicant, in one decision - *Border Timbers v. Zimbabwe* - but to stress that the party opposing the stay should use a lower threshold, not having the burden to demonstrate *"that there are 'exceptional circumstances' that require the lifting of the stay"* (Reply, § 27).
[26] Reply, § 18.
[27] Reply, § 19.

also not "automatic" [28]) and does not require the existence of "compelling" circumstances.

2. Whether the circumstances require a stay

59. The Applicant cites in support of its position the decision in *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania (ICSID Case No. ARB/15/41)* providing that:

> Article 52(5) does not indicate that one particular party bears the burden of establishing circumstances requiring a stay. It rather seems that establishing the existence of such circumstances is part of the Committee's discretionary power (…)[29]

60. However, the Applicant contends having met any burden of proof of the existence of "circumstances" that justify the stay to be maintained.

61. The Applicant asserts that the relevant circumstances that the Committee should consider when deciding whether to continue or lift the stay are the following: "(i) whether the annulment application is frivolous or dilatory; (ii) whether the stay would cause adverse consequences or prejudice to either party; (iii) the risk of non-recoupment of the award if paid now and later annulled; and (iv) the risk of non-compliance if the annulment is not successful"[30].

62. In the Applicant's view, these circumstances justify a decision of the Committee in favor of the stay, as

> a) the Application is well grounded and not dilatory[31] and this has been evidenced under the needed criterion of fumus boni juris[32,] which "means that premature enforcement of the Award would be manifestly imprudent"[33].
>
> b) There are no adverse consequences to the Respondents, let alone evidenced harm[34], all the alleged prejudices are hypothetical, as the Kingdom of Spain respects all her international obligations and "[i]n the unlikely event the Award is not annulled, the Kingdom of Spain will seek the European

[28] Reply, § 23.
[29] Reply, §§ 34 and **ANNEX-040**, § 53.
[30] Reply, § 36.
[31] Reply, §§ 38-46.
[32] Reply, § 43.
[33] Reply, § 44.
[34] Reply, §§ 48-69.

> Commission approval for the payment"[35], and the award adjudicates interest to compensate for the delay of eventual payment[36]. In any event, the risk of non-payment "has not been found determinative by arbitral precedents. Even when such a risk has been found, ICSID annulment committees have granted stays of enforcements"[37].
>
> c) There is a serious risk of non-recoupment of the amounts[38] as the Respondents provide no evidence of their solvability and, "even in the hypothetical scenario of that solvency been proved, the risk of capital movements and raising of assets among their entities would continue to exist" [39]. There is no equivalent solution to the existent protection of Respondents in the case of maintenance of the stay, as "absolutely nothing would compensate Spain's hardship in this regard"[40], and therefore "[t]he risk of non-recoupment for the Kingdom of Spain is higher than the risk of non-payment for Infrared"[41]
>
> d) "[T]he lift of the stay and the subsequent payment of this Award would mean for the Respondent (sic) … the violation of European regulation on Staid-aid, [42] the Applicant is solvent and the ICSID systems admits the annulment request as a right and no negative inferences may result of the exercise of a right: "Lawful ways of proceeding cannot constitute an open violation of anything and it is a lawful way of proceeding to oppose to enforcement when Spain has not been authorized by the European Commission to do the payment yet"[43] and requested already that authorization; if the authorization is not granted, lifting the stay "could require recovery proceedings to be commenced against Infrared by Spain, consistent with its obligations under EU law"[44] or legal action from the Respondents "seeking to overturn said determination" and the Parties will be unnecessarily and inefficiently "embroiled in legal battles"[45].

63. The lift of the stay – in the anticipated outcome of annulment of the Award - will create "secondary damages" to the Applicant (lack of compensatory interest, reputational and public/general interest damages not covered, distribution of the money paid/obtained through enforcement to shareholders of the Respondents[46]).

64. As far as EU constraints are concerned, the Applicant posits – as a strong argument in favor of the stay – that "the TFEU, which sets out EU Member States' obligations with

[35] Reply, § 50.
[36] Reply, § 51.
[37] Reply, § 63.
[38] Reply, §§ 70-79.
[39] Reply, § 72.
[40] Reply, § 73.
[41] Reply, § 78.
[42] Reply, § 58 and §§ 80-123.
[43] Reply, § 66.
[44] Reply, § 81.
[45] Reply, § 82.
[46] Applicant's Hearing Opening Statement (Presentación), slides 30-31 and slide 32 for General Interest Damages.

respect to State Aid, is an international treaty which binds Spain and has, in intra-EU affairs, priority over the ICSID Convention and the ECT"[47].

65. The Applicant stresses that "[k]eeping the stay of enforcement during this annulment proceeding would avoid a conflict between Articles 107 and 108 of the TFEU and Article 53 of the ICSID Convention. If a stay is not granted, an unnecessary conflict with one of the most relevant international organizations and the world most developed regional integration organization will arise"[48], and refers in support of this position the duties of the Respondents (as the Applicant) to "comply with their international obligations"[49] and the VCLT rules for the interpretation of Treaties[50].

66. The Applicant confirms that it has acted in accordance with all its international obligations and on November 2019 notified the Award to the European Commission ("**EC**" or "**Commission**")[51], which demonstrates its "determination to obtain the EC's authorization as soon as possible"[52] and waits the EC deliberation, pending which it has a "*standstill obligation* which prevents it of making any sort of disbursement"[53].

67. The argument of the harm of the risk of being in a queue of creditors is considered by the Applicant as "hardly an argument to request that stay of enforcement is not continued but plain and simple speculation, based on the unreal premise that all cases will result in liability"[54].

68. The Applicant concludes that the "circumstance" *"*concerning the potential harm that would be caused to each of the Parties if the stay of enforcement was continued or revoked also weighs in favor of continuing the stay. The Respondents would suffer absolutely no harm by the continuation of the stay – they have only been able to allege a speculative and hypothetical menace– even if the Award survives annulment in its entirety"[55].

[47] Reply, § 103.
[48] Reply, § 108.
[49] Reply, § 110.
[50] Reply, §§ 111-114.
[51] Reply, § 117.
[52] Reply, § 118.
[53] Reply, § 120.
[54] Reply, § 53.
[55] Reply, § 87.

69. On August 27, 2020, the Applicant referred to a decision of the *SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38)* ("***SolEs***") *ad hoc* committee that – against the trend of all the previous similar decisions related to the Kingdom of Spain – granted the maintenance of the stay of enforcement, and after the leave granted by the Committee, submitted into the record that decision[56] that allegedly is considered as a good precedent for its case.

3. Whether security should be ordered

70. The Applicant considers that the stay shall be maintained and it is not prepared to provide any special undertaking, as no risk actually exists for the Respondents in the allegedly improbable situation of the Award not being annulled and adequate compensation is granted by post-award interest as decided in the Award.

71. The post-award interest is allegedly "in no way insufficient"[57] and there "would be no injury even if it were 0%"[58], also because the "[d]elay in receiving payment is a consequence of the *proper application* of the procedural guarantees of the annulment procedure, and the principle of legal certainty"[59].

72. The Applicant refuses to admit, when asked by the Committee to comment on, the possibility of granting the stay conditioned upon Spain providing a payment undertaking (similar to what was requested in *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)* ("***NextEra***")) within a certain period of time from the Committee's Decision on the Stay Request, during which Spain may try to obtain a declaration from the EU Commission not opposing the undertaking and the consequences related thereto, as in its opinion it would be "bad law [that] should not be reproduced"[60]; and the same occurs in relation to the possibility of granting the stay conditioned upon Spain issuing

[56] As authorized by PO4.
[57] Applicant's Hearing Rebuttal, slide 3.
[58] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3 ("Because article 52(5) expressly provides that an award creditor's rights are subject to a stay in an *ad hoc* Committee considers that the circumstances so require, the postponement of the right to payment of the award caused by a stay cannot, by definition, per se constitute prejudice"). Applicant's Hearing Rebuttal, slide 4.
[59] Applicant's Hearing Rebuttal, slide 4.
[60] Applicant's Hearing Rebuttal, slide 19.

an irrevocable bank guarantee within a certain period of time from the Committee's Decision on the Stay Request, during which Spain may try to obtain a declaration from the EU Commission not opposing the issuance of the bank guarantee and the consequences related thereto.

73. The Applicant alleges, against this possibility, that:

> (i) EU is not a party in this proceeding,
> (ii) To put the stay under condition subsequent depending on a third party is bad law,
> (iii) A decision as such is a kind of black mail to the EU to accept something regarding its own State Aid regime,
> (iv) The NextEra decision is not an example of good law: it even enters into internal competences of the states on who should authorize what.
> (v) [This is a] [b]ad transfer of commercial arbitration practices to investment arbitration"[61] and
> (vi) [These possibilities were met with "[t]remendous surprise by these questions addressed to the Kingdom of Spain[62] .

74. The economic and financial situation of the Respondents, as demonstrated by their financial statements, is allegedly very poor and constitute an additional argument against lifting the stay: either the Respondents have no assets and emptied their balance and have no longer any assets, or had huge losses and for those reasons they are "not going to be able to reimburse the amounts if the stay of enforcement is lifted"[63].

75. As far as the acceptance of a lift of the stay, the Applicant considers that it "would need special guarantees [such as]:

> a) affidavit by the Infrared parent Group CEO to repay and to do a public release apologizing for the damages to Spain
> b) determination of interests. Not only 2% but to cover indirect damages too
> c) escrow in Spain[64]".

76. By letter of the July 14, 2020, the Applicant considers that the undertaking included in the Respondents' Request (not to distribute dividends to their parent companies) is misleading as an undertaking of the Respondents and of no value as a guarantee, not only because "it is limited to one of the InfraRed claimants, InfraRed Environmental Infrastructure GP Limited" but also as distribution of dividends "nowadays is not the

[61] Applicant's Hearing Rebuttal, slides 19-20.
[62] Applicant's Hearing Rebuttal, slide 20.
[63] Applicant's Request of July 3, 2020 to introduce new documents into the record ("**Applicant's Request**").
[64] Applicant's Hearing Rebuttal, slide 27.

usual way to move the money intra-group", and for those reasons "the Infrared's 'offer' should be completely sidelined"[65].

B. The Respondents' Position

77. The Respondents request 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 the Applicant, that circumstances do not warrant a stay of enforcement of the Award, and that Spain is already a debtor and after more than 5 years it is clear that "justice delayed is justice denied"[66].

78. The position of the Respondents is mostly detailed in their Response, the Rejoinder and their Hearing oral argument ("**Hearing Opening**" and "**Hearing Rebuttal**"). The Committee has prepared this summary of their position accordingly.

79. According to the Respondents, the Applicant has a long history of refusing to comply with international arbitral awards in similar situations. The Respondents further argue that "filing actions for annulment forms part of Spain's calculated strategy for delaying and impairing to the extent possible its payment of ICSID awards as well as its compliance with international obligations"[67], and the Application is "simply dilatory, frivolous and highly damaging" for the Respondents[68]. The alleged obligation of notification of the EU Commission demonstrate the delay strategy, as "[n]either Spain nor the European Commission has respected the deadlines and time periods regulatorily established to authorize payment of the InfraRed award (Spain's Annex 49 (R-392)"[69].

80. Contrary to the Applicant's Stay Submission, there is no rule, practice or tendency for an *ad hoc* committee to grant the stay of enforcement, which is the exception. The Applicant "bears the burden of proving that compelling circumstances exist so as to

[65] Applicant's letter of July 14, 2020, p. 2.
[66] Respondents' Hearing Opening, slide 7.
[67] Response, § 2.
[68] Response, § 3. In the same line, as alleged, the Kingdom of Spain lodged an Application for Revision of the Award (**CL-299**).
[69] Respondents' Hearing Opening, slide 13. See for the notification process, Respondents' Hearing Rebuttal, slide 5.

require the continuation of the stay" and the Kingdom of Spain "has not discharged its burden and no such circumstances concur"[70].

81. The stay would harm the Respondents, as it will increase the risk of non-compliance with the Award, would allow the Applicant time to reallocate assets, and in any event the post-award interest (which are compensatory by nature) are not intended to and will not compensate adequately[71].

82. If the Committee wishes to assess the balance of harm to the Parties, the Respondents allege that no harm exists for the Applicant because the immediate enforcement is no more than a natural consequence of the ICSID Rules[72].

83. The Respondents also emphasize that all the previous requests from the Applicant for stay of enforcement have not been granted or were only accepted with stringent conditions[73]. They consider that it is noteworthy that "Spain has remarkably avoided any reference to the recent four decisions that other *ad hoc* committees — hearing over Spain's applications for stay in substantially similar fact settings — have either rejected (i.e., *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36)* ("***Eiser***"), *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)* ("***Antin***") and *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain (ICSID Case No. ARB/15/20)* ("***Cube***")) or conditioned the stay of enforcement upon a strict guarantee of payment (i.e., *NextEra*). In *NextEra*, the committee required Spain to undertake that it will (*inter alia*) unconditionally and irrevocably pay the pecuniary obligations imposed by the award following the notification of the decision on annulment, such that the award-creditor will be fully compensated, including interest, and would not need to engage in any action to recognize, enforce or execute the award"[74].

[70] Response, § 4.
[71] Response, § 5 and Respondents' Hearing Rebuttal, slides 18-22.
[72] Response, § 6.
[73] Response, § 7.
[74] Rejoinder, § 3.

1. The applicable legal standard

84. The Respondents consider that "the remedy of annulment — coherently with the principle of finality of awards — is a narrow and exceptional one, limited to very exceptional circumstances"[75]. As a consequence, the stay of enforcement being the exception and not the rule, the legal standard to be applied to this request is high: the Applicant has the burden of the proof[76] (as mandated by the Article 54(4), of the ICSID Arbitration Rules[77]) that exceptional and "compelling circumstances" occur in a way that allow the Committee to exercise its discretion in accordance with the ICSID Convention and Rules[78].

85. To support their point of view, the Respondents quote various *ad hoc* committees' previous decisions and Article 52(5) of the ICSID Convention, which states "[t]he Committee may, if it considers that the circumstances so require, stay the enforcement pending its decision […]." According to the Respondents, the expression "may" confirms that it is not mandatory and the expression "require" demonstrate that it is actually the stay which is the exception.[79] They further argue that there is no presumption in favor of the stay request, quite the opposite[80] and the expression "require" demands that the Committee applies a "strict standard …following the interpretation given by other committees" referred by the Respondents[81].

86. The Respondents disagree with the Applicant as far as the trend of *ad hoc* committees to confirm the stay is concerned. They state that statistics are not a useful tool, as "the discretion with which the ICSID Convention has entrusted this …Committee is not to be exercised based on statistics. Statistics might be relevant for other *non-adjudicatory* tasks (secretarial functions or *lege ferenda* reforms) but are certainly not one of the factors to assess, in this or any other case, whether to impose of a permanent stay"[82].

[75] Response, § 12.
[76] Rejoinder, §§ 18-22 for the alleged "vast majority of ICSID decisions" that rule as referred by the Respondents as compared with a single decision in favor of Applicant's viewpoint.
[77] "[a] request […] shall specify the circumstances that require the stay or its modification or termination".
[78] Response, § 14.
[79] Response, §§ 13-16.
[80] See *inter alia Antin*, § 62 (**CL-277**).
[81] Rejoinder, § 13.
[82] Rejoinder, § 24.

87. In any event, they consider that the trend – and not only in Spain-related decisions – favors exactly the opposite position and that all the Spain related cases were against the intentions of the State[83].

88. Therefore, the Respondents conclude that the circumstances must "rise beyond the ordinary to reach the level that requires continuation of the stay"[84] and, quoting past *ad hoc* committee decisions of similar cases, some of them involving Spain, concludes that "not any ordinary circumstance is sufficient"[85].

2. Whether the circumstances require a stay

89. The Respondents consider that the Applicant "has not discharged its burden and no such circumstances concur" that would allow the Committee to exercise its discretion in favor of granting the stay[86].

90. On the contrary, the Applicant's previous behavior (not to comply with any award in similar ECT arbitration cases, and resorting always to annulment procedures under inexistent and frivolous grounds) show a pattern of lack of respect for its obligations with an alleged "strategy [to] 'protect' seizable assets, relocating and transferring them through different jurisdictions"[87].

91. When the Application is "frivolous", as it allegedly is in this case, it is necessary to go against the "well-settled jurisprudence of ICSID committees holding that the decision whether to grant or deny the continuation of the stay should not consider the merits of the annulment application"[88].

92. This would be enough to conclude that no circumstances "require" to decide in favor of the request. However, if this was not the case, the maintenance of the stay would cause unfair and relevant harm to the Respondents[89].

[83] Rejoinder, §§ 23-29.
[84] Rejoinder, § 15.
[85] Rejoinder, § 16.
[86] Response, § 18.
[87] Response, § 19.
[88] Response, §§ 20-21.
[89] Response, Section 3.1.

93. The harm is anticipated by the consequences of the Applicant's conduct, as it "reveals its lack of commitment to abide by its international obligation to comply with ICSID awards"[90], and by its contention that "the payment of the Award is contingent upon the European Commission's authorization"[91] which is a clear demonstration of Applicant's intention not to comply with the Award.

94. As a consequence, the Respondents harm will be inevitable as "a permanent stay would relegate this party to an unfavorable position within the (increasingly) long line of ECT award-creditors against Spain"[92] that "presently, hold ECT awards worth more than 1 EUR billion (only in damages) and are pursuing enforcement actions against Spain"[93].

95. The Respondents further argue that this situation "has been considered a relevant factor to lift the stay by other ICSID committees, which held that said risk is not adequately addressed by payment of post-award interest"[94], as they are "compensatory in nature (not punitive) and, hence, it cannot constitute a pretext to undermine the award's finality or impair the possibilities of immediate enforcement"[95].

96. In the Respondents' view, this argument relating to the post-award interest had been advanced by the Applicant in previous requests to stay the enforcement of awards, but to no avail, as decided by the competent *ad hoc* committees[96], and correspond to the pattern of decision in other cases not involving Spain.

97. But even assuming that a balance of harm should not necessarily be addressed by the Committee in favor of the Respondents for lifting the stay, the Respondents contend that the Applicant will suffer no harm if the permanent stay request is dismissed[97].

98. The Applicant considers its risks to be related with the EU rules and the non-recoupment[98], but the Respondents posit that they are inexistent and/or irrelevant.

[90] *Idem*.
[91] Response, § 22.
[92] Response, § 31.
[93] Rejoinder, § 2.
[94] Rejoinder, § 52.
[95] Response, § 38.
[96] Response, §§ 39-40.
[97] Response, Section 3.2.
[98] Rejoinder, § 35.

99. In relation to the EU, the Respondents argue that the risk is that "Spain will not comply with the award but is otherwise irrelevant for the purposes of this decision"[99] and "[t]he European Commission (EC) cannot decide whether an ICSID award is enforceable or not as a matter of international law"[100].

100. In any event, the Respondents contend that "Spain's alleged own 'conflict' with EU law[101] is unrelated and irrelevant for the Committee to decide whether to lift the provisional stay. Said "'conflict' (if any) would exist irrespective of the lifting or continuation of the stay. Therefore, this argument could never stand as a compelling circumstance requiring continuation of the stay of enforcement"[102], and this reasoning having already been applied by previous ad committees in similar cases related with Spain[103].

101. The Respondents posit that the "EU institutions are subject to the rule of law", "EU law is not applicable to the case at hand"[104], and "Spain stated before the European Commission that the payment of the award did not require prior authorization (Spain's Annex 048 (R-391), section 4.3)"[105]. In practical terms, they consider that "[t]he European Commission is assisting Spain: this review process by the EC of every award was created in a Decision on State Aid of November 2017 and formed part of a political decision against investment arbitration"[106].

102. In accordance with the Respondents position, there is also no risk – contrary to the Applicant's allegations – of non-recoupment of amounts that might be accessed through enforcement, as the "InfraRed's Environmental Infrastructure portfolio, which is reflected at para. 6 of the Award" and "the funds within the environmental infrastructure portfolio form part of the INFRARED CAPITAL PARTNERS GROUP,

[99] Rejoinder, § 35.
[100] Respondents' Hearing Rebuttal, slide 5.
[101] "It would be unfair to stay the enforcement of the investor's award due to a legal conundrum of Spain's own creation (*Antin*, §§ 75-77; *Cube*, §§ 138-139) (Respondents' Hearing Opening Statement, slide 28).
[102] Rejoinder, § 56.
[103] Rejoinder, §§ 57-59.
[104] "The application and binding force of the ICSID Convention is not contingent on the decisions that a European Court may adopt in relation to an internal decision on State Aid (see Micula UK Supreme Court Judgment, [2020] UKSC 5, https://www.supremecourt.uk/cases/uksc-2018-0177 html)" (Respondents' Hearing Rebuttal, slides 7-9).
[105] Respondents' Hearing Opening, slides 35-36.
[106] Respondents' Hearing Rebuttal, slide 5.

which actively manages **over 200 infrastructure and real estate projects** in 30 countries **with USD 12 billion of equity under management** in private and listed funds" (emphasis in the original)[107].

103. The Respondents further assert that "Spain presents an improper comparison. The exercise is not to be done with the current financial situation of the InfraRed entities but with their situation after having collected the amounts due by Spain under the Award (EUR 28.20 million in damages, plus interest and legal costs – around EUR 33 million). There can be no doubt about the InfraRed entities' solvency after collecting the Award"[108].

104. Moreover, the Respondents contend that even if "funds are distributed within the corporate group and this results in the claimant entities' insolvency or an impossibility to obtain reimbursement, there exist several legal remedies available to the Kingdom of Spain (setting aside of transactions, including rescission and claw-back actions in the context of insolvency, in this case, governed in principle by English law – *lex concursus*)"[109].

105. The Respondents refer that, *quod no*, if there was a risk of non-recoupment "in any event, as aptly concluded by other ICSID committees, the mere risk of non-recoupment after enforcement — absent situations where the respondents on annulment (and award-creditors) are "*in financial distress or in the brink of insolvency*"[110] which is not the case — does not justify the continuation of the stay"[111].

106. The Respondents conclude that their position is reinforced by the fact that it is for domestic courts where the enforcement of the award is lodged to assess those risks[112] and not for the Committee,[113] and that those risks are "a natural consequence of the enforcement regime created by the ICSID Convention"[114], to which Spain adhered.

[107] Response, § 42 and Rejoinder, §§ 42-44 for the clarification of the InfraRed Group chart.
[108] Respondents' Hearing Rebuttal, slide 13.
[109] Respondents' Hearing Rebuttal, slide 15.
[110] *Antin*, § 72 (**CL-277**).
[111] Response, § 46 and Rejoinder, § 37.
[112] In the cases of enforcement through domestic courts the *lex fori* applies and these courts are "better placed to assess several of the circumstances alleged by Spain" (Respondents' Hearing Opening, slides 19-21).
[113] Response, § 47.
[114] Response, § 48.

3. Whether security should be ordered

107. The Respondents argue as their primary position that, in light of the above reasons, the stay should be lifted by the Committee. However, if the Committee finds that circumstances beyond the ordinary exist that justify the stay to be maintained, then security must be requested from the Applicant as a pre-condition for not lifting the stay.

108. In the Respondents' view, the undertaking allegedly provided by the Applicant (to "*seek authorization of the EC to proceed with payment and […] promptly pay it* ***upon receiving such authorization"*** [115] ***)*** is not a "valid undertaking under the ICSID Convention in the present circumstances. It amounts to *no commitment at all* (Spain agrees to pay ***if*** *the EC so authorizes*)"[116] and as such, "it offers *less* than what Spain is already obliged under the plain terms of Articles 53 and 54 of the ICSID Convention, which do not condition in any manner Spain's obligation to abide by the terms of final awards"[117].

109. Being so, in this allegedly unlikely scenario, "Spain should be ordered to furnish an unconditional undertaking of payment of the Award, including interests and all other sums"[118], "without needing to resort to any recognition, enforcement or execution proceedings"[119], and the Committee is empowered to order it. The Respondents refer for that purpose to the recent *NextEra ad hoc* committee decision[120].

110. The Respondents argue that as "Spain is bound to apply Articles 53-54 of the ICSID Convention and the provisional stay must be lifted unconditionally"[121], there is no justification for the Committee to condition the lifting of the stay to any undertaking from the Respondents including the inadmissibility of requesting from the Respondents the payment of any interest on the amounts recovered in case of total or partial

[115] Reply, § 10 (f) (emphasis in the original).
[116] Respondents' Hearing Rebuttal, slide 6 ("It is very unlikely that the EC makes a declaration not opposing the payment undertaking or the issuance of a bank guarantee and the consequences related thereto because that would exceed its limited powers under EU State Aid law") (emphasis in the original).
[117] Rejoinder, § 30.
[118] Rejoinder, § 31.
[119] Rejoinder, § 32.
[120] Rejoinder, § 33, quoting *NextEra*, § 102(a) and (b) (**CL-282)**
[121] Respondents' Hearing Opening, slide 33.

annulment of the award or any other compensation of the Applicant's alleged additional damages, including reputational and public interest damages[122].

111. In the Respondents' view, requesting any undertaking from the Applicant is "a waste of time" because like in *NextEra,* "Spain delayed the issuance of the undertaking as much as possible, even requesting an unnecessary translation of the Committee's [d]ecision[123]". In that situation, "[n]ot only Spain did not issue the requested undertaking, but it also issued a rude letter against the Committee's order by a non-duly-authorised signatory[124]" and "[c]onsequently, the stay was lifted"[125].

112. The Respondents contend that – faced with the Applicant's refusal to deposit the amount awarded in an escrow account, which could be a solution[126] - the only admissible possibility of maintaining the stay of the enforcement will be "the issuance of an unconditional, firm and irrevocable bank guarantee by Wells Fargo at a branch located in the US in InfraRed's favor subject only to the issuance of the Decision on Annulment"[127] or, being "more adequate if Spain would pay the sums of the award in an escrow account at a top-tier international bank (preferably where ICSID has accounts, i.e. Wells Fargo Bank, at a branch located outside the EU (e.gr., New York City); and subject only to the submission of the Decision on Annulment rejecting the Application of Annulment"[128].

113. In the event that the Committee decides to lift the stay, the Respondents propose, as a guarantee in case that a recoupment might be a consequence of the final decision of the Committee, an "undertaking executed by the Directors of InfraRed Environmental Infrastructure GP Limited whereby the company commits not to distribute to its shareholders any amounts collected from Spain under the Award. This could be

[122] Respondents' Hearing Rebuttal, slides 23-24.
[123] *NextEra*, §§ 2 and 5 (**CL-297**)
[124] *NextEra*, § 9 (**CL-297**)
[125] Respondents' Hearing Opening, slides 37-8. See also *NextEra*, § 16 (**CL-297**)
[126] Respondents' Hearing Rebuttal, slide 18.
[127] Respondents' Hearing Opening Statement, slide 39.
[128] *Id.*

executed in compliance with any relevant formalities existing under English law" (the "**Undertaking**")[129].

114. The Respondents posit that the financial statements of their parent companies "show operating profits and net assets exceeding the amount of compensation awarded by the Tribunal", that "InfraRed Capital Partners (Management) LLP is the entity managing InfraRed Environmental Infrastructure General Partner (GP) Limited (i.e. one of the claimants) under the supervision of UK authorities and subject to UK accountancy rules, and that "[p]ursuant to UK rules, the entity and the directors to the claimant will not be able to distribute or de-capitalize the claimant's entities pending annulment or they might incur in liabilities otherwise"[130].

115. In reply to the Applicant's arguments and criticism in relation to the Undertaking, the Respondents present a broader undertaking ("**Broader Undertaking**"). This new proposal is intended to reinforce the conditions to justify the lifting of the stay by providing that:

> "In case the stay of enforcement of the Award […] is lifted, and pending this annulment action (ICSID Case No. ARB/14/12 – Annulment), INFRARED ENVIRONMENTAL INFRASTRUCTURE GP LIMITED undertakes not to transfer or distribute to any shareholder of the InfraRed Capital Partners Group or to any third party (including investors in the InfraRed Environmental Infrastructure fund) any amounts collected from the Kingdom of Spain under the Award. This undertaking would be executed in compliance with any relevant formalities existing under English law" [131].

IV. THE COMMITTEE'S ANALYSIS

A. The applicable legal standard

116. First and foremost, the legal standard for a decision on the stay of enforcement of an award is defined by the applicable rules: Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules.

[129] Respondents' "Request to introduce new documents into the record" of July 3, 2020 ("**Respondents' Request**"), p. 5.
[130] Respondents' Request, pp. 2-3.
[131] Respondents' August 27, 2020 comments, § 7.

117. Article 52(5) of the ICSID Convention provides that:

> 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.

118. 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 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.

119. According to paragraph (4) of Rule 54 of the Arbitration Rules, a request "shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations". In this regard, the Committee first notes that it granted the

Parties two rounds of written submissions on the Stay Request. Second, the Committee conducted a virtual Hearing due to the COVID-19 pandemic and listened carefully to the Parties' oral argument on whether or not to continue the stay of enforcement of the Award. Finally, the Committee provided the Parties with several opportunities to introduce new documents to the record in support of their positions, and to comment on their own documents and on the ones submitted by the other side. The Committee will now examine whether circumstances exist that require the continuation, modification or termination of the stay pursuant to Rule 54 of the Arbitration Rules.

120. The Parties appear to agree on some of the applicable legal standards that flow from these rules, namely that: "(1) ICSID committees enjoy discretion to decide whether the stay should be lifted or continued", and "(2) Article 52(5) of the ICSID Convention is open-ended in the sense that it does not limit or specify the circumstances to be taken into account by committees"[132]. They also agree that the existence of "(i) prejudice to the applicant if the continuation is not granted; (ii) prejudice to the award-creditor; and (iii) a dilatory or frivolous nature of the annulment application"[133], may be relevant for the Committee's decision.

121. However, the Parties seem to disagree about whether – as the Respondents argue – the ICSID system is "self-contained"[134], or – as suggested by the Applicant – the Committee must rule in accordance with Article 38 of the ICJ Statute[135] and, as a consequence, take into account as legal sources "the Treaty on the Functioning of the European Union (TFEU), "International Custom" and the "General Principles of Law" to issue this decision on the stay of enforcement of the Award[136].

122. The Committee is not persuaded that the ICSID system is 'self-contained', if by that expression it is meant that it exists in isolation from international law. However, it is a system in and of itself, in the sense that it is in the ICSID Convention and the Arbitration Rules (and considering these legal instruments in their entirety[137]) that it is necessary

[132] Rejoinder, § 5.
[133] *Idem*.
[134] Respondents' Hearing Rebuttal, slides 26-33.
[135] Reply, § 12.
[136] Rejoinder, § 6.
[137] To reinforce its case, the Applicant refers to Article 42 of the ICSID Convention, to conclude that it "leads to

to find the solution for any issue that a committee might face, notably the interpretation of the rules applicable to a given situation.

123. In the process of interpreting the applicable rules in this case, when necessary, it is possible to take into account the fact that the ICSID Convention is a treaty and, therefore, the rules for interpretation of the Vienna Convention on the Law of Treaties ("**VCLT**") constitute a relevant legal instrument.

124. The Committee agrees with the Parties that, when applicable, the rules of the Energy Chart Treaty ("**ECT"**) are binding for the Committee.

125. For any decision subject to the ICSID Rules, as is the case, previous decisions issued by ICSID tribunals (and by other international arbitral tribunals) and, even more, by *ad hoc* committees, may be considered as useful guidance, in light of the absence of a system of legal precedents.

126. Among the decisions that may inspire the Committee in its analysis are those that emanate from other *ad hoc* committees in cases relating to similar requests and in which the Kingdom of Spain is a party. The expertise of those *ad hoc* committees is an additional reason to look to them for inspiration. However, they are far from reaching the same conclusions[138]. Even assuming the equivalent quality of the decisions and the same legal framework, it is demonstrated that this a fact specific matter in which inspiration from previous decisions, although useful, is not decisive to its outcome.

127. The Committee also considers that it has discretion to resort to any other international legal instrument, whether or not a treaty, when it sees fit.

128. However, the Committee is mindful that the stay of enforcement phase of this annulment proceeding is not the occasion to analyze other issues that are or may be central to a different phase of this proceeding.

application of the TFUE" (See *supra*, § 55), as the applicability of the TFUE has been agreed by the Parties. However, as explained below, this issue will be relevant and will be analyzed by the Committee when it will need to consider and decide the annulment request.

[138] In three of the decisions (*Eiser*, *Antin* and *Cube*) the request for continuation of the stay was rejected, in another case (*NextEra*) it was granted with conditions (that the Kingdom of Spain was not able or willing to accept and therefore the final outcome was not to grant the continuation of the stay) and in the last and more recent case (*SolEs*) the continuation of the stay was granted without conditions attached.

129. This is the case of the discussion between the Parties as far as EU law is concerned. The Committee does not consider that issue relevant at this stage of the proceeding because it relates to the Application *per se.* To consider it at this stage would not only expose the Committee to the risk of prejudging, but also, and in any case, the issues between the Kingdom of Spain and the EC[139] are a consequence of the Award, which will survive irrespective of the decision on the stay[140]. At stake in this phase is only the decision on whether to lift or to continue the stay of enforcement.

130. As previously mentioned, in practical terms, the Parties are mostly in agreement in relation to the applicable legal standard. The 'self-contained' debate, as already clarified, does not seem relevant for the Committee at this stage of the proceeding.

131. The Committee also notes that, in accordance with Article 52(5) of the ICSID Convention, it has discretion to decide – also by applying the rules of the burden of proof – to continue the stay if circumstances justify that outcome.

132. The Committee disagrees with the Applicant's statement that the rule of the burden of proof is 'inexistent'[141]. That rule is always applicable; what may be a matter for discussion is which party has the burden in any given situation, and this will be decided if and when appropriate by the Committee, under "the normal approach to burden of proof"[142].

133. Needless to say, if the Committee considers that the Application is merely dilatory or frivolous, or if the request was not made in good faith, it would decide not to continue the stay, irrespective of any other issue[143].

134. In this regard, the Respondents did not prove that the Application is merely dilatory or frivolous. That evidence, under the ICSID system, would always be very demanding,

[139] As detailed in *supra*, 49 e) and 62 d)
[140] The "conflict between Articles 107 and 108 of the TFEU and Article 53 of the ICSID Convention", as alleged by the Applicant (see *supra*, § 65), cannot be avoided, let alone decided, at this stage.
[141] See *supra*, § 57. In subsequent statements, the Applicant seems to accept the Committee's actual position (See *supra*, §§ 59-60).
[142] *Cube* (**CL-289)**, § 124.
[143] An opposite but equivalent situation could occur if the Respondents had "unclean hands" as initially alleged by the Applicant, but no evidence was provided, at this stage, that this was the case.

and the fact that in some situations (as occurs with the ECT cases against Spain) the request for annulment is repeatedly made, is of no relevance *per se*.

135. The repeated behavior of a State is even less relevant when – as it is the case – legal issues relating to the EU State Aid rules are the common ground raised in all these requests for annulment. This is not the time to analyze the validity of the Applicant's arguments. However, it is clear that this is a complex legal issue, and it would be inappropriate (and with serious consequence to the Rule of Law) to issue a decision on these arguments based on the theory that the constant use of a legal argument to request the annulment of awards would be *per se* evidence of dilatory, frivolous and/or bad faith of the party in question.

136. And as far as good faith is concerned, the Committee did not find any reason to conclude that the Application was not made in good faith; quite the opposite, as the grounds presented for annulment are *prima facie* acceptable in accordance with any kind of rigorous benchmark.

137. Not being frivolous, dilatory or against duties of good faith, the Committee determines that the abstract legal standard for any request relating to the continuation of the stay must be found taking into account the evidence as to the existence and degree of prejudice or harm to the Applicant, if the stay is lifted, and/or to the Respondents, if the stay is continued.

138. Furthermore, as held by the *ad hoc* committee in *Antin*:

> "the circumstances which should exist for a stay to be required must, at the very least, rise above those which are common to most stay applications. This is to avoid any presumption that a stay would be granted once there is an application for the annulment of an award. Such a presumption would be, in the Committee's mind, contrary to the language of the ICSID Convention, the recent jurisprudence of ICSID annulment committees, and the principle that ICSID awards should be final and binding"[144].

139. The Committee follows this reasoning, as well as that resulting from the *Cube* committee, stating that "there is no effective presumption either in favour or against continuation of a stay"[145].

[144] *Antin* (**CL-277**), § 60.
[145] *Cube* (**CL-289**), § 127.

140. Finally, statistics of previous decisions are not relevant, for such obvious reason that it is not worthwhile delving into them. It is enough to mention that none of the Parties – and both in a way tried to elaborate on this argument with the intention of taking advantage of what they understood as helping their case – was able to quote any legal authority to reinforce that bizarre theory.

141. The Committee's decision will therefore be dependent upon the evidence – or lack of – as to whether "circumstances … require [the] stay enforcement of the award pending its decision"[146]. The Committee will now proceed to analyze this issue.

B. Whether circumstances require the stay

142. The Parties developed thoughtful arguments about whether the "circumstances" for continuing of lifting the stay need to be 'compelling/substantial'.

143. The Committee does not find the Parties' formalistic discussion to be useful. In its view, the point is much simpler and straightforward. Arbitration Rule 54 (4) provides that "[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". This is the guidance for the Committee when deciding whether to continue or lift the stay of enforcement.

144. Therefore, the solution results from the answers to three questions:

> (1) Is there any circumstance that may require the Committee to decide in favor of the stay of the enforcement?
>
> (2) If the answer is "yes", then what is the balance of harms between the two abstract solutions (to lift or not to lift the stay)?
>
> (3) If there is possible harm relating to each of the abstract solutions, is there a possible practical solution capable of minimizing the risks of actual or probable harm?

[146] ICSID Convention, Article 52 (5).

1. Is there any circumstance that may require the Committee to decide in favor of the stay of the enforcement?

145. The Parties have been adamant in defense of their positions.

146. For the Applicant, continuing the stay creates no harm to the Respondents and, in any case, they are protected from any possible harm by the fact that post-award interest has been awarded to them by the Tribunal. However, not continuing the stay will cause damage to the Applicant, such as losses, reputational harm, possible conflict with the EU and, above all, risks of non-recoupment of any amounts that might be recovered through enforcement proceedings by the Respondents because they are on the brink of bankruptcy and those monies can be easily transferred to entities that control the Respondents or to third parties.

147. The Respondents' position is the opposite. They insist on the applicability of the burden of proof rule and state that the Applicant did not provide any evidence of harm. And if, *quod non,* the Committee concludes that harm might ensue, it cannot be construed as a compelling or even relevant circumstance that would be robust enough to impair the immediate enforceability of the award in accordance the ICSID Rules. In any event, the domestic courts where enforcement of the award will be sought are much better prepared to deal with issues of risk, such as, allegedly, the risk of non-recoupment.

148. The Committee is prepared to accept, in the abstract, that an unlikely situation may occur, in which the enforcement of an award will not cause harm to the party against which enforcement is sought – but this is clearly not a common situation and is not the case in this proceeding.

149. And this is even more evident, considering the mere fact that the Award may be annulled by this Committee (this would not be the first case that an *ad hoc* committee has done so, even with similar awards against the Applicant), and this has a potential of harm that cannot be downgraded to the point of irrelevance. However, many of the

circumstances mentioned by the Applicant do not actually relate to enforcement but are rather a consequence of the award under the ICSID framework[147].

150. Notably, this is the situation of the EU State Aid argument. As stated in *Antin*[148] (where reference to *Eiser* is also made) "stay would not resolve any of the conflicts that the Applicant purports to face. If the stay is subsequently lifted, the conflicts return". In the same vein, the *Cube* committee held that: "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 and would require the Committee to consider facts and circumstances that pertain to the merits of the dispute". The Committee agrees with this reasoning and notes that it corresponds to the findings of the committees in *Eiser*, *Cube*, *NextEra* and *SolEs*, irrespective of their various solutions as far as the stay of enforcement is concerned.

151. These and any other circumstances materialized as an automatic consequence of the Award and the proceeding to annul it, are not to be considered by the Committee as a "circumstance" pursuant to and for the purposes of Article 52(5) of the ICSID Convention.

152. However, one issue that may be considered as a "circumstance" to be taken into account is the risk of non-recoupment, for the Applicant, of the amounts that might be recovered by the Respondents if the Committee decides to annul the Award, and whether in this case, this "circumstance" "rise[s] above those which are common to most stay applications"[149].

153. Contrary to the situation in *Cube,* where "Spain would have to provide more specific information and evidence about the risk of non-payment"[150], which did not occur, at least to the satisfaction of that committee, and as "it is not for Cube and Demeter

[147] This is the case with the issues relating to the European Union, the costs for the Applicant if obliged to litigate in different jurisdictions and even the reputational damage and the effects for the public interest of an enforcement action, as all these issues are a consequence derived from the Award and it is the ICSID system – to which the Kingdom of Spain adhered – that generate with a certain degree of automatism the abovementioned potential of harm.
[148] *Antin* (**CL-277**), § 75.
[149] **C-277**, § 60.
[150] **CL-289**, § 130.

positively to prove their financial good-standing"[151], in this case the issue has been discussed and the Committee considers it was provided with enough evidence to reach its own conclusions.

154. The Applicant even emphasized that the situation may depend on the relevant facts, as evidenced, when stating that "[w]hile *SolEs* has laid great emphasis on the *Eiser*, *Masdar*, *Antin*, and *NextEra* cases as supporting its argument that the stay should be lifted, Spain argues that these cases ought to be distinguished from the present case, where the award creditor's only relevant asset is on the verge of insolvency". [152]

155. The analysis of the Respondents' financial statements and the organizational chart of the InfraRed Group, demonstrate that, for a number of reasons, the financial and economic situation of the Respondents is not good enough to assure that risks of non-recoupment will not materialize in the future.[153]

156. The Respondents do not refuse the accuracy of that conclusion. In attempting to convince the Committee that the risk may be minimized, they not only submitted the Undertaking and a Broader Undertaking, but stated that their parent companies "show operating profits and net assets exceeding the amount of compensation awarded by the Tribunal"[154].

157. In the same vein, the Respondents contend that InfraRed Capital Partners (Management) LLP is the entity managing InfraRed Environmental Infrastructure General Partner (GP) Limited (*i.e.* one of the claimants) under the supervision of UK authorities and subject to UK accountancy rules and that "[p]ursuant to UK rules, the entity and the directors to the claimant will not be able to distribute or de-capitalize the claimant's entities pending annulment or they might incur in liabilities otherwise"[155].

158. The Committee, after analyzing the financial statements submitted for of all those entities, agrees with the Parties' positions: in case of a decision in favor of lifting the

[151] *Idem*.
[152] See *SolEs*, § 25.
[153] In a way, the Respondents attribute that situation to the conflict with the Applicant. This might or not be the case; however, for the purposes of the recoupment risk this is irrelevant, also because the Respondents did not provide evidence of causation to the satisfaction of the Committee.
[154] Respondents' letter of July 3, 2020 (tab related to the slide 15).
[155] *Idem*.

stay, without conditions or undertakings, the risk of non-recoupment is strong enough to be considered a "circumstance" as defined and for the purposes of Article 52 (5) of the ICSID Convention.

159. However, if undertakings are provided under which the "parent companies" (InfraRed Partners LLP and InfraRed Capital Partners (Management) LLP) are called by the Respondents to provide a valid guarantee, the risks of non-recoupment will become irrelevant taking into account the sound financial statements of those entities and the fact as referred by the Respondents, and already quoted above, that they "show operating profits and net assets exceeding the amount of compensation awarded by the Tribunal"[156].

160. The Committee – based on the evidence provided[157] - reaches this conclusion after analyzing the Respondents' financial statements and the organizational chart of the InfraRed Group, and also taking into account all the Parties' arguments, including those made in their post-hearing applications. It is evident that – as correctly stated by them – the Respondents' financial situation will strongly improve if the allocated compensation, as decided by the Tribunal, is recovered. However, this argument misses the point, because if, in a later phase of the annulment proceeding, the Committee decides in favor of the relief sought by the Applicant and some monies have been recovered by the Respondents, an issue of non-recoupment might arise.

161. However, seen from the Respondents' point of view, this circumstance is not relevant to the point of justifying the continuation of the stay of enforcement, because the fact that time would pass without the possibility of enforcement is not compensated by the adjudicated post-award interest. And the Committee considers that the Respondents are correct when they state that the post-award interest is "compensatory in nature (not punitive) and, hence, it cannot constitute a pretext to undermine the award's finality"[158]. The Committee agrees with *Antin's* and *Eiser's* reasoning in relation to interest (even if, contrary to *Antin*[159], it concludes that in this case, there is evidence of harm for both

[156] Respondents' letter of July 3, 2020.
[157] In *Antin*, § 73, no evidence was provided of financial distress or of risks of insolvency, and a similar conclusion has been reached in *Cube* **(CL-289)**, § 130.
[158] See *supra*, § 95.
[159] *Antin*, § 81.

parties that reaches a material level of risk) that payment of post-award interest is to "compensate for the deprivation of the principal until payment of the award, but they are not directly related to the issue of enforcement of the award"[160].

162. The provisional conclusion arising from the above is that the risk of non-recoupment, if the Committee decides to annul the Award, must be considered a "circumstance" that may "require" a decision in favor of continuing the stay of the enforcement until the final decision on the Application.

163. However, a decision to continue the stay of enforcement will harm the Respondents and this risk is not covered by the existent post-award interest. The Committee agrees here with the reasoning and decisions of other *ad hoc* committees about this matter[161].

164. The Committees needs therefore to assess the balance of harms, which will be done in the following section.

2. What is the balance of harms between the two abstract solutions (to lift or not to lift the stay)?

165. The Respondents insist that to continue the stay will necessarily generate harm for them, which they conclude is more than sufficient – in the balance of evidenced harms to the Parties – for the Committee to conclude in favor of lifting the stay, as the Respondents' harm will be much higher than that of the Applicant. The Committee considers, however, that the balance of harms must be analyzed and applied taking into account that the Committee has already reached the provisional conclusion that the risk of non-recoupment will be *per se* and in the abstract a "circumstance" that may "require" the stay of enforcement.

166. The Committee agrees that it is true that enforcement immediately after the award is issued is "a natural consequence of the enforcement regime created by the ICSID Convention"[162]. This results from Article 53 (1) of the ICSID Convention[163]. However,

[160] *Antin*, § 81.
[161] *Antin*, § 82.
[162] Response, § 48.
[163] "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention… Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of the Convention".

this argument misses the point. What is here at stake is not the discussion of whether it is a "natural consequence", but rather whether within a request for annulment of an award, and more specifically in a decision to lift or not to lift the stay of enforcement, it is also "natural" to take into account the possible harm of the non-recoupment. And the Committee considers it is possible to include this matter in the analysis of the balance of harms.

167. The Committee considers that the harm to the Respondents is mostly financial, as, for the foreseeable future, the Kingdom of Spain will be in a position to pay the amount due under the Award, beyond any doubt, if it is not annulled. It is true that the number and value of pending awards is not minor, but the amount of yearly income of the Kingdom of Spain is in excess of €300 billion.

168. The financial harm to the Respondents may have economic consequences, if it materializes. However, the Award may be considered, as of its notification to the Parties, as an asset of the Respondents, regardless of whether or not the stay is lifted. Therefore, the harmful effects pertain mostly to liquidity, which in any case may also have economic repercussions.

169. The harm to the Applicant is mostly economic because if the non-recoupment comes about, it will affect the value of the Applicant's assets and not only its liquidity. However, as the reasoning already presented confirms, this will correspond to a minor fraction of the assets of the Applicant, and even trivial if compared with her yearly income.

170. The Committee's conclusion, based on this analysis, is that the balance of harms would allow the Committee to decide in favor of not lifting the stay, if no solution arises under which it will be possible to cancel or at least strongly limit the risk of non-recoupment of any amounts received by the Respondents following the enforcement of the Award, in a case of annulment.

171. If some conditions may be found that will strongly limit the abovementioned risk of non-recoupment, the balance of harm tips in favor of lifting the stay, not only because of the balance of risks will change accordingly, but also because not lifting the stay is

the exception to the rule[164]. As a matter of fact, in the ICSID system, the enforceability of awards has been organized in a way that is not subject to the limits and constraints of the other available ISDS systems, such as the other possibilities of dispute resolution under the ECT.

172. However, it is a known fact that enforcement against sovereign states is not an easy task, if not for other reasons, because of their immunity. And the Committee is strongly convinced – taking into account the calendar agreed with the Parties and its duties of efficiency – that it is highly probable that the final decision on the Application will be notified within less than one year of this Decision, which is to be also taken into account.

173. In theory, there is a solution that might be feasible to minimize the risks for both Parties, under which the stay would not be lifted if the State was prepared to provide some undertaking, as decided by the *NextEra ad hoc* committee[165]. However, that solution did not materialize because, faced with that option or the alternative of the *ad hoc* committee lifting the stay, the Kingdom of Spain did not react, as it probably concluded that the harm of accepting the *ad hoc* committee solution would be worse than that of the lifting of the stay. That conclusion was not based upon a willful intention to refuse to accept the ruling of the *ad hoc* committee, but rather was a consequence of the alleged legal constraints relating to the EU regulations.

174. In this proceeding, it was also clear that the Applicant – if confronted with the same dilemma – would take the same option[166].

175. This option of the Kingdom of Spain puts into perspective the harm to be caused by the lifting of the stay when compared with the current risk relating to the EU. But this risk is not to be assessed at this stage of the proceeding, as mentioned above[167].

[164] See among others, *Cube* (**CL-289**), §121.
[165] See *NextEra*.
[166] See *supra*, §§ 71-72.
[167] See *supra*, § 129.

176. As such, the decision to be taken by the Committee on the Stay Request will also need to take into account the issue of the existence and implementation of a solution that might minimize the harm for both Parties, under an optimization analysis.

177. It is clear that the Applicant will not (or may not) accept a solution along the lines of *NextEra*, due to the EU constraints and allegedly because a "[d]elay in receiving payment is a consequence of the *proper application* of the procedural guarantees of the annulment procedure, and the principle of legal certainty"[168].

178. Irrespective of this argument, the fact is that *NextEra* demonstrated (and this proceeding confirmed[169]) that no reasonable undertaking will be provided to the Committee by the Applicant, and a commitment to request authorization from the EC to pay would clearly not be provided[170].

179. The Committee will now analyze that possibility from the opposite viewpoint, that of lifting the stay with conditions capable of minimizing the risks of non-recoupment.

3. Is there a possible practical solution capable of minimizing the risks of actual or probable harm to the Parties?

180. The Committee finds that it is possible to lift the stay provided it imposes certain conditions on the Respondents. The Committee also notes that while this possibility is within the Committee's discretion, the Respondents themselves suggested that the Committee lift the stay pursuant to certain conditions, and even proposed the Undertaking[171] and the Broader Undertaking[172].

181. The minimization of risks for both Parties in a given situation would usually be the outcome of a correct optimization of their positions and intentions. In the case at hand, the Applicant wishes to remove entirely the risk of non-recoupment of monies received by the Respondents through enforcement. The Respondents wish to have the possibility, without any strings attached, to start enforcement proceedings against the

[168] Applicant's Hearing Rebuttal, slide 4.
[169] See *supra*, §§ 71-72.
[170] As referred in *supra*, § 49 f).
[171] See *supra*, § 113.
[172] See *supra*, § 115.

Kingdom of Spain without the need to wait for the end of the annulment proceedings with the Committee's Decision on Annulment.

182. It is impossible to give to each Party all of what they want. However, it is possible to find a solution that considers the Applicant's concerns, on the one hand, and takes into account the wishes of the Respondents, on the other hand. It is in this context that it is adequate to construct the best available solution.

183. In sum, this solution will be implemented in a way that leads to the lifting of the stay, as the Respondents prefer, but protects the Applicant against the relevant risk of non-recoupment (by strongly minimizing it) with strings attached as conditions to lift the stay. If, after a certain period of time, the Respondents are not willing or able to provide adequate security, as defined by the Committee and to its satisfaction, the consequence will be that the balance of harms shifts into a riskier situation of harm to the Applicant, as the "circumstance" of the risk of non-recoupment will then "require" the continuation of the stay until the Decision on Annulment.

184. The Committee will analyze below the various reasonable conditions available to it as forms of security.

C. Whether security should be ordered

185. The Committee starts the analysis of the most appropriate security to be provided by looking at the Undertaking and the Broader Undertaking proposed by the Respondents. This is so because the mere fact that the Respondents are willingly prepared to provide these forms of security as a condition for lifting the stay favors the option of starting the analysis here.

186. This decision of the Respondents may be relevant, as the lack of any similar commitment was a factor that brought the *SolEs* committee to decide in favor of the continuation of the stay; quoting this decision, "SolEs, however, does not give any further evidence on its planned used of the award sums should the Award be enforced,

arguing that *the applicable ICSID provisions impose no obligation on SolEs Badajoz to demonstrate that circumstances require the lifting of the stay*"[173].

187. As a consequence, that committee concluded that "there is a real likelihood that the sums paid to SolEs under the Award would be distributed to the investors of SolEs's parent funds". This would not be the case here because of the Respondents' Undertaking and Broader Undertaking.

188. In a nutshell, the Respondents proposed the Undertaking to be "executed by the Directors of InfraRed Environmental Infrastructure GP Limited whereby the company commits not to distribute to its shareholders any amounts collected from Spain under the Award. This could be executed in compliance with any relevant formalities existing under English law"[174].

189. Confronted with the Applicant's arguments regarding the Undertaking, the Respondents proposed a Broader Undertaking, as follows:

> "not to transfer or distribute to any shareholder of the InfraRed Capital Partners Group or to any third party (including investors in the InfraRed Environmental Infrastructure fund) any amounts collected from the Kingdom of Spain under the Award. This undertaking would be executed in compliance with any relevant formalities existing under English law"[175].

190. Prior to the above commitments being proposed, the Applicant requested that certain conditions in relation to any possible decision by the Committee in favor of lifting the stay of enforcement be considered, and these are still useful for the Committee's analysis: "(a) affidavit by the Infrared parent Group CEO to repay and to do a public release apologizing for the damages to Spain, (b) determination of interests. Not only 2% but to cover indirect damages too, (c) escrow in Spain"[176].

191. The Committee notes that the Respondents' Broader Undertaking proposed conditions that expand and clarify that not only would dividends not be paid, but also that nothing would be transferred or distributed "in any way to any shareholder of the InfraRed

[173] *SolEs*, § 62.
[174] Respondents' Request of July 3, 2020, p. 5.
[175] Respondents' comments of August 27, 2020, § 7.
[176] Applicant's Hearing Rebuttal, slide 27.

Capital Partners Group or to any third party (including investors in the InfraRed Environmental Infrastructure fund)".

192. This proposal goes in the (right) direction of optimization of avoiding or minimizing both Parties' risks and potential harms. However, this is not enough to convince the Committee that the balance of harms will be adequately achieved, as it does not cover the possibility of actions by third parties under which one or all the Respondents – unwillingly – may be ordered by a court of law or any other empowered entity to pay to a creditor amounts already due.

193. In the same vein, the Committee considers that the Applicant's reference to a possible commitment by "the Infrared parent Group CEO to repay" any amounts received by the Respondents through enforcement (in spite of this being presented before the Broader Undertaking) may make sense. The Committee believes that any commitment should be presented by the parent companies, represented by the CEO or by anybody vested with the adequate powers for that purpose, as defined in accordance with the applicable law.

194. However, the other conditions suggested by the Applicant are not useful, let alone necessary, and therefore they are not accepted by the Committee. The reason for this is that they are irrelevant as far as the risks of recoupment are concerned ("a public release apologizing for the damages to Spain"), even if damages might occur and/or are excessive and therefore not balanced ("determination of interests. Not only 2% but to cover indirect damages too" and "escrow in Spain").

195. Under these circumstances, as a condition for lifting the stay, it is necessary for the Respondents to obtain and provide security additional to that offered by the Broader Undertaking. This additional security must be appropriate to safeguard a potential situation where one or all the Respondents are obliged to pay unwillingly to any entity "amounts collected from the Kingdom of Spain under the Award", by court decision or equivalent. In anticipation of that event and in relation to the actual amounts paid, the "parent companies" of the Respondents (InfraRed Partners LLP and InfraRed Capital Partners (Management) LLP) must grant directly to the Applicant unconditional security, whereby they undertake to automatically repay – in the event of the annulment

of the Award – and within a short period of time, the equivalent amounts that, unwillingly or not, have been transferred by any or all the Respondents to any entity.

196. The undertakings that will condition the lifting of the stay must be drafted by the Respondents in a way that will respect the applicable laws governing those undertakings and submitted for the discretionary approval of the Committee, after giving the Applicant an opportunity to provide its observations.

197. If the drafts of any of the undertakings are not submitted within a reasonable time period for approval by the Committee, the Committee will not lift the stay of enforcement. The same consequence will arise if the Respondents do not provide, within the deadline to be determined by the Committee, all the signed, legalized and/or certified undertakings as finally approved by the Committee.

198. The Committee considers that 60 calendar days, counted from the notification to the Parties of this Decision, is a reasonable period of time to receive the drafts for its approval, as referred above, and also for receiving all the signed, legalized and/or certified undertakings, also as referred above. In the latter case, the deadline will be counted from the notification of the approved final drafts.

V. DECISION AND ORDERS

199. For the reasons stated above, the Committee:

a. Decides that the stay of enforcement of the Award should be lifted provided that the Respondents comply with the following by December 31, 2020:

(i) undertake not to use, and not to transfer or distribute to any shareholder of the InfraRed Capital Partners Group or to any third party (including investors in the InfraRed Environmental Infrastructure fund and/or to entitle any third party funder rights to collect), any amounts collected from the Kingdom of Spain under the Award. This undertaking shall be submitted in draft form to the Committee for its approval. Before doing so, the Committee will grant the Applicant an opportunity to comment on it. The undertaking will be valid and enforceable until the Decision on Annulment (if the Application is denied) or until the total recoupment of any collected amounts (if the Application is upheld), and must be executed in compliance with any relevant formalities existing under English law; and

(ii) provide an undertaking from their parent companies - InfraRed Partners LLP and InfraRed Capital Partners (Management) LLP-, assuming a guarantee in favor of the Applicant if for any reason the Applicant may not obtain the total recoupment of any amounts collected from the Kingdom of Spain by the Respondents under any enforcement proceedings, immediately after the Respondents being ordered to return those amounts to the Kingdom of Spain by the Committee in case of future annulment of the Award. This undertaking shall be submitted in draft form to the Committee for its approval. Before doing so, the Committee will grant the Applicant an opportunity to comment on it. The undertaking will be valid and enforceable until the Decision on Annulment (if the Application is denied) or until the total recoupment of any collected amounts (if the Application is

upheld), and must be executed in compliance with any relevant formalities existing under English law.

(iii) If the Respondents are not willing or able to provide the above undertakings by December 31, 2020, the stay of enforcement of the Award should be continued unconditionally until the conclusion of the annulment proceeding.

b. Reserves the issue of costs regarding the Applicant's Stay Request to a further order or decision.

Dr. Karim Hafez
Member

Prof. Yuejiao Zhang
Member

Prof. José-Miguel Júdice
President