

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

RREEF INFRASTRUCTURE (G.P.) LIMITED AND

RREEF PAN-EUROPEAN INFRASTRUCTURE TWO LUX S.À R.L.

(“Claimants”)

and

KINGDOM OF SPAIN

(“Applicant”)

ICSID Case No. ARB/13/30

**DECISION ON STAY OF ENFORCEMENT OF THE
AWARD**

Members of the ad hoc Committee

Professor Lawrence Boo, President
Professor Enrique Barros Bourie, Member
Ms Bertha Cooper-Rousseau, Member

Secretary of the ad hoc Committee

Mr Gonzalo Flores

Date: 28 October 2020

REPRESENTATION OF THE PARTIES

*Representing RREEF Infrastructure (G.P.)
Limited and RREEF Pan-European Infrastructure
Two Lux S.à r.l.:*

Mr Jeff Sullivan
Mrs Stephanie Collins
Ms Helen Elmer
Mr Theo Tyrrell
Gibson, Dunn & Crutcher UK LLP
Telephone House 2-4 Temple Avenue,
London, EC4Y 0HB
United Kingdom

Representing the Kingdom of Spain:

Mr José Manuel Gutiérrez Delgado
Mr Pablo Elena Abad
Mr Rafael Gil Nievas
Mr Alberto Torró Molés
Ms Gabriela Cerdeiras
Ms María del Socorro Garrido Moreno
Ms Elena Oñoro Sainz
Ms Gloria María De la Guardia Limeres
Ms Ana María Rodríguez Esquivias
Mr Juan Antonio Quesada Navarro
Mr Javier Comerón Herrero
Ms Estíbaliz Hernández Marquínez
Ms María Eugenia Cediél Bruno
Abogacía General del Estado
Ministry of Justice of the Government of Spain
c/ Marqués de la Ensenada, 14-16, 2^a planta
28001, Madrid
Spain

TABLE OF CONTENTS

I.	THE PARTIES.....	1
II.	PROCEDURAL HISTORY.....	1
III.	PARTIES' REQUESTS FOR RELIEF.....	4
IV.	PARTIES' POSITIONS.....	5
A.	The Law Applicable.....	5
	(1) Applicable Legal Standard.....	5
	a. Applicant's Position	5
	b. Claimants' Position.....	6
	(2) Burden of Proof.....	7
	a. Applicant's Position	7
	b. Claimants' Position.....	7
B.	The Circumstances of the Present Case.....	8
	(1) Whether or not the Annulment Application is Frivolous or Dilatory.....	8
	a. Applicant's Position	8
	b. Claimants' Position.....	8
	(2) Whether the Applicant is likely to Comply with the Award.....	9
	a. Applicant's Position	9
	b. Claimants' Position.....	10
	(3) Prejudice to the Claimants if the Stay is Continued and the Annulment Application Unsuccessful.....	10
	a. Applicant's Position	10
	b. Claimants' Position.....	11
	(4) The Applicant's EU Obligations.....	11
	a. Applicant's Position	11
	b. Claimants' Position.....	11
	(5) Possibility of Recoupment of Funds from the Claimants if the Stay is Terminated and the Award subsequently Annulled.....	12
	a. Applicant's Position	12
	b. Claimants' Position.....	12
C.	Whether Security should be Ordered.....	13
	a. Applicant's Position	13
	b. Claimants' Position.....	14
V.	THE COMMITTEE'S ANALYSIS.....	14
A.	The Law Applicable.....	14
	(1) Applicable Legal Standard.....	14
	(2) Burden of Proof.....	17
B.	The Circumstances of the Present Case.....	19

(1) Whether or not the Annulment Application is Frivolous or Dilatory.....	19
(2) Whether the Applicant is likely to Comply with the Award.....	20
(3) Prejudice to the Claimants if the Stay is Continued and the Annulment Application Unsuccessful.....	21
(4) The Applicant’s EU Obligations.....	22
(5) Possibility of Recoupment of Funds from the Claimants if the Stay is Terminated and the Award subsequently Annulled.....	22
C. Whether Security should be Ordered.....	24
VI. COSTS.....	24
VII. DECISION	25

TABLE OF KEY ABBREVIATIONS/DEFINED TERMS

Annulment Application	Spain's application dated 8 April 2020 for annulment of the Award
Applicant or Spain	Kingdom of Spain
Arbitration Rules or ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Final award rendered on 11 December 2019 in the original arbitration proceeding
Claimants	First and Second Claimants
Committee	<i>Ad hoc</i> annulment committee constituted on 17 July 2020 comprising Professor Lawrence Boo Geok Seng (president), Professor Enrique Barros Bourie (member), and Ms Bertha Cooper-Rousseau (member)
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
First Claimant	RREEF Infrastructure (G.P.) Limited
ICSID	International Centre for Settlement of Investment Disputes
Parties	Claimants and Applicant
Second Claimant	RREEF Pan-European Infrastructure Two Lux S.à r.l.

I. THE PARTIES

1. The claimants are RREEF Infrastructure (G.P.) Limited, a private limited liability company incorporated in 2005 under the laws of Jersey, and RREEF Pan-European Infrastructure Two Lux S.à r.l., a private limited liability company incorporated in 2006 under the laws of Luxembourg (together, “**Claimants**”).
2. The applicant is the Kingdom of Spain (“**Applicant**” or “**Spain**”).
3. The Claimants and the Applicant are collectively referred to as the “**parties**”. The parties’ representatives and their addresses are listed above on page i.

II. PROCEDURAL HISTORY

Date	Event
8 April 2020	ICSID received from Spain an application for the annulment of the award rendered on 11 December 2019 in the original arbitration proceeding, together with annexes 001 through 009. In its Annulment Application, Spain also requested a stay of the enforcement of the Award.
15 April 2020	The Secretary-General of ICSID registered the Annulment Application, in accordance with Rule 50(2)(a) of the ICSID Arbitration Rules. Together with the notice of registration, the Secretary-General informed the parties of the provisional stay of the Award, in accordance with Rule 54(2) of the ICSID Arbitration Rules.
17 July 2020	<p>The Secretary-General, in accordance with Rule 52(2) of the ICSID Arbitration Rules, notified the parties that all members of the <i>ad hoc</i> Committee had accepted their appointments, and that the Committee was therefore deemed to have been constituted, and the annulment proceedings to have begun, as of 17 July 2020, pursuant to Rules 6(1) and 53 of the ICSID Arbitration Rules.</p> <p>The Committee is composed of Professor Lawrence Boo Geok Seng, a national of Singapore, as president; Professor Enrique Barros Bourie, a national of Chile, as member; and Ms Bertha Cooper-Rousseau, a national of The Bahamas, as member. All three members of the Committee were</p>

	<p>appointed by the Chair of the ICSID Administrative Council, in accordance with Article 52(3) of the ICSID Convention.</p> <p>On the same date, the parties were notified that Mr Gonzalo Flores, Deputy Secretary-General of ICSID, had been appointed as Secretary of the Committee.</p>
24 July 2020	The Claimants filed their Opposition to Spain’s Request for a Permanent Stay of Enforcement, together with exhibits C-300 through C-301 and legal authorities CL-246 through CL-262 (“ Opposition ”).
29 July 2020	The Committee directed that the provisional stay of the enforcement of the Award would be maintained until it has had an opportunity to review all of the parties’ submissions and to issue a further decision on the matter, thereby extending the time limit under Rule 54(2) of the ICSID Arbitration Rules. The Committee also invited the Applicant to file its Reply to the Claimants’ Opposition (“ Reply ”) by 10 August 2020.
30 July 2020	<p>The Applicant requested an extension until 12 August 2020 to file its Reply and sought confirmation from the Committee that the Reply could be filed in Spanish. The Applicant also confirmed that it would make submissions in Spanish during the first session.</p> <p>On the same date, the Claimants confirmed that they had no objections to the Applicant’s request for extension, and that they would make submissions in English during the first session.</p> <p>On the same date, the Committee invited the Applicant to file its Reply by 12 August 2020 in view of the parties’ agreement and noted the parties’ comments regarding the languages that would be used during the first session.</p>
12 August 2020	The Applicant filed its Reply, together with annexes 010 through 054.
13 August 2020	The Claimants requested leave to file further submissions in response to the Applicant’s Reply.
14 August 2020	The Applicant agreed for the Claimants to file further submissions, if it too could file further submissions thereafter.
17 August 2020	The Claimants agreed for both sides to file further submissions, as requested, provided that each side was granted the same amount of time for such further submissions.

18 August 2020	The Committee directed the Claimants to file their Rejoinder to the Applicant's Reply (" Rejoinder ") by 20 August 2020, and the Applicant to file its Sur-Rejoinder (" Sur-Rejoinder ") by 28 August 2020.
20 August 2020	The Claimants filed their Rejoinder, together with exhibits C-001 and C-302 as well as legal authorities CL-263 through CL-271.
28 August 2020	<p>The Applicant filed its Sur-Rejoinder, together with annexes 055 through 063. It also agreed to make its submissions in English during the first session, if the hearing on the stay of enforcement of the Award was to be held in a separate session, and without prejudice to making submissions in Spanish during such hearing.</p> <p>The Committee directed that the first session would be held on 3 September 2020 only in English, and that the hearing on the issue of stay of the Award would be held on 17 September 2020, in English and Spanish, with simultaneous interpretation in both languages.</p>
3 September 2020	<p>The Committee held the first session by video conference, with the following participants:</p> <p><u>Members of the Tribunal:</u> Professor Lawrence Boo, President of the Committee Professor Enrique Barros Bourie, Member Ms Bertha Cooper-Rousseau, Member</p> <p><u>ICSID Secretariat:</u> Mr Gonzalo Flores, Secretary to the Committee Ms Daniela Argüello, Legal Counsel</p> <p><u>On behalf of the Claimants:</u> Mr Jeff Sullivan, Gibson, Dunn & Crutcher UK LLP Ms Helen Elmer, Gibson, Dunn & Crutcher UK LLP</p> <p><u>On behalf of the Applicant:</u> Mr Alberto Torró Molés, Abogacía General del Estado Ms María del Socorro Garrido Moreno, Abogacía General del Estado</p>
8 September 2020	The Tribunal issued Procedural Order No. 1, which provides, <i>inter alia</i> , that the applicable Arbitration Rules are those in force as of 10 April 2006, and that the procedural languages are English and Spanish.
17 September 2020	<p>The Committee held the Hearing on Stay of Enforcement of the Award by video conference, with the following participants:</p> <p><u>Members of the Tribunal:</u> Professor Lawrence Boo, President of the Committee Professor Enrique Barros Bourie, Member</p>

	<p>Ms Bertha Cooper-Rousseau, Member</p> <p><u>ICSID Secretariat:</u> Mr Gonzalo Flores, Secretary to the Committee Ms Daniela Argüello, Legal Counsel</p> <p><u>On behalf of the Claimants:</u> Mr Jeff Sullivan, Gibson, Dunn & Crutcher UK LLP Mrs Stephanie Collins, Gibson, Dunn & Crutcher UK LLP Ms Helen Elmer, Gibson, Dunn & Crutcher UK LLP</p> <p><u>On behalf of the Applicant:</u> Mr Alberto Torró Molés, Abogacía General del Estado Ms María del Socorro Garrido Moreno, Abogacía General del Estado</p>
--	---

III. PARTIES' REQUESTS FOR RELIEF

4. The Applicant requests in its Sur-Rejoinder dated 28 August 2020:¹

[...] that the stay of enforcement of the Award is 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.

5. The Claimants request the following relief in their Rejoinder dated 20 August 2020:²

a. Spain's request for the imposition of a permanent stay be denied as it has failed to prove the existence of circumstances that require the Committee to grant such a stay;

b. Alternatively, if a continuation of the stay is granted, in light of the risk of non-payment and the prejudice that would be caused to the Claimants, Spain should be ordered to pay the funds into an escrow account in the United States; or, in the alternative, provide the security identified in paragraph 86 above; and

c. Spain should be ordered to pay the Claimants' costs in responding to the request for a stay.

6. The "security identified in paragraph 86" in the Rejoinder referred to by the Claimants is as follows, in order of priority:³

¹ Applicant's Sur-Rejoinder, para. 133.

² Claimants' Rejoinder, para. 89.

³ Claimants' Rejoinder, para. 86.

- a. *Spain should be ordered to pay the full amount of the Award, plus accrued interest, into an escrow account located in the United States and payable to the Claimants immediately upon receipt of a Committee decision rejecting annulment. [...]*

- b. *As an alternative, Spain should be ordered to provide a binding and unconditional written undertaking that it will pay the Award promptly and in full upon the dismissal of its Annulment Application, along with the following: (i) the designation of an agent for service in the United States (along with a waiver of the service of process requirements otherwise required); and (ii) a waiver of sovereign immunity as to the attachment of its assets in order for the Claimants to satisfy the Award if Spain fails to keep its commitment.*

[emphasis in original]

IV. PARTIES' POSITIONS

7. The parties set forth their respective positions first in relation to the law applicable, and then according to how the law is to be applied to the circumstances of this case.

A. THE LAW APPLICABLE

(1) Applicable Legal Standard

a. Applicant's Position

8. The Applicant submits that Article 53 of the ICSID Convention does not impose any higher threshold for the stay to be continued.⁴ It submits that finality of awards is "*not an absolute principle*" and as such finality is subject always to a party's right to seek annulment and stay of enforcement of the award under the ICSID Convention.⁵

9. The Applicant points out that stays of enforcement have been granted by *ad hoc* annulment committees in the "*vast majority*" of cases,⁶ indicating that greater restraint is not needed in deciding whether to grant a stay.⁷ On the contrary, it submits, there is "*a general rule of caution*

⁴ Applicant's Reply, paras. 15-16; Applicant's Sur-Rejoinder, para. 12.

⁵ Applicant's Sur-Rejoinder, para. 13.

⁶ Applicant's Reply, para. 17.

⁷ Applicant's Sur-Rejoinder, para. 15.

or *prudence*” in favour of continuing the stay of awards,⁸ although it accepts that such a stay ought not to be continued automatically.⁹

10. The Applicant also accepts that the Committee has the sole discretion to decide whether to continue the stay or lift the same.¹⁰

b. Claimants’ Position

11. The Claimants submit that a stay constitutes an exception and not the rule.¹¹ They submit that a two-stage analysis is required under Article 52(5) of the ICSID Convention for the stay to be continued: first, the standard for a stay to be granted is that “*circumstances so require*”, and this must be based on objective evidence relating to the individual circumstances of the present case;¹² second, the Committee retains the discretion to decide whether to continue the stay, even if circumstances exist requiring a stay.¹³ The Claimants argue that the “*prevailing practice*” of stays being granted in the “*vast majority*” of cases is therefore irrelevant.¹⁴
12. In response to the Applicant’s submissions concerning “*prevailing practice*”, the Claimants also contend that previous *ad hoc* annulment committees have found such practice and the statistics relating thereto to be uninformative, given that the circumstances of each case are unique,¹⁵ and that in cases which are most analogous to the present case (i.e. where Spain is the party requesting a stay of enforcement), the ‘norm’ is for the stay to be lifted.¹⁶
13. The Claimants assert that “*it has repeatedly been held that the principle of finality under Article 53(1) must be considered, and therefore that greater restraint is needed in deciding whether a stay should be continued*”, citing *SGS v Paraguay* and *Antin v Spain*.¹⁷

⁸ Hearing Transcript, pg. 7, line 23 – pg. 8, line 15.

⁹ Applicant’s Sur-Rejoinder, paras. 15-16; Hearing Transcript, pg. 4, line 24 – pg. 5, line 1; pg. 77, lines 15-25.

¹⁰ Applicant’s Reply, para. 20.

¹¹ Claimants’ Rejoinder, paras. 9a and 11.

¹² Claimants’ Rejoinder, paras. 13 and 19.

¹³ Claimants’ Opposition, paras. 9 and 29.

¹⁴ Claimants’ Rejoinder, paras. 7 and 19.

¹⁵ Claimants’ Rejoinder, paras. 17, 20 and 22.

¹⁶ Claimants’ Rejoinder, para. 7.

¹⁷ Claimants’ Rejoinder, paras. 15-16: *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay’s Request for the Continued Stay of Enforcement of the Award, 22 March 2013, paras. 84-85; *Infrastructure Services Luxembourg S.à.r.l. and Energía Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energía Termosolar B.V.) v Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, para. 66.

(2) Burden of Proof

a. Applicant's Position

14. It is the Applicant's position that Article 52(5) of the ICSID Convention does not impose a burden of proof on a particular party to establish circumstances requiring a stay.¹⁸ It points out that Rule 54(4) of the ICSID Arbitration Rules only requires an applicant to specify such circumstances, not to prove them.¹⁹ In the same vein, it submits that there is no legal presumption either way.²⁰
15. The Applicant argues that, given the above, the burden of proof lies on the party making an affirmative assertion.²¹ It contends that in line with this legal principle, the burden of proof lies on it in respect of the circumstances it alleges require the stay to be continued,²² while the burden of proof lies on the Claimants in respect of those circumstances alleged by the Claimants.²³ Therefore, according to the Applicant, it has to prove that the harm of terminating the stay is greater than that of continuing it, while the Claimants have to prove the converse, i.e. that the harm of continuing the stay is greater than that of terminating it.²⁴ The Applicant then contends that it has discharged its burden of proof in this regard, whereas the Claimants have failed to do so.²⁵

b. Claimants' Position

16. The Claimants submit that the burden lies on the Applicant to prove that circumstances exist that require the stay to be continued,²⁶ citing case law including *Masdar v Spain*²⁷ and *NextEra v Spain*.²⁸

¹⁸ Applicant's Sur-Rejoinder, para. 63.

¹⁹ Applicant's Sur-Rejoinder, para. 81.

²⁰ Hearing Transcript, pg. 5, lines 5-8; pg. 10, lines 8-11.

²¹ Hearing Transcript, pg. 9, line 12 – pg. 10, line 7.

²² Applicant's Sur-Rejoinder, para. 18.

²³ Applicant's Sur-Rejoinder, para. 17.

²⁴ Hearing Transcript, pg. 10, lines 1-7.

²⁵ Applicant's Sur-Rejoinder, para. 20.

²⁶ Claimants' Rejoinder, para. 25; Claimants' Opposition, paras. 22-27.

²⁷ Claimants' Rejoinder, para. 25; Claimants' Opposition, para. 22: *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Decision on the Kingdom of Spain's Request for a Continuation of the Stay of Enforcement of the Award, 20 May 2020, para. 74.

²⁸ Claimants' Opposition, para. 23: *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, 6 April 2020, para. 80.

B. THE CIRCUMSTANCES OF THE PRESENT CASE

17. The following elements in the present case have been raised in the parties' submissions as possible circumstances to be taken into account when deciding whether the stay should be continued.

(1) Whether or not the Annulment Application is Frivolous or Dilatory

a. Applicant's Position

18. The Applicant says that the Annulment Application is well-founded and made in good faith, and is neither dilatory nor frivolous.²⁹ It submits that previous *ad hoc* annulment committees have found that a stay should be granted unless the annulment application is frivolous or dilatory. It cites *MTD v Chile* as an example³⁰ and urges the Committee to consider whether or not the annulment application is frivolous or dilatory,³¹ submitting that the "*serious*" nature of the Annulment Application is a circumstance in favour of granting a stay in the present case.

b. Claimants' Position

19. The Claimants submit that while the frivolous or dilatory nature of an annulment application should lead to a refusal to grant a stay, it does not mean that stay should be granted on the basis that an annulment application is not frivolous or dilatory.³² The Claimants submit that the allegedly serious nature of the Annulment Application is therefore irrelevant,³³ and that the merits of the Annulment Application should not influence the Committee's decision unless it is frivolous or dilatory.³⁴
20. The Claimants however submit that the Annulment Application in this instance is in fact "*manifestly frivolous and dilatory in nature*",³⁵ given that the Applicant's grounds for the Annulment Application are "*based on EU law*",³⁶ and that the tribunal in the main proceeding did consider the Applicant's arguments on European Union ("**EU**") law before rejecting those arguments, urging that "[w]hat Spain is really complaining about is that they [i.e. Spain] don't

²⁹ Applicant's Sur-Rejoinder, para. 49.

³⁰ Applicant's Sur-Rejoinder, para. 44: *MTD Equity Sdn Bhd. and MTD Chile S.A. v The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, para. 28.

³¹ Applicant's Sur-Rejoinder, para. 43.

³² Claimants' Rejoinder, paras. 32-33.

³³ Claimants' Rejoinder, paras. 29 and 34.

³⁴ Claimants' Rejoinder, para. 32; Hearing Transcript, pg. 60, line 20 – pg. 61, line 4.

³⁵ Claimants' Rejoinder, para. 35; Hearing Transcript, pg. 61, lines 19-20.

³⁶ Hearing Transcript, pg. 61, lines 24-25.

like the finding that the Tribunal ultimately made about the relevance of EU law; not that they [i.e. the Tribunal] *didn't consider it, and, of course, that would turn the annulment into an appeal.*"³⁷ The Claimants suggest that the Applicant's arguments for annulment do not even apply to the First Claimant (since it is not an EU entity), thereby making the Annulment Application even more frivolous.³⁸ Accordingly, the Claimants submit that the stay should be lifted.

(2) Whether the Applicant is likely to Comply with the Award

a. Applicant's Position

21. The Applicant submits that there is no history of non-compliance with "*final, confirmed*" arbitral awards by it³⁹ (because the awards referred to by the Claimants are "*all pending annulment*"),⁴⁰ and that there is no risk of its inability to pay.⁴¹
22. The Applicant draws attention to its need to comply with EU law which it submits is not merely an internal matter but rather an issue of international law,⁴² and submits that its notification of the Award to the European Commission is a sign of its willingness to comply with international law (including the Award) rather than an attempt to evade obligations.⁴³
23. The Applicant further "*confirms its commitment to pay the Award if it is not annulled in this proceeding, specifically, by seeking authorization from the European Commission consistent with its obligations under EU law and regulations, and then to pay promptly upon receiving such authorization*".⁴⁴ It believes that such a commitment on its part as a sovereign State should be sufficient under the circumstances of the present case.⁴⁵

³⁷ Hearing Transcript, pg. 67, lines 14-18.

³⁸ Claimants' Rejoinder, para. 36.

³⁹ Applicant's Reply, paras. 77 and 84; Hearing Transcript, pg. 17, lines 17-23.

⁴⁰ Hearing Transcript, pg. 81, lines 9-11.

⁴¹ Applicant's Reply, para. 83.

⁴² Applicant's Sur-Rejoinder, paras. 35 and 111.

⁴³ Applicant's Sur-Rejoinder, paras. 40 and 94.

⁴⁴ Applicant's Sur-Rejoinder, para. 41.

⁴⁵ Applicant's Sur-Rejoinder, para. 42.

b. Claimants' Position

24. The Claimants submit that there is a high risk of non-compliance with the Award by the Applicant, given its history of refusing to honour arbitral awards.⁴⁶ The Claimants also allege that the Applicant had refused to comply with an order from another ICSID *ad hoc* annulment committee⁴⁷ to provide an undertaking that the Applicant would comply with its ICSID and Energy Charter Treaty (“ECT”) obligations to pay an award.
25. The Claimants also argue that the Applicant’s attempt to “*condition payment on an internal EU law process*” also signifies the Applicant’s reluctance to comply with the Award.⁴⁸ They cite recent case law which is “*consistent in finding that conditioning payment of an award on internal law reflects a strong risk of non-payment and thus the stay must be lifted or conditioned on payment of security*”.⁴⁹

(3) Prejudice to the Claimants if the Stay is Continued and the Annulment Application Unsuccessful

a. Applicant's Position

26. The Applicant submits that the prejudice allegedly suffered by the Claimants if the stay is continued is hypothetical, and has not been proven by the Claimants.⁵⁰ The Applicant also argues that any delay in payment will be “*more than adequately*” compensated by interest,⁵¹ which will result in the Claimants receiving “*much more money than they would if they invested in Spanish government bonds*”,⁵² and that therefore “*delay in payment after an annulment of proceeding cannot be considered as a harm to be taken into account when deciding whether to suspend or not, or give a stay to an arbitral award*”.⁵³
27. The Applicant also contends that being in line after other creditors does not justify lifting the stay, citing *NextEra v Spain*.⁵⁴

⁴⁶ Claimants’ Rejoinder, para. 40.

⁴⁷ Claimants’ Rejoinder, para. 41: *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision Terminating the Stay of Enforcement of the Award, 28 May 2020, para. 12.

⁴⁸ Claimants’ Rejoinder, para. 43.

⁴⁹ Claimants’ Rejoinder, para. 48.

⁵⁰ Applicant’s Sur-Rejoinder, paras. 29 and 30.

⁵¹ Applicant’s Sur-Rejoinder, para. 31.

⁵² Applicant’s Sur-Rejoinder, para. 32.

⁵³ Hearing Transcript, pg. 16, line 19 – pg. 17, line 1.

⁵⁴ Applicant’s Sur-Rejoinder, para. 33: *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, 6 April 2020, para. 94.

b. Claimants' Position

28. The Claimants assert that they will suffer the prejudice of “*being pushed to the back of a long line of award-creditors*”⁵⁵ if the stay is continued and the Annulment Application unsuccessful. They also argue that the purpose of interest is to compensate, and not to justify undermining the Award’s finality.⁵⁶

(4) The Applicant’s EU Obligations

a. Applicant’s Position

29. The Applicant maintains that its obligations under EU law pertain to international law, and that therefore the potential conflict between compliance with the Award and compliance with EU law is a conflict of international obligations.⁵⁷ It also submits that it is obliged to obtain clearance from the European Commission to pay the Award because the Award constitutes notifiable State aid under Articles 107 and 108 of the Treaty on the Functioning of the European Union (“TFEU”), specifically citing Decision C(2017) 7384 of the European Commission⁵⁸ to support its allegation (that the Award constitutes notifiable State aid).⁵⁹

b. Claimants' Position

30. The Claimants submit that the final and binding nature of ICSID awards is not subject to any restrictions except annulment, and that therefore the Applicant’s obligations under EU law are irrelevant.⁶⁰ In particular, the Claimants submit that the ICSID Convention neither permits the Applicant to condition payment of the Award on the approval of a third party (here, the EU),⁶¹ nor allows for a stay to be granted pending resolution of matters of internal or regional laws.⁶²

⁵⁵ Claimants’ Rejoinder, para. 65.

⁵⁶ Claimants’ Rejoinder, paras. 67-68.

⁵⁷ Applicant’s Sur-Rejoinder, paras. 35 and 111.

⁵⁸ Annex 51 of Applicant’s Reply: Decision C(2017) 7384 of the European Commission, rendered on 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN)), Section 5 Conclusion.

⁵⁹ Applicant’s Sur-Rejoinder, paras. 106-110, 112, 117-119; Hearing Transcript, pg. 31, lines 3-11.

⁶⁰ Claimants’ Rejoinder, paras. 70 and 75.

⁶¹ Claimants’ Rejoinder, para. 78.

⁶² Claimants’ Rejoinder, para. 75.

31. The Claimants further submit that the Award does not constitute State aid, arguing that the Applicant has not established that the requisite conditions exist for the Award to constitute State aid requiring notification under the TFEU.⁶³

(5) Possibility of Recoupment of Funds from the Claimants if the Stay is Terminated and the Award subsequently Annulled

a. Applicant's Position

32. The Applicant submits that it faces a real risk of not being able to recoup payment if the stay is lifted and the Award enforced, before being subsequently annulled.⁶⁴ This is because the Claimants do not appear to be sufficiently solvent on the basis of available information.⁶⁵ It points out that the Second Claimant is in fact a company with “*negative equity*” (i.e. its liability exceeds its assets),⁶⁶ and is not “*creditworthy*”,⁶⁷ and as regards the First Claimant, no meaningful information as to its financial status is available or has been provided by the Claimants, despite requests from the Applicant.⁶⁸
33. The Applicant therefore submits that the Claimants’ assertion that they are “*substantial companies, with significant assets and access to capital*” is wholly unsupported, and wrong, based on the evidence that they have submitted.⁶⁹

b. Claimants' Position

34. The Claimants maintain that they are “*substantial companies, with significant assets and access to capital*”, and that therefore there is no real risk of non-recoupment if the stay is lifted and the Award subsequently annulled.⁷⁰
35. Specifically, the Claimants indicate that they hold “*nearly EUR 1 billion in assets*” (emphasis in original) as evidence that their financial situation is sound.⁷¹ They also allege that the First

⁶³ Claimants’ Rejoinder, para. 71.

⁶⁴ Applicant’s Sur-Rejoinder, para. 21.

⁶⁵ Applicant’s Sur-Rejoinder, paras. 24-25.

⁶⁶ Applicant’s Sur-Rejoinder, para. 25.

⁶⁷ Hearing Transcript, pg. 14, line 18 – pg. 15, line 3.

⁶⁸ Applicant’s Sur-Rejoinder, para. 26.

⁶⁹ Applicant’s Sur-Rejoinder, para. 28.

⁷⁰ Claimants’ Rejoinder, para. 56.

⁷¹ Claimants’ Rejoinder, para. 53.

Claimant has “*access to uncommitted capital in excess of EUR 142 million*”,⁷² and argue that the Second Claimant is not insolvent, whether under Spanish or Luxembourg law.⁷³

36. To allay any fear of possible inability to recoup, the Claimants also “*offer such an undertaking if the Committee deems it necessary: that they will not distribute any proceeds of any amounts recovered until the annulment has been decided, and that they would immediately repay those amounts if the award is annulled*”.⁷⁴

C. WHETHER SECURITY SHOULD BE ORDERED

a. Applicant’s Position

37. The Applicant submits that the same circumstances that support the grant of stay, support the grant of that stay unconditionally, and that the Claimants have not discharged their burden of proof that any stay granted should be conditioned on a provision of security.⁷⁵
38. The Applicant also argues that payment of the Award plus interest into an escrow account would incur additional costs, and that this would be equivalent to imposing “*a cost or a fine*” on it, which is not contemplated under the ICSID Convention. Doing so would therefore be penalising it for requesting annulment in addition to curtailing its rights under Article 52 of the ICSID Convention.⁷⁶ The Applicant suggests that there is no legal norm indicating that provision of security is “*an automatic or counterbalancing right*” to a stay, citing *Azurix v Argentina*,⁷⁷ adding that posting security into escrow would put the Claimants in a better position than they would otherwise be in, and that this is not the purpose of annulment proceedings.⁷⁸
39. As regards the Claimants’ request in the form of an undertaking, the Applicant refers to its commitment as offered at paragraph 23 above,⁷⁹ and reiterates that such commitment should

⁷² Claimants’ Rejoinder, para. 55.

⁷³ Claimants’ Rejoinder, para. 57; Hearing Transcript, pg. 56, lines 4-6.

⁷⁴ Hearing Transcript, pg. 60, lines 2-6; pg. 73, lines 5-16.

⁷⁵ Applicant’s Sur-Rejoinder, para. 123.

⁷⁶ Applicant’s Sur-Rejoinder, para. 124.

⁷⁷ Applicant’s Sur-Rejoinder, para. 125; *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, paras. 22, 25, 37 and 40.

⁷⁸ Applicant’s Sur-Rejoinder, para. 126.

⁷⁹ Applicant’s Sur-Rejoinder, paras. 104 and 127.

be “sufficient, without additional onerous conditions or securities”.⁸⁰ It discloses that it has “already initiated proceedings to obtain the EC’s clearance as promptly as possible” as an indicator of its commitment.⁸¹ The Applicant also observes that the text of the undertaking demanded by the Claimants “would be unacceptable for any sovereign country and should never be considered by the Committee. Indeed, the waiver of sovereign immunity that the Claimants include would be in direct contradiction with Article 55 of the ICSID Convention, by which the Parties are to abide.”⁸²

b. Claimants’ Position

40. The Claimants submit that the Applicant ought to provide security “to counterbalance the risk of non-compliance and the prejudice caused to the Claimants”, arguing that case law confirms the present Committee’s power to condition a stay on such security.⁸³ They contend that providing such security as requested would allay the Applicant’s concerns regarding both recoupment of funds and the costs of such recoupment, in the event the Annulment Application succeeds.⁸⁴

V. THE COMMITTEE’S ANALYSIS

41. The above (paragraphs 8 to 40) is a brief summary of the main contentions and positions advanced by the parties. In this section, the Committee will discuss some of the arguments raised and consider them in deciding whether to grant a continuation or to lift the stay of enforcement of the Award in this matter. While the Committee has heard and read all of the parties’ submissions and arguments, the discussions below will deal only with those which in the Committee’s view have an impact on the outcome of the application.

A. THE LAW APPLICABLE

(1) Applicable Legal Standard

42. The finality of ICSID awards is spelt out in Article 53(1) of the Convention:

⁸⁰ Applicant’s Sur-Rejoinder, para. 105.

⁸¹ Applicant’s Sur-Rejoinder, paras. 105 and 127.

⁸² Applicant’s Sur-Rejoinder, para. 128.

⁸³ Claimants’ Rejoinder, para. 85.

⁸⁴ Claimants’ Rejoinder, paras. 87-88.

Article 53

(1) 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 this Convention.

[emphasis added]

43. Article 52 of the Convention gives a party the right to seek annulment of the award and when such an application is pending, the enforcement of the award may be stayed. Article 52(5) provides:

Article 52

[...]

(5) 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.

[emphasis added]

44. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, to which the United Kingdom,⁸⁵ Luxembourg and Spain are contracting parties, treaties “*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms [...] in their context*”. It is therefore only appropriate that the Committee first considers the ordinary meaning of Article 52(5).
45. On a plain and simple reading, the Committee agrees with the Claimants, that a two-stage analysis is set out under Article 52(5) of the Convention for the stay to be continued: *first*, it must be shown that “*circumstances so require*” for the enforcement of the Award to be stayed pending the Committee’s decision regarding the Annulment Application; and *second*, if such circumstances are present, the Committee should then exercise its discretion (evident from the word “*may*”) whether to continue the stay. As between the parties, there is no disagreement

⁸⁵ Jersey is a British Crown Dependency and is internationally represented by the government of the United Kingdom.

between them as to the second stage of the analysis;⁸⁶ it is the first stage where the parties' differences lie.

46. There seems to be some confusion with regard to the threshold past which circumstances can be said to “*require*” the stay to be continued. This arises out of the use of the word “*except*” in Article 53(1). The Applicant’s position is that no higher threshold than usual is necessary under Article 52(5). At the oral hearing, the Claimants affirmed their position that they “*do not suggest [that the Committee] need[s] to find exceptional circumstances. [The Committee] must find that circumstances exist in order to impose the stay.*”⁸⁷
47. Notwithstanding their position, the Claimants maintain that “*greater restraint is needed in deciding whether a stay should be continued*” as a result of the final and binding nature of ICSID awards under Article 53(1) of the Convention.⁸⁸ This is contested by the Applicant, which asserts that the principle of finality is not absolute and that its right to seek annulment and stay of enforcement is not subordinate to the Claimants’ right to enforce the Award.⁸⁹
48. On a plain reading of Article 53(1), ICSID awards are final and binding, subject only to the remedies available under the ICSID Convention. There is no suggestion in the text or any justification in principle to impose the right to enforce an award as ranking superior to that of an aggrieved party’s right to seek its annulment. If they are each intended to be a counterbalance of the other, they must each be accorded equal weight and treatment. The Committee is therefore not persuaded that “*greater restraint*” should be exercised in deciding to grant a continuation of stay as submitted by the Claimants or that “*a general rule of caution or prudence*” when lifting a stay exists simply because a party has applied for annulment,⁹⁰ which the Applicant so urges us to adopt. In taking this view, the Committee is conscious that while past decisions by other *ad hoc* committees might have taken one view or the other in relation to the exercise of restraint or caution on the specific facts of those cases, they do not constitute precedents which this Committee is inclined to follow. In the Committee’s view, each matter should be decided based on an appreciation of the specific circumstances of the case, taking into account any burden of proof that has to be discharged by either side. This then leads

⁸⁶ Applicant’s Reply, para. 20; Claimants’ Opposition, para. 9.

⁸⁷ Hearing Transcript, pg. 42, lines 4-6.

⁸⁸ Claimants’ Rejoinder, paras. 15-16.

⁸⁹ Applicant’s Sur-Rejoinder, para. 13.

⁹⁰ Hearing Transcript, pg. 7, line 23 – pg. 8, line 15.

the discussion on to the question of the burden of proof required to be discharged by each of the parties herein.

(2) Burden of Proof

49. The Claimants submit that “[t]he language of Article 52(5) of the ICSID Convention imposes the burden of proof on Spain to establish that circumstances exist which require a stay”.⁹¹ The Committee however sees Article 52(5) as merely establishing the legal standard to be met before enforcement may be stayed pending the decision on annulment. It does not speak to the burden of proof required of the applicant seeking stay.
50. Rule 54 of the ICSID Arbitration Rules, which deals with stay of enforcement, provides as follows:

Rule 54 Stay of Enforcement of the Award

(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) shall specify the circumstances that require the stay or its modification

⁹¹ Claimants' Opposition, para. 22.

or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

[...]

[emphases added]

51. The rules quoted above similarly do not indicate specifically which party bears the burden of proof. The best indication available is Rule 54(4) of the ICSID Arbitration Rules, which stipulates that the party requesting a stay or modification or termination of stay “*shall specify the circumstances that require the stay or its modification or termination*”, and does not specify that the burden is incumbent only on the applicant seeking the stay.
52. The Committee is aware that in *Masdar v Spain* and *NextEra v Spain* the committees seem to take the position that the State parties which were applicants for the continuation of the stay were held to bear the burden of proof that “*circumstances exist which require a stay*”. This Committee observes that in each of those cases, the applications for stay were made only by the State parties, respondents in the arbitration. In the case here, in addition to the Applicant, the Claimants too filed an Opposition under Rule 54(2) to lift the stay and is thereby a ‘requesting party’ under Rule 54(4) as well, albeit one that is requesting for termination of the stay. Accordingly, it would not be inconsistent with the reasoning in *Masdar v Spain* and *NextEra v Spain* to require the Claimants to bear the burden of proof in respect of its request under Rule 54(2).
53. The Committee is therefore unable to discern any principle under Article 52(5) of the Convention or Rule 54(4) of the Arbitration Rules that the burden lies positively only on the Applicant.
54. Given that the relevant provisions under the ICSID Convention and Arbitration Rules do not specify or otherwise indicate which party bears the burden of proof, the Committee believes it appropriate to consider the general principle of *onus probandi incumbit actori*: that the burden of proof lies with the party making a positive assertion. This means that the Applicant has to prove the circumstances which it alleges require the stay to be continued, while the burden lies on the Claimants to prove the circumstances that they allege require the stay to be terminated. This then leaves the Committee to consider if each has so discharged their burden and if so, how the discretion to lift or continue stay should be exercised.

B. THE CIRCUMSTANCES OF THE PRESENT CASE

55. The parties agree that the question as to whether the stay should be continued is fact-specific and depends on the circumstances of this case,⁹² but they do not fully agree on what circumstances should be taken into account. Notwithstanding this, the Committee deems it appropriate to address the following elements, as they have been raised at one point or another in the Parties' submissions as possible circumstances to be taken into account in deciding whether the stay should be continued or lifted.

(1) Whether or not the Annulment Application is Frivolous or Dilatory

56. The Committee does not accept the Applicant's submission that a stay should be granted unless the annulment application is frivolous or dilatory. The mere fact that there is some merit in the Annulment Application is a neutral factor and cannot of itself be a basis to grant a stay of enforcement. The Committee agrees that the converse is applicable, such that if the grounds for stay are frivolous or dilatory, it operates as a factor for lifting a stay of enforcement. The Applicant in its Annulment Application cited two principal grounds, viz.:

- i. That the arbitral tribunal in the original proceeding ("**Arbitral Tribunal**") lacked jurisdiction on the basis that the case at hand was an intra-EU dispute between an EU member State and investors from different member States, and therefore no arbitration could be filed under Article 26 of the ECT since that would be in breach of EU law applicable between member States and particularly of Articles 267 and 344 of the TFEU;⁹³ and
 - ii. That the Arbitral Tribunal failed to properly consider, when analysing the merits of the dispute, the implications of EU law.⁹⁴
57. On a plain reading of these pleaded grounds, the Committee could see that they are substantive grounds both on lack of jurisdiction and excess of powers relating to the applicable law. In the Committee's view it would not be proper to tag the Annulment Application with the label of being "*frivolous and dilatory*". The fact that these matters were addressed by the parties during the arbitration does not render them as lesser grounds for consideration by the Committee. In the absence of any indication of bad faith motivating the Annulment Application, the

⁹² Applicant's Sur-Rejoinder, para. 16; Claimants' Rejoinder, para. 19.

⁹³ Applicant's Annulment Application, paras. 26-37.

⁹⁴ Applicant's Annulment Application, paras. 38-44.

Committee cannot agree that the Annulment Application is one that is frivolous or dilatory. Aside from this, the Committee makes no other observation on the merits of the Annulment Application.

(2) Whether the Applicant is likely to Comply with the Award

58. There is no dispute between the parties that the Applicant's behaviour is a factor that should be taken into account in considering the continuation of stay.⁹⁵ The Claimants have described the Applicant as a State that has an "*undisputed history of non-compliance with other awards pending against it*",⁹⁶ none of which have been honoured. That the Applicant has not paid any of the 14 awards (12 ICSID and two non-ICSID) made against it is true. The Committee notes however that the Applicant has applied for annulment against each of these awards. So far the Applicant has succeeded in obtaining annulment in one case⁹⁷ with the rest still pending before different *ad hoc* committees. It is therefore not accurate to say that Spain has an "*undisputed history of non-compliance with other awards pending against it*".⁹⁸ In the Committee's view, it seems premature to conclude that the Applicant has failed or refused to comply with the awards. The fact that the Applicant had sought to annul the awards does not mean that it is a recalcitrant defaulter, as it was merely exercising a right and remedy available under the ICSID Convention and the Rules. Accordingly, the Committee is not prepared to hold that the Applicant has "*a history of refusing to honour awards*".⁹⁹
59. The Committee also agrees that whether the Applicant has the ability to pay on the Award is a relevant factor to be considered in continuing or granting stay. In this regard, the Committee accepts that the Applicant is the fifth largest economy in the EU and is ranked 13th among all countries in the world in terms of its GDP. While there may be other award creditors which may be seeking payment should the Applicant's annulment attempts fail, the Committee is not convinced that the Applicant lacks the funds or the ability to honour the awards, including the Award in this arbitration. The Committee is therefore not prepared to agree that the Applicant will be unable to meet the payments under the Award should the Annulment Application fail.¹⁰⁰

⁹⁵ Applicant's Sur-Rejoinder, para. 93; Hearing Transcript, pg. 49, lines 7-18.

⁹⁶ Claimants' Rejoinder, para. 39.

⁹⁷ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020.

⁹⁸ Claimants' Rejoinder, para. 39.

⁹⁹ Claimants' Rejoinder, para. 40.

¹⁰⁰ Claimants' Rejoinder, para. 39.

(3) Prejudice to the Claimants if the Stay is Continued and the Annulment Application Unsuccessful

60. The Claimants seek to persuade the Committee that they would suffer continuing prejudice should they succeed in the annulment proceeding in having to await receiving payment of the damages much later, and possibly only through enforcement proceedings. They also express concern that, with other awards pending against the Applicant, they could be pushed to the back of the line in the queue for payment. In essence, the Claimants' complaint of prejudice is one of delay, costs and loss of priority.
61. As discussed above in paragraph 59, the Committee does not agree that there will be any solvency issue or risk of non-payment by the Applicant such that if the Claimants succeed, there would be nothing left for it to recover under the Award. The Award has provided not just for monetary compensation but also that the same compensation attracts interest at 2.07% compounded monthly,¹⁰¹ a rate above the rate for Spanish government bonds¹⁰² and even higher than commercial rates that are currently offered by any financial institution.¹⁰³ This means that for any delay in receiving any money due to them under the Award, the Claimants would be more than adequately compensated by the interest that would have accrued. While the Committee agrees with the Claimants that "*the purpose of post-award interest is compensatory, not a pretext to undermine the Award's finality*", citing *Antin v Spain* and *NextEra v Spain*,¹⁰⁴ the Committee does not agree that granting of stay undermines the finality of the Award. Permitting a stay is in reality a further step to preserve the Award's eventual finality so that if affirmed by the annulment process, there could be no doubt as to its universal finality and enforceability.
62. The Committee is also not persuaded that the Committee should lift the stay in order that the Claimants remain in the front of the queue instead of being "*pushed to the back of a long line of award-creditors*" if the stay is continued and the Annulment Application eventually dismissed.¹⁰⁵ The fear of being at the back of the queue of creditors is only real if the award

¹⁰¹ Applicant's Reply, para. 91.

¹⁰² Applicant's Reply, para. 92.

¹⁰³ Hearing Transcript, pg. 79, lines 18-20.

¹⁰⁴ Claimants' Rejoinder, paras. 67-68: *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, para. 82; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, 6 April 2020, para. 93.

¹⁰⁵ Claimants' Rejoinder, para. 65.

debtor could be said to be in a precarious financial situation. If the Annulment Application fails, the Claimants remain in line and will eventually be paid, whether it is in the front or the back of the line. There is in fact no added prejudice to the Claimants. In the Committee's view there is no legitimate basis, or any need for the Committee to assist the Claimants to jump the queue ahead of other creditors by lifting the stay. In this respect, the Committee shares the view of the annulment committee in *NextEra v Spain* that "such a possibility of being behind the queue of other creditors is not a significant risk factor that would be sufficient to support the lifting of the stay".¹⁰⁶

(4) The Applicant's EU Obligations

63. The Committee recognises that the Applicant may have obligations under the EU framework and is subject to EU laws which could impose obligations upon it. The Committee is aware that the Applicant may be caught in a double bind situation such that if the Applicant pays on the Award without clearance from the European Commission, it could well be exposed to further financial sanctions to be imposed by the European Commission. This is however related to the question of whether the imposition of EU laws and obligations on the Applicant is a ground to annul the Award, which would require further consideration at the substantive hearing of the Annulment Application. For the moment, the Committee takes the view that the question of whether there is a risk in recoupment of funds (if paid on lifting the stay) would be the more important factor to be considered.

(5) Possibility of Recoupment of Funds from the Claimants if the Stay is Terminated and the Award subsequently Annulled

64. The parties are in agreement that the possibility of recoupment is a relevant factor in deciding whether or not to continue the stay. The Committee sees this as one of the main factors to be considered. While the Applicant is a sovereign State with a sizeable economy and resources that could pay when required, the question is whether the Claimants as award creditors would be able to repay all sums paid to or received by them should the Annulment Application succeed.
65. The Claimants have described themselves as "*substantial companies, with significant assets and access to capital*".¹⁰⁷ Unfortunately, there is little by way of evidence to support their financial

¹⁰⁶ *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, 6 April 2020, para. 94.

¹⁰⁷ Claimants' Rejoinder, para. 56.

standing. The First Claimant did not furnish its financial accounts and had instead tendered a letter signed by Charlotte Cruickshank¹⁰⁸ of Jersey, as an alternate director of the First Claimant, certifying in a single-line letter that it has “*undrawn commitments in the [Pan-European Infrastructure Fund LP] as at 19 August 2020 are EUR 142,647,811.42*”. The Second Claimant’s 2018 financial statements¹⁰⁹ as filed in the public registry in Luxembourg showed the company as having a negative equity with debts in excess of its EUR 1 billion assets and a cash balance of only EUR 431,148. The Claimants however argued that the Second Claimant remains a company with assets of more than EUR 1 billion and that under Spanish and Luxembourg laws, the Second Claimant is not formally insolvent. In their view, the accounts filed do not reflect the increased valuation of the assets, which when sold could realise values which could exceed its liabilities.

66. On the basis of these observations, the Committee has concerns as to the Claimants’ financial standing. While the Claimants may not be formally insolvent under Spanish or Luxembourg laws, the accounts of the Second Claimant show that it is not on strong financial footing and there is no assurance that the Applicant could obtain recoupment if the sum under the Award is received by the Second Claimant. The situation with the First Claimant is no better. With no accounts or evidence to show its financial standing apart from the mere single-line declaration by Ms Cruickshank, there is little assurance that any sum paid to it could be recouped by the Applicant.
67. In their attempt to assure the Committee that funds paid to the Claimants would be recoverable, the Claimants have offered to provide an undertaking that “*they will not distribute any proceeds of any amounts recovered until the annulment has been decided, and that they would immediately repay those amounts if the award is annulled*”.¹¹⁰ Given the financial situation of the Claimants, such an undertaking by the Claimants themselves would be faint assurance to the Applicant as there remains the risk that the Claimants may not be able to make good their undertaking, or ringfence the funds once released, against the reach of their creditors.

¹⁰⁸ Exhibit C-302: Letter from RREEF Infrastructure (G.P.) Limited regarding undrawn commitments to the Pan-European Infrastructure Fund LP, 19 August 2020.

¹⁰⁹ Annex-35 to Applicant’s Reply: RREEF Pan-European Infrastructure Two Lux S.à r.l. Balance Sheet for financial year ending 31 December 2018.

¹¹⁰ Hearing Transcript, pg. 60, lines 2-6; pg. 73, lines 5-16.

68. The Committee is therefore of the view that there is a real risk of the Applicant not being able to recoup the funds if so paid, and that this is an important factor that militates against lifting the stay of enforcement.
69. Taking into account all the factors considered above, namely that there is minimal risk that the Applicant would not honour the Award if the Annulment Application fails, that any delay on the part of the Claimants receiving payment would be adequately compensated by the payment of the interest rate as set in the Award, and that there is a real risk that the Applicant may not be able to recoup payment should it succeed in the Annulment Application, the Committee reaches the view that the stay request must be granted without condition and the termination of stay rejected.

C. WHETHER SECURITY SHOULD BE ORDERED

70. Having decided that the stay should be maintained without condition, there is no longer a need to consider the Claimants' request that security be ordered. The Committee nevertheless wishes to say that it agrees with the Applicant that provision of security would place the Claimants in a better position than they would otherwise be in, especially vis-à-vis other creditors. This is not the purpose of annulment proceedings. The Committee also agrees that the posting of security by the Applicant into escrow would impose an unnecessary burden on the Applicant. On the basis that the Applicant is not insolvent and will unlikely renege on its obligations under the Convention, there is really no justification to order it to put funds in escrow as a condition to continue stay. Accordingly, the Committee declines to order the security as requested by the Claimants, whether in the form of posting funds into escrow or an undertaking from the Applicant in the language proposed by the Claimants.

VI. COSTS

71. The costs of this application will be deferred for determination with the Committee's final decision on the Annulment Application.

VII.DECISION

For the reasons set out above,

The Tribunal hereby -

- I. Grants the Applicant's request for the stay of enforcement of the Award to 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 annulment proceeding;
- II. Reserves its right to modify or terminate the stay at any time; and
- III. Reserves its decision on costs for determination in the Committee's final decision on the Annulment Application.



Lawrence G S Boo
President of the *ad hoc* Committee
(on behalf of the Committee)