INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ALBANIABEG AMBIENT SH.P.K, M. ANGELO NOVELLI AND COSTRUZIONI S.R.L.

Applicants

and

REPUBLIC OF ALBANIA

Respondent

(ICSID Case No. ARB/14/26)
Annulment Proceeding

DECISION ON THE APPLICANTS' REQUEST FOR THE CONTINUATION OF THE PROVISIONAL STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee
Professor Doug Jones, President of the *ad hoc* Committee
Ms. Dyalá Jiménez Figueres, Member of the *ad hoc* Committee
Mr. Johan Sidklev, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Mr. Francisco Abriani

Date of dispatch to the Parties: August 10, 2021

REPRESENTATION OF THE PARTIES

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Albania	Republic of Albania
Applicants or Claimants	Albaniabeg Sh.p.k., M. Angelo Novelli and Costruzioni S.r.l.
Committee	The *ad hoc* Committee constituted in these proceedings consisting of Prof. Doug Jones AO as President, Ms. Dyalá Jiménez Figueres and Mr. Johan Sidklev
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award rendered on March 20, 2020, by the Tribunal in ICSID Case No. ARB/14/26 between the Claimants and the Respondent
Hydro ICSID case	ICSID Case No. ARB/15/28 brought by Hydro S.r.l., Costruzioni S.r.l, Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti against Albania under the Italy-Albania bilateral investment treaty
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
Opposition	Respondent's Opposition to the continuation of the provisional stay of enforcement of the Award dated December 14, 2020
Rebuttal Opposition	Respondent's Rebuttal Opposition dated February 1, 2021
Rejoinder to Opposition	Claimants' Rejoinder Response to the Opposition dated February 22, 2021
Respondent	Republic of Albania
Response to Opposition	Claimants' Response to the Opposition dated January 6, 2021
Stay Application	Claimant's application for the continuation of the provisional stay of enforcement of the Award dated July 16, 2020

Stay of Enforcement Hearing	Hearing on the Stay Application held on May 17, 2021
Tr. [page:line] [Speaker(s)]	Transcript of the Stay of Enforcement Hearing
Tribunal	The tribunal in ICSID Case No. ARB/14/26 composed of Sir Richard Aikens (President), Lord Hoffmann and Mr. John M. Townsend

I. INTRODUCTION AND PARTIES

1. This decision concerns an application for the continuation of the provisional stay (the "**Stay Application**"), submitted by Albaniabeg Sh.p.k., M. Angelo Novelli and Costruzioni S.r.l. (together, "**Claimants**" or "**Applicants**"), of enforcement of the Award rendered on March 20, 2020, by a tribunal composed of Sir Richard Aikens (President) who replaced Professor David Caron, Lord Hoffmann and Mr. John M. Townsend (the "**Tribunal**") in ICSID Case No. ARB/14/26 (the "**Award**") in the arbitration proceeding between the Republic of Albania ("**Albania**" or the "**Respondent**") and the Claimants.

2. The Claimants and the Respondent are hereinafter collectively referred to as the "**Parties**" and individually referred to as a "**Party**." The Parties' legal representatives are listed above on page (i).

II. BACKGROUND AND PROCEDURAL HISTORY

A. REGISTRATION OF THE APPLICATION FOR ANNULMENT

3. On July 16, 2020, the Claimants filed with the International Centre for Settlement of Investment Disputes ("**ICSID**") an application for annulment of the Award pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965 (the "**ICSID Convention**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") ("**Annulment Application**"). In their Annulment Application, the Claimants requested a stay of enforcement in respect of the Award. Therefore, the enforcement of the Award was provisionally stayed.

4. On October 15, 2020, the *ad hoc* Committee (the "**Committee**") was constituted in accordance with Article 52(3) of the Convention. The members of the Committee are: Prof. Doug Jones AO (Australian, Irish) as President, Ms. Dyalá Jiménez Figueres (Costa Rican) and Mr. Johan Sidklev (Swedish).

B. FIRST SESSION

5. On November 23, 2020, the Committee held its First Session by videoconference. A recording of the session was distributed to the Committee and the Parties. The following persons were present at the session:

Members of the ad hoc *Committee*
Professor Doug Jones, President of the *ad hoc* Committee
Ms. Dyalá Jiménez Figueres, Member of the *ad hoc* Committee
Mr. Johan Sidklev, Member of the *ad hoc* Committee

ICSID Secretariat:
Mr. Francisco Abriani, Secretary of the *ad hoc* Committee

Participating on behalf of Albaniabeg Sh.p.k. and others:
Ms. Valentine Chessa
Ms. Daniela Antona
Ms. Nataliya Barysheva
CastaldiPartners
Mr. Aksel Doruk
Meltem Avocats

Participating on behalf of the Republic of Albania:
Enkelejda Muçaj
Ms. Julinda Mansaku
State Advocates Office

6. During the First Session, the Committee and the Parties considered (i) the draft procedural order circulated by the Secretary of the Committee on November 5, 2020, (ii) the draft agenda circulated by the Secretary of the Committee on November 19, 2020, (iii) the Parties' comments on the draft procedural order received on November 18, 2020, and (iv) the Parties' comments on the draft agenda received on November 20, 2020.

7. Following the first session, on November 24, 2020, the Committee issued Procedural Order No. 1 recording the agreements of the Parties and the Committee's decision on procedural matters in these proceedings. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 2006, that the procedural language would be English, and that the place of the proceedings would be London, United Kingdom. Procedural Order No. 1 also set out the schedule of the proceedings including a schedule for the Parties' filing of submissions on the Stay of Enforcement Application and the Annulment Application.

C. WRITTEN SUBMISSIONS ON THE STAY APPLICATION

8. Following the procedural calendar, on December 14, 2020, the Respondent filed its Opposition to the continuation of the provisional stay ("**Opposition**") together with Exhibits R-0063 through R-0064 and Legal Authorities RLA-0138 through RLA-0148.

9. On January 6, 2021, the Claimants filed their Response to the Opposition ("**Response to Opposition**") together with Exhibits C-0137 through C-0147 and Legal Authorities CLA-0245 through CLA-0265.

10. On February 1, 2021, the Respondent filed its Rebuttal Opposition ("**Rebuttal Opposition**") together with Exhibits R-0065 through R-0074 and Legal Authorities RLA-0149 through RLA-0154.

11. On February 22, 2021, the Claimants filed their Rejoinder response to the Opposition ("**Rejoinder to Opposition**") together with Exhibits C-0148 through C-0157 and Legal Authorities CLA-0245 (resubmitted) and CLA-0266 through CLA-0274.

D. PROCEDURAL ORDERS NO. 2 AND NO. 3

12. On March 15, 2021, the Committee confirmed that the hearing on the Stay Application would be held virtually on May 17, 2021 (the "**Stay of Enforcement Hearing**"). After consulting the Parties', the Committee, on April 24, 2021, issued Procedural Order No. 2 setting out the procedural rules to govern the conduct of the Stay of Enforcement Hearing.

13. On April 28, 2021, the Claimants wrote to the Committee seeking authorization to produce additional documentary evidence ahead of the Stay of Enforcement Hearing. Upon the Committee's invitation, the Respondent provided a response objecting to the Claimants' request on May 3, 2021 and the Claimants submitted a reply on May 5, 2021.

14. On May 10, 2021, after giving due consideration to the Parties' positions, the Committee issued Procedural Order No. 3 in which it decided to admit the additional documents identified in the Claimants' letter of April 28, 2021. The additional documents emerged only after the filing of the Claimants' final submissions on the Stay Application, and the Committee considered that they were sufficiently relevant and

would not prejudice the Respondent because the information was either publicly available or available to the Respondent. The Committee informed the Parties that it would hear submissions on the probative value of the additional documents at the Stay of Enforcement Hearing.

E. STAY OF ENFORCEMENT HEARING AND SUBSEQUENT EVENTS

15. The Stay of Enforcement Hearing was held virtually on May 17, 2021. The following persons were present at the Hearing:

Members of the ad hoc *Committee*:
Professor Doug Jones, President of the *ad hoc* Committee
Ms. Dyalá Jiménez Figueres, Member of the *ad hoc* Committee
Mr. Johan Sidklev, Member of the *ad hoc* Committee

ICSID Secretariat:
Mr. Francisco Abriani, Secretary of the *ad hoc* Committee

Participating on behalf of Albaniabeg Sh.p.k. and others:
Ms. Valentine Chessa
Ms. Daniela Antona
Ms. Nataliya Barysheva
CastaldiPartners

Mr. Aksel Doruk
Meltem Avocats

Participating on behalf of the Republic of Albania:
Mr. Peter Webster
Essex Court Chambers

Mr. Tom Price
Ms. Anna Packwood
Ms. Bethan Luckman
Gowling WLG

Enkelejda Muçaj
Ms. Julinda Mansaku
Ms. Boriana Nikolla
State Advocates Office

Court Reporter:
Ms. Anne-Marie Stallard

16. In response to the Committee's request following the Stay of Enforcement Hearing, the Respondent provided on June 15, 2021, further information in respect of the awards and judgments listed in Annex A to the Rebuttal Opposition as it had offered to do at the Stay of Enforcement Hearing ("**Updated Annex A**"). On the following day, the Claimants requested an opportunity to respond, which was granted by the Committee. In accordance with the Committee's directions, the Claimants submitted their responsive comments on the Respondent's Updated Annex A on July 9, 2021 ("**Response to Updated Annex A**"). After seeking an opportunity to reply, which was granted by the Committee, the Respondent filed its reply to the Claimants' comments on July 23, 2021 ("**Reply to Response to Updated Annex A**"). Upon request, the Claimants were granted leave to file a short response which was filed on July 28, 2021 ("**Further Response to Updated Annex A**"). On August 9, 2021 the Respondent wrote to the Committee objecting to the Claimants' assertions, in the Further Response to Updated Annex A, regarding the position under Albanian law on requests for enforcement.

III. THE PARTIES' REQUESTS FOR RELIEF

A. CLAIMANTS' REQUEST FOR RELIEF

17. The Claimants request that:

a. the provisional stay of enforcement of the Award continue until the Committee decides the Annulment Application;[1]

b. the stay not be conditional on the provision of security;[2] and

c. the Committee order the Respondent to pay all legal and other costs in relation to the Stay Application.[3]

[1] Annulment Application, para. 128; Response to Opposition, para. 75.

[2] Response to Opposition, para. 75.

[3] Response to Opposition, para. 75.

B. RESPONDENT'S REQUEST FOR RELIEF

18. The Respondent requests that:

a. the Committee order that the provisional stay of enforcement of the Award be lifted with immediate effect;[4]

b. alternatively, if the Committee is minded to allow the stay to continue until a decision on the Annulment Application is rendered, that the stay be conditional upon the Claimants providing "real and effective" security for the full value of the Award including post-award interest, and further, should the Claimants not provide acceptable security within 30 days of the Committee's decision, order that the stay should terminate automatically;[5] and

c. the question of costs be reserved until the conclusion of the annulment proceedings.[6]

IV. THE PARTIES' POSITIONS

A. APPLICABLE TEST FOR GRANTING A CONTINUATION OF STAY

(1) Claimants' position

19. The Claimants submit that Article 52(5) of the ICSID Convention gives the Committee full discretion to stay the enforcement.[7] The criteria for this discretion "*are the circumstances that may require the stay of enforcement*"[8] and includes the existence of prejudice to the award debtor and to the award creditor.[9]

20. The Committee's power is said to be a discretionary power which, unlike an arbitrary power, must be exercised within a set frame of criteria.[10] In exercising this discretion, the task of the Committee is to assess the "*proper balance between the interests of the*

[4] Rebuttal Opposition, para. 6.1.

[5] Opposition, para. 3.7; Rebuttal Opposition, para. 6.1

[6] Rebuttal Opposition, para. 6.1.

[7] Response to Opposition, para. 23; Rejoinder to Opposition, para. 16; Tr. p. 12:17-12:20 (Ms Chessa); **CLA-0245**, C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, Art. 52, para. 594.

[8] **CLA-0245**, C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, Art. 52, para. 594.

[9] Response to Opposition, paras. 24-25.

[10] Rejoinder to Opposition, para. 19.

parties".[11] The Claimants say this is supported by ICSID case law including *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* which said that *ad hoc* committees:[12]

> *should balance the overall interests affected and the circumstances to determine whether the stay on enforcement should be maintained. In this determination the Committee finds the potential prejudice that each party would suffer to be among the most significant factors.*

21. An argument which imbues the Claimants' submissions is that the Respondent is taking a position in these proceedings which contradicts its position in the Hydro ICSID annulment proceedings. The Claimants contend that the Respondent's position that a stay of enforcement is an exceptional remedy in ICSID proceedings is in direct contradiction with its position in the Hydro ICSID case.[13]

(2) Respondent's position

22. The Respondent accepts that the Committee has wide discretion to decide whether the circumstances require a stay,[14] and that the Committee cannot make a decision regarding the merits of the Annulment Application.[15]

23. However, the Respondent emphasizes that the burden is on the Claimants to justify the continuation of the stay. It argues that Article 52(5) of the ICSID Convention, through the use of the term "require", imposes a high standard of proof. Since stay of enforcement is an exceptional remedy, the Claimants must prove the existence of circumstances beyond the ordinary consequences that normally flow from an ICSID

[11] Response to Opposition, para. 24; Rejoinder to Opposition, paras. 16 and 20; **RLA-0144**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18, Decision of the *Ad Hoc* Committe on the Stay of Enforcement of the Award, 12 November 2010 ("***Kardassopoulos v. Georgia***"), para. 29.

[12] Rejoinder to Opposition, para. 21; **CLA-0262**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Stay of Enforcement of the Award, 17 September 2020 ("***Tethyan Copper v. Pakistan***"), para. 179.

[13] Rejoinder to Opposition, para. 15.

[14] Rebuttal Opposition, para. 3.4.

[15] Tr. Pp. 26:24-27:2 (Mr Webster).

award rejecting a claim.[16] As stated in *Sempra Energy v. Argentina*, the grant of continuation is not automatic:

> *An ICSID award is immediately payable by the award debtor, irrespective of whether annulment is sought or not. A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour or granting a stay of enforcement. This follows […] from the ordinary meaning to be given to the terms of article 52(4) of the ICSID Convention, which authorises the Committee to stay enforcement of the award pending its decision "if it considers that the circumstances so require".*

24. Though there is no jurisprudence on the exact test to be applied,[17] ICSID case law indicates a strict approach which requires "the existence of particularized circumstances of an unusually acute nature that would flow from termination of the provisional stay, and in the Committee's judgment, therefore require its continuation".[18] As demonstrated by the Hydro ICSID Case, a non-trivial risk of non-recoupment is insufficient.[19] In that case, Albania suffered total losses estimated at almost EUR 1 billion and short-term recovery needs were estimated at approximately EUR 545 million.[20] In submitting that the same approach should be applied in this case the Respondent argues that, though the Hydro ICSID annulment decision is not binding on this Committee, the Stay Application was brought by one of the companies which was a party to the Hydro ICSID case and "*the people of Albania might well wonder what is going on if this Committee applies to the question before it a materially different test that was more favourable to the applicants and less favourable to Albania, when Albania has been refused a stay when it had placed before the committee evidence of funding difficulties there*."[21]

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[16] Rebuttal Opposition, paras. 2.2-2.4; **RLA-0148** *Sempra Energy International v Argentine Republic,* ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 5 March 2009 ("***Sempra Energy v. Argentina***"), para. 27; **RLA-0146** *Infrastructure Services Luxembourg S.a.r.l. and 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, ("***Infrastructure Services v. Spain***"), para. 67.

[17] Tr. P. 35:13-35:15 (Mr Webster).

[18] **C-0156**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on the Stay of Enforcement of the Award, 13 March 2020, para. 101.

[19] *Ibid,* para. 134.

[20] Tr. P. 34:15-34:19 (Mr Webster).

[21] Tr. Pp. 35:13-36:1 (Mr Webster).

25. The Respondent contends that Article 52(5) does not require the Committee to merely balance the interests of the parties. Rather, it should undertake a structured analysis to determine whether a stay is required by looking at whether the Claimants have discharged their burden of proof and substantiated their allegation that a stay is required.[22] The Respondent further argues that even if the Claimants discharge their burden, the Committee maintains a residual discretion whether to grant the stay or not.[23]

B. CIRCUMSTANCES JUSTIFYING A STAY

26. The background context of the dispute between the Parties and related entities bears upon their respective arguments in relation to this Stay Application. Relevantly, there are four arbitrations involving the Respondent and one of the Claimants, Costruzioni S.r.l. ("**Costruzioni**"), or other companies with a connection to the Claimants. Both Parties refer to these arbitrations in their submissions which are summarized briefly as follows:

a. two ICC International Court of Arbitration cases (the "**ICC cases**") brought by Hydro S.r.l. ("**Hydro**") against Albania in connection with a concession agreement for the construction of a hydropower plant in Albania (the "**Kalivaç Project**"). Albania was successful in both ICC cases and was awarded **EUR 9,273,187** in total (including costs) plus interest which have not yet been paid;[24]

b. ICSID Case No. ARB/15/28 brought by Hydro, Costruzioni, Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti against Albania under the Italy-Albania bilateral investment treaty regarding investments made in Albania's hydropower, wind energy and media industries ("**Hydro ICSID case**"). The award was rendered in April 2019 and the annulment application was filed by Albania in August 2019. The *ad hoc* committee decided to lift the stay in March 2020 and ultimately rejected the

[22] Rebuttal Opposition, para. 3.9; **RLA-0149**, *Burlington Resources, Inc. v Republic of Ecuador,* ICSID case No. ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017 ("***Burlington v. Ecuador***"), para. 78.

[23] Rebuttal Opposition, para. 3.4; Tr. P. 36:3-37:22 (Mr Webster); **RLA-0149,** *Burlington v. Ecuador*, para. 70.

[24] Rebuttal Opposition, para. 3.43.

annulment application in April 2021.[25] The claimants were jointly awarded **EUR 8,222,238.53** in legal and expert costs plus interest;[26] and

c. the present proceedings brought by Albaniabeg Ambient Sh.p.k, Angelo Novelli and Costruzioni against Albania in connection with a concession agreement for the production of electrical energy from solid urban waste. Under the Award, Albania was granted **EUR 2,326,601** in costs plus interest.

27. The Hydro ICSID case and the present proceedings share two common parties, namely Costruzioni and the Respondent. It is noted that although Albania was ordered to pay EUR 99,487,000 in damages to certain claimants in the Hydro ICSID case, no damages were awarded to the Claimants in the present proceedings.[27] The ICC cases and the present case do not share common parties aside from the Respondent.

(1) Claimants' position

28. The Claimants argue that the balance of the interests require a continuation of the provisional stay until the Committee has decided the Annulment Application.[28] The Claimants contend that they face the risk of non-recoupment of monies due to them in the event that the Annulment Application is successful in whole or in part, or difficulty of recovering the monies, which is recognized as a significant factor in favour of maintaining the stay.[29]

29. The Claimants say that they face the risk of non-recoupment due to the following circumstances:[30]

a. the wide use of Sovereign State immunity by the Respondent to avoid enforcement;

[25] Tr. P. 11:12-11:18.

[26] Response to Opposition, para. 11.

[27] Tr. P. 31:1-31:8 (Mr Webster).

[28] Annulment Application, para. 128; Response to Opposition, para. 27; Rejoinder to Opposition paras. 21-22.

[29] **RLA-0142**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, 4 April 2016, para. 110.

[30] Rejoinder to Opposition, para. 24.

b. the history of non-compliance with international obligations by the Respondent; and

c. the Respondent's proven animus towards the Claimants.

30. The Claimants maintain that the continuation of the stay is the only way to ensure a proper balance of interests between the Parties given that the Claimants face significant risk of prejudice and irreparable harm arising from a real risk of non-recoupment. On the other hand, there is no risk of prejudice to the Respondent. The Claimants further contend that there is a fundamental difference in the assessment of whether the circumstances require a stay depending on whether the stay is requested by a State or by an investor.[31]

31. The Claimants further say that the Respondent's position is directly contradictory to the position it took in the Hydro ICSID annulment proceedings and that this cannot be explained by the fact that the circumstances of the two cases are different.[32] They submit that the Respondent's contradictory approach demonstrates the risk of prejudice faced by the Claimants[33] and indicates its intention not to comply with unfavourable decisions.[34]

a. Sovereign state immunity

32. One of the differences between investors and States is said to arise from the difficulty of recovering payments made to a State which can use sovereign immunity as a shield to resist enforcement and attachment of assets.[35] Thus, the Claimants argue, the possible problems arising from sovereign state immunity from execution support the continuation of stay.[36] They say this is illustrated by *Libananco v. Turkey*[37] which, like the present case, involved an investor's request for stay of an award granting only costs.

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[31] Response to Opposition, para. 26; Rejoinder to Opposition, para. 27.

[32] Rejoinder to Opposition, para. 62.

[33] Response to Opposition, paras. 5, 19-20;

[34] Rejoinder to Opposition, para. 6.

[35] **CLA-0246**, *Libananco Holdings Co. Ltd. V. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012 ("***Libananco v. Turkey***"), para. 14.

[36] Rejoinder to Opposition, para. 26; **CLA-0245**, C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, para. 609.

[37] **CLA-0246**, *Libananco v. Turkey.*

In granting the stay of enforcement, the committee in that case acknowledged the difficulty of recovering any payments previously made to a State because of sovereign state immunity,[38] and considered that the investor had "*a clear interest in obtaining a continued stay of enforcement of the order on reimbursement and cost compensation*".[39]

33. The Claimants contend that sovereign state immunity was also recognised as one of the guiding criteria in *Perenco v. Ecuador*.[40] That decision stated that, in examining the factual circumstances of the case, a relevant factor is "*the prospect of prompt enforcement of the award if it is upheld, including enforcement that is unimpeded by problems arising from immunity from execution*".[41]

34. The Claimants allege that the Respondent has systematically used its immunity to shield itself against attempts from award-creditors to enforce the award in Belgium, Austria and the Netherlands.[42] This is said to indicate that the Respondent, should the stay be lifted, will not hesitate to invoke its state immunity to oppose any attempt by the Claimants to recoup the amounts paid.[43] At the Stay of Enforcement Hearing the Claimants stated that:[44]

> *These* [cases on slide 20] *are extremely recent examples of cases in which Albania has shielded beyond its state immunity to resist enforcement. This has occurred in Belgium, Exhibit C-149; in Austria, Exhibit C-150; in the Netherlands, Exhibit C-151.*
>
> *So our point is that Albania's conduct in the other proceedings is likely to be reproduced in the present proceedings, considering the pattern of non-compliance with its ICSID obligations by Albania.*

[38] Tr. P. 13:14-13:22 (Ms Chessa).

[39] **CLA-0246**, *Libananco v. Turkey,* para. 47.

[40] Tr. P. 14:1-14:3 (Ms Chessa).

[41] **CLA-0266**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement of the Award, 21 February 2020 ("***Perenco v. Ecuador***"), para. 68.

[42] Rejoinder to Opposition, para. 33; Tr. P. 14:4-14:9.

[43] Rejoinder to Opposition, para. 34.

[44] Tr. P. 14:4-14:13 (Ms Chessa).

b. Alleged history of non-compliance

35. The Claimants allege that the Respondent has a history of non-compliance with international obligations,[45] and say this is demonstrated by reference to various cases involving non-payment by Albania. This consolidated pattern and practice of non-compliance forces award-creditors to pursue enforcement for years or decades or more after decisions. The Claimants argue:[46]

> *Here we have only some of the examples of cases – references to cases in which Albania has not complied or, like for instance in the first one, in the* Corfu *case, where it took Albania an extremely long time to comply, in this case it was 43 years. One of the cases in this slide is the* Sharxhi and Others v Albania *case, which also has some similarities with the present case, in the sense that it was also an expropriation. And as in other cases and as in case 15/28, Albania has conducted a misinformation campaign, an extremely aggressive campaign against Mr Sharxhi and others. And here I am on slide 22, I am referring in particular to Exhibit C-143, and to a speech by the Albanian Prime Minister in November 2018 in which the Prime Minister made very clear that the 13 million that were granted by the European Court of Human Rights to Sharxhi, this government will not give this money to them.*

36. In addition to these cases and others cited in their Response to Opposition and Rejoinder to Opposition,[47] the Claimants contend that there are numerous European Court of Human Rights cases in which Albania is currently not compliant.[48] Moreover, the Claimants say that the Respondent has denied these obligations before foreign financial authorities, declaring before the Central Bank of Ireland in relation to the Eurobond issuance that "[t]*here are no governmental, legal or arbitration proceedings (including any such proceedings which are pending or threatened, of which the Issuer is aware) which may have, or have had during the 12 months prior to the date of this Prospectus, a significant effect on the financial position of the Issuer*".[49]

[45] Response to Opposition, paras. 39-57; Rejoinder to Opposition, para. 35.

[46] Tr. P. 14:14-15:19 (Ms Chessa).

[47] Response to Opposition, paras. 40-44; Rejoinder to Opposition, para. 36.

[48] Rejoinder to Opposition, para. 36; Claimants' Opening Presentation, slides 23-24.

[49] Response to Opposition, para. 17; Claimants' Opening Presentation, slide 25; **C-0141**, Prospectus for the issue price of the EUR 650,000,000 3.500% Notes due 16 June 2027 of the Republic of Albania, 12 June 2020.

37. The Claimants further argue that the information provided by the Respondent in Updated Annex A does not demonstrate a history of good compliance with its international obligations.[50] It is said that Updated Annex A in fact reveals the Respondent's failure to comply with its enforcement obligations in a timely and effective manner and confirms that the Claimants face a substantial risk of non-recoupment. Further, the Claimants assert that it demonstrates the Respondent's well-established pattern of shielding behind the practical difficulties of enforcing decisions against a State by, for example, blaming claimants for not starting enforcement proceedings.

38. Specifically, the Claimants' comments include that there is no evidence of payment nor enforcement for certain cases identified as "executed" by the Respondent, the information provided by the Respondent regarding payment contradicts that provided on the ECHR database, and there is no indication as to when payment will be made for cases described as "execution processing". Additionally, where payment has been made, the Claimants say it has been made outside the deadline (including shortly after the Stay of Enforcement Hearing) or is only a partial payment or payment of award for very low amounts. For example, the Claimants say that the payment deadline in the *Sharxhi* case was fixed for 28 August 2018,[51] almost three years ago, but payment has not been made.

39. The Claimants argue that the Respondent's letter to the Department for the Execution of Judgments of the ECHR demonstrates that the Respondent is unwilling to comply voluntarily and that any future payment, if any, would be made outside the deadline. In that letter, the Respondent requests to pay the judgment in instalments because it is impossible to proceed with payment given the limited state budget due to the November 2019 earthquake and Covid-19 pandemic.[52] However, Sharxhi's response to the

[50] Claimants' Letter to the Committee dated 9 July 2021 p. 2; Response to Updated Annex A dated 9 July 2021; Claimants' Letter to the Committee dated 28 July 2021.

[51] **C-0153**, Information relating to payment awaited or information received incomplete, Status as of 10 February 2021.

[52] **R-0092**, Communication from the State Advocate's Office to the Department for the Execution of Judgments of the ECHR dated 15 February 2021, in relation to *Sharxhi and others v. Albania* (No. 10613/16).

Respondent shows that, contrary to the Respondent's assurances, there are no negotiations ongoing regarding arrangements for payment.[53]

c. Alleged animus

40. In addition to the general pattern of non-compliance, the Claimants allege that the background to the present proceedings, particularly the Hydro ICSID case, reveals a specific pattern of non-compliance and animus towards a certain "kind of investor" such as Costruzioni in the present proceedings and the claimants in the Hydro ICSID case.[54] The Claimants contend that the Respondent has engaged in an aggressive campaign against some foreign investors and indicated that it has "no intention whatsoever" to comply with their obligation under the ICSID Convention.[55]

41. The Claimants say that the Hydro ICSID case is relevant as Costruzioni is a common party in both arbitrations and Mrs. Liliana Condomitti Becchetti (another claimant in the Hydro ICSID case) is the main shareholder of Costruzioni.[56] This background raises serious doubts as to the Respondent's intention to repay any and all amounts received in the event that the Annulment Application is successful.

42. It is argued that the Respondent has consistently failed to comply with its obligations in relation to the Hydro ICSID case. After the Hydro ICSID award was rendered in April 2019, the Respondent did not voluntarily comply with the award. The Respondent sought annulment of the award in August 2019 and a continuation of the provisional stay of enforcement, emphasising that it faced an acute financial burden on its budget due to a serious earthquake suffered in November 2019.[57]

43. The Claimants allege that the Respondent has systematically obstructed the enforcement of the Hydro ICSID award in the Albania courts. In March 2020, the Court of Appeal of Tirana rejected the request for enforcement on the following grounds:[58]

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[53] **C-0165**, Communication from Applicants in the Case of *Sharxhi and Others v. Albania* (Application No. 10613/16).

[54] Rejoinder to Opposition, para. 46; Tr. 17:12-17:16 (Ms Chessa).

[55] Tr. P. 20:2-20:9 (Ms Chessa).

[56] Rejoinder to Opposition, paras. 43-44.

[57] Response to Opposition, para. 20.

[58] Response to Opposition, para. 52; **C-0138**, Decision of the Court of Appeal of Tirana dated 4 March 2020.

> *The request for annulment of the Award and the interim stay of the enforcement of the award, in accordance with Articles 52 (5) and 54 (2) of the ICSID Convention has been communicated to the parties, thus causing impediments to its enforcement in the Republic of Albania.*

The Claimants say this was contrary to Articles 53 and 54 of the ICSID Convention which provide that awards "shall be binding on the parties…except to the extent that enforcement shall have been stayed"[59] and that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".[60]

44. When the committee lifted the provisional stay in the Hydro ICISD annulment proceedings, the Respondent again did not comply. The Claimants maintain that this was an attempt to escape its obligations consistent with the declarations of Minister of Finance Anila Denaj that Albania would not pay.[61] On April 2, 2021, after the final submissions on the Stay Application in these proceedings were submitted in February 2021, the committee rejected the Respondent's annulment application in the Hydro ICSID annulment proceedings. Following the decision, the claimants in the Hydro ICSID case sent a letter to the Respondent on April 6, 2021 reminding it of its assurances and undertakings.[62] However, the Respondent has not complied with its obligations to pay the claimants.[63]

45. Moreover, the Claimants argue that this is consistent with the political campaign engaged in by the Respondent against them and other investors. They allege that the Hydro ICSID award contained numerous references to events which are representative of the Respondent's animus. For example, that Prime Minister Rama explicitly stated that he considered the government to be at 'war' with certain investors,[64] and that these

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[59] ICSID Convention, Art. 53(1).

[60] ICSID Convention, Art. 54(1).

[61] Response to Opposition, para. 53; **C-0146**, "*Albanian Minister of Finance Anila Denaj said the government will not pay the fine to Francesco Becchetti until a final decision has been ruled*" from https://exit.al/en/2020/12/03/138807/ (last access on 4 January 2021).

[62] **C-0159**, Letter from Investors to Albania in *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, dated 6 April 2021.

[63] Tr. P. 11:23-11:24 (Ms Chessa).

[64] **C-0137**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019 ("***Hydro Award***"), para. 713.

comments indicated a political campaign against 'that kind of investor'.[65] Moreover, comments about a war against investors have continued after the annulment decision.[66]

46. These comments, which occurred before and after the annulment decision and before and after the election in Albania, are said to reveal a "*very constant and consistent pattern*" of aggressive campaigning against certain investors and the lack of intention to comply with the Respondent's obligations.[67] The Claimants say this raises serious doubts as to the assurances provided by the Respondent that "*it will promptly repay the Applicants any and all amounts received in satisfaction of the Award to the extent that this Application for Annulment is successful*".[68] Despite similar assurances in the Hydro ICSID case, the Respondent has not complied so far.[69]

47. In light of this and the increase of cases brought by investors against the Respondent, lifting the stay would pose a significant risk of non-recoupment for the Claimants.[70]

d. Risk of irreparable injury to the Claimants

48. As to the hardship and possibility of irreparable injury faced by the Claimants, they say that the structural difference between a State and a private investor and the different impact that an amount can have on their budget is obvious.[71] In this case, the lifting of the provisional stay would expose the Claimants to immediate harm as they would be deprived of a significant amount of cash flow which would be extremely difficult if not impossible to recoup.[72] Given the Respondent's history of non-compliance and animus, the Claimants would suffer harm which is beyond the routine consequence of the losing

[65] **C-0137**, *Hydro Award*, para. 715.

[66] **C-0161**, Excerpt, transcript and translation of the opinion expressed by Prime Minister Edi Rama in the program "LOG" of Endri Xhafo on ABC News TV dated 8 April 2021.

[67] Tr. P. 20:10-20:13; Claimants' Opening Presentation, slide 32; **C-0160**, Transcript and translation of an interview of Prime Minister Edi Rama: "Rama breaks the silence and unrestrain the language for the 110 million euro trial: Becchetti, Ilir and Sali will take what you don't eat" dated 7 April 2021; **C-0161**, Excerpt, transcript and translation of the opinion expressed by Prime Minister Edi Rama in the program "LOG" of Endri Xhafo on ABC News TV dated 8 April 2021; **C-0162**, Excerpt and translation of the article published by TPZ.al: "Edi Rama: Becchetti won the lawsuit, he will not receive any money, but he will pay us! Rakipi: I understand the embarrassment…" dated 15 April 2021; **C-0163**, Transcript and translation of Arnautistan Show by Mustafa Nano on MCN TV dated 20 April 2021; **C-0164**, Transcript of the opinion expressed by the Prime Minister on RTV KLAN dated 29 April 2021.

[68] Rebuttal Opposition, para. 3.15.

[69] Tr. P. 19:21-20:1 (Ms Chessa).

[70] Response to Opposition, para. 45.

[71] Rejoinder to Opposition, para. 29.

[72] Response to Opposition, para. 61, Rejoinder to Opposition, para. 48

party having to comply with its obligations under an ICSID award.[73] In the Claimants' submission, it is not necessary to produce accounts to illustrate the impact of the lifting of the stay would cause on cashflow.[74]

e. Risk of prejudice to the Respondent

49. The Claimants contend that on the other hand there is no possible harm to the Respondent as the lifting of the stay would not lead to severe consequences in terms of business opportunities, impact on the markets, economic stability, and creditworthiness for Albania.[75] The Claimants say that according to ICSID case law, "*allegations of harm must be substantiated by 'specific evidence and data' that give rise to a 'particularized fear' of harm*".[76] The Respondent has not proven the existence of a risk of prejudice and substantiated its "fear of harm". Rather, if the Annulment Application were to be dismissed, the Respondent would be compensated by interest accruing on the Award.[77]

50. Further, the Claimants argue that the Respondent has relied on inaccurate and misleading information to demonstrate an alleged risk that the Claimants will not comply with the Award in the event that it is not annulled.[78] The Claimants confirm that they will comply with the Committee's decision should it reject the Annulment Application, and denies the Respondent's contention that there are doubts as to the Claimants' intent to comply with an award on the basis that Hydro has failed to pay the damages or costs awarded to the Respondent.[79] They say that Hydro is not a party to the present proceedings and the Respondent cannot draw conclusions based on the alleged conduct of a third party. Moreover, the Respondent omits the fact that it owes Hydro significant amounts of money for works carried out on the Kalivac site.

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[73] Rejoinder to Opposition, para. 47.

[74] Rejoinder to Opposition, para. 48.

[75] Response to Opposition, para. 63, Rejoinder to Opposition, para. 49; Tr, p. 21:7-21:11 (Ms Chessa).

[76] **CLA-0268**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case ARB/13/1, Decision on the Stay of Enforcement of the Award, 22 February 2018, para. 108; **RLA-0139**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 17 April 2020 ("***Cube Infrastructure v. Spain***"), para. 127.

[77] Rejoinder to Opposition, para. 54; Tr. 21:12-21:15 (Ms Chessa).

[78] Rejoinder to Opposition, paras. 52-53.

[79] Rejoinder to Opposition, para. 53.

51. Finally, the Claimants deny the allegation that it has commenced the proceedings simply to delay payment. As illustrated by ICSID case law,[80] "*unless there is some indication that the annulment application is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed*". Additionally, they say that the procedural history shows that it is the Respondent that is using dilatory tactics to escape its payment obligations resulting from the Hydro ICSID case.

(2) Respondents' position

52. The Respondent says that the Claimants have not discharged their burden of proof. The circumstances do not require the continuation of a stay when considering the risk of prejudice to the Claimants and the risk of prejudice to the Respondent.

53. The Respondent rejects the argument that the Claimants face a risk of recoupment and irreparable harm while the Respondent faces no risk of prejudice. It alleges that on a proper application of the facts, the circumstances do not justify a stay. The Respondent contends that when applying the facts, there is no fundamental difference in the analysis depending on whether the stay is requested by an investor or by a State.[81] The decision in *Libananco v. Turkey*, relied on by the Claimants, in fact stresses that there is no such distinction:[82]

> *As a general matter it is useful to recall that a party in an ICSID arbitration, whether it be a state or a private party, has no right under the ICSID Convention to protection from enforcement efforts while pursuing an annulment proceeding.*

54. It is contended by the Respondent that "*all of* [the Claimants'] *submissions only go to one point: namely the alleged risk of non-recoupment*" and so the Claimants' case falls

[80] **RLA-0154**, *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2018 ("***Enron***"), para. 48; **CLA-0270**, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, para. 26; **CLA-0271**, *CDC Group plc v. Republic of the Seychelles,* ICSID Case No. ARB/02/14, Decision on Whether or Not to Continue Stay and Order, 14 July 2004, paras. 13-15; **CLA-0272**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, para. 28; **CLA-0247**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006 ("***CMS v. Argentina***"), para. 37.

[81] Rebuttal Opposition, paras. 3.5-3.7.

[82] **CLA-0246**, *Libananco v Turkey*, para. 56.

entirely on this point.[83] The Respondent's position is that none of the three factors identified by the Claimants demonstrate a risk of non-recoupment. The Respondent argues that a risk of non-recoupment only arises if sums are going to be paid to Albania:[84]

> *Albania's submission is that it's highly unlikely, for the reasons that I've gone through already, that the Claimants are going to pay voluntarily, and the Claimants have given no evidence at all of their financial position. Two of them are corporate vehicles, so could easily be rendered judgment-proof if that's not already happened. It's incumbent, I say, on the Claimants to show that there is a risk of non-recoupment against which they need protection. And as part and parcel of that, they need to show that Albania is going, likely, to receive some money that, in the unlikely event that the annulment succeeds, Albania would be obliged to repay. The Claimants have said nothing about this at all.*

55. Moreover, there is no risk of non-recoupment as defined by the Claimants because, as a sovereign State, the Respondent will plainly be able to afford to repay the sum of EUR 2,326,601.[85] The Respondent submits that the focus of the analysis in relation to the risk of non-recoupment "*is on the nature and assets of the party which is going to be paying back in the event of a successful annulment*".[86] As illustrated by *Infrastructure Holdings v. Spain*, the mere difficulty of recovering amounts paid out under the Award are burdens and risks "*common to virtually all annulment applications. They are* […] *a natural consequence of the annulment proceedings. Such circumstances cannot, as explained* [above]*, be sufficient to require a stay*".[87] Similar to *Infrastructure Holdings v. Spain*, there is no evidence in the present case to the effect that the Claimants bear an unusually high financial burden or risk in connection with recovery of the Award monies, or shown to be in financial distress or brink of insolvency.[88]

[83] Tr. P. 39:17-23 (Mr Webster).

[84] Tr. P. 40:1-40:14 (Mr Webster).

[85] Opposition, para. 3.4; Rebuttal Opposition, para. 3.16.

[86] Tr. Pp. 45:24-46:1 (Mr Webster).

[87] **RLA-0146** *Infrastructure Services v. Spain*, para. 72.

[88] **RLA-0146** *Infrastructure Services v. Spain*, para. 73.

a. Sovereign state immunity

56. In addition, the Respondent maintains that whatever difficulties may be associated with enforcement against a sovereign State arise as a natural consequence of the claim being rejected and do not constitute a reason to grant the exceptional remedy of a stay.[89] The Respondent says:[90]

> *So the existence of immunity can make enforcement more challenging. I obviously have to accept that. But enforcement remains possible, and in my submission it's properly analysed as part and parcel of the annulment process, by analogy to the Committee's analysis in the* Infrastructure v Spain *case.*

57. The Respondent also contends that there are inaccuracies in the Claimants' assertion that it widely uses sovereign state immunity. In particular it says that Albania did not appear in the proceedings in the Netherlands nor Austria and so cannot be described as having positively invoked immunity in respect of those proceedings.[91]

58. Further, contrary to the Claimants' submission, the committee in *Libananco v. Turkey* did not acknowledge actual difficulties in seeking enforcement against sovereign States.[92] The Respondent says that the Claimants are merely repeating an argument raised by the applicants in *Libananco*. In any event, the Respondent assures the Committee that it will promptly repay the Claimants any and all amounts received in satisfaction of the Award to the extent that it is annulled.[93]

b. Alleged history of non-compliance

59. The Respondent denies that it has a history of non-compliance with international obligations and non-payment of awards.[94] It says that the question of whether there is general compliance with international obligations is not something on which the Committee could or should make a finding.[95] The material provided by the Claimants

[89] Rebuttal Opposition, para. 3.14.
[90] Tr. P. 47:1-47:6 (Mr Webster).
[91] Tr. P. 46:12-46:22 (Mr Webster).
[92] Rebuttal Opposition, para. 3.14.
[93] Rebuttal Opposition, para. 3.15.
[94] Rebuttal Opposition, para. 3.18.
[95] Tr. Pp. 47:17-48:4 (Mr Webster).

is limited and does not put the Committee in a position to have a global view of all of the Respondent's international obligations.

60. In any event, the Respondent maintains that the specific cases cited by the Claimants do not demonstrate any systematic and consistent failure by the Respondent to comply, and the Claimants have mischaracterised or misunderstood the cases. For example, some are commercial awards which do not involve breaches of international obligations and do not inform the Committee as to the Respondent's attitude to complying with international obligations.[96] The *Corfu Channel* case involved an award obtained against former communist authorities many decades ago and say nothing about how Albania now responds to its international obligations.[97]

61. The Respondent says its history of good compliance with international obligations is demonstrated by the cases detailed in Annex A to its Rebuttal Opposition,[98] which was updated following the Stay of Enforcement Hearing. While reiterating its primary position that its general compliance with international obligations is not something which the Committee needs to or can make a meaningful finding on, the Respondent submits that Updated Annex A contains a list of select cases showing the Respondent generally in compliance, that payment is awaited from the Respondent's side in only a limited number of cases and the Respondent is engaging constructively with the relevant institutions as demonstrated by the Action Plans provided by the Respondent on these cases.[99] For example, in regards to the *Sharxhi* case, the Respondent says it intends to pay and is in discussions with the claimants about the method of payment.[100] Recently, on February 15, 2021, the Respondent had written to the Department for the Execution of Judgments of the ECHR requesting to make just payment in instalments.[101] It referred to the difficult social economic situation facing the country, emphasised that it is nonetheless taking all possible measures to ensure the execution

[96] See for example, Tr. 49:9-49:15 and p. 51:12-51:23 (Mr Webster).

[97] Rebuttal Opposition, para. 3.18(a).

[98] Rebuttal Opposition, para. 3.20; Annex A of Rebuttal Opposition.

[99] Respondent's Letter to the Committee dated 15 June 2021; Respondent's Letter to Committee dated 23 July 2021; Updated Annex A to Rebuttal Opposition.

[100] Rebuttal Opposition, para. 3.18(b); Tr. P. 48:17-48:24 (Mr Webster).

[101] **R-0092**, Communication from the State Advocate's Office to the Department for the Execution of Judgments of the ECHR dated 15 February 2021, in relation to *Sharxhi and others v. Albania* (No. 10613/16).

of the judgment and noted that the case is pending before the domestic courts which are expected to deliver a final judgment on the claims.

62. Finally, the Respondent also denies any suggestion that it acted improperly in connection with the Eurobond issuance.[102]

c. Alleged animus

63. The Respondent says that there is no animus towards the Claimants. It argues that there was no finding in the underlying Award that supports a submission that the Respondent has acted with animus towards the Claimants.[103] In relation to the Hydro ICSID case, the Respondent contends that it has no relevance to the current proceedings. None of the Claimants in the present proceedings were awarded damages in the Hydro ICSID case.[104]

64. The Respondent also rejects the Claimants' arguments that it advanced a contradictory position in the Hydro ICSID annulment proceedings and says that different positions are explained by the different circumstances of the two cases.[105] Of note, the Respondent sought a stay of enforcement because Albania suffered a serious earthquake in 2019 which gave rise to significant losses and the urgent and immediate requirement to dedicate substantial funds to the humanitarian needs of its population. Thus, the acute financial burden on the Respondent impacted its ability to voluntarily pay the EUR 108,235,386 award.[106] In contrast, the sum due from the Claimants is EUR 2,326,600 which is an amount that the Respondent could easily repay.

65. Further, the Respondent denies that it has no intention to comply with any obligations owed to the Claimants. It contends that the statements relied on by the Claimants are taken out of context. For example, "*at Exhibit C-160 Mr Rama expressly referred to Albanians paying a penalty of 110 million out of their own pockets*" and that the Minister of Finance "*had declared that once all of the courts decided and when it has decided they will be paid, they will be paid. She did not say* […] *that Albania had no*

[102] Tr. P. 54:7-54:17 (Mr Webster).
[103] Rebuttal Opposition, para. 3.34; Tr. Pp. 54:24-55:2 (Mr Webster).
[104] Rebuttal Opposition, para. 3.34.
[105] Rebuttal Opposition, paras. 3.22-3.23.
[106] Rebuttal Opposition, paras. 3.22, 3.25-3.27

obligation whatsoever to comply".[107] In any event, the Respondent says that the comments on which the Claimants rely were made in the political arena and should not be interpreted as statements of intent issued by the Albanian Government and its law enforcement agencies, who fully intend to comply with the law.[108]

66. Additionally, the Respondent argues that the Tirana Court of Appeal decision does not indicate any systematic obstruction of enforcement of the Hydro ICSID award. At the time of the decision on March 4, 2020, the provisional stay was still in place.[109] As to the Hydro ICSID annulment decision, the Respondent confirmed that it has not yet been complied with but say that it was rendered only recently in April 2021.

d. Risk of irreparable injury to the Claimants

67. The Respondent argues that the Claimants assert without proof that lifting the stay would expose them to immediate harm.[110] It highlighted that the Claimants have not disclosed any accounts or made any attempt to explain the alleged impact that lifting the stay would have on their respective financial positions and cash flows.[111] Accordingly, no evidence has been provided to the Committee on the effect of lifting the stay on the Claimants.

68. In any event, as set out above and illustrated by *Eiser v Spain*, the alleged harm is merely a routine consequence of the losing party having to comply with its obligations under an ICSID award:[112]

> *the Committee agrees with the committee in SGS v Paraguay that payment of an award is 'the natural consequence of the enforcement regime created by the ICSID Convention.' Thus the*

[107] Tr. P. 56:4-56:15 (Mr Webster); See also **C-0160**, Transcript and translation of an interview of Prime Minister Edi Rama: "Rama breaks the silence and unrestrain the language for the 110 million euro trial: Becchetti, Ilir and Sali will take what you don't eat", dated 7 April 2021; **C-0146**, "Albanian Minister of Finance Anila Denaj said the government will not pay the fine to Francesco Becchetti until a final decision has been ruled", dated 3 December 2020, p. 3.

[108] Tr. P. 56:19-56:25 (Mr Webster).

[109] Rebuttal Opposition, para. 3.30; Tr. P. 57:5-57:16 (Mr Webster).

[110] Rebuttal Opposition, para. 3.35.

[111] Tr. Pp. 38:17-39:4 (Mr Webster).

[112] Rebuttal Opposition, para. 3.36; **RLA-0150**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Stay of Enforcement of the Award, 23 March 2018, para. 63.

burden of exchange of funds going back and forth could not be a valid basis to support a request for stay on enforcement.

e. Risk of prejudice to the Respondent

69. The Respondent says that, as the Claimants have failed to demonstrate why the stay is required, the analysis should end there. Nevertheless, it submits that the stay should not be granted due to the comparative prejudice that the Respondent would face, which is substantial.[113]

70. The key test in this regard is whether there is sufficient doubt that the Claimants will comply with the award if upheld.[114] The Respondent argues that there is significant doubt in this case that the Claimants will not comply with the Award in the event that it is not annulled.[115] It says that the Committee should infer, from the fact that Hydro (company connected to the Claimants) is in breach of its obligations under the two ICC awards and from the aggressive campaign of coordinated litigation that the Claimants and their associates have conducted against the Respondent, that the Claimants are likely to take the same attitude of non-compliance towards their obligations to the Respondent.[116]

71. The Respondent also submits that the continuation of the stay will increase the risk that there will be no assets to enforce against if the Annulment Application is rejected,[117] and that the Application was commenced simply to delay payment.[118]

72. Furthermore, Albania states that Claimants' argument that the Respondent faces no prejudice because it is the net debtor of all the various arbitral proceedings is inaccurate.[119] The Hydro ICSID case, the only arbitration with any finding against the Respondent, does not award damages to any of the Claimants in the current

[113] Rebuttal Opposition, para. 3.39

[114] **RLA-0147**, *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Applicant's Request for a Continued Stay on Enforcement of the Award, 12 April 2017 ("***Standard Chartered Bank v Tanesco***"), para. 62; **RLA-0142**, *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, 4 April 2016, para. 98; **CLA-0266**, *Perenco v. Ecuador*, para. 69.

[115] Rebuttal Opposition, para. 3.44.

[116] Opposition, para. 3.6; Rebuttal Opposition, para. 3.44; Tr. Pp. 29:15-30:23 (Mr Webster).

[117] Rebuttal Opposition, para. 3.44(c).

[118] Rebuttal Opposition, para. 3.44(d).

[119] Rebuttal Opposition, para. 3.40.

proceedings.[120] In addition, it is a misstatement to say that the Respondent owes Hydro significant sums for the Kalivac works since the claims have been wholly dismissed in the ICC cases, and Hydro was ordered to pay EUR 9,273,187 in total (including costs) to the Respondent and failed to do so.[121]

73. Thus, the Respondent is not obligated to consider or accept an offer from Hydro to 'set off' amounts to which it was not entitled against outstanding amounts awarded to the Respondent under two ICC awards.[122] In any event, the Respondent says in relation to set off with the Hydro ICSID case:[123]

> *It is right that I acknowledge that the tribunal in that case ordered Albania to pay the Claimants' costs, but there is no way of knowing how that entitlement to costs is being divided up among the six claimants in the ICSID arbitration and, critically -- and this is the final bullet point on slide 6 -- the claimants in the ICSID arbitration are demanding payment of the full amount. So they are not recognising any entitlement to set-off.*
>
> *[…] And there is no basis, in my submission, on which this Tribunal could treat that award as somehow securing the obligations which Costruzioni and the other two Claimants before you owe to Albania.*

74. Finally, the Respondent says it should not be prevented from enforcing this *prima facie* valid Award in the absence of compelling and exceptional circumstances.[124] The Tribunal in the Award dismissed all of the Claimants' claims "*because there is no basis for making them*".[125] The Respondent has already spent considerable sums defending the unmeritorious proceedings and is entitled to receive the costs awarded to it. Should the stay be granted, the Respondent would be out of pocket for at least a further two years as the costs were due for payment on April 17, 2020 and the Hearing on the Annulment Application is to take place in January 2022. The Respondent contends that

[120] Opposition, para. 3.5-3.7; Rebuttal Opposition, para. 3.42; Tr. p. 31:1-31:17 (Mr Webster).
[121] Rebuttal Opposition, para. 3.43.
[122] Rebuttal Opposition, para. 3.43.
[123] Tr. pp. 31:17-32:11 (Mr Webster).
[124] Rebuttal Opposition, para. 3.45.
[125] Award, para. 556.

the interest payable on the Award will not adequately compensate it for the continued delay.[126]

C. PROVISION OF SECURITY

(1) Claimants' position

75. The Claimants argue that the stay should not be conditional upon the provision of security as it would be a disproportionate measure. As argued by the Respondent in the Hydro ICSID annulment proceedings, "*granting a stay with the requirement for security would impinge on the fundamental right to request annulment*".[127]

76. They contend that the Respondent has not provided evidence showing a substantial risk of non-compliance by the Claimants should the Annulment Application be unsuccessful.[128] As illustrated by *Azurix v. Argentina*, the provision of a security is not "*an automatic or counterbalancing right*" to a stay and should be ordered only in "*limited exceptions* […] *in order to eliminate any 'reasonable doubt as to the* [award debtor's] *intent to comply'*".[129] A reasonable doubt exists only in circumstances where a party makes it clear that it will not comply with its obligations under a final award.[130] Here, there is no proof that the chances of obtaining enforcement of the Award would deteriorate.[131]

77. The Claimants say that the Respondent should be estopped from adopting the position that requiring security is standard practice,[132] as this is a contradictory position to the one taken in the Hydro ICISD annulment proceedings.[133] There, the Respondent submitted that the provision of security is "exceptional in nature" as the ICSID Convention does not condition the continuation of the stay upon any form of security,

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[126] Rebuttal Opposition, para. 3.45.

[127] Tr. P. 22:18-22:20 (Ms Chessa); **C-0155**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Albania's Response to Claimants' 11 December 2019 Submission, 17 December 2019, para. 36.

[128] Rejoinder to Opposition, para. 57; Tr. pp. 22:10-22:14 (Ms Chessa).

[129] **CLA-0274**, *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 ("***Azurix Corp.***"), para. 25.

[130] **RLA-0154,** *Enron*, para. 49.

[131] Tr. P. 23:13-23:16 (Ms Chessa).

[132] Rejoinder to Opposition, para. 57.

[133] Response to Opposition, para. 69; Rejoinder to Opposition, para. 59; Tr. pp. 22:21-23:4 (Ms Chessa).

and that the party seeking the provision of security must present evidence showing a substantial risk of non-compliance with an award.[134]

78. Further, the Claimants argue that requiring security would be burdensome and unnecessary because they would need to provide collateral, pay bank fees and cover costs associated with obtaining and negotiating the security, and this would result in the unavailability of funds.[135] As stated in *Enron*, the hardship of providing a security may result from "*the consequences of freezing the amount due for the duration of the annulment proceedings*" and "*is a further reason why security should not be ordered as a matter of course*".[136] Contrary to the Respondent's position, it is irrelevant and beside the point to say that costs would not be significant and would be less than the legal costs incurred in connection with the Stay Application.[137] Moreover, this would result in Costruzioni being forced to advance additional funds while being deprived of payments due under the Hydro Award and forced to pursue enforcement against the Respondent's immunity defense.

79. Finally, the Claimants submit that the Committee should not condition the stay on the provision of security where this would be equal to compliance because the obligation to make an immediate payment does not exist when a stay of enforcement is granted.[138] The Respondent has failed to explain their contention that the provision of security would be a lesser burden than compliance with the award.[139]

(2) Respondent's position

80. The Respondent submits that the Committee should exercise its discretionary power[140] to condition any continued stay upon the provision of financial security by the Claimants to secure their obligations under the Award.[141] It contends that given the likelihood that the Claimants will not comply with their obligations under the Award,

[134] Rejoinder to Opposition, para. 56.

[135] Response to Opposition, para. 69; Rejoinder to Opposition, para. 59.

[136] **RLA-0154,** *Enron*, para. 51.

[137] Rejoinder to Opposition, para. 57.

[138] **CLA-0267**, *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, para. 86.

[139] Rejoinder to Opposition, para. 57.

[140] Rebuttal Opposition, para. 4.1; For example, **RLA-0147** *Standard Chartered Bank v Tanesco.*

[141] Rebuttal Opposition, para. 4.4.

provision of security is justified.[142] The Respondent requests security in the form of either an unconditional and irrevocable bank guarantee or security bond, a standby letter of credit, or a capitalised escrow account pledged in favour of the Respondent for the full value of the Award including post-award interest to the date of issuance of said effective security. In addition, the Respondent requests that, should the Applicants not provide acceptable security within 30 days of the Committee's decision, the stay should terminate automatically.[143]

81. The Respondent argues that conditioning a grant of stay on security is consistent with the obligation on the parties under Article 53 of the ICSID Convention to comply with ICSID awards.[144] As stated by the committee in *Standard Chartered Bank v Tanesco*:[145]

> *the lifting of the provisional stay or imposition of a guarantee are not punishments: the parties have a procedural right guaranteed by the ICSID Convention that allows them to request the annulment of an award, but this right cannot operate against the presumption of validity of awards rendered under the ICSID Convention.*

82. The Respondent says it is common practice to require some form of security if a stay is granted.[146] In *Standard Chartered Bank v Tanesco*, the committee further stated:[147]

> *By conditioning the stay, Claimant's right of enforcement shall also be protected in order to balance the interest of the Parties.*

83. Further, the approach to determining whether security should be required is the same regardless of whether the request for security is made by an investor or a State.[148] There is no requirement set out in *Libananco v Turkey* that the State, in order to obtain

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[142] Respondent's Opening Presentation, slide 26.

[143] Rebuttal Opposition, para. 4.17(b).

[144] Rebuttal Opposition, para. 4.2; **RLA-0147,** *Standard Chartered Bank v Tanesco*, para. 84.

[145] **RLA-0147,** *Standard Chartered Bank v Tanesco*, para. 87.

[146] Tr. p. 60:17-61:20 (Mr Webster); **RLA-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, up to 5 May 2016, para. 58.

[147] **RLA-0147** *Standard Chartered Bank v Tanesco*, para. 86; See also **RLA-0144**, *Kardassopoulos v Georgia*,; **RLA-0152** *Orascom TMT Investments S.a.r.l. v People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020; **CLA-0247**, *CMS v. Argentina*, para. 36.

[148] Rebuttal Opposition, para. 4.6; **RLA-0148**, *Sempra Energy v. Argentina*, paras. 95-96.

security, must show that its chances of obtaining enforcement of the award would deteriorate as a result of the stay.[149]

84. The Respondent argues that the requested security would not cause hardship. Claimants have provided no evidence of the level of collateral, fees or other costs that they would incur and no explanation of why none of the Claimants would be able to afford it.[150] The Respondent's enquiries suggest that the estimated cost to the Claimants of providing a guarantee would be in the region of EUR 70,000.[151] It is said that this is not a significant sum in the context of their Annulment Application and cannot be seriously considered to impose a financial burden when they were able to pay the USD 250,000 advance in respect of these proceedings in November 2020, and the costs incurred in connection with the Stay Application will likely be far higher.[152] Further to the relatively low sum required to obtain security, the Claimants have not demonstrated that they fall within the *MINE* test for hardship being that the termination of the stay or granting of the security would have "*catastrophic, immediate and irreversible consequences for the award debtor's ability to conduct its affairs*".[153]

85. Finally, the Respondent maintains that it would not be put in a "better" position than it otherwise might be in by reason of the security. As stated in *Sempra*:

> *The appropriate comparison is the scenario where annulment is not sought; in that case the award debtor would be obliged to comply with the award immediately upon its rendering,* i.e. *to make the payment that the bank guarantee is intended to ensure.*

D. COSTS

86. The Claimants say that the Committee should exercise its discretion on costs to order the Respondent to pay all costs associated with the opposition to the continuation of the stay because the opposition is meritless and the Respondent has taken contradictory

[149] Rebuttal Opposition, para. 4.7.

[150] Rebuttal Opposition, para. 4.11(a).

[151] Rebuttal Opposition, para. 4.11(c)

[152] Rebuttal Opposition, paras. 4.11(d)-4.11(e).

[153] Rebuttal Opposition, para. 4.14(e)(iii); **CLA-0261** *Maritime International Nominees Establishment v Republic of Guinea,* ICSID Case No. ARB/84/4, Interim Order No.1: Guinea's Application for Stay of Enforcement of the Award, 12 August 1988 ("***MINE***"), para 27.

positions in breach of the principle of estoppel.[154] They argue that costs should not be held over until the conclusion of the annulment phase.[155]

87. The Respondent contends that it would be wholly inappropriate for it to bear all of the costs related to the Stay Application.[156] Its opposition was not made in bad faith nor is it without merit. As set out above, it says it was not inconsistent to seek a continuation of stay of enforcement in the Hydro proceedings while opposing the continuation of stay in this case.[157] The Respondent requests that the Committee reserve the question of costs in relation to the Stay Application to the conclusion of the Annulment Application, when it will have a comprehensive view of the proceedings as a whole.[158] This is said to be standard practice.[159]

V. THE *AD HOC* COMMITTEE'S ANALYSIS

88. The Committee will set out its analysis by addressing:

a. First, the legal framework and test applicable to the Committee's discretion to grant the continuation of the stay of enforcement;

b. Secondly, whether the stay of enforcement should be continued;

c. Thirdly, if the stay of enforcement should be continued, whether it should be conditional upon the provision of security; and

d. Finally, whether costs should be ordered at this stage of the proceedings.

[154] Rejoinder to Opposition, para. 63.

[155] Rejoinder to Opposition, para. 64.

[156] Rebuttal Opposition, para. 5.2.

[157] Rebuttal Opposition, para. 5.2

[158] Rebuttal Opposition, para. 5.3; Tr. p. 66:8-66:23.

[159] See for example **RLA-0149** *Burlington v Ecuador*; **CLA-0262**, *Tethyan Copper v. Pakistan*, para. 179; **RLA-0139,** *Cube Infrastructure v. Spain*, para. 121; **CLA-0266,** *Perenco v. Ecuador*; **RLA-0150** *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Stay of Enforcement of the Award, 23 March 2018; **RLA-0144**, *Kardassopoulos v Georgia*; **CLA-0246**, *Libananco v. Turkey*.

A. LEGAL FRAMEWORK AND APPLICABLE TEST

89. The Committee begins its analysis by examining the legal framework relevant to the exercise of its discretion to grant a continuation of the stay of enforcement, and then considering the applicable test for the exercise of that discretion.

90. The text of Article 52(5) establishes that the Committee has wide discretion to stay the enforcement of the award. It provides that "*the Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision*". The relevant procedures to be followed with respect to a stay of enforcement are set out in Rule 54 of the ICSID Arbitration Rules.

91. The Committee's wide discretion under Article 52(5) must be read in the context of the enforcement bias set out in the ICSID Convention. Article 53(1) establishes that awards "*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*" and "*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*". Absent voluntary compliance, Article 54(2) provides that parties may seek recognition or enforcement in a Contracting State to the ICSID Convention simply by furnishing a competent court or other designated authority a copy of the award certified by the Secretary-General. Pursuant to Article 54(1), the Contracting State is obliged to recognize the binding nature of the award and must enforce the award.

92. The Committee is mindful of the enforcement regime in the ICSID Convention and considers that its wide discretion to grant a continuation of stay is tempered by the binding and enforceable nature of awards under the ICSID Convention. Thus, the Committee agrees with the following statement in *Kardassopoulos v. Georgia*:[160]

> *Consonant with the extraordinary nature of the annulment remedy, the stay of the enforcement is an exception to the ICSID enforcement regime. Stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant.*

[160] **RLA-0144**, *Kardassopoulos v. Georgia*, para. 26; See also **RLA-0149**, *Burlington v. Ecuador*, para. 73.

93. The Committee also shares the view of the *ad hoc* Committee in *Sempra Energy v. Argentina* which held that:[161]

> *A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour of granting a stay of enforcement. This follows, in the Committee's opinion, from the ordinary meaning to be given to the terms of Article 52(4) of the ICSID Convention, which authorizes the Committee to stay enforcement of the award pending its decision "if it considers that the circumstances so require". Although the ICSID Convention does not give any indication as to what circumstances would warrant a stay, it is nonetheless clear from this language that there must be some circumstances present that speak in favour of granting a stay. As a consequence, it cannot be assumed that there should be a presumption in favour of a stay or that the primary burden is placed on the award creditor to show that continuation of the stay should not be granted.*

94. It follows that the burden of proof lies with the Claimants, as the requesting party, to demonstrate the existence of circumstances that justify a departure from the pro-enforcement bias in the ICSID Convention and therefore require a continuation of the stay. This is further supported by Rule 54(4) of the ICSID Arbitration Rules which requires that "*a request [for a stay of enforcement] shall specify the circumstances that require the stay*" and by the decisions of prior ICSID *ad hoc* committees.[162]

95. As to the standard of proof, there is also some common ground between the Parties that there is no presumption in favour of granting a stay of enforcement. The Claimants accept, as explained by the *ad hoc* Committee in *Cube Infrastructure v. Spain*, that:[163]

> *... in assessing the circumstances asserted by each of the Parties, and in determining the appropriate standard of proof, there is no effective presumption either in favour or against continuation of a stay. Rather, and consistent with the view expressed by other, in particular more recent* ad hoc *Committees, the Committee must consider the specific facts and evidence relied on by Spain, and in so far as relevant by Cube and Demeter, whereby "the circumstances must be specific, and allegations of*

[161] **RLA-0148**, *Sempra Energy v. Argentina*, para. 27

[162] See for example, **RLA-0144**, *Kardassopoulos v. Georgia*, para. 26; **RLA-0149**, *Burlington v. Ecuador*, para. 75; **RLA-0148**, *Sempra Energy v. Argentina*, para. 27.

[163] Rejoinder to Opposition, para. 50; **RLA-0139**, *Cube Infrastructure v. Spain*, para. 127.

> *harm must be substantiated by 'specific evidence and data' that give rise to a 'particularized fear of harm'".*

96. The Parties otherwise do not agree on the proper approach to the exercise of the Committee's discretion. It is helpful at this point of the analysis to briefly review the past decisions of *ad hoc* Committees discussing the proper approach to the Committee's exercise of discretion. The Committee does not consider these decisions to be binding precedents but recognizes that they can be instructive.

97. Some past decisions suggest that the exercise of the Committee's discretion involves undertaking a balancing exercise of the Parties' interests to determine whether the circumstances of the case require a stay.[164] In addition to the *ad hoc* Committee in *Tethyan Copper Company*,[165] which found that in exercising its discretion the Committee should balance the overall interests affected and the circumstances to determine whether the stay on enforcement should be maintained, the *ad hoc* Committee in *Kardassopoulos v. Georgia* stated, having explained the exceptional nature of the stay of enforcement in the context of the ICSID Convention, that:[166]

> *An* ad hoc *committee enjoys rather all latitude to find the proper balance between the interests of the parties in a given case and the legitimate right to enforce the award in order to rule on the request for a stay presented to it pursuant to Article 52(5) of the ICSID Convention, with or without conditions.*

98. Further, the *ad hoc* Committee in *Perenco v. Ecuador* said:[167]

> *In sum, the Committee will exercise its discretion in view of balancing the interests of both Parties by appreciating the circumstances as specified by them.*

In that case, the *ad hoc* Committee also discussed the criteria for determining whether the circumstances require a stay, and explained:

> *Evidently, the exercise of discretion must be based on retraceable rationality and not be arbitrary. As provided by the ICSID Convention, circumstances requiring a stay are guiding*

[164] Rejoinder to Opposition, para. 20.

[165] **CLA-0262**, *Tethyan Copper v. Pakistan*, para. 179.

[166] **RLA-0144**, *Kardassopoulos v. Georgia*, para. 29.

[167] **CLA-0266**, *Perenco v. Ecuador*, para. 70.

> *criteria. There are no pre-defined criteria nor can the possible criteria be examined in isolation. They are interrelated and may have higher or lower pertinence in light of the specific factual circumstances of the case. In the practice of* ad hoc *committees since 1985, a number of such recurrent criteria have emerged. In his commentary, Schreuer summarizes them as follows:*
>
> > *- the strength of the case for or against annulment,*
> > *- whether the party seeking the stay also furnishes security for the award,*
> >
> > *- the risk that there would be problems in recovering payment made in compliance with the award should it be annulled,*
> >
> > *- whether there is a dilatory motive underlying the application for annulment,*
> >
> > *- the prospect of prompt enforcement of the award if it is upheld, including enforcement that is unimpeded by problems arising from immunity from execution,*
> >
> > *- hardship to either party in the event that the stay is continued, or lifted,*
> >
> > *- possible irreparable injury to the award debtor in the case of immediate enforcement.*

99. On the other hand, it may be said that Article 52(5) does not require at a first instance that the Committee balance the interests of the Parties. For example, it was said in *Burlington v. Ecuador* that:[168]

> *As stated at the beginning of this analysis, the first step for the Committee is to determine whether circumstances exist that would require the continuation of the stay. Such circumstances are to be considered by themselves and to be proven by the party requesting the continuation of the stay. If the determination is favorable to the continuation of the stay, then the Committee may consider other factors such as those argued by the Claimant. In the view of the Committee, "proportionality" is not an additional step in the Committee's analysis, the latter to be based only on the circumstances proven by the applicant. If the Committee were to find that the circumstances pled are not proven, proportionality cannot compensate for the lack of proof of the circumstances that would require the continuation of the stay.*

100. In that case, the *ad hoc* Committee rejected Ecuador's application for stay because it failed to prove that the termination of the stay would lead to severe consequences for

[168] **RLA-0149**, *Burlington v. Ecuador*, para. 78.

its ability to conduct its affairs.[169] This was the only circumstance it had pled that required the continuation of the stay of enforcement.

101. The discussion above illustrates that the precedents do not speak clearly with one voice on the proper approach to the Committee's discretion to grant a continuation of a stay. Having considered the relevant legal framework and the past decisions of *ad hoc* Committees, the Committee is of the view that the most appropriate approach to the exercise of its discretion involves two steps. The first step requires the Claimants to establish the existence of particularized circumstances requiring the continuation of the stay, which the Committee agrees is an exceptional remedy, and in doing so the Claimants must substantiate their allegations with evidence. As revealed by a review of the authorities, and identified by the Claimants, the relevant factors in the discretionary criteria include the risk of non-recoupment from the Respondent should the Annulment Application be successful, including problems arising from immunity from execution, and the prospect of prompt enforcement of the award if it is upheld.

102. In the event that the Claimants are able to establish the existence of such circumstances, the Committee would proceed to the second step and assess whether, having regard to all the relevant circumstances and facts, a continuation of the stay should be granted. As explained in *Burlington v. Ecuador*:[170]

> *According to Article 52(5), the Committee has to appreciate first whether circumstances are present that make it necessary to stay enforcement or continue the provisional stay of enforcement. Once the Committee has concluded that such circumstances exist, then it may decide in favor or against the continuation of the stay. The Committee emphasizes the term "may" because even when the required circumstances are present, a committee may decide against the continuation of the stay of enforcement. This wide discretion of the Committee in making its decision is compounded by the unspecified nature of the circumstances that may lead an annulment committee to conclude that they require that enforcement be stayed.*

103. In the Committee's view, the assessment of all the circumstances may involve for example, a consideration of factors such as the prospect of compliance by the

[169] *Ibid,* para. 85.

[170] *Ibid*, para. 70.

Claimants, the risk of non-recovery, a comparison of the risk of irreparable harm to either party and the dilatory character of the Annulment Application.[171]

104. However, whether the Annulment Application will ultimately prevail is an irrelevant factor. The Committee should not undertake a preliminary assessment of the prospects of the Annulment Application to determine whether the request for stay should be granted or not.[172] In this respect, the applicable test differs from the approach commonly taken in domestic courts where the prospects of the underlying application succeeding is a relevant factor to take into account.

B. ANALYSIS OF THE CIRCUMSTANCES

105. With respect to the first step of analysis, the Claimants essentially rely on the risk of non-recoupment as the circumstance requiring a continuation of the stay. The Committee concludes that the evidence sufficiently supports a finding that, if the stay was to be lifted and Award monies paid to the Respondent, the circumstances give rise to a real risk of non-recoupment which requires a continuation of the stay. It is widely recognized that the risk of non-recoupment is a factor that can warrant the continuation of a stay.[173] The risk of non-recoupment in this case is primarily demonstrated by the Respondent's history of non-compliance with adverse decisions in the context of an apparent political resistance to awards made against the Respondent in investor-state disputes.

106. It should be noted at the outset that the Committee does not consider it necessary to reach a conclusion on the issue of whether the Respondent is *generally* compliant with its international obligations or not, which is an issue that has been hotly debated between the Parties even after the Stay of Enforcement Hearing. Nor does the Committee consider it necessary to make any findings about the position under Albanian law on requests for enforcement. However, it is clear on the evidence that there are multiple instances where the Respondent's discharge of its obligations is pending or in delay, showing that the Respondent is non-compliant with its obligations in at least some instances. By way of example, the judgment in *Delijorgji v. Albania*

[171] See for example, **RLA-0149** *Burlington v. Ecuador*, paras. 77-78.

[172] Rejoinder to Opposition, para. 38; Tr. pp. 26:24- 27:2 (Mr Webster); See **RLA-0148**, *Sempra Energy v. Argentina*, para. 25; **RLA-0139**, *Cube Infrastructure v. Spain*, para. 139.

[173] **CLA-0262**, *Tethyan Copper v. Pakistan*, para. 83.

(No. 6858/11) was made final on 14 September 2015 and the payment deadline was fixed for 14 December 2015, but execution is still processing to date.[174] Indeed, the Respondent acknowledges that there are instances of non-payment or delayed payment and remarks that "[t]*here will always be cases which, for one reason or another, take longer to enforce*".[175]

107. In addition to this history, the Committee is moreover not persuaded by the Respondent's assurances that it will promptly repay the Claimants to the extent that the Award is annulled. The Respondent says that there is no real risk of non-recoupment because:[176]

> *as a sovereign State* [the Respondent] *will plainly be able to afford to repay the sum of EUR 2,326,601 should the Committee uphold the Applicants' Application for Annulment. Indeed, the Applicants' associates have recently successfully obtained enforcement of the award in the Hydro ICSID Arbitration (which is itself subject to annulment proceedings issued by the Respondent) in various fora.*

108. While the Committee accepts that the sum of EUR 2,326,601 is not significant in the context of Albania's state budget, it is notable that Updated Annex A identifies cases in which payment is outstanding for significantly lower sums. Further and more to the point, it is evident that there is political resistance in Albania regarding compliance with and enforcement of adverse decisions on investor-state disputes. Of particular relevance are the findings made in the tribunal's award in the Hydro ICSID proceedings and the Respondent's response to those proceedings, which the Committee sets out briefly in the following paragraphs.

109. The Hydro ICSID tribunal concluded that the Respondent had engaged in a political campaign against foreign investors and found that:

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[174] Reply to Response to Updated Annex A, dated 23 July 2021, p. 16; **C-0153**, Information relating to payment awaited or information received incomplete, Status as of 10 February 2021; **R-090**, Updated Action Report provided by the Albanian Government to the Department for the Execution of Judgments of the ECHR dated 21 December 2016.

[175] Respondent's Letter to the *ad hoc* Committee, dated 23 July 2021, p. 3 (Reply to Response to Updated Annex A).

[176] Rebuttal Opposition, para 3.16.

a. "*Prime Minister Rama explicitly stated that he considered the government to be at 'war' with certain investors, including the Claimants, and that the war had been successful". He went on to say that the executive government 'will shake the foundations of the judicial system' in a way that those judges who had 'become part of the crime cannot even imagine*"; and [177]

b. "*the Prime Minister's comments are best read as indicating a political campaign against, at least, 'that kind of investor'… This reading is further supported by the weaknesses identified in the money laundering allegations*".[178]

110. In response to the Hydro ICSID award, Finance Minister Anila Denaj stated that "[o]*nce all the courts decide and when it's decided they will be paid, they will be paid. Fines are not the right word, they are obligations. The state budget will pay them.*"[179] However, contrary to the obligation to immediately satisfy the award, as at the date of the Stay of Enforcement Hearing, the award had still not been paid. Thus, the Respondent did not pay the sums awarded under the Hydro ICSID award when it was issued, when its application to stay the enforcement of the award was rejected or when its application to annul the award was rejected. In explaining this at the Hearing, the Respondent stated: [180]

> *Now, the annulment application was only rejected really relatively recently, at the start of April 2021. As the Committee can probably imagine, this is a sensitive issue. It's a controversial award, not least because it's made against the backdrop of criminal proceedings against some of the Claimants, including in respect of money laundering.*
>
> (Committee's emphasis)

[177] **C-0137**, *Hydro Award*, para. 713.

[178] *Ibid*, para. 715.

[179] **C-0146**, "Albanian Minister of Finance Anila Denaj said the government will not pay the fine to Francesco Becchetti until a final decision has been ruled", dated 3 December 2020, p. 3.

[180] Tr. p. 55:13-55:19 (Mr Webster).

111. Following the Hydro ICSID annulment decision, comments by members of the Albanian government about the efficacy of the award have continued to be equivocal. On April 8, 2021 Prime Minister Rama stated:[181]

> *And third, we have won 3 trials, and the last thing I am telling you is that this is not a finished war. I cannot say more than that, it is a matter of war being waged, there is an alternative plan and there are strategies to move forward, but this war is not over.*
>
> (Committee's emphasis)

Then, in an interview on April 16, 2021:[182]

> *Fevziu: but how will you pay zero, there are international rules that force you to pay ...*
>
> *Rama: I can't say it, so I can't say it, but I know what I'm talking about. The Albanian State will pay to him ZERO and he will pay to the Albanian State, remember my words here! How, I cannot say, because it is a question ...*
>
> *Fevziu: ... legal question ...*
>
> *Rama: ... it is a question of strategy ... and it is not my strategy, but the strategy of those who deal with this affair.*

112. The Committee considers that comments made in the political arena should not be ignored. When all the circumstances are viewed together, it appears that there is a real risk that the Respondent might engage in tactics to resist enforcement of an adverse decision and make the recovery of funds difficult. The Committee concludes that there is sufficient doubt about the prospect of the Respondent returning monies collected under the Award to the Claimants in a timely and effective manner should the Committee decide to annul the Award.

113. Although no evidence has been produced by the Claimants with respect to their financial position, the Committee does not consider this to be fatal to the Claimants' case. In the view of the Committee, it remains necessary to grant the stay on

[181] **C-0161**, Excerpt, transcript and translation of the opinion expressed by Prime Minister Edi Rama in the program "LOG" of Endri Xhafo on ABC News TV dated 8 April 2021.

[182] **C-0164**, Transcript of the opinion expressed by Prime Minister Edi Rama on RTV KLAN dated 29 April 2021.

enforcement of the Award because the effect of lifting the stay would be to expose the Claimants to a real risk of being unable to recover funds from the Respondent.

114. Turning to the second step of the analysis, the Committee considers that, having regard to all the relevant circumstances and facts, a continuation of the stay should be granted in the present case. The Committee does not accept that the Respondent will suffer prejudice of a kind or degree warranting the provision of security. There is insufficient evidence to support an inference that the Claimants are unwilling to comply with the Award if it is upheld or that they lack the funds to pay the Award. Thus, the potential prejudice faced by the Respondent is the delayed receipt of funds from having to wait until the Committee' decision on the Annulment Application and the effort and expense of being put to defend the Annulment Application. The potential harm caused by delayed enforcement of the *prima facie* valid Award and the general increased risk that the Claimants may have no assets to enforce against due to the delay would be adequately compensated by the interest that will accrue on the Award. The additional expenses incurred to defend the Annulment Application would be compensated by a costs award. Further, as stated above, the amount in dispute is insignificant relative to the Respondent's state budget. Therefore, any potential harm that the Respondent will suffer is limited and, having regard to the proportionality of the respective harm potentially suffered by the Parties, the Committee determines that its discretion should be exercised to grant a continuation of the stay.

115. The Committee emphasizes that its decision regarding the continuation of the stay is without prejudice to the decision on the merits of the Annulment Application.

C. PROVISION OF SECURITY

116. It is common ground between the Parties that the Committee has the power to condition the grant of a stay upon the provision of security. The Committee agrees with the observation in *Kardassopoulos v. Georgia* that:[183]

> *The powers of the Committee to subject the stay of enforcement to conditions is implied by the broad discretion given to it under*

[183] **RLA-0144**, *Kardassopoulos v. Georgia*, para. 29.

Article 52(5) of the Convention to stay enforcement of the award "if it considers that the circumstances so require".

117. The Committee also shares the views of the committees in *Sempra Energy* and *Azurix Corp.* that the ordering of security is not a "counterbalancing right" to the negative effect of a stay of enforcement. This is because the right to seek an annulment is a right under the ICSID Convention and there is no requirement for any counterbalance in the form of security or otherwise.[184] The Committee is guided by the observation of the committee in *Azurix Corp* that "[t]*o apply a strict rule that the price for the stay is the provision of security appears to the Committee to create a positive gloss to the enforcement regime provided for under Section 6 of the Convention. Effectively, such an approach would be to add a provision that is neither express nor implicit in the ICSID Convention*".[185] The Committee considers that the purpose of requiring security is to provide the responding party assurance of compliance should the award be upheld.

118. The Committee agrees that the relevant enquiry is whether in all the circumstances it may be said that there is sufficient doubt as to whether the Claimants will comply with the Award in the event that it is upheld.[186] For the reasons provided in the paragraphs above, the Respondent has not demonstrated the existence of sufficient doubt.[187] Thus, the Committee finds that in the present case the stay of enforcement should not be conditional upon the provision of security because there are no circumstances beyond delay (which is compensated for by interest) that would warrant the provision of security. However, if there is a change of circumstances, consistent with its wide discretion under Article 52(5) of the ICSID Convention, the Committee has the power to modify its decision on the provision of security or even to lift the stay should it determine this to be appropriate in the changed circumstances. The Committee's decision should not be seen as an unconditional vote of confidence in the Claimants' ability and willingness to comply with the Award. If it can later be shown that there is sufficient doubt that the Claimants will comply with the Award because, for example, the Claimants have begun divesting monies or assets or otherwise evincing an intention

[184] **RLA-0148**, *Sempra Energy v. Argentina*, para. 97.

[185] **CLA-0274**, *Azurix Corp.*, para. 34.

[186] **RLA-0154**, *Enron*, para. 49.

[187] **RLA-0140**, *SoIEs Badajoz GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/38, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, para. 86. See also **CLA-0274**, *Azurix Corp.*, para. 25; **RLA-0154**, *Enron*, para. 49.

not to comply, the Committee will react quickly to ensure that the interests of both Parties are appropriately balanced.

D. COSTS

119. The Committee agrees with the Respondent that it is appropriate to decide costs at the conclusion of the annulment phase when it will have the benefit of viewing the proceedings as a whole. Accordingly, the Committee determines that costs should be held over.

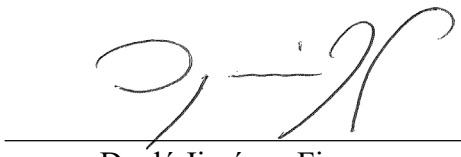
VI. DECISION

120. For the reasons set forth above, the Committee decides as follows:

(1) the stay of enforcement of the Award rendered on March 20, 2020 shall continue pending the Committee's decision on the Annulment Application;

(2) the stay of enforcement shall not be conditional upon the provision of security; and

(3) a determination on costs is reserved until the conclusion of the Annulment Application.



Dyalá Jiménez Figueres
Member of the Committee

Date: August 10, 2021

Johan Sidklev
Member of the Committee

Date: August 10, 2021

Professor Doug Jones
President of the Committee

Date: August 10, 2021