INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB
Claimants

v.

Kingdom of Spain
Respondent

ICSID Case No. ARB/15/42
Annulment Proceeding

DECISION ON STAY OF ENFORCEMENT OF THE AWARD

Members of the Committee
Ms. Wendy J. Miles, QC, President of the *ad hoc* Committee
Dr. José Antonio Moreno Rodríguez, Member of the *ad hoc* Committee
Prof. Dr. Jacomijn J. van Haersolte-van Hof, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Mr. Paul-Jean Le Cannu

---

26 March 2021

TABLE OF CONTENTS

I. BACKGROUND

1. This Decision addresses the request by the Kingdom of Spain (the "**Respondent**" or "**Spain**") for the continuation of the stay of enforcement of the ICSID award rendered on 5 August 2020 in the arbitration proceeding *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No. ARB/15/42 (the "**Award**").

2. On 30 September 2020, the Applicant filed its *Application for Annulment of the Award*, accompanied by Annexes 01 to 11 (the "**Application for Annulment**"). In its Application for Annulment, Spain requested, among other things: (i) a provisional stay of enforcement of the Award in accordance with ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2); and (ii) the continuation of the stay of enforcement of the Award until the Committee renders its Decision on the Application for Annulment.[1]

3. On 6 October 2020, the Secretary General of ICSID registered the Application and informed the Parties of the provisional stay of the Award pursuant to ICSID Arbitration Rule 54(2).

4. On 14 December 2020, the *ad hoc* Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Ms. Wendy J. Miles, QC, a national of New Zealand, President; Dr. José Antonio Moreno Rodríguez, a national of Paraguay; and Prof. Dr. Jacomijn J. van Haersolte-van Hof, a national of The Netherlands (the "**Committee**").

5. On 30 December 2020, the Parties confirmed by email that they had agreed: (i) to conduct the stay proceedings in the English language; and (ii) to extend the 30-day deadline until the Committee has reached a final decision on the stay.

6. On 14 January 2021, the European Commission filed an *Application for Leave to Intervene as Non-Disputing Party in the Annulment Proceedings* (the "**EC Application**").

[1] Application for Annulment, ¶ 52.

7. On 15 January 2021, the Applicant filed its *Submission in Support of the Continuation of the Stay of Enforcement of the Award*, together with Exhibits R-0005, R-0253, R-0382 to R-0385 and Legal Authorities RL-0126 to RL-0144 (the "**Submission**").

8. On 20 January 2021, the Committee invited the Parties to provide their observations on the EC Application.

9. On 29 January 2021, Hydro Energy 1 S.à r.l. ("**Hydro**") and Hydroxana Sweden ("**Hydroxana**") (together the "**Claimants**"), filed their *Response to Spain's Request for a Permanent Stay of Enforcement*, together with Annex A, Exhibit C-186 and Legal Authorities CL-159 to CL-184 (the "**Response**").

10. On 12 February 2021, the Respondent filed its *Reply in Support of the Continuation of the Stay of Enforcement of the Award*, together with Exhibit R-0386 and Legal Authorities RL-0147 to RL-0157 (the "**Reply**").

11. On 26 February 2021, the Claimants filed their *Rejoinder to the Kingdom of Spain's Submission in Support of Continuing the Provisional Stay of Enforcement of the Award*, together with an Updated Annex A and Exhibits C-189 to C-194 (the "**Rejoinder**").

12. On 3 March 2021, the Committee issued Procedural Order No. 1, which recorded the Parties' agreements and the Committee's decisions on procedural matters.

13. Section II of this Decision summarize the Parties' positions regarding the continuation of the stay of enforcement of the Award. Section III sets out the reasons for the Committee's decision. The Committee's decision and orders are recorded in Section IV.

II. THE PARTIES' POSITIONS

(i) The Kingdom of Spain

14. The Kingdom of Spain's starting point is that "*it is the prevailing practice for ICSID ad hoc annulment committees to stay enforcement of an award during the pendency of the*

annulment proceeding".[2] The Kingdom of Spain then submits that "*exceptional circumstances*" are required to depart from that "*standard practice*" or "*norm*".[3] It submits that no such circumstances exist in the current case and all circumstances "*typically considered*" weigh in favour of continuing the stay.[4]

15. According to the Kingdom of Spain, such typically considered circumstances include serious prejudice and harm to the Applicant in not continuing the stay, prejudice or harm to the Claimants in continuing the stay, history of compliance by the Applicant, and/or merits of the underlying Annulment Application.

a. Submissions on Applicable Legal Standard

16. First, the Kingdom of Spain's position is that "*it is the prevailing practice for ICSID ad hoc annulment committees to stay enforcement of an award during the pendency of the annulment proceeding*",[5] and that any departure from that requires the existence of exceptional circumstances. In support of its submissions as to prevailing practice, the Kingdom of Spain relies on statements in several stay decisions in earlier ICSID annulment proceedings to support that position, including:

a) *Occidental v Ecuador*, that "*[t]he prevailing practice in prior annulment cases has been to grant the stay of enforcement*";[6]

[2] Spain's Submission, para 5. *See also:* Spain's Reply, para 10.
[3] Spain's Submission, para 5.
[4] Spain's Submission, para 6.
[5] Spain's Submission, para 5. *See also:* Spain's Reply, para 10.
[6] Spain's Submission, para 8; Spain's Reply, para 23; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, 30 September 2013 ("*Occidental v Ecuador*"), para 50, RL-0127.

b) *Victor Pey Casado v Chile*, that "*absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic*";[7]

c) *MTD v Chile*, that "*unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed*";[8] and

d) *Tenaris II v Bolivian Republic of Venezuela*, that Article 52(5) "*does not intend to empower ad hoc committees to reject the request for a stay when the applicant pursues its legitimate right to have the award examined*".[9]

17. In its Reply, the Kingdom of Spain acknowledges that neither the ICSID Convention nor the ICSID Rules provide specific guidance on the factors to be considered in continuing a stay.[10] Moreover, it clarifies that it was not asserting that a continuation of the stay would be "*automatic*",[11] but rather that the Kingdom of Spain was not required to meet a standard of showing "*compelling*" or "*exceptional*" circumstances in order to succeed in its application.[12]

18. In support of its submission that it need not show existence of compelling or exceptional circumstances in support of a stay, the Kingdom of Spain relied upon several earlier

[7] Spain's Submission, para 9; *Víctor Pey Casado and Fondation v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010 ("*Victor Pey Casado v Chile*"), para 25, RL-0128.
[8] Spain's Submission, para 10; *MTD Equity Sdn Bhd. and MTD Chile S.A. v The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005 ("*MTD v Chile*"), para 28, RL-0130.
[9] Spain's Submission, para 15; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, 23 February 2018 ("*Tenaris II v Venezuela*"), para 104, RL-0139.
[10] Spain's Reply, para 19.
[11] Spain's Reply, para 26.
[12] Spain's Reply, paras 26-27.

decisions of *ad hoc* committees dealing with stay of enforcement,[13] including *OI European Group B.V. v Bolivarian Republic of Venezuela*,[14] *Burlington Resources Inc. v Republic of Ecuador*,[15] *Border Timbers v Zimbabwe*[16] and *Kardassopoulos v Georgia*.[17]

19. The Kingdom of Spain in its Reply further seeks to characterize the Claimants' submissions as imposing on it the burden of proof to demonstrate compelling circumstances.[18] The Kingdom of Spain denies that such a burden exists and makes clear that it does not seek to "*impose the primary burden on [the Claimants] to prove why the stay should not be granted*". Nevertheless, it does submit that certain matters are logically for the Claimants to demonstrate, such as whether it would suffer prejudice as a result of the stay.[19]

b. Submissions on Circumstances to be Considered

20. As to the circumstances to be considered, the Kingdom of Spain identifies the following three factors in its Submission and Reply:

1) the Annulment Application is well-grounded, serious, not frivolous or dilatory;

2) serious prejudice and harm to the Applicant if the stay is not continued; and

3) no prejudice or harm to the Claimants in continuing the stay.[20]

[13] Spain's Reply, paras 28-30.
[14] *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Annulment Proceeding, Decision On Stay of Enforcemnet of the Award, 4 April 2016 ("*OI European v Venezuela*"), RL-0152.
[15] *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Stay of Enforcement of the Award, 31 August 2017 ("*Burlington Resources Inc. v Republic of Ecuador*"), RL-0149.
[16] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Stay of Enforcement of the Award, 24 April 2017 ("*Border Timbers v Zimbabwe*"), RL-0150.
[17] *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision of the ad hoc Committee on the Stay of Enforcement of the Award, 12 November 2010 ("*Kardassopoulos v Georgia*"), RL-0148.
[18] Spain's Reply, para 33.
[19] Spain's Reply, para 38.
[20] The Committee deals with the three circumstances in the order they are pleaded in the Kingdom of Spain's Submission, which is slightly different to the listed five factors in Spain's Submission, para 6 (and indeed the four factors listed in Spain's Reply, para 39).

1) Application well-grounded and not dilatory

21. As to the first factor, the Kingdom of Spain acknowledges that in previous stay decisions, ICSID *ad hoc* committees have held that one of the circumstances to be considered in determining whether or not to stay enforcement is the *bona fides* of the underlying annulment application.[21] Accordingly, at paragraphs 13 to 18 of Spain's Submission, and paragraphs 41 to 50 of Spain's Reply, the Kingdom of Spain sets out its submissions as to why the Annulment Application has been made in good faith and is well-grounded and not dilatory, respectively.

22. First, the Kingdom of Spain submits that the Annulment Application has been made on the following grounds, which it describes as serious and in good faith:[22]

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

23. The Kingdom of Spain goes on to refer to three earlier ICSID *ad hoc* committee decisions, which suggest that it would be inappropriate to reject a stay request when the applicant is pursuing a legitimate right, including *Victor Pey Casado v Chile*, *Tenaris II v Venezuela* and *Perenco v Ecuador*.[23]

24. The Kingdom of Spain observes that it is not asking the Committee to make its ultimate determinations on the merits of the underlying Annulment Application, but rather to accept that it is a non-frivolous application.[24]

[21] Spain's Submission, para 13; Spain's Reply, para 41.
[22] Spain's Submission, para 13, ftn 7.
[23] Spain's Submission, paras 14-16; *Victor Pey Casado v Chile*, para 72, RL-0128; *Tenaris II v Venezuela*, para 104, RL-0139; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Caso No. ARB/08/6, Annulment Proceeding, Decision on Stay of Enforcement of the Award, 21 February 2020, para 69, RL-0138.
[24] Spain's Submission, para 18.

25. In its Reply, the Kingdom of Spain responds to the Claimants' submissions as to the merits of the underlying Annulment Application (summarized below) by reiterating that this is indeed a relevant circumstance and "*clearly weighs in favour of the stay*".[25]

2) Serious prejudice and harm to Applicant if stay is not continued

26. As to the second factor, in its Submission and Reply, the Kingdom of Spain describes the serious prejudice and harm that it submits would be suffered by it if the stay were not continued.[26] This is essentially a serious risk of non-recoupment from the Claimants if the Annulment Application were ultimately successful and the Award annulled in whole or part.

27. In its Submission, the Kingdom of Spain cites the *ad hoc* committee in *MTD v Chile*, that a sovereign state "*should not be exposed …[] … to the risk that payment made under an award which is eventually annulled may turn out to be irrecoverable from an insolvent claimant*".[27]

28. In its Reply, the Kingdom of Spain provides more expansive references to earlier *ad hoc* committee decisions on stay, including five recent cases against Spain: *SolEs Badajoz GmbH v Spain*,[28] *RREEF Infrastructure (GP) Limited v Spain*,[29] *Cube v Spain*,[30] *Masdar v Spain*[31] and *NextEra v Spain*.[32] The Kingdom of Spain points out that the stay was not continued in *Cube*, *Masdar* and *NextEra*, but was continued in *SolEs Badajoz* and

[25] Spain's Reply, paras 45-50.
[26] Spain's Submission, paras 19-39; Spain's Reply, paras 71-91.
[27] Spain's Submission, para 20.
[28] *Soles Badajoz GMBH v The Kingdom of Spain*, ICSID Case No. ARB/15/38, Annulment, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020 ("*SolEs Badajoz GmbH v Spain*"), RL-0155.
[29] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Stay of Enforcement of the Award, 28 October 2020 ("*RREEF Infrastructure (GP) Limited v Spain*"), RL-0147.
[30] *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 v Spain*"), CL-0180.
[31] *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Decision on the Kingdom of Spain's Request for a Continuation of the Stay of Enforcement of the Award, 20 May 2020 ("*Masdar v Spain*"), CL-0181.
[32] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision On Stay of Enforcement of the Award, 6 April 2020 ("*NextEra v Spain*"), CL-0179.

RREEF.[33] In both of the latter cases, the Kingdom of Spain submits that lack of financial resources and the risk of non-recoupment was a substantial factor. In *Cube*, *Masdar* and *NextEra*, on the other hand, the Kingdom of Spain submits that either insolvency was not alleged or there was no evidence to support the existence of a risk of non-recoupment.[34]

29. In the current case, the Kingdom of Spain submits that there is a high risk of non-recoupment because: (i) the Claimants' financial statements show total assets of €18.8 million, against an Award value of €30.875 million; (ii) that these financial statements show a high risk of non-recoupment; and (iii) that the Kingdom of Spain's previous experience with unrelated claimants highlights the difficulty of seeking recoupment.[35]

3) No prejudice or harm to the Claimants in continuing the stay

30. As to the third factor, in its Submission the Kingdom of Spain acknowledges that previous *ad hoc* committees have considered whether the continuation of the stay would have adverse economic consequences on the award creditor, citing *Quiborax S.A. v Plurinational State of Bolivia*.[36] However, it denies that the Claimants in the current case would be harmed.

31. The Kingdom of Spain's two primary arguments against Claimants' harm are that it will abide by its international obligations and that the Claimants would be entitled to payment of interest for any deferred payment.[37] In its Submission, the Kingdom of Spain asserts that "*[t]here is also no history of non-compliance*".[38] It notes that it takes its international obligations seriously and has already notified the Award to the European Commission for

[33] Spain's Reply, para 78.
[34] Spain's Reply, paras 84-86.
[35] Spain's Submission, paras 29-39.
[36] *Quiborax S.A. and Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on the Application to Terminate the Provisional Stay of Enforcement of the Award, 21 February 2017 ("*Quiborax S.A. v Plurinational State of Bolivia*"), RL-0132; Spain's Submission, para 40.
[37] Spain's Submission, paras 41-51.
[38] Spain's Submission, para 44.

its State Aid assessment "*thereby completing the steps that would allow its payment promptly upon reception of the EC authorization*".[39]

32. As to interest, the Kingdom of Spain referred to the approach followed by earlier *ad hoc* committees in *Caratube II v Republic of Kazakhstan*[40] and *Azurix v Argentina*,[41] where the committees both noted that interest payable would adequately compensate for delay.[42] The Kingdom of Spain went on to note that the Award interest rate in the current Award is at a rate of EURIBOR plus 1%, which is "*well above the Spain 10 years Government Bonds, which have a 0.277% yield as of [15 January 2020]*".[43]

c. Serious Prejudice to Applicant of Potential Conflict with EU Law

33. Finally, the Kingdom of Spain refers in its Submission and Reply at length to its obligations under EU law.[44] At paragraph 6 of its Submission, the Kingdom of Spain includes serious prejudice and harm caused to it by the lifting of the stay because it could result in a potential conflict with its obligations under EU law (and in particular European Commission State aid regulations), as one of the "*circumstances typically considered by ICSID Annulment Committees in determining requests for stays [that] weigh in favor of continuing the stay of enforcement here*".

34. However, when the Kingdom of Spain sets out its detailed pleadings in respect of this factor, it does not refer to or rely on this as a circumstance considered by other *ad hoc* committees or cite a single earlier decision in support. Instead, it sets out its substantive submissions on EU law that appear to form the basis for its Annulment Application.

[39] Spain's Submission, para 46.
[40] *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13 Annulment Proceeding, Decision on Stay of Enforcement of the Award, 12 December 2019, RL-0136.
[41] *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, RL-0129.
[42] Spain's Submission, paras 47-48.
[43] Spain's Submission, paras 49-50.
[44] Spain's Submission, paras 52-75; Spain's Reply, paras 92-133.

35. In both its Submission and Reply, the Kingdom of Spain sets out what it describes as "*a balancing exercise*", between submitting the Award to the European Commission now for a determination as to whether it constitutes incompatible State aid, or waiting until after any annulment decision to do so.[45] In its Reply, the Kingdom of Spain refutes the Claimants' argument (summarized below) that its reliance on the European Commission's State aid determination undermine its position on the stay, and explains that it is required to comply with its EU law obligations.[46] Having argued at length that it is "*committed to seek EC approval*"[47] and "*not to try to block compliance*",[48] the Kingdom of Spain confirms again at paragraph 127 of its Reply (as stated earlier in its Submission, paragraph 46) that it already notified the Award to the EC on 3 September 2020,[49] and further confirms that it received EC acknowledgement of that notification on 6 November 2020,[50] and that the EC's clearance is currently pending.[51]

36. The Kingdom of Spain then goes on to note that "*while the EC's clearance is pending, the Member State has a* standstill obligation *which prevents it [from] making any sort of disbursement*".[52]

(ii) The Claimants

37. The Claimants' starting point is the final and binding nature of ICSID awards as set out in Article 53(1) of the ICSID Convention. The Claimants submit that annulment pursuant to Article 52 is a narrow and exceptional remedy and that the "*Committee must determine*

[45] Spain's Submission, paras 61-74; Spain's Reply, paras 92-99.
[46] Spain's Reply, paras 100-126.
[47] Spain's Reply, para 112.
[48] Spain's Reply, para 112.
[49] Spain's Reply, para 127.
[50] Spain's Reply, para 129.
[51] Spain's Reply, para 130.
[52] Spain's Reply, para 130. Emphasis in original.

whether circumstances are present that necessitate a stay".[53] If they are, then the Committee may exercise its discretion to grant the stay of enforcement.[54]

38. The circumstances that the Claimants submit have been taken into account by previous *ad hoc* committees are: (i) existence of a dilatory motive; (ii) prospects of non-compliance by the award debtor; (iii) evidence of hardship to the applicant; and (iv) prospects of recoupment from the award creditor if the annulment is successful.[55] The Claimant goes on to assert in its Response and Rejoinder that the Kingdom of Spain bears the burden of proof to demonstrate that the stay is required in this case.[56]

a. Submissions on Applicable Legal Standard

39. In relation to the applicable legal standard, the Claimants relies on three primary points (summarized at paragraph 10 of the Response): (i) the finality of ICSID awards and narrow and exceptional remedy of annulment; (ii) the granting of stays in ICSID proceedings being the exception not the rule; and (iii) the burden of proof lying with the Kingdom of Spain to demonstrate that a stay is required in this case.

40. First, in relation to the finality of awards and the exceptional remedy of annulment, the Claimants refer to Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Rules as requiring a two-stage analysis. The first is whether circumstances are present to necessitate a stay and the second is to exercise discretion whether or not to continue the stay if such circumstances exist.[57]

41. In relation to finality of awards, the Claimant refers to the language of Article 53(1) of the ICSID Convention and the *ad hoc* committee decisions on stays of enforcement in three earlier annulment proceedings:

[53] Claimants' Response, para 14.
[54] Claimants' Response, para 14.
[55] Claimants' Response, para 47.
[56] Claimants' Response, paras 41-46; Claimants' Rejoinder, paras 30-36.
[57] Claimants' Response, para 14.

a) *Antin v Spain*,[58] where "*[t]he Committee considers that the need to respect the finality of the award calls for greater restraint in deciding whether a stay of enforcement should be granted*";[59]

b) *Cube v Spain*, where "*the Committee is of the view that a stay is an exceptional remedy in the context of the ICSID system*";[60] and

c) *SGS v Paraguay*,[61] where the Committee concluded that "*the binding nature of the award is the rule, whereas its annulment is the exception*".[62]

42. The Claimants sought to reinforce their argument as to the exceptional nature of a stay by referring to the language of Article 53(1) of the ICSID Convention that "*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*".[63] The Claimants relied on *Kardassapoulos v Georgia* and *Sempra v Argentina*[64] to reinforce the binding nature of a final award under the ICSID Convention.[65]

[58] *Infrastructure Services Luxembourg S.à r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019 ("*Antin v Spain*") CL-0178.
[59] Claimants' Response, para 16.
[60] Claimants' Response, para 17.
[61] *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award, 22 March 2013, CL-0165.
[62] Claimants' Response, para 18.
[63] Claimants' Response, para 19.
[64] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 5 March 2009 ("*Sempra v Argentina*"), CL-0161.
[65] Claimants' Response, paras 20-21.

43. In order to support its submission that the remedy of annulment is narrow and exceptional, the Claimants relied on the *ad hoc* committee decisions on stay of enforcement in *Total v Argentina*,[66] *Burlington v Ecuador* and *SGS v Paraguay*.[67]

44. Secondly, in relation to a stay of enforcement being the exception rather than the rule, the Claimants referred again to Article 52(5) of the ICSID Convention and the language therein that the enforcement of an award may be stayed if the Committee "*considers that the circumstances so require*".[68] In support of that proposition, the Claimants rely on the *ad hoc* committee decisions on stay of enforcement in *Kardassapoulos v Georgia*, *Antin v Spain*, *Valores Mundiales v Venezuela*, *OI European v Venezuela* and *Border Timbers v Zimbabwe*".[69]

45. The Claimants focus in particular on the stay decision in *Antin v Spain*, and the *ad hoc* committee's observation that Article 52(5) "*makes clear that a stay should be continued only if there are circumstances requiring such a stay*".[70] They further note that the *Antin* committee observed that "*stays may only be granted in cases where there are special or particular circumstances that bring the case outside the run of usual annulment applications and which compels the granting of a stay*".[71]

46. In their Rejoinder, the Claimants rebut the Kingdom of Spain's argument that it is not required to show that exceptional circumstances exist in order to obtain a stay of enforcement, which the Claimants call a 'straw man'. According to the Claimants, the Kingdom of Spain must prove, based on objective evidence, that the circumstances so require a stay.[72]

[66] *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Stay of Enforcement of the Award, 4 December 2014 ("*Total v Argentina*"), CL-0166.
[67] Claimants' Response, paras 22-25.
[68] Claimants' Response, para 28.
[69] Claimants' Response, paras 29-38.
[70] Claimants' Response, para 37.
[71] Claimants' Response, para 38.
[72] Claimants' Rejoinder, para 17.

47. However, the Claimants reiterate in their Rejoinder that, in their submission, stays are an exceptional remedy, reflecting the final and binding nature of the award and the exceptional nature of the remedy of annulment.[73] This, according to the Claimants, is the legal standard "*based on consistent ICSID case law on the point*".[74] The Claimants then reiterate and expand on their earlier discussion of the aforementioned cases to support their point.

48. Thirdly, in relation to the Kingdom of Spain bearing the burden of proof, the Claimants submit that the language of Article 52(5) of the ICSID Convention "*imposes the burden of proof on Spain to establish that circumstances exist which require a stay*". The Claimants rely on the *ad hoc* committee decisions on stay in *Masdar v Spain*, *NextEra v Spain* and *Karkey v Pakistan*[75] to support its arguments as to the burden of proof.[76]

49. In their Rejoinder, the Claimants submit that the Kingdom of Spain has failed to discharge its burden of proof and rebut its argument that the Claimant must prove that it will suffer prejudice as a result of the stay.[77] In particular, the Claimants submit that there is no such burden on them based both on the language of the ICSID Rules and on earlier *ad hoc* committee decisions on stay of enforcement.[78] The Claimants relied on the decisions cited in their Response, and responded to the Kingdom of Spain's references to *Standard Chartered v Tanzania*,[79] stating that the *ad hoc* committee in that decision on stay did not indicate that one particular party had the burden of proof.[80]

[73] Claimants' Rejoinder, para 20.
[74] Claimants' Rejoinder, para 20.
[75] *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Decision on the Stay of Enforcement of the Award, 22 February 2018, CL-0175.
[76] Claimants' Response, paras 41-45.
[77] Claimants' Rejoinder, paras 30-31.
[78] Claimants' Rejoinder, para 31.
[79] *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, CL-0171.
[80] Claimants' Rejoinder, para 36.

b. Submissions on Circumstances to be Considered

50. As to the circumstances that the Claimants submitted were taken into consideration by previous *ad hoc* committees in decisions on stay, they summarized these at paragraph 47 of the Response and paragraph 37 of the Rejoinder as: (i) existence of dilatory motive; (ii) prospects of compliance; (iii) evidence of hardship to the applicant; and (iv) prospects of recoupment. The Claimants submit that none of these factors weighs in favour of stay of enforcement. The Claimants' submissions in respect of each factor is summarized below.

1) Existence of dilatory motive

51. From the outset, the Claimants refute the Kingdom of Spain's submission that a stay should be continued provided the annulment application is not dilatory or frivolous and is well-grounded and made in good faith.[81] Citing the *ad hoc* committee decision in *Total v Argentina* in support, which observes that "*[a] serious application is the least that can be expected from an applicant*", the Claimant argues that the existence of a good faith annulment application cannot be enough for a stay of enforcement; such circumstance would not be unusual.[82] The Claimants also rely on *Antin v Spain*, and the observation of the committee in that case that "*[c]ircumstances that are usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay*".[83]

52. In their Rejoinder, the Claimants put this even more clearly, stating that "*while a committee may consider the frivolous or dilatory nature of an application to deny continuation of a stay, that does not mean that a non-frivolous or non-dilatory application militates in favour of, or creates a presumption for, a stay*".[84] In support of that contention, the Claimants cited further to the following four *ad hoc* committee decisions on stay of enforcement:

[81] Claimants' Response, para 49.
[82] Claimants' Response, para 49.
[83] Claimants' Response, para 50.
[84] Claimants' Rejoinder, para 41.

a) *Total v Argentina* ("*the mere fact of the application for annulment being serious or not evidently dilatory is not sufficient to continue the stay of enforcement*");[85]

b) *Antin v Spain* ("*stays may only be granted in cases where there are special or particular circumstances that bring the case outside the run of usual annulment applications and which compels the granting of a stay*");[86]

c) *NextEra v Spain* ("*save in such instances as when it could be said that the application for annulment is manifestly frivolous or obviously unmeritorious, the merits of the annulment proceedings is not something an ad hoc committee should be concerned with when determining a continuation of a provisional stay*");[87] and

d) *Cube v Spain* ("*rather than forming a requirement that must be demonstrated positively, the absence of good faith or the dilatory nature of the application serves to rebut a request for a stay*").[88]

53. The Claimants then proceed to make the affirmative argument that the Kingdom of Spain's application is indeed manifestly frivolous, both in respect of its intra-EU jurisdiction argument and its claims regarding applicable law.[89] In support of its submission that the intra-EU argument is frivolous, the Claimants refer to the fact that "*the* 'intra-EU' *jurisdictional objection has been raised in no less than 55 other arbitration cases, including 22 involving Spain*".[90] As to the applicable law arguments, the Claimants argue that the Kingdom of Spain's arguments are contradictory in that it claims that the tribunal failed to apply EU law and, at the same time, grossly or egregiously misapplied EU law.[91]

[85] Claimants' Rejoinder, para 41.
[86] Claimants' Rejoinder, para 42.
[87] Claimants' Rejoinder, para 43.a.
[88] Claimants' Rejoinder, para 43.b.
[89] Claimants' Response, para 57; Claimants' Rejoinder, paras 45-47.
[90] Claimants' Response, para 57; Claimants' Rejoinder, para 45.
[91] Claimants' Response, para 58; Claimants' Rejoinder, para 46.

54. In their Rejoinder, the Claimants submit that the Kingdom of Spain has not addressed these arguments, neither disputing that no annulment has succeeded on the intra-EU law point and that its arguments as to applicable law are contradictory.[92]

2) Prospects of compliance

55. As to prospects of compliance, the Claimants refer the Committee to the Kingdom of Spain's alleged "*undisputed history of non-compliance with other awards pending against it*", refusal to provide undertakings to other *ad hoc* committees and its position that compliance with the Award is conditional (in relation to its European Commission State aid arguments).[93]

56. As to non-payment of ICSID awards against it, the Claimants included a table of 14 cases, which they argue demonstrate its position in relation to the Kingdom of Spain's compliance. The complete table is reproduced below:[94]

[92] Claimants' Rejoinder, para 47.
[93] Claimants' Response, para 60; Claimants' Rejoinder, paras 48-52.
[94] Claimants' Response, para 61.

No.	Case	Date of Final Award	Stay Lifted?	Payment made by Spain?
1.	*Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Spain*, ICSID Case No. ARB/13/36	4 May 2017[54]	Yes	No
2.	*Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1[55]	16 May 2018	Yes	No
3.	*Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31	15 June 2018	Yes	No
4.	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain*, ICSID Case No. ARB/14/11	31 May 2019	Yes	No
5.	*9REN Holding S.à r.l. v. Spain*, ICSID Case No. ARB/15/15	31 May 2019	Not yet decided	No
6.	*Cube Infrastructure Fund SICAV and others v. Spain*, ICSID Case No. ARB/15/20	15 July 2019	Yes	No
7.	*SolEs Badajoz GmbH v. Spain*, ICSID Case No. ARB/15/38	31 July 2019	No	No
8.	*InfraRed Environmental Infrastructure GP Limited and others v. Spain*, ICSID Case No. ARB/14/12	2 August 2019	Yes	No
9.	*OperaFund Eco- Invest SICAV PLC and Schwab Holding AG v. Spain*, ICSID Case No. ARB/15/36	6 September 2019	Yes	No
10.	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain*, ICSID Case No. ARB/13/30	11 December 2019	No	No
11.	*Watkins Holdings S.à r.l. and others v. Spain*, ICSID Case No. ARB/15/44	21 January 2020	Not yet decided	No
12.	*Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Spain*, ICSID Case No. ARB/15/42	5 August 2020	?	No
13.	*RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain*, ICSID Case No. ARB/14/34	18 December 2020	No annulment filed	No
14.	*BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16	25 January 2021	No annulment filed	No

57. As to the Kingdom of Spain's European Commission State aid argument, the Claimants argue that this "*defeats Spain's request for a stay*".[95] In particular, the Claimants focus on

[95] Claimants' Response, para 67.

the Kingdom of Spain's position that its payment of the Award amount will be subject to approval under internal EU law processes. The Claimants describe this as an "*express refusal … to comply*" and in itself "*sufficient to dismiss Spain's Stay Application*".[96] In this regard, the Claimants referred to an earlier *ad hoc* committee decision in *Micula v Romania*, where the committee considered a similar argument by Romania to be evidence of a "*probable risk*", and imposed conditions on the stay of enforcement accordingly.[97] The Claimants further referred to earlier cases involving alleged conflicting internal processes with compliance with an award, including *Total v Argentina*, *Sempra v Argentina*, *OI European v Venezuela*, *Tenaris v Venezuela* and *Valores Mundiales v Venezuela*.[98]

58. In their Rejoinder, the Claimants submit that the Kingdom of Spain does not refute that it has not yet paid any of the aforementioned awards, but instead argues that non-payment of this particular award cannot reflect a history of non-compliance, and that every case is different.[99] The Claimants further submit that the Kingdom of Spain's submissions in respect of its obligation to make payment insofar as it is compatible with EU law further evidences its risk of non-compliance.[100]

3) Evidence of hardship to the applicant

59. As to evidence of hardship to the Kingdom of Spain, the Claimants refute the Kingdom of Spain's submissions as to an inability to recoup, inconvenience and/or hardship due to

[96] Claimants' Response, para 67.
[97] Claimants' Response, para 68, *quoting Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016 ("*Micula v Romania*"), para 35, CL-0167.
[98] Claimants' Response, paras 68-71; *Total v Argentina*, paras 107-108, CL-0166; *Sempra v Argentina*, paras 53, 104-105, 112, CL-0161; *Sempra v Argentina*, Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award, 7 August 2009, para 23, CL-0162; *OI European v Venezuela*, paras 107, 130, CL-0170; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, 24 March 2017 ("*Tenaris I v Venezuela*"), paras 90, 94; *Valores Mundiales, S.L. and Consorcio Andino S.L. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on the Request for a Continuation of the Stay of Enforcement of the Award, 6 September 2018 ("*Valores v Venezuela*"), paras 94, 113, CL-0176.
[99] Claimants' Rejoinder, para 51-54.
[100] Claimants' Rejoinder, paras 55-56.

financial penalty from the EC.[101] The Claimants, in response to the Kingdom of Spain's submissions, also focus primarily on risk of non-recoupment. In that respect, they submit that the Claimant entities have total assets of approximately EUR 18 million, and are substantial companies that are solvent with access to capital.[102]

60. In response to the Kingdom of Spain's submissions as to the lack of sense in money passing backwards and forwards between the Parties, the Claimants refer to the decision in *Cube v Spain*, which stated that "*[g]eneral considerations that not continuing a stay might result in money to pass back and forth are not sufficient …* ".[103]

61. In their Rejoinder, the Claimants responded specifically to the Kingdom of Spain's reliance on earlier *ad hoc* committee decisions on stay of enforcement in *SolEs Badajoz GmbH v Spain* and *RREEF Infrastructure (GP) Limited v Spain*, where the decision was taken to continue the stays. The Claimants submit that in both of those cases, the claimants had not offered any risk mitigation by way of escrow or other security. The Claimants observe that this is not the case here, where it has proposed security "*precisely to alleviate the concerns identified*" by those committees.[104]

62. Finally in relation to risk of harm to the Kingdom of Spain, the Claimants observe in their Rejoinder that any perceived risk that proceeds of any award enforcement will be moved throughout the Claimants' corporate entities is hypothetical, and alleviated by the proposed undertakings.[105]

4) Risk of harm to claimant

63. As to risk of harm to them, the Claimants submit that there is a real risk that the Kingdom of Spain will not pay and that the Claimants would suffer harm if the stay is not lifted,

[101] Claimants' Response, paras 72-85; Claimants' Rejoinder, paras 60-70.
[102] Claimants' Response, paras 73-80; Claimants' Rejoinder, paras 61-62.
[103] Claimants' Response, para 82; Claimants' Rejoinder, para 63.
[104] Claimants' Rejoinder, para 66.
[105] Claimants' Rejoinder, para 67-68.

including "*as a result of being pushed to the back of a long line of award-creditors*".[106] The Claimants submit that the payment of interest does not adequately compensate this harm, because post-award interest is compensatory and "*not a pretext to undermine the Award's finality*" (relying on *Antin v Spain*),[107] and that it does not adequately compensate for "*uncertainty, delay and deprivation*" (relying on *NextEra v Spain* and *Cube v Spain*).[108]

64. In relation to the Kingdom of Spain's submissions as to the adequacy of interest in light of the negative yield on three-year Spanish government bonds, the Claimants submit that this misconstrues the purpose of post-award interest, which is compensatory, and puts the Claimants in the position of "*effectively being forced to loan money to Spain*".[109]

c. Obligations under EU Law

65. The Claimants' primary response to the Kingdom of Spain's submissions that it would be unable to pay the Award before obtaining clearance from the European Commission because "*it constitutes notifiable State Aid*" is that the argument is both wrong and irrelevant.[110]

66. The Claimants submit that the Kingdom of Spain's EU law arguments are wrong because the Award is not State aid. In particular, it is not State aid because it fails to meet any of the four necessary conditions for State aid requiring notification under the TFEU.[111] Those conditions are, the Claimants submit, that the measure must confer an economic advantage, be granted selectively, from State resources and distort competition and affect trade between Member States.[112]

[106] Claimants' Response, para 88; Claimants' Rejoinder, para 71.
[107] Claimants' Response, para 89; Claimants' Rejoinder, para 73.
[108] Claimants' Response, paras 89-90; Claimants' Rejoinder, paras 74-75.
[109] Claimants' Response, para 88-91; Claimants' Rejoinder, para 77.
[110] Claimants' Response, para 92; Claimants' Rejoinder, para 79.
[111] Claimants' Response, paras 93-94; Claimants' Rejoinder, paras 96-98.
[112] Claimants' Rejoinder, para 96.

67. The Claimants submit that the Kingdom of Spain's contention that the European Commission determined that the payment of the Award is notifiable State aid when it issued its 10 November 2017 decision is wrong and the decision is inapposite in the current case.[113]

68. Finally, the Claimants contend that any discussion as to whether or not the Kingdom of Spain must refrain from paying the Award under EU law is irrelevant for determining the application for stay of enforcement. This is because, according to the Claimants, the Committee's mandate is derived from the ICSID Convention (and ECT) and not EU law.[114] In this regard, the Claimants refer to the *ad hoc* committee decisions on stay of enforcement in *Eskosol v Italy*,[115] *Kardassopoulos v Georgia*, *Antin v Spain*, *Cube v Spain, NextEra v Spain* and *Masdar v Spain*.[116]

d. Security

69. As an alternative to the lifting of the stay, the Claimants submit that such stay should be conditioned on the Kingdom of Spain's provision of appropriate security to counterbalance the risk.[117] The Claimants refer to the *ad hoc* committee decision on stay of enforcement in *Karkey v Pakistan* as demonstrating a "*clear trend towards committees imposing such conditions*".[118]

70. The Claimants further offered to hold any recovered funds in escrow (although this offer was not repeated in the Rejoinder) or to provide a binding and unconditional undertaking to repay those monies in the event that the Annulment Application is successful.[119]

[113] Claimants' Response, para 95; Claimants' Rejoinder, para 99-101.
[114] Claimants' Response, para 97-105.
[115] *Eskosol S.p.A. in liquidazione v Italian Republic, ICSID Case No. ARB/15/50*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, CL-0177.
[116] Claimants' Response, paras 99-105.
[117] Claimants' Response, paras 107-108; Claimants' Rejoinder, paras 106-108.
[118] Claimants' Response, para 108.
[119] Claimants' Response, paras 109-110; Claimants' Rejoinder, para 109.

III. THE COMMITTEE'S ANALYSIS

(i) Applicable Legal Standard

71. Article 52(5) of the ICSID Convention provides that the *ad hoc* committee "*may, if it considers that the circumstances so require, stay enforcement of the award pending its decision*". The Article 52(5) standard is two-fold: (i) the Committee has a discretion to stay of enforcement of the Award and (ii) it is permitted (but not required) to exercise that discretion where it considers that the circumstances in the current case so require.

72. Both Parties have relied extensively on earlier *ad hoc* committee decisions on stay of enforcement in order to support their respective arguments as to the "*prevailing*" legal standard. The Kingdom of Spain, citing to a number of earlier decisions, contends that the prevailing standard is automatically to stay enforcement absent exceptional circumstances. Although the Claimants' starting point is that there is no prevailing practice because the ICSID Convention requires an *ad hoc* committee to consider the specific circumstances of the case before it, they go on to contend that there must be compelling reasons for a stay of enforcement, citing to a number of earlier decisions in support.

73. The Parties' competing legal standards – on the one hand to stay unless exceptional circumstances and on the other hand to stay only in the event of compelling circumstances – necessarily lead to opposite presumptive starting points. These, in turn, would shift the burden of proof: the Kingdom of Spain considers it to be for the Claimants to furnish proof of exceptional circumstances to lift the temporary stay, whereas the Claimants consider it to be for the Kingdom of Spain to furnish proof of compelling circumstances to stay enforcement.

74. For the reasons explained below, the Committee is not persuaded by either party's submissions as to prevailing legal standards, and does not accept that there is a presumption either in favour of or against a stay of enforcement. Instead, the Committee is guided by the language of Article 52(5) of the ICSID Convention and other relevant parts of the ICSID Convention and Rules.

75. First, the Committee is of the view that the existence of a provisional stay of the Award pursuant to Rule 54(2) of the ICSID Rules does not create any presumption in favour of a stay of enforcement pursuant to Article 52(5). Rule 54(2) provides as follows:

> (2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

76. Rule 54(2) has automatic and mandatory effect: if the annulment application contains a request for stay, the Secretary-General *shall* inform the parties of the provisional stay of the award. However, the scope of that provisional stay is limited: it automatically terminates unless, within 30 days of the constitution of the committee a party requests its continuation and the committee decides to continue the stay.

77. Article 52(5) of the ICSID Convention, by contrast, is discretionary in nature. It requires consideration of such circumstances as may merit in favour of or against the grant of a stay of enforcement. The circumstances to be considered are dealt with below.

78. Secondly, the Committee does not accept that the existence of a final award pursuant to Rule 53(1) of the ICSID Convention necessarily creates any presumption against a stay of enforcement pursuant to Article 52(5). The Committee notes that Article 52(5) is contained in Section 5 of the ICSID Convention, dealing with 'Interpretation, Revision and Annulment of the Award'. The Convention provisions dealing with matters requiring further steps in respect of an award precede those dealing with the award's finality and ensuing effect. Section 6 'Recognition and Enforcement of the Award', which includes Article 53(1), follows the section dealing with factors that potentially qualify that finality.

79. In that regard, the Claimants place considerable emphasis on the binding and final nature of awards, as set out in Article 53(1), which provides that:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award ***except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention***. [Emphasis added.]

80. It is somewhat circular to argue that Article 53(1) of the ICSID Convention sets a presumption of finality for an *ad hoc* committee in considering a stay application, when Article 53(1) itself expressly provides that such finality will be subject to any stay.

81. Therefore, the Committee is satisfied that the ICSID Convention establishes neither a presumption in favour nor a presumption against granting a stay of enforcement. As to the prevailing practice, the Committee makes two observations. First, there does not appear to be any one 'prevailing practice'. Each party has presented geographic and/or temporal snapshots of groups of cases in a manner that supports its respective point. The Parties' ability to find support for opposite positions demonstrates that there is no single 'prevailing practice' across the body of earlier *ad hoc* committee decisions on stay of enforcement. Secondly, given the language of Article 52(5), the only relevant prevailing practice is that each *ad hoc* committee in each case must make its own determination on the basis of the circumstances in the particular case. That is indeed the approach that the Committee has determined it will follow.

82. As to the burden of proof, if either party relies on the existence of a circumstance to support the grant or refusal of a stay, respectively, that party must provide evidence in support of that circumstance and establish how it militates in favour of (or against) a stay of enforcement in the current case. In turn, it will be for the opposing party, where relevant, to rebut that evidence.

(ii) The Circumstances to be Considered

83. The Parties in this case have raised three separate circumstances to be considered in relation to the stay, which the Committee considers to be relevant to its decision. These include: (a) harm to the Kingdom of Spain in lifting the stay of enforcement; (b) harm to the

Claimant in granting the stay of enforcement; and (c) existence of dilatory motive in the underlying annulment application. Both Parties provided additional submissions as to the effect and/or relevance of EU law, in the Kingdom of Spain's case, at least partly, as part of its case on hardship to it if no stay is granted. The Committee will address EU law separately below.

a. Harm to the Kingdom of Spain if no Stay of Enforcement

84. The first factor that the Committee considers to be relevant to its decision whether or not to grant a stay of enforcement in this case is the harm or hardship likely to be suffered by the Kingdom of Spain if a stay were not granted.

85. The Kingdom of Spain identifies this harm as the prejudice it would suffer as a consequence being unable to recoup monies from the Claimants if the Annulment Application were ultimately successful and the Award annulled in whole or part. The Kingdom of Spain acknowledges that in order for this risk of harm to exist, there must be a valid concern as to the Claimants' ability or willingness to repay in the event of annulment. In that regard, it relies on the Claimants' financial statements. Those financial statements disclose total assets of €18.8 million, consisting primarily of equity interests in the hydro plants in Spain. Those assets fall short of the €30.875 Award damages amount.

86. The Kingdom of Spain referred to a number of earlier *ad hoc* decisions where the stay was continued due to risk of exposure to inability to recover from an insolvent claimant, including *MTD v Chile*, *SolEs Badajoz GmbH v Spain* and *RREEF Infrastructure (GP) Limited v Spain*. In relation to three recent decisions where no stay of enforcement was granted, the Kingdom of Spain acknowledged that either insolvency was not alleged or there was no evidence to support the existence of a risk of non-recoupment (*Cube v Spain*, *Masdar v Spain* and *NextEra v Spain*).

87. The Claimants in the current case are not insolvent; they are operational and appear to have almost €20 million in assets.

88. Other than the financial statements evidencing the shortfall between the Claimants' non-cash assets and the Award damages amount, there is no additional evidence that supports the existence of risk of non-recoupment as a result of insolvency if the Award were annulled.

89. As to any apparent financial statement shortfall, the Claimants offered to alleviate any concerns in this respect by either holding any recovered funds in escrow or providing a binding and unconditional undertaking to repay any recovered monies in the event that the Annulment Application is successful.

90. To that end, as noted by the Claimants, in the decisions to stay enforcement by both *ad hoc* committees in *SolEs Badajoz GmbH v Spain* and *RREEF Infrastructure (GP) Limited v Spain*, the claimants had not offered any risk mitigation by way of escrow or other security. That is not the case here; the Claimants have indeed proposed security in order to alleviate the concerns identified by the *ad hoc* committees in *SolEs* and *RREEF*.

91. The Kingdom of Spain alludes to further circumstances that may lead to harm, including but not limited to potential sale of the Award or movement of Award proceeds through the Claimants' corporate entities which risk putting these out of reach for any recoupment. As these are circumstances upon which the Kingdom of Spain seeks affirmatively to rely, it is for the Kingdom of Spain to provide evidence in support. It has not done so and, instead, raises both risks as hypothetical. Even if they were actual risks, they too would be alleviated by the Claimants' proposed undertakings.

92. For the reasons outlined above, including the Claimants' offer of an undertaking, the Committee does not consider that there are circumstances of harm or likely harm to the Kingdom of Spain in the current case that require a stay of enforcement arising out of risk of non-recoupment from the Claimants.

b. Harm to the Claimants in Granting the Stay

93. The second factor that the Committee considers to be relevant to its decision whether or not to grant a stay of enforcement in this case is the harm or hardship likely to be suffered by the Claimants if the stay were continued.

94. The Kingdom of Spain acknowledges that a stay can create adverse economic consequences for an award creditor (such as in *Quiborax S.A. v Plurinational State of Bolivia*), but that it does not in the current case because Spain would abide by its international obligations and the Claimants would be entitled to interest for any deferred payment under the Award. In relation to that interest, the Kingdom of Spain refers to the Award rate of interest (EURIBOR plus 1%) as being well above the Spain 10-year government bonds as evidence of no adverse economic consequence.

95. The Claimants do not accept that interest is an adequate antidote for stay of enforcement of the Award pending the annulment decision. They also do not accept that the economic adequacy of the interest rate should be measured in light of the negative yield on Spanish government bonds.

96. A final and binding arbitral award is an asset. It is an instrument of value and that value is measured by its enforceability. An award that is subject to a stay cannot be enforced and that inevitably will have an impact on its value. As the Claimants have submitted, the purpose of post-award interest is to compensate for non-payment of the Award damages. But once compensatory post-award interest has become payable, the award creditor has already suffered adverse consequences as a result of delayed recovery. Although interest would go some way toward financially compensating the Claimants based on the time value of money, it would not remedy the Claimants' inability to choose how to apply those monies in their own discretion (as the Claimants put it, placing them in the position of "*effectively being forced to loan money to Spain*").[120]

[120] Claimants' Response, para 91.

97. Similarly, the *ad hoc* committees in *NextEra v Spain* and *Cube v Spain* have both observed that interest does not adequately compensate for "*uncertainty, delay and deprivation*".[121]

98. The adequacy of interest as a remedy for a stay of enforcement is further dependent upon the likelihood that the Award will be voluntarily complied with (if not annulled).

99. In that respect, the Kingdom of Spain affirmatively asserts that it has "*no history of non-compliance*" with arbitral awards. This is unpersuasive. The Claimants have identified at least 14 outstanding arbitral awards against the Kingdom of Spain, only five of which (including the current case) are currently subject to a provisional or continued stay. Whilst the Committee is primarily concerned about the risk of the Kingdom of Spain's non-compliance with the current Award, as opposed to its history of compliance or non-compliance in respect of other unrelated awards, it must accept that there is a real risk, as identified by the Claimants, that they will be "*pushed to the back of a long line of award-creditors*".[122]

100. Moreover, the position of the Kingdom of Spain in notifying the Award to the European Commission for State aid assessment, and its confirmation that it will not comply with the Award until or unless it receives European Commission pre-authorization to do so, is inconsistent with its position in relation to its intention to comply with the current Award. It emphasizes its intention to rely on its international obligations but, at the same time, maintains that those obligations are subject to the decision of the European Commission under EU law. Meanwhile, the Kingdom of Spain has applied to annul the Award precisely on the grounds that the Tribunal allegedly failed to apply or misapplied EU law.

101. The Claimants describe this argument as defeating the Kingdom of Spain's request for a stay and as being an express refusal to comply with its obligations under the Award that is itself sufficient to dismiss the stay application. The Committee does not agree that the Kingdom of Spain's arguments go quite that far. It appears to confirm that, if it were to

[121] *NextEra v Spain*, para 93, CL-0179; *see also*: *Cube v Spain*, para 133.
[122] *See* para 63, *supra*.

receive European Commission authorization, it would proceed to pay the Award amount. This, according to the Kingdom of Spain, would constitute compliance with its international law obligations. However, the assertion that it will not pay the Award amount insofar as it is incompatible with EU law does somewhat undermine the Kingdom of Spain's assurances in respect of compliance.

102. Previous *ad hoc* committee decisions have considered conditions to compliance in the context of stay of enforcement applications. In *Micula v Romania*, the committee considered a similar argument by Romania to be evidence of a "*probable risk*", and imposed conditions on the stay.[123] Earlier cases involving alleged conflicting internal processes with compliance with an award, such as *Sempra v Argentina*, led to a similar outcome.[124] In other cases, including *Total v Argentina*, *Sempra v Argentina*, *OI European v Venezuela*, *Tenaris v Venezuela* and *Valores Mundiales v Venezuela,* the committee rejected the request to continue the stay of enforcement (or, in one case, imposed conditions).[125]

103. For the reasons outlined above, the Committee does consider that there are circumstances of harm or likely harm to the Claimants in the current case that militate against a stay of enforcement arising out of risk of uncertainty, delay and deprivation that cannot adequately be compensated by interest.

[123] *Micula v Romania*, para 35, CL-0167.
[124] *Sempra v Argentina*, paras 104-105, 117-118, CL-0161. The stay was subsequently lifted by the committee. *See Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 August 2009, para 23, CL-0162.
[125] *Total v Argentina*, paras 107-108, CL-0166; *OI European v Venezuela*, paras 107, 108, 130, CL-0170; *Tenaris I v Venezuela*, paras 90, 94; *Valores v Venezuela*, paras 94-96, 113, CL-0176. For *Sempra v Argentina*, *see* ftn 124, *supra*.

c. Existence of Dilatory Motive

104. The third factor that the Committee considers to be relevant to its decision whether or not to grant a stay of enforcement in this case is the existence of dilatory motive in the underlying annulment application (lack of merit).

105. In relation to the merits of the underlying Annulment Application, there was some disagreement between the Parties as to the starting presumption, if any, from which to examine those merits. The Kingdom of Spain asserted that the Annulment Application has been made in good faith and is well-grounded and not dilatory. The Claimants submitted in response that a 'serious' annulment application is not enough, in itself, to warrant a stay of enforcement. It is not clear that this was ever the Kingdom of Spain's position, as opposed to it seeking to pre-empt the Claimants' later argument that its Annulment Application was indeed dilatory and without merit.

106. In any event, the Committee accepts that the fact that an annulment application is not dilatory is not in itself sufficient circumstance to require a stay of enforcement. The Committee notes that the *ad hoc* committee in *Total v Argentina* similarly observed in this respect that "*[a] serious application is the least that can be expected from an applicant*"[126] and the committee in *Antin v Spain*, noted that "*[c]ircumstances that are usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay*".[127]

107. However, as the Claimants further observed, an *ad hoc* committee may consider the frivolous or dilatory nature of an annulment application as a circumstance that might militate against granting a stay of enforcement. This would bring the case outside the circumstances that are usual to most annulment applications, referred to by the *ad hoc* committee in *Antin v Spain*.

[126] *Total v Argentina*, para 84, CL-0166.
[127] *Antin v Spain*, para 67, CL-0178.

108. The Claimants did put forward an affirmative case that the Kingdom of Spain's annulment application is indeed manifestly frivolous, both in respect of its intra-EU jurisdiction argument and its claims regarding applicable law. Among other things, the Claimants referred to the intra-EU jurisdiction argument being raised in 55 previous cases and failing on each occasion (including in 14 cases against Spain).

109. Be that as it may, this Committee is required to determine whether or not to grant a stay of enforcement based on the circumstances.

110. As to the current case, the Committee is not in a position to determine at this time that the Kingdom of Spain's intra-EU or applicable law arguments are frivolous. It does not have full submissions in respect of those arguments and they indeed lie at the heart of the Annulment Application. That application will be determined following full hearing of both Parties in accordance with Procedural Order No. 1, the ICSID Rules and the ICSID Convention.

111. For the reasons outlined above, the Committee does consider that there are circumstances arising out of an alleged dilatory motive by the Kingdom of Spain that would militate against a stay of enforcement. Equally, the Committee does not consider that the fact of a non-dilatory annulment application would, in itself, suffice to amount to circumstances requiring a stay.

d. Relevance of EU Law to the Stay of Enforcement Decision

112. Finally, as noted above, the Kingdom of Spain alludes to serious prejudice and harm caused to it by the lifting of the stay because it could result in a potential conflict with its obligations under EU law, in particular European Commission State aid regulations. The Kingdom of Spain describes that as one of the circumstances "*typically considered*" as

weighing in favour of a stay of enforcement, without giving any previous instance of such a case.[128]

113. The Kingdom of Spain's central tenet on EU law in respect of the stay application appears to be that it would be prejudiced if it were to submit the Award to the European Commission now, for a determination as to whether it constitutes incompatible State aid, as opposed to waiting until after the decision on the Annulment Application. However, the Kingdom of Spain has confirmed that it has already notified the Award, so this does not appear to be a relevant consideration.

114. The Kingdom of Spain's reference to the existence of an EU law standstill obligation pending European Commission clearance again potentially puts into issue the substantive grounds in its Annulment Application in the application for a stay of enforcement. In particular, it requires the Committee to engage in a balancing of the relative merits of EU law compliance requirements and ICSID compliance requirements. It would be premature for the Committee to make any determination in respect of those substantive grounds at this time, prior to the Parties having fully pleaded their respective positions in accordance with Procedural Order No. 1 and the ICSID Convention and Rules.

115. This is further reinforced by the nature of the Claimants' response to the Kingdom of Spain's EU law arguments, which they submit are wrong because the Award is not State aid. Again, these are matters for the Annulment Application, not the current application to stay enforcement. The Claimants' further submit that EU law is irrelevant for determining the application for stay of enforcement because the Committee's mandate is derived from the ICSID Convention (and ECT) and not EU law. In this regard, the Claimants referred to *ad hoc* committee decisions in *Antin v Spain*, *Cube v Spain, NextEra v Spain* and *Masdar v Spain*.[129]

[128] Spain's Submission, para 6; Spain's Reply, para 13.
[129] *See* para 68, *supra*.

116. Each of those decisions recognised the potential conflict between Spain's obligations under EU law and its obligations under the ICSID Convention, but did not accept that such conflict could constitute a circumstance requiring a stay of enforcement. This Committee takes the same position in relation to the current stay application, based on the circumstances of the current case as presented to it in the Parties' respective submissions to date.

117. At the end of the day, it would be the underlying Award that potentially gave rise to any conflict. Insofar as there is a conflict, it therefore already existed as a consequence of the Award. This has been alluded to in the Kingdom of Spain's Annulment Application; that submission will be dealt with in the annulment proceedings, conducted in accordance with Procedural Order No. 1, the ICSID Rules and the ICSID Convention.

118. For the purpose of the decision whether or not to grant a stay of enforcement, this Committee is limited to circumstances of this case requiring a stay. It is not the purpose of a stay of enforcement to remedy a potential conflict between the Kingdom of Spain's EU law obligations and its obligations under the ICSID Convention. Among other things, as noted in *Cube v Spain*, a stay would be temporary; ultimately it would not resolve the ill that concerns the Kingdom of Spain.

e. Whether Security Should be Ordered

119. Specifically in order to alleviate any risk of harm to the Kingdom of Spain arising out of the Claimants' financial position affecting its ability to recoup, the Claimants offered to hold any recovered funds in escrow or to provide a binding and unconditional undertaking to repay those monies in the event that the Annulment Application is successful.

120. Whilst this Committee finds no circumstances of harm or likely harm to the Kingdom of Spain in the current case that require a stay of enforcement arising out of risk of non-recoupment from the Claimants, that finding is predicated on the Claimants' offer to provide security in respect of any recovered monies.

121. Therefore, the Committee considers that such security would be appropriate, in the form of a binding and unconditional undertaking to repay those monies in the event that the Annulment Application is successful, as offered.

IV. DECISIONS AND ORDERS

122. For the reasons stated above, the Committee:

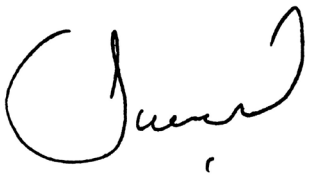
a. decides that the stay of enforcement of the Award should not be continued;

b. requires the Claimants, on or before 30 April 2021, to provide a binding and unconditional undertaking to repay any monies recovered in the event that the Annulment Application is successful in the following terms:

> Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB (the "**Hydro Parties**") hereby confirm that they undertake to promptly repay the Kingdom of Spain any and all amounts received in satisfaction of the Award rendered on 5 August 2020 (the "**Award**") to the extent that the annulment application is successful. The Hydro Parties further confirm that they undertake not to disburse or transfer any amounts received in satisfaction of the Award to their investors or to any other third party while the annulment proceeding is ongoing (or thereafter to the extent the annulment application is successful)[;][130]

c. reserves the issue of costs on this Application to a further order or decision.

[130] Claimants' Rejoinder, ftn 140. Emphasis in original.



Dr. José Antonio Moreno Rodríguez
Member of the *ad hoc* Committee

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

Ms. Wendy J. Miles, QC
President of the *ad hoc* Committee