



ABOGACÍA GENERAL DEL
ESTADO - DIRECCIÓN DEL
SERVICIO JURÍDICO DEL ESTADO

SUBDIRECCIÓN GENERAL DE
LOS SERVICIOS CONTENCIOSOS

Madrid, 7 February 2022

By email

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

In copy: Counsel for Claimants

Ref.: Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB Respondent on Annulment (also designated as the Claimants in this Proceeding) v. Kingdom of Spain Applicant on Annulment (also designated as the Respondent in this Proceeding) ICSID Case No. ARB/15/42, Annulment Proceeding

Dear Members of the *ad hoc* Committee,

1. The Kingdom of Spain respectfully requests the Ad hoc Committee to reconsider its Decision on Stay of Enforcement of the Award, dated 26th March 2021 (hereinafter “the Decision on Stay”) in light of the risk of non-recoupment of the amount of the Award in the event the Award is paid and subsequently annulled.
2. As the Committee will be aware, neither the ICSID Rules nor the Arbitration Rules expressly contemplate the possibility that an Arbitral Tribunal or Committee may reconsider a decision. However, while the ICSID rules and Arbitration rules do not expressly contemplate such a possibility, neither do they expressly prohibit it. In relation to the Request for Stay of enforcement, Rule 54 of the Arbitration Rules provides for the possibility that a Stay may be modified at the request of one of the parties.
3. Therefore the Respondent considers that the Committee has the possibility to reconsider its previously adopted Decision when in view of new evidence the content of the Decisions on Stay of Enforcement could certainly be affected.



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4. After the Committee's Decision on Stay, new information became available which shows there is substantial risk that the Kingdom of Spain would be unable to recoup payment of the Award should it be paid to Claimants and subsequently annulled.
5. In preparation for the hearing, the Kingdom of Spain located Claimants' 2020 financial statements¹ (Annex 1). As it will be developed this new information shows that Claimants have sold an interest in the Award, creating a real risk of non-recoupment should the Award be annulled.
6. In light of this development, Spain requests that the stay of enforcement should be re-instated.
7. The Decision on Stay recognized that a risk of non-recoupment may exist.² The Committee decided that the stay will be lifted contingent on Claimants' providing "*a binding and unconditional undertaking to repay any monies recovered in the event that the Annulment Application is successful.*"³
8. In accordance, the Committee requested the following assurance from Claimants (the "Assurance"):

*"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)."*⁴

¹ **Annex 1** Hydro Energy 1 S.à.r.l., Annual Accounts for the financial year ended December 31, 2020

² Decision on Stay, ¶¶ 88-89.

³ Decision on Stay, ¶ 122.

⁴ Decision on Stay, ¶ 122 (emphasis removed).



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9. The Decision on Stay states that the Assurance, which was provided by Claimants on 8 April 2021, should alleviate the risk of non-recoupment.⁵ However, Claimants appear to have figured out a loophole and to have taken advantage of it.
10. According to the Assurance, Claimants are not permitted to disburse or transfer any amounts received from Spain in satisfaction of the Award, but are not restricted from selling the rights to the Award to a third party and distributing the proceeds from that sale of rights to Claimants' shareholders. In that case, the third party would effectively own the rights to the Award and that third party is not subject to the Assurance. Thus, Claimants could technically honor the Assurance but in fact be unable to repay "*all amounts received in satisfaction of the Award*," because the funds will be in the hands of the third-party buyer of the rights to the Award. That third-party buyer would not be party to these proceedings or to the Assurance.
11. The foregoing is not a theoretical issue, but an actual problem. Based on publicly available information, HydroEnergy sold an interest in the Award to a third party. The 2020 financial statements of HydroEnergy state:

"On May 20, 2021, the Company entered into a funded participation agreement with a third party whereas the Company accepts to grant a participation interest in the award following the arbitration proceeding before the International Centre for Settlement of Investment Disputes Spain".⁶
12. This "participation agreement" was made after Claimants provided the Assurance to the Committee on 8 April 2021. Since HydroEnergy's financial statements for 2021 are not yet publicly available, it is unknown how much it was paid in exchange for this participation agreement, or any more details on the nature of that agreement.

⁵ Decision on Stay, ¶ 119 (stating: "*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.*").

⁶ **Annex 1** (Hydro Energy I S.à.r.l., Annual Accounts for the financial year ended December 31, 2020), p. 14 of PDF.



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13. This transaction appears similar to the one involving the award in 9REN v. Spain. Please note that 9REN v. Spain Decision on Stay is not in the public domain and in accordance with article 3 (13) of the IBA Rules shall be kept confidential by the Arbitral Tribunal and the Claimants in this annulment proceeding.

14. In this transaction, 9REN signed an agreement which gives a third-party (King Street Capital) a right to the award in that case.⁷ Due to this fact, which was publicly known prior to the decision on the continuation of stay in that case, the annulment committee concluded:

“132. These facts have not been convincingly rebutted by 9REN in its pleadings.

In particular, the Committee notes that:

a. Evidence has been provided by Spain that 9REN is a debtor to King Street Capital for the amount of the Award;

b. There is no reason not to believe that, as soon as the proceeds of the Award become available, namely with a lift of the stay of its enforcement, King Street Capital’s rights are immediately enforceable;

c. Despite its apparent solvency, 9REN’s financial statements show a gap between its current assets and the liability potentially arising from the annulment of the Award.

d. Despite 9REN’s assertion that is [sic] would have the ability to repay the Award amount, there is no evidence on the record supporting the assumption that, if required, the Award amount would be paid back.

e. It is therefore reasonable to assume that 9REN would face serious difficulties in paying back the amount of the Award to Spain if the Award were annulled by the present Committee.

133. A real risk of non-recoupment of the amount of the Award in the event of its annulment must therefore be deemed to exist in the instant case.⁸”

15. The committee in 9REN v. Spain recognized that given 9REN’s lack of assets and the sale of an interest in the Award, there was a real risk Spain would not be able to recoup the

⁷ Annex 2, 9REN v. Spain, Decision on Stay, ¶ 132.

⁸ Ibid, ¶ 133.



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balance of the award should an annulment be granted, and so it continued the stay of enforcement.⁹

16. The present circumstances are comparable to *9REN v. Spain*. *9REN* is a holding company with a single asset. Claimants are holding companies with no assets other than their interest in the hydroelectric facilities at issue in this arbitration (the “Hydro Plants”).¹⁰ *HydroEnergy*, established under the laws in Luxembourg, owns a 93% interest in *Hydroxana*.¹¹ The remaining 7% interest is not involved in this arbitration.¹² *Hydroxana*, established under the laws of Sweden, owns a 100% interest in the Spanish holding entities that hold the Hydro Plants.¹³ *HydroEnergy* is wholly-owned by a private equity fund through *Asper Renewable Power Partners 2*. While *HydroEnergy* appears to currently own the Hydro Plants, the private equity fund can dispose of the Hydro Plants at any time either to a third-party (via a sale) or transferring them to another company. Once the Hydro Plants are no longer owned by the private equity fund, *HydroEnergy* and *Hydroxana* will be empty shells with no assets to meet their obligations. Without any assets, Claimants would be unable to abide by the Assurance even if they intend to.

17. Due to *HydroEnergy*’s sale of an interest in the Award, a real risk of non-recoupment exists. Given this development, Spain requests that the stay of enforcement be re-instated.

18. As the Committee can confirm there is a real and serious risk that in the event that the Award is paid before a Decision of Annulment is taken by this Committee, the Kingdom of Spain will not be able to recover any amount paid to the Claimants.

19. The repayment undertaking submitted by *HydroEnergy* does not constitute sufficient security in view of the circumstances that have arisen since the adoption of the Decision on Stay¹⁴. The security submitted by the *HydroEnergy* parties in these annulment proceedings,

⁹ *Ibid*, ¶ 144.

¹⁰ **Annex 1** (*Hydro Energy 1 S.à.r.l.*, Annual Accounts for the financial year ended December 31, 2020), p. 9 of PDF.

¹¹ First Econ One Report, ¶¶ 17, 19.

¹² First Econ One Report, ¶ 18.

¹³ First Econ One Report, ¶¶ 17, 31-32.

¹⁴ *Ibid*, Section II



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in the Kingdom of Spain's view, would not be in accordance with the Committee's intention when it made the lifting of the Stay conditional upon adequate security being provided for the repayment of any amounts that may be paid to HydroEnergy in the event that the Award is ultimately annulled.

20. The Claimant's 2020 financial statements have been made publicly available after the Committee's Decision on the Stay, and therefore is a new fact that should be considered by the Committee in order to reconsider its Decision on the Stay.
21. In view of the above, the Kingdom of Spain respectfully requests the honorable Committee to reconsider its Decision on Stay of enforcement of the Award, 26th March 2021 and, consequently, declare grant the stay of enforcement of the Award until the final decision on the Application on Annulment is rendered.

Respectfully submitted,

