

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BayWa r.e. AG
(formerly BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH)
Respondent on Annulment/Claimant

v.

Kingdom of Spain
Applicant on Annulment/Respondent

(ICSID Case No. ARB/15/16)

Annulment Proceeding

PROCEDURAL ORDER NO. 2

ON THE STAY OF ENFORCEMENT OF THE AWARD

Members of the Committee

Prof. Dr. Dário Moura Vicente, President of the *ad hoc* Committee
Ms. Bertha Cooper-Rousseau, Member of the *ad hoc* Committee
Mr. Baiju S. Vasani, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Mercedes Cordido-Freytes de Kurowski

December 20, 2021

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I. PROCEDURAL HISTORY

1. On May 24, 2021, the International Centre for Settlement of Investment Disputes (“**ICSID**” or “**Centre**”) received from the Kingdom of Spain (“**Applicant**” or “**Spain**”) an Application for the annulment (“**Annulment Application**”) of the Award rendered on January 25, 2021 in ICSID Case No. ARB/15/16 (“**Award**”).
2. BayWa r.e. (“**BayWa**” or “**Claimant**” or “**Respondent on Annulment**”) and Spain are hereafter collectively referred to as the “**Parties**”.
3. On May 28, 2021, the Secretary-General of ICSID registered the Annulment Application, in accordance with Rule 50(2)(a) of the ICSID Arbitration Rules. Together with the notice of registration, the Secretary-General informed the Parties of the provisional stay of enforcement of the Award, in accordance with Rule 54(2) of the ICSID Arbitration Rules.
4. On August 16, 2021, the *ad hoc* Committee was constituted in accordance with ICSID Convention Article 52(3). Its members are Prof. Dr. Dário Moura Vicente, a national of Portugal, President of the Committee; Ms. Bertha Cooper-Rousseau, a national of The Bahamas; and Mr. Bajju S. Vasani, a national of the United Kingdom and the United States (“*ad hoc* **Committee**” or “**Committee**”).
5. On September 16, 2021, the Committee held a First Session by videoconference.
6. On September 27, 2021, the Committee issued Procedural Order No. 1 (“**PO 1**”) concerning procedural matters. The Parties’ agreement on the number, sequence and dates for the submission of the Parties’ pleadings concerning stay of enforcement, as indicated in Section 21.1 of PO 1, were set out in Annex A of PO 1: (i) Spain’s Memorial on stay of enforcement of the Award was to be filed by September 30, 2021; (ii) BayWa’s Counter-Memorial on stay of enforcement of the Award by October 21, 2021; (iii) Spain’s Reply on stay of enforcement of the Award by November 4, 2021; (iv) BayWa’s Rejoinder on stay of enforcement of the Award by November 18, 2021; and (v) the date for the issuance of the Committee’s Decision on stay of enforcement of the Award was “TBD” (to be determined).

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7. On September 30, 2021, Spain filed a *Memorial on the Stay of Enforcement of the Award* (“**Memorial on Stay**”).
8. On October 21, 2021, BayWa filed a *Counter-Memorial on Stay of Enforcement of the Award* (“**Counter-Memorial on Stay**”).
9. On October 22, 2021, the European Commission (“**EC**”) filed with the ICSID Secretariat an Application for Leave to Intervene as Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2) (“**EC’s Application**”).
10. On November 4, 2021, Spain filed a *Reply on the Stay of Enforcement of the Award* (“**Reply on Stay**”).
11. On November 5, 2021, each party filed observations on the EC’s Application.
12. On November 18, 2021, BayWa filed a *Rejoinder on Stay of Enforcement of the Award* (“**Rejoinder on Stay**”).

II. THE PARTIES’ POSITIONS

A. SPAIN’S POSITION

13. Spain submits that, absent exceptional circumstances, the prevailing practice of ICSID *ad hoc* annulment committees has been to stay enforcement of an award during the pendency of the annulment proceeding.¹
14. Spain contends that in the present case the stay of enforcement is justified given that: (i) it filed its Annulment Application in good faith²; (ii) Spain would be harmed if the stay is denied³; and (iii) BayWa would not be prejudiced if the stay is continued.⁴

1. The Applicable Legal Standard

15. Spain asserts with regard to the applicable law that it is necessary to resort to the sources of International Law listed in Article 38 of the Statute of the International Court of Justice

¹ Memorial on Stay, ¶ 4.

² Memorial on Stay, ¶¶ 11-13.

³ Memorial on Stay, ¶¶ 14-22.

⁴ Memorial on Stay, ¶¶ 6, 23-33.

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- (“**ICJ**”). According to these sources, Spain argues, the Committee should not lift the stay of enforcement:⁵ “*To lift the stay may lead to an international conflict as EU Law may be contravened as a result of said decision.*”⁶
16. Spain submits that pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(2), the Committee may continue the stay “*if it considers that the circumstances so require.*”⁷ It is Spain’s view that these provisions (i) neither provide specific guidance as to which factors should be considered by committees in their determination as to whether a stay of enforcement of an award should be lifted or not; nor (ii) make any reference to “exceptional” or “compelling” circumstances, used by BayWa in its arguments.⁸ In this regard, Spain submits that “*BayWa has manufactured a non-existent standard of ‘compelling circumstances’, not supported by the decision on which it relies.*”⁹
17. According to Spain, a vast majority of *ad hoc* committees, including in the *Occidental v. Ecuador* and *Victor Pey Casado* cases, have recognized the practice of granting the stay of enforcement, almost automatically.¹⁰ This is due, Spain argues, “*to the principle of respect to the sovereigns that is an actual and direct source of International Law.*”¹¹
18. Spain notes that annulment committees, as affirmed by the committee in *MTD v. Chile*, have found that, “*unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory*”, the continuation of the stay should be granted.¹²

⁵ Reply on Stay, ¶¶ 13-15.

⁶ Reply on Stay, ¶¶ 31-32.

⁷ Memorial on Stay, ¶ 7.

⁸ Reply on Stay, ¶¶ 17, 19.

⁹ Reply on Stay, ¶¶ 23-27, 29.

¹⁰ Memorial on Stay, ¶¶ 7-8, citing, among others: **RL-0134**. *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, September 30, 2013, (“**Occidental**”), ¶ 50; **RL-0135**. *Victor Pey Casado and Foundation “Presidente Allende” 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, May 5, 2010, (“**Pey Casado**”), ¶25. Reply on Annulment, ¶¶ 21.

¹¹ Reply on Stay, ¶ 21.

¹² Memorial on Stay, ¶9 (footnotes omitted).

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19. According to Spain, there are no circumstances in the present case that would warrant a departure from the above practice.¹³

2. Whether the Circumstances Require a Stay

20. Spain identifies the following circumstances to be considered by the Committee:

- a. that the Application is based on serious grounds, was made in good faith and is not dilatory;¹⁴
- b. that Spain would suffer prejudice and harm if the stay is not continued, risk non-recoupment, and be unduly burdened in case of recoupment;¹⁵
- c. that BayWa would suffer no harm if the stay is continued, given that the interest granted in the Award will compensate any delay in payment;¹⁶ and
- d. the risk of non-compliance if the annulment is not successful.¹⁷

21. Spain asserts to have met its burden of proof as to the circumstances that justify maintaining the stay of enforcement, and contends that BayWa must provide evidence that justify lifting the stay.¹⁸

i. THE APPLICATION HAS BEEN MADE IN GOOD FAITH AND IS NOT DILATORY

22. Spain submits that its Application is well-grounded, made in good faith, and is not frivolous or dilatory.¹⁹ Good faith is presumed, therefore BayWa's claims of bad faith must be proven.²⁰

23. Spain reiterates its position, as argued in its Application, that in the Award the Tribunal exceeded its powers, going beyond its jurisdiction, by (i) failing to apply the proper law

¹³ Memorial on Stay, ¶10.

¹⁴ Memorial on Stay, ¶¶ 11-13.

¹⁵ Memorial on Stay, ¶¶ 14-22.

¹⁶ Memorial on Stay, ¶¶ 23-33; Reply on Stay, ¶ 18.

¹⁷ Reply on Stay, ¶ 38.

¹⁸ Reply on Stay, ¶¶ 33-37.

¹⁹ Memorial on Stay, ¶ 11; Reply on Stay, ¶¶ 40-46.

²⁰ Reply on Stay, ¶ 44.

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with regard to the intra-EU objection and wrongly interpreting Article 26 of the Energy Charter Treaty (“ECT”); (ii) disregarding the European Union Law when assessing the facts and the merits of the case; and (iii) not applying the proper law.²¹

24. Spain submits, in response to BayWa’s arguments to the contrary, that it does not intend to relitigate any jurisdictional objection raised during the underlying arbitration.²²
25. Secondly, Spain points out that in the Award the Tribunal incurred in a serious departure from a fundamental rule of proceeding, by not authorizing the filing of the Declaration of the Representatives of the Governments of the Member States of January 15, 2019, and not allowing the European Commission to make a non-disputing party submission; all of which in Spain’s view violated its right to be heard.²³

ii. SPAIN WOULD BE HARMED IF THE STAY IS NOT CONTINUED

26. According to Spain, should the Committee decide not to continue the stay of enforcement of the Award, Spain would be harmed, and subject to undue burden.²⁴

(i) Risk of non-recoupment

27. In the event that Claimants [*sic*] enforce the Award, and the Committee later decides to annul the Award in whole or in part, Spain would be unable to recover the amount prematurely and inappropriately paid to Claimants [*sic*].²⁵
28. Spain brings to the Committee’s attention (i) the corporate structure of Claimants [*sic*] (i.e., BayWa RE being a wholly-owned subsidiary of BayWa AG, and BayWa AH a wholly-owned by BayWa RE); and (ii) that the Carracha and Jarreta wind farms (“**Projects**”), being owned in a 74% by Claimants [*sic*] through BayWa AH.
29. As a result, Spain argues, it is likely that Claimants [*sic*] might either distribute the amount of the Award to Claimants’ shareholders (i.e., BayWa AG), or (ii) sell their interest in the

²¹ Memorial on Stay, ¶ 12 (footnotes omitted).

²² Reply on Annulment, ¶ 43.

²³ Memorial on Stay, ¶ 13.

²⁴ Memorial on Stay, ¶¶ 14-15.

²⁵ Memorial on Stay, ¶ 16; Reply on Stay, ¶¶ 47-51.

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Award with the proceeds of such sale going to the parent companies. Spain submits that either scenario would make it difficult for Spain to recoup any amounts paid.²⁶ .

(ii) Undue burden in case of recoupment

30. Spain explains that any process of recoupment would imply legal proceedings and devoting more resources and efforts.²⁷ Spain contends that this could easily be prevented by the mere continuance of the stay.²⁸ Spain also notes that additional resources would come from the taxpayers’ money, which would otherwise be used for necessary public expenses.

iii. THE CONTINUATION OF THE STAY WOULD NOT HARM CLAIMANT

31. Spain notes that *ad hoc* committees may consider whether the “*continuation of the stay would have adverse economic consequences on the award creditor.*”²⁹

(i) The Award has granted interest

32. Spain holds that should the Committee deny its Annulment Application, any hypothetical delay in payment would not harm BayWa because, as found by the *Azurix* committee, “[t]he provision for interest compensates for the delay.”³⁰
33. This argument, submits Spain, still holds event it the EUROBOR is in negative values, as in the present, because when “*the interest became [sic] positive, Baywa would be covered by the Award’s finding on interest.*”³¹

²⁶ Memorial on Stay, ¶¶ 17-20.

²⁷ Memorial on Stay, ¶ 21; Reply on Stay, ¶¶ 52-55.

²⁸ Memorial on Stay, ¶ 22; Reply on Stay, ¶ 53.

²⁹ Memorial on Stay, ¶ 23; Reply on Stay, ¶¶ 56-59.

³⁰ Memorial on Stay, ¶ 25 (citing **RL-0136**, *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, December 28, 2007 (“*Azurix*”), ¶ 40).

³¹ Memorial on Stay, ¶ 27.

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(ii) Spain will abide by its international obligations

34. Spain submits that although committees may take into account in their analysis of stay of enforcement requests the risk of non-compliance if the award is not annulled³², committees, such as in *Enron* and *Continental Casualty*, have granted the stay even when such risks exist.³³
35. In any event, Spain points out that there is no risk of Spain not having enough resources, considering that it is “*the fifth-largest economy in the European Union*”, with a worldwide GDP ranking of 13.³⁴
36. Spain further contends that it has no history of non-compliance of its international obligations. In line with this, with Spain’s position that the regulatory measures in this case constitute a “*notifiable State aid*” under Article 108(3) of the Treaty on the Functioning of the EU (“*TFUE*”), and as proof of Spain’s intention to comply with its international obligations, Spain asserts that it has notified the Award to the European Commission (“*EC*”) for its State Aid assessment, so that it can comply with its payment promptly upon receipt of the EC’s authorization. In this regard, Spain explains that until it obtains the EC’s authorization, it is forbidden by the TFUE from making any payment under the Award.³⁵

3. Whether Security Should be Ordered

37. Spain argues that “*no guarantee should be required as a condition for continuing the stay of enforcement*”. Such a guarantee, as found by other committees, would place BayWa in

³² Memorial on Stay, ¶ 28 (relying on **RL-0140**, *Enron Corporation and 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, October 7, 2008, (“*Enron Decision for a Continued Stay*”), ¶ 49).

³³ Memorial on Stay, ¶ 28 (relying on **RL-0141**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award, May 20, 2009, (“*Enron Decision on Second Request to Lift Provisional Stay*”), ¶¶ 29, 46 (continuing the stay of enforcement unconditionally in light of all the circumstances, even though there was “*a high risk of non-compliance by Argentina with its obligations under Article 53 of the ICSID Convention if the Award is not annulled*”) **RL-0142**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Argentina’s Application for a Stay of Enforcement of the Award, October 23, 2009, (“*Continental*”), ¶¶ 12-16 (granting an unconditional stay, in light of the circumstances, even though there was “*no prospect that Argentina will comply with its obligation under Article 53 of the ICSID Convention*”)).

³⁴ Memorial on Stay, ¶ 29 (footnotes omitted).

³⁵ Memorial on Stay, ¶¶ 30-32 (footnotes omitted); Reply on Stay, ¶¶ 31, 78

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a better position than if the Annulment Application had not been filed. In its Reply, Spain objects to BayWa’s suggestion in its Counter-Memorial that the Committee order Spain to post “*a bond or security amounting to EUR 22.006 million plus interest*”, arguing that BayWa has “*failed to meet the burden of proving that the stay should be conditioned on security*”.³⁶

4. Petitum

38. Spain includes in its Reply on Stay of Enforcement of the Award the following *Petitum*:

*“In light of the foregoing, Spain respectfully submits that the stay of enforcement of the Award should be continued and maintained in effect, without security or other conditions, until the decision on the Annulment Application is rendered by the ad hoc Committee in these annulment proceedings.”*³⁷

B. BAYWA’S POSITION

39. BayWa brings to the Committee’s attention the fact that Spain has been involved in some 55 ECT cases, with an order to pay damages in at least 15 cases out of the 19 with public decisions, with payment obligations of over EUR 1,025 million plus interest and legal costs, and has not yet even paid the *Antin* award and the *PV Investors* decision, breaching its international obligations.³⁸

40. According to BayWa, unless the stay of enforcement is unconditionally lifted, BayWa would (i) “*see itself ‘trapped’ in the present annulment proceedings for 2 years without being able to protect its legitimate credit*”; and (ii) have to spend additional funds in its defense during the annulment proceeding, “*which are not covered by the Award.*”³⁹

³⁶ Memorial on Stay, ¶¶ 33 (footnotes omitted); Reply on Stay, ¶¶ 12, 102-108.

³⁷ Reply on Stay, ¶ 112.

³⁸ Counter-Memorial on Stay, ¶ 2 (referring to **CL-244-ENG**, *Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V.* (formerly, *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V.*) v. *Kingdom of Spain*, ICSID Case No. ARB/13/31- Annulment, Decision on Annulment, July 30, 2021 (“**Antin Decision on Annulment**”); and **CL-245-FR**, Decision by the Swiss Federal Tribunal in Spain’s set-aside application of the *PV Investors v. Spain* Award, February 23, 2021, and **CL-245-ENG**, Translation into English.) Rejoinder on Stay, ¶ 3.

³⁹ Counter-Memorial on Stay, ¶ 5.

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1. The Applicable Legal Standard

41. BayWa argues that Spain has mischaracterized the applicable ICSID standard: the Committee has the discretion under the ICSID Convention and the ICSID Arbitration Rules to account for the fact that “*the imposition of a permanent stay is an exception within the exceptional and narrow context of annulment*”, with no presumption in favor of the Applicant.⁴⁰
42. In its Rejoinder, BayWa submits that although the Parties differ sharply on their relevance, it is BayWa’s understanding that in the present case, the uncontested elements on the applicable legal standard are the following: (i) ICSID committees have discretion to decide on whether to lift or continue the stay; (ii) Article 52(5) of the ICSID Convention does not limit or specify the circumstances that the committees should take into account; and (iii) “*the Parties’ submissions reveal that both positions have been pleaded based on similar sets of circumstances: (i) harm to the applicant if the stay continuation is not granted; (ii) harm to the award-creditor’s rights if the stay is not lifted; and (iii) dilatory or frivolous nature of the annulment application*”.⁴¹
43. BayWa stresses that this is a self-contained ICSID legal standard, based on the ICSID Convention (interpreted in accordance with the VCLT) and the ICSID Arbitration Rules, and refutes Spain’s reliance on other sources.⁴²
44. BayWa notes that the Parties differ on a number of legal questions: (i) whether there is a “prevailing practice” in favor of the stay; (ii) the burden of proof; and (iii) the type of circumstances that have to be present for the continuation of the stay.⁴³
45. With regard to the “prevailing practice”, BayWa concedes that committees in older cases, such as those cited by Spain, were in favor of granting the stay of enforcement. However,

⁴⁰ Counter-Memorial on Stay, ¶¶ 8, 14-26. Rejoinder on Stay, ¶ 5.

⁴¹ Rejoinder on Stay, ¶ 8.

⁴² Rejoinder on Stay, ¶¶ 10-11.

⁴³ Rejoinder on Stay, ¶ 9.

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- that practice has changed during the recent years, and at least seven “*ICSID Committees have refused to grant permanent stays of enforcement of their respective ICSID awards.*”⁴⁴
46. BayWa notes that in line with the principle of finality of ICSID awards set forth under Article 53(1) of the ICSID Convention, several committees including in the *Burlington* and *Standard Chartered* cases have recognized the obligation of the parties to comply with awards.⁴⁵
47. Notwithstanding the above, argues BayWa, “*Spain systematically approaches the annulment process as if it was an ordinary appeal*”, thereby causing serious delays, which may frustrate the enforcement of awards.⁴⁶
48. BayWa calls the Committee’s attention to the imperative verb “require”, in Article 52(5) of the ICSID Convention (and in ICSID Arbitration Rule 54(4)): “[t]he Committee may, if

⁴⁴ Counter-Memorial on Stay, ¶¶ 12, 14-15. See: CL-247-ENG See **CL-247-ENG**, *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 – Annulment, Decision on the continuation of the provisional stay of Enforcement of the Award, October 21, 2019, (“**Antin Decision on Continuation Provisional Stay**”), ¶ 85; **CL-248-ENG**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, April 6, 2020, (“**NextEra I Decision on Stay**”), ¶¶ 98, 102(a) and **CL-246-ENG**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, April 28, 2020, (“**NextEra II Decision on Stay**”), ¶ 16 and **CL-249-ENG**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20 – Annulment Proceeding, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, April 17, 2020, (“**Cube**”), ¶ 141; **CL-250-ENG**, *InfraRed Environmental Infrastructure GP Limited, European Investments (Morón) 1 Limited, European Investments (Morón) 2 Limited, European Investment (Olivenza) 1 Limited, European Investments (Olivenza) 2 Limited v. the Kingdom of Spain*, ICSID CASE No. ARB/14/12-Annulment Proceedings, Decision on the Continuation of the Stay of Enforcement of the Award, October 27, 2020, (“**InfraRed**”), ¶ 199; **CL-251-ENG**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on the Request for the Continuation of the Stay of Enforcement of the Award, November 16, 2020, (“**OperaFund**”), ¶ 111; **CL-252-ENG**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 – Annulment Proceeding, Decision on the Kingdom of Spain’s Request for a Continuation of the Stay of Enforcement of the Award, May 20, 2020, (“**Masdar**”), ¶ 138. The reference to the decision by the Committee *Eiser v. Spain* to lift the provisional stay may be found in **CL-253-ENG**, *Eiser’s Enforcement petition filed in the US (case 1:18-cv-01686-CKK)* before the US District Court for the District of Columbia, July 19, 2018, ¶ 17. Additional references to the *Eiser* stay decision are made in the stay decisions of *Antin v. Spain* and *NextEra I Decision on Stay*). Rejoinder on Stay, ¶ 4.

⁴⁵ Counter-Memorial on Stay, ¶ 16 (relying on **CL-257-ENG**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment, Decision on Stay of Enforcement of the Award, August 31, 2017, (“**Burlington**”), ¶ 72; and **CL-258-ENG**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20 – Annulment, Decision on the Request for a Continued Stay on Enforcement of the Award, April 12, 2017 (“**Standard Chartered**”).

⁴⁶ Counter-Memorial on Stay, ¶ 17.

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*it considers that the circumstances so require, stay the enforcement pending its decision [...].*⁴⁷ This language, notes BayWa, is clearly intentional and is also present in ICSID Arbitration Rule 54(4), revealing a stringent standard: “*require*”.⁴⁸

49. Following criticism from Spain of the use by BayWa of the words “exceptional” “compelling” in its Counter-Memorial when referring to the circumstances to be considered when deciding on the stay, BayWa clarified in its Rejoinder that its position was based on the prevailing interpretation given by ICSID committees to the term “require” in Article 52(5) of the ICSID Convention that “*the applicant must show circumstances that rise beyond the ordinary to reach the level that requires continuation of the stay*”.⁴⁹ In support of its position, BayWa cites to the committees’ decisions in *Antin v. Spain* (2019); *Eiser v. Spain* (2018); *Karkey v. Pakistan* (2018); *Border Timbers v. Zimbabwe* (2017); *von Pezold v. Zimbabwe* (2017); *OI European v. Venezuela* (2016); and *SGS v. Paraguay* (2013).⁵⁰
50. As to the burden of proof, BayWa submits that (i) “*the Applicant bears the burden of proving that compelling circumstances exist so as to require the continuation of the stay*,”⁵¹ (ii) the vast majority of ICSID decisions confirm that the burden of proving the circumstances that require the stay lies with the applicant party, here Spain⁵²; and (iii) on

⁴⁷ Counter-Memorial on Stay, ¶ 19.

⁴⁸ Rejoinder on Stay, ¶ 18.

⁴⁹ Rejoinder on Stay, ¶ 20.

⁵⁰ Rejoinder on Stay, ¶ 20 (citing **CL-247-ENG**, *Antin* Decision on Continuation Provisional Stay, ¶¶ 58, 60, 66-67; **CL-279-ENG**, *Eiser Infrastructure Limited and Energia Solar Luxembourg à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Annulment, Decision on Stay of Enforcement the Award, March 23, 2018, (“**Eiser Decision on Stay**”), ¶¶ 47-48; **CL-264-ENG**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 - Annulment Proceeding, Decision on the Stay of Enforcement, February 2, 2018, (“**Karkey**”), ¶ 108; **CL-262-ENG**, *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 – Annulment, Decision on Stay of Enforcement of the Award, April 24, 2017 (“**Border Timbers**”), ¶¶ 78, 80; **CL-263-ENG**, *Bernhard von Pezold v. Zimbabwe*, ¶¶ 78-80; **CL-265-ENG**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25 - Annulment, Decision on Stay of Enforcement of the Award, April 4, 2016 (“**OP**”), ¶¶ 89, 94; **CL-266-ENG**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 - Annulment, Decision on the Continued Stay of Enforcement of the Award, March 2, 2013 (“**SGS**”), ¶¶ 80, 84-85).

⁵¹ Counter-Memorial on Stay, ¶¶ 8, 26.

⁵² Rejoinder on Stay, ¶¶ 22-26.

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this matter it relies on the committees’ decisions in *NextEra v. Spain*; *Cube v. Spain*; *Valores Mundiales v. Venezuela*; *Karkey v. Pakistan*; and *Burlington v. Ecuador*.⁵³

2. Whether the Circumstances Require a Stay

51. BayWa submits that: (i) Spain’s request does not show the concurrence of compelling circumstances requiring the stay of the Award to be continued;⁵⁴ (ii) BayWa would be harmed by an eventual continuation of the stay;⁵⁵ and (iii) The lift of the stay of enforcement does not harm Spain’s rights under the ICSID Convention⁵⁶

i. SPAIN’S REQUEST DOES NOT SHOW THE CONCURRENCE OF COMPELLING CIRCUMSTANCES REQUIRING THE STAY OF THE AWARD TO BE CONTINUED

52. In the Claimant’ opinion, “*Spain has not satisfied any ICSID (ECT) award rendered against it*”; aims at blocking actions of enforcement of awards; and “*as part of its strategy [it] has filed applications for annulment against all ICSID awards holding it liable under the Energy Charter Treaty.*”⁵⁷

53. According to BayWa, Spain has not submitted any serious ground for annulment, and its Annulment Application is dilatory. Furthermore, Spain as part of its strategy “*systematically appl[ies] for annulment in each and every case decided against it*”, and in the present case is attempting to relitigate the intra-EU objection, already dismissed by the *Antin* committee.⁵⁸

54. BayWa submits that “*a prima facie review of Spain’s annulment application confirms that the BayWa Award does not incur in any ground for annulment and that Spain is abusing of the ICSID Annulment mechanism.*”⁵⁹

⁵³ Counter-Memorial on Stay, ¶ 24; Rejoinder on Stay, ¶¶ 22-26.

⁵⁴ Counter-Memorial on Stay, ¶¶ 27-32.

⁵⁵ Counter-Memorial on Stay, ¶¶ 33-68.

⁵⁶ Counter-Memorial on Stay, ¶¶ 69-88.

⁵⁷ Counter-Memorial on Stay, ¶ 27.

⁵⁸ Counter-Memorial on Stay, ¶¶ 27-31.

⁵⁹ Counter-Memorial on Stay, ¶ 32. Rejoinder on Stay, ¶¶ 75-85.

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ii. BAYWA WOULD BE HARMED BY AN EVENTUAL CONTINUATION OF THE STAY

55. BayWa contends that it would be harmed by an eventual continuation of the stay of enforcement of the Award, for the following reasons:
56. First, there are serious doubts about Spain’s alleged commitment to comply with ICSID awards and with its international obligations under the ICSID Convention, and submits that Spain’s ‘EU law’ obstacle is irrelevant for the purposes of deciding the stay and actually confirms a probable risk of Spain’s non-compliance with the Award.⁶⁰
57. In support of its position, BayWa submits that the *Eiser*, *Antin* and *Cube* committees confirmed that such alleged conflict with EU law did not amount to a compelling circumstance requiring continuation of the stay of enforcement.⁶¹ Also, it notes that in the *Micula* case, considering that Romania might not be able to comply with the award due to a potential conflict with its EU law obligations, the committee ordered Romania to provide a written undertaking in light of this “probable risk” of non-compliance, which was not provided, and the stay was lifted.⁶²
58. Further, BayWa points out that in recent decisions, the committees in other ICSID (ECT) cases against Spain found that Spain’s conditioning its payments to obtaining the EC’s authorization, was (i) an “*objectively plausible risk of non-payment or, at a minimum, delayed payment*” (*NextEra*); (ii) indication “*that if anything, compliance with the Award is likely to be delayed and potentially frustrated*” (*Cube*); and (iii) “*of particular relevance*” concluding that “*Spain’s sustained position does not provide any assurances that the Award will be paid at all, let alone promptly in the event the Application for Annulment is denied.*” (*OperaFund*).⁶³
59. BayWa submits that in light of the publication on November 5, 2021, of the Decision by the EC on the preliminary incompatibility of the *Antin* award with EU state aid law, “*the*

⁶⁰ Counter-Memorial on Stay, ¶¶ 34-49; Rejoinder on Stay, ¶¶ 7, 51-61.

⁶¹ Counter-Memorial on Stay, ¶ 39 (footnotes omitted).

⁶² Counter-Memorial on Stay, ¶ 42 (footnote omitted).

⁶³ Counter-Memorial on Stay, ¶¶ 43-47 (Citing: **CL-248-ENG**, *NextEra* Decision on Stay, ¶ 92; **CL-251-ENG**, *OperaFund*, ¶¶ 104 and 105; **CL-249-ENG**, *Cube*, ¶ 133.)

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*notification of the Award to the European Commission, far from being a guarantee of compliance, is a signal of a probable risk of frustration or severely delayed compliance with BayWa’s Award”.*⁶⁴

60. Second, according to BayWa, the “*granting of the permanent stay would relegate BayWa in the long line of award-creditors against Spain, which are already competing for a limited pool of seizable assets.*”⁶⁵
61. Third, BayWa submits that “*payment of post-award interest would not be an adequate remedy to the prejudice that BayWa would suffer in case the stay was continued.*” This, because post-award interest can neither offset the real and increased risk of BayWa not seeing its Award monetized if the stay is not lifted, nor the risk of non-compliance or delay. In support of its position, BayWa cites to the committees’ decisions in *Eiser*, *Antin*, *NextEra*, *Cube*, *OperaFund*, and *InfraRed*. Also, the fact that the EUROBOR is currently in negative values (as acknowledged by Spain), means that Spain has no incentive to satisfy the amounts due to BayWa.⁶⁶

iii. THE LIFT OF THE STAY OF ENFORCEMENT DOES NOT HARM SPAIN’S RIGHTS UNDER THE ICSID CONVENTION

62. BayWa refutes Spain’s argument that if the stay is lifted Spain would be facing the risk of non-recoupment because BayWa could distribute the amount of the Award to its shareholders.⁶⁷ In support of its position, BayWa submits that: (i) “*Spain’s non-recoupment would only be relevant if and only if Spain had previously complied with the Award or posted a guarantee of its payment*”⁶⁸; (ii) Spain’s contentions fail to establish an actual risk of non-recoupment (i.e., the award-creditor being in financial distress or on the brink of insolvency), as found in *Karkey*, *Cube*, and *Masdar*, which is not the case here, where “*the BayWa Group is complete solvent*”⁶⁹; (iii) in the event that the stay is lifted and BayWa

⁶⁴ Rejoinder on Stay, ¶¶ 59-60.

⁶⁵ Counter-Memorial on Stay, ¶¶ 50-55. Rejoinder on Stay, ¶¶ 62-69.

⁶⁶ Counter-Memorial on Stay, ¶¶ 56-68 (footnotes omitted). Rejoinder on Stay, ¶¶ 70-74.

⁶⁷ Counter-Memorial on Stay, ¶¶ 69-88 (footnotes omitted).

⁶⁸ Counter-Memorial on Stay, ¶¶ 73-78 (footnotes omitted). Rejoinder on Stay, ¶¶ 39-41.

⁶⁹ Counter-Memorial on Stay, ¶¶ 79-81 (footnotes omitted). Rejoinder on Stay, ¶¶ 6, 42-50.

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starts enforcement actions in domestic courts, those courts would take into account the pendency of this annulment proceeding⁷⁰; and (iv) several committees, including in the *Antin* and *Masdar* cases, have found that non-recoupment risks raised by claimant(s) (i.e., transfer of interest in an award, the distribution of proceeds to shareholders, etc.) are common in annulment applications.⁷¹

3. Whether Security Should be Ordered

63. BayWa submits that its “*legitimate position as award-creditor will only be safeguarded during the pendency of this annulment action if Spain posted a bond or security amounting to EUR 22.006 million plus interest.*”⁷²
64. Subsequently, in its Rejoinder, BayWa added that “*in the unlikely case that the Committee decided not to lift the stay, it should – at the very least – order Spain to furnish an unconditional and irrevocable undertaking of payment of the Award.*”⁷³ This, being “*the only way for the Committee to ensure that the currently existing risk of frustration of the Award does not materialize.*”⁷⁴
65. BayWa also requests that the stay be unconditionally lifted.⁷⁵

4. Petitum

66. BayWa includes in its Rejoinder on Stay of Enforcement of the Award the following *Petitum*:
- “*In light of the foregoing, BayWa requests that the Committee order (i) the lift of the provisional stay of enforcement of the Award; and (ii) the Applicant (Spain) to bear all costs resulting from this procedural incident.*”⁷⁶

⁷⁰ Counter-Memorial on Stay, ¶ 84.

⁷¹ Counter-Memorial on Stay, ¶¶ 85-86 (footnotes omitted).

⁷² Counter-Memorial on Stay, ¶ 6.

⁷³ Rejoinder on Stay, ¶¶ 27-35.

⁷⁴ Rejoinder on Stay, ¶ 35.

⁷⁵ Counter-Memorial on Stay, ¶ 5.

⁷⁶ Rejoinder on Stay, ¶ 89.

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III. THE COMMITTEE’S ANALYSIS

A. THE APPLICABLE LEGAL STANDARDS

67. According to Article 53(1) of the ICSID Convention:

“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.”

68. Article 54(1) of the Convention adds thereto the following:

“Each 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.”

69. ICSID arbitral awards are thus binding as of the date of their issuance, and are automatically enforceable in the Convention’s Contracting States.

70. In light of the above, the Committee holds the view that stay of enforcement of an ICSID arbitral award should be deemed exceptional.

71. Pursuant to Article 52(5) of the ICSID Convention, an *ad hoc* annulment committee may nevertheless, if it considers that the “circumstances so require”, stay the enforcement of the award pending its decision.

72. Stay of enforcement should therefore, in the Committee’s view, be justified by fact-specific circumstances.

73. There is, accordingly, no presumption in favour of granting a request for stay, which would run counter to the said principle that ICSID awards are final and binding.⁷⁷

⁷⁷ See **CL-247-ENG**, *Antin Decision on Continuation Provisional Stay*, ¶ 65.

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74. Risk of non-recoupment of the amount of the award in case of its annulment is one of the said circumstances.⁷⁸
75. In fact, a State “*should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn to the irrecoverable from an insolvent claimant.*”⁷⁹
76. The burden of proving such a risk lies with party requesting the continued stay of enforcement.
77. Both parties in the instant case agree on this, although they disagree as to whether such a risk effectively occurs.
78. An overall balancing of the Parties’ interests, and of the potential harm suffered by each of them if the stay of enforcement is maintained or lifted, is also appropriate in order to decide a request for the continuation of the stay.⁸⁰
79. The merits of the application for annulment are, in any event, not relevant for this purpose.⁸¹

B. THE RELEVANT FACTS OF THE CASE AND WHETHER THEY REQUIRE A STAY

80. Since the Committee need and should not assess the merits of Spain’s application for annulment at the present stage of the proceeding, it will not analyse them here.
81. In any event, nothing indicates that Spain’s request is purely dilatory or frivolous. The Committee accordingly finds that there is no reason to dismiss Spain’s application on such grounds.

⁷⁸ See **CL-272-ENG**, *Watkins Holdings S.À.R.L and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Stay of Enforcement of the Award, June 28, 2021, (“*Watkins*”), ¶ 56; **252-ENG**, *Masdar*, ¶ 58.

⁷⁹ See **RL-0139** *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, September 1, 2006 , ¶ 38.

⁸⁰ See, in this sense, Decision on Stay of Enforcement of the Award rendered in *NextEra v. Spain*, ICSID Case No. ARB/14/11, ¶ 95.

⁸¹ See **CL-247-ENG**, *Antin Decision on Continuation Provisional Stay*, ¶ 83.

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82. This finding is nevertheless insufficient to conclude that the continuation of the stay should be granted: as held by the *ad hoc* Committee in *Watkins v. Spain*, “*the mere fact that there is some merit in the Application is a neutral factor and cannot of itself constitute a basis to continue the stay of enforcement*”.⁸²
83. Spain, as the annulment applicant, bears the burden of proving the circumstances that justify the continued stay of enforcement. The fundamental issue at stake is thus whether Spain has discharged its burden in respect of such circumstances, notably risk of recoupment.
84. In this regard, Spain, Spain invokes that:
- a. BayWa RE is a wholly owned subsidiary of BayWa AG and BayWa AH is a wholly owned by BayWa RE.⁸³
 - b. The amount of the Award, if paid to the Claimants, could be distributed to their shareholders.⁸⁴
 - c. Should the amount of the Award be distributed to the Claimants’ shareholders, there is no certainty that those amounts could be recouped by Claimants and subsequently by Spain in case the Award was annulled.⁸⁵
 - d. Claimants could moreover sell their interest in the Award and distribute those funds to their parent companies also.⁸⁶
85. BayWa, in turn, contends that:
- a. A generic risk of non-recoupment does not qualify as a circumstance that requires continuation of stay.⁸⁷

⁸² See the above-mentioned Decision on stay of enforcement of the award, ¶ 31.

⁸³ Memorial, ¶ 17.

⁸⁴ Memorial, ¶ 18.

⁸⁵ Memorial, ¶ 19.

⁸⁶ Memorial, ¶ 20.

⁸⁷ Counter-Memorial, ¶ 79.

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- b. Spain’s request for a permanent stay has only been granted in cases based on close to insolvency of the award creditor.⁸⁸
 - c. The BayWa group is completely solvent: its EBIT was in 2020 of EUR 188.4 and revenues amounted to EUR 17,155 million in 2020.⁸⁹
86. These data are not questioned by Spain. It nevertheless argues that, for corporations, responsibility is limited, and Spain will not be able to pursue the recoupment beyond the companies that were claimants in the arbitration.⁹⁰
87. BayWa states, in reply, that the possibility that the award creditor distributes the proceeds of the award to its shareholders is common to virtually all annulment applications and cannot constitute a risk of non-recoupment.⁹¹
88. Moreover, BayWa adds that:
- a. BayWa’s award amounts to EUR 22.006 million.
 - b. BayWa r.e. A.G.’s 2020 financial statements show EUR 2,616.3 million in total assets by the end of 2020.⁹²
 - c. Its equity was of EUR 352.2 million in 2020.
 - d. BayWa AG’s (BayWa’s parent company) 2020 consolidated financial statements show that BayWa Group’s equity amounts to EUR 1,256 million in 2020.
 - e. The Group’s total assets stood at EUR 9,044.4 million in December 2020.⁹³
89. The data in “a” and “b” above are confirmed by document C-561-ENG.
90. Spain holds that BayWa would not be harmed in any way if the Committee decides to continue the provisional stay of enforcement of the Award, because interest is payable on

⁸⁸ Counter-Memorial, ¶ 81.

⁸⁹ Counter-Memorial, ¶ 82.

⁹⁰ Reply, ¶ 50.

⁹¹ Rejoinder, ¶ 45.

⁹² Rejoinder, ¶ 47.

⁹³ Rejoinder, ¶ 48.

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the sum awarded at the six-month EURIBOR rate compounded semi-annually from 13 July 2013 until the date of payment of the Award.⁹⁴

91. Spain also contends that:

- a. It will abide by its international obligations.
- b. There is no danger that it would not have the financial resources to pay the Award in this case.⁹⁵
- c. It has no history of non-compliance.⁹⁶
- d. It has already notified the Award to the EC for its State Aid assessment, thereby completing the steps necessary that would allow its payment promptly upon reception of the EC authorization.⁹⁷

92. To this, however, BayWa objects that:

- a. Payment of post-award interest would not be an adequate remedy to the prejudice that BayWa would suffer in case the stay was continued.⁹⁸
- b. EURIBOR is currently in negative values, hence post-award interest cannot offset the prejudices that BayWa will suffer in case the provisional stay is not lifted.⁹⁹

93. Moreover, BayWa adds, even though it is aware of all ICSID awards for over 2 years, the EC has not authorized any single payment yet.¹⁰⁰

94. Considering the above, it is clear that Spain's essential argument in favour of the continuation of the stay is the concern that Claimant could distribute the amount of the Award, or its interest in it, to its shareholders, and that, since Claimant's liability is limited, in case of an annulment Spain might not be able to recoup the Award's amount.

⁹⁴ Memorial, ¶¶ 24-26.

⁹⁵ Memorial, ¶ 28.

⁹⁶ Memorial, ¶ 30.

⁹⁷ Memorial, ¶ 33.

⁹⁸ Counter-Memorial, ¶¶ 56- 66.

⁹⁹ Reply, ¶ 67.

¹⁰⁰ Reply, ¶ 53.

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95. There is, however, no evidence that this would be the case, and hence the Committee must conclude that Spain's contentions are based on assumptions, and not on facts.
96. As mentioned in other *ad hoc* committee's decisions on stay of enforcement, these assumptions correspond to risks inherent to all annulment applications and are not sufficient to require a stay of enforcement.¹⁰¹
97. The undeniable fact at stake in the instant case is that BayWa's assets, as evidenced by its 2020 financial statements, largely exceed the amount of the Award.
98. Thus, even if BayWa did distribute the amount of the Award by way of dividends to its shareholders, it would still have the means to repay the Award.
99. The analysis would be different if Claimant were, for example, shown to be in financial distress or on the brink of insolvency;¹⁰² this has, however, not been demonstrated by Spain in these proceedings.
100. In sum, there is no clear and convincing evidence in this case that points to a risk of non-recoupment of the Award amount by Spain in case of an annulment of the contested Award.
101. Accordingly, there seems to be no legitimate concern of non-recoupment that would justify a continuation of the stay of enforcement of the Award.
102. The alleged harm or undue burden potentially suffered by Spain as a result of the lifting of the stay of enforcement of the Award, as invoked in its submission, is therefore undemonstrated.
103. In contrast, payment of interest would not sufficiently compensate BayWa for the delay in paying the amount of the Award and the difficulties BayWa may face in enforcing the

¹⁰¹ See, similarly, **CL-247-ENG**, *Antin Decision on Continuation Provisional Stay*, ¶ 72; **CL-252-ENG**, *Masdar*, ¶¶ 119-123.

¹⁰² See **CL-247-ENG**, *Antin Decision on Continuation Provisional Stay*, ¶73.

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Award. It is therefore reasonable to conclude that the Award creditor would suffer harm if the stay of enforcement is not lifted.

104. Spain’s argument that there is no danger that it would not have the financial resources to pay the Award in this case does not seem, by itself, to be sufficient in order to determine the continuance of stay of the enforcement of the Award.¹⁰³
105. Finally, the Committee notes that the issue of whether, as submitted by Spain, the lifting of the stay of the Award may lead to an international conflict because EU Law may be contravened as a result of such a decision, is not decisive for its findings on the subject matter of this Order, considering that: (i) the continuance of the stay of enforcement of the Award would, by itself, not remove the risk of such a conflict; (ii) in any event, such a risk should not impair the overriding principle, to which this Committee is bound, that ICSID awards are final and binding nature under the 1965 Washington Convention.¹⁰⁴

C. WHETHER A SECURITY SHOULD BE ORDERED

106. Since no circumstances of the case require the Award to continue being stayed, there is no need for the Committee to consider an order that an unconditional and irrevocable undertaking of payment of the Award be provided by Spain, as requested by BayWa in case that the Committee decided not to lift the stay.

IV. DECISIONS

107. For the foregoing reasons, the provisional stay of enforcement of the arbitral Award is lifted.
108. The Committee reserves the right to modify this decision at any time if the circumstances change, notably if insufficiency of BayWa’s assets to repay the Award, in the event that the Award is annulled, is shown by Spain.

¹⁰³ In the same sense, see the above-mentioned Decision in **CL-252-ENG**, *Masdar*, ¶ 111.

¹⁰⁴ See, similarly, the above-mentioned decision **CL-248-ENG**, *NextEra I Decision on Stay*, ¶ 90.

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109. Decision on costs is reserved for determination in the Committee’s final decision on the annulment request.

All other requests are denied.

For and on behalf of the Committee:



Prof. Dr. Dário Moura Vicente
President of the Committee
Date: December 20, 2021