

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/16/18

DECISION ON THE RESPONDENT' REQUEST FOR THE STAY OF ENFORCEMENT OF THE AWARD

Members of the Tribunal

Mr. Eduardo Siqueiros T., President

Prof. Peter D. Cameron

Mr. Luis González García

Secretary of the Tribunal

Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 24 August 2023

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I. BACKGROUND.

1. On 13 September 2021, the Tribunal issued its Decision on Jurisdiction, Liability and Directions on Quantum (hereinafter the “**Decision**”).
2. On 2 May 2023, the Tribunal issued its Award (hereinafter the “**Award**”).
3. On 15 June 2023, the Kingdom of Spain (“**Respondent**”) submitted its Request for Rectification of the Award (“**Respondent’s Request for Rectification**”). Respondent’s Request for Rectification included a request to stay enforcement of the Award for the reasons stated therein that will be addressed in this Decision.
4. On 16 June 2023, the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) registered Respondent’s Request for Rectification.
5. On 16 June 2023, Infracapital F1 S.à.r.l. and Infracapital Solar B.V (jointly, “**Claimants**”) submitted their Request for Rectification of the Award (“**Claimants’ Request for Rectification**”).
6. On 21 June 2023, the Tribunal invited the Parties to submit a simultaneous response to the other Party’s Request for Rectification, as well as a subsequent reply and rejoinder, if any, under a proposed procedural calendar.
7. Upon a petition of Respondent to modify the procedural calendar, on 22 June 2023 the Parties reached an agreement to amend such calendar, which was accepted by the Tribunal.
8. On 12 July 2023, Claimants submitted their response entitled “*Claimants’ Response to Respondent’s Request for Rectification of the Award*” (“**Claimants’ Response**”), which included their position in respect to Respondent’s request to stay the enforcement of the Award.
9. On 12 July 2023, Respondent submitted its response entitled “*Respondent’s Response to Claimants’ Request for Rectification of the Award*” (“**Respondent’s Response**”).
10. On 21 July 2023, Claimants submitted their reply entitled “*Reply to Respondent’s Response to Claimants’ Request for Rectification of the Award*” (“**Claimants’ Reply**”).
11. On 21 July 2023, Respondent submitted its reply entitled “*Reply to Claimants’ Response to Respondent’s Request for Rectification of the Award*” (“**Respondent’s Reply**”).
12. On 28 July 2023, Claimants submitted a rejoinder entitled “*Rejoinder to Respondent’s Request for Rectification of the Award*” (“**Claimants’ Rejoinder**”).

13. On 28 July 2023, Respondent submitted a rejoinder entitled “*Respondent’s Rejoinder Regarding Claimants’ Request for Rectification of the Award*” (“**Respondent’s Rejoinder**”)
14. Claimants’ Request for Rectification and Respondent’s Request for Rectification, along with the Parties’ respective Response, Reply and Rejoinder, shall be jointly referred to as the “**Requests for Rectification**”.

II. REQUEST TO STAY THE ENFORCEMENT OF THE AWARD.

A. RESPONDENT’S POSITION.

15. Given that both Claimants and Respondent have submitted the Requests for Rectification on the basis that the text of the Award is either not clear and simply omits a word to be properly understood or, alternatively, that the Tribunal improperly decided the amount of damages despite its earlier findings that were the premise for the calculation of such damages, Respondent requests the Tribunal to stay, and hence order and inform “all parties” that the enforcement of the Award is stayed until the Requests for Rectification of the Award are decided.¹
16. Although the request to stay the enforcement (“**Stay Request**”) was made prior to learning of Claimants’ Request for Rectification, Respondent reiterates the need to order the stay given the fact that both Parties have now submitted Requests for Rectification.²
17. Respondent contends that Articles 44 to 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) grant the Tribunal full power to decide any issue which is not decided by the applicable rules to the proceeding and that, specifically, Article 44 establishes that “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question”.³ It adds that, in similar terms, Article 46 of the ICSID Convention states that “[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre”.⁴
18. To justify the Stay Request, Respondent asserts that it is based on “the concurrence of an extraordinary circumstance that justifies it: in compliance with the Decision of the European Union Commission on the S.A. 40348(2015/NN) procedure”,⁵ and because of this, “Respondent is compelled to notify the Infracapital Award to the EU Commission. The binding nature of the EU Commission Decision is established in Articles 107, 108 and 288

¹ Respondent’s Request for Rectification, ¶ 64(b).

² Respondent’s Response, ¶ 32.

³ Respondent’s Request for Rectification, ¶ 54.

⁴ Respondent’s Request for Rectification, ¶ 55.

⁵ Respondent’s Request for Rectification, ¶ 58.

of the TFEU. In addition, this binding nature derives also from Article 4.2 Directive 2001/77/EC.”⁶

19. Making reference to the Decision of the EU Commission of November 2017,⁷ Respondent argues that in said decision the Commission recalls that “*any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State Aid. However, the Arbitration Tribunals are not competent to authorize the granting of State Aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v. Spain, or were to do so in the future, this compensation would be notifiable State Aid pursuant to Article 108 (3) TFEU and be subject to the standstill obligation.*”⁸
20. Respondent argues that, given such background, it “must notify the Infracapital Award to the EU Commission in compliance with EU Law, and is indeed in the process of making such notification. Until the EU Commission takes a decision pursuant to Article 108 of the TFEU the Respondent cannot comply with the Award. Otherwise, it would breach its obligations under EU Law.”⁹
21. In response to Claimants’ contention that the Tribunal lacks the power to stay enforcement pending a request for rectification, Respondent asserts that this does not mean that the ICSID Convention or the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”) prohibit staying enforcement in the event of requests for supplementation and rectification of awards, and “... specifically for rectification in certain circumstances, as in cases like the present one where the amount of awarded compensation is affected by the invoked error”, because Article 44 of the ICSID Convention cited above is wide enough to allow the Tribunal to “decide the question”.¹⁰
22. Citing *Pey Casado v Chile*,¹¹ Respondent argues that the Tribunal can decide on requests for stay of enforcement also in relation to the remedies of supplementation and rectification under Rule 49 of the ICSID Arbitration Rules.¹²
23. In its Rejoinder, Respondent rejects Claimants’ interpretation on the limits of a tribunal, and contends that Rule 54 of ICSID Arbitration Rules refers only to stay of enforcement of an award in the event of requests for interpretation, revision or annulment because said Rule 54 is contained in Chapter VII, precisely on “*Interpretation, Annulment and Revision of the*

⁶ Respondent’s Request for Rectification, ¶ 58.

⁷ EU Commission Decision on State Aid S.A.40348(2015/NN)-Spain, Support for electricity generation from renewable energy sources cogeneration and waste (**RL-0060**).

⁸ Respondent’s Request for Rectification, ¶ 61, citing EU Commission Decision on State Aid S.A.40348(2015/NN)-Spain, Support for electricity generation from renewable energy sources cogeneration and waste (**RL-0060**).

⁹ Respondent’s Request for Rectification, ¶ 62.

¹⁰ Respondent’s Reply, ¶¶ 35-38.

¹¹ *Victor Pey Casado and Foundation «Presidente Allende» v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award, 16 May 2013 (“**Pey Casado, Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award**”) (Annex-003 to Respondent’s Request for Rectification).

¹² Respondent’s Reply, ¶¶ 37-38.

Award". Respondent states that, although Rule 49 of the ICSID Arbitration Rules, on "Supplementary Decisions and Rectification" does not include a specific provision on stay of enforcement, this does not mean that the ICSID Convention or the ICSID Arbitration Rules prohibit staying enforcement in the event of requests for supplementation and rectification of an award –specifically for rectification in certain circumstances, as in this case, where the amount of awarded compensation is affected by the invoked error. This would be covered, it adds, by its authority under Article 44 of the ICSID Convention, which provides that "[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question".¹³

B. CLAIMANTS' POSITION.

24. Claimants challenge that the Tribunal has powers to stay enforcement of the Award as requested by Respondent, because neither the ICSID Convention nor the ICSID Arbitration Rules grant the Tribunal such power. Claimants add that Articles 44 to 47 of the ICSID Convention –which Respondent relies on– do not address the power to stay enforcement of an award at all.¹⁴
25. While stay of enforcement of an award is addressed in Article 54 of the ICSID Convention, according to Claimants this provision allows a party to request a stay in an application for interpretation, revision, or annulment of an award pursuant to Article 50, but not in a request for rectification under Article 49, such as the one being examined now.¹⁵
26. In their Reply, Claimants add that, should the Contracting Parties to the ICSID Convention "... have wanted for rectification proceedings to prompt the stay of the Award, they would have included rectification in ICSID Rule 54. They did not."¹⁶ Further, that Section 6 of the Convention, titled "*Recognition and Enforcement of the Award*" states at Article 53(2): "*For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52*" and that "Rectification (Article 49(2)) is again not included within the relevant provisions governing the enforcement and stay of awards."¹⁷

¹³ Respondent's Rejoinder, ¶¶ 41-43.

¹⁴ Claimants' Request for Rectification, ¶ 29.

¹⁵ Claimants' Response, ¶¶ 30-31, adding that Spain made the same request based on the same arguments it now uses to seek a stay of the Award in *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Spain's Request for Rectification of the Award, 13 July 2020 ("**Watkins, Decision on Spain's Request for Rectification of the Award**") (CL-338), and in supplementary proceedings in *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Decision on the Respondent's Application to Stay Enforcement of the Award, 24 August 2018, ¶¶ 17-23 ("**Masdar, Decision on the Respondent's Application to Stay Enforcement of the Award**") (CL-338), also relying on these same grounds, and that bit failed in both attempts. In both cases, Claimants add, Spain failed. Also, Claimants' Reply, ¶ 28.

¹⁶ Claimants' Reply, ¶ 30.

¹⁷ Claimants' Reply, ¶ 31

C. THE TRIBUNAL'S ANALYSIS.

27. According to Respondent, Articles 44 and 46 in the ICSID Convention give powers to an ICSID tribunal to stay the enforcement of the award.
28. Article 44 ICSID Convention provides that a tribunal established under the ICSID Rules of Arbitration shall decide "... *any question of procedure [that] arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, ...*".¹⁸ The Tribunal does not find that a request to stay the enforcement of an award can qualify as an issue of "procedure". This is especially so, in a situation where the ICSID Convention and the ICSID Arbitration Rules specifically address the stay of enforcement in other provisions, as indicated below.
29. Article 46 of the ICSID Convention provides that a tribunal shall, if requested by a party to a proceeding, determine "... *any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*".¹⁹ The Tribunal, however, does not believe that Respondent's Request for Rectification contains or can qualify as a "claim or counterclaim" that is incidental to the issues decided by this Tribunal in the Award.
30. Article 50(2) of the ICSID Convention empowers the tribunal that has rendered an award (or a new tribunal, if this is not possible) to stay enforcement of the award, pending its decision on the interpretation of such award.²⁰ Article 51(4) deals with the revision of an award on the ground of discovery of some fact of such nature as decisively to affect the award issued, and also allows the same tribunal that rendered the award (or a new tribunal, if this is not possible) to stay enforcement of the award pending its decision. Article 52(5) addresses the annulment of the award issued, but in this case, it shall be the committee to be established who shall rule on the stay of enforcement pending its decision on the request for annulment. These three provisions are set out in Section 5 dealing with Interpretation, Revision and the Annulment of an Award.
31. Rule 54(1) of the ICSID Arbitration Rules provides for the stay of enforcement of an award, but limits this action to cases of interpretation, revision or annulment of an award:

¹⁸ Article 44 reads as follows: "*Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*"

¹⁹ Article 46 reads as follows: "*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*"

²⁰ Article 50(2) of the ICSID Convention reads as follows: "*The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision*".

The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

32. As is clear in these provisions, the only instances where the ICSID Convention or the ICSID Arbitration Rules contemplate the stay of enforcement of an award, are in very precise post-award remedies. These do not include a procedure where one of the parties (in this case, both) have submitted a request to rectify an award. Rectification of an award is expressly addressed in Rule 49 of the ICSID Arbitration Rules. Had the drafters of the ICSID Arbitration Rules intended to also contemplate the stay of enforcement for requests for rectification, they would have expressly provided for such a measure. But they did not.
33. Respondent contends that Rule 54 “... *has been interpreted in a flexible manner, including for instance requests for supplementary decisions and rectification after conclusion of an annulment, even if not referred to specifically in the ICSID Rules*”²¹ and cites *Pey Casado v Chile*²² as support, where the tribunal considered the possibility of staying the enforcement despite the application dealing with a request for supplementation.²³ The distinction between the *Pey Casado* case and this case is evident. First, in *Pey Casado v. Chile* the committee acknowledged that the request was being considered within an application for annulment of the award, and second, the committee nonetheless decided to reject the request for stay of enforcement.²⁴
34. A tribunal which dealt with an instance quite similar to the request for stay of enforcement submitted in the present case was that in *Watkins v Spain*.²⁵ In that case, Spain also submitted after the issuance of the award a request for rectification, along with a request for stay of enforcement pending the tribunal’s decision on the first request. The *Watkins* tribunal rejected the request for stay of enforcement because it concluded that Articles 44 to 47 of the ICSID Convention “... *do not confer jurisdiction on the Tribunal to issue a stay of enforcement of an award especially in view of the wording of Rule 54(1) of the Arbitration Rules*”.²⁶

²¹ Respondent’s Request for Rectification, ¶ 58.

²² *Pey Casado*, Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award (**Annex-003** to Respondent’s Request for Rectification).

²³ *Pey Casado*, Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award, ¶ 32. (**Annex-003** to Respondent’s Request for Rectification).

²⁴ Although Respondent contends (Respondent’s Reply, ¶ 39) that the decision issued by the *Pey Casado v Chile* tribunal was issued within a “request for supplementation” (i.e., Request for Supplementation of the Annulment Decision of the Award) such tribunal expressly acknowledged that “... *the request takes place within the context of an annulment proceeding the party making the application can make the request on the basis of Article 52(5) of Pey Casado*, Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award, ¶¶ 34-35. (**Annex-003** to Respondent’s Request for Rectification)

²⁵ **CL-339**, *Watkins*, Decision on Spain’s Request for Rectification of the Award.

²⁶ **CL-339**, *Watkins*, Decision on Spain’s Request for Rectification of the Award, ¶¶ 73-74.

35. Another tribunal that decided on a similar issue was in the *Masdar Solar v Spain* case,²⁷ where Spain submitted a request for a supplementary decision in respect of the award. Although the request for a supplementary decision differs from a request for rectification, as in this case, the provisions governing both are the same. Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules deal with both. The tribunal concluded that it had “...no power to order the stay of enforcement in connection with an application to supplement an award pursuant to Article 49(2) of the ICSID Convention”²⁸, also observing that post-award remedies which allow an ICSID Tribunal to order a stay of enforcement are regulated by Articles 50 to 52 of the ICSID Convention and ICSID Arbitration Rules 50 to 55, and that a stay of enforcement is not contemplated for supplementation and rectification of an award.²⁹
36. In connection with Respondent’s concern that it needs to notify the Award to the EU Commission in compliance with the Decision of the European Union Commission on the S.A. 40348(2015/NN) procedure,³⁰ and Respondent’s reliance on such obligation to support its contention that the Tribunal has powers “... to decide all issues that may arise and the exceptional circumstances ...”,³¹ the Tribunal notes that this same argument was expressed by Spain in *Masdar Solar v Spain*,³² and said tribunal found it unnecessary to address such argument given its conclusion that the tribunal had no powers to stay the enforcement of an award under a situation that is not expressly contemplated under the ICSID Convention or the ICSID Arbitration Rules.³³
37. The Tribunal further notes that Respondent asserts an argument that addresses its concern. Respondent states that in accordance with Article 49(2) of the ICSID Convention, the decision rectifying the Award “shall become part of the award” and “the periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered”. Respondent asserts that “until said decision is rendered, the Award will not be complete”.³⁴ But then Respondent argues that the Tribunal “should stay the enforcement of the Award as it can be said that the Award will not be complete until the decision regarding this Request for Rectification is rendered”.³⁵ The second part of its argument appears to be in contradiction or inconsistent with the first part.
38. According to the first part of Respondent’s argument, under the ICSID Convention any decision on a request for rectification will form part of the award, and the periods in which to seek a revision or annulment shall count as from the date of the decision is issued, which means

²⁷ CL-338, *Masdar*, Decision on the Respondent’s Application to Stay Enforcement of the Award.

²⁸ CL-338, *Masdar*, Decision on the Respondent’s Application to Stay Enforcement of the Award, ¶ 24.

²⁹ CL-338, *Masdar*, Decision on the Respondent’s Application to Stay Enforcement of the Award, ¶ 23.

³⁰ Respondent’s Request for Rectification, ¶¶ 58-62.

³¹ Respondent’s Request for Rectification, ¶ 63.

³² CL-338, *Masdar*, Decision on the Respondent’s Application to Stay Enforcement of the Award, ¶ 7, where the tribunal noted that the application was “...based on the occurrence of an extraordinary circumstance ...”.

³³ CL-338, *Masdar*, Decision on the Respondent’s Application to Stay Enforcement of the Award, ¶ 25.

³⁴ Respondent’s Request for Rectification, ¶ 56, Respondent’s Response, ¶ 31.

³⁵ Respondent’s Request for Rectification, ¶ 56.

that the award in itself is final, but subject to any decision on the request for rectification. Likewise, even after such a decision is issued, either party to an ICSID arbitration may seek a revision under Article 51 of the ICSID Convention or annulment under Article 52 of the ICSID Convention. In the latter instance, the provisions themselves provide for automatic stays of enforcement when such a petition is made with the relevant application for revision or annulment, pending a ruling by the tribunal on the subject. The *ad hoc* committee in *Continental v Argentina* confirmed this interpretation making an analysis of the principles in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.³⁶

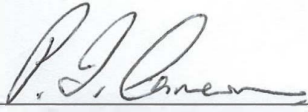
39. Considering the foregoing, the Tribunal concludes that it lacks the powers to stay the Award pending a decision on the Requests for Rectification.

III. DECISION

40. For the reasons given above, the Tribunal DECIDES:

- (1). To reject Respondent's Request to Stay the enforcement of the Award dated 2 May 2023.
- (2). That any determination of costs shall be made in the Decision on the Requests for Rectification.

³⁶ *Continental Casualty Company v. The Argentine Republic*, Decision on the Claimant's Preliminary Objection to Argentina's Application for Annulment, 23 October 2009, ICSID Case No. ARB/03/9 - Annulment Proceeding, as cited in **CL-338**, *Masdar*, Decision on the Respondent's Application to Stay Enforcement of the Award, ¶ 28.



Prof. Peter D. Cameron
Arbitrator

Mr. Luis González García
Arbitrator

Mr. Eduardo Siqueiros T.
President of the Tribunal

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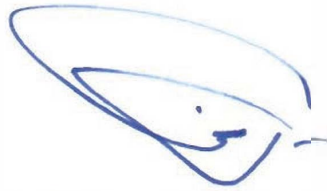


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