

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Sun-Flower Olmeda GmbH & Co KG and others**  
Respondent on Annulment

v.

**Kingdom of Spain**  
Applicant on Annulment

**(ICSID Case No. ARB/16/17)**  
**Annulment Proceeding**

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**DECISION ON THE CONTINUATION OF THE STAY OF ENFORCEMENT OF THE  
AWARD**

***Members of the ad hoc Committee***

Ms. Dyalá Jiménez, President  
Prof. Dr. Fausto de Quadros, Member  
Ms. Mélanie Riofrio Piché, Member

***Assistant to the President of the ad hoc Committee***

Ms. Karima Sauma

***Secretary of the ad hoc Committee***

Mr. Paul Jean Le Cannu

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29 April 2022

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## I. PROCEDURAL BACKGROUND

1. This Decision addresses the application by the Kingdom of Spain (the “**Applicant**” or “**Spain**”) for the continuation of a provisional stay of enforcement of the ICSID award rendered on 22 June 2021 in *Sun-Flower Olmeda GmbH & Co KG and others v. Kingdom of Spain*, ICSID Case No. ARB/16/17 (the “**Award**”).
2. Sun-Flower Olmeda GmbH & Co KG and others (“**Sun-Flower**” or “**Claimants**”) and Spain are collectively referred to as the “**Parties**”.
3. On 20 October 2021, the Applicant filed its *Application for Annulment of the Award*, together with Annexes 001 to 008 (the “**Application**”). In its Application, Spain requested, *inter alia*, (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 until the *ad hoc* Committee renders its decision in this annulment proceeding (the “**Stay Request**”).<sup>1</sup>
4. On 25 October 2021, 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).
5. On 13 December 2021, the *ad hoc* Committee was constituted in accordance with ICSID Arbitration Rules 6 and 53. Its members are Ms. Dyalá Jiménez (President), a national of Costa Rica, Prof. Dr. Fausto de Quadros, a national of Portugal, and Ms. Mélanie Riofrio Piché, a national of Canada and Ecuador (the “**ad hoc Committee**” or “**Committee**”). On the same date, the Parties were notified that Mr. Paul Jean Le Cannu, Team Leader / Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.
6. By letter dated 17 December 2021, the Committee, *inter alia*, (i) proposed to hold the First Session by videoconference (Zoom) indicating the dates on which it would be available, (ii) invited the Parties to confer and jointly propose a schedule of written submissions to address the Stay Request, and (iii) proposed the appointment of Ms. Karima Sauma as Assistant to the President of the Committee.
7. By emails of 21 and 23 January 2022, the Parties confirmed that they consented to the appointment of Ms. Sauma as Assistant to the President under the terms described in the Secretariat’s letter of

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<sup>1</sup> Application, ¶¶ 46, 48.

- 17 December 2021. Both Parties also informed the Secretariat of updates to the case distribution list and their availability on the dates proposed for the First Session.
8. By email of 23 January 2022, given that the Parties were not available on the same dates among those originally proposed by the Committee, the Committee proposed additional dates beyond the 60-day period provided in ICSID Arbitration Rule 13(1) and invited the Parties to confirm whether they would agree to hold the First Session on these additional dates.
  9. On 6 January 2022, the Committee provided the Parties with the declaration of Ms. Karima Sauma following her appointment as Assistant to the President of the Committee.
  10. By emails of 6 and 7 January 2022, the Parties informed the Committee of (i) their agreed schedule of submissions on the Stay Request, (ii) their joint availability on the additional dates proposed for the First Session, and (iii) their agreement that all the submissions on the Stay Request were to be made in English, without prejudice to the procedural language/s that would be established in the appropriate Procedural Order.
  11. On 7 January 2022, the Committee confirmed that the First Session would be held on 21 February 2022 and circulated a Draft Procedural Order No. 1 (“**Draft PO1**”). The Committee also took note of (i) the Parties’ agreement of the language of their submissions on the Stay Request, and (ii) the Parties’ proposed procedural calendar on the Stay Request, which it adopted. The Parties did not request a hearing for the Stay Request, and the Committee did not deem one necessary.
  12. On 4 February 2022, the Applicant filed its *Submission in Support of the Continuation of the Stay of Enforcement of the Award*, together with Annexes 1 and 009 to 020 (the “**Submission**”).
  13. On 8 February 2022, the Parties submitted their joint comments and proposals to the Draft PO1 that reflected their agreements and points of disagreement to be discussed during the First Session, which was held on 21 February 2022.
  14. On 24 February 2022, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters (“**PO1**”). PO1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural languages are English and Spanish, and that the place of the proceeding is Paris, France. PO1 also sets out a procedural calendar for the proceeding.

15. On 4 March 2022, the Claimants filed their *Response to Spain’s Request for the Stay of Enforcement*, together with the Brattle Rebuttal Quantum Report dated 2 February 2018 (submitted in the underlying arbitration as CE-0004), exhibits C-0226 to C-0232 and legal authorities CL-0192 to CL-0219 (the “**Response**”). On 18 March 2022, the Applicant filed its *Reply in Support of the Continuation of the Stay of Enforcement of the Award*, together with new legal authorities RL-0169 through RL-0180, as well as legal authorities RL-0019, RL-0034, RL-0072, RL-109, RL-0116, RL-0123, RL-126, and RL-0155 through RL-0168 (the “**Reply**”). On 1 April 2022, the Claimants filed their *Rejoinder on the Continuation of the Stay of Enforcement of the Award*, together with exhibit C-0234 and legal authorities CL-0231 and CL-0232 (the “**Rejoinder**”).

## II. THE APPLICANT’S POSITION

16. Spain argues that the stay of enforcement of the Award should be continued in this case as (i) its Application for Annulment was made in good faith<sup>2</sup> and (ii) enforcement of the Award would be prejudicial to Spain while it would not cause harm to Sun-Flower in any way.<sup>3</sup> In addition, Spain argues that an order for security is unnecessary, burdensome, and would place Sun-Flower in a better position than it would be in the absence of a stay of enforcement.<sup>4</sup> As regards Sun-Flower’s proposal of conditioning the stay to an undertaking, Spain made no comment specifically thereon.

### A. Applicable Legal Standard and Burden of Proof

17. The Applicant indicates that pursuant to Article 52(5) of the ICSID Convention, the Committee may continue the stay of enforcement of the Award “if it considers that the circumstances so require”, as also reflected in Rule 54(2) of the ICSID Arbitration Rules. It argues that the prevailing ICSID practice of granting stays of enforcement was recognized by the *ad hoc* committees in *Occidental v. Ecuador* and *Victor Pey Casado v. Chile*.<sup>5</sup>
18. Spain argues that neither the ICSID Convention nor the ICSID Arbitration Rules provides specific guidance on the factors that an *ad hoc* annulment Committee should consider in determining whether to continue a stay of enforcement under Article 52(5) of the ICSID Convention and ICSID

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<sup>2</sup> Submission, ¶ 11.

<sup>3</sup> Submission, ¶ 13, 27.

<sup>4</sup> Submission, ¶ 36.

<sup>5</sup> Submission, ¶¶ 7-8; **Annex-09 / RL-0158**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, 30 September 2013, ¶ 50; **Annex-10 / RL-0159**, *Victor Pey Casado and Presidente Allende Foundation 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, ¶ 25.

Arbitration Rule 54(2).<sup>6</sup> Spain alleges that ICSID *ad hoc* annulment committees have commonly considered a number of circumstances in determining whether to stay enforcement, including: (a) whether the annulment application is dilatory or frivolous; (b) the adverse consequences that may be caused to either party by the granting or denial of a stay of enforcement; (c) the risk of non-recoupment of the award if it is paid and subsequently annulled; and (d) the risk that the award may not be honored if the annulment application is unsuccessful.<sup>7</sup> Spain argues that it is the Committee’s task to exercise its discretionary power to evaluate all relevant circumstances in determining whether a stay of enforcement is to be continued.<sup>8</sup>

19. Further, the Applicant maintains that Sun-Flower attempts to mislead the Committee when it adds the words “compelling” and “exceptional” to the circumstances it needs to consider in deciding on the Stay Request.<sup>9</sup> Spain argues that Sun-Flower relies on a minority of decisions that have denied stays, but that this small group cannot be relied upon to support the argument that stays can only be granted under “exceptional” circumstances.<sup>10</sup> Additionally, Spain contends that the only case that actually used the expression “exceptional circumstances”, *Border Timbers v. Zimbabwe*, was referring to the burden on the party opposing the stay, in that the opposing party need not show “that there are ‘exceptional circumstances’ that require the lifting of the stay.”<sup>11</sup>
20. Spain submits that another applicable international convention, the Treaty on the Functioning of the EU (“TFEU”), forbids the payment of the Award until the European Commission authorizes such payment.<sup>12</sup> In addition, regarding other sources of International Law, Spain maintains that international custom and the general principles of law also recommend maintaining the stay, since the rule under international custom is to “respect the sovereigns and to try to avoid international conflicts”.<sup>13</sup>

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<sup>6</sup> Reply, ¶ 19.

<sup>7</sup> Reply, ¶ 20.

<sup>8</sup> Reply, ¶ 38.

<sup>9</sup> Reply, ¶ 21.

<sup>10</sup> Reply, ¶ 25.

<sup>11</sup> Reply, ¶ 30; **RL-0172**, *Border Timbers Limited and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Stay of Enforcement of the Award, 24 April 2017, ¶ 80.

<sup>12</sup> Reply, ¶ 33.

<sup>13</sup> Reply, ¶ 34.

21. As for the burden of proof, Spain contends that, whereas Spain’s burden of proof has been met<sup>14</sup>, Sun-Flower must provide evidence that justifies lifting the stay, “such as whether it would suffer any prejudice by the stay”.<sup>15</sup>
22. The Applicant contends that *ad hoc* annulment committees have found that a request for continuation of a stay should be granted unless it is obvious that the application is “without any basis under the Convention” and is “dilatory” in nature, as stated by the *ad hoc* committee in *MTD v. Chile*.<sup>16</sup>
23. Spain argues that the Annulment Application in this case is based on serious grounds, was made in good faith, and is not dilatory<sup>17</sup> because, in its view, the Arbitral Tribunal exceeded its powers in the Award and failed to apply the proper law. Subsidiarily, the Applicant deems that the Arbitral Tribunal failed to apply EU Law correctly.<sup>18</sup>
24. Additionally, Spain submits that good faith is presumed whereas bad faith must be proved, and Sun-Flower has provided no evidence of Spain’s supposed bad faith.<sup>19</sup>

#### **B. Harm to the Kingdom of Spain if the Stay Is Not Continued**

25. The Applicant argues that a key factor that may be considered by an *ad hoc* committee when deciding on a request for the continuation of the stay of enforcement is the harm that the decision could entail for each party.<sup>20</sup> Spain submits that if the stay is not continued and Spain is forced to pay the amounts ordered in the Award, it would face the risk of non-recoupment in the event the Award is annulled.<sup>21</sup> Spain claims that after the investment was made a number of facts have occurred surrounding Claimants that could make difficult the recovery of any amounts paid.<sup>22</sup> Spain contends that as soon as the awarded amounts are received by the Claimants they will likely be transferred outside the control of the Claimants’ companies.<sup>23</sup>

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<sup>14</sup> Reply, ¶¶ 37 and 42.

<sup>15</sup> Reply, ¶ 39.

<sup>16</sup> Submission, ¶ 9; **Annex-12 / RL-0161**, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent’s Request for a Continued Stay of Execution, 1 June 2005 ¶ 28.

<sup>17</sup> Submission, ¶ 11.

<sup>18</sup> Submission, ¶ 12.

<sup>19</sup> Reply, ¶ 46.

<sup>20</sup> Submission, ¶ 13.

<sup>21</sup> Submission, ¶ 15.

<sup>22</sup> Submission, ¶ 18-23.

<sup>23</sup> Reply, ¶ 50.

26. Spain mentions that, while Claimants argue that Sunflower Sustainable Investments Ltd. (“**Sunflower SIT**”) and Shikun & Binui Renewable Energy Ltd (“**SBRE**”) retain the legal right to enforce the Award amounts owed to Gilatz Spain and that they would have no difficulties returning any amounts on behalf of Gilatz Spain, this is unsupported.<sup>24</sup>
27. Spain maintains that its right to seek annulment and a stay of enforcement under the ICSID Convention is not subordinate to Sun-Flower’s right to obtain enforcement. Paying the Award and having to initiate proceedings to recover said amount subsequently is an unnecessary and costly burden.<sup>25</sup>
28. Spain posits further that if Sun-Flower were able to seek enforcement of the Award in its current form and the European Commission (“**EC**”) later were to determine that the Award is incompatible State Aid, this could require Spain to commence recovery proceedings against Sun-Flower.<sup>26</sup> In this scenario, Spain submits that if it fails to recover the amounts paid to Sun-Flower, “it could be liable for monetary penalties”.<sup>27</sup> Alternatively, an adverse determination by the EC concerning the Award could cause proceedings to be commenced by Sun-Flower seeking to overturn said determination.<sup>28</sup>
29. Spain also contends that a stay is warranted due to the different proceedings that would be required depending on the result of the annulment proceeding. If the Award is annulled in full, no valuation by the EC would be necessary, and if it is annulled in part, only the non-annulled parts of the Award would need to be assessed by the EC.<sup>29</sup>
30. Additionally, Spain maintains that it is obliged to obtain clearance from the EC to pay the Award because it constitutes notifiable State Aid under Article 108(3) of the TFEU.<sup>30</sup> Spain argues that the EC has already determined that payment of the Award is notifiable State Aid when it issued a decision on 10 November 2017 regarding Spain’s regulatory scheme supporting renewable

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<sup>24</sup> Reply, ¶ 51.

<sup>25</sup> Reply, ¶ 56.

<sup>26</sup> Reply, ¶ 67.

<sup>27</sup> Reply, ¶ 89.

<sup>28</sup> Reply, ¶ 68.

<sup>29</sup> Reply, ¶ 70.

<sup>30</sup> Reply, ¶ 75.



measures, which included the disputed measures in this Arbitration,<sup>31</sup> and specifically requested that it be notified if and when payment of the Award would be required.<sup>32</sup>

### C. Continuing the Stay Would Not Harm Sun-Flower

31. The Applicant argues that Sun-Flower would not be harmed in any way if the *ad hoc* Committee decides to continue the provisional stay of enforcement of the Award since if the Annulment Application is denied, any delay in payment of the Award would be remedied by the interest granted by the Arbitral Tribunal in the Award.<sup>33</sup> According to the Applicant, this is a factor that has been taken into account by other *ad hoc* committees, such as *Azurix v. Argentina*.<sup>34</sup>
32. Spain also alleges that in deciding whether to continue a stay of enforcement, committees may consider the risk of noncompliance with the award if it is not annulled, and even when such a risk exists, committees have found that it is not conclusive and stays of enforcement have been granted even in said circumstances.<sup>35</sup> Additionally, Spain argues that the fact that Claimants' cost of capital is higher than the post-award interest ordered by the Tribunal in the original Award is irrelevant.<sup>36</sup>
33. Spain submits that there is no danger that it will not have the financial resources to pay the Award since it is the fifth-largest economy in the European Union and is ranked 13th among all countries in the world in terms of GDP.<sup>37</sup> Spain also argues that it does not have a history of non-compliance.<sup>38</sup>
34. The Applicant alleges that the best proof that it intends to abide by its international obligations is the fact that it has already initiated the process to notify the Award to the EC for its State Aid assessment, thereby taking the steps towards payment.<sup>39</sup>

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<sup>31</sup> Reply, ¶ 81.

<sup>32</sup> Reply, ¶ 82. Spain also submits that Article 30 of the Vienna Convention of the Law of Treaties ("VCLT") supports its position. Reply, ¶ 95-99; **RL-0034 / CL-0005**, Vienna Convention on the Law of Treaties, 23 May 1969, Article 30.

<sup>33</sup> Submission, ¶¶ 27-28.

<sup>34</sup> Submission, ¶ 28; **Annex-11 / RL-0160**, *Azurix Corp. v. 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, ¶ 40.

<sup>35</sup> Submission, ¶ 31.

<sup>36</sup> Reply, ¶ 59.

<sup>37</sup> Submission, ¶ 32.

<sup>38</sup> Submission, ¶ 33; Reply, ¶ 63, 64.

<sup>39</sup> Submission, ¶ 35. Spain asserts that per Articles 107 and 108 of the TFEU, the EU Regulation and the EC Decision, before paying the Award, Spain must notify the European Commission and obtain clearance from the European Commission. Reply ¶83.

#### **D. No Security Should Be Provided by Spain**

35. Spain submits that no guarantee should be required as a condition for continuing the stay of enforcement, alleging that *ad hoc* committees have recognized that this would place the award creditor in a better position than it would have been if an annulment proceeding had not even been commenced. In order to impose such a guarantee the Committee should require proving that the award creditor would suffer prejudice if the stay were continued.<sup>40</sup> Spain considers that Sun-Flower has failed to meet this burden, and that the same factors that support the granting of a stay warrant granting the stay unconditionally.<sup>41</sup>
36. The Applicant further contends that the commission that a bank would charge to provide a guarantee of this kind would be likely considerable, and that this would amount to imposing a cost or a fine, which is not foreseen in the ICSID Convention.<sup>42</sup> Spain cites the *ad hoc* committees in *Azurix v. Argentina* and *Tenaris v. Venezuela* to support this position.<sup>43</sup>
37. Finally, Spain argues that it would make no sense to issue a security for the preservation of an economic value which might be annulled in its entirety pursuant to the annulment proceedings, as was the case of the *Eiser* award against Spain.<sup>44</sup>

#### **E. Spain's Request for Relief**

38. Spain requests that “the stay of enforcement of the Award [...] 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.”<sup>45</sup>

### **III. THE RESPONDENT ON ANNULMENT'S POSITION**

39. Sun-Flower argues that the ICSID Convention contains the strong presumption that awards are immediately enforceable, and therefore Spain must offer compelling reasons to overcome this

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<sup>40</sup> Submission, ¶ 36.

<sup>41</sup> Reply, ¶ 108.

<sup>42</sup> Reply, ¶ 109.

<sup>43</sup> Reply, ¶ 110-111; **Annex-11 / RL-0160**, *Azurix Corp. v. 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, ¶¶ 22, 25, 37 and 40; **RL-0178**, *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, ¶ 131.

<sup>44</sup> Reply, ¶ 112.

<sup>45</sup> Submission, ¶ 37; Reply, ¶ 117.

presumption.<sup>46</sup> Claimants posit that they “will consent to an extension of the stay on condition that Spain posts adequate security or an unconditional undertaking to pay the Award promptly and in full should the Committee reject the annulment application. Should Spain be unwilling to provide security or clear assurance of payment, the stay should be lifted.”<sup>47</sup>

#### **A. Applicable Legal Standard and Burden of Proof**

40. Claimants contend that three key legal principles apply to the present inquiry: (i) ICSID awards are immediately enforceable, and the award beneficiary’s right to compel payment can only be suspended in exceptional circumstances; (ii) Spain bears the burden of establishing those exceptional circumstances; and (iii) ICSID annulment committees enjoy broad discretion in determining whether to lift or condition the stay of enforcement.<sup>48</sup>
41. Claimants submit that according to Article 52, a stay is to be continued only where “the circumstances so require”, and those circumstances must be “exceptional” and the award debtor must prove them. According to Sun-Flower, “Article 52(5) of the ICSID Convention makes clear the discretionary and exceptional nature of a stay.”<sup>49</sup> This is also supported by Article 31(1) of the VCLT, which prescribes that it should be interpreted in good faith “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>50</sup>
42. Further, Claimants argue that a stay of enforcement beyond the provisional period under Article 52 is far from automatic, citing from the decisions by the *ad hoc* committees in *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*<sup>51</sup>, *Antin Infrastructure Services Luxembourg Sàrl v.*

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<sup>46</sup> Response, ¶ 2.

<sup>47</sup> Response, ¶ 3.

<sup>48</sup> Response, ¶ 8.

<sup>49</sup> Response, ¶ 10.

<sup>50</sup> Rejoinder, ¶ 6; **RL-0034 / CL-0005**, Vienna Convention on the Law of Treaties, 23 May 1969, Article 31(1).

<sup>51</sup> Response, ¶ 11; **RL-0170 / CL-0196**, *Ioannis Kardassopoulos and Ron Fuchs v. 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, ¶ 26.

*Spain*<sup>52</sup>, and *InfraRed Environmental Infrastructure GP Limited and others v. Spain*<sup>53</sup>, among others.

43. The Claimants argue that Spain ignores the distinction between conditional and unconditional stays of enforcement: “Unconditional stays of enforcement have always been unusual in ICSID annulment cases. And since 2017, stay requests have either been rejected or granted only with conditions 69% of the time. Before that, stays were either lifted or granted conditionally 65% of the time.”<sup>54</sup>
44. The Claimants allege that since the default position is that awards are immediately enforceable, Spain carries the burden of proving the exceptional circumstances that would justify maintaining the stay and cites to *OI European Group BV v. Venezuela* in support of its position.<sup>55</sup>
45. The Claimants further submit that EU law is irrelevant to the underlying dispute, and that the TFEU cannot trump the ICSID Convention by operation of Article 30 of the VCLT because these treaties do not relate to the same subject-matter and are not incompatible with each other.<sup>56</sup> Additionally, the Claimants argue that a State cannot invoke its own laws in order to justify a failure to perform, and that Spain has advanced this argument in nine recent annulment cases, where they have all been rejected.<sup>57</sup> Finally, Claimants allege that it is Spain’s burden to justify a continued stay of enforcement of the Award.<sup>58</sup>

## **B. The Risk of Non-Payment by Spain**

46. The Claimants assert that ICSID annulment committees enjoy broad discretion with respect to lifting or placing conditions on a stay of enforcement and argue that this is well-established in ICSID practice, particularly where there is a substantial risk that the applicant will not abide by the

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<sup>52</sup> Response, ¶ 13; Rejoinder, ¶ 8; **CL-0208**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg Sàrl 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, ¶¶ 61, 67.

<sup>53</sup> Rejoinder, ¶ 8; **CL-0215**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020, ¶ 138.

<sup>54</sup> Rejoinder, ¶ 10.

<sup>55</sup> Response, ¶ 14; **CL-0201**, *OI European Group BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, 4 April 2016, ¶ 94.

<sup>56</sup> Rejoinder, ¶ 13.

<sup>57</sup> Rejoinder, ¶ 15.

<sup>58</sup> Rejoinder, ¶ 16.

award if it is upheld.<sup>59</sup> The Claimants cite *NextEra Energy v. Spain* and *Sempra Energy International v. Argentina*, saying that the committees in these cases have exercised their discretion to make the continuation of a stay conditional on the award debtor posting security.<sup>60</sup>

47. The Claimants allege that a material risk that Spain will not comply with the Award is sufficient basis to either condition the stay or lift it. As the *Sempra* committee observed, the prospects of compliance “figured predominantly and even played a decisive role” in other committees’ decisions on requests to stay enforcement.<sup>61</sup>
48. The Claimants maintain that there is near certainty that Spain will refuse to comply with the Award, in defiance of its obligations under the ICSID Convention.<sup>62</sup> The Claimants indicate that except for the award in *Maffezini v. Spain*, all other ICSID awards against Spain remain unpaid and that Spain has applied to annul all ICSID awards rendered against it.<sup>63</sup> They further contend that an unconditional stay of enforcement will undermine the Claimants’ ability to collect their due, forcing them to wait while other award creditors pursue limited Spanish state assets outside the country.<sup>64</sup> Finally, Sun-Flower argues that Spain’s admission that payment can only follow after a “green light” from the European Commission demonstrates that it will not pay the Award promptly, or at all, and thus the risk of non-payment is established.<sup>65</sup>
49. The Claimants submit that its cost of capital based on the internal rate of return (IRR) of the PV projects ranges from 6.8%-7.5% to 8.2%-8.9%, which is higher than the post-award interest ordered by the Tribunal based on the rate of 10-year Spanish government bonds.<sup>66</sup> Moreover, the Claimants allege that post-award interest does not protect them against the risk that Spain will refuse to comply with the Award nor will it compensate adequately for the cost and effort of enforcement.<sup>67</sup> The Claimants add that Spain has eight outstanding ICSID awards and as many as five more pending,

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<sup>59</sup> Response, ¶ 16.

<sup>60</sup> Response, ¶ 16-18; **CL-0213**, *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision Terminating the Stay of Enforcement of the Award, 28 May 2020; **CL-0195**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 5 March 2009.

<sup>61</sup> Response, ¶ 21; **CL-0195**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 5 March 2009, ¶ 30.

<sup>62</sup> Response, ¶ 22.

<sup>63</sup> Response, ¶ 23; Rejoinder, ¶ 21.

<sup>64</sup> Response, ¶ 24.

<sup>65</sup> Response, ¶ 26.

<sup>66</sup> Response, ¶ 27.

<sup>67</sup> Response, ¶ 28.

so any delay in payment significantly diminishes likelihood of collection.<sup>68</sup> Claimants posit that they have indeed shown that they would be prejudiced by an unconditional stay.<sup>69</sup>

50. The Claimants are ready to accept a continuation of the stay subject to Spain posting financial security or providing an unconditional written undertaking to pay promptly.<sup>70</sup> The Claimants adduce that this will cause no prejudice or harm to Spain<sup>71</sup> and ensures a balance between the rights of the Parties.<sup>72</sup> Additionally, the Claimants argue that Spain's reliance on other obligations such as those prescribed by EU law further exacerbates the risk of non-payment.<sup>73</sup>
51. The Claimants argue that an order conditioning a stay of enforcement on the provision of security would not give the Claimants their due any time sooner<sup>74</sup> and would restore the Claimants to the position that, under the ICSID Convention, they should already occupy but for Spain's policy to challenge all adverse awards and disregard its Article 53 obligations. The Claimants cite *Occidental Petroleum Corporation v. Ecuador* in this regard.<sup>75</sup>

### **C. There Is No Risk of Non-Recoupment**

52. The Claimants argue that it is highly unlikely that enforcement efforts against Spain (which have not yet begun) would lead to a seizure of assets before the annulment procedure is finalized, as has happened in other cases.<sup>76</sup> Claimants put forward that, "[t]o the extent that the Committee considers Spain has shown any risk of non-recoupment, the Claimants are prepared to issue a joint undertaking [...] that they will return any amounts collected during enforcement in the event the annulment proceeding is decided in favour of Spain."<sup>77</sup> The Claimants also maintain that if Spain opts to post a bank guarantee or to place the Award amount in escrow, there would be no transfer of funds from Spain to the Claimants, and that the cost of this option would be minimal.

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<sup>68</sup> Response, ¶ 29.

<sup>69</sup> Rejoinder ¶ 46.

<sup>70</sup> Response, ¶ 36; Rejoinder ¶ 19, 22.

<sup>71</sup> Response, ¶ 30.

<sup>72</sup> Response, ¶ 31.

<sup>73</sup> Rejoinder ¶ 23.

<sup>74</sup> Response, ¶ 33.

<sup>75</sup> Response, ¶ 34; **CL-0198**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on the Stay of Enforcement of the Award, 30 September 2013, ¶ 68.

<sup>76</sup> Response, ¶ 37; Rejoinder ¶ 35.

<sup>77</sup> Response, ¶ 39.

Additionally, the Claimants argue that if Spain decides to provide an unconditional undertaking to pay, that will not involve any transfer of funds or transaction costs.<sup>78</sup>

53. The Claimants submit that Spain offers no evidence that any of the four Claimants will not return proceeds collected on enforcement, if necessary. The Claimants add that Sunflower SIT and SBRE are two leading Israeli renewable energy companies, and that nothing impedes the Committee from ordering Sun-Flower Olmeda to return any monies collected under the Award during enforcement.<sup>79</sup> The Claimants assert that Spain has failed to meet its burden of proof as it alleges only generalities about the risks of non-recoupment.<sup>80</sup> The Claimants argue that Redmill's sale of its shares in Sunflower SIT are nonetheless irrelevant. The Tribunal ordered payment of damages in favour only of Gilatz Spain and Sun-Flower Olmeda, so Redmill would not be entitled to enforce the Award against Spain, and its arrangements with the buyer of Sunflower SIT shares can have no bearing on Spain's ability to recover assets should the Award be annulled.<sup>81</sup> Sun-Flower also maintains that Gilatz Spain's merger with Vela does not have any impact on enforcement. The Claimants adduce that if the Award is annulled, the Committee could direct any of the Claimants to make the necessary payment to Spain.<sup>82</sup> The Claimants add that Sunflower SIT and SBRE hold the legal right to collect Award amounts owed to Gilatz Spain.<sup>83</sup>
54. The Claimants further allege that any cost associated with the recovery of assets after annulment cannot justify the maintenance of a stay of enforcement. The ICSID Convention stipulates that awards are immediately enforceable, despite the possibility that they may ultimately be annulled. Therefore, the Claimants maintain that the possible cost of recovering amounts paid or collected under awards that are later annulled is a natural consequence of the ICSID Convention enforcement regime.<sup>84</sup>

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<sup>78</sup> Rejoinder ¶ 27.

<sup>79</sup> Response, ¶ 38; Rejoinder ¶ 37.

<sup>80</sup> Response, ¶ 51.

<sup>81</sup> Response, ¶ 54.

<sup>82</sup> Response, ¶ 55.

<sup>83</sup> Response, ¶ 56.

<sup>84</sup> Response, ¶ 58; Rejoinder ¶ 40.

**D. The Stay Should Be Lifted If Spain Fails to Comply with the Conditions for a Continued Stay**

55. The Claimants ask the Committee to lift the stay if Spain fails either to issue a security or a written undertaking.<sup>85</sup> Sun-Flower contends that since there is no presumption in favour of continuing the stay, the mere absence of harm to the Claimants does not constitute “circumstances requiring” a stay. Instead, Spain has the positive burden of proving that a stay is necessary, absent which the stay should be lifted.<sup>86</sup>
56. The Claimants argue that Spain’s annulment application is not based on serious ground, adding that all tribunals hearing cases under the ECT against Spain (or any other respondent State) have dismissed jurisdictional objections based on EU law, and that no ICSID *ad hoc* committee has annulled an ECT award on the grounds that the tribunal exceeded its powers by rejecting Spain’s EU law jurisdictional objections.<sup>87</sup> Moreover, Sun-Flower submits that as several other committees have held, the merits of the application are irrelevant for purposes of determining whether a stay should be continued or lifted.<sup>88</sup>
57. The Claimants add that as the committee in *Masdar Solar & Wind v. Spain* held, “the mere fact that the application is not dilatory is not sufficient to grant the extension of the stay.” Spain bears the burden of demonstrating other circumstances that would require a continued stay other than the mere fact of having filed an application.<sup>89</sup> Moreover, the Claimants contend that Spain’s application is meritless.<sup>90</sup>
58. Additionally, the Claimants adduce that Spain cannot allege its obligations under EU law to refrain from paying the Award<sup>91</sup>, and that the conflict between EU law and the ICSID Convention is not a circumstance requiring a stay.<sup>92</sup>

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<sup>85</sup> Response, ¶ 42.

<sup>86</sup> Response, ¶ 43.

<sup>87</sup> Response, ¶ 47.

<sup>88</sup> Response, ¶ 48.

<sup>89</sup> Response, ¶ 49; Rejoinder, ¶ 31; **CL-0212**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Procedural Order No. 3 (Decision on the Kingdom of Spain’s Request for a Continuation of the Stay of Enforcement of the Award), 20 May 2020, ¶ 92.

<sup>90</sup> Rejoinder ¶ 33.

<sup>91</sup> Rejoinder ¶ 51.

<sup>92</sup> Rejoinder ¶ 54.



#### **E. Sun-Flower’s Request for Relief**

59. Sun-Flower requests that the Committee grant the following relief:

(a) DISMISS Spain’s application to continue unconditionally the provisional stay of enforcement of the Award;

(b) ORDER Spain to post security sufficient to satisfy the Award in full, or provide an unconditional written undertaking duly signed by Spain’s relevant authorities that it recognizes the Award as final and binding and that it shall pay the amounts ordered in the Award within 60 days from the notification of the Committee’s Decision upholding the Award;

(c) ORDER that the stay of enforcement be lifted, if Spain does not comply with the Committee’s order in (b) above;

(d) In the alternative, ORDER that the stay of enforcement be lifted immediately;

(e) ORDER Spain to pay the costs incurred by the Claimants in answering the petition to lift the provisional stay of enforcement of the Award; and

(f) AWARD any other relief to the Claimants deemed appropriate by the Committee.<sup>93</sup>

#### **IV. THE COMMITTEE’S ANALYSIS**

60. The Committee will first address the applicable legal standard and the burden of proof (A), after which it will analyze whether there are circumstances that require the continuation of the stay (B).

##### **A. Applicable Legal Standard and Burden of Proof**

61. There is a *iuris tantum* presumption of immediate enforceability of the Award under the ICSID Convention.<sup>94</sup> Unlike many local juridical systems, the stay of enforcement of an ICSID award is not an automatic rule that applies upon the request for annulment; rather, a “provisional” stay operates only if the requesting party asks for such a stay, and *ad hoc* committees must determine

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<sup>93</sup> Response, ¶ 59; Rejoinder, ¶ 57.

<sup>94</sup> See e.g. **CL-0197**, *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, ¶¶ 84-85.

whether to order that the stay continue. Further, under Rule 54(2) unless the *ad hoc* committee decides to continue the stay, it is automatically lifted.

62. Each case is examined individually, on its own merits. The Committee underscores the ample discretion given by the ICSID Convention and the Arbitration Rules in deciding whether to continue the stay. Indeed, Article 52(5) of the ICSID Convention states that an *ad hoc* committee “[...] **may**, if it considers that the circumstances so require [...]” stay the enforcement of the award (Emphasis added). What is more, an interpretation according to the ordinary meaning of this provision’s terms means that, even when an *ad hoc* committee considers that there are circumstances requiring a stay, it could still deny its continuation.<sup>95</sup>
63. In this regard, the Committee rejects the suggestion by Spain that a continuation of a stay “should be granted unless it is obvious that the application is [...] [baseless or dilatory] in nature”<sup>96</sup> or that there is a standard practice in favour of the continuation of stay.
64. The applicable rule qualifies the circumstances that annulment committees must consider in deciding whether to continue the stay: they must “require” the stay. The Committee shares the view of the *Antin* annulment committee in 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 [sic] the granting of a stay.”<sup>97</sup>
65. This broad discretion is recognized in virtually every decision on stay that is issued by annulment committees.<sup>98</sup> However, Rule 54(4) requires that a) the party asking for the continuance of the stay

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<sup>95</sup> In the words of the annulment committee in *Antin*, “[i]f the Committee is satisfied that such circumstances exist, it may then exercise its discretion under Article 52(5) to continue or lift the stay.” **CL-0208**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg Sàrl 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, ¶ 58.

<sup>96</sup> Submission, ¶ 9.

<sup>97</sup> **CL-0208**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg Sàrl 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, ¶ 67.

<sup>98</sup> See e.g. **RL-0170 / CL-0196**, *Ioannis Kardassopoulos and Ron Fuchs v. 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, ¶ 29; **Annex-09 / RL-0158 / CL-0198**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 30 September 2013, ¶ 47; **CL-0201**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, 4 April 2016, ¶¶ 87-89; **Annex-13 / RL-0162**, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on the Request to End the Provisional Suspension of the Execution of the Award, 21 February 2017, ¶ 41; **RL-0171 / CL-0206**, *Burlington Resources*,

specify the circumstances requiring the stay and b) the *ad hoc* committee give parties an opportunity to present their observations. Other than those two requirements, *ad hoc* committees are quite free in determining whether the enforcement of the award should be stayed during the annulment proceedings.

66. Spain did specify the circumstances it deems require the stay in its Submission and its Reply, namely, that the application for annulment is well-grounded, that there is a risk of non-recoupment for Spain should the award be annulled and, if recoupment were possible, that there would be an undue burden; also, that the continuance of the stay could harm all parties with unnecessary burdens and expenses. Since the first requirement of Rule 54(4) is to “specify” the circumstances, the Committee finds it has been fulfilled.
67. As regards the second requirement, the Parties themselves agreed on a calendar for two rounds of submissions on the issue and presented their submissions in writing on the dates agreed, so they were duly heard on the continuance of the stay. As mentioned in paragraph 11 *supra*, the Parties did not consider it necessary to hold a hearing on the issue.
68. Turning to the burden of proof, the Committee subscribes to the balance approach taken in *Standard Chartered*<sup>99</sup>, whereby the party requesting the continuance of the stay must advance, with supporting evidence or arguments, the grounds that require the stay, and the party resisting the case must support any positive allegations it raises. This rule on the burden of proof also applies to the Claimants’ request to condition any stay: Sun-Flower has to establish that there exists the need for the Committee to condition the continuance of the stay should it decide to order it.

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*Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶ 70; **RL-0178**, *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, ¶ 84; **RL-0179**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, ¶ 42; **CL-0209**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Stay of Enforcement of the Award, 12 December 2019, ¶ 69; **CL-0210**, *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, ¶ 77; **RL-0180**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 52; **CL-0226**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Stay of Enforcement of the Award, 17 September 2020, ¶ 129.

<sup>99</sup> **RL-0173 / CL-0203**, *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, ¶¶ 53-54.

69. In this case, for each request, namely Spain’s request to continue the stay and Sun-Flower’s request to order a condition if the continuance is granted, the corresponding party advanced arguments and supporting evidence. The Committee finds that each party has offered arguments and, where pertinent, evidence in support of its respective request and proposal.

**B. The Circumstances Requiring the Continuation of the Stay**

70. *Ad hoc* committees have taken into account different factors in determining the continuance of the provisional stay of the enforcement of an award, which include the risk of non-recoupment by the award debtor should the award be subsequently annulled, and the risk that the debtor will not pay should the award be upheld, as well as the potential harm produced to either party depending on the perspective.

71. The Committee first notes that the Award ordered Spain to pay the following:

to Gilatz: €28,974,354 (plus a “gross-up amount” per para. 687 of the Award)  
to Sun-Flower Olmeda: €18,360,528 and  
to Claimants: USD 224,446 plus €1.25 Million

72. This Award orders Spain to pay almost €49 Million.

73. Spain argues that, should the stay be lifted and Spain be ordered to pay such amounts, there is a risk of non-recoupment given the likelihood that the amounts paid will be transferred “outside the control of the Claimants’ companies.”<sup>100</sup> *Inter alia*, Spain points to the fact that in March 2021 Sunflower SIT notified the Tel Aviv stock exchange of an agreement for the sale of 64% of its shares to a third party and that part of such sale would be monies awarded in the Award. In support of such statement Spain submits a note from *Globes, Israel business news*<sup>101</sup> and an extract from a publication by *CIAR GLOBAL*, a specialized journal on international arbitration.<sup>102</sup>

74. On their part, the Claimants argue, first, that this may be irrelevant because enforcement proceedings are lengthy and, secondly, that Sun-Flower is owned by two leading Israeli renewable energy companies that are well-established and publicly-traded and that retain the right to enforce the Award in favour of Gilatz Spain, so there is no risk of non-recoupment. Should the Committee

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<sup>100</sup> Reply, ¶ 50.

<sup>101</sup> **Annex-20 / RL-0168**, Aviv Lévy, *Deutsch, Biram transfer Sunflower to their Keystone fund*, in *Globes, Israel business news*, 30 March 2021.

<sup>102</sup> **Annex-19 / RL-0167**, *CIAR GLOBAL, España Presenta Nueva Anulación En Un Arbitraje De Renovables Con Olmeda*, 27 October 2021.

find that there is a risk of non-recoupment, the Claimants offered to issue an undertaking that they would return any amounts collected during enforcement in the event the annulment proceeding is decided in favour of Spain.<sup>103</sup>

75. The evidence produced by Spain does not convince the Committee that there is currently a real risk that Spain would be unable to recover any amounts that would, eventually, be paid to the Claimants per the Award. Although the Claimants did not reject the assertion regarding the sale of the shares of one of Sun-Flower’s shareholders, the *Globes, Israel business news* note states that “[c]ompletion of the deal is subject to a number of preconditions.”<sup>104</sup> Further, nothing in the publications submitted by Spain speaks of financial troubles on the part of Claimants themselves or the value that such a divestiture of shares means to Sun-Flower or the other Claimants. Rather, the note indicates that the share price of Sunflower SIT “has risen by 30%”<sup>105</sup>, and Spain confirmed that Sunflower SIT had the right to seek payment on behalf of claimant Gilatz.
76. Spain also refers to potential “unnecessary burdens and expenses to all parties” stemming from an assessment process by the European Commission for the enforceability of the Award.<sup>106</sup> This argument by Spain is directly related to its submission that it faces conflicting obligations under EU and international law. Like the *ad hoc* committee in *InfraRed*, this Committee is of the view that those allegations “appear to go to the heart of this annulment proceeding and would require the Committee to consider facts and circumstances that pertain to the merits of the dispute.”<sup>107</sup> For this reason, the Committee finds it would be premature and therefore inappropriate to consider these specific arguments as “circumstances” in the terms required by Rule 54(4).
77. The Committee turns to the risk of non-payment raised by the Claimants. The Claimants submit that it is almost certain that Spain will not comply with the Award, but the Committee deems that this is a hasty conclusion. The Committee takes note of the position held by Spain in the world

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<sup>103</sup> Response, ¶ 39. See ¶ 52 *supra*.

<sup>104</sup> **Annex-20 / RL-0168**, Aviv Lévy, *Deutsch, Biram transfer Sunflower to their Keystone fund*, in *Globes, Israel business news*, 30 March 2021.

<sup>105</sup> Public information regarding the share value of SunFlower SIT is found here: [https://www.tase.co.il/en/market\\_data/security/1098755/major\\_data](https://www.tase.co.il/en/market_data/security/1098755/major_data). This information is referred to only for the sake of completeness *ad abundantiam*.

<sup>106</sup> Reply, ¶ 69.

<sup>107</sup> **CL-0215**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020, ¶ 150.

economy ranking<sup>108</sup>, as well as the size of its economy<sup>109</sup>, and cannot conclude that Spain will not be able to pay the almost €49 Million ordered in the Award.

78. Nonetheless, while there is nothing in the file that persuades the Committee of a risk that Spain will not be able to pay as ordered in the Award, the Committee must take into account that Spain is an award-debtor in some investor-State arbitration cases. Numerous other cases are in the annulment stage, to which Spain has acceded as an exercise of its right under the ICSID Convention. The *NextEra ad hoc* committee analyzed this same context and did note that Spain had “not yet made payment on any of the awards where stays of enforcement have been lifted.”<sup>110</sup>
79. The Parties refer to ten cases brought against Spain where a stay was requested (*Eiser, Antin, NextEra, Cube, Masdar Solar, Infrared, OperaFund, RWE, Soles Badajoz, and Watkins*<sup>111</sup>). By way of context, the Committee notes that in five of those cases (*Eiser, Antin, Cube, Masdar* and *OperaFund*) the continuation of stay was rejected, although in one of them (*Eiser*) the annulment committee ordered the investor to provide an undertaking to Spain. Of the three cases where the continuation was granted (*NextEra, Soles Badajoz, and Watkins*), one (*NextEra*) was short-lived.

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<sup>108</sup> Submission, ¶ 32. Spain refers to the following publication: World Bank, Gross domestic product ranking table for 2016, available at: <https://datacatalog.worldbank.org/int/search/dataset/0038130>.

<sup>109</sup> Submission, ¶ 32. Spain refers to the following publication: Eurostat, Share of Member States in EU GDP, April 10, 2017, available at: <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1>.

<sup>110</sup> **CL-0210**, *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, ¶ 91.

<sup>111</sup> **CL-0207**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Stay of Enforcement of the Award, 23 March 2018; **CL-0208**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg Sàrl 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; **CL-0210**, *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; **CL-0211**, *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; **CL-0212**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Procedural Order No. 3 (Decision on the Kingdom of Spain's Request for a Continuation of the Stay of Enforcement of the Award), 20 May 2020; **CL-0215**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020; **CL-0216**, *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, 16 November 2020; **CL-0218**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Stay of Enforcement of the Award (with Reasons to Follow), 22 November 2021; **RL-0180**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020; **CL-0227**, *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, 28 June 2021.

Finally, in one case (*RWE*) the committee lifted the stay upon an undertaking from the investors, although the Committee cannot ascertain whether the undertaking was effectively submitted.

80. While the majority of those decisions have rejected the continuation of the stay, the Committee is not bound by these decisions. The system allows for a casuistic approach, as taken by other annulment committees within the exercise of their discretion.
81. However, the Committee cannot be oblivious to the fact that Spain is potentially a debtor in additional cases and, should the different awards be upheld, the Claimants could become the subject of a lengthy collection process. Indeed, the Claimants submit that the Committee should consider the fact that they are one of many award creditors and face the risk of being left behind in the queue as a circumstance requiring the termination of the stay.
82. In this regard, while a stay could delay the Claimants' ability to collect readily the monies owed by Spain, the Committee finds that it is not a circumstance against requiring a stay (such as the risk of non-payment). However, the Committee will take this into account as part of the context of its decision. In any case, it is not the role of *ad hoc* committees to secure award creditors their "spot in the queue".
83. The Claimants finally add that the accrual of interest in this case does not compensate for the loss that the Claimants will bear, since the cost of capital of solar energy projects is higher than the post-award interest ordered in the Award. The Committee is of the opinion that this argument is not suited for the annulment stage but for the consideration of the Tribunal in the underlying arbitration. The issue as to whether interest covers the loss of money in time for the Claimants is therefore moot, and the Committee must note that post-award interest is indeed meant to compensate award-creditors for delay in recovery.
84. Given all of the above, Spain did not convince the Committee of a circumstance requiring the continuance of the stay. Bearing in mind the interests and risks of the Parties, and that Article 52(5) of the ICSID Convention calls for circumstances "requiring" a stay, as well as that there is no presumption in favour of continuing a stay, the Committee finds that, on balance, the stay should not be continued.
85. For that reason, the Committee does not deem it necessary to address the proposal (and petition) made by the Claimants to the effect that the stay be continued conditionally.

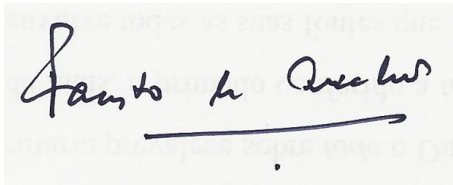
**V. COSTS**

86. The Claimants request that the Committee order Spain to cover the costs incurred during this phase of the proceedings. Spain did not make any petition in this regard and did not comment the Claimants' request. Article 61(2) and Article 52(4) of the ICSID Convention and Rule 47(1), and Rule 53 of the ICSID Arbitration Rules grant the Committee discretion to allocate costs.
87. The Committee does not find it necessary to make a decision on costs at this stage of the proceedings and will rather make it when rendering its final decision in the annulment proceedings.

**VI. DECISIONS AND ORDERS**

88. For the reasons stated above, the Committee:
- a. Dismisses the request by Spain for the continuance of the stay and admits the request by the Claimants for the lifting of the stay;
  - b. Orders the termination of the provisional stay upon notification of this decision;
  - c. Defers any decision on costs regarding the decision on stay until the final decision in the annulment proceedings;
  - d. Dismisses all other requests made by the Parties.



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Prof. Dr. Fausto de Quadros  
Member of the *ad hoc* Committee

Handwritten signature of Mélanie Riofrio Piché in blue ink.

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Ms. Mélanie Riofrio Piché  
Member of the *ad hoc* Committee

Handwritten signature of Dyalá Jiménez in blue ink.

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Ms. Dyalá Jiménez  
President of the *ad hoc* Committee