

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

STEAG GmbH
(“Respondent on Annulment”)

v.

Kingdom of Spain
(“Applicant on Annulment”)

(ICSID Case No. ARB/15/4)
Annulment Proceeding

DECISION ON THE STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee

Ms. Eva Kalnina, President
Mr. Milton Estuardo Argueta Pinto
Mr. Ricardo Vásquez Urrea

Secretary of the ad hoc Committee

Ms. Luisa Fernanda Torres

Date: 18 August 2022

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I. INTRODUCTION

1. This Decision addresses an application initially submitted on 15 December 2021 and briefed on 19 April 2022 and 30 May 2022 by the Kingdom of Spain (“**Spain**” or the “**Applicant**”), asking the *ad hoc* Committee to continue the stay of enforcement of the Award rendered on 17 August 2021 in ICSID Case No. ARB/15/4 between STEAG GmbH (“**STEAG**”) and Spain (the “**Award**”).
2. The dispute in the underlying arbitration related to various legislative and regulatory measures implemented by Spain that modified the regulatory and economic regime applicable to producers of electricity from concentrated solar power (*energía termosolar de concentración* or “**CSP**”). STEAG argued that these measures negatively impacted its investment in Arenales Solar PS, S.L., a Spanish company that owned a project for the construction and operation of a solar energy production facility located in Sevilla. The dispute was brought under the Energy Charter Treaty, which entered into force on 16 April 1998 with respect to Germany, and the Kingdom of Spain (the “**ECT**”). STEAG alleged that Spain (i) breached its obligations under Article 13 of the ECT by means of the indirect expropriation of their investment; and (ii) failed to comply with the following obligations under Article 10(1) of the ECT: (a) fair and equitable treatment, (b) most constant protection and security, and (c) umbrella clause. It sought damages in the amount of at least EUR 79 million by way of compensation for the alleged breaches of the ECT, plus costs. In turn, Spain objected to the Tribunal’s jurisdiction on the basis of (i) the intra-EU nature of the dispute; (ii) lack of jurisdiction *ratione temporis*; and (iii) Article 21 of the ECT with respect to the claim under Article 10(1) of the ECT arising out of the Tax on the Value of Production of Electric Power (“**TVPEE**”).¹ Spain also challenged the admissibility of the expropriation claim under Article 13 of the ECT arising out of the introduction of the TVPEE. It also argued that in any event, no breach of the ECT had taken place, and that STEAG had no right to compensation and ought to bear the costs of the proceedings as well as Spain’s legal costs.

¹ “Impuesto sobre el Valor de la Producción de la Energía Eléctrica” (“**IVPEE**”).

3. In its Decision on Jurisdiction, Liability and Instructions on the Quantification of Damages of 8 October 2020, the Tribunal decided:

1) Unanimously to declare that it lacks jurisdiction to hear the dispute regarding the alleged violation of Article 10(1) of the ECT arising out of the introduction of the TVPEE.

2) Unanimously to declare inadmissible the claim related to the alleged violation of Article 13 of the ECT arising out of the introduction of the TVPEE.

3) Unanimously to reject all other jurisdictional objections of the Respondent.

4) By majority to declare that the Kingdom of Spain has violated the fair and equitable treatment standard provided for in Article 10(1) of the ECT, in the terms indicated in Section VIII(A)(3) of this Decision.

5) Unanimously to dismiss the Claimant's other claims regarding the alleged violation of Articles 10(1) and 13 of the ECT.

6) By majority to order the Parties (a) to submit to the Tribunal within ninety (90) days from the date of notification of this decision a calculation of the amount of compensation prepared by mutual agreement, which shall follow the methodology indicated in paragraph 820 of this decision and take into account the criteria indicated in paragraph 821 of this decision; (b) in case of total or partial disagreement on the final compensation amount, to submit to the Tribunal within the aforementioned period of ninety (90) days the points of agreement and disagreement in relation to the calculation of the compensation.²

4. In its Award of 17 August 2021, the Tribunal further decided:

[...]

6) By majority to order the Kingdom of Spain to pay STEAG GmbH the sum of EUR 27,675,000, by way of compensation for the violation of Article 10(1) of the ECT [...].

7) By majority, to order the Kingdom of Spain to pay interest on the amount indicated in point 6 above, from 20 June 2014 and until the date of effective payment, at a rate of 1.5% compounded quarterly.

² Decision on Jurisdiction, Liability and Instructions on the Quantification of Damages, 8 October 2020, ¶ 823 (Committee's translation). The Decision was issued together with a dissenting opinion from Prof. Pierre-Marie Dupuy.

8) *By majority, to declare that the Parties are jointly and severally liable for the [...] arbitration costs [...]*

9) *By majority, to declare that the sums indicated in section 8 above must be borne fifty percent (50%) by STEAG GmbH and fifty percent (50%) by the Kingdom of Spain.*

10) *By majority, to declare that STEAG GmbH, the Claimant, must bear thirty percent (30%) of its representation costs and the Kingdom of Spain must bear its own representation costs and seventy percent (70%) of the representation costs of STEAG GmbH.³*

5. **Section II** of this Decision outlines the procedural history of this annulment proceeding to date in what pertains to the application for stay of enforcement of the Award, and **Section III** summarises the Parties’ positions regarding the continuation of the stay of enforcement of the Award. The Committee then sets out its analysis in **Section IV** before recording its decision and orders in **Section V**.

II. PROCEDURAL HISTORY⁴

6. On 15 December 2021, the Applicant filed its Application for Annulment, together with Annexes 1 to 24 (“**Application for Annulment**”). In its Application for Annulment, Spain requested, *inter alia*, (i) a provisional stay of enforcement of the Award in accordance with Article 52(5) of the ICSID Convention 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.
7. On 21 December 2021, the Acting Secretary General of ICSID registered the Application for Annulment and notified the Parties of the registration, in accordance with ICSID Arbitration Rules 50(2)(a) and (b); and informed the Parties of the provisional stay of enforcement of the Award pursuant to ICSID Arbitration Rule 54(2).

³ Award, ¶ 117 (Committee’s translation).

⁴ This Section describes the steps in the Procedural History that the Committee has deemed relevant for purposes of the present Decision. It is not intended to be an exhaustive narrative of the entire Procedural History up to this point in this annulment proceeding.

8. On 22 March 2022, the *ad hoc* Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are: Ms. Eva Kalnina, President, a national of the Republic of Latvia, Mr. Milton Estuardo Argueta Pinto, a national of the Republic of Guatemala, and Mr. Ricardo Vásquez Urra, a national of the Republic of Chile (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.
9. By letter dated 24 March 2022, the Committee, *inter alia*, (i) proposed to hold the First Session by videoconference (Zoom) indicating the dates on which it would be available; and (ii) invited the Parties (a) to confer and jointly propose a schedule of written submissions to address the application for continuation of the stay of enforcement of the Award, and (b) to consider whether an extension of the 30-day deadline in ICSID Arbitration Rule 54(2) would be necessary and could be agreed between the Parties.
10. By emails of 1 April 2022, the Parties informed the Committee of (i) their availability on the dates proposed for the First Session; and (ii) their respective proposed schedule of submissions on the application for continuation of the stay of enforcement of the Award (while both consenting to the extension of the ICSID Arbitration Rule 54(2) 30-day deadline).
11. On 15 April 2022, the Committee through its Secretary informed the Parties of the date of the First Session and the procedural calendar for the written submissions to address the application for continuation of the stay of enforcement of the Award. The Committee deferred to a later date the decision as to whether a hearing on the request for continuation of the stay of enforcement of the Award would be necessary.
12. On 19 April 2022, Spain filed its Submission in Support of the Continuation of the Stay of Enforcement of the Award, together with Annexes 25 to 50 (the “**Application**”).
13. On 10 May 2022, STEAG filed its Response to Spain’s Request for the Stay of Enforcement of the Award, together with Exhibits C-0102 to C-0104 and Legal Authorities CL-0164 to CL-0188 (the “**Response**”).

14. On 11 May 2022, the *ad hoc* Committee held the First Session by video conference.
15. On 26 May 2022, the *ad hoc* Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the Committee’s decisions on the areas in which the Parties were unable to reach an agreement (“**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 Washington, D.C. PO1 also sets out a procedural calendar for the proceeding.
16. On 30 May 2022, Spain filed its Reply in Support of the Continuation of the Stay of Enforcement of the Award, together with Annexes 51 to 77 and a draft English translation of STEAG’s Financial Statement as of 31 December 2021 (the “**Reply**”).
17. On 20 June 2022, STEAG filed its Rejoinder on the Continuation of the Stay of Enforcement of the Award, together with Legal Authorities CL-189 to CL-195 (the “**Rejoinder**”).
18. On 22 June 2022, the Committee informed the Parties, *inter alia*, that: (i) it had come to the conclusion that no hearing on the application to continue to the stay of enforcement of the Award would be necessary; and (ii) a slight modification of the Procedural Calendar for the annulment proceeding sought by Spain on 21 June 2022 was granted.
19. On 19 July 2022, within the agreed time limit, the Committee notified the Parties of its decision on Spain’s application for continuation of the stay of enforcement of the Award, as follows:

Upon careful review of the Parties’ submissions on the Applicant’s request for the continuation of the stay of enforcement of the award, the Committee has decided to grant the continuation of the stay provided certain conditions are met by the Applicant. The Committee’s fully reasoned decision will be issued in due course.
20. Thereafter, also on 19 July 2022, the Parties were notified that due to an internal redistribution of the Centre’s workload, Mr. Paul Jean Le Cannu would no longer be serving as Secretary of the Committee; and that Ms. Luisa Fernanda Torres, Legal Counsel, ICSID had been designated to serve as Secretary of the Committee from that point forward.

21. On 21 July 2022, following a request by Spain, the Committee issued a modified Procedural Calendar for this annulment proceeding (“**Revision No. 1**”).
22. The present instrument incorporates the Committee’s previously notified decision of 19 July 2022 on the application for continuation of the stay of enforcement, and it details the reasoning therefor.

III. SUMMARY OF THE PARTIES’ POSITIONS

23. In this section, the Committee provides a non-exhaustive summary of each Party’s position on the stay of enforcement of the Award, while emphasizing that in reaching its decision, the Committee has carefully considered the entirety of the Parties’ submissions on the request for continuation of the stay of enforcement of the Award.

A. SUMMARY OF SPAIN’S POSITION

24. Spain asks the Committee to order the continuation of the stay of enforcement of the Award, without security or other conditions, pending the Committee’s decision on the Application for Annulment.⁵

1. *Applicable Legal Standard*

25. Spain observes that ICSID *ad hoc* committees have wide discretion under Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(2) to continue a stay of enforcement, taking into account the specific circumstances of each case.⁶ According to Spain, the prevailing practice among committees is to grant the stay, as recognised by the committees in *Occidental v. Ecuador* and *Victor Pey Casado v. Chile*.⁷ In Spain’s view, because the

⁵ Reply, ¶ 191.

⁶ Application, ¶ 11; Reply, ¶ 14.

⁷ Application, ¶¶ 8-9, citing **Annex-25**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 – Annulment Proceeding, Decision on the Stay of Enforcement of the Award, 30 September 2013, ¶ 50 (“*The prevailing practice in prior annulment cases has been to grant the stay of enforcement*”); **Annex-32**, *Victor Pey Casado and Fondation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2 – Annulment Proceeding, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, 5 May 2010, ¶ 25 (“*absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic*”).

final validity of an award is uncertain when subject to an application for annulment, it would be imprudent to lift the stay and put the parties to the expense of the enforcement process.⁸

26. Spain refers to the following circumstances that committees have considered in making this determination: (a) whether the application for annulment is frivolous or dilatory in nature or not made in good faith;⁹ (b) the risk that the applicant will not be able to recover funds from the award creditor if the award is paid and later annulled;¹⁰ (c) whether continuation of the stay would have adverse economic consequences on the award creditor;¹¹ and (d) the risk of non-compliance if the stay is continued and the award is not annulled.¹² Spain also views its obligations under EU law relevant to the Application.
27. Spain does not accept that it bears the burden of proof in relation to the Application. Rather, says Spain, the burden must also be borne by STEAG where it makes a positive assertion, including its assertion that it would suffer prejudice as a result of the stay.¹³

2. *Whether the Stay Should be Continued*

28. In Spain's view, all the relevant circumstances weigh in favour of continuing the stay in this case.

⁸ Reply, ¶ 11, citing **Annex-30**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 21 February 2020, ¶ 65 (“requests for interpretation, revision or annulment do not set aside the validity and the finality of an award as rendered but open such risk and thereby a period of uncertainty as to its final enforceability”).

⁹ Application, ¶ 13 and Reply, ¶ 65, citing **Annex-27**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 – Annulment Proceeding, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, ¶ 28; **Annex-28**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 – Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006, ¶ 37.

¹⁰ Application, ¶¶ 19-20, citing **Annex-27**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 – Annulment Proceeding, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005.

¹¹ Application, ¶ 62, citing **Annex-31**, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 – Annulment Proceeding, Decision on the Application to Terminate the Provisional Stay of Enforcement of the Award, 21 February 2017, ¶ 62.

¹² Application, ¶ 64, citing **Annex-40**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, ¶ 49.

¹³ Reply, ¶ 16, citing **Annex-51**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 – Annulment Proceeding, 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, ¶ 73.

29. First, Spain states that its Application for Annulment “*raises serious, well-grounded bases for annulment and has been made in good faith.*”¹⁴ Spain acknowledges that its intra-EU objection has been rejected by many tribunals, but points out that the Court of Justice of the European Union (“CJEU”) recently confirmed Spain’s interpretation of Article 26 of the ECT.¹⁵ Further, Spain notes that it has raised other serious grounds for annulment in addition to its intra-EU objection.
30. Second, Spain argues that there is a serious risk that it will be unable to recover any amounts paid to STEAG if the Award is enforced and later annulled. Based on a review of STEAG’s 2020 financial statements, Spain alleges that STEAG is in a situation of asset deficiency, with its liabilities exceeding its assets, and that the company’s Earnings Before Interest and Taxes (“EBIT”) and cash flow figures reveal that it “*is consuming high levels of cash in its business, and is covering this negative free cash flow with additional debt.*”¹⁶ Spain also points out that STEAG has entered into a restructuring agreement with its creditors, which STEAG’s auditors view as a material uncertainty “*that may raise significant doubts about the company’s ability to continue as a going concern and represents a going concern risk.*”¹⁷ Thus, Spain doubts STEAG would have the funds to repay the Award if it is annulled. Moreover, even if the amounts paid could be recouped, the process of seeking repayment would involve further legal proceedings and significant expense, all of which could be avoided with a continuation of the stay.¹⁸
31. A related concern for Spain is that STEAG has announced that it “*is in promising negotiations on the sale of the payment claim against the Kingdom of Spain.*”¹⁹ The possible sale of the Award exacerbates the risk of non-recoupment and presents the additional risk that if Spain pays STEAG, it still may be subject to a second claim from a third party.²⁰

¹⁴ Application, ¶ 16.

¹⁵ Reply, ¶ 70, *citing Annex-20*, Judgment of the Grand Chamber of the Court of Justice of the European Union, Case C-741/19, *Republic of Moldova v. Komstroy*, 2 September 2021.

¹⁶ Application, ¶ 44. *See* Application, ¶¶ 31-44 *citing Annex-50*, 2020 Financial Statements Steag GmbH, pp. 14-15 and Reply, ¶ 48.

¹⁷ Application, ¶ 49, *quoting Annex-50*, 2020 Financial Statements Steag GmbH, p. 2.

¹⁸ Application, ¶ 22.

¹⁹ Application, ¶ 51, *quoting Annex-50*, 2020 Financial Statements Steag GmbH, p. 19.

²⁰ Reply, ¶¶ 27-28.

32. Third, Spain argues that the lifting of the stay would create a potential conflict with its obligations under EU law, causing “*immediate harm for both Parties in case of enforcement.*”²¹ Specifically, Spain says that the Award constitutes notifiable State Aid under Articles 107 and 108 of the Treaty on the Functioning of the European Union (“**TFEU**”), as already confirmed by the European Commission (“**EC**”), and Spain must therefore obtain clearance from the EC to pay the Award.²² According to Spain, this gives rise to the following conflict of its international obligations:

*[O]n the one hand, [Spain] must pay the compensation granted by the Steag Tribunal, since the award is binding on the Parties pursuant to Article 53 of the ICSID Convention. On the other hand, it cannot make such a payment without the European Commission’s authorization, pursuant to Articles 107 and 108 of the [TFEU].*²³

33. Spain notes that if the EC were to determine that the Award constitutes incompatible State Aid after it is enforced, Spain would be required to initiate proceedings against STEAG to recover the amount paid plus interest, resulting in unnecessary burden and expense on both Parties.²⁴
34. Fourth, Spain asserts that continuing the stay will not cause STEAG any prejudice or harm. Spain sees no risk that it will fail to comply with the Award if it is not annulled, noting that it has a large economy with ample resources to pay the Award if and when payment becomes appropriate.²⁵ In Spain’s view, there is no basis for the allegation that it has a history of refusing to honour awards. Rather, STEAG’s reference to the 19 outstanding awards against Spain is inapposite, because it ignores that Spain faces a conflict between international obligations under the ICSID Convention and EU law.²⁶
35. Spain offers the following assurance regarding its willingness to pay the Award:

²¹ Reply, ¶ 167.

²² Application, ¶ 82 and Reply, ¶¶ 161-165, *citing Annex-14*, Decision C(2017) 7384 of the European Commission, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN)), 10 November 2017.

²³ Application, ¶ 94; Reply, ¶ 147.

²⁴ Application, ¶¶ 86-88.

²⁵ Application, ¶ 65; Reply, ¶ 64.

²⁶ Reply, ¶ 60.

[T]he Kingdom of Spain, voluntarily, on its own initiative, confirms its commitment to pay the Award if it is not annulled in this proceeding, specifically, by seeking authorization from the European Commission consistent with its obligations under EU law and regulations, and then to pay promptly upon receiving such authorization.²⁷

36. To demonstrate its commitment, Spain points out that it has already requested the notification of the Award to the EC for its State Aid assessment.²⁸
37. Thus, according to Spain, STEAG has not identified any other harm it would suffer as a result of continuing the stay. To the contrary, if the Award is not annulled, STEAG would be fully compensated for any delay in payment of the Award by the accrual of interest.²⁹
38. Finally, Spain rejects STEAG’s reliance on the cases of the so-called “Spanish saga,” arguing that STEAG has offered a “*partial picture*” of those cases.³⁰ Among other observations, Spain views the *Eiser* case as “*probably the best example of the risks of lifting the stay once an application for annulment has been filed.*”³¹ There, the committee lifted the stay, forcing Spain to defend enforcement in the United States and Australia, before proceeding to annul the award in full.³²
39. In view of the above, Spain concludes that “*as a matter of efficiency, judicial economy, burden on the parties and streamlining of the process of satisfaction of the Award, a stay of enforcement at this time during the annulment proceedings is prudent and fair.*”³³

²⁷ Reply, ¶ 62.

²⁸ Application, ¶ 68.

²⁹ Application, ¶¶ 69-74, citing **Annex-43**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 12 December 2019, ¶ 97 (“*Claimants have not demonstrated that they would suffer any prejudice that could not be compensated by the payment of interests accrued upon the delay of the payment of the Award*”); **Annex-26**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶ 40 (“*Other than by being put to the effort and expense of defending an annulment request and by the receipt of funds being delayed (assuming the annulment application to be unsuccessful), the Committee does not accept that Azurix suffers any prejudice of a kind warranting the provision of security. The provision for interest compensates for the delay*”).

³⁰ Reply, ¶ 73.

³¹ Reply, ¶ 76.

³² Reply, ¶ 76, citing **Annex-67**, Baker & McKenzie, “*Australian Court Enforces ICSID Awards Against Spain*”, 27 February 2020.

³³ Reply, ¶ 172.

3. Security

40. Spain urges the Committee to continue the stay without granting any form of security for the Award, which Spain considers unnecessary and inconsistent with both the applicable rules and prevailing practice.³⁴ Spain observes that the ICSID Convention does not expressly recognise a committee’s power to order security, and the *travaux préparatoires* of the ICSID Convention shows that the drafters intentionally omitted the possibility of provisional measures when granting a stay.³⁵ Spain cites several recent cases in which committees have declined to grant security as a condition for the stay.³⁶
41. Spain also considers security inappropriate because, as recognised by the committees in *9REN v. Spain* and *Tenaris II v. Venezuela*, the provision of a security puts the award creditor in a better position than it would have been in without the annulment proceeding.³⁷ At the same time, Spain says it would bear the costs of the security, effectively “*penalizing it for requesting annulment and curtailing the right provided by Article 52 of the ICSID Convention.*”³⁸

³⁴ Reply, ¶ 175.

³⁵ Reply, ¶ 177, citing **Annex-77**, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968), vol. II, p. 856.

³⁶ Reply, ¶ 178, citing **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 86; **Annex-56**, *Watkins Holdings S.À.R.L and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 June 2021, ¶ 25; **Annex-26**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶¶ 22, 25, 37 and 40; **Annex-52**, *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2 – Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, ¶ 131; **Annex-53**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 October 2020, ¶ 70.

³⁷ Reply, ¶¶ 179, 184 citing **Annex-58**, *9REN Holding S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15 – Annulment Proceeding, Decision on The Stay of Enforcement of The Award, 19 November 2021, ¶¶ 138-140; **Annex-29**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23 – Annulment Proceeding, Decision on Venezuela’s Request for the Continued Stay of Enforcement of the Award, 23 February 2018, ¶ 104.

³⁸ Reply, ¶ 182.

42. Ultimately, Spain’s position is that the same factors that warrant granting the stay also warrant granting it unconditionally.³⁹

B. SUMMARY OF STEAG’S POSITION

43. In response to the Application, STEAG asks the Committee to:

I. DISMISS Spain’s request; and,

II. ORDER to lift the stay of enforcement without any conditions.

III. ALTERNATIVELY,

a. to lift the stay of enforcement subject to the condition that STEAG offers to open an escrow account to deposit any funds collected before the decision on the annulment of the Award; or,

b. to condition the continuation of the stay of enforcement subject to the condition that Spain provides an irrevocable bank guarantee in favour of STEAG for the amount of the Award plus interest accrued plus the interest that may accrue up to 31 December 2023.⁴⁰

1. Applicable Legal Standard

44. Like Spain, STEAG observes that Article 52(5) of the ICSID Convention allows a committee to grant a stay of the enforcement of an award “*if it considers that the circumstances so require.*”⁴¹ However, STEAG disagrees with Spain on two main aspects of the applicable standard under this provision. First, STEAG contends that Spain bears the burden of establishing the circumstances that justify continuation of the stay.⁴² Second, STEAG does not accept Spain’s assertion that it is prudent for a committee to grant a stay simply because the award is subject to an application for annulment. Although STEAG accepts that some committees have treated the stay of enforcement as automatic, it argues that this approach has been abandoned in the more recent cases.⁴³ STEAG’s view is that

³⁹ Reply, ¶ 181.

⁴⁰ Response, ¶ 54, Rejoinder, ¶ 67.

⁴¹ Rejoinder, ¶ 22, *quoting* ICSID Convention, Article 52(5).

⁴² Rejoinder, ¶ 24.

⁴³ Rejoinder, ¶ 24.

“committees should exercise restraint when deciding to grant a stay of enforcement because of its burdensome nature.”⁴⁴

45. Regarding the criteria to be considered when assessing whether to continue the stay, STEAG proposes the following broad criteria: (a) whether the application for annulment is frivolous or a dilatory tactic; (b) whether immediate compliance with the award would cause economic hardship on the applicant; and (c) whether it would be very difficult for the applicant to recoup payments made under the award if it is ultimately annulled, because the award creditor is in a very serious financial situation or “on the brink of insolvency.”⁴⁵
46. STEAG argues that Spain improperly ignores the second of the above three criteria.⁴⁶ In STEAG’s view, the (economic) harm – or absence of harm – resulting from immediate compliance is an important factor that committees have considered.⁴⁷ The ICSID Convention provides that awards are immediately enforceable, and the applicant needs to explain what damage it would suffer by complying with this obligation.⁴⁸
47. Further, STEAG rejects Spain’s argument that the Committee should consider whether a stay causes adverse consequences for STEAG in deciding whether to grant the stay. According to STEAG, this factor becomes relevant only if the Committee is satisfied that the conditions for a stay are met; then it may balance the interest of the Parties to determine whether any conditions are required.⁴⁹

⁴⁴ Response, ¶ 22; Rejoinder, ¶ 23.

⁴⁵ Response, ¶¶ 23-27, quoting **CL-169**, *Infrastructure Services Luxembourg S.à.r.l. & Energia Termosolar B.V. (previously Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31 – Annulment Proceeding, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, ¶ 73.

⁴⁶ Rejoinder, ¶¶ 28, 34.

⁴⁷ Rejoinder, ¶¶ 34-35, citing **CL-169**, *Infrastructure Services Luxembourg S.à.r.l. & Energia Termosolar B.V. (previously Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31 – Annulment Proceeding, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, ¶ 72.

⁴⁸ Rejoinder, ¶ 35.

⁴⁹ Rejoinder, ¶ 32, citing **CL-186**, Brian Kotick and Joel Dahlquist Cullborg, “A (Counter) Balancing Act: The Express Power to Order a Security on a Stay of Enforcement Pending Annulment,” [2018] 33(1) *ICSID Review – Foreign Investment Law Journal*, 272-273.

2. *Whether the Stay Should be Continued*

48. STEAG contends that Spain has failed to establish any of the necessary circumstances to justify granting the stay of enforcement.
49. First, STEAG sees the Application for Annulment as “*a textbook dilatory tactic*” aimed at delaying payment of the Award as long as possible.⁵⁰ Although STEAG does not ask the Committee to review the merits of the Application for Annulment at this stage, it urges the Committee to pay due regard to the fact that “*Spain has systematically requested the annulment of every single award rendered against it in what has become known as the Spanish saga of renewable energies,*” and that Spain has consistently requested a stay of enforcement based on the same arguments in every case.⁵¹ STEAG states that “*what Spain is trying to argue by way of the annulment application is mainly a reedition of the arguments related to the so-called intra-EU exception,*” which has never been accepted by any annulment committee.⁵²
50. Second, STEAG argues that immediate compliance with the Award would cause Spain no economic hardship, noting that the amount of the Award represents just 0.015% of Spain’s annual income.⁵³ Regarding Spain’s argument that it would be burdened by the cost of additional legal proceedings if it had to seek reimbursement of amounts paid on the Award if annulled, STEAG contends that Spain has not even attempted to explain the expected cost of such proceedings or how those costs would place Spain in a difficult financial position.⁵⁴
51. Third, STEAG rejects Spain’s allegation that it would face difficulty recouping any amounts paid on the Award in the case of annulment.⁵⁵ According to STEAG, Spain has failed to show that STEAG is in a very serious financial situation or about to declare itself insolvent, and Spain’s arguments are based on outdated financial statements from 2019 and 2020.⁵⁶

⁵⁰ Response, § 2.4.1 (heading); Rejoinder, § 2.3.1 (heading).

⁵¹ Response, ¶ 31.

⁵² Response, ¶ 32.

⁵³ Response, ¶ 35; Rejoinder, ¶¶ 45-46.

⁵⁴ Response, ¶ 35 (stating that “[e]very year the Spanish Ministry of Justice assigns a budget to the State Lawyers Corps (*Abogacía del Estado*). Such budget, for instance in 2020, was of more than EUR 40,000,000”).

⁵⁵ Response, § 2.4.3 (heading).

⁵⁶ Rejoinder, ¶ 50.

The reality, says STEAG, is that there has been a positive trend in its key economic figures, resulting from the transformation of its business toward more green energy, as evidenced by its consolidated financial statements for 2021.⁵⁷ In STEAG’s view, these consolidated financial statements are the most accurate picture of its financial situation because “*STEAG forms a single economic entity with its subsidiaries.*”⁵⁸ They show that STEAG would have ample resources to reimburse Spain in the case of annulment. Among other figures, STEAG notes that the amount of the Award is just “(i) 0.67% of STEAG’s consolidated assets as of 31 December 2021, (ii) 1.09% of STEAG’s revenue as of 31 December 2021, (iii) 8.85% of STEAG’s cash as of 31 December 2021 and (iv) 9.80% of STEAG’s profit in one year only.”⁵⁹

52. In any event, STEAG states that if Spain is concerned about its ability to recoup funds paid on the Award, STEAG is willing to “*open an escrow account to deposit any funds collected before the decision on the annulment of the Award*” – an approach adopted in prior annulment proceedings.⁶⁰
53. Thus, STEAG concludes that the Committee must reject the Application and lift the stay of enforcement.

3. Security

54. Alternatively, if the Committee is minded to continue the stay, STEAG submits that the Application must be granted on the condition of Spain providing a security to guarantee compliance with the Award.

⁵⁷ Rejoinder, ¶¶ 51-52, citing C-0104, STEAG’s Consolidated Annual Statements for 2021.

⁵⁸ Rejoinder, ¶ 52.

⁵⁹ Rejoinder, ¶ 53.

⁶⁰ Rejoinder, ¶ 54; Response, ¶ 45, citing CL-183, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 31 August 2017; CL-174, *InfraRed Environmental Infrastructure GP Limited & Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020, ¶ 195; CL-177, *Hydro Energy I S.à r.l. & Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 26 March 2021, ¶¶ 119-121; CL-180, *RWE Innogy GmbH & RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34 – Annulment Proceeding, Decision on Stay of Enforcement of the Award (With Reasons to Follow), 22 November 2021, ¶ 19.

55. As noted above, STEAG considers it appropriate in this context for the Committee to assess the prejudice that STEAG would suffer as a result of the stay. STEAG says the prejudice is significant because “*Spain’s conduct in other arbitrations and its statements so far in these proceedings casts very serious doubts as to Spain’s compliance with the Award.*”⁶¹ Again, STEAG notes that Spain has sought annulment of all awards rendered against it so far, and despite the fact that these awards have been upheld in all but one case (*Eiser v. Spain*), Spain has not voluntarily complied with any of them.⁶² Moreover, Spain has already announced that it will not pay the Award without authorisation by the EC, which STEAG states “*is not foreseen in the ICSID Convention and is a blatant infringement of Spain’s own obligations under Public International law.*”⁶³
56. STEAG also rejects Spain’s assertion that any delay in payment would be compensated by post-award interest. According to STEAG, this view is particularly wrong in the current economic climate of high inflation, with annual inflation in the Euro zone expected to be 8.1% in May 2022. In these circumstances, the interest rate in the Award (quarterly interest rate of 1.5% compounded every quarter) is insufficient to compensate for the loss of value of the Award.⁶⁴
57. STEAG asserts that it has the right to enforce the Award immediately and use the funds as it sees fit to offset inflation. However, it says that if a security is granted, “*then a portion of the lower profitability can be accepted due to the zero risk of collection of the Award amounts.*”⁶⁵

IV. ANALYSIS OF THE COMMITTEE

58. At the outset, the Committee emphasises that the purpose of this Decision is to determine whether the stay of enforcement of the Award should be continued. The Committee takes no decision at this stage on the merits of Spain’s Application for Annulment. The

⁶¹ Rejoinder, ¶ 59.

⁶² Rejoinder, ¶ 59.

⁶³ Rejoinder, ¶ 59.

⁶⁴ Rejoinder, ¶ 63.

⁶⁵ Rejoinder, ¶ 65.

Committee also observes that its analysis is necessarily based on its understanding of the record as it presently stands and should not be understood to pre-empt any different conclusions at a later stage.

A. APPLICABLE LEGAL STANDARD

59. The stay of enforcement of an award is governed by Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54.

60. Article 52(5) of the ICSID Convention provides as follows:

The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

61. ICSID Arbitration Rule 54 (Stay of Enforcement of the Award) provides that:

(1) The party applying for the interpretation, revision or annulment of an award may in its application [...] request a stay in the enforcement of part or all of the award [...].

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

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the [...] Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application [...].

(4) A request [...] shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the [...] Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay.

62. Consistent with Articles 31-32 of the Vienna Convention on the Law of Treaties (“VCLT”), the Committee interprets these provisions together and in the relevant context, which is provided by Article 53(1) of the ICSID Convention concerning the finality of awards:

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.

63. The importance of Article 53(1) was recognised by the committee in *Burlington v. Ecuador*, recalling the words of an earlier committee:

[B]oth parties to the dispute are obliged to abide by an award notwithstanding an annulment proceeding. As stated by the Standard Chartered committee: “the obligation that each State assumed on ratification of the Convention, under Article 53, to comply with awards against it is particularly important. This obligation is as important as the right to pursue annulment under Article 52 of the ICSID Convention. These two articles are linked together.”⁶⁶

64. As of today, there are several decisions within the ICSID system on the matter of stay, and while decisions by prior committees are not binding and do not constitute “*common law precedents*,”⁶⁷ they are invariably referred to by parties and “*constitute examples of the practice*” and therefore “*may influence the Committee if they are convincing and if they concern similar circumstances*.”⁶⁸

65. Having said that, under Article 52(5) of the ICSID Convention, a committee’s decision to continue a stay depends on whether “*it considers that the circumstances so require*.” The Convention specifies neither the circumstances that are relevant to the committee’s

⁶⁶ **CL-183**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶ 72 (quoting **Annex-70**, *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20 – Annulment Proceeding, Decision on Applicant’s Request for a Continued Stay on Enforcement of the Award, 12 April 2017, ¶ 84). See also, **CL-195**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15 – Annulment Proceeding, Decision on Stay of Enforcement, 12 November 2010, ¶¶ 23-25.

⁶⁷ **Annex-26**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶ 24.

⁶⁸ **Annex-49**, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 30 November 2004, ¶ 23.

determination nor the relative weight to be given to such circumstances. Rather, as repeatedly observed in prior cases, the determination regarding the stay is left to the discretion of the committee, considering the specific and fact-driven circumstances of each case.⁶⁹

66. The task of the Committee is to balance, on the one hand, the Applicant’s interest in a stay of enforcement of the Award pending the annulment proceeding and, on the other hand, the Respondent on Annulment’s right to the finality and enforceability of the Award under the Convention. In other words, as observed by the committee in *Churchill Mining v. Indonesia*, “[a] *balanced approach between the right of access to justice on the one hand and the right to enforcement on the other must be effectuated by ad hoc committees.*”⁷⁰
67. The Committee also agrees with prior committees which have determined that there exists no presumption either in favor of or against granting a continuation of the stay.⁷¹ Indeed, no such presumption is reflected in the relevant provisions of the ICSID Convention or ICSID Arbitration Rules. As convincingly stated by the committee in *Sempra v. Argentina*:

A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour of granting a stay of enforcement. This follows, in the Committee’s opinion, from the ordinary meaning to be given to the terms of Article 52(4) of the ICSID Convention, which authorizes the Committee to stay enforcement of the award pending its decision “if it considers that the circumstances so require”. Although the ICSID Convention does not give any indication as to what circumstances would warrant a stay, it is nonetheless clear from this language that there must be some circumstances present that speak in favour of granting a stay. As a consequence, it cannot be assumed that there should be a presumption in favour of a stay or that the primary burden is

⁶⁹ See, e.g., **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, ¶ 45 (“the word ‘circumstances’ [] in Article 52(5) [...] is not preceded by any qualifying adjective. The Committee therefore has wide discretion to weigh the circumstances presented by the Applicant”), ¶ 43 (“[t]he crux of the matter is therefore whether there are circumstances requiring the stay”); **CL-183**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶¶ 70-71.

⁷⁰ *Churchill Mining Plc et al. v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 & 12/40 – Annulment Proceeding, Decision on Request for Continued Stay, 27 June 2017, ¶ 38.

⁷¹ See, e.g., **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, ¶ 64; **CL-194**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 March 2009, ¶ 27.

*placed on the award creditor to show that continuation of the stay should not be granted.*⁷²

68. The Parties disagree as to who bears the burden of proof in relation to the Application. In this regard, the Committee refers to ICSID Arbitration Rule 54(4), which provides that a request for a stay of enforcement of an award “*shall specify the circumstances that require the stay [...].*” Accordingly, prior committees have concluded, and this Committee agrees, that the burden to establish that the circumstances of the case require continuing the stay rests with the party seeking the stay.⁷³ This position gives due regard to the principle of finality of awards as set forth in Article 53 of the ICSID Convention.
69. Furthermore, the discretion of the Committee under Article 52(5) of the ICSID Convention includes the authority to attach conditions to a stay of enforcement, if the Committee determines that the stay is required and that imposing conditions on the stay achieves the proper balance of the interests of the Parties in the circumstances. As observed by the committee in *Enron v. Argentina*, this interpretation is “*consistent with the objects and purposes of Article 52(5), which is designed to enable the ad hoc committee to balance the rights of the parties pending annulment proceedings.*”⁷⁴
70. In the same vein, as stated by the committee in *Perenco v. Ecuador*, “*ad hoc committees have the authority to order the granting of securities or written undertakings in connection with the stay of enforcement of an ICSID award. Such authority follows from the inherent*

⁷² **CL-194**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 March 2009, ¶ 27.

⁷³ See, e.g., **CL-183**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶¶ 74-75. See also, to the same effect, ICSID, Working Paper # 2, Proposals for Amendment of the ICSID Rules, ¶ 457 (“*A party requesting stay of enforcement typically has the burden of proof with regard to circumstances that require the stay*”).

⁷⁴ **CL-185**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶ 26. See also **CL-170**, *NextEra Energy Global Holdings B.V. & 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, 6 April 2020, ¶ 95 (conditioning the stay of enforcement upon Spain providing “*an undertaking that, should the Award not be annulled, it will unconditionally and promptly pay the amount owed under the Award*”).

*powers of ad hoc committees to conduct the proceedings. To date, no committee has considered the opposite.”*⁷⁵

71. The Committee also notes that, according to ICSID’s Background Paper on Annulment (dated 5 May 2016), committees attached conditions to the stay of enforcement in 22 out of 36 decisions in which a stay was granted.⁷⁶
72. Although Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(4) do not specify which “*circumstances*” may support a request for the stay of enforcement of an award, parties to prior annulment proceedings have presented, and committees have considered, a number of factors commonly applicable to this inquiry. As observed by ICSID in its Background Paper on Annulment, based on a compilation of decisions, such factors “*have included the risk of non-recovery of sums due under the award if the award is annulled, non-compliance with the award if the award is not annulled, any history of non-compliance with other awards or failure to pay advances to cover the costs of arbitration proceedings, adverse economic consequences on either party and the balance of both parties’ interests.*”⁷⁷

⁷⁵ **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, ¶¶ 78-79. *See also*, among others, **CL-195**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15 – Annulment Proceeding, Decision on Stay of Enforcement, 12 November 2010, ¶ 29 (“*It is not the case [...] that the powers of an ad hoc committee in this regard are to be exercised restrictively because conditional stays are not expressly mentioned in the ICSID Convention. An ad hoc committee enjoys rather all latitude to find the proper balance between the interests of the parties in a given case and the legitimate right to enforce the award in order to rule on the request for a stay*”).

⁷⁶ **Annex-6**, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 58. In a recent working paper concerning proposed amendments to the ICSID Rules, ICSID reported that the proposed rule concerning a stay of enforcement “*codifies and regulates the practice of conditionally staying enforcement if: (i) a stay is required by the circumstances; and (ii) the condition(s) is necessary in light of the circumstances.*” The Committee notes in passing that ICSID’s more recent Working Papers confirm this view (*see* ICSID, Working Paper # 1, Proposals for Amendment of the ICSID Rules, 2 August 2018, ¶ 648; and ICSID, Working Paper # 2, Proposals for Amendment of the ICSID Rules, ¶ 456).

⁷⁷ **Annex-6**, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 56 (internal citations omitted); *see also* **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, ¶ 26 (setting forth a similar list of factors).

73. Although some committees have also considered the additional factor of the merits or prospect for success of the application for annulment,⁷⁸ the Committee agrees with prior decisions observing that, normally, this factor is not a proper focus for purposes of the decision on whether or not to grant the stay.⁷⁹ Instead, the Committee accepts the view expressed by both Parties that an appropriate inquiry is whether the application is manifestly dilatory or abusive.⁸⁰ As STEAG highlights, however, an assessment that the application is not dilatory or abusive is insufficient, by itself, to support the continuation of a stay.⁸¹
74. Some committees have approached the analysis under Article 52(5) of the ICSID Convention by asking, first, whether the case circumstances “require” the continued stay, and second, if so, whether the stay should be conditioned on security. For example, the committee in *Burlington v. Ecuador* terminated the provisional stay of enforcement after finding that its continuation was not required in the circumstances of that case. According to the committee, that was “the end of the matter.”⁸² Other annulment committees have reached their respective conclusions – including whether or not to attach conditions to a stay – after examining the overall case circumstances, without first making specific findings as to whether a stay was “required.”⁸³

⁷⁸ See, e.g., **CL-194**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 March 2009, ¶ 24; **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, ¶ 68.

⁷⁹ See, e.g., **CL-185**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶ 47.

⁸⁰ Application, ¶ 10; Response, ¶ 24.

⁸¹ **CL-177**, *Hydro Energy I S.à r.l. & Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 26 March 2021, ¶¶ 105-111; **CL-178**, *Watkins Holdings S.À R.L. and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 June 2021, ¶ 33.

⁸² **CL-183**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶¶ 85-86. The *Burlington* committee therefore found it “unnecessary” to address the parties’ arguments concerning whether or not Ecuador should have posted security as a condition of the stay. *Id.*

⁸³ See generally **Annex-30**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 – Annulment Proceeding, Decision on Stay of Enforcement, 21 February 2020, § IV.A (addressing the varying approaches of committees to this question).

75. In this case, the Committee will proceed with a sequential analysis focusing first on whether, given the facts and circumstances specific to the present case, it has been demonstrated that the circumstances “*require*” the continuation of the stay; and if so, whether in the exercise of its discretion, the Committee should grant a continuation of the stay. If the Committee decides to continue the stay, then the next step in the Committee’s analysis will be to decide whether the stay should be subject to any conditions such as a security.

B. CIRCUMSTANCES IN THE CASE AT HAND

76. Within the framework outlined above, the Committee will now proceed with an assessment of the specific circumstances that the Parties have advanced as relevant for the determination of whether the stay should be continued. Having considered the Parties’ positions and in the exercise of its discretion, the Committee finds that the following four issues are the most relevant in determining whether a continued stay is required and, if so, what are the conditions, if any, that are necessary in light of all the circumstances of the present case: (1) the good faith basis of the Application for Annulment and whether it is manifestly dilatory or frivolous; (2) any risk, for Spain, of non-recoupment in case the Award were to be paid and later annulled, with due regard *inter alia* to STEAG’s financial viability; (3) any risk, for STEAG, of Spain’s non-compliance with the Award if the stay is continued and eventually the Award is not annulled, as well as the relevance of any history of non-compliance with arbitral awards by Spain; and, finally, (4) balance between both Parties’ interests in the context of the present Application, including any adverse economic consequences on either Party, which the Committee may take into account in particular when determining whether any conditions should be attached to a stay.

1. *Has the Application for Annulment Been Made in Good Faith?*

77. The Committee begins its analysis with the assessment of whether the Application for Annulment has been made in good faith and is not manifestly frivolous or dilatory. The good faith requirement has been frequently discussed by prior *ad hoc* committees when

considering requests for the stay of enforcement.⁸⁴ As noted in *Masdar v. Spain*, “the fact that there is some indication that an annulment application was made without basis in the ICSID Convention or with a dilatory intent is a circumstance that has been considered as a factor weighing in favor of the discontinuance of a stay.”⁸⁵

78. In the present case, STEAG asserts that the Application for Annulment is groundless, as Spain’s arguments regarding EU law have already been rejected by the Tribunal in the underlying arbitration as well as by several annulment committees in prior cases.⁸⁶ STEAG rejects Spain’s request for the Committee to assess *fumus boni iuris* or prospects for success of the Application for Annulment as falling outside the Committee’s powers at this stage of the proceedings.⁸⁷
79. In response, Spain submits that its Application for Annulment is based on serious grounds, *inter alia*, the Tribunal’s failure to state reasons and a serious departure from a fundamental rule of procedure.⁸⁸ According to Spain, the recent CJEU judgment in *Komstroy* also lends further support to its Application for Annulment.⁸⁹
80. As already noted above, the Committee agrees with STEAG that it does not need to review the merits of the Application for Annulment but rather to merely assess its dilatory or frivolous nature.⁹⁰ In other words, it is not the Committee’s task at the present stage to analyse the seriousness of each and every annulment ground invoked in the Application for Annulment. Suffice it to say that, at the present point in time, the Committee finds that, on

⁸⁴ See, e.g., **Annex-27**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 – Annulment Proceeding, Decision on the Respondent’s Request for a Continued Stay of Execution, 1 June 2005, ¶ 28; **Annex-28**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006, ¶ 37; **Annex-56**, *Watkins Holdings S.A.R.L and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 June 2021, ¶ 33.

⁸⁵ **Annex-51**, *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, 20 May 2020, ¶ 58.

⁸⁶ Response, ¶ 32.

⁸⁷ Response, ¶ 25.

⁸⁸ Reply, ¶ 69.

⁸⁹ Reply, ¶ 70, citing **Annex-20**, Judgment of the Grand Chamber of the Court of Justice of the European Union, Case C-741/19, *Republic of Moldova v. Komstroy*, 2 September 2021.

⁹⁰ Response, ¶ 25.

a plain reading, Spain’s Application for Annulment cannot be considered *prima facie* frivolous.

81. In this context, the Committee also needs to address STEAG’s argument that there are two facts proving Spain’s continuous dilatory tactics: (1) systematic requests for annulment of every single award rendered against Spain; and (2) consistent requests to stay the enforcement of ICSID awards rendered against it.⁹¹ In response, Spain rejects STEAG’s allegations and confirms its commitment to honour all arbitral awards, subject to the authorization by the European Commission.⁹²
82. The Committee notes that allegations similar to those made by STEAG have been raised in other cases against Spain. However, they have not been entertained by other committees. For instance, in *Masdar v. Spain*, the committee found that “*recourse to annulment, including the entitlement to request a stay of enforcement, is a legitimate right provided for in Article 52 of the ICSID Convention.*”⁹³ In *InfraRed v. Spain*, the committee observed that “*the fact that in some situations (as occurs with the ECT cases against Spain) the request for annulment is repeatedly made, is of no relevance per se.*”⁹⁴
83. The Committee finds the reasoning in these cases to be persuasive and agrees that a party’s exercise of the right to request annulment or the stay of enforcement does not *per se* prove any dilatory nature of such requests. The Committee therefore concludes that there is no evidence on record to conclude that Spain’s Application for Annulment would be manifestly frivolous or dilatory, or submitted in bad faith.
84. That said, the Committee’s present finding that the Application for Annulment cannot be considered manifestly frivolous or dilatory does not mean that the stay should automatically

⁹¹ Response, ¶ 31.

⁹² Reply, ¶ 62.

⁹³ **Annex-51**, *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, 20 May 2020, ¶ 90.

⁹⁴ **CL-174**, *InfraRed Environmental Infrastructure GP Limited & Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020, ¶ 134.

be maintained in the absence of other requirements being met, to which the Committee turns next.

2. Is There a Risk of Non-Recoupment of Amounts Awarded Under the Award?

85. The risk of non-recoupment has been considered by a number of *ad hoc* committees when deciding on the stay of enforcement.⁹⁵ As pointed out by the committee in *SolEs Bajadoz v. Spain*, a risk that Spain would not be able to recoup the monies paid under the Award if annulled is “a significant, if not decisive, circumstance within the meaning of Article 52(5) of the ICSID Convention, which militates towards the continuation of the stay of enforcement of the Award.”⁹⁶
86. Although some committees have not found the risk of non-recoupment to be a material factor when assessing the continuation of stay,⁹⁷ in the present case both Parties agree that this risk is relevant for the Committee’s decision on the stay of enforcement.⁹⁸ The Committee too agrees that this is a relevant factor and will therefore analyse the circumstances of the case and the Parties’ positions in order to determine whether a risk of non-recoupment exists in the present case.
87. In respect of the standard to determine such risk, prior *ad hoc* committees have followed different approaches. In *Masdar v. Spain*, the committee opined that “the cases in which a real risk of non-recoupment was found were cases in which ‘the risk of bankruptcy was

⁹⁵ See **CL-169**, *Infrastructure Services Luxembourg S.à.r.l. & Energia Termosolar B.V. (previously Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31 – Annulment Proceeding, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, ¶¶ 69-73; **Annex-73**, *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, 6 April 2020, ¶ 88; **CL-176**, *OperaFund Eco-Invest SICAV PLC & Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36 – Annulment Proceeding, Decision on the Request for the Continuation of the Stay of Enforcement of the Award, 16 November 2020, ¶ 90.

⁹⁶ **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 69.

⁹⁷ See **Annex-74**, *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, 17 April 2020, ¶ 132 (concluding that “risk of non-recoupment is therefore not a material factor in the Committee’s decision whether or not to continue the stay”).

⁹⁸ Application, ¶¶ 19 *et seq.*; Reply, ¶¶ 24 *et seq.*; Response, ¶¶ 37 *et seq.*

shown to be a legitimate concern,” and went on to find that there was no risk of non-recoupment, since there was no evidence showing “*that Masdar faces the risk of bankruptcy or that it fails regularly to comply with its payment obligations.*”⁹⁹ In *InfraRed v. Spain*, the committee acknowledged the risk of non-recoupment after considering the financial statements of the respective party.¹⁰⁰ In *RREEF v. Spain*, the committee opined that formal insolvency was not necessary to establish the risk, if the financial accounts of the party showed that it was not on strong financial footing.¹⁰¹

88. In the present case, the Committee finds that in determining the risk of non-recoupment it should consider the real risk of insolvency of STEAG, based on its financial statements.
89. Spain’s position on the risk of non-recoupment is based on (1) the allegedly weak financial position of STEAG, and (2) the risk of the sale of the Award.¹⁰² To confirm the former, Spain primarily relies upon STEAG’s financial statements and restructuring agreement with its creditors. As to the latter, Spain quotes STEAG’s own documents and points out that STEAG has neither confirmed nor denied its intention to sell the Award in the present case.¹⁰³
90. STEAG, in turn, maintains that Spain’s analysis is manipulative and does not correspond to reality. STEAG asserts that its financial position in 2021 has considerably improved, and the amount of the Award constitutes less than 1% of STEAG’s overall assets.¹⁰⁴ In respect of the sale of the Award, STEAG confirms that “*it is the sole legal owner of the Award and will [...] continue to be the sole owner of the Award until the end of these proceedings.*”¹⁰⁵

⁹⁹ **Annex-51**, *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, 20 May 2020, ¶¶ 121, 124.

¹⁰⁰ **CL-174**, *InfraRed Environmental Infrastructure GP Limited & Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 27 October 2020, ¶ 155.

¹⁰¹ **CL-175**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 October 2020, ¶¶ 65-66.

¹⁰² Application, ¶ 51, quoting **Annex-50**, 2020 Financial Statements Steag GmbH, p. 19.

¹⁰³ Reply, ¶¶ 24 *et seq.*

¹⁰⁴ Rejoinder, ¶¶ 52-53.

¹⁰⁵ Rejoinder, ¶ 49.

91. The Committee agrees with STEAG that assessment of financial situation and alleged insolvency cannot be based, in the present case, on the financial statement of one year. What is more, year 2020 is clearly not the most representative for most businesses due to the COVID-19 pandemic. At the same time, the Committee observes that STEAG's position is also mostly based on the financial statement for one year, this being the most recent financial year 2021. The Committee therefore concludes that the Parties' arguments in the present respect and the evidence presently on record is of limited assistance in order for the Committee to determine the alleged insolvency risk of STEAG.
92. Moreover, the Committee observes that STEAG's corporate structure is indeed quite complex, and that therefore it may be more reasonable to consider the consolidated financial statements of STEAG and its related companies. On the one hand, such corporate structures make companies more secure by allowing them *inter alia* to distribute assets between their subsidiaries. On the other hand, a complex corporate structure may also leave room for a potential dissipation of assets and/or difficulties in determining the scope of each entity's responsibility. Thus, in the Committee's view, the analysis of STEAG's corporate structure is again of limited assistance in assessing the potential risk of non-recoupment in the present case.
93. As to the alleged sale of the Award mentioned by STEAG in its financial statement of 2020, the Committee notes that in its Rejoinder, STEAG confirmed its intention to remain the sole owner of the Award until the end of these proceedings. At the present stage, the Committee finds no grounds to question STEAG's representation, let alone assume any bad faith on STEAG's behalf.
94. To conclude, the Committee acknowledges, in principle, the relevance of the risk of non-recoupment as a factor that needs to be considered when deciding on the stay of enforcement. The Committee further acknowledges that, in the present circumstances and based on the evidence before it, it cannot exclude that a certain risk of non-recoupment might exist, even if it may not be large. The Committee is also mindful of the potential inconvenience for Spain if it were required to pursue a potentially complex process,

navigating through STEAG’s corporate structure, in order to recover amounts paid under the Award, if it were eventually annulled.

95. That said, as the risk of non-recoupment is but one of several important factors for determining whether the stay of enforcement should be continued, the Committee does not need to attempt to determine the exact extent of this risk and will instead take its above findings into account in the context of other circumstances.

3. Is There a Risk of Non-Compliance With the Award?

96. The Committee will now address STEAG’s concern regarding the risk of Spain’s non-payment of the Award, if the Application for Annulment is rejected. Should the Committee find that such a risk exists, the Committee will evaluate the need to order security for the continuation of the stay of enforcement, as requested by STEAG.
97. It is undisputed that the risk of non-payment or non-compliance with the Award is an important criterion to be considered by the Committee, although it is not determinative.¹⁰⁶ For example, in *Enron v. Argentina*, as well as in *Continental Casualty Company v. Argentina*, the *ad hoc* committees granted the stay despite acknowledging a high risk of non-compliance with a party’s obligations under Article 53 of the ICSID Convention.¹⁰⁷
98. To assess any risk of non-compliance and determine whether there are doubts as to Spain’s commitment to comply with the Award, the Committee will analyse all the circumstances presented by the Parties, including the history of Spain’s alleged non-compliance with the awards rendered against it.
99. In the case at hand, STEAG asserts that Spain has not voluntarily satisfied any award decided against Spain.¹⁰⁸ STEAG lists 19 cases and notes that Spain has filed annulment

¹⁰⁶ See Reply, ¶ 58.

¹⁰⁷ Application, ¶ 64, citing **Annex-40**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 7 October 2008, ¶¶ 29, 46; **Annex-42**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9 – Annulment Proceeding, Decision on Argentina’s Application for a Stay of Enforcement of the Award, 23 October 2009, ¶¶ 12-16.

¹⁰⁸ Response, ¶ 10.

requests against every single award rendered against it.¹⁰⁹ STEAG concludes that systematic filing of annulment requests represents Spain’s strategy to delay any payments due for as long as possible.¹¹⁰

100. Spain, in turn, argues that STEAG has failed to provide any evidence regarding its alleged non-compliance with payment obligations under ICSID awards. The awards “*that have not been annulled and that remain outstanding are pending EC’s approbation, w[h]ich is a precondition to its payment,*” Spain explains.¹¹¹
101. Spain further provides a detailed history of decisions on stay of enforcement in the so-called “*Spanish saga,*” wherein, *inter alia*, the risk of non-compliance with awards was addressed by the committees.¹¹² Spain reminds that, being the fifth economy of the European Union, it has sufficient financial resources to pay the awards, if ordered to do so.¹¹³ Spain therefore reiterates its commitment “*to pay the Award if it is not annulled in this proceeding*” upon receiving authorisation from the European Commission.¹¹⁴
102. The Committee does not find it helpful or pertinent to analyse the circumstances of all the cases against Spain pending in annulment. In determining any risks of non-compliance, due regard should however be had to the awards upheld in annulment proceedings, such as:
- *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14;
 - *Infrastructure Services Luxembourg S.à.r.l. & Energia Termosolar B.V. (previously Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31;
 - *NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11;
 - *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38;

¹⁰⁹ Response, ¶¶ 9-10.

¹¹⁰ Response, ¶ 10.

¹¹¹ Reply, ¶ 186.

¹¹² Reply, ¶¶ 73 *et seq.*

¹¹³ Reply, ¶ 64.

¹¹⁴ Reply, ¶ 62.

- *Cube Infrastructure Fund SICAV & Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20.¹¹⁵

103. The Committee notes that neither Party has presented any factual exhibits regarding alleged non-compliance of Spain with payment obligations under the abovementioned awards. To the best of the Committee’s understanding, Spain’s position is that, in principle, its obligations to comply with these awards are in conflict with Spain’s obligations under EU law: “[s]hould the stay be lifted, a potential conflict of international obligations could arise.”¹¹⁶ In particular, Spain’s position appears to be that it requires a certain authorisation from the European Commission in order to proceed with the payments.¹¹⁷
104. Purely on the evidence before it, the Committee cannot conclude whether Spain has the history of non-compliance with the awards. Nevertheless, the Committee is mindful of Spain’s assertion that its payment obligations appear to be conditional upon the decision of the European Commission on the compatibility of the Award with European Union law.
105. Indeed, the Committee is mindful of the Applicant’s arguments about the international conflict faced by the Kingdom of Spain, which fundamentally goes to the merits of the present dispute, but is also relevant for the purposes of the stay.¹¹⁸ In the latter context, the Committee agrees with the *ad hoc* committee in *Antin v. Spain*, stating that Spain “willingly chose to undertake international obligations that may conflict with each other, it cannot thereafter complain of prejudice once these conflicts arise.”¹¹⁹ The Committee concludes that, despite Spain’s good faith to fulfil its commitments, which the Committee has no reason to question, the existing allegation of conflict creates uncertainty as to real prospects of Spain’s payment of the Award. In other words, the Committee finds that STEAG has raised some valid grounds for concern about a potential risk of non-payment of the Award.

¹¹⁵ Response, ¶ 11.

¹¹⁶ Reply, ¶ 117.

¹¹⁷ Reply, ¶¶ 116-118.

¹¹⁸ Reply, ¶ 146.

¹¹⁹ **CL-169**, *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 Proceeding, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, ¶ 76.

106. In light of the above, the Committee will now discuss whether granting a security may be an appropriate tool to deal with the uncertainty created by the allegations of conflict between the ICSID Convention and EU law in the present circumstances.
107. The Committee observes that parties frequently request to condition the stay of enforcement in annulment proceedings.¹²⁰ Prior committees have taken the view that conditions on the stay could balance the rights of the parties pending annulment proceedings.¹²¹ For instance, the *ad hoc* committee in *NextEra v. Spain* permitted the stay subject to Spain’s undertaking to “*unconditionally and promptly pay the amount owed under the Award.*”¹²²
108. In the case at hand, STEAG suggests that the provision of a security should be considered as a useful tool to establish some balance between the Parties.¹²³ Spain, in turn, finds it unnecessary and questions the Committee’s powers to condition the stay of enforcement.¹²⁴ More specifically, Spain refers to the drafting history of the ICSID Convention to demonstrate that negotiators intentionally deleted the provisions granting the powers to condition the stay.¹²⁵
109. Spain further relies upon recent developments in *SOLes Badajoz v. Spain*, *Watkins v. Spain*, *Azurix v. Argentina*, *Tenaris II v. Venezuela*, *RREEF v. Spain* and *Victor Pey Casado v. Chile* to prove that security is an exceptional tool granted in exceptional circumstances.¹²⁶

¹²⁰ See, e.g., **Annex-26**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶¶ 22, 25, 37 and 40; **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 86; **CL-185**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶¶ 25-27.

¹²¹ **CL-185**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶ 26.

¹²² **Annex-73**, *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, 6 April 2020, ¶ 95.

¹²³ Response, ¶ 49.

¹²⁴ Reply, ¶¶ 175-176.

¹²⁵ Reply, ¶ 177.

¹²⁶ Reply, ¶ 178.

It also quotes the *ad hoc* committee in *9REN v. Spain*, which rejected granting of the security as a tool that would put the applicant in a better position than it would have been without annulment proceedings ever being initiated.¹²⁷

110. As a final point, Spain argues that ordering a security “*would equal imposing a cost or a fine to the Kingdom of Spain, which are not foreseen in the ICSID Convention, and in fact penalizing it for requesting annulment and curtailing the right provided by Article 52 of the ICSID Convention.*”¹²⁸

111. The Committee will first address Spain’s concerns regarding the Committee’s powers to grant security. In fact, the source of the Committee’s powers is found in Article 52(5) of the ICSID Convention, which reads as follows:

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

112. In view of the wording of the above provision, the Committee cannot agree with Spain’s interpretation of Article 52(5). While the express provision granting the Committee powers to make the stay conditional was not included in the final text of this provision, such powers are not expressly prohibited either. In the Committee’s view, the negotiators left it to each individual committees’ discretion to determine the scope of their jurisdiction.

113. Similar view was expressed, for example, by the *ad hoc* committee in *Enron v. Argentina*:

The Committee does not view that silence as necessarily meaning that the power does not exist. The Committee considers that a discretionary power to allow or deny a remedy may implicitly include a power to allow the remedy subject to conditions, and that such an interpretation would be consistent with the objects and purposes of Article 52(5), which is designed

¹²⁷ Reply, ¶ 179.

¹²⁸ Reply, ¶ 182.

*to enable the ad hoc committee to balance the rights of the parties pending annulment proceedings.*¹²⁹

114. The Committee therefore concludes that it is not prevented by the ICSID Convention to grant security, should the Committee find it necessary and justified in the circumstances of the case. The Committee will therefore analyse next whether such circumstances exist in the case at hand.
115. The Committee’s view on this point resonates with the findings expressed by prior committees in *SolEs Badajoz v. Spain*¹³⁰ and *Azurix v. Argentina*.¹³¹ In the former case, the committee held:

*In deciding whether to order a condition for the stay, the Committee is guided by the observation made by the ad hoc committee in Azurix v. Argentina, that the provision of a security is not “an automatic or counterbalancing right” to a stay, but should instead be ordered only in “limited exceptions [...] in order to eliminate any ‘reasonable doubt as to the State’s intent to comply’”.*¹³²

116. Indeed, the Committee agrees that it should use the power to grant security with caution, in exceptional circumstances. That said, in the Committee’s view, the existing allegations of conflict between Spain’s obligations under EU law and the ICSID Convention amounts to such exceptional circumstances where the security may be justified to counter the effects of such alleged conflict.
117. In other words, while the Committee finds no reason to doubt Spain’s financial stability and its good faith commitment to satisfy the Award, the Committee is also of the view that Spain

¹²⁹ **CL-185**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶ 26.

¹³⁰ **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020.

¹³¹ **Annex-26**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007.

¹³² **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 86.

may ultimately assert that the existence of such conflicting obligations prevents it from complying with the Award in case its Application for Annulment is rejected.

118. The Committee further turns to Spain’s argument that, upon provision of security, STEAG is going to be put in a better position than it would have been if annulment proceedings had not been brought.¹³³ The Committee respectfully disagrees with the findings of the *9REN v. Spain* committee on this matter,¹³⁴ since in its view compliance with the Award under Article 53 of the ICSID Convention is itself an obligation undertaken by Spain. In the words of the *Masdar v. Spain* committee, Spain’s commitment to comply with the Award, if not annulled, “*does not put Masdar in any better a position than it would have been if the Award were immediately enforced.*”¹³⁵
119. For these reasons, the Committee concludes that there exists a valid concern as to Spain’s ability to comply with the Award, despite Spain’s numerous confirmations of its commitment to honor the Award voluntarily. The Committee notes that, by Spain’s own assertions, its compliance with the Award is dependent not only on Spain’s own intention but on the findings of the European Commission.¹³⁶ The Committee cannot accept Spain’s position that it must fulfil other obligations under different treaties as a valid reason for granting a continuation of an unconditional stay. Without prejudice to the outcome of this Annulment Application, the Committee makes the general observation that an ICSID award is binding on the parties and compliance with it cannot be subjected to other obligations, either domestic or international.

¹³³ Reply, ¶ 184.

¹³⁴ **Annex-58**, *9REN Holding S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 19 November 2021, ¶¶ 138-140 (“*In fact, as held by the ad hoc committee in CMS v. Argentina, “the provision of a bank guarantee puts a claimant in a better position than it would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution.”*”)

¹³⁵ **Annex-51**, *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, 20 May 2020, ¶ 111.

¹³⁶ In its Reply, Spain “*confirms its commitment to pay the Award if it is not annulled in this proceeding, specifically, by seeking authorization from the European Commission consistent with its obligations under EU law and regulations, and then to pay promptly upon receiving such authorization.*” Reply, ¶ 62 (emphasis added); see also, *id.* ¶ 169.

120. Thus, in view of all the circumstances of the case and in order to address Spain’s concerns regarding the risk of non-recoupment whilst at the same time being mindful of STEAG’s arguments regarding the potential risk of non-compliance with the Award by Spain, if the Award is not annulled, the Committee finds that imposition of security in the form of a bank guarantee equal to 50 % of the compensation granted in the Award and namely **EUR 13,837,500** in total, drawn on a reputable Western bank which is neither Spanish nor controlled by Spanish interests, is appropriate as a condition of the stay of enforcement. In the Committee’s view, such security appropriately mitigates against any potential risks and adequately balances any potential harm or prejudice caused to either Party, as discussed further below.

4. *What is the Balance of Hardships Between the Parties?*

121. As follows from the above, the Committee’s task while deciding on the stay of enforcement includes balancing of the hardships of the Parties.¹³⁷ The Parties have discussed at length any prejudice or harm caused to each Party if the Committee grants or refuses to grant the continuation of the stay.¹³⁸ In essence, the Parties’ arguments raise the following questions: (a) whether the risk of non-recoupment causes harm to the Kingdom of Spain; (b) whether the risk of non-compliance with the Award causes harm to STEAG; (c) whether delay in payment may be compensated to STEAG by the accrual of interest on the Award.

122. The Committee has already addressed in detail the risks of non-recoupment and non-compliance above, and has come to the conclusion that the granting of security sufficiently balances these risks and strikes an appropriate balance between the Parties’ different interests, including any potential prejudice or harm caused to either Party by the Committee’s decision on stay.

123. That said, the Committee still needs to consider the issue of the accrual of interest on the Award, which is a factor put forward by the Parties in this case and which has also been considered by prior committees. For instance, in *El Paso v. Argentina*, the *ad hoc* committee found that “*the creditor has the right, if the application for annulment were rejected, to*

¹³⁷ See *supra* ¶ 66.

¹³⁸ See Reply, ¶¶ 24 *et seq.*; Rejoinder, ¶¶ 45 *et seq.*

collect the interest accrued until the date when payment of the amount indicated in the Award is made.”¹³⁹ Similarly, in *Azurix v. Argentina* case the *ad hoc* committee held that “[t]he provision for interest compensates for the delay.”¹⁴⁰

124. This issue of post-award interest was also considered by several committees in cases against Spain. In *Watkins v. Spain* and *9REN v. Spain*, the *ad hoc* committees found that the payment of interest would adequately compensate for the delay in the enforcement of the awards.¹⁴¹ At the same time, the *Masdar v. Spain* and *SolEs Badajoz v. Spain ad hoc* committees held that the payment of interest itself is not a circumstance justifying the stay. Indeed, it might be considered to establish prejudice for the creditor, but the *ad hoc* committees in these respective cases did not find it significant.¹⁴²
125. In the present case, the Committee must determine whether post-award interest may compensate any alleged prejudice caused to STEAG as a result of the delay in payment. While Spain maintains that the accrued interest constitutes more than adequate compensation for the delay,¹⁴³ STEAG argues that current macroeconomic circumstances do not compensate the loss of the Award’s value as a result of the Eurozone inflation.¹⁴⁴
126. The Committee agrees that the 2022 annual inflation rate in the Eurozone is hardly predictable considering the current economic and geopolitical circumstances. Nonetheless, the Committee is inclined to agree with the *ad hoc* committee’s view in *MTD v. Chile*, finding that delay in payment is “*incidental to the Convention system of annulment*” and

¹³⁹ **Annex-54**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 14 November 2012, ¶ 53.

¹⁴⁰ **Annex-26**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 – Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶ 40.

¹⁴¹ **Annex-56**, *Watkins Holdings S.À.R.L and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44 – Annulment Proceeding, Decision on Stay of Enforcement of the Award, 28 June 2021, ¶ 49; **Annex-58**, *9REN Holding S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15 – Annulment Proceeding, Decision on The Stay of Enforcement of The Award, 19 November 2021, ¶¶ 141-142.

¹⁴² **Annex-51**, *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, 20 May 2020, ¶ 98; **Annex-57**, *Soles Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment Proceeding, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020, ¶ 81.

¹⁴³ Reply, ¶¶ 50, 53-54.

¹⁴⁴ Rejoinder, ¶ 64.

may be remedied by the payment of interest.¹⁴⁵ The Committee thus finds that, in view of its decision to order Spain to provide security, STEAG's risk regarding Spain's potential non-compliance with the Award is sufficiently lowered, and the payment of interest can reasonably compensate any delay in payment.

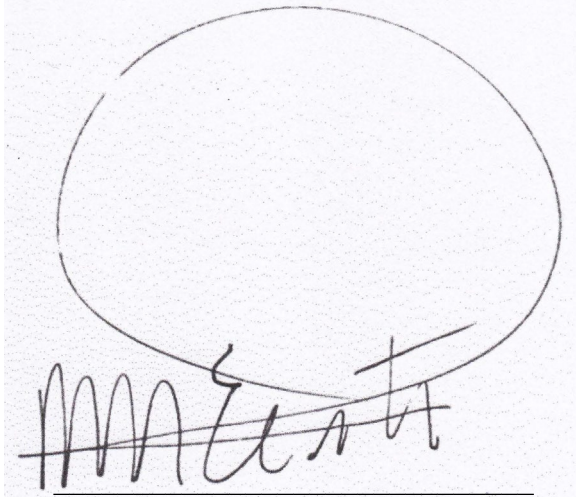
127. Based on the above, the Committee concludes that the prejudice or harm allegedly caused to each Party is reasonably balanced by its decision to order Spain to provide security in the amount of 50% of the compensation granted in the underlying Award.

V. DECISION

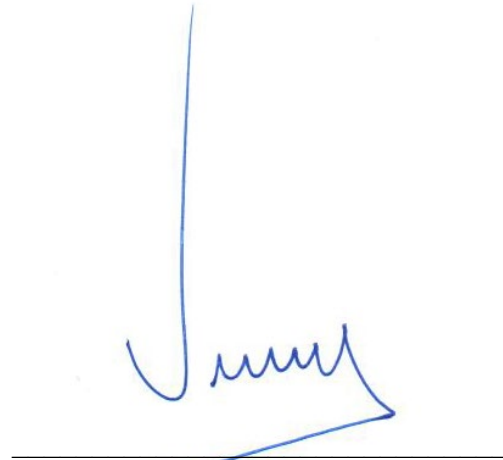
128. Based on the above considerations, the Committee decides that:

- (i) The provisional stay of enforcement of the Award shall continue for the duration of these annulment proceedings, provided that within sixty (60) days of this Decision the Applicant presents to STEAG and the Committee an unconditional and irrevocable letter of guarantee issued by an internationally recognized bank which is neither Spanish nor controlled by Spanish interests for the amount of 50% of the principal amount of compensation granted in the Award at paragraph 117(6) and namely **EUR 13,837,500** which may be drawn upon in full by STEAG upon presentation of a Decision of the Committee rejecting the Application for Annulment.
- (ii) If the Applicant does not comply with the above condition, the Committee may order the termination of the stay of enforcement of the Award.
- (iii) The costs arising out of this Application for the continuation of stay are reserved for a subsequent stage of the proceedings.

¹⁴⁵ **Annex-27**, *MTD Equity Sdn Bhd. and 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, ¶ 36.



Milton Estuardo Argueta Pinto
Member of the *ad hoc* Committee



Ricardo Vásquez Urra
Member of the *ad hoc* Committee



Eva Kalnina
President of the *ad hoc* Committee