

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**OPERA FUND ECO-INVEST SICAV PLC AND SCHWAB HOLDING AG**  
(Respondents on Annulment)

and

**KINGDOM OF SPAIN**  
(Applicant on Annulment)

**ICSID Case No. ARB/15/36**  
**Annulment Proceeding**

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

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***Members of the Committee***

Mr. Timothy J. Feighery, President of the *ad hoc* Committee  
Mr. Milton Estuardo Argueta Pinto, Member of the *ad hoc* Committee  
Prof. Fausto de Quadros, Member of the *ad hoc* Committee

***Secretary of the Tribunal***

Luisa Fernanda Torres

*Date:* 16 November 2020

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Mr. Rafael Gil Nieves  
Ms. Lourdes Martínez de Victoria  
Ms. Elena Oñoro Sainz  
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Ms. Eugenia Cediél Bruno  
Mr. Javier Comerón Herrero  
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## TABLE OF SELECTED ABBREVIATIONS

|                           |   |
|---------------------------|---|
| Application for Annulment | Application for Annulment, dated 25 February 2020   |
| Applicant                 | Kingdom of Spain  |
| Arbitration Rules         | ICSID Rules of Procedure for Arbitration Proceedings 2006   |
| C-[#]                     | OperaFund and Schwab’s Exhibit  |
| CL-[#]                    | OperaFund and Schwab’s Legal Authority  |
| Committee                 | Ad Hoc Committee constituted on 17 June 2020  |
| C-Mem. Stay               | OperaFund and Schwab’s Counter-Memorial in Opposition to the Request for the Continuation of the Stay of Enforcement of the Award, dated 31 July 2020 |
| ICSID Convention          | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965                                  |
| ICSID or the Centre       | International Centre for Settlement of Investment Disputes  |
| Mem. Stay                 | Kingdom of Spain’s Memorial in Support of the Continuation of the Stay of Enforcement of the Award, dated 16 July 2020                                |
| OperaFund                 | OperaFund Eco-Invest SICAV PLC  |
| R-[#]                     | Kingdom of Spain’s Exhibit  |
| RL-[#]                    | Kingdom of Spain’s Legal Authority  |
| Reply Stay                | Kingdom of Spain’s Reply in Support of the Continuation of the Stay of Enforcement of the Award, dated 15 September 2020                              |
| Rej. Stay                 | OperaFund and Schwab’s Rejoinder in Opposition to the Request for the Continuation of the Stay of Enforcement of the Award, dated 30 September 2020   |

|        |                   |
|--------|-------------------|
| Schwab | Schwab Holding AG |
| Spain  | Kingdom of Spain  |

## I. INTRODUCTION AND PARTIES

1. This Decision addresses the application by the Kingdom of Spain for the continuation of the stay of enforcement of the award rendered on 6 September 2019 in the arbitration proceeding captioned *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, as rectified by the Tribunal’s Decision on Rectification of the Award dated 28 October 2019 (the “**Award**”).
2. The Applicant on Annulment is the Kingdom of Spain (the “**Applicant on Annulment**,” the “**Applicant**” or “**Spain**”).
3. The Respondents on Annulment are OperaFund Eco-Invest SICAV PLC (“**OperaFund**”) and Schwab Holding AG (“**Schwab**”) (together the “**Respondents on Annulment**” or the “**Respondents**”).
4. The Applicant and the Respondents on Annulment are collectively referred to as the “**Parties**,” and the term “**Party**” is used to refer to either the Applicant or the Respondents on Annulment. The Parties’ representatives and their addresses are listed above on page (i), *supra*.

## II. PROCEDURAL HISTORY

5. On 25 February 2020, Spain submitted an Application for Annulment of the Award (“**Application for Annulment**”), accompanied by Annexes 1 to 24. In its Application for Annulment, Spain requested, among other things: (i) a provisional stay of enforcement of the Award in accordance with ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2); and (ii) the continuation of the stay of enforcement of the Award until the Committee renders its Decision on the Application for Annulment.<sup>1</sup>
6. On 3 March 2020, the Secretary General of ICSID registered the Application for Annulment and notified the Parties of the registration, in accordance with ICSID

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<sup>1</sup> Application for Annulment, ¶¶ 84, 85(a) and (b).

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).

7. The *ad hoc* Committee was constituted in accordance with ICSID Convention Article 52(3). Its members are Mr. Timothy J. Feighery, a U.S and Irish national, President; Mr. Milton Estuardo Argueta Pinto, a Guatemalan national; and Prof. Fausto de Quadros, a Portuguese national, (the “**Committee**”), all appointed by the Chairman of the ICSID Administrative Council.
8. On 17 June 2020, in accordance with ICSID Arbitration Rules 6(1) and 53, the Secretary General notified the Parties that all three members of the Committee had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.
9. On 1 July 2020, the Parties informed the Committee of their agreed Procedural Calendar for submissions concerning the stay of enforcement of the Award. The Parties further agreed to extend the deadline in ICSID Arbitration Rule 54(2) until 45 days after conclusion of the Parties’ written submissions on the stay of enforcement.<sup>2</sup> On 2 July 2020, the Committee confirmed the Procedural Calendar agreed by the Parties.
10. On 16 July 2020, Spain filed its Memorial in Support of the Continuation of the Stay of Enforcement of the Award, accompanied with Annexes 25 to 39 (“**Memorial on Stay**”).
11. On 23 July 2020, the Committee held a First Session with the Parties by video conference.
12. On 27 July 2020, the Committee issued Procedural Order No. 1, which embodied the Parties’ agreements on procedural matters and the Committee’s decisions on the disputed issues. It established, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish,

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<sup>2</sup> The 45-day deadline falls on 16 November 2020, as 14 November 2020 is a Saturday. See ICSID Administrative and Financial Regulation 29(2).

and that the place of proceeding would be Washington, DC, as the seat of the Centre. It also issued the Procedural Calendar for this annulment proceeding.

13. On 31 July 2020, OperaFund and Schwab submitted their Counter-Memorial in Opposition to the Request for the Continuation of the Stay of Enforcement of the Award, accompanied by Legal Authorities CL-0248 to CL-0273, and RL-0080 (“**Counter-Memorial on Stay**”).
14. On 15 September 2020, Spain filed its Reply in Support of the Continuation of the Stay of Enforcement of the Award, together with Exhibits BQR-0013 to BQR-0014, R-0364 to R-0371, and Legal Authorities RL-0150 to RL-0162 (“**Reply on Stay**”).<sup>3</sup>
15. On 30 September 2020, OperaFund and Schwab filed their Rejoinder in Opposition to the Request for the Continuation of the Stay of Enforcement of the Award, together with Legal Authorities CL-0274 to CL-0275 (“**Rejoinder on Stay**”).

### III. SUMMARY OF THE PARTIES’ POSITIONS

#### A. SPAIN’S POSITION

16. Spain requests that the Committee continue to stay enforcement of the Award until it renders its decision on the Application for Annulment, without requiring any security or imposing other conditions.<sup>4</sup>
17. Spain contends that it is the prevailing practice of ICSID annulment committees to stay enforcement of an award during the pendency of an annulment proceeding.<sup>5</sup> It asserts that a stay should be granted unless the annulment application is “*obviously frivolous*” or “*improper.*”<sup>6</sup> Although Spain acknowledges that the statistics concerning this prevailing

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<sup>3</sup> On 7 October 2020, Spain submitted a corrected consolidated set of Exhibits (BQR-0013 to BQR-0014, R-0357 to R-0371) and Legal Authorities (RL-0001, RL-0118 to RL-0162) to adapt the Annexes it had previously submitted to the nomenclature required by Procedural Order No. 1. Exhibits R-0357 to R-0363 corresponded to renumbered versions of Annexes previously submitted with the Application for Annulment and the Memorial on Stay; and Legal Authorities RL-0118 to RL-0149 corresponded to renumbered versions of Annexes previously submitted with the Application for Annulment and the Memorial on Stay.

<sup>4</sup> Mem. Stay ¶¶ 43; Reply Stay ¶ 144.

<sup>5</sup> Mem. Stay ¶¶ 4, 8.

<sup>6</sup> Mem. Stay ¶ 4.



practice do not mean that a stay should be automatic, it submits that they do demonstrate that greater restraint is not needed in deciding whether a stay should be continued.<sup>7</sup> Spain asserts that the threshold for a stay is not as high as OperaFund and Schwab contend,<sup>8</sup> and that ICSID Convention Article 53 does not require exceptional circumstances to grant a stay.<sup>9</sup> According to Spain, it has demonstrated sufficient circumstances warranting a stay in this case,<sup>10</sup> as discussed further below.

### 1. The Applicable Legal Standard

18. Spain invokes ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2), which it reads to freely permit the continuation of a stay “*if it [the Committee] considers that the circumstances so require.*”<sup>11</sup> Relying on *Occidental v. Ecuador* and *Victor Pey Casado v. Chile*, it submits that there is a prevailing practice that a stay of enforcement should be granted absent unusual circumstances.<sup>12</sup>
19. For Spain, the ordinary circumstances of an annulment action are sufficient circumstances to warrant the stay.<sup>13</sup> Focusing on the word “*except*” in ICSID Convention Article 53,<sup>14</sup> Spain contends that this does not mean that the circumstances that determine the stay of enforcement should be exceptional, but rather that normal, usual circumstances can be sufficient to grant a stay.<sup>15</sup> Spain submits that the principle of finality of the Award in ICSID Convention Article 53(1) is not absolute; and the existence of an annulment application places uncertainty on the final validity of an award.<sup>16</sup> Thus, in Spain’s view, it

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<sup>7</sup> Reply Stay ¶¶ 13-14.

<sup>8</sup> Reply Stay ¶ 14.

<sup>9</sup> Reply Stay ¶ 10.

<sup>10</sup> Reply Stay ¶ 17.

<sup>11</sup> Mem. Stay ¶ 8.

<sup>12</sup> Mem. Stay ¶¶ 8-9.

<sup>13</sup> Reply Stay ¶ 10.

<sup>14</sup> ICSID Convention, Art. 53(1) (“[...] *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 the Convention*”).

<sup>15</sup> Reply Stay ¶ 10.

<sup>16</sup> Reply Stay ¶¶ 11-12.

does not bear an additional burden of showing compelling circumstances to obtain continuation of the stay.<sup>17</sup>

20. Spain argues that its right to seek annulment and stay enforcement is equal to and should be counterbalanced with OperaFund's and Schwab's right to enforcement,<sup>18</sup> and the Committee should not exercise additional restraint as to the stay submission.<sup>19</sup> Relying on *MTD v. Chile*, Spain argues that a stay should be maintained unless the application for annulment is facially baseless or dilatory.<sup>20</sup>
21. Spain further contends that OperaFund and Schwab bear the burden of proving the reasons for removing the stay, and have failed to discharge that burden.<sup>21</sup> By contrast, the Applicant argues, Spain has demonstrated sufficient circumstances requiring the continuation of the stay, including serious prejudice and harm to it from the risk of non-recoupment of any amounts paid in enforcement;<sup>22</sup> and the fact that immediate payment of the Award would potentially collide with its obligations under European Union law (“**EU law**”) relating to the European Commission's assessment on State aid.<sup>23</sup> It further asserts that OperaFund and Schwab cannot maintain any counterbalancing or comparable prejudice, as any delay in payment will be compensated by the accrual of interest,<sup>24</sup> and Spain has no history of non-compliance with international arbitration awards or any financial inability to pay the Award.<sup>25</sup> Finally, Spain argues that the application for annulment is well grounded, serious, and it is not frivolous or dilatory.<sup>26</sup>

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<sup>17</sup> Reply Stay ¶ 11.

<sup>18</sup> Reply Stay ¶ 11.

<sup>19</sup> Reply Stay ¶ 13.

<sup>20</sup> Mem. Stay ¶ 10.

<sup>21</sup> Reply Stay ¶¶ 15-16, 23.

<sup>22</sup> Reply Stay ¶¶ 17-18. *See also*, Mem. Stay ¶ 7.

<sup>23</sup> Reply Stay ¶ 22.

<sup>24</sup> Reply Stay ¶ 19. *See also*, Mem. Stay ¶ 7.

<sup>25</sup> Reply Stay ¶ 20.

<sup>26</sup> Reply Stay ¶ 21. *See also*, Mem. Stay ¶ 5.

## 2. Whether the Circumstances Require a Stay

22. Spain submits that the circumstances of this case require continuation of the stay of enforcement.<sup>27</sup>
23. Spain posits that the one of the threshold circumstances to be considered is whether the annulment application is made in good faith and is not frivolous or dilatory.<sup>28</sup> It states that it is clear that its Application for Annulment is well-founded, based on serious grounds, made in good faith, and is not dilatory.<sup>29</sup> It asserts three grounds for annulling the Award. *First*, the Tribunal exceeded its jurisdiction by failing to apply the proper law to the intra-EU objection and misinterpreted Article 26 of the Energy Charter Treaty (“ECT”).<sup>30</sup> According to Spain, in making its Award, the Tribunal also failed to apply the proper law to the merits of the case by ignoring EU law and, importantly, the European Commission’s State Aid Decision on the Spanish renewable energy support scheme,<sup>31</sup> in contrast with recent decisions that have recognized EU law on State Aid as the applicable law to the merits.<sup>32</sup>
24. *Second*, Spain states that the Tribunal’s findings are contradictory and unsupported on quantum, the date of the investment and the application of Royal Decree 661/2007; and, as a result, the Tribunal failed to state the reasons on which the Award is based.<sup>33</sup> *Finally*, Spain states that the Tribunal departed from a fundamental rule of procedure by misplacing the burden of proof – according to Spain, OperaFund and Schwab did not provide enough evidence to meet their burden and ground their claims.<sup>34</sup>
25. Spain also asserts that a key factor for this Committee to consider is whether the outcome of this submission on stay will cause one or both of the Parties to suffer harm or prejudice.<sup>35</sup>

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<sup>27</sup> Reply Stay ¶ 142.

<sup>28</sup> Reply Stay ¶ 55.

<sup>29</sup> Mem. Stay ¶ 12. *See also*, Reply Stay ¶ 57.

<sup>30</sup> Mem. Stay ¶ 13.

<sup>31</sup> Mem. Stay ¶ 13; Reply Stay ¶ 58.

<sup>32</sup> Reply Stay ¶¶ 60-61.

<sup>33</sup> Mem. Stay ¶ 14.

<sup>34</sup> Mem. Stay ¶ 15.

<sup>35</sup> Mem. Stay ¶ 16.

It maintains that the balance of harms favors continuation of the stay, as Spain will “*suffer significant prejudice*” otherwise, while OperaFund and Schwab will “*suffer no real harm*” if the stay continues.<sup>36</sup>

26. According to Spain, the greatest variable here is the risk of non-recoupment of Award payments based on OperaFund’s current financial position,<sup>37</sup> and that the recoupment process would place unnecessary cost and burden on Spain, which would ultimately fall to the Spanish taxpayer.<sup>38</sup> Spain supports its position by arguing that although OperaFund had a net profit of EUR 6.6 million in 2018, it lost approximately EUR 2.8 million in 2019 in net assets, and has been losing EUR 2.2 million per year in net assets since 2016.<sup>39</sup>
27. Spain also asserts that while a statement of OperaFund’s financial position lists EUR 43 million in net assets as of 2019, an analysis of the net assets alone does not serve to offset the risk of non-recoupment as liquidating those assets would result in an amount lower than book value.<sup>40</sup> Spain also claims OperaFund has been having liquidity problems, forcing plans to sell assets, and it has posted negative cash flows for the past two years.<sup>41</sup> In addition it states that the amount due under the Award exceeds EUR 29.3 million, given the potential tax gross-up, costs and interests, apparently suggesting that the amount Spain would need to recoup would be even larger than indicated by OperaFund and Schwab.<sup>42</sup> Finally, Spain adds that OperaFund is considering the possibility of selling the Award to a financial investor or a hedge fund, which could produce additional recoupment issues.<sup>43</sup>
28. According to Spain, the balance of harms favors it because OperaFund and Schwab will not experience any harm or prejudice as a result of continuation of the stay.<sup>44</sup> This is the case, Spain argues, because the delay in payment will be remedied by payment of interest,

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<sup>36</sup> Reply Stay, ¶ 142. *See also*, Mem. Stay ¶ 16.

<sup>37</sup> Mem. Stay ¶¶ 17-18, 21; Reply Stay ¶¶ 24, 36.

<sup>38</sup> Mem. Stay ¶¶ 19-20.

<sup>39</sup> Mem. Stay ¶¶ 23, 26; Reply Stay ¶ 28.

<sup>40</sup> Reply Stay ¶¶ 29, 34.

<sup>41</sup> Mem. Stay ¶¶ 27-28.

<sup>42</sup> Reply Stay ¶ 35.

<sup>43</sup> Mem. Stay ¶¶ 31-32.

<sup>44</sup> Mem. Stay ¶ 34; Reply Stay ¶ 37.

and the continuation of the stay would not introduce a new risk but simply delay further the collection of the Award which is the precise risk covered by post-Award interest.<sup>45</sup> Moreover, Spain argues, the possibility of OperaFund and Schwab being pushed back in the line of creditors is not a significant risk factor to support lifting the stay.<sup>46</sup>

29. Spain further submits that while the risk of non-payment of the Award might be relevant, it should not be determinative.<sup>47</sup> That said, Spain argues that there is no risk that it would lack the financial resources to pay the Award, observing that it is the fifth largest economy in the EU, and has the 13<sup>th</sup> largest GDP worldwide.<sup>48</sup> It further notes that Spain has no history of non-compliance.<sup>49</sup> Finally, 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.*”<sup>50</sup> Put another way, Spain states that it commits to “*honor the Award if it is not annulled in this proceeding, and it obtains the appropriate authorization from the European Com[m]ission [...].*”<sup>51</sup> For Spain, this “*voluntary, self-initiated commitment*” made in the utmost good faith is all the commitment that is necessary and should weigh in favor of maintaining the stay.<sup>52</sup>
30. Spain submits that it has already notified the Award to the European Commission requesting clearance to pay, which demonstrates its intention to honor the Award.<sup>53</sup> It maintains, however, that since EU law is international law, fulfillment of its international obligations includes its obligations as an EU Member State, in particular by seeking permission to pay the Award from the European Commission.<sup>54</sup> Spain submits that it has an obligation to seek such clearance because the European Commission has already

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<sup>45</sup> Mem. Stay ¶ 35; Reply Stay ¶¶ 39, 42.

<sup>46</sup> Reply Stay ¶ 45.

<sup>47</sup> Mem. Stay ¶ 37; Reply Stay ¶ 46.

<sup>48</sup> Mem. Stay ¶ 38.

<sup>49</sup> Mem. Stay ¶ 39.

<sup>50</sup> Reply Stay ¶ 53.

<sup>51</sup> Reply Stay ¶ 143.

<sup>52</sup> Reply Stay ¶ 54.

<sup>53</sup> Mem. Stay ¶ 40; Reply Stay ¶ 52.

<sup>54</sup> See Reply Stay ¶¶ 47, 51, 53, 124.

determined that payment of the Award constitutes notifiable State Aid under Articles 107 and 108 of the Treaty on the Functioning of the European Union (“TFEU”), and the Commission is the only competent body to make such determination.<sup>55</sup> Lastly, Spain argues that this clearance process before the Commission is a circumstance that should be assessed by the Committee in deciding whether to maintain the stay of enforcement, given that the stay would prevent a potential conflict of international obligations that would affect both Parties.<sup>56</sup>

31. Finally, Spain takes issue with OperaFund and Schwab’s reliance on the decisions on the applications for stay of enforcement in other cases involving Spain, such as *Antin v. Spain*, *Cube v. Spain* and *NextEra v. Spain*, arguing (i) that the analysis should be case specific to the circumstances of the present case;<sup>57</sup> (ii) that OperaFund and Schwab have provided only a partial picture of the cases omitting, for example, reference to the recent ruling in *SolEs v. Spain* that authorized the unconditional continuation of the stay of enforcement, or to the annulment decision in *Eiser v. Spain*, which Spain asserts serves to demonstrate the risks of lifting the stay;<sup>58</sup> and (iii) that a number of the conclusions reached in the decisions on stay in *Eiser v. Spain*, *Antin v. Spain*, *Masdar v. Spain* and *NextEra v. Spain*, are either flawed, or actually support Spain’s position .<sup>59</sup>

### 3. Whether Security or a Guarantee is Required

32. In its Memorial on Stay, Spain submits that the continuation of the stay should not be conditioned on the provision of a guarantee. According to the Applicant, this would place the Award creditor in a better position than it would have been had the annulment application not been made.<sup>60</sup> Citing the Committee in *Victor Pey Casado v. Chile*, Spain

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<sup>55</sup> Reply Stay ¶¶ 119, 125-132.

<sup>56</sup> Reply Stay ¶¶ 133-134.

<sup>57</sup> Reply Stay ¶ 64.

<sup>58</sup> Reply Stay ¶¶ 65, 67-69.

<sup>59</sup> See Reply Stay ¶¶ 73-116.

<sup>60</sup> Mem. Stay ¶ 42.

asserts such a condition “requires a high burden of proving that the award creditor would suffer prejudice if the stay were continued.”<sup>61</sup>

33. Spain asserts that OperaFund and Schwab have failed to meet their burden of proving that the stay should be conditioned on the provision of security.<sup>62</sup> It avers that the same factors and circumstances that govern the stay analysis compel this Committee to grant the stay unconditionally, and that the burden is on OperaFund and Schwab to prove the need for security.<sup>63</sup> Ultimately, it stresses that the preservation of economic value by the issuance of security makes no sense where the Award might be annulled.<sup>64</sup>
34. Spain views the provision of security or guarantee as the equivalent of penalizing it for exercising its right to an annulment process under ICSID Convention Article 52.<sup>65</sup> Furthermore, it cites *Tenaris v. Venezuela II* for the proposition that the Committee should not facilitate enforcement or put OperaFund and Schwab in a better place than they would have been in absent the guarantee.<sup>66</sup>
35. Finally, Spain pledges that a binding and unconditional written undertaking is not necessary because it has already offered its commitment to honor the Award in good faith, consistent with its dual obligations under the ICSID Convention and EU law, if the Award is not annulled.<sup>67</sup>

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<sup>61</sup> Mem. Stay ¶ 42.

<sup>62</sup> Reply Stay ¶ 135.

<sup>63</sup> Reply Stay ¶¶ 135, 137.

<sup>64</sup> Reply Stay ¶ 140.

<sup>65</sup> Reply Stay ¶ 136.

<sup>66</sup> Reply Stay ¶ 138.

<sup>67</sup> Reply Stay ¶ 139. *See also*, Reply Stay, ¶¶ 117-118.

## B. OPERAFUND AND SCHWAB'S POSITION

36. OperaFund and Schwab oppose the continuation of the stay,<sup>68</sup> arguing that the Application for Annulment in this case is frivolous and aimed only at impairing their rights and delaying Spain's obligations.<sup>69</sup> In particular, OperaFund and Schwab:

“[R]equest[] that the Committee order (i) the lift of the provisional stay of enforcement of the Award; and (ii) the Applicant (Spain) to bear all costs resulting from this procedural incident.”<sup>70</sup>

37. For OperaFund and Schwab, Spain's Application for Annulment and its request for a permanent stay of enforcement of the Award are part of a “*calculated strategy*” to allow Spain to hide and relocate assets and escape payment of the Award, and to fabricate defenses against enforcement in coordination with the European Commission.<sup>71</sup> OperaFund and Schwab claim that Spain has not paid any of the amounts due under the various ICSID ECT awards against it, but instead has systematically rejected the reasoning in all such awards filing annulment applications as a delay strategy, in violation of the principle of finality of ICSID awards.<sup>72</sup> That conduct, Respondents argue, reveals Spain's lack of commitment to abide by its international obligations under the ICSID Convention and poses a risk of non-compliance with the Award.<sup>73</sup>
38. OperaFund and Schwab further contend that there is no presumption in favor of a stay; rather, Spain has the burden of showing “*compelling circumstances*” requiring the stay, such as prejudice to the Applicant.<sup>74</sup> They argue that the applicable presumption in this case is the presumption in favor of enforcement of ICSID awards, and the imposition of a permanent stay is an exceptional measure,<sup>75</sup> as demonstrated by recent ICSID committee

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<sup>68</sup> C-Mem. Stay ¶ 67; Resp. Rej. ¶ 84.

<sup>69</sup> C-Mem. Stay ¶ 3.

<sup>70</sup> C-Mem. Stay ¶ 67; Rej. Stay ¶ 84.

<sup>71</sup> C-Mem. Stay ¶ 3.

<sup>72</sup> C-Mem. Stay ¶ 2.

<sup>73</sup> C-Mem. Stay ¶ 6.

<sup>74</sup> C-Mem. Stay ¶¶ 4-5.

<sup>75</sup> C-Mem. Stay ¶¶ 4-5.



decisions in *Eiser v. Spain*, *Antin v. Spain*, *NextEra v. Spain*, and *Cube v. Spain*, which refused requests for the permanent stay of the underlying awards.<sup>76</sup>

39. OperaFund and Schwab further argue that the balance of circumstances or hardships favors lifting the stay, on the basis that the contrary result will increase the risk of Spain’s non-compliance with the Award and relegate OperaFund and Schwab in the long line of award-creditors awaiting access to Spain’s assets.<sup>77</sup> OperaFund and Schwab consider that these risks are not offset by post-award interest, which are compensatory and not punitive in nature.<sup>78</sup>

### 1. The Applicable Legal Standard

40. OperaFund and Schwab argue that the Committee’s analysis must start from ICSID Convention Article 53(1), which establishes that an award is final and the award debtor has an international obligation to pay in full.<sup>79</sup> They remark that the annulment remedy should not be equipoised with the finality of awards. The remedy of annulment is an exceptional one, and therefore the granting of a stay during the pendency of an annulment process is equally exceptional, as recognized in *Burlington v. Ecuador*, *Kardassopoulos v. Georgia*, *Tenaris I v. Venezuela*, and *Cube v. Spain*.<sup>80</sup>
41. Referring to the explicit language of ICSID Convention Article 52(5), pursuant to which “[t]he Committee *may*, if it considers that the *circumstances so require*, stay the enforcement pending its decision [...]”,<sup>81</sup> OperaFund and Schwab submit that the Parties agree that the Committee has discretion to decide whether to lift or continue the stay, and that Article 52(5) is open-ended in that it does not limit or specify the circumstances that the Committee can take into account.<sup>82</sup>

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<sup>76</sup> C-Mem. Stay ¶ 7.

<sup>77</sup> C-Mem. Stay ¶¶ 6, 21.

<sup>78</sup> C-Mem. Stay ¶ 6.

<sup>79</sup> C-Mem. Stay ¶ 10.

<sup>80</sup> C-Mem. Stay ¶ 11; Rej. Stay ¶ 11. *See also*, C-Mem. Stay ¶¶ 18, 42; Rej. Stay ¶ 2.

<sup>81</sup> C-Mem. Stay ¶¶ 12-13 (emphasis by OperaFund and Schwab).

<sup>82</sup> Rej. Stay ¶ 6.

42. Relying on *Border Timbers v. Zimbabwe*, *Antin v. Spain*, *Karkey v. Pakistan* and *OI European v. Venezuela*, OperaFund and Schwab further submit that the imperative verb “require” underlines that the circumstances to stay enforcement must be “compelling” or “rise beyond the ordinary,” and otherwise the stay should be lifted.<sup>83</sup> According to OperaFund and Schwab, this language in Article 52(5) is clearly intentional and reveals a “stringent standard.”<sup>84</sup> They further argue that the verb “require” also demonstrates that there is no presumption in favor of continuation of the stay of enforcement, and instead, the presumption is the opposite one, as supported by the decisions in *Valores Mundiales v. Venezuela*, *Caratube v. Kazakhstan*, *Sempre v. Argentina*, *SGS v. Paraguay*, *Eiser v. Spain* and *Antin v. Spain*.<sup>85</sup> Nor is there any prevailing practice in granting requests for continuation of a stay of enforcement.<sup>86</sup> OperaFund and Schwab rely on *Caratube v. Kazakhstan* for the proposition that prior decisions and statistics “do no create a binding precedent for ad hoc committees, much less a rule that the stay is automatic in all cases or that there is a presumption in favor of automaticity.”<sup>87</sup>
43. Finally, OperaFund and Schwab take the view that in accordance with ICSID Arbitration Rule 54(4), the requesting party bears the burden of showing the circumstances requiring a stay.<sup>88</sup> Thus, they argue that Spain, as the Applicant here, bears the burden of proving the existence of compelling circumstances to continue the stay; a burden, they contend, Spain has not discharged. On the other hand, they contend that OperaFund and Schwab do not have to show circumstances requiring lifting of the stay.<sup>89</sup> In any event, the Respondents on Annulment argue, they have demonstrated both that Spain will suffer no prejudice from lifting the stay, while OperaFund and Schwab would be prejudiced if the stay is continued.<sup>90</sup>

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<sup>83</sup> C-Mem. Stay ¶ 14. *See also*, Rej. Stay ¶¶ 2, 16-18 (relying also on *Eiser v. Spain* and *SGS v. Paraguay*).

<sup>84</sup> Rej. Stay ¶ 15.

<sup>85</sup> C-Mem. Stay ¶ 15; Rej. Stay ¶ 13. *See also*, C-Mem. Stay ¶ 18; Rej. Stay ¶ 2.

<sup>86</sup> Rej. Stay ¶ 14.

<sup>87</sup> C-Mem. Stay ¶ 15.

<sup>88</sup> C-Mem. Stay ¶ 16 (relying on *NextEra v. Spain*, *Cube v. Spain*, *Valores Mundiales v. Venezuela*, *Karkey v. Pakistan*, and *Burlington v. Ecuador*). *See also*, Rej. Stay ¶¶ 2, 19-21.

<sup>89</sup> C-Mem. Stay ¶¶ 17-18.

<sup>90</sup> Rej. Stay ¶ 22.

## 2. Whether the Circumstances Require a Stay

44. OperaFund and Schwab submit that Spain has not demonstrated the presence of circumstances requiring continuation of the stay.<sup>91</sup>
45. While OperaFund and Schwab argue that in deciding an application for continuation of the stay of enforcement an *ad hoc* committee should not consider the merits of the annulment application,<sup>92</sup> they submit that established jurisprudence allows an exception to this principle when the application is frivolous or dilatory,<sup>93</sup> as is – they assert – the case here.<sup>94</sup> In such situation, they argue, “*the circumstances favor lifting the provisional stay.*”<sup>95</sup> Conversely, the fact that an application for annulment is not frivolous or dilatory (*quod non*), does not favor the imposition of a permanent stay.<sup>96</sup>
46. OperaFund and Schwab contend that a *prima facie* review of the Application for Annulment in this case reveals that no serious ground for annulment has been submitted, and the systematic nature of Spain’s annulment applications in each case decided against it, evidences that their purpose is purely dilatory.<sup>97</sup> According to OperaFund and Schwab, Spain’s Application for Annulment in this case reveals nothing but a disagreement with the Tribunal’s analysis in the Award and an attempt to request the Committee to reexamine *de novo* every issue decided against Spain.<sup>98</sup>
47. OperaFund and Schwab submit that Spain has systematically refused to satisfy any ICSID (ECT) award against it, and has filed annulment applications in all of these cases,<sup>99</sup> fabricating grounds for annulment in order to delay compliance for the “*sole purpose*” of “*impair[ing] the investors’ efforts to collect their awards in coordination with the*

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<sup>91</sup> C-Mem. Stay § 3; Rej. Stay ¶ 3.

<sup>92</sup> C-Mem. Stay ¶ 22; Rej. Stay ¶ 70.

<sup>93</sup> C-Mem. Stay ¶ 23; Rej. Stay ¶ 71.

<sup>94</sup> C-Mem. Stay ¶ 24. *See also*, Rej. Stay ¶ 32.

<sup>95</sup> Rej. Stay ¶ 71 (emphasis in original).

<sup>96</sup> Rej. Stay ¶ 69.

<sup>97</sup> C-Mem. Stay ¶ 23; Rej. Stay ¶ 74.

<sup>98</sup> Rej. Stay ¶ 74.

<sup>99</sup> C-Mem. Stay ¶ 19.

*European Commission.*”<sup>100</sup> According to OperaFund and Schwab, Spain’s strategy is to buy time so it can relocate and transfer assets, while at the same time adopting “*retaliatory measures against electricity plants whose partners are or were involved in international arbitration.*”<sup>101</sup>

48. The Respondents on Annulment’s position is that the balance of circumstances favor lifting the stay because Spain cannot show prejudice or harm to it from doing so.<sup>102</sup> They submit that Spain’s allegation concerning the risk of non-recoupment must fail because: (i) a non-recoupment risk must presuppose that the Award has been paid;<sup>103</sup> (ii) it is for domestic courts to consider the risk of non-recoupment in the context of enforcement actions,<sup>104</sup> and in any event it is “*extremely unlikely*” that Spain can prove such risk even in that context.<sup>105</sup> OperaFund and Schwab deny that their position amounts to a rejection of the functions of the Committee, but rather is one of not putting the Committee “*in a context, and a point in time where the Committee lacks sufficient information to properly assess all matters at stake.*”<sup>106</sup> They add that, should the stay be lifted, Spain will not be unprotected in enforcement actions, nor will OperaFund and Schwab be allowed automatically to launch any kind of attachment effort.<sup>107</sup>
49. The Respondents on Annulment argue that in any event Spain has failed to demonstrate an actual risk of non-recoupment.<sup>108</sup> According to OperaFund and Schwab, Spain has merely referred to a generic risk of non-recoupment, which cannot be a compelling circumstance warranting a stay.<sup>109</sup> Relying on *Karkey v. Pakistan*, *Antin v. Spain*, and *Cube v. Spain*, OperaFund and Schwab submit that Spain would have to demonstrate that the creditor was at “*risk of bankruptcy*,” “*on the brink of insolvency*,” or that the payment will be made to

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<sup>100</sup> C-Mem. Stay ¶ 20.

<sup>101</sup> C-Mem. Stay ¶ 21.

<sup>102</sup> C-Mem. Stay § 3.1; Rej. Stay § 3.1.

<sup>103</sup> C-Mem. Stay ¶ 27; Rej. Stay ¶ 35.

<sup>104</sup> C-Mem. Stay ¶¶ 30-31; Rej. Stay ¶ 35.

<sup>105</sup> Rej. Stay ¶ 35.

<sup>106</sup> Rej. Stay ¶ 36.

<sup>107</sup> Rej. Stay ¶ 37.

<sup>108</sup> C-Mem. Stay § 3.1 (ii). *See also*, Rej. Stay ¶¶ 3, 32.

<sup>109</sup> C-Mem. Stay ¶ 33. *See also*, Rej. Stay ¶ 39 (i-iii).

an “*insolvent company*.”<sup>110</sup> According to OperaFund and Schwab, similar views have also been held by other committees including those in *Masdar v. Spain*, and *SolEs v. Spain*.<sup>111</sup>

50. OperaFund and Schwab contend that here “*none of the award creditors is in financial distress or in the brink of insolvency*,”<sup>112</sup> and Spain has misrepresented “*OperaFund’s solid financial situation*.”<sup>113</sup> They emphasize that OperaFund’s financial statement for June 2019 shows net assets of EUR 43.3 million, a figure that far outstrips the amount awarded to OperaFund and Schwab (EUR 29.30 million in damages),<sup>114</sup> even considering interest and costs.<sup>115</sup> Therefore, there is no risk of non-recoupment because those net assets “*would cover any eventual (yet, unlikely) liability incurred by OperaFund after the annulment*.”<sup>116</sup>
51. As to Spain’s contention that liquidation of these assets will result in an amount lower than book value, OperaFund and Schwab argue that such a thesis wrongly assumes that the company will have to be liquidated, while OperaFund’s current financial statement shows that no liquidation would be required.<sup>117</sup> Finally, OperaFund and Schwab emphasize that OperaFund’s situation is entirely different from that of the *SolEs* entities (the only Spanish case mentioned in this proceeding where a permanent stay has been granted), where the award at issue amounted to EUR 40.49 million in damages, while *SolEs*’s 2018 financial statement only reflected EUR 2.85 million in total assets.<sup>118</sup>
52. OperaFund and Schwab further maintain that they will be prejudiced by continuation of the stay,<sup>119</sup> which would jeopardize their legitimate rights.<sup>120</sup>

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<sup>110</sup> C-Mem. Stay ¶¶ 34-35.

<sup>111</sup> Rej. Stay ¶ 39 (iv-v).

<sup>112</sup> C-Mem. Stay ¶ 40. *See also*, Rej. Stay ¶ 45.

<sup>113</sup> C-Mem. Stay ¶ 37. *See also*, Rej. Stay ¶¶ 3, 39.

<sup>114</sup> C-Mem. Stay ¶¶ 38-39, 41; Rej. Stay ¶¶ 41-42.

<sup>115</sup> Rej. Stay ¶ 42(ii).

<sup>116</sup> C-Mem. Stay ¶ 41.

<sup>117</sup> Rej. Stay ¶ 42(iii).

<sup>118</sup> Rej. Stay ¶¶ 43-44.

<sup>119</sup> C-Mem. Stay § 3.2. *See also*, Rej. Stay ¶¶ 4, 32, § 3.2.

<sup>120</sup> C-Mem. Stay ¶ 55.

53. *First*, they submit that there is a “*real risk*” that Spain will ultimately fail to comply with the Award and will succeed in resisting compulsory enforcement.<sup>121</sup> They observe that Spain openly acknowledges that the Award will not be satisfied until the European Commission authorizes payment.<sup>122</sup> Apart from the fact that the alleged “*conflict*” with EU law is a problem of Spain’s own creation, OperaFund and Schwab submit that it is also irrelevant to the issue presently before the Committee.<sup>123</sup> They argue, however, that Spain’s position that its obligation to pay the Award is conditional on the European Commission authorization does confirm the existence of an “*objectively plausible risk*” of nonpayment or that payment “*is likely to be delayed and potentially frustrated,*” as recognized by the committees in *NextEra v. Spain* and *Cube v. Spain*.<sup>124</sup>
54. OperaFund and Schwab further submit that it is “*disingenuous*” for Spain to argue that its notification of the Award to the European Commission demonstrates its intent to comply with that Award, arguing that such steps cannot be evidence of its intention to honor the ICSID Convention, which imposes an unconditional obligation to comply with an ICSID award.<sup>125</sup>
55. *Second*, according to OperaFund and Schwab, the continuation of the stay will also impact their attempt to recover the Award amounts, because they will be relegated in a long line of creditors and which so far includes 13 claims and awards of over EUR 950 million.<sup>126</sup> Moreover, the Respondents on Annulment argue, so long as the stays are in place, Spain will have additional time “*to relocate assets and place them in enforcement ‘unfriendly’ jurisdictions or simply in EU jurisdictions under the reach of EC decisions.*”<sup>127</sup> This risk, they argue, goes beyond a mere delay in payment.<sup>128</sup> According to OperaFund and Schwab, the risk of relegation under a long line of creditors has already been considered a

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<sup>121</sup> C-Mem. Stay ¶ 44. *See also*, Rej. Stay ¶ 22.

<sup>122</sup> C-Mem. Stay ¶ 49.

<sup>123</sup> C-Mem. Stay ¶ 47; Rej. Stay ¶ 51.

<sup>124</sup> C-Mem. Stay ¶¶ 49, 51-54. *See also*, Rej. Stay ¶¶ 4, 32, 46-49.

<sup>125</sup> Rej. Stay ¶ 52.

<sup>126</sup> C-Mem. Stay ¶¶ 56-58. *See also*, Rej. Stay ¶¶ 22, 32, § 3.2(ii).

<sup>127</sup> Rej. Stay ¶ 59. *See also*, C-Mem. Stay ¶ 60 and Rej. Stay ¶ 4.

<sup>128</sup> Rej. Stay ¶ 60.

relevant factor in decisions such as *OI European v. Venezuela* or *Valores Mundiales v. Venezuela*.<sup>129</sup>

56. *Third*, OperaFund and Schwab argue that post-award interest would not serve as an adequate remedy for the prejudice they will suffer if the stay is continued.<sup>130</sup> In particular, the Respondents on Annulment assert that a payment of interest would not offset the increased risk of Spain's non-compliance with the Award, or the delay in compliance.<sup>131</sup> This is because interest cannot remedy a risk of deprivation that goes beyond the mere lapse of time, such as the risks of Spain's failure to honor the Award or of OperaFund and Schwab's being placed in a more disadvantageous situation than other ECT award creditors.<sup>132</sup> According to OperaFund and Schwab, Spain's position in this regard has already been rejected by a string of ICSID committees constituted in Spain's ECT cases, namely *Eiser v. Spain*, *Antin v. Spain*, *NextEra v. Spain* and *Cube v. Spain*.<sup>133</sup>
57. Recalling that the arbitration has already lasted more than 4 years, OperaFund and Schwab submit that continuation of the stay would not only deprive them of their right to enforce the Award for another 2 or 3 years, causing them additional damage, but that it will also subject them to a significantly increased risk of having to confront new legal issues raised by Spain *ex-post* under the aegis of the European Union, and of non-compliance with the Award, which cannot be offset by post-award interest.<sup>134</sup>
58. Finally, OperaFund and Schwab take issue with Spain's portrayal of the various stay decisions rendered in other ECT cases involving Spain, including *Eiser v. Spain*, *Antin v. Spain*, *NextEra v. Spain*, *Cube v. Spain*, *Masdar v. Spain* and *SolEs v. Spain*.<sup>135</sup> OperaFund and Schwab emphasize that out of these six decisions, five have lifted the provisional stay of enforcement, and the only one that granted the continuation of the stay was grounded on

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<sup>129</sup> Rej. Stay ¶ 55.

<sup>130</sup> C-Mem. Stay § 3.2 (iii). *See also*, Rej. Stay ¶¶ 4, 32, 62.

<sup>131</sup> C-Mem. Stay ¶ 63.

<sup>132</sup> Rej. Stay ¶ 62.

<sup>133</sup> C-Mem. Stay ¶ 64; Rej. Stay ¶ 63.

<sup>134</sup> C-Mem. Stay ¶ 66. *See also*, Rej. Stay ¶ 67.

<sup>135</sup> Rej. Stay ¶ 77.

case-specific circumstances involving the poor financial situation of the entities involved.<sup>136</sup>

59. They further submit that Spain’s submissions “*cherry-pick*[]” part of these decisions, overlooking the findings and analysis of the committees.<sup>137</sup> In particular, OperaFund and Schwab argue that: (i) *Eiser* demonstrates that the normal functioning of the ICSID enforcement mechanism causes no harm to the award debtor;<sup>138</sup> (ii) none of the six decisions has considered that the merits of Spain’s annulment applications favored the stay;<sup>139</sup> (iii) none of the six decisions has concluded that the EU law conflicts invoked by Spain justify granting the stay;<sup>140</sup> (iv) three of those decisions (*Eiser v. Spain*, *Antin v. Spain* and *Cube v. Spain*) categorically denied that Spain had substantiated any risk of non-recoupment, one (*Masdar v. Spain*) found no evidence that such risk existed, another (*NextEra v. Spain*) concluded that the Parties’ concerns would be addressed with conditioning the stay upon an undertaking by Spain which Spain failed to provide, and the last one (*SolEs v. Spain*) found a risk of non-recoupment based on the specific financial situation of the award creditors in that case.<sup>141</sup>

### 3. Whether Security or a Guarantee is Required

60. While OperaFund’s and Schwab’s primary position is that the balance of hardships in this case justifies lifting the stay of enforcement unconditionally, should the Committee decide that the stay should be maintained, they request that Spain be ordered to provide an “*unconditional undertaking of payment of the Award, including interest and all other sums.*”<sup>142</sup>
61. According to OperaFund and Schwab, Spain has not offered any “*valid security.*”<sup>143</sup> They argue that Spain’s statement that it will pay the Award if the EC so authorizes amounts to

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<sup>136</sup> Rej. Stay ¶ 78.

<sup>137</sup> Rej. Stay ¶¶ 79-81.

<sup>138</sup> Rej. Stay ¶ 80.

<sup>139</sup> Rej. Stay ¶ 81 (v).

<sup>140</sup> Rej. Stay ¶ 81 (vi).

<sup>141</sup> Rej. Stay ¶ 81 (vii).

<sup>142</sup> Rej. Stay ¶ 25.

<sup>143</sup> Rej. Stay ¶ 23.



no commitment at all, and indeed offers less than what Spain is already obliged to do under ICSID Convention Articles 53 and 54.<sup>144</sup> OperaFund and Schwab further note that in a prior case (*NextEra v. Spain*), Spain has already been ordered to provide a firm, unconditional and irrevocable undertaking of payment, and it has refused to do so, which demonstrates that Spain’s allegation that it intends to honor the Award here is a “*ruse*.”<sup>145</sup>

62. It is OperaFund’s and Schwab’s position that the “*Committee is empowered to order continuation of the provisional stay but subject to Spain furnishing appropriate security or an irrevocable and unconditional undertaking of payment of the Award, including interest and all other sums, without needing to resort to any recognition, enforcement or execution proceedings.*”<sup>146</sup>
63. According to OperaFund and Schwab, Spain’s submission that such security would amount to a cost or fine to the Applicant, or would place the creditor in a better position than it would be absent the annulment is a position that has already been dismissed by prior committees.<sup>147</sup> They refer, in particular, to the decision in *Sempra v. Argentina*, according to which (i) in a scenario where the State complies with the Award, the guarantee does not place the creditor in a better situation; and (ii) in a scenario where the annulment is not sought the debtor is “*obliged to comply with the award immediately upon its rendering, i.e. to make the payment that the [security] is intended to ensure.*”<sup>148</sup>

#### IV. THE COMMITTEE’S ANALYSIS

64. Considering the positions of the Parties, there are three main issues to be addressed by the Committee. The first issue is whether the stay of enforcement should be maintained pending the Committee’s decision on annulment. Second, if the Committee decides to maintain the stay of enforcement, whether the stay so ordered should be made subject to conditions. Third, if the Committee decides to impose conditions on the stay, what are the

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<sup>144</sup> Rej. Stay ¶ 24.

<sup>145</sup> Rej. Stay ¶¶ 28-30.

<sup>146</sup> Rej. Stay ¶ 26 (emphasis in original).

<sup>147</sup> Rej. Stay ¶ 27.

<sup>148</sup> Rej. Stay ¶ 27.

conditions that should be imposed. These issues will be addressed in the sections that follow.

**A. WHETHER THE PROVISIONAL STAY OF ENFORCEMENT SHOULD BE MAINTAINED**

65. In approaching whether the stay of enforcement in this proceeding should be maintained, the Committee addresses two main questions: *first*, the legal standard for continuation of a stay, and *second*, whether circumstances exist that require continuance of the stay.

**1. The Legal Standard for Continuation of the Stay**

66. ICSID Convention Article 52(5) sets forth the standard to be applied by *ad hoc* Committees in assessing requests for stays of enforcement of ICSID awards. It states that: “*The Committee may, if it considers 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 a request.*”<sup>149</sup>

67. ICSID Arbitration Rule 54(4) provides that: “*A request pursuant to paragraph (1), (2) (second sentence) or (3) [for a stay or its modification or termination] shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*”<sup>150</sup>

68. The Committee has carefully considered the Parties’ submissions on the issue of the legal standard to be applied to its decision on the continuation of the stay of enforcement, including prior decisions in other ICSID cases on the subject, particularly those that the Parties have directed to the Committee’s attention, which may help instruct, but do not bind, this Committee. The Parties diverge on two main issues: the applicable standard of proof, and the burden of proof.

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<sup>149</sup> ICSID Convention, Art. 53(5).

<sup>150</sup> ICSID Arbitration Rules, Rule 54(4).

*a. The Standard of Proof*

69. With regard to the standard of proof, Spain argues in the main that ICSID Convention Article 52(5) does not require “*exceptional*” circumstances to continue a stay of enforcement, rather, “*normal*” or “*usual*” circumstances may be sufficient to grant a stay.<sup>151</sup> Spain also contends that there is a “*prevailing ICSID practice of granting stays of enforcement,*” and that “*continuation of a stay should be granted unless it is obvious that the application is ‘without any basis under the Convention’ and is ‘dilatory’ in nature.*”<sup>152</sup> It cites the decision in *Victor Pey Casado v. Chile* for the proposition that granting a stay of enforcement “*has now become almost automatic.*”<sup>153</sup> In its Reply on Stay, Spain clarifies its position on the alleged “*prevailing practice*” in favor of stays of enforcement, by noting that this does not mean that stays should “*automatically*” be granted, but rather that “*the[] statistics demonstrate that ‘greater restraint is [not] needed in deciding whether a stay be continued.’*”<sup>154</sup> Fundamentally, Spain argues that “*the threshold for the stay is not as high as OperaFund contends.*”<sup>155</sup>
70. For their part, OperaFund and Schwab maintain that “*continuation of the stay remains an exception within the exceptional and narrow remedy of annulment in the ICSID framework.*”<sup>156</sup> They contend that there is a presumption in favor of enforcement of ICSID awards,<sup>157</sup> and no presumption in favor of the continuation of a stay.<sup>158</sup> They assert in addition that there is no “*prevailing practice*” that supports the granting of a stay of enforcement.<sup>159</sup> With reference to the language of ICSID Convention Article 52(5) – “*if it [the Committee] considers that the circumstances so require*” – OperaFund and Schwab

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<sup>151</sup> Reply Stay ¶ 10.

<sup>152</sup> Mem. Stay ¶¶ 8, 10.

<sup>153</sup> Mem. Stay ¶ 9 citing **RL-0141**, *Victor Pey Casado and Foundation “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 (“*Victor Pey Casado*”), ¶ 25.

<sup>154</sup> Reply Stay ¶ 13 citing **RL-0152**, *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 (“*Perenco*”) (emphasis in original).

<sup>155</sup> Reply Stay ¶ 14.

<sup>156</sup> Rej. Stay ¶ 11; C-Mem. Stay ¶¶ 11, 18.

<sup>157</sup> C-Mem. Stay ¶ 5.

<sup>158</sup> Rej. Stay ¶ 13.

<sup>159</sup> Rej. Stay ¶ 14.

contend that it is “*clearly intentional*” and “*reveals a stringent standard*.”<sup>160</sup> In sum, according to OperaFund and Schwab “*the applicant must show circumstances that rise beyond the ordinary to reach the level that requires continuation of the stay.*”<sup>161</sup>

71. In the Committee’s view, the ordinary meaning of the language of ICSID Convention Article 52(5) provides clear guidance as to the standard to be applied to continue the stay of enforcement. The language, “[t]he Committee may, if it considers that the circumstances so require,” makes three aspects of the standard clear: *first*, that the Committee has the discretion to decide whether the stay should be continued,<sup>162</sup> *second*, that this discretion warrants consideration of the particular factual circumstances of the case at hand,<sup>163</sup> and *third*, that the standard of proof is not, as OperaFund and Schwab contend, “*stringent*” nor indeed that it must “*rise beyond the ordinary.*” The standard is straightforwardly based on the factual circumstances of the specific case and whether those circumstances require, in the discretion of the Committee, the continuation of the stay, its termination, or indeed its modification. Put in more concrete terms, it requires, on the part of the Committee, an appreciation of prejudice that warrants a continuation, termination or modification of a stay.
72. Consequently, the Committee’s view eschews consideration of proffers of “*prevailing practice,*” or presumptions in favor of, or against, continuations of stays; such factors do not focus the inquiry on the particular circumstances of the case at hand. This is not to say that earlier cases may not be instructive; while not binding, they certainly can and do serve as valuable resources for the Committee’s deliberations and decision. However, these cases cannot take the place of the particular facts of the specific case before the Committee.

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<sup>160</sup> Rej. Stay ¶ 15 (emphasis in original).

<sup>161</sup> Rej. Stay ¶ 15.

<sup>162</sup> **RL-0158**, *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20 – Annulment, Decision on Applicant Request for a Continued Stay on Enforcement of the Award, 12 April 2017 (“**Standard Chartered Bank**”), ¶ 50, **RL-0154**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11 – Annulment, Decision on Stay of Enforcement of the Award, 6 April 2020 (“**NextEra**”), ¶ 77.

<sup>163</sup> See **RL-0154**, *NextEra*, ¶ 76.

73. Likewise, the Committee does not accept the proposition that there is a heightened standard by virtue of the contention that a stay of enforcement is “*an exception within the exceptional and narrow remedy of annulment in the ICSID framework.*”<sup>164</sup> In the Committee’s view, the ICSID annulment process – including its stay of enforcement provisions – is an integral part of the ICSID regime, and there is no suggestion in the language of ICSID Convention Article 52(5) or in ICSID Arbitration Rule 54 that indicates the imposition of a heightened standard for decisions on stays of enforcement.

**b. The Burden of Proof**

74. Spain contends that its assertions of the negative circumstances it would face if the stay is terminated requires that OperaFund and Schwab must give proof that they would suffer prejudice as a result of the stay, and that OperaFund and Schwab are not “*exempt from the burden of proving the alleged reasons why the stay should be lifted.*”<sup>165</sup> Spain further asserts that the “*burden must be met by the OperaFund Parties where they make an assertion.*”<sup>166</sup>

75. OperaFund and Schwab contend that “*following the text of Rule 54(4), ICSID Committees require that the party requesting the stay proves those circumstances that require continuation.*”<sup>167</sup> It asserts that in any event, it has “*adequately shown that Spain would not be prejudiced by the lifting of the stay and that, by contrast, the imposition of a permanent stay would significantly increase the risk that Spain may ultimately fail to comply with the Award and would further relegate OperaFund in the ‘long line’ of award creditors against Spain.*”<sup>168</sup>

76. The Committee sees little practical difference between the Parties on this issue.

77. While ICSID Convention Article 52(5) does not indicate which party carries the burden of establishing the circumstances requiring a stay, ICSID Arbitration Rule 54(4) requires that

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<sup>164</sup> Rej. Stay ¶ 11.

<sup>165</sup> Reply Stay ¶ 15.

<sup>166</sup> Reply Stay ¶ 16.

<sup>167</sup> C-Mem. Stay ¶ 16; Rej. Stay ¶ 20.

<sup>168</sup> Rej. Stay ¶ 22.

the person making the request “*shall specify the circumstances that require the stay or its modification or termination.*” Rule 54(4) continues: “*A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*”

78. The Committee draws two conclusions from this language of ICSID Arbitration Rule 54(4). *First*, the inclusion in the Rule of a party seeking not only a stay, but also parties seeking a modification or termination, indicates that this mandatory burden (“*shall*”) is dependent on who is making the request. In other words, OperaFund and Schwab could have requested a termination of the stay, but had it done so, it would have borne the burden of specifying the circumstances that require the termination. As it is, Spain requested the continuance of the stay, and consequently it must bear the initial burden of specifying the circumstances that require continuance of the stay.
79. *Second*, ICSID Arbitration Rule 54(4) makes it clear that a request shall only be granted after each party has been given an opportunity of presenting its observations. The Rule thus anticipates an opportunity on the part of the opposing party to rebut the circumstances claimed. In this case, the Parties have had two rounds of briefing on the issues. In the course of this briefing, both Parties have put forward their positive allegations, as well as their rebuttal arguments, in relation to all of the issues they have raised.
80. At this stage, therefore, it is the task of the Committee to determine whether an assessment of the evidence and argument put before it by the Parties reveals circumstances that require continuing the stay pending its decision on the application for annulment. This is the task to which the Committee shall now turn.

## **2. Whether Circumstances Exist that Require the Stay to Be Continued**

81. The Parties have raised, addressed, and challenged the following factors for the Committee’s consideration: (i) whether the annulment was made in good faith, and to what extent this is relevant to the Committee’s determination; and (ii) the alleged harm to the Parties in the event the stay is continued, which includes consideration of Spain’s obligations under EU law as they pertain to payment of the Award. The Committee addresses these factors in the sections that follow.

**a. The Annulment Was Made in Good Faith**

82. Spain asserts that its application for annulment is well grounded and not frivolous or dilatory, and that *ad hoc* committees “*have found that a request for continuation of a stay should be granted unless it is obvious that the application is ‘without any basis under the Convention’ and is ‘dilatory’ in nature.*”<sup>169</sup> Spain reinforces this argument by quoting from the *ad hoc* Committee in *MTD v. Chile*:

*“The Committee agrees with earlier decisions to the effect that, unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed. In requesting annulment, and applicant avails itself of a right given by the Convention. There is no indication here that Chile is acting in a merely dilatory matter. Thus the Committee does not need to form any view as to the likelihood of success of the application for annulment in this case.”*<sup>170</sup>

83. OperaFund and Schwab take issue with Spain’s claim that its annulment application is well-grounded and not dilatory.<sup>171</sup> They likewise contradict Spain’s position that the jurisprudence supports a continuation of a stay where it is shown that an annulment application is made in good faith and is not dilatory. OperaFund and Schwab contend that the *ad hoc* Committee’s decision in *MTD v. Chile* supports its position rather than that of Spain, and that the decision “*does not state that, unless frivolous or dilatory, the stay should be granted.*”<sup>172</sup> It contends that the decision simply stands for the proposition that “*unless the application is shown to be frivolous or dilatory, the Committee should not engage in an analysis of the merits of the annulment at this preliminary stage.*”<sup>173</sup>

84. As a threshold matter, the Committee is of the view that Spain’s application for annulment, on its face, is not frivolous or dilatory. The Application sets forth serious grounds that this

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<sup>169</sup> Reply Stay § IV (3.1), and ¶ 56.

<sup>170</sup> Reply Stay ¶ 56 citing **RL-0144**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 – Annulment, Decision on the Respondent’s Request for a Continued Stay of Execution, 1 June 2005 (“*MTD*”), ¶ 28.

<sup>171</sup> Rej. Stay ¶ 68.

<sup>172</sup> Rej. Stay ¶ 72 (emphasis in original).

<sup>173</sup> Rej. Stay ¶ 72.

Committee will consider and address on the merits, with the benefit of thorough briefing on both sides, at a later stage. The fact that this is one case of many claims against Spain that arise from the same underlying regulatory scheme, and that Spain has chosen to seek annulment of numerous the awards issued against it – including this case – does not render this annulment application dilatory or frivolous.<sup>174</sup> Furthermore, there is no indication here that Spain is acting in a dilatory manner in bringing the Annulment action.

85. However, the Committee is of the view that *prima facie* grounds for annulment do not amount to a circumstance that requires a stay of enforcement of an ICSID award.<sup>175</sup> As observed by other *ad hoc* Committees, if this were the case, “*the vast majority of annulment applications under the ICSID Convention would have been made in good faith, such that allowing a stay of enforcement in all such cases would in effect create a presumption in favor of granting a stay.*”<sup>176</sup> As the Committee has indicated in paragraph 72 *supra*, it is not prepared to recognize such a presumption. Nor apparently is Spain in this proceeding.<sup>177</sup>

***b. The Relevant Harm to the Parties in the Event the Stay Is Continued***

86. The Parties have each provided substantial arguments as to why continuation of the stay, or termination of the stay as the case may be, will significantly harm them. In the main, Spain contends that OperaFund’s financial situation reveals a serious risk of non-recoupment,<sup>178</sup> and cites the possibility that the Respondents on Annulment will sell their Award to a financial investor.<sup>179</sup> Spain also contends that OperaFund and Schwab will not be harmed by continuation of the stay on the basis that they will be compensated by the

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<sup>174</sup> C-Mem. Stay ¶ 3 (“*It is not credible that Spain finds grounds for annulment in every ICSID award and certainly, not in this case. Spain’s action for annulment is simply dilatory, frivolous and highly damaging for OperaFund.*”)

<sup>175</sup> See **RL-0158**, *Standard Chartered Bank*, ¶ 60; **RL-0145**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 – Annulment, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006 (“*CMS*”), ¶ 37.

<sup>176</sup> **RL-0162**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 – Annulment, Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020 (“*SolEs*”), ¶ 56.

<sup>177</sup> Reply Stay ¶ 9.

<sup>178</sup> Mem. Stay ¶¶ 21-30.

<sup>179</sup> Mem. Stay ¶ 31.



payment of interest, and because the Kingdom of Spain has “*no history of non-compliance*” and “*takes its international commitments seriously, and it intends to honor them.*”<sup>180</sup>

87. For its part, OperaFund and Schwab assert that Spain has failed to establish a risk of non-recoupment.<sup>181</sup> They claim that they would be prejudiced because of the likelihood that Spain will not pay the Award. OperaFund and Schwab argue that Spain’s alleged “*reliance on EU law to resist (at any cost) enforcement of ICSID awards reveals the existence of a plausible risk of Spain failing to comply with the Award.*”<sup>182</sup> They assert that granting a permanent stay would relegate them in the line of Spain’s award creditors, and that the payment of interest is inadequate to make them whole.<sup>183</sup>
88. In assessing the balance of the overall interests articulated by the Parties, the Committee will first examine the Applicant’s claims of prejudice to it and OperaFund’s and Schwab’s corresponding rebuttals, followed by its examination of OperaFund’s and Schwab’s claims of prejudice to them, and the Applicant’s rebuttals thereto.

(i) *Spain’s Claims of Prejudice*

89. As noted above, Spain contends that OperaFund’s financial situation reveals a serious risk of non-recoupment. It cites year-to-year losses between 2018 and 2019 of roughly EUR 9 million, mostly from OperaFund’s investments outside of Spain,<sup>184</sup> an increase in indebtedness of EUR 2.1 million over the same period of time,<sup>185</sup> and that the company has presented two consecutive fiscal years with negative cash flows at the close of the 2019 fiscal year.<sup>186</sup> Spain surmises that “[i]t could even occur that, in the event that the assets were disposed of, Operafund would reimburse the fund to investors and be dissolved,”<sup>187</sup>

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<sup>180</sup> Mem. Stay ¶ 39.

<sup>181</sup> Rej. Stay ¶¶ 38-45.

<sup>182</sup> Rej. Stay ¶ 46.

<sup>183</sup> Rej. Stay ¶¶ 54-67.

<sup>184</sup> Mem. Stay ¶¶ 23-24.

<sup>185</sup> Mem. Stay ¶ 26.

<sup>186</sup> Mem. Stay ¶ 27.

<sup>187</sup> Mem. Stay ¶ 29.

and states that OperaFund “*is considering the possibility of selling the Award to a financial investor or a hedge fund.*”<sup>188</sup>

90. The Committee accepts the risk of recoupment as a factor relevant to its decision on the stay of enforcement.<sup>189</sup> However, “*the risk of non-recoupment must be a real one, and not simply an abstract possibility that is ‘common to virtually all annulment applications.’*”<sup>190</sup> In examining the submissions of both sides with this in mind, the Committee notes the following: *first*, Spain’s conjecture that “*in the event that the assets were disposed of, Operafund would reimburse the fund to investors and be dissolved,*” is not supported by any evidence and thus carries no weight in the Committee’s analysis.<sup>191</sup>
91. *Second*, Spain’s identification in its Memorial on Stay of the possibility that OperaFund would sell the Award to a financial investor was not addressed any further by either Party in the subsequent briefing. In any event, the only evidence of such a sale is contained in an excerpt of a 15 January 2020 letter to OperaFund’s shareholders, which explains the Award, and the efforts made to obtain payment of the Award by Spain, including the recommendation of counsel that enforcement actions take place outside of the EU. It also states that, an “*alternative option, which is also under review, is to sell the award to a financial investor or hedge fund.*”<sup>192</sup> Given the passage of time since the date of this letter, and the failure of Spain to provide further information in its subsequent Reply on Stay, the Committee concludes that this is not a circumstance that requires continuation of the stay.
92. With regard to Spain’s contention that OperaFund’s financial position reveals a serious risk of non-recoupment, the Committee concludes that Spain has failed to meet the requisite showing. In determining the level of financial distress that would warrant a reasonable apprehension of non-recoupment, this Committee agrees with the *ad hoc* Committee in *Antin v. Spain*, that “*in the absence of any allegation that the Applicant bears an unusually*

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<sup>188</sup> Mem. Stay ¶ 31.

<sup>189</sup> See also, **RL-0154**, *NextEra*, ¶ 88; **RL-0162**, *SolEs*, ¶ 59.

<sup>190</sup> **RL-0162**, *SolEs*, ¶ 60.

<sup>191</sup> Mem. Stay ¶ 29.

<sup>192</sup> Mem. Stay ¶ 31 citing **R-0362**, Update for the shareholders of OperaFund Eco-Invest SICAV PLC, 15 January 2020.

*high financial burden or risk in connection with the recovery of the award monies, the Committee cannot consider the Applicant's situation to be a circumstance requiring a stay to be granted.*"<sup>193</sup>

93. In the present case, and focusing on the financial statements and information referenced by the Parties, the evidence indicates, at worst, that OperaFund experienced year-to-year losses between 2018 and 2019 of roughly EUR 9 million, an increase in indebtedness of EUR 2.1 million over the same period of time, and two consecutive fiscal years with negative cash flows at the close of the 2019 fiscal year. At the same time, OperaFund's financial statements, the same ones relied upon by Spain, show that as of 30 June 2019, OperaFund's net assets were worth EUR 43.3 million, not including the EUR 29.30 million it was awarded in the arbitration that is the subject of the this annulment proceeding. This does not indicate a company "*in financial distress or on the brink of insolvency.*"<sup>194</sup>
94. Finally, Spain contends that "*the clearance process before the European Commission is a circumstance in these proceedings, that this Committee should assess when continuing stay of enforcement since [such] stay would prevent a potential conflict that affects both Parties to this dispute.*"<sup>195</sup> Spain submits that "*the European Commission has already determined that payment of the Award is notifiable State Aid under Articles 107 and 108 of the TFEU,*"<sup>196</sup> and furthermore that Spain has "*notified the Award to the European Commission for its State Aid assessment, thereby completing the steps that would allow its payment promptly upon reception of the EC authorization.*"<sup>197</sup>
95. Spain does not, however, explain how it is that the "*stay would prevent a potential conflict that affects both Parties to this dispute.*"<sup>198</sup> It argues that "*it is the payment [...] that puts [...] Spain in a very difficult position*" and that "*a stay on enforcement would help the*

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<sup>193</sup> **RL-0159**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31 – Annulment, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019 ("*Antin*"), ¶ 73.

<sup>194</sup> **RL-0159**, *Antin*, ¶ 73.

<sup>195</sup> Reply Stay ¶ 133.

<sup>196</sup> Reply Stay ¶ 125.

<sup>197</sup> Mem. Stay ¶ 41.

<sup>198</sup> Reply Stay ¶ 133 (emphasis added).

*Respondent face such a conflict, at least until the European Commission reaches a decision on the compatibility of the award with the European Union Law.”*<sup>199</sup> However, Spain has failed to provide any evidence or information to establish how Spain itself would be prejudiced by its “*conflict of international obligations*,”<sup>200</sup> due to termination of the stay.

96. It appears that Spain is relying on two possible outcomes: one is that, if the stay is continued, the alleged conflict might disappear at least temporarily until the Application on Annulment is decided; another is that if the stay is continued and the Award is annulled, the alleged conflict would disappear permanently. There is, however, another potential outcome: that the stay is continued, the Award is not annulled with the immediate consequence that the stay is lifted, and by that time, the European Commission has not reached a decision or has decided not to authorize payment of the Award. In this scenario – a scenario that Spain has clearly not ruled out – the alleged conflict would resurface. As will be discussed in the section that follows, however, this situation does not come without a price to OperaFund and Schwab.

(ii) *OperaFund’s and Schwab’s Claims of Prejudice and the Relevance of Spain’s Conflict of International Obligations*

97. OperaFund’s and Schwab’s claims of prejudice are essentially threefold: *first*, that Spain’s consistent position that EU law precludes it from making any Award payment until it obtains EU State Aid clearance from the EU Commission confirms a “*probable*” or “*objectively plausible*” risk of non-compliance.<sup>201</sup> *Second*, that granting a permanent stay would relegate OperaFund and Schwab in a long line of award creditors, thus prejudicing its position as a creditor.<sup>202</sup> *Third*, and finally, OperaFund and Schwab contend that the payment of interest would not adequately compensate it for a “*deprivation that goes beyond the mere lapse of time.*”<sup>203</sup> The Committee recognizes that these factors are essentially intertwined, and examines them as such.

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<sup>199</sup> Reply Stay ¶ 90.

<sup>200</sup> Reply Stay ¶ 134.

<sup>201</sup> Rej. Stay ¶¶ 46-49.

<sup>202</sup> Rej. Stay ¶¶ 54-60.

<sup>203</sup> Rej. Stay ¶ 62.

98. With respect to the issues of relegation in the line of award creditors and the adequacy of the payment of interest, the Committee has several observations. On the one hand, the harm that would be caused to OperaFund and Schwab as a result of being relegated further in the line of creditors, and the inadequacy of a payment of interest, would depend on a refusal by Spain to pay the Award in the event the annulment is denied. In other words, if Spain were to pay the Award promptly upon denial of the Application for Annulment, OperaFund and Schwab would not be relegated down the line of other award creditors – it would be in its rightful place based on the ICSID process – and at the same time, a payment of interest would compensate the Respondents on Annulment for the time value of money, as that would be all that would require compensation.
99. On the other hand, however, in the scenario where Spain fails to pay the Award upon denial of the Application for Annulment, the prejudice that OperaFund and Schwab complain of becomes realized: other award creditors will have moved ahead of them in seeking assets to satisfy their awards, and they will have incurred costs that are not compensable by a payment of interest. As such, the Committee considers that these prejudices would constitute circumstances that require lifting the stay that is in place.<sup>204</sup>
100. The Committee’s task at this point is therefore to assess (i) the risk that Spain, in light of Spain’s international obligations, would not pay the Award promptly upon denial of the

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<sup>204</sup> Spain points to two cases for the proposition that “while the risk of non-payment may be relevant to consider, it has not been found to determinative by arbitral precedents” and “even when such a risk has been found, ICSID annulment committees have granted stays of enforcement.” Rej. Stay ¶ 46. However, the Committee in each – both involving Argentina – stressed the unique nature of the cases. In *Continental*, for example, the Committee gave “particular weight” to the fact that both parties were seeking annulment of the underlying award (for different reasons) and that the amount of the award (USD 2.8 million) was “such a small proportion of the amount that would still remain in dispute in the event that Continental’s own Application for Annulment were to succeed [...]” **RL-0149**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/09 – Annulment, Decision on the Application for a Stay of Enforcement of the Award, 23 October 2009 (“*Continental*”), ¶¶ 14-15. In rendering its decision on the stay of enforcement in *Enron*, the Committee noted that the “case has exceptional features, and its conclusion should not be understood as detracting in any way from the importance of the consideration [of the impact on confidence in the ICSID system].” **RL-0147**, *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 – Annulment, Decision on the Request for a Continued Stay of Enforcement of the Award, 7 October 2008 (“*Enron*”), ¶ 46. Chief among these exceptional features was the Committee’s concern that, given the Argentinian financial crisis, there was a “very high risk” that an award subject to annulment proceedings “might be used by strangers to the arbitration proceedings as a procedural vehicle to secure enforcement of their own unrelated claims against the respondent, such that amounts recovered by a claimant on the award, or security provided as a condition of a continuation of a stay, would be irrecoverable by the respondent in the event that the award is annulled.” **RL-0147**, *Enron*, ¶ 42. None of the factors that motivated the decisions in these two cases is present in the case before us now.

Application for Annulment; and (ii) who, as between Spain and Respondents, should bear that risk. The Committee will address these issues in turn.

101. With respect to the issue of the risk that Spain will not pay the Award promptly or at all if the Application for Annulment is denied, Spain has been clear and consistent in its position. As stated by Spain most recently:

*“In any case, and for the avoidance of doubt: the 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.”*<sup>205</sup>

102. The Committee has no doubt that Spain will pay the Award on the terms it states if the Application for Annulment is denied; that is, after seeking and receiving authorization from the European Commission. The Committee accepts that Spain’s position in this regard is guided by its concerns for its international obligations as a Member State of the European Union. However, as Spain recognizes at the same time, this position conflicts with its obligations under ICSID Convention Article 53.<sup>206</sup>
103. ICSID Convention Article 53 is clear: it provides that an ICSID 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 for in this Convention. Each party shall abide by and comply with the terms of the award [...].*” It does not permit a party to refuse to pay an award, nor does it permit a party to impose conditions on payment.
104. For these reasons, of particular relevance to the Committee is the necessary implication of Spain’s position that it will not pay the Award if the European Commission denies it the authority to do so. The fact that the issue is raised – even impliedly – in an ICSID Convention case requires serious consideration. As discussed above, while the prejudice to OperaFund and Schwab would emerge only if and when Spain failed to pay the Award

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<sup>205</sup> Reply Stay ¶ 53. *See also*, Reply Stay ¶¶ 139, 143.

<sup>206</sup> Reply Stay ¶ 51.

promptly, the fact is by that point in time the payment of interest is sufficiently likely to be inadequate to compensate OperaFund and Schwab for the prejudices described above.

105. In conclusion, the prompt payment of ICSID awards is a bedrock of the ICSID system.<sup>207</sup> Spain's sustained position does not provide any assurances that the Award will be paid at all, let alone promptly, in the event the Application for Annulment is denied. OperaFund and Schwab have established that they will be prejudiced based on the risk of non-payment of the Award, should the Application for Annulment be denied. Given these facts, the Committee concludes that Spain must bear the risk of non-payment of the Award in the event that the present Application for Annulment is denied. In the Committee's view, that risk is best reflected by lifting the stay to ensure that the Respondents on Annulment's prejudices will be minimized in the event of non-or delayed payment of the Award.

#### **B. THE REQUEST FOR SECURITY**

106. The Committee now turns to the issue of whether, in lieu of lifting the stay, some kind of security could be sought and obtained from Spain to ensure that the Award would be paid if the Application for Annulment was denied. The Committee is of the view that if Spain would give such an assurance, there would be no need to lift the stay. The Parties have addressed this issue in detail, and their positions are summarized below.
107. OperaFund and Schwab request that, if the Committee decides not to lift the stay, the Committee orders Spain to “*furnish an unconditional undertaking of payment of the Award, including interests and all other sums*”<sup>208</sup> or to “*furnish[] appropriate security.*”<sup>209</sup> OperaFund and Schwab contend that, as demonstrated by *Perenco*, this Committee has the power to do so.<sup>210</sup> They further assert that imposing such a security does not (contrary to Spain's claims) amount to a cost or fine against the Applicant, nor does it place the

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<sup>207</sup> See, e.g., **CL-0254**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶ 72; **RL-0158**, *Standard Chartered Bank*, ¶ 84.

<sup>208</sup> Rej. Stay ¶ 25.

<sup>209</sup> Rej. Stay ¶ 26.

<sup>210</sup> Rej. Stay ¶ 26 citing **RL-0152**, *Perenco*, ¶ 82.

Respondents on Annulment in a better position than they would have been in had Spain complied with the Award.<sup>211</sup>

108. For its part, Spain takes the position that the “*Operafund Parties have failed to meet the burden of proving that the stay should be conditioned on security.*”<sup>212</sup> Spain goes on to state that the “*same factors that support the grant of a stay, support the grant of that stay unconditionally.*”<sup>213</sup> As the Committee has determined, however, its assessment of the relevant factors have led to its decision that the risk of non-payment of the Award in the event that the Application for Annulment is denied must rest with Spain.
109. Furthermore, Spain rejects the possibility of any conditions of security or guarantees.<sup>214</sup> With respect to OperaFund’s and Schwab’s request for an order that Spain furnish a “*binding and unconditional written undertaking,*” Spain responds by recalling that “*it has already offered its commitment to honor the Award in good faith, consistent with its international obligations under the ICSID Convention and EU law, if the Award is not annulled in this proceeding. In the Kingdom of Spain’s view, that commitment should be sufficient: in fact, the Kingdom of Spain has already initiated proceedings to obtain the [European Commission]’s clearance as promptly as possible.*”<sup>215</sup>
110. The Committee concludes that this commitment is insufficient here because it does not, and Spain clearly will not, commit that it will comply with its obligations under the ICSID Convention in terms of payment of the Award.<sup>216</sup> To the contrary, Spain maintains that its action, including recognition of the Award, will be subject to the timing and authorization

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<sup>211</sup> Rej. Stay ¶ 27.

<sup>212</sup> Reply Stay ¶ 135.

<sup>213</sup> Reply Stay ¶ 135.

<sup>214</sup> Reply Stay ¶ 135.

<sup>215</sup> Reply Stay ¶ 139.

<sup>216</sup> See also, **CL-0250**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11 – Annulment, Decision Terminating the Stay of Enforcement of the Award, 28 May 2020, ¶ 12.



of the European Commission. Given that Spain has made it clear that it will pay only upon receipt of such authorization,<sup>217</sup> the Committee has no choice but to lift the stay.

## V. DECISION

111. For the reasons set forth above, the Committee unanimously decides to:

- (1) Reject Spain's request for a continuation of the stay of enforcement of the Award;
- (2) Orders that the stay of enforcement of the Award currently in place be lifted;
- (3) Reserves the right to modify this Decision if requested by either Party upon a modification of the prevailing circumstances; and
- (4) Reserves the decision on costs for a later stage of the proceedings.

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<sup>217</sup> Reply Stay, ¶ 143 (referring to Spain's "*commitment to honor the Award if it is not annulled in this proceeding, and it obtains the appropriate authorization from the European Com[m]ission, in accordance with its international obligations [...]*." (emphasis added).)



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

A handwritten signature in black ink, appearing to read 'Fausto de Quadros', is written in a cursive style.

Fausto de Quadros  
Member of the *ad hoc* Committee

A handwritten signature in blue ink, appearing to read 'Timothy J. Feighery', is written in a cursive style.

Timothy J. Feighery  
President of the *ad hoc* Committee