

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Eurus Energy Holdings Corporation**  
Respondent on Annulment

**v.**

**Kingdom of Spain**  
Applicant

**(ICSID Case No. ARB/16/4)**  
**Annulment Proceeding**

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**DECISION ON THE REQUEST TO CONTINUE THE STAY OF ENFORCEMENT OF  
THE AWARD**

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

Prof. Bernard Hanotiau, President of the *ad hoc* Committee  
Ms. Katherine González Arrocha, Member of the *ad hoc* Committee  
Dr. Penelope J. Ridings, Member of the *ad hoc* Committee

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

Ms. Veronica Lavista

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19 March 2024

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1. This Decision is issued concerning the request of the Kingdom of Spain to maintain the provisional stay of enforcement of the award rendered on 14 November 2022 in the case *Eurus Energy Holdings Corporation v. The Kingdom of Spain*, ICSID Case No. ARB/16/4 (the “**Award**”), pending the resolution of the Kingdom of Spain’s application for annulment.
2. This decision continues to use the term “**Claimant**” or “**Eurus**” to refer to Eurus Energy Holdings Corporation and “**Respondent**”, “**Spain**” or “**Applicant**” to refer to the Kingdom of Spain, as in the Arbitration. The Claimant and the Respondent are collectively referred to as the “**Parties**”.

**I. PROCEDURAL HISTORY**

3. On 12 September 2023, Spain filed an application for the annulment of the Award (the “**Application for Annulment**”) and requested the stay of enforcement of the Award pursuant to Article 52(5) of the ICSID Convention.
4. On 19 September 2023, the ICSID Secretary-General registered the Application for Annulment and informed the Parties of the provisional stay of the Award pursuant to ICSID Arbitration Rule 54(2).
5. On 5 October 2023, the ICSID Secretary-General proposed the appointment to the *ad hoc* Committee (the “**Committee**”) of Prof. Bernard Hanotiau, Ms. Katherine González Arrocha and Dr. Penelope Ridings and invited the Parties to provide their comments, if any, by 12 October 2023.
6. On 13 October 2023, the ICSID Secretary-General informed the Parties that ICSID had not received any observations regarding the appointment of Prof. Bernard Hanotiau, Ms. Katherine González Arrocha and Dr. Penelope Ridings and, therefore, had recommended to the Chairman of the ICSID Administrative Council to proceed with their appointment to the *ad hoc* Committee.
7. On 20 October 2023, the ICSID Secretary-General informed the Parties that the Members of the Committee had accepted their appointments and the Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Prof. Bernard Hanotiau, a national of Belgium, as President of the *ad hoc* Committee; Ms. Katherine González Arrocha, a national of France and Panama; and Dr. Penelope Ridings, a national of New Zealand. Ms. Veronica Lavista, ICSID Legal Counsel, was appointed to serve as Secretary of the Committee.

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8. On 1 November 2023, the Committee fixed the date of the First Session and invited the Parties to confer regarding the timetable for the exchange of submissions on Spain's request for the stay of the enforcement of the Award. Further, the Committee informed the Parties that, pursuant to Arbitration Rule 54(2), it continued the stay of the enforcement of the Award until it has reached a final decision on the continuation of the stay.
9. On 10 November 2023, the Committee confirmed the schedule of submissions on the stay of enforcement of the Award proposed by the Parties on 8 November 2023. The Committee invited the Parties to discuss whether they required a hearing on the stay of enforcement, and to present their positions one week after the first round of submissions, *i.e.*, on 27 December 2023.
10. On 1 December 2023, the Committee held a First Session by correspondence. The Committee considered the following: (i) the Draft Procedural Order circulated by the Secretary of the Committee on 6 November 2023; (ii) the Parties' comments on the Draft Procedural Order received on 27 November 2023, indicating the items on which they agreed. There were no disagreements between the Parties.
11. On 1 December 2023, Spain filed a request to continue the stay of enforcement of the Award, together with Annexes 1 through 30 ("**Spain's Application**").
12. On 11 December 2023, the Committee issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *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, and that the place of proceeding would be Paris, France. Annex B of Procedural Order No. 1 also set out the number and sequence of the pleadings, and the dates on which they are to be filed.
13. On 22 December 2023, Eurus filed observations on Spain's Application, together with Annexes 1 through 55 ("**Eurus Response**").
14. On 27 December 2023, the Parties informed the Committee that they had agreed that no hearing would be necessary on the Application.
15. On 12 January 2024, Spain filed its reply on the Application, together with Legal Authorities RL-0134 through RL-0142 ("**Spain's Reply**").
16. On 2 February 2024, Eurus filed its Rejoinder on the Application, together with Annexes 56 through 60 ("**Eurus Rejoinder**").

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**II. THE PARTIES' REQUESTS FOR RELIEF**

**A. Spain's request**

17. Spain requests that:

“[...] the stay of enforcement of the Award should be continued and maintained in effect, without security or other conditions, until the decision on the Annulment Application is rendered by the ad hoc Committee in these annulment proceedings.”<sup>1</sup>

**B. Eurus' request**

18. Eurus requests the Committee to:

- “(a) ORDER Spain to post security sufficient to satisfy the Award in full and provide an unconditional written undertaking duly signed by Spain's relevant authorities that it recognises the Award as final and binding and that it shall pay the amounts ordered in the Award within 60 days from the notification of the Committee's Decision upholding the Award; and further ORDER that the stay of enforcement be lifted, if Spain does not comply with the Committee's order;
- (b) In the alternative, DISMISS Spain's application to continue unconditionally the provisional stay of enforcement of the Award and ORDER that the stay of enforcement be lifted immediately;
- (c) ORDER Spain to pay the costs incurred by Eurus in answering the petition to lift the provisional stay of enforcement of the Award; and
- (d) AWARD any other relief to Eurus deemed appropriate by the Committee.”<sup>2</sup>

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<sup>1</sup> Spain's Reply, at 116.

<sup>2</sup> Eurus Rejoinder, at 82.

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### III. SPAIN'S POSITION

19. Spain considers that the conditions are met in the present case for the stay of enforcement of the Award to continue, without conditions or security, until the finalization of these annulment proceedings.

#### A. Applicable legal standard for the continuation of the stay

20. Spain considers that, in deciding on its Application, the Committee must not limit its inquiry to the ICSID Convention and Arbitration Rules, but must take into account all sources of law that are applicable. This includes the Treaty on the Functioning of the European Union (the “TFEU”), as well as customary international law and general principles of law.<sup>3</sup>
21. Spain submits that neither the ICSID Convention, nor the Arbitration Rules provide any specific guidance on what factors an *ad hoc* committee must consider when deciding whether to continue a stay of enforcement. However, the practice of various *ad hoc* committees shows that the following circumstances were deemed relevant: (i) whether the annulment application is dilatory or frivolous; (ii) the adverse consequences that may be caused to either party by continuing or discontinuing the stay of enforcement; (iii) the risk of non-recoupment of the award, if it is paid and later annulled; and (iv) the risk that the award may not be honored if the annulment application is unsuccessful.<sup>4</sup>
22. Spain adds that the prevailing practice of ICSID annulment committees is to grant stays of enforcement “due to the principle of respect to the sovereigns that is an actual and direct source of International Law”.<sup>5</sup> In its view, Eurus is attempting to ignore this prevailing practice by referring to a minority of decisions finding that stays can only be granted in compelling circumstances. Contrary to Eurus’ contentions, neither Article 52(5) of the Convention nor Arbitration Rule 54(2) employ the words “exceptional” or “compelling”, nor can such words be added to them. Arbitration Rule 54(2) simply refers to “circumstances”. This was confirmed by numerous annulment committees, including *Tenaris II*, *Perenco v. Ecuador* and *Occidental v. Ecuador*. Even the authorities relied upon by Eurus do not support its contention that “exceptional” or “compelling” circumstances are necessary, but stand for the proposition that there is no automatic right to an extension of the stay of enforcement. Spain argues that, in deciding whether to extend the stay of

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<sup>3</sup> Spain’s Reply, at 12, 13, 33, 34.

<sup>4</sup> Spain’s Application, at 7, 8; Spain’s Reply, at 16, 17, 40.

<sup>5</sup> Spain’s Reply, at 20.

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enforcement, the Committee has discretion and should be informed by the facts of the case.<sup>6</sup>

23. Spain considers that, in addition to the ICSID Convention and Arbitration Rules, the Committee should also apply the provisions of the TFEU, which forbids payment of the Award prior to the European Commission's authorization. In Spain's view, the TFEU is applicable because "[t]he ICSID Convention cannot work in the international landscape as a silo".<sup>7</sup> Instead, pursuant to Article 38 of the Statute of the International Court of Justice, "attention must be given"<sup>8</sup> to other international conventions that may be applicable, as well as to customary international law and general principles of law.<sup>9</sup>
24. Spain is of the view that it has put forward sufficient circumstances that justify maintaining the stay on enforcement. Eurus should therefore "give proof that it will suffer a prejudice as a result of the stay"<sup>10</sup> and that Spain will not incur the risks that it is invoking. In any event, according to Spain, no strict burden of proof analysis is called for in this context, as most annulment committees have held that what matters is the evaluation of the various relevant circumstances of the case.<sup>11</sup>

**B. The stay of enforcement of the Award should continue throughout these annulment proceedings**

*i. The Annulment Application has been made in good faith and is not frivolous*

25. According to Spain, requests for maintaining a stay of enforcement have routinely been granted, an exception being situations where it was obvious that the application for annulment was dilatory in nature and without any basis in the law. Several *ad hoc* committees, such as *Victor Pey Casado II*, *Tenaris II* and *Perenco v. Ecuador* have held

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<sup>6</sup> Spain's Application, at 9-16, referring *inter alia* to *Tenaris S.A. & Talta – Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23), Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, 23 February 2018, at 90, 104 (Annex-12 to Spain's Application) ("*Tenaris II*"); *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, at 48 (Annex-13 to Spain's Application) ("*Perenco v. Ecuador*"); Spain's Reply, at 21-30, referring *inter alia* to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on the Stay of Enforcement of the Award, 30 September 2013, at 50 (Exhibit RL-0119) ("*Occidental v. Ecuador*"); *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4), Decision on the Stay of Enforcement of the Award, 18 August 2022, at 65 (Exhibit RL-0141) ("*STEAG v. Spain*").

<sup>7</sup> Spain's Reply, at 33.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, at 33, 34.

<sup>10</sup> Spain's Application, at 17.

<sup>11</sup> Spain's Reply, at 37-39, referring *inter alia* to *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), Decision on Appellant's Request for a Continued Stay on Enforcement of the Award dated 12 April 2017 (Exhibit RL-0118) ("*Standard Chartered Bank v. Tanzania*").

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that, if an applicant for annulment pursues in good faith its right to have an award examined for fundamental institutional and procedural propriety, extensions of stays of enforcement should be granted.<sup>12</sup>

26. In the case before the Committee, Spain's Application for Annulment is based on serious grounds and has been made in good faith. In particular, Spain alleges that, in the Award, the Tribunal failed to apply the proper law by completely disregarding European Union law, as required by Article 26 of the Energy Charter Treaty (the "ECT"). In addition, Spain considers that the Award failed to state the reasons upon which it is based because it failed to provide sufficient reasoning in relation to some of the core elements of the procedure, *inter alia* the non-application of EU law on State aid. Spain maintains that it is not asking the Committee to make any determination on the merits of its Application for Annulment at this juncture, but only to determine that the Application for Annulment has been made in good faith and is not frivolous.<sup>13</sup>
27. Spain takes exception to Eurus' contention that the Application for Annulment is not based on serious grounds, and a mere recycling of arguments raised before the Tribunal or in the context of other proceedings. Spain also disputes that it intends to relitigate in annulment any jurisdictional objection raised in the underlying arbitration. According to Spain, Eurus' arguments are based on a presumption of bad faith, which cannot be accepted. The fact that Spain made a material error in its Application when referring to the quantification of interest in the Award is not enough to displace the presumption of good faith.<sup>14</sup>
  - ii. *Spain would suffer serious prejudice and harm if the stay of enforcement would not be maintained during the annulment proceedings*
28. Spain submits that a key factor the Committee must take into account is the harm that the (dis)continuation of the stay would cause either Party. In its view, if the stay were lifted and the Award ultimately annulled, it would face the risk of non-recoupment of any amounts unduly paid. Moreover, the recoupment process would require significant resources and effort, and a string of separate proceedings, all of them funded with taxpayer money.<sup>15</sup>

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<sup>12</sup> Spain's Application, at 25-28, referring to *Victor Pey Casado and Foundation President Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, at 72 (Annex-21 to the Application) ("*Victor Pey Casado IP*"); *Tenaris II*, at 104; *Perenco v. Ecuador*, at 69.

<sup>13</sup> *Id.*, at 29-33.

<sup>14</sup> Spain's Reply, at 42-47.

<sup>15</sup> Spain's Application, at 34-39.

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29. Spain notes that the *ad hoc* committees in *SolEs v. Spain*,<sup>16</sup> *RREEF v. Spain*<sup>17</sup> and *Watkins v. Spain*<sup>18</sup> decided to continue the stays of enforcement of the underlying awards throughout the annulment proceedings, considering that there was a risk of non-recoupment of any amounts paid. Moreover, the *Watkins* committee found that “[t]here [was] no suggestion in the text or any justification in principle to impose the right to enforce an award as ranking superior to that of an aggrieved party’s right to seek its annulment”.<sup>19</sup> As held by the *9REN v. Spain* committee, proof of insolvency is not a requirement; what is sufficient is for the State to give reasonable assurances that it will comply with the award, if it is not ultimately annulled.<sup>20</sup>
30. According to Spain, the fact that Eurus has an active business is not sufficient to disprove the existence of the risk of non-recoupment. For instance, Eurus undervalues the possibility that significant dividends, including the amount of the Award, could be distributed to Eurus’ shareholders or that Eurus could sell its interest in the Award to third parties, thus hampering Spain’s efforts to recoup any amounts paid. Further, there is no reference to the right to collect under the Award in Eurus’ annual accounts,<sup>21</sup> and Eurus has failed to offer a satisfactory explanation for this. Likewise, according to Spain, there is no guarantee that, once Spain attempts to recoup, Eurus will still exist.<sup>22</sup>
31. For these reasons, Spain considers that the risk of non-recoupment is higher than any non-payment risk faced by Eurus.<sup>23</sup>

iii. *Continuing the stay would not harm Eurus*

32. Spain considers that, in contrast with the risks that it would face if the stay were not continued, any harm that would befall Eurus would be limited to a delay in payment, which could be easily compensated by an award of interest.<sup>24</sup>

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<sup>16</sup> *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38), Decision on the Continuation of the Stay of Enforcement of the Award, 26 August 2020 (Annex-25 to Spain’s Application) (“*SolEs v. Spain*”).

<sup>17</sup> *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), Decision on the Stay of Enforcement of the Award, 28 October 2020 (Annex-23 to Spain’s Application) (“*RREEF v. Spain*”).

<sup>18</sup> *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (ICSID Case No. ARB/15/44), Decision on the Stay of Enforcement of the Award, 28 June 2021 (Annex-24 to Spain’s Application) (“*Watkins v. Spain*”).

<sup>19</sup> *Id.*, at 17.

<sup>20</sup> Spain’s Application, at 41-50, referring *inter alia* to *9REN Holding S.a.r.l v. Kingdom of Spain* (ICSID Case No. ARB/15/15), Decision on the Stay of Enforcement, 19 November 2021, at 124 (Annex-26) (“*9REN v. Spain*”).

<sup>21</sup> Spain also refers, in its Reply, to “JGC’s annual accounts” (Spain’s Reply, at 54).

<sup>22</sup> Spain’s Application, at 51-53; Spain’s Reply, at 51-56.

<sup>23</sup> Spain’s Reply, at 56.

<sup>24</sup> Spain’s Application, at 55, 56.

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33. Annulment committees such as *Azurix v. Argentina*,<sup>25</sup> *Caratube II*<sup>26</sup> and *Watkins v. Spain*<sup>27</sup> have consistently held that a simple delay in the payment of an award is insufficient to justify lifting the stay of enforcement, as any delay can be compensated by an award of interest. In its Application, Spain submitted that, under the Award, it was ordered to pay interest at the rate of 1.6%, compounded annually, until full payment – which is in line with Spain’s 10-year Government Bonds, which have a 3.620% yield.<sup>28</sup> When Eurus pointed out that this reference was incorrect and was taken from a different award, Spain simply responded that the company<sup>29</sup> acknowledged that it was entitled to interest and that this “would compensate any hypothetical delay in the payment of the Award”.<sup>30</sup>

*iv. Spain will abide by its international obligations*

34. Spain acknowledges that the Committee may consider the risk of non-compliance with the Award when ruling on the Application, but counters that the risk of non-compliance is not, in and of itself, determinative.<sup>31</sup>

35. Spain submits that, as the fourth largest economy in the European Union and the fifteenth in the world in terms of GDP, “there is no danger that [it] would not have the financial resources to pay the Award”.<sup>32</sup> Moreover, Spain declares that it “takes its international commitments seriously, and it intends to honor them”, and this “includes both its obligation under Article 53 of the ICSID Convention to abide by and comply with the terms of the Award in this case, and Spain’s obligation as a Member State of the European Union”.<sup>33</sup> Spain considers that the “best proof”<sup>34</sup> of its commitment to its international obligations is the fact that it has notified the Award to the European Commission for its State aid assessment.<sup>35</sup>

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<sup>25</sup> *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award dated 28 December 2007, at 40 (Annex-18 to Spain’s Application) (“*Azurix v. Argentina*”).

<sup>26</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on Stay of Enforcement of the Award, 12 December 2019, at 97 (Annex-27 to Spain’s Application) (“*Caratube II*”).

<sup>27</sup> *Watkins v. Spain*, at 49.

<sup>28</sup> Spain’s Application, at 56-61.

<sup>29</sup> Paragraph 61 of Spain’s Reply refers to “JGC”. The Committee understands that this is material error.

<sup>30</sup> Spain’s Reply, at 61.

<sup>31</sup> Spain’s Application, p. 14, referring *inter alia* to *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award, 20 May 2009, at 29, 46 (Annex-29 to Spain’s Application) (“*Enron v. Argentina*”).

<sup>32</sup> *Id.*, at 62.

<sup>33</sup> *Id.*, at 63 (internal citations omitted).

<sup>34</sup> *Id.*, at 65.

<sup>35</sup> *Id.*, at 65.

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36. Spain disputes Eurus' accusation that it has no intention to comply with the Award as "not true, speculative and unfounded".<sup>36</sup> Contrary to Eurus' allegations, the notification of the Award to the European Commission was a necessary step that would allow Spain to promptly make payment upon the Commission's authorization. Indeed, under its EU law obligations, Spain is required to submit the Award to the European Commission for a determination as to whether it constitutes incompatible State aid. By way of a decision of 10 November 2017, the European Commission determined that payment of the Award is notifiable State aid, and requested that it be notified if and when payment of the Award would be required. In light of Articles 107 and 108 of the TFEU, until this authorization is obtained, Spain is forbidden from making any payment.<sup>37</sup>
37. According to Spain, efficiency, judicial economy and considerations of costs argue in favor of continuing the stay of enforcement. If the stay were granted and the Award were ultimately annulled, either in full or in part, there would be no need for the Commission to make any State aid determination. However, if the stay were lifted and Eurus were able to enforce the Award, following which the Commission were to determine that the Award in its current form represents incompatible State aid, this would require Spain to commence recovery proceedings against Eurus. At the same time, Eurus could challenge the Commission's decision, resulting in further legal proceedings, and unnecessary burdens and expenses.<sup>38</sup>

**C. The stay of enforcement should continue and should not be subject to any conditions**

38. Spain contends that the same conditions that support maintaining the stay of enforcement also support an unconditional stay. In its view, Eurus has failed to show that the stay of enforcement should be conditioned on posting some form of security.<sup>39</sup>
39. Referring to *Azurix v. Argentina*<sup>40</sup> and *SolEs v. Spain*,<sup>41</sup> Spain contends that the imposition of security does not represent the norm in the practice of annulment committees and it is for the party requesting security to show that such is required. The *Tenaris II* committee further considered that an award of security would place the party benefiting from security in a much better position than it would have been in without a guarantee, which would amount to a redistribution of risks under the ICSID Convention. Relying on these authorities, Spain contends that the security requested by Eurus would amount to imposing

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<sup>36</sup> Spain's Reply, at 62.

<sup>37</sup> *Id.*, at 63, 74-85, referring *inter alia* to Decision C(2017) 7384 of the European Commission rendered on 11 November 2017 (RL-0073).

<sup>38</sup> *Id.*, at 65-73.

<sup>39</sup> *Id.*, at 106.

<sup>40</sup> *Azurix v. Argentina*, at 25.

<sup>41</sup> *SolEs Badajoz v. Spain*, at 86.

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a cost or a fine upon it, both not foreseen by the ICSID Convention, and both effectively penalizing it for requesting annulment. As regards Eurus' request for an unconditional undertaking to pay the Award promptly and in full, Spain notes 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",<sup>42</sup> subject to the Award being confirmed in these proceedings.<sup>43</sup>

#### IV. EURUS' POSITION

40. Eurus contends that, under the ICSID Convention, awards are presumed to be binding and immediately enforceable. The continuation of a stay of enforcement during annulment proceedings is not automatic, and Spain must show "compelling reasons"<sup>44</sup> in order for the Committee to do so. Moreover, a provisional stay of enforcement should not be extended where, as here, there is a risk that the respondent State will not comply with the award if it is ultimately confirmed.<sup>45</sup>

##### A. Applicable legal standard

41. Eurus submits that the Committee's decision on Spain's Application should be informed by the following key legal principles:
- (i) ICSID awards are immediately enforceable and enforcement can be stayed only in exceptional circumstances;
  - (ii) Spain, as the Party requesting the stay of enforcement, bears the burden of establishing the existence of exceptional circumstances; and
  - (iii) The Committee enjoys broad discretion in determining whether to lift the stay or to subject it to conditions.<sup>46</sup>

##### *i. ICSID awards are immediately enforceable*

42. Eurus argues that, under the ICSID Convention's Article 53(1), awards are immediately enforceable and remain enforceable throughout the annulment process, absent exceptional circumstances. There is nothing in the ICSID Convention that guarantees a stay of enforcement during annulment proceedings. Instead, the Convention provides that a provisional stay ends automatically 30 days after the *ad hoc* committee has been constituted, unless the committee issues a decision to the contrary. This means that Spain

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<sup>42</sup> Spain's Reply, at 112.

<sup>43</sup> *Id.*, at 107-112.

<sup>44</sup> Eurus Response, at 2.

<sup>45</sup> *Id.*, at 2-5; Eurus Rejoinder, at 4.

<sup>46</sup> Eurus Response, at 11.

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had an obligation to comply with the Award from the moment it was issued without there being any need for Eurus to take any actions. The binding nature of ICSID awards is not conditioned upon the commencement of enforcement proceedings.<sup>47</sup>

43. Eurus considers that the exceptional nature of stays of enforcement are a natural consequence of the unconditional obligation to comply with ICSID awards. Moreover, at all times, annulment committees retain discretion not to grant the stay. This is supported by the language of Article 52(5) of the ICSID Convention (“The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision”) and the decisions of various annulment committees, such as *SGS v. Paraguay*,<sup>48</sup> *Cube v. Spain*,<sup>49</sup> *Antin v. Spain*<sup>50</sup> and *Churchill Mining v. Indonesia*.<sup>51</sup> That there is no presumption in favor of maintaining the stay of enforcement is also demonstrated by the fact that a proposal to make a stay mandatory pending a decision on annulment was rejected during the drafting process of the ICSID Convention.<sup>52</sup>
44. While Article 52(5) of the ICSID Convention does not expressly use the word “exceptional”, annulment committees have employed wording that certainly supports the view that what is required are circumstances that are not ordinary. For instance, the *Antin v. Spain* committee held that “[c]ircumstances that are usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay”<sup>53</sup> and that “stays may only be granted in cases where there are special or particular circumstances that bring the case outside the run of usual annulment applications and which compels the granting of a stay”.<sup>54</sup> There is no presumption that a stay should be granted

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<sup>47</sup> *Id.*, at 13-15, referring *inter alia* to *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 March 2009, at 37 (Annex-13 Eurus Response) (“*Sempra v. Argentina*”); Eurus Rejoinder, at 12.

<sup>48</sup> *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Paraguay’s Request for the Continued Stay of Enforcement of the Award, 22 March 2013, at 85 (Annex-15 Eurus Response) (“*SGS v. Paraguay*”): “[D]espite an application for annulment, awards must be enforced and only in very specific cases where the circumstances so require, may enforcement be stayed by the corresponding committee.”

<sup>49</sup> *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 17 April 2020, at 121 (Annex-26 Eurus Response) (“*Cube v. Spain*”).

<sup>50</sup> *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), Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, at 67 (Annex-24 Eurus Response) (“*Antin v. Spain*”).

<sup>51</sup> *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Decision on the Request for Continued Stay of Enforcement of Award, 27 June 2017, at 34 (Annex-21 Eurus Response) (“*Churchill Mining v. Indonesia*”).

<sup>52</sup> Eurus Response, at 16-21, referring *inter alia* to History of the ICSID Convention, Volume II, Part 2, Documents 44-146 (1968), p. 849 (Annex-36 Eurus Response).

<sup>53</sup> *Antin v. Spain*, at 67.

<sup>54</sup> *Id.*

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once an application for annulment is filed. The *Kardassopoulos v. Georgia* committee has held that a “[s]tay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant”<sup>55</sup>; while the *Border Timbers v. Zimbabwe* committee decided that “circumstances must be sufficiently compelling so as to ‘require’ a stay”.<sup>56</sup> Such circumstances could show that “lifting of the stay would cause [the applicant] an unusual degree of prejudice”<sup>57</sup> or that applicant would suffer “irreparable harm” or “catastrophic consequences”<sup>58</sup> if the stay was not continued.<sup>59</sup>

45. Eurus disputes Spain’s submission that stays of enforcement represent the prevailing practice of ICSID annulment committees. Stays of enforcement have been unusual in ICSID annulment cases, while unconditional stays are even more uncommon. In any event, if this Committee were to look strictly at proceedings involving Spain, the prevailing practice of previous committees has been to reject requests to continue the stay of enforcement, since 11 out of 17 such applications have been rejected. What Eurus can agree to is that all applications have to be assessed on a case by case basis, and taking into account the specific circumstances of each case.<sup>60</sup>

ii. *Neither EU law nor international custom assist Spain*

46. Eurus argues that, contrary to Spain’s submissions, the TFEU specifically, and EU law in general, are entirely irrelevant to questions of procedure in these annulment proceedings. Article 53 of the ICSID Convention provides that award debtors such as Spain “shall abide by and comply with the terms of the award” without subjecting it to “any appeal or to any other remedy” except those provided in the Convention itself. No other source of law relied upon by Spain can excuse it from this obligation. Various annulment committees have heard and dismissed Spain’s arguments pertaining to the alleged conflict between EU law and the ICSID Convention. Moreover, Spain’s reference to an unidentified international custom of respect for sovereigns, in addition to being unproven, does not assist its case. In

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<sup>55</sup> *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Decision of the ad hoc Committee on the Stay of Enforcement of the Award, 12 November 2010, at 26 (Annex-14 Eurus Response) (“*Kardassopoulos v. Georgia*”).

<sup>56</sup> Eurus Rejoinder, at 18, quoting *inter alia* from *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Decision on Stay of Enforcement of the Award, 24 April 2017, at 78 (Exhibit RL-0136) (“*Border Timbers v. Zimbabwe*”).

<sup>57</sup> *Antin v. Spain*, at 67, 81.

<sup>58</sup> *OI European Group BV v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Stay of Enforcement of the Award, 4 April 2016, at 122 (Annex-18 Eurus Response) (“*OI Group v. Venezuela*”).

<sup>59</sup> Eurus Rejoinder, at 18, 19.

<sup>60</sup> Eurus Response, at 23-25, referring *inter alia* to *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Stay of Enforcement of the Award, 23 March 2018, at 50 (Annex-23 Eurus Response) (“*Eiser v. Spain*”); Eurus Rejoinder, at 21-23.

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these annulment proceedings, Eurus and Spain are on equal footing and Spain cannot demand special treatment.<sup>61</sup>

iii. *Spain has the burden to prove that a stay of enforcement is required*

47. Eurus submits that it is Spain, as the applicant requesting the stay of enforcement of the Award, who has the burden to show the existence of circumstances that warrant this exceptional remedy. This has been the consistent practice of ICSID annulment committees, such as *Kardassopoulos v. Georgia*,<sup>62</sup> *OI Group v. Venezuela*<sup>63</sup> and *Flughafen Zurich v. Venezuela*.<sup>64</sup> Spain's argument that this burden would fall on Eurus runs counter to the language of the ICSID Convention, which grants Eurus an unconditional right to an immediately valid and enforceable award. Spain's reliance in this respect on *Standard Chartered Bank v. Tanzania* is misplaced, as that committee stated that "in the opinion of the Committee from an interpretation of the ICSID Convention and Arbitration Rules, it is for the award debtor to advance grounds (supported as necessary by evidence) for the stay".<sup>65</sup>

iv. *The Committee has the power to lift or place conditions upon the stay of enforcement*

48. ICSID annulment committees enjoy broad discretion when deciding whether to lift stays of enforcement or to subject the maintenance of stays to various conditions. As established by the *Burlington Resources v. Ecuador* committee,<sup>66</sup> even if circumstances justifying the continuation of the stay exist, annulment committees retain the discretion to decide either in favor or against such a measure. Further, in cases where – such as here – there is a substantial risk that the applicant will not abide by the award if it is upheld, committees have regularly required the award debtor to post security.<sup>67</sup>

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<sup>61</sup> Eurus Rejoinder, at 25-28, referring *inter alia* to *STEAG v. Spain*, at 119; *SolEs v. Spain*, at 72; *Cube v. Spain*, at 138; *Eiser v. Spain*, at 69.

<sup>62</sup> *Kardassopoulos v. Georgia*, at 26.

<sup>63</sup> *OI Group v. Venezuela*, at 94.

<sup>64</sup> *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Decision on Stay of Enforcement of the Award, 11 March 2016, at 58 (Annex-17 Eurus Response) ("*Flughafen Zurich v. Venezuela*").

<sup>65</sup> Eurus Response, at 26-34; Eurus Rejoinder, at 29-33, quoting from *Standard Chartered Bank v. Tanzania*, at 54.

<sup>66</sup> *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Stay of Enforcement of the Award, 31 August 2017, at 70 (Annex-22 Eurus Response) ("*Burlington v. Ecuador*").

<sup>67</sup> Eurus Response, at 35-39, referring *inter alia* to *Repsol YPF Ecuador SA v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Procedural Order No. 1, Stay of Enforcement of the Award (Annulment Proceedings), 22 December 2005, at 8, 9 (Annex-10 Eurus Response) ("*Repsol v. Petroecuador*"); *Sempra v. Argentina*, at 30.

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**B. Spain has not demonstrated that it is entitled to the continuation of the stay of enforcement**

49. Eurus considers that Spain has failed to show the existence of exceptional circumstances that would warrant the continuation of the stay. Moreover, in its view:

- (i) There is a real risk that Spain will not comply with the Award;
- (ii) Eurus would suffer a serious prejudice if the stay were extended;
- (iii) Spain would suffer no prejudice if the stay were lifted;
- (iv) In making its determination, the Committee should not look to the merits of Spain's Application for Annulment.<sup>68</sup>

*i. There is a real risk that Spain will not comply with the Award*

50. Eurus contends that the most important circumstance that the Committee must bear in mind when deciding Spain's Application is Spain's past conduct and history of non-compliance with, and resistance against, its international obligations. This is consistent with the practice of ICSID annulment committees. For instance, the *Sempra v. Argentina* committee noted that it was "essential to its decision whether to terminate or continue the stay that it should first assess the prospects of Argentina complying with the Award, should it not be annulled".<sup>69</sup>

51. According to Eurus, the risk that Spain will refuse to comply with the Award is both "manifest and significant".<sup>70</sup> Eurus submits that, to date, except for one award issued in 2000 for the amount of approximately EUR 180,000, all other ICSID awards issued against Spain remain unpaid. This makes Spain one of the biggest arbitration debtors in the world, with a debt of around EUR 1.2 billion, excluding interest. Spain has vigorously resisted enforcement of all these awards and has used annulment proceedings and stays of enforcement as a means to delay payment, by challenging every single award against it. The fact that Spain has notified the Award to the European Commission does not signal its intent to comply with the Award, but the fact that it is using the mechanism as a tool to avoid complying with its international obligations. Spain's position that payment of the Award could follow only upon the Commission's authorization clearly demonstrates that Spain will not pay the Award promptly or potentially at all.<sup>71</sup>

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<sup>68</sup> *Id.*, at 41-95; Eurus Rejoinder, at 35-71.

<sup>69</sup> Eurus Response, at 42, quoting from *Sempra v. Argentina*, at 30; Eurus Rejoinder, at 35.

<sup>70</sup> Eurus Response, at 43.

<sup>71</sup> *Id.*, at 43-45, referring *inter alia* to N Lavranos, International Law Compliance Report Issue 2, October 2023, p 3 (Annex-54 Eurus Response); Eurus Response, Appendix, column D.

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52. Eurus considers that Spain has ignored this information and has instead relied upon empty statements that it is a democratic State, with respect for the rule of law that will abide by its international obligations. According to Eurus, the fact that Spain considers that there is no risk that it will not have the financial resources to pay the Award is irrelevant, since Spain has not promised that it will pay the Award if it is not annulled. Moreover, Spain's reliance on other obligations, such as those under EU law, as justification for refusing to pay any awards against it only underscore the risk of non-payment. These statements effectively mean that Spain considers the European Commission, and not this Committee, as having the power to either confirm or annul the Award.<sup>72</sup>
- ii. *Extending the unconditional stay would seriously prejudice Eurus*
53. Eurus submits that extending the unconditional stay of enforcement during these annulment proceedings would significantly decrease its chances of being compensated pursuant to the Award, even if the Application for Annulment were to be dismissed. Eurus notes that, since Spain has not complied with any ICSID award against it, the State has a long list of ICSID award creditors, some of whom are already advanced with enforcement proceedings. However, due to the fact that the European Commission has signaled that such awards may not be enforced in an EU Member State, the pool of assets available for enforcement has diminished considerably. ICSID award creditors have been forced to pursue enforcement proceedings against assets situated outside the EU. Under these circumstances, the inability to pursue enforcement proceedings during the annulment phase would considerably diminish Eurus' chances of receiving any compensation through Spain's attachable assets.<sup>73</sup>
54. The fact that Spain has assets that could satisfy an award, in general, is thus irrelevant to the inquiry, since Spain is refusing to comply with its obligations. The fact that Eurus has to compete with other creditors for the same assets is not just a risk inherent in the ICSID system, but a risk that Spain itself has created. Both the *Hydro Energy v. Spain*<sup>74</sup> and the *OperaFund v. Spain*<sup>75</sup> committees factored in this risk as part of their assessment.<sup>76</sup>
55. Eurus submits that, under these circumstances, post-award interest does not protect it against the risks engendered by Spain's non-compliance.

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<sup>72</sup> Eurus Rejoinder, at 37, 39, 40.

<sup>73</sup> Eurus Response, at 47-50.

<sup>74</sup> *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain* (ICSID Case No. ARB/15/42), Decision on Stay of Enforcement of the Award, 26 March 2021, at 99 (Annex-31 Eurus Response) ("*Hydro Energy v. Spain*").

<sup>75</sup> *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Decision on the Request for the Continuation of the Stay of Enforcement of the Award, 16 November 2020, at 99 (Annex-30 Eurus Response) ("*OperaFund v. Spain*").

<sup>76</sup> Eurus Response, at 51-55.

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56. Eurus adds that the actual monetary value of the interest awarded by the Tribunal is nowhere near the levels represented to the Committee by Spain. In particular, Spain's description of the interest granted in the Award comes from another case entirely – *JGC Holdings v. Spain*.<sup>77</sup> Spain's statement that the interest awarded to Eurus is in line with Spain's 10-year Government Bonds is also wrong. According to Eurus, the interest awarded is based on the 2-year government bonds, the Award's *dispositif* referring to "interest calculated by reference to a 2-year Spanish sovereign bond compounded annually, payable from 1 June 2021, until payment of this Award".<sup>78</sup> In light of the interest awarded to it, which is lower than the cost of capital of the wind farms subject to the Award, Eurus is losing money with every month the Award remains unpaid.<sup>79</sup>
57. Eurus further submits that, in any event, post-award interest only protects against the passage of time, but is not intended to, and indeed cannot offer Eurus any protection against Spain's refusal to comply with the Award, and the ensuing costs of enforcement proceedings. This was expressly acknowledged by the *Antin v. Spain*,<sup>80</sup> *Hydro Energy v. Spain*<sup>81</sup> and *Cube v. Spain*<sup>82</sup> annulment committees. It is only the lifting of the stay of enforcement or a continuation of the stay, subject to conditions, that can properly safeguard Eurus' rights.<sup>83</sup>
58. Eurus maintains that Spain has failed to address the above arguments or the case law referred to above, and has continued to incorrectly refer to Eurus by the name of a party to a different proceeding, *i.e.*, JGC.<sup>84</sup>
- iii. *There would be no prejudice to Spain if the stay were lifted*
59. Eurus contends that Spain has put forward no evidence for its contention that there is a potential risk of non-recoupment of the Award if the stay were lifted and Eurus were

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<sup>77</sup> *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain* (ICSID Case No. ARB/15/27), Award, 9 November 2021, at 73 (Annex-32 Eurus Response) ("*JGC Holdings v. Spain*").

<sup>78</sup> Award, at 158. Eurus notes that, during the rectification proceedings it initiated, it informed the Tribunal that, at times, the rate of the 2-year Spanish sovereign bond was negative. If applied to the Award, this would have resulted in a reduction of the compensation awarded to Eurus by approximately EUR 330,000. For this reason, the Tribunal ordered that "any negative rate on the two-year Spanish bond that is relevant to calculating the interest due on payment of the Award amount should be treated as a rate of zero when calculating the applicable interest" (*Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4), Decision on Rectification, 15 May 2023, at 71, Annex-6 Eurus Response).

<sup>79</sup> Eurus Response, at 57-63.

<sup>80</sup> *Antin v. Spain*, at 82.

<sup>81</sup> *Hydro Energy v. Spain*, at 96.

<sup>82</sup> *Cube v. Spain*, at 133.

<sup>83</sup> Eurus Response, at 64-67.

<sup>84</sup> Eurus Rejoinder, at 42-46.

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allowed to pursue enforcement of the Award. Simple allegations, without any evidentiary support, cannot be accepted.<sup>85</sup>

60. In Eurus' view, any costs associated with the recovery of assets if an award is annulled cannot justify continuing the stay of enforcement. Since the ICSID Convention provides that awards are immediately enforceable, despite the possibility that ultimately they may be annulled, the possible cost of recovering any amounts paid or collected under awards that are subsequently annulled is a natural consequence of the ICSID Convention regime. In any event, this issue would be eliminated by a conditional stay, such as the one proposed by Eurus. Spain's argument that its right to seek annulment under the ICSID Convention is not subordinate to "JGC's right to obtain enforcement"<sup>86</sup> is inapposite. While Spain does have a right to seek annulment, it does not have a right to a stay of enforcement during the annulment proceedings.<sup>87</sup>
61. Eurus takes exception to Spain's argument that, if the Award was ultimately annulled, Eurus would not return any proceeds collected on enforcement, or would be unable to do so. Spain offers no evidence that Eurus is facing bankruptcy or the prospect of being wound up. The cases relied upon by Spain concerned investors that were not in good financial standing, either because they were not generating income (*SolEs v. Spain*), they were saddled with debts (*RREEF v. Spain*), they were shell companies with no economic activity (*Watkins v. Spain*) or lacked sufficient assets to pay back the award (*9REN v. Spain*). In contrast, Eurus has an extremely active business, continuing to hold stakes in no fewer than 13 special purpose companies covering 21 different wind farms in Spain alone. Its net income for the period 1 April 2022-31 March 2023 was more than JPY 25.8 billion (approximately EUR 163.7 million), and its total equity for the same period was just under JPY 66 billion (approximately EUR 419 million). Moreover, as of August 2022, Eurus has been wholly owned by Toyota Tsusho Corporation ("Toyota Tsuho"), a trading company part of the Toyota Group. Toyota Tsusho reported revenues of more than JPY 5.13 trillion (approximately EUR 32.5 billion) and operating profits of JPY 233.14 billion (approximately EUR 1.48 billion) for the six months ending 30 September 2023.<sup>88</sup>
62. Eurus considers that Spain's concerns about the potential sale of Eurus' rights under the Award or the distribution of any proceeds to investors are ill-placed. Referring to *SolEs v.*

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<sup>85</sup> Eurus Response, at 68; Eurus Rejoinder, at 47.

<sup>86</sup> Spain's Reply, at 60.

<sup>87</sup> Eurus Response, at 69; Eurus Rejoinder, at 56, 57.

<sup>88</sup> Eurus Response, at 70-74, referring *inter alia* to Spain's Application, at 51; Eurus's Compiled Public Notices of Settlement of Accounts 2021-2023 (Annex-38 Eurus Response); Toyota Tsusho Corporation, "Toyota Tsusho Completes Stock Acquisition and 100% Ownership Acquisition of Eurus Energy Holdings", 1 August 2022 (Annex-43 Eurus Response); Toyota Tsusho Corporation's Financial Highlights for the Six Months Ended September 30, 2023 [IFRS basis] (Consolidated), 31 October 2023 (Annex-55 Eurus Response); Eurus Rejoinder, at 53.

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*Spain*,<sup>89</sup> Eurus argues that award creditors are entitled to use the funds obtained from an award in any manner they deem fit. What matters is whether the circumstances are such as to prevent the State from recouping the proceeds in the eventuality that the award is annulled. This is not the case here. Eurus is Japan's largest wind power generation operator, and is perfectly capable of satisfying its international obligations. Spain has failed to carry its burden of proof and offered no evidence to the contrary. Its allegation that Eurus may not be the legal owner of the Award because no reference to collection rights under the Award exists in "JGC's annual accounts"<sup>90</sup> and "[n]o answer has been provided by JGC"<sup>91</sup> is directed at a different investor. Eurus submits that its annual accounts are not publicly available, while those of its parent company, Toyota Tsusho, which are publicly available, would not ordinarily contain such a reference. Indeed, the Award is not an item that would appear in these annual accounts, including because they only recognize and record revenue when payment is either received or becomes a virtual certainty.<sup>92</sup> Eurus further confirms that "at the current time"<sup>93</sup> it is the legal owner of the Award. In any event, regardless of Eurus' potential decision to distribute any sums under the Award to investor or third parties, the Committee could order Eurus to return any monies collected. Since Eurus is "ready to honour all of its international debt obligations",<sup>94</sup> Spain's concerns are exaggerated. Equally, because enforcement efforts against Spain are likely to take some time, Spain's concerns about recoupment risks are speculative.<sup>95</sup>

63. Eurus considers that there is no prejudice to Spain resulting from the purported conflict with EU law. The *Antin v. Spain* and *Cube v. Spain*<sup>96</sup> committees have considered Spain's arguments pertaining to EU law and have rejected them as irrelevant to the issue of a stay of enforcement, with the *Antin* committee considering the issue to be "a legal conundrum of [Spain's] own making".<sup>97</sup> The *SolEs v. Spain* committee<sup>98</sup> even observed that addressing the issue would require it to consider facts and circumstances pertaining to the merits of the application for annulment, which it could not do. Eurus adds that, if any weight is to be accorded to Spain's EU law arguments, it would support a lifting of the stay of enforcement, with multiple annulment committees finding that they show an unwillingness to comply with ICSID awards.<sup>99</sup>

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<sup>89</sup> *SolEs v. Spain*, at 77.

<sup>90</sup> Spain Reply, at 54.

<sup>91</sup> *Id.*

<sup>92</sup> Eurus Rejoinder, at 50.

<sup>93</sup> Eurus Response, at 78.

<sup>94</sup> *Id.*, at 79.

<sup>95</sup> Eurus Response, at 75-80; Eurus Rejoinder, at 49, 50.

<sup>96</sup> *Cube v. Spain*, at 138.

<sup>97</sup> *Antin v. Spain*, at 76.

<sup>98</sup> *Cube v. Spain*, at 139.

<sup>99</sup> Eurus Response, at 81-88, referring *inter alia* to *OperaFund v. Spain*, at 104, 105; *STEAG v. Spain*, at 119; Eurus Rejoinder, 60-66.

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64. Finally, Eurus takes exception to Spain's argument that staying enforcement would avoid imposing an undue burden on third parties such as the European Commission. Indirect consequences on third parties cannot trump Eurus' right to enforcement and Spain's obligation to comply with the ICSID Convention. In any event, it appears from Spain's submissions that the European Commission is already in the process of reviewing the Award, and there is no suggestion that they are holding off on doing so until an annulment decision is rendered.<sup>100</sup>

*iv. The merits of Spain's Application for Annulment are irrelevant*

65. Eurus considers that, for purposes of deciding whether to lift or continue a stay of enforcement, the merits of an application for annulment are irrelevant. This was confirmed by numerous annulment committees, such as *OperaFund v. Spain*, *SGS v. Paraguay* and *MTD v. Chile*.<sup>101</sup> However, if the Committee were minded to consider the merits of the Annulment Application, according to Eurus, it should observe that Spain has adopted a one-size-fits-all approach in challenging every single adverse ICSID award against it, regardless of the existence of grounds for annulment, and has copied and pasted, verbatim, arguments from one case to the other, including by leaving in the names of other investors. According to Eurus, this would show that Spain's Application for Annulment is not based on serious grounds.<sup>102</sup>

66. Eurus adds that, even if Spain's Application for Annulment were serious and not dilatory, this would still be irrelevant for determining whether a stay should be continued. A party does not become entitled to a stay of enforcement simply because it complies with the minimum standard that is expected of any applicant seeking annulment.<sup>103</sup>

**C. If continued, the Committee should make the stay conditional**

67. According to Eurus, the above shows that the automatic stay of enforcement should be lifted. However, "Eurus is willing to agree to a continuation of the stay, provided it is subject to the conditions that Eurus proposes",<sup>104</sup> namely:

- (i) that Spain post security in the amount of EUR 106.2 million (*i.e.*, the principal amount of the compensation granted in the Award), with interest accrued as at

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<sup>100</sup> Eurus Rejoinder, at 58, 59.

<sup>101</sup> *MTD Equity Sdn Bhd v. Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, at 28 (Annex-19 Spain Application) ("*MTD v. Chile*").

<sup>102</sup> Eurus Response, at 89-95; Eurus Rejoinder, at 67-69.

<sup>103</sup> Eurus Rejoinder, at 70.

<sup>104</sup> Eurus Response, at 96.

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the date of the Committee's decision, plus USD 4,332,197.16 in costs awarded by the Tribunal to Eurus; and

- (ii) that Spain provides an unconditional undertaking that it recognizes the Award as final and binding, and that it will pay the Award within 60 days from the notification of the Committee's decision upholding the Award; and
  - (iii) that the stay of enforcement be lifted if Spain does not comply with the Committee's order.<sup>105</sup>
68. Eurus considers that such a solution would protect its rights, but would also protect Spain's interests and eliminate the risks it is now complaining of, namely the risk of non-recoupment and the supposed conflict with EU law. Eurus disputes that these conditions would place it in a better position than it would have been in had the annulment proceedings not been commenced. Such an argument is based on the premise that Spain would have refused to pay the Award, which assumes a breach by Spain of its obligations under the ICSID Convention. Moreover, the provision of security is not the same as payment, and Eurus would not receive any funds sooner than would otherwise be the case. Similarly, Spain would suffer no harm from posting the security, and the risk that Spanish assets would be seized during the annulment process and then would have to be recovered if Spain prevails is eliminated.<sup>106</sup>
69. According to Eurus, a conditional stay would represent a reasonable and balanced way to protect the legitimate interests of both Parties. This has been the conclusion of many annulment committees, such as *Flughafen Zurich v. Venezuela*.<sup>107</sup> Moreover, a conditional stay is justified in light of Spain's current practice of not complying with adverse ICSID awards. The *NextEra v. Spain* committee considered that an undertaking was the best means to balance the parties' interests, after finding that there were doubts as to whether Spain would pay the award in a timely manner.<sup>108</sup> A similar solution was adopted by the *STEAG v. Spain* committee,<sup>109</sup> which decided that granting security was appropriate in light of the risk of Spain not complying with the award.<sup>110</sup>

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<sup>105</sup> Eurus Response, at 97; Eurus Rejoinder, at 72.

<sup>106</sup> Eurus Response, at 97-101.

<sup>107</sup> *Flughafen Zurich v. Venezuela*, at 69.

<sup>108</sup> *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Decision on Stay of Enforcement of the Award, 6 April 2020, at 91-93 (Annex-25 Eurus Response) ("*NextEra v. Spain*").

<sup>109</sup> *STEAG v. Spain*, at 120.

<sup>110</sup> Eurus Response, at 102-106.

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70. According to Eurus, Spain has failed to engage in any meaningful way with its proposal. Its argument that Eurus has failed to prove that the stay should be conditioned on the provision of security is misguided as it is Spain that bears the burden of showing the existence of exceptional circumstances that would warrant the continuation of the stay of enforcement. Moreover, contrary to Spain's submission, Eurus did not request the provision of a bank guarantee, but that the Award amount be placed in an escrow account.<sup>111</sup>
71. Eurus adds that Spain's reliance on *Azurix v. Argentina* and *Tenaris II* does not assist its case. The *Azurix* committee decided not to impose security because, at that time, Argentina had no history of non-compliance with ICSID award. For its part, the *Tenaris II* committee decided that, since obtaining a bank guarantee would have been too costly for Venezuela, the stay of enforcement should be lifted.<sup>112</sup>
72. Finally, Eurus disputes Spain's argument that an unconditional undertaking that it will pay the Award promptly and in full is not necessary because Spain has offered its commitment to comply with the Award, consistent with the ICSID Convention and EU law, if the Award is not annulled. Eurus considers that Spain's representation is an effective signal that it will not pay the Award. Moreover, by notifying the Award to the European Commission, Spain is attempting to procure a decision finding that the awards are incompatible State aid, and to use that decision to delay and ultimately not pay the Award. This was also the conclusion of the *Cube v. Spain* committee, which considered that "the application to seek authorization from the EC further suggests that if anything, compliance with the Award is likely to be delayed and potentially frustrated".<sup>113</sup> Eurus adds that Spain has also delayed providing the European Commission with the requested information, which only further underscores its strategy to delay payment.<sup>114</sup>

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<sup>111</sup> Eurus Rejoinder, at 73-75.

<sup>112</sup> *Id.*, at 76-78.

<sup>113</sup> *Cube v. Spain*, at 133.

<sup>114</sup> Eurus Response, at 107, referring *inter alia* to the EU Commission Letter to Spain relating to Spain's notification of the *Antin v. Spain* award (Annex-39 Eurus Response); Eurus Rejoinder, at 79.

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**V. THE *AD HOC* COMMITTEE'S DECISION**

**A. Applicable legal standard**

73. The Parties agree, and the Committee concurs, that, in ruling on the Application, the Committee must apply the ICSID Convention and Arbitration Rules. However, Spain also argues that the Committee should equally apply the TFEU, customary international law and general principles of law. For its part, Eurus disputes that any source of law extraneous to the ICSID Convention and Arbitration Rules is relevant to the Application.
74. The Committee agrees with Eurus. The source of this Committee's jurisdiction is the ICSID Convention. Article 53(1) of the Convention clearly provides that the ICSID system of post-award remedies is self-contained, and that any stay of enforcement of an award may only be granted "pursuant to the relevant provisions of [the ICSID] Convention", *i.e.*, based on the rules and principles of this self-contained system:
- "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." [emphasis added]
75. There is, in other words, no room to apply EU law, including the TFEU, to the question of whether the stay of enforcement of the Award should be continued or not.
76. The Committee is likewise not persuaded by Spain's argument that enforcement of the Award should be stayed in light of a "principle of respect to the sovereigns that is an actual and direct source of International Law".<sup>115</sup> Spain provides no support for this statement. Moreover, as correctly pointed out by Eurus, the principle of equality of the Parties is a fundamental rule of procedure in ICSID proceedings. A State party to an ICSID arbitration does not enjoy more rights than the investor simply by virtue of it being a State.
77. Consequently, the sole source of this Committee's authority to rule on Spain's Application are the ICSID Convention and Arbitration Rules.
78. Article 52(5) of the ICSID Convention sets out two fundamental principles: (i) a stay of enforcement of an ICSID award pending completion of annulment proceedings should be granted if "so require[d]" by "the circumstances" of the case; and (ii) at all times, the *ad hoc* Committee retains discretion to continue the stay enforcement or to lift it:

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<sup>115</sup> Spain's Reply, at 20.

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“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.” [emphasis added]

79. As both Parties correctly point out, Article 52(5) of the ICSID Convention does not refer to the types of circumstances that would justify a stay of enforcement. However, pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “VCLT”), Article 52(5) of the ICSID Convention must be interpreted in the light of the context in which it is situated. This includes Article 53(1) of the Convention, which, in no uncertain terms, provides that ICSID awards are final, binding and immediately enforceable as of their issuance – unless enforcement has been stayed on the basis of the Convention. The principle of immediate enforceability of ICSID awards must consequently be borne in mind by annulment committees when deciding on requests for the stay of enforcement.
80. In light of the above, this Committee agrees with the *Antin v. Spain* committee that circumstances that are common to all applications for annulment are insufficient to justify a stay of enforcement of an ICSID award (or a continuation of a stay that was granted by the ICSID Secretary-General pursuant to ICSID Arbitration Rule 54(2)).<sup>116</sup> What must be present are circumstances that the Committee considers *require* a stay of enforcement. By implication, this means that a stay of enforcement is not automatic or presumed simply by virtue of the fact that an application for annulment has been filed. Conversely, no presumption that a stay of enforcement should be lifted exists either. In the words of previous annulment committees:

“[T]here is no presumption in favour of granting a request for a stay. As a corollary, stays may only be granted in cases where there are special or particular circumstances that bring the case outside the run of usual annulment applications and which compels the granting of a stay. Circumstances that are usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay.”<sup>117</sup>

“[T]he language of Article 52(5) suggests that a stay of enforcement should only be granted where ‘required’, and not automatically or as a matter of course.”<sup>118</sup>

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<sup>116</sup> *Antin v. Spain*, at 60.

<sup>117</sup> *Id.*, at 67.

<sup>118</sup> *SolEs v. Spain*, at 51.

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81. Both Spain and Eurus have referred to the previous practice of annulment committees when it comes to stays of enforcement. *Inter alia*, Spain has attempted to draw support for its argument that stays of enforcement represent the prevailing practice of ICSID annulment committees and are not granted solely when “exceptional” or “compelling” circumstances are present. In response, Eurus has argued that the more recent practice of ICSID annulment committees, in particular in cases involving Spain, has been to lift stays of enforcement.
82. This Committee considers the debate to be of limited assistance. It is helpful in so far as the practice of previous annulment committees allows one to discern some of the most frequently encountered factors that were weighed when deciding on requests to continue stays of enforcement. It is unhelpful when it comes to the relative proportion between the decisions to continue and the decisions to lift stays of enforcement. Article 52(5) of the ICSID Convention mandates the Committee to examine the circumstances of the case before it in order to determine if *these* circumstances require a stay of enforcement of the Award. The Committee’s decision must consequently be based on the circumstances of *this particular case*, and not on decisions taken by other annulment committees, in cases which may or may not be comparable.
83. When it comes to the various factors that previous committees have examined, they are, broadly speaking, the following: (i) the risk of non-compliance with the award by the award-debtor; (ii) the risk of non-recoupment of any amounts collected under the award, should the award be annulled; and (iii) the relative balance of harms between the parties if the stay of enforcement of the award were to be continued or discontinued.<sup>119</sup> Both Parties have referred to these circumstances in their respective pleadings. Where there is some disagreement between the Parties is the relevance – if any – of the merits of Spain’s Application for Annulment. Spain takes the position that ICSID *ad hoc* Committees have held that one of the circumstances to be considered in determining whether to stay enforcement during an annulment proceeding is whether the application for annulment is frivolous or dilatory, not made in good faith. Eurus, on the other hand, considers that the merits of Spain’s Application for Annulment are irrelevant at this stage.
84. At this very preliminary stage of the proceedings and without the benefit of a full record before it, the Committee does not consider it appropriate to issue any pronouncements on the merits of Spain’s Application for Annulment. While stays of enforcement may be lifted in those instances where it is manifestly clear that an application for annulment is frivolous or lacks any basis in the law, any further examination of the merits of an application for annulment would veer dangerously into the realm of prejudgment. Consequently, the

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<sup>119</sup> See, for example, *STEAG v. Spain*; *Antin v. Spain*; *SolEs v. Spain*.

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merits of Spain's Application for Annulment are entirely irrelevant to the Committee's assessment of Spain's Application.

85. Before turning to Spain's Application, the Committee wishes to briefly address the issue of burden of proof. Spain contends, on the one hand, that it has discharged its burden of proof by putting forward an array of circumstances that justify continuing the stay of enforcement,<sup>120</sup> and, on the other hand, that "Respondent on Annulment must give proof that it will suffer a prejudice as a result of the stay and that the Applicant does not hold the risk that it is invoking".<sup>121</sup> In other words, Spain appears to accept that, as the Party requesting the continuation of the stay of enforcement, it bears the burden of proving that conditions are met for the stay to be maintained.<sup>122</sup> However, Spain takes the view that it has discharged that burden and that it is now up to Eurus to demonstrate the contrary, should it wish for the stay of enforcement to be lifted. Eurus takes the view that the burden of proof falls on Spain to show that the Application should be granted.
86. The Committee recalls that ICSID Arbitration Rule 54(4) provides as follows:
- “(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) 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.” [emphasis added]
87. In other words, it is the party making the request, either for the continuation of a stay of enforcement or, as the case may be, for its modification or termination, that must show that the stay, its modification or termination, is required. In the case before the Committee, it is Spain that has filed the Application. Consequently, the burden falls on Spain to show that the circumstances of this case require the stay to be continued. Of course, to the extent that, in rebutting the Application, Eurus makes an allegation or puts forward a position, it is incumbent upon Eurus to substantiate it with evidence.
88. In any event, regardless of any discussion on burden of proof, both Parties agree that the Committee has discretionary powers to evaluate all the circumstances of the case and make a decision. The Committee concurs.<sup>123</sup>

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<sup>120</sup> Spain's Application, at 18.

<sup>121</sup> *Id.*, at 17.

<sup>122</sup> Spain also states, at paragraph 37 of its Reply: “the Applicant has presented the Committee with various circumstances that justify maintaining the stay of enforcement. Hence Spain's burden of proof has been met.”

<sup>123</sup> Spain's Application, at 19, 20; Eurus Rejoinder, at 32.

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89. Having made these preliminary observations, the Committee will now turn to the substance of Spain's Application.

**B. Whether the stay of enforcement should be continued**

90. As will be explained in more detail in the paragraphs below, the Committee has come to the conclusion that the stay of enforcement of the Award should henceforth continue subject to Spain posting security. In reaching this decision, the Committee has examined the circumstances referred to by the Parties, namely:

- (i) the risk of non-compliance with the Award by the award-debtor, *i.e.*, Spain;
- (ii) the risk of non-recoupment of any amounts collected under the award, should the award be annulled; and
- (iii) the relative balance of harms between the Parties if the stay of enforcement of the award were to be continued or discontinued.

*i. Whether there is a risk of non-compliance with the Award*

91. Spain has represented to this Committee that it will abide by its international obligations and, as support, has made the following statements:

“The Kingdom of Spain takes its international commitments seriously, and it intends to honor them. That includes both its obligation under Article 53 of the ICSID Convention to abide by and comply with the terms of the Award in this case, and Spain's obligation as a Member State of the European Union.”<sup>124</sup>

“The best proof that the Kingdom of Spain attempts to abide by its international obligations is the fact that it has already 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 European Commission authorization.”<sup>125</sup>

92. Spain maintains that it is not trying to avoid complying with its obligations under the ICSID Convention, but merely attempting to reconcile competing sets of obligations, *i.e.*, those under the ICSID Convention and those under EU law:

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<sup>124</sup> Spain's Application, at 63.

<sup>125</sup> *Id.*, at 65.

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“Spain is not trying to find ways to avoid payment of the Award in the event that annulment is denied. It must be emphasized: Spain has sought EC approval, it is not trying to block compliance. The procedure before the EC is not one where Spain may assert jurisdictional objections or otherwise try to object to the Award. It shouldn’t even be assumed that the EC will find that payment of the Award as incompatible State Aid.

It must be stressed that Spain is not looking for excuses but trying to ensure that it is correctly complying with all of its international obligations.”<sup>126</sup>

“[...] [P]ayment of the Award attracts the application of both Article 53 of the ICSID Convention and Articles 107 and 108 of the TFEU. Requiring Spain to comply with the Award, pursuant to Article 53 of the ICSID Convention, without authorization of the EC, would breach Articles 107 and 108 of the TFEU. Thus, in accordance with Article 30 of the VCLT, Article 53 of the ICSID Convention only applies to the extent that it is compatible with Articles 107 and 108 of the TFEU.”<sup>127</sup>

93. It is because of those same obligations under EU law, maintains Spain, that the overview provided by Eurus regarding Spain’s past compliance with adverse awards is inaccurate as “the EC has not finalized the authorization procedures”.<sup>128</sup>
94. The Committee has some sympathy for the difficult legal situation Spain finds itself in. The Committee also wishes to emphasize that it has no reason to doubt that Spain is attempting, in good faith, to reconcile conflicting legal obligations. However, if anything, Spain’s statements above show that there is a real risk of a delay in compliance and even of non-compliance with the Award and that Spain has decided to prioritize its obligations under EU law over its obligations under the ICSID Convention.
95. To recall, Article 53(1) of the ICSID Convention unambiguously provides that ICSID awards are final and binding on the parties, and may only be challenged or their execution may only be stayed *pursuant to the provisions of the ICSID Convention*:

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.” [emphasis added]

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<sup>126</sup> Spain’s Reply, at 87, 88.

<sup>127</sup> *Id.*, at 97.

<sup>128</sup> *Id.*, at 92.

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96. The ICSID Convention system is in other words an entirely self-contained system of remedies, and parties to ICSID proceedings may not rely upon other law, such as for instance EU law, in order to justify their failure to comply with the ICSID Convention.
97. Spain's statement that "Article 53 of the ICSID Convention only applies to the extent that it is compatible with Articles 107 and 108 of the TFEU"<sup>129</sup> constitutes an attempt to limit its obligations under the ICSID Convention by relying on EU law. This is not permitted under Article 53 of the ICSID Convention.
98. Further, the fact that Spain essentially acknowledges that it has delayed complying with the numerous awards listed in the Appendix to Eurus' Response (many of which have been confirmed on annulment) because approval from the European Commission was not forthcoming clearly shows that Spain views its obligations under EU law as being superior in force, and as prevailing over, its obligations under the ICSID Convention.
99. This Committee thus entirely shares the view of the *Antin v. Spain* committee, which held:
- "Insofar as [Spain] willingly chose to undertake international obligations that may conflict with each other, it cannot thereafter complain of prejudice once these conflicts arise."<sup>130</sup>
100. For these reasons, the Committee concludes that there is a real risk of Spain delaying compliance or even not complying with the Award, should it ultimately be confirmed.
- ii. *Whether there is a risk of non-recoupment of any amounts collected under the Award, should the Award be annulled*
101. Spain argues that there is a risk that, if the Award were annulled, it would not be able to recoup any amounts collected by Eurus and would have to expend significant resources in the process. Spain in particular considers that there is a risk that Eurus would distribute significant dividends to shareholders, sell its interest in the Award to third parties or that Eurus itself may cease to exist. Eurus strongly disputes these contentions, arguing that they are unsupported by any evidence and submits that it stands "ready to honour all of its international debt obligations".<sup>131</sup>
102. The Committee agrees with Eurus that Spain's allegations are not supported by any evidence. Simple allegations, without more, are insufficient to show that there is a risk of non-recoupment. Moreover, and in any event, Spain has not rebutted Eurus' statements

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<sup>129</sup> *Id.*, at 97.

<sup>130</sup> *Antin v. Spain*, at 76.

<sup>131</sup> Eurus Response, at 79.

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that it is a company with an extremely active business, with an annual net income superior to the amount of the Award, and which is owned by a large trading company. Spain's allegation that it has not found any reference to the Award in the annual accounts of a different investor, *i.e.*, JGC, are entirely inapposite. As regards the costs that would be associated with legal proceedings for the recoupment of any amounts collected under the Award, the Committee agrees with Eurus that they are an inevitable consequence of the ICSID system, which provides that awards are immediately enforceable unless circumstances require that their enforcement be stayed. In any event, depending on the forum, Spain could reclaim such costs.

103. In any event, whatever concerns Spain may have with regard to risks of non-recoupment are entirely alleviated by the fact that, as explained in Section V.C below, the Committee has decided to continue the stay subject to Spain posting security in the form of a payment in an escrow account. Thus, if ultimately the Committee were to decide to annul the Award, in whole or in part, Spain would not have to commence costly legal proceedings in order to attempt to recover any funds from Eurus. Any relevant funds would simply be disbursed to Spain from the escrow account pursuant to the decision of the Committee.
104. For all these reasons, the Committee considers that Spain has not demonstrated that there is a risk of non-recoupment, should the Award be annulled.

*iii. The relative balance of harms between the Parties*

105. This criterion requires that the Committee weigh the harm that would be suffered by Spain if the stay of enforcement of the Award were lifted against the harm that would befall Eurus if the stay of enforcement of the Award were to continue.
106. Spain argues that it will suffer significant harm if the stay of enforcement of the Award were lifted, as it would not be able to recover any amounts collected by Eurus and would incur considerable costs in legal proceedings aimed at such recovery. Moreover, according to Spain, if the European Commission were to determine that the Award in its current form represents State aid incompatible with EU law, Spain would likewise have to expend significant resources in legal proceedings for the recovery of any amounts Eurus has collected.
107. As explained in Section V.B.ii above, Spain has not demonstrated that it will be subject to a risk of non-recoupment should the Award be annulled in whole or in part. Moreover, any costs associated with recovering amounts collected under the Award are an inherent feature of the ICSID system, and not a special circumstance of this particular dispute.

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108. The Committee has also found that any problems Spain might be facing as a result of its EU law obligations conflicting with the ICSID Convention are of its making. In this respect, the Committee agrees with the *Antin v. Spain* committee that it would be unfair to Eurus if enforcement of the Award were stayed on account of conflicting obligations that Spain has voluntarily decided to enter into.
109. For its part, Eurus argues that there is a real risk that Spain may not comply with the Award. Considering Spain's history of non-compliance with adverse ICSID awards, continuing the stay would significantly decrease its chances of being compensated. Eurus would have to compete with numerous ICSID creditors for a limited number of assets belonging to Spain and situated outside the EU. In such a scenario, post-award interest would not protect it against the risks of Spain's non-compliance. Eurus considers that, because of such risks, the automatic stay of enforcement should be lifted and replaced with a conditional stay, subject to security.
110. In Section V.B.i above, the Committee has found that that there is a real risk that Spain may delay complying or indeed may not comply with the Award, should it ultimately be confirmed. The Committee agrees with Eurus that, in light of Spain's history of not paying adverse ICSID awards (whether due to lack of European Commission approval or otherwise), Eurus would likely have to enforce its rights against Spain's assets located outside the European Union, where it would compete with several other ICSID award creditors. While post-Award interest adequately protects Eurus' rights resulting from a simple delay in payment, the Committee is not persuaded that interest is enough to protect Eurus against the risk that the assets against which its rights could be enforced may be insufficient due to Spain's conduct.
111. Therefore, after balancing the harms that would be suffered by Spain and Eurus if the stay of enforcement were lifted or, on the contrary, continued, the Committee has come to the conclusion that the balance tilts in favor of continuing the stay of enforcement subject to Spain providing security.<sup>132</sup>

**C. The provision of security is required in order to adequately balance the Parties' rights and interests in these proceedings**

112. Eurus has requested that Spain be ordered both: (i) to post security sufficient to satisfy the Award in full; and (ii) to provide an unconditional undertaking that it recognizes the Award

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<sup>132</sup> The Committee notes in this respect that Eurus' main request for relief is that the continuation of the stay of enforcement be subject to the provision of security and only in the alternative does Eurus request that the stay of enforcement be lifted. Therefore, the Committee's analysis focuses on Eurus' first request for relief.

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as final and binding, and that it commits to paying the Award within 60 days of a decision upholding it.

113. The Committee considers that, in light of Spain's statements at paragraphs 91 and 92 above, and its continued reference to its obligations under EU law, it would be of little use to compel Spain to provide an unconditional undertaking that it recognizes the Award as final and binding, and that it commits to make payment within 60 days of the Award being upheld. The Committee considers that, in all likelihood, in light of its competing obligations under the ICSID Convention and EU law, Spain would have no other choice than to repeat its statement that it has every intention of complying with the Award, subject to receiving the required authorization from the European Commission. The Committee therefore rejects Eurus' request for an undertaking.
114. The Committee turns to Eurus' request for security.
115. The Parties essentially agree that the Committee has the power to order the provision of security as a condition for the continuation of the stay of enforcement of the Award.<sup>133</sup> The Committee concurs. Article 52(5) of the ICSID Convention, while not referring to the provision of security expressly, does not exclude it either. Numerous ICSID annulment committees have found that Article 52(5) of the Convention empowers them to request that security be provided as a condition for the continuation of a stay of enforcement.<sup>134</sup>
116. As anticipated in Sections V.B.ii. and iii. above, the Committee considers that the provision of security would address both Spain's concern that it may not be able to recoup any amounts potentially collected under the Award (and lose significant time and costs in its attempt to do so), and Eurus' concern that it would not have enough assets against which to enforce its rights. Indeed, if Spain were to post security, Eurus would effectively not be collecting any funds pending the finalization of these annulment proceedings. Therefore, there would be no funds that Spain would need to recoup. At the same time, since posting security into escrow is not payment, Spain would not be making any unauthorized payment and would not be in breach of any obligation under EU law.
117. The Committee does not agree with Spain that the provision of security would place Eurus in a better position than it would have been if the annulment proceedings had not commenced. Article 53(1) of the ICSID Convention unambiguously establishes that ICSID awards are enforceable, unless their enforcement is stayed in annulment proceedings. Consequently, if no annulment proceedings had been commenced, the enforcement of the

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<sup>133</sup> See, Spain's Reply, at 106, where Spain argues that the conditions for requiring security are not met.

<sup>134</sup> See, *STEAG v. Spain*; *NextEra v. Spain*; *Flughafen Zurich v. Venezuela*.

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Award would not have been stayed, and Spain would have been under an obligation to pay the Award. Posting security is by no means a “better” outcome than payment.

118. The Committee is also not persuaded that Spain would incur significant costs by posting security. As clarified in its Rejoinder,<sup>135</sup> Eurus is not requesting security in the form of a bank guarantee, but that the security be placed in an escrow account. The Committee considers the costs of such an operation to be reasonable, particularly for the “fourth-largest economy in the European Union”.<sup>136</sup>
119. In view of all these circumstances, the Committee considers that, henceforth, the stay of enforcement of the Award can only continue subject to Spain providing security. Such security appropriately mitigates against any potential risks and adequately balances any potential harms caused to either Party.
120. However, the Committee has not been briefed to its satisfaction on the precise amount of such security. For this reason, the Committee invites the Parties to provide short written submissions, not longer than 5 pages, on the amount of such security. The submissions shall be simultaneous and shall be filed by **Friday, 29 March 2024**.
121. The Committee’s decision on costs is reserved for its decision on annulment.

## VI. DECISION

122. For all the reasons specified above, the Committee decides as follows:
  - (i) REJECTS Spain’s request that the stay of enforcement of the Award should be continued without security or other conditions, until the decision on the Application for Annulment is rendered by the Committee;
  - (ii) REJECTS Eurus’ request that Spain provide an unconditional undertaking duly signed by Spain’s relevant authorities that it recognizes the Award as final and binding and that it shall pay the amounts ordered in the Award within 60 days from the notification of the Committee’s Decision upholding the Award;
  - (iii) DECIDES that the stay of enforcement of the Award should continue subject to Spain posting appropriate security within 30 days of the Committee’s decision fixing the amount of said security;

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<sup>135</sup> Eurus Rejoinder, at 73-75.

<sup>136</sup> Spain’s Application, at 62.

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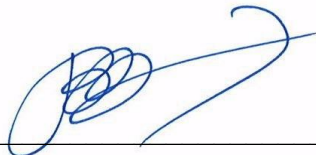
- (iv) DECIDES that, pending the Committee's decision at point (iii) above, the provisional stay of enforcement of the Award shall continue;
- (v) INVITES the Parties to file submissions on the amount of security by **Friday, 29 March 2024**;
- (vi) RESERVES its decision on costs for its decision on annulment; and
- (vii) REJECTS all other requests for relief.



Ms. Katherine González Arrocha  
Member of the *ad hoc* Committee



Dr. Penelope J. Ridings  
Member of the *ad hoc* Committee



Prof. Bernard Hanotiau  
President of the *ad hoc* Committee