

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SolEs Badajoz GmbH
Respondent on Annulment

v.

Kingdom of Spain
Applicant on Annulment

(ICSID Case No. ARB/15/38)
Annulment Proceeding

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

Members of the ad hoc Committee

Mr. Cavinder Bull, SC, President of the *ad hoc* Committee
Mr. Colm Ó hOisín, SC, Member of the *ad hoc* Committee
Mr. Noé Fernando Piérola Castro, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Mr. Paul Jean Le Cannu

August 26, 2020

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I. PROCEDURAL BACKGROUND

1. This Decision addresses the application by the Kingdom of Spain (the “Applicant” or “Spain”) for the continuation of a provisional stay of enforcement of the ICSID award rendered on July 31, 2019 in *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 (the “**Arbitration**”), as rectified by the Tribunal’s Decision on Rectification of the Award on December 5, 2019 (the “**Award**”).
2. On April 1, 2020, the Applicant filed its *Application for Annulment of the Award*, together with Annexes¹ 001 to 016 (the “**Application**”).
3. On April 3, 2020, the Secretary General of ICSID registered the Application and informed the Parties of the provisional stay of the award pursuant to ICSID Arbitration Rule 54(2).
4. On May 8, 2020, the *ad hoc* Committee was constituted in accordance with ICSID Arbitration Rules 6 and 53. Its members are Mr. Cavinder Bull, SC, (Singapore) President, Mr. Colm Ó hOisín, SC, (Ireland), Mr. Noé Fernando Piérola Castro (Peru and Switzerland).
5. On June 9, 2020, the Applicant filed its *Submission in Support of the Continuation of the Stay of Enforcement of the Award*, together with Annexes 017 to 033 (the “**Submission**”).
6. On June 23, 2020, SolEs Badajoz GmbH (“**SolEs**” or the “**Respondent on Annulment**”), filed its *Response to Applicant’s Request to Continue Stay*, together with Legal Authorities CL-001 to CL-024 (the “**Response**”).
7. On June 24, 2020, the Committee’s First Session was held by teleconference.
8. On June 25, 2020, the Committee issued Procedural Order No. 1, to which was appended the Procedural Calendar agreed by the Parties, and which provided, inter alia, for the hearing on stay of enforcement of the Award, on July 30, 2020.

¹ With its Observations on the European Commission’s Application for Leave to Intervene as a Non-Disputing Party of July 27, 2020, Spain provided two tables of concordance showing both the Annex number and the R or RL number of exhibits and legal authorities. See List of Exhibits (R) and List of Legal Authorities (RL), both dated July 27, 2020.

9. On July 7, 2020, the Applicant filed its *Reply in Support of the Continuation of the Stay of Enforcement of the Award*, together with Annexes 034 to 058 (the “**Reply**”).
10. On July 17, 2020, the European Commission filed an *Application for Leave to Intervene as a Non-Disputing Party* (the “**EC Application**”).
11. On July 21, 2020, the Respondent on Annulment filed its *Rejoinder to Applicant’s Request to Continue Stay*, together with Exhibits C-001 to C-004 and Legal Authorities CL-025 to CL-027 (the “**Rejoinder**”).
12. On July 27, 2020, the Committee issued Procedural Order No. 2 (“**PO2**”) *On the Organization of the Hearing on Stay of Enforcement of the Award* (the “**Hearing**”).
13. On the same date, the Parties each submitted observations on the EC Application.
14. On July 30, 2020, the Committee invited each Party to make comments on the other Party’s observations on the EC Application by August 12, 2020.
15. As contemplated in PO2, the Committee held the Hearing by video on July 30, 2020. In addition to the Members of the Committee and its Secretary, the following Party representatives attended the Hearing:

On behalf of the Kingdom of Spain:

Mr. Alberto Torró Molés, Abogacía General del Estado
Mr. Pablo Elena Abad, Abogacía General del Estado
Ms. Gabriela Cerdeiras, Abogacía General del Estado

On behalf of SolEs Badajoz GmbH:

Mr. Charles Kaplan, Orrick Herrington & Sutcliffe (Europe) LLP
Mr. Tunde Oyewole, Orrick Herrington & Sutcliffe (Europe) LLP
Ms. Sarah Lajugie, Orrick Herrington & Sutcliffe (Europe) LLP
Mr. Thomas Hopp, Voigt & Collegen GmbH
16. The audio recording of the Hearing was uploaded to the virtual platform Box on July 31, 2020 and the verbatim transcript was circulated to the Parties on August 3, 2020.

17. On August 12, 2020, each Party submitted comments on the other Party's observations on the EC Application.
18. Sections II and III of this Decision summarize the Parties' positions and arguments regarding the continuation of the stay of enforcement of the Award. Section IV sets out the reasons for the Committee's decision. The Committee's decision and orders are recorded in Section V.

II. THE APPLICANT'S POSITION

19. Spain argues that the stay of enforcement of the Award should be continued in this case as (i) its Application for Annulment was made in good faith and raises "clear and serious" grounds for annulment;² (ii) enforcement of the Award would be prejudicial to Spain;³ and (iii) SolEs will suffer no harm if the stay is continued.⁴ In addition, Spain argues that the stay should be continued unconditionally as an order for security is unnecessary, burdensome, and would place SolEs in a better position than it would be should there be no stay of enforcement.⁵

A. Spain's Application for Annulment was made in good faith

20. Spain submits that there is a prevailing practice amongst ICSID *ad hoc* committees to grant stays of enforcement absent unusual circumstances.⁶ Given that Spain's Application is "based on serious grounds, was made in good faith, and is not dilatory", there is no reason to depart from that standard practice.⁷ Spain explains that its Application raises "serious grounds" for annulment, as the Tribunal manifestly exceeded its powers, failed to state the reasons on which it was based, and committed

² Submission, ¶ 5.

³ Submission, ¶ 7.

⁴ *Ibid.*

⁵ Submission, ¶ 49.

⁶ Submission, ¶¶ 8-9, citing **RL-0117**, *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, September 30, 2013, ¶ 50; **RL-0118**, *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010, ¶ 25; Reply, ¶¶ 85-86; **RL-0128**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23), Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, February 23, 2018 ("*Tenaris v. Venezuela*"), ¶ 104.

⁷ Submission, ¶ 12.

a serious departure from a fundamental rule of procedure.⁸ Premature enforcement, Spain submits, would be imprudent in these circumstances.⁹

B. Spain will suffer harm if the stay is discontinued

21. Spain contends that the Committee has to consider “the harm that the continuation or not of the stay could imply for each party.”¹⁰ In this case, not continuing the stay of enforcement would be prejudicial to Spain because it would face “the risk of non-recoupment of the amounts unduly paid”¹¹ if the Award is enforced and subsequently annulled by this Committee. Even if the amounts were recouped, Spain would have to spend resources in the process, which is an additional burden that Spanish taxpayers should not bear.¹²
22. In addition, the financial situation of SolEs suggests that “there is a serious risk of non-recoupment if the stay is lifted”¹³, a risk to which a State should not be exposed to were the other party to turn out to be insolvent.¹⁴ If SolEs were allowed to enforce the Award now, “it would probably pay the dividends it owes to two private equity funds [SolEs21 GmbH and SolEs 22 GmbH] – a dividend it promised and which it has been unable to pay since its inception.”¹⁵ The promised dividend would have amounted to 5.94% per annum¹⁶, and was designed to be paid on a regular basis, as suggested by SolEs’s own evidence.¹⁷ While SolEs points to a payment made in 2012, Spain emphasizes that in the last seven years, those who invested in SolEs 21 GmbH and SolEs 22 GmbH and were promised regular payments, have not received any dividends.¹⁸
23. Spain further argues that if the Award is enforced and its proceeds distributed as dividends, SolEs and its subsidiary Fotonos de Castuera SL will have no assets against which Spain could recover its funds in the event that the Award is later annulled.¹⁹

⁸ Submission, ¶¶ 13-17.

⁹ Reply, ¶ 90.

¹⁰ Submission, ¶ 18.

¹¹ Submission, ¶ 19.

¹² Submission, ¶¶ 21-22.

¹³ Submission, Section II.B.(1).

¹⁴ Reply, ¶ 34. Spain refers to **RL-0123**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent’s Request for a Continued Stay of Execution, June 1, 2005.

¹⁵ Submission, ¶ 24. *See also* Submission, ¶¶ 26-27; Reply, ¶ 30.

¹⁶ Submission, ¶ 26; Reply, ¶ 37.

¹⁷ Reply, ¶¶ 37-41, 55.

¹⁸ Reply, ¶ 42.

¹⁹ Submission, ¶ 25.

SolEs's most recent publicly available financial statements, as Spain submits, confirm that SolEs lacks assets of a value similar to the damages awarded in the arbitration (EUR 40.49 million).²⁰ SolEs is unable to point to any such asset²¹, and merely claims that it and Fotonos de Castuera are solvent.²² Further, the financial statements submitted by SolEs in the underlying arbitration show that SolEs "has no other assets of material realisable value than those related to its investment in Fotonos de Castuera SL (shares and subordinated loans)."²³

24. In response to SolEs's argument that German accounting rules required it to use the lowest value for its assets (thus suggesting that the value of SolEs's assets may be more than what is reflected in its financial statement), Spain argues that financial statements must provide "a **true and fair view** of the net worth, financial position and results of the company."²⁴ (Emphasis in original.) Having valued its wholly-owned subsidiary at EUR 100,001, it is clear to Spain that SolEs does not have the assets that would allow Spain to recoup its funds if the Award were annulled after enforcement.²⁵ Moreover, said subsidiary, Fotonos de Castuera, is in a "dire financial situation"²⁶ and at "[h]igh risk of default"²⁷ given its negative equity value of EUR -41,266,497.²⁸
25. Spain also argues that its own experience in other cases, in which it has been unable to recover any payment for costs awards in its favour, demonstrates the risk of lifting the stay.²⁹ While SolEs has laid great emphasis on the *Eiser*, *Masdar*, *Antin*, and *NextEra* cases as supporting its argument that the stay should be lifted,³⁰ Spain argues that these

²⁰ Submission, ¶ 30.

²¹ Reply, ¶ 47.

²² Reply, ¶ 48.

²³ Submission, ¶ 32; Reply, ¶¶ 49-50.

²⁴ Reply, ¶ 52.

²⁵ Submission, ¶ 33.

²⁶ Submission, Section II.B.(4); Reply, ¶ 59.

²⁷ Reply, ¶ 57.

²⁸ Submission, ¶ 36; Reply, ¶ 58.

²⁹ Reply, ¶ 62.

³⁰ Reply, ¶ 95; **CL-0019-ENG**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Stay of Enforcement of the Award, March 23, 2018 ("**Eiser v. Spain**"); **CL-00023-ENG**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), Procedural Order No. 3 – Decision on the Kingdom of Spain's Request for a Continuation of the Stay of Enforcement of the Award, May 20, 2020 ("**Masdar v. Spain**"); **CL-0021-ENG**, *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, October 21, 2019 ("**Antin v. Spain**"); **CL-0022-ENG**, *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, April 6, 2020 ("**NextEra v. Spain**").

cases ought to be distinguished from the present case³¹, where the award creditor’s only relevant asset is on the verge of insolvency.³² In addition, SolEs failed to provide the full picture to the Committee by omitting to refer to the Decision on the Kingdom of Spain’s Application for Annulment in *Eiser*, which in Spain’s view “is probably the best example of the risks of lifting the stay once an application for annulment has been filed.”³³

26. Finally, Spain contends that it has potentially conflicting obligations under European Union (“EU”) law and under the ICSID Convention. In particular, Spain argues that it can only make payment under the Award if the European Commission has determined that the Award does not constitute incompatible State Aid under EU law.³⁴ Flowing from this, Spain submits that the enforcement of the Award should be stayed pending the conclusion of annulment proceedings in order to avoid potentially pointless litigation. In Spain’s view, if SolEs is allowed to enforce the Award, but the European Commission decides that the Award is incompatible with EU law, there would be further litigation by either Spain (so as to recover the proceeds of the Award from SolEs) or SolEs (so as to overturn the European Commission’s decision).³⁵ Such further litigation could potentially be avoided by staying enforcement of the Award pending the conclusion of the annulment proceedings – if the Award is annulled, then the issue of whether it constitutes incompatible State Aid would become moot.³⁶
27. Besides the spectre of potentially wasted litigation, Spain also raises concerns that the enforcement of the Award would place it “in the impossible situation of having to choose which international obligation it will have to breach, and to face the consequences of doing so.”³⁷ In addition to possible financial liability³⁸, such situation will also give rise to reputational damage due to non-compliance with international obligations.³⁹ In this respect, Spain emphasizes that it is “committed to seek the European Commission’s approval, not to try to block compliance.”⁴⁰ While SolEs has

³¹ Reply, ¶ 101.

³² *Ibid.*

³³ Reply, ¶ 98.

³⁴ Reply, ¶ 153.

³⁵ Reply, ¶¶ 154, 155.

³⁶ Reply, ¶ 156.

³⁷ Reply, ¶ 162.

³⁸ Reply, ¶ 161.

³⁹ Reply, ¶ 164.

⁴⁰ Reply, ¶ 177.

been ignoring EU law and its principle of primacy⁴¹, and misapplying the law of treaties⁴², Spain is simply trying to reconcile its potentially conflicting treaty obligations to the extent possible.⁴³

C. SolEs will suffer no harm if the stay is maintained

28. Spain submits that another relevant consideration in deciding to continue the stay is whether such a stay would have adverse consequences on the award creditor, which in this case is SolEs. In this respect, Spain argues that SolEs has failed to prove any prejudice that would arise out of the stay⁴⁴, and that SolEs would suffer no harm as a result of the continuation of the stay of enforcement for two main reasons.⁴⁵
29. First, if a stay of enforcement is granted and Spain's Application dismissed, any delay in enforcing the Award would be compensated for through the payment of post-award interest as provided in the Award.⁴⁶ Spain emphasizes that the quantum of interest provided for is not insignificant, pointing out that "SolEs Badajoz will be receiving two times more than it would if they invested in 10-year Spanish government bonds."⁴⁷
30. Secondly, Spain argues that there is no risk of SolEs being unable to enforce the Award if it is not annulled.⁴⁸ To begin with, there is no concern that Spain, as the fifth-largest economy in the EU, would be unable to meet its financial obligations under the Award.⁴⁹ Moreover, Spain emphasizes that it has no history of non-compliance and would abide by its obligations under the ICSID Convention and as a Member State of the EU.⁵⁰ Indeed, Spain has confirmed "its commitment to pay the Award if it is not annulled in this proceeding, specifically, by seeking authorization from the European Commission consistent with its obligations under EU law and regulations, and then to

⁴¹ Reply, ¶ 186.

⁴² Reply, ¶¶ 188-192.

⁴³ Reply, ¶ 180.

⁴⁴ Reply, ¶¶ 65-68.

⁴⁵ Submission, ¶ 39; Reply, ¶¶ 69-70.

⁴⁶ Submission, ¶ 41; Reply, ¶ 71.

⁴⁷ Reply, ¶ 77.

⁴⁸ Submission, ¶ 45; Reply, ¶ 81.

⁴⁹ Submission, ¶ 45.

⁵⁰ Submission, ¶ 46; Reply, ¶ 81.

pay promptly upon receiving such authorization.”⁵¹ Spain argues that this commitment should be sufficient and “weigh in favor of continuing the stay of enforcement.”⁵²

D. The stay should be continued unconditionally

31. Spain finally contends that the Committee should not ask for any guarantee as a condition for the continuation of the stay of enforcement. In Spain’s view, “[a]d hoc committees have recognized that this would place the award creditor in a better position than it would have been if an annulment proceeding had not been even commenced, and that it requires a high burden of proving that the award creditor would suffer prejudice if the stay were continued.”⁵³ In addition, SolEs has failed to prove that the continuation of the stay should be conditioned upon the provision of security.⁵⁴

E. Spain’s request for relief

32. Spain requests that “the stay of enforcement of the Award [...] be continued and maintained in effect until the decision on the Annulment Application is rendered by the Committee in this proceeding.”⁵⁵

III. THE RESPONDENT ON ANNULMENT’S POSITION

33. SolEs argues, contrary to Spain’s position, that a stay of enforcement is “an exceptional measure that may only be granted where circumstances so require”, and not “merely a discretionary measure to be ‘automatically’ granted if requested, unless circumstances justify that it be refused.”⁵⁶ SolEs points out that Spain’s requests for a stay of enforcement of awards rendered in renewable energy cases were rejected by the four committees that have ruled on these requests.⁵⁷

⁵¹ Reply, ¶ 83.

⁵² Reply, ¶ 84, 151-152.

⁵³ Submission, ¶ 49.

⁵⁴ Reply, ¶ 203.

⁵⁵ Submission, ¶ 50. *See also* Reply, ¶ 212 (“Spain respectfully submits 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 Committee in this proceeding.”)

⁵⁶ Response, ¶¶ 3, 15-19; Rejoinder, ¶ 18.

⁵⁷ Response, ¶¶ 4, 20-21. SolEs refers to **CL-00023-ENG**, *Masdar v. Spain*, ¶¶ 63, 93, 98, 124; **CL-0021-ENG**, *Antin v. Spain*, ¶¶ 67, 72; **CL-0022-ENG**, *NextEra v. Spain*, ¶¶ 80, 90; **CL-0019-ENG**, *Eiser v. Spain*, ¶¶ 48, 59, 61, 64, 69; Rejoinder, ¶¶ 13-16.

34. According to SolEs, Article 53(1) of the ICSID Convention “establishes the immediate binding nature of the award, therefore requiring compliance, except in cases where such rule does not apply.”⁵⁸ SolEs argues that Article 53(1) imposes an immediate obligation on an award debtor to comply with the award, and does not even require the award creditor to seek enforcement of the award.⁵⁹ In line with this, a stay of enforcement must be seen as an exception to the “default rule” requiring “full and immediate compliance” with the Award.⁶⁰ It must therefore only be granted in “*exceptional* cases, if and only if the circumstances objectively require it.”⁶¹ (Emphasis in original.)
35. SolEs argues that ICSID Arbitration Rule 54(1) also demonstrates the “default rule” providing that the stay shall be automatically terminated if the Committee does not decide to continue the stay within 30 days of the Committee’s constitution.⁶²
36. Finally, SolEs notes Article 52(5) of the ICSID Convention, which “establishes two thresholds for determining whether to take the exceptional step of continuing a stay.”⁶³ First, the Committee must determine if the circumstances of the case “require” (and not merely justify) the continuation of the stay.⁶⁴ If this first threshold test is satisfied, the Committee may then exercise its discretion to determine whether to stay enforcement of the award pending its decision.⁶⁵ In this respect, the burden rests on the award debtor, Spain, to demonstrate “(i) the existence of the circumstances it relies on and (ii) that these circumstances require the stay to be extended.”⁶⁶ Spain has not discharged this burden.⁶⁷ SolEs, on its part, is not obliged to show any circumstances requiring the lifting of the stay.⁶⁸

A. Whether Spain’s Application was based on serious grounds, made in good faith and is not dilatory is irrelevant

⁵⁸ Response, ¶ 7.
⁵⁹ Response, ¶¶ 7, 9.
⁶⁰ Response, ¶ 8.
⁶¹ Response, ¶ 10.
⁶² Response, ¶ 11.
⁶³ Response, ¶ 13.
⁶⁴ *Ibid.*
⁶⁵ *Ibid.*
⁶⁶ Rejoinder, ¶ 7.
⁶⁷ Rejoinder, ¶ 10.
⁶⁸ Rejoinder, ¶ 8.

37. SolEs contends that “[t]he merits of an annulment application are not relevant for the purposes of the decision on the stay of enforcement of the underlying award”⁶⁹ for two reasons. First, in SolEs’s view, it would be inappropriate for an *ad hoc* committee to review and express any views on the merits of an application for annulment at this stage of the proceeding.⁷⁰ Second, a good faith, serious application for annulment “is the least that can be expected from an applicant”, and cannot be a basis to grant a stay.⁷¹ If Spain’s *fumus boni iuris* criterion were accepted, “it would create an inappropriately low bar for a stay, at odds with the fundamental purpose of the ICSID enforcement regime.”⁷²

B. Spain cannot prove that there are circumstances requiring a stay

38. SolEs argues that Spain cannot complain of the risk of non-recoupment of the amounts paid under the Award since “[t]he risk of non-recovery is borne by any debtor to an award that has been challenged in annulment proceedings.”⁷³ Far from being an exceptional circumstance, it is a logical consequence of immediate enforceability of awards under the ICSID system.⁷⁴ In addition, Spain’s own arguments suggest that it would not suffer any hardship as a result of enforcement.⁷⁵

39. SolEs disagrees that SolEs’s financial situation reveals a risk of non-recoupment and that there is evidence that SolEs will use the proceeds to pay dividends and aggravate this risk.⁷⁶ First, Spain’s argument as to the use of the Award proceeds is speculative because SolEs did not promise, and is not obliged, to pay a dividend of 5.94% p.a. to its investors.⁷⁷ While initially regular payment of dividends were contemplated, these expectations changed when the disputed measures were put in place.⁷⁸ In any case, SolEs denies that periodic payments were promised to its investors, asserting that “[b]oth now and then, it has been contemplated that investors would receive most of

⁶⁹ Response, ¶ 25.

⁷⁰ Response, ¶ 26; Rejoinder, ¶ 43.

⁷¹ Response, ¶ 27; Rejoinder, ¶ 43.

⁷² Rejoinder, ¶ 48.

⁷³ Response, ¶ 32.

⁷⁴ *Ibid.*

⁷⁵ Response, ¶ 33.

⁷⁶ Response, ¶ 37.

⁷⁷ Response, ¶ 40.

⁷⁸ Rejoinder, ¶ 57.

their return in the form of a final future payment that would exceed any and all previous distributions.”⁷⁹

40. SolEs also contends that Spain’s arguments on its financial difficulties and insolvency were “already-refuted” in the underlying Arbitration, and notes that SolEs and its subsidiary, Fotonos de Castuera, are solvent due to their debt restructuring efforts.⁸⁰ Further, Spain misunderstands the one-Euro valuation of Fotonos de Castuera’s shares⁸¹ and the calculation of Fotonos de Castuera’s equity for the purposes of determining insolvency.⁸² Moreover, Spain’s arguments on SolEs’s financial status conveniently fails to take into account the effect of the disputed measures on its financial situation and that of Fotonos de Castuera.⁸³
41. SolEs points out that, as a general rule, the ICSID Convention does not require an award creditor to show that it would have assets to reimburse funds paid pursuant to the award if that award was annulled.⁸⁴ It argues that, on Spain’s analysis, “stays would always be granted: either the award creditor would be sufficiently financially secure and therefore ‘unworthy’ of immediate compliance by the award debtor [i.e., it suffers no harm], or the award creditor would be in need of the funds, thereby giving rise to the risk of non-recoupment of which Spain now complains.”⁸⁵ Contrary to Spain’s suggestion, all the *Eiser* case shows is that the scenario that materialized in that case – lifting of the stay and then annulment - is envisaged in the ICSID Convention.⁸⁶ Both companies are in any event solvent thanks to the financial restructuring of the project that SolEs was able to achieve.⁸⁷ SolEs concludes that there is “no evidence SolEs Badajoz would be unable to return the sums paid out to it in the event of annulment.”⁸⁸
42. As for Spain’s argument on its conflicting international obligations, SolEs disagrees that there is any conflict between the ICSID Convention and the ECT on the one hand and EU law on the other,⁸⁹ or that such conflict if it exists can justify a failure by Spain

⁷⁹ *Ibid.*

⁸⁰ Response, ¶ 45.

⁸¹ Rejoinder, ¶ 60.

⁸² Rejoinder, ¶ 61.

⁸³ Response, ¶ 46.

⁸⁴ Rejoinder, ¶ 62.

⁸⁵ Rejoinder, ¶ 63.

⁸⁶ Rejoinder, ¶ 66.

⁸⁷ Response, ¶ 46.

⁸⁸ *Ibid.*

⁸⁹ Rejoinder, ¶ 71.

to comply with its obligations under the ECT and the ICSID Convention.⁹⁰ SolEs rejects the applicability of EU law to the substance of the dispute and the primacy of EU law in disputes under the ECT involving EU Member States.⁹¹ It argues that Article 16 of the ECT provides that “ECT provisions take precedence over the provisions of other treaties, whether earlier or later, which concern the same subject-matter as the substantive investment protections of the ECT [...] or its dispute-resolution procedure.”⁹² In any event, SolEs argues that the issue of conflicting international obligations will not be resolved even if a stay of enforcement is granted, such that it cannot be said to be a circumstance “requiring” a stay.⁹³

C. Spain’s submission that SolEs would not be prejudiced does not justify a stay of enforcement

43. SolEs disagrees with Spain’s argument that the interest on the Award would compensate SolEs for any delay in payment, and contends that “post-award interest on the Award is irrelevant for the purpose of evaluating the validity of a stay request.”⁹⁴ Such interest is designed to provide compensation for the deprivation of the principal and leaves the award creditor “no better off than it would be if the respondent State had simply complied with its obligation to pay under the award.”⁹⁵ It cannot be a circumstance that requires a stay of enforcement, otherwise this would result in the award creditor having to bear the burden of showing why a stay should not be granted.⁹⁶ Accordingly, the fact that the Tribunal fixed a rate that “is higher than the current yield of a ten-year Spanish government bond (i.e., that interest rates in Spain (and elsewhere) have gone down since 2014) is irrelevant.”⁹⁷
44. SolEs also disagrees with Spain’s suggestion that continuing the stay would not harm SolEs because of Spain’s “assurance” that it will abide by its international obligations.⁹⁸ SolEs notes that Spain has consistently alleged a conflict between its obligations under EU law and its obligations under the ICSID Convention and the Energy Charter Treaty

⁹⁰ Rejoinder, ¶ 72.

⁹¹ Rejoinder, ¶ 75.

⁹² Rejoinder, ¶ 78.

⁹³ Rejoinder, ¶ 73.

⁹⁴ Response, ¶ 51. *See also* Rejoinder, ¶ 50.

⁹⁵ Response, ¶ 53; Rejoinder, ¶ 53.

⁹⁶ Response, ¶ 54.

⁹⁷ Rejoinder, ¶ 53.

⁹⁸ Response, ¶¶ 55-56.

(“ECT”),⁹⁹ and that Spain has not indicated whether, in the event that the European Commission does not authorize enforcement, it would prioritize its obligations under EU law over its obligations under the ICSID Convention and the ECT.¹⁰⁰ Indeed, SolEs argues that Spain’s Reply “leaves no doubt that Spain is prepared to evade compliance with the Award on the basis of its asserted EU obligations.”¹⁰¹ This ambiguity about Spain’s willingness to comply with the award is “yet another reason to reject its stay application.”¹⁰²

D. If the Committee finds that there are circumstances requiring a stay, the Committee should order a conditional stay

45. SolEs argues that if Spain is concerned about the risk of being unable to recoup the sums paid out under the Award, then it should “of its own accord offer concrete measures such as a guarantee in order to properly balance the debtor’s apprehension regarding the risk of non-recoupment with its ostensible willingness to pay if the Award is not annulled.”¹⁰³ Spain should not be allowed to complain about its concerns regarding allegedly “premature” payment of the Award whilst being “unprepared to agree to any measures that would balance those concerns with the Claimant’s right to payment of the Award.”¹⁰⁴ Moreover, SolEs disagrees that a conditional stay would place it in a better position than it would be without a guarantee, arguing that “a guarantee leaves an award creditor no better off than it would be if the respondent State had simply complied with its obligation to pay immediately under the award.”¹⁰⁵

E. SolEs’s request for relief

46. In its Response, SolEs requests that the Committee:

- “REJECT the Kingdom of Spain’s request to continue the stay of the Award.

⁹⁹ Response, ¶ 56.

¹⁰⁰ Response, ¶ 57; Rejoinder, ¶ 68.

¹⁰¹ Rejoinder, ¶ 69.

¹⁰² Response, ¶ 59.

¹⁰³ Rejoinder, ¶ 88.

¹⁰⁴ Rejoinder, ¶ 90.

¹⁰⁵ Rejoinder, ¶ 91.

- ORDER the Kingdom of Spain to pay all costs in connection with these proceedings.”¹⁰⁶

47. In its Rejoinder, SolEs requests that the Committee:

- “REJECT the Kingdom of Spain’s request to continue the stay of the Award.
- IN THE ALTERNATIVE, GRANT a stay conditioned on the provision of either:
 - o a bank guarantee for the full amount of the award, including interest, issued by a bank situated outside the European Union; or
 - o an unconditional undertaking to comply if the Award is not annulled, without any reservation, express or implied, on the basis of its alleged EU obligations.
- IN ANY EVENT, ORDER the Kingdom of Spain to pay all costs in connection with these proceedings.”¹⁰⁷

¹⁰⁶ Response, ¶ 61.

¹⁰⁷ Rejoinder, ¶ 93.

IV. THE COMMITTEE'S ANALYSIS

48. The Committee decides that the stay of enforcement should be continued. While the Committee is mindful that a stay of enforcement should not be granted as a matter of course in annulment proceedings, it considers that the present circumstances warrant the granting of a stay. In particular, the Committee accepts that there is a real risk that Spain may be unable to recoup the sums paid out under the Award should the Award be enforced and subsequently annulled. Thus, the prejudice that Spain might suffer if a stay is not granted outweighs the potential harm that SolEs might face if a stay is granted. The balance therefore tilts towards the continuation of the stay.

A. The applicable legal standard

49. At the outset, the Committee notes the Parties' disagreement on the applicable legal standard regarding the stay of enforcement of an award. Spain contends that the "prevailing practice in prior annulment cases has been to grant the stay of enforcement",¹⁰⁸ and disagrees with SolEs's submission that a stay of enforcement is an "exceptional measure" that should only be granted in "exceptional cases."¹⁰⁹

50. The Committee begins its analysis with the text of the ICSID Convention under which the present application is made. Article 52(5) of the ICSID Convention provides that:

"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.)

51. In the Committee's view, the 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. Numerous *ad hoc* committees have also held that there is no presumption that a stay of enforcement should be granted in annulment proceedings.¹¹⁰ In line with this, the Committee agrees with SolEs that a stay of enforcement should

¹⁰⁸ Submission, ¶ 8; citing **RL-0117**, *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, September 30, 2013, ¶ 50.

¹⁰⁹ Reply, ¶¶ 9-11. See Response, ¶¶ 3, 10.

¹¹⁰ See e.g. **CL-0021-ENG**, *Antin v. Spain*, ¶ 60; **CL-0022-ENG**, *NextEra v. Spain*, ¶ 79; **CL-0019-ENG**, *Eiser v. Spain*, ¶ 48.

not be “the default option in annulment proceedings” and that Spain bears the burden of proving that there are circumstances requiring a stay.¹¹¹

52. As for the question of what circumstances would “require” a stay, the ICSID Convention does not prescribe any particular factors that must be taken into account in deciding whether a stay should be continued, nor does it establish a presumption in favour of or against the continuation of a stay of enforcement. The Committee therefore agrees with the observations of the *ad hoc* committee in *NextEra v. Spain* that the Committee’s decision must be “one based on the set of particular factual circumstances of the case at hand” and that the Committee “will exercise its wide discretion [to stay enforcement] depending upon the circumstances of the case and its determination will be a case-specific, fact-specific inquiry.”¹¹²
53. The list of circumstances that may be considered is not closed, although it has been observed that circumstances “usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay.”¹¹³ In the absence of any presumption in favour of granting a stay, there must be “special or particular circumstances that bring the case outside the run of usual annulment applications.”¹¹⁴

B. Whether the circumstances require the stay to be continued

54. In reaching its decision, the Committee has considered the following issues raised in the Parties’ submissions:
- a. the relevance of the merits and good faith of the Application;
 - b. the prejudice that Spain might suffer if the stay is not continued; and
 - c. the prejudice that SolEs might suffer if the stay is continued.

The good faith of the Application

55. Spain contends that its Application “is based on serious grounds, was made in good faith, and is not dilatory.”¹¹⁵ It further argues that “unless faced with an obviously frivolous annulment application or other improper purposes [...] a stay of enforcement

¹¹¹ Response, ¶ 16.

¹¹² CL-0022-ENG, *NextEra v. Spain*, ¶¶ 76-77.

¹¹³ CL-0021-ENG, *Antin v. Spain*, ¶ 67.

¹¹⁴ *Ibid.*

¹¹⁵ Submission, ¶ 12.

should be granted.”¹¹⁶ SolEs’s reply is that “[t]he merits of an annulment application are not relevant for the purposes of the decision on the stay of enforcement of the underlying award.”¹¹⁷ SolEs argues that, first, the Committee should not be assessing the merits of Spain’s annulment application at this early stage, and second, the making of an annulment application in good faith is the least that can be expected from a party and cannot be a basis for staying enforcement of an award.¹¹⁸

56. In the Committee’s view, the merits of an annulment application can be relevant to a stay application insofar as a stay should not be granted where the application for annulment is manifestly frivolous or obviously unmeritorious. That said, the Committee disagrees with Spain’s submission that a stay of enforcement should be continued “unless it is obvious that the application is ‘without any basis under the Convention’ and is ‘dilatory’ in nature.”¹¹⁹ As pointed out by SolEs, such an argument has been rejected by numerous *ad hoc* committees.¹²⁰ More importantly, the Committee recognises that the vast majority of annulment applications under the ICSID Convention would have been made in good faith, such that allowing a stay of enforcement in all such cases would in effect create a presumption in favour of granting a stay. Such a presumption, as stated at paragraph 43 above, has no basis.

Prejudice suffered by Spain if a stay is not granted

57. Spain submits that it would suffer harm if the stay is not continued as it would (i) bear the risks and burdens of recovering sums paid out under the Award if the Award is enforced and subsequently annulled;¹²¹ and (ii) potentially face conflicting treaty

¹¹⁶ Submission, ¶ 4.

¹¹⁷ Response, ¶ 25.

¹¹⁸ Response, ¶¶ 25-27.

¹¹⁹ Submission, ¶ 10.

¹²⁰ See **CL-0018-ENG**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Decision on the Stay of Enforcement of the Award, February 22, 2018 (“**Karkey v. Pakistan**”), ¶ 118. See also **CL-00023-ENG**, *Masdar v. Spain*, ¶ 92; **CL-0021-ENG**, *Antin v. Spain*, ¶ 83; **CL-0022-ENG**, *NextEra v. Spain*, ¶ 82; **CL-0019-ENG**, *Eiser v. Spain*, ¶ 59 (citing **CL-0010-ENG**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Stay of Enforcement of the Award, December 4, 2014 (“**Total v. Argentina**”), ¶ 83; **CL-0013-ENG**, *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Stay of Enforcement of the Award, April 4, 2016 (“**OI European v. Venezuela**”), ¶ 115; **CL-0015-ENG**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), Decision on Applicant’s Request for a Continued Stay on Enforcement of the Award, April 12, 2017 (“**Standard Chartered Bank v. Tanzania**”), ¶ 60).

¹²¹ Submission, ¶ 19.

obligations if the Award is enforced.¹²² The Committee will address the Parties' arguments on these issues below.

58. First, Spain argues that “there is a serious risk of non-recoupment if the stay is lifted.” This is premised on (i) the likelihood that the award sums received by SolEs would be distributed to the investors and shareholders of SolEs’s parent companies,¹²³ and (ii) the lack of any valuable assets in SolEs against which Spain could recover its funds in the event that the Award is annulled.¹²⁴ SolEs in turn argues that these factors are “unexceptional or speculative, or both”, and do not justify a continuation of a stay.¹²⁵
59. The Committee considers the risk of non-recoupment to be a relevant factor in deciding the continuation of a stay of enforcement. In *Patrick Mitchell*, for example, the *ad hoc* committee granted a stay of enforcement as there was, *inter alia*, a justifiable concern by the respondent State that it would not be able to recoup the award monies which it pays to the claimant investor.¹²⁶ Similarly, the *ad hoc* committee in *NextEra v. Spain* ordered a conditional stay of enforcement on the basis that although “the ultimate owner of Claimants, at the top of a complex corporate chain, may be a large public-listed entity on the New York Stock Exchange [...] [that] does not sufficiently offset the risk of recoupment that Spain may face.”¹²⁷
60. To justify a stay of enforcement, the risk of non-recoupment must be a real one, and not simply an abstract possibility that is “common to virtually all annulment applications.”¹²⁸ In weighing whether such a risk exists, previous *ad hoc* annulment committees have considered factors such as:
- a. the creditor’s natural or juridical character;¹²⁹
 - b. the localization of its assets or activities;¹³⁰ and

¹²² Reply, ¶ 162.

¹²³ Submission, ¶ 24.

¹²⁴ Submission, ¶ 25.

¹²⁵ Response, ¶¶ 30, 37.

¹²⁶ **RL-0139**, *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, November 30, 2004 (“*Mitchell v. Congo*”), ¶ 24.

¹²⁷ **CL-0022-ENG**, *NextEra v. Spain*, ¶ 88. See also **CL-0023-ENG**, *Masdar v. Spain*, ¶ 121.

¹²⁸ **CL-0021-ENG**, *Antin v. Spain*, ¶ 72.

¹²⁹ **RL-0139**, *Mitchell v. Congo*, ¶ 24; **RL-0116**, *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo* (ICSID Case No. ARB/10/4), *Décision sur la Suspension de l'Execution de la Sentence Arbitrale*, September 30, 2014 (“*Lahoud and Lahoud v. Congo*”), ¶¶ 20, 65.

¹³⁰ **RL-0139**, *Mitchell v. Congo*, ¶24; **RL-0116**, *Lahoud and Lahoud v. Congo*, ¶¶ 20, 32, 65.

- c. the creditors financial stability in terms of assets¹³¹, revenue¹³², liquidity¹³³, profits¹³⁴, solvency¹³⁵ or risk of bankruptcy.¹³⁶

61. In the present case, Spain argues that any sums paid to SolEs under the Award would likely be distributed to their parent equity funds, SolEs 21 GmbH and SolEs 22 GmbH, which would in turn use these funds to pay promised dividends to their shareholders.¹³⁷ In this regard, Spain notes that SolEs (and its parent funds) have not paid dividends to their investors for the last seven years although their prospectuses indicated “high, regular dividends” for said investors.¹³⁸
62. In response, SolEs states that it is under no obligation to make payment of these dividends, and that Spain’s suggestions as to how SolEs would use the award sums remain speculative.¹³⁹ SolEs, however, does not give any further evidence on its planned use of the award sums should the Award be enforced, arguing that “the applicable ICSID provisions impose no obligation on SolEs Badajoz to demonstrate that circumstances require the lifting of the stay.”¹⁴⁰ SolEs also cites the *ad hoc* committee’s observation in *Masdar* that the distribution of award proceeds to shareholders are “possible scenarios that may occur in all cases in which the proceeds of an award are obtained by an original creditor.”¹⁴¹ It thus appears that SolEs is not ruling out that Award proceeds may be distributed to shareholders.

¹³¹ **CL-0010-ENG**, *Total v. Argentina*, ¶ 103; **CL-0015-ENG**, *Standard Chartered Bank v. Tanzania*, ¶ 73; **CL-0018-ENG**, *Karkey v. Pakistan*, ¶ 115; **RL-0127**, *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Stay of Enforcement of the Award, February 21, 2020, ¶ 75.

¹³² **CL-0010-ENG**, *Total v. Argentina*, ¶ 103.

¹³³ **CL-0013-ENG**, *OI European v. Venezuela*, ¶ 113.

¹³⁴ **CL-0015-ENG**, *Standard Chartered Bank v. Tanzania*, ¶ 73.

¹³⁵ **CL-0012-ENG**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Decision on the Stay of Enforcement of the Award, March 11, 2016, ¶ 64; **CL-0013-ENG**, *OI European v. Venezuela*, ¶ 113; **CL-0014-ENG**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Decision on the Request to Maintain the Stay of Enforcement of the Award, March 24, 2017, ¶ 87.

¹³⁶ **CL-0018-ENG**, *Karkey v. Pakistan*, ¶ 115; **CL-0020-SPA**, *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/13/11), Decision on the Request for a Continuation of the Stay of Enforcement of the Award, September 6, 2018, ¶ 98; **CL-0021-ENG**, *Antin v. Spain*, ¶ 73; **CL-0023-ENG**, *Masdar v. Spain*, ¶ 119-126.

¹³⁷ Submission, ¶¶ 26-27.

¹³⁸ Reply, ¶¶ 39-42.

¹³⁹ Response, ¶ 43.

¹⁴⁰ Rejoinder, ¶ 8.

¹⁴¹ Response, ¶ 42; **CL-00023-ENG**, *Masdar v. Spain*, ¶ 123.

63. Having heard the Parties' evidence and submissions, the Committee concludes that there is a real likelihood that the sums paid to SolEs under the Award would be distributed to the investors of SolEs's parent funds. On its part, Spain has shown evidence that SolEs has promised its investors a dividend of 5.94% per annum but has not made any dividend payments since 2012.¹⁴² While the prospectus relied on by Spain does not show a binding legal obligation to provide such returns, it does indicate that this is the business model and how capital and funding are obtained. Given SolEs's admission that "SolEs Badajoz is not currently generating income for its investors as a result of the Spanish measures," the Committee finds it not unreasonable to assume, as Spain argues, that such dividends, if paid, would have to come out from the monies paid under the Award.¹⁴³
64. SolEs, on its part, has not adequately rebutted Spain's contentions. SolEs has not, for example, identified any intended use of the Award monies that would alleviate any non-recoupment concerns (e.g. maintenance of adequate cash levels, purchase of marketable securities or acquisition of capital). Further, unlike the award creditors in other annulment proceedings,¹⁴⁴ SolEs has not offered any risk-mitigating responses, such as the deposit of the proceeds in an escrow account or an undertaking to repay any amounts eventually due or to refrain from disbursing or transferring them while the annulment proceeding is still underway. In short, there is no countervailing evidence showing that the risk of non-recoupment is unlikely or remote, e.g. showing that the Award proceeds would not be distributed by SolEs to its shareholders. The Committee is therefore left with no suggestion as to how the proceeds of the Award (which are substantial and amount to more than 14 times SolEs's assets or equity as of 31 December 2018) would be utilised other than to address the unfulfilled expectation of dividend payments to SolEs's parent investors. In these circumstances, it is not unreasonable for this Committee to assume that SolEs would use the proceeds from the Award (e.g. by distributing dividends to its investors) in a manner that may put those proceeds out of reach from Spain in the event that the Award is annulled. Were the situation otherwise, the Committee would have expected SolEs to come forward and provide more information than it did.

¹⁴² Submission, ¶ 26; Reply, ¶ 42.

¹⁴³ Response, ¶ 46.

¹⁴⁴ See, e.g., CL-0023-ENG, *Masdar v. Spain*, ¶ 118; CL-0022-ENG, *NextEra v. Spain*, ¶ 88.

65. Secondly, Spain submits that, in the event that the Award proceeds are distributed to SolEs's investors, SolEs and its subsidiary Fotonos de Castuera will have no assets against which Spain would be able to recover its funds if the Award is later annulled.¹⁴⁵ The Committee finds Spain's argument and evidence to be persuasive.
66. On their face, the financial statements of SolEs and its subsidiary, Fotonos de Castuera, show that these entities do not have assets sufficient to repay the Award sum whether now or in February 2022 when the present annulment proceeding is scheduled to be completed. As of 31 December 2018, SolEs's total assets were EUR 2.85 million, the most part of which were current assets (EUR 2.75 million).¹⁴⁶ Its gross revenue was EUR 95,000, while its net income was EUR 2.34 million.¹⁴⁷ These figures alone lend no confidence to SolEs's ability to repay the Award sum of EUR 40.49 million if the Award sums are spent and the Award is subsequently annulled.
67. Further, even if the Committee accepts SolEs's argument that both itself and its subsidiary are solvent, this would not eliminate the risk of non-recoupment highlighted by Spain. Solvency alone does not guarantee that SolEs will have sufficient assets to repay the award sums if required.
68. As for SolEs's argument that Spain "does not say a word about the impact of the disputed measures on the current financial situation of SolEs Badajoz and its Spanish subsidiary",¹⁴⁸ the Committee does not see the relevance of such an argument. Insofar as the disputed measures imposed by Spain had caused a financial loss to SolEs and its subsidiary, this loss would be compensated for by the Award. If SolEs chooses to spend the Award proceeds, then it cannot blame Spain for its resulting inability to repay these proceeds if the Award is subsequently annulled.
69. In the premises, the Committee accepts that if SolEs distributes the proceeds of the Award to its investors, it would be unlikely for Spain to recover those proceeds from SolEs's assets in the event that the Award is annulled. This finding, in conjunction with the Committee's finding that there is a real likelihood that SolEs distributes the Award

¹⁴⁵ Submission, ¶ 25.

¹⁴⁶ Submission, ¶ 29; **Annex-027**, *SolEs Badajoz GmbH, Jahresabschluss zum Geschäftsjahr vom 01.01.2018 bis zum 31.12.2018*. The English translation of Annex-027 is provided in paragraph 29 of the Submission.

¹⁴⁷ **C-003-GER**, *Bericht über die Erstellung des Jahresabschlusses zum 31. Dezember 2018 der SolEs Badajoz GmbH, Düsseldorf, Anlage II*.

¹⁴⁸ Response, ¶ 46.

sums to its investors, poses in the Committee’s view a significant risk that Spain would not be able to recoup the monies paid under the Award should the Award be annulled. This is a significant, if not decisive, circumstance within the meaning of Article 52(5) of the ICSID Convention, which militates towards the continuation of the stay of enforcement of the Award.

70. Thirdly, Spain submits that even if the proceeds of the Award can be recovered in the event of an annulment, the process of such recovery would impose a significant burden and expense on Spain that can be avoided with a stay of enforcement.¹⁴⁹ The Committee does not consider this to be a significant consideration supporting a stay of enforcement. As noted by previous *ad hoc* committees, the burden and expense of recovering award proceeds in an event of a successful annulment is common to annulment proceedings, and hence does not require a stay of enforcement to be granted.¹⁵⁰
71. Fourthly, Spain argues that the enforcement of the Award might accrue to it conflicting obligations under EU law and the ICSID Convention. In particular, EU law requires Spain to “submit the Award to the European Commission for a determination as to whether it constitutes incompatible State Aid.”¹⁵¹ If the stay is discontinued, the Award is enforced, and the European Commission subsequently finds that the Award constitutes incompatible State Aid, Spain would have to either commence proceedings against SolEs to recover the Award sum or, alternatively, face possible litigation brought by SolEs to overturn the European Commission’s determination.¹⁵² Spain submits that, since the entire issue would be moot if the Award is annulled, the Parties may avoid such “unnecessary burden and expense [...] by staying enforcement of the Award at this time.”¹⁵³
72. In the Committee’s view, any procedural hardships resulting from alleged conflicts between EU law and other treaty obligations do not require a stay of enforcement.

¹⁴⁹ Submission, ¶¶ 21-22.

¹⁵⁰ CL-0021-ENG, *Antin v. Spain*, ¶ 72.

¹⁵¹ Reply, ¶ 153.

¹⁵² Reply, ¶¶ 154-155.

¹⁵³ Reply, ¶¶ 156-157.

73. To begin with, the Committee agrees with the *ad hoc* committee in *Masdar* that, while a stay might allow Spain to temporarily avoid its conflicting obligations under the ICSID Convention and EU law, it would not change “the circumstances underlying the alleged conflict of laws.”¹⁵⁴ The *ad hoc* committee in *Eiser* also expressed a similar view in the face of such an argument:

“If the argument is that seeking clearance would create a contradiction between the ICSID Convention Rules and EU law, this issue, together with the need to request clearance from the EU, has been heavily debated by the Parties. ***The Committee considers that Spain has not shown that the manner through which or the process that will be followed to comply with its obligation contained in Article 53(1) of the ICSID Convention would be affected by the fact that the request for stay is granted or denied*** now or when the final ruling of the Committee is issued. Thus, the Committee denies this ground for [the] request to stay the enforcement of the Award.” (Emphasis added.)¹⁵⁵

74. A stay of enforcement would not necessarily resolve the procedural burdens complained of by Spain. For instance, a decision by the Commission on Spain’s notification of the Award for a State Aid assessment may trigger further litigation. Therefore, the Committee does not consider such difficulties to be a circumstance requiring the stay of enforcement to be continued.
75. In any event, the Committee also does not consider a stay of enforcement to be an appropriate means for resolving Spain’s conflicting international obligations. In this respect, the Committee shares the same doubt as the *Masdar* committee as to whether “the mere existence of constraints imposed by legal regimes other than that of the ICSID Convention – whether national or international – may be a valid ‘circumstance’ that ‘requires’ the stay of enforcement of the Award.”¹⁵⁶ As stated by the *ad hoc* committee in *Antin*, 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.”¹⁵⁷
76. Having considered the four issues above, the Committee is of the view that the enforcement of the Award at this juncture would prejudice Spain because there is a real risk that Spain would be unable to recoup the Award sums if the Award is subsequently

¹⁵⁴ CL-0023-ENG, *Masdar v. Spain*, ¶ 132.

¹⁵⁵ CL-0019-ENG, *Eiser v. Spain*, ¶ 69.

¹⁵⁶ CL-0023-ENG, *Masdar v. Spain*, ¶ 132.

¹⁵⁷ CL-0021-ENG, *Antin v. Spain*, ¶ 76.

annulled. This is premised on the Committee's findings that (i) there is a real likelihood that SolEs would use the proceeds of the Award and distribute them to its investors, and (ii) once those amounts are no longer available, SolEs would not have significant assets against which Spain would be able to recoup the Award sums in the event that its Application succeeds.

77. For the sake of clarity, the Committee emphasises that it is well within the rights of an award creditor to use the funds obtained from an award in any manner that it deems fit. However, the question before the Committee is not whether SolEs is entitled to distribute the proceeds of the Award to its investors, but whether there is a real possibility that such distribution occurs under circumstances that would prevent Spain from recouping the Award proceeds in the event that the Award is annulled. For the reasons set out above, the Committee answers this question in the affirmative.

Whether SolEs would be prejudiced if a stay is granted

78. Spain argues that SolEs would not suffer significant prejudice as (i) the interest of 1.74% compounded quarterly sufficiently compensates for any delay in the enforcement of the Award; and (ii) there is no risk that SolEs would not be able to enforce its Award against Spain, the fifth-largest economy in the EU.¹⁵⁸
79. SolEs does not point to any particular circumstance showing prejudice, but argues that (i) a post-award interest is irrelevant for the purpose of evaluating the validity of a stay request; and (ii) there is little confidence that Spain would willingly comply with its obligations under the ICSID Convention to honour the Award.¹⁵⁹ Further, SolEs submits that even if it is not prejudiced by a stay of enforcement, such lack of prejudice is not a circumstance requiring a stay to be granted.¹⁶⁰
80. The Committee agrees with SolEs's submission that a lack of prejudice is not a circumstance justifying a stay of enforcement. However, it is a relevant consideration in assessing whether the continuation of the stay would cause SolEs any prejudice so as to warrant the stay not being granted even though there are circumstances otherwise

¹⁵⁸ Submission, ¶¶ 40-49.

¹⁵⁹ Response, ¶¶ 51-59.

¹⁶⁰ Response, ¶¶ 50-59.

requiring such a stay. Having considered this issue, the Committee finds that no such prejudice has been established.

81. With respect to the question of post-award interest, the Committee agrees with SolEs and the *Masdar* committee that the payment of that interest does not in itself “speak to whether the circumstances require a stay.”¹⁶¹ At best, the payment of post-award interest “may show that the stay is less (or not at all) burdensome.”¹⁶² This might be a relevant consideration in establishing prejudice (or the lack thereof) for SolEs, but in this case, it is not significant.
82. With respect to SolEs’s ability to enforce the Award against Spain, there is no dispute as to Spain’s economic ability to honour the Award. While SolEs suggests that Spain is relying on EU law to potentially “escape its obligations under the ICSID Convention and the ECT,”¹⁶³ the Committee considers that there is insufficient evidence to impute that intent on Spain. In any case, even if Spain’s reluctance to pay the Award sums pending clearance from the European Commission poses difficulties in enforcing the Award, this is an issue to be resolved by the competent courts at the place of enforcement and not by this Committee in addressing the present application. For this reason, the Committee does not consider this issue to be a significant one in deciding whether a stay should be granted.
83. For the above reasons, the Committee does not consider that a stay of enforcement of the Award would cause any particular harm or prejudice to SolEs. In the absence of such prejudice, the Committee finds that it has no reason not to exercise its discretion to grant a stay in circumstances where such a stay is, in the Committee’s view, required.

C. Whether security should be ordered as a condition for the stay

84. SolEs argues that, if this Committee finds that there are circumstances requiring a stay, it should order the stay to be continued only on the condition that Spain provides:¹⁶⁴
 - a. a bank guarantee payable outside the EU; or

¹⁶¹ Response, ¶ 53; CL-00023-ENG, *Masdar v. Spain*, ¶ 98.

¹⁶² *Ibid.*

¹⁶³ Response, ¶ 57.

¹⁶⁴ Rejoinder, ¶ 92.

- b. an unconditional undertaking by Spain to comply with the Award if it is not annulled, without any reservation, express or implied, based on its alleged EU obligations.
85. Spain contends that the above conditions should be rejected. First, such conditions would circumvent the provisions of EU law that might stand in the way of enforcing the Award, and thus place SolEs in a “better position than it would have been in without a guarantee.”¹⁶⁵ Moreover the maintenance of a bank guarantee would involve significant bank charges, thus imposing a further burden on Spain.¹⁶⁶
86. In deciding whether to order a condition for the stay, the Committee is guided by the observation made by the *ad hoc* committee in *Azurix v. Argentina*, that the provision of a security is not “an automatic or counterbalancing right” to a stay, but should instead be ordered only in “limited exceptions [...] in order to eliminate any ‘reasonable doubt as to the State’s intent to comply’.”¹⁶⁷ In light of its finding that there is insufficient evidence to show that Spain might be unable or unwilling to honour the Award (see paragraph 82 above), the Committee does not find that the circumstances warrant the imposition of any condition for the continuation of the stay.

D. Whether the European Commission should be granted leave to intervene in the present application

87. On July 17, 2020, the European Commission filed an *Application for Leave to Intervene as a Non-Disputing Party* in the present annulment proceeding. One of the issues on which the European Commission requested to be heard, “where necessary”, was on the question of whether international law and EU law require the Award to be stayed unconditionally pending the conclusion of the annulment proceedings.¹⁶⁸
88. Given the Committee’s decision to continue the stay, it is unnecessary to consider the EC Application in respect of this issue. The Committee will separately consider the rest of the EC Application together with the Parties’ observations and their comments

¹⁶⁵ Reply, ¶ 207, citing **RL-0128**, *Tenaris v. Venezuela*, ¶ 155.

¹⁶⁶ Reply, ¶ 205.

¹⁶⁷ **RL-0119**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, December 28, 2007, ¶ 25.

¹⁶⁸ EC Application, July 17, 2020, ¶¶ 47-53, 58(b).

on each other's observations. The EC will be informed accordingly by separate communication.

V. DECISION AND ORDERS

89. For the reasons stated above, the Committee:

- a. decides that the stay of enforcement of the Award should be continued unconditionally until the conclusion of the present annulment proceeding; and
- b. reserves the issue of costs on this Application to a further order, decision or award.



Mr Fernando Pierola
Member of the *ad hoc* Committee



Mr. Colm Ó hOisín, SC
Member of the *ad hoc* Committee



Mr. Cavinder Bull, SC
President of the *ad hoc* Committee