



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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May 20, 2020

By email

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Re: Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain
(ICSID Case No. ARB/14/1) – Annulment Proceeding

Dear Sirs and Mesdames,

The *ad hoc* Committee has instructed me to circulate the attached signed copy of Procedural Order No. 3.

Further to Section 21 of the revised version of Procedural Order No. 1, the Parties are invited to indicate by **Wednesday, May 27, 2020** whether they consent to the publication of the procedural orders issued in this case on ICSID's website.

Your sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by several loops and a horizontal line extending to the right.

Paul-Jean Le Cannu
Secretary of the *ad hoc* Committee

Attachment

cc (*with attachment*): Members of the *ad hoc* Committee

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MASDAR SOLAR & WIND COOPERATIEF U.A.

v.

KINGDOM OF SPAIN

ICSID Case No. ARB/14/1 – Annulment Proceeding

PROCEDURAL ORDER NO. 3
**Decision on the Kingdom of Spain’s Request for a Continuation of the Stay of Enforcement
of the Award**

Members of the *ad hoc* Committee

Mr. Kap-You (Kevin) Kim, President of the *ad hoc* Committee
Mr. Noé Fernando Piérola Castro, Member of the *ad hoc* Committee
Ms. Carita Wallgren-Lindholm, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee

Mr. Paul Jean Le Cannu

Date: May 20, 2020

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I. INTRODUCTION

1. This “**Decision**” addresses the request made by the Kingdom of Spain (“**Spain**”) for a continuation of the stay of enforcement (the “**Request for Stay**”) of the Award rendered on May 16, 2018 in the ICSID Case No. ARB/14/1 (the “**Award**”) between Masdar Solar & Wind Cooperatief U.A. (“**Masdar**”) and Spain.¹
2. The Decision contains six sections, including the present introduction as Section I. Section II states the procedural background of this Decision and the Request for Stay. Section III provides a brief summary of the positions of Spain and Masdar (jointly “**the Parties**”). Section IV sets out the *ad hoc* Committee’s analysis. Section V addresses Masdar’s request for the establishment of a security if the stay is granted. Section VI deals with the allocation of fees and costs related to the Request for Stay. Section VII contains the decision of the *ad hoc* Committee (the “**Committee**”).

II. PROCEDURAL BACKGROUND

3. On March 28, 2019, Spain filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) an Application for Annulment (the “**Annulment Application**”) of the Award.
4. In that application, pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(1), Spain also requested the ICSID Secretary-General (the “**Secretary-General**”) to stay provisionally the enforcement of the Award.²
5. On April 4, 2019, the Acting Secretary-General registered the Annulment Application, and notified Masdar that the enforcement of the Award was provisionally stayed pursuant to ICSID Arbitration Rule 54(2).
6. On May 23, 2019, the Secretary-General notified the Parties of the constitution of the Committee in accordance with Article 52(3) of the ICSID Convention. The Committee was

¹ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), Award, May 16, 2018.

² Annulment Application, ¶¶ 85, 86 (a) and (b).

composed of Mr. Makhdoom Ali Khan (President), a national of Pakistan; Mr. Noé Fernando Piérola Castro, a national of Peru and Switzerland; and Ms. Carita Wallgren-Lindholm, a national of Finland. The Chairman of the Administrative Council appointed the three members. The Secretary-General also informed the Parties that the annulment proceeding was deemed to have begun in accordance with Rules 6 and 53 of the ICSID Arbitration Rules. They were also informed that Mr. Paul-Jean Le Cannu, Team Leader/Legal Counsel, would serve as Secretary of the Committee.

7. By letter of May 28, 2019, the Committee, through its Secretary, informed the Parties that it had “decided to extend *pro tem* the provisional stay of enforcement until it has heard both Parties and has reached a decision on the continuation of the stay.” To address the Request for Stay, the Committee established the following schedule:
 - (i) Tuesday, June 11, 2019: for the Applicant (Spain), to file a submission specifying the circumstances that require the continuation of the stay of enforcement.
 - (ii) Tuesday, June 25, 2019: for the Respondent (Masdar), to file a response on the stay of enforcement.
 - (iii) Tuesday, July 2, 2019: for the Applicant (Spain), to file a reply on the stay of enforcement.
 - (iv) Tuesday, July 9, 2019: for the Respondent (Masdar), to file a rejoinder on the stay of enforcement.
8. The Committee proposed dates for the first session. It also informed the Parties that during that session, they would be afforded the opportunity to make oral arguments on the issue of the stay. Given the Parties’ availability, the Committee decided to hold the first session on July 15, 2019 by telephone.³

³ See email from the Secretariat dated May 31, 2019.

9. On June 11, 2019, the “Submission of the Kingdom of Spain in Support of the Continuation of the Stay of Enforcement of the Award” (“**Spain’s Submission**”) was filed together with Annexes 29 to 40.⁴
10. On June 25, 2019, the “Respondent’s Response on Stay of Enforcement” (“**Masdar’s Response**”) was filed together with exhibits R-001 to R-011 and legal authorities RL-001 to RL-029.⁵
11. On July 2, 2019, the “Reply of the Kingdom of Spain in Support of the Continuation of the Stay of Enforcement of the Award” (“**Spain’s Reply**”) was filed together with Annexes 41 to 58.⁶
12. On July 9, 2019, the “Respondent’s Rejoinder on the Stay of Enforcement” (“**Masdar’s Rejoinder**”) was filed together with exhibits R-012 to R-013 and legal authorities RL-030 to RL-040.⁷
13. On the same date, in preparation for the first session, the Committee circulated to the Parties a draft agenda for that session and a draft Procedural Order No. 1.
14. On July 15, 2019, the Committee held the first session by telephone conference. The Parties and the Members of the Committee discussed the draft Procedural Order No. 1. The Parties also presented oral arguments on the request for continuation of the stay of enforcement. The audio recording of the first session and hearing on the Request for Stay was made available to the Parties and the Committee via the virtual platform BOX.

⁴ In the consolidated list of exhibits submitted by Spain on December 16, 2019 and the consolidated list of legal authorities submitted by Spain on January 15, 2020, R-0325 to R-0326 and RL-0110 to RL-0119.

⁵ In the Consolidated Indices of Factual Exhibits and Legal Authorities submitted by Masdar on January 23, 2020, C-0215 to C-0225 and CL-0261 to CL-0288.

⁶ In the consolidated list of exhibits submitted by Spain on December 16, 2019 and the consolidated list of legal authorities submitted by Spain on January 15, 2020, R-0327, RL-0066 and RL-0120 to RL-0135.

⁷ In the Consolidated Indices of Factual Exhibits and Legal Authorities submitted by Masdar on January 23, 2020, C-0226 to C-0227 and CL-0289 to CL-0298.

15. On July 17, 2019, the European Union filed an Application for Leave to Intervene as a Non-Disputing Party (the “NDP Application for Leave”). The Parties’ submitted their comments on the NDP Application for Leave on July 29, 2019.
16. On August 6, 2019, based on the Parties’ comments during the first session, the Committee issued Procedural Order No. 1.
17. On October 9, 2019, the Secretary-General informed the Parties that on that date Mr. Makhdoom Ali Khan had resigned from his position as President of the Committee in accordance with ICSID Arbitration Rules 8(2) and 53. Pursuant to ICSID Arbitration Rules 10(2) and 53, the Secretary-General deemed the proceeding suspended until the vacancy was filled.
18. On November 11, 2019, the Secretary-General informed the Parties that Mr. Kap-You (Kevin) Kim had accepted his appointment as President of the Committee.⁸ The annulment proceeding resumed from the point it had reached at the time the vacancy occurred.
19. By email of November 13, 2019, Spain asked the Committee whether it could specify the deadlines for its next submissions.
20. On November 15, 2019, Masdar wrote to the Committee regarding the procedural timetable, the Request for Stay, and a request for leave to introduce into the record in the Annulment Proceeding the Decision on the Continuation of the Provisional Stay of Enforcement of the Award rendered in *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) on October 21, 2019 (the “**Antin Decision**”). On November 18, 2019, Spain commented on Masdar’s letter of November 15, 2019. On November 19, 2019, the Parties exchanged a further round of comments on the issues addressed in Masdar’s November 15 letter.

⁸ See also the Claimant’s email of October 18, 2019; the Applicant’s email of October 18, 2019; the Secretariat’s email of October 18, 2019; the Secretariat’s communications of October 29, 2019; the Applicant’s letter of November 4, 2019; the Secretariat’s email of November 6, 2019; the Secretariat’s letters of November 7 and 8, 2019.

21. By letter of November 20, 2019, the Committee through its Secretary invited the Parties to seek an agreement by November 22, 2019, on the necessary adjustments to all pre-hearing deadlines in the existing procedural calendar so as to preserve the hearing dates. Having noted that both Parties would be willing to participate in a further hearing to address the Request for Stay, the Committee further invited the Parties to hold the proposed hearing by telephone on December 4, 2019.
22. On November 22, 2019, the Parties submitted an agreed procedural timetable to the Committee.
23. On December 3, 2019, the Committee through its Secretary informed the Parties that it adopted the Parties' agreed revisions to the procedural timetable. The Committee also circulated a list of questions for the Parties to address at the December 4 hearing.
24. On December 4, 2019, Spain requested that the Committee provide a Spanish translation of the December 3 list of questions, invoking Section 11 of Procedural Order No. 1.
25. On the same day, the Committee held a conference call with the Parties during which the Parties addressed (i) the Request for Stay, including the December 3 list of questions, (ii) Masdar's November 15, 2019 request for leave to submit the *Antin* Decision, and (iii) the European Commission's Application for Leave to Intervene as a Non-Disputing Party. Spain reiterated that the December 3 list of questions should have been sent in both English and Spanish, as required by Section 11 of PO1⁹, a position with which Masdar disagreed.¹⁰
26. On December 16, 2019, Spain submitted the electronic version of its Memorial in support of the Annulment Application, along with lists of exhibits and legal authorities, and the Expert Report of Professor Ricardo Gonsalbo Bono dated December 15, 2019. On January 8, 2020, the Centre confirmed receipt of these documents in hard copy, along with one USB device containing these documents and the following:
 - Hyperlinked List of Exhibits (English) in PDF and Excel format;

⁹ Tr. Conference call, December 4, 2019, 33:17 – 34:1; 43:17 – 44:8.

¹⁰ Tr. Conference call, December 4, 2019, 41:17 – 42:5; 45:10-13.

- Exhibits R-0112, R-0113, R-0146 to R-0147, R-0149 to R-0153, R-0181, R-0309 to R-0329 (in the languages indicated in the index);
 - Hyperlinked List of Legal Authorities (English) in PDF and Excel format; and
 - Legal Authorities RL-0002, RL-0003, RL-0007, RL-0010, RL-0011, RL-0045, RL-0053, RL-0064 to RL-0066, RL-0076, RL-0089, RL-0096, RL-0100 to RL-0136 (in the languages indicated in the index).
27. By letter of December 17, 2019, the Committee through its Secretary recalled that the Applicant had indicated in the December 4 conference call that it would like to request leave to submit additional legal authorities. The Committee invited the Applicant to do so by December 23, 2019, following which the Respondent (Masdar) would be afforded an opportunity to comment on the Applicant's (Spain's) request. The Committee would then issue its ruling on this request and Masdar's November 15, 2019 request. The Committee also invited Masdar to comment on the Applicant's request at paragraphs 276 and 281 of the Memorial in Support of Application for Annulment by December 23, 2019.
28. On the same date, the Committee through its Secretary circulated the Spanish version of PO1 and the revised English version of PO1.
29. On December 19, 2019, Masdar submitted comments in response to the Committee's invitation to comment on the Applicant's request at paragraphs 276 and 281 of the Memorial in Support of Application for Annulment. On December 23, 2019, the Committee through its Secretary invited Masdar to file its comments on the Applicant's request in its Counter-Memorial on Annulment, which was scheduled to be filed on April 1, 2020.
30. On the same date, Spain informed the Committee that it opposed Masdar's request to introduce the *Antin* Decision into the record and that it sought leave to introduce three additional legal authorities.¹¹ Further to the Committee's invitation, Masdar submitted on

¹¹ **Ex. RL-168**, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1), Award, December 2, 2019; **Ex. RL-171**, Order of the United States District Court of the District of

January 3, 2020 its comments on Spain's request for leave to introduce additional authorities, as well as further requests for leave to file additional legal authorities and factual exhibits into the record.

31. On January 8, 2020, having taken note of the Parties' requests for leave to file additional legal authorities and factual exhibits, the Committee, through its Secretary, invited the Parties to confer and inform the Committee by January 14, 2020 whether they were able to agree on the introduction of the aforementioned documents into the record.
32. On January 14, 2020, the Parties confirmed their agreement that the following documents should be admitted into the record in the following terms:

Submitted by Masdar:

- Decision on the Continuation of the Provisional Stay of Enforcement of the Award rendered in *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) on 21 October 2019;
- Award of 15 July 2019 in *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* (ICSID Case No. ARB/15/20);
- Award of 31 July 2019 in *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/38);
- Award of 2 August 2019 in *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* (ICSID Case No. ARB/14/12);
- Award of 6 September 2019 in *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain* (ICSID Case No. ARB/15/36); and
- Order of the Federal Court of Australia dated 25 October 2019 concerning enforcement of the *Antin* Award (the Australian Order);

Columbia dated August 28, 2019 ordering the stay of enforcement of the *Antin* Award; **Ex. RL-172**, *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Stay of Enforcement of the Award, December 12, 2019 ("*Caratube v. Kazakhstan*").

Submitted by Spain:

- Award of 2 December 2019 in *Stadtwerke München GmbH (“SWM”); RWE Innogy GmbH and others v Kingdom of Spain* (ICSID Case No. ARB/15/1);
- the Order of the United States District Court of the District of Columbia dated 28 August 2019 ordering the stay of enforcement of the *Antin* Award (the US Court Order);
- Decision on the Stay of Enforcement of the Award in *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* dated 12 December 2019 (ICSID Case No. ARB/13/13);
- Decision on Jurisdiction, Liability and Directions on Quantum dated 16 April 2015 in *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16); and
- Decision on Jurisdiction, Liability and Certain Issues of Quantum dated 30 December 2019 in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34).

These documents may be admitted as legal authorities, without prejudice to Masdar’s position that the US Court Order and the Australian Order are (in the context of this proceeding) properly factual exhibits.

33. On January 14, 2020, further to the Parties’ agreement of December 19, 2019, Spain submitted electronically the Spanish version of the Memorial in support of the Annulment Application, along with lists of exhibits and legal authorities, and the Expert Report of Professor Ricardo Gonsalbo Bono dated December 15, 2019.
34. On January 15, 2020, the Committee through its Secretary invited each Party to submit by January 22, 2020 its comments on the above listed documents submitted by the other Party. By email of January 22, 2020, the Committee clarified that each Party was invited to submit its comments on the documents submitted by both Parties, i.e. all of the documents listed in Masdar’s email of January 14, 2020. The deadline to do so was extended to January 23, 2020.

35. On January 23, 2020, the Parties simultaneously submitted the following documents:
- Spain’s Observations regarding the New Legal Authorities dated January 23, 2020 (the “Spain January 23, 2020 Comments”);
 - Masdar’s Comments on New Legal Authorities Submitted by the Parties in relation to Spain’s Application for the Continuation of the Stay of Enforcement, of the same date (the “Masdar January 23, 2020 Comments”);
 - The Consolidated Index of Masdar’s Legal Authorities; and
 - The Consolidated Index of Masdar’s Factual Exhibits.
36. On January 27, 2020, Spain sought leave to file two additional legal authorities pursuant to Section 15.6 of PO1. Further to the Committee’s invitation, Masdar submitted comments on this request on February 3, 2020 and sought permission to file comments on certain “misrepresentations” it identified in Spain’s January 23, 2020 Comments, following which Spain indicated it had contacted Masdar to discuss the matter.
37. On February 12, 2020, Spain informed the Committee that, following consultations with counsel for Masdar, a paragraph of its January 23, 2020 Comments was to be replaced with a new text.¹²
38. On February 14, 2020, the Committee conveyed the following message to the Parties through its Secretary:

The Committee recalls that Masdar had expressed concerns regarding certain comments made in Spain’s January 23, 2020 submission. The Committee understands from Spain’s email of February 12, 2020 that Masdar’s concerns have been addressed by the changes proposed by Spain to its January 23, 2020 submission. For the sake of good order, the Committee invites Masdar to confirm that the Committee’s understanding is correct and that Masdar’s request in paragraph 6 of its February 3, 2020 letter is now moot.

¹² In this paragraph, Spain discussed the “Order of the Federal Court of Australia dated 25 October 2019 concerning enforcement of the *Antin* Award.”

The Committee further understands that Spain's January 27, 2020 request under Section 15.6 of Procedural Order No. 1 is still pending. Unless otherwise advised by the Parties, the Committee will take the matter under advisement and issue its decision on the request in the coming days.

39. On February 15, 2020, Masdar confirmed that "it no longer pursue[d] the request in paragraph 6 of its 3 February 2020 letter, as Masdar's concern arose out of Spain's misrepresentation of the Australian Order, which, as Spain now concedes, lifted the stay on enforcement of the Antin award in Australia." Further to Spain's request for leave to respond to Masdar's communication, the Committee invited Spain to submit its comments on the understanding that (i) Spain's response should be limited to addressing Masdar's characterization that Spain has purportedly conceded that the Australian Order lifted the stay on enforcement, and (ii) there was no need for Spain to revisit earlier allegations of misrepresentation or inaccuracy regarding the third paragraph on page 3 of Spain's comments of January 23, 2020. Spain submitted its comments on March 6, 2020.
40. On March 13, 2020, the Committee conveyed the following message to the Parties through its Secretary:

The Committee refers to Spain's request pursuant to Section 15.6 of Procedural Order No. 1 dated January 27, 2020 ("Spain's request for leave") and Masdar's February 3, 2020 comments on Spain's request for leave.

Spain requests leave to submit the Order of the United States District Court for the District of Columbia in *Novenergia II - Energy & Environment (SCA) v. The Kingdom of Spain*, Civil Action No. 18-cv-01148, January 27, 2020, and the accompanying Memorandum Opinion.

The Committee notes that the Parties do not agree that these documents should be allowed to be submitted to the Committee. The Committee further notes that Spain's request for leave is based on the argument that the documents were recently published (27 January 2020) and contain principles to be followed by the Committee and factual context indicating that no ICSID ad hoc committee should deny the stay of enforcement of an award whose enforcement is being stayed by domestic courts.

In the Committee's view, Spain's written request has failed to provide a reasoned explanation showing how the above-referred circumstances qualify as "exceptional" and justify granting leave to file the proposed documents, within the meaning of Section 15.6 of Procedural Order No. 1. Therefore, Spain's request for leave is dismissed.

The Committee finally refers to the Parties' communications of February 15 and March 6, 2020. The Parties are invited to continue to work in the spirit of cooperation that has been conducive to the efficient conduct of these proceedings to date.

41. By email dated May 9, 2020, the Committee clarified to the Parties that the list of questions referred to above at paragraphs 23-25 fell within the ambit of correspondence of an "administrative or procedural" nature within the meaning of Paragraph 11(2) of Procedural Order No. 1. Thus, the list of questions was not required to be sent in both English and Spanish.
42. Having carefully reviewed the Parties' submissions, the Committee hereby issues this Decision on the stay of enforcement of the Award, pursuant to Rule 54 of the ICSID Arbitration Rules.

III. SUMMARY OF THE PARTIES' POSITIONS

43. The Parties' main positions are summarized below. The arguments are further elaborated in the relevant section of the Committee's analysis in Section IV. The Committee has considered all other arguments raised by the parties, even if not expressly addressed herein.

A. APPLICANT'S POSITION

44. In its Annulment Application, Spain requested that "[t]he stay of enforcement of the Award be maintained until the Decision of the *ad hoc* Committee on this Application for Annulment has been issued."¹³ The request was also restated in Spain's Submission and Spain's Reply.¹⁴

¹³ Annulment Application, ¶ 86(b).

¹⁴ Spain's Submission, ¶ 24; Spain's Reply, ¶ 127.

45. Spain's Request for a Stay is based on the following main grounds:

- (i) Granting stays of enforcement is the prevailing practice in ICSID annulment proceedings, and there are no circumstances in this case that would warrant a departure from that standard practice.¹⁵
- (ii) Unless faced with an obviously frivolous or dilatory annulment application, the Committee should grant a stay of enforcement. As Spain's Annulment Application is based on serious grounds, made in good faith, and not dilatory, the continuation of the stay is "compelling."¹⁶
- (iii) If the stay of enforcement is continued, Masdar will not be prejudiced: any delay in payment of the Award will be compensated by the accrual of interest. However, if the stay is discontinued, Spain will incur additional burdens and expenses. Among other things, Spain will incur expenses for the recovery of funds if the Award is ultimately annulled.¹⁷ Moreover, there is a risk that such a recovery might not even happen as Masdar might transfer its interest in the Award to third parties or distribute the funds to its shareholders.¹⁸
- (iv) While the risk of non-compliance may be a relevant circumstance to consider in the context of whether the stay of enforcement is required, it is not determinative.¹⁹ In this case, if the Award is not annulled, there is no risk that Spain will not have the financial resources to comply with the Award, "if and when the time comes that such payment may be appropriate."²⁰ In addition, Spain intends to honor its international obligations, both under the ICSID Convention as well as the law of the European Union ("EU law").²¹

¹⁵ Spain's Submission, ¶¶ 4, 7-10; Spain's Reply, ¶¶ 5, 15-17, 27.

¹⁶ Spain's Submission, ¶¶ 5, 9, 11-14; Spain's Reply, ¶¶ 6(a), 34-41.

¹⁷ Spain's Submission, ¶¶ 6, 15-18; Spain's Reply, ¶¶ 6(b), 6(d), 46-50, 61-63, 67, 125.

¹⁸ Spain's Reply, ¶ 64.

¹⁹ Spain's Reply, ¶ 53.

²⁰ Spain's Submission, ¶ 20.

²¹ Spain's Submission, ¶¶ 19-22; Spain's Reply, ¶¶ 6(c), 6(f), 54-60.

(v) Spain has the obligation to submit the Award to the European Commission (“EC”) for a determination on whether it constitutes State Aid that is compatible with EU law. If the stay is lifted and the Award is ultimately annulled, the EC’s review of the Award (and related determination) would be unnecessary.²² Furthermore, if the stay is lifted, Spain will be forced to face a conflict between its obligations under the ICSID Convention and those under EU law.²³ Nonetheless, Spain has already initiated the process for seeking authorization by notifying the Award to the EC.²⁴

46. Spain requested that the stay of enforcement be granted without requiring the submission of any type of security.²⁵

B. MASDAR’S POSITION

47. Masdar requested the Committee to dismiss Spain’s Request for Stay in its entirety²⁶, based on the following grounds:

(i) There is no basis in the ICSID Convention or ICSID Arbitration Rules for a presumption in favor of the granting of a stay of enforcement.²⁷ The fact that most requests for a stay have been granted in the past is neither dispositive nor indicative - each annulment committee has decided by considering the specific circumstances of the case before it.²⁸

(ii) The merit of an annulment application is not a valid ground for staying enforcement. First, the Committee cannot decide at such an early stage of the proceedings whether the application is well founded, as this would raise due process issues. Second, an application based on “serious” grounds is the least that could be

²² Spain’s Reply, ¶¶ 6(e), 68-70, 72-73, 77-86, 88-89.

²³ Spain’s Reply, ¶¶ 92-112.

²⁴ Spain’s Reply, ¶ 106.

²⁵ Spain’s Reply, ¶¶ 113-123, 127.

²⁶ Masdar’s Response, ¶ 84(a).

²⁷ Masdar’s Response, ¶¶ 10, 12-19.

²⁸ Masdar’s Response, ¶¶ 20-21.

expected in an annulment proceeding. Compliance with such a minimum duty does not result in the grant of a stay.²⁹

- (iii) The fact that Masdar might not suffer harm if the stay is continued is not a circumstance that requires a stay.³⁰ In any case, if the stay is continued, Masdar actually does face the risk of not being able to recover the compensation granted in the Award in light of the increasing number of creditors of Spain as a result of awards in other investor-State arbitrations.³¹
- (iv) The potential risk of Spain having to recoup payments from Masdar if the Award is annulled is not a circumstance that justifies a stay. It is a natural consequence of the ICSID enforcement regime.³² If there were a risk that such recoupment would not be possible, that may constitute a relevant circumstance that requires a stay. However, Spain in this case has presented no evidence that such a risk exists.³³ In any event, Masdar is willing to provide a written undertaking that if the Award is annulled, Masdar will repay Spain all proceeds obtained through the enforcement of the Award.³⁴
- (v) The absence of a risk of non-compliance by Spain if the Award is not annulled cannot be a circumstance justifying the stay of enforcement.³⁵ In this case, however, the risk of non-compliance is high. Spain's ability to pay the Award depends on authorization from the EC, and the outcome of that process cannot be known.³⁶ Furthermore, Spain's behavior since the Award was issued confirms that Spain does not intend to comply with the Award.³⁷

²⁹ Masdar's Response, ¶¶ 33-38; Masdar's Rejoinder, ¶ 22.

³⁰ Masdar's Response, ¶¶ 6, 40-41; Masdar's Rejoinder, ¶ 24.

³¹ Masdar's Response, ¶¶ 43-46; Masdar's Rejoinder, ¶¶ 25, 30.

³² Masdar's Response, ¶¶ 49-50; Masdar's Rejoinder, ¶¶ 35, 40.

³³ Masdar's Response, ¶ 51; Masdar's Rejoinder, ¶ 36.

³⁴ Masdar's Rejoinder, ¶ 39.

³⁵ Respondent's Response, ¶¶ 52-54.

³⁶ Masdar's Response, ¶¶ 57-58; Masdar's Rejoinder, ¶ 26.

³⁷ Masdar's Response, ¶ 65.

(vi) The fact that Spain is obliged to seek authorization from the EC and that the enforcement might give rise to an unnecessary burden for Spain and the EC cannot be a relevant circumstance that requires a stay.³⁸ First, the EC is not a party to these proceedings and therefore whether or not it faces a burden should have no bearing on the Committee's decision.³⁹ Second, since Spain has now notified the Award to the EC, denying the Request for Stay would not occasion any additional burden on Spain.⁴⁰ In any case, imposing a stay would not solve Spain's problems, it would only postpone them.⁴¹ The fact that Spain might face a conflict between its obligations under the ICSID Convention and EU law is not a "circumstance" that requires a stay, as it is not the Committee's role to resolve legal issues faced by Spain. In any event, the obligations in the ICSID Convention should prevail over those in EU law.⁴²

48. Alternatively, Masdar requested that, if the Committee were to accept Spain's request, it should condition the stay of enforcement on the provision of a security in one of the following three forms: (i) the payment of the sum under the Award and interest accrued into an escrow account; (ii) the posting of a bank guarantee; or (iii) a written undertaking by Spain's Secretary of State for Energy that the Award will be paid if the Annulment Application is rejected.⁴³

49. Finally, Masdar also requested the Committee to "order the Applicant to bear all fees and costs associated with the Request [for Stay]."⁴⁴

³⁸ Masdar's Rejoinder, ¶¶ 41-42.

³⁹ Masdar's Rejoinder, ¶ 44.

⁴⁰ Masdar's Rejoinder, ¶ 45.

⁴¹ Masdar's Rejoinder, ¶ 47.

⁴² Masdar's Rejoinder, ¶¶ 50-56.

⁴³ Masdar's Response, ¶ 83.

⁴⁴ Masdar's Response, ¶ 84(d).

IV. THE COMMITTEE'S ANALYSIS

50. In this Section, the Committee sets out the relevant legal standard under the ICSID Convention and the ICSID Arbitration Rules, and proceeds to consider the individual circumstances specified by the Parties in their submissions.

A. LEGAL STANDARD

51. Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules govern the stay of enforcement of an award. For the interpretation of treaty text, the Committee is guided by the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. (the “**Vienna Convention**”) ⁴⁵

52. Article 52(5) provides as follows:

Section 5

Interpretation, Revision and Annulment of the Award

[...]

Article 52

[...]

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the

⁴⁵ Articles 31 and 32 of the Vienna Convention state as follows:

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

53. In turn, Rule 54 states as follows:

Rule 54

Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

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

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(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.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

54. Article 53 of the ICSID Convention provides that the parties to a dispute 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.” Article 52(5) is the relevant provision that authorizes an annulment committee to stay the enforcement of an award while its decision on annulment is pending. In this respect, the stay of enforcement may be deemed as an exception to the general enforceability of ICSID awards.⁴⁶
55. Article 52(5) is based on the premise that the stay of enforcement is a temporary measure that ends with the decision on the request for annulment. It provides that the committee “may” grant a stay pending a decision on annulment. The committee is thus accorded a

⁴⁶ See **Ex. CL-0290**, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on the Application to Terminate the Provisional Stay of Enforcement of the Award, February 21, 2017 (“*Quiborax v. Bolivia*”), ¶ 37; *Caratube v. Kazakhstan*, ¶¶ 68-69.

certain level of discretion⁴⁷: it “may” decide to grant a stay, but “may” also decide not to do so according to the circumstances.⁴⁸

56. A committee’s prerogative to stay enforcement is contingent upon the fulfilment of a condition, i.e., “if [the Committee] considers that the circumstances so require.”
57. The standard to assess whether circumstances “require” a stay is not stated in Article 52(5) or Rule 54. In the absence of a specific standard, the Committee is of the view that considering whether the circumstances require a stay is ultimately a discretionary assessment to be made by the Committee based on the facts, conditions and/or events of the case.
58. Article 52(5) does not identify the types of circumstances that may require a stay.⁴⁹ In practice, however, some circumstances have been regularly considered by other Committees as factors either for the granting of a stay or for its discontinuance. For instance, the question of whether the applicant faces the risk of non-recoupment of funds, should the Award be enforced and later annulled, is a circumstance that has been considered by various annulment committees in determining whether the granting of a stay was required.⁵⁰ Conversely, the fact that there is some indication that an annulment application was made without basis in the ICSID Convention or with a dilatory intent is a

⁴⁷ Some committees have also held that the term “may” contained in Article 52(5) provides a range of discretion. See for instance **Ex. RL-0111**, *Victor Pey Casado and Fondation “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, May 5, 2010 (“*Victor Pey Casado v. Chile*”), ¶ 25; **Ex. RL-0116**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, October 7, 2008 (“*Enron v. Argentina (I)*”), ¶ 22; **Ex. RL-0110**, *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 (“*Occidental v. Ecuador*”), ¶ 47.

⁴⁸ In the same vein, see **Ex. CL-0272**, *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Stay of Enforcement of the Award, April 24, 2017 (“*Border Timbers v. Zimbabwe*”), ¶ 77.

⁴⁹ As noted by the committee in *Border Timbers v. Zimbabwe*, “the language in Article 52(5) of the ICSID Convention is open-ended” (*Border Timbers v. Zimbabwe*, ¶ 78).

⁵⁰ See for instance **Ex. CL-0274**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20, Decision on Applicant Request for a Continued Stay on Enforcement of the Award, April 12, 2017 (“*Standard Chartered Bank v. Tanzania*”), ¶ 73; **Ex. CL-0275**, *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 Group B.V. v. Venezuela*”), ¶¶ 109-114.

circumstance that has been considered as a factor weighing in favor of the discontinuance of a stay.⁵¹

59. Before the Committee addresses the circumstances specified in these proceedings, there are two legal questions in dispute between the Parties that the Committee needs to address at this stage:

- first, whether there is a “presumption” in favor of granting a stay of enforcement; and
- second, whether there is a specific burden of proof requirement imposed on either party.

a. Does Article 52(5) contain a “presumption” in favor of granting a stay

60. One of the questions in dispute before the Committee is whether there is a general rule in the ICSID Convention in favor of granting a stay of enforcement. According to **Spain**, “it is the prevailing practice for ICSID *ad hoc* annulment committees to stay enforcement of an award during the pendency of the annulment proceeding. Absent exceptional circumstances that require a departure from this standard practice, such stays have been considered the norm.”⁵² In support of its argument, Spain observed that stay has been granted in 39 out of 55 cases in which a stay was requested.⁵³ For Spain, “[t]here are no circumstances presented in this case that would warrant a departure from this standard practice.”⁵⁴ Spain also submitted that the plain language of Article 52(5) and Rule 54(2)

⁵¹ See for instance **Ex. RL-0113**, *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 (“*MTD v. Chile*”), ¶ 28; **Ex. RL-0114**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, September 1, 2006 (“*CMS v. Argentina*”), ¶ 37.

⁵² Spain’s Submission, ¶ 4.

⁵³ Spain’s Reply, ¶ 16.

⁵⁴ Spain’s Submission, ¶ 10.

does not support Masdar’s argument that stays could only be granted in “exceptional circumstances.”⁵⁵ Finally, in its Reply, Spain formulated its argument as follows:

The well-established arbitral precedents show that stays of enforcement during annulment proceedings are commonplace, routinely granted upon request, and that the Committees have “wide discretion” to grant the stay, taking into account the circumstances presented in each case.⁵⁶

61. For **Masdar**, “[t]here is [...] no textual support in the ICSID Convention or in the ICSID Arbitration Rules for the notion that there is a presumption in favor of granting a request for a continued stay. On the contrary, staying enforcement is an exceptional measure.”⁵⁷ According to Masdar, “[a] stay should be granted only where an *ad hoc* committee considers that the circumstances render it necessary.”⁵⁸ The only guidance provided by Article 52(5) and Rule 54(4) is that the circumstances at issue must “*require*” a stay; they must be compelling.⁵⁹
62. Furthermore, Masdar noted that while practice may show that in the majority of cases stays of enforcement were granted, the committees in each case considered the “specific circumstances” of the case concerned. Therefore, the fact that the stay has been granted in most of the cases is neither dispositive nor indicative.⁶⁰ Masdar argued that the stay mechanism is exceptional in nature.⁶¹
63. In the **Committee**’s view, the language of Article 52(5) is neutral. It does not contain a rule in favor of, or against, the granting of a stay of enforcement. The provision authorizes the Committee to grant a stay only “if it considers that the circumstances so require.” If this condition is not fulfilled, the Committee has no authority to grant a stay.

⁵⁵ Spain’s Reply, ¶¶ 13-14.

⁵⁶ Spain’s Reply, ¶ 27.

⁵⁷ Masdar’s Response, ¶ 10. See also Masdar’s Response, ¶¶ 18-19; Masdar’s Rejoinder, ¶ 12.

⁵⁸ Masdar’s Response, ¶ 12.

⁵⁹ Masdar’s Rejoinder, ¶ 10.

⁶⁰ Masdar’s Response, ¶¶ 20-21.

⁶¹ Masdar’s Response, ¶¶ 10; Masdar’s Rejoinder, ¶¶ 12.

64. The Committee acknowledges that in practice, the stay of enforcement has been granted in most cases in which it has been sought.⁶² It also notes that some committees have relied on this frequency of granting stays to rule in favor of a stay in the case before them.⁶³ However, as stated in *Libananco v. Turkey*, such an approach “does not follow from the ICSID Convention or the Arbitration Rules.”⁶⁴
65. In the Committee’s view, the decisions of other annulment committees are binding on the parties to those proceedings, but are not binding on other committees or on the parties to other disputes. Moreover, for the purpose of interpreting Article 52(5), these decisions do not constitute “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention.⁶⁵ The Applicant also acknowledges that, for purposes of a discussion on the relevance of the *Antin* Decision, “the sources of public international law are those enumerated in the article 38 of the Statute of the International Court of Justice [...] judicial decisions are an ancillary mechanism to help to determine which the sources of international law are.”⁶⁶
66. At the same time, the Committee does not find in Article 52(5) or in Rule 54 an indication that the circumstances that require a stay must be “exceptional”; as noted in *Burlington Resources v. Ecuador*, the nature of these circumstances is unspecified.⁶⁷
67. While stays of enforcement may be considered an exception to the general enforceability of ICSID awards, it does not follow that the relevant circumstances required to grant a stay should also be exceptional.

⁶² Updated background paper on annulment for the administrative council of ICSID, May 5, 2016, pp. 19-22.

⁶³ See *Occidental v. Ecuador*, ¶ 50; *Victor Pey Casado v. Chile*, ¶ 25.

⁶⁴ **Ex. CL-0279**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, May 7, 2012 (“*Libananco v. Turkey*”), ¶ 43.

⁶⁵ “3. There shall be taken into account, together with the context: ... (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [...]”

⁶⁶ Respondent’s Observations regarding the Claimants’ November 15 Letter, dated November 18, 2019, ¶ 19.

⁶⁷ **Ex. CL-0271**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/05), Decision on Stay of Enforcement of the Award, August 31, 2017, ¶ 70.

68. The Committee therefore reads Article 52(5) as requiring it to conduct an unbiased and neutral assessment of the circumstances specified in the submissions of the Parties, without assuming *a priori* that a stay of enforcement should, or should not, be granted.

b. Which party bears the burden of proof

69. The second legal issue that arises in these proceedings is the question of whether Article 52(5) and Rule 54 establish a particular burden of proof on either party.

70. According to Masdar, “Spain has the burden to demonstrate that there are circumstances requiring the continuation of the stay that it requests.”⁶⁸ It further submitted that Rule 54(4) of the ICSID Arbitration Rules supports this interpretation by establishing that the request for a stay shall specify the relevant circumstances justifying the stay. It added that “ICSID *ad hoc* committees have consistently held that the party requesting a stay bears the burden of proving that there are circumstances justifying their request.”⁶⁹ Masdar invoked the general principle of burden of proof, according to which the burden of proof lies on the party asserting an affirmative claim or defense.⁷⁰ It claimed that “it is for Spain to prove the circumstances required for the stay [...] [and o]nly if Masdar raises a positive defence does it have a burden of proof, and it does so only with respect to that defence.”⁷¹

71. On the other hand, Spain stated that it “has presented the Committee with an array of circumstances that justify stay of enforcement. Hence Spain’s burden of proof has been met.”⁷² It also noted that “*ad hoc* annulment committees have held that, rather than requiring a strict ‘burden of proof’ approach, it is the committee’s task to exercise its discretionary power to evaluate all relevant circumstances in determining whether a stay of enforcement is to be continued.”⁷³ In particular, Spain submitted that in view of the circumstances presented by it, Masdar had to give proof that it would suffer a prejudice as

⁶⁸ Masdar’s Response, ¶ 27.

⁶⁹ Masdar’s Response, ¶ 29.

⁷⁰ Masdar’s Response, ¶ 26; Masdar’s Rejoinder, ¶ 14.

⁷¹ Masdar’s Rejoinder, ¶ 17.

⁷² Spain’s Reply, ¶ 30.

⁷³ Spain’s Reply, ¶ 31.

a result of the stay.⁷⁴ According to Spain, the stay should be granted “unless it is going to cause irreparable harm to the one who requests enforcement.”⁷⁵

72. **The Committee** recalls that Rule 54(4) provides that the request for a stay “shall specify the circumstances that require the stay, its modification or its termination.” The ordinary meaning of the term to “specify” is “to name or state explicitly or in detail.”⁷⁶ However, specifying, naming or stating explicitly certain circumstances does not need to go as far as demonstrating or proving the existence of those circumstances. In the Committee’s view, the act of naming a particular fact may satisfy the requirement of specifying a circumstance while the act of demonstrating or proving a circumstance seems to require more than a mere assertion. It requires the submission of evidence or of an adequate explanation. Rule 54(4) of the ICSID Arbitration Rules in the Committee’s view only requires the applicant to specify the circumstances, not to prove them.⁷⁷
73. That said, the Committee acknowledges that the general notion that the burden of proof rests on the party that makes an affirmative assertion, whether as a claim or as a defense, should apply in the present case as a starting point.
74. Therefore, it is the Committee’s view that where Spain seeks a stay on the basis that circumstances exist that require a stay, the burden will be on Spain to prove the existence of such circumstances. At the same time, where Masdar makes a positive assertion, such as the assertion that Masdar will be harmed by the stay, the burden will be on Masdar to prove that it will be so harmed.
75. The Committee notes that the fact that the stay mechanism is “exceptional” under the ICSID Convention should not have a bearing on the relative burden of proof of either party to the proceedings. In particular, there is no reason to consider that because of the

⁷⁴ Spain’s Reply, ¶¶ 29, 32.

⁷⁵ Transcript of First Session (“Tr. First Session”), July 15, 2019, Mr. Gil Nievas, 105:10-13.

⁷⁶ Merriam-Webster’s Collegiate Dictionary, p. 1198.

⁷⁷ In *Standard Chartered Bank v. Tanzania*, the committee noted in respect of Article 52(5) that this provision “does not indicate that one particular party bears the burden of establishing circumstances requiring a stay.” (*Standard Chartered Bank v. Tanzania*, ¶ 53.)

exceptional character of the stay mechanism, any party should bear either an extraordinary or a qualified burden of proof.

B. CIRCUMSTANCES SPECIFIED IN FAVOR OF, AND AGAINST, STAY OF ENFORCEMENT

76. Rule 54(4) provides that, “[a] request [for stay] shall specify the circumstances that require the stay or its modification or termination.”

77. In its Submission, **Spain** specified certain circumstances that in its view justify the continuation of the present stay of enforcement:

- (i) that the Annulment Application has been made in good faith⁷⁸;
- (ii) that continuing the stay would not harm Masdar⁷⁹; and
- (iii) that Spain will abide by its international obligations (i.e. there is no risk of non-compliance with the Award if it is not annulled).⁸⁰

78. In addition to these circumstances, Spain argued that if the Award is enforced and later annulled:

- (iv) Spain would face the risk of non-recoupment of the funds from Masdar⁸¹; and
- (v) Spain and the EC would suffer a real prejudice in terms of unnecessary procedural activity and burdens, and Spain would face a conflict of obligations under the ICSID Convention and EU law⁸²;

79. On the other hand, in its submissions, **Masdar** opposed the relevance of these factors as “circumstances” that “require” a continued stay of enforcement.⁸³ In rebutting the

⁷⁸ Spain’s Submission, ¶¶ 11-14.

⁷⁹ Spain’s Submission, ¶¶ 15-18.

⁸⁰ Spain’s Submission, ¶¶ 19-23.

⁸¹ Spain’s Reply, ¶¶ 61-67.

⁸² Spain’s Reply, ¶¶ 68-112.

⁸³ Masdar’s Response, ¶¶ 33-65; Masdar’s Rejoinder, ¶¶ 20-56.

argument that continuing the stay would not harm Masdar, Masdar alleged that if the stay of enforcement is continued, Masdar faces the risk of never being able to recover the sums under the Award.⁸⁴

80. As a result of these submissions, the consideration of whether the stay of enforcement is required is based on the following circumstances:

Circumstance	Raised by
1. The Annulment Application has been made in good faith, is well grounded and not dilatory	Spain
2. Continuation of the stay <u>would not cause</u> adverse consequences to Masdar because it would be covered by interest payments	Spain
3. Continuation of the stay <u>would cause</u> adverse consequences to Masdar because it may not be able to obtain the damages granted by the Award	Masdar
4. There is no risk of non-compliance because Spain will abide by its international obligations	Spain
5. There is a risk of non-recoupment of funds	Spain
6. Spain and the EC would have to engage in unnecessary procedural activity and bear unnecessary burdens and Spain would face a conflict of obligations under the ICSID Convention and EU law	Spain

81. Each of these circumstances is examined below.

⁸⁴ Masdar's Response, ¶¶ 40-47; Masdar's Rejoinder, ¶¶ 25-34.

**a. Annulment Application made in good faith, well grounded and not dilatory
[Circumstance 1]**

82. **Spain** argued that, in light of the case law, a stay of enforcement should be granted unless the Annulment Application is without legal basis or is dilatory in nature.⁸⁵ Spain stated that its Annulment Application is based on serious grounds, was made in good faith, and is not dilatory.⁸⁶ Therefore, there are no circumstances to cause the Committee to depart from the standard practice of staying enforcement.⁸⁷ Spain stated that, if the frivolousness of an application may lead to the rejection of a request for a stay, “then the seriousness of the annulment application must necessarily be considered.”⁸⁸
83. While Spain does not ask the Committee to make its ultimate determination on the merits of the Annulment Application, it noted that a cursory analysis of the Annulment Application would show the good faith and seriousness of the grounds for annulment raised by Spain. Hence “premature” enforcement of the Award would be “manifestly imprudent.”⁸⁹
84. Spain also argued that, in the light of awards rendered in other investment arbitrations, the Masdar Award is unfounded or not properly reasoned, so that the “prudence principle and the balance of interests” require maintaining the stay of enforcement.⁹⁰ Spain referred particularly to the awards rendered in *BayWa v. Spain*, *Stadtwerke v. Spain*, and *RWE v. Spain*.⁹¹ While Spain’s argument does not refer directly to the grounds for annulment raised in its Annulment Application, it relies on alleged deficiencies of the merits of the Award in order to request that the stay be maintained.

⁸⁵ Spain’s Submission, ¶ 9.

⁸⁶ Spain’s Submission, ¶¶ 5, 11-14.

⁸⁷ Spain’s Submission, ¶ 10.

⁸⁸ Spain’s Reply, ¶ 36.

⁸⁹ Spain’s Reply, ¶¶ 37-41.

⁹⁰ Spain’s January 23, 2020 Comments, p. 5.

⁹¹ Submitted as Legal Authorities **RL-0166**, **RL-0168** and **RL-0170**, respectively.

85. **Masdar** argued that the merits of an annulment application are not a valid circumstance requiring a stay unless the application is manifestly dilatory.⁹² At this stage, it is not claiming that Spain's Annulment Application is dilatory.⁹³
86. The fact that an annulment application is not "manifestly dilatory" is not a circumstance requiring stay, since that is the least that can be expected from any annulment application.⁹⁴
87. In any event, Masdar argues that Spain has submitted no evidence of the strength of the grounds of its Annulment Application other than self-serving statements.⁹⁵
88. **The Committee** notes that the assessment of the merits or "seriousness" of an annulment application in the context of a request for a stay has been addressed in various cases. This Committee agrees with the committees in *MTD v. Chile* and *CMS v. Argentina*, which explained that, "unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed."⁹⁶
89. In the case at hand, the Committee finds that there is no indication that Spain's Annulment Application was brought without any basis in the ICSID Convention and that it is dilatory. Masdar also has not made that claim.⁹⁷ Therefore, in light of the approach taken by the other committees cited above, the Committee finds no reason to conduct a preliminary assessment of whether or not the Annulment Application is likely to succeed.
90. The Committee notes that recourse to annulment, including the entitlement to request a stay of enforcement, is a legitimate right provided for in Article 52 of the ICSID Convention. It is assumed that this right is exercised in good faith.⁹⁸ This implies that any application for annulment should be based on grounds that are considered by the applicant,

⁹² Masdar's Response, ¶¶ 33-37.

⁹³ Masdar's Response, ¶ 38.

⁹⁴ Masdar's Response, ¶ 36; Masdar's Rejoinder, footnote 37.

⁹⁵ Masdar's Response, ¶ 39.

⁹⁶ *MTD v. Chile*, ¶ 28; *CMS v. Argentina*, ¶ 37.

⁹⁷ Masdar's Response, ¶ 38.

⁹⁸ *Quiborax v. Bolivia*, ¶ 58.

Spain in this case, to be serious enough for the applicant to initiate the annulment process. It also means that, absent any indication to the contrary, an application must be deemed to have been submitted in good faith, without the intent of delaying the enforcement of the Award.

91. The Committee now examines whether a presumption of good faith of an annulment application could be considered a circumstance that requires the stay of enforcement of the award. If this presumption were to be so considered, all requests for a stay should be accepted automatically. The Committee notes that this argument in effect can be seen as amounting to the same argument as that of the presumption in favor of a stay. As noted above, however, Article 52(5) contemplates that the granting of a stay shall not be an automatic process. The stay depends on the discretion of each annulment committee, which, based on the case-specific circumstances, may or may not grant it. For this reason, the Committee considers that a presumption of good faith of the annulment application cannot be a sufficient ground for granting a stay. In other words, that presumption cannot qualify as a circumstance that “requires” a stay within the meaning of Article 52(5).
92. In this conclusion, the Committee agrees with the statements of the committees in *Total v. Argentina* and *OI European Group v. Venezuela*. As they stated, “the mere fact that the application is not dilatory is not sufficient to grant the extension of the stay.”⁹⁹
93. The Committee has also considered the legal authorities that Spain submitted on January 15, 2020 and its comments on these authorities. The comments challenge the reasoning of the Masdar Award in the light of the awards and decisions rendered in *BayWa v. Spain*, *Stadtwerke v. Spain*, and *RWE v. Spain*.¹⁰⁰ For the Committee, these comments are legal arguments, consideration of which presupposes some assessment of the Award, which in this proceeding can only be made through a preliminary assessment of the merits of the Annulment Application. However, as reasoned above, it is not for the Committee to

⁹⁹ Ex. CL-0277, *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; *OI European Group B.V. v. Venezuela*, ¶ 115.

¹⁰⁰ *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16); *Stadtwerke München GmbH (“SWM”)*; *RWE Innogy GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34).

conduct any preliminary assessment of this application unless there is some indication that it was brought without any basis in the Convention. Thus, the Committee considers that Spain's comments on certain features of the Award, as evaluated in the light of other awards, do not constitute a circumstance that requires a stay of enforcement.

b. No harm to Masdar if the stay of enforcement continues [Circumstance 2]

94. **Spain** argued that Masdar would face no harm if the stay of enforcement is continued. If the Annulment Application is ultimately rejected, Masdar would be fully compensated by the interest accrued on the amounts under the Award.¹⁰¹
95. **Masdar** argued that the absence of harm arising from a stay of enforcement is not a circumstance “justifying a stay that is required by **Spain**.”¹⁰² In its view, Masdar “has no burden to prove that the stay should be lifted”; rather, the burden is on Spain to demonstrate that the stay should remain in place.¹⁰³ Furthermore, contrary to Spain's argument, the fact that the interest accruing under the Award will be paid is not a “circumstance” warranting the continuation of a stay, as a number of annulment committees have previously confirmed.¹⁰⁴
96. **The Committee** starts its analysis by recalling that according to the ordinary meaning of the terms of Article 52(5), the circumstances that require a stay refer to “the material, logical, or other environmental conditions of an act or event”¹⁰⁵ that demand or make the stay necessary.¹⁰⁶ The Committee notes that the relevant question is then whether the absence of harm to Masdar, since interest is accruing under the Award, is a circumstance that renders the stay necessary.
97. Based on its submissions, Masdar does not dispute the fact that, if the stay is continued, the interest accrued under the Award would compensate the opportunity cost to Masdar of

¹⁰¹ Spain's Submission, ¶¶ 6, 15-18; Spain's Reply, ¶¶ 46-50.

¹⁰² Masdar's Response, ¶ 40 (emphasis in the original).

¹⁰³ Masdar's Rejoinder, ¶ 24.

¹⁰⁴ Masdar's Response, ¶ 42.

¹⁰⁵ The New Shorter Oxford English Dictionary, Vol 1, p. 405.

¹⁰⁶ The New Shorter Oxford English Dictionary, Vol 2, pp. 2556-2557.

the sums under the Award.¹⁰⁷ The question that remains, however, is whether the absence of such harm to Masdar is a circumstance that requires enforcement to be stayed.

98. Even if Masdar is suitably compensated for the opportunity cost of the awarded sums, that would leave Masdar in the same position as it would have been had the stay not been granted. This may show that the stay is less (or not at all) burdensome, but it does not speak to whether the circumstances require a stay. Since it is the latter that needs to be satisfied pursuant to Article 52(5) of the ICSID Convention, the Committee is of the view that the lack of harm to Masdar is not itself a circumstance that justifies a stay.

c. Masdar’s risk of not being able to recover the damages granted in the Award if the stay is continued [Circumstance 3]

99. In contesting Spain’s argument that a continuation of the stay would not harm Masdar, **Masdar** submitted that delaying enforcement would actually give rise to a “real risk” that Masdar “would never be able to recover the damages to which it is entitled.”¹⁰⁸ Masdar argued that Spain is the State against whom the second largest number of investment-treaty claims have been made¹⁰⁹, and its liability resulting from arbitration awards “is likely to increase significantly in the weeks and months ahead.”¹¹⁰ Maintaining the stay “would force Masdar into a queue of potentially around 40 creditors”, and every day of delay in enforcement “will directly reduce the likelihood of Masdar being able to enforce the Award altogether.”¹¹¹ Masdar states that the committee in *OI European Group B.V. v. Venezuela* had denied a stay of enforcement in similar circumstances.¹¹² Masdar notes that Spain has failed to address the analogy with this case.¹¹³ For Masdar, the only manner in which this

¹⁰⁷ Masdar’s Response, ¶¶ 40-42; Masdar’s Rejoinder, ¶ 24.

¹⁰⁸ Masdar’s Response, ¶ 43. See also Masdar’s Rejoinder, ¶ 25.

¹⁰⁹ Masdar’s Response, ¶ 44; Respondent’s Reply, ¶ 30.

¹¹⁰ Masdar’s Response, ¶ 45.

¹¹¹ Masdar’s Response, ¶ 46; Masdar’s Rejoinder, ¶ 30.

¹¹² Masdar’s Response, ¶ 47 (referring to *OI European Group B.V. v. Venezuela*, ¶¶ 124-125); Masdar’s Rejoinder, ¶¶ 33-34 (referring to *OI European Group B.V. v. Venezuela*, ¶¶ 124-125).

¹¹³ Masdar’s Rejoinder, ¶ 34.

prejudice can be prevented is “by dismissing the Request [for a Stay] and lifting the stay, or alternatively, by ordering Spain to provide adequate security.”¹¹⁴

100. In its Rejoinder, Masdar argued that Spain has shown that it does not intend to honor the Award, and this adds to the alleged risk that Masdar may be unable to recover the compensation it is owed under the Award.¹¹⁵
101. Masdar also submitted awards rendered in other investment arbitrations to show that Spain’s liability to award-creditors is allegedly increasing, and that Masdar’s risk of being relegated among them is already materializing.¹¹⁶ Masdar referred particularly to the awards rendered in *Antin v. Spain*, *OperaFund v. Spain*, *InfraRed v. Spain*, *SolEs v. Spain* and *Cube v. Spain*.¹¹⁷
102. For **Spain**, Masdar’s argument that there is a real risk of facing a queue of around 40 creditors should the stay be granted is pure speculation. Rather, Masdar should prove that Masdar’s viability depends on the payment of the Award.¹¹⁸ The stay cannot be lifted based on only speculation of harm.¹¹⁹
103. With respect to the argument that Spain had shown no intent to honor the Award, Spain noted that it has opposed enforcement based on justified grounds and in accordance with its rights. This cannot be taken to indicate that Spain does not intend to comply with the award.¹²⁰
104. The **Committee** notes that Masdar has presented decisions rendered in other arbitrations to show that Spain’s liability to award-creditors is increasing and that Masdar faces a real risk of being relegated among those creditors. However, the Committee also considers that the risk being referred to by Masdar would largely depend on whether Spain’s financial

¹¹⁴ Masdar’s Response, ¶ 46.

¹¹⁵ Masdar’s Rejoinder, ¶¶ 25-29.

¹¹⁶ Masdar’s January 23, 2020 Comments, ¶ 5.

¹¹⁷ Submitted as Legal Authorities **CL-0305**, **CL-0306**, **CL-0307**, **CL-0308** and **CL-0309**, respectively.

¹¹⁸ Spain’s Reply, ¶¶ 42-43.

¹¹⁹ Spain’s Reply, ¶ 44.

¹²⁰ Spain’s Reply, ¶¶ 55-58.

capacity is insufficient to cover the liability that it may face under this and other possible awards. Spain has submitted that it is “the fifth-largest economy in the European Union, and it is ranked 13th among all countries in the world in terms of GDP [...] [and that] there is no danger that Spain would not have the financial resources to pay the Award in this case.”¹²¹ Masdar has not disputed these facts.¹²² The Committee finds no reason to question Spain’s economic capacity to deal with this liability, including that of the Award.

105. With respect to Masdar’s argument that in similar circumstances, in *OI European Group B.V. v. Venezuela*, the committee found that the growing list of payment orders against the Applicant “[put] the Respondent on Annulment in a long line of creditors undertaking efforts to collect award amounts against the Applicant”¹²³, the Committee has not been presented with further details on the similarities between that case and this case. For example, the Committee has no information on the level of liability or the financial capacity of the debtor in that case. In any event, the Committee understands that such a case was decided on the basis of its own circumstances.
106. Accordingly, the Committee considers that there is insufficient evidence to conclude that, if the stay is continued, Masdar will face the risk of non-enforcement of the Award as a result of an increase in the number of Spain’s creditors.
107. Regarding the claim by Masdar that being able to recover the amount in the Award will be all the more unlikely because, according to Masdar, Spain has so far resisted attempts by Masdar to enforce the award, Spain’s exercise of its rights pursuant to the ICSID Convention and other relevant laws to seek annulment of the Award and stay its enforcement do not by themselves, in the Committee’s view, amount to an intent to escape any obligations that properly fall due.
108. Based on the foregoing, the Committee finds that Masdar has failed to demonstrate that it will suffer prejudice if the enforcement of the Award continues to be stayed.

¹²¹ Spain’s Submission, ¶ 20 (footnotes omitted).

¹²² Masdar’s Response, ¶¶ 43-46; Masdar’s Rejoinder, ¶¶ 30-34.

¹²³ *OI European Group B.V. v. Venezuela*, ¶ 125.

d. No risk of non-compliance with the Award considering Spain's compliance with its international obligations [Circumstance 4]

109. **Spain** also submitted that if the stay is continued and the Award is not annulled, there is no risk of non-compliance with the Award by Spain.¹²⁴ Given its economic capacity as a country, “there is no danger that Spain would not have the financial resources to pay the Award in this case.”¹²⁵ It added that “[t]here is also no history of non-compliance”: “Spain takes its international commitments seriously, and it intends to honor them”, and that if the Award is not annulled, “it will seek the authorization of the EC to pay the Award in accordance with the decision of the *ad hoc* annulment Committee in this proceeding, and it will pay Masdar promptly upon receiving such authorization.”¹²⁶ This commitment should be considered sufficient and should weigh in favor of continuing the stay.¹²⁷
110. **Masdar** argued that the absence of a risk of non-compliance is usually a rebuttal to the argument that there is a risk of non-compliance by the debtor. However, in Masdar’s view, it is not a circumstance that would itself lead to the conclusion that a stay of enforcement is required.¹²⁸ Even if it were a relevant circumstance, the risk of non-compliance by Spain is high. To comply, Spain needs to apply for clearance from the EC, and it cannot be known what the outcome of that process will be.¹²⁹ Furthermore, Spain’s reliance on EU law to avoid the payment of the Award is not a valid defense: if EU law is considered to be national law, it cannot take precedence over Spain’s international obligations; and if EU law is considered international law, Spain’s obligations under the ICSID Convention would still take precedence over its obligations under EU law because of the principle of *lex posterior*.¹³⁰ Moreover, the EU law instrument under which Spain allegedly has no choice but to seek authorization from the EC is not binding, and it is questionable whether the

¹²⁴ Spain’s Submission, ¶¶ 19-21; Spain’s Reply, ¶ 54.

¹²⁵ Spain’s Submission, ¶ 20.

¹²⁶ Spain’s Submission, ¶¶ 21-22.

¹²⁷ Spain’s Reply, ¶¶ 59-60.

¹²⁸ Masdar’s Response, ¶ 52-56.

¹²⁹ Masdar’s Response, ¶ 57; Masdar’s Rejoinder, ¶ 26.

¹³⁰ Masdar’s Response, ¶ 60.

Award confers any “state aid” at all for purposes of EU law.¹³¹ Finally, Masdar argued that the Applicant’s behavior in this dispute confirms that it does not intend to comply with the Award.¹³²

111. **The Committee** understands that under certain circumstances, the absence of risk of non-compliance with the Award (if not annulled) is a factor that might be relevant to considering a stay of enforcement. The Committee, however, does not find this to be a relevant factor in the present case. Spain’s commitment to comply with the Award (if not annulled) does not put Masdar in any better a position than it would have been if the Award were immediately enforced. Therefore, any likelihood that Spain will comply with the Award can at best be relied upon only to argue that a potential stay will not have a negative effect. But by itself, it cannot be a circumstance that requires or calls for a stay, because the same outcome is achieved even if no stay is granted. Therefore, it is the Committee’s view that the likelihood of compliance is not, in itself, a circumstance that “requires” a stay pursuant to Article 52(5) of the ICSID Convention.
112. To address this issue, the Committee considers that it need not make a ruling on whether the risk of non-compliance is indeed high, as Masdar claims. The Committee’s finding with respect to the relevance of this factor makes such an assessment moot.

e. Risk of non-recoupment of funds [Circumstance 5]

113. **Spain** argued that if the stay is lifted and the Award is enforced before being ultimately annulled, it would face the prospect of trying to recoup amounts improperly obtained by Masdar through enforcement.¹³³ In contrast to how Masdar will be suitably compensated by interest if the enforcement of the Award is stayed, Spain’s difficulties in recouping from

¹³¹ Masdar’s Response, ¶¶ 61-63.

¹³² Masdar’s Response, ¶ 65.

¹³³ Spain’s Submission, ¶¶ 6, 15-18; Spain’s Reply, ¶¶ 46-50, 61.

Masdar any amounts recovered by it and the loss of interest that Spain will face cannot be cured.¹³⁴

114. In Spain's view, it does not make sense to adopt an approach that will risk passing money back and forth between the parties in this manner. Accordingly, in no case in which annulment was granted has there been a situation where previously recovered sums have to be recouped after the annulment.¹³⁵ In any event, Spain's entitlement to seek annulment and a stay of enforcement is not subordinate to Masdar's right to obtain the enforcement of the award.¹³⁶
115. Furthermore, there is a risk that recovered amounts cannot even be recouped from Masdar in the first place if Masdar transfers its interest in the Award or the amounts payable thereunder to third parties or its shareholders.¹³⁷ In the hearing on the stay of enforcement dated July 15, 2019, upon a question from the Committee, Spain added that "Masdar is a sort of instrumentality of the United Arab Emirates, and the United Arab Emirates are buying, selling, and changing their corporations and their equity shareholdings constantly. You can go to their website of IPIC or Mubadala, and you will see the very substantive changes taking place in the portfolio."¹³⁸
116. **Masdar** noted that potentially incurring recoupment expenses is not a circumstance that requires a stay of enforcement. In its view, any such expenses is a natural consequence of the ICSID enforcement regime.¹³⁹ Spain is a Party to the ICSID Convention, and is therefore bound by all its obligations, including those relating to the voluntary compliance with Awards.¹⁴⁰

¹³⁴ Spain's Reply, ¶¶ 62-63.

¹³⁵ Spain's Response, ¶ 65.

¹³⁶ Spain's Response, ¶ 66.

¹³⁷ Spain's Reply, ¶ 64.

¹³⁸ Tr. First Session, July 15, 2019, Mr. Gil Nievas, 144:15-20.

¹³⁹ Masdar's Response, ¶¶ 49-50; Masdar's Rejoinder, ¶¶ 35, 40.

¹⁴⁰ Masdar's Reply, ¶ 50.

117. While the risk of being unable to recoup sums that were previously recovered under a subsequently annulled award appears to be a relevant factor for deciding whether a stay should be granted, Spain has presented no evidence showing the existence of such risk in this case.¹⁴¹ According to Masdar, Spain’s allegation just relies on speculation.¹⁴²
118. In any event, to address any doubt concerning the recoupment of funds, Masdar is willing to provide a written undertaking to repay any amounts due to Spain.¹⁴³
119. **The Committee** notes that the ICSID enforcement regime contemplates the immediate enforcement of an award following its issuance (Article 53 of the ICSID Convention) and the possibility of a subsequent annulment (Article 52 of the same). Thus, any risk of recouping amounts recovered under awards that are later annulled is a normal consequence of the design and structure of the ICSID Convention. If such a risk constituted a justification for granting a stay, stays would be granted almost automatically in all but the rarest of annulment proceedings. That would be contrary to the discretionary and exceptional nature of Article 52(5) of the ICSID Convention.¹⁴⁴
120. Accordingly, the Committee considers that the risk of having to recoup previously recovered funds is not a factor in deciding whether the circumstances require a stay.
121. On the other hand the risk of being unable to recoup such sums because they have been depleted or transferred can be a relevant factor to deciding a stay.¹⁴⁵ However, the cases in which a real risk of non-recoupment was found were cases in which “the risk of bankruptcy was shown to be a legitimate concern.”¹⁴⁶ In addition to the risk of insolvency, it has been

¹⁴¹ Masdar’s Response, ¶¶ 51; Masdar’s Rejoinder, ¶¶ 36, 38.

¹⁴² Masdar’s Reply, ¶ 51; Masdar’s Rejoinder, ¶¶ 36-38.

¹⁴³ Masdar’s Rejoinder, ¶ 39.

¹⁴⁴ See above, ¶¶ 54-55.

¹⁴⁵ *OI European Group B.V. v. Venezuela*, ¶ 110; *Total v. Argentina*, ¶ 102; **Ex. CL-0282**, *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, March 5, 2009 (“*Sempra v. Argentina*”), ¶ 80.

¹⁴⁶ **Ex. CL-0269**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Decision on Stay of Enforcement of the Award, February 22, 2018, ¶ 115. See also **Ex. CL-0276**, *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 Termination of the Stay of Enforcement of the Award, March 11, 2016, ¶ 64; **Ex. RL-112**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued

noted that the original creditor's failure to comply regularly with payment obligations¹⁴⁷ or to return voluntarily the sums of the award¹⁴⁸ could also be considered as circumstances indicating a risk of non-recoupment.

122. It seems that both Parties agree that the risk of non-recoupment of funds may be a relevant circumstance in favor of the granting of a stay.¹⁴⁹ They disagree whether there is a real risk of non-recoupment in the present case, if the Award was enforced but then annulled.¹⁵⁰
123. In the Committee's view, it seems that the risk of non-recoupment in this case is based on general assumptions. Spain has referred to some potential scenarios. The Committee notes, however, that the transfer of interest in an award, the distribution of proceeds to shareholders or the transfer of shares of a company to third parties are possible scenarios that may occur in all cases in which the proceeds of an award are obtained by an original creditor.
124. The Committee has seen no arguments or evidence in this case that would render any of the abovementioned scenarios more or less likely to occur. There is no objective evidence on the record pointing to specific facts that would support the existence of a risk of non-recoupment. Moreover, there is no evidence on the record showing that Masdar faces the risk of bankruptcy or that it fails regularly to comply with its payment obligations.¹⁵¹
125. The Committee understands that concerns relating to non-recoupment have been addressed in other cases through the provision of appropriate assurances by the enforcing party to

Stay of Enforcement of the Award, December 28, 2007, ¶¶ 14 and 21; *CMS v. Argentina*, ¶ 38; *MTD v. Chile*, ¶ 29.

¹⁴⁷ **Ex. CL-0266**, *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.

¹⁴⁸ **Ex. CL-0289**, *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 ("*Tenaris v. Venezuela*"), ¶ 87.

¹⁴⁹ Spain's Reply, ¶¶ 61-64; Masdar's Rejoinder, ¶ 36.

¹⁵⁰ Spain's Reply, ¶¶ 63-64; Masdar's Rejoinder, ¶ 36.

¹⁵¹ The committee in *Total v. Argentina* took a similar approach, in the sense that there was nothing in the record suggesting that the investor would refuse payment in the event the award was annulled, nor was there any persuasive evidence that an attachment of assets of the investor might affect the company to such an extent as to prevent payment to the State if the award was annulled (*Total v. Argentina*, ¶ 103).

return the proceeds if the award is annulled.¹⁵² In this case, Masdar is willing to provide a firm commitment to return any proceeds obtained through the enforcement of the Award, including any interest accrued on those proceeds.

126. In the light of the circumstances noted above, the Committee considers that this undertaking would be a sufficient assurance to address any concern relating to non-recoupment if the Award is later annulled.

**f. Spain's compliance with EU law requirements and procedures
[Circumstance 6]**

127. In its Reply, Spain submitted that there is a real prejudice that could be caused to Spain and to third parties if the Award is enforced and ultimately annulled. The EC has to undertake a review of the Award under EU law – i.e. to assess “whether the prospective payment by Spain to Masdar has the potential to distort competition in the EU internal market and affect trade between member states.”¹⁵³ This review would have been unnecessary if the Award is ultimately annulled.¹⁵⁴ If the Award is enforced and the EC determines that it is illegal under EU law, both parties will incur expenses and burdens: Spain would have to start recoupment proceedings against Masdar, and Masdar could start proceedings to challenge the EC decision.¹⁵⁵ In addition, it seems that Masdar will actively seek the enforcement of the Award in foreign courts.¹⁵⁶ All these burdens and expenses could be avoided by staying enforcement.¹⁵⁷ Considerations of efficiency, judicial

¹⁵² *Tenaris v. Venezuela*, ¶ 87; *Borders v. Zimbabwe*, ¶¶ 97-98; **Ex. CL-0273**, *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Decision on Stay of Enforcement of Award, April 24, 2017, ¶¶ 97-98; *Libananco v. Turkey*, ¶¶ 50-51; *Sempra v. Argentina*, ¶ 83; *Enron v. Argentina (I)*, ¶ 50; **Ex. RL-0117**, *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, May 20, 2009 (“*Enron v. Argentina (II)*”), ¶ 33.

¹⁵³ Spain's Reply, ¶ 68.

¹⁵⁴ Spain's Reply, ¶ 68.

¹⁵⁵ Spain's Reply, ¶¶ 69-70.

¹⁵⁶ Spain's Reply, ¶ 71.

¹⁵⁷ Spain's Reply, ¶ 72.

economy, the burden on the Parties and the need to streamline the process of satisfying the Award demonstrate that a stay of enforcement is prudent and fair.¹⁵⁸

128. Spain also argued that if the award is enforced, Spain will be forced to face an international law conflict between its ICSID obligations and EU law obligations.¹⁵⁹ As noted in its Reply, “[r]equiring 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. [the “Treaty on the Functioning of the European Union”].”¹⁶⁰ Spain also noted that it has notified the Award to the EC.¹⁶¹
129. For **Masdar**, the situation does not constitute a circumstance that requires the stay to be maintained.¹⁶² First, any burden that lifting the stay would occasion on the EC is irrelevant as the EC is not a party to the dispute.¹⁶³ Second, as the Award has been notified to the EC and the Parties will have to make submissions before the EC regardless, lifting the stay would not result in any additional burden for Spain, Masdar or the EC.¹⁶⁴ The fact that Spain could face conflicting legal obligations in paying the Award is not a circumstance requiring a stay. It is not for the Committee to resolve these legal problems.¹⁶⁵ In any event, the stay would not resolve them, but would just postpone them. If the Award is not annulled, Spain will in any event face the same consequences.¹⁶⁶ Third, Masdar does not accept that there is an irreconcilable conflict between the ICSID Convention and EU law. The ICSID Convention should prevail over EU law.¹⁶⁷ Lastly, Masdar denied that Spain was under an obligation of EU law to notify the Award to the EC for authorization. In its

¹⁵⁸ Spain’s Reply, ¶¶ 72-74.

¹⁵⁹ Spain’s Reply, ¶¶ 77-112.

¹⁶⁰ Spain’s Reply, ¶ 104.

¹⁶¹ Spain’s Reply, ¶ 106.

¹⁶² Masdar’s Rejoinder, ¶ 43.

¹⁶³ Masdar’s Rejoinder, ¶ 44.

¹⁶⁴ Masdar’s Rejoinder, ¶ 45.

¹⁶⁵ Masdar’s Rejoinder, ¶ 46.

¹⁶⁶ Masdar’s Rejoinder, ¶ 47.

¹⁶⁷ Masdar’s Rejoinder, ¶¶ 50-51.

view, the EC Decision on which Spain relied for the notification of the Award to the EC is not binding.¹⁶⁸

130. **The Committee** notes that pursuant to the language of Article 52(5), it is not precluded from examining any type of circumstances that may “require” the stay of enforcement. The Committee therefore does not exclude the possibility that, in making its decision, it could take into consideration the potential prejudice that an immediate enforcement of the Award could cause not only to the Parties, but also to non-disputing third parties to the dispute. In this vein, the Committee does not exclude *a priori* the allegation that a relatively premature enforcement of the Award could cause certain prejudice to a non-disputing party such as the EC.
131. The Committee notes that the procedural hardships identified by Spain – the avoidance of which would allegedly justify the stay of enforcement – relate to the submission of the Award to the EC and the EC’s authorization process under its own regulations. It also notes that Spain has submitted the Award to the EC and that the process before the EC is currently underway. The Committee thus understands that the procedural activity and any associated additional burden that Spain is concerned about will take place regardless, now that the Award has been notified to the EC. Therefore, a stay would do nothing to prevent the circumstance in question. Accordingly, the procedural hardships claimed by Spain seem not to be circumstances that “require” the stay of enforcement of the Award within the meaning of Article 52(5).
132. With respect to the alleged conflict of laws that Spain would face in view of its obligations under the ICSID Convention and EU law, the Committee acknowledges that the concurrent application of the attendant obligations may be avoided for now through the stay of enforcement of the Award. However, given the explanations provided by Spain, there is no indication that the circumstances underlying the alleged conflict of laws would change. In fact, if the Award is not annulled, the alleged conflict between Spain’s international obligations under the ICSID Convention and EU law would remain in place. In any case, the Committee is unconvinced that the mere existence of constraints imposed by legal

¹⁶⁸ Masdar’s Rejoinder, ¶¶ 50-56.

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.

133. For the reasons stated above, the Committee considers that the procedural burdens and the alleged conflict of laws between the ICSID Convention and EU law are not circumstances that require the stay of enforcement within the meaning of Article 52(5).

C. CONCLUSION

134. The Committee considers that the circumstances invoked by Spain in these proceedings are not circumstances that require a stay of enforcement within the meaning of Article 52(5).

135. The Committee considers that Masdar should provide the written undertaking referred to in paragraphs 125-126 of this Decision.

V. REQUEST FOR THE ESTABLISHMENT OF A SECURITY IF THE STAY WAS GRANTED

136. Based on the foregoing, the Committee does not see a need to examine Masdar’s request for the establishment of a security in case the enforcement of the Award is stayed.

VI. COSTS AND FEES

137. In its Response, Masdar requested the Committee to order the Applicant to bear all fees and costs associated with the Request for Stay.¹⁶⁹ The Committee reserves the determination of these costs and fees to the final decision on the Annulment Application.

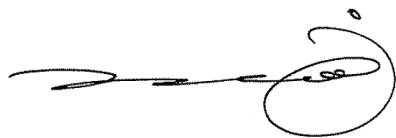
¹⁶⁹ Masdar’s Response, ¶ 84(d).

VII. DECISION

138. For the reasons stated above, the Committee:

- (i) Rejects Spain's request for a continuation of the stay of enforcement of the Award rendered on May 16, 2018 in the ICSID Case No. ARB/14/1.
- (ii) Orders that the stay of enforcement of the Award currently in place be lifted.
- (iii) Invites Masdar to provide to Spain a written undertaking in accordance with paragraphs 125-126 above, in a form that is legally binding in the Kingdom of the Netherlands, a copy of which shall be furnished to the Committee. The order provided in paragraph 138(ii) is not conditional upon the issuance of this written undertaking.
- (iv) Reserves its decision on the allocation of costs and fees until the final decision on the Annulment Application.
- (v) Reserves the right to modify this Decision if requested by either Party upon a modification of the prevailing circumstances.
- (vi) All other requests are denied.

For and on behalf of the Committee,



Kap-You (Kevin) Kim
President of the Committee
Date: May 20, 2020