

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CUBE INFRASTRUCTURE FUND SICAV,  
*et al.*,

Plaintiffs,

v.

KINGDOM OF SPAIN,

Defendants.

Civ. Action No. 20-1708 (EGS)

MEMORANDUM OPINION AND ORDER

Plaintiffs Cube Infrastructure Fund SICAV, Cube Infrastructure Managers S.A., Cube Energy S.C.A. (now Cube Energy S.a.r.l.), Demeter Partners S.A., and Demeter 2 FPCI seek to enforce a €33.7 million award, plus interest and costs, against Defendant Kingdom of Spain. Spain has moved to dismiss the Complaint, or, in the alternative, to stay the case until Spain's pending application to annul the award is resolved by the International Centre for Settlement of Investment Disputes ("ICSID"). See Def.'s Mot., ECF No. 11.<sup>1</sup> Upon consideration of Spain's motion, the response and reply thereto, the applicable law, and the entire record, the Court will **GRANT** Spain's motion for a stay and **DENY WITHOUT PREJUDICE** Spain's motion to dismiss.

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<sup>1</sup> When citing to electronic filings throughout this Memorandum Opinion the Court cites to the ECF header page number not the page number of the filed document.

## I. Background

Plaintiffs are Europe-based “investment and private equity funds” that invest in energy projects, including photovoltaic (“PV”) and hydro-power plants. Compl., ECF No. 1 ¶ 8. Cube Infrastructure Fund SICAV, Cube Infrastructure Managers S.A., and Cube Energy S.C.A. (“Cube Plaintiffs”) are established under the laws of the Grand Duchy of Luxembourg. See *id.* ¶ 2. Demeter Partners S.A. and Demeter 2 FPCI (“Demeter Plaintiffs”) are organized under the laws of France. See *id.* ¶ 3.

Plaintiffs’ lawsuit stems from cross-border investments in Spain’s energy sector. *Id.* ¶ 8. Beginning in 2004, Spain began to establish a special incentive regime “to encourage the development of more renewable energy facilities in order to help Spain achieve its renewable energy goals.” Pls.’ Opp’n, ECF No. 16 at 10. The incentives regarded “representations concerning the level of prices that would be paid for [energy facilities’] electricity and the stability of those prices over time.” Decision, Ex. B to Compl., ECF No. 1-3 at 66. Relying on these incentives, the Cube Plaintiffs invested in three PV facilities in Spain in 2008, see Compl., ECF No. 1 ¶ 15; and the Cube Plaintiffs and Demeter Plaintiffs entered into a partnership and acquired rights to 16 hydro-power facilities in Spain in 2011 and 2012, see *id.* ¶ 18. However, in 2010, Spain began to revoke the benefits previously guaranteed to investors such as

Plaintiffs, and, in 2013, enacted the “New Regulatory Regime.” Pls.’ Opp’n, ECF No. 16 at 11. Spain’s New Regulatory Regime “replaced the existing incentive schemes with a fixed reasonable rate of return and adversely affected the financial viability of the projects that Plaintiffs acquired.” Pls.’ Opp’n, ECF No. 16 at 11. Because the regulatory change allegedly caused Plaintiffs harm, the companies sought to arbitrate the dispute with Spain under the Energy Charter Treaty (“ECT”). Compl., ECF No. 1 ¶ 32.

The ECT is a multilateral agreement signed by fifty-three contracting parties—including Spain, Luxembourg, and France—that establishes “a legal framework . . . to promote long-term cooperation in the energy field.” ECT, Ex. C to Compl., ECF No. 1-4, art. 2. Article 26 of the ECT provides that “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former” may be submitted to the ICSID. *Id.* at art. 26. ICSID is an institution established pursuant to the Convention on Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (“ICSID Convention”) (D.E. 1-2).

On April 16, 2015, Plaintiffs commenced arbitration against Spain under a three-member ICSID tribunal. See Compl., ECF No. 1 ¶ 32. Spain objected to the tribunal’s jurisdiction on the ground that its offer to arbitrate in Article 26 of the ECT does

not apply to investors from other EU Member States but rather is limited to investors from states that are not members of the EU. See Def.'s Mot., ECF No. 11-1 at 19. In resolving the dispute, the arbitral panel ultimately found, among other things, that Spain was liable for breaching its obligations of fair and equitable treatment under Article 10(1) of the ECT. Compl., ECF No. 1 ¶ 45. The tribunal ordered Spain to pay €33.7 million plus interest and costs. *Id.* ¶ 8.

On November 12, 2019, Spain petitioned the ICSID for annulment of the arbitration award. *Id.* ¶ 48. The ICSID Annulment Committee declined Spain's request for a stay of enforcement, but the annulment proceeding remains pending. *Id.* ¶ 55; Def.'s Mot., ECF No. 11-1 at 20.

Seeking enforcement of the arbitral award, Plaintiffs filed their Complaint before this Court on June 23, 2020. See Compl., ECF No. 1. On December 18, 2020, Spain moved to dismiss the petition in this case, or in the alternative, to stay this case pending the outcome of the annulment proceedings. See Def.'s Mot., ECF No. 11. Plaintiffs filed their opposition on January 18, 2021, see Pls.' Opp'n, ECF No. 16; and Spain filed its reply brief on February 1, 2021, see Def.'s Reply, ECF No. 18. The motion is now ripe for adjudication.

## **II. Legal Standard**

Enforcement of ICSID awards in the United States is governed by 22 U.S.C. § 1650a, which implements the treaty obligations of the United States, as a contracting party to the ICSID Convention, to ensure that U.S. courts treat an ICSID award "as if it were a final judgment" of a state court. ICSID Convention, art. 54(1). Section 1650a provides, in relevant part, that "[t]he pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). The statute specifies that the Federal Arbitration Act—which provides limited grounds for vacating or refusing confirmation of an ordinary arbitration award, 9 U.S.C. §§ 9-10—“shall not apply to enforcement of awards rendered pursuant to the convention,” 22 U.S.C. § 1650a(a).

## **III. Analysis**

Spain has moved to stay this case pending the ICSID decision on Spain's petition to annul the arbitration award. Def.'s Mot., ECF No. 11. A court's authority to stay proceedings stems from "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). In considering a motion to

stay, courts must “weigh competing interests and maintain an even balance between the court’s interests in judicial economy and any possible hardship to the parties.” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254-55) (internal quotation marks omitted). The party seeking the stay has the burden of showing that the stay is needed and warranted. *Landis*, 299 U.S. at 255. In deciding whether to grant a stay, a court weighs “the benefits of a stay, the hardship to the movant of denying a stay, and any injury to the nonmovant from issuing a stay.” *Hulley Enters., Ltd. v. Russian Fed’n*, 211 F. Supp. 3d 269, 277-80 (D.D.C. 2016).<sup>2</sup>

The Court agrees that Spain has met its burden for the issuance of a stay in this case. First, the benefits of the stay are readily apparent. Spain has sought to annul the award, its application is still pending, and the ICSID Annulment Committee has the authority to grant the requested relief. See ICSID

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<sup>2</sup> Neither party challenges the Court’s jurisdiction to enter a stay. However the Court notes that a stay of a petition to enforce an arbitral award is a non-merits issue that a court may consider prior to resolving the question of jurisdiction. See *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342, 1348 (D.C. Cir. 2007) (“[C]ertain non-merits, nonjurisdictional issues may be addressed preliminarily because ‘[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.’”) (citation omitted); see also *Hulley*, 211 F. Supp. 3d at 277-80 (D.D.C. 2016) (deciding whether to stay petition to enforce arbitral decision prior to deciding the merits of jurisdictional arguments).

Convention, art. 52(3). In light of the fact that the very award that the Plaintiffs seek this Court to enforce may be annulled by the ICSID, the Court finds that the most efficient and fairest course is to stay proceedings pending the "resolution of independent proceedings which bear upon" the resolution of this case. *See IBT/HERE Empl. Representatives' Council v. Gate Gourmet Div. Ams.*, 402 F. Supp. 2d 289, 292 (D.D.C. 2005) (staying case when arbitrator's decision "may moot the defendants' motion to dismiss, or may resolve the issues raised in [the] lawsuit in their entirety").

Additionally, the stay conserves resources of both parties. Any decision on the merits by the Court would be subject to an appeal "with the associated delay and expense," and a stay also avoids the possibility of conflicting results between this Court's determination of enforcement and the ICSID's determination to annul the award. *See InterDigital Comms., Inc. v. Huawei Invest. & Holding Co.*, 166 F. Supp. 3d 463, 471 (S.D.N.Y. 2016) (staying case during the pendency of foreign proceedings); *see also Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005) (stating that "litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests") (citation omitted). "Although a stay would immediate[ly] delay the resolution of the parties' dispute, it would still likely be shorter than the

possible delay that would occur if this Court were to confirm the award and the [ICSID] were to then set it aside." *Matter of Arbitration of Certain Controversies Between Getma Int'l & Republic of Guinea*, 142 F. Supp. 3d 110, 114 (D.D.C. 2015) (internal quotation marks and alterations omitted).

The international nature of this matter also weighs in favor of issuing a stay. Considerations of international comity "are particularly resonant here, given that resolving this case mandates addressing a conflict between decades-old treaties and newly minted EU case law." *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019) (noting that "interests of comity, judicial efficiency, and the convenience of the parties and the courts – are especially strong 'where a [foreign] parallel proceeding is ongoing'" (quoting *Higgins v. SPX Corp.*, No. 05-846, 2006 WL 1008677, at \*4 (W.D. Mich. Apr. 18, 2006)). In view of these international issues, "[t]he Court is loath to wade into this territory unnecessarily." *Id.*

The hardship to Spain in denying the stay also militates in favor of granting a stay in this case. If the arbitral award is enforced prematurely and is later annulled, there will undoubtedly be litigation to recover any Spanish state assets that are seized during the pendency of the petition for annulment. For that reason, where "there is a possibility that

the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion” of annulment proceedings. *Europcar Italia, S.P.A. v. Maiellano Tours*, 156 F.3d 310, 317 (2d Cir. 1998).

With respect to the injury to the non-moving party, Plaintiffs have not identified any hardship they might face if this action is stayed. In addition, the Court notes that if Plaintiffs ultimately prevail they “will likely be compensated for any delay because the award includes interest.” *9REN Holding S.a.r.l. v. Kingdom of Spain*, No. 19-cv-1871, 2020 WL 5816012, at \*3 (D.D.C. Sept. 30, 2020) (finding that “the hardship to Spain, which could be significant, outweighs any potential hardship to 9REN”).

Finally, Plaintiffs contend that the plain language of the ICSID Convention “expressly precludes this Court’s examination of the discretionary factors that would apply to non-ICSID awards.” Pls.’ Opp’n, ECF No. 16 at 50 (citing ICSID Convention, art. 53 (stating that an award is made “binding on the parties . . . except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”). However, “the court’s authority to issue the stay arises under its inherent power, as this court has not yet even determined whether it has jurisdiction to hear the case.” *9REN Holding*, 2020 WL 5816012, at \*3 (rejecting plaintiff’s argument

that court did not have discretion to stay the proceedings under the ICSID Convention). And, as Defendants point out, several courts in this District have issued stays in similar cases against Spain arising under the ICSID. *See, e.g., Masdar*, 397 F. Supp. 3d at 40-41; *9REN Holding*, 2020 WL 5816012, at \*2-3; Mem. Op. and Order, ECF No. 36, *Infrastructure Servs. Luxembourg S.a.r.l. v. Kingdom of Spain*, No. 18-1753 (D.D.C. Aug. 28, 2019). Moreover, even in cases where the ICSID lifted its own provisional stay of enforcement prior to issuing a decision in annulment proceedings, as the ICSID has done here, courts in this District have found that a stay of the action remained appropriate. *See, e.g., Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, No. 18-cv-2395, 2020 WL 2996085, at \*3-4 (D.D.C. June 4, 2020).

Given the pendency of proceedings to annul the award the Court is being asked to enforce, the Court is persuaded, in an exercise of its judgment and after weighing the competing interests cited by the Supreme Court, that this action should be stayed. *See Landis*, 299 U.S. at 248, 254-55. The United States Court of Appeals for the District of Columbia has warned against issuing immoderate and indefinite stays, and, therefore, the Court will further order that the circumstances justifying this stay should be reviewed with regularity to avoid an unduly lengthy or indefinite stay. *See Belize*, 668 F.3d at 732-33

(stating a stay is immoderate and thus unlawful unless framed in a manner which ensures its force will be spent within reasonable limits). To that end, the Court will order the parties to provide regular status updates informing the Court of the status of the pending ICSID proceedings.

#### **IV. Conclusion**

For the foregoing reasons, the Court **GRANTS** the Kingdom of Spain's motion to stay and **DENIES WITHOUT PREJUDICE** its motion to dismiss. Accordingly, it is

**ORDERED** that this case is hereby **STAYED**; and it is

**FURTHER ORDERED** that the parties shall notify the Court within two business days of any ruling or development in the annulment proceedings; and it is

**FURTHER ORDERED** that the parties shall file a joint status report on the status of the annulment proceedings by no later than June 1, 2021, if no notice on the annulment proceedings have been filed by that date.

**SO ORDERED.**

**Signed: Emmet G. Sullivan**  
**United States District Judge**  
**May 17, 2021**