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**Award and Court Documents:** InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12) – Award – 2 August 2019; Civil Action No. 20-817 (JDB) – Memorandum Opinion – 29 June 2021; Civil Action No. 20-817 (JDB) – Order – 29 June 2021

**Case Report by:** Maria Gomez\*\*, Editor Ignacio Torterola\*\*\*

**Summary:** Plaintiffs brought an action to enforce an arbitral award issued by the International Centre for Settlement of Investment Disputes (“ICSID”) against the Kingdom of Spain (“Spain”). Spain opposed the enforcement based on several grounds or, alternatively, sought the suspension of the proceedings until the ICSID *ad hoc* Annulment Committee (“Annulment Committee”), presently examining the legality of the award, has decided its application for annulment.

On behalf of the European Union (“EU”), and in support of Spain, the European Commission (“EC”) filed a brief as *amicus curiae* arguing that EU law excluded ICSID jurisdiction over the dispute, thus invalidating the ICSID award. In turn, Plaintiffs moved for summary arguing that their ICSID award is not controversial and that no additional stay is needed.

The Court joined the consensus of other courts within the District of Columbia in considering comparable allegations before examining the merits of the conflict between the parties, and ultimately decided to stay the proceedings until a final resolution is rendered by the ICSID Annulment Committee.

**Main Issues:** conflicts of law between EU law and multiple treaty regimes, enforcement of ICSID award, annulment of award, staying of proceedings in federal district court.

**United States District Court for the District of Columbia:** John D. Bates (United States District Judge)

**Tribunal:** Mr. Stephen L. Drymer (President), Professor William W. Park (Co-Arbitrator) and Professor Pierre-Marie Dupuy (Co-Arbitrator)

**Members of the *ad hoc* Committee:** Prof. José-Miguel Júdece, President of the *ad hoc* Committee; Dr. Karim Hafez, Member of the *ad hoc* Committee; Prof. Yuejiao Zhang, Member of the *ad hoc* Committee.

**Claimant’s Counsel:** Mr. Alberto Fortún Costea, Mr. Luis Pérez de Ayala Becerril, Professor Miguel Gómez Jene, Ms. Maribel Rodríguez Vargas, Dr. José Ángel Rueda García, Mr. Antonio Delgado Camprubí, Mr. Borja Álvarez Sanz, Mr. José Ángel Sánchez Villegas (Cuatrecasas, Spain)

**Respondent’s Counsel:** Mr. José Manuel Gutiérrez Delgado, Ms. Amaia Rivas Kortázar, Mr. Antolín Fernández Antuña, Ms. Mónica Moraleda Saceda, Mr. Javier Castro López, Ms. María José Ruiz Sánchez, Mr. Roberto Fernández Castilla, Ms. Elena Oñoro Sainz (The Ministry of Justice of the Government of Spain)

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\*\* Maria Gomez is a Florida Licensed Attorney, pending admission to the District of Columbia Bar. After obtaining her Law and Journalism Dual Degree in Madrid, Spain, Maria moved to the United States where she earned a Juris Doctor and an LL.M degree in International Arbitration from the University of Miami School of Law. During her studies at the University of Miami, Maria served as Vice-President of the Miami Law International Arbitration Society. Maria’s passion for International Arbitration led her to work in the most prominent law firms in Miami. In addition, Maria co-founded MIA VYAP (Miami International Arbitration Very Young Arbitration Practitioners’ group) and she is currently a member of the Young ICCA Mentorship Program, and CEA-40’s Women Mentorship Program.

\*\*\* Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

## Digest:

### 1. Relevant Facts

Plaintiffs InfraRed Environmental Infrastructure GP Limited, European Investments (Morón) 1 Limited, European Investments (Morón) 2 Limited, European Investments (Olivenza) 1 Limited, and European Investments (Olivenza) 2 Limited are private investment companies organized under the laws of the United Kingdom. *InfraRed Env’t Infrastructure GP Ltd. v. Kingdom of Spain*, No. CV 20-817 (JDB), 2021 WL 2665406, at 1 (D.D.C. June 29, 2021). Plaintiffs invested a total of €31 million on two Spanish solar power plants in 2011. *Id.* at 2.

Between 2012 and 2014, Spain adopted a set of modifications to the compensation scheme for renewable energy generation, reducing the overall remuneration payable to producers of renewable energy including the invested power plants in all accounts. *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 8 May 2014, ¶¶ 2, 69. The key issue in the underlying arbitration was whether these legislative and regulatory amendments breached the international commitments of Spain under Article 10 of the Treaty on Energy Charter (“the ECT”). *InfraRed Env’t Infrastructure GP Ltd. v. Kingdom of Spain*, WL 2665406, at 2.

The ECT is a 1994 multilateral investment treaty between the EU, twenty-six EU member states including Spain and the United Kingdom<sup>1</sup>, and twenty-six non-EU countries. Mem. at 2 The purpose of the Treaty is to “promote long-term cooperation in the energy field.” *Id.* at 3.

Under Article 26 of the ECT, where both the investor’s home country and the state party to the dispute are parties to the ICSID Convention—as Spain, the United Kingdom, and the United States are and have been at all relevant times to this case—the aggrieved investor may, through its written consent, invoke ICSID arbitration to resolve its ECT-based dispute. *Id.*

In turn, ICSID’s jurisdiction extends to “any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to [ICSID].” *Id.* at 4. Moreover, “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.” *Id.*

## 2. Procedural History

On June 3, 2014, ICSID received a request for arbitration from Plaintiffs. *Id.* And, “[c]onsistent with the ICSID Convention and the ICSID Arbitration Rules, a three-member Tribunal was constituted for the case,” consisting of one arbitrator appointed by Plaintiffs, one appointed by Spain, and one appointed by the ICSID Secretary General. *Id.* The Tribunal collected written submissions from both sides, and after a four-day hearing in Paris in April 2017, the Tribunal awarded over US \$30 million plus interest, costs, and fees to Plaintiffs in August 2019. *Id.*

In December 2019, Spain applied to have the award annulled pursuant to Article 52 of the ICSID Convention, arguing that ICSID lacked jurisdiction because Spain never entered into a valid agreement to arbitrate disputes arising under the ECT. *Id.* In turn, ICSID provisionally stayed enforcement of the award, and constituted an *ad hoc* Annulment Committee consisting of three independent arbitrators who were not involved in the underlying arbitration. *Id.* at 5.

Although the Annulment Committee has not yet made an ultimate determination on the merits—the annulment proceedings are still ongoing; the Annulment Committee lifted its provisional stay on the enforcement of the award on the condition that Plaintiffs complied with certain undertakings not to use, transfer, or distribute any portion of the award collected prior to the final decision and to guarantee the return of all amounts collected from Spain pursuant to the award in the event of annulment. *Id.*

## 3. Positions of the Parties

### 3.1 Plaintiffs’ Position

On March 25, 2020, while ICSID annulment proceedings were pending, Plaintiffs filed suit in the U.S. District Court for the District of Columbia seeking to enforce the ICSID award against Spain, invoking Article 54 of the ICSID Convention that requires “[e]ach Contracting State” to “recognize an award rendered pursuant to [the ICSID] Convention as binding and enforce the

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<sup>1</sup> At all times relevant to this case, the United Kingdom was an EU member state.

pecuniary obligations imposed by that award . . . as if it were a final judgment of a court in that state.” *Id.*

Further, that Congress codified Article 54(1) into U.S. law, providing that those foreign sovereigns lose their immunity under the Foreign Sovereign Immunities Act (“FSIA”) with respect to any suit filed to enforce an award rendered under “an agreement to arbitrate . . . governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.” *Id.* at 6.

### 3.2 Spain’s Position

The main thrust of Spain’s motion to dismiss was that binding EU caselaw precluded its purported consent to arbitrate disputes with EU-based investors arising under the ECT, rendering the entire ICSID arbitration void *ab initio*, and divesting the Court of subject-matter jurisdiction. *Id.*

## 4. Court’s Analysis

### 4.1. Subject-Matter Jurisdiction

The Court began its analysis on subject-matter jurisdictions stating that “an independent obligation to determine whether subject-matter jurisdiction exists” is imposed on the federal courts of the United States. *Id.* at 7 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). Further, it stated that prior to addressing jurisdiction, a court may preliminarily address “certain non-merits, nonjurisdictional issues.” *Id.* (relying on *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342, 1348 (D.C. Cir. 2007)). As such, “[t]he stay of a petition to enforce an arbitration award is one such threshold issue that the Court may properly consider before jurisdiction.” *Id.* (quoting *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 38 (D.D.C. 2019)). Therefore, the Court concluded that it was appropriated to address the requested stay in this case. *Id.* at 8.

### 4.2 Spain’s Motion to Dismiss

Spain’s main argument in favor of dismissal was based in the decision of the Court of Justice of the EU (“CJEU”) in *Slovak Republic v. Achmea B.V.*,<sup>2</sup> CJEU Case No. C-248/16, where the CJEU held that EU law precluded any agreement by an EU member state to submit to arbitration against an investor from another EU member state, if such arbitration “may relate to the interpretation . . . of EU law.” *Id.* However, Spain had raised such argument before the ICSID tribunal in the underlying arbitration analyzed, which was ultimately dismissed. *Id.* at 9.

There, Tribunal found that *Achmea* could not superseded the provisions of the ECT because the CJEU’s authority was only binding “within the legal sphere of the [EU]” and its decision had “not met with the agreement of all ECT Contracting Parties.” *Id.* The tribunal also found that *Achmea*’s central holding did not even apply to disputes like the one presented arising under the ECT because any “provisions of EU law” raised in conjunction with Plaintiffs’ claims “are not dispositive or even relevant to resolve the issues raised by this dispute.” *Id.*

As such, the Court considered that these two challenges remain pending before the Annulment Committee, which stands “empowered to annul the entirety of the Award” if it agrees with Spain’s position. *Id.*

#### 4.3 Motion to Stay

The Court considered that staying the proceeding was in the interest of judicial *Id.* at 10. In so doing, the Court reasoned that the questions of law being litigated before the ICSID Annulment Committee were largely identical to those before it, and thus, the Court could not predict the outcome of the parallel annulment proceedings, leaving open the possibility for conflicting judgments. *Id.*

The Court also reasoned that “considerations of comity” weighed even more strongly in favor of a stay, based in the fact that—as Spain indicated—there are currently three cases pending before the CJEU which raised the question whether *Achmea*’s reasoning applies to arbitrations initiated under Article 26 of the ECT. *Id.* at 11. And, that at least six other actions to enforce arbitral awards against Spain were currently pending in the same District, being no coincidence that all of them have been stayed pending resolution of annulment proceedings. *Id.*

Plaintiffs, in turn, contended that, because the Annulment Committee has permitted conditional enforcement of the award pending its final decision, the Court should likewise permit enforcement of the award in the United States, insisting that “there is no risk of prejudice to Spain.” *Id.* at 12. Plaintiffs acknowledged that, if they were to prevail on their summary judgment motion, they would require a further court order to attach Spanish assets identified in the United States, requiring Spain to further litigate in this Court and to encumber whatever assets were ultimately attached, even if Plaintiffs voluntarily comply with their undertakings. *Id.* at 13. Otherwise, in the event of an ultimate annulment, Spain might need to pursue additional litigation to hold Plaintiffs to their undertakings, and to recover any damages caused by the post-attachment, pre-annulment encumbrance of its assets. *Id.*

The Court, relying on *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-CV-01618 (TSC), 2020 WL 5816238 (D.D.C. Sept. 30, 2020), highlighted that other courts in the district have rejected similar arguments and “issued stays, even where the ICSID lifted its stay on enforcing an award before issuing a decision in annulment proceedings.” *Id.* !

Ultimately, the Court concluded that, although it recognized Plaintiffs’ interest in the speedy resolution of their claims, absent any concrete pecuniary harm to the award to which Plaintiffs claimed entitlement, the balance of hardships favored a stay. And that such stay “pending a decision from the Annulment Committee will not inflict any harm that would outweigh the concrete hardship to Spain that might follow a potentially premature decision on the merits by th[e] Court.” *Id.* at 14. Furthermore, the Court required periodic updates from the parties on the progress of the annulment proceedings to ensure an expeditious resolution as soon as the Annulment Committee issues its decision. *Id.*

Additionally, Plaintiffs asked that the Court “in its discretion condition any stay on Spain’s provision of a bond.” *Id.* Nonetheless, the Court decided not to condition its stay on Spain’s

provision of a bond as Plaintiffs failed to identify any provisions of the ICSID Convention or relevant U.S. case law in support of their position. *Id.*

## **5. Order**

Based on the evidence presented, the Court ordered that Spain's motion to dismiss the complaint be denied without prejudice, and that Spain's motion to stay the proceedings be granted. *Id.* at 14-15. Also, that further proceedings in this matter were stayed pending final decision on the merits of the annulment proceedings before the ad hoc ICSID Annulment Committee. Lastly, the court ordered that Plaintiffs' motion for summary judgment be denied without prejudice. *Id.*