INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RWE INNOGY GMBH AND RWE INNOGY AERSA S.A.U.

(Claimants)

and

KINGDOM OF SPAIN

(Applicant on Annulment / Respondent)

ICSID Case No. ARB/14/34
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Ms. Carita Wallgren-Lindholm, President
Mr. Álvaro Rodrigo Castellanos Howell
Mr. Colm Ó hOisín SC

Secretary of the *ad hoc* Committee
Ms. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 20 March 2024

REPRESENTATION OF THE PARTIES

Representing RWE Innogy GmbH and RWE Innogy Aersa S.A.U.:

Ms. Marie Stoyanov
Allen & Overy LLP
52 avenue Hoche, CS 90005
75379 Paris, Cedex 08
France

and

Mr. Antonio Vázquez-Guillén
Mr. David Ingle
Mr. Pablo Torres
Ms. Lucinda Critchley
Mr. Gary Smadja
Ms. Tatiana Olazábal
Allen & Overy LLP
Calle Serrano 73
28006 Madrid
Spain

Representing the Kingdom of Spain:

Ms. María del Socorro Garrido Moreno
Ms. María Andrés Moreno
Ms. Gabriela Cerdeiras Megías
Ms. Lorena Fatás Pérez
Ms. Ana Fernández Daza
Ms. Inés Guzmán Gutiérrez
Ms. Lourdes Martínez de Victoria Gómez
Ms. Amparo Monterrey Sánchez
Ms. Elena Oñoro Sainz
Ms. Marina Adela Porta Serrano
Mr. Alberto Torró Molés
Abogacía General del Estado
Departamento de Arbitrajes Internacionales
c/ Marqués de la Ensenada, 14-16, 2ª planta
28004, Madrid
Spain

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS

Application	Application for Annulment filed on 16 April 2021
Award	Award rendered on 18 December 2020 in the arbitration proceeding between RWE Innogy GmbH and RWE Innogy Aersa S.A.U. and the Kingdom of Spain (ICSID Case No. ARB/14/34)
C-[#]	Claimants' Exhibit
CJEU or ECJ	Court of Justice of the European Union / European Court of Justice
CL-[#]	Claimants' Legal Authority
C-Mem.	Claimants' Counter-Memorial dated 2 December, 2021
Claimants or RWE Parties	RWE Innogy GmbH and RWE Innogy Aersa S.A.U.
Claimants' EC Observations	Claimants' Observations on the EC's Application for Leave to Intervene as Non-Disputing Party in the Annulment Proceedings dated 10 September 2021
Claimants' Statement of Costs	Claimants' Statement of Costs dated 13 October 2022, as updated on 10 May 2023
Claimants' Updated Statement of Costs	Claimants' Updated Statement of Costs submitted on 10 May 2023
Committee	Committee constituted on 19 April 2021 comprising: Ms. Carita Wallgren-Lindholm, President; Mr. Álvaro Rodrigo Castellanos Howell, Member; and Mr. Colm Ó hOisín SC, Member
Decision or *RWE* Decision	Decision on Jurisdiction, Liability, and Certain Issues of Quantum issued on 30 December, 2019 in the arbitration proceeding between RWE Innogy GmbH and RWE Innogy Aersa

	S.A.U. and the Kingdom of Spain (ICSID Case No. ARB/14/34), which is part of the Award
Declaration of 15 January 2019	Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union dated 15 January 2019 (**RL-0098)**
Declaration of 2 May 2019	Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) ECT replacing the statement made on 17 November 1997 on behalf of the European Communities (**RL-0203)**
Disputed Measures	A series of measures implemented by the government of Spain from December 2012 until 2014 modifying the regulatory and economic regime of renewable energy projects
EC or Commission	European Commission
EC NDP Submission	The European Commission's Written Submission as a Non-Disputing Party dated 3 November 2021 filed in the present case pursuant to ICSID Arbitration Rule 37(2)
ECT	Energy Charter Treaty which entered into force on 16 April 1998 for Germany and the Kingdom of Spain
EU	European Union
EU law	European Law
EIA	Economic Integration Agreements
"First Hindelang Report" or "Report"	Expert Declaration of Professor Steffen Hindelang filed with Spain's Memorial on Annulment
Hearing on Annulment	Hearing on Annulment held on 5 July and 6 July 2022 in The Hague and by video conference

Hearing on Stay	Hearing on the Stay of Enforcement of the Award held on 22 October 2021 by video conference
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Background Paper on Annulment	Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
Mem.	Respondent's Memorial of Annulment, dated 24 September 2021
R-[#]	Respondent's Exhibit
REIO	Regional Economic Integration Organization
Rejoinder	Claimants' Rejoinder on Annulment, dated 30 March 2022
Rejoinder on Stay of Enforcement	Claimants' Rejoinder on the Continuation of Stay of Enforcement of the Award, dated 28 September 2021
RL-[#]	Respondent's Legal Authority
Reply	Respondent's Reply on Annulment and Comments on the Written Pleadings of the European Commission, dated 2 February 2022
Reply on Stay of Enforcement	Respondent's Reply in Support of the Continuation of the Stay of Enforcement of the Award, dated 7 September 2021
Respondent's Statement of Costs	The Kingdom of Spain's Statement of Costs dated 13 October 2022, and reconfirmed on 10 May 2023
Response on Stay of Enforcement	Claimants' Response to Spain's Request

	for Stay of Enforcement, dated 16 July 2021
SCC	Stockholm Chamber of Commerce
"Second Hindelang Report" or "Second Report"	Second Expert Declaration of Professor Steffen Hindelang filed with Spain's Reply
Spain or Applicant on Annulment or Respondent	Kingdom of Spain
Submission on Stay of Enforcement	Respondent's Submission in Support of the Continuation of the Stay of Enforcement of the Award dated 25 June 2021
TFEU	Treaty on the Functioning of the European Union
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Tribunal constituted on 4 November 2015, and reconstituted on 12 January 2018 comprising Mr. Samuel Wordsworth QC (President), Mr. Judd L. Kessler, and Ms. Anna Joubin-Bret
VCLT	Vienna Convention on the Law of Treaties
1998 Declaration	Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, 9 March 1998 (**RL-0182**)/(**CL-0283**)

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for annulment (the "**Application**") of the Award rendered on 18 December 2020 in the arbitration proceeding between RWE Innogy GmbH and RWE Innogy Aersa S.A.U. and the Kingdom of Spain (ICSID Case No. ARB/14/34) (the "**Award**"). The Award was rendered by a tribunal composed of Mr. Samuel Wordsworth QC (President), Ms. Anna Joubin-Bret and Mr. Judd L. Kessler (the "**Tribunal**").

2. This Decision will continue to use "**Claimants**" to refer to RWE Innogy GmbH and RWE Innogy Aersa S.A.U. and "**Respondent**" for the Kingdom of Spain, as in the original proceeding. The party that filed the Application for Annulment, the Kingdom of Spain, is also referred to as "**Applicant**" or "**Spain**"**.** Claimants and Respondent are collectively referred to as the "**Parties**"**.** The Parties' representatives and their addresses are listed above on page (i).

3. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes **(**"**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty, which entered into force on 16 April 1998 for Germany and the Kingdom of Spain ("**ECT**"**)**, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

4. The dispute in the original proceeding related to measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy investments in Spain.

5. In its Decision on Jurisdiction, Liability, and Certain Issues of Quantum dated 30 December 2019 ("**Decision**"), which is part of the Award, the Tribunal ruled:

> "*(1) That it lacks jurisdiction to hear the claims of breach of Article 10(1) ECT with respect to the two Taxation Measures introduced by Law 15/2012 of 27 December 2017, but that the jurisdictional objections of the Respondent are otherwise rejected.*

> *(2) That the Respondent has breached Article 10(1) ECT (i) to the extent that it has procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place prior to adoption of the Disputed Measures, and (ii) the disproportionate nature of the new measures that it has adopted, with specific respect to Urano, Grisel II, Bancal I and II, Siglos I and II, and Cepeda.*
>
> *(3) All other claims and requests of the Parties are dismissed.*
>
> *(4) The Parties are directed to attempt to reach an agreement on the amount of compensation to be paid by the Respondent to the Claimants in respect of its breaches of its obligations as identified in paragraph (2), in accordance with the Tribunal's findings. In a first phase, the Parties are invited to agree by* ***January 23, 2020*** *on a reasonable schedule within which to attempt to reach agreement. If the Parties are unable to agree on such a schedule, such will be fixed by the Tribunal through further directions.*
>
> *(5) Insofar as the Parties fail to reach an agreement in accordance with (4) above, the Tribunal will, following consultation with the Parties, fix a calendar for further submissions of the Parties on the damages due to the Claimants.*
>
> *(6) The decision on the final determination of the damages due is thus reserved and will be fixed in the Award, along with the Tribunal's decisions as to interest, tax and costs.*"

6. In the Award, the Tribunal ordered the Kingdom of Spain to pay to Claimants a sum of EUR 28,080,000 as compensation for the damages that resulted from its wrongful acts along with interest at a rate of 2.07% compounded monthly from 30 June 2014 to the date of payment in full of all sums due pursuant to the Award. Spain was also ordered to bear 100% of the costs of the arbitration and reimburse Claimants EUR 2,373,909.24 in respect of Claimants' legal fees and other costs and expenses incurred in connection with the jurisdiction and liability phase resulting in the Decision. Claimants and Respondent were ordered to bear their own respective legal fees and other costs and expenses incurred in connection with the quantum phase.

7. Respondent applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying two grounds for annulment: (i) manifest excess of powers (Article 52(1)(b)); (ii) failure to state reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

8. On 16 April 2021, ICSID received an application from the Kingdom of Spain for annulment of the Award (the "**Application**").[1] The Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for the stay of enforcement of the Award until the Application was decided (the "**Request for Stay**").

9. On 19 April 2021, pursuant to ICSID Arbitration Rule 50(2), the Secretary-General of ICSID registered the Application. On the same date, the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed in accordance with ICSID Arbitration Rule 54(2).[2]

10. On 11 May 2021, the Secretariat informed the Parties of the Secretary-General's intention to propose to the Chairman the appointment to the *ad hoc* Committee of Carita Wallgren-Lindholm, a national of Finland, as President, Álvaro Rodrigo Castellanos Howell, a national of Guatemala and Colm Ó hOisín SC, a national of Ireland, as Committee Members.

11. On 18 May 2021, each of the Parties confirmed not having observations related to the proposal of 11 May 2021, and on the same date the Secretary-General informed the Parties that the Chairman would proceed to appoint Ms. Wallgren-Lindholm, Mr. Castellanos Howell and Mr. Ó hOisín SC.

12. By letter dated 28 May 2021, in accordance with ICSID Arbitration Rules 6 and 53, the Parties were notified that an *ad hoc* Committee composed of Ms. Carita Wallgren-Lindholm, a national of Finland, as President of the Committee, Mr. Álvaro Rodrigo Castellanos Howell, a national of Guatemala, and Mr. Colm Ó hOisín, a national of Ireland, had been constituted (the "***ad hoc* Committee**" or "**Committee**"). All members were appointed by the Chairman of the Administrative Council. On the same date, the Parties were notified that Ms.

[1] Application for Annulment in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, filed by the Kingdom of Spain on 16 April 2021, together with exhibits 1 through 14 (the "**Application**").

[2] Notice of Registration of Application for Annulment in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, dated 19 April 2021.

Mercedes Cordido-Freytes de Kurowski, Legal Counsel, ICSID, would serve as Secretary of the Committee.

13. On 3 June 2021, the Committee proposed holding the First Session by video conference indicating the dates when the Committee was available and provided a draft Procedural Order No. 1 to the Parties to facilitate the Parties' discussions on procedural matters. The Parties were invited to confer regarding the items addressed in the draft order and to modify the contents as they saw fit.

14. On 10 June 2021, the Parties informed the Committee of certain agreements reached by them as regards procedural matters.

15. On 11 June 2021, the Committee confirmed that the First Session was to be held on 16 July 2021, by video conference.

16. On 24 June 2021, Spain submitted a Draft Procedural Order No. 1 reflecting the Parties' agreements and points of disagreement that were to be discussed during the First Session. Claimants confirmed that such document reflected the Parties' positions regarding Procedural Order No. 1.

17. On 25 June 2021, Spain filed its Submission in Support of the Continuation of the Stay of Enforcement of the Award ("**Submission on Stay of Enforcement**"), together with Annexes 15 to 48 and an updated list of Annexes.

18. On 13 July 2021, the European Commission (the "**EC**" or the "**Commission**") filed with the ICSID Secretariat an Application for Leave to Intervene as a Non-Disputing Party in the Annulment Proceedings, also dated 13 July 2021 ("**EC's Application**"). On the same date, the Center acknowledged receipt to the EC of its Application and transmitted it to the Parties and to the Committee.[3]

19. Further on the same date, the Committee invited the Parties to submit their comments on the EC's Application by 28 July 2021.

[3] Procedural Order No. 2 dated October 14, 2021 ("**PO 2**"), ¶¶ 1-2.

20. On 16 July 2021, during the First Session, Claimants advised the Committee that the Parties had agreed to extend the deadline for the Parties to submit their comments on the EC's Application from 28 July 2021 until 10 September 2021.

21. On 16 July 2021, Claimants filed observations on Spain's request to continue the stay of the enforcement of the Award ("**Response on Stay of Enforcement**").

22. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on 16 July 2021, by video conference ("**First Session**").

23. On 19 July 2021, the Committee confirmed the extension of the deadline for the Parties to submit their comments on the EC's Application from 28 July 2021 until 10 September 2021.

24. On 27 July 2021, following the First Session, the Committee issued Procedural Order No. 1 ("**PO 1**") recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues. PO 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; that the procedural languages would be English and Spanish; and that the place of proceeding would be Washington D.C, United States. Procedural Order No. 1 also sets out the procedural calendar for the proceeding.

25. In accordance with Procedural Order No. 1, the date for the Committee to issue its Decision on the Stay of Enforcement of the Award was 22 November 2021 (Annex B of PO 1) and the Committee would endeavor to issue its Decision on the Stay of Enforcement within 30 days of the Hearing on the Stay of Enforcement of the Award, with its full reasoning to follow (footnote 6 of PO 1).[4]

26. On 7 September 2021, Respondent filed a Reply on the Stay of Enforcement of the Award in support of the continuation of the stay of enforcement of the Award ("**Reply on Stay of Enforcement**").

[4] Procedural Order No. 1 dated 27 July 2021.

27. On 10 September 2021, Claimants and Respondent submitted their observations on the EC's Application ("**Claimants' EC Observations**" and "**Spain's EC Observations**" and together "**Parties' EC Observations**").

28. On 24 September 2021, Spain filed its *Memorial on Annulment* ("**Memorial**" or "**Mem.**"), along with the Expert Declaration of Professor Steffen Hindelang ("**First Hindelang Report**" or "**Report**"), Exhibits R-0372 to R-0379, Legal Authorities RL-0163 to RL-0199, and a consolidated list of Exhibits and a consolidated list of Legal Authorities.

29. On 28 September 2021, Claimants filed a Rejoinder on the Respondent's request to continue the stay of enforcement of the Award ("**Rejoinder on Stay of Enforcement**").

30. On 1 October 2021, Claimants filed a request for the exclusion of evidence. The Claimants requested that the Committee declare inadmissible the expert report of Professor Steffen Hindelang regarding European Law ("**EU law**").

31. On 6 October 2021, Spain submitted its Observations on Claimants' request of 1 October 2021, asking the Committee to dismiss it.

32. On 14 October 2021, the Committee issued Procedural Order No. 2 ("**PO 2**") concerning the EC's Application.[5] After reviewing the EC's Application and the Parties' EC Observations, the Committee decided to grant the EC's Application partially. Pursuant to PO 2, the Commission was allowed to file a 20-page written submission by 3 November 2021 and to be limited to the ground of annulment consisting in the alleged manifest excess of powers as it related to the law applicable to the dispute, the applicability of Article 26 ECT to intra-EU disputes, and the pertinence of EU Law on State aid in interpreting the investment protection provided for by the ECT.[6]

33. A hearing on the Stay of Enforcement of the Award was held on 22 October 2021 by video conference ("**Hearing on the Stay of Enforcement**"). Participating in the Hearing were:

[5] PO 2.
[6] PO 2, ¶ 72.

Members of the *ad hoc* Committee

- Ms. Carita Wallgren-Lindholm, President of the Committee
- Mr. Álvaro Rodrigo Castellanos Howell, Member of the Committee
- Mr. Colm Ó hOisín SC, Member of the Committee

ICSID Secretariat

- Ms. Mercedes Cordido-Freytes de Kurowski, Secretary of the Committee
- Mr. Federico Salon-Kajganich, Paralegal

On behalf of the Applicant

- Ms. María del Socorro Garrido Moreno
- Ms. Gabriela Cerdeiras Megías
- Mr. Alberto Torró Molés

On behalf of Claimants

- Ms. Marie Stoyanov, Allen & Overy
- Mr. Antonio Vázquez-Guillen, Allen & Overy
- Mr. David Ingle, Allen & Overy
- Mr. Gary Smadja, Allen & Overy
- Ms. Tatiana Olazábal, Allen & Overy
- Ms. Almuth Vorndran, RWE

34. On 3 November 2021, the EC filed its Submission pursuant to ICSID Arbitration Rule 37(2).

35. On 19 November 2021, the Committee issued Procedural Order No. 3 ("**PO 3**") concerning Claimants' request of 20 September 2021 for the Committee to declare inadmissible and exclude from the record the expert report of Professor Steffen Hindelang regarding EU law submitted by Spain with its Memorial on Annulment dated 24 September 2021. For the reasons indicated in PO 3, the Committee decided as follows:

> "*(i) The Committee rejects at this time Claimants' Request that the Hindelang Report be declared inadmissible in these proceedings and excluded from the record;*
>
> *(ii) The Committee declares that Claimants are at liberty to submit a legal expert report in response; and*

> *(iii) The Committee reserves its decision on costs for the Decision on Annulment.*"

36. On 22 November 2021, the Committee issued a Decision on Stay of Enforcement of the Award (With Reasons to Follow) ("**Decision on Stay of Enforcement**"). The Committee decided that the stay not be continued and lifted the Stay of Enforcement of the Award conditional on the provision of written undertakings by Claimants to the Committee's satisfaction (the "**Undertakings**"). It also reserved the issue of costs for the Request to a further order or decision.[7] The Committee decided that it would issue the Fully Reasoned Decision on lifting of the Stay of Enforcement of the Award (the "**Fully Reasoned Decision**") upon the issuance of the Undertakings, as approved by the Committee. The Committee invited the Parties to agree on the terms of the Undertakings and inform the Committee of their agreement by 13 December 2021. Absent an agreement, the terms of the Undertakings were to be decided by the Committee. The Committee further ruled that the lifting of the stay would become effective by the issuance of the Fully Reasoned Decision.

37. On 2 December 2021, Claimants filed their *Counter-Memorial on Annulment* ("**Counter-Memorial**" or "**C-Mem.**") together with Exhibits C-0359 and C-0360, Legal Authorities CL-0281 to CL-0311, a consolidated list of Exhibits, and a consolidated list of Legal Authorities.

38. On 2 February 2022, Spain filed its *Reply on Annulment and Comments on the Written Pleadings of the EC* ("**Reply**") together with the Second Expert Declaration of Professor Steffen Hindelang ("**Second Hindelang Report**" or "**Second Report**"), Exhibits R-0380 to R-0384, Legal Authorities RL-0201 to RL-0221, a consolidated list of Exhibits, and a consolidated list of Legal Authorities.

39. On 28 February 2022, the Committee issued its Fully Reasoned Decision, lifting the stay of enforcement of the Award effective as of the date of the Decision.

[7] Decision on the Continuation of Stay of the Enforcement of the Award dated 22 November 2021, ¶¶ 18-19.

40. On 30 March 2022, Claimants filed their *Rejoinder on Annulment* ("**Rejoinder**"**),** together with Exhibits C-0361, C-0362, C-0363, Legal Authorities CL-0312-CL-0329, a consolidated list of Exhibits, and a consolidated list of Legal Authorities.

41. On 10 May 2022, Spain filed a Request for the Committee to decide on the admissibility of new documents. In its request, Spain requested leave from the Committee to introduce four new documents into the record:

> *"(i) ruling of the CJEU in Case C638-19 P, European Food y others vs. European Commission, dated January 25, 2022;*
>
> *(ii) the fact that the Commission referred the United Kingdom to the Court of Justice of the European Union in relation to a Judgment of its Supreme Court of 19 February 2020 allowing the enforcement of an arbitral award ordering Romania to pay compensation to investors;*
>
> *(iii) judgement of the Paris Court of Appeal nº48/2022, dated April 19, 2022 and*
>
> *(iv) judgement of the Paris Court of Appeal nº 49/2022, dated April 19, 2022."*

42. On 17 May 2022, at the invitation of the Committee, Claimants filed observations on Spain's request of 10 May 2022.

43. On 20 May 2022, the Committee proposed to the Parties holding the Pre-Hearing Organizational Meeting on 20 June 2022, inviting them to confirm their availability by 24 May 2022, which Claimants did on 23 May 2022, and Spain on 24 May 2022.

44. On 24 May 2022, the Committee confirmed that the Pre-Hearing Organizational Meeting would be held on 20 June 2022.

45. Also, on 24 May 2022, the Committee decided on Spain's admissibility request of 10 May 2022. The Committee granted leave to Spain to introduce into the record: (i) Judgment of the Paris Court of Appeal Nº 48/2022, dated 19 April 2022 ("***Strabag***"); (ii) Judgment of the Paris Court of Appeal Nº 49/2022, dated 19 April 2022 ("***Slot Group***"); and (iii) A document of February 2022, whereby the Commission referred the United Kingdom to the Court of Justice of the European Union in relation to a judgment of its Supreme Court of 19 February

2020. Considering that the Judgment of the ECJ in Case C638- 19 P, *European Food y others v European Commission*, dated 25 January 2022 ("***Micula* Judgment**") had previously been filed by Spain into the record together with its Reply on Annulment, as RL-0220, the Committee decided that there was no need for leave from the Committee to reintroduce this document. The Committee further indicated that if the Parties so wished they could file simultaneous written submissions by 2 June 2022 on the relevance of the above-indicated documents to the present case, including their respective positions on the effects of their inclusion, if any, on the final allocation of costs in these annulment proceedings.

46. On 31 May 2022, the Committee issued Procedural Order No. 4 ("**PO 4**"), of the same date, concerning Professor Steffen Hindelang's Reports. For the reasons indicated therein, the Committee decided as follows:

> *"(i) The Committee admits Professor Hindelang's First and Second Reports into the record;*
>
> *(ii) The Parties are to submit an agreed proposal concerning Professor Hindelang's examination during the Hearing, by 13 June 2022;*
>
> *(iii) As part of the Committee's assessment of the evidence, the Committee will consider Prof. Hindelang's Reports, as well as all the other evidence submitted by the Parties, and will determine the probative value to be attributed to their contents in consideration of the limited scope of annulment proceedings.*
>
> *(iv) The Committee reserves its decision on costs for the Decision on Annulment."*

47. Also, on 31 May 2022, the Committee provided to the Parties Draft Procedural Order No. 5 ("**Draft PO 5**") on the Organization of the Hearing, inviting them to consult and revert to the Committee by 13 June 2022 with any agreements and/or disagreements that they might have.

48. On 2 June 2022, each Party filed comments, pursuant to the Committee's directions of 24 May 2022, on the relevance of the new documents indicated under paragraph 45 *supra* that had been allowed into the record.

49. On 8 June 2022, Spain submitted Draft PO 5 reflecting the Parties' agreements and/or respective positions, and informed that the Parties had further agreed that the third Hearing Day, initially reserved for the Hearing, would not be needed and could consequently be released. The Parties' agreements in this regard were subsequently confirmed by Claimants by email of the same date.

50. A Pre-Hearing Organizational Meeting was held on 20 June 2022 by video conference.

51. On 22 June 2022, Spain requested leave from the Committee to introduce two new documents into the record: (i) Opinion 1/20 of the Court of Justice of the European Union issued on 16 June 2022, and (ii) Award rendered in the SCC-2016/135: *Green Power Partners K/S and SCE Solar Don Benito APS v. The Kingdom of Spain.* On the same date, the Committee invited Claimants to comment on this request by 24 June 2022.

52. Also, on 22 June 2022, the Committee issued Procedural Order No. 5 ("**PO 5**"), of the same date, concerning the Organization of the Hearing.

53. On 24 June 2022, Claimants filed observations on Spain's request of 22 June 2022 for the admissibility of new documents, requesting that the Committee deny Spain's request, and that, alternatively, should the Committee deem it appropriate to admit those documents, Claimants requested that the Committee also admit into the record the decisions on annulment issued in *InfraRed v. Spain* and *RREEF v. Spain*.

54. On 26 June 2022, Spain filed observations on Claimants' alternative request of 24 June 2022, accepting the same subject to the acceptance of the authorities whose introduction Spain requested in its letter of 22 June 2022.

55. On 28 June 2022, the Committee decided on the admissibility of new documents, granting leave to Spain to introduce into the record:

(i) Opinion 1/20 of the Court of Justice of the European Union issued on 16 June 2022; and

(ii) Award rendered in the SCC-2016/135: *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*.

The Committee further granted leave to Claimants to introduce into the record:

(i) *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* (ICSID Case No. ARB/14/12), Decision on Annulment, 10 June 2022; and

(ii) *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Annulment, 10 June 2022.

The above-indicated documents were to be submitted by 29 June 2022. The Committee also suggested that any request by a Party to address the relevance of the above admitted documents be discussed during the Hearing as to any such opportunity and its modality, if granted.

56. A hearing on the Application for Annulment was held on 5-6 July 2022 at The Hague and by video conference (the "**Hearing**"). The following persons were present at the hybrid Hearing:

Committee:	
Ms. Carita Wallgren-Lindholm	President
Mr. Álvaro Rodrigo Castellanos Howell	Member of the Committee
Mr. Colm Ó hOisín SC	Member of the Committee
ICSID Secretariat:	
Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Committee
Mr. Federico Salon-Kajganich	ICSID Paralegal (remotely)
Mr. Dimitrios Georgios Kontogiannis	ICSID Intern (remotely)
For the Claimants:	
Mr. Antonio Vázquez-Guillén	Allen & Overy LLP
Mr. David Ingle	Allen & Overy LLP
Mr. Pablo Torres	Allen & Overy LLP
Ms. Lucinda Critchley	Allen & Overy LLP
Ms. Tatiana Olazábal	Allen & Overy LLP
Ms. Almuth Vorndran	RWE
Ms. Megan Monteleone	Allen & Overy LLP, Summer Associate (remotely)

For the Respondent:	
Ms. María del Socorro Garrido Moreno	State Attorney's Office (remotely)
Ms. Ana Fernández-Daza Álvarez	State Attorney's Office
Ms. Amparo Monterrey Sánchez	State Attorney's Office
Ms. Gabriela Cerdeiras Megías	State Attorney's Office
Mr. Juan Quesada Navarro	State Attorney's Office (remotely)
Expert: Professor Steffen Hindelang	
Court Reporter(s):	
Mr. Trevor McGowan	English Court-Reporter
Ms. Elizabeth Cicoria	Spanish Court-Reporter
Interpreters:	
Mr. Jesús Getan Bornn	English/Spanish Interpreter (remotely)
Ms. Amalia de Klemm	English/Spanish Interpreter (remotely)
Ms. Ana Sophia Chapman	English/Spanish Interpreter (remotely)

57. During the last day of the Hearing, the President of the Committee informed the Parties that the Committee did not require post-hearing briefs from the Parties and invited them to state their positions in this regard. Both Parties confirmed their agreement with the Committee that there was no need for the filing of post-hearing briefs in the present annulment proceeding.

58. On 26 September 2022, Spain requested leave from the Committee to introduce two new documents into the record: (i) Press Release from GAR dated 7 September 2022 titled "German Court declares ICSID claims inadmissible", and (ii) Press release from Cologne Higher Regional Court "Applications by domestic companies for international arbitration against an EU Member State inadmissible." On the same date, the Committee invited Claimants to comment on this request by 3 October 2022.

59. On 3 October 2022, Claimants filed observations on Spain's request of 26 September 2022 for the admissibility of new documents and requested that the Committee deny Spain's request.

60. On 7 October 2022, the Committee informed the Parties of its decision to deny Spain's request of 26 September 2022. This, in light of (i) the advanced stage of the proceedings, where the Hearing on Annulment had already been held and the Parties had agreed not to file

post-hearing briefs; (ii) the advanced status of the Committee's work, with the Committee being in the process of drafting its Decision and holding deliberations; and (iii) considerations of procedural economy. The Committee also expressed that considering the arguments and documents on record, it was of the view that Spain would not be disadvantaged by the Committee not allowing further materials into these Annulment proceedings.

61. On 13 October 2022, each Party filed a statement of costs.

62. On 8 November 2022, the Committee gave the Parties an update on the status of its Decision on Annulment.

63. On 20 December 2022, Spain requested leave from the Committee to introduce into the record two new documents: (i) the Judgment of the Svea Court of Appeal dated 13 December 2022 concerning case SCC No. V (2015/063) between *Novenergia II - Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain);* and (ii) the Judgment rendered by the Swedish Supreme Court dated 14 December 2022 concerning the *PL Holdings v. Poland* (award) (the "**Swedish Judgments**"). On the same date, the Committee invited Claimants to comment on this request by 3 January 2023.

64. On 3 January 2023, Claimants filed observations on Spain's request of 20 December 2022.

65. Also on 3 January 2023, the Committee decided on the admissibility of the Swedish Judgments: (i) admitting them into the record; and (ii) giving the possibility to the Parties to submit simultaneous comments within a page limit, by 17 January 2023. The Committee noted that it would in due course revisit its expected timeline for its Decision, if needed.

66. On 17 January 2023, the Parties filed simultaneous comments on the Swedish Judgments.

67. On 14 February 2023 and 24 April 2023, the Committee further updated the Parties on the status of its Decision on Annulment.

68. On 2 May 2023, the Committee invited the Parties to update, if they so wished, their submissions on costs dated 13 October 2022, by 10 May 2023.

69. On 10 May 2023, Claimants updated their previous statement of costs. Spain, in turn, stated that it did not need to update its statement of costs of 13 October 2022.

70. On 21 June 2023, the Committee further updated the Parties on the status of its Decision on Annulment.

71. On 9 August 2023, Spain requested leave from the Committee to introduce into the record the German Federal Court of Justice's Decision I ZB 75/22 of 27 July 2023. On the same date, the Committee noting that as Spain itself had recognized, this was a very late stage of the deliberations to seek leave for the introduction of a new legal authority albeit, as Spain argued, "*of utmost relevance*" amounting to "*exceptional circumstances*". For good order, before taking its decision regarding admissibility, the Committee invited Claimants' comments on Spain's request by 17 August 2023.

72. On 17 August 2023, Claimants filed observations on Spain's request of 9 August 2023.

73. On 25 August 2023, the Committee decided on Spain's request for admissibility of the German Federal Court of Justice's Decision I ZB 75/22 of 27 July 2023. The Committee indicated that after having thoroughly evaluated the arguments expressed in Spain's request of 9 August 2023, and Claimants' observations of 17 August 2023, it could not find a justification nor the need for admitting further evidence at such a late stage of the proceedings. Accordingly, Spain's request was denied.

74. On 22 November 2023, the Committee declared the proceeding closed in accordance with ICSID Arbitration Rules 38(1) and 53.

75. On 28 November 2023, Spain requested leave from the Committee to introduce into the record a Judgment of the Berlin Court dated 14 November 2023.

76. On 4 December 2023, following the invitation of the Committee, Claimants presented their observations on Spain's request of 28 November 2023.

77. On 12 December 2023, the Committee after considering the Parties' positions on the matter, concluded that Spain had not proven to the Committee's satisfaction that there were exceptional circumstances that merited reopening of the proceeding pursuant to ICSID

Arbitration Rule 38(2), and therefore denied Spain's Request of 28 November 2023 to admit new evidence.

III. SUMMARY OF THE RELEVANT FACTS

78. The Applicant has provided a summary of the relevant facts of the case, taken from the Decision and Award in the underlying arbitration, which summary is recounted below.

79. In Spain, the production of electricity from renewable sources is a highly regulated industry. It has been regulated in compliance with Spain's binding international targets, including those of the European Union ("**EU**"). Spain submits that it also has had to comply with State Aid rules imposed by the EU, which require the achievement of energy policy targets without distorting the internal EU market.[8] Levelling out specific renewable energy sector costs allowing the sector to compete with traditional energy producers under equal conditions would result in a level playing field.

80. In November 1997, the Spanish Parliament approved the Electricity Sector Law that regulates the electricity sector ("**Law 54/1997**").[9] The Law 54/1997 distinguished between the "Ordinary Scheme", which was applicable to traditional energy suppliers, and the "Special Scheme", which was applicable to electricity production from renewable sources. The intent of the dual system was to promote and foster the production of renewable energy "given that the related technology required public support as the ordinary market electricity price was insufficient to meet costs involved in building and exploiting the special installations necessary for renewable energy production."[10]

81. The objective of Law 54/1997 was to provide a "*reasonable rate of return with reference to the cost of money in the capital market for renewable energy producers*."[11] The Applicant has submitted that the concept of reasonable return means that State Aid paid by the Spanish government to renewable energy producers permitted the latter to cover both capital costs

[8] Mem., ¶ 17.
[9] **R-0003**, Act 54/1997 of 27 November 1997.
[10] Mem., ¶ 19.
[11] Mem., ¶ 21.

("**capex**") and operating costs ("**opex**")" and obtain "…*a return that was neither excessive nor insufficient*."[12] The reasonableness was to be measured in light of the principles of Law 54/1997 and the economic sustainability and financial self-sufficiency of the Spanish electricity system. The Applicant also notes that the 1997 Special Regime had two phases: the first phase, to identify the standard cost of the standard investment (capex) and the operation and maintenance costs (opex) in accordance with actions of a diligent investor, and the second phase, to set a balanced and proportionate, i.e., reasonable target return.[13]

82. The Spanish regulatory authorities monitored and made appropriate adjustments to the State Aid provided for renewable electricity production. Adjustments were necessary to adapt the system to changes in the economic and the technological scenario and other market factors, to balance the various targets and interests in play. The reasonable rate of return was not quantified in the Law 54/1997 but was left to hierarchically lower legislation. The dynamic and fluid nature of the regulation applicable to this sector allows modifications when needed.[14]

83. The first regulation was Royal Decree 2818/1998[15] creating the special regime where renewable energy producers could choose to sell electricity at a fixed rate per kWh or at the free market price.[16] This Royal Decree was repealed and in 2004 Royal Decree 436/2004 ("**RD 436/2004**")[17] was enacted replacing the remuneration mechanisms with an average reference rate.[18]

84. In 2007, Spain approved Royal Decree 661/2007 ("**RD 661/2007**")[19] which repealed RD 436/2004 and "*replaced the average reference tariff by specific values for premiums and tariffs, expressed in euro cents per kWh*."[20] Spain describes the contents of RD 661/2007 as

[12] Mem., ¶ 22.
[13] Mem., ¶ 23.
[14] Mem., ¶ 24.
[15] **R-0098**, Royal Decree 2818/1998 of 23 December 1998.
[16] Mem., ¶ 25.
[17] **R-0100**, Royal Decree 436/2004 of 12 March 2004.
[18] Mem., ¶ 26.
[19] **R-0101**, Royal Decree 661/2007 of 25 May 2007.
[20] Mem., ¶ 27.

including the following regulations: (i) the option for some technologies to choose between two different rates, a fixed per unit of output or a premium over the market price for each unit of output; (ii) maximum and minimum payment limits for a premium; (iii) rates based on the entire production of a facility; (iv) allowing certain use of natural gas by renewable energy producers; (v) priority access and dispatch to and from the national grid, and (vi) principle of guaranteeing a reasonable rate of return for renewable energy producers.[21]

85. In 2008, at the time of the financial crisis, the Spanish government began to consider measures to reduce an increasing tariff deficit and limit access to RD 661/2007. In April 2009, Spain enacted Royal Decree Law 6/2009 ("**RDL 6/2009**")[22] introducing the pre-registration process for projects potentially eligible under the RD 661/2007 regime.[23]

86. In 2010, Spain enacted Royal Decree 1614/2010 ("**RD 1614/2010**")[24] which, among other things, aimed to "*limit the number of permitted operating hours for CSP plants entitled to the premium*."[25] That same year, Spain enacted Royal Decree Law 14/2010 ("**RDL 14/2010**")[26] extending the obligation to pay a toll for transmission and distribution networks to all electricity producers.[27]

87. In 2012, the Spanish government requested that the National Energy Commission ("**CNE**") prepare a report for possible reforms in the energy sector. After a consultation process, the CNE issued a report with recommendations to reduce the tariff deficit and rebalance the Spanish electricity system. Spain then implemented a series of measures related to the production, transport and distribution of energy affecting all producers.[28]

[21] Mem., ¶ 28.
[22] **R-0089**, Royal Decree-Law 6/2009 of 30 April 2009.
[23] Mem., ¶¶ 29-30.
[24] **R-0105**, Royal Decree 1614/2010 of 7 December 2010.
[25] Mem., ¶ 31.
[26] **R-0090**, Royal Decree-Law 14/2010 of 23 December 2010.
[27] Mem., ¶ 31.
[28] Mem., ¶¶ 32-33.

88. Law 15/2012[29] (i) imposed a 7 % tax on energy revenue generated by all electricity producers and fed into the grid; and (ii) imposed a hydraulic royalty for the use and exploitation of inland waters in the case of hydroelectric installations.[30]

89. On 1 February 2013, Spain enacted Royal Decree Law 2/2013 ("**RDL 2/2013**")[31] which (i) instituted the corrected Consumer Price Index as a measure to update the inflation adjustments for tariffs; and (ii) eliminated the premium option for the Special Regime.[32]

90. On 12 July 2013, Spain enacted Royal Decree Law 9/2013 ("**RDL 9/2013**")[33] which provided a specific remuneration above market price based on the costs per unit of installed energy plus standard amounts of operating costs for various types and outputs of renewable energy installations.[34]

91. On 26 December 2013, Spain enacted Law 24/2013[35] which replaced Law 53/1997 but was still based on the same principles, including the principle of reasonable return.[36]

92. On 10 June 2014, Spain enacted Royal Decree 413/2014 ("**RD 413/2014**")[37] which defined the remuneration of renewable energy producers under RDL 9/2013 providing a reasonable rate calculated on the basis of an "*efficient plant*."[38]

93. On 16 June 2014, the Ministerial Order IET/045/2014 ("**Ministerial Order**")[39] was issued to implement RDL 9/2013, Law 24/2013 and RD 413/2014, and setting specific economic parameters to calculate the remuneration of renewable energy producers.

---

[29] **R-0030**, Law 15/2012 of 27 December 2012 on tax measures for energy sustainability.
[30] Mem., ¶ 34.
[31] **R-0094**, Royal Decree-Law 2/2013 of 1 February 2013.
[32] Mem., ¶ 35.
[33] **R-0095**, Royal Decree-Law 9/2013 of 12 July 2013.
[34] Mem., ¶ 36.
[35] **R-0077**, Law 24/2013 of 26 December 2013 on the Electricity Sector.
[36] Mem., ¶ 37.
[37] **R-0110**, Royal Decree 413/2014 of 6 June 2014.
[38] Mem., ¶ 38.
[39] **R-0115**, Order IET/1045/2014 of 16 June 2014.

94. Lastly, Spain describes that the principle of reasonable return as well as priority access to the electricity transmission and distribution networks to and from the grid for renewable energy producers were recognized and maintained in RDL 9/2013, Law 24/2013, RD 413/2014, and the Ministerial Order. Spain submits that the regulatory measures approved between December 2012 and June 2014 continued with the essential characteristics of the system and the subsidies offered to the renewable energy producers as established in 1997. The Spanish regulator updated the system considering the economic, technological, and market changes as well as in an effort to reduce the tariff deficit and rebalance the Spanish electricity system. According to Spain, such measures were needed given the critical macro-economic situation in Spain and to fulfil its obligations as a member of the European Union.[40]

IV. SCOPE OF ANNULMENT AND APPLICABLE STANDARD

95. Spain in its Application seeks annulment of the Award on the following grounds as set out in Article 52(1)(b) and (e) of the ICSID Convention:

a) The Tribunal manifestly exceeded its powers; and

b) The Tribunal failed to state reasons with regard to its quantification of damages and its award of costs.

A. THE APPLICANT'S POSITION

96. The Applicant agrees with Claimants that the ICSID annulment under Article 52 of the ICSID Convention is not an appeal or an occasion to revisit the entire case but aims at ensuring the integrity of the arbitral proceedings.[41] Spain also accepts that there is neither a presumption in favour nor against annulment in the ICSID Convention.[42]

97. Spain also expresses its intent not to re-arbitrate the dispute and affirms that it is not presenting new evidence or new arguments herein.[43] Instead, Spain argues, it invokes solid

[40] Mem., ¶ 41.
[41] Reply, ¶¶ 12-13. Tr. Day 1, 6: 11-15.
[42] Reply, ¶ 16. Tr. Day 1, 6:25 and 7:1-2.
[43] Tr. Day 15:12-17.

grounds for annulment against an Award which shied away from "*principles essential to the ICSID Convention arbitration system*."[44] For Spain, the fact that the Tribunal has overstepped its jurisdiction without adequately explaining the reasons for its decision must lead to annulment of the Award in order to ensure "*the soundness and reliability of the arbitration system under the ICSID Convention and under the ECT…*"[45]

98. In addition, the Applicant addresses the argument put forward by Claimants as regards the limited scope of the powers of the Committee. Spain refers to Professor Hindelang's Second Report on the powers of the Annulment Committee attached to its Reply and addresses each of the arguments made by Claimants.

99. Spain does not dispute that annulment under the ICSID Convention is a limited and exceptional remedy but emphasizes that Spain "*invokes it [annulment] given the exceptional circumstances of the Award which mean that it falls within the grounds for annulment under Article 52(1)*." While Spain accepts that the Committee is not called upon to review *ex officio* the contents of the Award, it holds that the Committee is empowered to annul the Award if it considers that the reasons put forward justify the Award's annulment and this regardless of whether the Applicant has classified such reasons correctly or not. This means that the Committee is empowered to annul the Award even on a ground different from that put forward by the Applicant.[46]

100. Spain also contends that it was permitted to develop the arguments advanced in the Application since for the purposes thereof it is sufficient to indicate the grounds for annulment of the award under Article 52 of the ICSID Convention and the reasons for those grounds in summary form. In support of this conclusion, Spain refers to the *Elsamex* and *Venoklim* committees which confirmed that the parties can subsequently develop in writing

[44] Reply, ¶ 14.

[45] Reply, ¶ 15.

[46] Reply, ¶ 20, *citing* **RL-0216**, C. Schreuer and others, The ICSID Convention: A Commentary 1054 (2d Ed. 2009), ¶ 538.

their arguments in support of the grounds identified, once the *ad hoc* committee has been constituted.[47]

101. Furthermore, the Applicant recalls that Claimants have correctly pointed out that the ICSID annulment does not entail any review of the substantive correctness of the award.[48] However, for Spain, this does not preclude the Committee from annulling the Award in view of the breaches committed.[49]

102. Lastly, Spain rejects Claimants' argument that the Committee enjoys a discretionary power to annul the award (or not) when one of the Article 52(1) grounds is satisfied.[50] This argument, which suggests that the Committee may refuse to annul the Award where grounds for annulment have been established, is contrary to the historical record of the ICSID Convention and case law. Spain argues that if there are grounds for annulment, "*the award should be annulled without the Committee having any discretion*."[51] According to Spain, even the cases cited by Claimants do not support that *ad hoc* committees enjoy a discretionary power to (not) annul the award. Even in those cases where the committees have acknowledged the existence of a discretion, they held that such a discretion is not unlimited as it should be exercised in light of the object and purpose of the remedy of annulment.

---

[47] Reply, ¶¶ 21-23, relying on **RL- 0216**, "The ICSID Convention: A Commentary" Christoph H. Schreuer and others, ¶¶ 90, 94, pages 1054, 928-929; **RL-0217**, *Elsamex S.A. v. Republic of Honduras,* ICSID Case No. ARB/09/4, Decision on the Preliminary Objection of Elsamex S.A. against the Application for Annulment of the Award filed by the Republic of Honduras, 7 January 2014, ¶ 121 ("***Elsamex***"); **RL-0218**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/22, Decision of the *ad hoc* Committee on the Application for Annulment, 2 February 2018, ¶ 99 ("***Venoklim***").

[48] Reply, ¶ 25, making reference to C-Mem., ¶ 31.

[49] Tr. Day 1, 7:14-17.

[50] Tr. Day 1, 8:3-7.

[51] Reply, ¶¶ 28-32, *citing* **RL-0185**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.,* ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, ¶ 179 ("***Klöckner***"); **RL-0219**, Emmanuel Gaillard, *Chronique des sentences arbitrales,* 114(1) Journal Du Droit International 174 (1987), p. 186; **RL-0171**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 80 ("***Pey Casado***"); **RL-0221,** Sir Franklin Berman*, Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration,* in The Review of International Arbitral Awards 253 (E. Gaillard, JurisNet LLC 2010); **RL-0207**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ¶ 73 ("***EDF et al***"); **RL-0213**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, ¶ 148 ("***Blusun,* Decision on Annulment**"). Tr. Day 1, 8:3-13.

103. In support of Spain's position, during the Hearing, Professor Hindelang affirmed that "*[i]f illegality under the EU treaties is established by the Court of Justice, such as in the case of investor-state arbitration in an intra-EU context on the basis of the ECT, there remains no room for discretion.*"[52]

104. As regards the question of discretion, Spain concludes that the Committee must annul the Award if the grounds for annulment that Spain has put forward are satisfied. Otherwise, the Committee would act contrary to the object and purpose of the annulment mechanism of Article 52 of the ICSID Convention.[53]

B. CLAIMANTS' POSITION

105. Claimants contend that Spain seeks to appeal the Award under the guise of a request for annulment pursuant to Article 52(1)(b) and (e) of the ICSID Convention. For Claimants, Spain aims at re-arguing issues that have already been heard and determined by the Tribunal, in disregard of the limited scope of the annulment proceeding and the principle of finality of awards prescribed by Articles 52 and 53 of the ICSID Convention.

106. When it comes to the power of the Committee to annul the Award, Claimants further elaborate that Spain has attempted to evade the burden of proof that it bears when alleging that the Committee is empowered to annul the Award on grounds other than those invoked. This would be procedurally improper also since Claimants have had the opportunity to be heard only in respect of the grounds raised by the Applicant.[54] The fact that the Committee enjoys the discretion not to annul the Award, even when a ground for annulment is found to exist, is clear from the ordinary meaning of Article 52(3) of the ICSID Convention. This discretionary power, Claimants reaffirm, exists to shield the finality of awards, which is the cornerstone of ICSID arbitration.[55]

---

[52] Tr. Day 1 [S. Hindelang] 131:3-7.

[53] Reply, ¶¶ 33-34.

[54] Rejoinder, ¶¶ 36-38., *citing* **RL-0190**, *Duke Energy International Peru Investments No. 1 Ltd. V. Republic of Peru,* ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, ("***Duke***") ¶ 92.

[55] Rejoinder, ¶¶ 39-43, *citing* **CL-0294**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ¶ 73 ("***EDF et al***"); **CL-0293**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey,* ICSID Case

107. Claimants argue that ICSID annulment committees enjoy limited jurisdiction. ICSID annulment is an exceptional, extraordinary remedy, limited in scope, and must be construed considering the binding and final character of ICSID awards. In support of this argument, Claimants refer to the drafting history of the ICSID Convention along with its *travaux préparatoires* and to several *ad hoc* committees that stressed the exceptional nature of this remedy.[56]

108. Claimants further note that the *ad hoc* Committee is bound by the Applicant's request for annulment and should examine the Award's annulment within the scope of that request, namely only against the grounds of annulment invoked therein.[57] Thus, the scope of annulment is limited, and does not allow for an *ex officio* review of the Award as suggested by Spain.[58]

No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 45 ("***Tulip***"); **CL-0304**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020, ¶ 125 ("***Orascom****"*); **CL-0208**, *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on Annulment, ¶ 37 ("***CDC***"); **CL-0284**, C. Schreuer and others, The ICSID Convention: A Commentary, 1035-1040 (2d Ed. 2009) ¶ 466 ("**Schreuer**"); **RL-0221**, Sir Franklin Berman, *Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration, in* The Review of International Arbitral Awards, 256 (E. Gaillard Ed. JurisNet 2010); **CL-0328**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,* ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶¶ 498-499 ("***NextEra****"*).

[56] C-Mem., ¶¶ 22-23., *citing* **CL-0281**, ICSID, Excerpts from History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II-1, 218-219 (1965); **RL-0105**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016 ("**ICSID Background Paper on Annulment**") ¶ 71; **RL-0113**, *Maritime International Nominees Establishment (MINE) v. Republic of Guinea,* ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 4.04 ("***MINE***"); **RL-0106**, *Hussein Nuaman Soufraki v. The United Arab Emirates,* ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ¶ 20 ("***Soufraki***"); **CL-0276**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (Tanesco)*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018 ("***Standard Chartered***"), ¶ 62; **CL-0293**, *Tulip*, ¶ 43; **CL-0298**, *Bernhard von Pezold and Others v. Republic of Zimbabwe,* ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, ¶ 239 ("***Bernhard von Pezold***"); and **CL-0273**, *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/01/10, Decision on the Application for Annulment, 8 January 2007, ¶ 81 ("***Repsol***"). Tr. Day 1, 65:19-23; 66:4-13.

[57] C-Mem., ¶¶ 24-26., *citing* **RL-0105,** ICSID Background Paper on Annulment, ¶ 74; **RL-0172**, *Wena Hotels Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, 5 February 2002, ¶ 17 ("***Wena***"); **RL-0194**, *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, ¶ 167 ("***Total****"*); **CL-0298**, *Bernhard von Pezold*, ¶ 238; **RL-0113**, *MINE*, ¶ 4.08; **CL-0276**, *Standard Chartered*, ¶ 62; **CL-0304**, *Orascom TMT Investments S.a.r.l v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020, ¶ 124 ("***Orascom****"*); **CL-0284**, Shreuer, ¶ 531.

[58] Tr. Day 1,72: 5-11.

109. Moreover, according to Claimants, the exceptional nature, limited scope, and fundamental purposes of the annulment entail that the grounds for annulment are to be strictly construed. Being an exceptional remedy, which runs contrary to the finality of ICSID awards, annulment imposes a high threshold to be met under a limited scope of review.[59] In support of this conclusion, Claimants refer to previous decisions rendered by *ad hoc* annulment committees and available statistics on the outcome of annulment proceedings.[60]

110. Claimants further stress the fact that ICSID annulment committees are not empowered to function as courts of appeal to review the substantive correctness of awards. Article 53(1) of the ICSID Convention has explicitly excluded the possibility of any appeal against ICSID awards.[61] Instead, annulment is exclusively concerned with the integrity and legitimacy of the process of decision, a fact which significantly limits the material scope of the *ad hoc* annulment committees to the exclusion of findings of facts or law from their scope of review. Thus, the present Committee is neither empowered to amend the Award or substitute the Tribunal's reasoning with its own, nor to hear new arguments or evidence relating to the underlying arbitration.[62]

---

[59] Tr. Day 1,72: 5-11.

[60] C-Mem., ¶¶ 27-30., *citing* **CL-0307**, *Hydro S.r.l and Others v. Albania,* ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, ¶ 107 ("***Hydro***"); **RL-0194**, *Total*, ¶ 159; **CL-0225**, *OI European Group B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, 6 December 2018, ¶ 320 ("***OI***"); **CL-0279**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020,¶ 149 ("***Blusun***"); **CL-0309**, ICSID, The ICSID Caseload-Statistics, Issue 2021(2), 28 July 2021, 16.

[61] Tr. Day 1, 66: 16-20.

[62] C-Mem., ¶¶ 31-39. *citing* **CL-0284**, Schreuer; **RL-0106**, *Soufraki*, ¶ 23; **RL-0113**,*MINE*, ¶ 4.04; **RL-0185**, *Klöckner*, ¶ 83; **CL-0208**, *CDC*, ¶ 34; **RL-0188**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶ 63 ("***Enron***"); **RL-0193**, *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, 24 January 2014, ¶ 118 ("***Impregilo***"); **CL-0290**, *Alapli Elektrik B.V. v. Republic of Turkey,* ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶ 33 ("***Alapli***"); **CL-0293**, *Tulip*, ¶ 44; **CL-0298**, *Bernhard von Pezold*, ¶ 239; **CL-0279**, *Blusun*, , ¶ 148; **RL-0194**, *Total*, ¶ 179 ("***Total***"); **RL-0170**, *Iberdrola Energía, S.A. v. Republic of Guatemala,* ICSID Case No. ARB/09/5, Decision on the Request for Annulment of the Award submitted by Iberdrola Energía, S.A., 13 January 2015, ¶ 74 ("***Iberdrola***"); **CL-0209**, *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of 5 June 1990 and the Application by Indonesia for Annulment of the Supplemental Award of October 17, 1990, 17 December 1992, ¶ 1.18 ("***Amco II***"); **CL-0304**, *Orascom*, ¶ 124; **CL-0209**, *Amco II*, ¶ 1.17; **RL-0183**, *Helnan International Hotels A/S v. Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee on Application for Annulment, 14 June 2010, ¶ 20 ("***Helnan***"); **RL-0107**, *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, ¶ 73 ("***Sempra***"); **CL-0276**, *Standard Chartered*, ¶ 62; **CL-0298**, *Bernhard von Pezold*, ¶¶ 239, 251; **CL-0227**, *Tenaris*

111. Claimants also contend that the *ad hoc* Committee is empowered but not called upon or legally obliged to annul the Award even in circumstances where one of the grounds for annulment set out in Article 52 of the ICSID Convention is found to exist. According to Article 52(3), annulment committees do have the authority, but not the duty, to annul ICSID awards. It follows from an interpretation of the term '*authority'* found in Article 52(3) of the ICSID Convention based on its ordinary meaning that the power of *ad hoc* committees to annul ICSID awards is discretionary. In support of this conclusion, Claimants refer to prior decisions by annulment committees.[63]

112. In the same vein, Claimants point to the fact that when *ad hoc* annulment committees examine whether to exercise their discretion to annul ICSID awards, they should take into consideration the gravity of the circumstances constituting the ground for annulment and the material impact of that ground -if any- upon the outcome and the parties to the case. In so doing, *ad hoc* annulment committees should be guided by the binding and final nature of ICSID awards. For Claimants, awards should be upheld where the alleged error would have made no difference to the outcome. Spain's submissions are mainly complaints over issues which would have made no difference to the outcome of the case, a fact which renders Spain's submissions wrong and immaterial.[64]

S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II), ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, ¶¶ 44, 64 ("***Tenaris II***"); Claimants' letter to the *ad hoc* Committee dated 1 October 2021 on the admissibility of new evidence, ¶¶ 4-8; **CL-0280**, *Global Telecom Holding S.A.E. v. Government of Canada,* ICSID Case No. ARB/16/16, Procedural Order No. 2, Decision on Respondent's Request for Bifurcation, 14 December 2017, ¶ 14 ("***Global Telecom***"); *citing* **RL-0185**, *Klöckner*, ¶ 179.

[63] C-Mem., ¶¶ 40-47., *citing* **RL-0185**, *Klöckner*, ¶ 179; **CL-0284**, Schreuer, pp. 1035-1040; **RL-0207**, *EDF et al*, ¶ 73; **CL-0293**, *Tulip*, ¶ 45; **CL-0304**, *Orascom*, ¶¶ 125, 127; **CL-0208**, *CDC*, ¶ 37; **CL-0285**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) Vivendi v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 63, 66; **RL-0113**, *MINE*, ¶ 4.10; **CL-0279**, *Blusun*, ¶ 148; **CL-0269**, *Infrastructure Services Luxermbourg 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. Kindgom of Spain,* ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021, ¶ 233 ("***Antin***"); **CL-0296**, *CEAC Holdings Limited v. Montenegro,* ICSID Case No. ARB/14/08, Decision on Annulment, 1 May 2018, ¶ 84 ("***CEAC***"); **RL-0191**, *Mr. Patrick Mitchell v. The Democratic Republic of Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 45 ("***Mitchell***"); *Consortium R.F.C.C. v. Kingdom of Morocco,* ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., 18 January 2006, ¶ 226 as cited in **RL-0105**, ICSID Background Paper on Annulment, 48; **CL-0284**, Schreuer.

[64] C-Mem., ¶¶ 40-47.

113. In their Rejoinder, Claimants reiterate that although Spain acknowledges that ICSID annulment is an exceptional remedy and not an appeal against the substantive correctness of the award, Spain essentially attempts to convert this proceeding into an appeal.[65] Claimants also take issue with Professor Hindelang's testimony on the scope of annulment proceedings. According to Claimants, Professor Hindelang's opinion "*is clearly devoid of any merit*…" as it disregards one of the most fundamental principles of the ICSID Convention, the finality of awards, and suggests that ICSID annulment committees have a "*duty to annul*" the Award under EU law and that EU Member States "*modified the ICSID Convention*" by concluding the EU Treaties.[66] For Claimants, in his Second Report, Professor Hindelang attempts to rewrite the ICSID Convention. Professor Hindelang suggests that the standard for annulment that governs ICSID annulment is mandated by the EU Treaties and not by the ICSID Convention itself as he notes that "*finality of the award is not the leading principle in interpreting Article 52 of the ICSID Convention in intra-EU context, but consistency with the EU Treaties*."[67] Claimants contend that this view is neither supported nor confirmed by other *ad hoc* annulment committees seized of Spain's requests for annulment.[68]

114. Further, Claimants set forth that the ICSID Convention, being an international treaty, is to be interpreted in accordance with the Vienna Convention on the Law of Treaties ("**VCLT**") and that Professor Hindelang's view, for its part, suggests that the interpretation of the ICSID Convention varies between contracting States allowing EU Member States to "*appeal to their obligations under the EU Treaties to avoid compliance with their obligations under the Convention*."[69] The suggested interpretation of the ICSID Convention, Claimants note, does not conform with international law as it violates the good faith principle prescribed for in Article 31 VCLT and the principle of *pacta sunt servanda* found in Article 26 of this Treaty. In addition, Hindelang's view contradicts the principles of finality and enforceability of ICSID awards. The existence and importance of these principles is confirmed by the object and purpose of the ICSID Convention, ICSID case law, the *travaux préparatoires,* and the

[65] Rejoinder, ¶¶ 5, 19.

[66] Rejoinder, ¶¶ 6-7, 20.

[67] Rejoinder, ¶ 22, *citing* Second Hindelang Report, Section II.B.1.

[68] Rejoinder, ¶ 22, *citing* **CL-0329**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 93 ("***Cube***").

[69] Rejoinder, ¶ 23.

Centre itself.[70] As Claimants note, the Hindelang interpretation of the ICSID Convention allows EU Member States to escape their obligations under the ICSID Convention by relying on their alleged obligations under EU Treaties. In addition, according to Claimants, "*none of the legal bases on which Professor Hindelang purports to rely supports his position that the EU Treaties apply in these proceedings and/or prevail over the Convention*."[71]

115. Claimants also take issue with Professor Hindelang's view that Article 42(1) of the ICSID Convention suggests that the Committee is empowered to determine the law applicable to the annulment proceedings. For Claimants, this view disregards that ICSID annulment is "*a procedural control check over the relevant award as part of the self-contained ICSID system*" and not an appeal or review of the substantive correctness of the award. "*It is not for this Committee to decide the applicable law de novo*."[72] Claimants also note that the examination of whether the Tribunal's findings on jurisdiction and Applicable Law constitute a manifest excess of powers, as Spain argues, can only be made pursuant to Article 52(1)(b) of the ICSID Convention and not the EU Treaties.[73]

116. Furthermore, Claimants argue that Professor Hindelang's opinion that EU Member States could have modified the ICSID Convention *inter se* by concluding the EU Treaties is incorrect. According to Claimants, apart from the absence of relevant evidence in support of that conclusion, Spain and Germany could not have modified the ICSID Convention by concluding the EU Treaties since their EU accession pre-dated the conclusion of the ICSID Convention. Spain and Germany were already EU Member States when they became Contracting States to the ICSID Convention and, as a result, they could not have modified obligations that they had yet to assume.[74] In addition, such a modification of the ICSID Convention would not be compliant with the requirements of Article 41(1)(b) VCLT.

---

[70] Rejoinder, ¶ 25, *citing* **RL-0113**, *MINE*, ¶ 41; **CL-0314,** C. Schreuer and others, The ICSID Convention: A Commentary, 1100 (2d Ed. 2009) ("***Schreuer***"); **CL-0312**, A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition*, *Enforcement, Execution*, 2(2) ICSID Review – Foreign Investment Law Journal, 287, 317 (1987); **RL-0105**, ICSID Background Paper on Annulment, 1, ¶ 4; **CL-0318**, Judgment of the United Kingdom Supreme Court on *Micula and others v. Romania*, [2020] UKSC 5, 19 February 2020, ¶ 104.

[71] Rejoinder, ¶ 26.

[72] Rejoinder, ¶ 27**,** *citing* **CL-0315**, R. D. Bishop and S.M. Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012), ¶¶ 3.05, 3.10, 3.13-3.14; **CL-0314**, Schreuer, p. 903, ¶ 14.

[73] Rejoinder, ¶ 27.

[74] Rejoinder, ¶ 29.

Claimants note that *(i)* the notification requirement has not been satisfied and *(ii)* such a modification would have affected the rights and obligations of all Contracting States to the ICSID Convention.[75]

117. According to Claimants, there is nothing in "*either public international law or EU law providing that, in case of a conflict, EU law prevails over public international law*."[76] Claimants argue that the principle of finality of ICSID awards, being a right and an obligation to which all Contracting States have agreed, must be respected as the principle of *pacta sunt servanda* mandates.[77] For Claimants, in case of a conflict between EU law and the ICSID Convention, the Committee must apply the Convention.[78] Moreover, the CJEU has never stated that EU law prevails over international law and the ICSID Convention. As Claimants have noted, this would be contrary to the EU's international law obligations recognised by the EU Treaties. For Claimants, the principle of primacy of EU law concerns the relationship between EU law and national law and it is not a conflict of laws rule applicable to the relationship between obligations arising out of EU law and international law.[79]

C. THE COMMITTEE'S ANALYSIS

a. Introduction

118. The Committee in identifying the guardrails for its mandate first recalls the autonomous nature of the ICSID system as a stand-alone, self-contained and de-localized regime

[75] Rejoinder, ¶ 30.

[76] Rejoinder, ¶ 32.

[77] Rejoinder, ¶ 32, *citing* **CL-0328**, *NextEra*, ¶ 232; **CL-0300**, *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 181 ("***Eskosol***").

[78] Rejoinder, ¶ 33, *citing* **CL-0134**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.àr.l. v. The Kindgom of Spain,* ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 87 ("***RREEF,* Decision on Jurisdiction***").*

[79] Rejoinder, ¶ 34, *citing* **CL-0202**, *Watkins Holdings S.àr.l. and others v. Kingdom of Spain,* ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 202 ("***Watkins***"); **CL-0204**, *Hydro Energy 1 S.àr.l and Hydroxana Sweden AB v. Kingdom of Spain,* ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, ¶ 502(17) ("***Hydro Energy***"); **CL-0239**, *Cavalum SGPS, S.A. v. Kingdom of Spain,* ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶ 370(17) ("***Cavalum***"); **CL-0228**, *Landesbank Baden-Württemberg and others v. Kingdom of Spain,* ICSID Case No. ARB/15/45, Decision on that Intra-EU Jurisdictional Objection, 25 February 2019, ¶¶ 190-192; RL-0001, Treaty of Lisbon, 13 December 2007, Declaration 18 to the Lisbon Treaty, 754 ("***Landesbank***").

functioning without involvement of national courts.[80] The draftsmen of the ICSID Convention made a deliberate election to ensure finality of awards and "*sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice*. "[81] The limited mandate of an *ad hoc* committee is "*either to reject the application for annulment or to annul the award or part thereof on the basis of the grounds enumerated in Article 52 [of the ICSID Convention]*. "[82] These limited number of fundamental grounds have been exhaustively listed in Article 52(1) to safeguard against "*violation of the fundamental principles of law governing the Tribunal's proceedings*."[83] In analyzing the grounds for annulment invoked the Committee shall in principle take as their premise the record before the Tribunal.[84] The Committee also accepts that the power conferred upon it is not to review the quality or the "*adequacy of the reasons set forth by the [T]ribunal in [the A]ward*"[85] but to allow the award to stand where the "*[T]ribunal's legal interpretation is reasonable or tenable*. "[86] The Committee's analysis of the individual grounds invoked by Spain for annulment will therefore reflect the principle that the scope of its purview was designed to "*protect the integrity and not the result of ICSID arbitration proceedings*. "[87]

119. The Parties are in agreement in principle regarding the parameters of the ICSID annulment regime and the applicable standard to annulment. There is also no disagreement that the rationale of annulment under Article 52 of the ICSID Convention is to ensure due process and the integrity of the arbitral proceedings, and consequently, that annulment is not an appeal on the merits. Neither is an annulment proceeding an occasion to revisit the case before the Arbitral Tribunal by re-evaluating the facts and the law, the Parties agree in principle. Likewise, there is agreement that annulment is a limited and exceptional remedy and that there is no presumption in favour or against annulment.

[80] **RL-0105**, ICSID Background Paper on Annulment, ¶2.
[81] **RL-0105**, ICSID Background Paper on Annulment, ¶7.
[82] **RL-0105**, ICSID Background Paper on Annulment, ¶35.
[83] **RL-0105**, ICSID Background Paper on Annulment, ¶71.
[84] **RL-0105**, ICSID Background Paper on Annulment, p. 40.
[85] **RL-0105**, ICSID Background Paper on Annulment, p. 44, and *ad hoc* decisions referenced therein.
[86] **RL-0105**, ICSID Background Paper on Annulment, p. 44.
[87] **RL-0105**, ICSID Background Paper on Annulment, p. 44.

120. However, while the Parties appear to agree, at least in theory, on the standard applicable to annulment, they differ regarding its application to the Award at hand. And while there also appears to be agreement that this Committee is neither empowered to amend the Award or to substitute the Tribunal's reasoning with its own, nor to hear new arguments or evidence relating to the underlying arbitration,[88] the Parties differ as to what constitutes "*new arguments or evidence*" in these annulment proceedings. The Committee will address in turn the points of disagreement between them.

b. Does the limited power of an annulment committee prevent the Committee from trying the Application on grounds different, wholly or partly, from those set out in the Application?

121. One disagreement between the Parties relates to whether Spain has sufficiently indicated the grounds invoked for annulment in the Application and whether it has subsequently expanded on such grounds during the annulment proceedings beyond the grounds originally set out and hence in an impermissible fashion. Another related disagreement relates to the Committee's potential reliance on new additional grounds.

122. The disagreement between the Parties regarding an expansion or addition of annulment grounds by Spain has been mainly argued by them as a matter of principle.

123. While the Committee agrees with Spain that parties can subsequently develop their arguments in support of the grounds originally identified by them in their application for annulment,[89] it does not agree that the Committee is empowered to annul the Award on a ground different from one put forward by the Applicant, as argued by Spain.[90] Whether or not all the arguments now advanced by Spain differ from those originally set forth in the Application will be a matter of interpretation and will be addressed in connection with each argument in question. The same will apply to any instances where Spain contends that the

[88] C-Mem., ¶¶ 31-39; Reply, ¶ 259, *citing* **RL-0185**, *Klöckner*, ¶¶ 117-119.

[89] See, Reply, ¶ 21.

[90] Mem., ¶ 207; Reply, ¶ 368(d) ("[i]*n the event that the Annulment Committee considers that the facts described in this Memorial constitute ground for annulment on a ground of Article 52(1) of the ICSID Convention other than those alleged, the Kingdom of Spain requests the Committee to proceed to annul the Award on the basis of such alternative ground to those alleged*").

reasons put forward for annulment may only have been classified [in]correctly.[91] Hence, while there may be instances where some discussion needs to be held whether an argument has or has not been made in the Application, the Committee will only try grounds and arguments made by the Parties. Further, Spain's statement to the effect that the Committee "*is [not] deprived of the possibility of annulling the Award in view of the breaches committed*",[92] remains unclear. Spain has nonetheless agreed that ICSID annulment does not entail any review of the substantive correctness of the Award,[93] and the Committee takes the clear view and will proceed on the basis that it is only mandated to try matters relating to the integrity and legitimacy of the process of decision…to the exclusion of findings of facts or law[94] and, as argued by Claimants, to the exclusion of any *ex officio* powers. This also follows from the other party's right to be heard in respect of any invoked ground.[95] The Committee also agrees with Claimants that the grounds for annulment are to be strictly construed and evokes the principle of finality of awards[96] and exhaustive annulment grounds (Article 52(1) of the ICSID Convention) in support of its limited mandate.[97]

124. When analyzing the nature and scope of ICSID annulment and the related powers of an annulment committee, this Committee sees its mandate exclusively as "*a procedural control check over the relevant award as part of the self-contained ICSID system*"[98] as set forth by Claimants. Any examination by the Committee of the Award shall therefore be made under Article 52 of the ICSID Convention (and not e.g. under its Article 42(1)).[99] These questions

[91] Reply, ¶ 20.

[92] Reply, ¶ 25.

[93] Reply, ¶¶ 13 and 25.

[94] Reply, ¶¶ 27, 32 *citing* **RL-0106**, *Soufraki* , ¶ 23. Rejoinder, ¶ 19, *citing* **CL-0327**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 56 ("***SolEs***").

[95] **CL-0284**, Schreuer, p. 1040, ¶ 483, where Professor Schreuer explains that "if a tribunal were to decide on a motion by one party without hearing the other party, it would commit a serious departure from a fundamental rule of procedure, but if it decides in favour of the party that was not heard "*it is difficult to argue that this technical mistake would warrant annulment.*"

[96] C-Mem., ¶ 27, *citing* **CL-0307**, *Hydro S.r.l. and Others v. Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021 ("***Hydro***"), ¶ 107.

[97] C-Mem., ¶ 24.

[98] Rejoinder, ¶ 27, *citing* **CL-0315**, R.D. Bishop and S.M. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, 2012, ¶¶ 3.05 and 3.10, in turn *citing* **CL-0314**, Schreuer, p. 903, ¶ 14.

[99] Article 42(1) of the ICSID Convention, provides: "*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of*

will be further addressed by the Committee in connection with its analysis of the annulment grounds invoked by Spain. Spain's and its legal expert professor Hindelang's submission that the EU Member States have modified the ICSID Convention and that the leading principle in interpreting Article 52 is not finality of awards but consistency with the EU Treaties,[100] will also be analyzed in connection with Spain's individual grounds for annulment below.

c. The Committee's discretionary powers

125. When it comes to the question whether the Committee enjoys a discretionary power (not) to annul the Award when one annulment ground is satisfied, the Committee sides with Claimants that the power is discretionary on the basis of the wording of Article 52(3) *in fine*: "*The Committee shall have the authority to annul the award [in full or in part]*"(underlined here)[101]. In addition to the clear wording of the related provision, the decisions of most preceding *ad hoc* committees support this position.[102] In all events, the Committee takes the view that it has discretion to annul or not when an annulment ground is satisfied, in consideration of the circumstances of the case at hand.[103] As argued by Claimants, one such consideration is the gravity of the circumstance which constitutes the ground for annulment, i.e. whether the ground would have had an impact on the outcome of the case,[104] as set out by the Committee in greater detail when dealing with each invoked ground.

---

the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[100] Second Hindelang Report, ¶¶ 39-42; Tr. Day 1-130:8-14.

[101] See Tr. Day 1-73:4-12.

[102] See e.g., **RL-0194**, *Total*, ¶ 167(f) ("*an ad hoc committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an ad hoc committee has discretion with respect to the extent of an annulment, i.e., either partial or full*"). See also **CL-0276**, *Standard Chartered*, ¶ 62; and **CL-0304**, *Orascom*, ¶ 124. See also Tr. Day 1-73:13-16, making reference to the *NextEra* (**CL-328**), *CDC v. Seychelles* (**RL-195**), and *EDF v. Argentina* (**CL-294**) cases.

[103] **R-0105**, ICSID Background Paper on Annulment, p. 47. C-Mem., ¶ 24 (footnotes omitted).

[104] C-Mem., ¶45, relying on **CL-0296**, *CEAC*, ¶84.

d. Has the Applicant introduced new arguments and new evidence in violation of the rules applicable to Annulment Proceedings?

126. It follows from the nature of Annulment Proceedings under the ICSID Convention, as also set out in ICSID Background Paper on Annulment,[105] and in PO 1, that no new arguments or evidence relating to the underlying arbitration shall be introduced in these proceedings, which only are intended as a potential remedy for "*procedural errors in the decisional process*."[106] Spain in principle embraces this principle asserted by Claimants maintaining, however, that its arguments or evidence regarding EU law, including expert reports and legal authorities, cannot be seen as new materials.[107] Spain invokes its Legal Expert, Professor Hindelang, who explains that "*CJEU judgements are not 'new' developments*" as they have "*retroactive effect*" and that "*the Committee… is under the obligation to consider and pay due respect to any binding interpretation rendered by the CJEU even after the Tribunal issued its Award*."[108] The Committee will determine in connection with its assessment of such arguments, and of the evidentiary value of the legal materials submitted therewith not having been before the Tribunal, whether they indeed have the effect argued by Spain. *Professor Hindelang's* opinion that EU Member States cannot waive their obligations under EU Treaties is addressed separately (Section V(C)).

V. WHETHER SPAIN HAS WAIVED ITS ARGUMENTS ON JURISDICTION AND THE APPLICABLE LAW

A. CLAIMANTS' POSITION

127. Claimants argue that Spain is prevented from raising any arguments on jurisdiction and applicable law to annul the Award by virtue of ICSID Arbitration Rule 27. Claimants note that Spain has failed to promptly raise its objections to jurisdiction and applicable law, and therefore it has waived its rights to request annulment of the Award on those grounds.

[105] **RL-0105**, ICSID Background Paper on Annulment.

[106] **RL-0105**, ICSID Background Paper on Annulment, ¶ 71, making reference to Aron Broches, "Observations on the Finality of ICSID Awards" *in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 299 (1995).

[107] Tr. Day 1- 131:8-14.

[108] Second Hindelang Report, ¶ 46.

Claimants also note that ICSID Arbitration Rule 53 ensures applicability of Rule 27 to annulment proceedings.[109]

128. Under ICSID Arbitration Rule 27, Claimants contend, an applicant on annulment is prevented from invoking an alleged violation of the ICSID Convention, the Arbitration Rules, or other rules or agreements that apply to the underlying proceedings, where it knew or should have known that the alleged violation occurred but failed to promptly raise those issues before the tribunal. Claimants also note the particular relevance of this Rule to proceedings such as those of the case at hand, where the decisions on jurisdiction and liability have preceded the final [sic] award.

129. According to Claimants, ICSID Arbitration Rule 27 aims at preserving the procedural economy by preventing the parties from storing up their objections to a decision on jurisdiction and liability "*as future ammunition*" to annul the award. In support of these arguments, Claimants refer to several *ad hoc* committees confirming that ICSID Arbitration Rule 27 applies to annulment proceedings and ensures procedural economy.[110]

130. Claimants extensively refer to *Lemire v. Ukraine*.[111] Claimants argue that the *Lemire* annulment committee was called upon to annul an award based on findings made by the tribunal in its decision on jurisdiction and liability, which, as here, preceded its final [sic] award. According to the *Lemire* annulment committee, ICSID Arbitration Rule 27 applies on the basis that the party invoking any violations knew or should have known about such violations since the moment the decision on jurisdiction and liability was issued, and should have objected to such violations and reserved its rights to invoke these objections in a

[109] C-Mem., ¶¶ 48-54, *citing* **CL-0207**, *Joseph Charles Lemire v. Republic of Ukraine,* ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, 8 July 2013, ¶ 216 ("***Lemire***"); **RL-0169**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of The Philippines,* ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport, 23 December 2010, ¶ 205 ("***Fraport***"); **CL-0308**, *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 139 ("***Perenco***"); **CL-0276**, *Standard Chartered*, ¶ 446; **CL-0207**, *Lemire*, ¶¶ 203, 217, 272. Tr. Day 1, 10:10-14.

[110] C-Mem., ¶¶ 49-50. Tr. Day 1, 11:7-12.

[111] **CL-0207**, *Lemire*, ¶ 216.

subsequent annulment proceeding. A party's silence amounts to a waiver of its rights to object to the decision on jurisdiction and liability at the annulment stage.[112]

131. Claimants apply the *Lemire* standard to the underlying case. For Claimants, Spain had knowledge of the contents of the Decision on Jurisdiction and Liability since December 30, 2019, when the Parties were notified of the Decision. Thus, Spain was made aware of the alleged flaws of the Decision, namely that the Tribunal, as Spain argues, (i) wrongly upheld its jurisdiction over an intra-EU dispute in breach of Article 26(1)(3) ECT and Article 25 of the ICSID Convention, and (ii) failed to apply the proper law to the dispute by not applying EU law on State aid to the merits in breach of Article 26(6) ECT and Article 42(1) of the ICSID Convention.[113]

132. Furthermore, Claimants note that not only did Spain fail to state promptly its objections to the Tribunal's findings on jurisdiction and applicable law, even though it had ample opportunity to do so, but also praised the Award. It then, more than 15 months after the Decision, decided to file its annulment application and allege that the Tribunal manifestly exceeded its powers. For Claimants, Spain's Application is an example of egregious opportunism and a clear case which calls for application of the ICSID Arbitration Rule 27 waiver. Under this Rule, Spain is precluded "*from converting its artificial complaints based on EU law into purported grounds for annulment*."[114]

133. In their Rejoinder, Claimants reiterated their argument that Spain's "*opportunistic change of tack*" violates the good faith principle under international law, and it cannot lead to the Award's annulment. Only when it became convenient to avoid payment of the Award,[115] Spain decided, instead of praising the decision, to argue that the Tribunal had manifestly exceeded its powers in its findings on jurisdiction.[116] Thus, Spain must be prevented from

[112] C-Mem., ¶¶ 50-52.
[113] C-Mem., ¶¶ 53.
[114] C-Mem., ¶ 54.
[115] Rejoinder, ¶¶ 11-12.
[116] Rejoinder, ¶ 12. Tr. Day 1, 69:15-19.

elevating these known objections to the Tribunal's findings "…*as purported grounds for annulment*."[117]

134. On the one hand, Claimants argue, Spain has waived its EU law arguments. While Claimants agree with the Applicant that the waiver of any right cannot be presumed or blithely invoked and has to be examined carefully on a case-by-case basis, Spain has not shown how its conduct does not fall within the scope of ICSID Arbitration Rule 27. For Claimants, Spain's conduct violates the principle of good faith and the concept of *venire contra factum proprio non valet* enshrined in ICSID Arbitration Rule 27.[118]

135. Spain also now aims at limiting the applicable scope of ICSID Arbitration Rule 27 by misleadingly arguing that ICSID Arbitration Rule 27 exclusively concerns procedural breaches. According to Claimants, ICSID Arbitration Rule 27 refers to "*any other rules or agreement applicable to the proceeding without limitation*"[119] and Spain has not explained how its submissions on EU law fall outside of the scope of the sets of rules and agreements that applied to the underlying arbitration.[120] Spain also attempts to discredit the *Lemire* committee's findings by arguing that ICSID Arbitration Rule 27 only applies in relation to annulment applications based on Article 52(1)(d) of the ICSID Convention (i.e. departure from a fundamental rule of procedure),[121] without any support for such argument. According to Claimants, this argument finds no support and *Lemire* committee's findings are relevant, as that committee was faced with a similar situation where a decision on jurisdiction and liability preceded an award, and such position has also been endorsed by subsequent committees.[122] For Claimants, "ICSID Arbitration Rule 27 applies to Article 52 of the ICSID Convention *in toto*."[123]

---

[117] Rejoinder, ¶ 45.

[118] Rejoinder, ¶¶ 47-51, *citing* **CL-0313**, *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru,* ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 231; **CL-0328**, *NextEra*, ¶¶ 477-481.

[119] Rejoinder, ¶ 53.

[120] Rejoinder, ¶ 53.

[121] Reply, ¶ 45.

[122] Rejoinder, ¶ 54, *citing* **CL-0276**, *Standard Chartered*, ¶ 446.

[123] Rejoinder, ¶¶ 55-56, *citing* **CL-0207**, *Lemire*, ¶¶ 201, 217-226; **CL-0298**, *Bernhard von Pezold*, ¶¶ 264, 266, 269; **RL-0169**, *Fraport*, ¶ 204; **CL-0315**, R.D. Bishop and S.M. Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012), ¶ 11.24.

136. Claimants also contest Spain's contention that ICSID Arbitration Rule 27 would subvert the hierarchy of the sources of law applicable to the present dispute since the Rules of Procedure for Arbitration Proceedings adopted by the ICSID Administrative Council would limit the scope of the ICSID Convention. According to Claimants, ICSID Arbitration Rule 27 "*derives its legal effect from the ICSID Convention*…"[124] and Article 44 of the ICSID Convention provides that arbitrations will be conducted in accordance with the Arbitration Rules. Given that the Parties did not agree otherwise, they both apply to the dispute and are complementary. Thus, there is no "*subversion of hierarchy between both instruments* ..."[125] In all events, Claimants submit, Spain's argument in this respect is moot. While acknowledging that ICSID Arbitration Rule 27 may apply to Article 52(1)(d) of the ICSID Convention and that ICSID Arbitration Rule 27 may circumscribe a party's right under the ICSID Convention, Spain has not explained why ICSID Arbitration Rule 27 would not apply to Article 52 of the ICSID Convention as a whole.[126]

137. Lastly, Claimants reject as irrelevant Professor Hindelang's opinion that EU Member States' obligations arising from EU Treaties cannot be waived. According to Claimants, Spain itself contradicts Professor Hindelang's view, as it states in its Reply that the rights at stake are those Spain holds under the ICSID Convention and not the EU Treaties.[127] Thus, the Committee "*is mandated to decide on Spain's annulment application under the ICSID Convention and the Arbitration Rules*…"[128]

B. THE APPLICANT'S POSITION

138. Spain does not accept that it would be prevented from invoking arguments relating to the applicability of EU law in these proceedings and denies that it would have waived any rights regarding the Tribunal's lack of jurisdiction or the applicability of EU Law in respect of jurisdiction or the merits of the dispute. It argues that a waiver of any right cannot be

[124] Rejoinder, ¶ 58.

[125] Rejoinder, ¶ 59, *citing* ICSID Convention, Regulations and Rules, Introduction.

[126] Rejoinder, ¶ 60.

[127] Rejoinder, ¶ 62.

[128] Rejoinder, ¶ 63, *referring to* Section III.1 of the Rejoinder where Claimants had argued that Prof. Hindelang's attempt to rewrite the ICSID Convention must be rejected, with reference to Second Hindelang Report, Section II.B.1 (title of the sub-heading).

presumed or blithely invoked but must be evidenced by unequivocal acts of the allegedly waiving party, a matter to be examined on a case-by-case basis. In fact, Spain argues, by reference to the Hindelang report, that the obligations of the EU Member States flowing from EU Treaties cannot be waived. In this regard, Professor Hindelang stated during his presentation at the Hearing: "*EU Member States can neither deviate nor disapply the EU treaties inter se… a failure to promptly raise issues or objections is immaterial, as it is the very existence of that intra-EU investment tribunal which is contrary to the EU treaties*."[129]

139. For Spain, Claimants erred when reaching the conclusion that Spain had waived their rights, relying on an "*oddly broad interpretation of Rule 27*…" which"…*under no circumstances, may limit the scope of the ICSID Convention or be interpreted as restrictive of it*".[130] Such Claimants' interpretation is not in line with the scope and purpose of ICSID Arbitration Rule 27, is far removed from its literal meaning,[131] and empties Article 52 of the ICSID Convention of its content.[132] Claimants' interpretation renders ineffective the provisions of the ICSID Convention on the basis of the rules approved by the Administrative Council of the Centre, a measure which subverts the hierarchy of the sources of law applicable to the dispute at hand. In addition, it fails to take account of the nature and regulation of the right allegedly waived. Spain in these proceedings simply exercises "*the right set down by all Contracting States for those who go to arbitration as provided therein to request the annulment of the award in accordance with Art. 52*."[133]

140. For Spain, the wording of ICSID Arbitration Rule 27 clearly suggests that "*this rule refers to the non-compliance with procedural rules*…,"[134] namely, to procedural breaches, and this limits its scope of application. ICSID Arbitration Rule 27 would be applicable "*if grounds for annulment had been raised in accordance with Article 52(1)(d) of the ICSID Convention…[w]hich is not the case*."[135] Claimants' interpretation of ICSID Arbitration

[129] Tr. Day 1 [S. Hindelang], 132:2-7.
[130] Reply, ¶¶ 35-36.
[131] Reply, ¶ 40.
[132] Reply, ¶ 47.
[133] Reply, ¶ 39.
[134] Reply, ¶ 43.
[135] Reply, ¶ 45. Tr. Day 1, 10:15-25, 11:1-12.

Rule 27 runs counter to the wording and purpose of the provision as it "*goes beyond applying to procedural issues and applies to all grounds for annulment of Article 52 of the ICSID Convention…*"[136]

141. In addition, according to Spain, under ICSID Arbitration Rule 27, the objecting party must have a reasonable opportunity to raise its objection, a fact which presupposes that the objecting party was aware of the conduct of the tribunal that constitutes the basis of annulment. Spain recalls the *Fraport* committee which stated that ICSID Arbitration Rule 27 suggests that "*a party cannot be treated as having waived an objection to a course of action of which it was unaware*."[137] Thus, ICSID Arbitration Rule 27 prompts parties to act immediately when they become aware of a procedural breach during the proceedings. Having said that, Spain concludes that ICSID Arbitration Rule 27 aims at preventing "*the possibility of reacting, at the appropriate procedural stage, against procedural rules infringed in the course of proceedings, by not keeping such a plea 'preloaded' for later annulment.*"[138] Spain also recalls the *Pey Casado* committee which confirmed that ICSID Arbitration Rule 27 ensures that objecting parties, when there is a fundamental breach of procedural rules, raise their objections in a timely fashion, provided that they have been granted a reasonable opportunity to raise their objections.[139]

C. THE COMMITTEE'S ANALYSIS

142. The Committee will first address Claimants' argument that Spain has waived the right to invoke alleged grounds for annulment when it comes to jurisdiction and applicable law. Claimants rely on ICSID Arbitration Rule 27 which requires that a party promptly objects to a tribunal's non-compliance with certain rules, regulations or agreements in order to preserve its right to object.[140] Claimants argue that ICSID Arbitration Rule 27 applies to any ground for annulment under Article 52 of the ICSID Convention whereas Spain insists that only

[136] Reply, ¶ 49.
[137] Reply, ¶ 44; Reply, ¶¶ 35-36, *citing* **RL-0169**, *Fraport*, ¶¶ 205-208.
[138] Reply, ¶ 45.
[139] Reply, ¶ 46, *citing* **RL-0171**, *Pey Casado*, ¶ 82.
[140] C-Mem., ¶¶ 48-54.

procedural breaches are covered by this rule, something that it claims is clear already from the wording and purpose of this Rule.

143. ICSID Arbitration Rule 27 reads as follows (2006):

> "*A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.*"

144. The elements of disagreement between the Parties in the interpretation of ICSID Arbitration Rule 27 relate mainly to the interpretation of the wording of such rule and to Spain's behaviour after the Tribunal's issuance of the Decision (i.e., by initially lauding the Decision and subsequently criticizing it), and this in the light of decisions of other *ad hoc* committees' rulings on alike issues such as *Lemire* (invoked by Claimants) and *Fraport* and *Pey Casado* (invoked by Spain).

145. The Committee finds that the wording of ICSID Arbitration Rule 27 and the character of the set of rules and regulations that it refers to, under a literal interpretation, indicates that the purpose is to cover the conduct of the proceedings, i.e. the procedure. Similar provisions are found in many arbitration rules to ensure "*procedural economy*"[141] and to support the validity of the procedure, by ensuring that steps taken by the tribunal stand unless one of the parties objects.[142]

146. When reviewing *Lemire*, irrespective of its sequential and other similarities to the case at hand, and *Standard Chartered*[143] and the other *ad hoc* committees referenced by Claimants[144], the Committee does not find support for an interpretation of ICSID Arbitration

[141] **CL-0207**, *Lemire*, ¶ 216.

[142] **RL-0169**, *Fraport*, ¶ 205 ("[i]*n the context of the ordinary operation of ICSID arbitration proceedings in accordance with the particular arbitration rules applicable to the proceedings, this provision makes sound practical sense. It supports the validity of the procedure, by ensuring that steps taken by the tribunal stand unless one of the parties objects*")

[143] **CL-0276**, *Standard Chartered*, ¶ 62.

[144] C-Mem., ¶ 50, also making reference to: **RL-0169**, *Fraport,* ¶ 205; and **CL-0308**, *Perenco*, ¶ 139 ("*pursuant to Arbitration Rule 27, if a party is aware of a departure from a fundamental rule of procedure and does not positively oppose such violation, it waives its right to object it, and thereby to request the annulment on such basis*").

Rule 27 for it to apply, contrary to its wording and apparent purpose, to Article 52 of the ICSID Convention *in toto*, as argued by Claimants, and not only to its Article 52(1)(d), as held by Spain. Also, *Fraport*[145] and *Pey Casado*[146] clearly see ICSID Arbitration Rule 27 as one regulating a party's objections to a tribunal's violation of proper procedure.

147. It follows from the Committee's above analysis that Spain is not prevented by ICSID Arbitration Rule 27 from invoking arguments relating to the applicability of European Union law in these annulment proceedings, and Spain's jurisdictional objections and those relating to applicable law under Article 52(1)(b) of the ICSID Convention will therefore be tried by the Committee as within the scope of its purview. It also follows from the above that the fact of Spain's behaviour in lauding the Decision and subsequently criticizing it is not dispositive of the question whether Spain, through waiver, has lost its right to invoke EU law as a ground to annul the Award.

148. Having thus found that Spain has not waived its arguments on jurisdiction and applicable law, the Committee need not make any determination on Spain's argument regarding the alleged subversion of hierarchy of the sources of law applicable to the present dispute,[147] or whether the alleged non-waiverability of EU Treaty obligations among Member States could affect these proceedings,[148] as also argued by Spain.

VI. MANIFEST EXCESS OF POWERS

149. While the Applicant has set out several grounds for annulment, at the heart of these proceedings is the question of jurisdiction, more specifically whether an arbitral tribunal constituted in proceedings under the ECT and the ICSID Convention has jurisdiction to rule on a dispute between two Member States in the EU. The question of the necessary application of EU law in the underlying arbitration is also in dispute, and the consequences of any such application both to jurisdiction and to the merits (together the "***intra-EU objection***").

[145] **RL-0169**, *Fraport,* ¶ 205.
[146] **RL-0171**, *Pey Casado,* ¶ 82.
[147] Reply, ¶ 40.
[148] Tr. Day 1 [S. Hindelang], 132:2-7.

150. Spain argues that the Award must be annulled because the Tribunal manifestly exceeded its powers, which excess is manifested in two ways: (*i*) the Award goes beyond the Tribunal's jurisdiction in contravention of EU law; and (*ii*) the Tribunal applied the wrong law.[149]

A. APPLICABLE LEGAL STANDARD

(1) The Applicant's Position

151. Article 52(1)(b) of the ICSID Convention allows a party to seek annulment of an award when the Tribunal has "*manifestly exceeded its powers*." Spain explains that a manifest excess of powers may exist where a tribunal acts contravening the consent of the parties (or without their consent), namely where a tribunal fails to apply the proper law, exceeds its jurisdictional scope or has no jurisdiction, or rules on matters not raised by the Parties.[150]

152. According to Spain, tribunals fail to apply the proper law if they ignore the applicable law or apply it wrongly in a manner deemed "*so gross or egregious as substantially to amount to failure to apply the proper law.*"[151] In support of this conclusion, Spain refers to several *ad hoc* committees.[152]

153. In addition, Spain argues that "*... even when an arbitration tribunal correctly declares the applicable law, this can still amount to manifest excess of powers if a review clearly shows that in its ruling the tribunal concerned failed to effectively apply the principles that it recognized*"[153]. A tribunal, which has identified the applicable law, may exceed its powers if it applies a different standard than the one identified, as it then acts beyond the parties' arbitration agreement. The same is true when a tribunal applies a standard that is not included in the provision identified as applicable.[154] Spain is of the view that the *ad hoc* Committee

[149] Mem., ¶ 51; Reply, ¶ 53.

[150] Mem., ¶ 52.

[151] Mem., ¶ 53.

[152] Mem., ¶¶ 53-54, *citing* **RL-0106**, *Soufraki*, ¶ 86; **RL-0171**, *Pey Casado*, ¶ 70; **RL-0107**, *Sempra*, ¶¶ 164-165; **RL-0184**, *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, ¶ 43 ("***M.C.I.***"); **RL-0114**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶ 56 ("***Occidental***").

[153] Mem., ¶ 55, *citing* **RL-0170**, *Iberdrola*, ¶ 97.

[154] Mem., ¶¶ 60-64.

has to focus on what the Tribunal actually analyzed and argued rather than what the Tribunal stated it did.[155]

154. In light of the above, Spain argues that the Tribunal (i) failed to apply EU law to Article 26 ECT and improperly declared its jurisdiction; and (ii) failed to apply the appropriate standard by basing its ruling on the merits on Article 10(1) ECT, as it penalized the exercise of the right to regulate, the existence of which it had previously confirmed.[156]

155. In its Reply, Spain further explains that the "'*powers' referred to in Article 52(1)(b) of the ICSID Convention… have generally been related to the jurisdiction of the Arbitral Tribunal and to the applicable law.*"[157] As far as jurisdiction is concerned, Spain agrees with Claimants that Article 52 of the ICSID Convention requires the excess of powers to be manifest, and that the fact that the Tribunal has declared its jurisdiction "*over a matter outside it while failing to apply the law applicable are defects of such magnitude that the ICSID Convention itself understood that they should not be perpetuated over time without remedy*."[158] Article 52 of the ICSID Convention provides for such a remedy, Spain sets out, namely the mechanism of annulment for manifest excess of powers.

156. Spain also recalls in its Reply that its reasoning is "*in line with the doctrine of previous Annulment Committees*" and the ICSID Background Paper on Annulment. On the one hand, Spain briefly recalls the *AMCO I, Klöckner I, Vivendi I, Mitchell, Enron, Sempra, MHS, Helnan,* and *Occidental* annulment committees to support its conclusions that any improper affirmation of jurisdiction over an intra-EU dispute, any failure to apply the applicable law (EU law) or any application of a different standard when the applicable law has been correctly identified, constitutes an excess of powers and leads to the annulment of the

[155] Mem., ¶ 55-63, *citing* **RL-0185**, *Klöckner*, ¶ 79; **RL-0107**, *Sempra*, ¶¶ 208-209; **RL-0186**, *Mr. Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, ¶ 76 ("***Tza Yap Shum***"); **RL-0187**, *Amco Asia Corporation, et al. v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986, ¶¶ 95, 97 ("***Amco I***"); **RL-0188**, *Enron*, ¶ 377; **RL-0189**, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, ¶¶ 141-142, 154, 156-158, 160, 162, 179, 180, 182, 187-188) ("***Venezuela Holdings***").

[156] Mem., ¶ 64.

[157] Reply, ¶ 55, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶¶ 81, 87.

[158] Reply, ¶¶ 57-58.

award.[159] In addition, Spain refers to *ad hoc* committees that support an interpretation of the applicable standard in line with the Applicant's view even though they did not annul the award on that ground.[160]

157. To address Claimants' argument that the case law put forward by Spain is controversial and isolated, Spain further argues that it does not follow from the ICSID Background Paper on Annulment that Spain's position deviates from the doctrine of previous annulment committees. Such paper sets out the arbitration practice in annulment proceedings and concludes that while different committees have interpreted the standard in a very uniform manner, on other occasions there exist certain nuances between arbitration precedent.[161] This suggests, according to Spain, that any conclusion to the effect that the interpretations of some committees are less valuable than those of others would be misleading and Claimants' challenge of the cases invoked by Spain is not well substantiated.[162]

158. Spain also comments on Claimants' reference to other precedents that have dismissed the intra-EU objection. For Spain, "*the repeated (and erroneous) practice of various courts…cannot alter the terms on which the European Union and the Member States made commitments on dispute settlement under an international agreement such as the ECT*."[163] To support this conclusion, Spain invokes Professor Marcelo G. Kohen's dissenting opinion appended to the *Adamakopoulos* case. Spain subscribes to Professor Kohen's view that EU investors, by being part of the most developed international system of economic integration, "*…are not subject to an exclusive national (foreign) judicial system but to an international (regional) one to which they are not 'foreigners' (Non-EU) but part of it as EU citizens or*

[159] Reply, ¶¶ 66-74, *citing* **RL-0187**, *Amco I*, ¶ 23; **RL-0185**, *Klöckner*, ¶ 22; **RL-0208**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) Vivendi v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 86, 115 ("***Vivendi I***"); **RL-0191**, *Mitchell*, ¶¶ 46-47; **RL-0188**, *Enron*, ¶ 67; **RL-0107**, *Sempra*, ¶¶ 164-165; **RL-0209**, *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶ 80 ("***MHS***"); **RL-0183**, *Helnan*, ¶¶ 40-41.

[160] Reply, ¶¶ 76-79, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 84; **RL-0189**, *Venezuela Holdings*, ¶ 188(a); **RL-0106**, *Soufraki*, ¶ 86; **RL-0184**, *M.C.I.*, ¶ 43; **RL-0171**, *Pey Casado*, ¶ 70.

[161] Reply, ¶¶ 59-62, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶¶ 83-84, 93.

[162] Reply, ¶¶ 60-64.

[163] Reply, ¶ 80.

corporations in a single economic area."[164] Professor Kohen also mentioned that arbitrators are empowered to decide a dispute in accordance with the relevant applicable law, that "…*it is not in the interest of investment arbitration to extend jurisdiction where there is none…*", and that "…*mutual respect and comity… should prevail between judicial institutions.*"[165]

159. Lastly, Spain disagrees with Claimants' argument that an excess of powers cannot be deemed *manifest* if it requires the production of an expert report. Spain contends that an excess of powers may be manifest even though it may require some analysis and argumentation.[166]

160. For the Applicant, the excess of powers is manifest, and reinforced, *inter alia* for the following reasons: (i) the Tribunal from the moment of its constitution had knowledge that it was called upon to decide an intra-EU dispute; (ii) the jurisdiction of the Tribunal has been contested from the outset and at every opportunity during the original proceedings, a fact which allowed Claimants to object to the intra-EU objection raised by Spain; and (iii) the European Commission, being the ultimate guarantor of the application of the EU Treaties, sought to intervene and challenged the jurisdiction of the Tribunal on the grounds that it was an intra-EU dispute.[167]

(2) Claimants' Position

161. Claimants argue that Spain, when assessing the Tribunal's findings on jurisdiction and applicable law, ignored "*…that Article 52(1)(b) of the ICSID Convention is only triggered if two cumulative conditions are met: (a) there must be an excess of powers; and (b) the excess must be manifest*."[168]

162. Claimants submit that the term 'manifest' signals the exceptional nature of annulment, a fact which is also evident in the *travaux préparatoires*. According to Claimants, the ordinary

[164] Reply, ¶ 81, *citing* **RL-0204**, *Theodoros Adamakopoulos and Others v. Republic of Cyprus,* ICSID Case No. ARB/15/49, Decision on Jurisdiction, Statement of Dissent of Professor Marcelo G. Kohen, 7 February 2020, ¶ 79 ("***Theodoros Adamakopoulos,* Dissenting Opinion**").

[165] Reply, ¶ 81, *citing* **RL-0204**, *Theodoros Adamakopoulos*, Dissenting Opinion, ¶¶ 80, 82.

[166] Reply, ¶¶ 74, 87, *citing* **RL-0171,** *Pey Casado*, ¶ 70; **RL-0183** *Helnan*.

[167] Reply, ¶¶ 89-92.

[168] C-Mem., ¶ 57, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 82; **RL-0194**, *Total*, ¶ 171; **RL-0114**, *Occidental*, ¶ 57.

meaning of the term 'manifest' suggests that *ad hoc* annulment committees are concerned only with "'*plain, clear', 'obvious', 'self-evident', 'easily understood or recognised by the mind'*" excess of powers.[169] For Claimants, the ordinary meaning of the term 'manifest' requires the alleged excess of powers to be obvious by itself, self-evident, plain on its face, a fact which conforms with the exceptional nature of ICSID annulment.[170] Therefore, Claimants conclude that "*if extensive argumentation is required to show an alleged excess of power, it cannot be manifest*."[171] In a similar vein, Claimants note that the *Pey Casado* committee's view, which Spain referred to, that an extensive argumentation does not preclude the possibility of a manifest excess of powers "*as long as it is sufficiently clear and serious*", being a reference to the "*seriousness of the excess, rather than its obviousness*…", while in line with some *ad hoc* committee decisions, is nonetheless a minority view.[172]

163. Claimants also argue that an immaterial error does not justify the award's annulment under the ICSID Convention. Instead, annulment presupposes the existence of a serious and substantial error, a fact which flows from the very nature of annulment, which is that it constitutes an exceptional measure. In support of these conclusions, Claimants refer to a series of *ad hoc* annulment committees.[173]

---

[169] C-Mem., ¶ 60; Rejoinder, ¶¶ 66-67, *citing* **CL-0269**, *Antin*, ¶¶ 151-152; **CL-0286**, *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru,* ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶ 112 ("***Lucchetti***"); **RL-0186**, *Tza Yap Shum*, ¶ 51.

[170] C-Mem., ¶¶ 58-62, *citing* **CL-0282**, *Travaux préparatoires,* Volume II-2, pp. 850-852; **CL-0286**, *Lucchetti*, ¶ 101; **RL-0194**, *Total*, ¶¶ 171-178; **CL-0290**, *Alapli*, ¶ 232; **CL-0227**, *Tenaris II*, ¶ 73; **CL-0311**, Cambridge Dictionary defines manifest as "easily noticed or obvious" CAMBRIDGE DICTIONARY (Cambridge University Press); **CL-0290**, *Alapli*, ¶¶ 230-231; **CL-0208**, *CDC*, ¶ 41; **RL-0172**, *Wena*, ¶ 25; **CL-0217**, *Daimler Financial Services AG v. Argentine Republic,* ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ¶ 186 ("***Daimler***"); **CL-0225**, *OI*, ¶ 187; **CL-0273**, *Repsol*, ¶ 36; **RL-0171**, *Pey Casado*, ¶ 83.

[171] C-Mem., ¶ 61, *citing* **RL-0172**, *Wena*, ¶ 25.

[172] C-Mem., ¶ 62, *citing* **RL-0171**, *Pey Casado*, ¶ 83.

[173] C-Mem., ¶¶ 63-67, *citing* **RL-0113**, *MINE*, ¶ 6.40; **CL-0284**, Schreuer; **CL-0308**, *Perenco*, ¶ 98; **CL-0310**, *UP and C.D Holding Internationale v. Hungary,* ICSID Case No. ARB/13/35, Decision on Annulment, 11 August 2021, ¶ 164 ("***UP and C.D Holding Internationale***"); **RL-0172**, *Wena*, ¶ 25; **CL-0278**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, 29 May 2019, ¶ 80 ("***Teinver***"); **CL-0208,** *CDC*, ¶ 41; **CL-0273**, *Repsol*, ¶ 36; **RL-0191**, *Mitchell*, ¶ 20; **RL-0042**, *AES Summit Generation Limited and AES- Tisza Erömü Kft v. The Republic of Hungary,* ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2012, ¶ 31 ("***AES***"); **CL-0225**, *OI*, ¶ 187; **CL-0217**, *Daimler*, ¶ 186; **CL-0273**, *Repsol*, ¶ 36; **CL-0263**, *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶ 68 ("***Azurix***"); **CL-0277**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, ¶ 239 ("***Churchill***"); **CL-0208**, *CDC*, ¶ 41; **CL-0306**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling*

164. In the same context, Claimants set out that "*a committee's enquiry into a manifest excess of powers cannot be based on materials that were not put before the underlying tribunal*"[174] or materials that post-date the award in the original proceeding.[175]

165. Claimants further allege that the scope of the Committee's enquiry into the Tribunal's jurisdictional findings is limited to "*assessing whether the tribunal's approach was tenable or reasonable, based on the materials before it*…" and not to assessing the correctness of its findings.[176] This suggests, as Claimants argue, that *ad hoc* committees should respect the competence-competence principle and give "…*special weight to Article 41(1) of the Convention*..."[177] along with the fact that ICSID annulment is not an appeal.

166. For Claimants, "…*if there is any doubt or debate as to whether a tribunal has jurisdiction (i.e. where 'reasonable minds may differ'), there can be no finding of a manifest excess of powers*."[178] In this context and in light of the "*constant dismissal of the intra-EU objection*…", Claimants conclude that Spain's intra-EU grounds for annulment can never give rise to a manifest excess of powers in these circumstances.[179]

167. Claimants then turn to the Applicant's argument that the Tribunal manifestly exceeded its powers by failing to apply EU law. Claimants confirm that the excess must again be manifest, as there is no distinction between different excesses in the ICSID Convention. Claimants argue that an "*erroneous application of the law is not… a ground on which an award can be*

Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, ¶ 124 ("***Cortec Mining***"); **CL-0274**, C. Schreuer, The ICSID Convention: A Commentary 938 (2d Ed. 2009), ¶ 135; **CL-0227**, *Tenaris II*, ¶ 80; **CL-0269**, *Antin*, ¶¶ 151, 152; **CL-0286**, *Lucchetti*, ¶ 112; **RL-0186**, *Tza Yap Shum*, ¶ 80; **RL-0184**, *M.C.I.*, ¶ 51.

[174] C-Mem., ¶ 68, *citing* **CL-0077**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. The Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Decision on the Application for Annulment, 25 March 2010, ¶96 ("***Rumeli***"); **RL-0169**, *Fraport*, ¶ 45; **CL-0310**, *UP and C.D Holding Internationale*, ¶ 159.

[175] C-Mem., ¶ 69, *citing* **CL-0269**, *Antin*, ¶ 159.

[176] C-Mem., ¶ 70, *citing* **CL-0077**, *Rumeli*, ¶ 96; **RL-0192**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 78 ("***TECO I***"); **CL-0286**, *Lucchetti*, ¶ 112; Rejoinder, ¶ 68, *citing* **CL-0327**, *SolEs*, ¶ 68; **RL-0190**, *Duke*, ¶ 99; **CL-0328**, *NextEra*, ¶ 85.

[177] C-Mem., ¶ 71, *citing* **CL-0225**, *OI*, ¶¶ 182-183.

[178] C-Mem., ¶ 72, *citing* **CL-0263**, *Azurix*, ¶¶ 68-69; **RL-0194**, *Total*, ¶ 243; **CL-0276**, *Standard Chartered*, ¶ 222.

[179] C-Mem., ¶¶ 73-74, *citing* **CL-0269**, *Antin*, ¶ 154.

annulled under Article 52(1)(b)."[180] For that reason, "*decisions finding that a manifest excess of powers may result from an error of law have been extensively criticised, for blurring the crucial distinction between annulment and appeal.*"[181]

168. According to Claimants, Spain takes the view that a manifest excess of powers may result from an erroneous application of the law. However, as Claimants argue, this can only occur in "*exceptional circumstances where the tribunal's error is of an egregious nature*", and Spain's argument fails to meet this high threshold.[182] Claimants conclude that "*if different interpretations of the law are possible, an incorrect application of one of these interpretations will not amount to a sufficiently serious error.*"[183]

169. Claimants take issue with Spain's view that "*an ad hoc committee should not only check what the Tribunal said it did, but also what the Tribunal actually did in the particular case, in its effective reasoning.*"[184] For Claimants, this view is misleading as it suggests that a committee should "*embark into a quality control over a tribunal's reasoning and findings…*"[185], a fact which converts annulment proceedings into appeals and blurs the distinction between a serious error that paves the way for the award's annulment and an error of assessment that does not.[186] In this context, Claimants note that the cases put forward by Spain "*…have either been discredited or are completely unrelated to the facts at issue…*"[187]

170. Claimants reject Spain's argument that decisions in *Pey Casado* and *Occidental* suggest that "*…extensive argumentation and analysis do not preclude a finding of a manifest excess of*

[180] C-Mem., ¶ 77, *citing* **CL-0282**, *Travaux préparatoires,* Volume II-2, pp. 851, 853-854; **CL-0281**, *Travaux préparatoires,* Volume II-1, p. 518; **RL-0105**, ICSID Background Paper on Annulment, ¶¶ 15, 21, 72, 90.

[181] C-Mem., ¶¶ 81-83, *citing* **CL-0295**, *Venoklim Holding v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/22, Decision on Annulment, 2 February 2018, ¶ 204 ("***Venoklim***"); **RL-0170**, *Iberdrola*, ¶ 98; **CL-0225**, *OI*, ¶ 186; **RL-0192**, *TECO I*, ¶ 78.

[182] C-Mem., ¶ 79, *citing* **RL-0168**, *Caratube International Oil Company LLP v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶ 81 ("***Caratube***").

[183] C-Mem., ¶ 80, *citing* **RL-0184**, *M.C.I.*, ¶ 51; **CL-0286**, *Lucchetti,* ¶ 112.

[184] C-Mem., ¶ 82.

[185] C-Mem., ¶ 82.

[186] C-Mem., ¶¶ 82-83.

[187] C-Mem., ¶ 84, *citing* **CL-0284**, Schreuer, ¶¶ 237, 230; **RL-0187**, *Amco I*, ¶¶ 93-95; **RL-0189**, *Venezuela Holdings*, ¶ 188(a).

powers." Claimants recall that Spain's proposition has been rejected by subsequent annulment committees.[188]

171. As regards Spain's argument that the Tribunal not only failed to apply the proper law but also erroneously applied the applicable law, Claimants explain that an error of law must be gross or egregious to justify annulment of the Award. Claimants accept that some *ad hoc* committees have accepted that an erroneous application of the law could result in annulment, but this requires "*exceptional circumstances and a very high threshold*…" According to Claimants, and as has been confirmed by *ad hoc* committees, this suggests that the error of law should be gross and egregious.[189] Spain's claim clearly does not entail a gross or egregious error, and this prevents the Committee from annulling this Award even if it decided to verify whether the Tribunal correctly applied the applicable law.[190] For Claimants, the Tribunal's conclusion was "*at the very least tenable*…"[191]

172. In the same context, Claimants argue that the applicable legal standard is to be found in the decisions that did not annul awards under Article 52(1)(b) of the ICSID Convention and not in the decisions cited by Spain in which *ad hoc* committees found a manifest excess of powers.[192] Claimants repeat that these latter decisions not only have been criticized for going beyond the boundaries of Article 52(1)(b) in determining a manifest excess of powers, but also they do not undermine Claimants' position. Claimants, in briefly analyzing the decisions Spain put forward, conclude that these decisions confirmed that *(i)* errors in the application of laws do not justify annulment;[193] *(ii)* a tenable and reasonable decision should not be disturbed and doubts are to be resolved in favour of the Tribunal;[194] *(iii)* the *Enron* position is not applicable to this case since the Tribunal applied the law that Article 26(6) ECT

[188] Rejoinder, ¶¶ 69-70, *citing* **RL-0114**, *Occidental*, ¶ 267; **RL-0171**, *Pey Casado*, ¶ 70; **CL-0227**, *Tenaris II,* ¶ 80; **CL-0269**, *Antin*, ¶ 152; **CL-0329**, *Cube*, ¶ 179.

[189] Rejoinder, ¶¶ 71-74, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 93; **CL-0327**, *SolEs*, ¶¶ 67, 154; **CL-0328**, *NextEra*, ¶¶ 84, 250, 267.

[190] Rejoinder, ¶ 74, *citing* **CL-0327**, *SolEs*, ¶¶ 67, 154; **CL-0328**, *NextEra*, ¶¶ 84, 250, 267.

[191] Rejoinder, ¶ 74, *citing* **CL-0327**, *SolEs*, ¶¶ 67, 154; **CL-0328**, *NextEra*, ¶¶ 84, 250, 267.

[192] Rejoinder, ¶ 75.

[193] Rejoinder, ¶ 76, *citing* **RL-0187**, *Amco I*, ¶ 23; **RL-0185**, *Klöckner*, ¶ 52(e); **RL-0188**, *Enron*, ¶ 68; **RL-0107**, *Sempra*, ¶¶ 164, 165, 186-210.

[194] Rejoinder, ¶ 76, *citing* **RL-0185**, *Klöckner*, ¶ 52(e).

mandated, namely it did not disregard the applicable law; *(iv)* the erroneous application of the law may lead to the award's annulment only in an exceptional situation as Claimants note.[195]

173. As regards Spain's argument that the Tribunal manifestly exceeded its powers by declaring its jurisdiction, Claimants do not dispute that an excess of jurisdiction, if truly manifest, can lead to annulment. However, Claimants believe that the Tribunal did not exceed its powers, let alone manifestly, as it exercised the jurisdiction that the ECT bestowed upon it. Claimants also note that Spain's reference to *Mitchell, Helnan, Occidental,* and *Venezuela Holdings* is irrelevant since "*nothing comparable to those cases arises here*." According to Claimants, the Tribunal neither "forced its jurisdiction"[196], nor disregarded the applicable law[197], and Spain failed to show the relevance of the *Helnan* and *Occidental* annulment decisions to the present EU law submissions.[198] Claimants also note that Spain by referring to these cases attempts to "*obviate the fact that not a single annulment committee has ever determined that exercising jurisdiction over an intra-EU dispute constitutes a manifest excess of powers*."[199]

(3) The Committee's Analysis

174. Article 52(1)(b) of the ICSID Convention reads as follows in its relevant parts:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(b) that the Tribunal has manifestly exceeded its powers;*

175. When arguing that the Award must be annulled for manifest excess of powers under Article 52(1)(b), Spain, as set out below, argues excess both in relation to acceptance of jurisdiction

[195] Rejoinder, ¶ 76, *citing* **RL-0107**, *Sempra*, ¶¶ 164, 165, 186-210.

[196] Rejoinder, ¶ 78, *citing* **RL-0191**, *Mitchell*, ¶ 45; *Consortium R.F.C.C. v. Kingdom of Morocco,* ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., 18 January 2006, ¶¶ 42-43, 46; **RL-0183**, *Helnan*, ¶¶ 34-55.

[197] Rejoinder, ¶ 78, *citing* C-Mem., ¶ 84(d).

[198] Rejoinder, ¶ 78, *citing* **RL-0114**, *Occidental*, ¶ 590.

[199] Rejoinder, ¶ 79, *citing* **CL-0269**, *Antin*, ¶¶ 153-160; **CL-0327**, *SolEs*, ¶¶ 113-128; **CL-0328**, *NextEra*, ¶¶ 228-234; **CL-0310**, *UP and C.D Holding Internationale*, ¶ 259; **C-0363**, IA Reporter, "ICSID *Ad Hoc* Committee Dismisses Hungary's Bid to Annul Food Voucher Award", 10 May 2021.

and by non-application of EU law to the merits. It is not in dispute, and the Committee agrees, that the main powers of a tribunal that appear to have been contemplated by Article 52(1)(b) relate to the tribunal's jurisdiction and to the applicable law.[200] The Committee will try to deal with jurisdiction and applicable law separately, although they partly overlap and have to some extent been dealt with together by the Parties. The Parties' arguments as they relate to either jurisdiction or merits will be dealt with in greater detail by the Committee under such respective headings.

176. The Parties appear to agree that if it can be shown that the Tribunal exceeds the jurisdictional scope of its mandate, wrongly accepts jurisdiction or rules *extra* or *infra petita,* there has been excess of powers. Claimants do not accept that there can be manifest excess where there is an erroneous application of the applicable law, and insist that only a serious error in this respect could lead to annulment. They also reject Spain's contention that the Committee should check the Tribunal's reasoning to see if it had actually applied the law it had identified, and state that this would amount to quality control of the Tribunal's reasoning and findings, which is not within the Committee's purview. Claimants agree with Spain's contention that an erroneous application of the proper law that is "*so gross or egregious as substantially to amount to failure to apply the proper law*" can constitute a manifest excess of powers[201], noting that this will require exceptional circumstances and a very high threshold. The Committee agrees with the above contentions regarding the applicable legal standard and also with Claimants' allegation that any excess will fail for lack of sufficient seriousness where different interpretations of the law are possible.[202] As regards the question of whether the Committee should consider whether the law actually applied by the Tribunal differed from the one it had identified, it seems to the Committee that this will depend on the facts invoked for each alleged excess.

[200] **RL-0105**, ICSID Background Paper on Annulment, ¶¶ 85-94.

[201] C-Mem., ¶¶76, 79-80, 82 and the authorities referred to therein. Rejoinder, ¶ 73, and the authorities referred to therein.

[202] C-Mem., ¶ 80, *citing* **RL-0184**, *M.C.I.*, ¶ 51; **CL-0286**, *Lucchetti,* ¶ 112.

B. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY DECLARING ITS JURISDICTION

(1) The Applicant's Position

177. The Applicant claims that the Tribunal lacked jurisdiction to hear the present case and that the lack of jurisdiction arises from application of EU law. For Spain, the Tribunal has declared its jurisdiction beyond what it was entitled to under the rules applicable. In support of this conclusion, Spain submits the expert reports of Professor Steffen Hindelang with its Memorial and Reply.

178. The Committee has carefully considered all arguments. The following overview is a high-level description of the main themes of Spain's argumentation.

a. The Primacy of EU law and the CJEU's Exclusive Jurisdiction over EU law disputes

179. Spain commences its analysis by referring to the primacy of EU law and its pertinence in the context of the present dispute. The *principle of primacy* of EU law entails that in case of a conflict between national legislation of EU Member States and EU law, the latter prevails. According to Spain, the *principle of primacy* applies not only in respect of national laws but also in the context of public international law, namely to norms established for EU Member States in international agreements and treaties.[203] For Spain, international legal rules regulating the relationship between two EU Member States do not apply if they are contrary to the rules of EU Treaties. Spain contends that, under the primacy of EU law, any conflict between norms involving EU Member States and EU law – even within the context of public international law - must be resolved in favour of EU law.[204]

180. According to Spain, the *principle of primacy* has been recognised in Article 25 ECT. In the application of that Article, EU Member States, being members of a Regional Economic Integration Organization ("**REIO**"), namely the EU, are to be governed in their mutual relations by the law applicable to them, which is EU law.[205]

[203] Mem., ¶ 67, *referring to* First Hindelang Report, ¶¶ 41-48. Reply, ¶ 114.

[204] Mem., ¶ 66, and the legal authority referred to therein.

[205] Mem., ¶ 83.

181. In addition, Spain alleges that, pursuant to the EU Treaties, the CJEU enjoys exclusive jurisdiction to review disputes in matters falling within the purview of EU law to the exclusion of any other Court or tribunal. The CJEU's exclusive jurisdiction over EU law ensures the uniform interpretation thereof.[206]

182. In support of this conclusion, Spain invokes Articles 267 and 344 TFEU. Article 267 TFEU establishes the so-called "*preliminary ruling procedure*."[207] Under this procedure, the courts of each Member State are empowered to submit a question on an issue of the interpretation or application of EU law to the CJEU, the rulings of which are binding on EU Member States requiring them to take the necessary measures to ensure the harmonious application of EU law. Article 344 TFEU prevents EU Member States from submitting a dispute that affects the interpretation and application of EU Treaties to dispute resolution methods other than their national Courts. According to Spain, this provision entails that Member States may not submit to arbitration any disputes that will require arbitral tribunals to construe or apply EU law.[208]

183. In its Reply, Spain repeats that "*autonomy and primacy do not only exist in relation to the internal laws of the Member States, but also in relation to international law binding the Member States to each other*."[209] An international convention is applicable in the EU provided that it does not impinge or adversely impact on the primacy and autonomy of EU law and respects "…*a structured network of mutually interdependent principles, rules and legal relationships which bind the Union and its Member States*…"[210] For Spain, the primacy of EU law implies that EU law prevails over any other legal instrument, national or

[206] Mem., ¶ 69. Reply, ¶ 113, and the legal authority referred to therein.

[207] Mem., ¶ 69(i), regarding **RL-0001** EU Treaty, Treaty on the Functioning of the EU and EU Charter of Fundamental Rights, 26 October 2012. Consolidated, Article 267 TFUE: "*the Court of Justice of the European Union has jurisdiction to decide, as preliminary issues: a) on the construction of the Treaties*".

[208] Mem., ¶ 69(ii), regarding **RL-0001** EU Treaty, Treaty on the Functioning of the EU and EU Charter of Fundamental Rights, 26 October 2012. Consolidated, Article 344 TFEU: "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*."

[209] Reply, ¶¶ 106-111, *citing* **RL-0177**, Opinion 1/17 of the Plenary of the Court of Justice CJEU, CETA, 30 April 2019, ¶¶ 107, 109 ("***Opinion 1/17 of the CJEU***").

[210] Reply, ¶ 112, *citing* **RL-0177**, Opinion 1/17 of the CJEU, ¶¶ 107, 109.

international, to regulate intra-EU matters.[211] In support of this conclusion, Spain refers to the Opinion 1/17 of the CJEU.[212] In addition, Spain points to the Second Report of Professor Hindelang which affirms that the autonomy of EU law implies that "*EU law can disconnect from international treaties or conventions to regulate matters within the EU*…" even in the absence of a disconnection clause within the treaties.[213] Spain summarizes that in relations between EU Member States or between them and the EU, autonomy and primacy entail that intra-EU matters are to be disconnected from the international treaty if the treaty is applied in a way that does not conform to EU law. For Spain, Article 38 of the ICJ Statute, which determines the sources of international law, shows that ECT arbitration could not be used to settle an intra-EU dispute and thereby confirms the autonomy and primacy of EU law.[214]

184. In a similar vein, Spain notes that the EU judicial system aims at safeguarding the uniform and consistent application of EU law, a fact which is ensured through the exclusive jurisdiction of the CJEU to give the definite interpretation of EU law to the exclusion of arbitral tribunals.[215]

185. As a result, Spain contends, EU law and CJEU decisions prevent intra-EU disputes from being submitted to arbitration, resulting in the Tribunal's lack of jurisdiction.[216]

b. The ECT does not apply to Disputes between EU Member States

186. Spain argues that the customary international law rules of interpretation oblige the *ad hoc* Committee to conclude that the ECT (including Article 26) does not apply within the European Union. According to Spain, the purpose, text, and context of ECT suggest that it was never meant to include within its material scope disputes brought between EU Member States. In support of this conclusion, the Kingdom of Spain refers to the drafting history of the ECT and its objectives as an illustration of the fact that ECT was neither supposed to be nor conceived as a means to amend rules and principles governing EU law. Its primary focus

[211] Reply, ¶ 114.
[212] Reply, ¶ 111, *citing* **RL-0177**, Opinion 1/17 of the CJEU, ¶¶ 109-111.
[213] Reply, ¶ 115, *citing* Second Hindelang Report**,** ¶¶ 86 et seq.
[214] Reply, ¶¶ 117-118.
[215] Reply, ¶ 113, *citing* **RL-0177**, Opinion 1/17 of the CJEU, ¶ 111. Tr. Day 1, 25: 18-22.
[216] Reply, ¶¶ 109-110.

was to preserve "*the autonomy of the Union and primacy of EU law*" and create an environment of cooperation between the EU and Soviet bloc States.[217]

187. Furthermore, Spain notes that the mechanisms to protect investments made by citizens of one contracting party within the territory of the other contracting party were not designed to cover disputes among EU Member States. According to Spain, an investment made by an investor having the nationality of an EU Member State is not considered an investment in the territory of another Contracting State under the ECT. In support of this conclusion, Spain invokes Articles 1 and 26 ECT. Pursuant to the former, the EU, being a REIO, is considered a Contracting Party as it has consented to be bound by the ECT. Under the latter, an investment must have been made by an Investor of one Contracting Party in the Area of another Contracting Party. For Spain, these provisions limit the scope of arbitration only to disputes relating to investments made by "*an investor of one Contracting Party in the territory of another Contracting Party* […]."[218] Disputes that relate to an investment made in the territory of the same Contracting Party are excluded.[219] Thus, an investment by an investor in the territory of a European Union Member State is not an investment in the territory of another Contracting State. Since the EU is deemed, for the purposes of the ECT, to be a REIO, that is a Contracting Party, a dispute between two EU Member States, namely between States that form part of the same REIO, could not amount to a dispute between two different Contracting Parties.[220]

188. Furthermore, Spain refers to the fact that EU Member States have transferred certain competences to the European Community. This, according to Spain, explains why the EU is the Contracting Party for some parts of the ECT, those falling within the scope of EU's exclusive competences under its founding Treaties, and EU Member States for other parts of the ECT. It also suggests that EU Member States had "*no legal capacity to accept mutual*

[217] Mem., ¶¶ 70-72, *citing* **R-0354**, Counter-Memorial on the Merits and Memorial on Jurisdiction, 20 May 2016, ¶¶ 56-108.

[218] Mem., ¶ 77.

[219] Mem., ¶¶ 73-77, *citing* **RL-0164**, Energy Charter Treaty, Spanish version, 17 December 1991, Article 1(2)(3)(10) ("***ECT, Spanish version***").

[220] Mem., ¶ 79.

obligations for internal market matters as this was an area in which they had transferred sovereignty to the European Community."[221]

189. Spain also points out that if an intra-community arbitration were allowed in the context of the ECT, the principles of mutual trust (including trust in the judicial authorities of the other EU Member States), autonomy and uniform application of EU law (which is to be guaranteed by the CJEU) would be undermined. Intra-EU disputes have an internal dimension governed by EU law, which enjoys prevalence over other national laws, and are to be regulated exclusively in accordance with Articles 267 and 344 TFEU. Spain points to the incompatibility with EU law of the arbitration system established in the ECT, which was apparent even at the time of conclusion of the ECT. Similarly, the scope of Article 26 cannot be expanded to cover intra-community disputes as it would contravene EU Treaties since EU Member States have never validly offered arbitration to investors from other EU Member States. In support of these conclusions, Spain refers to the EU Interpretative Declaration submitted to the ECT Secretariat in March 1998.[222]

c. The Achmea *and* Komstroy *Judgments*

190. Spain recalls that in its crucial *Achmea* judgment ("***Achmea***")[223] the CJEU stated that EU Member States pursuant to Articles 267 and 344 TFEU[224]are prohibited from submitting disputes requiring the interpretation and application of EU law to a dispute resolution mechanism outside of the EU judicial system.

191. The Applicant summarizes *Achmea* along with the underlying background in its pleadings as follows:

192. In 2008, Achmea brought arbitration proceedings against Slovakia under the Czechoslovakia-Netherlands BIT of 1991 alleging that the prohibition of distribution of

[221] Mem., ¶¶ 80-82, *citing* **RL-0182**, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of Energy Charter Treaty, 9 March 1998 ("**1998 Declaration**"); **RL-0164**, ECT, Spanish version, Article 36(7).

[222] Mem., ¶¶ 84-89, *citing* **RL-0182**, 1998 Declaration.

[223] **RL-0108**, *Republic of Slovakia / Achmea BV,* Judgment of the Court of Justice of the European Union Case C-284/16, 6 March 2018 ("***Achmea***").

[224] Mem., ¶ 90, *citing* **RL-0108**, *Achmea*.

profits generated by health insurance business activities contravened the BIT and caused Achmea financial harm. In 2021, the tribunal found that Slovakia violated the BIT. Subsequently, Slovakia lodged an appeal in German courts seeking the annulment of the award on the basis that the BIT arbitration clause was contrary to multiple TFEU provisions. The German Court referred the question to the CJEU for a preliminary ruling on whether the arbitration clause was compatible with Articles 18, 267, and 344 TFEU.

193. Spain describes the *Achmea* judgment as relevant to the present case as it specifically examined whether an arbitral tribunal in international investment arbitration complies and is compatible with the principles of EU law. Spain notes that the CJEU concluded in *Achmea* that arbitration clauses in international investment agreements between EU Member States are not compatible with EU law and summarized the conclusions of the CJEU as follows:[225]

194. Arbitral tribunals are not part of the judicial system of the European Union, nor can an arbitral tribunal be described as a court "*of a Member State*" that can refer a question to the CJEU for preliminary ruling.[226]

195. Disputes before investment tribunals may affect the application or interpretation of EU law and should therefore be subject to the EU judicial system.[227]

196. By virtue of an arbitration clause, Member States agree to deviate from the jurisdiction of their own courts and thus from the EU system of judicial remedies. As a result, it cannot be guaranteed that disputes submitted to arbitration will be decided in a manner that ensures the full effectiveness of EU law.[228]

197. The decision of the arbitral tribunal is final and judicial review may be exercised by a national court only to the extent permitted by national law.[229]

[225] Mem., ¶¶ 95-96, *citing* **RL-0108**, *Achmea,* ¶¶ 35, 37, 41, 45, 48, 51, 55, 56; Report of Professor Steffen Hindelang, ¶ 21.
[226] Mem., ¶ 95.
[227] Mem., ¶ 95.
[228] Mem., ¶ 95.
[229] Mem., ¶ 95.

198. As a result of *Achmea*, the German Federal Court annulled the arbitral award on the basis that EU law provided that there was no agreement to submit the dispute to arbitration under German law. According to Spain, this reasoning has been followed by the CJEU even in cases where the EU itself was a party to the international treaty.[230] For Spain, the *Achmea* CJEU judgment applies to all international agreements including multilateral treaties signed by European Union Member States, such as the ECT.[231]

199. In support of this conclusion, Spain refers to the *Komstroy* judgment ("***Komstroy***").[232] The Applicant has advocated in this case that Article 26 ECT does not apply to intra-EU disputes. In light of *Komstroy,* Spain submits that it is now apparent that the legal reasoning in *Achmea* applies *mutatis mutandis* here and is not limited to intra-EU bilateral agreements.[233]

200. In addition, Spain notes that in ***Komstroy*** the CJEU observed that an arbitral tribunal constituted under Article 26 ECT is called upon to resolve disputes which necessarily involve the interpretation and application of EU law and that, although such tribunal must apply EU law, it does not form part of the EU law judicial system in that it cannot refer a question to the CJEU for preliminary ruling. Thus, the uniform application of EU law is not guaranteed as it would be by a dialogue mechanism between the National Courts and the CJEU.[234]

201. Spain also notes that in *Komstroy* the CJEU indicated that the fact that the EU had competence in international matters did not mean that a provision such as Article 26 ECT could exclude an EU dispute from the EU judicial system. Otherwise, the efficacy of EU law would have been undermined.[235]

202. Spain concludes that *Komstroy* limits the *ratione materiae* scope of Article 26 ECT. Article 26 ECT is binding on Member States in relation to investors from third States that are parties to the ECT in respect of investments made in the territory of those Member States. It does

[230] Mem., ¶¶ 96-97, *citing* **RL-0108**, *Achmea*, ¶ 51; First Hindelang Report, ¶¶ 21, 54-57; **RL-0177**, Opinion 1/17 of the CJEU.

[231] Mem., ¶ 98.

[232] **RL-0158**, *Republic of Moldova / Komstroy LLC,* Judgment of the Court of Justice of the European Union Case C-741/19, 2 September 2021 ("***Komstroy***").

[233] Mem., ¶¶ 99-100, *citing* **RL-0158**, *Komstroy*, ¶¶ 58-73.

[234] Mem., ¶¶ 100-102, *citing* **RL-0158**, *Komstroy*, ¶¶ 49-50, 51-52, 53, 60-62, 64.

[235] Mem., ¶ 103, *citing* **RL-0158**, *Komstroy*, ¶¶ 60-62.

not impose obligations on Member States among themselves as this would contravene the principle of autonomy of EU law. Thus, the dispute at hand falls outside the material scope of the dispute resolution mechanism established under Article 26(3) ECT.[236]

203. In its Reply, Spain challenges Claimants' attempt to deprive the CJEU *Komstroy* judgment of its relevance. Although the Tribunal was not aware of the *Komstroy* judgment as it post-dates the Award, Spain contends that its reasoning was already to be found in the *Achmea* judgment.[237] As a result, the Tribunal was aware of the legal reasoning that led to the *Komstroy* judgment as it "*takes up the Achmea pronouncements*…" and signals its applicability to the ECT.[238] The *Komstroy* judgment, Spain recalls, declares that the *Achmea* doctrine is applicable to the dispute settlement mechanism provided for in Article 26 ECT,[239] and concludes that Article 26(2)(c) does not apply to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State.[240]

204. Spain further argues that the relations between EU Member States under international law have to be examined through the lens of the *Achmea* judgment, namely as obligations of a bilateral nature. For Spain, the *Achmea* criteria are to be applied in an ECT case for the following main reasons: *(i)* the ECT, although a multilateral agreement, consists of a set of bilateral obligations and Article 26 ECT is intended to govern bilateral relations,[241] *(ii) Achmea* referred to international agreements in general,[242] *(iii)* the principle of autonomy of EU law cannot be escaped and accordingly, as in *Achmea,* the CJEU in *Komstroy* proceeds to apply its criteria to examine whether the autonomy and integrity of EU law would be respected if intra-EU disputes were to be arbitrated under Article 26 ECT.[243]

[236] Mem., ¶¶ 104-105, *citing* **RL-0158**, *Komstroy*, ¶ 65.
[237] Reply., ¶ 120.
[238] Reply, ¶ 122.
[239] Reply, ¶ 125.
[240] Reply, ¶ 126, *citing* **RL-0158,** *Komstroy*.
[241] Reply, ¶128, *citing* **RL-0158,** *Komstroy*, ¶ 41.
[242] Reply, ¶129, *citing* **RL-0158,** *Komstroy*, ¶ 62.
[243] Reply, ¶130.

205. In its Reply, Spain, while restating its analysis of the *Achmea* judgment, notes that the Tribunal, in an attempt to shield its jurisdiction over an intra-EU dispute, wrongly denied the applicability of the CJEU rulings on the ground that the EU was not a party to the bilateral treaty that gave rise to *Achmea*. For Spain, if the Tribunal had analysed the *Achmea* judgment it would have concluded that the reach of the *Achmea* judgment was not limited to bilateral treaties but covered international agreements.[244] In any case, the "*CJEU decision reiterates that an international agreement cannot affect the division of competences established by the [EU] Treaties and thus the autonomy of the EU legal order*."[245] In essence, the Tribunal, being "*outside the EU's judicial system which has no jurisdiction to apply EU law*", was called upon to interpret and apply EU law as binding international law for both parties.[246] In so doing, it jeopardizes the uniform interpretation of EU law since the Tribunal cannot be classified as a court or tribunal of a Member State and it is not entitled to make a reference to the Court for a preliminary ruling.[247]

206. Lastly, Spain contends that the preferential application of EU law for intra-EU matters over international conventions "*was at the time of the conclusion of the ECT and is now an essential rule*."[248] The Applicant also believes that the uniform application of EU law is not safeguarded when intra-EU matters are to be decided by arbitral tribunals, such as the *RWE* Tribunal, that do not form part of the EU judicial system and are not subject to any judicial control since annulment is outside the scope of national bodies as it is to be conducted under ICSID rules. As a result, "*the ECT cannot be interpreted as allowing intra-EU investment arbitration…*"[249] and "*…Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment…*"[250] For Spain, arbitration was never an offer to intra-EU investors and the ECT,

[244] Reply, ¶¶ 126-132, *citing* **RL-0158,** *Komstroy*, ¶¶ 41, 62, 64; **RL-0108**, *Achmea*, ¶ 62; First Hindelang Report, ¶¶ 76-79.

[245] Reply, ¶ 133, *citing* **RL-0158**, *Komstroy*, ¶¶ 42-43.

[246] Reply, ¶ 135, *citing* **RL-0158**, *Komstroy*, ¶¶ 50-51.

[247] Reply, ¶¶ 135-136, *citing* **RL-0158**, *Komstroy*, ¶¶ 51, 53.

[248] Reply, ¶ 134.

[249] Reply, ¶ 138, *citing* **RL-0158**, *Komstroy*, ¶ 62.

[250] Reply, ¶ 139, *citing* **RL-0158,** *Komstroy*, ¶ 66.

being ratified by the EU, "*must be interpreted for intra-EU matters in accordance with the entire EU legal framework.*"[251]

207. Overall, Spain argues that *(i)* the application of EU law is mandatory; *(ii)* the autonomy of the EU legal framework must be respected; and *(iii)* intra-EU investment arbitration is not allowed under the ECT.[252]

208. According to Spain, these conclusions along with the reasoning of *Achmea* and *Komstroy* have been confirmed in the *PL Holdings* judgment delivered on 26 October 2021.[253] The CJEU confirmed that it is not possible for Member States to commit themselves to abstracting from the EU's judicial system disputes relating to the application and interpretation of EU law.[254] The CJEU noted that the arbitration clause contained in the relevant BIT could jeopardize "*the principle of mutual trust and sincere cooperation…*"[255] since, by virtue of these agreements, Member States undertake to withdraw from the jurisdiction of their own courts and thus from the EU system of legal remedies. For the CJEU, this reasoning applies to *ad hoc* arbitration agreements which would produce the same effects.[256] In addition, the CJEU is of the view that disputes that may concern the interpretation and application of EU law cannot be removed from the judicial system of the EU, and Member States are required to challenge the validity of those arbitration clauses or *ad hoc* arbitration agreements on the basis of which the dispute was brought before that arbitral body.[257] As a result, national courts are obliged "*…to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law…*"[258]

209. Finally, Spain in support of its argument that the Tribunal lacked jurisdiction and manifestly exceeded its powers by improperly declaring its jurisdiction, notes that the question of

[251] Reply, ¶ 142.

[252] Reply, ¶ 143.

[253] Reply, ¶¶ 144-156, *citing* **RL-0210**, *Republic of Poland / PL Holdings Sàrl,* Judgment of the Court of Justice of the European Union, 26 October 2021 ("***PL Holdings Judgment of the CJEU***").

[254] Reply, ¶ 156.

[255] Reply, ¶ 150.

[256] Reply, ¶ 151, *citing* **RL-0210**, *PL Holdings* Judgment *of the CJEU*, ¶ 49.

[257] Reply, ¶ 152, *citing* **RL-0210**, *PL Holdings* Judgment *of the CJEU*, ¶ 52.

[258] Reply, ¶ 153, *citing* **RL-0210**, *PL Holdings* Judgment *of the CJEU*, ¶¶ 54-55.

whether this Tribunal has jurisdiction over an intra-EU matter is clearly settled in light of the CJEU rulings mentioned. In confirmation of this statement, in its Reply, Spain informed the Committee that "…*several annulment proceedings are pending before the Court of Appeal in Svea in relation to the Stockholm Chamber of Commerce awards…rendered in the context of intra-EU ECT disputes*."[259] Spain refers to the annulment proceedings brought by Italy against the *Greentech* and *Novenergia* awards, the underlying circumstances of which, according to Spain, are analogous to the case at hand.[260] The Applicant recalls that the Svea Court of Appeal decided to withdraw its request for a preliminary ruling to the CJEU, "*as it considers that such a preliminary ruling is no longer necessary in light of the CJEU decisions in* Komstroy v. Moldova *and* PL Holdings v. Poland…"[261] Spain concludes that the issue of whether EU law prevents the application of Article 26 ECT in an intra-EU context is "*clearly and unequivocally settled*"[262] in the light of the CJEU judgments mentioned above[263] and that the Arbitral Tribunal lacked jurisdiction and manifestly exceeded its powers by improperly declaring its jurisdiction to hear an intra-EU dispute.[264] The subsequently rendered Swedish Judgements will be further addressed under Section VI(B)(3)(f) below.

d. EU law and the ECT and their impact on this case

210. Spain submits that the *Achmea* judgment is directly applicable to the present case, and in Spain's view it was not properly analysed by the Tribunal in the underlying arbitration. The *Achmea* judgment, according to Spain, is applicable as it called for the application of EU law. "*Neither the Decision nor the Award we are concerned with here would be subject to*

[259] Reply, ¶ 157, *citing* **RL-0381**, IA Reporter Article on the Withdrawal of the Preliminary Ruling by the Svea Court of Appeal in the light of the *Komstroy* and *PL Holdings* Judgments; **RL-0211**, Order of the Svea Court of Appeal, 12 November 2021. NOTE: On 20 December 2022, Spain requested leave from the Committee to introduce into the record: (i) the Judgment of the Svea Court of Appeal dated 13 December 2022 concerning case SCC No. V (2015/063 between *Novenergia II- Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain);* and (ii) the Judgment rendered by the Swedish Supreme Court dated 14 December 2022 concerning the *PL Holdings v. Poland* award) (the "**Swedish Judgments**"), which after hearing comments from Claimants, the Committee admitted into the record on 3 January 2023.

[260] Reply, ¶ 161.

[261] Reply, ¶ 160.

[262] Reply, ¶ 162.

[263] Reply, ¶ 160.

[264] Reply, ¶ 164.

review by the European Union judicial system"[265] Hence, as Spain contends, according to the *Achmea* judgment, Article 26(4) ECT does not apply to intra-EU disputes.[266]

211. Spain also alleges that the ECT, a multilateral treaty signed by the EU and EU Member States, forms part of the EU Treaties. The Applicant recalls that the dispute resolution provisions contained in the ECT call for disputes to be resolved in accordance with the ECT and according to "*applicable rules and principles of International Law.*"[267] For Spain, Article 26 ECT provides that EU law is the international law applicable to this arbitration.

212. Spain concludes its analysis as follows: "*the application of the CJEU's position in its Achmea judgment to the present case is undisputed: clauses such as Article 26(6) ECT cannot apply between Member States of the Union, as is the case here*."[268] Consequently, Spain requests that this Committee correct the Tribunal's incorrect decision on applicable law in relation to both the relevant Decision and the Award.[269]

213. Spain refers to the European Commission, the EU Member States themselves including Spain and Germany, as sources who have confirmed the applicability of the *Achmea* judgment.[270]

214. Spain submits that based on the *Achmea* judgment, the European Commission issued Communication COM (2018) 547/2 which states:

> "…*"that all investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement".*[271] *Therefore, "national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the* Achmea *judgment.*

[265] Mem., ¶ 106.

[266] Mem., ¶ 106.

[267] Mem., ¶ 108, *citing* **RL-0164**, ECT, Spanish version, Article 26(6) ECT.

[268] Mem., ¶ 109.

[269] Mem., ¶ 109.

[270] Mem., ¶ 110.

[271] Mem., ¶ 111, *citing* **RL-0176**, Communication from The European Commission to The European Parliament and the Council on the Protection of intra-EU Investment, COM (2018) 547/2, 19 July 2018 ("***COM (2018) 547/2***").

> *Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs. The* Achmea *judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member State[s] of the EU and another Member State[s] of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable… The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU Member States and third countries"…*"[272]

215. The same conclusion was reached by the CJEU Advocate General Henrik Saugmandsgaard[273] and Advocate General M. Maciej Szpunar.[274] Both noted that the *Achmea* judgment mandates that Article 26 ECT does not apply to intra-EU disputes and that the CJEU has jurisdiction to rule on provisions of the ECT and on preliminary issues. Article 26 ECT is incompatible with European Union law as it permits the involvement of an arbitral tribunal, which is external to the EU legal system, to rule in an intra-EU litigation and apply EU law, a fact which impacts on the principle of mutual trust and autonomy of EU law.[275]

216. On a related note, Spain explained that in January 2019 almost all Member States signed a political declaration through which they stated that arbitration clauses such as the one provided in the ECT could not be understood as consent to submit intra-EU disputes to arbitration. According to Spain, this declaration amounts to evidence in terms of Articles 31 and 33 VCLT of the overreach of jurisdiction alleged in these annulment proceedings. By virtue of this declaration, Member States, including Spain and Germany, proclaimed that arbitration clauses interpreted as consents to intra-EU arbitration are incompatible with EU law and should be disapplied.[276] In support of the juridical value and binding character of

[272] Mem., ¶¶ 110-111, *citing* **RL-0176**, COM (2018) 547/2.

[273] Mem., ¶ 112, *citing* **RL-0196**, Conclusions of Advocate General Saugmandsgaard, 29 October 2020, Legal Opinion in cases C-798/18 and C-799/18, footnote 55.

[274] Mem., ¶ 113, *citing* **RL-0197**, Conclusions of Advocate General M. Maciej Szpunar, 3 March 2021, Legal Opinion in case C-741/19, ¶¶ 28, 29, 40-45, 89.

[275] Mem., ¶¶ 111-112.

[276] Mem., ¶¶117-118., *citing* **RL-0158**, *Komstroy*, ¶ 66; **RL-0098**, Declaration of Member States representatives on the juridical consequences of the Court of Justice Judgment in the case of *Achmea* and on the protection of investments in the European Union, 15 January 2019 ("***Declaration of 15 January 2019***"); **RL-0010**, Vienna Convention on the

declarations, Spain points to the ICJ's conclusion in the *Nuclear Tests* case (*Australia v. France*).[277]

e. The Tribunal's Decision Failed to properly Analyze the Lack of Jurisdiction

217. Spain believes that the Tribunal's Decision is wrong in asserting jurisdiction. According to the Applicant, the Tribunal manifestly exceeded its powers as it incorrectly and in a biased manner interpreted and construed European Union Law and concluded that it had jurisdiction to hear the underlying dispute in contradiction with the most basic principles of European Union Law.[278]

218. *First,* concerning the Tribunal's decision that the ECT does not provide a differentiated treatment for Member States of the EU, Spain argues that the Tribunal ignored (i) the series of treaties that make up European Union Law and which prevail over the ECT in accordance with the principle of primacy and (ii) the literal application of the phrase Regional Economic Integration Organization (REIO).[279]

219. *Second,* the Applicant states that the Tribunal denied the existence of an implicit disconnection clause and the existence of the principle of prevalence of EU law. In the event of a conflict between ECT and EU law, Spain argues, EU law prevails over international obligations of and between Member States. The prevalence of EU law is a special conflict rule in accordance with international law. As Spain noted, "*the Tribunal ignored the fact that the Member States have provided themselves with a specific dispute rule that prevails in the internal relations by virtue of the* principle of prevalence *and… applies to other international treaties*."[280] As a result, Article 26 ECT does not apply in intra-EU relations.[281]

Law of Treaties, 23 May 1969, BOE 17 June 1980; **RL-0198**, *Nuclear Tests (Australia v. France),* ICJ Judgment, 20 December 1974, 253, ¶ 43 ("***Nuclear Tests***").

[277] Mem., ¶ 119, relying on **RL-0198,** *Nuclear Tests*, p. 253.

[278] Mem., ¶ 122.

[279] Mem., ¶ 123.

[280] Mem., ¶¶ 124-126, **RL-0104**, *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain,* ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and certain Issues of Quantum, 30 December 2019, ¶¶ 332, 346, 361 ("***RWE,* Decision on Jurisdiction, Liability and certain Issues of Quantum**").

[281] Mem., ¶ 127.

220. *Thirdly,* Spain also argues that the Decision is wrong because it denied any relevance to the *Achmea* ruling. According to the Applicant, the Tribunal dismissed application of the *Achmea* judgment due to the fact that the EU is not a party to the BIT and that the Tribunal was not called upon to decide any matter of EU law.[282] For Spain, *Achmea*'s relevance is premised upon whether or not the arbitral tribunal may construe EU law. The Tribunal did not analyse the regulations on State aid and Articles 107 and 108 TFEU, as it should have.[283]

221. Furthermore, it follows from the finality of the award, the absence of judicial review by a national court and the fact that arbitral tribunals cannot raise preliminary issues that, under the *Achmea* logic, the Tribunal should have declared its lack of jurisdiction.[284] The Applicant concludes that the legal consequences of the *Achmea* judgment "*were clearly extendable to the RWE case, despite being the arbitration under the ECT, as recently declared by the CJEU Advocates General, Mr. Henrik Saugmandsgaard and Mr. Maciej Szpunar and by the CJEU in the Judgment in C-741/19*."[285]

222. The Applicant points to the exclusive jurisdiction of the CJEU over the interpretation of EU law and its jurisdiction for the interpretation of the ECT. For Spain, the CJEU's exclusive competence to determine the interpretation of EU law is undisputed and acknowledged by both Germany, the home state of the Claimant RWE Innogy GmbH, and Spain. It is also undisputed that the CJEU has competence to interpret EU acts, and in light of the *Komstroy* judgment, the ECT is deemed an EU act. The binding nature of CJEU rulings is also admitted and the CJEU's competence to hear cases affecting the intra-EU application of the ECT has been acknowledged by the so-called European Communities in the 1998 Declaration to the

[282] Mem., ¶ 128.

[283] Mem., ¶¶ 128-129, *citing* **RL-0104**, *RWE ,* Decision on Jurisdiction, Liability and certain Issues of Quantum, ¶¶ 363, 364.

[284] Mem., ¶¶130-131.

[285] Mem., ¶ 132-133, *citing* **RL-0175**, *Commission / Ireland,* Action for failure to fulfil obligations under Article 226 EC and Article 141 EA, brought on 30 October 2003, Commission of the European Communities supported by United Kingdom of Great Britain and Northern Ireland, Judgment of the Court of Justice of the European Union Case C-459/03, 30 May 2006; First Hindelang Report, ¶¶ 54-57; **RL-0158**, *Komstroy*; **RL-0196**, Conclusions of Advocate General Saugmandsgaard, 29 October 2020, Legal Opinion in cases C-798/18 and C-799/18; *citing* **RL-0197**, Conclusions of Advocate General M. Maciej Szpunar, 3 March 2021, Legal Opinion in case C-741/19.

ECT Secretariat.[286] Spain does not agree with Claimants that the 1998 Declaration is not relevant. The Applicant contends that it "*demonstrates that the Member States did not give their unconditional consent to intra-EU arbitration as this was contrary to their obligations as Member States of the European Communities*."[287] It would be impossible to understand that the Member States would consent to submit an intra-EU dispute to arbitration, as this would be contrary to the European legal order.[288] In addition, Spain rejects the idea that the Declaration of 2 May 2019 submitted to the ECT Secretariat replaced the 1998 Declaration. According to Spain it only replaced the Declaration issued in 1998 "*concerning the EU and Euratom and the effects of the implementation of the obligations arising from EU Regulation No. 912/2014 of the Parliament and of the Council*."[289]

223. Spain concludes that there "*is no doubt that the CJEU is the competent body to interpret EU law...*" and that the "*preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves*."[290] For Spain, "*...the only way to understand that the ECT and EU law are compatible is to conclude that Article 26(2)(c) ECT should be interpreted as being non-applicable in intra-EU disputes*."[291] As a result, the Tribunal manifestly exceeded its powers by declaring its jurisdiction over an intra-EU dispute.

224. In its Reply, Spain also alleges that the interpretation of a rule of EU law by the CJEU determines the scope and meaning of that rule and it has to be applied even to "*legal relationships pre-existing the judgment ruling on the request for interpretation.*"[292] As a result, Spain points out that the CJEU judgments mentioned are to be applied to the case at hand. Similarly, the Applicant reminds the Committee that the CJEU rulings in preliminary

[286] Reply, ¶¶ 173-177, *citing* **RL- 0001**, EU Treaty on the Functioning of the EU and EU Charter of Fundamental Rights, Consolidated, 26 October 2012; *citing* **RL-0158**, *Komstroy*, ¶¶ 21, 23, 49, 65, 66; **RL-0182**, 1998 Declaration.

[287] Reply, ¶ 180, *citing* C-Mem., ¶¶ 124-125.

[288] Reply, ¶ 182.

[289] Reply, ¶ 181, *citing* **RL-0104,** *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶ 331; **RL-0203,** Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, 2 May 2019 ("***Declaration of 2 May 2019***") (.

[290] Reply, ¶ 177, *citing* **RL-0158**, *Komstroy*, ¶¶ 65, 66.

[291] Reply, ¶ 179.

[292] Reply, ¶ 184.

proceedings are *res judicata*, namely final and no longer subject to appeal.[293] The binding nature of the CJEU judgments is accepted by the Member States by virtue of the ratification of the EU Treaties and the Claimants cannot enjoy rights that deviate from the legal framework applicable in their home country.[294]

f. The Swedish Judgments

225. In support of its argument that the Tribunal lacked jurisdiction to hear an intra-EU dispute, and as authorized by the Committee on 3 January 2023, on 9 January 2023, Spain filed two new documents: (i) RL-0226- Svea Court of Appeal - Judgment in case T 4658-18 dated 13 December 2022[295] (the "***Novenergia Judgment***"); and (ii) RL-0227- Judgment of the Swedish Supreme Court case T 1569/19 dated 14 December 2022[296] (the "***PL Holdings Judgment***") (together, the "**New Documents**"), followed by its comments on their relevance of 17 January 2023 ("***Spain Comments on Swedish Judgments***").

226. Regarding the Svea Court of Appeal Judgment dated 13 December 2022, Spain noted that the Appeals Court declared the arbitral award dated 15 February 2018 in case SCC No. V (2015/063) between *Novenergia II-Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain* null and void, on the grounds of lack of jurisdiction of the Arbitral Tribunal in an intra-EU dispute between an investor from a Member State of the European Union (Luxembourg) and the Kingdom of Spain.[297]

227. According to Spain, the Court of Appeal found that in line with the CJEU judgments in *Achmea*, *Komstroy* and *PL Holdings*, "*Spain and Novenergía could not have agreed, either before or after, that the issues in question should be settled by arbitration*."[298]

---

[293] Reply, ¶ 188.

[294] Reply, ¶¶ 184-193.

[295] **RL-0226**, Svea Court of Appeal - Judgment in case T 4658-18 dated 13 December 2022 ("***Novenergía* Judgment**").

[296] **RL-0227**, Judgment of the Swedish Supreme Court case 1569/19 dated 14 December 2022 ("***PL Holdings* Judgment**").

[297] Spain Comments on Swedish Judgments, ¶ 5.

[298] Spain Comments on Swedish Judgments, ¶¶ 7-8, *citing* **RL-0226**, *Novenergia* Judgment, ¶ 83.

228. The Court of Appeal decided that "*disputes which have their basis in the ECT may not be excluded from the national courts of the Member States and that article 26.2. c) of the ECT therefore does not apply to disputes between a Member State and an investor from another Member State concerning an investment made by the latter investor in the former Member State*."[299]

229. Spain, noting that this was an annulment of an SCC[300] case and not an ICSID award, nonetheless requested that the Committee consider the above indicated judgment as it also dealt with an intra-EU dispute.[301]

230. Regarding the Judgment of the Swedish Supreme Court dated 14 December 2022, Spain noted that the Swedish Supreme Court, taking the *Achmea* judgment into account, had annulled the award in *PL Holdings v. Poland,* after finding that it concerned an intra-EU arbitration which was invalid under EU law and contrary to Swedish international public policy.[302]

231. Spain concluded that the New Documents supported its position that the Tribunal lacked jurisdiction to hear an intra-EU dispute, and that the *RWE* Award should therefore be annulled.[303]

(2) Claimants' Position

a. The Tribunal's finding that Article 26 ECT applies intra-EU does not constitute a manifest excess of powers

232. According to Claimants, Spain argues that the Tribunal manifestly exceeded its powers by declaring its jurisdiction and dismissing Spain's intra-EU objection. Claimants believe that this allegation must be rejected. *First,* apart from the fact that Spain refers to an alleged bias which lacks any merit,[304] Claimants submit that Spain's argument concerns the allegedly

[299] Spain Comments on Swedish Judgments, ¶ 9, *citing* **RL-0226**, *Novenergia* Judgment, p. 41.
[300] Stockholm Chamber of Commerce.
[301] Spain Comments on Swedish Judgments, ¶ 11.
[302] Spain Comments on Swedish Judgments, ¶¶ 13-17.
[303] Spain Comments on Swedish Judgments, ¶ 21.
[304] C-Mem., ¶ 86.

wrong application of EU law by the Tribunal, a fact which touches upon the substantive correctness of the award and as a result falls outside of the material scope of the Committee as delimited by Article 52(1)(b) of the ICSID Convention. *Second,* Claimants note that Spain, although basing its arguments on "*a 40-page long expert opinion*" did not present this testimony or any expert testimony before the Tribunal.[305] Instead, for Claimants, Spain instrumentalises the annulment proceeding and attempts to "*bolster a failed jurisdictional objection*."[306] By virtue of the expert reports submitted, Spain aims at arguing against the intra-EU application of Article 26 ECT because of *Achmea* and *Komstroy*. However, the Tribunal ruled on *Achmea* and the *Komstroy* judgment did not exist when the Tribunal issued its Decision and Award.[307]

233. Claimants conclude that "*the Tribunal's finding that Article 26 ECT applies intra-EU is a very clear example of a jurisdictional finding that cannot constitute a manifest excess of powers.*"[308] Claimants note that even if Spain were able to show that its intra-EU objection was an "*issue on which reasonable minds might differ*,"[309] which it was not, that would not justify the annulment of the Award. According to Claimants, Spain did not meet even this low threshold.[310] In all events, Claimants argue, "*the Committee's task is only to determine whether the Tribunal's analysis was tenable, not whether it was correct*"[311] and that it would fall outside the scope of the Committee's remit to reconsider the merits of Spain's intra-EU objection *de novo*.

234. In their Rejoinder, Claimants repeat their views that the Tribunal's finding that EU law does not apply to jurisdiction is tenable and in line with similar decisions issued by numerous tribunals. The Tribunal drew a distinction between the law applicable to jurisdiction and the law applicable to the merits and concluded that Article 26(6) ECT applies to the latter. In any case, Claimants repeat that even if EU law were to be applied, it would not deprive the

[305] C-Mem., ¶¶ 85-89.
[306] C-Mem., ¶ 89.
[307] C-Mem., ¶ 89.
[308] C-Mem., ¶ 90.
[309] C-Mem., ¶ 90.
[310] C-Mem., ¶ 90.
[311] Rejoinder, ¶ 83.

Tribunal of its jurisdiction since the Tribunal was seized on claims under the ECT, not EU law.[312] In support of this conclusion and the Tribunal's findings, Claimants submit that the fact that Spain, as all EU Member States, has to abide by EU regulations, and that being an EU Member State ensures the stability of a country, as one of Claimants' witness testified in the arbitration, does not prove that Claimants' claim was brought under, or in relation to, EU law.[313] As the Tribunal noted, the existence of EU Directives on renewable energy does not mean that there is any incompatibility with the ECT.[314]

235. Overall, Claimants support the Tribunal's findings since even if EU law were applicable to jurisdiction, it cannot be used to vindicate an interpretation that does not conform with the ordinary meaning of the terms of Article 26(6) ECT.[315]

236. In their Rejoinder, Claimants argue that the Tribunal has interpreted Article 26 ECT in accordance with the VCLT, as Spain urged the Tribunal to do, and concluded that the ECT applies intra-EU. Claimants submit that this interpretation cannot amount to a manifest excess of powers and justify annulment of the Award. In support of this conclusion, Claimants refer to the *SolEs* committee which found that it had "*not been able to identify a gross or egregious error in the Tribunal's interpretation and application of Article 26 and other related provisions of the ECT in the establishment of the Tribunal's jurisdiction pursuant to the ECT.*"[316]

---

[312] Rejoinder, ¶¶ 115-117, *citing* **CL-0228**, *Landesbank*, ¶ 159; **CL-0193**, *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, ¶116 ("***Vattenfall,* Decision on the Achmea Issue**"); **CL-0204**, *Hydro Energy*, ¶¶ 502(2), 502(4); **CL-0300**, *Eskosol*, ¶ 113; **CL-0201**, *Baywa R.E. Renewable Energy GMBH and Others v. The Kingdom of Spain,* ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶ 146 ("***Baywa,* Decision on Jurisdiction, Liability and Directions on Quantum**"); **RL-0128**, *Freif Eurowind Holdings LTD. (United Kingdom) v. The Kingdom of Spain,* SCC Case No. V 2017/060, Final Award, 8 March 2021, ¶ 320 ("***Freif Eurowind Holdings,* Final Award**"); **CL-0196**, *9REN Holding S.àr.l v. Kingdom of Spain,* ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 146 ("***9REN,* Award**"); **CL-0194**, *Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. Kingdom of Spain,* SCC Case No. 2015/150, Final Award, 14 November 2018, ¶¶ 218-219 ("***Foresight Luxembourg Solar et al,* Final Award**").

[313] Rejoinder, ¶ 118, *citing* **R-0383**, Hearing Transcripts, Statement of Mr. Bünting, Day 2, 155:1-15.

[314] Rejoinder, ¶ 119.

[315] Rejoinder, ¶ 120, *citing* **CL-0228**, *Landesbank*, ¶ 160.

[316] Rejoinder, ¶¶ 98-99, *citing* **CL-0327**, *SolEs*, ¶ 128.

237. Claimants also reiterate their view that the *Komstroy* judgment, which Spain puts forward, suggests that Article 26 ECT bears different meaning in intra-EU disputes than in extra-EU ones, a result which "*is untenable as a matter of public international law, in particular when interpreting a multilateral treaty such as the ECT*."[317] Claimants subscribe to the Tribunal's conclusion that the proposed interpretation of Article 26 "*would be neither coherent nor workable*" since the ECT Contracting Parties have an interest in the interpretation of Article 26 ECT as it is binding upon them.[318] For Claimants, this was a tenable conclusion in line with the findings of other ECT tribunals before and after *Komstroy*.[319] In the same context, Claimants argue that the ordinary meaning of Article 26 ECT mandates that it applies intra-EU contrary to Spain's argument that the Tribunal disregarded the context in which the ECT was concluded by focusing on a literal interpretation of Article 26 ECT. However, this argument is misleading since the Tribunal analysed the ordinary meaning of Article 26 ECT considering the object and purpose of the ECT (Article 31(1) VCLT) and found that there was no indication that the purpose was to exclude intra-EU disputes.[320] Once again, Claimants are of the view that the Tribunal's conclusion was tenable.[321]

238. Lastly, Claimants address Spain's argument that the Tribunal disregarded the rules and principles of EU law that form part of international law applicable to this case. For Claimants, the Tribunal found that EU law cannot alter the meaning or lead to a rewriting of Article 26 ECT and pave the way for an interpretation that does not conform with the ordinary meaning of its terms and would be different for some Contracting Parties depending on their

[317] Rejoinder, ¶ 100, *citing* **RL-0158**, *Komstroy*, ¶ 73; **CL-0228**, *Landesbank*, ¶ 148.

[318] Rejoinder, ¶ 101.

[319] Rejoinder, ¶ 101, *citing* **CL-0193**, *Vattenfall,* Decision on the Achmea Issue, ¶ 156; **CL-0300**, *Eskosol*, ¶ 221; **CL-0191**, *Masdar Solar and Wind Cooperatief U.A. v. Kingdom of Spain,* ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 314 ("***Masdar, Award***"); **CL-0322**, *Mathias Kruck and others v. Kingdom of Spain,* ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, 6 December 2021, ¶¶ 37, 40; **CL-0324**, *Infracapital F1 S.àr.l. and Infracapital Solar B.V. v. Kingdom of Spain,* ICSID Case No. ARB/16/18, Decision on the Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, 1 February 2022, ¶ 112.

[320] Rejoinder, ¶ 102, *citing* **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 156; **CL-0301**, *SunReserve Luxco Holdings SRL v. The Italian Republic,* SCC Arbitration V (2016/32), Final Award, 25 March 2020, ¶¶ 388, 447 ("***SunReserve,* Final Award**"); **CL-0228**, *Landesbank*, ¶ 116.

[321] Rejoinder, ¶ 103, *citing* **CL-0301**, *SunReserve*, Final Award, ¶ 458.

nationality. A finding that intra-EU disputes fall outside the material scope of ECT tribunals would amount to a rewriting of Article 26 ECT.[322]

b. The primacy of EU law and the dismissal of Spain's argument

239. As regards Spain's core argument that EU law, via the principle of supremacy, prevails over the ECT and international law as between EU Member States and its citizens, Claimants note that Spain failed to satisfy the threshold for manifest excess of powers and that its submissions are wrong as a matter of international law.

240. Claimants also note that, in this annulment proceeding, Spain argues for the supremacy of EU law over the ECT under a special conflict rule that applies to all international treaties. According to Claimants, this argument is new, and Spain is prevented from bringing new arguments as ICSID annulment is "*not a place for a party to raise an argument that it did not make in the underlying arbitration proceeding*."[323]

241. In addition, as Claimants recall, the Tribunal did not disregard Spain's submissions. Instead, it examined and ruled upon them. For Claimants, bearing in mind the Tribunal's analysis "*it is hard to see how Spain can argue that the Tribunal did not show 'the slightest interest' for the principle of primacy of EU law*."[324] In support of this argument, Claimants summarise the Tribunal's findings as follows:

242. The Tribunal found that its jurisdiction derives from Article 25 of the ICSID Convention and 26 ECT and that the only issue that arose under Article 25 of the ICSID Convention was whether Spain had consented to arbitration under Article 26 ECT. For Claimants, since it was an ICSID case, the Tribunal correctly concluded that it did not have to apply any curial law that would have brought EU law into play and that Article 26 ECT, as with the whole ECT, had to be interpreted under the rules prescribed for in the VCLT.[325] Claimants also, in addressing Spain's argument that Article 26(6) ECT applied to jurisdiction, align with the

[322] Rejoinder, ¶ 105, *citing* **CL-0301**, *SunReserve*, Final Award, ¶ 388; **CL-0300**, *Eskosol*, ¶ 126.
[323] C-Mem., ¶ 95.
[324] C-Mem., ¶ 105.
[325] C-Mem., ¶ 97.

Tribunal in its rejection of the notion that "*the entirety of EU law is to be regarded as international law.*"[326] For Claimants and the Tribunal, Article 26(6) ECT is concerned with the law applicable to the merits of the dispute and it does not constitute a choice-of-law clause applicable to jurisdiction, as Spain puts forward. In that regard, Claimants argue that the Tribunal has correctly found that if EU law were to prevail over the ECT, the wording of the ECT itself should have so provided and that "*Article 25 ECT… says nothing about the primacy of EU law*."[327]

243. As regards Spain's contention that EU law should prevail over the ECT as *lex posterior* under Articles 30 and 59 VCLT, the Tribunal already found, with respect to Article 30, that even assuming that the EU Treaties were posterior to the ECT and covered the same subject-matter, Spain remains bound as a Contracting State in accordance with Article 16 ECT. For Claimants this conclusion is correct since ECT is more favourable than EU law as it empowers investors with the right to enforce their investment protections through direct access to arbitration against the host State.[328] With respect to Article 59 VCLT, the Tribunal rejected its applicability since "*…not all Contracting Parties to the ECT are EU Member States…*"[329]

244. Claimants also recall that the Tribunal, on the one hand, dismissed Spain's argument, in its attempt to override Article 26 ECT, that EU law should be taken into account under Article 31(3)(c) VCLT, and, on the other, found that the principle of *pacta sunt servanda* mandates that "*the provisions of Part III ECT to which Spain and Germany have subscribed must be taken as binding*" in the absence of any reservation by these two States or by the EU.[330]

245. In addition, the Tribunal "*made clear that it had jurisdiction even through the application of EU law*."[331] As Claimants put forward, the Tribunal explained that *(i)* it was seized of an ECT claim; *(ii)* there is no incompatibility between the EU internal rules on renewable energy

[326] C-Mem., ¶ 98, *citing* Decision, ¶ 314.
[327] C-Mem., ¶ 99.
[328] C-Mem., ¶ 100, *citing* First Hindelang Report, ¶¶ 49-52.
[329] C-Mem., ¶ 101.
[330] C-Mem., ¶ 103.
[331] C-Mem., ¶ 104.

and the ECT; *(iii)* the lawfulness of the Spanish support scheme does not preclude it from being in breach of the ECT; *(iv)* Part III protections do not fall within the EU's area of exclusive competence and jurisdiction under Article 26 ECT cannot be overridden; *(v)* *Achmea* does not impact on its jurisdiction.[332]

246. Claimants are of the view that since the Tribunal in the original proceeding extensively analysed whether the principle of primacy of EU law could adversely impact its jurisdiction and reached a tenable conclusion that it did not, Spain is attempting to re-litigate its primary case. According to Claimants, the Tribunal's findings that Article 26(6) ECT governs the merits of the case and the fact that it upheld jurisdiction, and its conclusion on the relationship between the ECT and EU law and the fact that it gave priority to the ECT are in line with the position of numerous other tribunals.[333] For Claimants, the principle of primacy of EU applies within the EU legal order and concerns the relationship between EU law and national law of EU Member States.

247. Claimants also allege that Professor Hindelang's views do not change the outcome of this analysis since *(i)* he failed to acknowledge that Article 26(6) ECT does not apply to the assessment of the jurisdiction of the Tribunal, which was appointed under the ECT; *(ii)* he disregarded the principle of *pacta sunt servanda* in the light of which the Tribunal ruled that if EU law were to prevail, the wording of the ECT should have so provided; *(iii)* he bases his

[332] C-Mem., ¶ 104.

[333] C-Mem., ¶¶ 106-107, *citing* **CL-0204**, *Hydro Energy*, ¶¶ 502(2), 502(4), 502(16); **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 116; **CL-0300**, *Eskosol*, ¶ 113; **CL-0201**, *Baywa*, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 264; **RL-0128**, *Freif Eurowind Holdings,* Final Award, 8 March 2021, ¶ 320; **CL-0196**, *9REN*, Award, ¶ 146; **CL-0228**, *Landesbank*, ¶ 159; **CL-0194**, *Foresight Luxembourg Solar*, Final Award, ¶¶ 218-219; **CL-0239**, *Cavalum*, ¶ 370(16); **CL-0042**, *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 4.134; **CL-0195**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,* ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, ¶ 355; **CL-0301**, *SunReserve*, Final Award, ¶ 414; **CL-0204**, *Hydro Energy*, ¶ 502(11)-(12); **CL-0300**, *Eskosol*, ¶¶ 181-182; **CL-0228**, *Landesbank*, ¶ 160; **CL-0200**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain,* ICSID Case No. ARB/15/36, Award, 6 September 2019, ¶ 327 ("***OperaFund,* Award**"); **CL-0197**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶ 130 ("***Cube,* Decision on Jurisdiction, Liability and Partial Decision on Quantum**"); **CL-0134**, *RREEF*, Decision on Jurisdiction, ¶ 87.

analysis on a purported duty to apply and abide by EU law in contradiction with the Tribunal's duty to solve the dispute under the ECT, "*even if this conflicted with EU law.*"[334]

248. In their Rejoinder, Claimants repeat the Tribunal's conclusion that "*if EU law were to prevail over the ECT, this could only result from the wording of the ECT itself…*" For Claimants, this conclusion "*cannot constitute a manifest excess of powers in circumstances where not a single tribunal has ever found that EU law could prevail over the ECT.*"[335] Claimants reiterate that the primacy of EU law concerns the relationship between EU law and national laws of the EU Member States. Thus, EU law does not prevail over the ECT.

249. As regards Spain's Reply, Claimants argue that Spain essentially recognises that it does not allege any failure to state reasons in relation to the Tribunal's assessment of its intra-EU objection. Further, Claimants note that the Tribunal was following Claimants' reasoning in finding that the ECT was more favourable than EU law, contrary to Spain's argument that the Tribunal did not explain why the provisions of the ECT were deemed more favourable. According to Claimants, this finding, which is aligned with dozens of other tribunals' findings, cannot amount to a manifest excess of powers.[336] In the same vein, the Tribunal, as other tribunals, found that EU law could not trump Article 16 ECT since no provision had been identified or put forward that would have had the effect of displacing Article 16, and, according to Claimants, Professor Hindelang's view was misplaced.[337]

250. Lastly, Claimants, in commenting on Spain's argument that Article 38 of the ICJ Statute suggests that the ECT does not apply intra-EU, note that Spain failed to "*flesh out this argument or in any way show that EU law must take primacy as a result of this Article*." This new argument raised by Spain, Claimants contend, implies that EU Treaties are a source of international law. However, this does not necessarily mean that these treaties are applicable in the present dispute or that they prevail over other sources of international law. Lastly,

[334] C-Mem., ¶ 110, *citing* First Hindelang Report, ¶ 76; **CL-0134**, *RREEF*, Decision on Jurisdiction, ¶ 87.
[335] Rejoinder, ¶ 123.
[336] Rejoinder, ¶¶ 125-126.
[337] Rejoinder, ¶¶ 127-128.

Claimants argue that Spain has not endeavoured to show that EU Treaties constitute customary international law.[338]

c. The dismissal of Spain's 'REIO' arguments

251. Claimants note that Spain rehashed its argument from the underlying arbitration that, because the EU is the only REIO party to the ECT, this prevents an investment made in the EU by an EU investor from qualifying as an investment under Article 26(1) ECT. In that regard, Spain's view is that the Tribunal "*erred in finding that Article 26 does not distinguish between intra-EU and extra-EU disputes*" since it ignored that EU Member States are to be treated differently than the rest of the Contracting Parties.[339] Claimants reject Spain's view and endorse the Tribunal's findings in that matter. As Claimants describe, the Tribunal strictly applied Articles 1(2), 1(3), 1(10), and 26(1) and observed that under the ECT a Contracting Party means either a State or a REIO.[340] Thus, for the Tribunal, Claimants are investors of another Contracting Party as the ECT requires. In this context, the Tribunal examined whether Claimants held qualifying investments in the territory of Spain under Article 26(1) ECT. The Tribunal, in conformity with the canons of interpretation enshrined in the VCLT, found that Claimants' investment was made "*in the Area of the former Contracting Party i.e. Spain*."[341] For the Tribunal, "*…[t]here is nothing in Articles 1(2), 1(10) or 26(1) to suggest that, where both Contracting Parties are within the Area of the EU, they are either to be regarded as ceasing to have their own Areas as States and Contracting Parties to the ECT or that the relevant Area becomes the Area of the EU.*"[342] Claimants believe that the Tribunal's conclusions are tenable and "*in line with dozens of other tribunals…*"[343]

---

[338] Rejoinder, ¶ 129.

[339] C-Mem., ¶ 111, *referring to* Mem., ¶¶ 73-81.

[340] C-Mem., ¶ 112.

[341] C-Mem., ¶ 114, *citing* Decision, ¶¶ 327-328.

[342] C-Mem., ¶ 114, *citing* Decision, ¶¶ 327-328.

[343] C-Mem., ¶¶ 115-116, *citing* **CL-0096**, *PV Investors v. Spain,* PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014, ¶¶ 178-180 ("***PV Investors,* Preliminary Award on Jurisdiction**"); **CL-0094**, *Charanne B.V. and Construction Investmens S.A.R.L. v. Kingdom of Spain,* SCC Case No. 062/2012, Final Award, 21 January 2016, ¶ 430; **RL-0088**, *Isolux Netherlands, BV v. Kingdom of Spain,* SCC Case V2013/153, Award and Dissenting Opinion, 12 and 6 July 2016, ¶¶ 633-636, 640; **CL-0191**, *Masdar*, Award, ¶¶ 315-323; **CL-0192**, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain,* ICSID Case No.

d. Article 26 was not intended to exclude intra-EU disputes and Spain's disconnection clause argument

252. Claimants turn to the disconnection clause argument put forward by Spain. For Claimants, this argument has no merit.[344] *First,* Spain not only did not claim the presence of an express or implicit disconnection clause in the underlying arbitration, but it also had agreed that the ECT does not contain a disconnection clause. *Second,* Claimants recall that the Tribunal had already addressed the issue of the non-existence of a disconnection clause in the ECT. As the Tribunal opined, Claimants repeat, and other tribunals also have confirmed[345], any exclusion of an intra-EU dispute from the remit of Article 26 ECT should have been expressly made by the EU or EU Member States.[346] Thus, it is Claimants' view that the idea of an implicit disconnection clause that could be read into the ECT, or the argument that the internal repartition of competences between the EU and its Member States frees them from consent to arbitration, lack foundation.[347] The Tribunal also rejected Spain's submission that Spain and Germany, being EU Member States when they concluded the ECT, lacked competence to undertake any obligations under the ECT. As it noted, there was no implicit or explicit disconnection clause as regards intra-EU disputes and there is no indication in the 1998 EU's statement that Article 26 ECT would not be applicable to intra-EU disputes.[348] Claimants further argue that the EU's statement in 1998, by virtue of which Spain alleges that the EU notified the existence of a disconnection clause, "*is an entirely new argument that is devoid of merit…*"[349] Spain, according to Claimants, did not make this allegation before the Tribunal.[350]

ARB/13/31, Award, 15 June 2018, ¶¶ 218-222; **CL-0201**, *Baywa*, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 247-248; **RL-0124**, *Stadtwerke München GMBH, Rweinnogy GMBH, and Others v. Kingdom of Spain,* ICSID Case No. ARB/15/1, Award, 2 December 2019, ¶ 131; **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶¶ 182-183; **CL-0300**, *Eskosol*, ¶ 93; **CL-0241**, *STEAG GmbH v. Kingdom of Spain,* ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020, ¶¶ 241-246.

[344] Tr. Day 1, 87:13-25; 88:1-4.

[345] C-Mem., ¶ 120.

[346] C-Mem., ¶ 119.

[347] C-Mem., ¶ 120.

[348] C-Mem., ¶ 121.

[349] C-Mem., ¶ 122, *citing* **CL-0283**, 1998 Declaration, p. 115. Claimants note that this statement was made in November 1997, but published in the EU official journal in March 1998.

[350] C-Mem., ¶ 122.

253. Claimants conclude that Spain's submission is wrong in any event. For Claimants, Article 26(3)(b)(ii) ECT is a *fork-in-the-road* clause under which a Contracting Party that did not consent to arbitrate disputes previously submitted to another forum, must notify the Secretariat of its policies. Thus, Claimants note that a statement submitted under this provision cannot logically support Spain's argument that Article 26 ECT *in toto* does not apply intra-EU. In the same vein, Claimants contend that there is nothing in the 1998 Declaration that excludes intra-EU disputes. Instead, the statement only indicates that the EU and the Member States concerned "*will determine between them who is the respondent, 'without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States*. "[351]

254. Lastly, Claimants claim that Spain's argument that the EU stated that Article 26 ECT only applies to claims involving investors from third countries is wrong. For Claimants, "*Spain fails to explain that its submissions on the 1998 statement in fact refer to a replacement statement submitted by the EU on 2 May 2019*."[352] In addition, Claimants note that the EU specified that disputes between an investor of a Member State and a Member State under the ECT did not fall within the scope of the statement.

255. In their Rejoinder, Claimants continue to support the Tribunal's finding that "*some form of disconnection clause or declaration of competences that would allow the Tribunal to disregard Article 26*" would have been necessary and that ECT does not contain an explicit or implicit disconnection clause. Claimants argue that the Tribunal's conclusion does not justify annulment since *(i)* Spain has agreed that such a disconnection clause does not exist; and *(ii)* it is tenable as it conforms with many other tribunals that ruled that an explicit disconnection clause is necessary and that the ECT does not contain an implicit disconnection clause.[353]

256. For Claimants, Spain's argument, which has been endorsed by Professor Hindelang, that an express disconnection clause was not necessary to disregard Article 26 ECT, is to be rejected.

[351] C-Mem., ¶ 124, *citing* **CL-0283**, 1998 Declaration, p. 115, footnote 1 and footnote 2.
[352] C-Mem., ¶ 125, *citing* **RL-0182**, 1998 Declaration, footnote 2.
[353] Rejoinder, ¶¶ 106-108, *citing* **CL-0301**, *SunReserve*, Final Award, ¶ 452.

Hindelang's view suggests that the EU and its Member States can unilaterally escape their legal obligations under any treaty by deciding to apply EU law, a position which violates the principle of *pacta sunt servanda*. Professor Hindelang further refers to the 1961 Hague Convention on the Legalization of Public Foreign Documents to support his contention that it is accepted that EU law prevails over the ECT. This reference does not suffice to establish the existence of customary international law in the absence of any reference to state practice and opinion juris, Claimants argue. For them, the only consistent practice is the rejection of the intra-EU objection and of the claim that EU law prevails over the ECT, if arguendo customary international law were deemed relevant to the interpretation of the ECT.[354]

257. Spain's reliance on customary international law furthermore contradicts Spain's acceptance that the ECT has to be interpreted in accordance with the VCLT. Claimants recall that it follows from Article 31(3)(b) VCLT that "*the only relevant subsequent practice that may be taken into account for the interpretation of a treaty is that related to the particular treaty at stake*…."[355], and according to Claimants there is no "*subsequent practice*" that supports Spain's interpretation of Article 26 ECT.[356]

258. As regards Spain's continuing reference to the statement of 1998 discussed above, Claimants subscribe to the Tribunal's view that such statement contains no indication that Article 26 ECT does not apply intra-EU. This finding is tenable and in line with the conclusions reached by other tribunals.[357]

259. Claimants also repeat that the principle of *pacta sunt servanda* confirms that the Tribunal had jurisdiction. As the Tribunal emphasized, the provisions of Part III of the ECT remain binding since neither Germany or Spain, nor the EU, made any qualification or reservation.

---

[354] Rejoinder, ¶ 109, Second Hindelang Report, ¶ 90; **CL-0321**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 704; **CL-0317**, W.M. Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law,* 30(2), ICSID Review- Foreign Investment Law Journal, p. 622 (2015).

[355] Rejoinder, ¶ 109.

[356] Rejoinder, ¶ 109, recalling under footnote 230 that Article 31(3)(b) of the VCLT provides that: "[t]*here 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*".

[357] C-Mem., ¶ 121, making reference to Decision, ¶¶ 331-332. Rejoinder, ¶ 110, *citing* **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶¶ 188-189; *citing* **CL-0228**, *Landesbank*, ¶ 147; **CL-0096**, *PV Investors*, Preliminary Award on Jurisdiction, ¶ 184.

For Claimants, in the light of these findings, Spain's view that this Tribunal erred in making reference to that cardinal principle is preposterous.[358] Of course, Claimants note, EU Member States are bound by the EU Treaties as they remain bound by the ECT.[359]

e. Achmea *and* Komstroy *do not preclude jurisdiction under Article 26 ECT*

260. Claimants argue that *Achmea* has no bearing on the Tribunal's jurisdiction and subscribe to the Tribunal's conclusions on the applicability of *Achmea* and on jurisdiction. For Claimants, Spain's argument that the reasoning and consequences of *Achmea* are to be extended to the case at hand is wrong and the Tribunal's decision to uphold jurisdiction is tenable.[360]

261. For Claimants, Spain attempts to litigate the issue of *Achmea de novo* even though it has been extensively discussed by the Parties and addressed by the Tribunal.[361] However, as Claimants restate, the Committee is not mandated to act as an appellate body.[362] In addition, Claimants praised the Tribunal's decision on jurisdiction and its reasoning. As the Tribunal ruled and Claimants repeat, *(i)* the present case is an ICSID arbitration and the Tribunal was not concerned with the application of a curial law, which could lead to the application of EU law; *(ii)* the Tribunal was seized of an ECT claim (not EU law); *(iii)* in the *Achmea* ruling, considerable emphasis was laid on the fact that the EU was not a party to the relevant BIT, which renders the *Achmea* reasoning not applicable to the present case since the EU has

---

[358] Rejoinder, ¶ 112, *citing* **CL-0271**, *Infracapital F1 S.àr.l. and Infracapital Solar B.V. v. Kingdom of Spain,* ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, ¶ 296.

[359] Rejoinder, ¶¶ 113-114, *citing* **CL-0325**, *Sevilla Beheer B.V. and others v. Kingdom of Spain,* ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, ¶ 672 ("***Sevilla,* Decision on Jurisdiction, Liability and the Principles of Quantum**").

[360] C-Mem., ¶¶ 126-133.

[361] Tr. Day 1, 88:5-12.

[362] C-Mem., ¶¶ 126-130, *citing* **CL-0191**, *Masdar,* Award, ¶ 332; **CL-0319**, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic,* ICSID Case No. ARB/16/5, Award, 14 September 2020, ¶¶ 285-290; **CL-0322**, *Mathias Kruck and others v. Kingdom of Spain,* ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, 6 December 2021, ¶¶ 43-44; **CL-0228**, *Landesbank*, ¶¶ 192-193; **CL-0320**, *Silver Ridge Power BV v. Italian Republic,* ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶¶ 211-212; Second Hindelang Report, ¶ 58; **CL-0197**, *Cube*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 132; **CL-0134**, *RREEF*, Decision on Jurisdiction, ¶ 75; **CL-0322**, *Mathias Kruck and others v. Kingdom of Spain,* ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, 6 December 2021, ¶ 44; **CL-0328**, *NextEra*, ¶¶ 231, 165-172; Second Hindelang Report, ¶¶ 76-81.

accepted the possibility of a claim being brought against it by becoming a party to the ECT; and *(iv)* there is no rule of international law identified on the basis of *Achmea*.[363]

262. Thus, Claimants conclude that the *Achmea* ruling did not prevent the Tribunal from declaring its jurisdiction, a fact confirmed by other arbitral tribunals as well.[364]

263. In a similar vein, Claimants argue that the *Komstroy* judgment does not impact or change this analysis. For Claimants, the invocation of the *Komstroy* judgment by Spain, the Commission, and by Professor Hindelang is an attempt to overturn the Tribunal's Decision. The Commission's view that the *Komstroy* judgment provides for an authentic, final, and binding interpretation in this respect entirely misses the point in Claimants' view.

264. Claimants argue that the Committee should refuse to entertain Spain's, the Commission's, and Professor Hindelang's submissions since the *Komstroy* judgment was not before the Tribunal. It was rendered more than 18 months after the Decision and nine months after the Award.[365] The Committee's enquiry into a manifest excess of powers is restricted to examining the reasonableness of the Tribunal's analysis "*on the basis of the materials available to it*."[366]

265. Claimants also submit that *Komstroy* postdates the perfection of Spain's consent to arbitrate the present dispute. Under Article 25(1) of the ICSID Convention, no party may withdraw its consent unilaterally. Thus, the Commission's emphasis on the retroactive effect of *Komstroy* under EU law cannot retroactively deprive the Tribunal of its jurisdiction.[367]

---

[363] C-Mem., ¶ 131.

[364] C-Mem., ¶¶ 132-133, *citing* **CL-0300**, *Eskosol*, ¶ 177; **CL-0325**, *Sevilla*, Decision on Jurisdiction, Liability and the Principles of Quantum, ¶ 661; **CL-0191**, *Masdar*, Award, ¶ 679; **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 164.

[365] C-Mem., ¶ 135; Second Hindelang Report, ¶¶ 80-81.

[366] C-Mem., ¶¶ 136-137, *citing* **CL-0269**, *Antin*, ¶ 159; **CL-0310**, *UP and C.D Holding Internationale*, ¶ 159; **CL-0302**, *UAB E energija (Lithuania) v. Republic of Latvia,* ICSID Case No. ARB/12/33, Decision on Annulment, 8 April 2020, ¶¶ 280-281.

[367] C-Mem., ¶ 139.

266. For Claimants, the CJEU's reasoning in *Komstroy* "*is clearly wrong as a matter of international law.*"[368] The CJEU "*adapted the vantage point of EU law*" without making any effort to conduct an interpretative exercise under the VCLT as required under international law. As Claimants note, it simply relied on "*an alleged need to preserve the autonomy and… the particular nature of EU law*."[369] In the same context, the CJEU's reasoning is illogical and circular and disregards the basic notion of *pacta sunt servanda* (Article 26 VCLT). Claimants note that the CJEU concluded that the fact that the EU was a Contracting Party to the ECT implies that the ECT is an EU act and therefore ECT tribunals are mandated to apply EU law. For Claimants, this reasoning suggests that "*every international agreement signed by the EU becomes an act of EU law and is therefore subordinate to EU law. This would mean that* any *treaty signed by the EU could cease to be applied if the EU unilaterally determined that it was incompatible with EU law*."[370] This reasoning also contravenes the multilateral nature of the ECT and disregards the principle of common intention of the parties (Article 31 VCLT).

267. Lastly, Claimants note that *Komstroy* does not establish a rule of international law that could preclude the Tribunal from declaring its jurisdiction and it is not binding upon ECT tribunals.[371] Thus, Claimants conclude that even if the Tribunal had dealt with *Komstroy,* this judgment would not have had any impact on the Tribunal's findings on jurisdiction and assessment of Spain's intra-EU objection.[372]

268. In their Rejoinder, Claimants repeat that the Tribunal, contrary to Spain's allegations, has extensively analysed Spain's intra-EU objection, the contents of *Achmea* and that it reached a tenable conclusion. Claimants also note that Spain failed to provide evidence in support of any manifest excess of powers and argue that the finding that *Achmea* does not preclude

[368] C-Mem., ¶¶ 140-143, *citing* **RL-0158**, *Komstroy*, ¶¶ 48-50, 65; **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 156.

[369] C-Mem., ¶ 141.

[370] C-Mem., ¶ 142.

[371] C-Mem., ¶¶ 144-145, *citing* **CL-0300**, *Eskosol*, ¶ 184; **CL-0228**, *Landesbank*, ¶ 102; **CL-0195**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,* ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, ¶ 354; **CL-0204**, *Hydro Energy*, ¶ 502(17); *Cavalum SGPS, S.A. v. Kingdom of Spain,* ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶ 500.

[372] C-Mem., ¶ 146.

jurisdiction, being in conformity with the vast majority of tribunals, cannot constitute a manifest excess of powers.[373] Spain's "*thinly-disguised appeal against the Tribunal's determination of the* Achmea *issue based on subsequent EU law developments*…" must not be entertained, Claimants argue.[374] In this context, Claimants reject the cases Spain puts forward in support of its argument as materially irrelevant.[375] Similarly, Claimants reject the pertinence of the *Komstroy* judgment since the CJEU's interpretation of Article 26 does not affect the jurisdiction of arbitral tribunals, a conclusion that has been upheld by several ECT tribunals.[376]

269. Lastly, Claimants take issue with Professor Hindelang's view that "*there has never been a valid offer to arbitrate, and that Article 26 has been inoperative ab initio from intra-EU disputes*…"[377] According to Claimants, "…*a judgment of the CJEU cannot by itself put an end to the ECT*…" In addition, Claimants note that as long as the ECT Contracting Parties do not declare the invalidity of their consent to ECT arbitration in accordance with the VCLT, ECT remains in full effect and no evidence that such steps have been followed has been adduced. The *Komstroy* judgment therefore does not affect the jurisdiction of the Tribunal.[378]

f. The Commission's analysis of Article 26 ECT is irrelevant and wrong

270. Claimants contend that the Commission attempts to establish the "*proper construction of Article 26 ECT*."[379] However, for Claimants, the Committee is not empowered to redecide the proper construction of Article 26 ECT. Claimants argue that the Tribunal's conclusion that Article 26 ECT does not suggest that Spain limited its consent to arbitrate to investors

[373] Rejoinder, ¶¶ 131-134.
[374] Rejoinder, ¶ 135.
[375] Rejoinder, ¶¶ 136-137.
[376] Rejoinder, ¶ 138.
[377] Rejoinder, ¶ 139, *citing* Second Hindelang Report, ¶¶ 80-81.
[378] Rejoinder, ¶¶ 140-144, *citing* **CL-0300**, *Eskosol*, ¶¶ 187,188,194-198.
[379] C-Mem., ¶ 147.

from non-EU States was tenable. Claimants are of the view that "*[i]t is not open to the Commission to seek to overturn it before the Committee*."[380]

271. Claimants further note that the Commission accepted that the *Komstroy* interpretation is not the "*only possible interpretation of Article 26 ECT…*", a fact which suggests that there can be no manifest excess of powers when it is debatable that jurisdiction exists.[381] In addition, the Commission attempted to defend the *Komstroy* interpretation of Article 26 ECT and the fact that the CJEU disregarded the multilateral nature of the ECT by drawing a parallel with the *Barcelona Traction* distinction between *erga omnes* obligations and those subject to diplomatic protection. For the Commission, the *Komstroy* interpretation is the only interpretation that prevents a conflict with primary law, and it has to prevail.[382] However, Claimants contend that the CJEU interpretation is untenable as a matter of international law. This is confirmed by the Tribunal, Claimants note, when stating that Spain's position suggests that "*…it would be possible to have different interpretations of Article 26 dependent on the identity of the host State and investor State in a given case, which would be neither coherent nor workable*."[383] Moreover, as Claimants argue, an interpretation that varies depending on the nationality of the parties violates the principle of good faith and Article 31 VCLT and the principle of *pacta sunt servanda*.[384]

272. Claimants also take issue with the Commission's view that there is no hierarchy between the elements of interpretation. Instead, Claimants' view is that Article 31 VCLT gives priority to the text over other contextual elements. As a result, the intra-EU application of Article 26 ECT is mandated by its plain wording, which fact cannot be escaped by the Commission.[385]

---

[380] C-Mem., ¶ 147, *citing* **RL-0193**, *Impregilo*, ¶ 132; **R-0338**, Decision C(2016) 7827 final of the European Commission, rendered on 28 November 2016, regarding Czech Republic Promotion of electricity production from renewable energy sources and State Aid SA 40171 (2015/NN), ¶ 92 ("***Decision C(2016) 7827 final of the EC***"); **RL-0205**, Communication from the EU Commission on The Support of Electricity from Renewable Energy Sources. COM (2005) 627, 7 December 2005; Second Hindelang Report, ¶¶ 57-73.

[381] C-Mem., ¶ 148.

[382] C-Mem., ¶ 149, *citing* **CL-0106**, *European Communities – Customs Classification of Certain Computer Equipment,* WTO Appellate Body (WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R), 5 June 1998, ¶ 84.

[383] C-Mem., ¶ 150, *citing* Decision, ¶ 372.

[384] C-Mem., ¶ 151, *citing* **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 156; **CL-0191**, *Masdar*, Award, ¶ 314.

[385] C-Mem., ¶ 152, *citing* **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 156; **CL-0301**, *SunReserve*, Final Award, ¶ 388.

Claimants further note that the Commission did not adduce evidence in support of its conclusion that the object and context of the ECT prevent Article 26 from applying intra-EU. Claimants also note that the Tribunal, having examined the Commission's position, rejected the Commission's restrictive interpretation.[386]

g. The Swedish Judgments

273. In their observations of 17 January 2023, Claimants request that the Committee disregard the Swedish Judgments, and order Spain to bear the relevant costs, arguing that the Swedish Judgments are irrelevant.[387]

274. First, in *PL Holdings Judgment*, the underlying dispute was under the Belgium/Luxembourg-Poland BIT and not the ECT and the case was subject to SCC Arbitration Rules; the Supreme Court found that it should not depart from the CJEU's interpretation of EU law, and as a result the Court set aside the awards pursuant to the Swedish Arbitration Act.[388]

275. Second, the *Novenergia Judgment* also concerned an arbitral award rendered by a Stockholm-seated tribunal under the SCC Arbitration Rules and reviewed on the basis of the Swedish Act. The Supreme Court, after referring to the CJEU's position in *Achmea* and *Komstroy* that intra-EU investment arbitration is incompatible with EU law, concluded that (i) the "*reasons used by the CJEU as a basis for its assessment are of a general nature and* [...] *do not leave room for any other conclusion when, as in this case, Swedish law is applicable to the proceedings*"[389]; (ii) that "*the impediments to arbitration set up by the CJEU must be equated with impediments in Swedish law*"[390]; and (iii) that on the application of EU law as required by the Swedish *lex arbitri*, the Court set aside the award.[391]

---

[386] C-Mem., ¶ 153.

[387] Claimants Comments on Swedish Judgments, ¶ 14.

[388] Claimants Comments on Swedish Judgments, ¶ 4. **RL-0227**, *PL Holdings* Judgment.

[389] Claimants Comments on Swedish Judgments, ¶ 5, *citing* **RL-0227**, *PL Holdings* Judgment, p. 36 (PDF, p. 82).

[390] Claimants Comments on Swedish Judgments, ¶ 5, *citing* **RL-0226**, *Novenergia* Judgment, p. 41 (PDF, p. 87).

[391] Claimants Comments on Swedish Judgments, ¶ 5, *citing* **RL-0226**, *Novenergia* Judgment p. 36 (PDF, p. 82).

(3) The Committee's Analysis

276. In arguing that the Tribunal manifestly exceeded its powers by declaring its jurisdiction and dismissing Spain's intra-EU objection, Spain lists a number of arguments in support of this contention, as set out in its pleadings, and also contained in the European Commission's written submission as a Non-Disputing Party dated 3 November 2021 filed in the present case pursuant to ICSID Arbitration Rule 37(2) ("**EC NDP Submission**") and in the First Hindelang Report and the Second Hindelang Report filed with the Applicant's Memorial and Reply on Annulment, respectively.

277. To Claimants' objection that many of Spain's arguments for annulment were never put to the Tribunal or postdate the underlying arbitration,[392] Spain essentially argues that it has the right to recharacterize the arguments that it made before the Tribunal and that decisions of the CJEU that post-date the Award have applied ever since the relevant regulation was conceived.[393] The two Expert Reports and judgments post-dating the Award have been admitted into the record by the Committee for it to assess their argued value as evidence reflecting the law applicable in the underlying arbitration *de lege lata.*

278. Claimants in essence invoke the fact that the Tribunal was constituted under the ECT and the ICSID Convention, and that it was under an obligation to apply the terms of the ECT irrespective of any possible inconsistency with EU law.[394] Claimants also insist that Spain has not been able to present any evidence to show that EU law takes precedence over the plain wording of the provisions of the ECT as a matter of international law.[395]

279. Spain's position that the Tribunal lacked jurisdiction is based both on the history of the ECT and on the application of EU law. Spain argues that the ECT was never designed to include disputes brought between EU Member States, and further affirms that in correctly applying customary international law rules of interpretation, one must necessarily conclude that the

[392] C-Mem., ¶ 153, *citing* **CL-0302**, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, 8 April 2020, ¶¶ 280-281.

[393] Reply, ¶ 120.

[394] C-Mem., ¶ 110(c).

[395] Rejoinder, ¶ 129.

ECT (including Article 26) does not apply within the European Union.[396] The Tribunal's lack of jurisdiction, according to Spain, arises from the application of EU law, which law necessarily becomes applicable in this determination.[397]

280. The Committee disagrees with Spain's position and will give its summary reasoning below against the related arguments made by the Parties as set out in the preceding sections to explain why the Committee does not find that the Tribunal manifestly exceeded its powers in accepting jurisdiction.

a. Primacy of EU law; The Tribunal's dismissal of the intra-EU objection

281. The argument that EU law applies and that the Tribunal therefore lacked jurisdiction (in exclusive favour of EU courts) was raised by Spain in the underlying arbitration and addressed by the Tribunal in the Decision, which also dealt with the alleged implications of *Achmea*.[398] This appears uncontroversial as such as between the Parties. The Committee also agrees that the Tribunal analyzed whether EU law was applicable and made related findings.[399] Spain has not raised an argument that the Tribunal failed to state reasons for its rejection of the intra-EU objection.

282. As is also uncontroversial, the Tribunal was constituted under the ECT and the ICSID Convention, which two instruments *a priori* apply to the related arbitral proceedings failing evidence to the contrary. As noted by Claimants, the ECT makes no mention of the primacy of EU law.[400] In view of its limited mandate, it is then for the Committee to assess whether there is any other basis to conclude that EU law necessarily applied to determine jurisdiction of such magnitude that the Tribunal's failure to acknowledge this constitutes such a "*gross or egregious misapplication or misinterpretation of the law [that] may lead to annulment*."[401]

---

[396] Reply, ¶ 217.

[397] Reply, ¶ 194.

[398] Decision, ¶¶ 272-295.

[399] Decision, ¶¶ 310-318, 346-350, 366, 373.

[400] C-Mem., ¶ 99.

[401] Mem., ¶ 53, quoting **RL-0106**, *Soufraki*, ¶ 86; **RL-0107,** *Sempra*, ¶¶ 164-165; and Reply, ¶ 78 (and the authorities referred to therein). C-Mem., ¶¶ 76-77 (and the authorities referred to therein); and Rejoinder, ¶¶ 71-74. **RL-105**, ICSID Background Paper on Annulment, ¶ 93 (and the authorities referred to therein).

283. To Claimants' suggestion that since Spain's argument concerns the allegedly incorrect application of EU law by the Tribunal leading to jurisdictional findings that were "*wrong*" and that Spain's argument accordingly touches upon the substantive correctness of the Award outside of the material scope of the Committee's mandate,[402] the Committee agrees with Spain that an excess of power under Article 52(1)(b) can relate both to jurisdiction and applicable law,[403] and that it is possible, as has been done here, to invoke the applicable law for the purposes of determining jurisdiction and for the Committee to deal with it for such purposes.

284. Spain, its expert witness Professor Hindelang and the EC NDP Submission, essentially adopt the position that EU law, including EU Treaties, always trump not only national legislation in the EU Member States but also international law including international treaties. Spain has invoked many individual arguments why this is the case, without ultimately showing why this is the necessary outcome of a legal analysis conducted under international law. The Committee accepts that from an EU perspective Spain's conclusion may be correct, but it does not follow that the same outcome emerges from the perspective of international law. Indeed, it is possible, and sometimes unavoidable, that different sets of rules conflict and collide. Spain's argument that EU Member States in their mutual relations are to be treated differently from non-EU Members under international agreements and conventions[404] has been presented under many headings and concepts, which will be dealt with herein on the premise that they all fundamentally emanate from the same general reasoning, whether or not presented as such in the underlying arbitration.

285. The Committee recalls that, based upon the clear wording of Article 52(1)(b) of the ICSID Convention, and as is widely accepted and confirmed by other *ad hoc* committees, and set out in the ICSID Background Paper on Annulment[405], a manifest excess of powers requires that both the excess and its manifest nature be determined by the Committee. The Tribunal rightly found, as set out by Claimants, that Spain had consented to arbitration under Article

[402] C-Mem., ¶ 87.

[403] Reply, ¶ 55, 56.

[404] Reply, ¶¶ 77, 197, 212.

[405] **RL-105**, ICSID Background Paper on Annulment, ¶ 82, *referring to Sempra,* ¶ 212; *Fraport,* ¶ 40; *AES*, ¶ 32; *Lemire,* ¶ 240; *Occidental*, ¶ 57; *EDF*, ¶ 191; *Total*, ¶ 171; *Micula*, ¶ 123; *TECO*, ¶ 76.

26 ECT as required by Article 25 of the ICSID Convention,[406] and the Committee finds no obvious basis for a finding by the Tribunal that curial law, in a delocalized ICSID arbitration, should have brought EU law into play (as in the Swedish Judgments referenced below in paras 299-303). Contrary to Spain's argument, Article 26(6) ECT, when interpreted under the VCLT, is concerned with the law applicable to the merits and does not constitute a choice-of-law clause, as also argued by Claimants.[407] As regards the existence of a special conflict rule argued by Spain to apply to all international treaties and resulting in the supremacy of EU law over the ECT, while not put forth in this very form in the underlying arbitration, the Committee sees it as another emanation of the primacy argument that EU law always prevails as between EU Member States. The Committee notes, as stated by Claimants, that if EU law were to prevail over the ECT this treaty would have so provided, which it does not.[408] .

286. The Tribunal's finding that EU law cannot alter the meaning or lead to a rewriting of Article 26 ECT for it to be interpreted differently from the ordinary meaning of its terms and so that there would be different interpretations for Contracting Parties depending on their nationality,[409] is also a tenable one in the Committee's view. The Tribunal also, as set out by Claimants, and contrary to Spain's allegation, analyzed the ordinary meaning of Article 26 considering the object and purpose of the ECT (under Article 31(1) VCLT) and found that there was no indication that the purpose was to exclude intra-EU disputes.[410] In consequence, the Committee, based upon the manner in which the Tribunal analyzed the ECT together with the ICSID Convention, is not satisfied that the Tribunal's acceptance of jurisdiction was an excess of powers, much less a manifest excess.

287. Spain's new and somewhat undeveloped reference in its Reply to Article 38 of the Statute of the International Court of Justice ("**ICJ Statute**")[411] also does not prove manifest excess of powers for failure to apply EU law since it presupposes, for any analogy, a finding that EU

[406] Mem., ¶ 97.

[407] C-Mem., ¶ 98.

[408] C-Mem., ¶ 98.

[409] Decision, ¶ 345.

[410] Decision, ¶ 329.

[411] See Reply, ¶ 118, Rejoinder, ¶ 129. Statute of the International Court of Justice, Article 38 (Second Hindelang Report, Exhibit 54) ("***ICJ Statute***").

law in its totality constitutes international law applicable to this dispute, something that has not been shown.

288. The Tribunal also dealt with and ruled on, in a tenable fashion, Spain's arguments under Article 30 VCLT (successive treaties on same subject matter)[412] and Article 59 VCLT (termination or suspension of treaties)[413] and dismissed them,[414] in accordance with its duty to rule on the dispute under the ECT. The Tribunal further concluded that even if it were wrong in that its mandate did not extend to the application of EU law, it would have reached the same result on jurisdiction through the application of EU law. Its reasoning for this conclusion is also tenable.[415]The Committee agrees with Claimants that the Tribunal's conclusion, following extensive analysis, that the primacy of EU law did not adversely impact its jurisdiction, is in line with the position of numerous other tribunals.[416] Also in view of this circumstance it is not conceivable that any excess of powers by the Tribunal- if one had been found- could be manifest.

289. The fact that two Swedish Judgments[417] have vacated arbitral awards under EU law does not affect the above conclusions since EU law in those cases was brought in via Swedish law as the *lex arbitri*, which is different from a delocalized ICSID arbitration.

290. In the Committee's view it has not been demonstrated that the principle of primacy of EU law, which concerns the relationship between EU law and national laws of the EU Member States, applies in the context of public international law to an arbitration under the ECT and the ICSID Convention. The Committee does not accept that the Tribunal's finding that EU law did not prevent it from accepting jurisdiction constituted a manifest excess of powers

[412] Decision, ¶ 342.

[413] Decision, ¶ 343.

[414] Decision, ¶¶ 346-350.

[415] Decision, ¶¶ 350-372.

[416] C-Mem., ¶¶ 96-99. Decision, ¶ 335.

[417] **RL-0226**, Svea Court of Appeal – Judgment, case T 4658-18 dated 13 December 2022, concerning case SCC No. V (2015/063) between *Novenergia II- Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain;* and **RL-0227**, Judgment of the Swedish Supreme Court, case 1569/19 dated 14 December 2022, concerning the *PL Holdings v. Poland* award ("***Swedish Judgments***").

under Article 52(1)(b) of the ICSID Convention. The CJEU's exclusive competence to exercise jurisdiction over EU law does not change this conclusion by the Committee.

b. The Achmea and Komstroy Judgments and their impact on jurisdiction under Article 26 ECT

291. The CJEU, in *Achmea* (2018), affirmed (or as stated by Spain "*confirmed*") "*the prohibition of Member States under Articles 267 and 344 TFEU from submitting disputes requiring the interpretation or application of EU law to dispute settlement mechanisms outside the Union's judicial system*"[418] since incompatible with EU law.

292. *Achmea* was considered by the Tribunal, and it dismissed the argument that the CJEU's judgment in that case deprived the Tribunal of its jurisdiction in the underlying arbitration.[419] The *Komstroy* Judgment was delivered after the Award. Nonetheless, Spain and the EC submit that the reasoning was already embedded in *Achmea. Achmea* was a ruling under a BIT whereas *Komstroy* arose under the ECT. Spain and the EC contend that the CJEU judgments do not only apply to the case at hand but that the interpretations of the CJEU are also binding in other alike cases and apply by analogy.[420] In Spain's and the EC's view these two judgments, by their acceptance of the intra-EU objection, conclusively settle the question whether investment arbitration is possible between EU Member States in their *inter se* relations.[421]

293. As set out by Spain, the EU Treaty together with the TFEU (jointly the "**EU Treaties**") provide that the CJEU "*... shall ensure that in the interpretation and application of the Treaties the law is observed*" and that consequently, in order to ensure uniform construction of EU law, EU treaties prohibit any court other than the CJEU from reviewing disputes on matters governed by EU law with the aim to guarantee CJEU exclusive jurisdiction over EU law.[422] While this statement, as such, is not disputed by the Committee, the relevant question

[418] Reply, ¶ 166.

[419] Decision, ¶¶ 362-374.

[420] Reply, ¶ 353. EC NDP Submission, ¶ 67.

[421] Reply, ¶ 339.

[422] Mem., ¶ 69, *citing* **RL-0001**, EU Treaty, Treaty on the Functioning of the EU and EU Charter of Fundamental Rights of 26 October 2012. Consolidated, Article 19(1) TEU.

obviously is how these facts affect the obligations of EU Member States under other international treaties, such as the ECT.

294. When it comes to the Tribunal's denial of the applicability of the CJEU rulings to the case at hand on the ground that the EU was not a party in the Bilateral Treaty that gave rise to *Achmea* while it, in Spain's view, should have understood that its conclusions were not limited to bilateral treaties but to (bilateral and multilateral) international agreements,[423] the Committee finds that the Tribunal's findings were perfectly tenable and could not have given rise to a manifest excess of powers even where Spain's underlying contention were true.

295. Spain argues that any remaining doubts at the international arbitration community level regarding whether the legal reasoning in *Achmea* applied *mutatis mutandis* to intra-EU disputes were dissipated by the CJEU Judgment of 2 September 2021, issued in case C-741/19.[424] For Spain, the *Komstroy* judgment affirms that an arbitral tribunal constituted under the scope of Article 26 ECT is called upon to resolve disputes which, in so far as they involve an EU Member State and an investor from another Member State, necessarily involve the interpretation and application of EU law. And since such a tribunal constituted under the ECT must apply EU law, as stated in the *Komstroy* judgment, but does not form part of the EU judicial system, it is unable to guarantee uniform application of EU law.[425] This, according to Spain, means that the CJEU has confirmed that the dispute resolution mechanism provided for in Article 26 ECT, while binding on Member States in relation to investors from third States that are parties to the ECT in respect of investments made in the territory of those Member States, cannot impose the same obligations on Member States among themselves, since this would be contrary to the principle of the autonomy of EU law.[426]

296. While the principle of autonomy of EU law applies within the Union, it still does not follow that EU law trumps public international law in the implementation of non-EU Treaties. Also, the premise that an arbitral tribunal constituted under the ECT must apply EU law (the ECT

[423] Reply, ¶ 171.
[424] Mem., ¶99. **RL-0158**, *Komstroy*, ¶ 64.
[425] Mem., ¶ 102.
[426] Mem., ¶ 104.

being an act of EU law in Spain's submission) cannot in the Committee's view be taken as a premise to conclude that a finding to the contrary constitutes a manifest excess of powers by the Tribunal. Indeed, the Tribunal having tried the matter found that the claims in the underlying arbitration were not based upon EU law - a correct observation- and found no other basis for the application of EU law thereto, another perfectly tenable conclusion. This Committee finds no basis to conclude that the Tribunal breached EU law, and in particular not in a gross or egregious manner, in accepting jurisdiction and rejecting the construct that EU law applies by necessity to all international treaties, such as the ECT and for purposes of its application, as between EU Member States. The mere fact that EU Member States have certain obligations *inter se* under EU law has not been shown to impact their other (external) obligations under international law from the perspective of such other binding obligations.

297. Absent the Committee's failure to embrace Spain's reasoning regarding interpretation of international law in the relevant respects, it also attaches importance to the fact that even the EC has stated that "*the interpretation reached by the CJEU [in Komstroy] i.e. non-application of the ECT intra-EU, may not be the only possible interpretation of Article 26 ECT*"[427] something that causes any alleged overreach of jurisdiction not to be manifest, if existing. It is also noteworthy that the vast majority of tribunals (with one known exception, the *Green Power* award)[428] have confirmed that Article 26 ECT applies intra-EU.[429]

298. When it comes to the alleged manifest excess of powers in the Tribunal's finding that an express disconnection clause would have been required for Article 26 ECT to exclude intra-EU disputes,[430] the Committee cannot see any basis for such allegation especially in circumstances where Spain in the underlying arbitration agreed that neither an express, nor an implied, disconnection clause existed.

---

[427] Written Submission of EU Commission, ¶ 43, or that EU law would on some other bases have applied to the question of establishing jurisdiction.
[428] **RL-0225**, SCC-2016/135: *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain* ("***Green Power***"). Each of the Parties commented on the relevance of the *Green Power* award during the Hearing. Spain: Tr. Day 1, 41:2-6; 126: 5-11; Tr. Day 2, 10:25 - 11:1-12; 18:1-9; 18:10-17; 21:20-23; and Claimants: Tr. Day 2, 56:23-25, 57:1-21. Claimants Comments on Swedish Judgments, ¶ 11.
[429] C-Mem., ¶ 90.
[430] Mem., ¶¶ 123-124, making reference to **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶¶ 332, 335, 346 and 361.

c. The Swedish Judgments

299. The two Swedish Judgments that were admitted into the record after the Hearing at Spain's request, one rendered by the Svea Court of Appeals on 13 December 2022 (the *Novenergia* Judgment) and the other one by the Swedish Supreme Court dated 14 December 2022 (the *PL Holdings* Judgment), were meant to corroborate Spain's argument of manifest excess of powers by the Tribunal in declaring its jurisdiction to hear an intra-EU dispute under the ECT.

300. The Svea Court of Appeals declared null and void for lack of jurisdiction an arbitral award rendered by a Stockholm seated SCC tribunal under the ECT. The Swedish Supreme Court, for its part, annulled an arbitral award rendered by an also Stockholm seated SCC tribunal, but under a BIT entered into by two EU Member States**.**

301. Both cases, in which compensation had been awarded to the respective claimants were, as mentioned, arbitrated under the SCC Rules with Swedish law as the *lex arbitri.* The awards were set aside under the Swedish Arbitration Act generally on the basis that EU law is part of Swedish law.

302. The Committee, as Claimants[431], finds that these two Swedish Judgments are irrelevant to the Committee's assessment of Spain's Application. In both judgments, Swedish law as *lex arbitri* had been applicable to the proceedings and these national courts examined the awards under the Swedish Arbitration Act and they were set aside/invalidated under Swedish law applying EU law. The courts reasoned that a national court cannot disregard an interpretation of the CJEU and the awards, in consequence, were contrary to Swedish *ordre public.* An award rendered under ICSID's "*delocalised and self-contained dispute resolution mechanism*" can only be challenged "*within the framework of the [ICSID] Convention, and pursuant to its terms*", and "*cannot be annulled by any State court*"[432]. The Committee further takes note, as Claimants[433], that the *Green Power* award,[434] introduced by Spain and

[431] Claimants Comments on Swedish Judgments, ¶ 10.
[432] Claimants Comments on Swedish Judgments, ¶ 10.
[433] Claimants Comments on Swedish Judgments, ¶ 11.
[434] **RL-0225**, *Green Power*.

relied on by Spain in support of its intra-EU objection, distinguishes that arbitration from arbitrations under the ICSID Convention in which, as emphasised by Claimants, "*…tribunals have unanimously dismissed the intra-EU objection.*[435]

303. Hence, even if the CJEU opinions had effect *ex tunc* as argued by Spain with support of its expert witness professor Hindelang[436] , there is not in the Committee's view any basis to find that the Tribunal manifestly exceeded its powers in accepting jurisdiction.

d. The "REIO" arguments under the ECT

304. Spain's argument that the Tribunal manifestly exceeded its mandate by not recognizing that an EU investor with an investment in another EU Member State does not hold a qualifying investment in the territory of another Contracting Party as required by Article 26(1) ECT since the EU is the only REIO party to the ECT,[437] also fails. Rather than ignoring Spain's argument to this effect, the Tribunal analyzed the argument by reference to the ordinary meaning of the terms of the ECT (in application of the VCLT) to determine whether the EU Member States were to be treated as one territory for purposes of the ECT and decided against such notions.[438] As stated by Claimants,[439] the Committee is of the view that the Tribunal's approach was a reasonable and tenable one, at the very least.

305. The Committee therefore dismisses Spain's claim for annulment based upon the Tribunal's alleged wrongful declaration of jurisdiction.

306. Having now concluded that the Tribunal did not manifestly exceed its powers by declaring its jurisdiction, the Committee will now turn to analyze whether there was manifest excess of powers by the Tribunal's failure to apply the proper law to the merits of the dispute, as argued by Spain.

---

[435] Claimants Comments on Swedish Judgments, ¶ 11.

[436] Reply, ¶¶ 184-193; First Hindelang Report, ¶ 39; First Hindelang Report, ¶ 46. Tr. Day 1 [Hindelang], 131:8-18; 133:22-25; 134:1-10; 145:8-13; 161:3-10.

[437] Mem., ¶¶ 73-81.

[438] Decision, ¶¶ 310-333.

[439] C-Mem., ¶ 116.

C. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY DECIDING NOT TO APPLY EU LAW TO THE MERITS OF THE CASE

(1) The Applicant's Position

307. Spain submits that the Tribunal manifestly exceeded its powers also by failing to apply EU law to the merits even though it was the applicable international law.[440] Spain further argues that if the Tribunal had considered EU law including EU legislation on State Aid and had conducted the analysis required under EU law, it would have reached very different conclusions as regards the merits of the dispute, a fact which entails the annulment of the Award. According to Spain, the Tribunal failed to apply EU law to the merits and to consider the significant consequences of doing so.[441]

308. Spain notes that the value of EU law as international law has been widely recognized by ICSID tribunals. In support of this conclusion, Spain refers to the *Electrabel* tribunal which concluded that "*there is no fundamental difference in the nature of international law and the nature of EU law that might serve to justify treating EU law differently…*"[442]

309. For Spain, EU law is applicable as it is part of the fundamental norms that affect the expectations of any investments in EU territory. Spain argues that the subsidies, whose petrification Claimants claimed in the underlying proceedings, are classified as State Aid and consequently are subject to the requirements of EU law.[443] The EU State Aid regime, which falls within the exclusive competence of the Commission, is regulated by Articles 107 and 108 TFEU and implementing regulations. Thus, argues Spain, the application of EU law is mandated and has "*very significant consequences related to the scope of the proclaimed law and legitimate expectations of investors*."[444]

310. According to Spain, EU law was also relevant to determine the scope of investors' rights. Claimants claimed "*the right by means of arbitration proceedings to be paid subsidies that*

---

[440] Mem., ¶ 134; Tr. Day 1, 64: 7-11.

[441] Tr. Day 1, 43: 1-5.

[442] Mem., ¶ 138, *citing* **RL-0002**, *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, ¶ 4.126.

[443] Mem., ¶ 139.

[444] Mem., ¶¶ 148-149, *citing* First Hindelang Report, ¶¶ 74-78.

constituted State Aid."[445] For Spain, EU law should have been applied to examine whether such an entitlement existed in the first place. If EU law had been applied to the merits of the dispute by the Tribunal, Claimants' claim seeking to continue indefinitely subsidies that constituted State Aid would have failed as incompatible with EU law.[446]

311. According to Spain the subsidies granted to producers of renewable energies were State Aid and subject to requirements of EU law. Spain refers to Directive 2001/77/EC on the Promotion of Electricity Generated from Renewable Energy Sources in Internal Electricity Market, which was passed into law to achieve targets in line with the Kyoto Protocol. The Directive recognised the need for State Aid in line with the Community Directives. The purpose of subsidies is to render renewable energies competitive in the market. However, it must not give rise to over-remuneration, which could distort competition.

312. In addition, Spain contends that under EU law legitimate expectations are excluded with regard to State Aid payments granted to investors by an EU Member State in breach of the notification and stand-still duty prescribed for in Article 108(3) TFEU and states: "*A recipient of State Aid cannot… have legitimate expectations in the lawfulness of aid that has not been notified to the Commission*."[447] In that regard, Claimants could not have legitimately expected that the amount of State Aid would have remained unchanged throughout the useful life of their projects since the regime was never notified in breach of the requirements of legislation on State Aid. For Spain, whether State Aid measures create legitimate expectations is conditioned upon the lawfulness of the aid, namely whether it has been granted in accordance with the applicable legal regime and is approved.[448] Thus, the classification of a measure as State Aid directly impacts on investors' legitimate expectations since investors, being obliged to comply with the law of the host State, cannot have legitimate

[445] Mem., ¶¶ 149-150, *citing* **RL-0111**, Decision C(2017) 7384 of the European Commission, rendered on 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN), ¶ 155 ("***Decision C(2017) 7384 of the EC***"); **R-0338**, Decision C(2016) 7827 final of the EC; **RL-0167**, Response from the EC on 29 February 2016 to the request for investigation from the ERAN Producers and Investors.

[446] Mem., ¶¶ 149-150; Reply, ¶¶ 236-248.

[447] Mem., ¶ 151, *citing* **RL-0111**, Decision C(2017) 7384 of the EC, ¶ 158. Tr. Day 1, 16:5-15.

[448] Reply, ¶¶ 242-245, **RL-0165**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award 27 December 2016 ("***Blusun*, Award**").

expectations of a treatment that is unlawful under that law. In support of these conclusions Spain refers to the EU Commission, the case-law of CJEU, and ICSID tribunals.[449]

313. Apart from arguing that if EU law was applied, the Tribunal would have concluded that the legitimate expectations claimed were not lawful, Spain notes that even if the subsidies had been correctly notified in accordance with TFEU, the Tribunal should have taken into consideration the fact that EU law permits States to amend or terminate State Aid regimes at any time to avoid overcompensation scenarios and to deal with unforeseen circumstances.[450]

314. The Applicant also points out that the application of EU law and EU Legislation on State Aid (including EU Directives on State Aid for Environmental Protection) renders the proportionality principle necessarily applicable.[451] According to Spain, "*by applying EU law, the RWE Tribunal would then have been forced to apply the principle of proportionality, which is compulsory under that legislative framework, and gone on to check whether the compensation recognized duly complied with that principle*."[452] In support of this argument, Spain refers to the *Wirtgen* tribunal which, in its analysis of the Czech scheme, conducted a proportionality analysis.[453]

315. Spain further contends that the Tribunal erred as it ignored the contents of Articles 107 and 108 TFEU when analyzing the legitimate expectations of Claimants. The Tribunal decided to entirely ignore EU law as legal rules applicable to the merits of the matter despite the fact that it had previously stated that it would decide the matter at hand "*in accordance with the ECT and applicable rules and principles of international law*…."[454] Furthermore, the

---

[449] Mem., ¶¶ 152-154, *citing* **RL-0165**, *Blusun*, Award, ¶ 148; **RL-0178**, *Baywa R.E. Renewable Energy GMBH and Others v. The Kingdom of Spain,* ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶ 569(a).

[450] Mem., ¶¶ 155-157, *citing* **RL-0152**, *Eurus*, Decision on Jurisdiction and Liability; **RL-0167**, Response from the EC on 29 February 2016 to the request for investigation from the ERAN Producers and Investors; **RL-0165**, *Blusun*, Award, ¶ 371.

[451] Tr. Day 1, 38:20-25; 39:1-2.

[452] Mem., ¶¶ 158-160, *citing* **R-0065, RL-0065**, EU Guidelines on State Aid in favour of the environment, 2008/C82/01, European Commission, ¶¶ 11, 31; **RL-0110**, *Mr. Jürgen Wirtgen and others v. Czech Republic,* PCA Case No. 2014-03, Award, 11 October 2017, ¶ 373.

[453] Mem., ¶ 160, *citing* **RL-0110**, *Mr. Jürgen Wirtgen and others v. Czech Republic,* PCA Case No. 2014-03, Award, 11 October 2017, ¶ 373.

[454] Mem., ¶¶ 163-165, *citing* **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶¶ 314, 360, 398, 482.

Tribunal mistakenly rejected the application of the European legislation on State Aid regardless of the fact that it had already recognised subsidies to the renewable energy sector to constitute State Aid.[455] According to Spain, such a failure to apply EU law and EU legislation on State Aid is clear evidence of excess of powers and should lead to the annulment of the Award.[456]

316. In its Reply, Spain reaffirmed its argument that the Tribunal had manifestly exceeded its powers by not applying the proper law (EU law). It repeated that EU law is the international law applicable, a fact which according to Spain had been clearly accepted by the Tribunal in the original proceeding. However, notwithstanding that acknowledgement, the Tribunal, as Spain contends, did not apply EU law.[457] Spain further notes that "*if the applicable law is not properly established, it can hardly be correctly applied*"[458], a failure which amounts to a manifest excess of powers under Article 52(1)(b) of the ICSID Convention. For Spain, if the Tribunal applied EU law, it would have concluded that there was no breach of the ECT.[459]

317. When reiterating that the Tribunal overlooked the EU rules on State aid prescribed for in Articles 107 and 108 TFEU, which were to be applied, the Tribunal, Spain notes, "*omits an analysis of the rules on State aid, and bluntly and erroneously resolves the issue on the basis that EU law does not form part of the applicable law*."[460] Spain also takes issue with Claimants' argument that not the entirety of EU law is part of international law as this, according to Spain, is contrary to the Tribunal's conclusion that the EU Treaties have the status of international law.[461]

318. The Applicant further contends that "*any compensation awarded by an Arbitral Tribunal constitutes State aid and therefore… necessarily requires analysis of a number of issues from*

[455] Mem., ¶ 167.

[456] Mem., ¶¶ 169-170. Tr. Day 1, 43:14-24.

[457] Reply, ¶ 222, *citing* **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶¶ 56 et seq.

[458] Reply, ¶ 223, *citing* Second Hindelang Report, ¶¶ 56 et seq; **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶¶ 314, 398.

[459] Reply, ¶ 224.

[460] Reply, ¶ 227, *citing* **RL-0001**, EU Treaty, Treaty on the Functioning of the EU and EU Charter of Fundamental Rights, Consolidated, 26 October 2012.

[461] Reply, ¶ 228, *citing* C-Mem., ¶ 158.

the EU law perspective."[462] In that regard, Spain recalls that the European Commission, which is the competent body to decide to apply the State Aid rules, has confirmed with the *Antin* Decision on State Aid that any compensation awarded by an arbitral tribunal constitutes State Aid.[463] Spain also recalls that the Commission was "*categorical in stating that no payment shall be made… nor can any payment be authorized by a tribunal if enforcement of the Antin Judgment is sought*." The Commission also noted that "*…this obligation applies irrespective of Articles 53 and 55 of the ICSID Convention*…" and that "*…these provisions do not oblige Spain to pay the award, because such payment would violate rules of international law, to which the EU Member States and the companies established within them have accorded primacy, i.e. the EU Treaties*."[464] Spain argues for the pertinence and applicability of the *Antin* case, in which the Commission declared State Aid as contrary to the EU's internal market, equally to the present proceeding since both cases had essentially the same basis and concerned the same measures and legal framework.[465]

319. For Spain, these are not new arguments or documents that cannot be taken into consideration by the Committee as "*the content of these documents refers to the same arguments that were presented before the* RWE *Tribunal and which, if properly analysed, would have led to results opposite to those reached in the Award…*"[466]

320. Spain, in its Reply, also reminds the Committee that the Commission has *(i)* urged EU Member States to promote renewable energies without distorting competition in the EU internal market or disregarding the State Aid rules and *(ii)* concluded that there is no right to State Aid and that EU investors are not protected against future changes in the support scheme, thereby rejecting any retroactive effect of measures and the existence of legitimate expectations.[467] According to the Applicant, if the Tribunal had applied EU law, it would

[462] Reply, ¶ 229, *citing* EC NDP Submission; Second Hindelang Report, ¶¶ 51-74.

[463] Reply, ¶¶ 230-231, *citing* **RL-0199**, European Commission C(2021) State Aid SA. 54155 (2021/NN) regarding Arbitration award to *Antin v. Spain*, July 2021, p. 30.

[464] Reply, ¶ 231.

[465] Reply, ¶ 234.

[466] Reply, ¶ 233, *citing* Rejoinder on the Merits and Reply on Jurisdiction, ¶¶ 407 et seq.

[467] Reply, ¶¶ 236-240, *citing* **RL-0111**, Decision C(2017) 7384 of the EC, ¶ 155; **R-0338**, Decision C(2016) 7827 final of the EC D, ¶ 92; **RL-0167**, Response from the EC on 29 February 2016 to request for investigation from the

have analysed these issues to examine whether Spain breached its obligations with respect to Claimants.

321. Lastly, Spain rejects Claimants' argument that EU law is not applicable due to its lack of relevance. For Spain, EU law applies along with the ECT[468] and the fact that its application has been disregarded by the Tribunal constitutes a manifest excess of powers due to the significant legal consequences of such disregard. As Spain noted, the application of EU law "*…prevents the payment of the compensation awarded by the* RWE *Award, and…contravenes the literal wording of repeated pronouncements from the European Commission…*"[469]

(2) Claimants' Position

322. Claimants submit that the Tribunal applied the proper law: Article 42(1) ICSID Convention and Article 26(6) ECT[470]; that there was no manifest excess of powers in not applying EU law on State aid to the merits; that "*EU law does not (and cannot) determine the applicable law to a claim for breach of the ECT*,"[471] and that the Tribunal's decision was, at the very least, tenable as a matter of law.

a. EU Law Not Applicable Under the ECT

323. Claimants' response to Spain's arguments under this heading is essentially twofold. First, they contend that the Tribunal's Decision was at the very least tenable and second, that the application of EU law would have made no difference to the outcome.

ERAN Producers and Investors; **RL-0205**, Communication from the EU Commission on The Support of Electricity from Renewable Energy Sources. COM (2005) 627, 7 December 2005, 10, section 3.5.; **R-0338**, Decision C(2016) 7827 final of the EC, ¶¶ 82-84, 92, 96.

[468] Reply, ¶¶ 244-246, *citing* **RL-0165**, *Blusun*, Award, ¶¶ 371, 591; **RL-0152**, *Eurus Energy Holdings Corporation v. Kingdom of Spain,* ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 ("***Eurus-Decision on Jurisdiction and Liability***").

[469] Reply, ¶¶ 247-248, *citing* **RL-0220**, *European Commission v. European Food SA and Others,* Judgement of the Court of Justice of the European Union in Case C-638/19 P, 25 January 2022; First Hindelang Report, ¶¶ 83-92; Second Hindelang Report, ¶¶ 53-54.

[470] C-Mem., ¶ 155, making reference to Decision, ¶¶ 396-397. Tr. Day 1, 77:18-20.

[471] C-Mem., ¶ 156.

324. Claimants argue that the Tribunal has correctly identified the applicable law, as it noted that the applicable law to the merits is governed by Article 42(1) ICSID Convention and Article 26(6) ECT.[472] Contrary to Spain's view, Claimants point out that "…*EU law does not (and cannot) determine the applicable law to a claim for breach of the ECT*."[473] In a similar vein, Claimants reject the Commission's reference to Article 38 of the ICJ Statute which applies to claims before the ICJ and not to an ECT Tribunal. Not only did neither Spain nor the Commission invoke this ICJ Statute in the underlying arbitration, Article 26(6) ECT was also the governing law clause in the underlying arbitration.[474]

325. For Claimants, the non-application of EU law by the Tribunal is consistent with its findings under Spain's intra-EU objection, contrary to what Spain argues. As the Tribunal concluded, (a) the entirety of EU law is not considered part of international law; (b) the Tribunal was called upon to decide a claim under the ECT and not under EU law; (c) the legality of the subsidy scheme under EU law has no bearing on its compatibility with Spain's obligations under the ECT; and (d) the fact that the subsidy may be a form of State aid does not imply that the current case requires application of EU law, which it does not. Claimants conclude that "*it cannot be said that the Tribunal misapplied the proper law (which would not lead to annulment), let alone misapplied it in an egregious manner (which may)*."[475] In support of this conclusion, Claimants refer to tribunals that have refuted that Article 26(6) ECT mandates application of EU law.[476] Thus, Claimants also argue that the Commission's contention that EU law is part of the rules and principles of international law under Article 26(6) ECT has to be rejected. Claimants also contest Spain's reference to *Baywa v. Spain* and *Eurus v. Spain*, as they do not "*advance its manifest excess of powers claim any further…*" being inconsistent in their reasoning.[477]

---

[472] C-Mem., ¶¶ 155-156. Tr. Day 1, 91:5-16.

[473] C-Mem., ¶ 156.

[474] C-Mem., ¶ 157.

[475] C-Mem., ¶ 159.

[476] C-Mem., ¶¶ 159-160, *citing* **CL-0197**, *Cube*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 158, 160, 330; **CL-0300**, *Eskosol*, ¶ 121; **CL-0299**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic,* SCC Arbitration V (2015/095), Final Award, 23 December 2018, ¶ 397 ("***Greentech et al,* Final Award**").

[477] C-Mem., ¶ 162. Tr. Day 1, 96:19-25; 97:1-5.

326. Claimants further argue that Spain and the Commission in essence attempt to "*convince the Committee that a different interpretation of Article 26(6) ECT to that reached by the Tribunal should prevail…*", namely that EU law on State aid necessarily forms part of the "*applicable rules and principles of international law*". For Claimants, this examination would be beyond the scope of the Committee's purview which is limited to "*…verifying whether the Tribunal's reasoning was tenable as a matter of law….*"[478] The Tribunal's interpretation is "at the very least tenable and in line with numerous other tribunals."[479] The Committee's mandate, according to Claimants, is not to overturn the Tribunal's interpretation as Spain suggests. The fact that some tribunals have found that EU law can be relevant to assessing the merits of an ECT claim is insufficient for the Committee to determine a manifest excess of powers.

327. Spain and the Commission, Claimants argue, are using the annulment proceeding to re-argue Spain's case on State aid and legitimate expectations, namely the merits of the case. Spain argues that had EU law been applied, the Tribunal would have found that Claimants "*had no legitimate expectations to receive the fixed tariffs scheduled under Spanish law*."[480] As noted by Claimants, "*[a]n alleged manifest excess of powers is not a gateway for a losing party…to re-argue its case on the merits, much less a legal basis on which the Committee can assess whether the Tribunal committed 'several errors in law'…*"[481] As long as the Tribunal's interpretation is tenable, "*the enquiry stops here*."[482]

328. Lastly, Claimants note that Spain's argument that the Commission has determined that the RD 661/2007 FIT regime is State aid is demonstrably false, as the Tribunal has already found.[483] Claimants also argue that the documents put forward by Spain in support of its argument are new evidence not put to the underlying Tribunal. It is not open to Spain to bring

[478] C-Mem., ¶ 163.
[479] C-Mem., ¶ 164.
[480] C-Mem., ¶¶ 165-166.
[481] C-Mem., ¶ 166.
[482] C-Mem., ¶ 166.
[483] C-Mem., ¶ 167.

them for the first time before the Committee and reliance on these new documents rather "*suggests that the Tribunal's decision was not obviously or manifestly incorrect*."[484]

329. In their Rejoinder, Claimants reiterate that the non-application of EU law on State aid to the merits of an ECT dispute is "*a tenable determination*"[485] and that Spain has failed to demonstrate that the Tribunal manifestly exceeded its powers. For Claimants, Spain has not shown that the alleged excess was manifest, namely self-evident, clear and obvious. Spain also relies on additional documents that it never put to the Tribunal, including the testimony of Professor Hindelang.[486] In fact, Spain never submitted any testimony on EU law before the Tribunal. According to Claimants, if there were a manifest excess of powers, "*Spain would not need to rely on these additional documents…*"[487]

330. Claimants again object to Spain's argument that the Tribunal wrongly determined the law applicable to the merits and applied the wrong law. Claimants repeat that the Tribunal correctly concluded from Articles 42(1) ICSID Convention and 26(6) ECT that it should decide the issues before it according to the ECT and the applicable rules and principles of international law.[488] The Tribunal strictly adhered to the ECT's choice-of-law clause and applied the law that the ECT expressly mandated.[489]

331. In the same context, Claimants allege that Spain's argument that EU law is international law is misleading. Claimants recall that the Tribunal found that EU Treaties (TFEU and TEU) are instruments constituting part of international law but that this finding does not imply that the entirety of EU law is to be deemed international law.[490] In particular, Claimants argue, it does not follow from such finding that "*EU law on State aid could be considered as*

[484] C-Mem., ¶ 168, *citing* **CL-0269**, *Antin*, ¶ 159.

[485] Rejoinder, ¶ 145.

[486] Rejoinder, ¶ 147.

[487] Rejoinder, ¶ 148.

[488] Rejoinder, ¶ 149.

[489] Rejoinder, ¶ 150, *citing* **RL-0114**, *Occidental*, ¶ 309.

[490] Rejoinder, ¶¶ 151, 154, *citing* **CL-0204**, *Hydro Energy*, ¶ 502(16); **CL-0239**, *Cavalum*, ¶ 370(16); **CL-0199**, *Infrared Environmental Infrastructure GP Limited and Others v. Kingdom of Spain,* ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 258, 272; **CL-0197**, *Cube*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 158.

'applicable rules and principles of international law' to the merits of the dispute under Article 26(6) ECT."[491]

332. In a similar vein, Claimants argue that, in light of the Tribunal's findings, it was logical for it to decide not to apply EU law. The Tribunal did not omit an analysis of the EU rules on State aid as Spain argues. Instead, EU law was not deemed applicable in the Tribunal's analysis as (i) the Tribunal was seized of an ECT, not an EU law claim; (no part of Claimants' claims concerns the issue of whether a subsidy to the renewable energy sector may constitute unlawful State aid); (ii) there can be a breach of the ECT also where the new regime has been found lawful under the TFEU; and (iii) the fact that a subsidy to the renewable energy sector may be a form of State aid does not require application of EU law concerning State aid in this case.[492] Claimants also make the point that when claims brought under the ECT are assessed, nothing in fact turns on the fact that EU Treaties are international law.

333. Furthermore, Claimants subscribe to the Tribunal's view that pursuant to Article 16 ECT, ECT prevails over EU law in case of any conflict. Thus, even if EU law were deemed part of the applicable law, it "*could never have operated such as to deprive RWE of its rights under the ECT*."[493] According to Claimants, Spain did not demonstrate that the non-application of EU law to the merits amounted to a gross or egregious error. Spain did not pass the required high threshold. In line with the Tribunal, "*numerous tribunals have found that Article 26(6) does not require the application of EU law to the merits of an ECT dispute...*"[494] Claimants, with reference to previous annulment committees, argue that the manifest requirement will not be satisfied if reasonable minds differ as to whether or not the tribunal issued a correct decision. For Claimants, a question of treaty interpretation is highly unlikely to give rise to a manifest excess of powers.[495]

---

[491] Rejoinder, ¶ 151.

[492] Rejoinder, ¶¶ 152-153.

[493] Rejoinder, ¶ 155, *citing* **CL-0198**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 ("***SolEs*, Award**"), ¶ 165; **CL-0200**, *OperaFund*, Award, ¶ 327.

[494] Rejoinder, ¶ 156, *citing* **RL-0168**, *Caratube*, ¶ 81; **RL-0042**, *AES*, ¶ 33.

[495] Rejoinder, ¶ 157, *citing* **CL-0279**, *Blusun*; **CL-0201**, *Baywa*, Decision on Jurisdiction, Liability and Directions on Quantum; *citing* **RL-0152**, *Eurus*, Decision on Jurisdiction and Liability; **CL-0276**, *Standard Chartered*, ¶ 183; **CL-0286**, *Lucchetti,* ¶ 112; **RL-0192**, *TECO I*, ¶ 78; **CL-0328**, *NextEra*, ¶ 81.

334. Claimants further argue that the Tribunal's determination is tenable and does not justify annulment since a decision should not be disturbed when it is tenable as a matter of law.[496] Claimants note that the different conclusions reached in a minority of ECT cases and Professor Hindelang's arguments that Article 26(6) ECT mandates the application of EU law, prove at most that "*it is arguable that EU applies to the merits*."[497] In support of this conclusion, Claimants refer to several *ad hoc* committees that reached the same conclusion, namely that a tribunal's interpretation of whether or not Article 26(6) ECT mandates application of EU law to the merits does not amount to a manifest excess of powers.[498] For Claimants, Professor Hindelang's opinion to the contrary is to be rejected as it runs contrary to the ordinary meaning of Article 26(6) ECT, "*even if the Committee were minded to determine its correct interpretation (which it should not, given the limited scope of its remit)*…"[499] Professor Hindelang's view is premised upon the mistaken proposition that Article 26 ECT contains only bilateral obligations, the interpretation of which could vary depending on the nationality of the parties and is to be decided by the two parties involved. Claimants reject this view since the Contracting Parties decided that tribunals should apply the choice-of-law clause at Article 26(6) ECT and did not draw a distinction between disputes involving EU Member States and those that do not. When arguing that Professor Hindelang's view does not conform with the "*natural and ordinary meaning*" of the terms of Article 26(6) ECT, they make reference to Article 31(1) VCLT. Claimants also challenge the pertinence of EU law since it "*is silent on the interpretation of the obligations under Part III of the ECT*…" and taking into account the context in which the words are used, EU law was not intended to fall within the terms "*rules and principles of international law*…"[500]

335. Lastly, Claimants challenge the relevance of Spain's reference to the Commission's State aid decision on the *Antin* award. For Claimants, the issues of compliance with intra-EU awards in light of EU State aid rules are irrelevant to determining whether the Tribunal manifestly

[496] Rejoinder, ¶ 157.

[497] Rejoinder, ¶ 158.

[498] Rejoinder, ¶¶ 159-160, *citing* **CL-0327**, *SolEs*, ¶ 154; **CL-0328**, *NextEra*, ¶¶ 244, 247, 248, 263-267; **CL-0290**, *Alapli*, ¶ 244; **CL-0329**, *Cube*, ¶¶ 221-228.

[499] Rejoinder, ¶ 162, *citing* Second Hindelang Report, ¶¶ 60-61, 63-73, 84; **CL-0300**, *Eskosol*, ¶¶ 120-122, 148-151; **CL-0299**, *Greentech et al*, Final Award, ¶ 397.

[500] Rejoinder, ¶ 162.

exceeded its powers in determining the applicable law under Article 52(1)(b) ICSID Convention. As the Tribunal noted, "*issues of enforcement were irrelevant to its determination…*" since issues of enforcement are "*ultimately a matter for the courts of concerned ICSID Contracting States… and the Tribunal cannot determine its jurisdiction by reference to how differing Contracting States may understand and apply their obligations under Article 54…*", though this does not mean that the Tribunal is not "*naturally concerned that its award should be capable of enforcement*."[501] Claimants also note that the Committee is not seized of any enforcement issue. For Claimants, enforcement issues are not relevant to the proceedings at hand and no excess of powers has been identified by the Tribunal's non-application of EU law on State aid to the merits of this case.[502]

336. Claimants conclude from the above that "*the Tribunal did not exceed its powers (let alone manifestly so) in not applying EU law on State aid to the merits*."[503]

b. Applying EU Law Would Not Have Led to a Different Outcome

337. With respect to rules on State aid, Claimants point out that even if the Tribunal had applied EU law to the merits, it would not have reached a different result, as Spain has argued.[504] Claimants note that Spain's submissions have been made in the abstract irrespective of the Tribunal's findings. On the one hand, with respect to legitimate expectations, the Tribunal has found that Claimants did not have any legitimate expectations that the special regime would remain substantially unchanged or that there was a promised return when Claimants invested. In that regard, Claimants contend that the application of EU law would not have made any difference, nor would it have altered the Tribunal's findings. On the other hand, as regards proportionality, the Tribunal found that Spain breached the FET standard prescribed for in Article 10(1) ECT. The benchmark used by the Tribunal to assess the proportionality of Spain's measures was the one that the Commission deemed compatible with the internal

[501] Rejoinder, ¶ 163, *citing* **CL-0239**, *Cavalum*, ¶ 370(18); **CL-0300**, *Eskosol*, ¶ 235; **CL-0193**, *Vattenfall*, Decision on the Achmea Issue, ¶ 230.

[502] Rejoinder, ¶ 164, *citing* **CL-0328**, *NextEra*, ¶ 266.

[503] Rejoinder, ¶ 165.

[504] Rejoinder, ¶¶ 166-170.

market in the Commission's 2017 Decision. Thus, applying EU law would have had no bearing on the Tribunal's findings.[505]

338. Thus, bearing in mind that annulment is premised upon a ground for annulment which is material to the outcome, Claimants note that "*EU law was immaterial to the outcome of the dispute with respect to legitimate expectations or proportionality, even if this ground of annulment had merit (*quod non*), it would have to be rejected since it has no bearing on the Tribunal's ultimate findings*."[506]

339. In their Rejoinder, Claimants argue that Spain failed to rebut Claimants' position that EU law was immaterial to the outcome[507] and that Spain did not engage with Claimants' submissions. Instead, as Claimants note, Spain restated the Commission's position on State aid without demonstrating that the Tribunal would, or could, have reached a different result through the application of EU law. Claimants are also of the view that the *BayWa* and *Eurus* cases, which Spain has referred to, do not prove that EU law was material to the outcome since both tribunals, although they deemed EU law applicable, concluded that Spain was liable under 10(1) ECT. Thus, according to Claimants, "*EU law could never have had the effect of allowing Spain to escape liability under the ECT*"[508], and "*no ECT tribunal has ever absolved Spain of its liability through the application of EU law.*"[509]

340. Claimants also argue that Spain, being incapable of rebutting Claimants' submissions, has turned to its compliance with the Award. This issue, Claimants allege, has nothing to do with whether EU law could have had an impact with respect to Spain's liability under the ECT nor is it relevant to this Committee's enquiry into Spain's pleaded grounds for annulment.[510] Claimants take issue with Professor Hindelang's Report in which it is wrongly implied that

[505] C-Mem., ¶ 172, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 104; **RL-0172**, *Wena*, ¶ 101; **CL-0307**, *Hydro*, ¶ 119.

[506] C-Mem., ¶ 173, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 108.

[507] Rejoinder, ¶ 166.

[508] Rejoinder, ¶ 168.

[509] Rejoinder, ¶ 168**,** *citing* **CL-0201**, *BayWa*, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 629(c); **RL-0152**, *Eurus*, Decision on Jurisdiction and Liability, ¶ 467(c).

[510] Rejoinder, ¶ 169, *citing* **CL-0328**, *NextEra*, ¶ 266.

a tribunal seized of an ECT claim and dispute had to require the Commission's authorisation to issue an award, an allegation that Professor Hindelang did not explain.[511]

(3) The Committee's Analysis

341. The issue for the Committee to decide here is whether there was an excess of powers by the Tribunal in its decision on the applicable law and whether that excess was manifest. Spain submits that the Tribunal ignored the applicable law and that there was also an incorrect application of the applicable law.[512] Spain notes that while the Tribunal had not questioned whether EU law was international law it ultimately still decided to ignore EU law as legal rules applicable to the merits, thereby contradicting itself.[513]

342. In order to make a determination that there was a manifest excess of powers the Committee would have to identify an egregious or gross error, as also agreed by the Parties.[514] The Committee will now, within the scope of the Committee's mandate, recall the Tribunal's reasoning in the respects raised by Spain.

343. Article 26(6) ECT was central to the Tribunal's determination of the applicable law. Such article reads: "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*."

344. The Tribunal indicated that the provisions of the ECT (including Article 26) are to be interpreted and applied in accordance with the VCLT.[515]

345. It determined that Article 26(6) ECT is concerned with a choice of law applicable to the merits of the dispute before the Tribunal and not with a choice of law in relation to jurisdiction.[516] In reaching that conclusion it was assisted by the reasoning in the *Vattenfall*

[511] Rejoinder, ¶¶ 169-170, *citing* Second Hindelang Report, ¶¶ 53-54.
[512] Mem., ¶136.
[513] Mem., ¶¶164-165.
[514] **RL-0106**, *Soufraki*, ¶86.
[515] Decision, ¶311.
[516] Decision, ¶315.

case,[517] namely that Article 26(6) ECT is concerned with a dispute as identified in Article 26(1) i.e. a dispute concerning an alleged breach of obligations under Part III of the ECT.

346. The Tribunal clearly recognised that the applicable law in relation to its determination on the issues in dispute is the ECT and the applicable rules and principles of international law.[518]

347. The Tribunal, however, did not consider that any relevant rule of international law had been identified to it on the basis of the *Achmea* Judgment or elsewhere.[519]

348. There is a recognition in the Tribunal's Decision, a recognition shared by other tribunals and *ad hoc* committees, that aspects of EU law are potentially applicable rules and principles of international law and potentially therefore part of the applicable law to the merits of the dispute.[520] However, the Tribunal's analysis is that the EU law relied on, namely the State Aid provisions in Articles 107 and 108 TFEU, is not relevant to the dispute. It rejects the argument made by Spain and by the Commission that the dispute affects essential elements of EU law, including State Aid.[521] The Decision observed that no part of Claimants' claim concerned the issue of whether the regime in RD 661/2007 contained unlawful State Aid.[522] The fact that a subsidy to the renewable energy sector was a form of State Aid did not mean that EU law concerning State Aid needed to be applied.[523] The Tribunal also observed that there was no evidence that the Disputed Measures were motivated by State Aid concerns.[524]

349. The Tribunal determined that Claimants were correct in that the ECT grants investors rights that are additional to any right provided by EU law.[525] The Tribunal rejected the notion that

[517] Decision of Tribunal, ¶ 315, *citing* **CL-0193**, *Vattenfall*, Decision on the *Achmea* Issue, ¶ 116.

[518] Decision, ¶398.

[519] Decision, ¶345: "*The Tribunal agrees with the Vattenfall tribunal that relevant rules of international law applicable in the relations between the parties are to be taken into account under Article 31(3)(c) VCLT, which does not imply that there is to be a re-writing of a provision such as Article 26 ECT so as to arrive at an interpretation that is both contrary to the ordinary meaning of its terms and has the result that the same provision has different meanings for different parties to the same treaty. Moreover, …the Tribunal does not consider that there is any relevant rule of international law that has been identified to it on the basis of the* Achmea *Judgment or elsewhere.*"

[520] Decision, ¶366.

[521] Decision, ¶356.

[522] Decision, ¶359.

[523] Decision, ¶360.

[524] Decision, ¶356.

[525] Decision, ¶354.

because there is an EU internal market in electricity and EU Directives on renewable energy that there must be some incompatibility with the ECT or the application of the ECT.[526]

350. The Tribunal also explored the possibility that that there might be a derogation from the provisions of Parts III and V of the ECT by virtue of Article 16. It assumed in Spain's favour that the TFEU or TEU were in the words of Article 16 ECT "*a subsequent international agreement, whose terms … concern the subject matter of Part III or V of this Treaty*".[527] However, it found that nothing in the terms of those two EU Treaties could be construed to derogate from the provisions of Part III or Part V of the ECT and concluded, as argued by Claimants, that "*the provisions of Part III and V that are relied on in the context of the current claim are correctly seen as 'more favourable to the Investor or Investment' such that Article 16 is engaged*."[528]

351. The Tribunal also considered Spain's arguments that EU law prevailed by virtue of Articles 30, 31(3)(c) and 59 of the VCLT. It regarded Article 30 as a default rule, that is to say one, which only applies if there is no specific provision in a treaty dealing with prior or subsequent treaties.[529] In the case of the ECT it found that there is a specific provision, i.e. Article 16.

352. While the Tribunal accepted that as a matter of principle Article 16 ECT could be displaced by express language in a subsequent treaty that, the Tribunal held, would require all contracting parties to the ECT to agree and in any event there was no indication of such an intention and no express language in the TFEU.[530] Article 59(1) VCLT, the Tribunal noted, requires that in order to imply termination or suspension of the earlier treaty all the parties to it must conclude the later treaty relating to the same subject matter, something that had not happened in this case.[531]

353. Furthermore, while the Tribunal accepted that relevant rules of international law applicable in the relations between the parties were to be taken into account by virtue of Article 31(3)(c)

[526] Decision, ¶355.
[527] Decision, ¶340.
[528] Decision, ¶340.
[529] Decision, ¶338.
[530] Decision, ¶341.
[531] Decision, ¶343.

of the VCLT, this did not mean that there was to be a re-writing of a provision such as Article 26 of the ECT so as to arrive at an interpretation that is contrary to the ordinary meaning of its terms and leads to different meanings for different parties to the same treaty.[532]

354. An important aspect of Spain's case under this ground of annulment is that the recognition of EU law by the Tribunal was required in order to examine the true legitimate expectations of Claimants. However, as pointed out by Claimants, the Tribunal rejected the claims relating to legitimate expectations. If the failure to apply EU law in relation to this aspect of Claimants' claim could not have made any difference to the outcome, it cannot in the Committee's view have amounted to manifest excess.

355. The conclusion reached by the Tribunal that EU law and in particular EU law on State Aid was not relevant to the determination on the merits is broadly consistent with the decisions made by numerous other tribunals (e.g. *Cube v. Spain*, *OperaFund v. Spain*, *SolEs v. Spain*, *Infracapital v. Spain* and *FREIF v. Spain*). In contrast, a smaller number of tribunals (e.g. *BayWa v. Spain* and *Eurus v. Spain*) have taken the view that EU State Aid law can be relevant for the merits of an ECT claim, and in particular in relation to the question of legitimate expectations. The mere fact that some tribunals have reached a different conclusion on this issue, or that there is an arguable case that EU law applies to the merits[533], is not a basis for a finding of manifest excess. The Tribunal did not omit an analysis of the EU rules on State aid as Spain argues, but found that "… *issues of enforcement are ultimately a matter for the courts of concerned ICSID Contracting States*."[534]

356. The Committee therefore finds that there was no gross or egregious error in the Tribunal's making of its determination, on the basis of Article 26(6) ECT, on the law applicable to the merits. The Tribunal's analysis and conclusion were certainly tenable, and it is not for this Committee to substitute a different view.

[532] Decision, ¶345.
[533] C-Mem., ¶ 156.
[534] Rejoinder, ¶ 163.

357. Spain's claim for annulment of the Award due to manifest excess of powers by the Tribunal for its failure to apply the proper law to the merits of the dispute is therefore dismissed by the Committee.

VII. FAILURE TO STATE REASONS

A. THE APPLICABLE LEGAL STANDARD

(1) The Applicant's Position

358. Spain argues that an award must be annulled "*if the reasons forming the basis for the award are not stated*" in accordance with Article 52(1)(e) ICSID Convention.[535] Spain further submits that pursuant to Article 48(3) of the ICSID Convention, "*the tribunal must deal with all issues submitted and must state the reasons that form the basis for the award conclusions*."[536]

359. Spain alleges that annulment committees have decided that, at a minimum, a ruling must allow a reader to "*follow how the tribunal proceeded from Point A. to Point B*."[537] Particularly, the supporting reasons "*must constitute an appropriate foundation for the conclusions reached through such reasons.*"[538]

360. For Spain, the task of a committee is to determine whether there has been a comprehensive and consistent reasoning that a reader can follow.[539] Spain argues that there is a need for a party to be able to understand the ruling precisely because "*the statement of reasons guarantees procedural legitimacy and validity.*"[540] The Applicant contends that committees

---

[535] Mem., ¶ 172.

[536] Mem., ¶ 172. Tr. Day 1, 44:13-25; 45:1-3.

[537] Mem., ¶¶ 172-173, *citing* **RL-0113**, *MINE*, ¶ 5.09; *citing* **RL-0190**, *Duke*, ¶ 203; **RL-0172**, *Wena*, ¶ 79; **RL-0186**, *Tza Yap Shum*, ¶ 112; **RL-0170**, *Iberdrola*, ¶ 119; **RL-0169**, *Fraport*, ¶ 249; **RL-0193**, *Impregilo*, ¶ 181; **RL-0194**, *Total*, ¶ 267; **RL-0163**, C. Schreuer, The ICSID Convention: A Commentary, 824 (2d Ed. 2009); **RL-0187**, *Amco I*, ¶ 43.

[538] Mem., ¶ 173.

[539] Mem., ¶ 174, *citing* **RL-0107**, *Sempra*, ¶ 167.

[540] Mem., ¶ 175, *citing* **RL-0112**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 164-166 ("***Tidewater***").

have clarified that insufficient and inadequate reasons can lead to the annulment of an award[541] and that reasons also cannot be contradictory or frivolous.[542]

361. Finally, Spain argues that Articles 48(3) and 52(1)(e) ICSID Convention impose the obligation on tribunals to address all issues, arguments, and evidence presented. In that sense, a failure "*...to deal with a specific issue put before it*" or to consider "*...certain significant items of proof or evidence*" amounts to a failure to state reasons and could justify annulment.[543] In support of this argument, Spain refers to the *MINE* and *TECO* annulment decisions where the committees decided to annul the damages section because the tribunal did not address certain arguments raised by a party or because the tribunal ignored the existence of evidence in the record.[544]

362. In its Reply, Spain points to the fact that Claimants' analysis is superficial as it reduces the failure to state reasons to cases of total omission of reasons. This restrictive approach in its view contradicts standard practice as reflected in the ICSID Background Paper on Annulment.[545] Spain provides an overview of the cases where it finds support for its annulment application on the basis of failure to state reasons, as follows:

363. First, from the *Klöckner* committee, its finding that the failure to deal with every question submitted to the tribunal; the existence of contradictory reasons, which cancel each other out; or the absence of a statement of reasons that are sufficiently relevant to provide a basis for the tribunal's decision, constituted a failure to state reasons.[546]

---

[541] Mem., ¶ 176, *citing* **RL-0106**, *Soufraki*, ¶¶ 122-123; **RL-0185**, *Klöckner*, ¶ 144; **RL-0191**, *Mitchell*, ¶ 21; **RL-0171**, *Pey Casado*, ¶ 86.

[542] Mem., ¶ 177, *citing* **RL-0113 RL-0113**, *MINE*, ¶ 5.09; **RL-0185**, *Klöckner*, ¶ 116; **RL-0106**, *Soufraki*, ¶ 125; **RL-0171**, *Pey Casado*, ¶ 281; **RL-0112**, *Tidewater*, ¶ 170; **RL-0192**, *TECO I*, ¶ 90; **RL-0168,** *Caratube*, ¶ 185; **RL-0195** *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005, ¶ 70; **RL-0189**, *Venezuela Holdings*, ¶ 189; **RL-0163**, C. Schreuer, The ICSID Convention: A Commentary, 1011 (2d Ed. 2009); **RL-0187**, *Amco I*, ¶ 97.

[543] Mem., ¶ 181, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 104; **RL-0113**, *MINE*, ¶¶ 6.99-6.101; **RL-0192**, *TECO I*, ¶ 138.

[544] Mem., ¶¶ 181-182, *citing* **RL-0192**, *TECO I*, ¶¶ 131, 137, 138.

[545] Reply, ¶ 253, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 108; C-Mem., ¶¶ 195-196.

[546] Reply, ¶¶ 255-259, *citing* **RL-0185**, *Klöckner*.

364. Second, from the *Teco* committee, its finding that the failure of reasons occurs when a tribunal has failed to set out the considerations that underpinned its decision in a manner that can be understood by the reader.[547]

365. Third, Spain finds support in the *Amco I* committee's finding that there must be a reasonable connection between the bases invoked by a tribunal and its conclusions, namely that tribunals should provide "*sufficiently pertinent reasons*", which should constitute an appropriate foundation for the conclusions reached.[548]

366. Spain further argues that the reader of an award must be able to follow the reasoning of the tribunal on points of fact and law, namely how the tribunal proceeded from Point A to Point B and eventually to its conclusion (*MINE, Enron*, and *CMS*).[549] In that regard, contradictory or frivolous reasons do not serve the purpose of the award (*MINE*).[550]

367. Such failure to state reasons also occurs, Spain submits, when the tribunal fails to rule on issues raised by the parties (*MINE*)[551]; and that the mere expression of reasons that are so inadequate that they adversely impact on the coherence of the reasoning does not suffice to validate the award (*Mitchell*);[552] and that it is not the Committee's task "*to imagine what might or should have been the arbitrators' reasons, any more than it should substitute 'correct' reasons for possibly 'incorrect' reasons, or deal 'ex post facto' with questions submitted to the Tribunal which the Award left unanswered*." (*Klöckner*).[553]

368. Furthermore, Spain quotes the committee in the *Tidewater* case to point out that the "*statement of reasons is one of the central duties of arbitral tribunals*" as the "*legitimacy of the process depends on its intelligibility and transparency.*"[554] Moreover, the existence of reasons allows the reader of an award to understand the process leading to its conclusions.[555]

---

[547] Reply, ¶ 274, *citing* **RL-0192**, *TECO I*, ¶¶ 87, 128.
[548] Reply, ¶ 260, *citing* **RL-0187**, *Amco I*, ¶ 43.
[549] Reply, ¶¶ 264-271 (and the authorities referenced to therein).
[550] Reply, ¶ 264, *citing* **RL-0113**, *MINE*, ¶ 5.07.
[551] Reply, ¶ 265 (with the authority referenced to therein).
[552] Reply, ¶ 267 (with the authority referenced to therein).
[553] Reply, ¶ 259, *citing* **RL-0185**, *Klöckner*, ¶ 151.
[554] Reply, ¶ 275, *citing* **RL-0112**, *Tidewater*, ¶¶ 163-164.
[555] Reply, ¶ 276, *citing* **RL-0112**, *Tidewater*, ¶¶ 166-172.

Spain also contends that this analysis applies to the quantification of damages by tribunals as the case-law referred to shows.[556] For Spain, the Committee "*should go into very precise aspects of the quantification of damages*."[557]

(2) The Claimants' Position

369. Claimants begin their analysis by noting that Article 52(1)(e) of the ICSID Convention is to be strictly construed as it imposes a high threshold. In light of this Article's fundamental purpose, which is to safeguard the integrity of the proceedings, and its significant impact, as it sets aside the principle of finality of awards, all grounds on which annulment is justified must be clearly identifiable and beyond any doubt. Doubts are to be resolved in favour of the tribunal. Otherwise, Claimants argue, the character of ICSID annulment may be distorted as it would be rendered an appeal. Thus, for Claimants, the threshold Spain is called upon to satisfy is high and minor errors do not justify annulment.[558]

370. *First,* Claimants argue that tribunals are called on to provide reasons that are necessary for their decisions and not to address every argument made or evidence adduced by the parties. For Claimants, Article 52(1)(e) of the ICSID Convention requires tribunals to provide the reasons on which the award is based, and the Applicant is obliged to show that the point that the Tribunal failed to address was necessary to the Tribunal's decision. In that regard, Claimants submit that Spain, the party that bears the burden of proof, failed to prove that "*the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous*."[559] Similarly, Claimants point out that the Tribunal was not under the obligation to address the arguments and evidence submitted by Spain under Articles 48(3) and 52(1)(e) of the Convention, as Spain argues. Any failure to deal with any question under Article 48(3) does not justify annulment unless

[556] Reply, ¶ ¶ 261-262, *citing* **RL-0187**, *Amco I*, ¶¶ 97, 106, 110; Reply, ¶ 266, *citing* **RL-0113**, *MINE*, ¶¶ 6.105, 6.107; Reply, ¶ 272, *citing* **RL -0171**, *Pey Casado*, ¶¶ 86, 285-286; Reply, ¶ 278, *citing* **RL-0214**, *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Annulment Proceeding, Decision on Annulment, 28 May 2021, ¶ 467.

[557] Reply, ¶ 263.

[558] C-Mem., ¶¶ 176-179, *citing* **CL-0307**, *Hydro*, ¶¶ 106, 107; **CL-0296**, *CEAC*, ¶¶ 95, 139; **CL-0284**, Schreuer, ¶ 344; **CL-0227**, *Tenaris II,* ¶ 111; **RL-0042**, *AES*, ¶ 47; **CL-0269**, *Antin*, ¶ 234.

[559] C-Mem., ¶ 180, *citing* **CL-0207**, *Lemire*, ¶ 279; **CL-0276**, *Standard Chartered*, ¶ 611; **CL-0168**, *Ioan Micula, Viorel Micula and others v. The Republic of Romania,* ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, ¶ 139; **CL-0290**, *Alapli*, ¶ 202; **CL-0225**, *OI*, ¶ 321; **CL-0276**, *Standard Chartered*, ¶¶ 610-611.

it is shown that that failure could have affected the Tribunal's ultimate decision. According to Claimants, this was not the case here.[560] Claimants also note that the Tribunal was neither obliged to deal with every argument that the Parties put forward[561], nor required to explain itself with respect to its assessment of each piece of evidence adduced.[562]

371. *Second,* Claimants believe that an enquiry into the sufficiency and adequacy of the Tribunal's reasons is irrelevant under Article 52(1)(e) of the ICSID Convention. Otherwise, the Committee would run the risk of assessing the substantive correctness of the Award, impermissibly assuming the functions of an appeals court. For Claimants, the requirement to state reasons aims at ensuring that parties are able to follow the reasoning of the tribunal and understand the facts and law applied by it in reaching its conclusion.[563] Claimants submit that the adequacy of reasons falls outside the mandate of *ad hoc* annulment committees.[564] The Committee should not engage "*in a review of the quality of an award's reasons but rather the legitimacy of the process in making the awards*." Spain has misleadingly analysed the *AMCO I* and *MINE* test when it argues that the Committee should focus on the adequacy of reasons and has stated that *AMCO I* clarifies the *MINE* standard while it in fact predated *MINE* by three years.[565]

372. Claimants also note that the fact that insufficient reasons or inadequate reasons do not justify annulment has been widely accepted by *ad hoc* annulment committees.[566] On that point, Claimants also wish to remind the Committee that even the *Soufraki* committee, another

[560] C-Mem., ¶ 181, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 103; **CL-0306**, *Cortec Mining*, ¶ 179; **RL-0172**, *Wena*, ¶ 101; **CL-0307**, *Hydro*, ¶ 119; **RL-0105**, ICSID Background Paper on Annulment, ¶ 104.

[561] C-Mem., ¶ 182, *citing* **CL-0294**, *EDF et al*, ¶ 346; **CL-0279**, *Blusun*, , ¶ 245; **CL-0307**, *Hydro*, ¶ 126; **CL-0284**, Schreuer, ¶ 419.

[562] C-Mem., ¶ 183, *citing* **RL-0186**, *Tza Yap Shum*, ¶ 110; **RL-0192**, *TECO I*, ¶ 125; **RL-0188**, *Enron*, ¶ 222; **CL-0279**, *Blusun*, Decision on Annulment, ¶ 174; **RL-0192**, *TECO I*, ¶¶ 130, 133-134.

[563] C-Mem., ¶¶ 185-186, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 105; **RL-0172**, *Wena*, ¶ 81; **CL-0293**, *Tulip*, ¶¶ 98, 100, 104; **CL-0292**, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015, ¶ 64; **RL-0113**, *MINE*, ¶ 5.09.

[564] C-Mem., ¶ 187, *citing* **RL-0113**, *MINE*, ¶ 5.08.

[565] C-Mem., ¶¶ 188, *citing* **RL-0187**, *Amco I*, ¶ 43.

[566] C-Mem., ¶¶ 189-190, *citing* **CL-0289,** R.D. Bishop and S.M. Marchili, Annulmnent Under the ICSID Convention (2012), ¶¶ 3.28-3.34; **CL-0284**, Schreuer, ¶¶ 368-370; **CL-0209**, *Amco II*, ¶ 7.55; **CL-0291**, *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, ¶ 217; **CL-0208**, *CDC*, ¶ 70; **CL-0290**, *Alapli*, ¶ 197; **CL-0225**, *OI*, ¶¶ 320-321.

decision which Spain misleadingly interprets, drew a distinction between insufficient or inadequate reasons as a ground for annulment and wrong or unconvincing reasons, which fall outside the purview of annulment committees. As the *Soufraki* committee concluded and Claimants repeat, as long as the tribunal's reasoning connect the facts or law of the case to the conclusions reached in a reasonable fashion, annulment is to be avoided.[567] In a similar vein, Claimants reject Spain's argument that annulment committees are empowered to examine whether the reasoning put forward by the tribunal was comprehensive. The *Sempra* committee distinguished between comprehensible reasons that demonstrate and support a discernible line of thinking and a lacuna in the award that makes it impossible for the reader to follow the reasoning on a certain point. For Claimants, it results from *Sempra* that the standard is not whether the reasons are comprehensive but whether it was clear how the tribunal reasoned and reached its conclusions. Reasons should be "*comprehensible*"- not "*comprehensive*."[568]

373. In a similar vein, Claimants argue that Spain attempts to annul the Award by forcing the Committee to enquire into the adequacy of reasons. For Claimants, this is not permitted under the ICSID Convention. The Committee is not empowered to determine whether the Tribunal in the original proceeding made a correct finding in law or fact or to examine the quality of the reasoning put forward.[569] Furthermore, Claimants emphasize that the burden imposed on tribunals and their obligation to provide reasons for their decision are limited, as they cannot mean that "*every finding, assumption, or legal conclusion en route to an ultimate decision… must be expressed in detail*."[570]

374. As regards Spain's argument that contradictory reasons may justify annulment, Claimants accept this possibility. However, they remind the Committee that an annulment on the basis of contradictory reasons presupposes that the reasons at stake "*completely cancel each other*

[567] C-Mem., ¶ 191, *citing* **RL-0106**, *Soufraki*, ¶¶ 123, 128.

[568] C-Mem., ¶ 192, *citing* **RL-0107**, *Sempra*, ¶¶ 167-168; **RL-0031**, *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 97.

[569] C-Mem., ¶ 193, *citing* **CL-0306**, *Cortec Mining*, ¶¶ 231, 250; **CL-0208**, *CDC*, ¶ 70; **CL-0308**, *Perenco*, ¶ 164.

[570] C-Mem., ¶ 194, *citing* **CL-0307**, *Hydro*, ¶ 130.

out, leaving the [a]ward with a total absence of reasons."[571] For Claimants, a very high threshold is imposed, and a "*holistic reading of the [a]ward…, as opposed to a comparison between [its] isolated sections*".[572]

375. *Lastly,* Claimants argue that tribunals enjoy wide discretion in how they structure their reasoning. In that regard, Claimants subscribe to Professor Schreuer's view that "*[i]t cannot be expected […] that reasons must go to such lengths as to persuade a disgruntled party why it has lost.*"[573] Claimants also note that even if explicit reasons are missing, committees are able to further explain and clarify the reasoning rather than annul the award.[574] Similarly, committees are prompted to identify the reasons put forward by the tribunal in recognition of the fact that tribunals have discretion in how they express themselves.[575]

376. For Claimants, tribunals enjoy considerable discretion in deciding on quantum, a fact that casts doubts over the notion that a failure to state reasons for a costs order justifies annulment.[576]

377. In their Rejoinder, Claimants argue that Spain "*has barely engaged with RWE's submissions*."[577] Claimants also note that Spain has not argued that the Tribunal failed to

---

[571] C-Mem., ¶ 195, *citing* **CL-0276**, *Standard Chartered*, ¶ 611; **CL-0217**, *Daimler*, ¶ 77; **CL-0288**, *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶ 103; ; **CL-0308**, *Perenco*, ¶ 169; **CL-0285**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générake des Eaux) Vivendi v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 75; **CL-0290**, *Alapli*, ¶ 200; **CL-0217**, *Daimler*, ¶¶ 77, 78; **CL-0293**, *Tulip*, ¶ 109; **CL-0284**, Schreuer, ¶ 345; **CL-0208**, *CDC*, ¶ 81; **CL-0290**, *Alapli*, ¶ 201; **CL-0217**, *Daimler*, ¶ 78.

[572] C-Mem., ¶ 196, *citing* **CL-0208**, *CDC*, ¶ 81; **CL-0290**, *Alapli*, ¶ 201; **CL-0217**, *Daimler*, ¶¶ 78, 128; **CL-0288**, *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶ 103.

[573] C-Mem., ¶ 199, *citing* **CL-0277**, *Churchill*, ¶ 254; **CL-0308**, *Perenco*, ¶ 294; **CL-0307**, *Hydro S.r.l and others v. Albania,* ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, ¶ 155; **CL-0284**, Schreuer, ¶ 363.

[574] C-Mem., ¶¶ 200-201, *citing* **CL-0288**, *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶ 101; **CL-0293**, *Tulip*, ¶ 108; **RL-0106**, *Soufraki*, ¶ 24; **RL-0190**, *Duke*, ¶ 205; **RL-0172**, *Wena*, ¶¶ 81, 83; **RL-0192**, *TECO I*, ¶ 111; **CL-0284**, Schreuer, ¶ 362; **RL-0106**, *Soufraki*, ¶ 24.

[575] C-Mem., ¶ 202, *citing* **CL-0307**, *Hydro*, ¶ 149.

[576] C-Mem., ¶¶ 203-204, *citing* **RL-0114**, *Occidental*, ¶ 412; **RL-0172**, *Wena*, ¶ 91; **CL-0077**, *Rumeli*, ¶ 146; **RL-0190**, *Duke*, ¶ 256; **CL-0208**, *CDC*, ¶ 87.

[577] Rejoinder, ¶ 171.

deal with a question that was put to it, a fact that renders the discussion on Articles 48(3) and 52(1)(e) of the ICSID Convention purely academic. In addition, Claimants reject Spain's argument that Claimants' analysis reduces the failure to state reasons to cases of total omission of reasons in contradiction with the standard practice and notes that Spain has failed to establish what this standard practice is. Furthermore, Claimants note that even the ICSID Background Paper on Annulment on which Spain bases its argument notes that this annulment ground, though frequently invoked, is rarely accepted.[578]

378. In addition, Claimants take issue with the cases referred to by Spain. For Claimants, Spain has cherry-picked authorities and case law in an attempt to elucidate the legal standard for annulment with reference to ten annulment decisions. Claimants believe that the threshold for annulment can be found in the decisions that did not annul the award on this ground.[579] Claimants also note that Spain referred to *Klöckner* and *AMCO I* decisions that have been long discredited since they wrongly perceived annulment as a review of the quality and correctness of reasons put forward by the tribunals in the original proceedings.[580] Spain also referred to *MINE v. Guinea*, which, according to Claimants, supports Claimants' position. As Claimants set out in their Counter-Memorial, Spain overlooked the fact that the *MINE* committee clarified that the adequacy of tribunal reasoning should not be assessed under Article 52(1)(e) of the ICSID Convention.[581] Spain's reliance on *Mitchell* again is misplaced according to Claimants since *Mitchell* also followed the *MINE* committee and accepted that any analysis of the adequacy of reasoning falls outside of the committee's mandate.[582] This approach, Claimants note, has been widely endorsed.[583]

379. Lastly, Claimants argue that *CMS* and *Enron,* referenced by Spain, conform with Claimants' own position as they both follow the correct standard for annulment established in *Vivendi v Argentina I* and confirm that tribunals enjoy discretion in structuring their reasoning and that

[578] Rejoinder, ¶ 174, *citing* **RL-0105**, ICSID Background Paper on Annulment, ¶ 108.

[579] Rejoinder, ¶ 175.

[580] Rejoinder, ¶ 176, *citing* **CL-0315**, R. D. Bishop and S.M. Marchili, *Annulment under the ICSID Convention* (Oxford University Press, 2012), ¶ 3.28-3.34; **CL-0284**, Schreuer, ¶¶ 368-370, 371-372.

[581] Rejoinder, ¶ 177, *citing* **RL-0113**, *MINE*, ¶ 5.07.

[582] Rejoinder, ¶ 178, *citing* **RL-0191**, *Mitchell*, ¶ 212; **CL-0227**, *Tenaris II,* ¶ 114.

[583] Rejoinder, ¶¶ 179-180, *citing* **CL-0327**, *SolEs*, ¶ 82, *citing* **CL-0328**, *NextEra*, ¶ 128; **CL-0329**, *Cube*, ¶ 316.

committees are not empowered to examine the correctness of the award.[584] Similarly, "*neither* TECO, Tidewater *nor* Perenco *undermine* RWE's *position on the legal standard*" as these decisions confirm that the correctness of the tribunal's reasoning and its quality are not to be reviewed.[585] As regards Spain's reference to *Pey Casado* to discredit the Tribunal's reasoning on damages, Claimants challenge the pertinence of *Pey Casado* since "*the RWE award contains nothing comparable to this*." case.[586]

(3) The Committee's Analysis

380. Article 48(3) of the ICSID Convention provides that "*The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".*

381. Article 52(1)(e) of the Convention includes as one ground for a request for annulment "*that the Award has failed to state the reasons on which it is based".*

382. When it comes to this ground for annulment invoked by Spain (Article 52(1)(e)), the Committee recalls its limited mandate only to secure the legitimacy of the process, and the high threshold for annulment, against Article 53 of the Convention providing for the finality of ICSID awards. This means that the ground for annulment shall be strictly construed. In order to succeed, Spain must prove, as argued by Claimants, that any allegedly absent, unintelligible, contradictory or frivolous reasons, criteria with which the Tribunal agrees, were essential for the outcome of the case.

383. The Committee also agrees with Claimants that it follows from the fact that an assessment of the substantive correctness of the Award is outside of the Committee's purview, that the Committee is not empowered to assess the quality, correctness or comprehensiveness of the Tribunal's reasoning, which the Tribunal may structure in its discretion. It suffices that the Tribunal's reasoning connects the facts or law of the case to the conclusions reached in a

[584] Rejoinder, ¶ 181, *citing* **CL-0285**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 64-65; **RL-0172**, *Wena*, ¶¶ 79-81.

[585] Rejoinder, ¶ 183, *citing* **RL-0192**, *TECO I*, ¶¶ 88-90, *citing* **RL-0112**, *Tidewater*, ¶¶ 168, 171-172; **CL-0308**, *Perenco*, ¶ 164.

[586] Rejoinder, ¶ 182.

reasonable fashion. Only where it is impossible to follow the Tribunal's reasoning, how it got from point A to point B, could a ground for annulment exist.

384. As regards the requirement under Article 48 (3) of the Convention that the Award deal with every question submitted to the Tribunal, the test to be applied by the Committee shall be whether a question has been identified that the Tribunal failed to deal with and that was necessary to the Tribunal's decision.

B. FAILURE TO STATE REASONS IN THE TRIBUNAL'S CONCLUSIONS REGARDING QUANTIFICATION OF DAMAGES

(1) The Applicant's Position

385. Spain takes issue with the Tribunal's reasoning on the quantification of damages in relation to retroactivity. Spain, before setting out its arguments, provides a brief explanation of the methods used under the Old and New Regimes to calculate the reasonable rate of return for renewable energy producers. Spain recalls that Royal Decree 661/2007 was substituted by Royal Decree-Act 9/2013. *Royal Decree-Act 9/2013 calculated the* reasonable rate of return *for renewable energy producers to be 7.398% and took revenue received throughout the useful life of a plant into account for the calculation*…" Thus, Spain notes, if some plants received a sum exceeding 7.398% before the enactment of the Royal Decree-Act 9/2013, those "*said* additional *revenues meant receiving* lower *revenues after that law came into force.*"[587]

386. Spain recalls that the Tribunal took a different approach to many other tribunals in rejecting the contention that taking into account revenue prior to the enactment of the Royal Decree-Act 9/2013 to calculate the remuneration due under the New Regime amounted to a retroactive application contrary to international law and thereby to a breach of Article 10(1) ECT.[588] Instead, the Tribunal, Spain notes, characterised that aspect of the reformed system

[587] Mem., ¶¶ 184-185, *citing* **R-0095** Royal Decree-Act 9/2013 of 12 July 2013.

[588] Mem., ¶ 186, *citing* **RL-0178**, *Baywa R.E. Renewable Energy GMBH and Others v. The Kingdom of Spain,* ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019; **RL-0152**, *Eurus*, Decision on Jurisdiction and Liability; **RL-0099**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.àr.l. v. The Kingdom of Spain,* ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018.

as "*retrospective*" application and found that another form of "*retroactivity*", referring to the period between Royal Decree-Act 9/2013 and Ministerial Order 1045/2014, breached the ECT. Spain also explains that although the Royal Decree 661/2007 was revoked in July 2013, the Regulator did not establish details of the new standard facilities until June 2014 when these were specified in the Ministerial Order. As a result, renewable energy plants continued to provisionally be paid the subsidies calculated under Royal Decree 661/2007. Then, "…*the amounts received between July 2013 and June 2014 needed to be adjusted to bring the amounts received during that period in*[] *line with the amounts provided in the 2013-2014 measures*."[589]

387. In this context, Spain recalls, the Tribunal concluded that it would be a subversion of the prior legal regime, and in breach of Article 10(1) ECT, for Spain to require repayment of sums already paid and that subject to verification and precise quantification of the amount paid, there had been a breach of ECT.[590] Spain notes that the Tribunal expressly stated the need for verification of the amounts paid and limited Spain's liability to the repayment of sums already paid.[591]

388. Thus, for Spain, the Tribunal was concerned with the payment *per se* and the fact that Claimants had to transfer money to Spain. In this context, Spain argues that there might have been some instances in which transfers were effectively made by the plants to Spain, a fact that confirms the need for an effective verification of the payments. This view, according to Spain, contradicts Claimants' arguments that payment should have been ordered in relation to twenty-one of the twenty-four plants and Claimants' rejection of the relevance of whether payment was effectively made.[592]

---

[589] Mem., ¶¶ 186-189, *citing* **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶ 617; **R-0095** Royal Decree-Act 9/201 of 12 July 2013, Transitory Provision Three and **R-0110** Royal Decree 413/2014 of 6 June 2014, Transitory Provision Eight.

[590] Mem., ¶ 191.

[591] Mem., ¶ 192.

[592] Mem., ¶¶ 194-196, *citing* **R-0374** Respondent's Responsive Observations on the Experts' Joint Report of 19 May 2020, ¶¶ 4-7; **R-0375**, Respondent's Observations on the Experts' Joint Report of 1 May 2020; **R-0376**, Claimants' Comments on the Experts' Joint Report of 1 May 2020, ¶ 27; **R-0379**, Reply to Respondent's Quantum Submission of 19 May 2020, ¶ 18; **R-0377**, Respondent's email of 20 May 2020; **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶ 621; **RL-0103**, *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v.*

389. As regards the negative invoices invoked by Claimants, Spain is of the view that if the Tribunal was effectively dealing with amounts paid (and not just deducted) it would be necessary to analyse those invoices that contained both concepts, and that if the Tribunal accepted such construction of the Decision, then an opportunity for pronouncements on those calculations should have been offered.[593]

390. For Spain, the Tribunal failed to explain how it reached its conclusion which was inconsistent with its legal reasoning. According to Spain, the Tribunal did not focus on the payment of amounts, as it originally stated, since "*the repayment of sums can be procured just as readily by deducting such sums from debts that are due as by requiring repayment in the form of transfer*."[594] This conclusion contradicts its reasoning. As Spain contends, if focus on payment was not of primary concern, then why did the Tribunal confirm that considering revenues prior to Royal Decree-Act 9/2013 -to calculate the reasonable rate of return throughout the entire useful life of the plant- was legal since this would mean that many other plants, which have been paid more than 7.389%, would receive less after the 2013-2014 measures. Spain further argues that the Tribunal did not explain why the same formula can be lawful for ten of the plants and unlawful for another eleven.[595]

391. Overall, it is Spain's view that the Tribunal's reasoning does not enable the reader to understand how it reached its conclusions. A consistent reasoning would have entailed that the Tribunal focused on the amounts effectively paid, as it initially stated. Had it done so, Spain notes, once the relevant documents had been gathered, the Parties could have calculated the quantum.[596]

392. In its Reply, Spain reiterates its argument that there is an inconsistency between the Decision and the Award with respect to quantification of damages in relation to retroactivity. According to Spain, the Decision declared a breach of the fair and equitable treatment in

---

Kingdom of Spain, ICSID Case No. ARB/14/34, Award of 18 December 2020, ¶¶ 99-100 ("***RWE,* Award**" or "**Award**").

[593] Mem., ¶¶ 195.

[594] Mem., ¶¶ 197, *citing* **RL-0103**, *RWE,* Award, ¶¶ 99-100.

[595] Mem., ¶ 198.

[596] Mem., ¶¶ 196-200, *citing* **R-0376**, Claimants' Comments on the Experts' Joint Report of 1 May 2020, ¶ 27.

Article 10(1) ECT due to the demand for the repayment of sums collected during the period between the entry into force of RD-Act 9/2013 and IET Order 1025/2014 [sic].[597] Contrary to this conclusion, Spain contends, the Award quantifies the damage for the amounts that were not only effectively returned but also were the object of compensation, namely amounts both paid and compensated but not returned by payment.[598]

393. Spain also recalls that the Tribunal considers as a subversion of the previous regime and a breach of the ECT the fact that 10 plants had to pay the State the excess collected during the transitional period. For Spain, this reasoning suggests that ECT is breached with respect to those 10 plants while not breached with respect to the rest of the plants. In that regard, Spain believes that "*if the differentiating element of these 10 plants compared to the rest was that they had repaid part of what they had received through payments, and the Award also recognises damages for compensation, this differentiating element of these 10 plants compared to the rest is blurred*."[599]

394. Furthermore, Spain submits that these inconsistencies cannot be clarified by Claimants despite their attempt to do so in their Counter-Memorial since "*the reasoning… should have been included in the Decision and Award and* [*stated*] *by the members of the Arbitral Tribunal…*"[600] Claimants, Spain contends, failed to align the Decision and the Award. "*What seemed to the Tribunal to be a subversion of the system was the fact that the plants had to make direct payments to the State in reimbursing the overpayment…*" and "*…the reason for finding against the Kingdom of Spain is that… these plants had repaid the subsidies with direct payments*." Spain alleges that although this was agreed in the Award, as it referred only to those 10 plants, the damage was quantified not only based on what was paid directly but also on what was compensated with credits in favour of Claimants.[601]

---

[597] Reply, ¶ 281.

[598] Reply, ¶ 281, *citing* **RL-0103**, *RWE,* Award, ¶ 99.

[599] Reply, ¶ 286.

[600] Reply, ¶¶ 287-288, *citing* **RL-0104**, *RWE,* Decision on Jurisdiction, Liability and Certain Issues of Quantum, ¶ 620.

[601] Reply, ¶ 289.

395. Spain takes issue with Claimants' view that the mere argument that there is absence of a statement of reasons does not suffice unless it is proven that those statements of reasons were essential. For Spain, "[*t*]*his lack of reasoning is not irrelevant, since it refers to a substantial part of the Decision and the Award, such as the Quantum, which has a direct impact, namely that of increasing the quantification of damages by including the compensation for these 10 plants*."[602]

396. Spain agrees with Claimants that the Tribunal was not called upon to give reasons for all aspects of the Award. However, this does not mean that this Committee should disregard that the Tribunal offered contradictory arguments as to what is to be considered as paid. In the same context, the Applicant clarifies that it does not call on the Committee to analyse the quality and correctness of the merits of the Decision and the Award, as argued by Claimants. Instead, Spain wishes to help the Committee see the contradiction between the Decision and the Award.[603] Spain also subscribes to Claimants' view that annulment is premised upon the existence of significant contradictions that lead to cancelling one decision against another.

397. Spain argues that "*with the change of meaning given to the word 'refund' in the Award, in practice the Tribunal considers it in line with the ECT to compensate the overpayments received in the past with the future remunerations in order not to exceed the 7.398% return in 11 plants, but nevertheless considers the compensations made in the other 10 to be illegal*."[604]

398. For Spain, there would have been no contradiction had the Tribunal respected the original meaning of the term "*repayment*", which encompassed only direct payments.[605]

(2) Claimants' Position

399. Claimants are of the view that Spain's argument that the Award must be partially annulled due to a failure to state reasons concerning the Tribunal's findings that damages were due to Claimants and costs ordered, is to be rejected. For Claimants, Spain has failed to satisfy the

[602] Reply, ¶ 290, *citing* Reply Brief in Response to the Application for Annulment, ¶ 180.
[603] Reply, ¶ 292, *citing* Reply Brief in Response to the Application for Annulment, ¶ 188.
[604] Reply, ¶ 294.
[605] Reply, ¶¶ 294-295, *citing* **RL-0185**, *Klöckner*, ¶¶ 115-120.

"*high threshold required under Article 52(1)(e)*."[606] Claimants analyse what the applicable legal standard should be and the reasons why there was neither a failure to state reasons nor any reason now to justify the Award's partial annulment.

400. Claimants contend that there is no defect in the Tribunal's reasoning with respect to its finding concerning compensation for amounts repaid. Claimants reject Spain's views that the Tribunal did not state reasons with respect to the meaning given to the term "*repayment*" in the Decision and Award, or with respect to the number of plants covered by the Tribunal's findings.[607]

401. Claimants recall that the Tribunal concluded in its Award "*that by procuring repayment from 10 RWE plants of sums that had already been paid to those plants in the period between the adoption of RDL 9/2013 and Order IET 1045/2014, the Disputed Measures constituted a compensable breach of the ECT*;"[608] and (ii) that damages for repayments should only apply with respect to 10 of the plants.[609] Claimants also recall that the Tribunal reached that conclusion bearing in mind that "*it was only with respect to 10 plants that there had been 'a total and unreasonable change to, or subversion of, the legal regime'...*"[610] In the Award, the Tribunal explained that Spain procured repayment in respect of these 10 plants, as it appropriated money owed to these plants by virtue of the negative invoices issued, as Claimants have argued.[611]

402. Thus, Claimants conclude that the Tribunal's decision was easy to follow and clear in finding that there was a compensable breach of the ECT with respect to the 10 plants "*that no longer received any premium under the New Regime*."[612] For Claimants, Spain's attempt to "*fabricate an annullable failure to state reasons*" must be dismissed since the Tribunal has

[606] C-Mem., ¶ 175.
[607] C-Mem., ¶ 206.
[608] C-Mem., ¶ 208, making reference to the Award, ¶ 92.
[609] C-Mem., ¶ 209.
[610] C-Mem., ¶ 210.
[611] C-Mem., ¶¶ 211-213.
[612] C-Mem., ¶ 214.

sufficiently stated the reasons underlying its conclusions as follows.[613]

403. *First,* as Claimants note, the Tribunal, in order to determine if the legal regime was unreasonably changed, examined whether the disputed measures had an impermissible retroactive effect. The Tribunal found that the "*New Regime's taking into account of revenues received under Spain's former regulatory schemes was not a breach of the ECT*", contrary to Claimants' submissions.[614] Spain, according to Claimants, accepted this conclusion. On the other hand, the Tribunal found that 10 of RWE's plants had to repay sums to Spain, "*when examining the effect of the 11-month period between Spain's (a) repeal of RD 661/2007… and (b) introduction of the remuneration parameters under the New Regime*…"[615] Claimants argue that this happened because during this period qualifying renewable installations continued to be paid according to the remuneration established under the RD 661/2007 and Spain ordered installations to repay the difference. As a result, these 10 plants not only did not receive any premium under Order IET 1045/2014 (New Regime) but also were obliged to repay the amounts received under the old regime. In this context, Claimants recall that the Tribunal found that this repayment breached Article 10(1) ECT, and that Claimants were entitled to return of all sums repaid.[616] The Tribunal found Spain liable under Article 10(1) ECT, held that the amounts that had to be repaid were subject to verification and precise quantification of the amounts paid, and invited the Parties to reach an agreement on quantum. According to Claimants, the Parties agreed that their experts would produce a joint expert report, and this led to competing visions on the meaning of repayment, an issue which was settled by the Tribunal in the Award.

404. Claimants also take issue with Spain's argument presented as "*the alternative legal interpretation of the Tribunal's decision*". Claimants note that Spain essentially argues that no repayment from any of the plants to Spain ever took place. For Claimants, this is a new argument put forward by Spain, which also is contrary to the conclusions of its own expert, BDO. This argument also disregards that the CNMC, Spain's National Commission on

[613] C-Mem., ¶ 215.
[614] C-Mem., ¶¶ 218-220.
[615] C-Mem., ¶ 221.
[616] C-Mem., ¶¶ 221-222.

Markets Competition, issued negative invoices in confirmation of the due payment and the fact that "*the transfer of money occurred from the plants to the CNMC through CNMC appropriating the cash that these plants were entitled to receive from the sale of electricity they had produced in the months following Order IET 1045/2014.*" Claimants explain that "*the CNMC appropriated cash that the plants had rightfully earned to set it off against the debts these plants owed to the CNMC pursuant to the New Regime*."[617] Claimants' arguments have been confirmed by the Tribunal as it rejected Spain's view and held that it had no doubt that Spain's measures were a form of procuring repayment.[618]

405. Claimants conclude that the Tribunal's reasoning was easy to follow and clear as it went from point A to point B when it stated that "*it makes no difference that the plants did not have to transfer any money to the Respondent*."[619] This reasoning, Claimants further argue, enables the reader to follow the Tribunal's conclusions on points of law and fact, as required.[620] In that regard, Claimants believe that Spain's allegation that the Tribunal should have focused on the amounts effectively paid is a prohibited attempt to overturn the Tribunal's conclusion on a matter that is finally settled.[621]

406. Claimants also address Spain's argument that documentation should be gathered prior to the calculation of damages. For Claimants, this argument cannot amount to a failure to state reasons and justify annulment. Instead, Claimants argue that this issue could be deemed a procedural irregularity that Spain did not raise and cannot put forward at this point. Claimants further allege that the Tribunal's reasoning on this point remains clear. Claimants reject Spain's argument that they submitted "*new figures*" without leave.[622] As Claimants argue, Spain overlooked the fact that Claimants in response to Spain's arguments explained *(i)* that Spain accepted that both Parties were granted ample opportunity to comment on matters; *(ii)* that Claimants referred to the negative invoices to respond to Spain's denial of their

[617] C-Mem., ¶ 228, *citing* Joint Expert Report, 16 April 2020, Table 3; Claimants' Responsive Submission on the Experts' Joint Report, 19 May 2020, ¶¶ 9, 13-14, 15-16.

[618] C-Mem., ¶ 229.

[619] C-Mem., ¶ 231.

[620] C-Mem., ¶ 232, *citing* **RL-0113**, *MINE*, ¶ 5.08.

[621] C-Mem., ¶ 233, *citing* **R-0377**, e-mail from Spain to the Tribunal, 20 May 2020.

[622] C-Mem., ¶ 235, *citing* Claimants' Responsive Submission on the Experts' Joint Report, 19 May 2020, ¶ 14.

existence; *(iii)* that the figures contained in the negative invoices were already known to Spain and the Tribunal since the Parties' experts relied on them for the purposes of the preparation of their Joint Report.[623] The Tribunal, having considered the Parties' communications and their submissions, settled the issue and confirmed Claimants' views on the matter. The Tribunal further acknowledged that there had been no formal objection to the admission of these invoices onto the record of this arbitration and that such an objection would have been deemed untenable.[624]

407. Lastly, Claimants take issue with the fact that Spain disputed the number of plants covered by the Tribunal's Decision and points out that the Tribunal in the Award determined that Spain had breached the ECT with respect to 10 plants only, confirming thus Spain's argument that "*compensation should be limited to the ten plants subject to which the Tribunal's Decision referred*."[625] Again, Claimants are of the view that the Tribunal's reasoning is not hard to follow. *First*, the Tribunal found that Spain breached the ECT with respect to repayment imposed on 10 plants. *Second*, the Award stated that "*this finding applied to the 10 plants because the fact that they were not to benefit from the New Regime and were moreover required to repay sums received under the prior regime amounted to a total and unreasonable change to, or subversion of, the legal regime*". *Then,* the Tribunal noted that there was no basis on which to revisit this determination at the quantum phase, and *lastly* the Award quantified damages due for the repayment obligation imposed on those plants.[626]

408. Claimants also argue that the Tribunal's liability finding was not based "*on the fact that certain plants received* less *subsidies under the New Regime, but that 10 plants had lost their entitlement to* any *incentive* and *were required to make repayment*."[627] The Tribunal also confirmed that "*this was a different matter to its finding on the taking into account of past*

[623] C-Mem., ¶ 236, *citing* **C-0359**, e-mail from RWE to the Tribunal, 20 May 2020.

[624] C-Mem., ¶ 237, *citing* **C-0360**, E-mail from the Tribunal to the Parties, 20 May 2020.

[625] C-Mem., ¶¶ 239-241, *citing* Claimants' Comments on the Experts' Joint Report, 1 May 2020, ¶¶ 17-24 (BDO Report, ¶ 153).

[626] C-Mem., ¶ 242.

[627] C-Mem., ¶ 244.

revenues to calculate (and, in many instances, reduce) future subsidies…"[628] Claimants also argue that the Tribunal's finding is consistent with the Decision and the position of Spain and its experts, Spain having argued that "*there* was *a valid reason to treat these 10 plants separately*."[629]

409. For Claimants, Spain attempts to annul the Award on the basis of an argument that contradicts the position it took in front of the Tribunal. Spain impermissibly changed tack on quantum at the annulment stage.[630]

410. In their Rejoinder, Claimants argue that Spain in its Reply "*continues to gloss over the Tribunal's clear reasoning*" in an attempt to create confusion and contradictions that do not exist. For Claimants, Spain's claim that there is inconsistency between the meaning given to the term "*repayment*" in the Decision and Award is erroneous. Spain misleadingly argues that the Tribunal considered as a subversion of the system the fact that plants had to make direct payments to the State in reimbursing the overpayment. This, Claimants argue, is not what the Tribunal found.[631] In essence, Claimants clarify that the Tribunal found that the fact that Spain had procured repayment in relation to 10 of Claimants' plants is a subversion of the prior regime. The Tribunal also dismissed Spain's argument and did not restrict the scope of its findings on liability to direct payments. Thus, Claimants conclude that "*there was, therefore, no change in the meaning assigned to the term repayment between the Decision and Award*."[632] Claimants note that the Tribunal in both the Decision and the Award confirmed the extent to which Spain had procured repayment by Claimants of sums previously paid since the CNMC had appropriated revenues that the 10 plants would otherwise have been entitled to keep.[633] In this context, Claimants recall, the Tribunal

[628] C-Mem., ¶ 245.
[629] C-Mem., ¶ 246, *citing* Spain's Responsive Observations on the Experts' Joint Report, 19 May 2020, ¶¶ 19-20.
[630] C-Mem., ¶ 247, *citing* **CL-0269**, *Antin*, ¶ 252; **CL-0298**, *Bernhard von Pezold*, ¶ 251.
[631] Rejoinder, ¶ 188.
[632] Rejoinder, ¶ 190.
[633] Rejoinder, ¶ 190.

concluded that "*Spain's focus on whether payment had been effected through a transfer of cash…*" was irrelevant.[634]

411. For Claimants, the Tribunal's reasoning is not contradictory or lacking in explanation. The Tribunal found that there is a compensable breach of the ECT by virtue of Spain's procured repayment and it also confirmed the irrelevance of the fact that the plants did not have to make transfers to Spain and that damages were due.[635] Claimants once again argue that the Tribunal's reasoning enables the reader to follow the reasoning of the Tribunal on the points of fact and law, and thus annulment is not justified.[636]

412. Claimants also contend that the Tribunal's decision to restrict damages to 10 of RWE's plants is in conformity with the Tribunal's findings on retroactivity, contrary to what Spain argues. As Claimants noted in their Counter-Memorial, the Tribunal found that there was a compensable breach of the ECT with respect to the repayment procured from 10 of RWE's plants, which finding is not connected to RWE's retroactivity claim, which was rejected by the Tribunal.[637]

413. Lastly, Claimants take issue with Spain's rejection of the fact that the differentiating element of these 10 plants was that they repaid part of what they had received through payments. For Claimants, what these 10 plants had in common was that they did not receive any benefits under the New Regime, a fact that does not relate to the form that the repayment obligation took.[638] Claimants also remind the Committee that it was on this basis that Spain and its experts had argued before the Tribunal that these plants should be treated separately.[639]

414. In light of the above, Claimants conclude that the Tribunal's reasoning on why damages should be limited to the 10 plants is clear, contains no contradictions and does not justify

[634] Rejoinder, ¶ 191.
[635] Rejoinder, ¶ 192.
[636] Rejoinder, ¶ 193, *citing* **RL-0113**, *MINE*, ¶ 5.08.
[637] Rejoinder, ¶¶ 195-196.
[638] Rejoinder, ¶ 197.
[639] Rejoinder, ¶¶ 198-200.

annulment.[640]

(3) The Committee's Analysis

415. While the facts and the computations involved in the Tribunal's damages calculation are quite complex, the question before this Committee is whether "*a tribunal's conclusion could be followed through the reading of the stated reasons*."[641] Reasons shall have been given for all points that are essential to the outcome of the case and such arguments cannot be contradictory or unintelligible. There is, however, no requirement for the Tribunal to deal with every argument made or every piece of evidence produced by the Parties. It is also not for the Committee to examine the adequacy or persuasiveness of the Tribunal's reasons. All these considerations have been extensively discussed above.

416. When arguing that there is a contradiction between the Decision and the Award, Spain's argumentation appears to evolve around its interpretation of the term "*repayment*". In the Committee's view, however, there appears to be little justification for the interpretation that Spain has adopted of the term repayment as used in the Decision. At no point does the Decision expressly limit 'procurement of repayment' to a repayment by transfer. Furthermore, the Tribunal has expressly and with clear reasoning rejected Spain's interpretation of the Decision:

> "*As a matter of economic reality and, more important, within the meaning of what was ordered by the Tribunal, the repayment of sums can be procured just as readily by deducting such sums from debts that are due as by requiring repayment in the form of a transfer, and the Respondent's so-called "alternative legal interpretation of the Tribunal's Decision" can accordingly be rejected in short order.*"[642]

417. Other *ad hoc* committees have taken the view that genuinely contradictory reasons may cancel each other out and thereby amount to a failure to state reasons.[643] In this case, no genuine contradiction has been established by Spain. The Tribunal has provided a coherent

[640] Rejoinder, ¶¶ 198-200.

[641] **CL-0327**, *SolEs*, ¶80.

[642] Award, ¶ 99.

[643] For example: **RL-0185**, *Klöckner*, referred to by Spain, and **CL-0207**, *Lemire*, referred to by Claimants.

explanation of its determination, which rules out the contradiction that Spain had alleged.

418. Spain has extended its argument by contending that, given the manner in which the Tribunal has interpreted 'repayment' in the Award, there is a contradiction between the Tribunal's finding that the treatment of the 10 plants amounted to a breach of Article 10(1) ECT, and its finding that the treatment of the other 11 plants did not amount to a breach.[644]

419. The Committee, however, cannot identify a genuine contradiction. The position of the 10 plants that were no longer in receipt of a special payment after the Disputed Measures is materially different to the 11 plants that would continue to receive the Special Payment. In the case of the former, it seems that the CNMC deducted the monies from the revenues earned from the sale of electricity on the open market.[645] In the case of the latter, the special payment received under the New Regime was calculated by reference to the sums received under the Old Regime.

420. It is also noteworthy that Spain and its experts in the underlying arbitration argued for a distinction between those plants that had lost any entitlement to a special payment under the New Regime and those that continued to receive the special payment, something that makes this ground for annulment less compelling.

421. In view of the aforesaid, the Committee finds that Spain has not shown that there is a basis to hold that the Award should be annulled for failure to state reasons relative to the Tribunal's damages findings, which claim therefore is dismissed by the Committee.

C. FAILURE TO STATE REASONS IN THE TRIBUNAL'S CONCLUSIONS REGARDING COSTS

(1) The Applicant's Position

422. According to Spain, it is impossible to understand the Tribunal's reasoning on costs. Spain submits that the Tribunal failed to explain why Claimants' costs were deemed reasonable and it committed blatant contradictions when applying the principle that a losing party must pay the costs. Spain notes that one cannot understand how one can start at *Point A.* and end

[644] Reply, ¶ 294.
[645] Award, ¶ 98.

at *Point B*.[646] The Tribunal accepted without any explanation as good legal costs incurred by RWE even though the fees submitted by Claimants amounted to more than double the fees submitted by Spain. Furthermore, the Tribunal ordered the Applicant to pay 50% of Claimants' legal fees and all the arbitration costs despite the fact that it had previously stated that neither Party can be deemed successful.[647] Due to these contradictions and inconsistencies, Spain argues that no reasoning has been given for the decision on costs.[648]

423. In its Reply, Spain acknowledges that Article 61(2) of the ICSID Convention and Rule 28(1) empower the Tribunal to determine the costs of the arbitration and their allocation. Although Spain notes that "their *amount is more than double the fees submitted by the Kingdom of Spain*…", it does not dispute it.[649] Spain also reiterates its position that it is impossible to understand the Tribunal's reasoning with regard to costs, and that the Tribunal reached a contradictory conclusion when deciding on the apportionment of costs, as mentioned in Spain's Memorial.[650]

424. Spain recalls that although the Tribunal noted that neither Party can be seen as wholly successful and that each aspect of the claims was reasonably brought and skilfully and appropriately pursued, it ordered Spain to bear 50% of Claimants' legal fees and costs, in respect of the agreed-by-the-parties principle that a losing party should bear responsibility for costs and the principle that costs follow the event. Spain reiterates that it is not possible to follow the Tribunal's reasoning on this point.[651]

425. Lastly, Spain rejects Claimants' argument that it omitted key elements when describing the reasoning of the Tribunal and justifies the reference to the views expressed by Arbitrator Joubin-Bret in footnote 141 of the *RWE* Award.[652] Spain contends that its arguments arise out of the *RWE* Award itself and rejects Claimants' attempt to devalue this argument. As

[646] Mem., ¶ 204, *citing* **RL-0104**, *RWE,* ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and certain Issues of Quantum, ¶¶ 141, 144.

[647] Mem., ¶¶ 201-205, *citing* **RL-0103**, *RWE,* Award, ¶¶ 141, 144, 145.

[648] Mem., ¶ 205.

[649] Reply, ¶ 297.

[650] Reply, ¶ 301.

[651] Reply, ¶ 302.

[652] Reply, ¶ 303.

Spain notes, it "*is not just a difference of opinion that the Claimant is trying to exploit, it is an unreasoned conclusion by the Tribunal*."[653] It states that since neither Party has been a complete winner and the Claimants have only been awarded 10% of the claim, it is not understandable that Spain has to pay 50% of the fees.[654] Claimants, Spain argues, have omitted any reference to the fact that RWE has only recovered 10% of the amounts claimed.[655]

426. Spain concludes that the Tribunal's decision on costs does not appear to be reasoned and should be annulled.[656]

(2) Claimants' Position

427. Claimants reject Spain's arguments that the Tribunal's reasoning in relation to its costs was impossible to understand.[657] For Claimants, both the Tribunal's findings that RWE's costs were reasonable, and that Spain had to bear 50% of the Claimants' costs, are adequately reasoned.

428. As regards the Tribunal's finding that RWE's costs were reasonable, Claimants argue that Spain did not make any submission that Claimants' costs were not reasonable and as a result the Award cannot be annulled "*with respect to an issue that Spain had not raised before the Tribunal*."[658] Spain also misleadingly argues that the Tribunal did not explain why Claimants' costs were reasonable. Claimants recall that the Tribunal noted that "*given the scale of this arbitration, such costs were reasonably incurred*." For Claimants, the Tribunal was able to refer to the scale of the underlying arbitration to determine the reasonableness of the costs, and indeed the scale of this arbitration justifies these costs.[659] Claimants also argue that RWE's legal fees were plainly reasonable on their face, especially in light of similar

[653] Reply, ¶ 304.
[654] Reply, ¶ 304.
[655] Reply, ¶¶ 305-309, *citing* **RL-0103**, *RWE,* Award, ¶¶ 142, 144.
[656] Reply, ¶ 309.
[657] C-Mem., ¶ 249.
[658] C-Mem., ¶ 251, *citing* **R-0378**, Spain's submission on costs, 26 February 2019.
[659] C-Mem., ¶ 252, *citing* **CL-0277**, *Churchill*, ¶ 254; **CL-0229**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,* ICSID Case No. ARB/14/11, Final Award, 31 May 2019, ¶ 21.

cases, and thus the Tribunal did not have to embark on an elaborate appraisal of RWE's legal fees.[660]

429. As regards the Tribunal's finding that Spain should bear 50% of RWE's costs, Claimants reject Spain's argument that the Tribunal "*committed blatant contradictions and inconsistencies when applying the principle that the losing party must pay costs*."[661] Claimants contend that Spain has misunderstood the Tribunal's reasoning and omitted key elements when stating its case. Part of Spain's argument is the fact that the Tribunal allegedly granted Claimants 10% of the claimed quantum. However, Claimants note that this is not the Tribunal's conclusion, but the different view expressed by Ms Joubin-Bret at footnote 141 of the Award. From this, Claimants understand that Spain is concerned with "*a difference of opinions between the majority of the Tribunal*…", a fact which does not justify ICSID annulment. If Spain's view were to prevail, then "*the mere existence of a dissenting opinion would always result in annulment*."[662]

430. Claimants also point out that Spain has ignored the fact that the Tribunal ordered the Parties to bear their own costs for the quantum phase. "…*the costs order that Spain takes issue with is only that covering the determination on jurisdiction and liability*."[663] However, Claimants remind the Committee that their claims succeeded in establishing the Tribunal's jurisdiction and Spain's liability for breaching the ECT, a circumstance also held out by the Tribunal in its reasoning.[664] Claimants note that Spain did not cite where the Tribunal concluded why costs were awarded notwithstanding that "*neither Party was 'wholly successful'*."[665] For Claimants, the Tribunal's reasoning can be followed by any reader: The Tribunal concluded that *(i)* it has broad discretion in allocating the costs (Article 61(2) of the ICSID Convention); *(ii)* the Parties adopted the principle that a losing party bears the costs; *(iii)* that neither Party can be seen as wholly successful; *(iv)* that Claimants were forced to initiate lengthy and costly proceedings to establish Spain's liability under the ECT; *(v)* that Spain breached the

[660] C-Mem., ¶ 254.
[661] C-Mem., ¶ 255.
[662] C-Mem., ¶ 257.
[663] C-Mem., ¶ 258.
[664] C-Mem., ¶ 258.
[665] C-Mem., ¶ 259.

ECT and harmed Claimants and should bear 50% of Claimants' costs for jurisdiction and liability.[666]

431. In their Rejoinder, Claimants reiterate their position that Spain's arguments do not provide any basis on which annulment of the Award could be justified. For Claimants, Spain argues that the Tribunal's reasoning is impossible to understand despite the fact that it has accepted that the Tribunal had full discretion to allocate the costs. Spain has also failed to meet the high threshold required to show that the Tribunal failed to reason its costs order.[667] It is not uncommon that a tribunal's reasoning does not extend to the area of costs so that it may even be doubted, in Claimants' view, whether Article 52(1)(e) of the ICSID Convention was intended to embrace this issue. Claimants also repeat that Spain bases its arguments on a separate view expressed by Ms Joubin-Bret at footnote 141 of the Award in an attempt to annul the Award by capitalizing on a view which is not the reasoning adopted by the majority and which renders Spain's claim entirely baseless.[668]

432. Claimants also insist that the Tribunal's costs order does not cover the quantum phase. The Tribunal ordered Spain to bear 50% of Claimants' costs for the jurisdiction and liability phases and the Parties to bear their own costs for the quantum phase. Thus, Spain's argument that Claimants received a favourable costs order on quantum is clearly "*wide off the mark.*"[669]

(3) The Committee's Analysis

433. As stated in ICSID Background Paper on Annulment the requirement in Article 48(3) of the ICSID Convention to state reasons "*is intended to ensure that parties can understand the reasoning of the Tribunal*"[670] while it is not relevant whether the reasoning is correct or

[666] C-Mem., ¶ 260.

[667] Rejoinder, ¶ 202, *citing* **CL-0208**, *CDC*, ¶ 87.

[668] Rejoinder, ¶ 203.

[669] Rejoinder, ¶ 204.

[670] **RL-0105**, ICSID Background Paper on Annulment, ¶ 105, relying on ***MINE***, ¶ 5.09 ("*the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*"); *Vivendi I*, ¶ 64; *Wena*, ¶ 81; *Transgabonais*, ¶88; *El Paso*, ¶ 220; *Kılıç*, ¶ 64; *Iberdrola*, ¶ 124; *Lemire*, ¶ 277; *Libananco*, ¶ 192; *Occidental*, ¶ 66; *Tulip*, ¶¶ 98, 104; *Total*, ¶ 267; *Dogan*, ¶¶ 261-263; *Micula*, ¶¶136, 198; *Lahoud*, ¶ 131; *TECO*, ¶¶ 87, 124.

convincing.[671]

434. Considering that a tribunal has wide discretion both to allocate costs, which is accepted by both Parties, and to structure its reasoning, the Committee finds that the basis for the Tribunal's allocation of costs in the Award between the two stages of the proceedings is understandable and adequately reasoned.

435. There is nothing contradictory in ordering costs based upon the respective successes in the jurisdictional and liability phase, on the one hand, and the phase on quantum on the other. The Tribunal's statement with respect to the amount of Claimants' costs that "*given the scale of this arbitration, such costs were reasonably incurred*"[672], is certainly "*comprehensible*" as argued by Claimants[673] without any need to be comprehensive. The Committee also takes note that Spain did not raise the reasonability of Claimants' cost submission before the Tribunal.[674]

436. It follows from the above findings that the Committee sees no basis for annulment in the Tribunal's alleged failure to state reasons for its cost order, which claim by Spain therefore is dismissed.

VIII. COSTS

A. THE APPLICANT'S COST SUBMISSIONS

437. In its statement of costs in these annulment proceedings, Spain provides the following breakdown of its costs:

[671] **RL-0105**, ICSID Background Paper on Annulment, ¶ 105, relying on *Klöckner I*, ¶ 129; *MINE*, ¶¶ 5.08 & 5.09; *Vivendi I*, ¶ 64; *Wena*, ¶ 79; *CDC*, ¶¶ 70 & 75; *MCI*, ¶ 82; *Fraport*, ¶ 277; *Vieira*, ¶ 355; *Caratube,* ¶ 185; *Impregilo*, ¶ 180; *SGS*, ¶ 121; *Iberdrola*, ¶¶ 76-77; *Lemire*, ¶ 278; *Occidental*, ¶ 66; *Tulip*, ¶¶ 99, 104; *EDF*, ¶ 328; *Total*, ¶ 271; *Micula*, ¶ 135; *TECO*, ¶ 124.

[672] C-Mem., ¶ 252, quoting from the Award, ¶ 145.

[673] C-Mem., ¶ 192.

[674] C-Mem., ¶ 251.

Category	Amount
ICSID fees and Advance Payments	557,571.64 EUR
Legal fees directly incurred by the Kingdom of Spain	853,000.00 EUR
Translations	3,263.62 EUR
Travel Expenses	6,517.43 EUR
Other expenses	51,585.00 EUR
TOTAL AMOUNT	1,471,937.69 EUR

438. Spain requests that the Committee order Claimants to pay all the costs of the present proceedings, including Spain's costs amounting to 1,471,937.69 EUR, together with post award interest, at a compound rate to be determined by the Committee.[675]

B. CLAIMANTS' COST SUBMISSIONS

439. In their statement of costs,[676] Claimants provide the following breakdown of their costs:

Category	Amount
Allen & Overy's legal fees up to 13 October 2022	646,722.88 EUR
Costs connected with attendance at the Hearing on Annulment, document processing and printing, transportation costs, hotels, meals, telephone charges and incidental third-party expenses.	16,896.70 EUR

[675] Reply, ¶ 368(c). Respondent's Statement of Costs dated 13 October 2022, and reconfirmed on 10 May 2023, ¶¶ 10-11.

[676] Claimants' Statement of Costs dated 13 October 2022, as updated on 10 May 2023.

Translation services	6,589.00 EUR
Legal fees incurred in addressing the Swedish Judgments which Spain introduced onto the record in January 2023	20,982.60 EUR
Additional legal fees incurred in the annulment proceedings between 13 October 2022 and 10 May 2023	5,427.44 EUR
TOTAL AMOUNT	696,618.62 EUR

440. Claimants submit that (i) Article 52(4) of the ICSID Convention provides that "[t]*he provisions of* […] *Chapters VI and VII shall apply* mutatis mutandis *to proceedings before the Committee*"; (ii) Chapter VI of the Convention contains Article 61, rendering it equally applicable to annulment proceedings; and (iii) ICSID Arbitration Rule 47(1)(j), applied by virtue of Rule 53, gives the Committee discretion to allocate all costs of the proceeding between the Parties as it deems appropriate.[677]

441. Claimants request that the Committee grant a costs award pursuant to Article 61(2) of the ICSID Convention, ordering Spain to bear the costs of this annulment proceeding, as well as Claimants' costs for legal representation and expenses, in the amount of 696,618.62 EUR.[678]

C. THE COMMITTEE'S DECISION ON COSTS

442. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

[677] Claimants' Statement of Costs dated 13 October 2022, ¶¶ 12-13.

[678] Claimants' Statement of Costs dated 13 October 2022, ¶ 15, as updated on 10 May 2023.

443. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the proceeding, including legal fees and other costs, between the Parties as it deems appropriate.

444. The Committee has dismissed Spain's claims for annulment in their entirety and Claimants are successful on all points in dispute. A large portion of the submissions in these proceedings have related to the intra-EU objection and to Spain's allegation that EU law should have been applied to jurisdiction and merits. Much of the evidence, including the Expert Reports, and in particular the many cases that Spain has submitted as legal authorities herein, also at a late stage of the proceedings with leave from the Committee, have also related to EU law, and have, after careful analysis by the Committee, not proven to be material to the outcome. Much of the time invested in these proceedings by the Parties and the Committee alike has been spent addressing questions of EU law, which was ultimately deemed not applicable herein. This consideration, in the Committee's view, in addition to the fact that Claimants are the successful party, warrants for all annulment costs to be borne by Spain, including the legal fees and expenses of Claimants.

445. As to the amount of Claimants' legal fees and expenses, the Committee finds them reasonable and justified as such and also with a view to having been generated to a great extent by engagement with EU law against their own position *ab initio* that it does not apply. In further application of the principle that costs follow the event, the Committee has also had regard to the fact that the stay of enforcement of the Award was lifted at Claimants' application.

446. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee Members' fees and expenses	578,241.91
ICSID's administrative fees	126,000.00

Direct expenses	106,994.67
Total	**811,236.58**

447. The above costs have been paid out of the advances made by Spain as the Applicant Party pursuant to Administrative and Financial Regulation 14(3)(e).[679]

448. Accordingly, the Committee orders Spain to bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, and to pay EUR 696,618.62 to Claimants to cover in full Claimants' legal fees and expenses.

IX. DECISION

449. For the reasons set forth above, the Committee hereby unanimously decides as follows:

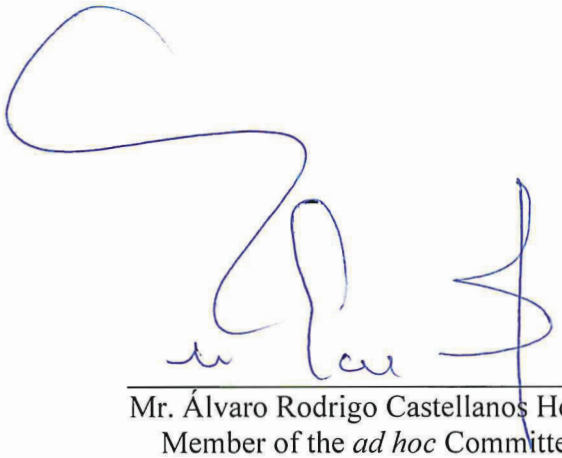
(1) Spain's application for annulment of the Award dated 18 December 2020 is dismissed in its entirety;

(2) Spain shall bear the entire costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses;

(3) Spain shall pay EUR 696,618.62 to Claimants for their full legal fees and expenses incurred in this annulment proceeding; and

(4) All other arguments and requests are dismissed.

[679] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance will be reimbursed to Spain.



Mr. Álvaro Rodrigo Castellanos Howell
Member of the *ad hoc* Committee
Date: 18 March 2024

Mr. Colm Ó hOisín
Member of the *ad hoc* Committee
Date:

Ms. Carita Wallgren-Lindholm
President of the *ad hoc* Committee
Date:

Mr. Álvaro Rodrigo Castellanos Howell
Member of the *ad hoc* Committee
Date:

Mr. Colm Ó hOisín
Member of the *ad hoc* Committee
Date: 19 March 2024

Ms. Carita Wallgren-Lindholm
President of the *ad hoc* Committee
Date:

Mr. Álvaro Rodrigo Castellanos Howell
Member of the *ad hoc* Committee
Date:

Mr. Colm Ó hOisín
Member of the *ad hoc* Committee
Date:

Ms. Carita Wallgren-Lindholm
President of the *ad hoc* Committee
Date: 20 March 2024