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SVEA COURT OF
APPEAL
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Case T 1626-19; The Kingdom of Spain ./ ForeSight Luxembourg Solar 1 S.à.r.l. et al

With reference to the Court of Appeal's order of 24 May 2019 (file appendix 68) and thereafter granted time extensions, the Kingdom of Spain hereby submits a brief in reply to Foresight Luxembourg Solar 1 S.à.r.l. et al's statement of defence of 10 May 2019 (file appendix 40) (the "Statement of Defence").

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[orig. p. 46]

H. REQUEST FOR PRELIMINARY RULING

18 Spain's proposals for questions to the CJEU in the application for summons

[...]

18.1 Question 1 – the interpretation of Article 26 ECT

[...]

[orig. p. 47]

[...]

Question 1

- 1) Shall Article 26 ECT, by which a Contracting Party gives its unconditional consent to the submission of a dispute between that Contracting Party and an investor from another Contracting Party regarding the latter's investments in the former's Area to international arbitration, be interpreted as applicable to a dispute between an investor from one EU [orig. p. 48] Member State and another EU Member State regarding an investment by the former in the latter?

18.2 Questions 2, 3 and 4 – whether Articles 4.3 and 19 TEU and 267 and 344 TFEU preclude a provision such as Article 26 ECT

[...]

Questions 2 – 4:

If question 1 is answered in the [affirmative (corrected after submittal)]:

- 2) Does Article 344 TFEU preclude the application of a provision in an international agreement such as the arbitration clause in Article 26 ECT to a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter?
- 3)
- 4) Do the Articles 19 TEU and 267 TFEU preclude the application of a provision in an international agreement such as the arbitration clause in Article 26 ECT to a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter?

[orig. p. 49]

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- 5) Do Article 4.3 TEU and the principle of sincere cooperation preclude the application of a provision in an international agreement such as the arbitration clause in Article 26 ECT to a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter?

[...]

19 Proposal for new and further questions to the CJEU

[...]

19.1 Questions 5, 6 and 7 – state aid

[...]

Question 5

263. Does an arbitral award, by which the arbitral tribunal awards damages as compensation for the repeal of an aid measure implemented in violation of the standstill obligation in Article 108.3 TFEU, in itself constitute a state aid measure?

[orig. p. 50]

Question 6

264. Must a national court, which is seized to rule on a petition to declare an arbitral award invalid, grant the petition if the arbitral award violates the standstill obligation in Article 108.3 TFEU, if the court according to internal procedural provisions must grant a petition to declare an arbitral award invalid if the arbitral award or the manner in which the arbitral award arose is manifestly incompatible with national public policy?

Question 7

265. Must a national court, which is seized to rule on a petition to declare an arbitral award invalid, grant the petition if the arbitral award violates the standstill obligation in Article 108.3 TFEU, if the court according to internal procedural provisions must grant a petition to declare an arbitral award invalid if the arbitral award includes the determination of an issue which may not be decided by arbitrators?

19.2 Question 8 –Articles 4.3 and 19 TFEU and 267 and 344 FEUF and public policy

[...]

Question 8

- 5) [sic] Must a national court, which is seized to rule on a petition to declare an

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arbitral award invalid, grant the petition if the arbitral award has been issued on the basis of Article 26 ECT in a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter, if the court according to national procedural provisions must grant a petition to declare the award invalid if the arbitral award or the manner in which the arbitral award arose is manifestly incompatible with national public policy?

19.3 **Question 9 –Articles 4.3 and 19 TFEU and 267 and 344 FEUF and arbitrability**

[...]

[orig. p. 51]

Question 9

- 6) [sic] Must a national court, which is seized to rule on a petition to declare an arbitral award invalid grant the petition if the arbitral award has been issued on the basis of Article 26 ECT in a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter, and the court according to national procedural provisions must grant a petition to declare an arbitral award invalid if the arbitral award includes the determination of an issue which may not be decided by arbitrators?

19.4 **Question 10 – the applicability of national preclusion rules**

[...]

Question 10

- 7) [sic] In a situation where a national procedural provision prevents setting aside an arbitral award because one party, which is an EU Member State, is precluded from invoking that article 26 ECT violates Articles 4.3 and 19 TEU and Articles 267 and 344 TFEU in a dispute between an investor from one EU Member State and another EU Member State regarding an investment by the former in the latter, do the primacy of EU law and the principle of effectiveness require that such a [national] provision be set aside by the national court?