IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HYDRO ENERGY 1 SARL AND HYDROXANA SWEDEN AB,

Petitioners,

v.

KINGDOM OF SPAIN,

Respondent.

Civil Action No 1:21-cv-02463-RJL

Expert Declaration of Conor Quigley

I. INTRODUCTION

1. I, Conor Quigley Q.C., make this declaration based upon my personal knowledge, except as to those statements made upon information and belief, and I believe all such statements, and the information upon which they are based, to be true.

2. I am a British national, born on February 21, 1958.

3. I am a barrister, called to the Bar of England and Wales in 1985 by the Honourable Society of Gray's Inn, London. In 2003, I was admitted to the Inner Bar as Queen's Counsel. I specialise in the area of European Union ("EU") law, particularly as an expert in EU State aid law. I am the author of a leading textbook, *European State Aid Law and Policy*, (3rd edition, 2015, Hart/Bloomsbury Publishing, Oxford). I am a Visiting Research Fellow at the Institute of European and Comparative Law at the University of Oxford. I am also a Visiting Fellow in the Centre of European Law, King's College London. My CV is attached as Exhibit 1.

4. I have no familial or business relationship or affiliation with any of the parties to the above-captioned matter. I have never represented any of them in any capacity.

5. Gibson, Dunn & Crutcher LLP, counsel to HYDRO ENERGY S.A.R.L. and HYDROXANA SWEDEN AB ("Petitioners"), has invited me to submit an expert declaration in

this action to enforce the arbitral award rendered in *Hydro Energy 1 S.A.R.L. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42 (Aug. 5, 2020) (the "Award").

6. My expertise is restricted to EU Law and relevant public international law. I am asked on behalf of the Petitioners to address only the State aid issues arising in these proceedings. I do not express an opinion on any other issues or law in this declaration.

7. I am being compensated at a rate of £1,000 per hour to prepare this expert declaration and, if required, to testify in this matter.

8. I have previously submitted reports on EU State aid law in support of the Petitioners in three other proceedings in this District for enforcement of foreign arbitral awards:

a. *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, Case No. 1:18-cv-1686-CKK;

b. *Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. v. Kingdom of Spain*, Case No. 1:18-cv-01753-EGS; and

c. *RREEF Infrastructure (G.P.) Ltd and RREEF Pan European Infrastructure Two v Kingdom of Spain*, Case No. 1:19-cv-03783-CJN.

9. In addition to basing my opinion on my existing knowledge of the topic of EU State aid law, counsel for the Petitioners has provided me with the following materials:

a. *Hydro Energy 1 SARL and Hydroxana Sweden A v Spain*, ICSID Case No. ARB/15/42, Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction (Feb. 24, 2017);

b. *Hydro Energy 1 SARL and Hydroxana Sweden A v Spain*, ICSID Case No. ARB/15/42, Spain's Rejoinder on the Merits and Reply on Jurisdiction (Feb. 16, 2018);

c. *Hydro Energy 1 SARL and Hydroxana Sweden A v Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (Mar. 9, 2020);

d. Memorandum of Law in support of the Kingdom of Spain's Motion to Dismiss the Petition or Stay the Proceedings (Feb. 24, 2022), ECF No. 12-1;

e. Declaration of Professor Steffen Hindelang in support of the Kingdom of Spain's Motion to Dismiss (Feb. 24, 2022) ("Hindelang Declaration"), ECF No. 12-2; and

f. Brief for the European Commission on behalf of the European Union as amicus curiae in support of the Kingdom of Spain (Mar. 17, 2022), ECF No. 16-1.

10. The Kingdom of Spain, in its Memorandum in support of its Motion to Dismiss the Petition, argues, in relation to State aid, first, that payment of the Award is unlawful because it would (i) constitute State aid/subsidies under EU law that has not been approved by the European Commission (the "Commission") and which Spain is therefore prohibited from paying and (ii) compel Spain to violate a decision of the Court of Justice of the European Union ("CJEU").[1] Spain argues that the Commission has the sole authority to permit an EU Member State to pay such subsidies, and that the Commission's Decision 2017/7384 of November 17, 2017 is binding in the present proceedings. This Decision purportedly determined that Spanish subsidies for renewable energy production constitute State aid within the meaning of Article 107(1) TFEU and that Spain's implementation of the subsidy regime was in breach of Article 108(3) TFEU. Secondly, Spain argues that any compensation that an Arbitration Tribunal, pursuant to the Energy Charter Treaty, were to grant to an investor would constitute in and of itself State aid.[2] Equally, the European Commission asserts that enforcement of the Award would place Spain in violation of the EU State aid rules and that the Spanish support scheme at issue has been held to constitute State aid by the CJEU in the *Elcogas* case and by the Commission itself in the Decision of November 17, 2017. In addition, Spain argues that in Decision SA.54155 of July 19, 2021, the Commission held as regards the *Antin* case that enforcement of an Award constituted State aid.[3]

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[1] Memorandum of Law in Support of the Kingdom of Spain's Motion to Dismiss the Petition ("Spain's Memorandum"), ECF No. 12-1 at 11.

[2] *Id*.

[3] European Commission's *Amicus Curiae* Brief, ECF No. 17 at 25.

Professor Hindelang, who has submitted an expert opinion in support of Spain's Motion to Dismiss in this case, asserts that the Decision of November 17, 2017 concerns arbitrations such as that initiated by Hydro Energy, such that any compensation ordered by the Tribunal would be notifiable State aid and, in particular, is financed through Spain's State resources and is imputable to the State.[4]

11. I have been asked to give my expert opinion on the following State aid under EU law arising out of these arguments:

a. What is the proper scope of the EU State aid rules under EU law;

b. What is the proper interpretation and effect in the present proceedings of the Commission's Decision of November 10, 2017 on Spain's renewable energy regulation scheme;

c. What is the proper interpretation and effect in the present proceedings of the Commission's Decision of July 19, 2021 on the arbitration award to Antin;

d. Whether the Tribunal encroached on the European Commission's competence to review State aid;

e. Whether payment of the Award or a judgment enforcing the Award constitutes unlawful State aid; and

f. Whether Spain is precluded from implementing the Award through payment of the compensation.

12. As a preliminary observation, it must be noted that Spain raised state aid arguments in its briefing during the Arbitration, claiming that because the dispute involved, in its opinion, issues of EU law, such as State aid, the Tribunal lacked jurisdiction. Spain's Counter-Memorial, ¶¶ 97, 965–968; Spain's Rejoinder, ¶¶ 79, 85–91, 97. The Tribunal rejected Spain's arguments. Decision on Jurisdiction, ¶¶ 183, 193, 213, 502.

[4] Hindelang Declaration, ECF No. 12-2 ("Hindelang Decl.").

II. EXECUTIVE SUMMARY

13. Article 107(1) TFEU provides that State aid is the granting of a selective economic advantage by an EU Member State to a beneficiary that distorts competition insofar as it affects trade between Member States. The Commission, in its decisions of (i) November 10, 2017 on the Spanish renewable energy regulatory scheme and (ii) July 19, 2021 on the *Antin* award, did not make any finding capable of binding the Tribunal in the *Hydro Energy* case to the effect that the award of compensation constituted State aid. Moreover, the Tribunal did not make any finding either as to whether the compensation amounted to State aid or as to whether any such compensation constituted aid that is compatible with the EU's internal market pursuant to Article 107(3) TFEU. It follows that the Tribunal did not encroach on the European Commission's competence to review State aid.

14. The compensation in the Award ordered by the Tribunal to be paid by Spain to the Petitioners does not constitute State aid. State aid entails a gratuitous advantage granted by and imputable to the State, which is fundamentally different from the award by the Tribunal of damages for breach of obligations under Article 10(1) of the Energy Charter Treaty. Payment of the Award or a judgment enforcing the Award is not imputable to the State (Spain) and does not constitute incompatible and/or unlawful State aid.

15. Equally, any assertion that Spain is now precluded from paying the Award as a result of the decision of November 10, 2017 is wrong.

III. STATE AID RULES UNDER THE TFEU

16. EU State aid law is encapsulated in Articles 107 and 108 TFEU.[5] Article 107 sets out substantive State aid rules. Article 108 contains the procedural rules for the enforcement of Article 107. The procedural rules in Article 108, as developed over the years by the European Commission ("the Commission") and through the case law of the Court of Justice of the European

[5] *See* Treaty on the Functioning of the European Union ("TFEU"), arts. 107-108, ECF No. 16-12, at 12–14.

Union ("CJEU"), are further elaborated in the Procedural Regulation, Council Regulation (EU) 2015/1589.[6]

17. Article 107(1) provides that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

18. Article 107(3)(c) provides that certain aid "may be considered compatible with the internal market" including "aid to facilitate the development of certain economic activities . . . where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

19. Article 108(3) provides that the Commission must be informed in advance of any plans to grant aid.

20. Pursuant to Article 108(3), the Commission must make a preliminary assessment of the State measure. Following that preliminary assessment, the Commission must make a decision finding either: (i) that the measure does not amount to State aid; or (ii) that the measure amounts to State aid, but is clearly compatible with the internal market; or (iii) that the Commission has serious doubts that the measure is compatible with the internal market.[7]

21. The Commission has no power, at the end of the preliminary stage, simply to declare that a measure is State aid, without more, or to take a final negative decision that State aid has been awarded that is incompatible with the internal market. Where, at this stage, the Commission concludes that it has serious doubts as to the compatibility of the aid, it must open a formal investigation and invite comments from interested parties pursuant to Article 108(2).[8] The formal investigation requires the Commission to publish in the *Official Journal of the European*

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[6] *See* Procedural Regulation, Council Regulation (EU) 2015/1589, 2015 O.J. (L 258) 9, http://tiny.cc/mzdarz ("Procedural Regulation").

[7] *See id.*, art. 4.

[8] *See id.*, art. 6.

Union a summary of its initial conclusions and concerns and invite comments from interested parties.[9] Interested parties include supposed beneficiaries of the supposed aid scheme, the Member State concerned, other persons such as competitors of the supposed beneficiaries and other Member States. The formal investigation procedure allows all of these parties to take a full part in the Commission's assessment. This is mandatory and may not be avoided by the Commission. Comments from interested parties may well lead the Commission to change its preliminary views, in particular to find that the measure in question does not constitute State aid at all or that it is indeed compatible with the internal market.

22. Following the formal investigation, the Commission must make a decision pursuant to Article 108(2) TFEU finding either: (i) that the measure does not amount to State aid; or (ii) that the measure amounts to State aid, but is compatible with the internal market (possibly with conditions); or (iii) that the measure is incompatible with the internal market and may not be implemented.[10] This decision may only be taken if the procedural requirements concerning interested parties have been complied with. Again, the Commission has no power to take a decision merely stating that the measure in question constitutes State aid, without more.

23. Aid put into effect without having been first approved by the Commission as being compatible with the internal market is categorised as "illegal aid."[11] Thus, there is a distinction, which must be clearly understood, between the notions of "incompatible" State aid and "illegal" State aid. Compatibility/incompatibility is a matter of substantive compatibility with the internal market pursuant to Article 107, whereas legality/illegality concerns compliance with the procedural requirements of Article 108. The illegality is the failure of the Member State to notify the aid. There is no connotation to be derived from this that the alleged beneficiary of the aid has itself acted in any way unlawfully. In other words, it is not the beneficiary who has breached Article 108(3) TFEU, but solely the Member State.

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[9] *Id.*

[10] *See id.*, art. 9.

[11] *Id.*, art. 1(f) (quotation marks omitted).

24. Even where a measure constituting State aid has been put into effect without Commission approval, the Commission remains entitled (and indeed bound) to investigate the measure as to its compatibility with the internal market where it comes to its attention.

25. Article 107(1), coupled with Article 108(3), is directly effective, so that it may be applied by a national court or tribunal. This means that a court or tribunal may consider the status and effect of a measure, so as to determine whether or not it amounts to State aid within the scope and meaning of Article 107(1), and whether or not it has been notified to the Commission within the meaning of Article 108(3) and/or put into effect prior to approval being forthcoming from the Commission, so as to determine whether the aid is illegal. A national court has no jurisdiction to determine whether a measure granting State aid is compatible with the internal market pursuant to Article 107(3), which is solely for the European Commission to determine.

IV. THE COMMISSION'S DECISION OF NOVEMBER 10, 2017 ON SPAIN'S RENEWABLE ENERGY REGULATORY SCHEME

26. Spain states that on November 10, 2017 the European Commission issued a binding decision regarding Spain's regulatory scheme for providing support in the electricity sector.[12] Spain claims, first, that this Decision "determined that the subsidies for renewable energy production – the ones that formed the basis of Petitioners' claim in the underlying arbitration – constitute State aid within the meaning of Article 107(1) TFEU" and that it "also determined that Spain's implementation of the subsidy regime, in part because it benefited investors like Petitioners, was 'in breach of Article 108(3) TFEU.'"[13] Second, Spain asserts that "the Commission explained that 'any compensation which an Arbitration Tribunal were to grant to an investor' in respect of the subsidies that were the subject of Spain's regulatory reforms in the energy sector 'would constitute in and of itself State aid'. . . . As a result, Spain, as an EU Member

[12] *See* European Commission Decision on State Aid SA.40348 (2015/NN), Spain: Support for electricity generation from renewable energy sources, cogeneration and waste, 2017 O.J. (C442) (Nov. 11, 2017), ECF No. 16-61 ("Commission's Decision").

[13] Spain's Memorandum at 11.

State, cannot pay any such award without the European Commission's prior review and authorization."[14]

27. In my opinion, this wholly misconstrues the nature of that Decision. Spain seeks to give the impression that the Commission assessed the regulatory scheme applicable to the dispute that formed the basis of the claim in the proceedings before the Tribunal. However, the regulatory scheme assessed by the Commission was not that applicable to the dispute. On the contrary, the Decision was taken pursuant to Article 108(3), following a preliminary assessment into the specific notified measures, which consisted solely of the specific remuneration scheme adopted by Spain in 2013 and 2014 (the "2013-14 Scheme").[15] The Commission found, following its preliminary assessment, that the 2013-14 Scheme was compatible with the internal market.[16] Therefore, the Commission did not open a formal investigation under Article 108(2) TFEU into the measures constituting the 2013-14 Scheme.

28. As regards Spain's assertion that the Decision determined that the implementation of the subsidy regime was in breach of Article 108(3) TFEU, this was a finding by the Commission solely as regards the premature implementation of the 2013-14 scheme, which was not notified until December 22, 2014. The breach of Article 108(3) TFEU was in relation to the implementation of the 2013-14 scheme prior to its notification and subsequent approval on November 10, 2017. There was no finding of any putative breach of Article 108(3) TFEU in relation to the earlier regulatory scheme.

29. The notified measures, which are the subject of the Commission's assessment in the Decision of November 10, 2017, did not include the premium economic scheme introduced by Spain in 2007-2008, and governed by Royal Decrees 661/2007 and 1578/2008 (the "2007-08 measures"). Nor did the Commission examine or assess whether there was any alleged aid arising out of the Award of compensation by the Tribunal.

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[14] *Id*. at 11–12.

[15] Commission's Decision ¶¶ 1, 6.

[16] *Id*. ¶ 34.

30. Moreover, despite the fact that Spain did not notify the Commission of the 2007-08 measures, the Commission would have been entitled of its own motion to investigate the 2007-08 measures as possible aid. However, the Commission did not use its procedural powers under Article 108 or the Procedural Regulation to investigate those measures. Because the Commission did not undertake to assess the 2007-08 measures, it could not lawfully conclude that they constituted aid that was incompatible with the internal market. Such a finding could only have been made following the opening of a formal investigation and calling for comments from interested parties, thereby permitting those interested parties to make known their views, which would have to be taken into account in the Commission's final decision.[17]

31. The Commission's Decision stated: "As Spain has decided to replace the premium economic scheme with the notified aid measure it is not relevant for the scope of this decision to assess whether the originally foreseen payments under the previous schemes would have been compatible or not."[18] It follows that the Commission expressly did not take the opportunity to assess whether the 2007-08 Scheme under RD 661/2007 constituted State aid and whether any such putative aid was compatible or incompatible with the internal market.

32. The Commission went on to comment on the fact that a number of investors had initiated investor-State arbitrations against Spain on the basis of the Energy Charter Treaty ("ECT") against the changes brought about in 2013-14 Scheme. The Commission proffered the view that "there is also on substance no violation of the fair and equitable treatment provisions" under EU law.[19] The Commission reached that conclusion on the basis that "in the specific situation of the present case Spain has not violated the principles of legal certainty and legitimate expectations under Union law" and that "the principle of fair and equitable treatment cannot have

[17] *See* Procedural Regulation, art. 6.

[18] Commission's Decision, ¶ 156.

[19] *Id*. ¶ 164.

a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme."[20]

33. It must be recognized, however, that the Commission's finding on State aid in this Decision can apply only to the 2013-14 Scheme, which in any event was found to be compatible with the internal market. The Decision does not assess either the 2007-08 measures or the Award (or any other ECT arbitral award for that matter). Absent the Commission making an assessment in accordance with the procedure laid down in Article 108 of the TFEU, the Commission cannot make any finding at all as to whether the 2007-08 measures constituted State aid, let alone whether they constituted compatible or incompatible State aid. Accordingly, the Commission made no finding that the Award constituted State aid, let alone whether it constituted incompatible or unlawful aid. This is confirmed by the absence of any such findings in the conclusions of the Decision with respect to the 2007-08 measures.[21] As noted above, such a finding could be made only after the Commission opened a formal investigation and followed the procedure laid down in Article 108(2) and the Procedural Regulation.

34. This is in sharp distinction to the Commission's Decision 2015/1470 in the *Micula* case ("Commission's Decision on *Micula*"), to which reference is made by Professor Hindelang.[22] In *Micula*, the Commission followed the procedure in Article 108, and it assessed an arbitral award that had been issued in favour of the *Micula* claimants. In that case, the Commission had found initially that it suspected the existence of unlawful State aid and it issued a suspension injunction precluding the continuing granting of the aid in question.[23] It opened a formal investigation and closed the proceedings with a final decision in which it declared the aid incompatible with the

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[20] *Id*.

[21] *See Jan Rudolf Maas v. Comm'n*, Joined Case Nos. T-81/07, T-82/07 & T-83/07, ECLI:EU:T:2009:237, ¶ 46 (July 1, 2009), http://tiny.cc/ioz9qz.

[22] *See* Decision on State aid S.A.38517 (2014/C) (ex 2014/NN), *Arbitral Award Micula v. Romania*, 2015 O.J. L 232/43 (Mar. 30, 2015), ECF No. 12-68 ("Decision on State aid"). Professor Hindelang refers to this decision at ¶ 90.

[23] Decision on State aid, ¶ 6.

internal market and required its recovery as illegal aid.[24] The Commission's Decision on *Micula* was based on the fact that the *Micula* award compensated the claimants in that arbitration for the repeal of a scheme that was itself incompatible State aid, and therefore the award essentially re-established the incentives under the repealed scheme and thus would also constitute incompatible aid.[25]

35. I disagree with Professor Hindelang's implication that this decision is binding with respect to the Award.[26] The Commission's decision on *Micula* was only binding with respect to the aid assessed in that decision—the *Micula* award. It does not constitute a Commission decision with respect to this Award or any other arbitral award. It may be noted that the Commission's decision was annulled in its entirety by the European Union General Court,[27] which judgment was subsequently overturned by the CJEU, which also referred the case back to the General Court to consider further arguments.[28] In the *Micula* cases, however, it had already been decided by the Romanian Competition Council that the compensation constituted State aid. The main difference of judgment as between the General Court and the CJEU was the determination of when that aid might be awarded. The General Court held that it was, at least partially, for a period prior to Romania being a Member State of the European Union, a point which the Commission had not taken into account in its decision declaring the aid illegal, whereas the CJEU held that the aid would be awarded following the determination of the compensation award which definitively established the right to receive the compensation.[29] It follows that the *Micula* jurisprudence is not

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[24] *Id.*, arts. 1–2.

[25] *Id.* ¶ 96.

[26] Hindelang Decl., ¶¶ 81–82.

[27] *European Food SA v. Comm'n*, Case Nos. T-624/15, T-694/15, & T-704/15, ECLI:EU:T:2019:423 (June 18, 2019), http://tiny.cc/sn0ruz.

[28] *Comm'n v. European Food SA*, Case No. C-638/19 P, ECLI:EU:C:2022:50 (Jan. 25, 2022) ECF No. 12-69.

[29] *Id.*, ¶¶ 115–125.

authority for any proposition that the Decision of November 10, 2017 has determined that the 2007-08 scheme constitutes State aid.

36. As noted above, in its Decision on Spain's 2013-2014 Scheme, the Commission stated "that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the *premium* economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, . . . this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation."[30] As explained above, without a formal investigation, this statement lacks all legal force as a matter of EU law.[31] Moreover, for the reasons set out below, this statement is also incorrect.

37. This expression of opinion, expressed within the body of a formal decision relating to the 2013-2014 Scheme, is not a binding decision regarding Spain's EU law obligations in relation to this dispute. First of all, as already stated, the 2007-2008 measures were not assessed at all by the Commission in its 2017 Decision. Secondly, there was no finding by the Commission, in accordance with Article 108(3) TFEU or Article 4 of the Procedural Regulation, that the payment of compensation under a tribunal award was either (i) not a State aid measure, or (ii) a State aid measure that was clearly compatible with the internal market, or (iii) such as to cause the Commission to have serious doubts as to its compatibility. Article 4(1) specifies that one of these decisions "shall" be taken, so that there is no possibility for the Commission to take a decision merely finding that a measure constitutes State aid, without more. If the Commission finds that

[30] Commission's Decision, ¶ 165.

[31] *See supra* ¶¶ 21–23, 32

the measure is State aid, therefore, it must either declare it compatible with the internal market[32] or open a formal investigation pursuant to Article 108(2) TFEU.[33]

38. It follows that the Commission has not adopted any binding decision regarding Spain's EU law obligations in relation to this dispute. Moreover, the Commission's assertions in its Amicus Curiae Brief that it "has determined … that the arbitral award at issue here constitutes 'State aid'" and that the "Commission has launched a formal investigation into the matter and ordered Spain to suspend any payment of the award until that investigation is concluded"[34] is odd. No reference is given for this purported determination. If the Commission is to be taken to be relying on its assertions in the Decision of November 10, 2017, that determination, as stated above, has no legal effect.

V. THE COMMISSION'S DECISION OF JULY 19, 2021 ON THE ARBITRATION AWARD TO ANTIN

39. In its Amicus Curiae Brief, the Commission also seeks to rely on its Decision of July 19, 2021 opening a formal investigation into the arbitration award in favour of Antin, which also concerns compensation under the ECT in relation to amendments to the 2007-08 Spanish regulatory scheme. The Commission states that "Rather than subject Spain to conflicting legal obligations—or place Spain in violation of its EU law obligations—this Court should dismiss the petition so that these issues can be resolved in the EU legal system."[35]

40. The Commission's Brief ignores completely the fact that the Tribunal considered the dispute from the perspective solely of the infringements of the ECT and that State aid law did not form any part of its decision.

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[32] Procedural Regulation, art. 4(3).

[33] Procedural Regulation, art. 4(4); *Germany v. Comm'n*, Case No. 84/82, ECLI:EU:C:1984:117, ¶ 13 (Mar. 20, 1984), http://tiny.cc/3uz9qz.

[34] European Commission's *Amicus Curiae* Brief at 5.

[35] *Id*. at 25.

41. In his Declaration, Professor Hindelang, referring to the *Antin* award investigation, merely states without any further analysis that the Commission, "at this stage in the proceedings on a preliminary basis, perceives the payment of the [*Antin*] award to constitute State aid".[36]

42. The investigation into the *Antin* award, however, has no bearing whatsoever on the present case seeking the enforcement of the Hydro Energy Award which is solely concerned with compensation for breach of the ECT. There is no direct connection between the *Antin* Award and the *Hydro Energy* Award. Indeed, it may be noted that the Commission decision opening the formal investigation states that Spain notified the *Antin* Award which related to compensation in the amount of €101 million and that the notified measure is an individual aid. It follows that the notification, and therefore the investigation, does not concern the 2007-08 scheme and aid allegedly due pursuant to that scheme.[37]

43. Moreover, the opening of the *Antin* Award investigation cannot be regarded as an investigation into all arbitral awards relating to infringement by Spain of the ECT. It therefore has no effect whatsoever on the enforcement of the Hydro Energy Award in the present case.

VI. THE TRIBUNAL DID NOT ENCROACH ON THE COMMISSION'S COMPETENCE TO REVIEW STATE AID

44. In the proceedings leading up to the making of the Award,[38] the parties made various submissions to the Tribunal relating to State aid in relation to both arguments on the merits of the Petitioners' claims as well as the jurisdiction of the Tribunal.[39]

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[36] Hindelang Decl., ¶ 92.

[37] *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v.* ICSID Case No. ARB/13/31, Award (June 15, 2018), ECF No. 12-70, ¶ 1.

[38] *Hydro Energy 1 SARL and Hydroxana Sweden A v. Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (Mar. 9, 2020), ECF No. 1-1 at 53.

[39] *Hydro Energy 1 SARL and Hydroxana Sweden A v. Spain*, ICSID Case No. ARB/15/42, Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction (Feb. 24, 2017), ¶¶ 960–973; *Hydro Energy 1 SARL and Hydroxana Sweden A v. Spain*, ICSID Case No. ARB/15/42, Spain's Rejoinder on the Merits and Reply on Jurisdiction (Feb. 16, 2018), ¶¶ 85–98.

45. In its submissions, Spain made reference to the CJEU judgment in *Elcogas* and to the notification of the 2013-14 measures giving rise to the Commission's Opening Decision of November 10, 2017.

46. On merits, the Petitioners' case was that Spain has caused substantial losses to their investments in the Spanish Electricity System (SES) and violated its international obligations under the ECT. The Petitioners had invested in Spain's Renewable Energy power generation sector attracted by the stable economic regime available to investors in reliance of the regulatory framework set forth in the 2007-08 measures. Thereafter, Spain modified the regulatory framework for the SES, by adopting a series of measures in 2012-14 that changed the conditions for the investors' remuneration of their investments in the wind and solar sectors. Such modifications breached Spain's obligations under Article 10(1) ECT to provide fair and equitable treatment and to guarantee its commitments under the umbrella clause, entitling the Petitioners to compensation.[40]

47. On the merits, the Tribunal rejected Spain's arguments, concluding that Spain had a duty to comply with Article 10(1) ECT, which duty related to any obligations it has entered into with an investor, and the rules enunciated in the 2007-08 measures were essential components of the domestic legal environment of the investment which the Claimants could legitimately expect Spain would observe and enforce. The legitimate expectation of the Claimants was to receive a reasonable return for its investment.

48. On damages, the Tribunal held that Spain must compensate the Claimants for the ensuing losses they incurred as a consequence of this breach. Moreover, the Tribunal did not assess whether that regime constituted State aid, as it was not relevant to the Tribunal's finding of a breach of Article 10(1) of the ECT. Instead, the Tribunal found solely that there had been a breach of the ECT by Spain in replacing the premium economic scheme with the 2014 measures. In other words, the Tribunal considered the pre-existing regime as being the legal foundation on the basis of which the Petitioners' investments had been made and that the alteration to that pre-

[40] Decision on Jurisdiction Liability and Directions on Quantum, ¶ 770.

existing regime gave rise to a breach of the ECT, resulting in damage to the Petitioners in respect of which they were entitled to compensation.

49. Especially given that the Commission did not deem it necessary to investigate the pre-existing regime in its assessment of the 2014 regime, even though it obviously knew of the existence of RD 661/2007 and the fact that it had not been notified in advance for approval pursuant to Article 108(3), there is no reason why the Tribunal should have been required to make such an assessment. On the contrary, the Tribunal was entitled to set the parameters of its inquiry as set out above and to determine liability for compensation on that basis.

50. The Tribunal's decision does not allow Spain to flout any binding legal obligations. It is important to appreciate that the legal obligation under Article 108(3) TFEU is for Spain to notify the European Commission of any State aid that it intends to grant prior to putting the measure into effect. The Tribunal did not make any finding in that regard. It did not make any finding allowing Spain to escape any notification obligations it may have as a matter of EU law.

51. Moreover, Article 108(3) TFEU imposes no obligation whatsoever on the supposed recipient of aid. Instead, whenever the Commission takes a decision finding that a Member State has unlawfully granted aid, it will normally order the Member State to recover the aid from the recipient. Even then, the decision itself imposes no legal obligation on the recipient; rather, the Member State is required to adopt national legal measures ensuring that the aid is recovered. Thus, the Tribunal did not make any finding allowing the Petitioners to escape any supposed obligations under Article 108(3) TFEU.

VII. THE AWARD IS NOT STATE AID

52. Spain claims that the Award constitutes unlawful State aid under EU law.[41] This is incorrect. The Award cannot be construed as State aid, and certainly not incompatible state aid, that Spain is precluded from paying.

53. First, there has been no decision of the European Commission finding that the compensation under the Award amounts to State aid. Second, State aid entails a gratuitous

[41] Spain's Memorandum at 2.

advantage, which is absent in the case of an award of compensation for damages. Third, for aid to fall within the scope of Article 107(1) TFEU, the purported economic advantage must be imputable to the State, i.e. Spain. However, the CJEU has explicitly held that the advantage derived from an award of an international tribunal such as an ICSID tribunal is attributable to the Tribunal. Payment of compensation for breach of the ECT required by the Award cannot, therefore, be imputable to Spain.

(i) *No Decision by the Commission finding the Award constitutes State aid*

54. The notion of State aid is that it is a gratuitous payment by the State, lacking consideration, which results in an economic advantage that the recipient would not have obtained in normal market conditions.[42] State aid is normally granted by means of a financial grant or through a tax reduction or by purchasing goods or services at a higher than market value. In those circumstances, a public authority gives to a recipient a financial benefit that is not required by the normal operation of the market.

55. Under Article 107(1), to qualify as State aid, a measure must fulfil all the following requirements.[43] First, there must be an intervention by the State or through State resources. This presupposes action that is imputable to the State.[44] Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. The Commission has not conducted any such analysis in connection with the Award. This is confirmed in paragraph 156 of the Decision of November 10, 2017 which states that "[i]n the present decision, the Commission has assessed the measure notified by Spain (see section 2.1)." Section 2.1 of the Decision lists the specific

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[42] *SFEI v. La Poste*, Case No. C-39/94, ECLI:EU:C:1996:285, ¶ 60 (July 11, 1996), ECF No. 12-64.

[43] *Comm'n v. World Duty Free Grp. SA*, Case Bi,s C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, ¶ 53 (Dec. 21, 2016), http://tiny.cc/un0ruz.

[44] *France v. Comm'n*, Case No. C-482/99, ECLI:EU:C:2002:294, ¶ 24 (May 16, 2002), http://tiny.cc/7i39qz; *Deutsche Bahn AG v. Comm'n*, Case T-351/02, ECLI:EU:T:2006:104, ¶ 101 (Apr. 5, 2006), http://tiny.cc/dq39qz.

pieces of Spanish legislation that are assessed by the Commission, and the Award is not listed in Section 2.1 (nor any other award).

56. The present case is clearly distinguished from the circumstances in the *Micula* case. In that case, the Romanian authorities adopted legislation in 1998 granting certain investors in disadvantaged regions various tax incentives. The Romanian Competition Council subsequently found that these tax incentives amounted to State aid and had to be revoked. Mr Ioan Micula and Mr Viorel Micula, Swedish citizens residing in Romania, were the majority shareholders of the European Food and Drinks Group which made investments in the relevant area in 2000-2002.

57. In 2004, Romania repealed the tax incentives, leading to a claim under the Bilateral Investment Treaty between Romania and Sweden. The claim in question was therefore clearly related directly related to damages for the loss of the tax incentives, which since 2000 had been designated as State aid by the Romanian Competition Council. On December 11, 2013, the arbitral award found that, by repealing the tax incentives, Romania had violated the legitimate expectations of the claimants and failed to ensure their fair and equitable treatment and ordered payment of damages. The European Commission adopted, on May 26, 2014, its decision obliging Romania to suspend any action that might lead to the implementation or execution of the award, on the ground that such action appeared to constitute unlawful State aid. On March 30, 2015, the Commission adopted its final decision finding that the compensation awarded by the arbitral tribunal amounted to State aid which was incompatible with the internal market and ordered its recovery.[45]

58. On an application for judicial review of the Commission's decision, the EU General Court, reiterating the *Asteris* judgment discussed below, held that compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of

[45] *Commission v. European Food S.A.*, Case No. C-638/19P, ECLI:EU:2022:50, ¶¶ 13–33.

unlawful or incompatible aid.[46] However, the General Court then held that the aid in question was not in fact incompatible with EU law because it arose prior to Romania joining the EU in 2004.[47]

59. On appeal, the CJEU overturned the General Court's judgment in this respect. The CJEU, in examining the question of when State aid is granted, agreed with the General Court that the compensation granted by the arbitral tribunal was intended to compensate for the damage suffered as a result of the repeal of the tax incentives, but held, contrary to the General Court, that "the decisive factor for establishing the date on which the right to receive State aid was conferred … is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the State, to grant it." Since Romania was a Member State of the EU on the date of the award, the aid was granted when EU State aid law applied.[48] In fact, the CJEU did not disturb the precedent set by *Asteris*, noting that "the question whether the compensation granted by that award may constitute 'State aid' within the meaning of Article 107(1) TFEU, in particular in the light of the case-law stemming from … *Asteris* … according to which such aid is of a fundamentally different legal nature from that of the damages which national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals, is not the subject matter of the present appeal and is therefore outside the Court's jurisdiction in this context."[49]

60. The reasoning of both the General Court and the CJEU is based on the specific facts which include, in particular, the finding by the Romanian Competition Council that the tax incentives amounted to State aid. No such finding has been made in the present case. The Tribunal made no such finding, and indeed, did not even consider the issue of State aid in its legal reasoning

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[46] *European Foods SA v. Commission*, Case Nos. T-624/15, T-694/15, & T-704/15, ECLI:EU:T:2019:423, ¶ 103.

[47] *Id.*, ¶¶ 104–05.

[48] *Commission v. European Food S.A.*, Case No.C-638/19P, ECLI:EU:2022:50, ¶¶ 115–126.

[49] *Id.* ¶ 131.

for the Award. On the contrary, the Tribunal found that there had been breaches of ECT, Article 10(1) which caused damage to the Petitioners and which Spain was bound to compensate.

(ii) *An award of damages is not a gratuitous advantage*

61. In any event, the Award cannot be considered State aid as there was no finding by the Tribunal that the compensation amounted to a gratuitous economic advantage. By definition, compensation awarded for breach of legal obligations is not a gratuitous benefit but is based on a legal requirement to provide restitution for the damage caused by the unlawful action of the defendant. It is not an economic advantage that the recipient would not have obtained in normal market conditions. It is compensation for damage caused by the defendant. In other words, it is a payment to counter the damage caused by the defendant's actions to the claimant. That is a fundamentally different notion from a gratuitous payment which is the essence of an economic advantage granted through State aid.

62. Contrary to the Commission's expressed view in the Decision of November 10, 2017,[50] an award of compensation in these circumstances does not amount to State aid as is clearly stated by the CJEU in *Asteris v. Greece*:

> ". . . State aid, that is to say measures of the public authorities favouring certain undertakings or the production of certain goods, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals.
>
> . . . [D]amages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles [107 and 108 of the TFEU]."[51]

63. This approach was confirmed by the CJEU in *Commission v Aer Lingus and Ryanair*:

> "The … reimbursement to an undertaking of an amount of tax which it was required to pay in breach of EU law or the damages which national authorities are ordered to pay to

[50] Commission's Decision, ¶ 165.

[51] *Asteris v. Greece*, Case No. 106-120/87, ECLI:EU:C:1988:457, ¶¶ 23–24 (Sept. 27, 1988), http://tiny.cc/9o29qz.

undertakings to compensate for the damage they have caused them does not constitute State aid."[52]

64. Moreover, since there is no economic advantage accruing to the recipients of compensation in these circumstances, it follows that there is nothing to give rise to any distortion of competition, as required by Article 107(1).

65. The CJEU has held that any aid may be considered as strengthening the market position of the recipient as compared with its competitors and thereby having a potential effect on competition.[53] It has also held that, in principle, aid distorts competition if it releases an economic actor from costs which it would normally have to bear in its normal course of business.[54]

66. Compensation for damage caused by breach of obligations under the ECT does not strengthen the recipient's market position nor does it constitute a release from costs that an economic actor would normally bear in its normal activities. It follows that such compensation is not considered an economic advantage and, equally, that it does not give rise to any distortion of competition or affect trade in the EU. On the contrary, compensation for damage caused by the unlawful breach of legal obligations reinstates the normal market conditions which would have existed had the damage not been caused in the first place.

(iii) *Aid must be imputable to the State*

67. Article 107(1) applies to aid granted by the State. This implies two separate requirements: (i) aid must be financed through State resources; and (ii) the grant of aid must be imputable to the State. These are two separate conditions, so that the financing of a measure through State resources will not result in that measure being regarded as State aid if the measure itself is not imputable to the State. In the present case, the payment of compensation, which

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[52] *Commission v. Aer Lingus*, Case Nos. C-164/15P & C-165/16P, ECLI:EU:C:2016:990, ¶ 72 (Dec. 21, 2016), http://tiny.cc/7h49qz.

[53] *Philip Morris Holland BC v. Comm'n*, Case 730/79, ECLI:EU:C:1980:209, ¶ 11 (Sept. 17, 1980), http://tiny.cc/i329qz.

[54] *Italy v. Comm'n*, Case No. C-86/89, ECLI:EU:C:1990:373, ¶ 18 (Nov. 6, 1990), http://tiny.cc/3b39qz.

resulting in a transfer of State resources, is not imputable to a decision of Spain but is instead imputable to the decision of the Tribunal, which is categorically not part of the Spanish State.

68. It is inherent in Article 107(1) that the aid measure must be imputable to the State for it to be regarded as being granted by the State.[55] Essentially, this requirement means that a public authority of the State, of its own volition, must grant the aid. Where, however, a State measure is taken pursuant to an overriding and binding legal obligation imposed on the State, it cannot be concluded that the measure is imputable to the State. For example, where an EU directive required a Member State to legislate a specific tax exemption, the exemption, even though enacted in State legislation and giving rise to a fiscal burden on the State, could not be imputed to the State because the State was bound as a matter of EU law to adopt the measure.[56] It follows that even where the State funds a particular subsidy, that will not amount to State aid where the State has no discretion in paying the subsidy.

69. The CJEU has explicitly confirmed in its recent decision in *Commission v European Foods* that an arbitral tribunal, such as under ICSID, is not "a court or tribunal of a Member State".[57] Whilst this was in the context of jurisdiction in the light of the *Achmea* and *Komstroy* judgments, it must be generally applicable as a principle of EU law. It follows that the grant of compensation pursuant to a binding Award of an Arbitral Tribunal cannot be imputable to Spain.

70. Moreover, as already described above, this was a central distinction between the judgments of the General Court and the CJEU in *Commission v. European Foods*. The General Court had held that the award in question constituted the mere recognition of a right which arose at the time of the repeal of the tax incentives, whereas the payments made subsequently represented only the enforcement of that right. By contrast, the CJEU held that, whilst it could not be ruled

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[55] *France v. Comm'n*, Case No. C-482/99, ECLI:EU:C:2002:294, ¶ 24 (May 16, 2002), http://tiny.cc/7i39qz.

[56] *Deutsche Bahn v. Comm'n*, Case No. T-351/02, ECLI:EU:T:2006:104, ¶ 102 (Apr. 5, 2006), http://tiny.cc/dq39qz.

[57] *Commission v. European Food S.A.*, No. Case C-638/19P, ECLI:EU:2022:50, ¶ 142.

out that such a right to compensation arises on the date of the repeal of the system, the decisive factor for establishing the date on which the right to receive the aid was conferred on its beneficiaries is the acquisition by those beneficiaries of a definitive right to receive the aid and to the corresponding commitment, by the State, to grant that aid. The CJEU then definitively held that the right to compensation was granted only by the arbitration award and that it was only upon the conclusion of the arbitral proceedings that the arbitration applicants were able to obtain actual payment of that compensation.[58]

71. This distinction between aid being financed by a public body, but being imputable to a court or tribunal has recently been developed by the CJEU in other case law. In *Alouminion v. Commission*, the applicant entered into a contract in 1960 with the public electricity company DEI, under which it was granted a preferential tariff for the supply of electricity, with the contract subject to automatic renewal every five years unless terminated by one of the parties. In 2004, when DEI informed Alouminion of its intention to terminate the contract as of April 2006, the latter challenged that termination before the Greek courts. The national court, as an interim measure, suspended the effects of the termination on the ground that it was not consistent with the 1960 contract. The General Court annulled the decision, holding that the interim measure could not be regarded as new aid or an extension of existing aid, but merely followed from the finding that the contract had not been lawfully terminated in accordance with its terms.[59] On appeal, however, in *DEI v. Commission*, the CJEU, contradicting the finding that the national court was merely interpreting the provisions of the 1960 contract, held that the interim measure constituted a State aid intervention by reinstating the application of the preferential tariff such as to alter the time limits set out in the contract.[60] It was, accordingly, the action of the court itself, not the public company, to which the aid was imputable.

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[58] *Id.*, ¶¶ 115–125.

[59] *Alouminion AE v. Commission*, Case No. T-542/11, ECLI:EU:T:2014:859, ¶¶ 55–56 (Oct. 8, 2014), http://tiny.cc/wn0ruz.

[60] *DEI v. Commission*, Case No. 590/14P, ECLI:EU:C:2016:797, ¶¶ 58–59 (Oct. 26, 2016), http://tiny.cc/xn0ruz.

72. The CJEU followed the judgment in *DEI v. Commission* in *Mytilinaios AE v. Commission*.[61] Likewise, in *Simet v. Commission*, compensation ordered by judgment of the Italian Council of State to be paid by the government was notified to the Commission as State aid.[62] In *Alz-Chem v. Commission*, the General Court held that it could not be ruled out that a measure may be regarded as a decision attributable to the State because of a decision of a national court.[63] In *ARFEA v. Commission*, where the right to receive aid was retroactively established through national court proceedings, the General Court held that the grant of the aid took effect only at the date of the relevant national judgments.[64]

73. Finally, in further proceedings between DEI and the Commission, concerning the electricity tariff for subsequent periods, the General Court held that a Greek arbitral tribunal granted State aid through a binding award in which it determined the tariff at which electricity was to be supplied by a State-owned undertaking to its customer at a rate which was below market value. In accordance with the Greek legislation establishing the arbitration tribunal and its powers, the tribunal exercised a judicial function identical to that of the ordinary courts. Those proceedings were governed by the Greek Code of Civil Procedure as well as arbitration rules of the Greek Energy Regulatory Authority and awards of the arbitral tribunals were legally binding and enforceable in the civil courts. Accordingly, the arbitral tribunals were considered an integral part of the Greek judicial system and, as such, were classified as a body exercising a power falling within the prerogatives of the public authority.[65]

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[61] *Mytilinaios AE v. Commission*, Case No. C-332/18P, ECLI:EU:C:2019:1065, ¶ 68.

[62] *Simet SpA v. Commission*, Case No. C-232/16P, ECLI:EU:T:2017:200, ¶¶ 19–21, http://tiny.cc/yn0ruz; *Simet SpA v. Commission*, Case No. T-15/14, ECLI:EU:T:2016:124, ¶ 38, http://tiny.cc/0o0ruz.

[63] *AlzChem AG v. Commission,* Case No. T-284/15, ECLI:EU:C:2018:950, ¶¶ 107–108, (Sept. 24, 2019), http://tiny.cc/1o0ruz.

[64] *ARFEA v. Commission*, Case No. T-720/16, ECLI:EU:T:2018:853, ¶ 185 (Nov. 29, 2018), http://tiny.cc/2o0ruz.

[65] *DEI v. Commission*, Case Nos. T-639/14 RENV, T-352/15 & T-740/17, ECLI:EU:T:2021:604, ¶¶ 151–159 (Sept. 22, 2021), http://tiny.cc/3o0ruz.

74. Equally, enforcement of the Award by this honourable Court cannot give rise to aid that is imputable to Spain.

75. In fact, Spain is required, as a matter of international law, to fulfil its obligations under the ECT and the ICSID Convention[66] to pay the compensation ordered by the Tribunal. Thus, the compensation cannot be regarded as State aid, but is instead simply the consequence of Spain's obligations voluntarily accepted through accession to these treaties.

VIII. SPAIN IS NOT PRECLUDED AS A MATTER OF EU LAW FROM IMPLEMENTING THE AWARD

76. Spain also asserts that Spain is precluded as a matter of EU law from implementing the award as it constitutes unlawful State aid.[67]

77. For the reasons set out above, the statement in the Commission's Decisions concerning awards have no effect on the Award.

78. Equally, in my opinion, Spain is not precluded as a matter of EU law from implementing the Award. The mere fact that the Commission thinks payment of the Award might be aid does not mean that it is. Nor does this impose any obligation on Spain, particularly where there are equally cogent reasons for arguing that the Award does not constitute State aid. The obligation on a Member State is only to notify measures that actually satisfy all the criteria of Article 107(1) TFEU.[68]

79. As stated above, compensation for breach of legal rights is not State aid. It is compensation for damage caused by the defendant. In other words, it is a payment to counter the damage caused by the defendant's actions to the claimant. That is a fundamentally different notion

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66 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"), 17 U.S.T. 1270 (Mar. 18, 1965), ECF No. 1-2.

67 Spain's Memorandum at 2.

68 Procedural Regulation, art. 3; *Administración del Estado v. Xunta de Galicia*, Case No. C-71/04, ECLI:EU:C:2005:493, ¶ 2 (July 21, 2005), http://tiny.cc/eb49qz.

from a gratuitous payment which is the essence of an economic advantage granted through State aid. This distinction is fully recognised by the European Courts.[69]

80. The mere fact that the Commission takes a particular view of a matter and proffers its interpretation of EU law does not mean that it is necessarily correct or that it must be followed by national courts. There are countless instances of judgments in the European Courts where the legal opinion of the Commission has been found wanting. These judgments include many where Commission's decisions on State aid have been overturned.[70]

81. National courts are bound to apply decisions of the European Courts, but they are not necessarily bound by opinions expressed by the European Commission which have no special legal status, including in matters of State aid law.

82. It is quite possible that a national court may be asked to consider whether there has been an infringement of the standstill clause in Article 108(3) TFEU at the same time as the Commission commences a preliminary assessment. The CJEU has held that the scope of the obligation imposed on the national court may vary depending on whether or not the Commission has initiated the formal investigation procedure with regard to the measure at issue in the proceedings before the national court.[71] Where the Commission has not yet initiated the formal examination procedure and has therefore not yet taken a decision as to whether the measures under consideration are capable of constituting State aid, it is for the national courts to verify whether

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[69] *Asteris v. Greece*, Case No. 106-120/87, ECLI:EU:C:1988:457, ¶¶ 23–24 (Sept. 27, 1988), http://tiny.cc/je49qz; *Comm'n v. Aer Lingus*, Case Nos. C-164/15 P & C-165/15P, ECLI:EU:C:2016:990, ¶ 72 (Dec. 21, 2016), http://tiny.cc/7h49qz.

[70] In relation to renewable energy and State aid, for instance, the CJEU has rejected some or all of the Commission's arguments in the following cases: *PreussenElektra AG v. Schleswag AG*, Case No. C-379/98, ECLI:EU:C:2001:160 (Mar. 13, 2001), http://tiny.cc/dq49qz; *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, Case No. C-329/15, ECLI:EU:C:2017:671 (Sept. 13, 2017), http://tiny.cc/at49qz; *Germany v. Comm'n*, Case No. C-405/16 P, ECLI:EU:C:2019:268 (Mar. 28, 2019), http://tiny.cc/nw49qz.

[71] *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*, Case No. C-284/12, ECLI:EC:C:2013:755, ¶ 33 (Nov. 21, 2013), http://tiny.cc/hy49qz.

the measure at issue constitutes an aid within the meaning of Article 107(1) TFEU.[72] On the other hand, where the Commission has already taken a decision to open a formal investigation procedure, national courts must refrain from taking decisions which conflict with the Commission's decision, even though the opening decision is provisional.[73]

83. It follows in the present case that Spain is under no obligation as a matter of EU law not to pay compensation pursuant to the Award.

IX. CONCLUSION

84. In conclusion,

i. the Tribunal did not encroach on the European Commission's competence to review State aid;

ii. payment of the Award or a judgment enforcing the Award does not constitute incompatible State aid within the scope of Article 107(1) TFEU; and

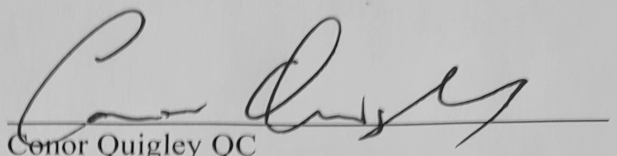
iii. Spain is not precluded from paying and Petitioners are not precluded from receiving the Award.

[72] *Id.*, ¶ 34.

[73] *Id.*, ¶ 41.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 24, 2022
London, United Kingdom



Conor Quigley QC
Serle Court

CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2022, I caused the foregoing Expert Declaration of Conor Quigley, and exhibit thereto, to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

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