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CERTIFICATE

9REN HOLDING S.À.R.L

v.

KINGDOM OF SPAIN

(ICSID CASE NO. ARB/15/15)

ANNULMENT PROCEEDING

I hereby certify that the attached document is a true copy of the English version of the *ad hoc* Committee's Decision on Annulment dated 17 November 2022.

Meg Kinnear
Secretary-General

Washington, D.C., 17 November 2022

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

9REN Holding S.à.r.l

and

Kingdom of Spain

(ICSID Case No. ARB/15/15)

DECISION ON ANNULMENT

Members of the* ad hoc *Committee

Prof. Dr. Dário Moura Vicente, President of the *ad hoc* Committee
Prof. Dr. Nicolas Molfessis, Member of the *ad hoc* Committee
Dr. Fernando Piérola-Castro, Member of the *ad hoc* Committee

Secretary of the* ad hoc *Committee

Ms. Anna Toubiana

Date of dispatch to the Parties: 17 November 2022

TABLE OF CONTENTS

Table of Abbreviations and Defined Terms

9REN	9REN Holding S.à.r.l.
Achmea	Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik v. Achmea* BV, case C 284/16, ECLI:EU:C:2018:158, CL-180
Applicant	Kingdom of Spain
Award	Award rendered on 31 May 2019 in ICSID Case No. ARB/15/15
Tribunal	Arbitral Tribunal that rendered the 9REN Award
AfA	Spain's Application for Annulment dated 3 April 2020
BIT	Bilateral Investment Treaty
C-	Claimant's Exhibit
CL-	Claimant's Legal Authority
C-MoA	Counter-Memorial on Annulment dated 9 February 2021
Claimant	9REN Holding S.à.r.l.
Committee	*Ad hoc* Committee appointed to decide on the request for annulment of the 9REN Award
CcS	Claimant's Closing Statement
CJEU	Court of Justice of the European Union
CoS	Claimant's Opening Statement
EC	European Commission
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Komstroy	Judgment of the CJEU (Grand Chamber) of 2 September 2021, *République de Moldavie v. Komstroy LLC*, case C 741/19, ECLI:EU:C:2021:655, C-319
MoA	Respondent's Memorial on Annulment dated 30 October 2020
NDP	Non-Disputing Party
R-	Respondent's Exhibit
RcS	Respondent's Closing Statement
RD 661/2007	Royal Decree 661/2007, of 25 May 2007, which regulates the activity of electricity production under the special regime

REIO	Regional Economic Integration Organization
RejoA	Claimant's Rejoinder on Annulment dated 27 July 2021
Respondent	Kingdom of Spain
RL-	Respondent's Legal Authority
RoA	Respondent's Reply on Annulment dated 4 May 2021
RoS	Respondent's Opening Statement
Spain	The Kingdom of Spain
TEU	Treaty on European Union dated 7 February 1992
TFEU	Treaty on the Functioning of the European Union dated 25 March 1957
EU Treaties	Treaty on European Union and Treaty on the Functioning of the European Union
TVPEE	Tax on the Value of the Production of Electrical Energy
VCLT	Vienna Convention on the Law of Treaties, dated 23 May 1969

I. INTRODUCTION

A. THE DISPUTED AWARD

1. These proceedings concern a request for the annulment of the Award rendered on 31 May 2019 (hereinafter the "**Award**") by the Arbitral Tribunal composed of The Honorable Ian Binnie, C.C., K.C., acting as President, and Messrs. David R. Haigh, K.C., and V.V. Veeder, Q.C., acting as Co-Arbitrators (hereinafter the "**Tribunal**").

2. That Award decided a dispute submitted to the International Centre for Settlement of Investment Disputes (hereinafter "**ICSID**"), based on the Energy Charter Treaty (hereinafter "**ECT**") and the ICSID Convention, which opposed 9REN Holding S.à.r.l. (hereinafter "**9REN**" or "**Claimant**") and the Kingdom of Spain (hereinafter "**Spain**," "**Respondent**" or "**Applicant**") (ICSID Case No. ARB/15/15).

3. The dispute concerns compensation sought by 9REN from Spain, pursuant to the ECT, for losses allegedly arising from investments made in the renewable energies sector and the alleged breach by Spain of its obligations under the ECT with respect to those investments.

4. In its Award, the Tribunal granted the following relief:
   (a) A declaration that the Tribunal had jurisdiction under the ECT and the ICSID Convention;
   (b) A declaration that Spain has violated the FET standard in Article 10(1) of the ECT with respect to the Claimant's investments;
   (c) Compensation under the ECT and international law to the Claimant in the sum of €41.76 million plus interest at a rate equivalent to the 5-year Spanish Government bond yield compounded annually from 30 June 2014 until Spain's full and final satisfaction of the Award; and
   (d) Costs of the proceeding, including (but not limited to) the Claimant's legal fees and expenses**,** plus the fees and expenses of the Claimant's experts for a total of US$4,814,570 and €562,458, and the fees and expenses of the Tribunal and ICSID in the sum of US$299,908.16.

B. THE PARTIES' REPRESENTATION

5. The Parties were represented in these proceedings as follows:

For 9REN:	For Spain:
Mr. Kenneth R. Fleuriet Ms. Héloïse Hervé King & Spalding 48 bis Rue de Monceau 75008 Paris France	Ms. María del Socorro Garrido Moreno Ms. María Andrés Moreno Mr. Javier Castro López Ms. Gabriela Cerdeiras Megías Mr. Pablo Elena Abad Mr. Antolín Fernández Antuña Ms. Lorena Fatás Pérez Ms. Patricia Froehlingsdorf Nicolás Mr. José Manuel Gutiérrez Delgado Ms. Ines Guzman Gutierrez Ms. Lourdes Martínez de Victoria Gómez Ms. Amparo Monterrey Sánchez Ms. Elena Oñoro Sainz Ms. Amaia Rivas Kortázar Ms. María José Ruiz Sánchez Mr. Francisco Javier Torres Gella Mr. Alberto Torró Molés Abogacía General del Estado Departamento de Arbitrajes Internacionales c/ Marqués de la Ensenada, 14-16, 2ª planta 28004, Madrid Spain
Mr. Reginald R. Smith Mr. Kevin D. Mohr King & Spalding 1100 Louisiana St., Suite 4000 Houston, TX 77002 U.S.A.	
Mr. Christopher S. Smith Ms. Rikki Stern King & Spalding LLP 1180 Peachtree St. NE, Suite 1600 Atlanta, GA 30309 U.S.A.	

II. PROCEDURAL HISTORY

6. On 3 April 2020, ICSID received an Application for Annulment of the Award from Spain (hereinafter "**AfA**"). The AfA was filed pursuant to Article 52(5) of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (hereinafter the "**ICSID Arbitration Rules**"). In its AfA, Spain requested that the enforcement of the Award be stayed provisionally pursuant to Article 52(5) of the ICSID Convention.

7. On 7 April 2020, the Secretary-General registered the AfA pursuant to ICSID Arbitration Rule 50(2). She also informed the Parties that, pursuant to Article 52(3) of the ICSID Convention, the Chairman of the Administrative Council of ICSID would proceed with the

appointment of an *ad hoc* committee. Finally, the Secretary-General confirmed the provisional stay of enforcement of the Award pursuant to ICSID Arbitration Rule 54(2).

8. On 6 May 2020, the Secretary-General informed the Parties of her intention to propose to the Chairman of the ICSID Administrative Council the appointment to the *ad hoc* Committee of Dr. Karim Hafez, a national of Egypt, as President of the *ad hoc* Committee, Prof. Dr. Dário Moura Vicente, a national of Portugal, and Prof. Dr. Nicolas Molfessis, a national of France. The Parties were asked to submit any observations by 13 May 2020.

9. By letter dated 12 May 2020, the Applicant sought additional clarifications from Dr. Hafez. The Applicant's letter was transmitted to Dr. Hafez on the same date.

10. On 14 May 2020, 9REN confirmed it had no observations in relation to the proposed candidates for the *ad hoc* Committee.

11. On 20 May 2020, the Parties were informed of Dr. Hafez's response to Spain's request for additional clarifications dated 12 May 2020.

12. On 22 May 2020, Spain confirmed it had no further observations on the proposed candidates for the *ad hoc* Committee.

13. On 28 May 2020, the Secretary-General notified the Parties that the Chairman of the ICSID Administrative Council would proceed to appoint Dr. Karim Hafez, Prof. Dr. Nicolas Molfessis and Prof. Dr. Dário Moura Vicente. The *ad hoc* Committee (hereinafter the "**Committee**") was constituted on 8 June 2020 and the annulment proceeding was deemed to have begun as of that date pursuant to Arbitration Rules 6, 52(2), and 53. On the same date, the Secretary-General informed the Parties that Ms. Anna Toubiana, ICSID Legal Counsel, would serve as Secretary of the Committee.

14. On 20 July 2020, the Committee held a First Session by video conference. An audio recording of the session was distributed to the Members of the Committee as well as to the Parties. Participating in the session were:

Members of the ad hoc *Committee*

Dr. Karim Hafez, President of the *ad hoc* Committee

Prof. Dr. Nicolas Molfessis, Member of the *ad hoc* Committee

Prof. Dr. Dário Moura Vicente, Member of the *ad hoc* Committee

ICSID Secretariat

Ms. Anna Toubiana, Secretary of the *ad hoc* Committee

Participating on behalf of 9REN Holding S.à.r.l

Mr. Kenneth Fleuriet, King & Spalding LLP

Ms. Amy Frey, King & Spalding LLP

Ms. Inés Vazquez García, Gómez-Acebo & Pombo

Participating on behalf of the Kingdom of Spain

Mr. Pablo Elena Abad, Abogacía General del Estado – Ministry of Justice

Mr. Alberto Torró Molés, Abogacía General del Estado – Ministry of Justice

Ms. Gabriela Cerdeiras Megías, Abogacía General del Estado – Ministry of Justice

15. During the First Session, the Committee and the Parties considered (i) the draft procedural order circulated by the Secretary of the Committee on 1 July 2020 and (ii) the Parties' comments and respective positions on the draft procedural order submitted on 13 July 2020.

16. Among other items on the agenda, the Parties confirmed the proper constitution of the Committee and the timetable for the proceeding.

17. On 20 July 2020, Spain filed a request to continue the stay of enforcement of the Award.

18. On 23 July 2020, the Committee issued Procedural Order No. 1 governing the procedural matters of the annulment proceeding, including the further schedule of written and oral pleadings.

19. On 3 August 2020, 9REN filed observations on Spain's request to continue the stay of enforcement of the Award.

20. On 13 August 2020, Spain filed a response to 9REN's observations of 3 August 2020.

21. On 24 August 2020, 9REN filed further observations on Spain's response of 13 August 2020.

22. On 30 October 2020, Spain filed a Memorial on Annulment (hereinafter "**MoA**"), together with Exhibits R-0359 and R-0360, Legal Authorities RL-0144 through RL-0173, and an Expert Report by Prof. Steffen Hindelang (hereinafter "**Hindelang Report 1**").

23. On 20 January 2021, the European Commission (hereinafter "**EC**") submitted with the ICSID Secretariat an Application for Leave to Intervene as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2).

24. On 1 February 2021, the Secretary-General informed the Parties that Ms. Anna Toubiana would be taking maternity leave and therefore would be replaced by Mr. Francisco Grob as Secretary of the Committee.

25. On 5 February 2021, both Parties filed Observations on the Non-Disputing Party's Application.

26. On 9 February 2021, 9REN filed a Counter-Memorial on Annulment (hereinafter "**C-MoA**"), together with Exhibits C-1, C-92, C-242 through C-246, C-249, C-279, C-281 through C-307, Legal Authorities CL-6, CL-20, CL-71, CL-79, CL-80, CL-95, CL-99, CL-101, CL-102, CL-109, CL-110, CL-113 through CL-115, CL-129, CL-131, CL-158, CL-162, CL-166 through CL-168, CL-173, CL-177, CL-180, CL-192 through CL-198, CL-201, CL-203, CL-213, CL-216, CL-219 through CL-332, and an Expert Report by Prof. Piet Eeckhout (hereinafter "**Eeckhout Report 1**").

27. On 4 May 2021, Spain filed a Reply on Annulment (hereinafter "**RoA**"), together with Exhibits R-0361 through R-0377, Legal Authorities RL-0175 through RL-0197, and the Second Expert Report by Prof. Steffen Hindelang (hereinafter "**Hindelang Report 2**").

28. On 27 July 2021, 9REN filed a Rejoinder on Annulment (hereinafter "**RejoA**"), together with Exhibits C-308 through C-318, Legal Authorities CL-333 through CL-353, and the Second Expert Report by Prof. Piet Eeckhout (hereinafter "**Eeckhout Report 2**").

29. On 30 August 2021, Ms. Toubiana resumed her work as Secretary of the Committee.

30. Ensuing Committee member Karim Hafez's resignation, on 14 September 2021, ICSID notified the Parties of the Committee's vacancy and suspended the proceeding pursuant to ICSID Arbitration Rule 10(2).

31. On 15 October 2021, the Committee was reconstituted. The new Committee was composed of Prof. Dr. Dário Moura Vicente (Portuguese), now President of the Committee, Prof. Dr. Nicolas Molfessis (French), and Dr. N. Fernando Piérola-Castro (Peruvian/Swiss). Following the reconstitution of the Committee, the proceeding resumed pursuant to ICSID Arbitration Rules 12 and 53.

32. On 19 November 2021, the Committee issued a Decision on the Continuation of the Stay of Enforcement of the Award. The Committee decided that the stay of enforcement of the Award should be continued and reserved the issue of costs on this request to the Committee's final decision on the AfA.

33. On the same day, the Committee issued a Decision on the European Commission's Application to file a written submission pursuant to ICSID Arbitration Rule 37(2), granting in part the EC's application.

34. On 9 December 2021, the EC filed a written submission pursuant to ICSID Arbitration Rule 37(2).

35. On 7 February 2022, the Committee held a pre-hearing organizational meeting with the Parties by video conference.

36. On 23 February 2022, the Committee issued Procedural Order No. 4 regarding the organization of the hearing.

37. The Hearing took place in Paris, France, from 9-11 March 2022. The following persons attended the Hearing:

Members of the ad hoc *Committee*

Prof. Dr. Dário Moura Vicente, President of the *ad hoc* Committee

Prof. Dr. Nicolas Molfessis, Member of the *ad hoc* Committee

Dr. N. Fernando Piérola-Castro, Member of the *ad hoc* Committee

ICSID Secretariat

Ms. Anna Toubiana, Secretary of the *ad hoc* Committee

Participating on behalf of 9REN Holding S.à.r.l

Mr. Kenneth Fleuriet, King & Spalding LLP

Ms. Amy Frey, King & Spalding LLP

Ms. Violeta Valicenti, King & Spalding LLP

Expert appointed by 9REN

Prof. Piet Eeckhout

Participating on behalf of the Kingdom of Spain

Ms. Lorena Fatás, Abogacía General del Estado – Ministry of Justice

Ms. Lourdes Martínez de Victoria, Abogacía General del Estado – Ministry of Justice

Ms. Amparo Monterrey Sánchez, Abogacía General del Estado – Ministry of Justice

Expert appointed by the Kingdom of Spain

Prof. Steffen Hindelang

Court Reporters

Ms. Anne-Marie Stallard, English Court Reporter

Ms. Elizabeth Cicoria, Spanish Court Reporter

Interpreters

Ms. Amalia Thaler, English-Spanish Interpreter

Ms. Roxana Dazin, English-Spanish Interpreter

38. On 25 April 2022, Spain filed a request for leave to introduce two new legal authorities into the record. On 2 May 2022, 9REN submitted its comments on Spain's request and sought leave to introduce three new legal authorities into the record.

39. The Committee decided both requests on 4 May 2022, and invited the Parties to present simultaneous written submissions on the five new authorities by 20 May 2022, which they did.

40. On 20 June 2022, 9REN requested the Committee that two decisions rendered on 10 June 2022 by other annulment committees be accepted into the case record, and that the Committee take judicial note of their contents, without the need for further submissions from the Parties.

41. On the same date, Spain also requested that Opinion 1/20 on the compatibility with the EU Treaties of Article 26 of the draft modernised ECT, issued by the Court of Justice of the EU (hereinafter "**CJEU**") on 16 June 2022, be introduced into the record without further submissions from the Parties. On 21 June 2022, Spain submitted an additional request to introduce into the record the arbitral award rendered in case SCC-2016/135, *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain.*

42. On 21 June 2022, the Committee accepted the abovementioned requests. However, considering the stage of the proceedings in which these were made, the Committee decided not to allow additional Parties' submissions on any of the new authorities that were thus incorporated into the case record.

43. The Parties filed their submissions on costs on 22 June 2022.

44. The proceeding was closed on 4 November 2022.

III. SPAIN'S REQUEST FOR ANNULMENT OF THE AWARD

45. Spain requests the annulment of the 9REN Award on two grounds, which are summarily described in the following sections:

(a) Manifest excess of powers by the Tribunal;

(b) Failure of the Tribunal to state reasons.

A. MANIFEST EXCESS OF POWERS

46. Spain submits that the 9REN Tribunal manifestly exceeded its powers by:

(a) Ruling beyond its jurisdiction over an intra-EU dispute in breach of Article 26 of the ECT;
(b) Unduly declaring its jurisdiction in breach of Article 17 of the ECT;
(c) Awarding compensation in excess of the amount corresponding to the Tribunal's own determinations on liability; and
(d) Failing to apply EU law.

a) Jurisdiction over the Dispute

(i) Breach of Article 26 of the ECT

47. According to Spain, the Tribunal wrongfully ruled that it had jurisdiction over an intra-EU dispute and, in doing so, grossly ignored EU law. In fact, in Spain's view:

(a) EU law must be considered as the international law applicable between the disputing Parties pursuant to Article 26(6) ECT;
(b) EU law prevails over the ECT when a dispute is an intra-EU one, and in case a tribunal were to find a conflict between EU law and the ECT;
(c) An interpretation of Article 26(3) ECT consistent with EU law precluded the Tribunal from asserting jurisdiction over the dispute; and
(d) Article 26 of the ECT was never a valid offer of arbitration for intra-EU disputes, and therefore the Tribunal lacked jurisdiction to settle the dispute under the terms of Article 25 of the ICSID Convention.[1]

[1] Respondent's Application for Annulment (hereinafter "**AfA**"), ¶¶ 34-36.

48. In support of these arguments, Spain submits that in its Judgment of 6 March 2018, in *Slowakische Republik v. Achmea BV*, (hereinafter "***Achmea***")[2], the CJEU adopted the view that Articles 267 and 344 of the TFEU prohibit EU Member States from submitting disputes requiring the interpretation or application of EU law by dispute resolution mechanisms outside the EU's judicial system.[3]

49. That ruling states *inter alia* the following:

> "*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*."[4]

50. An arbitral tribunal, Spain submits, is not part of the EU judicial system, nor can it be described as a court "*of a Member State*" that can refer a question to the CJEU for a preliminary ruling. However, disputes before investment protection arbitral tribunals may affect the application or interpretation of EU law and should therefore be subject to the EU judicial system.

51. Through an arbitration clause, EU Member States agree to deviate from the jurisdiction of their own courts and therefore from the EU judicial review system, so that there is no guarantee that disputes submitted to arbitration will be resolved in a way that ensures the full effectiveness of EU law.[5] Accordingly, pursuant to the *Achmea* judgment, which was issued before the 9REN Award, Article 26 of the ECT does not cover intra-EU disputes.[6]

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[2] Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik v. Achmea BV*, case C-284/16, ECLI:EU:C:2018:158, CL-180 (hereinafter, "***Achmea***").

[3] Respondent's Memorial on Annulment (hereinafter "**MoA**"), ¶ 77.

[4] *Achmea*, ¶ 60.

[5] MoA, ¶ 82.

[6] *Id.*, ¶ 85.

52. The *Achmea* judgment is, in Spain's view, directly applicable to the case at hand, as the Tribunal was called upon to apply EU law, and the Award is not subject to review by the EU judicial system.[7]

53. Spain requests that the present Committee corrects the determination of the applicable law by the Tribunal. In line with the CJEU's holdings in *Achmea*, provisions such as Article 26(6) of the ECT cannot be applied between Member States of the Union, as is the case here.[8]

54. This view is supported, Spain alleges, by the EC's Communication COM (2018) 547/2, according to which all investor-state arbitration clauses in intra-EU BITs are inapplicable and any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement.[9]

55. This understanding of *Achmea* was, according to Spain,[10] confirmed by the ruling of the CJEU in *République de Moldavie v Komstroy LLC* (hereinafter "*Komstroy*"), in which the Court held that:

> "*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 made by the latter in the first Member State.*"[11]

56. This view has been reiterated by the Court in its Opinion 1/20, issued on 16 June 2022, which affirms that:

> "*It is clear from the judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655), and in particular from paragraphs 40 to 66 thereof, that compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires*

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[7] *Ibid*.

[8] *Id.*, ¶ 88.

[9] *Id.*, ¶ 90.

[10] Respondent's Opening Statement, slides 27 ff. (hereinafter "**RoS**").

[11] Judgment of the CJEU (Grand Chamber) of 2 September 2021, *République de Moldavie v Komstroy LLC*, case C-741/19, ECLI:EU:C:2021:655 (hereinafter "***Komstroy***")¶ 66, C-319.

> *Article 26(2)(c) of the ECT to be interpreted as meaning that it is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*"[12]

57. Moreover, in Spain's view, the Paris Court of Appeal rulings of 19 April 2022, introduced into the record on 20 May 2022,[13] which annulled two intra-EU BIT arbitral awards on the basis of the said case-law of the CJEU, "*confirm the explanation provided for by the Kingdom of Spain about how EU Law, and in particular EU judicial system, works, as well as the binding effect on EU Member States and EU citizens of the settled case law of the CJEU.*"[14]

58. The award rendered on 16 June 2022 in *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain*, which Spain introduced into the record on 21 June 2022, followed, in essence, the CJEU's stance on arbitral tribunals' jurisdiction to decide disputes between investors from an EU Member State and another Member State.[15] In fact, the tribunal concluded in that award that it "*does not have jurisdiction to hear the claims brought by the Claimants*." To this effect, the tribunal posited, *inter alia,* that: (i) "*Swedish law, which is applicable through the operation of Section 48 SAA, recognizes the primacy of EU law*"; and that (ii) being "[s]*eated in an EU Member State, it likewise cannot apply the consent to arbitrate by the Respondent and affirm its jurisdiction*."[16]

59. Spain submits that a tribunal manifestly exceeds its powers under Article 52(1)(b) of the ICSID Convention when it lacks jurisdiction or rules beyond the terms of its jurisdiction.[17]

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[12] Opinion 1/20 of the Court (Fourth Chamber), 16 June 2022, RL-0212, ¶ 47.

[13] Paris Court of Appeal, Ruling of 19 April 2022, *Strabag et al. v République de Pologne*, No. 48/2022, RL-210; Paris Court of Appeal, Ruling of 19 April 2022, *Slot et al. v République de Pologne*, No. 49/2022, RL-0211.

[14] Respondent's submission of 20 May 2022, ¶ 30.

[15] See *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain*, SCC-2016/135 Award of 16 June 2022, ¶¶ 468 ff, RL-0213 (hereinafter "***Green Power***").

[16] *Green Power*, ¶ 475.

[17] MoA, ¶ 94.

There is also excess of powers where a tribunal manifestly fails to determine the applicable law or where it manifestly fails to interpret the law applicable to the dispute.[18]

60. The 9REN Tribunal concluded that EU law was not applicable, which, according to Spain, constitutes an excess of jurisdiction by not applying the corresponding law, and then made a partial, and erroneous application of that law.[19] The Tribunal therefore manifestly exceeded its powers by declaring its jurisdiction over an intra-EU dispute.[20]

61. In sum, Spain's position is that there is an *excess of powers* because:

(a) The dispute at hand is entirely European;
(b) The CJEU is the competent body to hear intra-EU disputes;
(c) EU law should be applied to the dispute, as required by Article 26(6) of the ECT;
(d) The Tribunal was called to apply EU law and respect the powers of the CJEU.

62. Such excess of powers is *manifest* because the standard of evidence submitted before the Tribunal was beyond any reasonable doubt. In fact, according to Spain:

(a) The *Achmea* holdings obviously apply to the ECT;
(b) *Achmea* has been further confirmed by the *Komstroy* judgment; and
(c) The same view prevailed in the Svea Court of Appeal Order of November 2021, as well as in the CJEU ruling in *PL Holdings*.[21]

[18] *Id.*, ¶ 95.

[19] *Id.*, ¶ 106.

[20] *Id.*, ¶ 83.

[21] RoS slides 42-57.

(ii) Breach of Article 17(1) of the ECT

63. In Spain's view, 9REN cannot be considered as an investor protected by the ECT. This is so because the requirements for the "*denial of benefits*" objection under Article 17 of the ECT are met in the instant case.[22]

64. Indeed, 9REN is owned or controlled by nationals of a third country, the United States of America,[23] and does not undertake any business at its artificially designated Luxembourg address; it is merely a "*letterbox company*."[24]

65. By recognizing 9REN the quality of an investor protected by the ECT, the Tribunal also exceeded its jurisdiction: it resolved a dispute beyond what is authorized by the Treaty. The Award should therefore be annulled for this reason.[25]

b) Quantum of Damages

66. Spain moreover contends that the Tribunal exceeded its powers by awarding the Claimant compensation that: (i) is inconsistent with the Tribunal's conclusions regarding the Spanish State's regulatory power; and (ii) compensates 9REN for damages in a completely arbitrary manner and contrary to the Tribunal's own conclusions.[26] This is allegedly the case of the Tribunal's rulings contained in paragraphs 416 and 417 of the Award.

67. The Tribunal was, Spain submits, obliged to resolve the dispute in accordance with the evidence presented by the Parties. However, the Award was "*completely negligent*" in making use of the "*tools*" provided by the Parties and improperly renounced to achieve a degree of precision that was easily attainable.[27]

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[22] Respondent's Reply on Annulment (hereinafter "**RoA**"), ¶ 137.

[23] *Id.*, ¶ 142.

[24] *Id.*, ¶ 146.

[25] MoA, ¶ 119.

[26] *Id.*, ¶ 120.

[27] *Id.*, ¶ 128.

68. The Tribunal's findings on liability should, according to Spain, reflect a reduction of at least 33% of the claimed damages before discount for regulatory risk was applied, as explained in its Request for Rectification.[28]

69. Applying the liability findings in the *switches* included in the Excel EO-127 model would reduce the damages for the Solaica plants from EUR 51.2 to 34.5 million, and this would occur even without taking into account (i) the impact of regulatory risk, which was not specified in the Award, and (ii) the corresponding changes to the calculations made by FTI for the Spanish plants. Even before implementing these two changes, the impact of EUR 16.7 million (difference between EUR 51.2 million and 34.5 million) is significantly higher (a 20% difference) than the EUR 10.44 million included in paragraph 416 of the Award, which leads to damages of EUR 41.76 million.[29]

70. The reduction of the Award by only EUR 10.44 million leaves serious doubts as to whether the Tribunal has actually excluded from the damages awarded the amount arising from the 7% tax damage claim and which is outside its jurisdiction as stated by the Tribunal.[30]

71. Thus, the Award, by determining damages in a random and arbitrary manner, departs from the ECT mandate.[31]

72. Spain moreover suggests that the Tribunal has thereby acted *ex aequo et bono* without agreement of the parties to do so, as required by the ICSID Convention, which can also constitute a manifest excess of powers.[32]

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[28] RoS, slide 167.

[29] RoA, ¶ 187.

[30] *Id.*, ¶ 200.

[31] *Id.*, ¶ 204.

[32] MoA, ¶ 135, citing the *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, RL-0125.

c) Failure to Apply EU Law

73. Additionally, Spain contends that in order to decide the scope of investors' rights and analyse the true legitimate expectations of the Claimant, it was crucial to apply EU law to the merits.[33] In Spain's view, by failing to do so, the Tribunal also manifestly exceeded its powers.[34]

B. FAILURE TO STATE REASONS IN THE AWARD

74. Spain considers that the 9REN Award should moreover be annulled because it failed to comply with its essential obligation to state reasons in relation to four issues crucial to the legitimacy of the Award:

(a) The applicability of EU law;
(b) The jurisdictional objection relating to "*denial of benefits*;"
(c) Its findings of liability in relation to the alleged breaches of the ECT; and
(d) The quantification of damages.[35]

a) Applicable Law

75. Spain holds that it is impossible to understand what, according to the Tribunal, is the applicable law or the extent to which it took into consideration EU law.[36] In fact, "*in a matter of four paragraphs*" the Tribunal declared that EU law is not applicable while it also declared that it would apply EU law.[37] According to Spain, the expression of contradictory reasoning is equivalent, for the purposes of the ground for annulment it invokes, to a failure to state reasons.[38]

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[33] Respondent's Closing Statement, slides 29 ff. (hereinafter "**RcS**").

[34] *Id.*, slide 33.

[35] RoA, ¶ 221.

[36] AfA, ¶ 38.

[37] MoA, ¶ 150.

[38] *Id.*, ¶ 151.

76. Specifically, Spain alleges that it "*requested the application of EU law as International Law in accordance with article 26(6) ECT to decide all the issues in dispute*,"[39] but the Award contradicted itself in its reasoning in paragraphs 168 and 172. The Award should therefore be annulled.[40]

77. The Award should moreover be annulled for failure to state reasons in matters of EU law, as it omits reasoning on key issues (such as the interpretation of Article 26(1) ECT and the *Achmea* judgment, which prevents the reader from following its reasoning), and it gives contradictory reasons that cancel each other out in relation to the application of EU law.[41]

78. In the underlying arbitration, the Parties disputed the consequences of the EU's qualification as a Regional Economic Integration Organisation (hereinafter, "**REIO**") in Articles 1(3) and 1(10) ECT. According to Spain, the EU is a REIO for the purposes of its consideration as a "*Contracting Party*" and an investment "Area." Therefore, Spain maintained in the underlying arbitration that the ECT was not applicable to intra-EU disputes, since a single contracting party and a single investment area were at stake.[42]

79. However, these arguments were not addressed by the Tribunal in its Award.[43] This should therefore be annulled due to failure to state reasons.[44]

b) Denial of Benefits Objection

80. The Tribunal's failure to state reasons is, according to Spain, even more obvious regarding its denial of benefits objection. The Award devotes "*one single paragraph, with absolutely no reasoning*," to dismiss this objection.[45] The Award thus fails to give sufficient reasons

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[39] RoS, slide 81.

[40] *Id.*, slide 91.

[41] *Id.*, ¶ 282.

[42] RoA, ¶ 258.

[43] RoS, slide 74.

[44] RcS, slide 49.

[45] AfA, ¶ 39.

and explanations in a matter that was crucial for the arbitration. This lack of reasoning is constitutive of annulment of the Award.[46]

81. In this respect, Spain notes that: (i) 9REN is a legal entity incorporated in the territory of an ECT Contracting Party other than the one against which the dispute is raised; (ii) this legal entity is controlled or owned by citizens or nationals of a third country; and (iii) this legal entity must "*not conduct major business activities in the territory of the Contracting Party in which it is established*."[47]

82. In light of the above, Spain maintains that the Tribunal manifestly exceeded itself by granting 9REN protection under Part III of the ECT that had been denied to it by Spain. The invocation of that clause by Spain has not been out of time.[48]

c) Liability

83. Spain submits that the Award lacks a statement of reasons in setting out its conclusions on liability. It is not possible, Spain argues, to follow the reasoning of the Award when it concludes that Spain has breached Article 10(1) of the ECT, in fixing the date of the investment, and in assessing the measures in dispute.[49]

84. The Tribunal stated that Article 44(3) of RD 661/2007 was a specific undertaking from Spain to the Claimant. Then, the Tribunal determined that this commitment had created legitimate expectations of stability. There is, however, no reasoning to be found in the Award explaining how the Tribunal reaches these conclusions.[50]

85. In fact, Spain argues that at no point in the Award: (i) is the fair and equitable treatment (hereinafter "**FET**") standard defined; (ii) does the Tribunal provide its understanding of

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[46] MoA, ¶ 160.

[47] RoS, slide 134.

[48] RoS, slide 137; RcS, slide 73.

[49] RoA, ¶ 293.

[50] AfA, ¶ 40.

the concept of *legitimate expectations* or its relation to the FET standard;[51] or (iii) is the *standard of stability* defined or explained in the context of the FET standard.[52] However, the determination of this standard was fundamental, as it allows Spain to know the criterion and the test to which the challenged measures are subject.[53] Thus, the Award does not meet the minimum reasoning requirements and should be annulled.[54]

86. In the Award, the Tribunal concluded that Spain made a "*petrification commitment*" to the Claimant. However, according to Spain, the Award responds, in a "*haphazard and unmotivated manner*," to arguments made by Spain in this respect. This approach is allegedly irregular and suggests that the Tribunal has reversed the burden of proof.[55]

87. Moreover, at no point did the Tribunal analyse the precise effect of each of the contested measures. This gap in reasoning is also impermissible in Spain's view.[56]

88. Additionally, Spain argues that: (i) the Award fails to specify to what Spain committed by means of Article 44(3) of RD 661/2007;[57] (ii) in letter (d) of paragraph 264, the Award incurs an unacceptable distortion of reality;[58] (iii) Spain cannot know how the Tribunal, by reading the Royal Decree referred to, concluded that Spain's commitment to the investor was to petrify the tariff.[59]

89. In sum, according to Spain, the Tribunal:

    (a) Did not address the FET standard under the ECT and other arguments put forward by Spain (i.e., Act No. 54/1997);

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[51] *Id.*, ¶ 41.

[52] *Id.*, ¶ 41.

[53] RoA, ¶ 336.

[54] MoA, ¶ 162.

[55] *Id.*, ¶ 165.

[56] RoA, ¶ 330.

[57] RoS, slide 103.

[58] *Id.*, slide 105.

[59] *Id.*, slide 106.

(b) Started its reasoning seeming to have reached a conclusion;

(c) Reached conclusions without giving explanations; and

(d) Contradicted itself in its reasoning.[60]

90. This conduct should lead the Committee to annul the Award for failure to state reasons.[61]

d) Quantum of Damages

91. According to Spain, it is impossible to understand how the Tribunal reached a 20% reduction of the Claimant's original claim.[62] The Award thus lacks the minimum reasoning in its conclusions regarding the quantification of damages.[63] The percentage set by the Tribunal is, furthermore, inconsistent with the evidence before it.[64] The Tribunal should at best have made a reduction in damages of at least 33%.[65]

92. The Tribunal chose to calculate damages on the basis of the amount claimed by the Claimant and to make two types of adjustments thereafter:

(a) By "*removing*" three of the Claimant's claims: (i) for the reimbursement of the 7% TVPEE; (ii) for five years of useful life claimed in excess, as the Claimant proposed 35 years, although the Tribunal only recognised 30 years; and (iii) for the claim for damages to the Formiñena plant, as it was not included within the scope of tariff protection pursuant to the Tribunal's findings on liability; and

(b) By incorporating a "discount": (i) an illiquidity discount; and (ii) a regulatory risk discount.

93. This paragraph of the Award, Spain argues, speaks for itself. Not "*a single motive or reason*" that justifies the 20% reduction is specified. No single reference to the expert

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[60] RcS, slide 68.

[61] *Id.*, slide 69.

[62] AfA, ¶ 47.

[63] MoA, ¶ 201.

[64] *Id.*, ¶ 203.

[65] *Id.*, ¶ 212.

evidence or to the previous conclusions of the Tribunal is to be found in this alleged estimate.[66]

94. In Spain's view, this Committee faces the same situation as the Committee in *Tidewater v. Venezuela*, where annulment was granted for failure to state reasons. In that case, the committee concluded that "*one part of the Award, where a genuinely contradictory reasoning on the amount of compensation cancels out another reasoning with respect to the same compensation, must be annulled*."[67]

95. Of the reduction of damages in the amount of EUR 10.44 million: (i) EUR 7.5 million correspond to the useful life reduction; (ii) 7% TVPEE (Act 15/12) were outside the jurisdiction of the Tribunal;[68] and (iii) approximately EUR 1 million corresponds to the Formiñena plant. Claimant has not been able to prove that the extra EUR 3 million reduction covers the effect of the findings on jurisdiction and damages.[69]

C. SPAIN'S *PETITA*

96. Based on the foregoing, Spain requests that the Committee:

(a) Annul the Award in its entirety under Article 52(1)(b) of the ICSID Convention, as the Tribunal manifestly exceeded its powers by unduly declaring its jurisdiction over an intra-EU dispute, by dismissing the "*denial of benefits*" objection and by arbitrarily awarding damages in excess of the ECT mandate;

(b) Annul the Award in its entirety under Article 52(1)(e) of the ICSID Convention for failure to state reasons in the determination of the applicable law, in the dismissal of the denial of benefits objection, in the determination of liability findings and in the quantification of damages;

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[66] RoA, ¶ 369.

[67] RoS, slide 157, citing *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, ¶ 196 RL-0127 (hereinafter "***Tidewater***").

[68] 9REN Award, ¶¶ 189-208.

[69] RcS, slide 82.

(c) In the alternative, annul the part of the Award relating to the quantification of damages under Article 52(1)(b) and (e) due to a manifest excess of powers and a failure to state reasons; and

(d) Determine that 9REN shall pay all the costs of the proceedings.[70]

IV. 9REN'S POSITION

97. According to 9REN, Spain's arguments evidence a "*fundamental misunderstanding*" of the applicable legal standards and the limits of the Committee's jurisdiction. The claims that Spain raises with respect to the Award reflect Spain's mere disagreement with the Tribunal's conclusions that did not comport with Spain's position in the underlying arbitration. Spain seeks to reargue those positions in these proceedings and have the Committee assess the validity of the Tribunal's factual and legal findings anew.[71]

98. 9REN submits that none of the findings from the Tribunal amount to an excess of power, but even if they did, that excess could not be "*manifest*" because every other tribunal that has considered the same issues has reached conclusions that are consistent with those of the 9REN Tribunal.[72]

99. The Committee should, moreover, not consider any evidence on jurisdiction or liability that post-dates the original Tribunal's declaration of closure of proceedings, which occurred on 21 December 2018.[73]

100. In any event, the *Cube*,[74] *SolEs*,[75] and *NextEra*[76] committees' decisions submitted in May

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[70] RoA, ¶ 404.

[71] Respondent's Counter-Memorial on Annulment, ¶ 2 (hereinafter "**C-MoA**").

[72] *Id.*, ¶ 6.

[73] *Id.*, ¶ 102.

[74] *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, CL-371 (hereinafter "***Cube***").

[75] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, CL-373 (hereinafter "***SolEs***").

[76] *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, March 18, 2022, CL-372 (hereinafter "***NextEra***").

2022 confirm, from 9REN's point of view, that "*the limited scope of annulment proceedings, are further support that the 9REN Tribunal made no annullable error*." Furthermore, 9REN submits, "[n]*one of these arbitral awards was annulled despite arguments by Spain very similar to these proceedings related to the intra-EU objection, denial of benefits, liability, and quantum*."[77]

A. MANIFEST EXCESS OF POWERS

101. Although 9REN rejects that the Tribunal erred, it submits that the errors alleged by Spain come nowhere near the level required to demonstrate a "*manifest excess of power*."[78]

102. 9REN moreover notes that: (i) not a single "*intra-EU*" ECT tribunal has concluded that EU law is relevant in the manner Spain suggests; and (ii) several dozen tribunals have concluded that it is not;[79] (iii) there is no "*manifest*" excess of power when the underlying issue is "s*usceptible of argument 'one way or the other*.'"[80]

a) Jurisdiction over the Dispute

103. According to 9REN, the plain meaning of Article 26(3) of the ECT is that each and every Contracting Party to the ECT, i.e., including each and every EU Member State (including Spain), as well as the EU itself, gave their "*unconditional consent*" to investor-state dispute resolution in accordance with the terms of that provision.[81] The ECT contains no exception, express or implied, for intra-EU disputes.

104. The Tribunal applied the general rules of treaty interpretation from the Vienna Convention on the Law of Treaties (hereinafter "**VCLT**") and concluded that the plain terms of the ECT had to be upheld. The Tribunal also observed that, under Spain's interpretation, the same terms of the ECT would result in a different application depending on the Contracting

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[77] Claimant's *Submission on Five New Legal Authorities*, 20 May 2022, ¶ 21.

[78] C-MoA, ¶ 114.

[79] *Id.*, ¶ 122.

[80] Claimant's Opening Statement (hereinafter "**CoS**"), slide 43.

[81] C-MoA, ¶ 136.

Parties concerned, and that there was simply no support in the ECT for this type of differentiated interpretation.[82]

105. In 9REN's view, the Tribunal correctly interpreted the ECT provisions and found no such exception for "*intra-EU*" arbitration. This is the same conclusion that at least 27 other ECT tribunals have reached; namely, that the plain terms of the ECT do not contain an exception to the dispute resolution provision for "*intra-EU*" disputes.[83]

106. *Achmea* explicitly does not extend to cases concerning multilateral treaties to which the EU is a party, including the ECT.[84] *Achmea* was therefore, 9REN submits, irrelevant to the Tribunal's jurisdiction. *Komstroy* is also irrelevant to the Tribunal's jurisdiction and to the Committee's analysis, and in any event has no impact upon Spain's obligations under the ECT.[85]

107. In fact, 9REN argues, CJEU decisions, such as *Achmea* and *Komstroy*, have no automatic effect on international treaties. For example, EU Member States understood that they needed to take action to terminate their intra-EU BITs after *Achmea*. The EU and its Member States will need to address any lack of compatibility between EU law and the ECT by amending the ECT or withdrawing from the Treaty. Until they do so (and until the ECT's "*sunset period*" expires in the case of withdrawal), their obligations under the ECT remain fully intact.[86]

108. Pursuant to Article 26(6) of the ECT, "[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*." EU law is not part of "*international law applicable to the underlying arbitration under Article 26 of the ECT*."[87] As the Tribunal explained, the

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[82] *Id.*, ¶ 137.

[83] *Id.*, ¶ 141.

[84] *Id.*, ¶ 145.

[85] CoS, slides 49-50.

[86] *Id.*, slide 70.

[87] C-MoA, ¶ 155.

language in Article 26(6) "*refers to public international law, not regional law such as EU Law as interpreted by the CJEU*."[88]

109. For 9REN, Spain's position on the supposed "*autonomy*" and "*primacy*" of EU law is nonsensical. Those terms are used in EU law to express the notion that EU law "*trumps*" the domestic law of EU Member States. They do not mean that EU law "*trumps*" public international aw.[89] The principle of "*primacy*" of EU law therefore does not amount to a conflict rule under international law.[90]

110. Article 16 of the ECT is, according to 9REN, a "*firewall*" that no EU responding State nor the EC has ever been able to convince any ECT tribunal to ignore. While nearly all ECT tribunals have found there is no conflict between the ECT and EU law to begin with, none has found that the ECT would not in fact "*trump*" EU law if there were a conflict in light of Article 16. There is no scenario in which "*intra-EU*" arbitration will be impermissible under the ECT because the ECT will always "*trump*" any contrary EU law on the subject.[91]

111. The Tribunal therefore rightly concluded, according to 9REN, that EU law could not be considered as part of "*rules and principles of international law*" under Article 26(6) of the ECT and thus did not form part of the governing law of the ECT.[92]

112. In sum, 9REN submits, Spain has failed to demonstrate that the Tribunal committed an "*excess of power*," much less a "*manifest excess of power*," and even less a "*manifest excess of power*" worthy of the extreme sanction of annulment.[93]

113. 9REN moreover notes that Spain's attempt to deny the ECT's benefits retroactively has been consistently rejected by ECT tribunals. The *Isolux* tribunal, for example, rejected Spain's identical argument, noting that "*the denial of benefits clause can never function*

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[88] *Id.*, ¶ 155.

[89] C-MoA, ¶ 175.

[90] *Id.*, ¶ 180.

[91] *Id.*, ¶ 182.

[92] *Id.*, ¶ 187.

[93] *Id.*, ¶ 198.

retroactively" and therefore "*the notification of such denial must be prior to the commencement of the dispute*."[94] Similarly, the *NextEra v. Spain* tribunal also rejected Spain's objection noting that it had "*failed to exercise its right to deny benefits under Article 17(1) in a timely fashion*."[95] In fact, at least ten ECT tribunals have decided this issue in the same manner, leading to a *jurisprudence constante* on this subject.[96]

114. The Tribunal rightly explained that the business activity of a holding company was "*typically preoccupied with paperwork, board meetings, bank accounts and cheque books*," which is precisely the evidence that 9REN submitted in the arbitration.[97]

115. 9REN accordingly rejects that the Tribunal has manifestly exceeded its powers in respect of Spain's denial of benefits objection. 9REN additionally notes in this regard that:

> "*The NextEra committee, which considered nearly identical arguments from Spain on this objection, found that the NextEra tribunal's reasoning was 'tenable' as a matter of law and could not be said to be a 'non-application' 'or a misapplication' of law. It noted that the tribunal's conclusion was in line with 'various' other decisions, and thus no error, let alone a 'manifest' error, could have been said to have occurred*."[98]

b) Quantum of Damages

116. 9REN submits that the view that tribunals enjoy broad discretion in estimating the quantum of damages is so well settled that it also forms a *jurisprudence constante*.[99]

117. The gist of Spain's argument is that the tribunal manifestly exceeded its powers by rejecting the specific valuations advanced by the Parties' experts and fashioning its own

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[94] *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award of 12 July 2016, ¶ 715, CL-110.

[95] Claimant's Rejoinder on Annulment, ¶ 153 (hereinafter "**RejoA**").

[96] *Id.*, ¶ 154.

[97] *Id.*, ¶ 156.

[98] Claimant's Submission on Five New Legal Authorities, 20 May 2022, ¶ 4.

[99] C-MoA, ¶ 211.

estimate of 9REN's losses based on its evaluation of all of the evidence before it and its "*margin of appreciation*."[100]

118. Spain's disapproval of the outcome is no more a basis for annulment than it was for rectification, and it is not a demonstration of the Tribunal having committed an excess of power. The Committee should therefore reject Spain's application for annulment in this respect.[101]

119. Even if true, according to 9REN, the alleged errors that Spain identifies in the Tribunal's calculations would not provide a basis for annulment.[102] In fact, the Tribunal acted within its discretion to approach the quantum issues in this case. The assessment of damages is not only inherently imprecise, but parties and their experts often present different quantum valuations. Under such circumstances, tribunals must have broad discretion to assess quantum based on their own judgment, which should not be confused with a decision *ex aequo et bono*.[103]

120. In sum, the Tribunal considered the arguments by both Parties and their experts and found their arguments wanting. Instead, the Tribunal arrived at a figure with which it was comfortable based on the circumstances of the case. Spain's arguments invite the Committee to re-evaluate the Tribunal's judgment, but that is not part of the mission entrusted to the Committee under the ICSID Convention, Article 52.[104]

121. The same conclusion was arrived at by the annulment committees in the *NextEra, Soles,* and *Cube* cases, in which they "*found that Spain's attacks on each tribunal's liability*

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[100] *Id.*, ¶ 215.

[101] *Id.*, ¶ 220.

[102] RejoA, ¶ 164.

[103] *Id.*, ¶ 181.

[104] *Id.*, ¶ 182.

conclusions focused on the content of those conclusions, which is plainly outside the scope of annulment."[105]

122. In any event, the Tribunal's finding of fact was, 9REN contends, supported by ample evidence, namely: (i) a testimony from Mr. Francesco Giuliani; (ii) documentary evidence of 9REN's Luxembourg-based employees (C-242); (iii) salary slips (e.g., C-243); (iv) office lease (C-244); and (v) board meeting minutes (C-246, C-249).[106]

123. Spain's arguments on quantum are, in sum, outside the scope of annulment.[107]

B. FAILURE TO STATE REASONS IN THE AWARD

124. 9REN submits that a failure to state reasons only occurs within the meaning of Article 52(1)(e) when:

(a) The conclusion that allegedly lacks reasons is outcome determinative;[108] and
(b) It is impossible to understand how the tribunal arrived at its conclusion.[109]

125. The standard under Article 52(1)(e) is a "*minimum requirement*." It merely requires that an "*informed reader* […] *understand how the tribunal reached its conclusions*" or a "*reasonable reader* [be able] t*o understand the award*."[110]

126. The question for the Committee is thus simply whether the Tribunal included any reasons – either explicitly or implicitly – for its conclusions. If reasons are given, the Committee's

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[105] Claimant's Submission on Five New Legal Authorities, 20 May 2022, ¶ 5, citing the *NextEra* annulment decision, ¶¶ 351-353; the *SolEs* annulment decision, ¶ 219; and the *Cube* annulment decision, ¶ 342.

[106] CoS, slide 98.

[107] *Id.*, slide 111.

[108] C-MoA, ¶ 220, citing *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment, Sept. 29, 2016, ¶ 143.

[109] *Id.*, citing *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on Annulment, Dec. 10, 2010, ¶ 355.

[110] C-MoA, ¶ 224, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, Feb. 1, 2016, ¶ 265.

inquiry on this ground must end.[111]

a) Applicable Law

127. Spain claims that the Award fails to state reasons for the Tribunal's rejection of the intra-EU objection. However, 9REN submits, the Tribunal assessed Spain's objection and provided adequate reasons for dismissing it.

128. Spain obviously disagrees with the Tribunal's reasoning or conclusions, but that is not the standard by which the Committee must judge the Award. The fact is that reasons are present in the Award, and, for 9REN, that is the end of the analysis.[112]

129. Article 26(1) of the ECT is "*the starting point*" to determine jurisdiction under the ECT. Spain seems to contend that the Tribunal did not properly carry out its analysis in accordance with this provision, but Spain's position is mistaken. The Tribunal began its analysis by quoting Article 26(1), which, it found, "*sets out the conditions precedent to the availability of ECT arbitration*".[113]

130. Spain's arguments about the REIO definition are wrong in 9REN's view. The definition of "*REIO*" and "*territory*" of a REIO in ECT Articles 1(3) and 1(10) contain no language affecting the ability of investors of EU Member States to commence arbitration against other EU Member States. Instead, the ECT merely acknowledges that some Contracting Parties are also members of regional organizations. Those are defined terms, nothing more. The fact that the ECT defines a Contracting Party as "*a State or a* [REIO] *which has consented to be bound by this Treaty and for which the Treaty is in force*" does not in any way support Spain's position that the ECT was not intended to apply among the EU Member States.[114]

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[111] C-MoA, ¶ 230.

[112] RejoA, ¶ 205.

[113] *Id.*, ¶ 208.

[114] *Id.*, ¶ 210.

131. Article 26 thus applies to disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former.[115]

132. The Tribunal carefully analysed the *Achmea* judgment in its Award and reached the same conclusion that every single ECT tribunal has reached to date.[116]

133. In particular, 9REN notes that:

(a) The Award states reasons for rejecting Spain's EU-law-based arguments in paragraph 141;
(b) The Tribunal addressed three key features of Spain's EU-law-based argument in Part 6;
(c) The Tribunal was not required to explicitly address every argument that Spain made;
(d) The Award states reasons for the Tribunal's jurisdiction under Article 26(1) of the ECT in paragraphs 116-120;
(e) The Award states reasons why *Achmea* was irrelevant to the Tribunal's jurisdiction in paragraphs 152-154; and
(f) The Award explains why EU law was not part of the dispute's applicable law in paragraphs 146-147.[117]

b) Denial of Benefits Objection

134. According to 9REN, it has been well-settled for years that a denial of benefits provision may not be invoked once an arbitration has begun, because a contrary rule would be used opportunistically by states to wipe out any claim by a claimant with upstream ownership in a third state.[118]

135. 9REN Holding S.à.r.l. has carried out normal business activities in Luxembourg since its founding. 9REN has leased office space and has maintained at least one locally-based

[115] *Id.*, ¶ 211.

[116] *Id.*, ¶ 217.

[117] CoS, slides 131-140.

[118] C-MoA, ¶ 203.

employee in Luxembourg since July 2009. 9REN has also maintained bank accounts there, since incorporation, with ING Luxembourg. Further, 9REN pays taxes in Luxembourg.[119]

136. The Tribunal explicitly quoted the testimony from Mr. Giuliani in its Award, which explained in detail 9REN's activities in Luxembourg.[120]

137. In summary, this ground for annulment fails, according to 9REN, for many of the same reasons why the EU law arguments fail: the Tribunal thoroughly considered the facts before it in light of each of Spain's arguments; it correctly rejected Spain's objection; and its findings are consistent with every other ECT tribunal that has considered these issues to date.[121]

c) Liability

138. 9REN notes that the Award states reasons for the Tribunal's findings on liability in paragraphs 214 *et seq*.[122] In fact:

(a) The Tribunal proceeded to present and assess each of Spain's arguments with regard to whether 9REN had a legitimate expectation of specific and predictable tariffs, and that the tariffs would not be changed;[123]

(b) Paragraph 309 of the Award alone provides at least two reasons for the Tribunal's conclusion on liability: (i) the Tribunal's factual finding that Spain's incentive regime was not limited to merely a reasonable rate of return; and (ii) the Tribunal's factual finding that 9REN was entitled to expect the incentives as provided by the express terms of RD 661/2007. Either is a sufficient basis for rejecting Spain's argument that the Award should be annulled on this ground;[124] and

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[119] *Id.*, ¶ 205.

[120] RejoA, ¶ 230.

[121] C-MoA, ¶ 207.

[122] CoS, slide 147-148.

[123] RejoA, ¶ 241.

[124] *Id.*, ¶ 245.

(c) The Tribunal's reasons for its conclusion that Spain infringed the ECT are laid down in several paragraphs of the Award, notably in paragraph 311.[125]

d) Quantum of Damages

139. Spain's position on the quantum of damages is, according to 9REN, nothing more than a claim that the Tribunal articulated no specific reasons why the discount to FTI's damages valuation to account for regulatory risk and other variables should be 20% rather than some other figure.[126]

140. The *jurisprudence constante* makes clear that tribunals need to say very little in order to satisfy the obligation to provide an explanation of reasons for quantum findings, precisely because the exercise inherently involves judgment and discretion, which often are incapable of precise articulation.[127]

141. The fact that tribunals have wide latitude in providing reasons for their decisions on quantum flows inexorably from the fact that they have – and as described above, must have – broad authority to arrive at decisions on quantum based on their judgment and discretion rather than on mathematical precision. Quantum awards are often the result of approximation or estimation, and often a result of widely diverging competing views.[128]

142. According to 9REN, the *NextEra ad hoc* committee confirmed these views, in that it found that: (i) "*a tribunal must engage in a fact intensive inquiry and must make a discretionary judgment to assess what it deems appropriate for damages*;" (ii) "*a consensus … exists among committees that tribunals have a wide margin of appreciation when determining damages*;" and (iii) for these reasons, an annulment application based on damages "*must*

[125] *Id.*, ¶ 247.

[126] *Id.*, ¶ 261.

[127] *Id.*, ¶ 264.

[128] *Id.*, ¶ 26.

meet a higher bar."[129]

143. In any event, the Award states reasons for the Tribunal's findings on quantum in paragraphs 405-407.[130]

144. In its closing statement, 9REN added that the 20% reduction in damages decided by the Tribunal comprises the following:

7% TVPEE	Neutralized by NRR (Award ¶ 191)
30 year life	EUR 7.5 million reduction (Award ¶ 416)
Formiñena	Less than EUR 1 million (on Spain's case)
Risk	Approx. EUR 2 million (implicit from other inputs)
Total	EUR 10.44 million (EUR 52.2 million minus EUR 41.76 million) [131]

C. 9REN'S *PETITA*

145. For the foregoing reasons, 9REN requests that the Committee:

(a) Dismiss Spain's AfA in its entirety;
(b) Uphold the validity of the Award;
(c) Order Spain to reimburse 9REN for all its legal costs and expenses associated with this proceeding (including professional fees and disbursements);
(d) Order Spain to immediately comply with the Award; and
(e) Award 9REN any other relief that the Committee deems just and proper.[132]

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[129] Claimant's Submission on Five New Legal Authorities, 20 May 2022, ¶ 7, citing the *NextEra* annulment decision, ¶ 273.

[130] CoS, slide 156.

[131] *Id.*, slides 2-25.

[132] RejoA, ¶ 265.

V. THE EUROPEAN COMMISSION'S OBSERVATIONS

a) The European Commission's Written Submission as a Non-Disputing Party

146. The EC concluded its submission as a NDP as follows:

(a) The CJEU held in *Komstroy* that Article 26(2)(c) of the ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State;

(b) In other words, when such an intra-EU dispute arises, there is no "*unconditional consent to the submission of a dispute to international arbitration*" pursuant to paragraph (3) of Article 26, and there is no procedure for the investor to provide its consent and thereby perfect the offer to arbitrate, such as that set out in paragraph (4) of the same provision;

(c) A tribunal, such as the Arbitral Tribunal in the present proceedings, which purports to be established under paragraph (4), was improperly so and therefore lacked jurisdiction;

(d) That finding constitutes an authentic, binding and final interpretation of ECT Article 26, for the Contracting Parties concerned (here: Spain and Luxembourg), the Claimant, the Tribunal and the Committee;

(e) As with any authentic interpretation and any interpretation given by an international court, that interpretation applies *ex tunc*;

(f) In conclusion, Spain did not validly consent to investor-State arbitration in relation to disputes brought by investors from another EU Member State, such as Claimant, and the Tribunal lacked the competence to hear the case;

(g) Moreover, by failing to apply provisions of EU law, the Tribunal failed to apply the applicable law, and thereby committed a manifest excess of power;

(h) Thus, the conclusions in point 87 above must lead to the annulment of the Award; and

(i) Finally, Spain may not pay the Award, not at least until the EC has taken a final decision on the compatibility, or lack thereof, of such a payment. That is an obligation not only under EU law, but also under the international law applicable between the parties.[133]

b) The Parties' Observations on the European Commission's Submission

(i) Spain

147. Spain agrees with the EC on the paramount relevance of the *Komstroy* ruling. The *Komstroy* ruling clearly sets out that the *Achmea* holdings are applicable to multilateral agreements, which ultimately generate bilateral obligations between two of the ECT contracting parties.[134]

148. The *Komstroy* ruling entirely confirms Spain's views: (i) the CJEU set out in the *Achmea* ruling clear criterions, drafted in general terms and to be applied not only to BITs but also to multilateral Treaties; (ii) those criterions are to be applied to the ECT in order to properly interpret ECT Article 26; and (iii) ECT Article 26(2)(c) must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[135]

149. As explained by the EC, the CJEU decision reiterates that an international agreement cannot affect the allocation of powers laid down by the Treaties and, hence, the autonomy of the EU legal system. This autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law.[136]

150. The autonomy of the EU and the preferential application of the EU legal framework for intra-EU affairs over international conventions, even if they do not have any disconnection

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[133] European Commission's Written Submission as Non-Disputing Party, 9 December 2021, ¶¶ 95-103.

[134] *Respondent's* Comments on the European Commission Submission, 30 December 2021, ¶¶ 14-15.

[135] *Id.*, ¶ 15.

[136] *Id.*, ¶ 20.

clause, has been admitted by all States and is international custom that must be respected.[137]

151. In light of the EC's submission, Spain concludes the following:

(a) The application of the EU law is mandatory; foreign direct investment (including the ECT) is part of the EU competences and subject to EU law and; in cases where the seat of the arbitration is in a Member State of the EU, the national courts have to ensure such application;
(b) The autonomy of the EU legal framework must be respected; and
(c) Intra-EU investment arbitration is not allowed, and the ECT cannot be interpreted as allowing it.[138]

(ii) 9REN

152. In its comments on the EC's submission, 9REN reiterates that the Committee may not review or address alleged errors of law in this proceeding**.** For this reason alone, the Committee should disregard that submission as beyond the scope of this annulment proceeding.[139]

153. Moreover, 9REN alleges, the EC's reliance on *Komstroy* is flawed because: (i) *Komstroy* is based on an EU law interpretation of the ECT and does not even purport to apply international law; and (ii) a decision from the CJEU is not binding upon an ECT tribunal or an ICSID annulment committee, which are constituted under the ECT and the ICSID Convention, respectively, and are not bodies of the EU legal order.[140]

154. The original incentives regimes that induced 9REN's investments in Spain were not considered to be "*State aid*" under EU law when 9REN invested and held the expectations

[137] *Id.*, ¶ 22.

[138] *Id.*, ¶ 25.

[139] Claimant's Comments on the European Commission's amicus brief, 30 December 2021, ¶ 6.

[140] *Id.*, ¶ 11.

it did, or for that matter ever. In fact, as of today, there still has been no determination by the EC that the original aid schemes were State aid, much less unlawful State aid.[141]

155. In assessing the EC's position on jurisdiction, the starting point is the plain language of the ECT itself. 9REN notes that the EC focuses its arguments almost exclusively on matters of EU law, while disregarding the express terms of the ECT, which contradict its position. The Committee may not proceed in the same manner. The ECT was the basis for the constitution of the Tribunal and the ICSID Convention was the exclusive source of its jurisdiction and mandate.[142]

156. *Komstroy* is only relevant within the realm of EU law. It cannot and does not have any bearing on the meaning of the ECT under international law. *Komstroy* also may not serve as a basis for annulment, since the judgment did not exist when the Tribunal made its determination of its jurisdiction. Thus, it cannot be said that the Tribunal manifestly exceeded its power as a result of *Komstroy*.[143]

157. Under international law, the Tribunal was required to apply ECT Article 26 as written, which contains no exception or reservation for intra-EU disputes. Further, nothing in the ECT would have permitted the Tribunal to rely on or to apply EU law in determining its jurisdiction, even if the *Komstroy* judgment had existed at the time it did (which, of course, it did not). Thus, the CJEU's EU law-based interpretation of ECT Article 26(2)(c) is irrelevant for multiple reasons, and has no bearing upon the Tribunal's determination of its jurisdiction under the ECT and international law.[144]

158. The *BayWa* tribunal confirmed 9REN's position and expressly stated that "*the source of its competence is the ECT, a valid multilateral treaty to which all EU Member States and the EU itself are parties and which is governed by international law. Specifically,*

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[141] *Id.*, ¶ 14.

[142] *Id.*, ¶ 17.

[143] *Id.*, ¶ 18.

[144] *Id.*, ¶ 19.

Article 26 defines the jurisdiction of the Tribunal, which (as already held) had inter se application when it was concluded."[145]

159. The ICSID Convention, at Article 26, makes this point all the more unequivocal, stating that "[c]*onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*." Thus, the fact that, under EU law following *Komstroy*, *intra*-EU investment treaty disputes must be brought before EU courts is irrelevant: the ICSID Convention confirms that when Spain gave its "*unconditional consent*" to arbitrate disputes in the ECT, it did so to the exclusion of any other remedy. The CJEU's decision cannot and does not revoke or invalidate Spain's consent to be bound by an international treaty such as the ECT or the ICSID Convention.[146]

160. Even if it had carried out the appropriate international law analysis, the CJEU's decision would not be binding upon an ECT tribunal, which is constituted under the ECT and the ICSID Convention and beholden only to those instruments and general or customary international law (which EU law is not).[147]

161. The ECT contains a *lex specialis* conflict of law provision, which governs any matters of conflict, including the situation in which EU law, as interpreted in *Komstroy*, conflicts with ECT Article 26. An application of ECT Article 16 would result in an ECT tribunal upholding its jurisdiction over an intra-EU arbitration because the ECT is more favorable to the investor and its investments than the new EU rule articulated by the CJEU in *Komstroy*.[148]

162. The *Kruck* tribunal correctly observed that the "*solution*" to the problem of the conflict resulting from *Komstroy* is not a matter for arbitral tribunals to determine, but instead "*lies*

[145] *Id.*, ¶ 21.

[146] *Id.*, ¶ 23.

[147] *Id.*, ¶ 25.

[148] *Id.*, ¶ 27.

in the hands of the Contracting Parties to the ECT who alone hold the power to amend the ECT pursuant to its Article 42."[149]

163. The EC's position on EU State aid law is incorrect because: (i) EU law was not part of the governing law to be applied by the Tribunal, and (ii) there has never been any finding, under EU law or otherwise, that Spain's incentives programs were State aid, much less unlawful State aid.[150]

164. The fact that Spain did not notify RD 661/2007 or RD 1578/2008 to the EC for a State aid analysis is clear evidence that Spain did not consider those regimes to be State aid, as is the fact that the EC never opened a State aid investigation into either regime. It is reasonable for investors to believe that Spain and the EC contemporaneously act in compliance with their EU law obligations.[151]

165. For all the foregoing reasons, even if the Committee determines that it is entitled to revisit the merits of the Award (which it is not), the EC's arguments on State aid lack merit, are irrelevant, or both; and they should be disregarded.[152]

VI. THE EXPERTS' REPORTS

166. Both Parties submitted reports by experts of their own choice: Spain submitted two reports by Professor Steffen Hindelang; and 9REN submitted two reports by Professor Piet Eeckhout. The Parties also had the opportunity to cross-examine and re-examine the experts at the hearing. Their reports are briefly described in the following sections.

[149] *Id.*, ¶ 29.

[150] *Id.*, ¶ 46.

[151] *Id.*, ¶ 66.

[152] *Id.*, ¶ 71.

A. THE HINDELANG REPORTS

a) Hindelang Report 1

(i) Jurisdiction

167. According to Prof. Hindelang, the Tribunal had to apply the Treaty on European Union (hereinafter "**TEU**") and the Treaty on the Functioning of the European Union (hereinafter "**TFEU**") (collectively, hereinafter "**EU Treaties**") as well as the legal order derived therefrom. Its purported jurisdiction on the basis of Article 26 of the ECT conflicts with the EU Treaties. The EU Treaties enjoy primacy over any conflicting international law obligation between EU Member States, including an offer to arbitrate purportedly contained in Article 26 of the ECT. By virtue of the principle of primacy, the Tribunal was therefore not only entitled, but legally obliged – like any public body created by one or more EU Member States, to prevent conflict by declining its jurisdiction.[153]

168. As explained in *Achmea*, any provision in an international agreement that is incompatible with EU law, like Article 26 of the ECT, would be precluded by EU law from having any legal effect. Therefore, a putative offer to arbitrate extended by an EU Member State to an investor from another EU Member State, like Article 26 of the ECT, is rendered inapplicable and cannot be accepted to form an agreement to arbitrate.[154]

169. The principle of primacy of EU law also applies to international agreements or treaties between EU Member States. EU law therefore takes precedence over the rules created by EU Member States in international agreements or treaties concluded between them.[155]

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[153] First Expert Declaration of Prof. Steffen Hindelang, ¶ 5.

[154] *Id.*, ¶ 17.

[155] *Id.*, ¶ 41.

170. Under *Achmea,* Member States are precluded from extending an offer to arbitrate to matters that may require the interpretation or application of EU law where such an interpretation or application is insufficiently reviewable by the CJEU.[156]

171. For the very same reasons as set out in *Achmea*, Article 26 of the ECT does not contain a valid offer by any Member State to arbitrate matters of EU law in an intra-EU context. Such an offer is precluded by the principles of primacy and autonomy and particularly by Articles 267 and 344 of the TFEU. Article 26 of the ECT runs afoul of the EU Treaties, circumventing the EU Member States' national courts and the preliminary ruling procedure under Article 267 of the TFEU and interfering with the CJEU's exclusive authority to ultimately determine the content and validity of EU law under Articles 267 and 344 of the TFEU. Thus, Article 26 has been inoperative *ab initio* for intra-EU disputes.[157]

172. A tribunal established under Article 26 of the ECT may be called upon to interpret or apply EU law in regard to a range of issues. For example, in an arbitration in which the claimant alleges that the responding State has breached the requirement under Article 10(1) of the ECT, to provide its investment with fair and equitable treatment, the tribunal would need to assess the investor's assertion of its "*legitimate expectations*" *vis-à-vis* its investment. The content of those "*expectations*" is normally assessed by reference to the prevailing legal regime, which includes the applicable EU regulatory framework.[158]

(ii) Payment of the Award

173. Payment of the Award in the present case to 9REN would have to be financed through Spain's state resources and is imputable to the State; and such payment would qualify as State aid to an investor. It is therefore subject to the obligation imposed by Article 108(3) of the TFEU that an EU Member State cannot put in effect any measures that constitutes

[156] *Id.*, ¶ 49.

[157] *Id.*, ¶ 57.

[158] *Id.*, ¶ 64.

State aid unless and until approved by the EC. The payment of the Award would therefore be in violation of EU law.[159]

b) Hindelang Report 2

(i) Jurisdiction

174. Article 26 of the ECT is, according to Prof. Hindelang in his second report, inoperative between EU Member States *ex tunc*, i.e., from the time the ECT came into force.[160]

175. This conclusion is in line with a view expressed recently by two of the CJEU's Advocate Generals, and most prominently, Advocate General Maciej Szpunar in *Komstroy*.[161]

176. *Achmea* precludes intra-EU arbitration under Article 26 of the ECT. The principle of primacy of EU law, enshrined in the EU Treaties, is the supreme conflict rule governing the relationship between the EU Treaties and other international agreements with regard to obligations of the EU Member States *inter se*. This means that Article 26 of the ECT does not apply between EU Member States and precludes an EU Member State from extending a valid offer to arbitrate to a national of another EU Member State.[162]

177. The ECT is a multilateral treaty. The specific provision at issue, Article 26, is analogous to Article 8 of the Dutch-Slovak BIT because it creates bilateral undertakings among the Contracting Parties.[163]

178. The lack of a disconnection clause in the ECT does not mean that the EU held the position that the ECT applies in an intra-EU context.[164]

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[159] *Id.*, ¶ 73.

[160] Second Expert Declaration of Prof. Steffen Hindelang, ¶ 8.

[161] *Id.*, ¶ 9.

[162] *Id.*, ¶ 13.

[163] *Id.*, ¶ 20.

[164] *Id.*, ¶ 34.

179. There is no need for an explicit disconnection clause in the ECT because the EU Treaties and EU secondary law can disconnect EU Member States from a treaty *inter se*. For example, the 1961 Hague Convention on the Legalization of Public Foreign Documents (the "*Apostille Convention*") has been ratified by 117 States, and has no disconnection clause at all.[165]

180. The EU Treaties establish an all-encompassing conflict rule, the principle of primacy of EU law. This rule means that in the international law relationships between EU Member States, the EU Treaties and the legal order created by them prevail over any inconsistent treaty provision entered into by Member States.[166]

(ii) Payment of the Award

181. Spain's payment of the Award in contravention of its obligations under Article 108 (3) of the TFEU and the respective implementation legislation would make Spain liable under EU law. The EC has, then, the power to compel Spain to recover any amounts paid under the Award without the EC's approval. It can also commence an infringement proceeding against Spain before the CJEU if Spain is unable to recover such payments, and, eventually, may seek the imposition of monetary penalties.[167]

B. THE EECKHOUT REPORTS

a) Eeckhout Report 1

182. Prof. Eeckhout's first report concludes as follows:

(a) The ECT applies in intra-EU relations. It follows that the Tribunal in this case correctly concluded that it had jurisdiction over this dispute notwithstanding the intra-EU nature of the parties. If the limited inquiry under Article 52 is whether the Tribunal's

[165] *Id.*, ¶ 37.

[166] *Id.*, ¶ 59.

[167] *Id.*, ¶ 85.

conclusion was a "*tenable*" one, then in his view, the point is wholly unarguable: clearly the Tribunal's conclusion was a tenable one;

(b) There is no conflict between EU law and the intra-EU application of the ECT. Such intra-EU application does not offend against the principle of autonomy of EU law. But even if such a conflict did exist, it would be correct to give precedence to the ECT pursuant to its Article 16(2);

(c) The ECT Tribunal in this case correctly concluded that the law applicable to determining whether Spain had violated Part III of the ECT was the ECT itself together with applicable rules and principles of international law. The Tribunal was correct to find that this did not include EU law, such as EU internal market law and State aid law. If the limited inquiry under Article 52 is whether the Tribunal's conclusion was a "*tenable*" one, in his view, the Tribunal's conclusion was a tenable one;

(d) In any event, the Award is not a form of EU State aid and the EC has never rendered a finding to that effect. Furthermore, as in the *Kadi* case, any lack of compatibility between the Award and EU State Aid law would be limited to EU law in its effects, and would not invalidate the Award, which derives its status from the ECT and the ICSID Convention (not from EU law).[168]

(i) Jurisdiction

183. Regarding jurisdiction, Prof. Eeckhout observes that the CJEU case law on primacy is confined to the relationship between EU law and the domestic legal orders of the EU Member States. At no point has the CJEU ever ruled on how any conflict between a Member State's EU law obligations and its international (non-EU) law obligations should be resolved, on the international plane. That is unsurprising because the CJEU's jurisdiction is limited to EU law.

184. EU law is not "*applicable*" international law in an ECT investment arbitration. EU law does not govern the jurisdiction of an ECT tribunal at all, and nor is such a tribunal required or even empowered to apply EU law. The fact that the EU Treaties impose international

[168] First Expert Opinion of Prof. Piet Eeckhout, ¶¶ 87-90.

obligations on the EU Member States is not sufficient for bringing those obligations within the jurisdiction of an ECT tribunal.

185. The CJEU's jurisdiction is limited to EU law and therefore is not binding on an investment treaty tribunal constituted under the ECT. *Achmea* does not purport to govern the interpretation of any international agreements concluded by EU Member States.

186. The act of concluding the ECT has not been annulled or declared invalid. Effectively, Spain and Professor Hindelang are requesting this Committee to rule on a point of EU law which is within the CJEU's sole jurisdiction, and is not within the jurisdiction of any other court or tribunal in the EU Member States: that intra-EU investment arbitration under the ECT violates the autonomy of EU law.

187. Where the EU acts under international law, as it did when becoming a Contracting Party to the ECT, it is bound by the relevant rules and principles of international law. This includes, first and foremost, the principle of *pacta sunt servanda* (as codified in, *inter alia,* the VCLT).

188. Any conflicts between those EU Treaties and other international treaties to which the EU Member States are parties need to be resolved within the "*four corners of public international law*." However, what the EU cannot do is to claim that its own system of law governs such conflicts.

189. The EU can negotiate a "*disconnection clause*," which addresses the non-applicability of the treaty or some of its provisions exclusively between EU Member States. Such a disconnection clause may be used where the EU considers there to be potentially overlapping obligations, between an EU Member State's treaty obligations and its EU law obligations. The clause has the effect of excluding the application of the treaty in intra-EU relations and has been used by the EU in multiple occasions.

190. Giving meaning to the terms used, in their context and in the light of a treaty's object and purpose, is the first customary international law rule of treaty interpretation. A simple reading of the terms of the ECT, in their ordinary meaning, confirms that all of the Contracting Parties are bound by all of the ECT's provisions.

191. Prof. Eeckhout therefore concludes that the ECT applies in intra-EU relations, on the basis of its express provisions, and on the basis of the absence of any of the well-established techniques that could avoid such intra-EU application.

192. The ECT contains an express conflict rule in Article 16(2), which states that where two or more Contracting Parties have entered into another treaty, whose terms "*concern the subject matter of Part III or V of this Treaty*," the terms of Part III and Part V prevail, provided they are "*more favourable to the Investor or Investment*."

193. The fact that the EU's founding treaties, or EU law more generally, cannot invalidate treaties or agreements which the Member States have concluded, on their own, is confirmed by Article 351 of the TFEU.

194. As Advocate General Mischo established in *Commission v. Portugal*, the first paragraph of this provision is merely declaratory, in the sense that it confirms the international law principle of *pacta sunt servanda*.

195. This means that there is no automatic primacy of the EU Treaties under international law; for else, there would be no need to remove any lack of compatibility.[169]

(ii) State aid

196. To constitute unauthorized State aid, the award must first constitute State aid that requires authorization. There is no authority confirming that that is the case, nor could there be any because the award does not meet the definition of a State aid under EU law.[170]

b) Eeckhout Report 2

197. In his second report, Prof. Eeckhout essentially reiterates the reasoning set out in his first report and concludes as follows:

[169] First Expert Opinion of Prof. Piet Eeckhout, ¶¶ 9-77.

[170] *Id.*, ¶ 78.

(a) The ECT applies in intra-EU relations. It follows that the Tribunal in this case correctly concluded that it had jurisdiction over this dispute notwithstanding the intra-EU nature of the parties. If the limited inquiry under Article 52 is whether the Tribunal's conclusion was a "*tenable*" one, in his view, the Tribunal's conclusion was a tenable one;

(b) There is no conflict between EU law and the intra-EU application of the ECT. Such intra-EU application does not offend against the principle of the autonomy of EU law. But even if such a conflict did exist, it would be correct to give precedence to the ECT pursuant to its Article 16(2);

(c) The ECT Tribunal in this case correctly concluded that the law applicable to determining whether Spain had violated Part III of the ECT was the ECT itself together with applicable rules and principles of International Law. The Tribunal was correct to find that this did not include EU law, such as EU internal market law and State aid law. If the limited inquiry under Article 52 is whether the Tribunal's conclusion was a "tenable" one, then again, in Prof. Eeckout's view, the point is wholly unarguable: clearly the Tribunal's conclusion was a tenable one;

(d) In any event, the Award is not a form of EU State aid and the EC has never rendered a finding to that effect. Furthermore, as in the *Kadi* case, any incompatibility between the Award and EU State aid law would be limited to EU law in its effects, and would not invalidate the Award, which derives its status from the ECT and the ICSID Convention (not from EU law).[171]

VII. THE COMMITTEE'S ANALYSIS

A. THE APPLICABLE LEGAL STANDARDS

198. In its analysis of Spain's request for annulment of the Award, the Committee bases itself on the following standards, which *ad hoc* committees constituted under the ICSID

[171] Second Expert Opinion of Prof. Piet Eeckhout, ¶¶ 65-68.

Convention have repeatedly applied in their decisions and are consistent with the Convention.

a) No Review of the Award on the Merits

199. According to Article 53(1) of the ICSID Convention:

> "*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*."

200. Annulment proceedings must therefore be distinguished from appeals, since they do not involve a review of the merits of the award, or the possibility of its modification. In the words of an authoritative commentator, any *ad hoc* committee "*will either leave the award intact or put a definitive end to its binding force*."[172]

201. This view was upheld, *inter alia,* by the *ad hoc* committee in *Tidewater v. Venezuela*, which stressed that:

(a) Under the ICSID Rules, no appreciation is allowed in annulment proceedings of the quality of reasons of the award;[173]

(b) No examination of the merits of the award is allowed in such proceedings either. In fact, an *ad hoc* committee must not re-assess the merits of the case, which it would do notably "*if it discarded the Tribunal's exercise of discretion in fixing the amount of compensation and replaced it by its own discretion*;"[174] and

(c) An *ad hoc* committee must therefore "*abstain from scrutinizing whether the Tribunal has established the facts correctly, has interpreted the applicable law correctly and has subsumed the facts as established correctly under the law as interpreted*."[175]

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[172] Aron Broches, "Observations on the Finality of ICSID Awards", 6(2) *ICSID Review – Foreign Investment Law Journal*, 321, 324 (1991), CL-300.

[173] *Tidewater*, ¶ 168, RL-0127.

[174] *Id.,* ¶ 171.

[175] *Id.,* ¶ 172.

202. More recently, the same view was shared by the *ad hoc* committee that decided the request for annulment in *Antin v. Spain*, which specifically held that an annulment committee cannot review *de novo* the facts, evidence and criteria used by the tribunal in its award of damages.[176]

b) Legal Standards for Manifest Excess of Powers

203. Article 52(1)(b) of the ICSID Convention provides for annulment of an award only where:

(a) A tribunal has *exceeded its powers*; and
(b) Such excess is *manifest*.

204. The manifest nature of an excess of powers has been interpreted by most *ad hoc* committees to mean an excess that is "*obvious, clear or self-evident*."[177] This is in line with the exceptional and limited character of an annulment as opposed to an appeal.[178]

205. Nevertheless, *ad hoc* committees have also held that there may be an excess of powers if a tribunal "*incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking, or when Tribunal exceeds the scope of its jurisdiction*."[179]

206. An error that is obvious or self-evident must necessarily be one that would be "*readily apparent without a need to resort to extensive argumentation and analysis to reveal it*."[180]

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[176] *Infra. Servs. Lux. S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31 – Annulment Proceeding, Decision on Annulment (hereinafter "***Antin v. Spain,* Decision on Annulment**"), ¶ 168, CL-361.

[177] ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, ¶ 83, RL-0125.

[178] *Antin v. Spain,* Decision on Annulment, ¶ 151.

[179] ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, ¶ 87, RL-0125.

[180] *Antin v. Spain,* Decision on Annulment, ¶ 152.

207. While an annulment claim must be resolved based on its own merits, the fact that a tribunal has arrived at the same conclusion as other tribunals in similar situations might be an indication that an alleged excess of powers is not manifest.[181]

208. For this purpose, an arbitral *jurisprudence constante* provides a persuasive, reasoned, and documented analytical framework as to how other adjudicating bodies have treated similar matters. In *Antin v. Spain*, the fact that 56 other tribunals agreed with the Tribunal's views was held by the *ad hoc* committee as sufficient to show that the tribunal's reasoning was tenable and not clearly or self-evidently wrong.[182]

209. In any event, a committee can only annul the tribunal's award on damages if the tribunal has made an obvious or manifest error that is discernible from the face of the award. A committee should not make its own findings of fact or law apart from what is clearly established in the award.[183]

210. A debatable application of the law does not amount to a manifest excess of power by the tribunal.[184] As stated in the decision of the *TECO v. Guatemala* annulment committee:

> "*In determining whether a tribunal has committed a manifest excess of power, an annulment committee is not empowered to verify whether a tribunal's jurisdictional analysis or a tribunal's application of the law was correct, but only whether it was tenable as a matter of law. Even if a committee might have a different view on a debatable issue, it is simply not within its powers to correct a tribunal's interpretation of the law or assessment of the facts*."[185]

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[181] *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 Annulment (hereinafter "***Teinver***"), ¶ 59, CL-290.

[182] Decision on Annulment, ¶ 154.

[183] *Antin v. Spain*, Decision on Annulment, ¶ 169.

[184] ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, ¶ 90, RL-0125.

[185] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, at ¶ 78, RL-0168EN.

c) Legal Standards for Failure to State Reasons

211. It is well accepted, both in prior cases and literature, that Article 52(1)(e) of the ICSID Convention concerns a *failure to state any reasons; not the failure to state correct or convincing reasons*.[186] As noted by the *MINE v. Guinea* committee:

> "*[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (l)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention*."[187]

212. According to the same committee, that requirement "*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*."[188]

213. It is also noteworthy, in this respect, that a tribunal is not required to state every reason explicitly, nor is it required to address all the parties' arguments individually.[189] As the *ad hoc* committee in *Teinver* held:

> "*Article 52(1)(e) expresses the minimum requirement that a good faith reader of the award can understand the motives that led the Tribunal to adopt its decisions. In assessing whether that is the case, the award must be*

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[186] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 64, CL-129. See, along the same lines, more recently, the decision rendered on 18 March 2022 by the *ad hoc* committee in *NextEra*, CL-372, stating, in ¶ 128, that: "*The Committee finds that it must not engage in an assessment of the 'correctness' of the Tribunal's reasoning or whether it was 'appropriate or convincing*.'" See also the decision rendered on 28 March 2022 by the *ad hoc* Committee in *Cube v. Spain*, CL-371, stating, in ¶ 320, that: "*the Committee agrees with the notion that the ability to follow the reasoning, does not imply a right or ability to review the adequacy of the reasons*."

[187] *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, ¶ 5.08, RL-0124 (hereinafter "***MINE***").

[188] *Id.*, ¶ 5.09. See also the decision rendered on 16 March 2022 by the *ad hoc* committee in *SolEs*, CL-373, at ¶ 83, stating that: "*While a failure to state reasons can take many forms, the ultimate question is whether the Committee is satisfied that the Tribunal's award is possible to follow 'from Point A. to Point B.'. If so, there can be no basis for annulment on this ground*."

[189] However, a tribunal's failure to address questions that might have affected the tribunal's conclusion may constitute, in certain circumstances, a failure to state reasons. *MINE*, ¶ 6.99-101, RL-0124.

> *considered in its entirety. The mere fact that reasons are unclear or imperfectly expressed is therefore insufficient to annul an award. Likewise, contradictory reasons may only entail annulment if the contradiction is such that it becomes impossible to understand the motives that led such tribunal to adopt its solution*."[190]

214. Considering the *principle of finality* set out in the ICSID Convention, an annulment committee is limited in its ability to characterise a tribunal's reasoning as deficient, inadequate or otherwise faulty, and cannot substitute its own judgment for that of the tribunal.[191]

B. Analysis of the 9REN Award (1): Manifest Excess of Powers by the Tribunal

a) Jurisdiction over the Dispute

(i) The Relevant Normative Texts

215. The starting point of the analysis of the jurisdictional issues raised in these proceedings is ECT Article 26(3)(a), which states that:

> "*Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article*."

216. Parties agree that this provision should be interpreted in conformity with VCLT Article 31(1), which lays down that:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose*."

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[190] *Teinver*, ¶ 209, CL-290.

[191] *Antin v. Spain*, Decision on Annulment, ¶ 234.

217. ECT Article 16 addresses possible conflicts between the Contracting Parties' obligations under the ECT and other international agreements, and states in this respect that:

> "*Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment*."

218. Declaration 17 to the Treaty of Lisbon amending the TEU and the Treaty establishing the European Community, signed on 13 December 2007, states, in turn, that:

> "*The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law*."

(iii) The Relevant Case-law: the *Vattenfall* decision

219. The jurisdictional issues raised in these proceedings, and on which the Award relied upon,[192] have been extensively dealt with in the *Vattenfall* decision on the *Achmea* issue, according to which a tribunal's assessment of its jurisdiction is to be made "*under the ICSID Convention, interpreted in the light of general principles of international law, and the instrument(s) containing the consent to arbitration. For the Tribunal, the starting point is Article 26 ECT, setting out the terms of the agreement to arbitrate.*"[193]

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[192] 9REN Award, ¶¶ 146-147.

[193] *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (hereinafter "***Vattenfall***"), ¶ 128, CL-196.

220. According to the *Vattenfall* tribunal, the principles of international law "*relevant to the interpretation, application, and other aspects of treaties*," namely ECT Article 26, are primarily those set out in the VCLT.[194] It added that "*EU Law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT.*"[195] The *Vattenfall* tribunal noted that EU law is, to be sure, international law because it is rooted in international treaties.[196] However, the EC's approach that EU law forms part of the analysis of the tribunal's jurisdiction via VCLT Article 31(3)(c) (as "*any relevant rule*[] *of international law applicable in the relations between the parties*") is "*unacceptable as it would potentially allow for different interpretations of the same ECT treaty provision*," "*creat*[ing] *one set of obligations applicable in at least some 'intra-EU' disputes and another set of different obligations applicable to other disputes.*"[197]

221. The *Vattenfall* tribunal further held that:

> "*When States enter into international legal obligations under a multilateral treaty, pacta sunt servanda and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the legal obligations entered into by one State or another and depending on the parties to a particular dispute. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT.*"[198]

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[194] *Id.*, ¶ 132.

[195] *Id.*, ¶ 133.

[196] *Id.*, ¶ 146, citing *Electrabel v. Hungary*, ¶ 4.120.

[197] *Id.*, ¶ 155.

[198] *Id.*, ¶ 156.

222. EU law may therefore not be used to provide a meaning of Article 26 that departs from the ordinary meaning of the terms of that Article.[199]

223. The *Vattenfall* tribunal accordingly concluded that "*the law applicable to the assessment of its jurisdiction [is] the ECT, in particular Article 26 thereof, in conjunction with Article 25 of the ICSID Convention. These treaties are to be interpreted in accordance with general principles of international law, in particular as set out in the VCLT*."[200] Taking into account the wording of Article 26 of the ECT, read together with the above provisions, the *Vattenfall* tribunal could not agree that intra-EU arbitrations have been carved out from the application of Article 26 of the ECT.[201]

224. Moreover, even though it considered that there was a simpler and clearer route to the answer to the jurisdictional challenge based on the provisions of the EU Treaties,[202] the *Vattenfall* tribunal noted that pursuant to Article 16(2) of the ECT, the Contracting Parties to the ECT, including the EU:

> "[*S*]*pecifically and explicitly agreed that prior or subsequent treaties that they enter into with each other, whose terms concern the subject matter of Part III or V of the ECT, shall not be construed so as to derogate from any provision in Part III ('Investment Promotion and Protection,' including the substantive protections) or Part V ('Dispute Settlement') ECT, where a provision is more favourable to the Investor or Investment*."[203]

225. In this way, by the terms of Article 16 of the ECT itself, it would be prohibited for a Contracting Party to construe the EU Treaties so as to derogate from an investor's right to dispute resolution under Article 26 of the ECT, to the extent that they are understood to concern the same subject matter.[204]

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[199] *Id.*, ¶ 164.

[200] *Id.*, ¶ 166.

[201] *Id.*, ¶ 188.

[202] *Id.*, ¶ 192.

[203] *Id.*, ¶ 193.

[204] *Id.*, ¶ 195.

226. Article 16 of the ECT was deemed to be a *lex specialis* as a conflict of laws rule in the *Vattenfall* case. In the tribunal's view, Article 16 poses an insurmountable obstacle to the respondent's argument that EU law prevails over the ECT. The application of Article 16 confirms the effectiveness of Article 26 and the investor's right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties.[205]

(iv) The 9REN Award

227. The Tribunal followed the *Vattenfall* line of reasoning with regard to its own jurisdiction. In this respect, the Tribunal stated that:

> "*Although EU law, comprised of and derived from treaties between EU Member States, is properly characterized as international law, it does not displace the general rule of interpretation in Article 31(1) VCLT […]*."[206]

228. To the extent that EU law may be "*taken into account, together with the context*" under Article 31(3), the Tribunal went on to say that EU law does not displace the plain reading of Article 26 of the ECT because otherwise:

> "[*T*]*he same words in the same treaty provision may have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute. An ECT dispute between an Australian claimant and Spain, for example, would be subject to different rules than an ECT dispute between a German claimant and Spain. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT*."[207]

229. Accordingly, the Tribunal noted that:

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[205] *Id.*, ¶ 229.

[206] 9REN Award, ¶ 146.

[207] *Id.*, ¶ 146.

> "*The exclusion of intra-EU disputes from the scope of ECT would not be consistent with the plain language of the ECT or the ICSID Convention.*"[208]

230. Moreover, the Tribunal addressed Spain's argument that the CJEU judgment in *Achmea* precluded the Tribunal to accept jurisdiction.[209] The Tribunal explained its understanding of the *Achmea* decision. It noted that this decision affirmed the scope of the EU treaty making power, including the establishment of dispute resolution mechanisms outside the framework of the EU courts, and considered that this notion rebutted "*Spain's position that EU laws exist in a bubble subject to interpretation and consideration only by EU courts (and tribunals)*."[210] It further found that Spain's argument that the ECT has different Member categories, with different access to different remedies (according to their EU or non-EU membership), "*has no basis in the text of the ECT itself or in the Achmea decision*."[211]

231. The Tribunal also addressed the subsidiary argument that even if it had jurisdiction, the Tribunal could not apply EU law (as a component of "*International Law*" under Article 26(6)) and set itself "*as an interpreter of EU Law, which is the exclusive province of EU courts*."[212] The Tribunal considered that the case did not rest on EU law, but rather on whether the Claimant was entitled to compensation under the ECT. It considered therefore that it was not required to interpret and apply EU law.[213] However, it noted that "*in the application of international law,* [it] *may have regard from time to time to national law (e.g. with respect to the Claimant's corporate status) as well as to EU law (e.g. Spain's justification for its regulatory steps)*."[214] The Tribunal then found that:

> "[*H*]*aving properly taken jurisdiction to resolve this dispute it is within that jurisdiction to consider EU law to the extent necessary for the resolution of*

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[208] *Id.*, ¶ 147.

[209] *Id.*, ¶ 148.

[210] *Id.*, ¶¶ 152-153.

[211] *Id.*, ¶ 154.

[212] *Id.*, ¶ 160.

[213] *Id.*, ¶¶ 168-169.

[214] *Id.*, ¶ 170.

> *the dispute under international law. For the purpose of its decision on jurisdiction, the Tribunal does not consider that EU law is materially incompatible with the applicable international law, including the EU treaties and Article 26 of the ECT as to investor-State arbitration under the ICSID Convention*."[215]

232. In sum, the Tribunal concluded in respect of its own jurisdiction:

> "*(i) the ECJ's judgment in Achmea does not extend to the ECT, a multilateral treaty to which both EU Member States and the EU are signatory parties, including (especially) Article 26 of the ECT; (ii) there was and is no material conflict between the ECT and EU law (including the EU treaties, particularly the Treaty of the European Union ("TEU") and TFEU); (iii) EU law does not modify Spain's obligations under the ECT, including Article 26 of the ECT; (iv) this Tribunal's jurisdiction and its exercise in the present case rests upon the ECT (with international law as the applicable law) and not EU law; and (v) this is an ICSID arbitration under the ICSID Convention without a seat or legal place in any national jurisdiction, still less in any EU Member State*."[216]

(iv) Analysis

233. It is undisputed that an exercise of jurisdiction that is not conferred upon a tribunal is in principle an excess of powers.[217] In this case, however, no such excess has been established. The Tribunal addressed Spain's jurisdictional objection based on the relevance of EU law under the "*governing law*" argument, the "*institutional*" argument and the "*application of EU Law*" argument. With respect to the first two arguments, the Tribunal conducted an interpretation of the jurisdictional clause contained in Article 26 of the ECT. It found that the plain language of this provision does not allow the exclusion of intra-EU disputes from the scope of the ECT, and that a different position – either through the alleged context provided by EU law or through the *Achmea* decision – would lead to incoherent or

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[215] *Id.*, ¶ 172.

[216] *Id.*, ¶ 173.

[217] ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, ¶ 87, RL-0125; *Teinver*, ¶ 59, CL-290.

variable interpretative results of Article 26 (according to the involvement of EU or non-EU ECT Contracting Parties)[218] and without any basis on the text of the ECT. [219] Spain raises multiple arguments based on certain principles of EU law, which in its view should have prevailed over the Tribunal's plain reading of the text of Article 26. However, other than seeking a re-interpretation of Article 26 by this Committee, Spain fails to demonstrate how the Tribunal's reliance on the notion of coherence and uniformity for the interpretation of the same terms of Article 26 of the ECT (as applicable to different ECT Contracting Parties (EU and non-EU Contracting Parties) could constitute an interpretative error of such an egregious character that should be characterized as an excess of power in the Tribunal's reading of its jurisdictional clause. Spain's arguments based on the primacy of EU law over the terms of the ECT are dealt with further below.

234. Spain also challenges the manner in which the Tribunal addressed the "*application of EU Law*" argument. The challenge is based on the alleged contradictions incurred by the Tribunal in disregarding EU law as part of the applicable law, while, on the other hand, retaining its ability to consider EU law if necessary and deeming it as not materially incompatible with the applicable international law.[220] At the outset, it must be noted that annulment applications based on alleged contradictions that render a tribunal's conclusion null relate to the ground of failure to state reasons under Article 52.1(e), and not to that of a manifest excess of power under Article 52.1(b) of the ICSID Convention. On this basis alone, this application for annulment should be rejected. Furthermore, it is not "*manifest*" that such an alleged contradiction would constitute an excess of powers by the Tribunal. The Tribunal made it clear that it was required to apply the ECT as the applicable law, and not required to do so with respect to EU law. It explained its position by noting that the Claimant's case rested on the ECT, and not on EU law. The Tribunal also noted, however, that it could have regard to national and regional law as part of its adjudicating task under international law (*e.g.,* with respect to the Claimant's corporate status or Spain's

[218] 9REN Award, ¶ 146.

[219] *Id.*, ¶ 154.

[220] MoA, ¶¶ 99-106; RoA, ¶ 83.

justification for its regulatory steps). It is difficult to see in this explanation, or in the manner in which the Tribunal addressed the question of the applicable law, an error of such an egregious character, let alone "*manifest*," which would be equivalent to a plain misapplication of the applicable law to the dispute.

235. Furthermore, in the present proceedings, two distinct normative systems have been invoked in respect of the Tribunal's jurisdiction over the dispute, namely:

(a) The ECT, pursuant to Article 26(3)(a) of which each Contracting Party has given its "*unconditional consent*" to the submission of investor-state disputes to international arbitration or conciliation in accordance with the provisions of that treaty; and

(b) The law of the EU, the autonomy of which, as interpreted by the CJEU in *Achmea* and *Komstroy,* precludes the application of a provision, such as Article 26 of the ECT, "*whereby a dispute between an investor of one Member State and another Member State concerning EU Law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed*."[221]

236. The relationship between these two normative systems can be considered in light of different rules:

(a) Article 16(2) of the ECT, which provides for the *primacy of the ECT* over prior or subsequent agreements of Contracting Parties; and

(b) Declaration 17 to the Lisbon Treaty, which enshrines the principle of *primacy of EU law*.

237. Prior decisions have invoked both these rules. The former has prevailed in arbitral tribunals' case law on investment disputes subject to the ICSID Convention and Rules, even after *Achmea* and *Komstroy*. The latter prevailed in the abovementioned CJEU rulings, as well as in the Paris Court of Appeal rulings of 19 April 2022, and in the SCC-

[221] *Komstroy*, ¶ 62, C-319.

2016/135 arbitral award on *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain*.

238. The Committee notes, in this regard, that those rules have different addressees:

(a) The *EU law primacy rule* is addressed to: (i) jurisdictional bodies whose authority derives from EU law itself, such as the CJEU, or from EU Member States' law, such as national courts; and (ii) arbitral tribunals subject to the law of EU Member States as their *lex arbitri*, on the basis of which they should assess their jurisdiction, and to the control of the courts of those States.

(b) The *ECT primacy rule* is addressed to the jurisdictional bodies mentioned in Article 26 of the ECT, notably arbitral tribunals constituted pursuant to that treaty and the ICSID Convention that are subject neither to the law of an EU Member State as their *lex arbitri*, nor to the control of the courts of that State.

239. The former was the case of: (i) the CJEU in the abovementioned *Achmea* and *Komstroy* rulings; (ii) the Paris Court of Appeal in its rulings of 19 April 2022, which annulled, based on the principle of primacy of EU law, two awards that had upheld arbitral tribunals' jurisdiction to hear disputes between EU Member States and investors from other EU Member States;[222] and (iii) the tribunal in the SCC-2016/135 case, which declined jurisdiction to hear the dispute brought by the Claimant against Spain, because it was bound by the law of an EU Member State, specifically Swedish law, as its *lex arbitri*.[223]

240. The latter was the case of the 9REN Tribunal. In light of the above, the Committee understands why the Tribunal in 9REN relied on the ECT when assessing its jurisdiction, despite the CJEU rulings to the contrary, and that no excess of powers has thus been incurred by the Tribunal.

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[222] Paris Court of Appeal, Ruling of 19 April 2022, *Strabag et al. v République de Pologne*, No. 48/2022, RL-210; Paris Court of Appeal, Ruling of 19 April 2022, *Slot et al. v République de Pologne*. No. 49/2022, RL-0211.

[223] *Green Power*, ¶ 478, RL-0213.

241. The Committee cannot therefore concur with Prof. Hindelang's view according to which "[b]*y virtue of the principle of primacy, the said Tribunal was therefore not only entitled, but legally obliged – like any public body created by one or more EU Member States, to prevent conflict by declining its jurisdiction*."[224]

242. The Tribunal was *not* a body created by one or more EU Member States, or subject to the law of those States, but rather a jurisdictional body instituted according to Article 26(4)(a)(i) of the ECT and operating under ICSID Arbitration Rules.[225]

243. It was therefore to the ECT alone that the 9REN Tribunal owed its existence, and which accordingly determined its jurisdiction: "*The ECT is the 'constitution' of the Tribunal*," as noted in the *RREEF* Decision on Jurisdiction.[226]

244. The relevance of this point was expressly acknowledged by the SCC-2016/135 arbitral tribunal, which stated in its award:

(a) "*[T]he Claimants could have opted for an ICSID arbitration under Article 26(4)(a)(i) ECT, given that both Denmark and Spain are – and were at the time the arbitration commenced – parties to the ICSID Convention. The Claimants opted instead to conduct the proceedings under the SCC Rules and, upon the Claimants' proposal in a letter dated 21 October 2016, the seat of the arbitration was set in Stockholm. Both Parties agree that this determination of the seat attracts the application of Swedish arbitration law, particularly the SAA, as the the applicable lex arbitri*;"[227]

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[224] First Expert Declaration of Prof. Steffen Hindelang, ¶ 5.

[225] 9REN award, ¶ 131.

[226] *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 Jurisdiction, ¶ 74, CL-101 (hereinafter "***RREEF, Decision on Jurisdiction***").

[227] *Green Power*, ¶ 162, RL-0213.

(b) "*In point of fact, the application of this lex arbitri and the control exercised by the Swedish courts was one of the considerations for which the Claimants opted for a SCC arbitration in Stockholm*;"[228]

(c) "*As the Parties have not explicitly agreed on the law governing the arbitration agreement and neither the ECT nor the SCC Rules, to which the Parties have agreed, determines the law applicable to the arbitration agreement, it follows that, pursuant to Section 48 SAA, Swedish law, i.e. the law of the seat, is applicable to the determination of jurisdictional matters*;"[229]

(d) "*The selection of the seat in Sweden, an EU Member State, also attracts the application of EU law, which is part of the law in force in every EU Member State, including Sweden*;"[230]

(e) "*The question of whether or not EU law applies to the determination of jurisdiction and, if so, the extent to which it does so, does not arise in the same manner in the circumstances of this arbitration as in ICSID proceedings*."[231]

245. In light of the above, the reasoning that led to the conclusion arrived at by the SCC-2016/135 arbitral tribunal in respect of its own jurisdiction cannot be transposed to the assessment of the 9REN Tribunal's jurisdiction.

246. In any event, as pointed out by Prof. Eeckhout, "*there is simply no CJEU case law that states that the primacy of EU law constitutes an international conflict rule*" whereby EU law prevails over any inconsistent treaty provision entered into by EU Member States.[232]

247. In this respect, it is noteworthy that a significant number of decisions rendered by tribunals and *ad hoc* committees have upheld the view endorsed by the Tribunal in respect of the jurisdictional issues that it decided.

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[228] *Id.*, ¶ 163.

[229] *Id.*, ¶ 165.

[230] *Id.*, ¶ 166.

[231] *Id.*, ¶ 166.

[232] Second Expert Opinion of Prof. Piet Eeckhout, ¶ 50.

248. It suffices to mention in this regard, in addition to the *Vattenfall* decision described above, the following decisions:

(a) *LBBW* Decision on Jurisdiction: "*A judgment of the CJEU in response to a reference from a national court for a preliminary ruling is binding only upon the court making the reference. EU law has no concept of stare decisis, so such a judgment would not bind other courts.* […] *This Tribunal, however, derives its authority not from national or EU law but from an international agreement and from the rules of public international law. There is therefore no question of it being bound by the CJEU Achmea Judgment* […];"[233]

(b) *Eiser* Award: "*The Tribunal's jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order and is not subject to the requirements of that legal order. However, the Tribunal need not address the possible consequences that might arise in a case of a conflict between its role under the ECT and the European legal order, because no such conflict has been shown to exist here*;"[234]

(c) *Rockhopper* Decision on Intra-EU Objection: "*a proper reading of the Achmea does not lead to the conclusion that it is in any way a relevant consideration for the investor-State arbitration mechanism established in Article 26 of the ECT as regards intra-EU relations*;"[235]

(d) *Novenergia* Award: "*Third, this Tribunal's jurisdiction is based exclusively on the explicit terms of the ECT. As is evident, the Tribunal is not constituted on the basis of the European legal order and it is not subject to any requirements of such legal order*;"[236]

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[233] *Landesbank Baden-Württemberg et al. v. Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection (hereinafter "***LBBW* Decision**"), ¶ 102, CL-277.

[234] *Eiser Infrastructure Limited Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, ¶ 199, CL-158.

[235] *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU jurisdictional objection (hereinafter "***Rockhopper* Decision**"), ¶ 173, CL-279.

[236] *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶ 461, CL-177.

(e) *OperaFund* Award: "*all substantive provisions of the ECT remain fully applicable and EU law is not part of the applicable substantive law in this case*;"[237] and

(f) *RREEF* Decision on Jurisdiction: "*However, this Tribunal has been established by a specific treaty, the ECT, which binds both the EU and its Member States on the one hand and non-EU States on the other hand. … The Tribunal observes, however, that should it ever be determined that there existed an inconsistency between the ECT and EU law – quod non in the present case – and absent any possibility to reconcile both rules through interpretation, the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. This would be the case even were this to be the source of possible detriment to EU law. EU law does not and cannot 'trump' public international law*."[238]

249. Reference should also be made here to the *Antin v. Spain ad hoc* committee decision on annulment, which settled issues similar to those under discussion in the present proceedings:

(a) According to that decision, "*on their plain and ordinary reading, the ECT provides the Tribunal with the jurisdiction to entertain claims against Spain (a Contracting Party) by investors of Luxembourg (also a Contracting Party) related to investments made by the Claimants in Spain*."[239]

(b) The ECT's purpose does not support Spain's interpretation thereof. Nothing in Article 2 of the ECT, captioned "*Purpose of the Treaty*," "*suggests the exclusion of claims by investors who are nationals of an EU Member State who is also a party to the ECT against another EU Member State*."[240]

(c) According to the committee, the tribunal's jurisdiction arises from the express terms of the ECT, which is binding on the State parties and the EU: "*The EU*

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[237] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, ¶ 330, CL-247.

[238] *RREEF,* Decision on Jurisdiction, ¶¶ 74 y 87, CL-101.

[239] *Antin v. Spain,* Decision on Annulment, ¶ 236.

[240] *Id.*, ¶ 237 b.

treaties creating the EEC and the EU cannot be interpreted in a manner that undermines the prior consents to submit to arbitration under the ECT given by each of the EU Member States and the EU itself. The alleged problem of incompatibility between EU law and the ECT, if there is one, is to be sorted out by the EU and the EU States counterparties to the ECT."[241]

(d) Moreover, the committee held that the tribunal had "*stated clearly and comprehensibly its reasons for concluding that EU Law would not apply to bar its jurisdiction. While Spain may dispute the soundness of the Tribunal's premises and findings, such criticisms do not give rise to a ground for annulment*."[242]

250. More recently, the same fundamental line of reasoning has prevailed in three decisions rendered by *ad hoc* committees on annulment requests concerning ICSID arbitral awards, namely:

(a) *Cube Infrastructure v. Spain*, in which the *ad hoc* committee held: "*Spain's arguments do not affect the conclusion that as a matter of international law, EU law does not have primacy. The provisions invoked by Spain are provisions of EU law and their scope and relevance must be determined insofar as EU law is applicable and relevant. They do not serve as a means of elevating EU law and equating it with international law. Insofar as the interpretation of the ECT is concerned, this is not a question to be addressed at the level of EU law. As a multilateral treaty, the ECT and the determination of the scope of jurisdiction of disputes submitted on the basis thereof is to be determined on the basis of international law*;"[243]

(b) *NextEra Energy v. Spain*, in which the *ad hoc* committee found that "*the Tribunal did not exceed its powers by upholding jurisdiction to hear the case under Art. 26 of the ECT despite Spain's intra-EU objection. The Tribunal's decision was tenable*

[241] *Id.*, ¶ 237 d.

[242] *Id.*, ¶ 239.

[243] *Cube*, ¶ 211, CL-371.

as a matter of law and it could not be deemed a gross or egregious misapplication of the law that a reasonable person could not accept such that it would amount to a non-application of the law;"[244] and

(c) *SolEs Badajoz v. Spain*, in which the *ad hoc* committee noted that it "*has 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. Accordingly, the Committee considers that the Tribunal did not exceed its powers within the meaning of Article 52(1)(b) of the ICSID Convention*."[245]

(d) *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.ÀR.L. v. Spain*, where the *ad hoc* committee held that "*properly construed, Article 26 of the ECT applies to claims by any investor from a Contracting Party (including an investor from an EU member State) against another EU member State*."[246]

(e) *InfraRed Environmental Infrastructure GP Limited and others v. Spain*, in which the *ad hoc* committee decided that "*the Committee does not find that the Award fails the test of Article 52(1)(b) of the ICSID Convention as there is no manifest excess of powers when the Tribunal refused to decline its jurisdiction and the solution was not in itself unreasonable*."[247]

251. A particular problem arises in connection with Spain's argument based on the EU's characterization as a "*REIO*" as defined in Articles 1(2) and 1(3) of the ECT. However, as the Tribunal noted in its Award, "*EU member states are as much parties to the ECT as the*

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[244] *NextEra*, ¶ 231, CL-372.

[245] *SolEs*, ¶ 128, CL-373.

[246] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.ÀR.L. v. Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶ 75, CL-374.

[247] *InfraRed Environmental Infrastructure GP Limited and others v. Spain,* ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 496, CL-375.

EU itself," and both have legal standing as respondents in a claim under the ECT.[248] Thus, the issue was effectively addressed by the Tribunal in the Award.

252. In this Committee's view, as the *ad hoc* committee in *Antin v. Spain* considered,[249] the fact that the EU, as "*REIO*," is also a Contracting Party of the ECT did not bar the Tribunal's jurisdiction.

253. In fact, under the VCLT's general principles of treaty interpretation, the EU's participation in the ECT as a Contracting Party thereto cannot, by itself, imply a carveout of its Member States from the Treaty's dispute resolution clauses and that, accordingly, ECT was not intended to apply among the EU Member States. For this to happen, an express provision would have to be inserted in the ECT, which is not the case.

254. As the *Vattenfall* tribunal noted in this respect:

> "*As a Contracting Party to the ECT, the EU has accepted the possibility of arbitration proceedings under Article 26, even against itself, without making a distinction between investors from EU or non-EU Member States. There is no language suggesting that EU Member States have "transferred competence" to the EU in respect of intra-EU arbitrations, or that such arbitrations are barred.*"[250]

255. In any event, it should be noted that, according to the *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:[251]

> "*The European Communities are a regional economic integration organization within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions. / The European Communities and their Member States have both concluded the*

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[248] 9REN Award, ¶ 156.

[249] *Antin v. Spain,* Decision on Annulment, ¶ 237 c.

[250] *Vattenfall*, ¶ 188, CL-196.

[251] *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*, Official Journal of the European Communities, Series L, No. 69, 9 March 1998, p. 115, RL-203.

> *Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences*."

256. This Statement makes explicit that, despite the then European Communities (and now the EU) being a REIO, both the Union and its Member States are "*internationally responsible for the fulfilment*" of their responsibilities under the ECT, which must be interpreted as including the possibility of EU Member States being responding parties in arbitration proceedings commenced against them by foreign investors under Article 26 of the ECT.

257. And the Statement goes on to say that:[252]

> "*The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.*
> *The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice.*"

258. There is, clearly, no suggestion in these passages of the Statement that investors from EU Member States are precluded from commencing arbitration proceedings against other EU Member States. Quite to the contrary, the first of these paragraphs of the Statement expressly refers to the possibility of an EU Member State being a "*respondent party to arbitration proceedings initiated by an Investor of another Contracting Party*;" and nothing in that passage of the Statement allows the conclusion that "*another Contracting Party*" for the purposes of the Statement only includes non-EU Member States. If such an

[252] *Ibid*.

exclusion had been intended by the European Communities, good faith would have required them to state it expressly, which was not the case.

259. To be sure, the Statement mentions that the CJUE "*is competent to examine any question relating to the application and interpretation of […] international agreements concluded by the Communities*," which includes the ECT. But this does not mean that the CJUE is *exclusively competent* for that purpose and that, accordingly, the jurisdiction of tribunals constituted pursuant to Article 26 of the ECT is ousted in intra-EU investment disputes.

260. In sum, Article 26 of the ECT offers investors an option for arbitration regarding the settlement of their disputes with host States, to which the latter have given their unconditional consent. The EU submitted a Statement to the Secretariat of the ECT regarding the application of that provision to the EU as a REIO. Although the Statement safeguards the competence of the CJEU to interpret and apply the ECT, at no point does it exclude arbitration as a dispute settlement mechanism between its Member States and investors from other Member States.

261. Spain's request for annulment on grounds that the Tribunal has manifestly exceeded its powers in assuming jurisdiction over the dispute must, considering the above, be dismissed.

b) Quantum of Damages

262. Spain further challenges the Award on grounds that the 9REN Tribunal exceeded its powers by awarding the Claimant a compensation that is allegedly inconsistent with the Tribunal's conclusions regarding the Spanish State's regulatory power and that compensates 9REN for damages in a "*completely arbitrary manner*"[253] and "*contrary to the Tribunal's own conclusions*."[254] This would be the case, as mentioned above, of the findings laid down in paragraphs 416 and 417 of the Award, which state respectively:

> "*In the circumstances, having regard to the onus on the Claimant to prove the quantum of its claim, the Tribunal, on the evidentiary record before it,*

[253] MoA, ¶ 122.

[254] *Id.*, ¶ 120.

> *reduces the quantum asserted by the Claimant by 20% from €52.2 million to €41.76 million by removing the claim to reimbursement of the 7% TVPEE, reducing the expected useful operating life of the facilities from 35 to 30 years (which Mr. Edwards calculated would itself reduce the claim by €7.5 million), eliminating the tariff protection for the Formiñena plant in light of the explicit warning of potential tariff reductions in RD 1578/2008, and incorporating a discount for illiquidity and regulatory risk.*"
>
> "*In the circumstances, the Tribunal therefore concludes that the Claimant has established a loss of €52.2 million less 20% for a net quantum of €41.76 million.*"

263. For the reasons stated below, Spain has failed to demonstrate that, in determining the amount of compensation due, the Tribunal exceeded its powers within the meaning of Article 52.1(b) of the ICSID Convention. The Tribunal found that Spain had violated the FET standard in Article 10(1) of the ECT with respect to the Claimant's investments.[255] Consequently, the Tribunal considered itself obliged to provide sufficient compensation to the Claimant to eliminate the consequences of Spain's wrongful conduct.[256] The Tribunal proceeded to quantify the amount of compensation due. It agreed with the use of a discounted cash flow (DCF) methodology, but recognised that "*its output is wholly dependent on the quality of the inputs, many of which are necessarily … 'judgmental and subjective*.'"[257] At this point, the Tribunal considered that "[t]*he element of imprecision reinforces the inevitability of a certain amount of approximation when assessing damages*."[258] The Tribunal then assessed the evidence submitted by the Parties. Rather than accepting it at face value, the Tribunal questioned it, and decided to establish its own estimation of the appropriate amount of compensation due. By proceeding in this manner, it is unclear how the Tribunal would have exceeded its powers as Spain claims.

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[255] 9REN Award, ¶¶ 309, 311 and 449(2).

[256] *Id.*, ¶¶ 373-377, 404, 410.

[257] *Id.*, ¶ 408.

[258] *Id.*, ¶ 408.

264. Spain's case regarding the quantum portion of the Award is based on the allegation that the Tribunal established the amount of compensation *ex aequo et bono*, that the amount of reduction is inconsistent with the Tribunal's own findings, and that the Tribunal did not satisfy itself that the amount of compensation would not correspond to damages for the levy of the 7% TVPEE tax.

265. In the Committee's view, nothing in the impugned Award allows the conclusion that the Tribunal decided *ex aequo et bono* in respect of the quantum of damages. To the contrary, the Tribunal's findings are based on criteria expressly spelled out in paragraph 416 of the Award, which do not lend themselves to a characterization as elements of an *ex aequo et bono* administration of justice. It is one thing, in fact, to exercise a *margin of appreciation* when determining the quantum of damages under international law; and a different one to decide on the basis of equitable considerations, by departing from the applicable law.

266. The margin of appreciation invoked by the Tribunal[259] is allowed by an arbitral *jurisprudence constante.* It consists of no more than a particular expression of any adjudicator's freedom to assess the evidence submitted by the parties, while remaining faithful to the applicable legal standards, notably that of *full compensation* for the injury caused by an internationally wrongful act. Such a margin of appreciation has been recently invoked, in ICSID cases, in the *Antin* award,[260] and was upheld by the *ad hoc* committee that decided the request for annulment of that award.

267. In the instant case, it is evident that the Tribunal has gone no further than exercising the said *margin of appreciation* without unduly departing from the applicable principles of international law for the assessment of compensation, as expressed notably in the decision of the Permanent Court of International Justice in the case of *Chorzów Factory*, which the Tribunal has expressly cited in the Award.[261]

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[259] *Id.*, ¶¶ 405 and 411.

[260] *Infrastructure Services Luxembourg 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. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Rectification of the Award, 29 January 2019, ¶¶ 26 y 36, CL-348.

[261] 9REN Award, ¶¶ 373 ff.

268. The Tribunal was mindful of the fact that, as it noted, "[t]*here* [were] *many contingencies and contingencies within contingencies*."[262] Thus, it had to exercise a margin of appreciation to the best of its abilities "*with the tools provided to it by the Parties*."[263] Given these special circumstances, nothing suggests that by reducing the damages awarded to 9REN by 20%, the Tribunal failed to comply with the standard set out under customary international law. Quite to the contrary, the Tribunal's considerations in this respect indicate that it endeavored to restore, as faithfully as possible, the hypothetical situation that would have existed had Spain not acted in breach of the FET standard, which the Tribunal found to have occurred in the instant case. To this extent, no decision *ex aequo et bono* has been rendered in this instant case.

269. Furthermore, with respect to Spain's allegation that the 20% reduction is inconsistent with statements made by the Tribunal in its Award, the Committee considers that the assessment that Spain requests in respect of those passages would involve a review of the merits of the Award, in particular, the extent to which the conclusion is supported by the Tribunal's own findings of fact.

270. As already mentioned, such a review is outside the scope of this Committee's powers, which do not comprise the possibility of scrutinizing the correctness of the Tribunal's findings in respect of the disputed facts and the application of the relevant rules to those facts in order to determine the quantum of damages.

271. In the premises, the Tribunal has reduced the amount of the damages asserted by the Claimant by 20%, from EUR 52.2 million to EUR 41.76 million. This reduction was based by the Tribunal on the factors listed in paragraph 416 of the Award: (i) removing the claim to reimbursement of the 7% TVPEE; (ii) reducing the expected useful operating life of the facilities from 35 to 30 years; (iii) eliminating the tariff protection for the Formiñena plant in light of the explicit warning of potential tariff reductions in RD 1578/2008; and (iv) incorporating a discount for illiquidity and regulatory risk.

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[262] *Id.*, ¶ 415.

[263] *Id.*, ¶ 415.

272. Both parties agree that such a reduction was required; they nevertheless disagree on the amount of the reduction, which Spain held in its Request for Rectification should add up to at least 33% before applying any discount for regulatory risk.

273. That Request was denied by the Tribunal on the following terms:

> "*The crux of the Respondent's argument is that the Tribunal made a number of numerical findings of fact which should lead by simple arithmetic to a quantum award (the Respondent says €34.8 million) instead of the Tribunal's calculation of €41.76 million. In making this argument, the Respondent is obliged to argue that the Tribunal not only referred to some of the opinions of the expert witnesses but adopted the references as findings of fact when in fact the Tribunal did no such thing and in fact expressly warned against any such interpretation. The Tribunal referred to Mr Edward's expert evidence as based on a model whose "output is wholly dependent on the quality of the inputs, many of which are necessarily (to borrow Mr. Edwards' phrase) 'judgmental and subjective.'" The model incorporated a number of assumptions and inputs with which the Tribunal expressly disagreed. Further, the Tribunal stated, "[t]he element of imprecision reinforces the inevitability of a certain amount of approximation when assessing damages." And further, "… the experts were often working not so much with specific figures but a range of figures, which, when combined one with the others, potentially unleashed a multiplier effect that could lead to a wide range of outcomes." All of these factors required a "margin of appreciation." In the face of these repeated disclaimers, the Respondent's attempt to transform some of the Tribunal's observations into precise numerical findings of fact which lead by a mathematical exercise to a different "precise" result is, to say the least, disingenuous. Moreover, the Respondent's resort to the Econ One 'dynamic' Excel model to put on the record its own untested calculations that were never in evidence puts the Claimant to an unfair disadvantage in terms of due process*."[264]

274. And the Tribunal went on to say:

> "*Instead of reading the quantum analysis in its entirety and putting the references to the expert witnesses' in context, the Respondent also ignores*

[264] Decision on the Request for Rectification, ¶ 27, R-0344.

> *the countervailing evidence where the Tribunal noted items which, to some extent, offset the items relied on by the Respondent, such as corporate income tax[33] and the reduction in operating costs following introduction of an outside partner (which FTI found would "marginally increase the compensation to the Claimant"). The Tribunal's decision on quantum was not "inadvertent" and in the Tribunal's view the quantum of the award was well within the "margin of appreciation" the jurisprudence constante allows*."[265]

275. On this basis, the Tribunal concluded as follows:

> "*In short, the Respondent's misreading of the award, and its selective citation of some of the award's observations, as well as the conclusions the Respondent purports to draw from its novel use of the Econ One "dynamic" Excel sheet, do not disclose any "clerical, arithmetical or similar error in the award." On the contrary, the Respondent's application is simply an attempt to express its disapproval of the outcome*."[266]

276. As is evident from the foregoing, any scrutiny of the Tribunal's findings in this respect would necessarily involve an assessment by this Committee of the well-founded nature of the Tribunal's calculations of the quantum of damages. This is outside the scope of the Committee's powers. Spain's arguments in this regard cannot therefore be admitted under the legal framework to which this Committee is bound.

277. As the *ad hoc* committee in *Impregilo v. Argentina* noted:

> "*The Committee cannot review de novo the facts, evidence and criteria used by the Tribunal in assessing the damages nor the amount of compensation awarded to Impregilo […]. Of course, the assessment of damages cannot be arbitrary, but a Tribunal's determination of the amount of compensation allows for a high level of discretion and a disagreement with the criteria used by the Tribunal cannot be a ground for annulment of an award.*"[267]

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[265] *Id.*, ¶ 28.

[266] *Id.*, ¶ 29.

[267] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (hereinafter, "***Impregilo v. Argentina*, Decision on Annulment**") ¶ 160, RL-0170.

278. More recently, this view was upheld by the *NextEra* committee on annulment in its decision, which states:

> "*As a general matter, the Committee agrees with the consensus that exists among committees that tribunals have a wide margin of appreciation when determining damages*."[268]

279. Concerning Spain's allegation that the Tribunal exceeded its powers by not ensuring that the amount for compensation was not attributed to the 7% TVPEE tax, there is no evidence showing that the 20% reduction did not in effect account for a reduction corresponding to the amounts due for the 7% tax.

280. Based on these grounds, it must be concluded that there are no valid reasons for the annulment of the Award for manifest excess of powers.

C. ANALYSIS OF THE 9REN AWARD (2): FAILURE TO STATE REASONS IN THE AWARD

a) Applicable Law

281. Spain further contends that the Award failed to state reasons in relation to the applicability of EU law, which it argues should apply to the determination of the Tribunal's jurisdiction.

282. Spain moreover adduces that the Award declares that EU law is not applicable, but subsequently that it would apply EU law; and that such allegedly contradictory reasoning is equivalent to a failure to state reasons.

283. Spain's argument cannot, however, be accepted. The Tribunal has dealt at length with the issue of the applicable law, in particular the applicability of EU law.[269]

284. The Tribunal summarized its findings in this respect as follows:

> "*(i) the ECJ's judgment in Achmea does not extend to the ECT, a multilateral treaty to which both EU Member States and the EU are*

[268] *NextEra*, ¶ 273, CL-372.

[269] 9REN Award, ¶¶ 142-172.

> *signatory parties, including (especially) Article 26 of the ECT; (ii) there was and is no material conflict between the ECT and EU law (including the EU treaties, particularly the Treaty of the European Union ("TEU") and TFEU); (iii) EU law does not modify Spain's obligations under the ECT, including Article 26 of the ECT; (iv) this Tribunal's jurisdiction and its exercise in the present case rests upon the ECT (with international law as the applicable law) and not EU law; and (v) this is an ICSID arbitration under the ICSID Convention without a seat or legal place in any national jurisdiction, still less in any EU Member State*."[270]

285. In light of the above, it is excessive to state that the Tribunal has failed to give reasons for its findings on the issue of applicable law. To the contrary, the Tribunal extensively considered this issue, and reached a conclusion that is in line with the case law of other tribunals that have dealt with the same issue previously, most notably in the abovementioned *Vattenfall* case.

286. There is also no contradictory reasoning in the Award regarding this issue, at least to the point that "*it becomes impossible to understand the motives that led such tribunal to adopt its solution.*"[271] The Tribunal was clear in stating that its jurisdiction rests upon the ECT (with international law as the applicable law), and not upon EU law, but that nevertheless it was within that jurisdiction to consider EU law to the extent necessary for the resolution of the dispute under international law.[272]

287. There is no inconsistency in this finding. Whilst the applicable law to an international dispute may be one, namely international law, as it results in the instant case from Article 26(6) ECT, a tribunal is not precluded from taking into consideration other legal systems and from assessing the possible relevance of legal situations constituted, modified or extinguished under such other legal systems within the context of the applicable law that

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[270] *Id.*, ¶ 173.

[271] *Teinver v. Argentina*, Decision on Annulment, ¶ 209.

[272] 9REN Award, ¶ 172.

it is bound to apply. Such other legal systems are then taken as *facts* whose relevance is to be assessed in light of the applicable law.

288. On this basis, the Tribunal declared itself "*prepared to accept, arguendo, that Spain's' modifications of the FIT benefits in 2010 and the following years were permitted under both EU law and Spanish law*" (paragraph 171), while insisting that "*EU law does not modify Spain's obligations under the ECT, including Article 26 of the ECT.*"[273]

289. In conclusion, the Award cannot be held to omit sufficient reasons in respect of the issue of the applicable law, nor to be based in its conclusion upon contradictory reasons. Although such reasons may be subject to criticism from a party's point of view, this does not constitute, under the ICSID Convention, a ground for the annulment of the Award and this Committee is accordingly barred from debating their accuracy or soundness.

b) Denial of Benefits Objection

290. According to Spain, the Tribunal has devoted "*one single paragraph, with absolutely no reasoning, to dismiss this objection*."[274]

291. The matter was however dealt with in paragraphs 174 to 182 of the Award, which concludes: "*quite apart from the timeliness issue, Spain has failed to establish that 9REN lacks substantial business activities in Luxembourg. Article 17 of the ECT has no application to the facts of this case*," for which reason the objection was rejected.[275]

292. In order to reach this conclusion, the Tribunal not only considered the applicable legal standard, as laid down in Article 17 of the ECT (paragraph 175), but also the arguments adduced by both Parties and the evidence carried by Claimant in respect of its plea that

[273] *Id.*, ¶ 173.

[274] AfA, ¶ 39.

[275] *Id.*, ¶ 182.

9REN carried on "*substantial business operations*" in Luxembourg, notably Mr. Giuliani's testimony.[276]

293. Therefore, it does not seem accurate that the matter was dealt with in "*a single paragraph with absolutely no reasoning*." It must be noted that, as an objection to the Tribunal's jurisdiction, the burden of proof rested on Spain (to prove that the Claimant lacked substantial business activities in Luxembourg), and not on the Claimant (to prove that it had business activities in Luxembourg). In this sense, the Tribunal was not satisfied with the evidence submitted by Spain, and it so stated. Spain may consider the Tribunal's reasons insufficient or unconvincing, but the matter was the object of analysis by the Tribunal. It lies outside the scope of the Committee's powers to review the Tribunal's assessment of the evidence leading to its conclusion in this respect.

294. Spain's request for annulment on this ground must therefore be rejected.

c) Liability

295. The Award concluded that Spain denied 9REN fair and equitable treatment, inconsistently with Article 10(1) of the ECT, because 9REN's reasonable and legitimate expectations in the circumstances were frustrated.[277]

296. However, Spain complains that it does not understand how the Tribunal reached that conclusion. Hence, in its view, the Award should be annulled due to a failure to state reasons. Spain disagrees with the manner in which the Tribunal addressed the FET standard as if certain outcomes were already assumed and the burden of proof rested on Spain.[278] It also disagrees with the meaning attributed by the Tribunal to certain Spanish Supreme Court's rulings and the weight given to the financial consequences arising from the adoption of Spain's regulatory choices.[279] Spain equally questions the Tribunal's reading

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[276] *Id.*, ¶ 180.

[277] *Id.*, ¶¶ 307-309 y 449(2).

[278] Memorial, ¶ 165.

[279] *Id.*, ¶¶ 167-169.

of RD 661/2007 as a source of the relevant specific commitment to the investor[280], and the date of the investment chosen in the Award.[281] Finally, Spain also takes issue with the Tribunal's findings on liability, in particular the relationship between the findings on legitimate expectations and those on the breach of the ECT.[282]

297. However, a disagreement with the findings of the Award does not necessarily mean that the Tribunal has failed to state reasons for those findings. Assuming that insufficient reasons would be enough to annul the Award, the question thus arises as to whether the Tribunal has failed to comply with its duty to provide reasons for its findings in respect of Spain's liability for the breach of FET.

298. In this respect, one should note that, as is widely recognized, tribunals are not required to deal with every argument raised by the parties. A tribunal is "*entitled to be terse*" and has "*no duty to follow the parties in the detail of their arguments*."[283]

299. Moreover, even if the Tribunal misunderstood Spain's position and arguments, and such misunderstandings were material, these are not grounds for annulment. As stressed by the *ad hoc* committee in *Impregilo v. Argentina*:

> "*Article 52(1)(e) does not allow a committee to assess the correctness or persuasiveness of the reasoning in the award or to inquire into the quality of the reasons*."[284]

300. It is clear that the Tribunal arrived at conclusions different from those sought by Spain. Nonetheless, Spain's dissatisfaction with the quality of the reasoning of the Award, however justified it might be, is not a sufficient ground to annul it.

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[280] *Id.*, ¶¶ 170-176.

[281] *Id.*, ¶ 182.

[282] *Id.*, ¶¶ 183-198.

[283] *Antin v. Spain*, Decision on Annulment, ¶ 241.

[284] *Impregilo v. Argentina*, Decision on Annulment, ¶ 181.

301. The Tribunal stated reasons for its findings. In the premises, the Tribunal, after it characterized as a "*threshold issue*" the question of "*whether the facts of this case are capable of giving rise to the legitimate expectation asserted by the Claimant that the benefits set out in RD 661/2007 were irrevocable within the scope of the ECT's FET standard*" (paragraph 214), it proceeded in Part 7 of the Award to an analysis of whether such legitimate expectations existed in the instant case, and whether their frustration amounted to a breach of the FET standard.[285]

302. The Tribunal's explanation in this respect is laid down in paragraph 309 of the Award, which reads as follows:

> "*Having rejected the Respondent's view that the extent of the Claimant's legitimate expectation was limited to a "reasonable rate of return," and having accepted the Claimant's interpretation of RD 661/2007, and Mr. Giuliani's evidence of the actual expectation the Claimant possessed, and the reasonableness of the Claimant's reliance in the circumstances, the Tribunal concludes that the Respondent denied the Claimant fair and equitable treatment. In this respect, the Tribunal substantially adopts the list of violations alleged by the Claimant set out in paragraphs 299 to 301 above*."

303. The Tribunal went on to state that:

> "*The financial vulnerability of renewable energy projects is the heavy up-front capital costs. Once money is "sunk" in the PV facilities, the funds of the developer (and its bankers) are locked into the FIT contracts with their investments effectively (as the Claimant put it) long-term hostages. If energy prices rise, the benefit accrues to Spain not the operators who, in Spain's view, will recover only what Spain unilaterally declares to be a reasonable return by reference to the bond market. On the other hand, if energy prices fall, Spain claims the right to resile from what the Tribunal has concluded was a regulatory guarantee of price stability. Spain's position is that it alone should benefit from rising prices, but the burden of falling prices is to be off-loaded onto investors. As a matter of Spanish domestic law, such treatment of local investors has been held to be constitutional, but in the*

[285] 9REN Award, ¶¶ 212-311.

> *Tribunal's view, such one-sided treatment is neither fair nor equitable. Under the ECT, the Claimant, as a foreign investor, was entitled to fair and equitable treatment and in this case did not receive it*."[286]

304. In general, the Award provides reasons for the Tribunal's findings on Spain's liability under the ECT. While the wording might not be arguably the best model of clarity, for what matters in this proceeding, it does contain reasons supporting the final conclusion on liability. Accordingly, no annulment can therefore be granted on the basis of this ground.

d) Quantum of Damages

305. Spain finally contests the 9REN Award for alleged failure to state reasons in respect of quantum of damages, because, in its view, it is impossible to understand how the Tribunal reached a 20% reduction on the Claimant's original claim.

306. According to Spain, the Tribunal's findings on jurisdiction and liability should instead reflect a reduction of the claimed damages of at least 33%, as explained in its Request for Rectification of the Award, which as mentioned above was denied.

307. In respect of the quantum of compensation owed to 9REN by Spain, the Tribunal noted in paragraph 405 of the Award that:

> "*Complex issues in the assessment of compensation that divide the Parties' expert witnesses justify a margin of appreciation for the Tribunal under the ECT and international law. The required exercise is acknowledged to be less than an exact science*."

308. The Tribunal also stated that, "[i]*n undertaking quantification, the Tribunal recognizes that while the DCF method presents a picture of mathematical precision, its output is wholly dependent on the quality of the inputs, many of which are necessarily …judgmental and subjective*." It added that the assessment of damages "*is often a difficult exercise*," which

[286] *Id.*, ¶ 311.

involves an exercise of estimation and "*the weighing of competing (but equally legitimate) facts, valuation methods and opinions*."[287]

309. In examining the specific facts of the case, the Tribunal also explained that the experts "*were often working not so much with specific figures but a range of figures, which when combined one with the others potentially unleashed a multiplier effect that could lead to a wide range of outcomes*."[288] The Tribunal examined, questioned, agreed and disagreed with various propositions made by the Parties' experts. It reflected those views in its Award.[289] Thus, the Tribunal did not just accept a particular compensatory formula, but rather decided to develop its own calculation. At the end of the process, in the light of the facts and views presented by the Parties' experts, the Tribunal gave account of the situation. In its view, the determination of the amount was "*not capable of precise calculation on the basis of the materials before the Tribunal. There* [were] *too many contingencies and contingencies within contingencies]*."[290] Under these circumstances, the Tribunal decided to exercise its margin of appreciation. From the explanation given, the Tribunal made use of this margin of appreciation by weighing conflicting considerations, some of which were judgmental or subjective, and arrived at an estimate reduction rate, which it considered appropriate in the light of the circumstances. There is no reason to cast doubt on the good faith of the Tribunal when exerting this margin of discretion.

310. Such a margin of appreciation is widely acknowledged in international law and is to a large extent inevitable. The Tribunal has therefore properly invoked it and used it.

311. In essence, as stated above, the reduction in the amount of damages awarded to 9REN was based on the following reasons that the Tribunal listed as factors in paragraph 416 of the Award: (i) the need to remove the claim of reimbursement of the 7% TVPEE; (ii) the need to reduce the expected useful operating life of the facilities from 35 to 30 years; (iii) the

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[287] *Id.*, ¶ 408.

[288] *Id.*, ¶ 409.

[289] *Id.*, ¶ 412-414.

[290] *Id.*, ¶ 415.

need to eliminate the tariff protection for the Formiñena plant in light of the explicit warning of potential tariff reductions in RD 1578/2008; and (iv) the need to incorporate a discount for illiquidity and regulatory risk.

312. Based on the foregoing, the Tribunal gave reasons in the Award for the reduction of 9REN's claim for damages. If there is any error in the calculation of that reduction, this would be an error in the appreciation of the facts, which would be beyond the scope of this annulment proceeding.

313. It must therefore be concluded that the Tribunal has not failed to provide reasons for its assessment of damages, and that any scrutiny of those reasons is beyond the Committee's powers as laid down in Article 52(1)(e) of the ICSID Convention.

D. CONCLUSION

314. In view of the above, the Committee finds that no grounds for annulment of the Award exist in the present case. Spain's application must therefore be rejected.

VIII. COSTS

A. SPAIN'S SUBMISSIONS

315. In its submission on costs of 22 June 2022,[291] Spain held, *inter alia,* that:

(a) "*In deciding how to allocate the costs of these proceedings, the Kingdom of Spain understands that the Committee should be guided by the principle that "costs follow the event" if there are no indications that a different approach should be called for*;"

(b) "*In this regard, it is evident that the Applicant has been compelled to go through these annulment proceedings. The Kingdom of Spain noted from the very commencement of the underlying arbitration that the 9REN Tribunal lacked jurisdiction to hear a dispute initiated by an investor from the European Union*

[291] Respondent's Submission on Costs, ¶¶ 6-9.

against a Member State of the European Union. Thus, 9REN should be responsible for the costs incurred by the Applicant in connection with these proceedings: it was 9REN – and not the Kingdom of Spain – who decided to initiate the dispute before an arbitral tribunal who lacked jurisdiction to hear intra-EU disputes;"

(c) "*The Kingdom of Spain also notes that it would still be entitled to recover the costs incurred by it in the unlikely event that the Committee did not annul the award in its entirety, but it partially corrected the amount of the 9REN award. As the members of the Committee are aware, the Kingdom of Spain has underlined in the annulment proceedings the gross errors that the 9REN tribunal made in terms of damages*;" and

(d) "*In short, the Applicant was left with no choice but to initiate this annulment proceedings and it should be compensated for the costs incurred*."

316. The costs incurred by Spain are, in sum, as follows:[292]

(a) ICSID fees and Advance Payments: EUR 433,350.21;

(b) Legal fees directly incurred by Spain: EUR 1,354,000;

(c) Expert Reports: EUR 44,565.01;

(d) Translations: EUR 3,286.94;

(e) Other expenses: EUR 29,499.52.

317. Spain asks the *ad hoc* Committee that 9REN pay all the costs of the proceedings, including its own costs in the total amount of EUR 1,864,701.68.[293]

318. Spain further requests that 9REN be ordered to pay post-Award interest on the foregoing sums, at a compound rate of interest to be determined by the Committee, until the date of full satisfaction of the Committee's decision.[294]

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[292] *Id.*, ¶ 22.

[293] *Id.*, ¶ 23.

[294] *Id.*, ¶ 24.

B. 9REN'S SUBMISSIONS

319. In its submission on costs of 22 June 2022, 9REN has, in turn, submitted that:[295]

(a) "*9REN bases its request for an award of the fees and expenses it has incurred on the fact that, for all the reasons outlined in its prior written and oral submissions, 9REN should prevail in this annulment proceeding. Further, Spain has abused its right to annulment by seeking an appeal or retrial on dozens of issues that go well beyond the limited grounds for annulment under Article 52 of the ICSID Convention*;"

(b) "*In this proceeding, Spain's abuses go further, because Spain's use of an EU law expert necessitated 9REN to retain a rebuttal expert and incur fees briefing numerous EU law issues that go well beyond the scope of this Committee's limited mandate*;" and

(c) "*Both in relation to as well as apart from the intra-EU objection, 9REN was forced to incur legal fees and expenses defending against arguments from Spain that were not well-founded under the ICSID Convention or in international law. Therefore, in order to wipe out as far as possible the consequences of Spain's misconduct, the Committee should award 9REN the entirety of its legal fees and expenses in the present proceeding*."

320. In sum, 9REN submits that the Committee should order Spain to pay the legal fees and expenses incurred by 9REN in this annulment proceeding, and it should declare that Spain remains responsible for all costs of the proceeding.[296]

321. The costs incurred by 9REN are, in sum, as follows:[297]

(a) King & Spalding's Legal Fees: USD 1,509,071.50;

(b) Prof. Piet Eeckhout's Fees & Expenses: EUR 34,000.00;

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[295] Claimant's Costs Submission, ¶¶ 4-6.

[296] *Id.*, ¶ 8.

[297] *Id.*, ¶ 10.

(c) Expenses: USD 6,394.52.

322. For the foregoing reasons, 9REN requests the Committee to: (i) order that Spain reimburse all legal fees and expenses incurred by 9REN in the annulment proceeding, in the amounts of USD 1,515,466.02 and EUR 34,000.00; and (ii) declare that Spain remains responsible for all the costs of this proceeding, including the costs and expenses of ICSID as well as the fees and expenses of the Members of the Committee.[298]

323. 9REN also requests that Spain be ordered to pay post-decision interest on the foregoing sums, at a compound, commercial rate of interest to be determined by the Committee, until the date of Spain's full satisfaction of the Committee's orders on costs and payment of the Decision.[299]

C. THE COSTS OF THE PROCEEDINGS

324. The costs of the annulment proceeding, including the Committee's fees and expenses, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee Members' fees and expenses	
Prof. Dr. Dário Moura Vicente	97,232.06
Prof. Dr. Nicolas Molfessis	84,000.00
Dr. Fernando Piérola-Castro	86,617.51
Dr. Karim Hafez	13,736.60
ICSID administrative fees	126,000.00
Direct expenses	75,799.18
Total	**483,385.35**

D. THE COMMITTEE'S DECISION ON COSTS

325. Article 61(2) of the ICSID Convention provides that:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in*

[298] *Id.*, ¶ 12.

[299] *Id.*, ¶ 13.

> *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*."

326. This provision, together with ICSID Arbitration Rule 47(1)(j), applicable by virtue of ICSID Arbitration Rule 53, gives the Committee discretion to allocate all costs of the proceedings, including Counsel's fees and other costs, between the Parties, as it deems appropriate. Both Parties agreed on this in their submissions on costs.

327. In the instant case, and as stated above, Spain's application for annulment must be dismissed. The Committee recalls that it nevertheless decided to stay the enforcement of the Award pending decision on the application for annulment, as requested by Spain, despite 9REN's opposition. The outcome of this procedural step was therefore favourable to Spain.

328. Moreover, the issues under discussion in these proceedings, in particular that of the Tribunal's jurisdiction, present a high degree of complexity, and have been the object of divergent decisions by courts and tribunals of high standing. Therefore, albeit unsuccessful, Spain's application cannot be deemed as futile or unsubstantiated.

329. In addition to the above, the Committee notes that both Parties have complied forthwith in all instances with its orders and decisions, and that their conduct during the proceedings was irreprehensible.

330. In light of the abovementioned circumstances, the Committee, exercising its discretion, decides the following in respect of the apportionment of costs:

(a) Spain shall bear its own legal costs and expenses;

(b) Spain shall reimburse 9REN 75% of its legal fees, in the amount of USD 1,131,803.62;

(c) 9REN shall bear 25% of its legal fees, and all of its other expenses;

(d) If payment of the above-mentioned amount of USD 1,131,803.62 is not made by Spain within sixty days from the notification of the present decision, the amount payable shall be increased by interest at the rate of 2% compounded annually; and

(e) Spain shall bear all costs of the proceedings, including the Committee's fees and expenses and ICSID's costs.

IX. DECISIONS AND ORDERS

331. For the foregoing reasons, the Committee unanimously decides the following:

(a) Spain's application for annulment is dismissed;

(b) The stay of enforcement of the Award is automatically terminated in accordance with ICSID Arbitration Rule 54(3);

(c) Spain shall bear all the costs of the proceedings, including the fees and expenses of the Committee and ICSID's administrative fees and direct expenses, as reflected in ICSID's final financial statement, and pay USD 1,131,803.62 to the Claimant in respect of their legal fees;

(d) This amount shall be increased by interest at the rate of 2% compounded annually if payment is not made within sixty days from the notification of the present decision.

Prof. Dr. Nicolas Molfessis
Member of the *ad hoc* Committee

Date: 15 November 2022

Dr. Fernando Piérola-Castro
Member of the *ad hoc* Committee

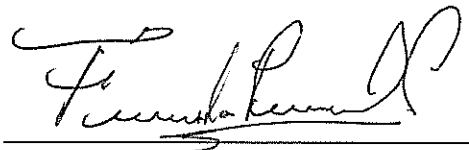
Date:

Prof. Dr. Dário Moura Vicente
President of the *ad hoc* Committee

Date:

Prof. Dr. Nicolas Molfessis
Member of the *ad hoc* Committee

Date:



Dr. Fernando Piérola-Castro
Member of the *ad hoc* Committee

Date: 15 November 2022

Prof. Dr. Dário Moura Vicente
President of the *ad hoc* Committee

Date:

Prof. Dr. Nicolas Molfessis
Member of the *ad hoc* Committee

Date:

Dr. Fernando Piérola-Castro
Member of the *ad hoc* Committee

Date:

Prof. Dr. Dário Moura Vicente
President of the *ad hoc* Committee

Date: 16 November 2022