LIONBRIDGE

STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Dutch into English of the attached Writ of Summons.

Laura Musich, Managing Editor
Lionbridge

Sworn to and subscribed before me
this 7th day of January, 2023.

ETHAN WIN LY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01LY6323702
Qualified in New York County
My Commission Expires 04-27-2023

WRIT OF SUMMONS ALSO CONTAINING AN INCIDENTAL CLAIM PURSUANT TO ART. 223 DUTCH CODE OF CIVIL PROCEDURE

On this day, December twenty second, two thousand and twenty-two

AT THE REQUEST OF:

The **KINGDOM OF SPAIN,** herein represented by the Public Prosecutor, the Ministry of Justice of the Kingdom located at 5 Calle Ayala (28001) Madrid, Spain ("Spain"), and solely for the purpose for which this summons is issued, domiciled in Amsterdam at Claude Debussylaan 247 (1082 MC), at the offices of Simmons & Simmons LLP with current account with nationwide coverage number 88170281, from which office Mr. N. Peters is appointed attorney at law;

I, Bas de Veer, assigned bailiff at the offices of Jan Sebastiaan Evers, bailiff in Amsterdam and with offices there at Hogehilweg 4;

SUMMONED:

1. the private company with limited liability **NEXTERA ENERGY GLOBAL HOLDINGS B.V.** ("NextEra Global"), having its registered office in Amsterdam and its principal place of business at Basisweg 10 (1043 AP), Amsterdam, delivering my writ there and leaving a copy of this summons to:

and

2. the private company with limited liability **NEXTERA ENERGY SPAIN HOLDINGS B.V.** ("NextEra Spain"), having its registered office in Amsterdam and its principal place of business at Basisweg 10 (1043 AP), Amsterdam, there doing my writ of summons and leaving copies of this writ of summons and of the exhibits referred to therein, preceded by a summary thereof, to: [stamp:] the above address in a closed envelope with reference to the legal provisions because I did not find anybody there to whom I could legally leave a copy.

IN ORDER TO:

On **Wednesday, January 25, 2023** at ten (10:00) a.m. not in person, but represented by an attorney, to appear at the public hearing of the District Court of Amsterdam, which hearing will be held in the courthouse at Parnassusweg 280 (1076 AV) Amsterdam;

WITH THE NOTICE THAT:

if a defendant fails to appear on the first docketed hearing date or on a docketed hearing date to be defined more specifically by neglecting to appoint a lawyer, or fails to pay the court fee hereinafter referred to in a timely manner, and the prescribed time limits and formalities have been complied with, the court shall default against such defendant and shall grant the claim unless it deems it to be unlawful or unfounded;

if at least one of the defendants has appeared at the hearing, a single verdict will be rendered between all parties, which shall be considered a verdict after trial;

upon appearance in the proceedings, a court fee will be charged to each of the defendants, payable within four weeks from the time of appearing;

the amount of the court fees is listed in the most recent appendix belonging to the Civil Court Fees Act, which can be found on the website: www.kbvg.nl/griffierechtentabel, among others.

If the person is impecunious, a court fee for impecunious persons established by or under the law is levied, if at the time the court fee is levied such person has produced:

(1) a copy of the decision to grant an addition, as referred to in Article 29 of the Legal Aid Act, or if this is not possible due to circumstances not reasonably attributable to him, a copy of the application, as referred to in Article 24(2) of the Legal Aid Act, or

(2) a statement from the board of the Legal Aid Board, as referred to in Article 7, third paragraph, subsection e, of the Legal Aid Act, showing that his income does not exceed the income referred to in the order in council under Article 35, second paragraph, of that Act

of defendants who appear before the same attorney and make identical submissions or present identical defenses, a joint court fee is levied only once, based on Article 15 of the Civil Registration Fees Act;

IN ORDER TO:

On behalf of the plaintiff claim and conclude as follows:

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1. Introduction

1.1 Defendants sub 1 and 2, NextEra Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (collectively "NextEra") invested in the construction of two solar power plants in Spain during the period 2010-2013. In doing so, they intended to take advantage of a ruling of the Kingdom of Spain ("Spain") that provided for the necessary favorable financial conditions. That ruling constituted State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) and had not been notified in advance to the European Commission in accordance with Article 108(3) TFEU. As such, Spain's measure constituted unlawful aid. Spain was therefore not allowed under EU law to implement the regulations and consequently it was not allowed to pay the amount that NextEra believed it was entitled to. The regulations were amended and in 2017 the European Commission declared these amended regulations to be compatible with the internal market (approved) pursuant to Article 107(3) TFEU (**Exhibit 1**).[1]

1.2 NextEra thereupon commenced arbitration proceedings before the arbitral tribunal of the International Centre for Settlement of Investment Disputes ("ICSID"; the arbitral tribunal hereinafter referred to as the "ICSID Arbitral Tribunal") established under the International Energy Charter (hereinafter referred to by its usual English abbreviation as "ECT") seeking damages from Spain. The ICSID Arbitral Tribunal granted this claim. **(Exhibit 2).** An application to the so-called *ad hoc Committee* under the ICSID to set aside the arbitral tribunal's award was subsequently rejected **(Exhibit 3)**.

1.3 NextEra is now seeking authorization from the District Court for the District of Columbia to enforce the aforementioned arbitral award **(Exhibit 4)**. That authorization will allow NextEra to seizure under a warrant of execution on Spain's assets in the United States, or at least outside the European Union.

1.4 In doing so, NextEra seeks to circumvent the prohibition on the provision of state aid - which, as will be explained below, includes compensation in lieu of state aid. Through execution, funds charged to Spain will still benefit NextEra, which constitutes a grant of unlawful aid to NextEra. NextEra thus seeks to have Spain violate its obligations under the TFEU.

1.5 In addition, enforcement of the arbitral award is also contrary to Articles 267 and 344 TFEU. These articles preclude a provision in an international agreement concluded between two member states of the European Union under which an investor from one of these member states, in the event of a dispute about investments in the other member state, may initiate proceedings against the latter state before an arbitral tribunal and that member state has undertaken to accept its authority.[2] The ECT is such an agreement.

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[1] Decision of the European Commission of November 10, 2017, SA.40348 (2015/NN) - *Spain Support for electricity generation from renewable energy sources, cogeneration and waste.* https://ec.europa.eu/competition/state aid/cases/258770/258770 1945237 333 2.pdf.

[2] ECJ March 6, 2018, Achmea, C-284/16, ECLI:EU:C:2018:158, par. 32. See also ECJ September 2, 2021, Komstroy, ECLI:EU:C:2021:655 and ECJ October 26, 2021, PL Holdings, ECLI:EU:C:2021:875

1.6 Continuing the execution in defiance of the foregoing constitutes an abuse of right, c.q. abuse of execution power.

1.7 Spain therefore claims to prohibit NextEra and companies associated with these companies from proceeding with the execution of the arbitral award. Spain also requests your Court, by way of an incidental claim, to grant injunctive relief for the duration of the proceedings on the merits,[3] to prevent NextEra from proceeding to execution in the interim, with all the possible irreversible consequences thereof.

1.8 For the sake of completeness, it should be noted that Spain is still pending similar proceedings in the Netherlands against two other companies, in connection with ECT arbitrations brought against it by those parties. The same is happening in other European jurisdictions (Germany and Luxembourg) where the same issues are involved.

1.9 Spain explains its claims below. In Part I, Spain sets out the facts and circumstances relevant to this case, and in Part II, it explains its claims and the legal framework in more detail. Finally, in Part III, Spain formulates its petition and discusses some issues of a procedural nature.

PART I: FACTS AND CIRCUMSTANCES

2. Parties and the Spanish regulations to promote electricity production from renewable energy sources

2.1 NextEra, during the period 2010-2013, through its subsidiary NextEra Energy España S.L.U. ("NextEra España"), which holds 100% of the shares of the Spain-based companies Planta Termosolar de Extremadura, S.L.U. ("PTE1"), Planta Termosolar de Extremadura 2, S.L.U. ("PTE2"), and NextEra Energy España Operating Services, S.L.U. ("NEEOS") invested in the construction of two concentrated solar power (CSP) plants, which plants are referred to as Termosol 1 and Termosol 2. These plants are owned by PTE1 and PTE2, respectively.

2.2 NextEra Global was founded on March 27, 2008. NextEra Spain was founded on May 7, 2008. Since 2011, NextEra Global has been 100% owned by the Dutch company NextEra Energy Global Holdings Cooperative U.A., which in turn is a subsidiary of NextEra Energy Inc, a U.S.-based company.

2.3 In 2007, Spain introduced a regulation to promote the production of electricity from renewable energy sources. It was regulated by Royal Decrees 661/2007, 1578/2008 and 6/2009 (the "2007 Regulation") and implemented EU Directive 2001/77/EC on renewable energy.[4] The 2007 Regulation was not notified to the European Commission or otherwise assessed by the European Commission under state aid rules, despite recital 12 of Directive 2001/77/EC, which states that *"Articles 87 and 88* [of the Treaty, now Articles 107 and 108 TFEU] *continue to apply to such state aid."*[5] That recital makes it clear that Member States remained obliged to notify their state

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3 It did not seem appropriate to Spain - also in light of the complexity of the case - to submit the case for interlocutory proceedings.

4 Directive 2001/77/EC of the European Parliament and of the Council of September 27, 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ 2001, L283/33.

5 See margin number 11 of the European Commission Decision of July 19, 2021, SA.54155, attached as **Exhibit 5**).

aid regulations that they had adopted to convert that directive.

2.4 Under the 2007 regulation, renewable energy producers could choose between two eligibility options. The first option consisted of subsidizing the production of energy from renewable sources by receiving a fixed rate per kWh of energy produced (hereinafter: subsidy option), with the rate updated annually using the consumer price index. The second option consisted of selling the (generated) electricity on the market and then receiving a premium per kWh of electricity sold on top of the market price (premium option).[6]

2.5 Both the subsidy and the premium were calculated based on typical costs and revenues of standard renewable energy installations. In doing so, Spain estimated both the initial investment costs and the operating and maintenance costs of standard installations, as well as the market price.

2.6 The 2007 regulation was financed through net access tariffs imposed on electricity consumers and network users by Spanish Law 54/1997 and Spanish Royal Decree 2017/1997. In doing so, these tariffs were calculated in accordance with a methodology established by the Spanish government. In doing so, Spanish Royal Decree 2017/1997 designated the *Comisión Nacional de Energia* (the National Energy Commission) - an advisory public body included in the (Spanish) National Commission for Markets and Competition (hereinafter "NCMM") – to transfer the collected tariffs, through subsequent settlements, to the beneficiaries of the 2007 regulation. In doing so, the annexes of Royal Decree 2017/1997 defined the beneficiaries of the settlements, determined the applicable mathematical formulas, and regulated the settlement procedure itself, according to predetermined objective parameters.[7]

2.7 Furthermore, under the 2007 regulation, concentrated solar power plants were also entitled to the tariff/premium for fossil fuel/ natural gas generated electricity when used in conjunction with renewable energy sources to ensure stable production and supply, as long as the share of such electricity did not exceed 12% of total electricity produced in the case of the tariff and 15% of total electricity produced in the case of the premium.[8]

2.8 To obtain the aid under the 2007 regulation, potential beneficiaries had to apply to the Spanish Directorate General of Energy Policy and Mining. Those installations that met the eligibility criteria were entered in a pre-allocation register on a first-come, first-served basis. The installations in the register were thus allowed to receive the aid.[9]

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6 See margin number 14 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

7 See margin numbers 19 through 21 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

8 See margin number 17 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

9 See margin number 18 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

2.9 NextEra and its subsidiaries began activities to realize the plants in 2007.

2.10 On May 14, 2009, PTE 1 and PTE 2 requested registration of the first Termosol plant ("Termosol 1") and the second Termosol plant ("Termosol 2"), respectively, in the pre-allocation register.

2.11 In November 2009, Spain established a prioritization of the projects or installations submitted to the Administrative Register for pre-allocation of payment. This prioritization had 4 phases. The prioritization established annual restrictions regarding the start-up and commissioning of the installations registered in the pre-allocation register, so that the installations could not start supplying energy through the distribution or transmission grid before certain dates.

2.12 On December 11, 2009, the Termosol plants were enrolled in the pre-allocation register and assigned to phase 3 of a prioritization schedule.

2.13 On December 16, 2009, PTE1 and PTE2 entered into Engineering, Procurement Support and Construction Support Services Agreements with Sener Ingeniería y Sistemas S.A. ("Sener").

2.14 On December 22, 2009, both PTEs submitted a request to the Spanish Directorate General of Energy Policy and Mines to postpone their construction deadlines for Termosol 1 and Termosol 2, moving instead to Phase 4 prioritization.

2.15 On February 18, 2010, the Spanish Directorate General of Energy Policy and Mines decided to approve the application to transfer the Termosol plants to Phase 4. As a result, the Termosol plants were required to obtain permanent registration in the appropriate register by December 31, 2013.

2.16 On December 2, 2010, PTE1 and PTE2 notified that they were waiving the commissioning dates of Termosol 1 (January 1, 2013) and Termosol 2 (March 15, 2013), which had been set pursuant to the decision of the Spanish Directorate General of Energy Policy and Mines, and requested that the Directorate General communicate the compensation conditions for the operational life of the plant.

2.17 On December 28, 2010, in response to that request, the Directorate General communicated to PTE1 and PTE2 the tariffs, premiums and upper and lower limits and additional provisions applicable to the facilities under the provisions of the fifth transitional provision of RDL 6/2009, as established in Royal Decree 661/2007.

2.18 On April 28, 2011, PTE1 and PTE2 entered into loan agreements to finance the construction of the Termosol plants. The plants were completed in 2013. Termosol 1 received final registration in the RAIPRE on May 29, 2013, whereas Termosol 2 received that registration on June 7, 2013.

2.19 Starting in 2012, Spain introduced several pieces of legislation that modified the 2007 regime, but retained the essential features of that original regime.

2.20 First, Law no. 15/2012 eliminated compensation for electricity generated with natural gas. Then, Law 2/2013 of February 1, 2013, among other things, abolished the

mechanism for the abolished adjustment of feed-in tariffs to the consumer price index and replaced it with a lower index.[10]

2.21 The 2013 regulation provides support for renewable energy installations, among other things.

2.22 Two types of facilities are eligible under the 2013 regulation:

(A) Facilities receiving support under this new scheme following the entry into force of Royal Decree 413/2014 on June 11, 2014 ("new facilities"); and

(B) Facilities that were already entitled to or already receiving aid from the 2007 scheme when Decree-Law 9/2013 entered into force on July 14, 2013 ("existing Facilities").[11]

2.23 The new 2013 arrangement resulted in an aid adapted to the new features of the regulation.

2.24 The European Commission approved the 2013 regulations as compatible with the internal market by decision of November 10, 2017 (see Exhibit 1).

2.25 All facilities that originally benefited from the 2007 regulation were automatically enrolled in the 2013 regulation. In assessing the compatibility of the regulation, the Commission took into account the sum of payments made to existing facilities under the 2007 and 2013 regulations to verify that there was no overcompensation.[12]

2.26 The European Commission assessed the proportionality of the aid granted to existing facilities in accordance with paragraph 131(a) of the Environmental Aid Guidelines on the basis of the cash-flow calculations of 21 standard facilities. These included revenues from past sales (including those resulting from the 2007 regulations for existing facilities), expected future revenues from sales, initial investment costs, operating costs and the compensation to be granted to each facility for both operation and investment. For all examples provided, the Commission verified that the aid did not exceed what would be necessary to recover the initial investment costs and relevant operating costs, plus a margin of reasonable return based on past and projected costs and market prices. The Commission's 2017 decision concluded that these rates of return were in line with those applicable to similar measures approved by the Commission and did not lead to overcompensation.[13]

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10 See margin number 24 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

11 See margin number 28 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

12 See margin number 34 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

13 See margin number 35 of the European Commission Decision of July 19, 2021, SA.54155, attached as Exhibit 5.

2.27 NextEra claims to have been damaged by the changes to the 2007 regulations, leading to lower aid amounts.

3. The ECT arbitration brought by NextEra

3.1 Then NextEra based on the ECT, which was ratified by the Netherlands and Spain and entered into force for both countries, and the ICSID Convention, issued a request for arbitration to ICSID, which was received by ICSID on May 15, 2014.[14]

3.2 Spain filed a defense, denying the jurisdiction of the ICSID arbitral tribunal.

3.3 The ICSID Arbitral Tribunal issued its *Decision on Jurisdiction, Liability and Principles of Quantum* (ARB/14/11) on March 12, 2019. In it, it held (among other things) that:

(A) the ICSID arbitral tribunal had jurisdiction to hear the dispute;

(B) Spain failed to comply with its obligation under Article 10(1) ECT to ensure fair and equitable treatment in that it did not protect the legitimate expectations of the Plaintiffs; and

(C) That plaintiffs (NextEra) are entitled to damages.

3.4 On May 31, 2019, the ICSID Arbitral Tribunal issued its Final Award. In this final arbitral award, Spain was ordered to pay:

(A) an amount of EUR 290.6 million in connection with its violation of Article 10(1) ECT, on which amount interest is payable as of June 30, 2016 (at a rate of 0.234%);

(B) an amount of USD 132,368.86 in costs of the arbitration to be increased by interest from the date of the final arbitral award; and

(C) an amount of USD 4,147,031.81 + EUR 1,042,135.30, representing one-third of NextEra's legal costs in the arbitration, plus interest from the date of the final arbitral award.

3.5 Thus, the arbitral award results in a payment obligation from Spain to NextEra of currently more than EUR 295 million.

3.6 Spain notified the ICSID Arbitral Tribunal's award in respect of NextEra as aid to the European Commission. The European Commission acknowledged receipt of the notification on March 11, 2020 and registered it under number SA.56676. The European Commission has not yet taken a decision regarding the notified aid.

[14] Marginal number 6 of the Decision on Jurisdiction, Liability and Principles of Quantum dated March 12, 2019 (ARB/14/11), attached as **Exhibit 6**.

4. The annulment proceedings with the *ad hoc* Committee

4.1 Spain filed an appeal for annulment of the May 31, 2019 arbitral award on September 26, 2019. An annulment procedure before the *Ad Hoc Committee* has a very reticent review framework with a number of exhaustive grounds for annulment laid down in Article 52 (1) of the Convention. Furthermore, it is settled case law under the ICSID that:

> *(1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an ad hoc Committee is limited; (3) ad hoc Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an ad hoc Committee cannot substitute the Tribunal's determination on the merits for its own; (4) ad hoc Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly;* (....)"[15]

4.2 In its Decision on Annulment of March 18, 2022, the *ad hoc Committee* rejected the appeal for annulment.[16] It did so in the restrained manner customary for the *ad hoc Committee* and held, inter alia, that the ICSID Arbitral Tribunal had not gone beyond its mandate.

5. NextEra seeks enforcement of the arbitration award in the United States

5.1 NextEra filed an action in the District Court for the District of Columbia ("District Court") on June 3, 2019, by which NextEra asks the District Court (i) to enter an order recognizing and affirming the arbitration award and damages awarded by the ICSID Arbitral Tribunal, and (ii) to enter an award in favor of NextEra in the amount of damages awarded by the ICSID Arbitral Tribunal.[17]

5.2 On October 11, 2019, Spain filed a motion to dismiss, or at least staying NextEra's June 3, 2019 request with the District Court and asked the District Court to schedule a hearing.

5.3 On September 30, 2020, the District Court granted Spain's motion to staying the proceedings.[18]

5.4 Following rejection of the appeal to set aside the arbitral award by the *Ad Hoc Committee* on March 18, 2022, Spain filed a renewed motion to dismiss NextEra's June 3, 2019 request with the District Court on May 2, 2022.[19]

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15 On this subject, see the ICSID Updated Background Paper on Annulment for the Administrative Council of ICSID from May 2016, para. 74, that can be accessed at https://icsid.worldbank.org/sites/default/files/publications/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf.

16 *Decision on Annulment* of the ICSID *ad hoc Committee* of March 18, 2022, in the ICSID case with Case No. ARB/14/11, attached as Exhibit 3.

17 Nextera claim dated June 3, 2019 in District Court, attached as Exhibit 4.

18 Order dated September 30, 2020 from District Court, attached as **Exhibit 7.**

19 Motion of Spain dated May 2, 2022 in District Court, attached as **Exhibit 8a**. The accompanying Memorandum of Law in Support of Spain's Motion of May 2, 2022 is attached as **Exhibit 8b.**

5.5 Spain subsequently filed a statement of reply in support of the renewed motion to dismiss NextEra's June 3, 2019 request with the District Court on June 29, 2022.[20]

5.6 The District Court has not yet issued a final judgment.

PART III: LEGAL FRAMEWORK AND THE ILLEGALITY OF IMPLEMENTATION

6. The concept of state aid

6.1 The concept of state aid is an objective and legal concept directly defined in Article 107(1) TFEU.[21] Article 107(1), TFEU states:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

6.2 This provision shows that an aid measure exists if the following criteria are met:

(A) by the government with public funds;

(B) to an enterprise;

(C) provides a selective, non-market advantage;

(D) By which competition is distorted; and

(E) interstate commerce can be affected.

6.3 A national measure that meets all the above criteria qualifies as an aid measure within the meaning of Article 107(1) TFEU.

6.4 Article 108(3) TFEU states:

> *"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it deems that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in the preceding paragraph. The Member State concerned shall not put its proposed measures into effect until that procedure has resulted in a final decision."*

6.5 This article section introduces prior control of support measures by the European Commission: every (new) support measure must be notified to the Commission

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20 Memorandum of Reply Spain dated June 29, 2022 to District Court, attached as **Exhibit 9**.

21 Court of Justice judgment of December 22, 2008, British Aggregates v. Commission, C-487/06 P, ECLI:EU:C:2008:757, point 111; Court of Justice judgment of May 16, 2000, France v. Ladbroke Racing and Commission, C-83/98, ECLI:EU:C:2000:248, point 25.

beforehand (notification obligation) and cannot be implemented until the Commission has declared the aid compatible (*standstill* obligation).[22]

6.6 An aid measure introduced (implemented) in violation of Article 108(3) TFEU without a prior positive decision of the European Commission constitutes unlawful aid.[23]

6.7 Similarly, if, after investigation, the European Commission does not or does not timely notify aid – therefore illegal aid – as compatible, that does not change the illegality of the aid granted in breach of the notification and standstill obligations. The Court of Justice ruled in this regard:

> *"The Commission's final decision does not have the effect of retrospectively covering the invalidity of implementing measures adopted in breach of the prohibition laid down in that provision. Any other interpretation would facilitate the infringement by the Member State concerned of the last sentence of Article 88(3) EC* [now Article 107(3) TFEU] *and* deprive *that provision of its useful effect*."[24]

7. Compensation as replacement of unlawful state aid

7.1 While companies may apply to national courts to order the payment of damages to which they believe they are entitled, such claims cannot have the effect of circumventing the effective application of the Union's state aid rules.[25]

7.2 In particular, companies that may be entitled under national law to receive aid that has not been notified to and approved by the Commission, but have not received such aid, cannot claim compensation for the amount equal to the amount of aid that has not been received, as this would constitute an indirect award of unlawful aid.[26]

8. (Execution of) an arbitral award as a support measure

8.1 From the judgment of the Court of Justice in the Micula case[27] (hereinafter: Micula judgment) it is clear that the European Commission has jurisdiction to examine whether an award of an arbitral tribunal established under the ICSID Convention by which that tribunal awarded damages to a number of companies constitutes State aid

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22 Unless there is an exception to the notification obligation under a block exemption such as the General Block Exemption Regulation (EU) 651/2014. No exceptions to the notification obligation apply in this case.

23 See Article 1(f), Council Regulation (EU) 2015/1589 of July 13, 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 2015, L248/9.

24 ECJ February 12, 2008, CELF, C-199/06, ECLI:EU:C:2008:79, point 40.

25 ECJ June 29 2004, Commission v. Council, C-110/02, ECLI:EU:C:2004:395, point 43; ECJ July 18, 2007, Lucchini, C-119/05, ECLI:EU:C:2007:434, points 59-63; ECJ November 11, 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742, points 42-44.

26 ECJ November 11, 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742, points 42-44. See also Commission Decision April 16, 2004, State aid N 304/2003 – The Netherlands, Aid in favor of Akzo Nobel to reduce the transport of chlorine, marginal 18 and footnote 10. See also Conclusion of Attorney General Ruiz-Jarabo Colomer of April 28, 2005 in Atzeni and Others, C-346/03 and C-529/03, ECLI:EU:C:2005:256, par. 198.

27 ECJ January 25, 2022, C-638/19 P, Commission v. European Food and Others, ECLI:EU:C:2022:50.

within the meaning of Article 107(1) TFEU. This entails that given the role of the national court in state aid control, the national court is also empowered to give a judgment on whether such an arbitral tribunal award constitutes state aid within the meaning of Article 107(1) TFEU, and is further obliged to take the necessary measures to ensure compliance with Article 108(3) TFEU.

8.2 The background to the Micula ruling is as follows.

8.3 ICSID Convention, entered into force for Romania on October 12, 1975. By 2022, Sweden and Romania had concluded a Bilateral Investment Treaty (BIT) for the promotion and mutual protection of investments (hereinafter BIT). Article 2(3) of this BIT provides that each contracting party shall at all times ensure fair and equitable treatment of the investments of investors of the other contracting party. The BIT further provides that disputes between investors and contracting countries shall be settled by an arbitral tribunal applying the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter: ICSID Convention).[28]

8.4 In 2005, as part of the negotiations for Romania's accession to the European Union, the Romanian government abolished a national incentive regulation that favored certain investors in disadvantaged regions (hereinafter: tax incentive regulation). Several Swedish investors had made investments in a particular region in Romania under that tax incentive regulation. These investors considered that by abolishing the tax incentive regulation, Romania had not fulfilled its obligation to treat the investments they had made fairly and equitably according to the BIT. Accordingly, they requested the establishment of an arbitral tribunal to compensate them for the damages they had suffered due to the abolition of the tax incentive regulation.

8.5 By an arbitral award dated December 11, 2013, this Arbitral Tribunal found that, by abolishing the tax incentive regulation in question, Romania had betrayed the legitimate expectations of the applicants in arbitration, had failed to act transparently by not informing those applicants in a timely manner, and had failed to ensure fair and equitable treatment of those applicants' investments within the meaning of Article 2(3) BIT. The arbitral tribunal therefore ordered Romania to pay the applicants in arbitration damages of approximately €178 million.

8.6 The European Commission then warned Romania that any implementation or execution of the arbitration award would be considered new state aid and had to be notified to the Commission. Romania. The Commission then issued a decision in 2014 ordering Romania to immediately suspend any measure that might lead to the implementation or execution of the arbitral award, as such a measure would amount to unlawful state aid, until the Commission issued a final decision on the compatibility of this measure. Romania nevertheless paid the compensation awarded by the arbitral tribunal to the Swedish investors. By decision of March 30, 2015,[29] the Commission classified the payment of that compensation as state aid within the meaning of Article

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28 The ICSID Convention had entered into force for Romania in 1975, see point 3 Micula judgment.

29 Commission Decision (EU) 2015/1470 of March 30, 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral Award Micula v. Romania of December 11, 2013, *Pb.* 2015, L 232/4.

107 TFEU, which was incompatible with the internal market, prohibited its implementation and ordered the recovery of amounts already paid.

8.7 That Commission decision was the subject of several requests for annulment before the General Court of the European Union ("General Court"). The General Court annulled the Commission's decision, in particular because the Commission had applied its powers under the state aid rules retroactively to facts dating to before Romania's accession to the Union on January 1, 2007. In fact, the General Court assumed that the aid in question was granted by Romania on the date the tax incentive regulation was abolished, i.e. in 2005, and not on the date of the arbitral award.

8.8 An important question in this judgment is whether, in the event that damages are awarded by an arbitral award due to the abolition of an incentive (tax) regulation that is in breach of a BIT, State aid within the meaning of Article 107(1) TFEU is granted on the date on which those damages are actually paid in execution of that award because the right to damages definitively arises on the date on which that award of the arbitral tribunal becomes enforceable, or on the date of the abolition of the regulation. In the Micula judgment, the Court reminds that the decisive criterion for determining the time at which State aid is granted is the moment at which the beneficiary of a given measure acquires a firm claim to the aid and the State accordingly undertakes to grant the aid. At that moment, in the Court's view, such a measure may lead to a distortion of competition capable of affecting trade between Member States within the meaning of Article 107(1) TFEU. It was then found that the right to compensation for the loss allegedly suffered by the applicants in arbitration because of the alleged abolition of the (tax) incentive regulation in question, in violation of the BIT, was not granted until the arbitral award. Indeed, only at the end of the arbitration proceedings initiated for that purpose pursuant to the arbitration clause of Article 7 BIT were the applicants in arbitration able to obtain actual payment of such damages. The Court of Justice emphasized that even if the alleged abolition of the (tax) incentive regulation realized in violation of the BIT constituted the damaging event, the right to the compensation in question was granted exclusively by the arbitral award, which, after granting the claim brought by the applicants in arbitration, not only established the existence of this right but also quantified its amount. The Commission was therefore competent to adopt the decision of March 30, 2015 on the basis of Article 108 TFEU.[30]

8.9 This means that an award of an arbitral tribunal ordering a Member State to pay compensation to a company operating in the European Union is subject to State aid control under Articles 107 and 108 TFEU. It has already been explained above that compensation for damages replacing unlawful or incompatible state aid also itself constitutes state aid within the meaning of Article 107(1) TFEU. See chapter 7 above. This also applies if such compensation is awarded by an arbitral tribunal, because even then compensation replaces unlawful or incompatible aid. See also paragraph 77 of the European Commission's Antin decision and paragraphs 100-108 of the European Commission's Micula decision. In both cases, the European Commission ruled that the payment of damages awarded by the arbitral tribunal, through the execution or enforcement of the award, created an advantage for the applicants in arbitration that they would not have been able to obtain under normal market

30 Paragraph 126 Micula judgment.

conditions, and constitutes State aid because the other conditions of Article 107(1) TFEU are met. This is not altered by the fact that the arbitral tribunal was established under international law.

8.10 It is relevant here that, according to case law of the Court of Justice, an international agreement may not infringe on the system of jurisdiction established by the Treaties and therefore on the autonomy of the legal system of the European Union, the respect of which the Court of Justice ensures, see Achmea judgment para. 32.[31] In that judgment, the Court of Justice ruled that Articles 267 and 344 TFEU preclude a provision in an international agreement concluded between two Member States of the European Union 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 State before an arbitral tribunal and that Member State has undertaken to accept its jurisdiction.[32] By concluding such an agreement, the Member States which are parties to it withdraw from the jurisdiction of their own courts any disputes which may concern the application or interpretation of Union law, such as the rules on State aid, and consequently from the system of remedies which they are required to provide under the second subparagraph of Article 19(1) TEU in the areas covered by that law. Such an international agreement may therefore have the effect of preventing these disputes from being settled in a manner that ensures the full effect of that law.[33] An arbitration clause is therefore incompatible with the principle of loyal cooperation laid down in the first subparagraph of Article 4(3) TEU and negatively affects the autonomy of Union law.[34] This means that an arbitration clause cannot be applied and, in any event, Union law cannot be overruled by an award of the arbitral tribunal. State aid rules therefore remain applicable in the event the arbitral tribunal orders a Member State of the European Union to pay damages.

8.11 In the PL Holdings judgment the Court of Justice further added: "If a Member State which is a party to a dispute which may concern the application and interpretation of European Union law is permitted to submit that dispute to an arbitration body with the same characteristics as the body referred to in an invalid arbitration clause in an international agreement as referred to in point 44 of this judgment, and namely by concluding an ad hoc arbitration agreement the content of which corresponds to that clause, this would in fact have the effect of circumventing the obligations arising for that Member State from the Treaties and, more specifically, from Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of March 6, 2018, Achmea (C-284/16, EU:C:2018:158)."[35] In that case, the Court of Justice held that Articles 267 and 344 TFEU preclude national legislation allowing a Member State to conclude with an investor from another Member State an ad hoc arbitration agreement allowing the continuation of an arbitration procedure initiated on the basis of an arbitration clause identical in substance to that agreement, included in an international agreement concluded between those two Member States and null and void for being contrary to those articles. In short, it is obvious that circumvention of EU law is not permitted.

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31 ECJ March 6, 2018, Achmea, C-284/16, ECLI:EU:C:2018:158, point 32.

32 *Ibid.,* p. 60.

33 ECJ February 27, 2018, Associação Sindical dos Juízes Portugueses, C-64/16, ECLI:EU:C:2018:117, point 34; ECJ October 26, 2021, PL Holdings, C-109/20, ECLI:EU:C:2021:875, point 45.

34 ECJ October 26, 2021, PL Holdings C-109/20, ECLI:EU:C:2021:875, point 46.

35 ECJ October 26, 2021, PL Holdings C-109/20, ECLI:EU:C:2021:875, point 47.

9. Role of the national court

9.1 It follows from the foregoing that Article 108(3) TFEU introduced preventive monitoring of proposed new aid measures. The purpose of this preventive monitoring is to ensure that only aid measures that have been declared compatible with the internal market are put into effect.[36]

9.2 In order to achieve this objective, the implementation of a proposed aid measure must be suspended until the European Commission has ruled by way of a final decision on the compatibility of the aid measure (the *standstill* obligation).[37]

9.3 The task of the national courts rests on the direct effect of the prohibition on the implementation of planned aid measures introduced by Article 108(3) TFEU. The direct effect of this prohibition extends to any aid measure implemented without notification.[38]

9.4 The national court should ensure that, in accordance with national law, all the consequences will be drawn from a breach of the obligation to notify and the *standstill* direction referred to in the last sentence of Article 108(3) TFEU, both as regards the validity of the implementing acts and as regards the recovery of the financial support granted in violation of that provision or any provisional measures.[39]

9.5 In this context, the Court confirmed by way of a preliminary ruling (because in the Court of Justice's view the answer to the questions raised was already apparent from previous judgments delivered by the Court of Justice), that European Union law, in particular Articles 267 and 344 TFEU, must be interpreted as meaning that a court of a Member State having to rule on the enforcement of the arbitral award which was the subject of *Commission Decision (EU) 2015/1470 of March 30, 2015 on State aid* SA.38517 *(2014/C) (ex 2014/NN) enforced by Romania - Arbitral award in Micula v. Romania of December 11, 2013,* should set aside arbitral award and the award cannot in any event be enforced to enable its beneficiaries to obtain payment of the compensation awarded to them.[40]

9.6 Spain also points out that in order to ensure compliance with Article 108(3) TFEU, it is not necessary for the Commission to have found by decision that an aid measure is unlawful. The Eesti Pagar judgment of the Court of Justice shows that even when a Member State (or a judge of that Member State) finds that a measure constitutes an aid measure and has not been notified to the European Commission unlawfully, even in the absence of a decision of the European Commission, the Member State and all

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36 ECJ March 3, 2020, C-75/18, Vodafone Magyarország Mobil Tźvközlési Zrt., C-75/18, ECLI:EU:C:2020:139, point 19.

37 ECJ November 21, 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraphs 25 and 26, and ECJ March 5, 2019, Eesti Pagar, C-349/17, ECLI:EU:C:2019:172, point 84).

38 ECJ November 21, 2013, Deutsche Lufthansa, C-284/12, ECLI:EU:C:2013:755, point 29, and ECJ March 5, 2019, Eesti Pagar, C-349/17, EU:C:2019:172, point 88.

39 ECJ November 21, 2013, Deutsche Lufthansa, C-284/12, ECLI:EU:C:2013:755, point 30, and ECJ March 5, 2019, Eesti Pagar, C-349/17, EU:C:2019:172, point 89.

40 September 21, 2022, Romatsa, C-333/19, ECLI:EU:C:2022:749, dictum. The decision is only available in French and is attached as **Exhibit 10a**. An unofficial Dutch translation, made with Deepl and for the reader's convenience, is attached as **Exhibit 10b**.

its organs must take the necessary measures to prevent unlawful aid from being granted or disbursed.[41]

10. **Legitimate trust**

10.1 It is settled case-law of the Court of Justice that, in view of the fundamental role of the notification obligation under Article 108(3) TFEU for the effectiveness of the Commission's compulsory supervision of State aid, beneficiary undertakings cannot have a legitimate expectation as to the lawfulness of an aid measure unless it has been granted in compliance with the notification procedure under Article 108(3) TFEU.[42]

10.2 According to the Court, a prudent businessman should normally be able to ascertain whether the notification procedure has been complied with.[43] If the undertaking has not ascertained this, it is in principle not entitled to rely on legitimate expectations.

10.3 In particular, if aid has been granted that was not previously notified to the Commission, so that it is unlawful under Article 108(3) TFEU, the aid recipient cannot have a legitimate expectation of the lawfulness of the grant of aid at that time except in exceptional circumstances.[44]

10.4 The Court pointed out that Articles 107 and 108 TFEU would lose any useful effect if a Member State whose authorities granted aid in violation of the procedural rules of Article 109 could rely on the legitimate expectations of the recipients of the aid in order to evade its obligation to take the necessary measures to implement a decision by which the Commission orders it to recover or withhold aid.[45]

10.5 It is also settled case law that in order to rely on legitimate expectations in the case of unlawful aid, three conditions must be met. First, the person concerned must have received from the administration precise, unconditional and concordant assurances from *authorised* and reliable sources. Second, these commitments must be capable of creating legitimate expectations on the part of the person to whom they are addressed. Third, the assurances must comply with applicable regulations.[46]

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41 ECJ March 5, 2019, Eesti Pagar, C-349/17, ECLI:EU:C:2019:172, point 91.

42 See in this respect: ECJ November 24, 1987, RSV/Commission, 223/85, ECLI:EU:C:1987:502, points 16 and 17; ECJ September 20, 1990, Commission/Germany, C-5/89, EU:C:1990:320, points 14 and 16; ECJ June 13, 2013, HGA and others/Commission, C-630/11 P-C-633/11 P, ECLI:EU:C:2013:387, paragraph 134; ECJ January 27, 1998, Ladbroke Racing/Commission, T-67/94, EU:T:1998:7, point 182; Court October 16, 2014, Alcoa Trasformazioni/Commission, T-177/10, ECLI:EU:T:2014:897, point 61, and Court April 22, 2016, Ireland and Aughinish Alumina v. Commission, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, point 214.

43 See, inter alia, ECJ September 20, 1990, Commission/Germany, C-5/89, EU:C:1990:32 point 14.

44 ECJ September 20, 1990, Commission/Germany, C-5/8s, Eu:C:1990:320, points 14 and 16.

45 ECJ September 20, 1990, Commission/Germany, C-5/89, EU:C:1990:320, point 17.

46 See, for example: General Court November 15, 2018, Deutsche Telekom, T-207/10, ECLI:EU:T:2018:786, point 46.

10.6 The Court of Justice clarified that national authorities do not count as a competent authority in this context, but that the trust must have been generated by European Union institutions.[47]

11. Damages to replace unlawful aid also constitutes unlawful aid

11.1 Although companies may apply to national courts to order the payment of damages to which they believe they are entitled, such claims cannot have the effect of circumventing the effective application of Union state aid rules.[48]

11.2 In particular, companies that may be entitled under national law to receive aid that has not been notified to and approved by the Commission, but have not received such aid, cannot claim compensation for the amount equal to the amount of aid that has not been received, as this would constitute an indirect award of unlawful aid.[49]

12. Application of the state aid legal framework on the case

The 2007 regulation constituted an unlawful aid measure

12.1 The European Commission has already ruled on the 2007 regulation in its 2017[50] and 2021[51] decisions. In those decisions, the Commission found that the 2007 regulation (and the subsequently amended regulation) constituted aid.

12.2 It is certain that the 2007 regulation was not notified to the European Commission.

12.3 As the above legal framework shows, it is thus established that the 2007 regulation constituted unlawful aid.

No legitimate trust

12.4 As explained above, a beneficiary of a national measure can only claim legitimate expectations if those legitimate expectations have been created by an institution of the European Union. There is nothing to show that the European Commission expressed itself in any way such that NextEra could derive confidence therefrom that the 2007 regulation would not constitute aid or would qualify as legitimate aid.

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47 See, for example, ECJ March 5, 2019, C-349/17, Eesti Pagar, ECLI:EU:C:2019:172, point 101.

48 ECJ June 29, 2004, Commission/Council, C-110/02, ECLI:EU:C:2004:395, point 43; ECJ July 18, 2007, Lucchini, C-119/05, ECLI:EU:C:2007:434, points 59-63; ECJ November 11, 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742, points 42-44.

49 ECJ November 11, 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742, points 42-44. See also Commission Decision April 16, 2004, State aid N 304/2003 - The Netherlands, Aid in favor of Akzo Nobel to restrict the transport of chlorine, marg. 18 and footnote 10. See also Conclusion of Attorney General Ruiz-Jarabo Colomer of April 28, 2005 in Atzeni and Others, C-346/03 and C-529/03, ECLI:EU:C:2005:256, point 198.

50 Commission Decision of November 10, 2017, SA.40348 (2015/NN) - Spain Support for electricity generation from renewable energy sources, cogeneration and waste, attached as Exhibit 1.

51 Decision of the European Commission dated July 19, 2021, SA.54155, attached as Exhibit 5.

12.5 Nor does it appear that NextEra could in any way derive confidence from a statement by the European Commission that an arbitral award (whether of the ICSID Arbitral Tribunal or not) could be considered lawful aid. On the contrary, it even explicitly appears from the European Commission's decision of March 30, 2015[52] cited above (which led to the Micula ruling), i.e. well before the ICSID arbitral tribunal ruling, that the European Commission considers (the execution of) a ruling of an ICSID arbitral tribunal as unlawful aid.

13. **Application of the state aid concept to (the enforcement of) the arbitral award**

13.1 From the foregoing it is clear that the 2007 regulation constituted unlawful aid and therefore could not result in a grant to NextEra. It also follows from the foregoing that an award of damages in lieu of otherwise unlawful aid itself also constitutes unlawful aid. Thus, an award of damages in lieu of the aid NextEra believed it could receive under the 2007 regulation, while NextEra is not entitled to rely on legitimate expectations in connection therewith, also constitutes unlawful aid.

13.2 It is irrelevant here whether the award of that compensation which serves to replace unlawful State aid is made by an administrative body of the Member State or by a judicial authority. In fact, as indicated above, the courts of the Member States also have the duty to ensure compliance with state aid rules.[53]

13.3 While Member State authorities are obliged to ensure compliance with State aid rules, it is equally true that they cannot conclude treaties whereby they remove the competence to adjudicate such (substitute) damages from national courts and assign it to an arbitral body. In doing so, they could circumvent the obligations arising from the case law of the Court of Justice and thereby nullify the useful effect of the state aid rules, including the notification obligation and the standstill provisions.

13.4 Spain points out that in its 2017 decision, the European Commission already commented on the state aid assessment of an ICSID arbitral tribunal award in a similar case and ruled in this regard as follows (translated):

> *"(160) By way of introduction, the Commission notes that most of the investors who have brought cases against Spain are located in other Member States of the Union. The Commission is of the opinion that any provision providing for investor-state arbitration between* two *Member States is against Union law;* t*his concerns in particular Article 19(1) TEU, the principles of the freedom of establishment, the freedom to provide services and the free movement of capital, as laid down in the Treaties (in particular Articles 49, 52, 56 and 63 TFEU), as well as Articles 64(*2*), 65(1), 66, 75, 107, 108, 65 215, 267 and Article 344 TFEU, and the general principles of Union law of primacy, unity and effectiveness of Union law, mutual trust and legal certainty.*

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52 Commission Decision (EU) 2015/1470 of March 30, 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania - Micula v. Romania arbitral award of December 11, 2013, *Pb.* 2015, L 232/4.

53 ECJ March 5, 2019, Eesti Pagar, C-349/17, ECLI:EU:C:2019:172, point 91.

(161) The conflict concerns both substance and enforcement. On the substance, Union law provides a complete set of rules on investment protection (notably in Articles 49, 52, 56 and 63 TFEU, as well as in Articles 64(2), 65(1), 66, 75 and 215 TFEU). Member States therefore do not have the power to conclude bilateral or multilateral agreements among themselves, as they may thereby affect common rules or alter their scope. As the two sets of investment protection rules potentially applicable between an EU Member State and an investor of another state (i.e. the Treaties and Bilateral Investment Treaties (BITs) within the EU or the ECT in an intra-EU situation) are not identical in substance and are applied by different Courts, there is also a risk of conflict between the international investment treaty and Union law.

(162) As regards enforcement, in a dispute between an investor from a Member State and another Member State or an intra-EU BIT, an arbitral tribunal set up on the basis of the Energy Charter Treaty must apply Union law as the applicable law (both as the international law applicable between the parties and, where appropriate, as the national law of the host State). However, according to the case law, the arbitral tribunal is not a judicial body of a Member State, and therefore cannot refer to the Court, because, in particular, the requirements of permanence, State character and mandatory jurisdiction are not met.

(163) The resulting conflict between treaties must, in accordance with the Court's case law, be resolved on the basis of the principle of primacy in favor of Union law. For these reasons, the ECT does not apply to investors from other Member States bringing a dispute against another *Member State.*

(164) In any event, there is also essentially no violation of the provisions on fair and equitable treatment. As noted above in paragraph 3.5.2, in the specific situation of the present case, Spain has not violated the principles of legal certainty and legitimate expectations under Union law. In a situation within the EU, Union law forms part of the applicable law, since it constitutes the international law applicable between the parties in case of disputes. Consequently, the principle of fair and equitable treatment, based on the principle of conforming interpretation, cannot have a wider scope than the Union law concepts of legal certainty and legitimate expectations in the context of a state aid regulation. In a non-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor can have a de facto legitimate expectation arising from unlawful state aid. This has been explicitly recognized by arbitral tribunals. In any event, it is settled case law that a measure that does not violate the national provisions on legitimate expectations generally does not violate the provision on fair and equitable treatment.

(165) The Commission recalls that any compensation that an arbitral tribunal would award to an investor based on the fact that Spain modified the economic premium regulation through the notified regulation, would in

> *itself constitute state aid. However, the arbitral tribunals have no authority to authorize the granting of state aid. That is an exclusive competence of the Commission. If they grant compensation, as in the Plaintiff/Spain case, or would do so in the future, such compensation would have to be logged* as *State aid within the meaning of Article 108(3) TFEU and be subject to the standstill obligation.*
>
> *(166) Finally, the Commission recalls that this decision is part of Union law and as such is also binding on arbitration courts when they apply Union law. The exclusive forum to challenge its validity are the European judicial* entities."[54]

13.5 In its decision of July 19, 2021, the Commission further held that an ICSID arbitral tribunal ruling in a similar case constitutes aid.[55]

13.6 Spain has notified the ICSID arbitral tribunal's ruling in respect of NextEra to the European Commission. The European Commission acknowledged receipt of the notification on March 11, 2020 and registered it under number SA.56676. The European Commission has not yet taken a decision regarding the notified aid.

14. Task of the national court

14.1 From the foregoing it is clear that decisions of the European Commission – which are, moreover, irrevocable – show that *both* the 2007 regulation *and the* award of damages by the ICSID arbitral tribunal, as well as its execution, should be classified as unlawful aid.

14.2 Case law of the Court of Justice shows that national courts should refrain from taking decisions contrary to a Commission decision and should abide by the Commission's assessment of the existence of state aid.[56]

14.3 Union law requires the national court to take effective measures to prevent the payment of the unlawful aid to its beneficiary.[57]

14.4 In the present case, prohibiting Spain from paying the aid in the form of compensation to NextEra pursuant to the arbitral award is not an effective measure, because once authorization to execute has been irrevocably granted to NextEra by a court of a third country, Spain cannot stop that execution as such.

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54 Commission Decision of November 10, 2017, SA.40348 (2015/NN) - Spain Support for electricity generation from renewable energy sources, cogeneration and waste, attached as Exhibit 1.

55 Decision of the European Commission dated July 19, 2021, SA.54155, attached as Exhibit 5.

56 ECJ November 1, 2013, Deutsche Lufthansa, C-284/12, ECLI:EU:C:2013:755, point 41.

57 See ECJ December 8, 2011, Residex Capital IV, C-275/10, ECLI:EU:C:2011:814, points 44-47. See also: Commission Notice on the Enforcement of State Aid Rules by National Courts, OJEU 2021, C305/1.

14.5 It is for this reason that Spain requests that your Court, as an effective measure to ensure that no payment of unlawful aid is made, impose an injunction on NextEra to proceed with the execution of the arbitral award.

15. Conclusion regarding the state aid law assessment

15.1 On the basis of the foregoing, it must be concluded that, under Union law, your Court must take as a given that the execution of the ICSID arbitral tribunal's decision - whether or not after a national court has granted leave to execute - results in Spain granting unlawful State aid to NextEra. Further, it is clear from Union law that effective measures must subsequently be taken to prevent the provision of that unlawful aid. Since a court injunction prohibiting Spain from granting the aid does not prevent NextEra from continuing to grant that unlawful aid to NextEra through the enforcement of the ICSID Arbitral Tribunal's award rendered in violation of Union law, an injunction prohibiting NextEra from seeking such enforcement constitutes an effective measure to comply with Union law obligations.

16. **Concluding remarks regarding the state aid legal assessment**

16.1 Spain wishes to point out to your Court that the *Commission's Notice on the Enforcement of State Aid Rules by National Courts*[58] allows your Court to request information from the European Commission or seek an opinion on the application of the state aid rules.

17. Articles 267 and 344 TFEU also preclude the execution

17.1 In addition to Articles 107 and 108 TFEU, Articles 267 and 344 TFEU, as interpreted by the Court of Justice, preclude enforcement of the ICSID Arbitral Tribunal's ruling.

17.2 In the Achmea judgment, the Grand Chamber of the Court of Justice ruled on the incompatibility of Union law with investment arbitrations between Member States and/or residents of Member States. The case concerned a bilateral investment treaty ("BIT") concluded between the Netherlands and Slovakia and, in particular, the question of whether the settlement mechanism for investment disputes between foreign investors and the EU Member States in question (so-called *Investor-State Dispute Settlement)* included therein was compatible with Union law. Invoking Articles 267 and 344 of the TFEU, the ECJ answered this question negatively. The ECJ concluded that settlement mechanisms in Intra-EU BITs impinge on the autonomy of Union law:

> *"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 Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands* and *the Czech and Slovak Federative Republic, under which an investor from one of those Member States, in the event of a dispute concerning investments in the other Member State, may initiate proceedings against the latter State*

58 OJEU 2021, C305/1.

> *before an arbitral tribunal whose jurisdiction this Member State has undertaken to accept."*[59]

17.3 Its justification included the circumstance that:

> "(...) *the Member States that are a party to the BIT have, by its conclusion, established a mechanism for the resolution of disputes between an investor and a Member State, which may prevent those disputes, although they may relate to the application of Union law, from being resolved in such a way as to ensure the full effect of that law*."[60]

17.4 One factor in this is that arbitral tribunals are not part of the national legal order and therefore cannot, for example, submit preliminary questions to the Court of Justice. This while an agreement – such as a BIT – cannot affect the allocation of responsibilities and powers as laid down in the Union Treaties, such as the powers of the Court of Justice.[61] Furthermore, according to the Court of Justice, the arbitration clause in question undermines not only the principle of mutual trust between Member States, but also the preservation of the distinctive nature of the law established by the Treaties, which is guaranteed by the preliminary ruling procedure of Article 267 TFEU, and consequently that article is incompatible with the principle of loyal cooperation between Member States.

17.5 This landmark ruling enshrined in the EU legal order the incompatibility with EU law of investment arbitration proceedings between member states and/or nationals of another member state. Consequently, the consent of the EU state participating in an arbitration procedure was also deemed (to have been) without effect.

17.6 In a judgment of September 2, 2021, delivered in a case between the Republic of Moldova and Komstroy LLC ("Komstroy"), the Court – following the opinion of A-G Szpunar – confirmed the aforementioned incompatibility.[62] Importantly, the Komstroy judgment concerned an arbitral award rendered under the ECT, similar to the present case. The Court of Justice held, inter alia, that

> "(...) *although the ECT may require Member States, in their relations with investors from non-member countries which are also parties to that Treaty, to comply with the arbitration rules laid down therein in respect of investments made by those investors in those Member States, the maintenance of the autonomy and specificity of European Union law precludes the ECT from imposing the same obligations on* the Member States *as between themselves. (...) In view of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not applying to disputes between a Member State and an investor from another Member State concerning an investment made by that investor in the former Member State."*[63]

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59 ECJ March 6, 2018, Achmea, C-284/16, EU:C:2018:158, point 62.
60 ECJ March 6, 2018, Achmea, C-284/16, EU:C:2018:158, point 56.
61 See, e.g., ECJ May 30, 2006, C-459/03, *Commission v Ireland,* EU:C:2006:345; Opinion 2/13, point 180.
62 ECJ September 2, 2021, Komstroy, C-741/19, ECLI:EU:C:2021:655.
63 ECJ September 2, 2021, Komstroy, C-741/19, ECLI:EU:C:2021:655, points 65 and 66.

17.7 In PL Holdings, the Court of Justice again confirmed this case law.[64] Moreover, in this case the Court of Justice held that there is no reason to limit its interpretation of Articles 267 and 344 TFEU over time.[65] Therefore, the Court of Justice's interpretation of Articles 267 and 344 TFEU with respect to the possibility for Member States to agree on arbitration clauses in treaties was already in place at the time the ECT was entered into and thus also at the time of the investments made by NextEra in Spain.

17.8 Moreover, the Achmea line was recently confirmed in the Micula judgment cited above, which – again similar to the present case – involved a ruling by an ICSID arbitral tribunal.[66] As explained above, that judgment also confirmed that an intra-EU arbitral award granting financial compensation to a European investor constitutes state aid, which is also a violation of EU law.

17.9 Following Achmea (and subsequent case law), case law has also developed in the various Member States in which application of the aforementioned ECJ case law has been made. Spain points in this regard, for example, to the rulings of the Swedish Court of Appeal in which an intra-EU arbitral award was annulled on grounds of arbitrability translation (an English translation is attached as **Exhibit 11**) and of the Swedish Supreme Court, which annulled the PL Holdings v. Poland intra-EU arbitral award, adhering to the Court of Justice's judgment on violation of public policy (an English translation is attached as **Exhibit 12**).

17.10 Moreover, ECJ case law has also led to far-reaching consequences in the European treaty framework. The starting signal for this was, among other things, a July 19, 2018 call by the European Commission to Member States to terminate intra-EU BITs in view of their *"incontestable incompatibility"* with EU law.[67] At the same time, the European Commission took the position that national courts are obliged to annul arbitral awards rendered under Intra-EU BITs and refuse their enforcement.[68]

17.11 In response, on May 29, 2020, most member states, including Spain and the Kingdom of the Netherlands, concluded an international agreement to terminate bilateral investment treaties between EU member states.[69] This agreement confirmed in Article 4 the willingness of the parties to be bound by the interpretation of the Achmea judgment and the nullity of the arbitration clauses from the moment the last party to the BIT in question became an EU member state. For the Netherlands, this agreement entered into force on March 31, 2021.

17.12 In the run-up to the aforementioned agreement, the Dutch cabinet also explicitly affirmed in the context of the ECT that this agreement should be compatible with

64 ECJ October 26, 2021, C-109/20, ECLI:EU:C:2021:875, in particular points 44-47.
65 ECJ October 26, 2021, C-109/20, ECLI:EU:C:2021:875, points 64, 66 and 69.
66 ECJ January 25, 2022, C-638/19 P, Commission v European Food and Others, ECLI:EU:C:2022:50.
67 Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM (2018) 547 final, July 19, 2018, p. 2.
68 Ibid. p. 3.
69 Available in the Official Journal of the European Union, L 169/1.

the EU treaties, as the EU is a party to the ECT.[70] Arbitrations conducted under the ECT are thus also incompatible with EU law.

17.13 Meanwhile, the ECT has been denounced by many member states. Spain (on October 12, 2022) and the Netherlands (on October 19, 2022) have also announced their withdrawal from the agreement.

17.14 In view of all the above, the enforcement – in addition to constituting a violation of the State aid rules – would also otherwise be in violation of Union law. Indeed, according to the case law of the Court of Justice, the arbitral award rendered between the parties under Article 10, 26(2), 4 lit. a) (i) ECT cannot stand. With a view to the effective enforcement of Union law, the award cannot be recognized and enforced for breach of Union law.

17.15 More specifically, with the incompatibility between the ECT and Union law, it must be assumed that an agreement to arbitrate was lacking from the onset. In addition to the absence of an agreement to arbitrate, the arbitral award (and any enforcement thereof) is also contrary to public policy and the ICSID arbitral tribunal rendered an award in violation of the principle of arbitrability.[71] In this regard, it is worth noting the value of EU law in the Dutch legal order, as also confirmed in the Van Gend en Loos[72] and Costa/Enel judgments.[73] EU law constitutes an autonomous legal order and EU law takes precedence over the national legal order.[74]

17.16 Just recently, an arbitral tribunal in an ICSID arbitration against Spain under the ECT declined jurisdiction, in light of the Achmea and Komstroy judgments. The place of arbitration was Stockholm. To the extent relevant to these proceedings, the arbitral tribunal considered, inter alia, the following:

> *"475. The Tribunal further observes that Swedish law, which is applicable through the operation of Section 48 SAA, recognizes the primacy of EU law. Although the Tribunal is not aware of a decision from the competent Swedish courts specifically addressing the relations between the ECT and EU law, it is conscious that the Svea Court of Appeal withdrew its petition for a preliminary ruling on these relations on the basis of the Komstroy Judgment of the Court of Justice, indicating in this way that its questions were addressed by the Komstroy Judgment. The Tribunal moreover finds guidance in the decision of a court from another EU Member State, the German Bundesgerichtshof which set aside* the *Achmea award, expressly referring to the primacy of EU law.*
>
> *476. The primacy of EU law has been clearly recognized in all the foregoing cases and, very specifically, precluded the unilateral offer to arbitrate in Article 26 ECT because inconsistent with the autonomy and primacy of EU law.*
>
> *477. It is therefore the unanimous view of the Tribunal that the same*

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70 See Report of a written consultation, February 1, 2021, Parliamentary Papers II 2020/21, 35 649 (R2150), no. 3, p. 15.

71 Also particularly in connection with state aid rules, which are not at the free disposal of the parties.

72 ECJ February 5, 1963, 26-62, ECLI:EU:C:1963:1 *(Van Gend & Loos),* p. 23.

73 ECJ July 15, 1964, 6-64, ECLI: EU:C:1964:66 (Costa/ENEL), p. 1219.

74 On those principles, see recently Y.L. Bouzoraa and J. Lindeboom, "The autonomy of the European legal order and the primacy of EU law: substantive and institutional aspects," *AA* 2021-258.

> *considerations apply to the offer to arbitrate by Spain under Article 26 ECT. Seated in an EU Member State, it likewise cannot apply the consent to arbitrate by the Respondent and affirm its jurisdiction. Following the reasoning of* the *CJEU Grand Chamber in the Achmea Judgment and subsequently confirmed in the Komstrov Judgment. this Tribunal considers that the offer of the Respondent, as an EU Member State. to arbitrate under Article 26 ECT a dispute with investors of another EU Member State which would, of necessity, require this Tribunal to interpret and apply the EU Treaties, is precluded. Therefore, there is no unilateral offer by the Respondent which the Claimants could accept.*[75]

17.17 Thus, it is clear that Spain's awards against NextEra under the arbitral award could never be enforced in the European Union in any case. Even if the parties were to conduct the same arbitration again today with an EU state as the place of arbitration, the arbitral tribunal would decline jurisdiction.

17.18 NextEra is an EU national. As such, it is also subject to Union law and the foregoing can be held against it. Indeed, it is established – and Spain's declarations of law also focus on this – that no valid offer of arbitration was ever made by Spain and thus no valid arbitration agreement was ever concluded. NextEra must also be aware of this. Whether a third-party court considers itself bound by that is separate of that. What matters is that NextEra cannot ignore or circumvent that circumstance by seeking enforcement of an invalid arbitral award in another jurisdiction. If it does so, it will commit an abuse of rights, or at least act negligently towards Spain.

17.19 Thereby, Spain has a right and interest in the requested injunction.

18. Continuing the execution constitutes abuse of execution power

18.1 It has been sufficiently explained above that enforcement of the arbitral award is contrary to EU law. This also means that the continuation of enforcement in defiance thereof constitutes an abuse of law, and in particular an abuse of (enforcement) power, and is in any case contrary to the care that is customary in society. This is unlawful vis-à-vis Spain and basis for the requested injunctions and related penalty orders.

18.2 In that connection, reference should be made to Article 3:13(1) and (2) of the Civil Code:

> *"1. One to whom a power is vested may not invoke it if he abuses it.*
>
> *2. A power may be abused, inter alia, by exercising it for no other purpose than to harm another or for any other purpose than that for which it has been granted or in the event that, taking into account the disproportion between the interest in exercising it and the interest which is harmed by it, one could not reasonably have come to that exercise."*

18.3 The present case includes the latter case. The latter case provides for the situation where the person exercising the power know or should know said disparity.[76] There is

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75 Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V2016/135. Footnotes omitted from quoted considerations.

76 HR May 21, 1999, ECLI:NL: HR:1999:ZC2905 *(Kerkhof and Wekking/Spoelstra).*

an abuse of power if, after weighing both interests with due regard for reasonableness, it appears that there is an impermissible disparity.[77]

18.4 In this case, NextEra knows that the arbitral award is invalid since it was issued without the existence of an underlying arbitration agreement. It also knows, or at least ought to know, that enforcement (forced or otherwise) may result in unlawful State aid, with all its possible consequences for Spain. NextEra is thus aware that there is an impermissible disparity between its interest in enforcing an invalid arbitral award in a foreign jurisdiction and Spain's interest in preventing it from doing so and thus respecting Union law.

18.5 Furthermore, this case clearly involves a manifest error of law by the ICSID Arbitral Tribunal. In fact, the ICSID Arbitral Tribunal issued an arbitral award which is contrary to the State aid rules either in substance or in legal effect. In this context, it should also be noted that the State aid rules can, according to the settled case law of the Court of Justice, overrule the authority of *res judicata* of *inter partes* awards. Logically, therefore, this also applies to arbitral awards rendered in violation of state aid rules as well as arbitral awards rendered in violation of the aforementioned Achmea and Komstroy case law.

18.6 The enumeration in paragraph 2 is not exhaustive. Other criteria can also be applied to arrive at an abuse of power. For example, the Supreme Court considered in its December 31, 2019 summary judgment on the enforcement and suspension of judgments:

> *"In this connection, it is worth noting that the cases mentioned in the judgment of April 22, 1983 in 5.3.3 cited above – the judgment to be enforced is obviously based on a mistake of law or fact, or its enforcement will, as a result of facts occurring or having come to light after the judgment was rendered, give rise to a state of emergency on the part of the person being enforced – are merely examples of a situation in which the party empowered to enforce a judgment taking into account the disparity between the interest in the enforcement and the interest damaged by it, cannot reasonably come to that enforcement and therefore misuses its power. There is no reason to limit said ground for suspension to these cases. After all, there may also be other situations in which, in connection with facts that occurred or came to light after the judgment, there is a misuse of power in accordance with the standard mentioned in Article 3:13 of the Dutch Civil Code."*[78]

In the present case, this misuse of powers can further be found in the circumstance that NextEra knows or should have known that the arbitral awards and their enforcement violate EU law, and deliberately seeks their enforcement in a non-EU country. This while NextEra itself is EU resident and that this whole issue, it should be noted, started because NextEra wanted to make use of subsidy regulations arising from EU law. Also the circumstance that it knows, or at least should know, that it

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77 GS Property Law, Art. 3:13 BW, infra. 47.

78 See HR December 20, 2019, ECLI:NL:HR:2019:2026, para. 5.7.2.

might expose Spain to sanctions, plays a role in this.

19. The abuse of power justifies the requested immediate provisions

19.1 In view of the foregoing, Spain is also entitled to and has an interest in the requested provisions pursuant to Article 223 of the Dutch Code of Civil Procedure (which are related to the claims on the merits). It is of great (urgent) importance that NextEra is prohibited, pending these proceedings, from continuing with the enforcement that has already started.

19.2 Nor can Spain be required to await the outcome of these (potentially lengthy) proceedings on the merits. The stakes are simply too high for that. If NextEra proceeds with the execution now, Spain may never see its money back, if the verdict is given in its favor at the end of these proceedings. Moreover, NextEra shows that it does not want to wait with the execution, but rather tries to execute as soon as possible, and through a non-EU country.

19.3 This is all the more compelling since there is a real risk of restitution on the part of NextEra. Although NextEra is part of a listed group, the two entities in question only have equity of USD 167,857 (NextEra Spain[79]) and USD 8,176,668 (NextEra Global[80]) respectively, according to their most recently published financial statements. The likelihood is that if NextEra were to recover from Spain in the short term, and Spain were to ultimately prevail in these proceedings, the consequences of enforcement would be irreversible and NextEra would have no recourse.

PART III: PROCEDURAL ASPECTS AND SUBJECT MATTER

20. Spain's claims and the need for penalty payments

20.1 The foregoing has substantiated why the ICSID Arbitral Tribunal's awards under discussion constitute unlawful aid and are also otherwise contrary to Union law in connection with the provisions of the Achmea award, and that execution of those verdicts therefore comes into conflict with Union law.

20.2 Spain thus has the right and interest to seek a declaration that such enforcement is unlawful and that, as an effective measure to prevent acts contrary to the TFEU, NextEra be ordered to withdraw, or at least suspend, the proceedings pending before the District Court of the District of Columbia under no 1:19-cv-01618, as well as NextEra be prohibited from enforcing said arbitral awards until such time as the European Commission declares the aid measure contained in said arbitral awards compatible with the internal market pursuant to Article 107(3) TFEU.

20.3 For the measure to be truly effective, it must be ensured that if NextEra does not withdraw, or at least suspend, the proceedings in the District Court of the District of Columbia, NextEra forfeits a penalty payment adequate to give NextEra sufficient incentive to proceed with withdrawal, or at least suspension.

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79 **Exhibit 13,** excerpt from the Commercial Register of the Chamber of Commerce of NextEra Spain.

80 **Exhibit 14,** excerpt from the Commercial Register of the Chamber of Commerce of NextEra Global.

20.4 For the measure to be truly effective, it must also be ensured that if NextEra does proceed with the execution, NextEra will not be in a better position than if it refrains from enforcement in accordance with Union law. It is for this reason that Spain requests that NextEra be ordered to pay a penalty of (at most) EUR 300 million, being the amount that Spain would have to pay NextEra under the arbitral award (EUR 290.6 million), plus costs. The penalty may be lower if NextEra executes for a lower amount. This ensures that NextEra must pay a penalty payment such that it will not be put in a more advantageous position if it proceeds with the execution despite your Court's ruling.

20.5 Since under EU State aid law the concept of an undertaking is not related to a legal entity, but is based on an economic concept of an undertaking, in which it is necessary to assess to which economic entity an advantage (within the meaning of Article 107(1) TFEU) accrues, an effective measure to prevent unlawful aid being granted to NextEra cannot be limited to defendants sub 1 and sub 2. Indeed, under those circumstances, it would not be precluded that another legal entity from the economic relationship to which defendants belong receives the unlawful aid by executing the judgments. To prevent that, an injunction is sought against any company (economically) related to defendants sub 1 and 2. This is in line with the concept of "undertaking" as used in state aid law.

20.6 Since the defendants or their affiliates could already proceed to enforcement pending these proceedings, Spain has the right and interest to seek injunctive relief as provided in Article 223 Dutch Code of Civil Procedure for the duration of the proceedings. After all, if NextEra proceeds to the execution pending these proceedings, there is a risk of irreversible consequences since NextEra may dispose of the assets obtained by execution or otherwise ensure that Spain will no longer be able to recover the assets obtained through the execution, while, moreover, it cannot be ruled out that NextEra will not provide an alternative remedy. The injunctive relief sought is primarily to ensure that NextEra will not pursue the proceedings in the District Court of the District of Columbia and will make every effort to stay those proceedings. To the extent that NextEra would nonetheless continue those proceedings and proceed to execution after authorization is granted, it is important to attach to the injunctive relief a periodic penalty payment that prevents NextEra from acting in violation of the injunctive relief.

21. A cross-border ban through a provisional provision is indicated

21.1 In view of all the foregoing, Spain is entitled to and has an interest in a worldwide injunction prohibiting NextEra from taking implementing measures aimed at enforcing the arbitral award by way of preliminary relief. It is established case law that the Dutch court may issue an injunction aimed at acts abroad, assuming that it has jurisdiction to hear a claim concerning an infringement (here, an unlawful act claim) on the basis of any rule of (universal) international jurisdiction.[81]

22. The defense and its rebuttal

22.1 Some defenses known to Spain have already been refuted above.

[81] See, e.g., HR March 19, 2004, *NJ* 2007, 585 *(Philips/Postech),* cf. P. Vlas.

23. A guilty verdict must be declared provisionally enforceable

23.1 A balancing of interests implies that a condemnatory judgment must be declared provisionally enforceable. After all, otherwise those judgments could prove meaningless if NextEra could appeal and then still enforce them pending that appeal.

23.2 Spain has already explained above that there is a real risk of restitution on the part of NextEra. Conversely, there is no risk that Spain – should NextEra ultimately come out on top - will offer no recourse. In that light, Spain's interest in provisionally enforceable judgments outweighs NextEra's as yet unknown interest in not declaring the provisionally enforceable judgments enforceable.

24. **Authority**

24.1 Since both defendants are domiciled in Amsterdam, your court has jurisdiction over this case.

25. Proof

25.1 Spain deems that the Exhibits it has brought into the proceedings sufficiently prove its contentions. Nevertheless, in so far as it has any burden of proof, it offers to provide additional proof of its contentions by any means in law, including by hearing witnesses or experts.

25.2 Spain shall submit the Exhibits to this subpoena no later than the first docketed hearing date.

FOR THIS REASON

In the incident

It may please Your Court by interlocutory decree on the foregoing grounds and to the extent possible with respect to all claims listed below as provisionally enforceable:

(A) Order the defendants or any other affiliate of the defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 to take all actions necessary to suspend the proceedings currently pending before the United States District Court for the District of Columbia under case number 1:19-cv-01618 until final judgment is entered in the present action, within 10 days of service of the judgment in the incident, under penalty of a daily penalty of EUR 30,000 for each day or part of a day that Defendants fail to effect such suspension.

(B) For the duration of the proceedings, prohibit the Defendants or any affiliate of the Defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 from enforcing, or otherwise proceeding in any way to enforce (measures), including taking precautionary measures, anywhere in the world, the arbitral awards rendered by the ICSID Arbitral Tribunal on March 12, 2019 and May 31, 2019;

(C) Prohibit the defendants or any affiliate of them within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 for the duration of the proceedings to make any attempt anywhere in the world to seek to have

Spain sentenced to pay or otherwise proceeding to enforce the damages awarded by the ICSID Arbitral Tribunal by arbitral awards dated March 12, 2019 and May 31, 2019, including taking conservatory measures;

(D) Prohibit Defendants or any other affiliate of Defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No 651/2014, for the duration of the proceedings, from seeking anywhere in the world to seek to have Spain sentenced to pay, or otherwise proceeding to enforce, any damages suffered by NextEra as a result of the changes to the 2007 Regulation, including the taking of precautionary measures;

(E) To impose on the Defendants or any other affiliated company within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 a lump sum penalty payment in the amount of EUR 300 million or an amount equivalent to the amount obtained by NextEra (whether in parts or not) through the execution, whichever is lower, if NextEra fails to comply with the injunctive relief sought above under B, C and D.

Primarily

It may please Your Court by Judgment on the foregoing grounds and to the extent possible with respect to all claims set forth below to be provisionally enforceable:

(F) Rule that the 2007 regulation constitutes aid within the meaning of Article 107(1) TFEU;

(G) Rule that the 2007 regulation was not notified to the Commission in accordance with Article 108(3) TFEU and constitutes illegal state aid;

(H) Rule that the damages awarded by the ICSID Arbitral Tribunal by arbitral awards of March 12, 2019 and May 31, 2019 constitute aid within the meaning of Article 107(1) TFEU;

(I) Declare as a matter of law that no valid arbitration agreement was ever reached between Spain and NextEra;

(J) Rule that the recovery of damages awarded by the ICSID Arbitral Tribunal by arbitral awards of March 12, 2019 and May 31, 2019 is contrary to Union law, so long as the European Commission has not declared those arbitral awards compatible with the internal market;

(K) Declare as a matter of law that there was no legitimate expectation on the part of the defendants or any affiliate of the defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 that it was entitled to that aid measure contained in the 2007 regulation;

(L) Direct the Defendants or any other affiliate of them within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 to take all actions necessary to suspend and hold in abeyance the proceedings currently pending before the United States District Court for the District of Columbia under Case No. 1:19-cv-01618, until the European Commission accepts the arbitral awards issued by the ICSID Arbitral Tribunal on March 12, 2019 and May 31, 2019 declared

with the internal market, within 10 days of service of the judgment, under penalty of a daily penalty of EUR 30,000 for each day or part of a day that defendants fail to effect such suspension.

(M) To order the Defendants or any affiliate of the Defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 to withdraw the proceedings currently pending before the United States District Court for the District of Columbia under case number 1:19-cv-01618, within 10 days after the European Commission declares the March 12, 2019 and May 31, 2019 arbitral awards rendered by the ICSID Arbitral Tribunal to be incompatible with the Internal Market, under penalty of a daily payment of EUR 30,000 per day for each day or part of a day that Defendants fail to effect such suspension.

(N) Prohibit the Defendants or any other affiliated company within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 from seeking anywhere in the world to enjoin the Kingdom of Spain from paying, or otherwise proceeding to enforce, any damages suffered by NextEra as a result of the changes to the 2007 Regulation;

(O) Prohibit the Defendants or any affiliate of the Defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 from prohibiting, or otherwise proceeding to enforce anywhere in the world the arbitral awards issued by the ICSID Arbitral Tribunal dated March 12, 2019 and May 31, 2019, or at least prohibit NextEra from enforcing, anywhere in the world, or in any other way proceed to execution of the damages awarded by the ICSID Arbitral Tribunal by arbitral awards of March 12, 2019 and May 31, 2019, until the European Commission has declared those arbitral awards compatible with the internal market;

(P) Prohibit Defendants or any other affiliate of Defendants within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 from seeking to enjoin Spain, anywhere in the world, from paying, or otherwise proceeding to claim, the damages awarded by the ICSID Arbitral Tribunal by arbitral awards dated March 12, 2019 and May 31, 2019, or at least prohibit NextEra from seeking to enjoin Spain, anywhere in the world, from paying or otherwise proceed to claim, the damages awarded by the ICSID Arbitral Tribunal by arbitral awards of March 12, 2019 and May 31, 2019 until the European Commission declares those arbitral awards compatible with the internal market;

(Q) To impose on the Defendants or any other affiliated company within the meaning of Article 3(3) of Annex I to Regulation (EU) No. 651/2014 a one-time penalty payment in the amount of EUR 300 million or an amount equivalent to the amount obtained by NextEra (whether in parts or not) through the execution, whichever is lower;

(R) Order the defendants to pay the legal costs incurred by Spain, including the follow-up costs, the court fees due and the amount of attorney's fees estimated up to this judgment.

The cost of this for me, bailiff, is EUR 103.33

This case is being handled by Simmons & Simmons LLP, Claude Debussylaan 247, 1082 MC, Amsterdam, Mr. N. Peters (telephone number: 020 722 2360; e-mail niek.peters@simmons-simmons.com and Mr. J.J. Bakker (telephone number: 020 722 2353; e-mail: jonathan.bakker@simmons-simmons.com).

EXHIBIT OVERVIEW

1. European Commission Decision of November 10, 2017, SA.40348 (2015/NN) - Spain Support for electricity generation from renewable energy sources, cogeneration and waste
2. Award from the ICSID dated May 31, 2019, case no. ARB/14/11
3. Decision on Annulment of the ICSID Ad Hoc Committee of March 18, 2022, Case No. ARB/14/11.
4. Nextera claim in the District Court for the District of Columbia dated June 3, 2022, case no. 1:19-cv-01618
5. Decision of the European Commission of July 19, 2021, SA.54155 (2021/NN) - Arbitration award to Antin - Spain
6. ICSID's Decision on Jurisdiction, Liability and Principles of Quantum of March 12, 2019, case no. ARB/14/11
7. Order of the District Court for the District of Columbia dated September 30, 2020, Case No. 1:19-cv-01618-TSC
8a. Motion of Spain to the District Court for the District of Columbia dated May 2, 2022, Case No. 1:19- cv-01618-TSC
8b. Memorandum of Understanding in Support of Spain's Motion to the District Court for the District of Columbia dated May 2, 2022, Case No. 1:19-cv-01618-TSC
9. Statement of Defence Spain to the District Court for the District of Columbia dated June 29, 2022, Case No. 1:19-cv-01618-TSC
10a. Order of the ECJ of September 21, 2022 in Case C-333/19, ECLI:EU:C:2022:749 (Romatsa).
10b. Unofficial Dutch translation, made with Deepl and for the reader's convenience, of ECJ decision of September 21, 2022 in Case C-333/19, ECLI:EU:C:2022:749 (Romatsa)
11. Ruling of the Swedish Court of Appeal of December 13, 2022, case no. T 4658-18
12. Ruling of the Swedish Supreme Court of December 14, 2022, case no. T 1569-19
13. Chamber of Commerce excerpt NextEra Energy Spain Holdings B.V.
14. Chamber of Commerce excerpt NextEra Energy Global Holdings B.V.