Guy ENGEL
Bailiff of Justice
2, rue Guido Oppenheim
L-2263 LUXEMBOURG

SUMMONS
Before the District Court of and in Luxembourg
HEARING COMMERCIAL MATTERS ACCORDING TO THE CIVIL PROCEDURE

IN THE YEAR TWO THOUSAND AND TWENTY-TWO, ON THE TWENTY-SECOND DAY OF DECEMBER.

AT THE REQUEST OF :

The **Kingdom of Spain**, represented herein by the Office of the State Attorney General *(Abogacía General del Estado),* Ministry of Justice, domiciled at 5 Calle Ayala, 28001 Madrid (Spain);

hereinafter the ***Plaintiff*** or ***Spain,***

Represented by and electing domicile at the office of **BONN STEICHEN & PARTNERS,** a limited partnership, established and having its registered office at L-3364 Leudelange 11, rue du Château d'Eau, registered with the Luxembourg Trade and Companies Register under number B211933, entered in List V of the Roster of the Luxembourg Bar Association, represented herein by its current Manager, namely the limited liability company BSP S.à r.l, established and having its registered office at L-3364 Leudelange 11, rue du Château d'Eau, registered with the Luxembourg Trade and Companies Register under number B211880, itself represented, for the purposes of the present proceedings, by **Mr. Fabio TREVISAN,** Attorney-at-Law, who is herewith appointed and will act as such representative;

I, THE UNDERSIGNED, GUY ENGEL, BAILIFF, RESIDING AT 2 RUE GUIDO OPPENHEIM L-2263 LUXEMBOURG, REGISTERED AT THE DISTRICT COURT OF AND IN LUXEMBOURG.

HAVE SUMMONED:

The limited liability company **9REN Holding S.àr.l,** having its registered office at 19, rue Eugène Ruppert L-2453 Luxembourg, registered with the Luxembourg Trade and Companies Register under number B137669, represented herein by its current Board of Directors,

hereinafter referred to as the ***Defendant*** or ***9REN,***

to appear, represented by counsel, before the District Court of and in Luxembourg hearing commercial matters according to the Civil Procedure according to Article 547 Item 2 of the New Code of Civil Procedure, in Luxembourg, Cité Judiciaire, Plateau du Saint-Esprit, Building TL, in its ordinary courtroom.

PLEASE NOTE THAT, ACCORDING TO ARTICLES 79, 80, AND 154 OF THE NEW CODE OF CIVIL PROCEDURE, THAT, WHERE THE PRESENT NOTIFICATION IS MADE IN PERSON AND THE DEFENDANT DOES NOT APPEAR, THE JUDGMENT TO BE HANDED DOWN WILL BE DEEMED TO BE A JUDGEMENT BY DEFAULT AND NOT SUBJECT TO any OPPOSITION;

BASED ON THE FOLLOWING REASONS:

***In limine litis,* it should be clarified that the Kingdom of Spain does not intend to waive its immunity from jurisdiction and immunity from enforcement within the scope of the present proceedings or in any other proceedings wherein it opposes the parties being summoned.**

I. THE FACTS

A. Presentation of the Parties

1. Spain is a sovereign State which has been a member of the European Union since January 1, 1986. In this respect, the State is also a signatory to the Energy Charter Treaty (the "***TCE*** "), which come into force and effect within the European Union on April 16, 1998 and provides a multilateral framework for cooperation in the field of energy **(Exhibit 1)**.

2. 9REN is a holding company whose purpose is the acquisition of participations in companies specializing in the renewable energy industry, whose head office is located in Luxembourg.

3. In this regard, in 2008, 9REN acquired a Spanish company by the name of Gamesa Solar S.A. **(Exhibit 2)**, which was developing infrastructure and projects, at various stages of development, in the renewable energy sector in Spain (hereinafter referred to as the "***Investment").***

Please note that these investments were based on a specific legislative regime established by Spain for the generation of electricity using renewable energy sources, according to European Directive 2001/77/EC[1], to wit:

- Royal Decree 436/2004, which increased the rates paid to renewable energy producers, as set forth in Royal Decree dated December 9, 1994, creating a special regime for renewable energy (hereinafter the "***Spanish Regime 2004*** "), and
- Royal Decree 661/2007, under which Spain grants a subsidy to renewable energy producers (hereinafter the "***Spanish Regime 2007*** "), to wit:

  (i) By paying a fixed rate per kWh of energy produced (updated annually according to the consumer price index), or

  (ii) By paying a premium per kWh of electricity sold on the electricity market.

In 2013, the Spanish Regime 2007 was amended by the Spanish government[2] (hereinafter the "***Spanish Regime 2013***"), in particular with respect to the modalities for the remuneration of energy production[3]. The changes which were made to the Spanish Regime 2007 were intended to apply to all investors, including investors benefiting from the Spanish Regime 2007.

As a result of this development, the investors, including the Defendant, deemed that they had suffered a significant loss in respect of the investment, which had occurred in violation of Spain's obligations under the ECT and international law.

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[1] Directive 2001/77/EC by the European Parliament and the Council dated September 27, 2001 regarding the promotion of electricity produced using renewable energy sources in the internal electricity market.

[2] Royal Decrees Nos. 9/2013 dated July 12, 2013, Law d24/2013 dated December 26, 2013 regarding the electricity sector, Royal Decree 413/2014 dated June 6, 2014, and orders IET/1045/2014 and IET/1459/2014.

[3] Royal Decree No. 2/2013 dated February 1, 2013.

B. Introduction of an arbitration procedure

4. It was within this context that, on March 30, 2015, the Defendant filed a request for arbitration with the Arbitration Centre for the Settlement of Disputes ("***ICSID***") on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("***ICSID Convention*** "),[4] as well as on the basis of the ECT.

Indeed, the ECT provides for a dispute resolution clause in its Article 26, allowing a dispute between an investor and a State to be submitted to arbitration (according to Article 26.2.C of the ECT).

5. On May 31, 2019**,** the ICSID issued ICSID Arbitral Award No. ARB/15/15 **(Exhibit 2)**, as corrected by the Amending Award dated December 6, 2019 **(Exhibit 3)** (such decisions are hereinafter collectively referred to as the "***Arbitral Award*** "), pursuant to which:

- The arbitral tribunal asserted jurisdiction pursuant to Article 26 of the ECT and the ICSID Convention to rule on the investment dispute;
- The arbitral tribunal found that Spain had violated Article 10(1) of the ECT by failing to grant the Respondents fair and equitable treatment in respect of the investment;
- As a result, Spain was ordered to compensate the Respondent in an amount of EUR 41.76 million (plus interest as established by the Arbitral Award), as well as to cover the costs resulting from the arbitration proceedings (i.e. USD 299,908.16) and the Defendant's fees (i.e. USD 4,814,570 and EUR 562,458).

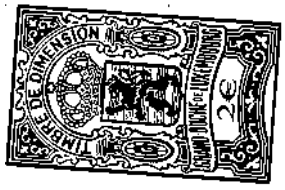
6. On April 3, 2020, Spain, the Respondent within the scope of the arbitration proceedings, filed an action for annulment of the Arbitral Award, challenging, among other things, the jurisdiction of the arbitral tribunal, the lack of a statement of reasons for the award, and a serious breach of a fundamental procedural rule.

Following the filing of this action for nullification, on April 7, 2020, the Secretariat of the ICSID confirmed the provisional suspension of the effects of the Arbitral Award.

On November 17, 2022, the ICSID Committee definitively rejected the action for nullification **(Exhibit 4)** , considering that the arbitral tribunal had not exceeded its powers by declaring itself competent to rule on a dispute between two parties who are nationals of the European Union. This decision also put an end to the stay of execution of the Arbitral Award.

C. Regarding the institution of proceedings for the enforcement of the Arbitral Award at issue

7. The Defendant decided to initiate enforcement proceedings in various jurisdictions, all of them non-European.



[4] The ICSID Convention has been in force and effect in Luxembourg since August 29, 1970 and in Spain since September 17, 1994. It is also a multilateral convention which aims to promote international investment through tools such as the ICSID, which is an independent dispute resolution center.

1) The procedure for enforcement of the Arbitral Award in the United States

8. On June 27, 2019, the Defendant filed a civil action in the *United States District Court for the District of Columbia* ("***District Court***") against the Plaintiff for an order granting exequatur of the Arbitral Award **(Exhibit 5)**.

On January 15, 2020, Spain served a "*Motion to dismiss"* opposing 9REN's U.S. enforcement action and, in the alternative, requested a stay of the proceedings in the District Court **(Exhibit 6)**.

9. On September 30, 2020, the *District Court* granted Spain's request to stay the proceedings in order to comply with the stay issued by the General Secretariat of the ICSID **(Exhibit 7)**.

On December 7, 2022, following the ICSID Committee's decision rejecting the nullification action, the *District Court* lifted the stay of proceedings and ordered the proceedings to continue **(Exhibit 8)**.

2) The procedure for enforcement of the Arbitral Award in Australia

10. On March 26, 2020, the Defendant filed an exequatur action with the Federal Court in Sydney for recognition of the Arbitral Award in Australia *(* **Exhibit 15)**.

On April 22, 2020, the Federal Court in Sydney stayed the Australian enforcement proceedings of the Arbitral Award **(Exhibit 9),** which have been pending since such time.

D. Regarding notifications by Spain to the European Commission under State Aid law

11. Article 108, Paragraph 3 of the TFEU establishes the following:

> *"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or modify aid. Where it considers that a project is not compatible with the internal market, according to Article 107, it shall initiate the procedure set forth in the preceding paragraph without further delay. The Member State in question may not implement the planned measures until this procedure has resulted in a final decision.*

In order to verify compliance of the Spanish Scheme 2013 with EU law, including State aid law, Spain has notified the European Commission of this scheme[5]. The Spanish Scheme 2007 has not been notified.

[5] Already in its decision dated October 22, 2014, the CJEU ruled, in the Elcogâs case, in response to a request for a preliminary ruling from the Spanish Supreme Court *Tribunal Supremo,* that Article 107, Paragraph 1 of the TFEU *"must be interpreted as meaning that amounts allocated to a private electricity-producing undertaking which are financed by all end users of electricity located in the national territory and which are distributed to enterprises in the electricity sector by a public body according to predetermined legal criteria constitute an intervention by the State or through State resources* " (Aff. C-275/13).

By way of a decision dated November 10, 2017, the European Commission declared that the Spanish Scheme 2013 constituted State aid in line with EU law[6] (hereinafter referred to as the ***"2017 Commission Decision"*, Exhibit 10)**.

However, and to the extent that a number of investors benefiting from the Spanish Scheme 2007 had already brought arbitration proceedings against Spain due to the alleged violation of the ECT, considering the evolution of the scheme, a 2017 Commission Decision expressly emphasizes that no violation of the ECT has occurred in this respect and that:

"(165) The Commission reiterates that any compensation which an arbitration tribunal would award to an investor on the grounds that Spain has amended the notified [Spanish Scheme 2007] by the [Spanish Scheme 2013] would in and by itself constitute State aid. However, arbitration tribunals do not have any jurisdiction to authorize the granting of State aid. This is an exclusive competence of the Commission. Where they grant compensation, as in the Eiser/Spain case, or where they were to do so in the future, ***this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and would be subject to the status quo obligation****.*

(166) Finally, the Commission reiterates that this decision forms part of Union law and, as such, is also binding for arbitral tribunals whenever they apply Union law. Only European courts can challenge its validity **" (Exhibit 10,** paragraphs 165-166, page 32, informal translation).

12. On October 16, 2019, in order to comply with Union law and the terms of the 2017 Commission Decision, **Spain proceeded to notify the European Commission of the Arbitral Award,** based on Article 108(3) TFEU **(Exhibit 11)**.

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II. LEGAL BASIS

13. It is within the context described above and in view of the decision of the Defendant, a company incorporated in Luxembourg, to enforce the Arbitral Award at issue and therefore to obtain payment of the amount of the award - which is clearly contrary, in several respects, to European Union law and to Luxembourg public policy - that Spain is now compelled to bring the present action in order to (i) preserve its present and future rights and (ii) prevent significant damage.

II.1. REGARDING THE FINDING THAT INTRA-EUROPEAN UNION INVESTMENT ARBITRATION IS INCOMPATIBLE WITH EUROPEAN UNION LAW

A. The incompatibility of intra-EU investment arbitration with the autonomy and primacy of European Union law

14. Prior to the issuance of the Arbitral Award at issue, the Court of Justice of the European Union ***("CJEU** ") had had the opportunity to take a position regarding the incompatibility between European Union law and investment arbitration involving Member States as parties.

On March 6, 2018, the Grand Chamber of the CJEU issued the decision *Slowakische Republik v. Achméa B.V.* (the "***Achméa***" decision), holding that:

[6] EU Commission, November 10, 2017, *Decision on State Aid SA.40348 (2015/NN) implemented by Spain - scheme for the support of renewable energy production,* see page 34 (Exhibit 10).

> *"Articles 267 and 344 TFEU must be interpreted as precluding a provision contained in an international agreement entered into between Member States, ... under which an investor of one of those Member States may, in the event of a dispute concerning investments in the other Member State, initiate proceedings against the latter Member State before an arbitral tribunal, the jurisdiction of which that Member State has agreed to accept"*[7].

Based on this landmark decision, the incompatibility of EU law with investment arbitration proceedings between Member States and/or nationals of another Member State has been enshrined in the EU legal order. As a result thereof, the **consent granted by the State of the Union participating in the arbitration procedure was thereafter considered to be devoid of any purpose**.

In a judgment dated September 2, 2021, rendered within the scope of a dispute between the Republic of Moldova and Komstroy LLC[8], the Court reaffirmed this incompatibility, in particular with respect to the ECT which formed the basis of the arbitral award (the "***Komstroy"*** decision***).***

On January 25, 2022, the CJEU reaffirmed this principle in the European Commission vs. European Food et al. decision[9] (the "***EuroFood*** " decision) in relation to any arbitration subject to ICSID Convention rules.

On July 14, 2022, this incompatibility was enshrined as a principle of public order in a decision by the Court of Cassation in Luxembourg **(Exhibit 12)** , which held the following, thereby enshrining the same absolute principle in Luxembourg public order:

> "[From the accession of the Member State which is a party to the arbitration procedure], ***the European Union's own system of judicial remedies has replaced the BIT arbitration procedure [...]*** *and that the consent of the plaintiff in cassation to have the dispute settled through the application of the arbitration clause contained therein is devoid of any object, the Judges of Appeal, by ruling as they did,* ***violated both Articles 267 and 344 TFEU and the principle of public international law of the immunity of the State of Romania from Jurisdiction"[10].***

15. The enshrinement of these principles in European jurisprudence has also forced the European conventional framework to evolve.

On May 29, 2020, most Member States, including Spain and the Grand Duchy of Luxembourg, entered into an international agreement to end bilateral investment treaties between EU Member States **(Exhibit 13)**. This agreement confirmed the willingness of the parties to be bound by the interpretation of the Achméa judgment and the nullity of the arbitration clauses as of the last accession to the European Union of the Member State being a party to the arbitration.

Within this context, the ECT has been denounced by many Member States. Spain (on October 12, 2022) and Luxembourg (on November 11, 2022) have announced their withdrawal from this agreement (the withdrawal procedures have commenced and are still in progress as of this date).

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[7] CJEU, Grand Chamber, March 6, 2018, C-284/16, Slowakische Republik vs. Achméa BV.

[8] CJEU, Grand Chamber, September 2, 2021, C-741/19, Republic of Moldova vs. Komstroy LLC.

[9] CJEU, Grand Chamber, January 25, 2022, C-638/19, decision European Commission vs. European Food et al.

[10] Court of Cassation, July 14, 2022, No. 116/2014, emphasis added by us.

Based on the foregoing, it follows that:

- **An arbitration clause contained in a bilateral investment treaty, like the ECT, is now considered to have no purpose against a Member State within the scope of an intra-EU dispute;**
- **An intra-EU investment arbitration procedure is considered to violate the principle of autonomy of European Union law;**
- **Such a procedure also contradicts the international public law of the immunity of jurisdiction of the States;**
- **As a result, any sum awarded within the scope of an intra-EU investment arbitration procedure could not be recovered, considering that the subjects of European law could not have consented to the arbitration and therefore not have waived their immunity.**

B. Regarding classification as illegal State aid, contrary to Union law, of the amounts allocated within the scope of an intra-EU investment arbitration in favor of European investors

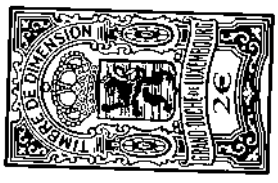
16. Free competition is a fundamental principle within the European Union which each State is under obligation to guarantee. The fundamental treaties of the Union therefore establish a set of binding rules with which the Member States - and, consequently, their citizens - must comply, under penalty of sanctioning. No advantage can therefore be granted to one investor over another unless the European Commission confirms the legality of such a regime[11].

Article 107 TFEU states, in substance, that a measure constitutes State aid where it is granted to an enterprise by a State through the allocation of public funds in order to provide it with a selective anti-competitive advantage affecting inter-State trade.

As soon as State aid has been identified, the European Commission is involved to decide whether the measure is compatible with the internal market. Where this is not the case, this constitutes a case of **illegal State aid,** which (i) must not be put into effect and (ii) where it has already been put into effect, must be repaid. It follows that any aid which has not been notified in advance to the European Commission or which has been implemented before the Commission has declared it compliant is therefore illegal. This violation leads to the opening of default proceedings[12].

EU law has established that an intra-EU investment arbitration award awarding damages to an investor constitutes illegal State aid.

This was affirmed by the European Commission in a decision 2015/470 within the scope of the Micula case[13]. In this respect, the EuroFood decision confirmed the Commission's jurisdiction by holding that an intra-European arbitration award granting financial compensation to a European investor constituted an advantage in favor of an investor attributable to the State, as soon as the award was issued.[14]



[11] Articles 107 and 108 TFEU.

[12] Council Regulation (EU) 2015/1589 dated July 13, 2015 establishing detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codified text).

[13] httDs://eur-lex.euroDa.eu/leqal-content/EN/TXT/HTML/?uri=CELEX:32015D1470&from=EN

[14] EU Commission, Decision March 30, 2015, No. 2015/1470, *concerning State Aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania - Arbitral award in the Micula/Romania case.*

In a judgment dated September 21, 2022, the CJEU extended this principle to the enforcement of an arbitral award which had been qualified as illegal State aid, as follows:

> *" Union law, in particular Articles 267 and 344 TFEU, must be interpreted as meaning that a court of a Member State before which enforcement is sought of the arbitration award which was the subject of Commission Decision (EU) 2015/1470 dated March 30, 2015 concerning State Aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania - Arbitral Award in the Micula/Romania case dated December 11, 2013, is* ***under obligation to set aside that award and, consequently, can not in any case proceed with its enforcement to allow its beneficiaries to obtain payment of the damages granted to them"[15].***

Based on the foregoing, it follows that payment of damages by a Member State within the scope of an intra-European Investment Arbitral Award constitutes illegal State aid. Such a payment:

- **Is in clear contradiction with Articles 107 and 108 of the TFEU as well as with European Union law, and**
- **Above all, gives rise to sanctions against the Member State which has complied therewith.**

II.2. PRIMARILY : REGARDING THE REQUEST FOR CESSATION, ON THE BASIS OF ABUSE OF RIGHT, OF ANY ENFORCEMENT BY THE DEFENDANT OF THE ARBITRAL AWARD TO OBTAIN PAYMENT OF UNDUE SUMS

A. conditions for abuse of rights

17. Abuse of rights is defined by article 6-1 of the Civil Code as "*any act or fact which manifestly exceeds, based on the intention of its perpetrator, by its purpose, or by the circumstances in which it occurred, the normal exercise of a right, is not protected by the law."*

Still according to this Article of the Civil Code, the abuse of rights "*makes its perpetrator liable and may give rise to an action for cessation to prevent the abuse from continuing"*.

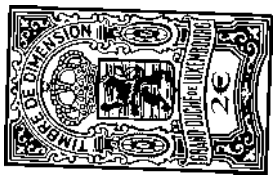
Luxembourg law therefore provides for two sanctions, to wit:

- The liability of the abuser, and/or,
- The action in cessation, i.e. the action to reduce the right to its normal use.

Article 6-1 of the Civil Code was introduced as a result of a bill No. 2878 concerning the interpretation of laws and the abuse and misappropriation of rights as well as by a bill No. 1129 amending Article 6 of the Civil Code in order to prohibit the abuse and misappropriation of rights.

It appears from the comments made in the bill No. 2878 in relation to Article 6-1 of the Civil Code that " *the violation of this purpose through an immoderate use not taking sufficiently into account, as far as possible, the interests of other persons concerned not only opens the door for the traditional action of liability for compensation of the damage caused, but essentially allows for an action for cessation of the act already in progress or for a stay of execution where the act is only planned*.

[15] CJEU, X[th] Chamber, September 21, 2022, C-333/19, ROMATSA decision, Romania, European Commission and EUROCONTROL vs. European Food et al. (emphasis added).



In most cases, as a matter of fact, what is essentially important - and what constitutes the only way to give effective satisfaction to the injured third party or to the general interest which is violated - is the non-fulfilment of the act, where compensation in money is only a **subsidiary solution** and an alternative whenever any other measure proves unfeasible without denying the very existence of the right.

What the text intends to sanction - in a direct manner and without forced and artificial recourse to the notion of quasi-tortuous fault - is the malicious and bad faith exercise of rights or the exercise of rights without real utility for their holder and especially without regard to the competing rights of third parties, through a distortion of their social function.

Any deviation from this utility, even where unintentional, is subject to sanctioning. The person who "*uses* " a right is therefore called upon to have regard to the situation of those who are likely to suffer the effects of the exercise of such right. Among different ways of exercising his right, the holder is invited to choose the one which is least harmful to others or even to refrain from exercising such right.

B. The Defendant's abuse of rights

By seeking enforcement of the Arbitral Award outside the European Union, the Defendant commits an abuse of rights for the following reasons:

1) Through the implementation of illegal State aid through abusive procedures of enforcement of the Arbitral Award

18. It was reiterated above that, in its EuroFood decision[16], the CJEU deemed that the payment of damages awarded by an arbitration award, where rendered within the scope of an intra-European investment dispute, which is carried out by a Member State constituted an advantage granted in favor of the investor being the creditor of the award. According to the CJEU's assessment, State aid is deemed to be *"granted"* from the moment the arbitral tribunal makes the compensation in favor of the investor[17] compulsory (i.e. as of the day the award is rendered).

Once again, it should be reiterated that, within the scope of the notification of the Spanish Regime 2013, in view of the fact that a number of investors benefiting from the Spanish Regime 2007 had already brought arbitration proceedings against Spain due to the alleged violation of the ECT in light of the evolution of the Spanish Regime, the European Commission expressly stressed that:

> *"(165) The Commission reiterates that any compensation which an arbitration tribunal awards to an investor based on the grounds that Spain has amended the notified [Spanish Regime 2007] by the [Spanish Regime 2013] in and by itself constitutes State aid. However, arbitration tribunals do not have any jurisdiction to authorize the granting of State aid. This is an exclusive competence of the Commission.* ***Where they grant compensation, like in the Eiser/Spain case, or where they were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and would be subject to the status quo obligation.***
>
> *(166) Finally, the Commission reiterates that this decision is a part of the law of the Union and, as such, is also binding for arbitral tribunals when applying the*

[16] CJEU, Grand Chamber, January 25, 2022, C-638/19, Commission vs. European Food et al.
[17] CJEU, Grand Chamber, January 25, 2022, C-638/19, Commission vs. European Food et al., §115 et seq.

law of the Union. Only European courts can challenge its validity **" (Exhibit 10,** paragraphs 165-166, page 32, emphasis added).

In 2021, following this 2017 decision, the European Commission also stated, in relation to another arbitration award which also awarded financial compensation to European investors who had availed themselves of the modification of the Spanish Regime 2007, that it was of the opinion that this "*Arbitral Award* ***constitutes State aid*** "[18] not compatible with the principles of Union law. In this respect and following the notification of the arbitration award in question by Spain to the Commission, the latter decided to formally initiate an investigation[19].

Based on the foregoing, it follows that this reasoning is applicable *mutatis mutandis* and without distinction to any arbitral award which awards monetary compensation to European investors, within the scope of an intra-European arbitration, under the 2007 amendment of the Spanish regime.

19. In this case, the Arbitral Award aims to compensate the Defendant for the consequences, considered unfavorable, resulting from the legislative change which was applied to the entire Spanish territory.

The Defendant, based on the provisions of the ECT, has therefore obtained damages in this respect, whereas the other investors, not benefiting from the ECT regime, can not obtain such an advantage. In this regard, it should be noted that the Spanish courts have upheld the validity of the Spanish Regime 2013 (which, as a reminder, is the subject of the proceedings which gave rise to the Arbitral Award) and, as a result, the Spanish investors (not being able to rely on the ECT) did not receive any compensation as a result of the amendment of the 2007 Regime[20].

Any enforcement of the Arbitral Award would therefore constitute illegal State aid.

The notification of the Arbitral Award dated November 11, 2019, made to the Commission by Spain, therefore suspends any effect which may result from the Arbitral Award, according to the terms of the 2017 Commission Decision and the terms of Article 108(3) TFEU.

20. In this case, the Defendant has initiated enforcement of the Award only in non-European countries, namely the United States and Australia, in order to obtain compulsory payment of sums which are not owed on the basis of (i) the suspension of the effects of the Award following Spain's notification dated June 15, 2020, and (ii) the application of European law principles which have now been definitively established.

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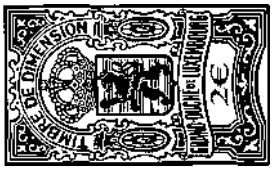
[18] **Exhibit 14 -** European Commission, letter to Spain Ref. *State Aid SA.54155 (2021/NN) - Arbitration award to Antin - Spain,* July 19, 2021, C(2021) 5405, paragraph 154, page 29, informal translation.

[19] **Exhibit 14 -** European Commission, letter to Spain Ref. *State Aid SA.54155 (2021/NN) - Arbitration award to Antin - Spain,* July 19, 2021, C(2021) 5405, page 30.

[20] In this respect, see the following:

- Ruling by the Constitutional Court 28/2015 dated February 19, 2015. (Appeal regarding unconstitutionality 6412/2013) referring to the Royal Decree-Law 2/2013 dated February 1 regarding urgent measures in the electrical system and in the financial sector).
- Supreme Court Ruling 63/2016, January 21, 2016. (Administrative Appeal 627/2012)) referring to Ordinance 1045/2014 dated June 12, 2014.
- Constitutional Court ruling dated December 17, 2015. (Appeal regarding unconstitutionality 5347/2013)), Ruling by the Constitutional Court dated March 08, 2016. (Appeal regarding unconstitutionality 2391/2014), Ruling of the Constitutional Court dated February 18, 2016. (Appeal regarding unconstitutionality 6031/2013)) referring to the Royal Decree-Law 9/2013 dated July 12.



However, regardless of the country where payment is ordered and/or made, State aid is illegal considering that it is contrary to the law of the European Union, where the Defendant is located, and therefore cannot be paid.

It therefore follows from the foregoing that the willingness and actions of the Defendant to enforce the Arbitral Award, which grants compensation which must be characterized as illegal State aid pursuant to the applicable law, clearly constitute an abuse of right, which must be prevented and stopped.

2) Regarding the abuse of right constituted by the enforcement of an Arbitral Award in contradiction with the primacy and autonomy of European Union law

21. The Defendant also commits an abuse of rights by seeking to enforce an Arbitral Award which is null and void, considering that the parties were unable to agree to submit their dispute to arbitration according to the long-established Achméa case law.

As reiterated in Section ***II.1,*** the Member States are bound by the autonomy of the European Union's judicial system and its primacy and therefore can not remove their dispute from it.

In this respect, the Member States and their courts must refuse to apply norms which would have effects contrary to this law[21] and must also endeavor to ensure that the fundamental principles of Union law are respected on their territory.

The dispute regarding the evolution of the Spanish legislative regime with regard to aid granted to renewable energy producers can only, as a right of a Member State, be decided by the national or European courts. The Arbitral Award therefore violates the law of the Union, which applies to and is binding both for the Member States and their nationals (including the Defendant).

Still in application of this principle of primacy and the principle of autonomy of the law of the Union as reiterated by the Achméa ruling, Spain was not in a position to agree to remove this dispute from the autonomous system of jurisdiction of the European Union. The offer to arbitrate contained in the ECT therefore never existed, and there was no consent to the arbitral tribunal, which deprives the Arbitral Award of any basis.

However, the Luxembourg courts must ensure that they give full effect to EU law, which was firmly reaffirmed by the Court of Cassation in a judgment dated July 14, 2022, which quashed, without reference, an exequatur judgment on an intra-EU arbitration award for the same reasons as those set out herein.

Based on the foregoing, it follows that everything resulting from the Arbitral Award, including the compensation, can not be enforced, considering that this constitutes a violation of the principle of primacy and effectiveness of the law of the European Union, which is binding for both the Member States and their nationals.

As a consequence of the foregoing, the enforcement measures undertaken by the Defendant constitute an abuse of right inasmuch they violate Union law, and in particular:

[21] CJEU, March 9, 1978, No. 106/77, Administration des finances de l'Etat v. Société anonyme Simmenthal.

- **The principle of primacy and autonomy of European Union law;**
- **The obligation to suspend any measure which may give effect to a notified State aid, which is guaranteed by the TFEU;**
- **By giving effect to illegal State aid, through the application of the European Jurisprudence and the European Commission's Decision dated January 19, 2021.**

This Court is therefore requested to order the Defendant to cease any enforcement of the Arbitral Award to obtain payment of undue sums on the basis of abuse of right.

All of the above shall be accompanied by a penalty measure, in the event that the Defendant violates the terms of the forthcoming judgment, in an amount of 100,000 EUR per day.

11.3. **ALTERNATIVELY: REQUEST FOR JUDICIAL DECLARATION IN LIGHT OF THE DEFENDANT'S OBLIGATION TO COMPLY WITH PUBLIC POLICY PROVISIONS**

22. The declaratory action is defined as an action whose purpose is to have the existence or non-existence of a legal situation or the regularity or irregularity of an act, which is not contested, declared by the Court[22].

The case law has clarified the following:

> *"In order to justify the exercise of a declaratory action, it is sufficient that a serious uncertainty or a serious threat paralyzes the normal exercise of a right and that, on the other hand, the judicial declaration requested is of such a nature as to offer the Plaintiff not a purely theoretical satisfaction, but a concrete and determined utility"[23].*

To be declared admissible, two cumulative conditions must therefore be met[24]:

1. The requirement of a serious and grave threat to a right to the point of creating a specific disturbance;
2. The judicial declaration must be of such a nature as to offer the plaintiff a concrete and determined utility.

However, whenever the request does not solely seek to obtain the judicial declaration of the existence or non-existence of a legal situation or of the regularity or irregularity of an act, but makes this declaration subject to compliance by the defendant with an obligation not to impose a penalty, then this request must " *be reclassified as a conservatory action, inasmuch as it seeks to maintain a* status quo"[25].

23. It will be shown below that the conditions for granting a declaratory action, which also has a protective purpose, are met in this case insofar as:

[22] Solus et Perrot, *Droit judiciaire privé,* éd. Sirey, 1961, tome 1, No. 230, page 209.
[23] TAL Lux. July 5, 2017, No. 182329 XV, Docket No. 833/2017, citing the Court of Appeals, December 7, 1976, Pas. 23,477 and Court of Appeals, April 22, 1999, No. 21314; also see TAL Lux. January 16, 2018, No. 19/2018 (8th Chamber), Docket No. TAL- 2017-00412.
[24] TAL Lux, July 5, 2017, No. 182329, XV Docket No. 833/2017; TAL Lux, April 25, 2018, No. 181613 + 184874 + 186633, Docket No. 2018TALCH15/543.
[25] TAL Lux, April 30, 2021, Docket No. TAL-2020-02660 and TAL-2020-04402.

- The measures of enforcement of the Arbitral Award which were taken against Spain by the Defendant violate Luxembourg public policy ***(A.),*** and
- The judicial declaration will therefore prevent the effects of such measures by achieving that the Court recognizes that the Arbitral Award violates European Union law and, therefore, that the Defendant can not enforce it, all of the foregoing under penalty of the law (B.).

A. Regarding disturbance of public order caused by the enforcement measures taken by the Defendant

24. From the very beginning, it should be noted that Article 6 of the Civil Code expressly establishes that: "*no derogation may be made, by means of special agreements, from the laws concerning public order and morality*".

Let us reiterate that the notion of public order is a vast concept which is not defined by any text. Luxembourg law does not define this concept any further, although it is generally accepted that "*the public policy exception only comes into play as soon as the application of the normally applicable foreign law would, in the specific case submitted to the Luxembourg court, have a sufficiently serious effect on an interest which the Luxembourg legal system deems to be in need of protection*"[26].

Public policy is therefore an evolving concept which encompasses "*fundamental concepts of the legislative policy of the forum*"[27].

25. Very recently, the Luxembourg Court of Cassation had the opportunity to review what public policy covers in the enforcement of an arbitral award based on an intra-EU bilateral investment agreement.

In a landmark decision, the High Court has enshrined in Luxembourg law the latest case law of the CJEU in matters of intra-EU investment arbitration. In this respect, in its decision dated July 14, 2022, the Court of Cassation retained a plea of public order, raised ex officio:

> *"Having regard to Articles 267 and 344 of the TFEU and the principle of immunity from jurisdiction of foreign states.*
>
> *It follows from the judgment under appeal that the STATE OF ROMANIA had invoked, before the judges of appeal, as defenses in respect of the request for recognition of the arbitration award both its immunity from jurisdiction and the infringement of European Union law of the arbitration clause set forth in Article 7(5) of the bilateral investment treaty (hereinafter the "BIT") between the Kingdom of Sweden and the State of Romania.*
>
> ***That an arbitration clause contained in an international agreement between two EU Member States is contrary to Articles 267 and 344 TFEU was upheld in the*** **[Achméa]** ***ruling*** *dated March 6, 2018 (C-284/16,* [...p, *therefore prior to the time of the ruling by the judges of the appeal*.
>
> [•••]
>
> [As of the accession of the Member State which is party to the arbitration procedure], ***the European Union's own system of judicial remedies has replaced the BIT arbitration procedure [...]*** *and that the consent of the claimant in cassation*

[26] Conclusions by the Public Prosecutor's Office in the exequatur case ALBANIA BEG AMBIENT *vs.* ENEL, in the presence of the Public Prosecutor's Office and P. KINSCH, "Quelques aspects d'actualité du droit international privé", Bulletin Cercle François Laurent, 1995, page 16.

[27] For example, see TAL, January 6, 2021, Docket No. TAL-2020-03260.

> *... to see to it that the dispute is resolved through the application of the arbitration clause contained therein is devoid of any basis, the Judges of Appeal, in ruling as they did,* ***violated both Articles 267 and 344 TFEU and the principle of public international law of the immunity of the State of Romania from jurisdiction"[28].***

26. It has already been established above, see Section ***II.1,*** that there is now an absolute incompatibility between European Union law and arbitrations concerning an intra-European Union dispute. The consequences resulting therefrom, which have been retained by the jurisprudence of the CJEU and the Member States, have also been established.

As a result thereof and in application of the foregoing, any measure or decision taken in violation of the above-mentioned case law constitutes a serious and grave threat to Luxembourg public policy, which integrates national law, European Union law, and public international law.

In this case, the fact that a Luxembourg company enforces the Arbitral Award constitutes a disturbance of Luxembourg public policy, considering that this results in proven violations:

- Of European Union law (f.), and
- The principle of the immunity of jurisdiction of Spain (2.).

1) Regarding violations of European Union law as a result of the enforcement of the Arbitral Award, aimed at forcing Spain to pay the amounts awarded

- **Regarding the characterization as State aid of the sums awarded by the Arbitral Award which conflict with European Union law:**

27. Reference is made to the previous statements (see Section ***II.1)***, where it has been demonstrated that the sums awarded within the scope of the Arbitral Award constitute State aid, which is contrary to European Union law.

It is under these conditions that the Defendant nevertheless proceeds **outside of the European** Union to recover the sums awarded within the scope of the Arbitral Award. This attitude is clearly intended to circumvent the rules of European Union law.

This is clearly a case of *forum shopping,* aimed at giving effect to an anti-competitive situation and illegitimately benefiting the Defendant, a European Union national, to the detriment of Spain. Your Court will not be deceived thereby.

28. As a matter of fact, it is irrelevant that the payment of the amounts which are owed under the Arbitral Award is ordered by a court outside the European Union and takes place within this context, considering that:

- State aid remains State aid, regardless of where payment is made, and
- In the event that a payment is made (regardless of where), Spain will be in violation of the rules of European Union law (as such, the European Commission will ask Spain to take action to recover the sums paid to the Notified Parties).

[28] Court of Cassation, July 14, 2022, Docket No. 116/2014, page 29.

29. Let us reiterate in this respect that the principle of effectiveness of the law of the Union, "*which requires the Member States to refrain from making the implementation of the law of the Union practically impossible or excessively difficult* ", reinforces all the more the need for your Court to stop the enforcement measures undertaken by the Defendant.

Were enforcement to be ordered by foreign courts and its effects implemented, Spain would be unable to comply with its obligations under EU law, which could result in default proceedings against Spain.

30. On one hand, pending the Commission's confirmation that the payment of this Arbitral Award constitutes State Aid, Spain is bound by the suspensive effect as set forth in Article 108(3) TFEU[29]. Payment by public force in other States would then conflict with this obligation of the Plaintiff.

On the other hand, Spain would then be unable to recover the sums paid under these foreign enforcement decisions despite the fact that the State aid law provides for the obligation to recover these sums[30]

Considering the abusive maneuvers already undertaken by the Defendant, it is likely that these funds would not be returned to Spain despite the relevant obligations under the State Aid Law.

Any precautionary measures would be particularly complicated to implement. As a matter of fact, the Defendant is an investment vehicle which is part of a group structured across different States. In this respect, the risk of dissipation of assets is clearly evident, considering that the damages - obtained as illegal State aid which must be returned - may be transferred through the entire structure.

This Court is under obligation to uphold the primacy[31] and effectiveness of Union law by preventing any enforcement action which would put the Plaintiff in breach of its international law obligations. This was firmly reaffirmed by the Court of Cassation in the above-mentioned ruling dated July 14, 2022, which quashed, without reference, a judgment granting exequatur to an intra-EU arbitral award for the same reasons as those invoked in this present case.

As a result, the procedures for the enforcement of the Arbitral Award, insofar as they pursue payment of sums which are equivalent to State aid, constitute a serious and grave threat to public policy, considering that they patently violate European Union law and, in particular, the law on State Aid.

- **Regarding the issue of whether the Arbitral Award is inconsistent with the European Union's principle of autonomy of jurisdiction:**

31. Please note that Article 344 of the Treaty on the Functioning of the European Union ("**TFEU")** establishes the following: "*The Member States agree to refrain from submitting a dispute concerning the interpretation or application of the Treaties to any methods of settlement other than those set forth in the Treaties"*.

[29] See **Exhibit 14 -** European Commission, letter to Spain ref. *State Aid SA.54155 (2021/NN) - Arbitration award to Antin - Spain,* July 19, 2021, C(2021) 5405.

[30] TFEU, Article 108(2)

[31] CJEU, July 15, 1964, No. 6/64, Flaminio Costa vs E.N.E.L.

It follows, based on the principle of the **autonomy of jurisdiction** of the European Union, that only the CJEU and the courts of the Member States are competent to interpret and apply European Union law.

The CJEU recently reiterated that this principle constitutes "*the cornerstone of the judicial system conceived thereby,* [which] *is intended to ensure the unity of interpretation of Union law, thereby making it possible to ensure its consistency, full effect, and autonomy, and, ultimately, the proper character of the law which is established by the Treaties"*[32].

As established by the above-mentioned "Achméa" case law[33], compliance with this principle is incompatible with the possibility of submitting an intra-European investment dispute to an arbitral tribunal. This incompatibility is explained by the fact that an arbitral tribunal would not be required to apply EU law and can not submit preliminary questions to the CJEU, considering that it is not a court which is a part of the European judicial system.

Any interpretation or application contrary to the foregoing would result in the parties to the arbitration not being able to benefit from the remedies provided for under European law, which would then deprive them of the full application of Union law and the protection of their rights[34].

In its "Komstroy" decision dated September 2, 2021, the CJEU extended the application of this principle to the ECT, which forms the basis for the jurisdiction of the arbitral tribunal in the Arbitral Award. In this ruling, the CJEU held that:

> "*Article 26(2)(c) of the ECT must be interpreted as* ***not*** being ***applicable to disputes between a Member State and an investor of another Member State*** *concerning an investment made by the latter in the first-mentioned Member State* "[35] (emphasis added).

The CJEU also took care to specify that, by submitting the dispute to arbitration, it was *de facto* removed from the jurisdiction of the courts of the Member States, in particular in view of the fact that:

> "*According to Articles 53 and 54 of the ICSID Convention,* **[the arbitral award is not subject]** ***to any review by a court of a Member State*** *insofar as its conformity with the law of the Union is concerned"*[36] (emphasis added).

As a result, the CJEU deemed that this situation was "*likely to lead to a situation* ***where such disputes would not be decided in a manner which would guarantee the full effectiveness of that law*** *(ruling dated October 26, 2021, PL Holdings, C-109/20, EU:C:2021:875, point 45 and cited case law)* "[37] (emphasis added).

32. In this present case, it is clear that the enforcement of the Arbitral Award constitutes a serious and grave threat to the principle of autonomy of jurisdiction of the European Union, considering that:

[32] CJEU, Grand Chamber, September 2, 2021, C-741/19, Republic of Moldova vs. Komstroy LLC, §45,46.
[33] CJEU, Grand Chamber, March 6, 2018, C-284/16, Slowakische Republik vs. Achméa BV.
[34] In this respect, see: CJEU, Grand Chamber, March 6, 2018, C-284/16, Slowakische Republik vs. Achméa BV.
[35] CJEU, Grand Chamber, September 2, 2021, C-741/19, Republic of Moldova vs. Komstroy LLC, §66.
[36] CJEU, Grand Chamber, January 25, 2022, C-638/19, Commission vs. European Food et al., §139.
[37] CJEU, Grand Chamber, January 25, 2022, C-638/19, Commission vs. European Food et al., §139.

- Spain's consent to the arbitration procedure is based on the ECT, and therefore, Spain's consent to the arbitration procedure has become irrelevant considering that the arbitration clause contained in the ECT is not enforceable against Member States, and
- the arbitration procedure relates to a dispute concerning an intra-European Union investment between a Member State and a European national which, since the Achméa decision, is no longer possible without violating the autonomy of jurisdiction of the European Union.

Based on the foregoing, it follows that, by seeking to obtain the enforcement of the Arbitral Award at issue, the Defendant and, in particular, the statutory management bodies of the Defendant, are causing a serious and grave threat to the principle of the autonomy of jurisdiction of the European Union and are knowingly violating the law of the Union.

2) Regarding non-respect of the principle of immunity from jurisdiction of a sovereign State

33. Considering that arbitration is contractual justice, consent to submit thereto is an essential and prior component. Within the scope of investment arbitration, it is the ratification by a State of a bilateral investment treaty containing an arbitration clause which allows the express acceptance by a State to waive its immunity from jurisdiction and agree to be a party to the arbitration proceedings.

This requirement of consent to arbitration is enshrined in Luxembourg law and forms the basis for a valid arbitration agreement. Pursuant to the terms of Article 1251 of the New Code of Civil Procedure ("***NCCP"),*** read in combination with Article 1244 NCCP, an award can therefore not be effective where there is no valid arbitration agreement[38].

However, since the Achméa ruling, the CJEU has deemed that the consent of Member States granted within the scope of bilateral investment treaties between EU Member States was no longer valid. In this respect, in the field of investment arbitration, the CJEU has very recently reiterated the following:

*" Such **consent [...] is based on a treaty entered into between two States** according to which they have, in a general manner and in advance, consented to remove, from the jurisdiction of their own courts, disputes which may relate to the interpretation or application of Union law in favor of the arbitration procedure (for such purpose, see the rulings dated March 6, 2018, Achméa, C-284/16, EU:C:2018:158, points 55 and 56, and dated September 2, 2021, Republic of Moldova, C-741/19, EU:C:2021:655, points 59 and 60).*

*Under these circumstances, considering that, as from the accession of Romania to the Union, the system of judicial remedies set forth in the EU and TFEU Treaties has replaced this arbitration procedure, the **consent to such effect granted by that State is now devoid of any purpose"**[39].*

34. As a follow-up to the Achméa ruling, on May 29, 2020, all Member States, including the Kingdom of Spain and the Grand Duchy of Luxembourg, entered into an international agreement terminating bilateral investment treaties between Member States of the European Union. The agreement is explicit and states the following:

[38] Articles 1244 and 1251 of the New Code of Civil Procedure.
[39] CJEU, Grand Chamber, January 25, 2022, C-638/19, Commission vs. European Food et al., §144-145.

> *"The contracting parties confirm that* ***the arbitration clauses are contrary to*** *the Union Treaties and are* ***therefore inapplicable****. As a result of this incompatibility between arbitration clauses and the Union treaties, as of the date on which the last of the parties to a bilateral investment treaty* ***has become a Member State of the European Union****, the arbitration clause contained in such a bilateral investment treaty* ***can not serve as a legal basis for arbitration proceedings***[40]***.***

In Luxembourg, this agreement was enacted through the law dated June 20, 2022[41].

The Court of Cassation applied this principle in a ruling dated July 14, 2022, wherein the Court held that, by virtue of the accession of a State to the European Union: "*the consent of the Plaintiff of the cassation action to have the dispute resolved through the application of the arbitration clause* ***contained*** *therein* ***is devoid of any purpose,*** *and the judges of appeal, in ruling as they did, violated both Articles 267 and 344* ***TFEU and the principle of public international law of immunity from jurisdiction"***[42]***.***

Based on the foregoing, it follows that any interpretation contrary to the decision of the Court of Cassation (or those of the CJEU) would admit the possibility of submitting a dispute to arbitration without the consent of the parties thereto. This lack of consent in matters of investment arbitration is all the more prejudicial to the rights of the Plaintiff, a sovereign State, considering that it violates its immunity from jurisdiction.

35. Immunity from jurisdiction is a principle of international public law enshrined in Luxembourg and European public policy, which must therefore be respected by all Member States, including Luxembourg and Spain.

By way of the application of the Achméa and Komstroy case law, it must therefore be deemed that Article 26 of the ECT regarding the settlement of disputes between an investor and a contracting party is not applicable to disputes between a Member State and an investor from another Member State.

36. In this case, the jurisdiction of the arbitral tribunal in the Arbitral Award was based on the ECT. This Court must therefore rule that Spain has not validly consented to waive its immunity from jurisdiction, considering that the arbitral tribunal as a matter of fact lacks any jurisdiction to render any award. As a result, the Arbitral Award, now covered by the aforementioned enforcement measures, is null and void.

Therefore, allowing a Luxembourg national to take measures of enforcement of the Arbitral Award causes a specific disturbance to the public order of Luxembourg and of the European Union including the immunity of jurisdiction of a State, Spain.

***

[40] **Exhibit 13.** Agreement on the Termination of Bilateral Investment Treaties between Member States of the European Union, May 29, 2020, OJ L169, Article 4.

[41] Law dated June 20, 2022, approving the Agreement on the termination of bilateral investment treaties between Member States of the European Union, signed in Brussels on May 5, 2020, Memorial A No. 333 of 2022.

[42] Court of Cassation, July 14, 2022, No. 116/2014 of the Register, page 29.

37. Based on the foregoing, it follows that the fact that a Luxembourg national takes measures to enforce a void Arbitral Award constitutes a **serious and grave threat to the commitments assumed by Luxembourg:**

- To enforce the primacy of European Union law;
- To guarantee the protection of fundamental rights enshrined in European Union law, such as the principle of the autonomy of European Union courts and free competition;
- To enforce the immunity from jurisdiction of another sovereign Member State as a principle of public international law.

The decision to engage in measures to enforce the Arbitral Award was taken on Luxembourg territory by the statutory body of the Luxembourg company, which is subject to national and European law. Any payment in its favor, regardless of where the payment comes from, would be made in Luxembourg territory, considering that the balance sheet of the Luxembourg company would reflect such payment.

However, allowing a Luxembourg national to give effect to the Arbitral Award and therefore collect the proceeds of a violation of public policy, in violation of national and European law, constitutes a disturbance of Luxembourg public policy. In other words, no Luxembourg national can be permitted to violate national and European public order with impunity.

B. Regarding the specific and determined utility of the present action: Spain's compliance with its obligations under international law

38. It will be established hereinafter that the judicial declaration has a **specific and determined utility** considering that it will allow the Plaintiff to achieve that the Luxembourg courts acknowledge that the Defendant must cease the enforcement measures which have been initiated or refrain from engaging in new enforcement measures aimed at obtaining the enforcement of the disputed Arbitral Award, inasmuch as this award violates the immunity of jurisdiction of Spain and, in any case, the law of the European Union.

The present action will also allow Spain to comply with its obligations under European Union law to respect free competition in the internal market, considering that any payment of the compensation granted by the Arbitral Award to the Defendant would constitute illegal State aid.

In this regard, this petition for judicial declaration will therefore permit to:

- Guarantee the immunity of the Plaintiff from jurisdiction, and
- Above all, ensure that Luxembourg or any subject under Luxembourg law complies with its obligations under Union and international law.

As a result of the foregoing, this Court is herewith requested to declare that the pursuit by the statutory body of the Defendant or the taking of further enforcement measures, to obtain the enforcement of the Arbitral Award at issue constitutes a breach of public policy inasmuch as it is contrary to national and European Union law.

II.4. IN ANY CASE: REGARDING THE PETITION SUBJECT TO SECTION 240 OF THE NEW CODE OF CIVIL PROCEDURE

39. It would be entirely unfair to leave Spain to bear the legal and procedural costs which it had to incur to prevent the continuation of measures to enforce an Arbitral Award which clearly violates national and European public policy.

The costs of this present action should therefore not be borne by the Plaintiff, and the Defendant should be ordered to pay a procedural indemnity of 20,000 EUR as well as the costs of the proceedings.

***

This present complaint is based on the following exhibits submitted in support thereof, namely:

Exhibit 1.	Energy Charter Treaty.
Exhibit 2.	ICSID Award No. ARB/15/15 dated May 31, 2019.
Exhibit 3.	ICSID Amending Award No. ARB/15/15 dated December 6, 2019.
Exhibit 4.	Decision to dismiss the appeal for nullification of the ICSID Arbitral Award No. ARB/15/15 dated November 17, 2022.
Exhibit 5.	Exequatur Action before the *United States District Court for the District* of Columbia brought by Defendants on June 27, 2019.
Exhibit 6.	Opposition of Spain, dated January 15, 2020, to the exequatur action before the *United States District Court for the District of Columbia*.
Exhibit 7.	Decision of suspension of the ruling by the *United States District Court for the District* of Columbia dated September 30, 2020.
Exhibit 8.	Decision of the *United States District Court for the District* of Columbia dated December 7, 2022.
Exhibit 9.	Order dated April 22, 2020 by the *Federal Court of Sydney.*
Exhibit 10.	European Commission decision dated November 10, 2017.
Exhibit 11.	Notification of the Arbitral Award dated October 16, 2019.
Exhibit 12.	Ruling by the Court of Cassation dated July 14, 2022, Docket No. 116/2014.
Exhibit 13.	Agreement on the termination of bilateral investment treaties between Member States of the European Union, O J L169 dated May 29, 2020.
Exhibit 14.	Decision by the European Commission addressed to Spain dated July 19, 2021, Ref. *State Aid SA.54155 (2021/NN) - Arbitration award to Antin - Spain,* informing of the opening of the in-depth State aid investigation.
Exhibit 15.	*Petition* dated March 26, 2020 before the *Federal Court of Sydney*

according to which the Plaintiff reserves the right to produce other documents and develop other means and arguments over the course of the proceedings as appropriate.

FOR THE ABOVE REASONS,
MAY IT PLEASE THE COURT

To declare the present summons admissible in terms of its form,

based on the merits, hold it to be well-founded and justified, and grant it:

PRIMARILY, ON THE BASIS OF ABUSE OF RIGHTS:

ORDER the company 9REN Holding S.àr.l. to cease, in particular on the basis of the abuse of right enshrined in Article 6-1 of the Civil Code, any enforcement of the ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019), for the purpose of obtaining payment of undue sums whereas the Arbitral Award is null and void and the recovery constitutes illegal State aid.

Taking into account the seriousness of the dispute, **IMPOSE** upon the company 9REN Holding S.àr.l. a penalty in an amount of 100.000 EUR per day, in the event that it fails to comply with the terms of the present ruling, after the expiration of a period of 15 days as of the service of the present ruling by the Bailiff:

- the penalty shall start to apply, against the defendant, on the day when, 15 days following the service of this judgment, such defendant:
  - (i) commences or continues any enforcement proceedings or measures to enforce ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019), and/or
  - (ii) enforces, or causes to be enforced, against Spain, any enforcement measures already obtained which are intended to cause Spain to pay, whether directly or indirectly, the amounts awarded by ICSID Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019),
- and the penalty shall end on the day:
  - (i) of the cessation by the Defendant of all actions or judicial or administrative proceedings which violate the terms of this ruling, or
  - (ii) when the amount whose enforcement is sought, i.e. EUR 41.76 million, is reached,
  - (iii) or as soon as the European Commission declares, in a final decision, which has become binding, that the Arbitral Award No. ARB/15/15 dated May 31, 2019 (as modified by the amending award dated December 6, 2019) is compatible with the internal market and complies with European law, including regarding State aid;

ALTERNATIVELY, IN CASE *QUOD NON,* SHOULD THE COURT SHOULD THAT THERE IS NO ABUSE OF RIGHT, BASED ON THE DECLARATORY ACTION:

RULE that the Plaintiff has an existing and present interest in obtaining a judgment in Luxembourg declaring that the Defendant is in breach of Luxembourg and European public policy by having passed resolutions concerning the enforcement of ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019), inasmuch as it was rendered between a Member State and an investor who is a national of another Member State of the European Union in respect of an intra-European investment.

DECLARE that, in view of this finding, the Defendant can not, as an entity subject to compliance with European Union law, decide to:

i. Pursue the decisions taken by the statutory body of the Defendant initiating the proceedings to obtain the enforcement of ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019), or

ii. Take any new or subsequent action to obtain such enforcement of ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019).

DECLARE that any decision by the Board of Directors of the Defendant sub 1) to enforce the ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as modified by the amending award dated December 6, 2019) violates Luxembourg and European public policy;

AND ULTIMATELY DECLARE null and void any decision by the Board of Directors of the Defendant sub 1) to mandate its counsel to enforce ICSID Arbitral Award No. ARB/15/15 dated May 31, 2019 (as amended by the Amending Award dated December 6, 2019),

***

IN ANY CASE:

SENTENCE the company 9REN Holding S.àr.l. to pay to the Plaintiff the amount of 20,000 EUR on the basis of Article 240 of the NCCP, inasmuch as it would be unfair, in view of the circumstances, to leave it to bear all legal costs and fees which it had to incur to defend itself;

SENTENCE the company 9REN Holding S.àr.l to pay all costs and expenses of the proceedings;

ORDER the provisional enforcement of the forthcoming judgment, any opposition or immediate appeal notwithstanding and prior to registration and without any security deposit;

PROVIDE NOTICE to Spain that it reserves all other rights, dues, means, and actions.

Duly noted, with all reservations.

COST	
FEE	72.00
COP	18.00
VOY	10.00
ADR	7.20
EXCLUDING	107.20
VAT	18.22
TOTAL	125.42
ENR	12.00
TIM	46.00
P&T	5.00
ALL TAXES INCLUDED	**188.42**