OFFICE OF STATE ATTORNEY
STATE DEPARTMENT OF LEGAL SERVICES

SUB-DEPARTMENT OF LITIGATION SERVICES

TO THE GENERAL OFFICE OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

in relation to

ISCID ARBITRATION Case No. ARB/15/16 - Annulment

THE KINGDOM OF SPAIN

Annulment Applicant, Respondent

-V-

BAYWA R.E. RENEWABLE ENERGY GMBH

BAYWA R.E. ASSET HOLDING

Annulment Respondents, Claimants

MEMORIAL ON ANNULMENT

Submitted on behalf of the Kingdom of Spain by:
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28004 Madrid
Spain

22 November 2021

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I. LIST OF MAIN ABBREVIATIONS

"**BIT**": Bilateral Investment Treaty.

"**CNE**": *Comisión Nacional de Energía* (National Energy Commission). Regulatory Body for energy systems in Spain (since 7 October 2013 its functions are assumed by the National Commission for Markets and Competition).

"**Intra-EU dispute**": dispute between an EU investor and an EU Member State.

"**Vienna Convention**": Vienna Convention on the Law of Treaties, of 23 May 1969.

"**ICSID**" or "**CIADI**": International Centre for Settlement of Investment Disputes (Centro Internacional de Arreglo de Diferencias relativas a Inversiones)

"**IDAE**": *Instituto para la Diversificación y Ahorro de la Energía* (Institute for Diversification and Saving of Energy).

"**Respondent**" or "**Annulment Applicant**": Kingdom of Spain.

"**Claimants**": Baywa R.E. Renewable Energy GMBH and Baywa R.E. Asset Holding.

"**These Arbitration Proceedings**", "**Arbitration**" or the "**Underlying Arbitration"**: arbitration brought by Baywa R.E. Renewable Energy GMBH and Baywa R.E. Asset Holding against the Kingdom of Spain.

"**Intra-EU investment**": Investment in the EU area by an EU investor.

"**TVPEE**": Tax on the Value of Production of Electrical Energy.

"**Award**": Award issued in ISCID Case No.ARB/15/16 of 25 January 2021.

"**Law 15/2012**": Law 15/2012, of 27 December 2012, on tax measures for energy sustainability.

"**Law 54/1997**" or "**LSE 1997**": Law 54/1997, of 27 November 1997, Electricity Sector Act.

"**Royal Decree 2818/1998**": Royal Decree 2818/1998, of 23 December 1998, on electricity production from facilities supplied by renewable resources or sources of energy, waste or generation.

"**Royal Decree 436/2004**": Royal Decree 436/2004, of 12 March 2004, establishing the methodology for the updating and systematisation of the legal and economic regimes for electricity production activities under the special regime.

"**Royal Decree 661/2007**" or "**RD 661/2007**": Royal Decree 661/2007, of 25 May 2007, which regulates electricity production under the special regime.

"**Royal Decree-Law 6/2009**": Royal Decree-Law 6/2009, of 30 April, establishing certain measures in the energy sector and approving the social tariff.

"**Royal Decree 1614/2010**": Royal Decree 1614/2010, of 7 December, regulating and amending certain aspects of electricity production from thermoelectric solar and wind technologies.

"**Royal Decree-Law 2/2013**": Royal Decree-Law 2/2013, of 1 February 2013, on urgent measures applicable to the electricity system and the financial sector.

"**Royal Decree-Law 9/2013**" or "**RDL 9/2013**": Royal Decree-Law 9/2013, of 12 July 2013, for adopting urgent measures to guarantee financial stability of the electricity system.

"**Law 24/2013**": Law 24/2013, of 26 December, Electricity Sector Act.

"**Royal Decree 413/2014**": Royal Decree 413/2014, of 6 June 2014, which regulates electricity production activities from renewable energy sources, cogeneration and waste.

"**Ministerial Order 1045/2014**" or "**Parameters Order**": Order IET/1045/2014, of 16 June, passing into law remuneration parameters for standard facilities, applicable to specific electricity production facilities from renewable energy sources, cogeneration and waste.

"**SES**": Spanish Electricity System.

"**Application**": Application to Annul Award filed by the Kingdom of Spain on 24 May 2021.

"**ECT**": Energy Charter Treaty, signed in Lisbon on 17 December 1994.

"**FET**": Fair and Equitable Treatment.

"**Tribunal**": Arbitral Tribunal in ISCID Arbitration Case No. ARB/15/16.

"**TUE**": Consolidated version of the Treaty on the European Union, published in the European Union Gazette on 26 October 2012.

"**TFEU**": Consolidated version of the Treaty on the Functioning of the European Union, published in the European Union Official Gazette on 26 October 2012.

"**ECJ**": European Court of Justice.

"**EU**" or "**the Union**": European Union.

II. INTRODUCTION AND EXECUTIVE SUMMARY

1. In accordance with the procedural schedule approved as Annex A of Procedural Order No. 1, of 27 September 2021, the Kingdom of Spain hereby files this Memorial on Annulment pursuant to Article 52 ISCID Convention against the award issued on 25 January 2021 (the "**Award**") in ISCID Case No. ARB/15/16 (the "**Arbitration**" or the **"Underlying Arbitration**") between BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH (jointly, "**Baywa**" or the "**Claimants**") and the Kingdom of Spain.[1] The Award includes the Decision on Jurisdiction, Liability and Quantum Instructions, of 2 December 2019.[2] The Award also includes the Dissenting opinion of Mr Horacio A. Grigera Naón, the arbitrator appointed by the Claimants.

2. The Kingdom of Spain considers that there are very fundamental reasons to annul the Award, as some grounds for annulment established in the ICSID Convention are present in this case. For that reason, the Kingdom of Spain filed the Annulment Application (the "**Application**") on 24 May 2021 based on Article 52(1)(b), (d) and (e) ICSID Convention, pursuant to the legal reasoning summed up below.

   a. Excess of powers and failure to state reasons, under Articles 52(1)(b) and 52(1)(e) ICSID Convention, respectively, as the Tribunal had no jurisdiction regarding a claim filed by two companies incorporated in an EU member State, Germany, against another Member State of the European Union ("**EU**"). Not only did the Tribunal exceed its powers, but additionally it failed to set out the legal reasoning for the declarations contained in the Award. Despite the fact that there are grounds for annulment both under Article 52(1)(b) and under 52(1)(e), for procedural econocmy these matters shall be dicussed essentially in the section on Manifest Excess of Powers.

   d. Serious breach of a fundamental Procedural Rule pursuant to Article 52(1)(d) ICSID Convention, especially, that the Award should be annulled given that: (1) the Arbitral Tribunal infringed the right of the Kingdom of Spain to be heard when refusing to allow the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019; and (2) the Arbitral Tribunal improperly dismissed the European Commission petition to participate in the proceedings as Amicus Curiae.

3. Each of the aforesaid grounds for annulment will be explained in depth below. As already stated in advance, categorising the various facts and/or allegations on which this Memorial for Annulment is based into one specific ground for annulment is not

[1] (RL-0124 Previously Annex-01 Baywa R.E. Renewable Energy GMBH et al v Kingdom of Spain, ICSID Case No. ARB/15/16. Award. 25 January 2021).

[2] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019).

restrictive and should not prevent the ad hoc Committee from complying with its obligation to consider whether those facts and allegations come under another ground for annulment.

4. As set out in the ICSID Convention the aforesaid circumstances require the Award to be annulled on the basis of manifest excess of powers, failure to state reasons and serious breach of fundamental rules of procedure. Any single one of the aforesaid grounds would suffice alone to justify annulment. Taken together, the requirement to annul is not only imperative on the basis of the legal grounds but also necessary to ensure that international investment arbitration is not undermined.

III. CONTEXT AND BACKGROUND

5. In order to provide the ad hoc Committee with sufficient context to perform its important role, the summary of the regulatory regime governing the renewable energy sector in Spain will be set out, together with the circumstances under which Baywa made its investment and conclusions of the Award in relation to jurisdiction, liability and quantum.

A. THE LEGAL REGIME OF RENEWABLE ENERGIES IN THE KINGDOM OF SPAIN AS PART OF THE SPANISH ELECTRICITY SYSTEM

6. Complying with binding international objectives, especially those imposed by the European Union, Spain has regulated electricity production from renewable sources for over 20 years. The electricity sector is highly regulated in Spain, subject to frequent adjustments and reviews, to accommodate regulation both to the economic context and to the state of technology.

7. The Spanish electricity sector additionally requires consideration of rules imposed under EU Law on State Aid. The EU Treaties, in order to guarantee free competition, prohibit member States from subsidising their companies (State Aid), which can only be authorised in certain specific circumstances[3].

8. The aforesaid State Aid legislation also applies to the energy sector and, inter alia, requires energy policy objectives to be achieved without distorting the internal EU market, i.e., without overpaying producers or imposing excessive costs on consumers. The aforesaid concept is closely linked to what is known as the "level playing field": levelling out specific renewable sector costs, thereby enabling them to compete with conventional producers, under equal conditions.

9. On November 1997, the Spanish Parliament passed into law a legal framework to govern the electricity sector, the Electricity Sector Act, Law 54/1997 ("**LSE 1997**" or "**Law**

[3] (RL-0001 EU Treaty, TFEU UE and EU Charter Fundamental Rights. 26 October 2012. Consolidated) Article 107 et seq.

54/1997"). The 1997 Electricity Sector Act was based on several key principles, including the need to guarantee electricity supply, as well as ensuring the Spanish Electricity System ("**SES**") is financially self-sufficient.

10. Law 54/1997 differentiates between an "*Ordinary Regime*" that applies to conventional energy producers and a "*Special Regime*" applying to energy production from renewable sources. The purpose of the dual regime was to develop renewable energy production, in which regard the technology required public support given that the price of energy on the ordinary market did not suffice to meet costs of building and exploiting the special facilities required to produce renewable energy.

11. The Spanish government's intention, by subsidising the cost of renewable energy production using a variety of mechanisms, was to achieve the objectives for the use of renewable energy in Spain and to meet EU targets.

12. Pursuant to the 1997 Electricity Sector Act, the basic aim of the system of aid and subsidies was to provide a *reasonable return* for renewable energy producers in relation to the cost of money in the capital market.[4] Law 54/1997 did not quantify the aforesaid *reasonable return,* but rather left it up to hierarchically subordinate juridical instruments to develop and implement the Law's objectives: regulations or Royal Decrees.

13. In the context of the energy sector, the concept of a *reasonable return* meant that State Aid paid by the Spanish Government to renewable energy producers permitted the latter to cover both capital costs ("**CAPEX"**) and operating costs (**"OPEX"**), also obtaining a return that was neither excessive nor insufficient, in other words, a reasonable return. By definition, the reasonable nature of the return has to adapt to evolving circumstances (technical, cost of capital, etc.) which serve to guarantee the reasonable rate of return whilst, at the same time, ensuring the Spanish electricity system is self-sufficient and there is a balance between revenue and costs.

14. The Special Regime established in the 1997 Electricity Sector Act provided a two-stage methodology for setting remuneration for renewable energy producers. The first stage was to identify the standard cost of a typical investment (CAPEX) and operating and maintenance costs (OPEX) in accordance with the actions of a diligent investor. The second stage comprised establishing a target rate of return that would be "*balanced and*

[4] (R-0079 Law 54/1997, of 27 November, Electricity Sector Act), Article 30(4) ("The remuneration regime for electricity production facilities subject to the special regime will be completed by receiving a premium, in the regulatory terms established for such instances […]. The grid delivery voltage will be taken into account to establish bonus amounts, together with the effective contribution to environmental improvement, primary energy savings and energy efficiency, economically justifiable use for heat production, and investment costs incurred, in order to achieve a reasonable rate of return with reference to the cost of money in money markets."). (The original wording in Spanish of the foregoing sentence reads: "*conseguir unas tasas de rentabilidad razonables con referencia al coste del dinero en el mercado de capitales.*" See idem.)

proportionate" i.e. reasonable. The rate of return was to be established with reference to the cost of money in the capital market[5].

15. Since the enactment of Law 54/1997 (Electricity Sector Act) and throughout the almost 20 years the Act remained in force, the Spanish regulatory authorities have monitored and continually adjusted the subsidies made available for renewable energy production, so these could be adapted to economic, technological changes and other factors such as the need to guarantee the SES is sustainable. The dynamic and fluid nature of regulation applicable to this regulated sector includes establishing a "*reasonable rate of return*". This is reflected in the continual adjustments set out in regulations applicable to renewable electricity production[6].

16. Royal Decree 661/2007 ("**RD 661/2007**"), which revoked RD 436/2004, was enacted in 2007 as part of this continuous adaptation process, following Royal Decrees 2818/1998[7] and 436/2004[8], establishing the following characteristic traits:

- The option for certain technologies to choose between two different tariffs, annually: (i) a fixed tariff per production unit (the "*Regulated tariff option*") or ii) a premium on the market price per production unit (the "*Premium option*");[9]
- Maximum and minimum limits for Premium Option payments;[10]
- Production based tariffs for the entire operation of a facility;[11]
- To permit the use of natural gas by renewable energy producers, for technical reasons, for up to 15% of the entire electricity generation;[12]
- Priority access and priority dispatch to and from the Spanish national electricity grid for electricity produced from renewable energy sources; and
- The principle of guaranteeing a reasonable rate of return for renewable energy producers.

[5] (R-0079 Law 54/1997, of 27 November, Electricity Sector Act), Article 30(4), *in fine*.
[6] (RL-0088 Isolux v Spain. Award dated 12 July 2016) . In the Isolux case, involving the same regulatory measures in question as this case, the Arbitral Tribunal observed that during the years prior to adopting these measures in 2012-2014, "*the regulatory framework had been amended several times*" also that these continual amendments and adjustments proved "*the government has authority and the duty to adapt to the economic and technical needs at any given time, within the [electricity sector]*" in Spain. The Arbitral Tribunal dismissed all claims related to the measures, stating that "*any investor would have foreseen not just a fundamental change to the Special Regime content, but also that the regime would eventually be abolished* ", ¶¶¶ 784-785, 787-789, 804.
[7] (R-0097 Royal Decree 2818/1998, of 23 December).
[8] (R-0099 Royal Decree 436/2004, of 12 March).
[9] (R-0101 Royal Decree 661/2007, of 25 May), Articles 24.4, 25, 27.
[10] (R-0101 Royal Decree 661/2007, 25 May), Articles 27, 36.
[11] (R-00101 Royal Decree 661/2007, of 25 May), Articles 24, 36, 44.
[12] (R-0101 Royal Decree 661/2007, of 25 May), Article 2, Article 2(1)(b)(subgroup b.1.2) "Equipment that uses fuel to maintain the heat transfer fluid temperature to compensate for absence of solar radiation, and this may affect planned energy delivery", up to 15% of the production.

17. The Kingdom of Spain has been concerned with resolving the "*tariff deficit*" ever since Law 54/1997 was enacted[13]. Once RD 661/2007 came into force, at the same time as the international financial crisis commenced in 2008, the "*tariff deficit*" in Spain increased considerably, i.e. the differences between revenue generated from tariffs paid by energy producers and by end consumers to access transport and the electricity grid network and electric system costs which were expected to be covered from tariffs (*inter alia*, the production transmission and distribution of electricity. This threatened the sustainability of the Spanish Electricity system, which was a guiding principle in Law 54/1997, to which RD 661/2007 was subordinate, and, as a result, the Spanish government started to review and implement measures intended to reduce the tariff deficit and limit availability under RD 661/2007.

18. In April 2009, Spain enacted Royal Decree-Law 6/2009[14], which introduced the "*pre-registration process*" and thereby "*sought to restrict the number of projects potentially entitled to state aid according to the RD 661/2007*". The aforesaid Decree-Law established that any plant that was not completed within three years would not be entitled to receive state aid under RD 661/2007.

19. In 2010, Spain enacted Royal Decree 1614/2010[15] in order, inter alia, to limit the number of permitted operating hours for CSP plants entitled to the premium and to eliminate the premium option during the first year of operation of facilities. That same year, Spain also passed into law Royal Decree-Law 14/2010[16], extending the toll payment requirement for using the electricity grid transport or distribution networks to all electricity producers, including those subject to the Special Regime.

20. In early 2012, the Spanish government asked the Spanish Energy Commission ("**CNE**") to produce a report setting out proposals for possible reforms to the energy sector regulations. Before drafting that report, the CNE held a public consultation process in February 2012 and invited interested parties to submit observations and comments regarding the potential reforms Spain should carry out[17]. Comments were submitted to the Spanish Energy Commission from a total of 477 interested parties.

21. Having held the consultation process with interested parties, the CNE went on to issue its report, which recommended taking steps to reduce the tariff deficit and return the SES to equilibrium, including the measures challenged by the Claimants in these Arbitration proceedings[18]. In line with the CNE recommendations, Spain passed into law a series of measures related to the production, transport and distribution of energy and these applied to all operators in the Spanish Electricity System, including renewable energy producers

[13] (R-0101 Royal Decree 661/2007, of 25 May) See for example the preamble or RD 661/2007
[14] (R-0088 Royal Decree-Law 6/2009 of 30 April).
[15] (R-0105 Royal Decree 1614/2010, of 7 December).
[16] (R-0089 Royal Decree-Law 14/2010, of 23 December).
[17] (R-0194 Information regarding the public consultation on regulatory measures in the electricity sector held on 2 February 2012 and 9 March 2012).
[18] (R-0131 National Energy Committee (CNE) report, dated 7 March 2012).

and traditional energy producers as well as consumers. Baywa challenges the following measures in this Arbitration.

22. Law 15/2012 was enacted on 27 December 2012[19] and: (i) imposed a 7% tax on revenue from energy generated by electricity producers (of both renewable and non-renewable energy) that was subsequently fed into the Spanish electricity grid, and also (ii) eliminated premiums paid for electricity generated in CSP plants using natural gas. This measure was introduced in order to limit the use of natural gas by renewable energy producers to the amount deemed necessary on technical grounds, thereby avoiding misuse of renewable energy subsidies by energy produced from non-renewable sources.[20]

23. Royal Decree-Law 2/2013 ("**RDL 2/2013**") was enacted on 1 February 2013.[21] This Royal Decree-Law (i) brought in the adjusted Consumer Price Index ("**CPI**") as the standard measure for updating inflation adjustments for tariffs and (ii) eliminated the option of a premium for each unit exceeding the market price (in other words, the Premium Option) and meant that electricity producers with CSP plants could choose between selling electricity at market price or applying a fixed tariff. CPI adjustments were brought in to stabilise inflation adjustments. The previous (non-adjusted) CPI included raw foodstuffs and fuel, rendering the index unstable. The premium option was eliminated because it caused difficulties for guaranteeing a *reasonable rate of return* and led to overpayments.

24. Royal Decree-Law 9/2013 ("**RDL 9/2013**") was enacted on 12 July 2013[22]. This Royal Decree-Law configured the public subsidies system in such a way that renewable energy production provided a "*specific remuneration*" over and above the market price but based on "*costs per installed energy unit, plus fixed established amounts for operating costs*" for different kinds of CSP and production. RDL 9/2013 maintained the *reasonable return* principle, calculated on the basis of revenue from the sale of electricity on the market plus state aid to cover 'CAPEX' and 'OPEX' costs that a standard, efficient and well-managed company would be unable to recover in view of market price.

25. **Law 24/2013** was enacted on 26 December 2013[23] and replaced the 1997 Electricity Sector Act. However, despite apparently removing the distinction made between ordinary and special regimes, the 2013 Law was based on the same principles as the earlier 1997 Act and included the *reasonable return* principle. In that regard, the Preamble to Law 24/2013 provided that the law "*enshrines the principle of reasonable return and establishes a criterion of parameters for reviewing remuneration every six years in*

[19] (R-0003 Law 15/2012 of 27 December, on fiscal measures for energy sustainability).
[20] (R-0101 Royal Decree 661/2007, 25 May) Article 2 RD 661/2007 provided that natural gas could be used in the CSP on technical grounds, to maintain the heat transfer fluid temperature as required by meteorological conditions, up to 15% of production. It was subsequently decided that the amount of natural gas necessary on such technical grounds was in fact quite small.
[21] (R-0093 Royal Decree- Law 2/2013, of 1 February).
[22] (R-0094 Royal Decree- Law 9/2013, of 12 July).
[23] (R-0077 Law 24/2013, of 26 December, Electricity Sector Act).

compliance with the aforesaid principle", also maintaining advantages agreed with renewable energy producers. The 2013 Law additionally conserved priority access rights to the grid transport and distribution networks for electricity from renewable energy sources, as had already been established in the earlier regulations and continued to favour renewable energy producers over conventional energy producers.

26. Royal Decree 413/2014 ("**RD 413/2014**") was enacted on 10 June 2014.[24] This Royal Decree defined remuneration for renewable energy producers set out in RDL 9/2013 and established a reasonable rate of return calculated on the basis of an "*efficient plant."* The concept of an "*efficient plant*" was not new, but had already been taken into account in RD 661/2007 and also in the 1997 Electricity Sector Act, which provided that the reasonable rate of return would be calculated in accordance with the 2005-2010 Renewable Energies Plan, which, in turn, allowed for technical parameters and financial scenarios based on the assumption of an efficient plant maximising its resources.[25]

27. Lastly, on 16 June 2014, Ministerial Order IET/1045/2014 (the "**Ministerial Order**") was enacted and implemented the three earlier regulations (RDL 9/2013, Law 24/2013 and RD 413/2014), setting specific economic parameters for calculating remuneration for renewable energy producers.[26] The specific economic parameters included costs related to the value of the initial investment (such as equipment), variable exploitation costs (e.g. insurance, the cost of accessing distribution networks) and fixed exploitation costs (e.g. land lease costs).

28. Just as with the 1997 Electricity Sector Act and RD 661/2007, the *reasonable return* principle was recognised and maintained in RDL 9/2013, in Law 24/2013, in RD 413/2014 and also in the Ministerial Order. Equally, and as stated above, the aforesaid regulations also preserved the main characteristics of the 1997 Electricity Sector Act and of RD 661/2007. In other words, they maintained priority access to and from the Spanish electricity grid transport and distribution networks for electricity from renewable energy sources.

29. Thus, the regulatory measures that became law between December 2012 and June 2014 maintained the same essential characteristics of the state aid system for renewable energy producers that were put in place in 1997 and subsequently adapted ever since. The Spanish regulator continually updated the renewable energy promotion system, implementing adjustments the regulator deemed necessary in view of the economic,

[24] (R-0110 Royal Decree 413/2014, of 6 June).

[25] (R-0119 2005-2010 Renewable Energy Plan for Spain), pp. 273-280. The 2005-2010 Renewable Energy Plan defined a series of technical parameters related to "*size, coolant operating hours, unit cost, operating periods, useful life, operating and maintenance costs and final sale prices*" for each type of plant and "*this was applied to a number of financing aids*" for each plant type. The Renewable Energy Plans calculated the CAPEX and OPEX for standard model plants for each type of renewable energy source.

[26] (R-0115 Order IET/1045/2014, of 16 June, which passed into law the remuneration parameters for standard facilities, applicable to some facilities producing electricity from renewable sources, cogeneration and waste.) This measure was later supplemented by Ministerial Order IET/1168/2014 of 3 July 2014, which was also part of the measures disputed by Baywa.

technological changes and market factors, reducing the tariff deficit and avoiding overpayments to renewable energy producers, thereby bringing the Spanish electricity system back into equilibrium.

30. Baywa deemed that the regulatory measures referred to above which became law between 2012 and 2014 affected the Baywa expectation that the subsidies would remain set in stone, subsequently bringing the Arbitration proceedings.

B. BAYWA AND ITS INVESTMENT

31. The Arbitration Claimants were Baywa R.E. Renewable Energy GMBH and Baywa R.E. Asset Holding, two companies incorporated in Germany, a European Union Member State, under the Laws applicable to companies in Germany and in the EU.

32. The Claimants acquired equity and participative loans in two Spanish companies, Parque Eólico La Carracha, S.L. and Parque Eólico Plana de Jarreta, S.L. These two SPVs owned two wind farms with an installed capacity of 49 MWs each, located in the Spanish province of in Zaragoza, specifically in the area known as La Muela. The wind farms were called La Carracha and Plana de Jarreta.

C. AWARD CONCLUSIONS

33. First of all, with regard to jurisdiction, Spain raised two objections to the Arbitral Tribunal jurisdiction in the course of the Arbitration proceedings: (1) no jurisdiction to hear an intra-EU dispute; and (2) no jurisdiction to hear claims related to the Tax on the Value of Production of Electrical Energy ("**TVPEE**"), created by Law 15/2012.

34. In its Award, the Arbitral Tribunal agreed that it had no jurisdiction in relation to TVPEE. However, the Tribunal wrongly dismissed the jurisdictional objection on intra-EU disputes, declaring its jurisdiction to hear the intra-EU dispute before it. Notwithstanding, the Tribunal accepted that EU Law, and especially legislation on State aid, was significant for the merits of this matter.

35. Regarding the merits of the case, the Arbitral Tribunal dismissed all but one of the Claimants´ claims.

36. Especifically, the Arbitral Tribunal dismissed the claim in relation to indirect expropriation of the Claimants' investment, with the projects continuing to operate under their control.[27]

37. The Arbitral Tribunal also rejected to the claim on the umbrella clause, deeming that neither Spanish legislation –especially Royal Decree 661/2007– nor the "agreement"

[27] (RL-0124 Previously Annex-01 Baywa R.E. Renewable Energy GMBH and Other v the Kingdom of Spain, ICSID Case No. ARB/15/16. Award. 25 January 2021), paras. 429, 430.

entered into by the wind farm sector in 2010, nor IDAE and Invest in Spain press releases or IDAE statements amounted to an undertaking on the part of the Kingdom of Spain.[28]

38. Furthermore, in relation to the Fair and Equitable Treatment standard, the Arbitral Tribunal dismissed the argument that the Claimants had legitimate expectations that the special regime established in Royal Decree 661/2007 would be maintained over the entire lifetime of the plants. The Award stated that the only legitimate expectation of the Claimants was that the plants would achieve a reasonable return. In other words, the Tribunal recognised that the Kingdom of Spain could make legislative changes affecting already existing renewable facilities, as long as it remained within the limits established in the Electricity Sector Act of granting a reasonable return:

> *"Article 30.4 of Law 54/1997 stated a general principle and empowered the administration to give effect to it by regulation. The stream cannot rise higher than its source, or commit the state to more than the legislative framework allows. A requirement that the remuneration system be such as to allow recipients 'to achieve reasonable profitability rates with reference to the cost of money on capital markets' is general in its terms, but it is perfectly intelligible and imposes some limits on what can be done.[…] the only legitimate expectation the Claimants could have had was that of a 'reasonable return' in terms of Law 54/1997."*[29]

39. The only obligation the Award deemed to have been breached is the obligation to develop and create stable conditions, as set down in Article 10(1) Energy Charter Treaty ("**ECT**") on the basis that the measures were adopted retroactively. The Arbitral Tribunal concluded in its Decision that the breach of Article 10(1), first and second sentence, only refers to the retroactive reduction of the permitted return on investment.[30]

40. Regarding Quantum, in its Decision the Arbitral Tribunal invited the parties and their respective experts to reach agreement on the compensation amount to be paid for the aforesaid breach. In its final Award, the Arbitral Tribunal ordered the Respondent to pay the Claimants compensation in the amount of 22.006 million euros. The aforesaid amount would accrue interest, calculated at EURIBOR six month rate, from 13 July 2013 until the date the Award is paid.[31] Additionally, the Tribunal dismissed the claim regarding alleged taxes to be paid in Germany on the compensation (tax gross-up). The Decision concluded as follows: "*Claimants did not substantiate their claim to a tax gross-up*" and

[28] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), paras. 433-459, 465-466.
[29] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), paras. 473, 498
[30] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), paras. 615 and 616.
[31] (RL-0124 Previously Annex-01 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Award. 25 January 2021), Para 76

"*there appears to be no precedent for the award of a tax gross-up involving taxation of a third State*".[32]

41. The Award additionally stated that each body should pay its own legal representation costs, whereas ICSID costs should be divided equitably between the Parties.

42. Moreover it should be highlighted that the Baywa Tribunal deemed that EU law on State Aid does apply to the merits of this matter.[33] In actual fact, the Award criticises the fact that the Claimants in this instance did not consider EU Law on State Aid in their due diligence process.[34] The Award also stated that as the disputed measures had not been notified to the European Commission "*the Claimants could not legitimately have expected that the Special Regime subsidies were lawful*".[35]

IV. GROUNDS FOR ANNULMENT

43. The Kingdom of Spain seeks annulment of the Award based on the following grounds, pursuant to Articles 52(1)(b) (d) and (e) ICSID Convention:

    a) That the Tribunal manifestly exceeded its powers;

    b) That a serious breach of a fundamental Procedural Rule has occurred; and

    c) That the Tribunal failed to state reasons that serve as the legal basis for dismissing the intra-EU objection.

A. MANIFEST EXCESS OF POWERS.

44. First of all, the Kingdom of Spain considers that the Award must be annulled because the Tribunal has incurred a manifest excess of powers. The aforesaid manifest excess of powers occurred when the Tribunal acted beyond its jurisdiction and contravenes EU Law, which prohibits a company from one EU country from claiming against an EU Member State (intra-EU objection);

45. Before taking a closer look at these issues, this party would remind the *ad hoc* Annulment Committee how the Kingdom of Spain believes the ground for annulment on the basis of manifest excess of powers should be construed.

(1) Introduction

[32] *Ibid*., para. 626.
[33] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), paras. 553-587.
[34] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH and Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), para. 569.c.
[35] (RL-0125 Previously Annex-02 Baywa R.E. Renewable Energy GMBH an Other v The Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum. 2 December 2019), para. 569.g.

46. Article 52 (1) (b) ISCID Convention authorises a party to bring an application for annulment of an award if the Tribunal "*manifestly exceeds its powers*". The right to legitimately exercise a Tribunal's powers is linked to consent of the parties and, as a result, the Arbitral Tribunal is deemed to have exceeded its powers if, by sections, it contravenes that consent[36]. Manifest excess of powers can be found to have occurred, *inter alia*, if the Arbitral Tribunal fails to apply the appropriate law (including the *ius cogens*) and/or if the Tribunal goes beyond its jurisdiction, does not have jurisdiction or decides matters not put by the parties.[37]

47. Failure to apply current legislation in force occurs when the Tribunal entirely ignores the applicable law, or construes it erroneously or if the wrongful application of the law is "*so clumsy or atrocious that it substantially amounts to a failure to apply the correct law*"[38].

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[36] (RL-0165 Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee dated June 14, 2010, ¶¶ 40-41 ("*the question is whether an ICSID arbitral Tribunal exceeded its competences by making reference to the agreement entered into by the parties. The authority of the tribunal arises from that agreement or undertaking which, in the final instance, establishes the scope of those competences. In the case of an investment Treaty claim, the agreement is established by means of the BIT and by the ICSID Convention (by reference, including the arbitration clause) and by filing the investor claim. When read together, these three elements comprise the arbitration clause, and, therefore, prescribed parameters of the Tribunal competences… The concept of "competences" of a tribunal goes beyond its jurisdiction and refers to the scope of the task the parties entrusted to the tribunal in compliance with the tribunal mandate and the manner in which the parties agreed that task should be performed. This is the reason why, for example, non-application of the law chosen by the parties (but not an incorrect application of the law) was accepted by the ICSID Conventional contracting states. Along the same lines, see RL-0173 Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Decision of the ad hoc Committee dated March 1, 2011, ¶¶ 95-96.*"

[37] (RL- 0126 Previously Annex-03 Updated background paper on annulment for the administrative council of ICSID, May 5, 2016) CIADI, ¶ 87 ("*Annulment committees have maintained that exceeding competences can occur if a Tribunal wrongly concludes it has jurisdiction when, in fact, there is an absence of jurisdiction or if the tribunal exceeds the scope of its jurisdiction. In the opposite sense, for a tribunal to refuse jurisdiction when jurisdiction in fact exists is also equivalent to exceeding its competences.*"); ¶ 90 *("The run up to the ICSID Convention clearly showed the non-application of the correct law by a tribunal can constitute a manifest exceeding of competences.*"); RL-0166 of the ICSID convention: documents concerning the origin and the formulation of the convention on the settlement of investment disputes between states and nationals of other states, volumes II-1 and II-2 (ICSID 20**0**6), Page 851 ("*Mr Broches (Chairman) commented that non-application of the correct law would amount to exceeding of competences if the parties had instructed the tribunal to apply a specific law*").

[38] (RL-01081 Hussein Nuaman Soufraki v. The United Arab Emirates Decision of the ad hoc, ICSID Case No ARB/02/7 committee on the application for annulment, 5 June 2007), ¶ 86; (RL-0127 Previously Annex-05 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award dated June 29, 2010 ("Sempra Decision on Annulment")) ¶¶ 164-165 ("*as a general rule, this Committee does not wish to completely set aside the possibility that a manifest error of law could, in exceptional circumstances, be of such an atrocious nature as to constitute a manifest excess of powers. In that case, the Committee has concluded that the Tribunal, (in relation to Article XI BIT) failed to apply the applicable law and, in not doing so, in fact manifestly exceeded its competences".);* (RL-0167, *M.C.I. Power Group L.C. and Turbine Inc. V Republic of Ecuador, República de Ecuador*, ICSID Case No ARB/03/6, Decision on annulment dated 19 October 2009, ¶ 43 *("The tribunal does not have unlimited leeway for applying the law, as arbitration judges must remain within the limits of their competences, as duly established in the MINE annulment decision, and may not exceed their competences."*), ¶ 49 *("[M]anifest exceeding of competences by virtue of Article 52(1)(b) ICSID Convention . . . should be construed as being equivalent to a safety valve permitting unfair or particularly unreasonable decisions to be dismissed."*), ¶ 51 ("*A serious breach of the law would have been a deviation from a legal principle or rule that is clear and may not give rise to differing interpretations,";* (RL-0160 Occidental Petroleum v. Ecuador. Decision on Annulment. 2 November 2015), ¶ 56 *("wrongful interpretation or incorrect application of the appropriate law to be applied to the merits of the matter, even serious wrongful interpretation or*

In the words of the *ad hoc* Committee in the *Pey Casado* case, "*a broad argument and analysis does not eliminate the possibility of concluding that manifest excess of powers has occurred, as long as the occurrence is sufficiently clear and serious.*"[39]

48. The *ad hoc* Committee in the case of *Soufraki* duly explained the circumstances in which wrongful application of the law equates to a manifest failure to apply the law, as follows:

"*Such that no reasonable person ("bon père de famille"), could possibly accept the erroneous or seriously erroneous and resulting application, which must be distinguished from simple error – even a serious error – when construing the law… in these annulment proceedings, both the claimant and the respondent acknowledged, during the verbal hearing stage, that an offensively erroneous construction of the correct law - but nothing less - can amount to an annulable error*."[40]

49. An *ad hoc* Annulment Committee must review not only what the tribunal says it has done, but also what the tribunal actually did, from the effective legal reasoning. In other words, even in instances when a tribunal correctly declares the applicable law, manifest excess of powers can still be found to exist if, upon review, the ruling clearly shows the Arbitral Tribunal failed to effectively apply the principles it recognised. As set out by the Annulment Committee in *Iberdrola v. Guatemala*:

"*[T]he Soufraki ad hoc Annulment Committee likewise stated that an error in application of the law can be so severe that it amounts to non-application of the relevant law. Thus, the ad hoc Annulment Committee should review the matters analysed by the Tribunal and actually argued, rather than what the tribunal says it has done. For a tribunal simply to state that it is applying the applicable law, or not, is not sufficient to decide the matter*."[41]

50. The same idea was followed by the *ad hoc* Committee in *Klöckner I*:

"*To sum up, [the Tribunal] must recognise that which is restricted to stating principles and showing failure to provide evidence of the existence of a principle or to explore the rules by which the judgment can take a specific form, that this Tribunal failed to apply "the law of the Contracting State"".*[42]

51. An identical analysis was used by the *ad hoc* Committee in *Sempra* to ensure the Arbitral Tribunal had applied the correct law, concluding as follows:

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incorrect application, do not justify annulment. Nevertheless, in exceptional circumstances, a serious or atrocious error of law may be construed as failure to apply the appropriate law, and can give rise to annulment.").

[39] (RL-0133 Previously Annex-19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012)

[40] (RL-0081 Hussein Nuaman Soufraki v. The United Arab Emirates Decision of the ad hoc, ICSID Case No ARB/02/7 committee on the application for annulment, 5 June 2007), ¶ 86.

[41] (RL-0131 Previously Annex-15 Iberdrola Energía v. Guatemala. Decision on Annulment Application. 13 January 2015), ¶ 97.

[42] (RL-0168 Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A. ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award dated May 3, 1985 Decision on annulment, ¶ 79 (emphasis in original document).

"*The Tribunal has in effect maintained that the substantive criteria of Article XI simply cannot be applied when the rules of customary international law- as stated in the IDC Articles- do not involve release from obligation instance of unlawfulness, and that Article 25 "trumps" Article XI that it provides the compulsory rule to apply. Thus, the Tribunal adopted Article 25 of IDC statutes as the primary law to be applied instead of Article XI BIT, and, in doing so, made the fundamental error of identifying and applying applicable law*."[43]

52. This case was especially significant that it concluded that even if the tribunal identifies the applicable law, for example the relevant provision of the applicable Treaty but then in fact applies a different criterion, this is deemed to be in excess of powers in that the Tribunal acted beyond the agreement of the parties to arbitration.[44]

53. The *ad hoc* Annulment Committee in *Sempra* especially emphasised the fact that "*the Tribunal did not review the basis that the applicable legal rule is that in Article X BIT."*[45] the *ad hoc* Committee *Amco I* approached the issue similarly when stating that even if the tribunal was aware of the relevant provisions of Indonesian law, it had not applied those provisions when calculating damage quantum .[46]

54. Manifest excess of powers also occurs when, instead of applying the relevant provisions of a BIT, it applies standards that are not included in that provision. In *Enron* the *ad hoc* committee annulled the judgment because the Tribunal failed to apply the legal standard included in Article 25(1)(a) of ILC, Articles and instead applied financial standards put to the Tribunal by an expert in the course of the proceedings.

55. Thus, the *ad hoc* Committee in *Enron* declared as follows:

"*The Tribunal was being asked to calculate whether, according to a proper interpretation of Article 25(1)(a) of the Articles on State Liability, the "single manner" requirement of the provision had been applied and not as decided, from an economic perspective; whether there were other available options to deal with the economic crisis. The ad hoc Committee concluded that the adopted measures were not the "single*

[43] (RL-0127 Previously Annex-05 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award dated June 29, 2010 ("Sempra Decision on Annulment")), ¶ 208.

[44] *See also*, (RL-0169 Mr. Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Annulment dated February 12, 2015, ¶ 76 ("*The ad hoc Committee agrees with the Republic of Peru in that, given that the jurisdiction of an arbitration tribunal relies on the consent of the parties, to ignore the terms of the agreement of the parties and the manner in which this is expressed in the arbitration clause amounts to exceeding its powers each time powers exercised by arbitration judges are not those that were granted. One can deduce from this that an arbitration tribunal usurps its powers when it attributes to the parties agreements and declarations that they have not entered into*.").

[45] (RL-0127 Previously Annex-05 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award dated June 29, 2010 ("Sempra Decision on Annulment")), 209.

[46] RL-0170 *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment dated May 16, 1986, 1 ICSID REPORTS 509 (1993), ¶¶ 95, 97.

manner"; that the Tribunal has in fact not applied Article 25(1)(a) of the Articles on State Liability (or more specifically, the customary international law that said provision reflects), but had in fact, instead, taken the opinion of an expert on the financial crisis. Given all the circumstances, the ad hoc Committee was of the opinion that this amounted to a breach of applying applicable law as grounds for annulment under Article 52(1)(b) ISCID Convention."[47]

56. Annulment was also granted in the *Venezuela Holdings* case on the basis that it was impossible to apply the proper law to ascertain compensation quantum in an expropriation. The relevant BIT provision stated that expropriations would be compensated on the basis of "*the market value of the investment*"[48]. Nevertheless, the same BIT provision also provided that the law applicable to the dispute included internal law of the host State and "*provisions of special agreements related to the investments*".[49] Venezuela argued that one should take into consideration the terms and conditions of the contract governing the investment in order to ascertain the compensation quantum, including a contractual clause that would provide compensation formally if government measures, which were according to the project terms, were approved by Congress. The arbitral tribunal maintained that the contractor provisions and congressional authorisations could neither "*release or excuse the respondent party from its obligations under the Treaty nor from the wording of customary international law*" and should not be affected in any way, granting compensation of more than 1,000 million US dollars.[50]

57. The *ad hoc* Committee annulled the ruling, and found that the tribunal had not applied the correct law, or stated its reasons in that regard [51]. The *ad hoc* Committee explained this as follows:

"*While it is true to say that the Tribunal gave some attention to destroying two subterfuges (that the Maximum Prices binding from the contract point of view per se in BIT Arbitration or that the Maximum price can have the effect of displacing Venezuela's international obligations with regard to investors or of prevailing over the latter), the Tribunal, did not at any point consider the significance that limitations on the rights of investors included in the Maximum Price could actually have for applying compulsory criteria established in the BIT in relation to compensation.*

(…)

[47] (RL-0171 *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic,* ICSID Case No. ARB/01/3, decision on the Application for Annulment lodged by the Republic of Argentina 30 July 2010, ¶ 377.
[48] RL-0172, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment Application dated 9 March 2017 ("Venezuela Holdings Decision on Annulment"), ¶¶ 141-142, 160, 182.
[49] Ibid, ¶ 154.
[50] Ibid, ¶¶ 156-158, 179.
[51] Ibid, ¶¶ 162, 188(a), 188(c).

In this particular case, the underlying concept remains unexplained; there is nothing in the award at first sight that permits us to establish that a relationship exists between liability 'by virtue of the suggested international law' and the compensation criterion expressly laid down in the BIT. Even if a pre-existing hypothetical obligation, under 'International Law', effectively exists… Neither was absolutely any legal reasoning set out to permit establishing the reason forming the basis that obligation can be tried in the courts and the context of arbitration. This is especially so when the grounds according to which one must consider that these prevail over the express provision received in the BIT. In other words, if the intent is such to undermine any idea by virtue of which national law can invoke breach of an international obligation as a defence, the Tribunal ended up by falling into a different version of exactly the same type of proposal, i.e. that some source of international obligation can be invoked in order to displace individual rights and obligations established in the treaty. If the Tribunal had attempted to set out the proposition directly or to set out the legal reasoning, it would have immediately noted that this proposition was entirely unsustainable, as a general principle, as is the proposal that the Tribunal intends to dismiss.

(…)

The Tribunal manifestly exceeded its powers when maintaining that international terminal law and specifically customary international law governed both ascertaining and calculating compensation quantum and calculated the compensation quantum due to the Mobil parties for expropriating their investment in the Cerro Negro project, instead of applying the BIT provisions."[52]

58. The "*manifest excess of powers*" was also explained by the *ad hoc* Annulment Committee in the *Occidental v. Ecuador* in the following terms:

"*Exceeding the powers of the tribunal is a polysemous concept:*

- according to the primary significance, this refers to the scenarios in which a tribunal decides disputes not included in the powers granted by the parties;

- nevertheless there is also a secondary meaning: when having jurisdiction, tribunal takes a wrong decision, and exceeds its powers.

(...)

The powers of an arbitration tribunal derived from the authority granted by the parties; if the arbitration judges rule on disputes not included in those granted powers, or decide matters beyond their jurisdiction, or which should not be resolved by arbitration, the award should not be maintained and must be annulled.

[52] Ibid, ¶¶ 180, 187, 188(a). *See also id.*, ¶¶ 178-179, 184.

Exceeding tribunal powers can occur both by excess and by default."[53]

59. The dispute in *Occidental* referred to a hydrocarbon prospecting and exploitation project in Ecuador, in which the claimants took part under a participation agreement. The arbitral tribunal decided Ecuador was in breach of the provisions for expropriation under the corresponding BIT, granting compensation of more than 1,700 million dollars subject to the updated value of cash flows provided for the project[54]. Nevertheless, the claimants only owned 60% of the investment: the remaining portion was owned by another company that was not the claimant in the arbitration proceedings and was not protected under the BIT[55]. As a result, the *ad hoc* annulment Committee decided that by granting compensation on the basis of 100% of the updated value of cash flows of the project, the tribunal had manifestly exceeded its powers:

"*By compensating a protected investor for an investment in which the beneficiary investor was a nonprotected investor, the Tribunal unlawfully extended the scope of its competences and exceeded its powers.*

(…)

In this instance, the exceeding of powers is manifest: the Tribunal decided it had jurisdiction regarding the investment, and at that time, [the claimant][for the purposes of Article I(a) of the Treaty] was no longer a member of TPRB, deciding the Claimants should be compensated 100% of the value of Block 15."[56]

60. The Annulment Committee in *Occidental* decided to partly annul the award on grounds of the compensation granted being inadequate. The Annulment Committee in this instance could perfectly well apply similar legal reasoning. The Annulment Committee in *Occidental* made the point that "*one could use a simple mathematical calculation*" to "*replace the amount of compensation awarded by the Arbitral Tribunal with the correct amount*", and reduce the aforesaid amount "*from 100% to 60% of the value of Block 15*" (i.e. the investment)[57]. The outcome was that the annulment decision reduced compensation granted by approximately 700 million US dollars[58].

61. In this instance, as the award is flawed by the fact of having heard an intra-EU dispute without jurisdiction for the purpose, the Kingdom of Spain argued in its defence that the grounds for annulment are of such magnitude that the Award must be annulled in its entirety.

[53] (RL-0160 Occidental Petroleum v. Ecuador. Decision on Annulment. 2 November 2015), Decision on Annulment *Occidental*, ¶¶ 48-50 (the underlining is ours).
[54] Ibid, ¶ 27.
[55] Ibid, ¶¶ 265-266.
[56] Ibid, ¶¶ 266, 268.
[57] Ibid, ¶¶ 299, 585.
[58] Ibid, ¶¶ 586, 590.

(2) Manifest excess of powers due to dismissing the intra-EU objection and hearing a dispute brought by a Claimant of one EU Member State against an EU State

(2.1) The existence of grounds for annulmment

62. As explained in the Application for Annulment, the Arbitral Tribunal exceeded its authority manifestly by going beyond its jurisdiction. Especially, the Kingdom of Spain is of the opinion that, as declared in ECJ and Member State jurisprudence, and as arising from the EU Treaties, there is no possibility of investment arbitration between one company of an EU member State and a Member State.

63. The starting point for all international issues is to turn to the corresponding sources of International Law, which are given in Article 38 of the International Court of Justice Statutes, where it states: *"The Court, whose role it is to decide disputes brought before the court in accordance with international law, must apply: (a) international Conventions, either general or private, establishing rules expressly recognised by the litigating States; (b) international custom as evidence of a practice generally accepted as law; (c) general principles of law recognised by civilised nations*[59]*;*"

64. It is especially important to highlight the fact that Article 8 of the Statute goes on to say "*without prejudice to the provisions of Article 59, court decisions and legal doctrine set down by the most competent experts in law of the various nations, as an auxiliary measure for establishing the rules of law*".

65. As a result, rulings are not deemed a source of International Law, but merely an auxiliary and subsidiary measure to assist in ascertaining the Legal rules. Nevertheless they are not Rules of Law per se. This is a significant issue, given that several court rulings exist that apply the so-called "*Parrot effect*" and reproduce the statements contained in other court rulings without going into substantive matters; the fact that this occurs merely perpetuates errors in such rulings. Unfortunately, this is what is occurring with regard to the so-called intra-EU Objection, of which the Baywa Award subject of these annulment proceedings is an example.

66. The Kingdom of Spain maintains that, in accordance with the above, two sources of Public International Law are: (a) the Conventions; (b) international custom and (c) general principles of Law, according to which the Arbitral Tribunal did not have jurisdiction to hear the dispute brought by Baywa masked by various legal instruments.

67. Insofar as Conventions are concerned, the Treaty on the Functioning of the European Union ("**TFEU**[60]") it is clear where it states the Principle of Primacy of EU Law in Declaration 17. This does not mean that the EU considers its own legislation to be

[59] (RL-0149 Statute of The International Court of Justice. 18 April 1946) Article 38 International Court of Justice Statutes
[60] (RL-0001 EU Treaty, TFEU and EU Charter Fundamental Rights. 26 October 2012. Consolidated.) TFEU.

superior to other legislation on international treaties. But it does mean that within the EU, the Member States have decided that EU legislation must be applied to intra-EU matters, whilst international Conventions continue in force for relationships with third-party countries.

68. Insofar as international custom, the Kingdom of Spain would recall that international customs are the first and most important source of International Law. The two traditional factors that international custom requires are repeated good practice and the subjective element or *opinio iuris* acceptance of the practice as law.

69. EU Law, as it regulates intra-EU issues through internal EU legislation, giving prevalence to matters established in international Conventions, has made confirmed rulings in practice. This frequent practice commenced more than 55 years ago, and has been reiterated over time and without exception in the EU, duly respected by all EU Member States and third-party countries.

70. The good practice began with the ECJ ruling in the case of *Van Geend en Loos*[61], which established the principle of the autonomy of EU Law and was subsequently confirmed by the judgment handed down in ECJ *Costa/ENEL*[62], which declared the principle of the prevalence or primacy of EU law beyond all doubt.

71. Even pursuant to general principles of International Law, there is no possibility to bring investment arbitration in intra-EU matters. Given that the TFEU was duly ratified by Member States, all Member States have accepted the prevalence of EU law. Thus, according to the *pacta sunt servanda* principle, it must be accepted that member States have committed to adhering to the principle of prevalence of EU Law.

72. The European Court of Justice has clearly acknowledged there is no possibility of bringing open investment arbitration within the EU. The ECJ judgment in the case of *Achmea* states as follows: *"Articles 267 and 344 TFEU must be construed as a prohibition on a provision of international agreements entered into by the Member States, such as Article 8 BIT, by virtue of which the investor from one Member State may, if a dispute arises in relation to investments in the other Member States, instigate proceedings against the other Member States, before an Arbitral Tribunal with jurisdiction that the Member State concerned has undertaken to accept* [63]"

[61] (RL-0162 ECJ judgment, of 5 February 1963, issued in case C-26/62. Gend & Loos v. Nederlandse administratie der belastingen). ECJ judgment, of 5 February 1963, issued in case C-26/62. Gend & Loos v. Nederlandse administratie der belastingen

[62] (RL-0249 ECJ judgment of 15 July1964, issued in Case 6/64, regarding Flaiminio Costa v. ENEL) (RL-0164 Judgment of the Court of Justice, AETR, Case 22/70. 31 March 1971). The same prevalence also reflects the fact that Member States cannot individually negotiate international treaties in issues where EU legislation exists, as set out in the so-called AETR doctrine (Case No.22/70, *Commission v Council* [1971] ECR 263 (*AETR/ERTA*)).

[63] (RL-0111Achmea B.V. v. The Slovak Republic UNCITRAL, PCA Case No. 2013-12 (Number (Number 2), Award on Jurisdiction and Admissibility of 20 May 2014.) Achmea B.V. v Republic of Slovakia UNCITRAL PCA

73. For the avoidance of doubt, Germany and the Kingdom of Spain, together with a further 20 Member States and the European Commission, specifically declared that construing the ECT and allowing intra-EU investment arbitration is *"incompatible with the Treaties, and must therefore be set aside*[64]*"*.

74. The Award wrongly considered that, in the absence of a disconnection clause, the Tribunal could not conclude that EU ratification of the ECT would replace consent given individually by EU Member States in relation to the ECT[65].

75. Based on the mistaken reasoning set out above, the Tribunal concluded it could not draw the conclusion that Spain, by consenting to submit ECT-related disputes to arbitration, excluded differences in relation to intra-EU investments. Furthermore the prevalence of EU Law excludes the jurisdiction of this Tribunal, established in the ECT. Likewise, the Award wrongly considered that the entry into force of the TFEU could not be construed as meaning it could amend the previous conclusion[66].

76. The Award has incurred the same grounds for annulment, under Article 52 (1)(b), as there is a manifest excess of jurisdiction.

77. First of all, proper application of customary rules of International Law when construing treaties obliges us to conclude that the ECT (including Article 26) does not apply within the EU. The Arbitral Tribunal has not conducted an analysis of all the rules of construction established in Article 31 of the Vienna Convention in relation to the Law of Treaties, but rather simply stated that there was no disconnection clause and that the Tribunal was of the understanding that the TFEU did not alter that scenario in any way. On that basis, the Tribunal stated its conclusion. In doing so, it failed to analyse the construction required, by virtue of Article 31 of the Vienna Convention on the Law of Treaties. Neither did it take into consideration the absence of jurisdiction of EU member states to contract obligations among themselves, as a result of the transfer of competences to the EU, as recognised in Article 1, section 3, ECT.

78. Secondly, alternatively, even if it were possible to construe that Article 26 covers intra-EU disputes, such a construction would come into conflict with the EU Treaties. That conflict, as a matter of International Law, must be decided in favour of EU law. Given that EU Law forms part of binding International Law for all EU Member States, non-application of Article 26 as an issue of EU Law means that neither the Kingdom of Spain nor the originating State of the Claimant, Germany, have made a valid offer for

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Case No.2013-12.) Achmea B.V. v Republic of Slovakia UNCITRAL, PCA Case No.2013-12 (Number (Number 2), Award on jurisdiction and admissibility, 20 May 2014.) para. 60

[64] (RL-0132 Previously Annex-16 Declaration of Member State representatives of the juridical consequences in relation to the ECJ in the case of Achmea and on the protection of investments in the European Union. 15 January 2019)

[65] (RL-0124 Previously Annex-01 Baywa R.E. Renewable Energy GMBH and another against the Kingdom of Spain, ICSID Case No. ARB/15/16. Laudo. 25 January 2021) Annex A of the Award para. 247 (3) y (4) and para. 249

[66] Id. Paras. 271 and following

arbitration to investors of other EU Member States, and that no valid arbitration agreement exists between the Claimants (nor the country of incorporation) and Spain.

79. Relationships between EU Member States are governed by the principle of "*mutual trust*", including trust in the judicial authorities of the other EU Member States, which also formed part of the EU court system. Within that system, the autonomy and uniform application of EU law is guaranteed by the authority granted to the ECJ. The aforementioned principles would apparently not be met if intra-EU arbitration were allowed.

80. The European Court of Justice, in the judgment handed down in the *Achmea*, case confirmed that, in light of Articles 267 and 344 of the Treaty on the Functioning of the EU (TFEU), EU treaties have always prohibited EU member States from offering to resolve disputes between investors and EU States before international arbitration tribunals.

81. This is not just the case with regard to the BIT, but also in relation to multilateral treaties, such as the Energy Charter Treaty (ECT). ECJ judgments form part of EU Law and, therefore, of International Law, as recognised by other arbitration tribunals.

82. It is factual that the prohibition on intra-EU investment arbitration and ECT has been expressly dealt with by the European Court of Justice in the *Komstroy* case, clarifying that the pronouncements set down in *Achmea* on the impossibility of intra-EU investment arbitration under the scope of bilateral investment Treaties must be extended to intra-EU investment arbitration, within the scope of the ECT, the latter being deemed prohibited[67].

83. Nevertheless, the Arbitral Tribunal, notwithstanding the *iura novit curia* principle and despite the principle that an Arbitral Tribunal check whether it has jurisdiction to hear the case throughout the entire proceedings, despite the fact that it was aware that throughout the process of the existing proceedings in the *Achmea* case before the ECJ, it refused to properly evaluate pronouncements of the *Achmea* judgment.

84. Furthermore, the Award concluded, specifically, that EU Law is compatible with intra-EU investment arbitration, which blatantly and openly conflicts with the outcome set down by the European Court of Justice.

85. Lastly, in the event of a conflict between the Energy Charter Treaty and EU Law, EU Member States have agreed a specific rule for resolving treaty disputes, which is that EU Law prevails over other international obligations of Member States among themselves. In other words, the prevalence of EU Law is a special dispute rule set down in accordance with International Law. The principle of prevalence of EU Law applies equally to

[67] RL-0156 ECJ (European Court of Justice) Judgment in the Case C-741/19 (Republic of Moldova v Komstroy LLC, subjugated in the rights and obligations of Energoalians). 2 September 2021 Komstroy judgment

internal law and international treaties within the EU, even when third-party countries are also party to such treaties.

86. Therefore, in accordance with the implicit TFEU conflict resolution rule, Article 26 ECT cannot apply to intra-EU relations. The dispute in question refers to relationships that purely exist within the EU and do not fit third-party countries or their investors.

87. One can deduce from this that, in accordance with well-established dispute rules, accepted by EU Member States, Article 26 ECT does not apply in this matter and, therefore, cannot lead to a valid arbitration agreement. This conflict issue is not directly dealt with in the Award.

(2.2) Conclusions

88. Pursuant to the matters set out above, the Award must be annulled by applying Article 52 (1)(b) ISCID Convention, given that allowing jurisdiction for investment arbitration within the EU amounts to a manifest excess of powers.

89. Secondarily, the Award must be annulled by application of Article 52 (1)(e) ICSCID due to manifest contradictions and failure to sufficiently state reasons for dismissing this objection.

B. FAILURE TO STATE REASONS.

90. The Kingdom of Spain is of the opinion that the Award should be annulled in that the Tribunal failed to meet its essential obligation of stating reasons for dismissing the intra-EU objection.

(1) Introduction

91. Article 52(1)(e) ISCID Convention establishes that an Award must be annulled if it failed to state the legal reasoning on which it is based. Along equal lines, in accordance with Article 48(3) l ICSID Convention the court must deal with all issues brought before the Court, and state the legal reasoning on which its conclusions are based.

92. Annulment Committees have established uniformly that Articles 48(3) and 52(1)(e) ICSID Convention require, at least, that the ruling permits the reader, *"to follow the manner in which the tribunal proceeded from Point A to point B"*.[68] Also, as clarified by

[68] (RL-0129 Previously Annex-13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 5.09. This strategy has been followed by a broad majority of ICSID Annulment committees. *See also, e.g.* RL-0173 *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Per*u, ICSID Case No. ARB/03/28, Decision of the ad hoc Committee dated March 1, 2011 Decision on Annulment, ¶ 203; (RL-0130 Previously Annex-14 Wena Hotels v. Egypt. Decision on the Application for Annulment. 5 February 2002), ¶ 79; RL-0169 *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment dated February 12, 2015 ¶ 112; (RL-0131 Previously Annex-15 Iberdrola Energía v. Guatemala. Decision on Annulment.

the Annulment Committee in the case of *Amco I, "the supporting reasons must be deeper than a simple issue of nomenclature and must serve as the proper foundation for the conclusions reached on the basis of that reasoning. To put it another way, there must be a reasonable connection between the legal basis invoked by a tribunal and the conclusions reached by this Tribunal"*.[69]

93. Under Article 52(1)(e) ICSID Convention, the *ad hoc* committees are tasked with determining whether the court has shown comprehensive and consistent reasoning. This was described by the *ad hoc* Committee in *Sempra* as follows:

"*While the fact that the complete absence of reasons warrants an annulment is clear, in practice such a situation rarely or hardly ever arises. On the other hand, there may be an (alleged) absence of reasons owing to a particular aspect of the award or to insufficient, inadequate or potentially contradictory reasons. Difficulties arise when determining which standard should be applied in deciding whether a defect of reasoning ought to result in annulment. Whereas "trivial, cursory or absurd arguments by a court" may be subject to annulment, there is no abundance of such clear-cut cases. Ad hoc committees are faced with the task of drawing the important distinction between discovering, on the one hand, reasons that are reasonably comprehensible and consistent, thus demonstrating, in general, a discernible and logically sound line of thinking, and, on the other, "circumstances [where] the award demonstrates a significant omission, preventing the reader from following the reasoning in this aspect*"[70].

94. The need to ensure that the parties are capable of understanding a judgment "is especially important in arbitration between investors and States" given that "the expression of reasons guarantees procedural legitimacy and validity".[71] As put by the Tidewater Committee:

"*The fact that not just the parties to the dispute, but also other State bodies and the general public, can understand, where a court finds against the State, the reasons why the court considers that a sovereign act violated the law and what – in the eyes of the*

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13 January 2015), ¶ 119; (RL-0128 Previously Annex-12 Fraport v. Philippines. Decision on the Application for Annulment. 23 December 2010), ¶ 249; RL-0177 *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment dated January 24, 2014 Decision on Annulment, ¶ 181; RL-0178 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment dated February 1, 2016 Decision on Annulment, ¶ 267. *See also* (RL-0157 "The ICSID Convention: A commentary" Schreuer and others. 2013), p. 824 ("*the award must be built on a coherent and logical line of reasoning, sufficient to permit an informed reader, especially the parties, to understand the legal grounds put forward by the Tribunal*.").

[69] RL-0170 *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment dated May 16, 1986, 1 ICSID REPORTS 509 (1993) Decision on Annulment, ¶ 43.

[70] (RL-00127 Previously Annex-05 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award dated June 29, 2010 ("Sempra Decision on Annulment")) (Previously Annex-008), ¶ 167.

[71] (RL-0163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment dated December 27, 2016 ("Tidewater Decision on Annulment")), ¶¶ 164, 166.

court – would be a legitimate sovereign act under the circumstances of the case, is a matter of public interest.

(…)

By introducing the possibility of annulment owing to the failure to express reasons, the ICSID Convention recognises the specific nature of investment arbitration. (…) The legitimacy of one arbitration decision to invalidate a sovereign act would be seriously infringed, were the court not obliged to explain the reasons why the act contravenes the law."[72]

95. In *Soufraki*, the Annulment Committee also clarified that insufficient and inadequate reasons will result in the annulment of a ruling:

"*[E]ven where reasoning is not entirely absent, certain flaws in the statement of reasons may result in an annulment. The ad hoc Committee considers that insufficient or inadequate reasons, as well as being contradictory, could motivate annulment. (…) Insufficient or inadequate reasons comprise reasons that, alone, cannot provide a reasonable basis for the solution reached*."[73]

96. Similarly, it has been consistently acknowledged that the requirement to indicate the reasons "*is not fulfilled by either contradictory or trivial reasons*"[74]. The *ad hoc*

[72] (RL-0163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment dated December 27, 2016 ("Tidewater Decision on Annulment")), ¶¶ 164-165.

[73] (RL-0081 Hussein Nuaman Soufraki v. The United Arab Emirates Decision of the ad hoc, ICSID Case No ARB/02/7 committee on the application for annulment, 5 June 2007) (Previously Annex-007), ¶¶ 122-123 (emphasis in original document). *See also* RL-0168 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.* ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner against the Arbitral Award dated May 3, 1985, ¶ 144 (finding failure to state reasons because statements and simple postulations do not amount to reasons); RL-0174 *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award dated November 1, 2006, ¶ 21 *("[When there is a failure to state reasons, and insofar as one simply and flatly gives no reason, or reasons given are inappropriate, then the consistency of legal reasoning is seriously affected*".); (RL-0133 Previously Annex-19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012), ¶ 86 ("*the ad hoc Committee is of the opinion that there is a logical or express basis for the conclusions in relation to a crucial point or the point that is decisive for the outcome, then annulment must come into play, irrespective of whether it is based on complete absence of reasons or the outcome of frivolous or contradictory explanations*".).

[74] (RL-0129 - Previously Annex-13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 5.09; (RL-0168 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* S.A. ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award dated May 3, 1985, ¶ 116 ("*with regard to 'contradictory reasons,' it is in principle appropriate to include this notion in the category of 'failure to state reasons' simply because two genuinely contradictory reasons cancel each other out.*"); (RL-0081 Hussein Nuaman Soufraki v. The United Arab Emirates Decision of the ad hoc, ICSID Case No ARB/02/7 committee on the application for annulment, 5 June 2007 (Previously Annex-007)), ¶ 125 ("*one can also deem contradictory reasons to mean the absence of an indication of reasons*") (emphasis in original document); (RL-0133 Previously Annex-19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012) ¶ 281 ("*As perfectly established in multiple ad hoc ICSID Annulment Committees, 'failure to state reasons' may be a combination of contradictory reasons*".); (RL-0163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian

committees have applied this principle and have annulled rulings where the reasoning of the court was deemed inconsistent or contradictory. In *Amco I*, the Committee annulled the ruling because, among other reasons, the court contradicted itself when it came to quantifying the investment of the claimants by including a loan as part of the claimant's alleged share capital, despite the fact that the court "*was certain that the rules excluded loan funds sourced from foreign capital investment*"[75].

97. In MINE, the Committee concluded that the court "*had contradicted itself*" and had not fulfilled "*the requirement for a ruling to indicate its underlying reasons*".[76] On the one hand, the court rejected the theories for damages as submitted by the parties on the grounds that these were speculative. On the other hand, it adopted a theory for damages which "*disregarded the actual situation and was based on a hypothesis that the same court had rejected as the calculation basis for the damages*".[77]

98. In *Pey Casado v. Chile*, the court decided that the expropriation of the claimants fell outside the temporal scope of the BIT, and therefore fell outside the jurisdiction of the court.[78] In adopting this decision, the court expressly signalled that discussion of the expropriation claim "*could not be considered by the Court*".[79] However, when quantifying compensation for the claimants, the court used a calculation based on expropriations which had already been used by the Chilean authorities in offering compensation for the expropriation of the claimants' investment. The Committee annulled the damages portion of the ruling due to the fact that the "*reasoning used by the court*" was "*simply contradictory*".[80]

Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment dated December 27, 2016 ("Tidewater Decision on Annulment")), ¶ 170 ("[*Genuine contradictions cancel each other out' and can amount to not stating reasons*".); (RL-0175 *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on annulment dated 5 April 2016 ("Decision on annulment in the case of *TECO*"), ¶ 90 ("[*Contradictory reasons can justify annulment*".); (RL-0158 Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No.ARB/08/12,Decison on the Annulment Application 21 February 2014.) ¶ 185 ("*Any reasons deemed contradictory or frivolous can amount to not stating reasons and may lead an ad hoc Committee to dismiss an award*".); RL-0179 *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment of the Republic of Seychelles dated June 29, 2005, Decision on annulment, ¶ 70 ("*Article 52(1)(e) requires the Tribunal to state reasons, and for those reasons to be understandable, in other words they should neither be 'contradictory' nor 'frivolous'*"); RL-0172 *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment dated March 9, 2017, ¶ 189 ("[*The fact of not stating appropriate reasons and that they must not be contradictory takes on a vital importance*"). *See also* (RL-0157 "The ICSID Convention: A commentary" Schreuer and others. 2013), p. 1011 ("*Contradictory reasons will not permit the reader to understand the grounds on which the tribunal ruled, just as if there were no reason at all"*.).

[75] (RL-0170 *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment dated May 16, 1986, 1 ICSID REPORTS 509 (1993) Decision on Annulment, ¶ 97.

[76] (RL-0129 Previously Annex-13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 6.107.

[77] Ibid.

[78] (RL-0133 Previously Annex-19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012).

[79] Ibid, ¶ 283.

[80] Ibid, ¶¶ 282-286.

99. As previously discussed, in the *Tidewater* Case, the court expressly adopted a country risk premium of 14.75% in order to calculate the discount index to apply to the compensation owing to the legal expropriation of the claimants' investment.[81] Nevertheless, the court ruled in favor of a country risk premium of 1.5%, instead of applying the 14.75% index as it had expressly agreed to apply. The Committee annulled the part of the damages of the ruling because the compensation that the court settled on was "*irreconcilable with the findings of the court*" and "*authentically contradictory*".[82]

100. Finally, Articles 48(3) and 52(1)(e) ICSID Convention also impose on the court the obligation to deal with the issues, arguments and proof presented. The fact that a court "*does not broach a specific query submitted to it*" or "*does not deal with certain relevant proof or evidence*" in its determination is tantamount to not indicating the reasons and is justification for an annulment.[83] The *MINE ad hoc* Committee annulled the damages section in that case because "*the court had not dealt with the questions raised by Guinea, the responses to which may have affected the court's findings*".[84] In the words of that Committee:

> "*If the argument put forward by Guinea (…) had been accepted, it would have meant a dramatic reduction in the claim for damages. [The arguments made by Guinea] therefore raised an important dilemma. The court either failed to consider them, or, while it did consider them, it believed it should reject Guinea's arguments. This fact, however, did not relieve the court of its obligation to state the reasons for its rejection, as the basis for its findings*."[85]

101. Similarly, the *TECO ad hoc* Committe annulled the decision made by the court in respect of damages against the claimant's loss of value because the court "*was unaware that evidence in the record included evidence which appeared, at least, relevant*".[86] The "*complete lack of discussion*" by the court "*of the Parties' export reports*" about the matter "*meant that [the committee] assumed the court's actual line of reasoning*".[87]

(2) Failure to state reasons why the Award rejects the intra-EU objection

(2.1) Existence of ground for annulment

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[81] (RL-0163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment dated December 27, 2016 ("Tidewater Decision on Annulment")), ¶ 181.
[82] Ibid, ¶ 189.
[83] (RL-0126 Previously Annex-03 Updated background paper on annulment for the administrative council of ICSID, May 5, 2016) Updated document on Annulment for the ICSID Adminitrative Council, (Previously Annex-009) ¶ 104.
[84] (RL-0129 Previously Annex-13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 6.99.
[85] Ibid, ¶ 6.101.
[86] RL-0175 *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment dated April 5, 2016, ¶ 138.
[87] Ibid, ¶¶ 131, 137.

102. As the Kingdom of Spain indicated above, the Kingdom of Spain invoked in the Arbitration that EU Law is applicable to the dispute and affects both the substance of the dispute and the jurisdiction. It must be recognised that the Award applies EU Law in respect of the substance of the dispute, but, unfortunately, the Award enters into the substance where it should not have, because the court was without jurisdiction under the intra-EU objection.

103. The Award devotes points 247–251 and 262–283 to attempting to prove there is jurisdiction for hearing intra-EU disputes. The Kingdom of Spain considers that the weak and clumsy reasoning of the Court has already been displayed, as there is manifest overreach here. Nonetheless, let us briefly revisit the matter.

104. The Award splits the "analysis" of the matter into two distinct sections. On the one hand to declare that, without a disconnection clause, the ECT shall be considered as applicable[88]. On the other hand, to declare that, where a conflict exists between the ECT and EU treaties, the conflict must be resolved in favour of applying the ECT[89].

105. With regard to the first aspect, the reasoning is entirely insufficient and, in practice, restricts itself to pointing out that the non-existence of a disconnection clause determines that the ECT is applicable between EU Member States and that the distribution of competences between the EU and the Member States shall not impinge on the full application of the ECT.

106. The Award makes such announcements without supporting them in any way, legally or otherwise.

107. In identical fashion, the Award is based on the false reasoning that *Achmea* has no effect on the application of ECT Article 16, purely on the grounds that *Achmea* refers to a bilateral investment treaty. The Court recognises that the solution would be different had *Achmea* referred to a multilateral investment treaty[90]. As it stands, the European Court of Justice declared in *Komstroy* that the same pronouncements made by Achmea for a bilateral treaty are applicable to the ECT.

(2.2) Conclusions

108. International arbitration cannot authorise arbitration tribunals to alter the source system for International Law and refuse subsequent international agreements their having full application.

109. International arbitration cannot authorise, without establishing grounds, international courts to alter the potential consent of the Parties to arbitration. If the

[88] (RL-0124 Previously Annex-01 Baywa R.E. Renewable Energy GMBH et al -v- Kingdom of Spain, ICSID Case No. ARB/15/16. LAward. 25 January 2021) Annex A, paras. 247 to 251.
[89] Ibid. Paras 262 to 283
[90] Ibid, para 282.

potential consent of the Parties to the underlying Arbitration is based on the ECT, with the law applicable being determined pursuant to Article 26(6) ECT, in addition to Article 38 of the Statute of the International Court of Justice, arbitration courts shall not alter the potential agreements for determining the law applicable to arbitration, as the Arbitration Court did without providing reasons, as reflected in the Award under application for annulment.

110. The foregoing are grounds for the annulment of the Award under Article 52(1)(e) ICSID Convention and/or, where applicable, under Article 52(1)(b) *ibid*.

C. SERIOUS BREACH OF A FUNDAMENTAL PROCEDURAL RULE

111. Moreover, the Applicant seeks annulment of the Award based on infringement by the Arbitral Tribunal of a fundamental procedural rule: the right to be heard. The Baywa Tribunal denied the incorporation into the record of the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019. Additionally the tribunal improperly rejected the application from the European Commission to act as Amicus Curiae, and thereby rejected the option to hear from the best possible expert in regard to a key jurisdiction objection raised by the Kingdom of Spain.

(1) Introduction

112. Pursuant to Article 52(1)(d) ICSID Convention, an award must be annulled if it produces a serious deviation from a fundamental procedural rule. A deviation is deemed serious if a party is deprived of protection granted under the relevant procedural rule. A procedural rule is deemed fundamental if it refers to the fundamental impartiality that should govern all proceedings and is included in the minimum "*due process*" standards required in International Law[91].

113. One such procedural rule uniformly recognised as fundamental is that a party must be given a full and fair opportunity to present its case, in other words: "*the right of a party to be heard*".[92] Generally speaking, the right to be heard is the "*right of the party to*

[91] (RL-0126 Previously Annex-03 Updated background paper on annulment for the administrative council of ICSID, May 5, 2016) (Previously Annex-009), ¶ 98.

[92] (RL0126 Previously Annex-03 Updated background paper on annulment for the administrative council of ICSID, May 5, 2016), ¶ 99; (RL-0129) Previously Annex -13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 5.06; (RL-0163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment dated December 27, 2016 ("Tidewater Decision on Annulment")) ¶ 149; (RL-0172 *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment dated March 9, 2017, Decision on Annulment Venezuela Holdings, ¶130; (RL-0160) Occidental Petroleum v. Ecuador. Decision on Annulment. 2 November 2015), ¶ 60; (RL-0130 Previously Annex -14 Wena Hotels v. Egypt. Decision on the Application for Annulment. 5 February 2002), ¶ -7; (RL-0131 Previously Annex -15 Iberdrola Energía v. Guatemala. Decision on the Application for Annulment. 13 January 2015), ¶ 105; RL-0178 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment dated February 1, 2016 Decision on annulment, ¶ 314; RL-0179 *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for

state its claim or its defence and to submit all arguments and evidence supporting that claim or defence".[93] The aforesaid right:

"*Provides the parties with an opportunity to submit all their arguments and relevant evidence, and to respond to arguments and evidence adduced by the opponent. Especially, each party must have an opportunity to respond to each formal legal point put to the court and every legal issue raised by the case*."[94]

114. The right to be heard not only refers to the right of the parties to submit arguments and evidence, but also to do so with an "*equal comparative opportunity*" to the other party.[95] In other words, the right to be heard includes the "*equality of the parties rule*".[96]

115. "*A deviation from right to be heard, which is a fundamental procedural rule*" occurs "*when a party is not given a full, fair or comparatively equal opportunity to present its defence or submit evidence in relation to each element of the claim at every stage of the arbitration proceedings*."[97]

116. The right to be heard can be infringed in a variety of manners. One is when a party is not allowed to present "*all arguments and all evidence the party [deems] significant*".[98] "*If a tribunal refuses to allow an argument to be put or evidence to be adduced" this amounts to a "refusal to hear" one of the parties and "[would imply] the right to be heard has been infringed*".[99] Such an infringement is further exacerbated when the other party receives different treatment and is allowed to present their arguments and evidence, under similar circumstances.

Annulment of the Republic of Seychelles dated June 29, 2005, Decision on annulment, ¶ 49; (RL-0128 Previously Annex -12 Fraport v. Philippines. Decision on the Application for Annulment. 23 December 2010), ¶ 197; (RL-0159 Azurix Corp.v. The Argentine Republic. Decision on the Application for Annulment. 1 September 2009), ¶¶ 52, 212 (RL-0161 Tulip v. Republic of Turkey. Decision on Annulment. 30 December 2015), ¶¶ 80, 82_(RL_0133 Previously Annex -19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012), ¶ 184;

[93] (RL-0130 Previously Annex -14 Wena Hotels v. Egypt. Decision on the Application for Annulment. 5 February 2002), ¶ 57.

[94] (RL-0161 Tulip v. Republic of Turkey. Decision on Annulment. 30 December 2015), ¶ 80. *See also* (RL-0131 Previously Annex -15 Iberdrola Energía v. Guatemala. Decision on the Application for Annulment. 13 January 2015), ¶ 105.

[95] (RL-0133 Previously Annex -19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012), ¶ 184; (RL-0160 Occidental Petroleum v. Ecuador. Decision on Annulment. 2 November 2015), ¶ 60; (RL-0131 Previously Annex -15 Iberdrola Energía v. Guatemala. Decision on the Application for Annulment. 13 January 2015), ¶ 105; (RL-0161 Tulip v. Republic of Turkey. Decision on 30 December 2015), ¶ 145; (RL-0128 Previously Annex -12 Fraport v. Philippines. Decision on the Application for Annulment. 23 December 2010), ¶ 202; (RL-0129 Previously Annex -13 MINE v. Guinea. Decision on the Application by Guinea for Partial Annulment. 14 December 1989), ¶ 5.06; (RL-0159 Azurix Corp.v. The Argentine Republic. Decision on the Application for Annulment. 1 September 2009)¶¶ 213-214

[96] RL-0170 *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment dated May 16, 1986, 1 ICSID REPORTS 509 (1993), Decision on annulment, ¶ 88.

[97] (RL-0133 Previously Annex -19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012), ¶ 184;

[98] (RL-0161 Tulip v. Republic of Turkey. Decision on Annulment. 30 December 2015), ¶ 80.

[99] Idem, ¶ 82.

117. The right to be heard is also infringed if a party is not provided the opportunity to properly respond to arguments and evidence submitted by the other party, in that the right to be heard includes *"the right of each party to make presentations on evidence adduced by the opponent"*.[100] Especially, a tribunal must *"grant both parties the opportunity to make presentations when the Tribunal receives new evidence which it deems significant for its final deliberations"*.[101] In the event that *"an arbitral tribunal fails to award that right, the award handed down may be annulled"*.[102]

118. The *ad hoc* Committee in *Fraport* annulled the award on the basis that the Tribunal had not permitted the claimant to rebut the new evidence put by the respondent. After the hearing had concluded, the Tribunal requested the respondent to file evidence relating to the dismissal of the prosecution lawyer in a criminal case brought against the claimant. On the basis of the tribunal's request, the respondent filed a large number of documents from the prosecution lawyer's dossier. The claimant also filed documents in relation to the prosecution lawyer's dossier. Nevertheless the arbitral tribunal did not permit the parties to make any allegations with regard to the new evidence filed by the respondent, when ascertaining the Tribunal had no jurisdiction over the dispute as the claimant's investment contravened national law.[103]

119. The *ad hoc* annulment committee concluded the tribunal *"should have provided an additional opportunity to the parties to submit their evidence"* on a specific issue related to the new evidence put by the respondent.[104] Given that the tribunal failed to grant that opportunity to the claimant and that the new evidence submitted by the respondent had special importance for the tribunal's ruling, the ad hoc annulment committee decided to annul the award entirely.[105]

120. Other ad hoc annulment committees have applied similar legal reasoning and annulled awards where a party was not granted a true opportunity to rebut evidence and submit its case. In *Pey Casado*, the Tribunal concluded that Chile infringed provisions on denial of justice rather than having discriminated the relevant BIT yet nevertheless granted compensation based on an evaluation for expropriation of the claimants' investment. In the course of the annulment proceedings, Chile argued that it had been denied the opportunity to put its case in relation to calculation of damages for non-expropriation claims, which were finally taken as the basis for liability.[106] The *ad hoc* annulment committee agreed with Chile, in that it found there had been a serious deviation from a fundamental procedural rule that requires annulment, despite the fact

[100] (RL-0128 Previously Annex-12 Fraport v. Philippines. Decision on the Application for Annulment. 23 December 2010) ¶ 200.
[101] Idem ¶ 202.
[102] Idem ¶ 200.
[103] Idem ¶¶ 155, 157, 159-160, 179, 230, 235.
[104] Idem ¶ 245.
[105] Idem, ¶ 247.
[106] (RL-0133) Previously Annex-19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012), ¶¶ 247-248;

that the matter of damages had been discussed at the hearing, albeit briefly. The *ad hoc* annulment committee confirmed that one cannot expect a party to present its case *"in a minute"* in the course of the hearing.[107] Another fundamental consideration in the ad hoc committee's conclusion was the fact that the parties were not given the opportunity to file subsequent petitions to the hearing, which would have set out Chile's quantum calculation as arising from breach of Article 4 BIT.[108]

121. Unjustified refusal by a Tribunal of a request from an applicant to file documents is a further example of breach of the right to be heard. One circumstance that should be taken into account to decide whether a Tribunal's refusal to seek the filing of documents equates to violation of the right to be heard is whether the Tribunal, having disallowed the filing of the documents, concluded there was an absence of evidence in the case.

122. In *Pey Casado*, the *ad hoc* Committee dismissed the applicant's statement that the Tribunal ruling to not seek the Claimants' documents to be filed amounted to a violation of the right to be heard because the *ad hoc* committee *"found the Tribunal had not used the absence of evidence in the matters dealt with given the denial of applications for evidence from Chile"* to affect its ruling.[109] However, a serious deviation may have occurred when a Tribunal cites the absence of evidence as the basis for its ruling, having earlier refused applications regarding documents in relation to that evidence. As established by Derains: *"if a party can demonstrate it was unable to comply with the burden of evidence unless it could submit certain documents, the arbitral judges have a duty to require submission of those documents. If they fail to do so, justice will not be done and the end purpose of the arbitration award is at stake."*[110]

123. Other jurists agree that the refusal by a Tribunal to order documents to be submitted can constitute an infringement of the right to be heard:

- Kaufmann-Kohler: "*[O]ne cannot ignore the fact that refusal to order documents to be submitted can amount to an infringement of the opportunity and the right of the party to be heard, under certain circumstances. That right includes the right to submit evidence to support one's case. If one party does not have the necessary documents to establish the relevant facts as is its duty for the burden of proof and the documents remain demonstrably under the control of the opponent, then one can reasonably argue that refusal to grant an application for the documents may deprive the party seeking discovery of the opportunity to be heard*."[111]

[107] Idem., ¶ 263.
[108] Idem., ¶ 264.
[109] Idem ¶ 331.
[110] RL-0182 Yves Derains, Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint, in the International Chamber of Commerce Gazette, Special 2006: Documents filed in international 83 (International Chamber of Commerce 2006), p. 87.
[111] RL-0183 Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1313 (October 2003), pages 1327-1328, no. 66.

- Schreuer: *"Allowing and evaluating evidence is a fundamental aspect of fair and impartial court proceedings. Breach of the relevant rules, as set out in Arbitration Rules, but also of general principles of law, may expose an arbitration award to annulment on the basis it incurred serious breach of fundamental procedural rule in accordance with Article 52(1)(d) ICSID Convention."*[112]

- Berger: "*[T]he Scope and handling of document presentation is at the procedural discretion of the arbitration Tribunal. (…) [T]hat procedural discretion is always subject to the right of the parties to procedural guarantees. In addition to the prior specific requisites that apply to an application to file (…) the arbitral Tribunal must, therefore, always take into consideration that refusal to order documents to be submitted may amount to violation of an arbitration proceedings guarantee*."[113]

- El-Ahdab and Bouchenaki: "*[I]t would seem that the ability of a party to request certain documents held by its opponent -by the corollary and the ability of turning to the tribunal to order such filing of documents if the presenting party refuses to provide the documents requested - has gradually become a 'right' and, more specifically, is deemed a procedural or fundamental right and related to procedural guarantees. Arbitral tribunals, in principle and in practice are more and more reluctant to ignore the matter and therefore to refuse to grant permission*."[114]

124. At all events, procedural breach as a basis for annulment does not end with the matters set out above. On this point, one should remember the words of the *ad hoc* Committee in Iberdrola v Guatemala:

> *"This Committee understands that a fundamental rule of procedure is one that establishes a minimum procedural standard that must be respected in accordance with international law, as defined in Wena Hotels v. Egypt.63. In general, the following hypotheses have been recognised as a violation of fundamental rules: (i) the lack of impartiality and unequal treatment of the parties, (ii) the violation of the right to be heard, (iii) the absence or abuse of deliberation by the arbitrators; (iv) the violation of rules of proof and (v) the violation of rules of legal standing."*[115]

125. In the present case, the Tribunal incurred in a serious breach of fundamental rules, and specifically it seriously deviated from the fundamental right of Spain to be heard, when it prevented the Kingdom of Spain from submitting the "Declaration of the

[112] RL-0176 Christoph H. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (2nd ed., Cambridge University Press 2009) (Excerpt), Art. 43, page 642, ¶ 4.
[113] RL-0180, Peter Berger, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION (3rd ed., Kluwer Law International 2015), page 585-586, ¶¶ 26.34-26.35.
[114] RL-0181 Jalal El-Ahdab and Amal Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, in ARBITRATION ADVOCACY IN CHANGING TIMES, 15 ICCA CONGRESS SERIES 65 (A. Jan van den Berg ed., Kluwer Law International 2011), Page 99.
[115] (RL-0131 Previously Annex 15 Iberdrola Energía v. Guatemala. Decision on the Application for Annulment. 13 January 2015), para. 105.

Representatives of the Governments of the Member States, of 15 January 2019" in its defence, a key document for the defence of the Kingdom of Spain. Additionally, the Tribunal improperly refused to allow the European Commission's application to act as Amicus Curiae on an essential matter, bearing in mind that the Commission is the most authoritative voice for illustrating the Tribunal both on the intra-EU Objection and the application of EU law to the merits of the dispute.

126. Before proceeding to analyse the procedural breaches, it is appropriate to remember, as highlighted by the ad hoc Committee in the *Pey Casado* case, that the annulment Applicant is not obliged to prove the arbitration outcome would have been different if the infringed procedural rule had been upheld[116], but rather must only show the serious nature of the breach in this instance. The Kingdom of Spain is of the opinion that the serious nature of these breaches is irrefutable.

(2) The Tribunal infringed Spain's right to be heard by refusing to allow the presentation of the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019

127. In the Baywa proceeding, the Arbitral Tribunal prevented Spain from including into the record the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019. Said document contains a declaration from the EU Member States, including Germany, the Claimants' country, and of the Respondent, the Kingdom of Spain, on the juridical consequences of the Court of Justice Judgment in Achmea and on protecting investments in the European Union.

128. On 28 January 2019, the Kingdom of Spain sent a letter to the Arbitral Tribunal seeking to introduce the Declaration into the arbitration proceedings record, pursuant to paragraph 16.3 Procedural Order No. 1. In its letter, the Kingdom of Spain also sought permission for the Parties to submit allegations on this new legal authority. The Kingdom of Spain explained in its letter the importance of the document in question with regard to certain key aspects of its defence:

> *"[t]he Declaration deals with the full extent of the consequences of the ruling of the CJEU in Achmea concerning investment arbitration and particularly the ECT in relation to EU law, and therefore relates directly with both the jurisdictional objection raised by the Respondent and with the application of EU Law for the settlement of the intra-EU dispute presented before this Arbitral Tribunal."*[117]

129. On 6 February 2019, the Baywa Tribunal replied by a short letter to the Parties and denied the Respondent's Request. The Tribunal's letter simply said*:*

[116] (RL-0133 Previously Annex -19 Pey Casado v. Chile. Decision on the Application for Annulment. 18 December 2012)¶ 78.
[117] R-0517N (Previously Annex -17) Letter of 28 January 2019 sent by the Kingdom of Spain to the Baywa Tribunal requesting leave to introduce into the record the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019.

"Dear Counsel,

I refer to Respondent's January 28 request to introduce a new document into the record, and Claimants' response of February 4, 2019.

Having reviewed the parties' arguments, the Tribunal considers that pursuant to section 16.3 of Procedural Order No. 1 no exceptional circumstances exist to admit the proposed document at this advanced stage of the proceedings. Respondent's request is therefore denied."[118]

130. This decision of the Arbitral Tribunal seriously breached fundamental procedural rules. Firstly, the right of the Kingdom of Spain to be heard when the Tribunal prevented the Kingdom of Spain from providing a highly significant document as proof of its case. The underlying arbitration was an intra-EU dispute between German investors and the Kingdom of Spain and the document concerned contains a declaration, inter alia, from Germany and Spain confirming it is not possible for intra-EU arbitration to exist.

131. One has to bear in mind that Germany and Spain, by means of that declaration, gave a value of interpretation in relation to how the ECT should be understood between them. Given that the Arbitral Tribunal was called to interpret the ECT, the declaration was absolutely essential for its decision on the intra-EU objection. It is not possible to understand why the Arbitral Tribunal refused to include this interpretative Declaration from Germany and Spain, in the dossier.

132. It should be taken into account that the burden of proof does not lie with the party seeking to annul the Award to prove it would have won the case if the declaration been allowed in the record. All the applicant has to show is that allowing the document would have potentially led to a substantially different award. In this sense, the a*d hoc* Committee in Caratube stated as follows:

"A departure is serious if the violation of the fundamental rule of procedure produced a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied"[119]

133. Along the same lines, the Commission in Tulip highlighted:

"To require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome. Therefore, an applicant must demonstrate that the observance of the rule had the potential of causing the tribunal to render an award substantially different from what it actually decided."[120]

[118] R-0518 (Previously Annex -18) Letter of 6 February 2019 from the Baywa Tribunal to the Parties.
[119] RL-0158 Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No.ARB/08/12,Decison on the Annulment Application 21 February 2014.), ¶ 99
[120] RL-0161 Tulip v. Republic of Turkey. Decision on Annulment. 30 December 2015), ¶¶78

134. As we saw above, in this case the breach was potentially very important for the outcome as it contains a direct and explicit declaration of the two ECT Contracting Parties involved in this dispute, Germany and Spain, on the effects of the Achmea judgment on intra-EU arbitration proceedings.

135. Nevertheless, additionally, and secondly, the Arbitral Tribunal seriously infringed fundamental procedural rules by refusing to allow the incorporation into the record of said Declaration without providing any justification at all. In other words, the Tribunal not only refused to allow a capital document for Spain's defence but additionally it did so entirely failing to state the reasons for that refusal. As we have seen, the letter of 6 February 2019 in which the Tribunal rejects the submission of the Declaration is a simple three-line letter that simply states that there are no exceptional circumstances to allow the filing of the document. There is no attempt to offer any explanation as to why. As at today's date the Kingdom of Spain still does not know why the Tribunal deemed there were no exceptional circumstances to reject the inclusion into the record of this new document, which had been published just a few days before Spain requested it be included in the case and directly affected one of the main arguments of the Respondent's defence.

136. By reason of all the above, one must conclude that the Baywa Tribunal seriously breachedfundamental rules of procedure. As a result, the Award must be annulled under Article 52 (1)(d) ICSID Convention.

(3) The Tribunal improperly rejected the application from the European Commission to intervene as Amicus Curiae

137. Furthermore, it is not possible to understand why the Tribunal did not permit the European Commission to act as "amicus curiae" in this case.

138. Whne delaing with the intra-EU objection, the Award refers to ECT preparatory work and upholds their value. Nevertheless, the institution that would best construe the evolution of that preparatory work and in relation to the reason for the ECT final draft was not authorised to act as "amicus curiae".

139. Surprisingly, the Tribunal decided not to hear from those who could have explained the entire ECT formation iter and explain the final draft.

140. Nevertheless the fact is that, additionally, the European Comission is a privileged subject when it comes to explaining how the EU treaties should be interpreted, and the relationship between them and the ECT. In other words, the European Commission, as "Guardian of the EU Treaties" could have provided a different and qualified view in relation to: (1) how EU treaties must be interpreted; and (2) on the relationship between the ECT and EU treaties. That qualified view is especially important as the European Commission was the driver of the ECT itslef. It is not possible to understand why the Commission was not allowed to even submit a written report in that regard.

V. PETITUM AND RESERVATION OF RIGHTS

141. By virtue of the above, the Kingdom of Spain respectfully requests the *ad hoc* Committee to annul the Award based on the grounds and arguments set out in this Memorial and, especially, that:

a) The *ad hoc* Committee completely annuls the Award pursuant to Article 52(1)(b) ISCID Convention, as the arbitral Tribunal incurred manifest excess of powers when it heard a dispute between investors from one EU Member State (Germany) and a State that is also a member of the EU.

b) Completely annul the Award pursuant to Article 52(1)(e) ISCID Convention, due to its failing to state the reasons why the Tribunal believes that it has jurisdiction to hear a dispute between an alleged investor from one EU State and a State that is also a member of the EU.

c) Completely annul the Award pursuant to Article 52(1)(d) SCID Convention, due to a serious breach of fundamental rules of procedure as the Tribunal did not allow the Kingdom of Spain to adduce a significant document for its defence and rejected the involvement of the European Commission as amicus curiae with regard to a matter that is equally key to its defence.

142. The Kingdom of Spain considers that its understanding that the facts described in this Memorial amount to specific grounds to annul under Article 52(1) ISCID Convention does not mean the *ad hoc* Committee could not annul the Award if it deems those facts amount to a different ground to annul under Article 52(1) ISCID Convention.

143. The Kingdom of Spain reserves the right to supplement, amend or add to these allegations and to submit all such additional arguments as necessary in accordance with the ISCID Convention, the ISCID Arbitration Rules, Procedural Orders and the *ad hoc* Committee guidelines.

Respectfully submitted,