INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

JGC Holdings Corporation
Respondent on Annulment

v.

Kingdom of Spain
Applicant on Annulment

(ICSID Case No. ARB/15/27)

Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee
Ms. Dyalá Jiménez, President of the *ad hoc* Committee
Ms. Tina M. Cicchetti, Member of the *ad hoc* Committee
Dr. Ucheora Onwuamaegbu, Member of the *ad hoc* Committee

Secretary of ad hoc Committee
Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to President of the ad hoc Committee
Ms. Karima Sauma

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6 February 2024

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REPRESENTATION OF THE PARTIES

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TABLE OF [SELECTED] ABBREVIATIONS/DEFINED TERMS

Annulment Application	Application for Annulment of the Award filed by the Kingdom of Spain on 3 September 2022
Applicant or Respondent or Spain	Kingdom of Spain
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings as of 10 April 2006
Award	Tribunal's Award rendered on 9 November 2021 in *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain* (ICSID Case No. ARB/15/27), which incorporated the Decision on Jurisdiction, Liability, and Certain Issues of Quantum issued on 21 May 2021
ECT	Energy Charter Treaty which entered into force for Japan on 21 October 2002 and for the Kingdom of Spain on 16 April 1998
C-[#]	JGC's Exhibit
Memorial on Annulment	Kingdom of Spain's Memorial on Annulment dated 8 November 2022
Reply on Annulment	Kingdom of Spain's Reply dated 13 March 2023
CL-[#]	JGC's Legal Authority
Committee	The *ad hoc* Committee composed of Ms. Dyalá Jiménez Figueres (President), Ms. Tina M. Cicchetti, and Dr. Ucheora Onwuamaegbu
Counter-Memorial on Annulment	JGC's Counter-Memorial on Annulment dated 17 January 2023
2021 Decision	Tribunal's Decision on Jurisdiction, Liability and Certain Issues of *Quantum* issued on 21 May 2021; attached to the Decision was separate opinion by arbitrator Mónica Pinto. The 2021 Decision is part of the Award

Decision on the Stay of Enforcement of the Award	Committee's Decision on the Stay of Enforcement of the Award dated 23 November 2022
Decision on the Disqualification Proposal	Decision issued by Ms. Tina Cicchetti and Dr. Ucheora Onwuamaegbu (the "Unchallenged Members of the *ad hoc* Committee") on the Proposal to Disqualify Ms. Dyalá Jiménez Figueres dated 22 August 2022
Hearing on Annulment or Hearing	Hearing on Annulment held on 19 July 2023 in person in London, United Kingdom and by video conference
Hearing on Stay	Hearing on the stay of enforcement of the Award, held on 19 October 2022 by video conference
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Kingdom of Spain's Exhibit
Rejoinder on Annulment	JGC's Rejoinder dated 19 May 2023
RL-[#]	Kingdom of Spain's Legal Authority
Tr. Day [#] [page:line]	Transcript of the Hearing of 19 July 2023
Tribunal	Arbitral tribunal that rendered the Award, composed of Prof. Hi-Taek Shin, President, Prof. Dr. August Reinisch, and Prof. Mónica Pinto

1. The claimant is JGC Holdings Corporation (formerly JGC Corporation) ("**JGC**" or the "**Claimant**"). The respondent is the Kingdom of Spain ("**Spain**" or the "**Respondent**"). The Claimant and Spain are collectively referred to as the "**Parties**." The identity of the Parties' representatives and their addresses are listed above on page (iii).

2. This case concerns an application for annulment submitted by Spain (the **"Annulment Application"**) of the award rendered on 9 November 2021 in JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain (ICSID Case No. ARB/15/27) (the **"Award"**) by a Tribunal composed of Prof. Hi-Taek Shin, President, Prof. Dr. August Reinisch and Prof. Mónica Pinto (the "**Tribunal**"). This decision is the final decision in the annulment proceedings (the "**Decision**").

3. In Section I the Committee refers to the procedural history, while in Section II the Committee provides a brief background against which the Annulment Application was submitted. In Section III the Committee lays out the Parties' requests for relief. Section IV sets out the Parties' respective positions and arguments regarding the grounds for annulment and includes the Committee's reasoning and decisions on the merits of the Annulment. Before the final dispositive Section VI, the Committee addresses the question of costs of the annulment proceedings in Section V.

I. Procedural History

4. On 9 March 2022, ICSID received the Annulment Application together with Annexes 1 to 18. The Annulment Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for the stay of enforcement of the Award (the "**Stay Request**") until the Annulment Application was decided.

5. On 14 March 2022, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Acting Secretary-General of ICSID registered the Annulment Application. On the same date, in accordance with ICSID Arbitration Rule 54(2), the Acting Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

6. On 31 March 2022, following an exchange of correspondence between the Parties and the Secretariat,[1] and in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Ms. Dyalá Jiménez Figueres, a national of Costa Rica, designated to the Panel of Arbitrators by Costa Rica and appointed as President of the Committee, Ms. Tina Cicchetti, a national of Canada and Italy designated to the Panel of Arbitrators by Canada, and Dr. Ucheora Onwuamaegbu, a national of Nigeria and the United Kingdom designated to the Panel of Arbitrators by Nigeria, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Ms. Mercedes Cordido-Freytes de Kurowski, Legal Counsel of ICSID, would serve as Secretary of the Committee.

7. On 4 April 2022, the Committee informed the Parties on its availability for the First Session; invited the Parties to confer and jointly propose a schedule of written submissions on the Stay Request; and proposed the appointment of Ms. Karima Sauma as Assistant to the President of the Committee.

8. On 6 April 2022, on the instruction of the Committee, the Secretary of the Committee (i) informed the Parties of the Committee's proposed dates for the first session, (ii) circulated a Draft Procedural Order No. 1 to facilitate the Parties' discussions on procedural matters, and (iii) invited the Parties to confer and jointly propose a schedule for the submissions on the Stay Request and to agree on the language of their submissions on the Stay Request.

9. The Parties submitted comments on 20 April 2022, 29 April 2022, and 18 May 2022 indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

10. On 18 April 2022, the Committee confirmed the appointment of Ms. Karima Sauma as Assistant to the President and circulated Ms. Sauma's declaration and statement.

[1] *See* communications with the Parties of 21 and 30 March 2022.

11. On 21 April 2022, the Parties informed the Committee of their agreed schedule for the filing of their submissions on the Stay Request.

12. In accordance with the agreed schedule, on 17 May 2022, Spain filed a submission in support of the continuation of the stay of enforcement of the Award together with Annexes 19 to 38 ("**Spain's Submission on Stay**").

13. On 25 May 2022, the Committee held a first session with the Parties by video conference (the "**First Session**"). During that session Ms. Jiménez Figueres informed the Parties that she and Mr. Fortún, one of JGC's external counsel, had been classmates during their LL.M. more than 20 years before.

14. On 7 June 2022, Spain filed a proposal for the disqualification of Ms. Jiménez Figueres ("**Disqualification Proposal**"), and the proceeding was suspended in accordance with Rules 53 and 9(6) of the ICSID Arbitration Rules.

15. Also on 7 June 2022, while the proceedings were suspended, JGC submitted its Counter-Memorial on the Stay of Enforcement of the Award, together with Exhibits C-726 to C-731 and Legal Authorities CL-212 to CL-242 ("**JGC's Counter-Memorial on Stay**").

16. Following submissions from the Parties and explanations from Ms. Jiménez Figueres, on 22 August 2022, the unchallenged members of the Committee issued the decision declining the Disqualification Proposal, and the proceedings were resumed pursuant to Rule 9(6) of the ICSID Arbitration Rules. On that same date, JGC's Counter-Memorial on Stay was transmitted to the Parties and the Committee.

17. On 31 August 2022, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the Committee's decisions on those matters on which the Parties were unable to reach an agreement ("**PO1**"). PO1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural languages would be English and Spanish (save for the written submissions regarding the Stay Request, which as agreed would be submitted in the English language only), and that the place of the proceeding would be Washington, D.C. PO1 also set out a procedural calendar for the proceedings, including the submissions for the stay of enforcement of the Award. The

Committee also established that the hearing on the stay of enforcement would be held on Wednesday, 19 October 2022 (the "**Hearing on Stay**") and proposed a hearing schedule to the Parties. The Parties confirmed their agreement with the hearing schedule on 8 September 2022.

18. In accordance with the procedural calendar set forth in PO1, on 13 September 2022, Spain submitted its Reply on the Stay of Enforcement of the Award together with Legal Authorities RL-170 to RL-180 ("**Spain's Reply on Stay**").

19. On 20 September 2022, Spain filed a request seeking leave from the Committee to introduce into the record a new expert report on European Union ("**EU**") law by a university professor. Following an invitation from the Committee, on 27 September 2022, JGC filed observations on Spain's request, together with Exhibits C-732 to C-735 and Legal Authorities CL-243 to CL-245. JGC opposed Spain's request labeling it inadmissible and lacking legal support.

20. On 4 October 2022, JGC filed its Rejoinder on the Stay of Enforcement together with C-736 to C-742 and Legal Authorities CL-246 to CL-257 ("**JGC's Rejoinder on Stay**").

21. On 10 October 2022, the Committee issued Procedural Order No. 2 dismissing Spain's Request for leave to file a new expert report on EU law by a University Professor ("**PO2**").

22. On 19 October 2022, the Hearing on Stay was held by video conference, as agreed. Present at the Hearing on Stay were:

Committee Members:
Ms. Dyalá Jiménez Figueres
Ms. Tina Cicchetti
Dr. Ucheora Onwuamaegbu

ICSID Secretariat:
Ms. Mercedes C. de Kurowski
Ms. Ivania Fernández

Assistant to the Committee:
Ms. Karima Sauma

JGC Holdings Corporation:
Counsel:
Mr. Alberto Fortún Costea
Dr. José Ángel Rueda García
Mr. Borja Álvarez Sanz
Ms. María Soledad Peña Plaza
Mr. Marcos Díaz Tarragó
Ms. Yoshimi Ohara
Ms. Annia Hsu

Party Representatives:
Mr. Hisanori Kato
Mr. Nobukazu Ishii
Mr. Kei Unno
Ms. Yoshie Nagai

Kingdom of Spain:
Ms. Lorena Fatás Pérez
Ms. Amparo Monterrey Sánchez
Ms. María del Socorro Garrido Moreno

Court Reporters:
Ms. Regina Spector
Mr. Trevor McGowan

Interpreters:
Ms. Silvia Colla
Mr. Daniel Giglio
Mr. Charles Roberts

Technical Support Staff:
Mr. Mike Young

23. On 8 November 2022, Spain filed its Memorial on Annulment together with Exhibits R-400 to R-403, Legal Authorities RL-181 to RL-206, and consolidated Lists of Exhibits and Legal Authorities ("**Memorial on Annulment**").

24. On 23 November 2022, the Committee issued its Decision on the Stay of Enforcement of the Award. For the reasons indicated therein the Committee: (i) rejected Spain's request for the continued stay of enforcement of the Award, (ii) lifted the provisional stay as of the date of that Decision, (iii) reserved its decision on the allocation of costs until the conclusion of these annulment proceedings, and (iv) dismissed all other requests by the Parties.

25. On 17 January 2023, JGC filed its Counter-Memorial on Annulment, together with Exhibits C-743 to C-756, Legal Authorities CL-258 to CL-286, and consolidated Lists of Exhibits and Legal Authorities ("**Counter-Memorial on Annulment**").

26. On 13 March 2023, Spain filed its Reply on Annulment, together with Exhibit R-404 and Legal Authorities RL-207 to RL-211 and consolidated Lists of Exhibits and Legal Authorities ("**Reply on Annulment**").

27. On 15 March 2023, following the communications from the Parties, the Committee confirmed that the Pre-Hearing Organizational Meeting ("**PHOM**") would be held on 21 June 2023 by videoconference. On 24 April 2023, the Committee informed the Parties *inter alia* that the Hearing on Annulment would take place at the International Dispute Resolution Center (IDRC) in London on 19 July 2023, with the possibility to join remotely by videoconference (Zoom) for those who were not able to attend in person.

28. On 19 May 2023, JGC filed its Rejoinder on Annulment, together with Legal Authorities CL-287 to CL-296 and a consolidated List of Legal Authorities ("**Rejoinder on Annulment**").

29. On 29 May 2023, both Parties confirmed that the PHOM was no longer necessary. As a result, on 31 May 2023, the Committee informed the Parties that the PHOM had been canceled.

30. On 13 June 2023, after several exchanges with the Parties, the Committee issued Procedural Order No. 3 concerning the Organization of the Hearing ("**PO3**").

31. On 7 July 2023, the European Commission ("**EC**") submitted an "Application for leave to intervene as non-disputing party in the annulment proceedings" (the "**EC Application**"). The Committee invited the Parties to comment thereon, which they did on 10 July 2023. On 11 July 2023, the Committee informed the Parties that given the proximity of the hearing, the Committee would issue a decision on the EC Application after the hearing.

32. A one-day hearing was held on 19 July 2023, at the IDRC (the "**Hearing on Annulment**") in London. The following persons were present:

Committee:	
Ms. Dyalá Jiménez	President
Ms. Tina M. Cicchetti	Member of the Committee
Dr. Ucheora Onwuamaegbu	Member of the Committee
ICSID Secretariat:	
Ms. Mercedes C. de Kurowski	Secretary of the Committee
Ms. Ivania Fernández	Paralegal (remotely)
Assistant to the President:	
Ms. Karima Sauma	
For JGC Holdings Corporation:	
Counsel:	
Mr. Alberto Fortún Costea	Cuatrecasas
Mr. José Ángel Rueda García	Cuatrecasas
Ms. Lucía Pérez-Manglano Villalonga	Cuatrecasas
Mr. Ignacio López Ibarra	Cuatrecasas (remotely)
Ms. Yoshimi Ohara	Nagashima Ohno & Tsunematsu (remotely)
Ms. Annia Hsu	Nagashima Ohno & Tsunematsu (remotely)
Party Representatives:	
Ms. Yoshie Nagai	JGC Holdings Corporation (remotely)
Ms. Moe Hongyo	JGC Holdings Corporation (remotely)
For the Kingdom of Spain:	
Ms. Lorena Fatás Pérez	Abogacía General del Estado
Ms. Inés Guzmán Gutiérrez	Abogacía General del Estado
Ms. Amparo Monterrey Sánchez	Abogacía General del Estado
Ms. María del Socorro Garrido Moreno	Abogacía General del Estado (remotely)
Ms. Gabriela Cerdeiras Megías	Abogacía General del Estado (remotely)
Court Reporters:	
Mr. Trevor McGowan	English Court Reporter
Ms. Celina Rinaldi	Spanish Court Reporter
Ms. Micaela Fernández	Spanish Court Reporter
Interpreters:	
Mr. Jesús Getan Bornn	
Ms. Anna Sophia Chapman	

Ms. Amalia Thaler-de Klemm

33. The Hearing on Annulment ran smoothly, and the Parties agreed with the Committee that there was no need to file post-hearing briefs. The Parties agreed that they would submit their corrections, if any, to the transcripts by 8 September 2023, given the summer holidays in Spain during the month of August. They would attempt to agree on a date to present the submission on costs thereafter.

34. On 24 July 2023, after evaluating the EC's arguments, and the Parties' positions on the EC Application, the Committee issued its decision rejecting the EC Application. The Committee deemed that a) the purported submission by the EC was not a matter directly related to the questions regarding the annulment but rather to the merits of the arbitration; b) the EC would not bring a different perspective from the Parties; c) the information contained in the record, including that in the EC Application itself, was robust enough to contribute to the Committee's determination in any case; and d) given the late stage in the proceedings, there would be an unnecessary disruption.

35. In accordance with the Committee's directions of 2 November 2023, the Parties filed their submissions on costs on 16 November 2023.

36. The proceeding was closed on 16 November 2023.

II. Background

37. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty (the "**ECT**"), which entered into force for Japan on 21 October 2002, and for the Kingdom of Spain on 16 April 1998, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

38. The dispute in the original proceeding related to a series of measures implemented by Spain modifying the regulatory and economic regime of renewable energy projects between

January 2012 and June 2014 after the Claimant had made an investment in two concentrated solar power plants ("**CSP**") in Spain in 2010.[2]

39. On 21 May 2021, the Tribunal issued its Decision on Jurisdiction, Liability, and Certain Issues of Quantum (the "**2021 Decision**").

40. The Tribunal decided to uphold the Respondent's jurisdictional objection on questions concerning a 7 percent TVPEE. On Liability, the majority of the Tribunal decided that, except for the TVPEE, the regulatory changes introduced by the Respondent in the Disputed Measures, as defined therein, constituted a breach of the Respondent's obligation under Article 10(1) of the ECT to accord fair and equitable treatment ("**FET**"). Regarding damages, the Tribunal issued specific directions to the Parties and encouraged the valuation experts of both Parties to confer with each other in the process of a new calculation as directed by the Tribunal.

41. Subsequently, on 21 July 2021, the Parties filed a Joint Memorandum and a joint model prepared by their respective experts on *quantum*, followed by updated submissions on costs filed on 9 September 2021.

42. In its Rejoinder on Jurisdiction, the Claimant requested an award a) declaring that the Tribunal had jurisdiction, b) declaring that the Respondent had breached its obligations under Part III of the ECT as well as under the rules and principles of international law, c) ordering compensation in the amount of EUR 105.2 million plus interest, and d) ordering the Respondent to pay the entire costs of the arbitration. [3]

43. In its Post-Hearing Brief, Spain requested that the Tribunal declare its lack of jurisdiction to hear the Claimant's claims or declare the claims' inadmissibility. Secondarily, Spain requested that the Tribunal reject all the claims on the merits and that it dismiss the Claimant's compensatory claims and order the Claimant to pay all costs and expenses.[4]

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[2] Award, ¶ 5.
[3] The Claimant included a similar request for relief in its other submissions. *See* the 2021 Decision, ¶¶ 376-379.
[4] The Respondent included a similar request for relief in its other submissions. *See* the 2021 Decision, ¶¶ 380-382.

44. On 9 November 2021, the Tribunal rendered the award (the "**Award**"), in which it decided as follows:

i) The Respondent's jurisdictional objection on questions concerning the 7 percent TVPEE measures is upheld. Except for the questions concerning the 7 percent TVPEE measures, the Tribunal has jurisdiction to determine the Claimant's claims.

ii) In compensation for the damages caused by the Respondent's breach of its obligations under the Article 10(1) of the ECT, the Respondent shall pay the Claimant EUR 23.51 million with pre-award interest on that amount at the rate of 2.748 percent, compounded monthly, from 21 June 2014 until the date of this Award.

iii) The Respondent shall pay the Claimant USD 333,737.08 (25 percent of the total cost of arbitration).

iv) The Respondent shall pay the Claimant EUR 1,579,314.53; JPY 25,260,284.4; and USD 290,000.00 (40 percent of the Claimant's legal costs and related disbursements).

v) The Respondent shall pay interest at the rate of 1.6 percent, compounded monthly, on the amount it owes to the Claimant as at the date of the Award under ii), iii) and iv) above from the date of the Award until the date of payment.

vi) Except as set forth above, all other claims of the Claimant are denied.[5]

45. In accordance with Section IV of the Convention, and as expressly indicated in the Award, the 2021 Decision, including the Partial Dissent, are integral parts of the Award.[6] Accordingly, it is understood that when the Parties make reference to the 2021 Decision in

[5] Award, ¶73.

[6] Award, ¶ 6.

their submissions on annulment, they are referring to it as part of the Award, which is the object of the annulment proceedings.

46. The Respondent applied for annulment of the Award based on Article 52(1) of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers (Article 52(1)(b)), (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d)), and (iii) failure to state reasons (Article 52(1)(e)).

III. Requests for Relief

47. In this section, the Committee cites the Parties' requests for relief as stated in their memorials, starting with the Applicant, followed by JGC.

A. Spain's Request for Relief

48. In its Annulment Application,[7] Spain requests that:

> a) The Secretary-General register this Application for Annulment pursuant to Arbitration Rule 50(2) and informs all parties that the execution of the Award has been provisionally stayed in accordance with Article 52(5) of the ICSID Convention and Arbitration Rule 54(2);
>
> b) The stay of enforcement of the Award be maintained until the Decision of the *ad hoc* Committee on this Application for Annulment has been issued;
>
> c) The Award be annulled under Article 52(1) subparagraphs (b), (d) and (e) of the ICSID Convention; and
>
> d) The Respondent be ordered to pay the full costs of these proceedings, including the fees and expenses.

49. In both the Memorial and the Reply on Annulment,[8] Spain requests that the Committee:

> a) Annul the JGC Award in its entirety under Article 52(1)(b) of the ICSID Convention for manifestly exceeding its powers by failing to apply EU law to the merits of the dispute.

[7] Application for Annulment, ¶ 55.
[8] Memorial on Annulment, ¶ 192; Reply on Annulment, ¶ 182.

b) Annul the JGC Award in its entirety under Article 52(1)(e) of the ICSID Convention for failure to state reasons in the determination of the applicable law.

c) Annul the Award in its entirety under Article 52(1)(d) of the ICSID Convention, for serious breach of fundamental rules of procedure, such as the equality of parties and the right to be heard.

d) Order JGC to pay all the costs of the proceedings.

B. JGC's Request for Relief

50. In the Counter-Memorial, the Rejoinder on Annulment, and the Statement on Costs,[9] the Claimant requests that the Committee render a Decision dismissing Spain's request for annulment of the Award in its entirety and ordering Spain to pay JGC's legal fees and all annulment costs (including the Committee members' fees, ICSID fees and all related expenses) incurred in these proceedings.

51. The Claimant also reserved its rights "to make further submissions on fact and/or law, to respond to any new allegations or defenses that Spain may put forward, as well as to provide and request any evidence that it deems appropriate and, accordingly, to amend and/or supplement the relief sought in this annulment proceeding".[10]

IV. The Grounds for Annulment

52. In this section, the Committee first sets out the Parties' positions and the Committee's analysis on the standard of review that should be applied in annulment proceedings (A). Subsequently, the Committee describes the Parties' arguments and positions regarding each of the three grounds on which Spain bases its Annulment Application, as well as the Committee's analysis and decision. The Committee follows the same order adopted by Spain in its Annulment Application: manifest excess of powers (B), failure to state reasons (C), and serious breach of a fundamental rule of procedure (D).

[9] Counter-Memorial on Annulment, ¶ 150; Rejoinder on Annulment, ¶ 92; JGC's Statement on Costs, ¶ 20.
[10] Rejoinder on Annulment, ¶ 93.

53. The Committee has reviewed the totality of the Parties' submissions and arguments but will refer only to the positions that are most relevant to its decision-making process.

A. The Standard of Review in Annulment Proceedings

54. The Parties made preliminary comments regarding the general scope of the Committee's work, specifically related to the mission of the Committee under the ICSID Convention and to the ambit of the Committee's purview in relation to what was or was not in the record before the Tribunal.

1. Spain's Position

55. Spain clarifies that it takes no issue with the decision on jurisdiction and no issue with the decision regarding quantum. The annulment proceeding is focused on the merits, essentially, on the fact that the Tribunal failed to apply the law agreed by the Parties.[11] Spain underscores that some arguments under manifest excess of powers overlap with the ones regarding failure to state reasons.[12]

56. Spain agrees with JGC that an annulment proceeding is not a new opportunity to re-arbitrate the dispute.[13] The Applicant asserts that this Committee is not bound by other committees' decisions[14] and that there is no presumption in favor of or against annulment.[15] Spain further asserts that the Committee should exercise its function as "guardian" of the ICSID Convention in the sense that, when faced with facts that establish one of the grounds for annulment, like in the present case, its obligation is to annul the award.[16]

57. For Spain, given that the Tribunal departed from the mandate conferred on it by the Parties,[17] which is an essential part of the functioning of the system, the Committee should annul the

[11] Tr. Day 1 (English), 4:7-9 and 6:12-15.
[12] Memorial on Annulment, ¶ 124.
[13] Reply on Annulment, ¶ 10.
[14] Reply on Annulment, ¶ 11.
[15] Reply on Annulment, ¶ 12.
[16] Reply on Annulment, ¶ 24.
[17] Tr. Day 1 (English), 5:20-22.

Award. Relying on *Tza Yap Shum v. Peru*:[18] "[…] a [...] tribunal usurps its powers when it attributes to the parties agreements and statements they have not made."

58. Spain also responds to the Claimant's allegations regarding material that is allegedly impermissible by arguing essentially that the material is related to its arguments in the underlying arbitration and serve to support its views, as will be explained *infra*.

2. JGC's Position

59. The Claimant stresses that an ICSID *ad hoc* committee is not a court of appeal[19] and clarifies that i) the result of a successful application for annulment is the invalidation of the original decision, while the result of a successful appeal is its modification, and that ii) annulment is only concerned with the legitimacy of the process but not with its substantive correctness, whereas an appeal is concerned with both.[20] JGC refers to *InfraRed v. Spain*, *MTD v. Chile* and *Antin v. Spain*,[21] where these elements have been underscored. Relying on the *travaux préparatoires* of the ICSID Convention, JGC underlines that the fundamental objective of the system is to ensure the finality of arbitration awards and that the first [sic] ICSID Secretary-General characterized annulment as a remedy concerning procedural errors.[22]

60. Also, according to the Claimant, there are certain arguments and documents submitted by Spain in the annulment proceedings that should not be considered by the Committee given that they were not placed before the Tribunal. JGC alleges that "Spain submits new claims that were never raised during the Arbitration (*e.g.*, new claims related to state aid, Competition law, or the invocation of Article 6 ECT)".[23] It also underscores that the *Green*

[18] **RL-189**, *Tza Yap Shum* v. *Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment 12 February 2015 [hereinafter: *Tza Yap Shum v. Peru*], ¶ 76. See also slide 7 of Spain's Opening Statements.
[19] Rejoinder on Annulment, ¶ 11.
[20] Rejoinder on Annulment, ¶¶ 13-14.
[21] **CL-252-EN**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022; **CL-245-ENG**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007; **CL-212-ENG**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V.* (formerly, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.*) *v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021.
[22] Rejoinder on Annulment, ¶ 10.
[23] Counter-Memorial on Annulment, ¶ 63. See also slide 3 Opening Statement.

Power v. Spain award was issued after the date of the Award,[24] while the *Eurus v. Spain* award was not put before the Tribunal, even though Spain could have done so because it predates the Award.[25] The Claimant insists that the Committee should refrain from relying on new arguments and evidence brought by Spain.[26]

61. JGC agrees with Spain in that some aspects regarding manifest excess of powers are linked with the ones related to failure to state reasons.[27]

3. The Committee's Analysis

62. There is wide consensus regarding the limited mandate of annulment committees. The role of the Committee is restricted to safeguarding the integrity of ICSID awards. As has been expressed in the ICSID Background Paper on Annulment:

> […] the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, annulment was designed purposefully to confer a limited scope of review which would safeguard against 'violation of the fundamental principles of law governing the [t]ribunal's proceedings.[28]

63. It is with those words very much in mind that the Committee will determine the issues in the present case.

64. As regards alleged new arguments presented by Spain, during the Hearing on Annulment the Committee asked the Parties to address the matter given the complaints raised by JGC. Spain indicated that the arguments regarding State aid and its relation to competition law, as well as the Article 1(3) argument regarding the "Regional Economic Integration Organization" (**"REIO"**), were present in the underlying arbitration as part of its submissions, during the Hearing on Annulment and in the EC's application to intervene.[29]

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[24] Counter-Memorial on Annulment, ¶ 58.
[25] Tr. Day 1 (English), 60:23-25.
[26] Counter-Memorial on Annulment, ¶ 65.
[27] Tr. Day 1 (English), 135:11-16.
[28] **RL-147**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 71.
[29] Tr. Day 1(English), 126-128.

65. The Committee also asked the Parties specifically whether the case theory according to which EU law as international law stems from Article 38 of the Statutes of the International Court of Justice ("**ICJ**") had been put forward by Spain in the underlying arbitration. While Spain was not in a position to respond immediately, counsel for the Claimant indicated that the argument based on such provision was not advanced during the arbitration and rather had been proposed by Spain during annulment proceedings generally.[30] Spain did not deny this and did not take up the opportunity it was given to submit an answer after the Hearing on Annulment.

66. In order to assess whether the Award should be annulled, the Committee must assess the case as it was presented before the Tribunal and not as if it were being presented to the Committee itself. Therefore, new arguments on the merits of the Tribunal's decisions are of no use. For that reason, insofar as it is required to ascertain whether the grounds for annulment are satisfied, the Committee will consider only the Parties' cases as presented to the Tribunal during the underlying arbitration. This is also a matter of procedural fairness.

67. The Committee observes however that the *Eurus v. Spain* decision formed an important part of the discussion between the Parties in their written pleadings and during the Hearing on Annulment, despite it having been issued after the rendering of the Award. This decision may be referred to as a legal authority by the Committee in its analysis for that reason.

B. Manifest Excess of Powers

68. In this section, the Committee summarizes the Parties' positions regarding the applicable standard to the ground under Article 52(1)(b) of the ICSID Convention, followed by how each Party argues that the ground is applicable to the case. The Applicant's positions will be described first, followed by the Claimant's, and the Committee's analysis will ensue.

[30] Tr. Day 1(English), 137:1-13.

1. Spain's Position

a) Applicable Standard

69. Spain states that a tribunal exceeds its powers when it acts in contravention of the parties' consent.[31] The Applicant argues that a tribunal's failure to apply the agreed applicable law to the merits leads to a manifest excess of powers.[32]

70. Spain highlights the importance of the parties' agreement to determine "the framework that should guide the Tribunal's action" referring to the decisions in *Helnan International Hotels A/S v. Arab Republic of Egypt* and *Mr. Tza Yap Shum v. Republic of Peru*.[33] The Applicant differentiates the concepts of "non-application" and "misapplication" of the law and puts forth that "non-application" exists when the tribunal disregards the applicable law, while misapplication of the law must be "so gross or egregious as to amount in substance to a failure to apply the correct law".[34]

71. The Applicant maintains that even in cases where a tribunal correctly identifies the applicable law, a manifest excess of powers may still exist if an examination of the award shows that the tribunal did not actually apply that law. Spain cites various decisions to support this contention.[35]

72. Spain indicates that the overreaching of a tribunal becomes manifest when it is measured against the agreement of the parties. The Applicant argues that *ad hoc* committees have adopted a three-step method to verify whether a tribunal has manifestly failed to apply the appropriate law: "(i) identify the appropriate applicable law; (ii) identify which law the [t]ribunal applied; and (iii) whether this decision meant a manifest disregard of the applicable

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[31] Memorial on Annulment, ¶ 51; Reply on Annulment, ¶ 39.
[32] Reply on Annulment, ¶ 32.
[33] Memorial on Annulment, ¶¶ 54-55; **RL-0185**, *Helnan International Hotels A/S v. Arab Republic of Egypt*. ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, 14 June 2010; **RL-0189** *Mr. Tza Yap Shum v. Peru*.
[34] Memorial on Annulment, ¶¶ 56-57; **RL-0104**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment, 5 June 2007 [hereinafter: *Soufraki v. UAE*].
[35] Memorial on Annulment, ¶¶ 62-68.

law."[36] During the Hearing on Annulment, Spain announced that it would (i) identify the arbitration agreement by the Parties, (ii) identify which was the applicable law in that agreement, and finally (iii) "check whether the JGC Tribunal indeed applied the applicable law as agreed by the contracting parties to the ECT."[37]

73. When asked by the Committee whether the test for "manifest" includes an examination as to the reasonability of the tribunal's conclusions or, at least, whether a tribunal's decision is tenable, Spain indicated that what is important is that the Committee ascertain whether the Tribunal applied the law agreed by the Parties.[38] It also added that the test for "manifest" is whether the excess is outcome-determinative: "[…] but [reasonability] is not the issue here; the issue is whether they applied the applicable law, which we believe is an outcome-determinative issue."[39]

b) The Ground as Applied in the Case

74. The Applicant argues that although the Tribunal correctly identified the relevant provisions of both the ICSID Convention and the ECT, it failed to apply the law and therefore incurred in a manifest excess of powers by departing from the Parties' agreement.[40] Spain insists that the Tribunal manifestly exceeded its powers by omitting to apply the law agreed to by the Parties in Article 26(6) of the ECT[41] and provides the reasons set out below.

75. The Committee organizes the Applicant's allegations as follows. First, the terms of Article 26(6) of the ECT refer to EU law because a) "rules and principles of international law" include EU law and b) the ECT parties expected and agreed to be governed by EU law when the dispute concerns an investment in EU territory, given the object and purpose of the ECT, as well as the rest of the provisions of the ECT. Second, by not applying EU law as international law, the Tribunal not only exceeded the powers conferred on it but did so manifestly, as there is evidence from other cases that the application of EU law to the merits

[36] Memorial on Annulment, ¶ 72.
[37] Tr. Day 1 (English), 6:20-24.
[38] Tr. Day 1 (English), 125: 22-25, and 126:1.
[39] Tr. Day 1 (English), 131:10-12, and 132:1-3.
[40] Memorial on Annulment, ¶ 53; Tr. Day 1 (English), 7:11.
[41] Memorial on Annulment, ¶ 47; Reply on Annulment, ¶ 25.

would have rendered a different result. Finally, Spain insists that contrary to what JGC proposes, it consistently argued that EU law is the applicable law to the merits, even after it withdrew its objection on jurisdiction.

76. As regards the first point, Spain asserts that an interpretation of Article 26(6) of the ECT according to the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (**"VCLT"**) results in that, besides the ECT, EU law is also the applicable law.[42] According to Spain, since EU law stems from international treaties it is international law within the meaning of Article 38 of the Statute of the ICJ.[43] The Applicant alleges that the Tribunal manifestly exceeded its powers by rejecting the notion that EU law is international law "directly applicable to the merits of the dispute" in paragraph 481 of the 2021 Decision.

77. To counter the Claimant's argument regarding the fact that JGC holds a Japanese nationality and therefore the intra-EU question is inapposite, Spain refers to the *Eurus v. Spain* decision, which involved a Japanese investor and an EU member State. There, the tribunal held that EU law was applicable as "true" international law[44]. Spain contends that:

> EU law is part of international law, being established by a series of treaties as interpreted by courts (notably the CJEU) to whose jurisdiction EU member states have consented. It is correct that Japan is a third party to the EU treaties and is not bound by them as such. But the EU treaties have established legal regimes for regulating matters such as state aid, which are furthermore directly applicable as part of the law of the member states.[45]

78. The Applicant argues more specifically that the EU rules on State aid are to be considered as the applicable norms since their purpose is to guarantee competition within the European market, which is one of the purposes of the ECT under Article 6.[46] The Applicant alleges that Article 2 of the ECT, as well as the 1991 European Energy Charter, are "the principles

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[42] Reply on Annulment, ¶¶ 35, 74.
[43] Memorial on Annulment, ¶¶ 73, 75; Reply on Annulment, ¶ 45.
[44] Memorial on Annulment, ¶¶ 114, 115; **RL-0141**, *BayWa R.E. Renewable Energy GMBH and Others v The Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019; **RL-0200**, *Eurus Energy Holdings Corporation v Kingdom of Spain* ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021.
[45] Memorial on Annulment, ¶ 115.
[46] Memorial on Annulment, ¶¶ 77, 120; Reply on Annulment, ¶ 47.

that the ECT state parties wanted an arbitral tribunal such as the one in the JGC case to have in mind when it comes to resolving an international dispute".[47] Spain claims that this is consistent with the "purpose and context" of the ECT.[48] It maintains that each contracting party assumed the obligation to enforce laws against unilateral and concerted anti-competitive conduct in the energy sector.[49] The Applicant puts forth that it is incompatible with both the ECT and EU law that an investor should receive subsidies that distort competition in the energy market.[50]

79. Spain also considers that the contracting parties to the ECT expressly recognized the binding nature of decisions taken by the EU institutions in matters governed by the ECT in Article 1(3) since the EU is a REIO. The Applicant argues that the ECT member States did not agree that they could ignore EU law or that it should only apply to nationals of member States.[51] Spain claims that the preparatory documents follow this view.[52]

80. Spain maintains that any aid or subsidy granted by the State is prohibited under EU law, unless it is subject to prior authorization from the EC.[53] It states that Articles 107 and 108 of the Treaty on the Functioning of the European Union (**"TFEU"**) are the basis of State aid law[54] and contends that the EC has ruled in various instances that "any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. […] If they award compensation, such as in *Eiser v. Spain*, or were to do so in the future, this compensation would be notifiable State aid."[55]

[47] Reply on Annulment, ¶¶ 48-50.
[48] Memorial on Annulment, ¶ 80.
[49] Memorial on Annulment, ¶ 86.
[50] Memorial on Annulment, ¶ 92.
[51] Memorial on Annulment, ¶ 95; Reply on Annulment, ¶ 51.
[52] Memorial on Annulment, ¶ 96.
[53] Memorial on Annulment, ¶ 107.
[54] Memorial on Annulment, ¶ 106.
[55] Memorial on Annulment, ¶ 109; **RL-0100**, Decision C(2017) 7384 of the European Commission rendered on 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN))), ¶ 166.

81. Spain asserts that, had the Tribunal applied the proper law, it would not have recognized that JGC had any legitimate expectations that the aid scheme would remain unchanged.[56] The Tribunal would not have found Spain liable –and no damages would have been awarded[57]-- because the FET analysis would have impacted three points. Those points are: (i) the definition of an investor's "objective expectations", given the binding nature of European decisions and directives; (ii) the definition of an investor's "subjective expectations", because of certain European pronouncements that it had to apply but chose not to; and (iii) the analysis surrounding the proportionality of the measures adopted by Spain, specifically given the need to take into account "the level playing field in order to assess the appropriateness of the measures".[58]

82. Finally, Spain stresses that it never withdrew the position on EU law as applicable law to the merits. During the Hearing on Annulment, the Applicant clarified that the withdrawal of the "jurisdictional objection has nothing to do with the fact that we withdrew any of our arguments regarding EU law being applicable international law to the dispute".[59] Spain added that it invoked EU law as international law directly applicable to the merits of the dispute in its post-hearing brief, in the opening statement before the Tribunal, and in the hearing of the underlying arbitration.[60]

83. Spain turns to *Green Power v. Spain,*[61] where the tribunal understood that it was called to apply EU law on State aid.[62] The Applicant admits that *Green Power v. Spain* and the present case are not "entirely identical" because the investor in *Green Power v. Spain* was European, but the point it puts forward is that the laws of the EU are applicable in the territory of a EU member State, irrespective of the nationality of the investor.[63]

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[56] Memorial on Annulment, ¶ 112.
[57] Reply on Annulment, ¶ 56. See also, ¶ 121.
[58] Memorial on Annulment, ¶ 105; Reply on Annulment, ¶¶ 57-60.
[59] Tr. Day 1 (English), 89:25- 90:3.
[60] Tr. Day 1 (English), 90:10-18.
[61] **RL-0201**, *Green Power Partners K/S and SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case V 2016/135, Final Award, 16 June 2022.
[62] Memorial on Annulment, ¶ 120; Reply on Annulment, ¶ 63.
[63] Memorial on Annulment, ¶ 120.

84. It adds that this is in harmony with "the pronouncements of the CJEU in its Opinion on the CETA between the EU and Canada, which highlights the differences in the application of EU law between Europeans and third-country nationals".[64]

85. Spain offers that EU law develops the commitments made by the ECT member States regarding access to markets.[65] The Applicant maintains that the signatory states of the ECT, including Japan, agreed to the binding nature of the decisions adopted by the institutions of the EU, and that these would be recognized "since these competences had been ceded to [the European Commission]".[66] Spain asserts that the wording of ECT Article 1(3) is self-evident in this regard. The Applicant alleges that it has pointed to decisions made by European institutions such as Directive 2001/77 that gave rise to the entire reform of renewable energies carried out by Spain and that have "statutory application to the case".[67] It concludes that because of this, European regulations considered subsidies to renewable energy producers as State aid and that they established a ceiling limit which is a fair return.[68]

2. JGC's Position

a) Applicable Standard

86. JGC asserts that Article 52(1)(b) of the ICSID Convention contains a dual requirement: first, it must be determined that a tribunal failed to identify and apply the law applicable to the dispute and, secondly, that it did so in a manifest manner.[69] JGC alleges that Spain agrees with the standard that the Tribunal's excess of powers for its failure to apply the proper law must be (i) "manifest", understood as "obvious, clear, or self-evident" and "substantially serious", excluding any "debatable application of the law" and applied only to cases where

[64] Memorial on Annulment, ¶ 118.
[65] Reply on Annulment, ¶ 49.
[66] Reply on Annulment, ¶ 51.
[67] Reply on Annulment, ¶ 52; **RL-0015**, Directive 2001/77/EC of the European Parliament and the Council, 27 September 2001.
[68] Reply on Annulment, ¶ 53.
[69] Counter-Memorial on Annulment, ¶ 12.

the tribunal "failed manifestly to apply the law" and (ii) clearly capable of making a difference to the result.[70]

87. The Claimant underscores that Spain fails to mention that at least 11 *ad hoc* committees of the so-called ECT Spanish saga have rejected Spain's similar applications for annulment of intra-EU awards on the grounds of a manifest excess of powers for not applying EU law in intra-EU disputes.[71] JGC adduces that if every ICSID committee confronted with the application of EU law in intra-EU cases has dismissed the requests for annulment, "it is all the more necessary for the Committee to dismiss Spain's Application in an extra-EU case".[72] Referring to past decisions on the same issues, the Claimant admitted during the Hearing on Annulment that there has been no unanimity; however it stressed that "the more debate we have about the applicability of EU law to the merits of the dispute, the less manifest it is that there is an excess of powers when the [Tribunal] decided not to apply [EU] law to the merits of the dispute."[73]

88. JGC indicates that "Spain's interpretation of the ICSID standard is incorrect and Spain conveniently omits some important descriptions of the legal standard under Article 52(1)(b) ICSID Convention."[74]

89. First, because the word "manifest" in said provision should be understood as obvious or self-evident and substantially serious and cites other committees that have shared the view of this high threshold.[75] The Claimant highlights that the word "manifest" is applied in the ICSID Convention three times: "at Article 36, when the Secretary General has to examine the potential registration of our Request for Arbitration; in Article 52(1)(b) in terms of annulment, and also in Article 57, when there is a challenge to a member of an arbitral

[70] Rejoinder on Annulment, ¶ 19.
[71] Rejoinder on Annulment, ¶ 21.
[72] Rejoinder on Annulment, ¶ 22.
[73] Tr. Day 1 (English), 135:1-6.
[74] Counter-Memorial on Annulment, ¶ 15.
[75] Counter-Memorial on Annulment, ¶¶ 15-17.

tribunal, or a committee".[76] In this context, JGC proposes that if a tribunal's application of the law is reasonable or at least tenable, it is not a manifest excess of powers.

90. Second, the Claimant contends that a manifest excess of powers will only exist where the action in question is clearly capable of making a difference to the result, and cites the *BayWa v. Spain* and *Eurus v. Spain* cases where the application of EU law did not make a difference given that the tribunals found Spain liable and ordered it to pay the investors compensation for damages.[77] At the Hearing on Annulment, JGC indicated that in any case, the test regarding the determination of the outcome is speculative.[78]

91. Finally, JGC indicates why the cases cited by the Applicant in its Memorial are distinguishable from the present case.[79] For example, the Claimant asserts that the committee in *Sempra v. Argentina*[80] concluded that the tribunal had adopted customary international law as the primary law to be applied, and in so doing made a fundamental error in identifying and applying the applicable law. However, JGC adduces that in this case, the Tribunal followed the mandate of Article 26(6) ECT and applied the ECT as the primary law and explained that in an international arbitration, EU law and domestic law are to be considered as facts.[81]

92. The Claimant also cites the committee in *Venezuela Holdings v. Venezuela*[82] that annulled the award because the tribunal in that case applied customary international law in place of the BIT. However, in this case, the Tribunal did not apply any customary rule of international law over the ECT.[83]

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[76] Tr. Day 1 (English), 133:19-24.
[77] Counter-Memorial on Annulment, ¶ 18. See also, Tr. Day 1 (English), 55:5-13.
[78] Tr. Day 1 (English), 147:19-25.
[79] Counter-Memorial on Annulment, ¶ 21.
[80] **RL-148**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010 [hereinafter: *Sempra v. Argentina*].
[81] Counter-Memorial on Annulment, ¶ 21.
[82] **RL-0192**, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017 [hereinafter: *Venezuela Holdings v. Venezuela*].
[83] Counter-Memorial on Annulment, ¶ 21.

b) The Ground as Applied in the Case

93. JGC puts forth that Spain's claim regarding manifest excess of powers is focused on the Tribunal's failure to apply EU law to the dispute.[84] JGC asserts that the Applicant's argument in this annulment action is contrary to the basic principle of international law that treaties are not binding on non-parties; the holding of the Court of Justice of the European Union's (**"CJEU"**) Opinion 1/17[85] on the Comprehensive Economic and Trade Agreement (**"Opinion 1/17**") and its own procedural conduct during the arbitration. Therefore, Spain's ground for annulment based on Article 52(1)(b) of the ICSID Convention "is moot and must be dismissed".[86]

94. The Claimant explains at length how in the underlying arbitration Spain first argued that EU law was applicable to the merits of the dispute and that, because only EU courts had the competence to apply EU law, the Tribunal lacked jurisdiction.[87] JGC affirms that later the Applicant withdrew its objection to the jurisdiction of the Tribunal when the CJEU issued Opinion 1/17, where the CJEU indicated that CETA was compatible with EU law because EU law was considered a fact (and not applicable law) in the ISDS mechanism set out in that treaty.[88]

95. The Claimant maintains that Spain thereby acknowledged that EU law was a fact in the present case and could not be a part of the "applicable law".[89] The Claimant also specifies that, ever since *Achmea*, the EC has stated on several occasions that the decision did not apply to extra-EU investors claiming under the ECT.[90]

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[84] Counter-Memorial on Annulment, ¶ 14.
[85] **C-734-ENG**, Opinion 1/17 of the Plenary Session of the Court of Justice CJEU, CETA, 30 April 2019.
[86] Counter-Memorial on Annulment, ¶¶ 42, 43; Rejoinder on Annulment, ¶ 38.
[87] Counter-Memorial on Annulment, ¶ 43.
[88] Counter-Memorial on Annulment, ¶ 35.
[89] Counter-Memorial on Annulment, ¶ 40.
[90] Counter-Memorial on Annulment, ¶ 33.

96. The Claimant also maintains that the Tribunal reached a reasonable conclusion when it did not consider EU law as part of the law applicable to the merits of the dispute, and that its legal analysis was "clear".[91]

97. First, JGC contends that the Tribunal applied the express wording of Article 26(6) of the ECT, which is a literal interpretation of the Parties' agreement.[92] When turning to the question of whether EU law was to be considered international law applicable to the dispute, the Claimant asserts that the non-EU nationality of JGC played a "major role" in the Tribunal's analysis,[93] and that the Tribunal ruled in accordance with the principle of international law that treaties are not binding on non-parties.[94] JGC argues that Spain's request to apply EU law is wrong as a matter of law, as other committees have determined.[95]

98. Second, the Claimant adduces that even if the Tribunal had failed to apply the proper law, its error would not have been of a manifest nature, as evidenced by how many other tribunals have decided not to apply EU law to the merits of an ECT dispute against a member State.[96] In this sense, JGC stresses that the outcome by the Tribunal was, at the very least, entirely reasonable.[97]

99. Third, according to JGC, a manifest excess of powers will only exist where the action in question is clearly capable of making a difference to the result, and "there is not a single ECT tribunal which has applied EU law to the merits of the dispute and has concluded that the investors lacked any legitimate expectation due to EU law State aid rules".[98] JGC contends that Spain has not met the standard set for Article 52(1)(b) as it has not been able to prove that, had the Tribunal applied EU law as law to the merits, the outcome of the case would

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[91] Counter-Memorial on Annulment, ¶ 48. JGC states that Spain has not attacked the reasonableness of the Award and is silent on this in its submissions. The Claimant goes on to explain why the contents of the Award are reasonable and correct and maintains that this was not rebutted by Spain (Rejoinder on Annulment, ¶¶ 29-35).
[92] Counter-Memorial on Annulment, ¶ 45; Rejoinder on Annulment, ¶ 29.
[93] Counter-Memorial on Annulment, ¶ 46.
[94] Counter-Memorial on Annulment, ¶ 47. See also, Tr. Day 1 (English), 138:4-8.
[95] Counter-Memorial on Annulment, ¶ 48.
[96] Counter-Memorial on Annulment, ¶ 49.
[97] Tr. Day 1 (English), 57:10-22.
[98] Counter-Memorial on Annulment, ¶ 51.

have been clearly different.[99] The Claimant also explains that Spain omitted key findings in both *BayWa v. Spain* and *Eurus v. Spain* and indicates that they do not support the Applicant's case.[100]

100. Fourth, the Claimant asserts that every other committee in the ECT Spanish saga has dismissed Spain's attempt to set aside the award for not applying EU law to the merits of the dispute and cites other committees' decisions.[101] JGC also argues that *Green Power v. Spain* is irrelevant for the annulment of the Award because it post-dates it, it relates to an intra-EU dispute, it did not rule on the applicability of EU law to the merits of the dispute, and the case's findings on jurisdiction would be inapposite to ICSID cases because it is not an ICSID case.[102]

3. The Committee's Analysis

101. In this section the Committee will determine what is the applicable standard and what is the approach that it will take (a) to determine whether the Tribunal manifestly exceeded its powers (b).

a) Applicable Standard and Approach by the Committee

102. From Article 42(1) of the ICSID Convention, it is clear to the Committee that the "powers" of tribunals include the determination of the case in accordance with the rules of law agreed by the parties. Past committees have applied a two-prong test to the question of manifest excess of powers. First, they assess whether there has been an excess of powers and, only if that is the case, subsequently evaluate whether such excess is manifest. If the two prongs are

[99] Rejoinder on Annulment, ¶ 43.
[100] Counter-Memorial on Annulment, ¶¶ 52, 53; Rejoinder on Annulment, ¶¶ 41, 42; **RL-150**, *BayWa r.e. AG v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Award, 25 January 2021 [hereinafter: *BayWa v. Spain*]; **CL-269-ENG**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB 16/4, Award, 14 November 2022.
[101] Counter-Memorial on Annulment, ¶ 55.
[102] Counter-Memorial on Annulment, ¶¶ 58-61.

fulfilled, the award in question merits annulment. Annulment decisions referred to by each of the Parties illustrate that analysis.[103]

103. The Committee notes that the Parties agree generally on how the first prong of the test, i.e., whether the Tribunal applied the law agreed by the Parties to the merits, is satisfied in the present case. The Committee needs first to ascertain whether in the Award the Tribunal identified what the agreement of the Parties was regarding the "rules of law" applicable to determine the issues in dispute. Subsequently, the Committee needs to assess whether the Tribunal in fact applied such "rules of law" that it identified as being agreed to by the Parties. Although the Committee needs to determine whether the Tribunal applied the "correct" law i.e., the law agreed to by the Parties, the question as to whether the application of the law was itself correct does not have a place in annulment proceedings, and both Parties agree thereto.

104. In the formula of past committees, the question is whether the Tribunal identified the applicable law and endeavored to apply it.[104] This is what the Committee will do in the following section.

105. The Parties also agree that, for the second prong of the test, i.e., whether the non-application of the law agreed by the Parties is "manifest", the excess must be obvious. However, the Parties do not entirely agree on how the Committee must ascertain whether an excess, if at all present, is manifest, or obvious. For the Applicant, an application of the law can be considered manifestly or obviously wrong if the outcome would have been different but for the excess.[105]

106. JGC agreed to this test in the written submissions, but at the Hearing on Annulment the Claimant also stated that the Tribunal's findings needed only not to be unreasonable in order for them to pass the test: "[…] the only thing that matters for the annulment of an ICSID

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[103] Reply on Annulment, ¶¶ 30 *et seq*; Rejoinder on Annulment, ¶¶ 19 *et seq.*
[104] **RL-191**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶ 219; **CL-287-ENG**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, ¶ 122.
[105] Tr. Day 1 (English), 97:10-24.

award is whether the tribunal's arguments were unreasonable in a manifest way […]".[106] Thus, for the Claimant, a decision can be considered manifestly, or obviously, wrong if it is not reasonable or even tenable. Among other cases, JGC relies on *TECO v. Guatemala*.[107]

107. As mentioned, the Committee must first ascertain whether the Tribunal identified the applicable law agreed to by the Parties and whether it endeavored to apply such law to the merits of the dispute. If that is the case, the exam will be complete since the Committee will not find an excess of powers at all.

108. If, on the contrary, the Committee finds that the Tribunal did not apply the law agreed to by the Parties at all, which is Spain's allegation, the Committee would need to take a further step and verify whether such fault is "manifest". For such purposes, the Committee must determine whether the non-application of the law is "[…] quite evident without the need to engage in an elaborate analysis of the text of the Award."[108]

109. To summarize, Spain insists that the difference in the result of the case should be the focus of the analysis, while JGC argues that the Committee would need to gauge whether the decision regarding the applicable law was reasonable or, at least, tenable.

110. The Committee takes no strong stance regarding a specific test, whether outcome-determinative or reasonableness; each case is different and past annulment committees have applied either or both. The Committee considers that as a matter of principle and out of procedural fairness it should make an effort to apply the tests proposed by the Parties if they are, as in the present case, reasonable. Therefore, if the Committee finds that the Tribunal exceeded its powers, it will consider both proposals when determining whether it did so manifestly.

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[106] Tr. Day 1 (English), 55:20-22.
[107] **RL-0195**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016 [hereinafter: *TECO v. Guatemala*], ¶ 78.
[108] **RL-148**, *Sempra v. Argentina*, ¶ 213.

b) The Ground as Applied to the Case

111. For the reasons that follow, the Committee finds that the Tribunal identified the applicable law agreed to by the Parties and applied it, so the first prong of the test is not fulfilled in the present case.

112. The Award contains 11 paragraphs devoted to the question of applicable law. The starting point of the Tribunal, which also serves as the starting point for the Committee, is Articles 42(1) of the ICSID Convention and 26(6) of the ECT.[109] Spain takes no issue with this initial approach by the Tribunal.

113. In paragraph 474 of the 2021 Decision the Tribunal declares that "[…] the issues in dispute in this arbitration are to be determined in accordance with the ECT and applicable rules and principles of international law." In this statement the Tribunal clearly identifies the "rules of law as may be agreed by the parties" by directly citing the ECT, which contains the consent of the contracting parties of the ECT and, ultimately, JGC's consent. The question however does not end there, since Spain alleges that while the ECT was indeed applicable, EU law had to be applied as well, because it is included in the second part of Article 26(6) of the ECT under "applicable rules and principles of international law". This lies at the core of the Parties' disagreement.

114. In the following sentence the Tribunal deals with that argument: "Article 26(6) does not include any reference to rules of domestic law nor is there any mention to the law of the European Union."[110] In turn, paragraph 481 of the 2021 Decision, which was discussed at length by the Parties and is crucial for this analysis, contains the determination by the Tribunal regarding the applicability of EU law:

> […] The Tribunal disagrees with the Respondent's proposition that EU law is in fact international law directly applicable to the merits of this dispute. As this arbitration case is between an investor of Japan, one Contracting Party to the ECT which is not a Member State of the EU, and the Kingdom of Spain, another Contracting Party to the ECT, the Tribunal considers that EU law

[109] The 2021 Decision, ¶¶ 472-473.
[110] The 2021 Decision, ¶ 474.

> could not be viewed as international law for the purpose of Article 26(6) of the ECT.

115. This paragraph encloses two ideas that are material to ascertain whether the Tribunal correctly identified the applicable law to the merits of the dispute. The first is that Japan is a contracting party to the ECT but not to the EU Treaties, given that it is not a member State of the EU. For the Tribunal this means that EU law is not binding on Japan the way it is binding on EU member States. Regarding this specific question, the Committee is persuaded by JGC's argument according to which the Tribunal "ruled in accordance with the very basic principle of international law [enshrined in Article 34 of the VCLT], that treaties are not binding on non-parties".[111]

116. This is relevant for purposes of addressing the argument put forward by Spain according to which Article 1(3) of the ECT is one of the keys that opens the door for the Tribunal to be compelled to apply EU law to the dispute. Spain alleges that all contracting parties to the ECT are bound by Article 1(3) and that, by that measure, they recognize EU law as obligatory. The Committee is not convinced by this argument, for the following reasons.

117. First, Article 1(3) of the ECT reads:

> "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

118. According to the ordinary meaning of the terms employed in that provision, per Article 31 of the VCLT, Article 1(3) establishes that all contracting parties to the ECT recognize that the members of any REIO are bound by the supranational regime that they have created in the matters that are covered by that regime. The only REIO signatory to the ECT is the EU, so naturally only the member States of the EU (the States that have transferred competence to the EU) are bound by that regime. The contracting parties to the ECT that are not EU

[111] Tr. Day 1 (English), 56:16-20.

member States agreed to recognize this explicitly in the treaty, under Article 1(3). That is as far as the provision goes.

119. Even if it interprets the provision taking into account its context and considering the ECT's object and purpose, the Committee does not see in that provision what Spain purports it says. Article 1(3) is included in Part I of the ECT, which is devoted to the definitions and the purpose of the treaty. Article 1 includes 14 definitions, while Article 2 lays out the purpose of the treaty, as follows:

> This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

120. Although "Charter" refers to the European Energy Charter, there is nothing in Article 2 that is indicative of EU law being the applicable law.

121. Spain invokes Article 6 as well, which is devoted to competition. However, the arbitration was initiated on the basis of an alleged breach of Article 10, not Article 6. Also, the ECT provides for a distinct mechanism for the resolution of conflicts arising out of competition matters, per Article 6(7). To conclude, there is nothing in the ordinary meaning of the terms of the articles invoked by Spain nor in their context nor in the ECT's object and purpose that suggests that the contracting parties chose EU law as the law applicable to disputes arising out of Article 10.

122. The second notion is predicated on the idea that was just analyzed and regards the consent of the Parties. Specifically, the Tribunal stated that for Japan "EU law could not be viewed as international law for the purpose of Article 26(6) of the ECT" (emphasis added). This goes to the heart of the Parties' consent, since it necessarily implies that Japan, of which JGC is a national, did not contemplate that disputes arising from the ECT would be resolved by applying EU law. In turn, nothing suggests that when JGC accepted the offer by Spain to arbitrate by filing the Request for Arbitration it could have contemplated that EU law would be the applicable law to the merits of the dispute per Article 26(6) of the ECT.

123. In paragraph 476 of the Award, the Tribunal indicated that Spain agreed during the hearing that Article 26 of the ECT includes international law as the applicable law. JGC gives

considerable weight to this statement in support of its contention that Spain waived its proposition that EU law was applicable to the merits. The Committee is not persuaded by this argument. In any case, as mentioned, the Tribunal recognized in paragraph 481 of the Award that Spain proposed that EU law is international law directly applicable to the case.

124. In this sense, the Committee agrees with Spain that the withdrawal of its objection on jurisdiction related to the intra-EU question did not mean that it was implicitly recognizing that EU law was not applicable to the merits. Although the Claimant's case is strong on this point given that there is a basis for some inconsistency in Spain's line of argument, the Committee's task regarding manifest excess of powers ends with the assessment as to whether the Tribunal identified the correct law and applied it. Whether a party was inconsistent in its arguments should not be decisive for the assessment by an annulment committee under this ground, as committees analyze the decisions of the tribunals and not the conduct of the parties. The Committee might turn to this argument when it analyzes the other two grounds for annulment.

125. To conclude the first prong of the test, the Committee highlights that the Tribunal did identify the correct law applicable to the merits of the dispute in paragraph 481 of the Award, as follows: "[…] the Respondent's international responsibility towards the Claimant for breaches of the ECT shall be determined solely in accordance with the ECT and the applicable rules and principles of international law". The Tribunal went on to interpret the meaning of "applicable rules and principles of international law" for the purpose of Article 26(6) of the ECT as "independent and separate from the Respondent's domestic law or the law of European Union".[112]

126. The second prong of the test requires the Committee to ascertain whether the Tribunal did in fact apply the law it identified. The Committee has reviewed the reasoning applied by the Tribunal to the essential legal question, i.e., the standard of protection under Article 10(1) of

[112] Award, ¶ 481.

the ECT, to which it devoted 11 paragraphs of the 2021 Decision (section VI(D)) and concludes that the second prong is also satisfied. A brief recount of such process is presented.

127. In paragraphs 795 *et seq* of the 2021 Decision, the Tribunal described the differences among past tribunals' decisions in the investment cases against Spain arising out of the renewable energy regulations. The Tribunal subsequently provided its own interpretation of the first two sentences of Article 10(1) of the ECT and considered: "[…] that these provisions jointly require that the host State accord FET to investors and, in particular, maintain fundamental stability of the regulatory regime, specifically by not overturning the essential characteristics of such regime."[113] The Tribunal clarified that stability did not mean freezing or petrification of the legal regime in accordance with the ordinary meaning of "stable".[114] In its analysis, the Tribunal referred to recent investment cases against Spain, such as *Antin*, *SolEs Badajoz*, and *Charanne*.

128. The Tribunal then proceeded to address the issue of FET and legitimate expectations in paragraphs 824 *et seq* of the 2021 Decision, indicating that "the host State's power to regulate has been narrowed by the drafters of the ECT".[115] The Tribunal noted that the Parties agreed that legitimate expectations were to be assessed at the date of the investment (which it later determined to be 6 August 2010);[116] however, in terms of the commitment by the State, the Tribunal took note of the Parties' disagreement and provided an overview of the different approaches in past decisions of, particularly but not only, the cases arising from the renewable energy regime in Spain.

129. In paragraph 847 of the 2021 Decision the Tribunal concludes that specific assurances are not indispensable for acts of a State to generate legitimate expectations. It "finds it more convincing to assume a broader significance of the FET clause, in particular in the context of the first sentence of Article 10(1) of the ECT which imposes the Contracting Parties a duty to create stable conditions for the investment into the energy sector".[117] The Tribunal

[113] The 2021 Decision, ¶ 815.
[114] The 2021 Decision, ¶¶ 818-820.
[115] The 2021 Decision, ¶ 827.
[116] The 2021 Decision, ¶ 874.
[117] The 2021 Decision, ¶ 853.

established that in the absence of specific assurances it is required to do a balancing exercise, such as the one applied in the *RREEF v. Spain* case.[118]

130. Finally, the section ends with an assessment as to whether due diligence on the part of the investor is required and, if so, to what extent. In application of the ECT, due to the absence of such a requirement, the Tribunal concludes that specific circumstances of each case have to be considered to answer those questions.[119] Before applying the law to the facts, the Tribunal concluded the section by stating that

> […] The Tribunal is of the view that the assessment of an investor's legitimate expectation should consider the totality of the regulatory framework relied on by the investor taking into account the stability commitments built in the laws and regulations, duly interpreted, and representations and assurances made by the host State to attract the investment from the international law perspective.[120]

131. In the Committee's view, the Tribunal applied the ECT and applicable rules and principles of international law, namely the rules of interpretation under the VCLT, to the case. The Tribunal was consistent in the way it approached the question of EU law, as it included the matters regarding EU State aid in the factual analysis to determine whether, in accordance with international law, Spain breached its commitment under Article 10(1) of the ECT. The conclusion in paragraph 938 of the 2021 Decision is a clear example:

> The duty laid down in Article 10(1) of the ECT requires that the Kingdom of Spain encourage and create stable conditions for investors of other Contracting Parties and to accord them FET. In the Tribunal's view, the Spanish regulatory regime governing the Claimant's investment under discussion, in particular RD 661/2007, RD-L 6/2009 and RD 1614/2010 together with the representations and announcements of the relevant Ministry in contemporaneous press releases, expressed the Respondent's unequivocal assurances and guarantees for stability of the continuing application of the remuneration regime relied on by the Claimant at the time of investment. These consistent assurances and guarantees should be the benchmark to determine whether the Respondent is in breach of its obligations to provide stability and FET under Article 10(1) of the ECT by implementing the Disputed Measures. In this sense, the Tribunal considers that the

[118] The 2021 Decision, ¶ 861.
[119] The 2021 Decision, ¶ 867.
[120] The 2021 Decision, ¶ 870.

> Respondent's stability assurances and guarantees, irrespective of their individual or collective nature or interpretation under the domestic Spanish law and its rule of hierarchy of norms, reinforce its international obligation to create and maintain stable conditions and to provide FET. In this regard, the Tribunal considers that the stability promises in the domestic law and other official and informal assurances of the Respondent and Article 10(1) of ECT could be the basis of the Claimant's legitimate expectations in this case.

132. Indeed, as described below (see para. 166.iv *infra*), the Tribunal noted that "Article 26(6) of the ECT does not include any reference to rules of domestic law nor is there any mention of the law of the European Union."[121] The Tribunal went on to note Spain's argument that "EU law is in fact international law directly applicable to the merits of this dispute […] therefore the standards invoked by the Claimant must be interpreted in a manner consistent with EU law."[122]

133. The Tribunal agreed with Spain that it was key to understand the regulatory framework that existed at the time to determine whether it could give rise to legitimate expectations protected by international law.[123] However, the Tribunal disagreed with Spain that "EU law is in fact international law directly applicable to the merits of this dispute" [124] and instead considered that Spanish domestic law (including EU law) "could provide a context in connection with the assessment of the legitimate expectations claimed by the Claimant under Article 10(1) of the ECT."[125] Accordingly, the Tribunal went on to consider the Spanish regulatory context in detail as a matter of fact in its determination of JGC's legitimate expectations under Article 10(1) of the ECT.

134. For all the above reasons, the Committee finds that the Tribunal identified and applied the law agreed to by the Parties and thus did not exceed its powers. Given this finding, the question as to whether the excess of powers is "manifest" is rendered moot and not necessary for the Committee to address.

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[121] The 2021 Decision, ¶ 474.
[122] Award, ¶ 477 citing Respondent's PHB at ¶ 75.
[123] Award, ¶ 478.
[124] The 2021 Decision, ¶ 481.
[125] Award, ¶ 482.

C. Failure to State Reasons

135. In this section, the Committee summarizes the Parties' positions regarding the applicable standard to the ground under Article 52(1)(e) of the ICSID Convention, followed by how each Party argues that the ground is applicable to the case. As in the previous section B, the Applicant's positions will be described first, followed by the Claimant's, and the Committee's analysis will ensue.

1. Spain's Position

a) Applicable Standard

136. The Applicant contends that the Award must be annulled because the Tribunal failed to state the reasons for not applying EU law to the case.[126] The Applicant states that the Award devotes Section VI(B) to the determination of the applicable law and identifies Article 26(6) of the ECT as the agreement of the Parties that should guide the Tribunal.[127] However, Spain asserts, the Award assumes that EU law is not international law without explaining why.[128]

137. Spain invokes Article 52(1)(e) as well as Article 48(3) of the ICSID Convention to support its position.[129] The Applicant asserts that *ad hoc* committees must "determine whether there is comprehensive and consistent reasoning on the part of the tribunal",[130] and that the parties must be able to understand the award.[131]

138. In addition, the Applicant agrees with JGC that "the basis for setting aside an award for failure to state reasons is the one determined by the [sic] *MINE v. Guinea*".[132] Spain notes that in that case the committee concluded that, because the tribunal did not deal with questions raised by the Republic of Guinea and the answer to those questions might have

[126] Memorial on Annulment, ¶ 123.
[127] Memorial on Annulment, ¶ 97.
[128] Memorial on Annulment, ¶¶ 99, 102.
[129] Memorial on Annulment, ¶ 126.
[130] Memorial on Annulment, ¶ 128.
[131] Memorial on Annulment, ¶ 129.
[132] Reply on Annulment, ¶ 73. **RL-85**, *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, 14 December 1989 [hereinafter: *MINE v. Guinea*], ¶ 73.

affected the tribunal's conclusion, the failure to address those questions constituted a failure to state the reasons on which that conclusion was based.[133]

139. Spain describes other decisions of committees in which the lack of statement of reasons as a ground for annulment was considered.[134] In reference to *MINE v. Guinea* and *TECO v. Guatemala*, the Applicant adds that "the mere expression in the Award of an opinion does not serve as a statement of reasons, unless it offers in detail the reasoning that has enabled the Tribunal to reach such a conclusion".[135] It indicates that insufficient, inadequate, frivolous or contradictory reasons are also a basis for annulment, as well as if the tribunal omits relevant issues raised by the parties.[136]

140. Relying on *Klöckner v. Cameroon*, Spain states that the task of the Committee should not be to "reconstruct" the Award.[137]

b) The Ground as Applied to the Case

141. Spain argues that the Tribunal did not explain why it did not apply EU law as international law. It claims that there is no attempt by the Tribunal to interpret Article 26(6) of the ECT according to the VCLT nor does the Award contain "a single reference to either treaty interpretation rules or doctrine".[138] The Applicant indicates that Article 26(6) of the ECT makes no distinction between different categories of international law,[139] and that it incorporates the principle of *iura novit curia*.[140] Spain also cites a case based on the German-Czech bilateral investment treaty where the tribunal "concluded that EU law was

[133] Reply on Annulment, ¶ 88.
[134] Reply on Annulment, ¶¶ 77-100.
[135] Reply on Annulment, ¶ 102.
[136] Memorial on Annulment, ¶ 131; Reply on Annulment, ¶¶ 102-105.
[137] Reply on Annulment, ¶ 106; **RL-0188,** *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, 3 May 1985.
[138] Memorial on Annulment, ¶ 141.
[139] Reply on Annulment, ¶ 109.
[140] Reply on Annulment, ¶ 111.

international law applicable to the dispute by virtue of the proximity principle enshrined in Article 31(3) of the Vienna Convention".[141]

142. The Applicant asserts that EU law had to be considered in its three forms, that is, as international law, as domestic law of any EU member State and as a "fundamental fact".[142] Spain avers that EU law is important for defining legitimate expectations and the scope of FET[143] as has been recognized by the EC.[144]

143. Nonetheless, according to Spain the Award only addresses the relevance of EU law as a fact in one paragraph.[145] The Applicant asserts that in the underlying arbitration, it had stated that the assessment of legitimate expectations must include a verification as to whether a promised subsidy is lawful under EU law.[146] Spain maintains that the Tribunal "fails to reason how the Claimant could acquire any legitimate expectations contrary to the general rule laid down in Article 107 TFEU, a genuine international treaty".[147] It also states that the Tribunal could not point to any due diligence carried out by JGC regarding EU law.[148] The Applicant emphasizes that EU law is not only relevant from the point of view of the investor's objective and subjective legitimate expectations but also from the point of view of the principle of proportionality, because if the measure adopted was proportionate, despite infringing on JGC's legitimate expectations, then Spain would not have breached the FET standard as per Article 10(1) of the ECT.[149]

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[141] Reply on Annulment, ¶ 113, making reference to **RL-0111,** *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03. Award 11 October 2017), [hereinafter: *Wirtgen v. Czech Republic*], ¶ 174.
[142] Reply on Annulment, ¶ 114.
[143] Reply on Annulment, ¶ 116.
[144] Reply on Annulment, ¶ 117; **RL-0100**, Decision C(2017) 7384 of the European Commission, rendered on 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN)).
[145] Memorial on Annulment, ¶ 146.
[146] Memorial on Annulment, ¶ 145; Reply on Annulment, ¶ 108.
[147] Memorial on Annulment, ¶ 148.
[148] Memorial on Annulment, ¶ 149.
[149] Memorial on Annulment, ¶¶ 151, 152.

144. Spain adds that the Tribunal ignored that the measures it introduced aimed to level the "playing field" in the energy market, and that the ECT does not protect expectations that perpetuate situations of "distorted market competition".[150]

2. JGC's Position

a) Applicable Standard

145. The Claimant suggests that the "ICSID standard for annulment at stake is very stringent and Spain has not met (and cannot meet by any means) the exceptional circumstances that would warrant the annulment of an award for failure to state reasons".[151] JGC maintains that the standard for annulment under Article 52(1)(e) of the ICSID Convention is "particularly high" and could occur only in "manifest" cases, meaning that the award "must contain no reasons on a particular finding that is indispensable to apprehend the tribunal's reasoning".[152] The Claimant states that the decisions cited by Spain do not support its position.[153]

146. JGC argues that Spain agrees with the following legal standard: "for the Award to be annulled under Article 52(1)(e), Spain would have to prove that the Award suffers from: (i) a complete lack of reasons for dismissing the determination of EU law as international law applicable to the merits of the case; (ii) that the reasons provided for such dismissal are frivolous or contradictory in nature; or that (iii) it is manifestly impossible to infer how the Tribunal proceeded from Point 'A' to Point 'B' in its reasoning".[154] It considers that, nonetheless, Spain's request for annulment is not based on a lack of reasons but rather on a disagreement with the motives provided by the Tribunal.[155]

[150] Memorial on Annulment, ¶ 153.
[151] Counter-Memorial on Annulment, ¶ 69; Rejoinder on Annulment, ¶ 47.
[152] Counter-Memorial on Annulment, ¶ 74.
[153] Rejoinder on Annulment, ¶ 48.
[154] Rejoinder on Annulment, ¶ 49.
[155] Counter-Memorial on Annulment, ¶ 76; Memorial on Annulment, ¶ 127.

147. The Claimant insists that the ICSID Convention just requires the parties in an arbitration to understand the logical reasoning followed by the tribunal[156] and that, accordingly, this Committee must verify only whether the reader can understand the Tribunal's decision.[157]

148. The Claimant argues that Spain is trying to rewrite Article 52(1)(e) of the ICSID Convention by adding that the ground for annulment is one of failure to state "sufficient or adequate reasons", and that this could lead the Committee to an examination of the substance of the Tribunal's decision, in contravention of Article 53 of the ICSID Convention.[158]

b) The Ground as Applied to the Case

149. JGC contends that it is hard to understand why Spain avers that the Tribunal had to apply EU law since, by withdrawing its EU law jurisdictional objection in the underlying arbitration, Spain "acknowledged at that time that EU law was not applicable to the merits".[159] The Claimant adds that in any case, the Tribunal "did analyze the potential argument and stated its reasons to reject the application of EU law to the merits of the dispute as a matter of international law"[160].

150. JGC maintains that in the underlying arbitration, Spain did not maintain its argument that EU law was part of the international law applicable to the dispute pursuant to Article 26(6) of the ECT after November 2019, so it cannot argue it now.[161] The Claimant affirms that the Tribunal did include a justification for its decision to reject Spain's allegations concerning the applicability of EU law to the merits of the dispute and considers its reasoning "clear, straightforward and easy to follow from point A to point B".[162] JGC summarizes the Tribunal's findings on this point.[163] The Claimant argues that Spain takes issue with the

[156] Counter-Memorial on Annulment, ¶ 77.
[157] Counter-Memorial on Annulment, ¶ 79.
[158] Counter-Memorial on Annulment, ¶ 80.
[159] Counter-Memorial on Annulment, ¶ 85.
[160] Counter-Memorial on Annulment, ¶ 85.
[161] Counter-Memorial on Annulment, ¶¶ 87-94.
[162] Counter-Memorial on Annulment, ¶ 96; Rejoinder on Annulment, ¶ 59.
[163] Counter-Memorial on Annulment, ¶ 97.

correctness of the Tribunal's reasoning but not with its logic or congruence and notes that criticizing the correctness of ICSID awards has become routine for Spain.[164]

151. JGC alleges that Spain also acknowledged during the hearing that Article 26(6) of the ECT only referred to international law, not to EU law, and that there is no explicit reference to EU law in Article 26(6) of the ECT. The Claimant asserts that the question of whether international law encompasses EU law is a different topic that the Tribunal later decided upon.[165]

152. For JGC, Spain's subsidiary contention that the Tribunal did not apply EU law is the Applicant's way of reopening the discussion on the merits, which is improper in ICSID annulment proceedings.[166]

153. First, the Claimant suggests that Spain's position in its Memorial on Annulment is contradictory because it first asserts that the Tribunal did not consider EU law as a fact but then it acknowledges that the Tribunal did address this.[167]

154. Second, JGC indicates that the Tribunal did consider both EU law and national law as a matter of fact.[168] The Claimant also asserts that the Tribunal did not reject Spain's arguments without reason.[169]

155. Third, in response to Spain's claim that the Tribunal did not point to any due diligence carried out by JGC on EU law, JGC cites the Award: "[JGC] conducted an appropriate level of due diligence expected of investors in similar circumstances".[170] Fourth, the Claimant argues that the Tribunal did consider and justifiably rejected Spain's invocation of EU State aid law as an argument to deny the existence of JGC's legitimate expectations.[171]

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[164] Rejoinder on Annulment, ¶ 59.
[165] Counter-Memorial on Annulment, ¶ 99.
[166] Counter-Memorial on Annulment, ¶ 101.
[167] Counter-Memorial on Annulment, ¶ 102.
[168] Counter-Memorial on Annulment, ¶ 103.
[169] Counter-Memorial on Annulment, ¶ 107.
[170] Counter-Memorial on Annulment, ¶ 108; **RL-0146**, *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain*, ICSID Case No. ARB/15/27, Award, 9 November 2021, ¶ 973.
[171] Counter-Memorial on Annulment, ¶ 110.

156. To recapitulate, JGC contends that Spain cannot argue that the Award failed to state reasons because: i) Spain acknowledged that EU law was a fact and was not a potentially applicable law to the merits of the case when it withdrew the "EU law jurisdictional objection"; ii) the Tribunal sufficiently justified its decision when rejecting Spain's allegations concerning the applicability of EU law as part of the law applicable to the merits of the dispute; and iii) the Tribunal thoroughly examined the Spanish regulatory framework, which incorporates considerations of EU law as relevant facts at the time of JGC's investment to assess its legitimate expectations.[172]

3. The Committee's Analysis

a) Applicable Standard and Approach by the Committee

157. In the ICSID system the ground for annulment for failure to state reasons is linked to the requirement under Article 48(3) of the ICSID Convention that tribunals state reasons for their decision.[173]

158. While under Article 52(1)(e) of the ICSID Convention annulment committees must ascertain whether tribunals issue reasoned awards, there is wide consensus surrounding the notion that annulment cannot be used to revise the decision of tribunals to determine whether the reasoning is adequate. Rather, annulment committees must conclude whether "[…] it is clear how the Tribunal reasoned in order to reach the conclusion it did."[174] Numerous committees have agreed with this test, which implies a minimum requirement: "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[175]

159. The Parties agree with this general notion, but they disagree on how the Committee should approach the question. The Hearing on Annulment provided an opportunity for the

[172] Rejoinder on Annulment, ¶ 54.
[173] **RL-147**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016; see also **RL-85**, *MINE v. Guinea*, ¶ 5.07.
[174] **RL-148**, *Sempra v. Argentina*, ¶ 168.
[175] **RL-85**, *MINE v. Guinea*, ¶ 5.09.

Committee to discuss this with the Parties. Indeed, the Committee asked the Parties whether the Committee could rely on implied or implicit reasoning by the Tribunal in its assessment of this ground much in the way the committee in *Soufraki* did, as described in paragraphs 24 to 26 of its decision.[176]

160. Spain replied that "[…] the Committee cannot infer the Tribunal's reasoning in an implied way if it could only be explicit, as we believe that this would go beyond the factors(?) of the Annulment Committee."[177] In contrast, JGC stated that the Committee should take an active role in the reading of the award; for the Claimant, the Committee can "[…] infer or take into account implied reasons, but always without -- of course without the boundaries of the arbitration file and without the boundaries of the Award."[178].

161. The Committee agrees with this approach, which has been also accepted in other cases, such as *TECO v. Guatemala*, where the committee found that "not all of a tribunal's reasons need to be set out explicitly, as long as they can be understood from the rest of the award".[179] This approach entails reading the Award as a whole and essentially asking the question, Is there a problem understanding how the tribunal arrived at its decision?

b) The Ground as Applied to the Case

162. The Applicant complains that the Tribunal did not reason the Award specifically on the issue of applicable law[180] and focuses on paragraphs 472 *et seq*. The Committee sought "clarification as to whether Spain takes the position that there are any contradictory reasons in the Award, or whether its challenge on this basis is just on the adequacy of the reasons" during the Hearing on Annulment.[181] The Applicant replied that Spain does not "believe that

[176] **RL-0104**, *Hussein Nuaman Soufraki v. The United Arab Emirates* Decision of the ad hoc committee on the application for annulment, ICSID Case No ARB/02/7, 5 June 2007, [hereinafter *Soufraki v. UAE*], ¶¶ 24-26.
[177] Tr. Day 1 (English), 121:5-8.
[178] Tr. Day 1 (English), 124:19-22.
[179] **RL-0195**, *TECO v. Guatemala*, ¶ 88.
[180] "[…] [T]here is, is an absolute lack of motivation of the Tribunal regarding the applicable law." Tr. Day 1 (English), 120:16-18; see also Tr. Day 1 (English), 121:15-16.
[181] Tr. Day 1 (English), 110:15-19.

the [Award] has contradictory reasons, we only believe that it has an absolute lack of motivation."[182]

163. The Committee agrees with the Parties that in the present case the grounds manifest excess of powers and failure to state reasons are linked insofar as they have a common object: the Tribunal's decision on the applicable law. For that reason, the description provided by the Committee of the Tribunal's reasoning in section VI(B) of the 2021 Decision is relevant for purposes of this analysis, so paragraphs 117-121 *supra* should be deemed included in this section and read as part of it.

164. The Committee confirms that, in its view, it is clear how the Tribunal reasoned in section VI(B) of the 2021 Decision to reach its conclusion. Essentially, the Tribunal found that "the ECT and applicable rules and principles of international law" under Article 26(6) of the ECT do not include EU law and, therefore, that EU law is not applicable to the merits directly as the applicable law chosen by the Parties in accordance with Article 42(1) of the ICSID Convention. The analysis provided by the Committee in paragraphs 117-121 *supra* illustrates that a reader can easily discern the ideas of the Tribunal where they were not stated explicitly. As the *Soufraki* committee plainly explained, "[n]ot every word has to be explained. Generally accepted propositions need not be extensively justified."[183]

165. Since the Committee has established that it is required to read the Award in its totality to assess whether the Tribunal stated the reasons, for the sake of completeness, the Committee shall assess whether there is enough reasoning in the Award as a whole for the Tribunal's conclusion regarding the applicable law to the merits. For the reasons that follow, the Committee determines that, even beyond section VI(B), the Award contains reasoning that offers a discernible path "from point A. to point B." in the present case.

[182] Tr. Day 1 (English), 121:20-22.
[183] **RL-0104**, *Soufraki v. UAE*, ¶ 131.

166. In sum, the Tribunal reasoned as follows:

i) Article 42(1) of the ICSID Convention provides, *inter alia*, that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."[184]

ii) The ECT contains the rules of law chosen by the Parties. Article 26(6) of the ECT provides that: "a tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." [185]

iii) So, the issues in dispute in the arbitration were "to be determined in accordance with the ECT and applicable rules and principles of international law."[186]

iv) On its face, "Article 26(6) of the ECT does not include any reference to rules of domestic law nor is there any mention of the law of the European Union."[187] "In an international arbitration, domestic law is considered a fact" and the applicable "rules and principles of international law" are "independent and separate from the Respondent's domestic law or the law of the European Union.[188]

v) "As this arbitration case is between an investor of Japan, one Contracting Party to the ECT which is not a Member State of EU, and the Kingdom of Spain, another Contracting Party to the ECT, the Tribunal considers that EU law could not be viewed as international law <u>for the purpose of Article 26(6) of the ECT</u>."[189] [Emphasis added]

[184] Award, ¶ 472.
[185] Award, ¶ 473.
[186] Award, ¶ 474.
[187] Award, ¶ 474.
[188] Award, ¶¶ 480-481.
[189] Award, ¶ 481.

167. The Tribunal's reasoning is clear. The plain wording of Article 26(6) does not include reference to domestic or EU law and importing EU law as international law for the purpose of Article 26(6) would not be appropriate when one of the parties was not an EU member State. It is important to note that the Tribunal did not say that EU law was not international law. Instead, it reasoned that in the circumstances EU law could not be viewed as international law for the purpose of Article 26(6). In doing so, it interpreted Article 26(6) of the ECT.

168. It is also important to note that the Tribunal did not disregard Spanish (nor EU law). After determining that the applicable law was the "[ECT] and applicable rules and principles of international law", the Tribunal determined the standard of protection under the ECT. Subsequently, in the application of the law to the facts, the Tribunal described the relevant regulatory framework in Spain at the time of JGC's investment. That section included a specific analysis of the scheme that the Tribunal had meticulously already described broadly, in more than 40 pages under section III(C).

169. In the Committee's view, the whole Award consistently treats both EU law and Spanish law as part of the factual context that shaped the Claimant's legitimate expectations. Because of the chronological order in which the relevant events took place, the Tribunal gave little or no relevance to EU State aid law[190] and gave more relevance to the CNE report, for example, in the shaping of legitimate expectations of the investors.[191] The reasons for such approach were provided by the Tribunal in section VI(B), where it found essentially that a) Japan could not have consented to EU law as applicable law under Article 26(6),[192] since b) it does not "include any reference to rules of domestic law nor is there any mention of the law of the [EU]"[193] and, in conclusion, c) it would consider Spanish law as factual context for the assessment of legitimate expectations.[194]

[190] The 2021 Decision, ¶¶ 938, 1004.
[191] The 2021 Decision, ¶¶ 893, 895.
[192] The 2021 Decision, ¶ 481.
[193] The 2021 Decision, ¶ 474.
[194] The 2021 Decision, ¶ 482.

170. For all the aforementioned reasons, the Committee finds that the Tribunal did not fail to state reasons.

D. Serious Breach of a Fundamental Rule of Procedure

171. In this section, the Committee summarizes the Parties' positions regarding the applicable standard to the ground under Article 52(1)(d) of the ICSID Convention, followed by how each party argues that the ground is applicable to the case. As in the previous section C, the Applicant's positions will be described first, followed by the Claimant's, and the Committee's analysis will ensue.

1. Spain's Position

a) Applicable Standard

172. Spain invokes Article 52(1)(d) of the ICSID Convention, pursuant to which an award must be annulled if there is a serious departure from a fundamental rule of procedure. The Applicant suggests that a deviation is serious if a party is deprived of the protection afforded by the relevant procedural rule. It asserts that a rule of procedure is fundamental if it refers to the essential fairness that must govern all proceedings and is included within the minimum standard of "due process" required by international law.[195] Spain considers that a tribunal's discretion cannot be an argument used to infringe on the parties' basic rights.[196]

173. Spain argues that the right of a party to be heard is a fundamental rule of procedure[197] and that this entails an equal opportunity for both parties to present arguments and evidence.[198] According to Spain, a serious departure from a fundamental rule of procedure also includes the unjustified refusal of a request for document production, and cites cases and commentators to support this contention.[199] The inobservance of the rules on the burden of

[195] Memorial on Annulment, ¶ 157.
[196] Reply on Annulment, ¶¶ 126, 145.
[197] Reply on Annulment, ¶ 128.
[198] Memorial on Annulment, ¶ 159.
[199] Memorial on Annulment, ¶¶ 164-166.

proof is another breach of procedural rules according to the Applicant.[200] The Applicant refers to a series of cases where committees have determined these issues.[201]

174. Spain also argues that "the waiver of any right cannot be presumed or blithely invoked but must be evidenced by unequivocal acts of the alleged withdrawing party".[202] Furthermore, it claims that this standard of annulment does not require proof or evidence that the outcome of the proceedings would have been different in the absence of the breach.[203] Spain reiterates that it is not seeking to re-litigate the matter.[204]

175. The Applicant claims that this right does not encompass only "formal" aspects such as submitting memorials or speaking at the hearing but also "material" ones that include a tribunal's taking into account of the parties' submissions.[205]

b) The Ground as Applied to the Case

176. Spain argues that the Tribunal violated its right to be heard.[206] Spain contends that its arguments regarding the applicability of EU law on State aid were not heard in the material sense.[207] In addition, Spain argues that the Award violated its right to be heard when it did not take into account the *BayWa v. Spain* award (devoting only one paragraph of the Award to it), which was decisive to the issues.[208] The Applicant claims that that one paragraph was inadequate and violated its rights.[209] Spain contends that is was "left without knowing the

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[200] Memorial on Annulment, ¶ 170.
[201] Reply on Annulment, ¶¶ 131-141, referring to **RL-0088**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015; **RL-0084**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010 [hereinafter: *Fraport v. Philippines*]; **RL-0190**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986; **RL-0089**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, 18 December 2012; **RL-0195**, *TECO v. Guatemala*.
[202] Reply on Annulment, ¶ 148.
[203] Reply on Annulment, ¶¶ 154, 168.
[204] Reply on Annulment, ¶ 155.
[205] Memorial on Annulment, ¶¶ 173, 174; Reply on Annulment, ¶ 157.
[206] Memorial on Annulment, ¶ 172.
[207] Memorial on Annulment, ¶ 176.
[208] Memorial on Annulment, ¶ 177; **RL-0150**, *BayWa v. Spain*; Reply on Annulment, ¶ 158.
[209] Memorial on Annulment, ¶ 181; Reply on Annulment, ¶¶ 160, 162.

reason why the *BayWa v. Spain* award has not been analysed",[210] even after it requested for the decision to be introduced into the record and commented on.[211]

177. Spain also maintains that the Tribunal rejected the EC's request to file an *amicus curiae* brief without reason.[212] According to Spain the EC "would have provided the Tribunal with authoritative clarification and confirmation of Spain's obligations as a member State of the European Union with respect to the relevant issues in the case".[213] The Applicant adds that when the Tribunal rejected the EC's application for intervention, it was already aware that it was going to benefit the Claimant.[214] Indeed, the Tribunal stated that the EC's arguments would have supported those put forth by Spain.[215]

178. According to Spain, the Tribunal disallowed highly conclusive evidence supporting the lack of jurisdiction of the Tribunal while allowing Claimant's.[216]

179. In response to JGC's contention that the Applicant failed to raise an objection in relation to the Tribunal's decision to reject the intervention of the EC, and also withdrew its jurisdictional objection based on EU law and therefore waived its right to request annulment of the Award,[217] Spain claims that it did not waive any rights. It maintains that it raised this infringement at the first procedural opportunity available to it, i.e., the annulment proceedings, and that the Committee should consider the nature and regulation of the right allegedly waived.[218] Indeed, Spain avers that it is exercising its right to seek annulment of the Award per Article 52 of the ICSID Convention. The Applicant contends that JGC's interpretation of ICSID Arbitration Rule 27 is expansive and must be rejected because the rule refers to non-compliance with procedural rules.[219] It argues that, in any case, the only

[210] Reply on Annulment, ¶ 163.
[211] Reply on Annulment, ¶ 168.
[212] Memorial on Annulment, ¶ 184; Reply on Annulment, ¶ 174.
[213] Memorial on Annulment, ¶ 185.
[214] Memorial on Annulment, ¶ 186; Reply on Annulment, ¶ 178.
[215] Reply on Annulment, ¶ 176.
[216] Memorial on Annulment, ¶ 191.
[217] Counter-Memorial on Annulment, ¶ 147.
[218] Reply on Annulment, ¶ 149.
[219] Reply on Annulment, ¶ 151.

way to react to a procedural violation committed by the Tribunal in the 2021 Decision or the Award is by applying for annulment.[220]

2. JGC's Position

180. The Claimant considers this ground to be frivolous and a reiteration of allegations in other cases that do not apply to this one.[221]

a) Applicable Standard

181. JGC contends that Article 52(1)(d) of the ICSID Convention imposes two obligations on the Applicant: "First, to identify the rule of procedure that the Tribunal purportedly departed from, and second, to satisfy its burden of proof regarding three points: (i) the 'fundamental' nature of said rule; (ii) the 'departure' by the Tribunal from said rule; and (iii) the 'serious' nature of the departure".[222]

182. The Claimant argues i) that to establish a serious departure from a fundamental rule of procedure it is required that the party raise the objection during the arbitration; ii) that conduct leading to a serious departure from a fundamental rule of procedure is found in the conduct of the tribunal, not in the content of its decision; iii) that a breach of the right to be heard and to be treated equally is found when a party cannot present all relevant arguments and evidence or when a party does not have the opportunity to respond adequately to the arguments and evidence presented by the other; and, finally, iv) that for a departure to be "serious" the existence of actual material prejudice and evidence that the violation has caused a substantially different result in the case are required.[223]

183. Also, the Claimant notes that Spain acknowledges that the right to be heard does not include receiving an award with a detailed explanation of each and every argument invoked.[224]

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[220] Reply on Annulment, ¶ 153.
[221] Counter-Memorial on Annulment, ¶ 114.
[222] Counter-Memorial on Annulment, ¶ 117.
[223] Rejoinder on Annulment, ¶ 65.
[224] Rejoinder on Annulment, ¶ 75.

184. Finally, the Claimant underscores the fact that tribunals enjoy the "widest of discretions when considering the relevance and admissibility of evidence and intervention of third parties",[225] and because of that discretionary power, those decisions are not subject to review by annulment committees. JGC claims that Spain's request regarding *BayWa v. Spain* and the EC's intervention are unprecedented because it is asking the Committee to review the Tribunal's decision regarding these two issues; however, awards are only binding on the parties and tribunals have great discretion to decide on *amicus curiae* requests.[226]

b) The Ground as Applied to the Case

185. For the following reasons, the Committee concludes that the Tribunal did not fail to state reasons for its findings.

186. The Claimant suggests that Spain confirmed the lack of merit of its Annulment Application due to an alleged departure from a fundamental rule of procedure because it admitted in its Reply that "there was no flaw in the procedure adopted by the Tribunal."[227]

187. JGC alleges that Spain's argument regarding the brief reference to *BayWa v. Spain* in the Award is "frivolous and untenable, since it manifestly falls outside the scope of Article 52(1)(d) ICSID Convention"[228] for a number of reasons.

188. First, it alleges that the Applicant's right to be heard was respected when it was allowed to submit the case with its legal authorities.[229]

189. Secondly, it avers that the Tribunal analyzed *BayWa v. Spain* in paragraph 968 of the 2021 Decision, as Spain itself points out,[230] and it is not for the Committee to consider whether a single paragraph devoted to *BayWa v. Spain* is adequate.[231]

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[225] Counter-Memorial on Annulment, ¶ 119.
[226] Counter-Memorial on Annulment, ¶ 121.
[227] Rejoinder on Annulment, ¶ 64.
[228] Counter-Memorial on Annulment, ¶ 124.
[229] Counter-Memorial on Annulment, ¶ 125.
[230] Counter-Memorial on Annulment, ¶ 126; Memorial on Annulment, ¶ 178; Rejoinder on Annulment, ¶ 68.
[231] Counter-Memorial on Annulment, ¶ 127.

190. Thirdly, JGC maintains that by invoking the material scope of this right, "Spain aims for the alignment of the Tribunal's conclusions concerning the applicability of the *BayWa v. Spain* award (and its relevance to EU state aid rules) with Spain's".[232] The Claimant indicates that Spain invokes the "material scope" argument of the right without any legal basis[233] and refers to no precedents. JGC argues that Spain is not trying to exercise its right to be heard, "rather it is trying to exercise a non-existent 'right to be right'".[234]

191. Fourth, the Claimant adduces that even if the Tribunal's decision affected Spain's right to be heard, the alleged departure would not have been as "serious" as to justify annulment under Article 52(1)(d) of the ICSID Convention.[235] JGC maintains that Spain cannot prove that the alleged departure was outcome-determinative.[236]

192. Regarding Spain's request that the *BayWa v. Spain* award be admitted to the record, the Claimant asserts that Spain's letter to the Tribunal did not justify how the case was relevant to the arbitration and also stated that, given the late stage of the proceedings, Spain did not consider it necessary for the Parties to submit comments on the decision.[237] JGC contends that in any case, under ICSID Arbitration Rule 34(1), the Tribunal is the sole judge of the admissibility of any evidence and of its probative value.[238] The Claimant adds that the *BayWa v. Spain* award would have actually supported JGC's position in the arbitration.[239]

193. Regarding the intervention of the EC as *amicus curiae*, JGC claims that this falls outside the scope of the annulment grounds under the ICSID Convention.[240]

194. First, the Claimant argues that the right to be heard is breached when a party is prevented from presenting its case. However, in this case, the Tribunal rejected the EC's Application after it reviewed it and reviewed the Parties' positions thereon, and after considering that the

[232] Counter-Memorial on Annulment, ¶ 129.
[233] Rejoinder on Annulment, ¶ 69.
[234] Rejoinder on Annulment, ¶ 70.
[235] Counter-Memorial on Annulment, ¶ 130.
[236] Rejoinder on Annulment, ¶ 79.
[237] Rejoinder on Annulment, ¶ 72.
[238] Rejoinder on Annulment, ¶ 73.
[239] Rejoinder on Annulment, ¶ 76.
[240] Counter-Memorial on Annulment, ¶ 133.

EU law issue was a matter that Spain could address on its own.[241] Thus, JGC argues that Spain was not prevented from presenting its case.[242]

195. Second, the Claimant puts forth that the Tribunal's decision to deny the EC's request to intervene fell within its discretionary power under ICSID Arbitration Rule 37(2),[243] and that it explained its reasons when doing so.[244]

196. Third, JGC argues that there is no right in an ICSID proceeding to have the participation of an *amicus curiae*, and that in any case its views should be independent from the parties.[245]

197. Fourth, the Claimant avers that Spain's request to annul the Award on this ground is contradictory with its requests for annulment of other similar ECT awards where it has not contested the denial of the EC's application.[246]

198. Fifth, JGC maintains that even if the Tribunal's decision to reject the EC's intervention would have affected Spain's right to be heard, the alleged departure would not have been "serious" because the Tribunal would not have reached a "substantially different result."[247]

199. Sixth, the Claimant argues that ICSID annulment committees have regularly applied ICSID Arbitration Rule 27 to deny applications for annulment under Article 52(1)(d) of the ICSID Convention and cites cases in support thereof.[248] It suggests that Spain has waived its right to request annulment under this ground.

200. The Claimant asserts that the right to be heard is not absolute, but rather implies that the parties have been able to present all the arguments and evidence relevant to their cases.[249]

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[241] Counter-Memorial on Annulment, ¶¶ 135, 136.
[242] Rejoinder on Annulment, ¶ 87.
[243] Counter-Memorial on Annulment, ¶ 137.
[244] Counter-Memorial on Annulment, ¶ 138; Rejoinder on Annulment, ¶¶ 84, 85.
[245] Counter-Memorial on Annulment, ¶ 140.
[246] Counter-Memorial on Annulment, ¶ 144.
[247] Counter-Memorial on Annulment, ¶ 145.
[248] Counter-Memorial on Annulment, ¶ 146.
[249] Rejoinder on Annulment, ¶ 90.

3. The Committee's Analysis

a) Applicable Standard and Approach by the Committee

201. The ordinary meaning of the terms in Article 52(1)(d) of the ICSID Convention requires that committees answer the following questions: a) what is the "fundamental rule of procedure" in question, b) has there been a departure from such a rule, and c) is the departure "serious".

202. To answer the first question the Committee needs to identify the specific fundamental rule of procedure that the Applicant alleges has been breached. Spain avers that the right to be heard is the fundamental rule of procedure at issue and refers to past committees that have included the right to be heard within the rules that are protected under Article 52(1).[250] JGC agrees[251] and so does the Committee. The Committee is not unique in this regard, as practically all annulment committees faced with this ground include the right to be heard as a fundamental rule of procedure.[252] The right to be heard includes the possibility for each party to present its case but does not mean the tribunals must admit or accept all requests from parties. Indeed, parties confer upon the arbitrators the powers to determine issues regarding evidence and procedural aspects of the case. What is essential is that parties are given the opportunity to present their cases.

203. The conduct of the tribunal has to be assessed to reply to the second question, i.e., whether there was a violation of the right to be heard. In other words, if the conduct identified by the applicant party does impede that party from presenting its case, there is a departure from a fundamental rule of procedure and the annulment committee would need to ask the third and final question.

204. That final question is whether the departure is serious. In this regard, Spain proposes that the departure is serious if the party is deprived of the protection afforded by the relevant rule of procedure.[253] Also, Spain states that a committee does not need to assess whether the decision

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[250] **RL-84**, *Fraport v. Philippines*; **RL-87**, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, 13 January 2015.
[251] Tr. Day 1 (English), 83:25.
[252] See for example, **RL-84**, *Fraport v. Philippines*; **RL-0192**, *Venezuela Holdings v. Venezuela*.
[253] Tr. Day 1 (English), 34:24-25.

would have been different but for the departure of the fundamental rule of procedure and relies on *TECO v. Guatemala*, *Tulip v. Turkey* and *Pey Casado v. Chile* for such proposition.

205. JGC agrees as well. It adds that Spain cannot prove that the alleged departure was outcome-determinative, since the ICSID system is not based on binding precedents.[254]

b) The Ground as Applied to the Case

206. In this case, there are essentially two actions, or omissions, by the Tribunal with which Spain takes issue. The first is the alleged omission to take into account the *BayWa v. Spain* award; the second is the rejection by the Tribunal of the EC's request to file a non-disputing party submission.

207. The fundamental rule of procedure that Spain alleges was departed from with relation to the *BayWa v. Spain* award is two-fold, namely, a) a so-called "material" aspect of the right to be heard in the reasoning of the Award and b) a "formal" aspect, which was infringed because the Tribunal did not listen to Spain on the issue of EU State aid as applied by the *BayWa v. Spain* tribunal.

208. The Committee finds exactly the opposite: the Tribunal actually took into account the *BayWa v. Spain* award in its analysis. Whether it agreed with Spain's interpretation or not is a matter that falls outside the scope of annulment proceedings, but there is no possible breach of the right to be heard if it is clear that the Tribunal permitted the introduction of the decision into the record and addressed its substance in the Award. This is reflected first in paragraph 810, where the Tribunal explains that it has considered all the awards submitted by the Parties, including those submitted after the PHB (which was the case of the *BayWa v. Spain* award), and then in paragraph 968, which specifically refers to *BayWa v. Spain*.

209. The Committee asked Spain during the Hearing on Annulment if it had any comment regarding the fact that in the letter requesting to introduce the *BayWa v. Spain* award it stated that it "considers that it is not necessary for the Parties to make written observations on the

[254] Counter-Memorial on Annulment, ¶ 131.

new legal authorities".[255] Spain explained that it did not find it necessary because the conclusions of the *BayWa v. Spain* award were self-explanatory.[256] While the Committee agrees with Spain in that this statement does not constitute a waiver of Spain's right to seek annulment under Article 52(1)(c) of the ICSID Convention, it does find it inconsistent with the arguments that Spain brings forth to sustain that ground.

210. Finally, the Committee is not persuaded by Spain that there is a fundamental rule of procedure to be protected behind the second allegation of a serious departure from a fundamental rule of procedure. A tribunal does not have an obligation to accept the request of a non-disputing party, or friend of the court, to make a submission and there is no right of a party that is linked to such request. From a structural point of view, in terms of the parties' standing and their fundamental rights, Spain did not come close to the first hurdle on this question. By alleging that the rejection of the EC's request to participate in the proceedings impacted its fundamental right to present its case, Spain is virtually erasing the identity of the EC as a third party to the dispute. Spain was afforded more than enough opportunity at the Hearing on Annulment to address the alleged unequal treatment and any breach of due process by the Tribunal but failed to show, through examples or otherwise, how the rejection of the EC application constituted a departure from a fundamental rule of procedure.

211. In any case, the Committee agrees with JGC that the discussion between the Parties is embedded in the reasoning of the Award.[257] For example, in pages 119 *et seq* of the [English] transcript of the first day of the hearing in the underlying arbitration[258] there is a description of the domestic energy regulations made by Respondent, which the Tribunal did take into account in its own description of the scheme as commented *supra*. The EU State aid regulations were simply not found to be as relevant as Spain advanced within the context of the case at the relevant time of the investment. Whether this is a right or wrong approach, it

[255] **R-403**, Respondent's letter of 4 December 2019.
[256] Tr. Day 1 (English), 114:18-24.
[257] Tr. Day 1 (English), 123:17-19, 24.
[258] **R-400**, *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain*, ICSID Case No. ARB/15/27, Transcript Hearing Day 1, 17 September 2018.

is not one that violates any right to be heard but rather one that confirms that Spain was heard.[259]

212. For all the afore-mentioned reasons, the Committee finds that there has been no departure, much less a serious departure, from a fundamental rule of procedure by the Tribunal, as alleged by the Kingdom of Spain. This third alleged ground for annulment also fails.

V. Costs

A. Spain's Position

213. In its statement of costs dated 16 November 2023, Spain submits that pursuant to Article 52(4) of the ICSID Convention and Arbitration Rule 53, Article 61(2) and Arbitration Rule 47(1)(j) apply *mutatis mutandis* to annulment proceedings.[260] The Applicant maintains further that Article 61(2) of the ICSID Convention grants the Committee the authority to assess and apportion the costs of this arbitration between the Parties, and that there exists "wide consensus" that committees have a degree of discretion to decide the allocation of costs.[261]

214. Spain argues that the Committee should be guided by the rule that "costs follow the event" if there are no indications that a different approach should be called for.[262] The Applicant alleges that it has been compelled to go through with these annulment proceedings because JGC "decided to initiate the dispute before an arbitral tribunal who lacked jurisdiction to hear intra-EU disputes".[263]

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[259] Another example is found in paragraph 477 of the Award, where the Tribunal describes Respondent's arguments regarding EU law.
[260] Spain's Statement on Costs, ¶ 4.
[261] Spain's Statement on Costs, ¶ 5.
[262] Spain's Statement on Costs, ¶ 6.
[263] Spain's Statement on Costs, ¶ 7. The Tribunal notes that this request for costs is based on an argument irrelevant to these annulment proceedings in respect of the Award, as this was not an intra-EU dispute.

215. Spain also notes that it would be entitled to recover the costs incurred by it "in the unlikely event that the Committee did not annul the award in its entirety, but it partially corrected the amount of the JGC award".[264]

216. Spain requests that "JGC pay all the costs of the proceedings"[265] and that it is ordered to pay post-award interest at a compound rate determined by the Committee.[266]

217. Spain claims a total of 1,217,926.62 EUR, broken down as follows:

i) ICSID fees and advance payments: 588,667.04 EUR

ii) Legal fees: 600,000 EUR

iii) Translations: 2,314.13 EUR

iv) Travel expenses: 3,113.37 EUR

v) Other expenses: 23,831.08 EUR

B. JGC's Position

218. In its statement of costs dated 16 November 2023, JGC agrees that the Committee has discretion regarding the allocation of the costs related to the annulment proceedings according to Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j), and also that both provisions are applicable to these annulment proceedings pursuant to Article 52(4) of the ICSID Convention and Arbitration Rule 53.[267]

219. JGC requests that the Committee order Spain to bear the full costs and expenses incurred by the *ad hoc* Committee and ICSID and reimburse JGC for its legal costs and expenses.[268] The Claimant maintains that the current practice of the "costs follow the event" rule should apply

[264] Spain's Statement on Costs, ¶ 8. The Tribunal notes that Spain did not seek to correct the amount of the Award in these proceedings.
[265] Spain's Statement on Costs, ¶ 21.
[266] Spain's Statement on Costs, ¶ 22.
[267] JGC's Statement on Costs, ¶ 11.
[268] JGC's Statement on Costs, ¶ 12.

and that this has been the case in the arbitrations of the so-called Spanish saga.[269] JGC also provides other cases where committees have applied this rule.[270]

220. JGC submits that the amount of time incurred by its attorneys is reasonable considering (i) the grounds on which the annulment action was based, (ii) the additional procedural incidents, (iii) the written exchanges between the Parties in relation to both the specific alleged grounds of annulment and the provisional stay of enforcement of the Award, (iv) the hearing on stay of enforcement, and (v) the hearing before the Committee.[271]

221. JGC claims a total of EUR 387,292.68 and JPY 2,007,600.00 broken down as follows:

i) Attorney's fees: EUR 378,845 and JPY 2,007,600.00
ii) Hearing expenses: EUR 4,733.05
iii) Translation expenses: EUR 3,533.61
iv) Photocopies: EUR 45.28
v) Other expenses: EUR 135.74

C. The Committee's Analysis and Decision on Costs

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

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

223. Article 61(2) applies *mutatis mutandis* to annulment proceedings according to Article 52(4) of the ICSID Convention. This provision, together with Arbitration Rules 53 and 47(1)(j), gives the Committee ample discretion to allocate all costs of the proceedings, including attorney's fees and other costs.[272] The discretion is only limited by an agreement of the

[269] JGC's Statement on Costs, ¶ 13.
[270] JGC's Statement on Costs, ¶¶ 16-18.
[271] JGC's Statement on Costs, ¶ 8.
[272] On its part, Article 26(8) of the ECT indicates that awards of arbitration "may include an award of interest".

Parties ("if the parties otherwise agree"), and while the provision does not speak of any standard applicable to the decision on costs, it does establish an obligation to assess the expenses incurred by the parties. Rule 28(2) of the ICSID Arbitration Rules provides that:

> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary- General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding. (Emphasis added).

224. Both the Claimant and Spain propose that the Committee should apply the costs follow the event rule.[273]

225. Spain presented its Application arguing that the Tribunal manifestly exceeded its powers, failed to state reasons, and seriously departed from a fundamental rule of procedure in the Award. Unanimously, the Committee has rejected Spain's claims. The Applicant failed to establish the claims upon which it based its right to pursue annulment in the present case and JGC is the prevailing party. Since the Parties agree as to the applicable rule, there is nothing else that the Committee needs to consider in order to conclude that Spain must bear the costs of the annulment proceedings incurred by both Parties.

226. For the avoidance of doubt, the Committee has considered and rejects Spain's argument that it was "compelled" to file the Application because JGC "decided to initiate the dispute before an arbitral tribunal who lacked jurisdiction to hear intra-EU disputes". As has been noted, JGC is a Japanese corporation, and the 2021 Decision does not deal with an intra-EU dispute. Accordingly, this argument is not relevant to the Committee's determination of the costs of the Application and it does not provide a basis to vary the applicable rule that costs follow the event.

227. As regards the assessment of the legal fees, they should be reasonable. Past committees have qualified the test in their decisions. For example, in *CDC v. Seychelles*, the committee

[273] JGC's Statement on Costs, ¶ 13; Spain's Statement on Costs, ¶ 6.

decided that reasonableness was to be determined considering "the circumstances" of the case,[274] and the committee in *Adem Dogan v. Turkmenistan* explained that "reasonableness should not be assessed based on a comparison with the other party's costs and/or comparison to the amount of damages awarded, but rather by considering the amount of work required by the party to properly defend its case".[275]

228. The Committee agrees with the Claimant that the fees incurred are "reasonable"[276] considering the circumstances of the case, which involved two rounds of written submissions, a request for disqualification of a member of the Committee, a request for non-disputing party intervention, a hearing on the stay of enforcement of the Award, and an in-person hearing on annulment. In addition, the Committee notes that the legal fees and expenses incurred by JGC are also reasonable when compared to those claimed by Spain. Spain's legal fees were 50 percent higher than those claimed by JGC: Spain incurred in EUR 600,000 in legal fees while JGC's legal fees amount to EUR 378,845 and JPY 2,007,600.

229. For those reasons, the Committee finds that Spain must cover all costs of the annulment proceedings, including the costs incurred by JGC which the Committee has determined are reasonable.

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

Committee Members' fees and expenses	
Dyalá Jiménez, President	84,552.97
Tina M. Cicchetti, Member	54,300.58
Ucheora Onwuamaegbu, Member	77,706.60
ICSID's administrative fees	84,000.00
Direct expenses	76,895.24
Total	**382,153.09**

[274] **RL-0199**, 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, 29 June 2005, ¶ 90.
[275] **CL-296**, *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, ¶ 280.
[276] JGC's Statement on Costs, ¶ 8.

231. The above costs have been paid out of the advances made by Spain, which is the party seeking annulment, in accordance with ICSID Administrative and Financial Regulation 14(3)(e).[277]

VI. Decision

232. For all the above-mentioned reasons, the Committee:

A. DISMISSES the Application for Annulment submitted by Spain;

B. DETERMINES that Spain shall bear all costs of the proceedings, amounting to USD 382,153.09;

C. ORDERS Spain to pay JGC the sum of EUR 387,292.68 and JPY 2,007,600.00 for legal fees and expenses;

D. DISMISSES any other requests for relief by the Parties not included in this section.

[277] The remaining balance will be reimbursed to the Applicant.

Ms. Tina M. Cicchetti
Member

Date: 2 February 2024

Dr. Ucheora Onwuamaegbu
Member

Date:

Ms. Dyalá Jiménez
President of the *ad hoc* Committee

Date:

Ms. Tina M. Cicchetti
Member

Date:

Dr. Ucheora Onwuamaegbu
Member

Date: 2 February 2024

Ms. Dyalá Jiménez
President of the *ad hoc* Committee

Date:

Ms. Tina M. Cicchetti
Member

Date:

Dr. Ucheora Onwuamaegbu
Member

Date:

Ms. Dyalá Jiménez
President of the *ad hoc* Committee

Date: 6 February 2024