INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

STEAG GMBH
(Respondent on Annulment)

v.

KINGDOM OF SPAIN
(Applicant on Annulment)

(ICSID CASE NO. ARB/15/4) – ANNULMENT PROCEEDING

I hereby certify that the attached document is a true copy of the English version of the *ad hoc* Committee's Decision on Annulment dated 30 September 2024.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., 30 September 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

STEAG GMBH
Respondent on Annulment

and

KINGDOM OF SPAIN
Applicant on Annulment

ICSID Case No. ARB/15/4
Annulment Proceeding

Decision on Annulment

Members of the ad hoc Committee
Ms. Eva Kalnina, President of the *ad hoc* Committee
Dr. Milton Estuardo Argueta Pinto, Member of the *ad hoc* Committee
Mr. Ricardo Vásquez Urra, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Ms. Luisa Fernanda Torres

Date of Dispatch to the Parties: 30 September 2024

REPRESENTATION OF THE PARTIES

Representing Kingdom of Spain:

Ms. María Andrés Moreno
Mr. Jaime Campmany Márquez de Prado
Ms. Gabriela Cerdeiras Megías
Ms. Lorena Fatás Pérez
Ms. Ana Fernández-Daza Álvarez
Ms. María del Socorro Garrido Moreno
Ms. Inés Guzmán Gutiérrez
Ms. Lourdes Martínez de Victoria Gómez
Ms. Amparo Monterrey Sánchez
Ms. Elena Oñoro Sainz
Mr. Javier Peñalver Hernández
Ms. Marina Adela Porta Serrano
Ms. Amparo Sánchez Aguilar
Mr. Eduardo Tahoces López

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Representing STEAG GmbH:

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Mr. Elías Soria Iglesias
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Washington, DC 20006
U.S.A.

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TABLE OF SELECTED ABBREVIATIONS

Application for Annulment	Kingdom of Spain's Application for Annulment, dated 15 December 2021
Applicant	Kingdom of Spain
Award	Award rendered on 17 August 2021 in the arbitration proceeding captioned *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4)
CJEU	Court of Justice of the European Union
C-[#]	STEAG's Exhibit
CL-[#]	STEAG's Legal Authority
Counter-Memorial (or Counter-Memorial on Annulment)	STEAG's Counter-Memorial on Annulment, dated 18 October 2022
Counter-Memorial on Stay	STEAG's Response on the Stay of Enforcement, dated 10 May 2022
Committee	Ad Hoc Committee constituted on 22 March 2022
DCF	Discounted Cash Flow
Decision on Jurisdiction and Liability	Decision on Jurisdiction, Liability and Instructions on the Quantification of Damages, dated 8 October 2020
EC	European Commission
EC Application	European Commission's Application for Leave to Intervene as a Non-Disputing Party, dated 22 December 2022
ECT	Energy Charter Treaty
EU	European Union
First Eeckhout Report	Expert Report by Professor Piet Eeckhout, dated 18 October 2022
First Gosalbo Report	Expert Report by Professor Ricardo Gosalbo Bono, dated 18 July 2022

FET	Fair and Equitable Treatment
Hearing on Annulment	Hearing on Annulment held 26 and 27 April 2023
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
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
Memorial (or Memorial on Annulment)	Kingdom of Spain's Memorial on Annulment, dated 18 July 2022
Memorial on Stay	Kingdom of Spain's Memorial in Support of the Continuation of the Stay of Enforcement of the Award, dated 19 April 2022
NRR	New Regulatory Regime
RD	Royal Decree
RDL	Royal Decree-Law
REIO	Regional Economic Integration Organization
R-[#]	Kingdom of Spain's Exhibit
RL-[#]	Kingdom of Spain's Legal Authority
Rejoinder (or Rejoinder on Annulment)	STEAG's Rejoinder on Annulment, dated 24 February 2023
Rejoinder Stay	STEAG's Rejoinder on the Stay of Enforcement, dated 20 June 2022
Reply (or Reply on Annulment)	Kingdom of Spain's Reply on Annulment, dated 19 December 2022
Reply Stay	Kingdom of Spain's Reply on the Stay of Enforcement of the Award, dated 30 May 2022
RRO	Original Regulatory Regime

Second Eeckhout Report	Second Expert Report of Professor Piet Eeckhout, dated 24 February 2023
Second Gosalbo Report	Second Expert Report by Professor Ricardo Gosalbo Bono, dated 15 December 2022
STEAG	STEAG GmbH
STEAG's Post-Hearing Brief	STEAG's Post-Hearing Brief, dated 30 June 2023
STEAG's Submission on Costs	STEAG's Submission on Costs, dated 14 July 2023
Spain	Kingdom of Spain
Spain's Post-Hearing Brief	Kingdom of Spain's Post-Hearing Brief, dated 30 June 2023
Spain's Submission on Costs	Kingdom of Spain's Submission on Costs, dated 14 July 2023
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TVPEE	Tax on the Value of the Production of Electrical Energy
Transcript, Day [#], [page:line]	Transcript of the Hearing on Annulment (as jointly revised by the Parties on 24 May 2023) (English version)
Tribunal	Arbitral Tribunal in the original arbitration proceeding composed of Eduardo Zuleta (President), Guido Santiago Tawil and Pierre-Marie Dupuy
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND THE PARTIES

1. This proceeding concerns the application by the Kingdom of Spain for the annulment of the award rendered on 17 August 2021 in the arbitration proceeding captioned *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4 (the "**Award**"), which was submitted on 15 December 2021 (the "**Application for Annulment**"). The Award was rendered by an Arbitral Tribunal composed of Mr. Eduardo Zuleta (President), Professor Guido Tawil and Professor Pierre-Marie Dupuy (the "**Tribunal**"). The Award incorporated the Tribunal's Decision on Jurisdiction, Liability and Directions on Quantum dated 8 October 2020 (the "**Decision on Jurisdiction and Liability**"), the Tribunal's Supplementary Decision of 10 February 2021, and the Tribunal's Communication of 17 March 2021.[1] Professor Pierre-Marie Dupuy appended a Dissent to the Decision on Jurisdiction, Liability and Directions on Quantum.

2. The Award resulted from a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty ("**ECT**"), which entered into force for Spain and Germany 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**").

3. The Applicant on Annulment is the Kingdom of Spain ("**Spain**").

4. The Respondent on Annulment is STEAG GmbH, a company incorporated under the laws of Germany ("**STEAG**").

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[1] **RL-150**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Award, 17 August 2021 ("**Award**"), ¶ 117; **RL-148**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Instructions on Damages Quantification, 8 October 2020 ("**Decision on Jurisdiction and Liability**") and **RL-149**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Dissenting Opinion of Prof. Pierre-Marie Dupuy, 8 October 2020 ("**Dupuy Dissent**"); **RL-149**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Supplementary Decision, 10 February 2021 ("**Supplementary Decision**"). Although the Decision on Jurisdiction and Liability and the Supplementary Decision are incorporated as annexes to the Award (**RL-150**), because each of them was also presented as a standalone legal authority in this case (**RL-148** and **RL-149**, respectively), for ease of reference the Committee will refer to **RL-148** when citing the Decision on Jurisdiction and Liability and to **RL-149** when citing the Supplementary Decision, mindful that they are both an integral part of the Award.

5. Spain and STEAG are collectively referred to as the "**Parties**," and the term "**Party**" is used to refer to either the Applicant on Annulment or the Respondent on Annulment. The Parties' representatives and their addresses are listed above on page (i), *supra*.

6. The dispute in the underlying arbitration related to an investment in the concentrated solar power ("**CSP**") sector in Spain.[2] The dispute arose out of regulatory measures implemented by Spain which modified the economic regime for renewable energy investments in Spain. On jurisdiction, the Tribunal concluded that it had jurisdiction over the claims submitted by STEAG, except for the claim for breach of Article 10(1) of the ECT as a result of the Tax on the Value of the Production of Electrical Energy ("**TVPEE**"), and it concluded that the claim for breach of Article 13 of the ECT arising out of the TVPEE was inadmissible.[3] On liability, the majority of the Tribunal found Spain liable for breach of the fair and equitable treatment standard ("**FET**") in Article 10(1) of the ECT,[4] and it unanimously dismissed the remaining claims for breach of Article 10(1) and Article 13 of the ECT.[5] On quantum, the majority of the Tribunal ordered Spain to pay STEAG damages assessed at **EUR 27,675,000**, together with pre-Award and post-Award interest.[6]

7. Spain seeks the annulment of the Award under Article 52(1)(b), (d) and (e) of the ICSID Convention.

II. PROCEDURAL HISTORY

8. On 15 December 2021, Spain submitted its Application for Annulment, accompanied by Annexes 1 to 24. In its Application, Spain requested, among other things: (i) a provisional stay of enforcement of the Award in accordance with Article 52(5) of the ICSID Convention and Rule 54(2) of the 2006 ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration**

[2] **RL-150**, Award, ¶ 3.
[3] **RL-150**, Award, ¶ 117(1)-(3).
[4] **RL-150**, Award, ¶ 117(4).
[5] **RL-150**, Award, ¶ 117(5).
[6] **RL-150**, Award, ¶ 117(6)-(7).

Rules"); and (ii) the continuation of the stay of enforcement of the Award until the Committee renders its Decision on the Application for Annulment.[7]

9. On 21 December 2021, the Acting Secretary General of ICSID registered the Application for Annulment and notified the Parties of the registration, in accordance with ICSID Arbitration Rule 50(2)(a) and (b); and informed the Parties of the provisional stay of enforcement of the Award pursuant to ICSID Arbitration Rule 54(2).

10. The *ad hoc* Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Ms. Eva Kalnina, a Latvian national, President; Dr. Milton Estuardo Argueta Pinto, a Guatemalan national; and Mr. Ricardo Vásquez Urra, a Chilean national, (the "**Committee**"), all appointed by the Chairman of the ICSID Administrative Council.

11. On 22 March 2022, in accordance with ICSID Arbitration Rules 6(1) and 53, the Secretary General notified the Parties that all three members of the Committee had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. Mr. Paul Jean Le Cannu, Team Leader and ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

12. On 24 March 2022, the Committee, *inter alia*: (i) proposed dates to hold the First Session; and (ii) invited the Parties to confer and jointly propose a schedule of written submissions to address the application for continuation of the stay of enforcement of the Award, and to consider whether an extension of the 30-day deadline in ICSID Arbitration Rule 54(2) would be necessary and could be agreed between the Parties.

13. On 1 April 2022, the Parties informed the Committee of: (i) their availability on the dates proposed for the First Session; and (ii) their respective proposed schedule of submissions on the application for continuation of the stay of enforcement of the Award (with both Parties consenting to the extension of the 30-day deadline in ICSID Arbitration Rule 54(2)).

14. On 15 April 2022, the Committee confirmed the date of the First Session and set forth the Procedural Calendar for the written submissions to address the application for continuation of the

[7] Application for Annulment, ¶¶ 88, 90 (a)-(b).

stay of enforcement of the Award. The Committee deferred to a later date the decision as to whether a hearing on the request for continuation of the stay of enforcement of the Award would be necessary. In addition, in preparation for the First Session, the Committee transmitted a draft Procedural Order No. 1 for the Parties' review and comments.

15. On 19 April 2022, Spain filed its Memorial in Support of the Continuation of the Stay of Enforcement of the Award, together with Annexes 25 to 50 ("**Memorial on Stay**").

16. On 29 April 2022, the Parties submitted their comments to the draft Procedural Order No. 1.

17. On 10 May 2022, STEAG submitted its Response on the Stay of Enforcement, together with Exhibits C-102 to C-104 and Legal Authorities CL-164 to CL-188 ("**Counter-Memorial on Stay**").

18. On 11 May 2022, the Committee held the First Session with the Parties by video conference.

19. On 26 May 2022, the Committee issued Procedural Order No. 1 ("**PO1**"), which embodied the Parties' agreements on procedural matters and the Committee's decisions on the disputed issues. It established, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be Spanish and English, and that the place of proceeding would be Washington, DC. It also set forth the Procedural Calendar for this annulment proceeding.

20. On 27 May 2022, Spain filed a request seeking leave from the Committee to file a new expert report, pursuant to Section 15.4 of PO1. On the same day, the Committee invited STEAG to provide its observations on Spain's request by 3 June 2022.

21. On 30 May 2022, Spain filed its Reply on the Stay of Enforcement of the Award, together with Annexes 51 to 77 ("**Reply on Stay**") and a draft English translation of STEAG's Financial Statement as of 31 December 2021.

22. On 3 June 2022, STEAG filed its observations on Spain's request of 27 May 2022, opposing the application.

23. On 20 June 2022, STEAG filed its Rejoinder on the Stay of Enforcement of the Award, together with Legal Authorities CL-189 to CL-195 ("**Rejoinder on Stay**").

24. On 21 June 2022, Spain reiterated its application of 27 May 2022 for leave to file a new expert report and requested an extension of the deadline to submit its Memorial on Annulment. On the same day, the Committee informed the Parties that it was considering the Parties' arguments on the matter and that it would promptly notify its decision. Spain submitted further comments in support of its application on 22 June 2022.

25. Thereafter, also on 22 June 2022, the Committee informed the Parties of its decision on Spain's request of 27 May 2022. The Committee granted Spain's application to file a new expert report and announced that a procedural order detailing its reasoning would follow. In addition, the Committee informed the Parties that: (i) it had concluded that no hearing on the application to continue the stay of enforcement of the Award would be necessary; and (ii) Spain's application for a short extension to file its Memorial on Annulment was granted, and STEAG was at liberty to request a similar extension for its Counter-Memorial on Annulment, if necessary.

26. On 11 July 2022, the Committee issued its reasoned Procedural Order No. 2 ("**PO2**"), concerning Spain's request to submit an expert report. As anticipated, PO2 provides as follows:

> *46. For all the above reasons, the Committee decides:*
>
> *a. to uphold the request of the Kingdom of Spain for submission of the report/declaration on EU law as prima facie relevant to the annulment ground enshrined in Article 52(1)(b) of the ICSID Convention; and*
>
> *b. to reserve its decision on costs until a later stage of these proceedings.*[8]

27. On 18 July 2022, Spain filed its Memorial on Annulment, together with Exhibits R-448 to R-456, Legal Authorities RL-201 to RL-253, selected Exhibits and Legal Authorities from the original arbitration proceeding ("**Memorial on Annulment**" or "**Memorial**"), and an Expert Report by Professor Ricardo Gosalbo Bono dated 18 July 2022 ("**First Gosalbo Report**"),

[8] PO2, ¶ 46.

accompanied by Exhibits 1 to 18.[9] On the same date, Spain requested an extension to submit the English translation of its Memorial on Annulment.

28. On 19 July 2022, within the agreed time limit, the Committee notified the Parties of its decision on Spain's application for continuation of the stay of enforcement of the Award, as follows:

> *Upon careful review of the Parties' submissions on the Applicant's request for the continuation of the stay of enforcement of the award, the Committee has decided to grant the continuation of the stay provided certain conditions are met by the Applicant. The Committee's fully reasoned decision will be issued in due course.*

29. Thereafter, also on 19 July 2022, the Parties were notified that due to an internal redistribution of the Centre's workload, Mr. Paul Jean Le Cannu would no longer be serving as Secretary of the Committee, and that Ms. Luisa Fernanda Torres, Legal Counsel, ICSID had been designated to serve as Secretary of the Committee from that point forward.

30. On 21 July 2022, following Spain's request of 18 July 2022, the Committee amended the Procedural Calendar ("**Calendar Revision No. 1**").

31. On 18 August 2022, as previously announced, the Committee issued its reasoned Decision on Stay of Enforcement of the Award. The Decision provides that:

> *128. Based on the above considerations, the Committee decides that:*
>
> *(1) The provisional stay of enforcement of the Award shall continue for the duration of these annulment proceedings, provided that within sixty (60) days of this Decision the Applicant presents to STEAG and the Committee an unconditional and irrevocable letter of guarantee issued by an internationally recognized bank which is neither Spanish nor controlled by Spanish interests for the amount of 50% of the principal amount of compensation granted in the Award at paragraph 117(6) and namely **EUR 13,837,500** which*

[9] Spain resubmitted certain materials previously filed with the Application for Annulment, the Memorial on Stay and the Reply on Stay with the appropriate R- and RL- designations, as follows: R-433 to R-447 corresponded to renumbered versions of Annexes previously submitted; and Legal Authorities RL-148 to RL-200 corresponded to renumbered versions of Annexes previously submitted.

> *may be drawn upon in full by STEAG upon presentation of a Decision of the Committee rejecting the Application for Annulment.*
>
> *(ii) If the Applicant does not comply with the above condition, the Committee may order the termination of the stay of enforcement of the Award.*
>
> *(iii) The costs arising out of this Application for the continuation of stay are reserved for a subsequent stage of the proceedings.*[10]

32. On 27 September 2022, STEAG requested: (i) leave to submit an expert report pursuant to Section 15.4 of PO1; and (ii) an extension to file its Counter-Memorial on Annulment pursuant to the Committee's communication of 22 June 2022. On 29 September 2022, the Committee invited Spain to submit its observations by 3 October 2022.

33. On 3 October 2022, Spain submitted its comments indicating that: (i) it had no objection to STEAG introducing a legal expert report provided that Spain was granted an opportunity to submit a rebuttal legal expert report together with its Reply on Annulment; and (ii) it had no objection to STEAG's request for an extension, provided that Spain was granted a similar extension for its next submission if necessary.

34. On 5 October 2022, the Committee notified the Parties that: (i) STEAG's request to file an expert report with its Counter-Memorial on Annulment was granted; and (ii) STEAG's request for an extension to file its Counter-Memorial on Annulment was granted, and the subsequent dates on the calendar would also be adjusted in consequence. As a result, the Committee issued a revised Procedural Calendar to reflect the amendments ("**Calendar Revision No. 2**"). In addition, the Committee invited STEAG to provide its observations regarding Spain's request for leave to file a reply expert report with its Reply on Annulment by 12 October 2022.

35. On 10 October 2022, following a request by Spain, the Committee issued a revised Procedural Calendar ("**Calendar Revision No. 3**").

36. On 12 October 2022, STEAG filed its observations on Spain's request for leave to file a reply expert report together with the Reply on Annulment, opposing the application.

[10] Decision on Stay of Enforcement of the Award, 18 August 2022, ¶ 128.

37. On 18 October 2022, STEAG filed its Counter-Memorial on Annulment, together with Legal Authorities CL-196 to CL-223, selected Exhibits and Legal Authorities from the original arbitration proceeding ("**Counter-Memorial on Annulment**" or "**Counter-Memorial**"), and an Expert Report by Professor Piet Eeckhout dated 18 October 2022 ("**First Eeckhout Report**"), with Exhibits PE-001 to PE-047.

38. On 21 October 2022, STEAG filed an application asking the Committee to lift the stay of enforcement of the Award on the ground that Spain "*ha*[d] *not posted the letter of guarantee required on the 18 August 2022 Decision on Stay of Enforcement*." On 23 October 2022, the Committee invited Spain to file a response to STEAG's application, which Spain provided on 27 October 2022 opposing STEAG's application.

39. Also on 23 October 2022, the Committee invited the Parties to submit a further round of brief exchanges regarding Spain's pending application for leave to submit a reply expert report with the Reply on Annulment, addressing a set of specific points. Spain filed its comments on 27 October 2022, and STEAG filed its reply on 1 November 2022.

40. On 11 November 2022, the Committee issued Procedural Order No. 3 ("**PO3**"), where it authorized the filing of a second round of expert reports, as follows:

> *36. For all the above reasons, the Committee decides and orders that:*
>
> *a. The Kingdom of Spain's request to submit a second report by Professor Ricardo Gosalbo on EU law with the Reply on Annulment is granted;*
>
> *b. STEAG GmbH is granted leave to submit a second report by Professor Eeckhout on EU law with the Rejoinder on Annulment, if it so wishes;*
>
> *c. Each expert report is to be responsive to the opposing expert's preceding report and limited in length to 25 pages;*
>
> *d. The Parties are to make their best efforts to determine whether there is scope for narrowing down the disagreements between the Parties' experts, to confer and revert to the Committee by* ***21 December 2022****;*

> *e. The Committee's decision on whether to hold an oral hearing is reserved; and*
>
> *f. The Committee's decision on costs is reserved until a later stage of these proceedings.*[11]

41. On 18 November 2022, the Committee issued its Second Decision on Stay of Enforcement of the Award. The Committee decided as follows:

> *Based on the above considerations, and having deliberated on the matter, the Committee orders the termination of the stay of enforcement of the Award pursuant to ICSID Arbitration Rule 54 effective as of* ***1 December 2022****, unless Spain has before that date presented, in accordance with paragraph 128 of the Decision on Stay of Enforcement, an unconditional and irrevocable letter of guarantee issued by an internationally recognized bank which is neither Spanish nor controlled by Spanish interests for the amount of 50% of the principal amount of compensation granted in the Award at paragraph 117(6) and namely EUR 13,837,500 which may be drawn upon in full by STEAG upon presentation of a Decision of the Committee rejecting the Application for Annulment.*[12]

42. On 19 December 2022, Spain filed its Reply on Annulment, together with Exhibits R-457 to R-464, Legal Authorities RL-254 to RL-271, selected Exhibits and Legal Authorities from the original arbitration proceeding ("**Reply on Annulment**" or "**Reply**"), and a Second Expert Report by Professor Ricardo Gosalbo Bono dated 15 December 2022 ("**Second Gosalbo Report**"), accompanied by Exhibits 19 to 28.[13]

43. On 21 December 2022, pursuant to the Procedural Calendar, each Party filed its observations on whether a Hearing on Annulment should be held and, if so, in which format.

44. Also on 21 December 2022, Spain informed the Committee that pursuant to PO3, the Parties had conferred as to whether the two experts might find points of agreement, and that this had not been possible. That same day, STEAG filed an application requesting that: (i) the Committee declare the Second Gosalbo Report inadmissible and exclude it from the record; or (ii)

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[11] PO3, ¶ 36.

[12] Second Decision on Stay of Enforcement of the Award, 18 November 2022, ¶ 12.

[13] On 27 December 2022, Spain submitted a corrected List of Legal Authorities.

in the alternative, that certain paragraphs of the Second Gosalbo Report be stricken from the record.

45. On 22 December 2022, the Committee invited Spain to provide by 11 January 2023 its observations on STEAG's application to strike the Second Gosalbo Report.

46. Also on 22 December 2022, the European Commission ("**EC**") filed an Application for Leave to Intervene as a Non-Disputing Party, pursuant to ICSID Arbitration Rule 37(2), together with Annex 1 ("**EC Application**"). The EC Application was communicated to the Parties and the Committee on the same day. That same day, the Committee invited the Parties to provide their observations on the EC Application by 16 January 2023.

47. On 9 January 2023, having considered the Parties' positions regarding the need for a Hearing on Annulment and its format, the Committee ruled as follows:

> *First, the Committee confirms that a Hearing on Annulment will be held in this case. The present proceeding is governed by the 2006 ICSID Arbitration Rules. Pursuant to Arbitration Rule 29 (applicable to annulment proceedings by virtue of Arbitration Rule 53), '[e]xcept if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.' Absent an agreement to dispense with the oral phase (which does not exist in this case as Spain requests that a hearing be held), ICSID Arbitration Rule 29 requires an oral phase.*
>
> *Second, the Committee has taken note of both Parties' shared preference for an in-person hearing, and it is content with the in-person format. The Committee has further taken note of STEAG's position about Washington, DC as the proper venue for the Hearing. Having had due regard to Articles 62-63 of the ICSID Convention and Section 10 of Procedural Order No. 1, the Committee finds that the Hearing on Annulment shall take place in Washington, DC at ICSID's facilities.*
>
> *Finally, as to the length of the Hearing, the Committee finds it prudent to continue reserving 2 full days for the Hearing (26 and 27 April 2023). In due course, upon conclusion of the on-going written phase, the Committee will consult the Parties about the specifics of the daily agenda for the Hearing.*

48. On 11 January 2023, Spain filed its observations opposing STEAG's application to strike the Second Gosalbo Report.

49. On 16 January 2023, STEAG filed its observations on the EC Application. On the same date, Spain filed its observations on the EC Application, together with Legal Authorities RL-272 to RL-273.

50. On 7 February 2023, the Committee notified the Parties that it had decided to admit the Second Gosalbo Report to the record in its entirety, and that a further procedural order stating the Committee's reasoning would follow.

51. On 13 February 2023, the Committee issued its reasoned Procedural Order No. 4 ("**PO4**") concerning STEAG's application to strike the Second Gosalbo Report, which provides as follows:

> *34. For all the above reasons, the Committee decides and orders that:*
>
> *(a) As foreshadowed in the Committee's communication to the Parties of 7 February 2023, the Second Gosalbo Report is admitted to the record in full;*
>
> *(b) As provided for in PO2, STEAG may submit a second report by Professor Eeckhout on EU law (limited to 25 pages in length) with the Rejoinder on Annulment in response to the Second Gosalbo Report, if it so wishes;*
>
> *(c) All decisions regarding the costs of this Request are reserved until a later stage of these proceedings.*[14]

52. On 24 February 2023, STEAG filed its Rejoinder on Annulment, together with Exhibits C-105 and C-106 and Legal Authorities CL-224 to CL-235, selected Exhibits and Legal Authorities from the original arbitration proceeding ("**Rejoinder on Annulment**" or "**Rejoinder**"), and the Second Expert Report of Professor Piet Eeckhout dated 24 February 2023 ("**Second Eeckhout Report**"), with Exhibits PE-048 to PE-054.

53. On 17 March 2023, the Committee circulated a draft procedural order concerning the organization of the Hearing on Annulment in preparation for the Pre-Hearing Organizational

[14] PO4, ¶ 34.

Conference ("**Pre-Hearing Conference**"). The Parties submitted their comments on the draft procedural order on 23 and 24 March 2023.

54. On 21 March 2023, each Party gave notice of the experts called for examination at the Hearing on Annulment.

55. On 27 March 2023, having examined the Parties' comments on the draft procedural order, the Committee observed that there were no areas of disagreement between the Parties or open issues. Accordingly, the Committee invited the Parties to confer and revert on whether it would still be necessary to hold the Pre-Hearing Conference.

56. On 28 March 2023, the Parties informed the Committee that they agreed that a Pre-Hearing Conference was not necessary. On the same day, the Committee confirmed that, in light of the Parties' agreement, the Pre-Hearing Conference would not take place.

57. On 5 April 2023, the Parties jointly submitted the Electronic Hearing Bundle for the Hearing on Annulment.

58. On 14 April 2023, the Committee issued Procedural Order No. 5 ("**PO5**") concerning the organization of the Hearing on Annulment.

59. On 25 April 2023, the Committee notified the Parties and the EC of its decision to dismiss the EC Application and indicated that a further procedural order stating the Committee's reasoning therefore would follow. The Committee stated:

> *Having carefully considered the European Commission's Application for Leave to Intervene as a Non-Disputing Party in this proceeding of 22 December 2022 ('EC Application'), and the Parties' observations on the EC Application of 16 January 2023, the Committee is now in a position to advise the European Commission and the Parties that it has decided to dismiss the EC Application in full. A more detailed procedural order stating the reasons for the Committee's decision will follow in due course.*

60. The Hearing on Annulment was held in Washington D.C. from 26 to 27 April 2023. The following persons were present:

Committee:	
Ms. Eva Kalnina	President
Dr. Milton Estuardo Argueta Pinto	Member
Mr. Ricardo Vásquez Urra	Member
ICSID Secretariat:	
Ms. Luisa Fernanda Torres	Secretary of the Committee
Spain:	
Ms. Gabriela Cerdeiras Megías	Abogacía General del Estado, Ministerio de Justicia
Ms. Inés Guzmán Gutiérrez	Abogacía General del Estado, Ministerio de Justicia
Ms. Amparo Monterrey Sánchez	Abogacía General del Estado, Ministerio de Justicia
Ms. Lourdes Martínez de Victoria	Abogacía General del Estado, Ministerio de Justicia
Expert:	
Mr. Ricardo Gosalbo Bono	Expert for the Kingdom of Spain
STEAG:	
Mr. Ignacio Díaz de la Cruz	Clifford Chance, S.L.P.
Mr. José García Cueto	Clifford Chance US LLP
Mr. Elías Soria Iglesias	Clifford Chance, S.L.P.
Expert:	
Prof. Piet Eeckhout	Expert for STEAG GmbH
Court Reporters:	
Ms. Dawn Larson	B&B Reporters (English)
Mr. Dante Rinaldi	D-R Esteno (Spanish)
Interpreters:	
Ms. Silvia Colla	Interpreter
Mr. Charlie Roberts	Interpreter
Mr. Daniel Giglio	Interpreter

61. During the Hearing on Annulment, the Parties submitted various demonstrative exhibits, as follows:

- Spain: RD-001 (Opening Statement).
- STEAG: CD-001 (Opening Statement); CD-002 (for Expert's Direct Presentation).

62. On 11 May 2023, the Committee issued its Post-Hearing directions to the Parties.

63. On 24 May 2023, the Parties submitted their agreed corrections to the transcript of the Hearing on Annulment.

64. On 30 May 2023, STEAG filed an application seeking leave to submit two new legal authorities to the record, with its Post-Hearing Brief. On 31 May 2023, the Committee invited Spain to provide its observations concerning STEAG's application.

65. On 7 June 2023, Spain filed its response to STEAG's application, stating that it did not object to it, provided that Spain was also authorized to file two additional documents to the record. That same day, the Committee invited STEAG to confirm whether it had any objection to Spain's request, indicating that, absent any objection from STEAG, the Committee would proceed to authorize introduction of the materials requested by both Parties to the record.

66. On 12 June 2023, the Committee confirmed that both Parties were authorized to introduce to the record the materials requested in their applications of 30 May 2023 and 7 June 2023.

67. On 13 June 2023, STEAG filed Legal Authorities CL-236 and CL-237.

68. On 14 June 2023, Spain filed Exhibits R-465 and R-466.

69. On 30 June 2023, each Party filed its respective Post-Hearing Brief. Spain's Post-Hearing Brief was accompanied with Exhibits R-465 and R-466, as well as selected Legal Authorities from the original arbitration proceeding.

70. On 10 July 2023, the Committee sought confirmation from the Parties as to whether in the English text of the Decision on Annulment (i) any quotation of the Award (including the Decision on Jurisdiction, Liability and Instructions on Quantum, the Dissenting Opinion or the Supplementary Decision) could remain in its original language (Spanish) without translation; and (ii) any quotation of materials filed by the Parties in Spanish without translation could also remain in Spanish.

71. On 11 July 2023, Spain confirmed its agreement with the Committee's proposal above; and STEAG did the same on 14 July 2023.

72. On 14 July 2023, the Parties filed their respective Submissions on Costs.

73. On 19 September 2023, the Committee issued Procedural Order No. 6 ("**PO6**"), providing reasons for its earlier decision of 25 April 2023 to dismiss the EC Application.

74. On 25 March 2024, pursuant to Section 15.2 of PO1, Spain sought leave to introduce "*a new document confirming the primacy of EU Law: European's Court of Justice's Judgement of 14 March 2024*."

75. On 26 March 2024, the Committee invited STEAG to provide its comments on Spain's application by 3 April 2024.

76. On 2 April 2024, STEAG filed its comments.

77. On 2 May 2024, the Committee issued Procedural Order No. 7 ("**PO7**") on Spain's Request to Introduce a New Legal Authority. The Committee decided as follows:

> *15. The Committee thus concludes that Spain has not met its burden to establish the presence of any special circumstances that would justify the introduction of the Judgment at this very late stage of the proceedings when the Committee is in the final stages of completing its Decision.*
>
> […]
>
> *16. Based on the above considerations, the Committee dismisses the Request in full.*

78. On 10 July 2024, pursuant to Section 15.2 of PO1, Spain sought leave to introduce two legal authorities to the record, namely: (i) the Agreement on the Interpretation and Application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States, dated 26 June 2024; and (ii) the Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings, dated 26 June 2024.

79. On 10 July 2024, the Committee invited STEAG to provide its comments on Spain's application by 16 July 2024.

80. On 16 July 2024, STEAG filed its comments, opposing Spain's application.

81. On 11 September 2024, the Committee issued Procedural Order No. 8 ("**PO8**") on Spain's Request to Introduce New Legal Authorities. The Committee decided as follows:

> *13. Given that this Committee is already at a very advanced stage of the deliberations* […] *the Committee does not find the Agreement and/or the Declaration sufficiently relevant to reopen the discussion of the arguments already presented by the Parties.*
>
> *14. The Committee understands that it was Spain's obligation under the Agreement to inform the Committee about its existence and appreciates Spain's cooperation on this matter. However, the Committee concludes that Spain failed to prove the presence of any special circumstances to justify the introduction of the Agreement and/or the Declaration pursuant to Section 15.2 of Procedural Order No. 1.*
>
> […]
>
> *15. Based on the above considerations, the Committee dismisses the Request in full.*

82. The proceeding was closed on 13 September 2024.

III. THE PARTIES' REQUESTS FOR RELIEF

A. SPAIN'S REQUEST FOR RELIEF

83. Spain requests that the Committee:

> *a) Annul the Steag Award in its entirety under Article 52(1)(b) of the ICSID Convention, for manifestly exceeding its powers by improperly declaring its jurisdiction over an intra-EU dispute and for grossly and improperly misapplying fundamental law for the shaping of investors' legitimate expectations, such as European Union law.*
>
> *b) Annul the Steag Award in its entirety under Article 52(1)(e) of the ICSID Convention for failure to state reasons in the terms described in this Memorial on Annulment.*
>
> *c) Annul the Steag Award in its entirety under Article 52(1)(a) of the ICSID Convention, for serious breach of the fundamental rules of procedure outlined above.*

> *a) Order Steag GmbH to pay all the costs of the proceedings.*[15]

84. Spain adds that if "*the Annulment Committee considers that the facts described in this Memorial constitute a ground for annulment on a ground of Article 52(1) of the ICSID Convention other than those alleged, the Kingdom of Spain requests the Committee to proceed to annul the Award on that ground as well.*"[16]

B. STEAG'S REQUEST FOR RELIEF

85. STEAG requests that the Committee:

> ***I. DISMISS*** *Spain's request entirely; and,*
>
> ***II. ORDER*** *Spain to bear all costs arising out of its request, including the costs of the annulment proceedings such as the fees and expenses of the Members of the Committee, ICSID's administrative fees, STEAG's legal fees and costs and the costs of its in-house legal team, together with the legal interest that the Committee may deem applicable.*[17]

IV. OVERVIEW OF THE PARTIES' POSITIONS

86. Spain seeks the annulment of the Award based on the following three grounds: (i) manifest excess of powers under Article 52(1)(b) of the ICSID Convention; (ii) serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention; and (iii) failure to state reasons under Article 52(1)(e) of the ICSID Convention. Spain also requests the Committee to consider whether the facts put forward by Spain also constitute other grounds for annulment under Article 52(1) of the ICSID Convention and, if so, to proceed to annul the Award on those grounds as well.[18]

87. First, in respect of manifest excess of powers, Spain alleges that Article 26 of the ECT contradicts fundamental provisions of EU law embodied in Articles 267 and 344 of the Treaty on

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[15] Reply, ¶ 467. *See also* Spain's Post-Hearing Brief, ¶ 158.

[16] Reply, ¶ 468. *See also* Spain's Post-Hearing Brief, ¶ 159 (similar language, but referring to "*the facts described in the Memorials, during the annulment hearing and in these PHBs*").

[17] Rejoinder, ¶ 163. *See also* STEAG's Post-Hearing Brief, ¶ 126.

[18] Reply, ¶ 468; Spain's Post-Hearing Brief, ¶ 159.

the Functioning of the European Union ("**TFEU**") and therefore cannot constitute consent to arbitrate intra-EU disputes.[19] Spain's primary position is that the Tribunal failed to apply EU law to its jurisdictional analysis and to the merits of the case, thereby manifestly exceeding its powers in determination of the applicable law.[20]

88. Second, in respect of serious departure from a fundamental rule of procedure, Spain submits that the Tribunal breached the *onus probandi incumbit actori* rule when the Tribunal shifted the burden of proof from STEAG to Spain in the assessment of STEAG's due diligence reports and in the assessment of the existence of damages incurred by STEAG, thereby violating Spain's right to be heard.[21]

89. Third, in respect of the failure to state reasons, Spain contends that the Tribunal failed to explain its decision to apply the Discounted Cash Flow ("**DCF**") method suggested by STEAG as well as the value of the different parameters used in this method. In addition, Spain argues that the Tribunal breached Article 52(1)(e) of the ICSID Convention by presenting contradictory findings on the foreseeability of the regulatory changes.[22]

90. Finally, Spain emphasizes its agreement that "*the annulment proceedings are not a new opportunity to re-arbitrate the dispute*" and submits that it invokes only "*solid grounds for annulment*."[23] Spain submits that its position presented in the annulment application is reinforced by Professor Dupuy's Dissenting Opinion and expert reports from Professor Gosalbo, Spain's legal expert.[24]

91. STEAG, in its turn, objects to all annulment grounds advanced by Spain and submits that Spain has filed an appeal instead of an annulment application.[25] STEAG reiterates the

[19] Memorial, ¶ 4.
[20] Memorial, ¶ 6.
[21] Memorial, ¶¶ 12-13; Reply, ¶ 3.
[22] Memorial, ¶¶ 9-11.
[23] Reply, ¶ 5.
[24] Memorial, ¶¶ 358, 373; Reply, ¶¶ 6-10.
[25] Counter-Memorial, ¶¶ 3-4.

extraordinary nature of the ICSID annulment mechanism and requests the Committee to dismiss Spain's application entirely.[26]

92. STEAG explains that Spain's positions is a textbook example of an appeal, and Spain's annulment applications on the same grounds have already been dismissed in six other ICSID annulment proceedings.[27] In STEAG's view, Spain is merely repeating its arguments regarding the Tribunal's jurisdiction over intra-EU disputes, which were examined in detail and dismissed by the Tribunal, because EU law neither governed the Tribunal's jurisdiction nor prevailed over the ECT. STEAG underlines that its position is supported by Professor Eeckhout, its legal expert.[28]

93. STEAG also disagrees with Spain that the Tribunal failed to state any reasons or failed to apply any fundamental rules of procedure.[29] STEAG underlines that Spain's arguments only indicate its dissatisfaction with the outcome of the case despite a full and fair opportunity to present its case to the Tribunal.[30]

94. The Parties' positions on the various grounds for annulment are summarized in more detail in the sections that follow. The Committee has considered the entirety of the Parties' respective positions in detail, regardless of whether those arguments are explicitly mentioned by the Committee in the summaries of the Parties' positions.

V. MANIFEST EXCESS OF POWERS

95. Spain submits that the Award should be annulled on the grounds that the Tribunal manifestly exceeded its powers in two ways: (i) by asserting jurisdiction over a dispute between an EU Member State and an investor from another EU Member State, contrary to EU law; and (ii) by failing to apply EU law to the merits of the dispute. After discussing the applicable legal standard, the Committee addresses each of these issues in turn.

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[26] Counter-Memorial, ¶¶ 5, 230.
[27] Counter-Memorial, ¶ 15.
[28] Counter-Memorial, ¶¶ 11-12.
[29] Counter-Memorial, ¶¶ 18-19.
[30] Counter-Memorial, ¶ 19.

A. APPLICABLE LEGAL STANDARD

(1) Spain's Position

96. Spain submits that a tribunal manifestly exceeds its power under Article 52(1)(b) of the ICSID Convention when, *inter alia*, it: (i) "*exceeds its jurisdiction, or has no jurisdiction*";[31] (ii) "*does not apply the appropriate law*";[32] (iii) commits a "*gross error of law*";[33] or (iv) "*rules on issues which have been not* [sic] *raised by the parties*."[34] Spain highlights ICSID's observation in its 2016 Background Paper on Annulment that "[t]*he main powers of the Tribunal that appear to have been contemplated by* [Article 52(1)(b)] *relate to the Tribunal's jurisdiction and to the applicable law*."[35]

97. Spain explains that because the power of a tribunal derives from the parties' consent, the tribunal does not have authority to act outside the scope of that consent.[36] Citing *Occidental v. Ecuador*, Spain observes that an "[e]*xcess of powers can be committed both by overreach and by default*."[37]

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[31] Memorial, ¶ 61; Reply, ¶ 27, *citing* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 87 ("*Ad hoc Committees have held that there may be an excess of powers if a Tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking, or when the Tribunal exceeds the scope of its jurisdiction*.").

[32] Memorial, ¶¶ 61, 64.

[33] **RD-1**, Spain's Opening Presentation, slide 8. *See* Transcript, Day 1, 16:3-10; Reply, ¶ 47, *citing* **RL-94**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ¶ 86 ("*Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law*"); **RL-152**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, ¶¶ 164-165 ("*As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers*.").

[34] Memorial, ¶ 61.

[35] Reply, ¶ 27; **RD-1**, Spain's Opening Presentation, slide 10, *quoting* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 81.

[36] Memorial, ¶ 61; **RD-1**, Spain's Opening Presentation, slide 11, *quoting* **RL-220**, *Helnan International Hotels AS v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, ¶¶ 40-41 ("*The question whether an ICSID arbitral tribunal has exceeded its powers is determined by reference to the agreement of the parties. It is that agreement or compromis from which the tribunal's powers flow, and which accordingly determines the extent of those powers*."); **RL-228**, *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the ad hoc Committee, 1 March 2011, ¶¶ 95-96.

[37] Memorial, ¶ 73, *quoting* **RL-161**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶¶ 48-50.

98. In assessing whether such an excess of power has occurred, says Spain, the Committee should follow the guidance of the committee in *Iberdrola v. Guatemala*, and "*review what the tribunal has actually analysed and argued, rather than what the tribunal has claimed to have done. The mere assertion by the tribunal that it was applying the relevant law, or lack thereof, is not sufficient to decide the matter.*"[38]

99. As to the "*manifest*" standard, Spain again cites the 2016 ICSID Background Paper on Annulment, which provides the following summary:

> *The 'manifest' nature of the excess of powers has been interpreted by most ad hoc committees to mean an excess that is obvious, clear or self-evident, and which is discernable without the need for an elaborate analysis of the award. However, some ad hoc committees have interpreted the meaning of 'manifest' to require that the excess be serious or material to the outcome of the case.*[39]

100. Spain emphasizes that an excess of powers can be "*manifest*" even where it requires extensive argumentation and analysis.[40] As indicated by the committee in *Pey Casado v. Chile*, "*an extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious.*"[41]

101. Spain accuses STEAG of trying "*to avoid the mandatory annulment through a biased and erroneous view of the term 'manifest'*" and highlights that this term must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**").[42] In this respect, Spain refers to the three authentic versions of the ICSID Convention in English, French and Spanish. Beginning with the Spanish version of Article 52(1)(b) – "*que el tribunal se hubiere*

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[38] Memorial, ¶ 64, *quoting* **RL-157**, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, 13 January 2015, ¶ 97 (Spain's translation at Memorial, ¶ 64).

[39] Reply, ¶ 29; **RD-1**, Spain's Opening Presentation, slide 10, *quoting* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 83.

[40] Memorial, ¶ 62; **RD-1**, Spain's Opening Presentation, slide 9, *quoting* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 70; **RL-161**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶ 59.

[41] **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 70.

[42] Reply, ¶¶ 48-49.

extralimitado manifiestamente en sus facultades" – Spain relies on the Diccionario de la Lengua Española, according to which "*manifest*" means "*discovered*."[43] In Spain's view, this means that if an excess of powers is discovered, the award must be annulled. Turning to the French version – "*excès de pouvoir manifeste du Tribunal*" – Spain cites the Larousse dictionary definition of "*manifeste*" as "[*d*]*ont la nature, la réalité, l'authenticité s'imposent avec evidence*," and concludes that "*if an overreaching is proven, an award must be annulled*."[44] Finally, on the English version – "*that the Tribunal has manifestly exceeded its powers*" – Spain offers the Oxford Dictionary definition of "*manifest*," which is "*easy to see or understand*," and therefore argues that "*an excess of powers that can be readily understood or seen should result in the annulment of an award*."[45]

102. Although Spain cites numerous cases in support of its position, it recalls that "*there is no principle of precedent in international arbitration*," and considers that the Committee is "*entirely free to assess* […] *what constitutes the phrase 'manifest excess of powers.'*"[46] Ultimately, Spain urges the Committee to:

> [F]*orm its own opinion on the STEAG Award, in accordance with the sources of international law of Article 38 of the ICJ Statute, starting from the principle that international law can never enshrine an unjust result and bearing in mind, where appropriate and without being bound by them, all the approaches of the different applicable precedents.*[47]

(2) STEAG's Position

103. As a preliminary matter, STEAG stresses that an ICSID annulment committee is not an appeal body. Rather, STEAG says, "[a]*nnulment is an exceptional and narrowly circumscribed remedy and the role of an ad hoc committee is limited*."[48] STEAG accuses Spain of advancing a "*textbook appeal*," which could only be upheld by undermining the ICSID Convention.[49]

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[43] Reply, ¶ 51.
[44] Reply, ¶ 52.
[45] Reply, ¶ 53.
[46] Transcript, Day 1, 15:14-16:2.
[47] Reply, ¶ 31.
[48] Counter-Memorial, ¶ 5.
[49] Counter-Memorial, Section 1.2 (heading).

104. More specifically, STEAG argues that an annulment committee is not permitted to reconsider the tribunal's findings or "*review the jurisdiction of the Arbitral Tribunal in light of new evidence or according to an extensive and deep review of the matter*."[50] For STEAG, this follows from the principle of *kompetenz-kompetenz* enshrined in Article 41(1) of the ICSID Convention and the limited scope of annulment.[51] As explained by the committee in *RREEF v. Spain*:

> [A]*d hoc committees do not have the power to reconsider ICSID tribunals' jurisdictional decisions de novo. Any attempt to establish a ground under Article 52 must be scrupulously examined to ensure that it is not a 'back door' attack on the tribunal's decision on its substantive jurisdiction, viz. whether there is party consent to arbitrate and the jurisdictional requirements under the Convention are met. The burden to show that such a ground is established must necessarily lie with the applicant, Spain in this instance.*[52]

105. Turning to the "*manifest*" standard, STEAG emphasizes that the term "*manifest*" is fundamental to Article 52(1)(b) of the ICSID Convention and sets a very high standard for establishing that an award should be annulled.[53] In STEAG's view, the term "*was not included by the drafters accidentally*," but rather deliberately added at Germany's request to minimise the "*risk of frustration of awards*."[54]

106. As to the meaning of "*manifest*," STEAG agrees with the committee in *Repsol v. Peru* that "*exceeding one's powers is 'manifest' when it is 'obvious by itself' simply by reading the Award, that is, even prior to a detailed examination of its contents*."[55] STEAG points out that the committee in *Antin v. Spain* expressly rejected Spain's position that finding a manifest excess of

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[50] Counter-Memorial, ¶¶ 36, 41; **CD-1**, STEAG's Opening Presentation, slide 19, *quoting* **RL-152**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, ¶¶ 73-74.

[51] Counter-Memorial, ¶ 36.

[52] Counter-Memorial, ¶ 38, *quoting* **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶ 19.

[53] Counter-Memorial, ¶ 34; **CD-1**, STEAG's Opening Presentation, slide 20.

[54] Counter-Memorial, ¶¶ 34-35, *quoting* **CL-197**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention – A Commentary* (Cambridge University Press 2013), p. 938, ¶ 134.

[55] Counter-Memorial, ¶ 37, *quoting* **CL-199**, *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, 8 January 2007, ¶ 36.

power may require extensive arguments and analysis.[56] Similarly, in *SolEs v. Spain*, the committee noted that any excess of powers had to be "*discernable from a plain reading of the award*" and "*perceived without difficulty.*"[57]

107. In sum, STEAG considers that the Committee should follow a "*two-pronged approach*" in determining whether the Tribunal manifestly exceeded its power in relation to jurisdiction. It states:

> • *First, the Committee shall review the agreement of the parties to submit the dispute to arbitration contained in the relevant treaty (i.e., the ECT) and any other applicable rules (e.g. the ICSID Convention) in order to define the scope of such agreement.*
>
> • *Second, only if it finds that an excess of powers took place, then the Committee shall then discuss whether such excess of powers was 'manifest', or obvious, self-evident and apparent from the plain reading of the Award.*[58]

108. According to STEAG, all the cases cited by Spain support this two-pronged test.[59]

109. Regarding Spain's argument that the Tribunal manifestly exceeded its power in relation to the applicable law, STEAG contends that the appropriate standard in determining whether a tribunal failed to apply the proper law is for the applicant to prove "*a gross or egregious misinterpretation of the choice-of-law provisions*," which Spain cannot do.[60]

(3) The Committee's Analysis

110. Pursuant to Article 52(1) of the ICSID Convention, either party may request annulment of the award if "*the Tribunal has manifestly exceeded its powers*." The Committee will commence

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[56] **CD-1**, STEAG's Opening Presentation, slide 20, *quoting* **CL-165**, *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, ¶ 152.

[57] Counter-Memorial, ¶ 38, *quoting* **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 66.

[58] Counter-Memorial, ¶ 41. *See also id.*, ¶ 31.

[59] Rejoinder, ¶ 70.

[60] Counter-Memorial, ¶¶ 114-115, *citing* **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 149; **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶ 111.

its analysis by first determining the scope of its own powers. The Committee will also provide some general observations on the rules of interpretation of the arbitration agreement and the significance of precedents in its analysis. Finally, the Committee will discuss the threshold for meeting the "*manifest excess of powers*" standard set out in the ICSID Convention.

a. The Scope of the Committee's Powers

111. The Committee acknowledges the clear distinction between an annulment process and an appeal. Unlike an appellate court, the Committee's role is not to review the substantive correctness of the Tribunal's decision concerning the law or the facts. Instead, the Committee's authority is limited to assessing the legitimacy of the process that led to the Tribunal's decision. As explained by the committee in *RREEF v. Spain*:

> [A]*d hoc committees do not have the power to reconsider ICSID tribunals' jurisdictional decisions de novo. Any attempt to establish a ground under Article 52 must be scrupulously examined to ensure that it is not a 'back door' attack on the tribunal's decision on its substantive jurisdiction, viz. whether there is party consent to arbitrate and the jurisdictional requirements under the Convention are met. The burden to show that such a ground is established must necessarily lie with the applicant, Spain in this instance.*[61]

112. This understanding was confirmed by a number of *ad hoc* committees, including the committee in *Antin v. Spain*:[62]

> *The Committee hence agrees with the Claimants that it cannot review de novo the facts, evidence and criteria used by the Tribunal in its award of damages, nor can the Committee make or substitute its own findings of fact in lieu of the Tribunal's.*

113. The Committee agrees with STEAG that "[a]*nnulment is an exceptional and narrowly circumscribed remedy and the role of an ad hoc committee is limited.*"[63] Consequently, the

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[61] Counter-Memorial, ¶ 38, *quoting* **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶ 19.

[62] **CL-165**, *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, ¶ 168.

[63] Counter-Memorial, ¶ 5.

Committee will ensure that its review is limited to the annulment grounds set forth in the ICSID Convention.

b. The Rules of Interpretation of the Arbitration Agreement

114. In the Committee's view, the main discrepancy between the Parties' positions lies in interpreting the scope of the arbitration agreement.[64] Nevertheless, the Parties have not identified a specific standard for such interpretation.

115. In the case at hand, the Tribunal's jurisdiction derives from Article 26 of the ECT and Article 25 of the ICSID Convention.[65] The Parties do not contest that the ECT and the ICSID Convention are international treaties. Thus, the scope of the arbitration agreement should be interpreted in accordance with Article 31 of the VCLT, which reads as follows:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

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[64] *See, e.g.,* Memorial, ¶ 61; Counter-Memorial, ¶¶ 27-31.

[65] **RL-148**, Decision on Jurisdiction and Liability, ¶ 7.

> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*[66]

116. While the Parties largely agree on the applicability of the VCLT to the interpretation of the arbitration agreement and the ECT,[67] Spain's criticism of the Award relates to paragraphs 2 and 3 of Article 31. In particular, Spain alleges that the Tribunal "*only took into account the textual language of the Article 31 and not Paragraphs 2 and 3 regarding the context*."[68]

117. The Committee also observes that, Spain has criticized, *inter alia*, the Tribunal's lack of consideration of the *travaux préparatoires* of the ECT,[69] which constitute supplementary means of the interpretation under Article 32 of the VCLT. Spain has further alleged that despite referring to Article 32 of the VCLT, the Tribunal refrained from analysing Article 26 of the ECT in accordance with that provision.[70]

118. In this respect, the Committee accepts that various approaches may exist to interpreting Article 31 of the VCLT. In the Committee's view, the starting point of any treaty interpretation is the textual interpretation, and therefore the actual words of the treaty should be given the most significant weight. As confirmed by Professor James Crawford, "*the intention of the parties as expressed in the text is the best guide to their common intention.*"[71]

119. As to Spain's criticism regarding the Tribunal's alleged failure to take into account paragraphs 2 and 3 of Article 31 of the VCLT, the Committee is of the view that the Tribunal sufficiently analysed the ordinary meaning of the ECT, and also gave due regard to the context of the ECT's conclusion, as will be further demonstrated below.

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[66] **RL-10**, VCLT, pp. 12-13, Article 31.

[67] *See, e.g.*, Reply, ¶ 199; Rejoinder, ¶ 17.

[68] Transcript, Day 2, 311:10-14. *See also* Reply, ¶ 199.

[69] Reply, ¶¶ 86-87, 206.

[70] Reply, ¶ 199; Transcript, Day 2, 311:8-15 (arguing that the Tribunal's application of the VCLT was "*wrong because it only took into account the textual language of the Article 31 and not Paragraphs 2 and 3 regarding the context, **and also Article 32**, which is linked to Article 31.*") (Emphasis added).

[71] **CL-202**, James Crawford, *Brownlie's Principles of Public International Law* (OUP Oxford 9th Ed. 2019), p. 365.

120. In sum, based on the arguments on the record, the Committee is not persuaded that the Tribunal's determination regarding the standard of interpretation of the ECT leads to the conclusion that the Tribunal manifestly exceeded its powers. The VCLT contains comprehensive provisions that are adequate for ensuring a consistent and harmonious interpretation of the ECT, and the Committee will assess the Tribunal's findings in light of these provisions.

c. The Significance of Precedents in the Committee's Analysis

121. In their submissions and during the hearing the Parties have referred to the findings of numerous other *ad hoc* committees, and in particular to annulment decisions in other renewable energy cases against Spain.[72] At times, STEAG has even provided the Committee with statistical data regarding the assessment and success of Spain's arguments in prior cases.[73] STEAG has also accused Spain of an abusive annulment application since allegedly no prior committee has yet agreed with Spain's position regarding intra-EU investment disputes.[74]

122. In this context, the Committee finds it necessary to address the question of the relevance of precedents for the Committee's analysis.

123. The Committee agrees with Spain that there is no principle of precedent in international investment arbitration. Although the 2016 ICSID Background Paper on Annulment refers to "*developments in case law on annulment*,"[75] the ICSID Convention itself does not impose on the tribunals nor *ad hoc* committees any requirements to follow the reasoning of other committees. This conclusion may be drawn from the reading of Article 53 of the ICSID Convention, which provides that "[t]*he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.*"[76] That is to say, even if a tribunal's findings are contrary to the findings of other tribunals concerning similar legal and/or

[72] Transcript, Day 1, 19:4-20:1; **CD-1**, STEAG's Opening Presentation, slides 10-11; Counter-Memorial, ¶ 128.
[73] Counter-Memorial, ¶ 15; STEAG's Post-Hearing Brief, ¶ 88; STEAG's Submission on Costs, ¶¶ 21-22.
[74] Counter-Memorial, ¶¶ 15-16.
[75] **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 1.
[76] ICSID Convention, Article 53.

factual circumstances, an award is annulled only when one of the grounds in Article 52 of the ICSID Convention is met.[77]

124. Similarly, there are no precedents that are binding on *ad hoc* committees, and *ad hoc* committees have no obligation to rely on them. It is therefore not surprising that even in cases with relatively similar legal and/or factual backgrounds some *ad hoc* committees came to different decisions. This Committee is also considering this case on its own merits in light of the legal arguments and evidence put forward by each of the Parties.

125. Nevertheless, decisions of other *ad hoc* committees interpreting the same terms of the ICSID Convention or effects of the same circumstances may be taken into account by the Committee as persuasive authority or guidance. Therefore, the Committee will perform its own analysis of the Parties' positions, their legal arguments, and the factual basis for the application for annulment, while keeping in mind the findings of other *ad hoc* committees on similar questions, but always expressing its own position regarding those findings.

d. The Interpretation of the Term "Manifest Excess of Powers"

126. Based on the plain reading of Article 52(1) of the ICSID Convention, the Committee notes that it needs to follow a two-prong test and must determine: (i) whether the Tribunal overstepped its powers granted by the arbitration agreement; and (ii) if so, whether such excess of powers was manifest.

127. The Parties follow different approaches in interpreting the term "*manifest excess of powers*." In its Post-Hearing Brief, STEAG argues that Spain's interpretation of this ground is limited merely to the first prong of the aforementioned two-prong test.[78] Spain, in its turn, points out two key discrepancies in the Parties' positions: first, differing views regarding "*the fact of*

[77] *See, e.g.*, **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶ 27; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 485.

[78] STEAG's Post-Hearing Brief, ¶ 20 (characterizing Spain's position as being that "*as long as the Committee concludes that an excess of powers was committed —because the Arbitral Tribunal lacked jurisdiction—, then that is more than enough to annul*.")

considering the lack of consent of the parties to arbitrate the dispute within the present ground for annulment"; and second, the interpretation of the term "*manifest*."[79]

128. Having analysed the Parties' positions, the Committee finds that the Parties' standards for the interpretation of the term "*manifest excess of powers*" are not irreconcilable. Even if Spain did not explicitly mention the two-prong test, it did not raise any objections to it, and effectively applied it in practice.[80]

129. Thus, the Committee sees no reason not to apply the two-prong test, which has also been widely adopted by annulment committees in other cases under the ICSID Convention.[81] The Committee will therefore proceed to determine the following two issues: (i) the scope of the term "*excess of powers*," and (ii) the meaning of the term "*manifest*."

130. First, it should be noted that STEAG did not specifically address the term "*excess of powers*." Spain has however relied on findings in *Occidental v. Ecuador* in this context:

> *Excess of powers is a polysemic concept:*
>
> *- in its primary meaning it refers to situations where a tribunal adjudicates disputes not included in the powers granted by the parties;*
>
> *- but there is also a secondary sense: when a tribunal having jurisdiction adopts an erroneous decision that exceeds its powers.*[82]

131. The Committee accepts this duality of the term "*excess of powers*" and observes that it will therefore assess the Tribunal's Award from two perspectives: (i) whether the Tribunal had jurisdiction to settle this dispute; and (ii) whether the Tribunal manifestly exceeded its powers while exercising its jurisdiction.

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[79] Spain's Post-Hearing Brief, ¶¶ 76, 79.

[80] Reply, ¶¶ 47-48, 50-53.

[81] *See, e.g.*, **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 63; **CL-236**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment, 20 March 2023, ¶¶ 126-129; **CL-237**, *BayWa r.e. AG v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Annulment, 8 May 2023, ¶¶ 135-142.

[82] **RL-161**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶¶ 48-50.

132. Second, as to the "*manifest*" standard, Spain relies on the 2016 ICSID Background Paper on Annulment, which states as follows:[83]

> *The 'manifest' nature of the excess of powers has been interpreted by most ad hoc committees to mean an excess that is obvious, clear or self-evident, and which is discernable without the need for an elaborate analysis of the award. However, some ad hoc committees have interpreted the meaning of 'manifest' to require that the excess be serious or material to the outcome of the case.*

133. STEAG, in its turn, provides the Committee with a thorough analysis of the term "*manifest*" and emphasizes that an excess of powers *per se* is not sufficient to satisfy the annulment request.[84] STEAG uses a number of other terms, including those defined by other *ad hoc* committees, to explain the meaning of "*manifest*." Among them, the Committee notes such terms as "*obvious by itself*," "*self-evident*," "*discerned with little effort*," "*perceived without difficulty*."[85]

134. Having examined the Parties' positions, the Committee agrees that the interpretation of the term "*manifest*" must start with the plain reading of Article 52(1) of the ICSID Convention. Spain's analysis with reference to various dictionaries leads the Committee to conclude that the drafters of the ICSID Convention aimed to set a high standard of obvious or self-evident excess of powers. That is to say, the excess of powers should be so clear or evident that it does not require any extensive or complex analysis.

135. This understanding is reinforced by the findings of other committees that have expressed the view that manifest excess of powers should be evident from a plain reading of the award and perceived or recognized as such by an annulment committee without difficulty:

> *Article 52(1)(b) of the Convention only permits annulment if a dual requirement is met: the existence of an excess of powers, and that such excess of powers is 'manifest' – a term which the Parties agree means 'perceived without difficulty'. The Parties also agree that this important additional limitation applies both to a jurisdictional excess of powers and to a failure to apply the proper law. This*

[83] Reply, ¶ 29; **RD-1**, Spain's Opening Presentation, slide 10, *quoting* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 83.

[84] Counter-Memorial, ¶¶ 35, 38.

[85] Counter-Memorial, ¶¶ 37-38.

> *conclusion, shared by this Committee, has been confirmed by previous committees.*[86]

136. The Committee also accepts that a manifest excess of powers may not be limited to the excess of jurisdiction itself but may also arise from a tribunal's failure to apply the relevant law, or its decision to apply other laws than those agreed by the parties, or, in a further alternative, from a gross or egregious tribunal's misinterpretation or misapplication of the laws actually agreed. Importantly, the Committee needs to assess whether the Tribunal's misinterpretation or misapplication of the law is so gross or egregious as to give rise to a failure to apply the proper law at all.[87] The threshold to be met in this case is sufficiently high, and the Committee will therefore conduct its analysis with due care.

137. The Committee will now proceed to assess the Tribunal's alleged manifest excess of powers in light of the standards and principles outlined above.

B. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY ASSERTING JURISDICTION

(1) Spain's Position

138. Spain's position is that the Tribunal manifestly exceeded its power by improperly asserting jurisdiction under Article 26 of the ECT.[88] Spain advances several reasons why the dispute resolution mechanism in Article 26 of the ECT cannot apply to disputes between an EU Member State and an investor of another EU Member State. For Spain, it follows that the Tribunal decided a dispute over which it manifestly lacked jurisdiction, and the Award must be annulled. In support of its position, Spain relies on the expert reports of Professor Ricardo Gosalbo Bono submitted with its Memorial and Reply.

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[86] **RL-161**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶¶ 57-58. *See also* **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 66.

[87] **CL-236**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment, 20 March 2023, ¶ 135 (on interpretation of the Updated ICSID Background Paper on Annulment).

[88] *See, e.g.,* Memorial, § IV.A.2 (heading), ¶ 274; Reply, § III.A.2 (heading).

a. Interpretation of the ECT under the VCLT

139. Spain's first main argument is based on its proposed interpretation of Article 26 of the ECT under Article 31(1) of the VCLT. According to Spain, the text, context and object and purpose of the ECT make clear that Article 26(3) of the ECT does not apply to intra-EU disputes.[89] Beginning with the text, Spain and Professor Gosalbo note that Article 26 of the ECT imposes a diversity requirement: "*a Contracting Party and an Investor of another Contracting Party*."[90] In Spain's view, this condition is not fulfilled when both parties are from EU Member States, because those parties are part of the same Regional Economic Integration Organization ("**REIO**") as defined in Article 1(3) of the ECT, and therefore part of the same "*Contracting Party*."[91] In the same vein, Spain and Professor Gosalbo consider that STEAG did not make an investment in the "*Area*" of another Contracting State, as required under Article 26(1) of the ECT, because under Article 1(10) of the ECT, the "*Area*" of a REIO "*means the Areas of the member states of such Organization*."[92] On this basis, Professor Gosalbo concludes that EU "*investors are not 'Investor(s) of another Contracting Party' as far as EU Member States are concerned. Rather, they are 'Investors' of a 'Contracting Party', i.e., the EU, making investments in the 'Territory' or area of that same Contracting Party*."[93] Therefore, according to Spain and Professor Gosalbo, the Tribunal clearly lacked jurisdiction *ratione personae*.[94]

140. Spain continues its interpretation under Article 31(1) of the VCLT by considering the object and purpose of the ECT. In this respect, Spain states that although the Tribunal referred to Article 31(1) of the VCLT, it "*only does this literally, without analyzing the context, object, and purpose of the Treaty in its entirety as ordered by the Vienna Convention*."[95] But for Spain, the object and purpose is critical because it shows "*that the Member States of the Union never consented to submit intra-EU disputes to arbitration. They would not and could not consent.*"[96]

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[89] Reply, ¶ 75; **RD-1**, Spain's Opening Presentation, slides 14-22.
[90] Reply, ¶ 79; **RD-1**, Spain's Opening Presentation, slide 16; First Gosalbo Report, ¶ 26.
[91] Memorial, ¶ 106; Reply, ¶¶ 79, 89.
[92] **RL-254**, ECT, Article 1(10).
[93] First Gosalbo Report, ¶ 30. *See* Memorial, ¶ 105; Reply, ¶¶ 88, 92.
[94] Memorial, ¶ 81; First Gosalbo Report, ¶¶ 26 *et seq.*
[95] Transcript, Day 1, 24:13-17.
[96] Reply, ¶ 81.

141. According to Spain, the purpose of the ECT was to promote cooperation in the energy sector between the EU and the former Soviet States.[97] The ECT was never intended to regulate intra-EU affairs or modify principles of EU law.[98] Rather, in Spain's view, the ECT "*preserves the principle of the autonomy of the Union and the primacy of Union law,*" as reflected in the *travaux préparatoires* of the ECT.[99] This is further confirmed, Spain says, by the special status that the ECT grants the EU, for instance by providing in Article 36(7) that the EU acts as a single bloc at meetings of the Charter Conference and by recognizing in Article 1(3) the EU's power to take decisions binding on the Member States.[100]

142. As additional support, Spain asserts that the principle of primacy of EU law was already contained in the Treaty of Rome of 1957, which gave birth to the European Economic Community.[101] Further, Spain refers to the Statement submitted by the European Communities to the ECT Secretariat in 1998 (the "**1998 European Communities Statement**"), which Spain characterizes as a related instrument under Article 31(2)(b) of the VCLT.[102] It provides, *inter alia*, that:

> *The European Communities are a regional economic integration organisation within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions.*
>
> *The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.*

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[97] Reply, ¶ 86; **RD-1**, Spain's Opening Presentation, slide 15, *quoting* **RL-6**, The Energy Charter Treaty and Related Documents, 17 December 1991, Background.

[98] Reply, ¶ 86.

[99] Reply, ¶ 86, *citing* **R-462**, Web page Energy Charter (https://www.energycharter.org/what-we-do/dispute-settlement/access-to-travaux-preparatoires/energy-charter-treaty-drafts/). *See* § (b) *infra* for a discussion of Spain's position on the autonomy and primacy of EU law.

[100] Reply, ¶ 90; First Gosalbo Report, ¶ 31.

[101] Transcript, Day 1, 78:14-21.

[102] **RD-1**, Spain's Opening Presentation, slide 18, *citing* **RL-257**, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, 9 March 1998 ("**1998 European Communities Statement**").

[…]

> *Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.*[103]

143. On Spain's reading, the 1998 European Communities Statement "*demonstrates how the Member States did not give their unconditional consent to intra-EU arbitration as this was contrary to their obligations as Member States of the European Communities*."[104]

144. Spain sees no relevance in the fact that the ECT does not contain an express disconnection clause in relation to EU Member States, because Spain contends that the ECT contains an *implicit* disconnection clause,[105] as further discussed in Subsection (d) *infra*.

b. EU Law and the Alleged Incompatibility of Article 26 of the ECT

145. Spain's next argument is closely related to the first. As Professor Gosalbo puts it, "[e]*ven assuming that the ECT could be interpreted to apply intra-EU, quod non, the application of Article 26 ECT to intra-EU disputes would be contrary to EU Treaties and EU law as interpreted by the CJEU.*"[106] According to Professor Gosalbo and Spain, Article 26 of the ECT cannot apply intra EU because foundational principles of EU law have always prohibited EU Member States from offering to resolve disputes with investors of another EU Member State by international arbitration.[107] In particular, Spain relies on the principles of the "*primacy*" of EU law,[108] the autonomy of the EU legal system, and "*mutual trust*" among EU Members States.[109]

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[103] **RL-257**, 1998 European Communities Statement.

[104] Reply, ¶ 144.

[105] Memorial, ¶¶ 118-138, 248-249.

[106] First Gosalbo Report, ¶ 34.

[107] Memorial, ¶ 117.

[108] Memorial, ¶¶ 83, 86-88, *citing* **RL-216**, CJEU, Judgment, Case 106/77, *Amministrazione delle Finanze dello Stato and Simmenthal S.p.A*, 9 March 1978, ¶ 21.

[109] Memorial, ¶ 85; First Gosalbo Report, ¶ 38.

146. As to the principles of primacy and autonomy of the EU legal system, Spain explains that the Court of Justice of the European Union ("**CJEU**") is the supreme interpreter of EU law and has exclusive jurisdiction to determine its scope and content.[110] To guarantee the uniform interpretation of EU law, the EU Treaties (the TFEU, previously known as the Treaty of Rome, and the Treaty on European Union ("**TEU**"), previously known as the Maastricht Treaty) prohibit disputes concerning matters governed by EU law from being reviewed by any other body, such as an international arbitral tribunal, other than the CJEU.[111] Spain relies on the following provisions of the TFEU:

- **Article 267 of the TFEU**, which according to Spain, "*provides that the highest judicial instance of each EU Member State may refer questions on EU law to the CJEU ('preliminary ruling procedure'). The CJEU's decision on a preliminary ruling will bind the tribunals of the* [EU] *Member State concerned, which will take the necessary measures to ensure a harmonious application of EU law*."[112]

- **Article 344 of the TFEU**, which according to Spain, "*prohibits EU Member States from submitting a dispute concerning the interpretation or application of the EU Treaties to a method of dispute settlement other than their national tribunals*."[113]

147. Spain further highlights that the principle of primacy was expressly adopted by the EU Member States in 2007 in "Declaration 17" when they signed the Treaty of Lisbon.[114]

148. Spain has no doubt that these principles of EU law apply directly to the present dispute and the Tribunal's jurisdiction. According to Spain and Professor Gosalbo, all EU law, including the judgments of the CJEU and secondary EU law (regulations, directives, etc.), is "*part of international law binding on all EU member states*."[115] They consider EU law a source of public

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[110] Memorial, ¶ 89; Reply, ¶¶ 137-159.

[111] Memorial, ¶ 90.

[112] Memorial, ¶ 90(i), *referring* to **RL-1**, TFEU, Article 267.

[113] Memorial, ¶ 90(ii), *referring* to **RL-1**, TFEU, Article 344 ("*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*.").

[114] Reply, ¶ 70, *citing* **RL-256**, Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), 17 December 2007, p. 256. *See* First Gosalbo Report, ¶ 67.

[115] Memorial, ¶¶ 87, 94, 224; Reply, ¶¶ 69-74, 200; First Gosalbo Report, Part IV.

international law as stated in Article 38 of the Statute of the International Court of Justice (the "**ICJ**").[116] For Spain, it follows that EU law is fully applicable, "*not only on the merits but also on jurisdiction*," under Article 26(6) of the ECT, which requires that "*the issues in dispute*" be decided "*in accordance with this Treaty and applicable rules and principles of international law*."[117]

149. In explaining the operation of the principles of primacy and autonomy of EU law, Spain asserts that there are multiple options to apply this principle to the ECT-EU law relations:

1. "*as international custom recognised by civilised nations as a source of international law*;"

2. "*at the stage of the consent given by Member States and the* [EU] *to the Energy Charter Treaty, preventing them from giving their consent to the arbitration of intra-EU disputes*;"

3. "*at the stage of interpretation of the Treaties by imposing an interpretation of conformity between the two and of interpretation of the Treaties in application of the general rule of interpretation provided for in the Vienna Convention*."[118]

150. Further, Spain argues that EU law applies in light of the principle of primacy of EU law, which Spain considers "*a special conflict rule under international law*" that applies not only in respect of EU Member States' domestic law, but also to "*international treaties within the EU, even when third countries are also parties to such treaties*."[119] More generally, Spain asserts that in any intra-EU dispute, "*the rules of European law must necessarily be taken into account* […] *due to the fact that these rules constitute the specific applicable international law with which the parties to the conflict have equipped themselves to govern their mutual relations*."[120]

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[116] Transcript, Day 1, 42:12-14.

[117] Reply, ¶ 219; **RL-254**, ECT, Article 26(6).

[118] Spain's Post-Hearing Brief, ¶ 72.

[119] Memorial, ¶ 87. *See* Reply, ¶¶ 69-74.

[120] Reply, ¶ 201.

151. For Spain, the fact that the present dispute is an ICSID case and therefore not seated in the EU is irrelevant for the purposes of the Tribunal's jurisdiction.[121] In Spain's view, "[w]*e are concerned here with the nationality of the investor and the Contracting State in which the investment is made, both of which are European*."[122]

152. In Spain's view, once EU law is properly considered, it becomes clear that the arbitration clause in Article 26 of the ECT is precluded in intra-EU cases.[123] In sum, according to Spain, the application of such investor-State arbitration clauses to intra-EU disputes is incompatible with EU law, because such application "*circumvents the national courts of the EU Member States and the preliminary ruling procedure under Article 267 TFEU and interferes with the exclusive authority of the CJEU to ultimately determine the content and validity of EU law under Articles 267 and 344 TFEU*."[124]

153. In turn, Spain says, this incompatibility renders Article 26 of the ECT inoperative as between EU Member States.[125] As Professor Gosalbo opines, "[g]*iven the primacy of EU Treaties and EU law over all other international agreements between Member States of the EU, any offer of intra-EU arbitration contained in the ECT cannot have given rise to a valid arbitration agreement and is therefore ineffective because it cannot be executed*."[126]

154. According to Spain, all of this has been confirmed:

- *By the CJEU, in numerous pronouncements;*
- *By the* [EC], *at numerous events;*

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[121] Memorial, ¶ 243.

[122] Memorial, ¶ 243.

[123] Memorial, ¶ 91.

[124] Reply, ¶ 119.

[125] Reply, ¶ 119.

[126] First Gosalbo Report, ¶ 34. *See* Second Gosalbo Report, ¶¶ 39-47 (regarding the *ius cogens* nature of the principle of primacy of EU law: "*in my view ECT arbitral tribunals lack jurisdiction in matters intra-EU as a result of the autonomy and primacy of the EU legal order and that Spain as an EU Member State is precluded under Articles 267 and 344 TFEU to offer to submit to arbitration a dispute with investors from another EU Member State. International agreements concluded by the EU, including the ECT, are an integral part of the EU legal order and must therefore be compatible with the EU Treaties. Whenever arbitral tribunals have interpreted the ECT as also containing an investor-State arbitration clause applicable between EU Member States that clause would be incompatible with the EU Treaties and thus would have to be disapplied.*").

- *By most EU Member States (including Germany and Spain).*[127]

155. Of particular importance to Spain is the CJEU's 2018 judgment in Case C-284/16 (the "***Achmea* Judgment**"), where the court ruled as follows:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*[128]

156. In Spain's view, the *Achmea* Judgment applies equally to BITs and multilateral treaties such as the ECT.[129] Further, according to Spain, the *Achmea* Judgment – like all CJEU judgments – has retroactive effect.[130] Therefore, "*Article 26 has been inoperative ab initio for intra-EU disputes*" and cannot have formed the basis of the Tribunal's jurisdiction.[131]

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[127] Reply, ¶ 68, *citing* **RL-109**, CJEU, Judgment, Case C-459/03, Action for Failure to Fulfil Obligations under Article 226 EC and Article 141 EA, 30 May 2006; **RL-107**, Court of the European Communities (Grand Chamber), Judgment, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v. Council and Commission*, 3 September 2008; **RL-108**, CJEU, Opinion 2/13 (Full Court), Accession of the EU to the ECHR, 18 December 2014; **RL-103**, CJEU, Judgment, Case C-284/16, *Republic of Slovakia/Achmea BV*, 6 March 2018 (the "***Achmea* Judgment**"); **RL-212**, CJEU, Opinion 1/17 (Full Court), CETA, 30 April 2019; **RL-158**, CJEU, Judgment, Case C-741/19, *Republic of Moldova and Komstroy LLC* (subrogated to the rights and obligations of Energoalians), 2 September 2021 (the "***Komstroy* Judgment**"); **RL-159**, CJEU, Judgment, Case C-109/20, *Republic of Poland and PL Holdings Sàrl*, 26 October 2021 (the "***PL Holdings* Judgment**"); **RL-239**, CJEU, Opinion 1/20, 16 June 2022; **RL-210**, Communication from the European Commission to the European Parliament and the Council on the Protection of Intra-EU Investment, COM (2018) 547 final, 19 July 2018; **RL-137**, Declaration by the Representatives of the Member States on the Legal Consequences of the Judgment of the Court of Justice in the Achmea Case and on the Protection of Investments in the European Union, 15 January 2019 ("**Declaration by EU Member States**").

[128] Memorial, ¶ 142, *quoting* **RL-103**, *Achmea* Judgment, 6 March 2018, ¶ 62.

[129] Memorial, ¶¶ 149-156; First Gosalbo Report, ¶¶ 54-56.

[130] Reply, ¶ 101, *citing* **RL-260**, CJEU, Judgment, Cases C-66, 127 and 128/79, *Salumi*, 27 March 1980, ¶ 9, p. 1260 ("*The interpretation which, in the exercise of the jurisdiction conferred on it by Article 177 of the EEC Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation* […]").

[131] Reply, ¶ 119.

157. To support its view, Spain highlights that following the *Achmea* Judgment, in January 2019, the majority of EU Member States (including Spain and Germany) signed a declaration confirming that arbitration clauses such as the one in Article 26 of the ECT could not be understood as consent to submit intra-EU disputes to arbitration "*and thus would have to be disapplied*."[132] Spain also cites the CJEU's subsequent 2021 judgment in Case C-109/2020 (the "***PL Holdings* Judgment**"), in which the court reiterated that EU Member States cannot undertake to remove disputes concerning the application and interpretation of EU law from the EU's judicial system, which according to Spain, is "*a continuation and confirmation*" of the reasoning already set out in the *Achmea* Judgment.[133]

158. Notably, Spain says, the CJEU dispelled any doubts about the applicability of the *Achmea* Judgment to intra-EU disputes brought under the ECT in its 2021 judgment in Case C-741/19 (the "***Komstroy* Judgment**),[134] where the court held that:

> [T]*he exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.*
>
> […]
>
> *In the light of the foregoing, it must be concluded that* ***Article 26(2)(c) ECT must be interpreted as not being applicable*** *to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*[135]

[132] Memorial, ¶ 179; Reply, ¶ 96, *quoting* **RL-137**, Declaration by EU Member States, 15 January 2019.

[133] Memorial, ¶¶ 157-170; First Gosalbo Report, ¶ 57; **RD-1**, Spain's Opening Presentation, slides 28-29; **RL-159**, *PL Holdings* Judgment, 26 October 2021.

[134] Memorial, ¶ 149; **RL-158**, *Komstroy* Judgment, 2 September 2021.

[135] Reply, ¶¶ 117-118, *quoting* **RL-158**, *Komstroy* Judgment, 2 September 2021, ¶¶ 62, 66 (Spain's emphasis).

159. Thus, for Spain, the *Achmea* Judgment is not only "*fully applicable*" to the ECT, but "*its reasoning and its extension to the ECT has been confirmed in Komstroy and PL Holdings*."[136] Spain and Professor Gosalbo also rely on a number of other developments, including the following:

1. A pair of judgments issued by the Paris Court of Appeal on 19 April 2022, setting aside two intra-EU BIT awards against Poland on the basis of the *Achmea* and *PL Holdings* Judgments.[137]

2. The CJEU's Opinion 1/20 of 16 June 2022.[138]

3. The 16 June 2022 arbitral award in the Stockholm Chamber of Commerce ("**SCC**") case *Green Power v. Spain* (discussed further below).[139]

4. Reporting on a September 2022 Cologne Higher Regional Court ruling which found that under EU law, Article 26 of the ECT does not apply intra EU, and that two ICSID claims brought under the ECT were therefore inadmissible.[140]

160. Accordingly, Spain has no doubt that EU law has always precluded application of Article 26 of the ECT to intra-EU disputes.

161. Spain adds that even if EU law does not apply to the jurisdiction of the Tribunal pursuant to Article 26(6) of the ECT, EU law – in particular the law on State aid – is undoubtedly applicable to the merits of the case, as discussed below. Therefore, Spain says, the fact that the Tribunal had to decide matters of EU law, "*necessarily and mandatorily leads to the lack of jurisdiction of the Steag Tribunal*."[141]

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[136] Memorial, ¶¶ 241-242. *See* Spain's position regarding the *Achmea* Judgment generally, in Memorial, ¶¶ 139-148, 235-244; Reply, ¶¶ 132-136; First Gosalbo Report, ¶¶ 40-53; Second Gosalbo Report, ¶¶ 36-38.

[137] Memorial, ¶¶ 185-192; Reply, ¶¶ 160-185; **RL-237**, Paris Court of Appeal, *Slot v. Republique Pologne*, Judgment No. 49/2022, 19 April 2022; **RL-238**, Paris Court of Appeal, *Strabag v. Republique Pologne*, Judgment No. 48/2022, 19 April 2022

[138] Memorial, ¶¶ 193-198; Reply, ¶¶ 157-159; **RL-239**, CJEU, Opinion 1/20, 16 June 2022.

[139] Memorial, ¶¶ 199-220; Reply, ¶¶ 186-192; First Gosalbo Report, ¶ 58; Second Gosalbo Report, ¶ 29(b); **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022.

[140] Reply, ¶¶ 193-197, *citing* **R-459**, GAR, "*German court declares ICSID claims inadmissible*," 7 September 2022; **R-460**, Press Release from Cologne Higher Regional Court, "*Applications by domestic companies for international arbitration against an EU Member State inadmissible*," 8 September 2022.

[141] Memorial, ¶¶ 257-258.

c. Effect of the Alleged Incompatibility

162. Spain submits that any conflict between the ECT and EU law must be resolved in favour of EU law in accordance with the principle of primacy.[142] In sum, Spain's position is as follows:

> *The primacy principle of the law of the European Union does not restrict itself to one Member State, but it goes beyond that. The primacy state of the law of the Union is to be applied in accordance with treaties or international agreements among Member States* […] *The international agreements of the European Union and their members are concluded by means of an act of the Union, and are therefore subordinate to the constitutional system of the Union's Treaties insofar as it is an intra-European application. This means that international treaties, such as the ECT, to which the EU and the Member States are parties are subject to the system of sources of European law in which the Treaties established in the EU take precedence.*[143]

163. According to Spain, the ECT recognizes the primacy of EU law in several places, including Articles 25, 1(3) and 36(7).[144]

164. Given Spain's view that primacy is a special conflict rule, it argues that this rule should "*be applied in preference to the conflict rules provided for in the VCLT*," which are only residual rules.[145] However, Spain argues in the alternative that, even if Articles 30 and 59 of the VCLT were applied, EU law would still prevail as *lex posterior* given that the principle of primacy was codified in the Lisbon Treaty in 2007.[146]

165. Spain rejects the Tribunal's reliance on the conflict rule in Article 16 of the ECT, which Spain considers inapplicable "*because it concerns the mutual interpretation of two treaties and does not contain a rule for conflicting treaties and, in any case, has been superseded by the Treaty of Lisbon, in accordance with Article 30 (4)(a) VCLT.*"[147] However, in the further alternative,

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[142] Memorial, ¶¶ 127, 267; Reply, ¶ 9; Second Gosalbo Report, ¶¶ 41 *et seq.* *See also* Memorial, ¶ 136, *citing* **RL-2**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 4.189.

[143] Transcript, Day 1, 30:9-31:6.

[144] Memorial, ¶¶ 111, 119-124.

[145] Memorial, ¶ 269.

[146] Memorial, ¶¶ 130-131.

[147] Reply, ¶ 9. *See* Second Gosalbo Report, ¶ 56.

Spain asserts that even if Article 16 of the ECT applied, "*it can by no means be considered that the ECT should prevail*," because arbitration is not necessarily more favourable to the investor than other dispute resolution options, such as national courts.[148]

166. Thus, Spain concludes that an arbitral tribunal hearing an intra-EU dispute under the ECT must consider the effect of EU law, which again is to preclude intra-EU application of Article 26 of the ECT.[149]

d. Disconnection Clause

167. Spain further argues that there is an implicit disconnection clause in the ECT from which it follows that Article 26 of the ECT cannot apply to intra-EU disputes.[150] In brief, this is because:

1. At the time the ECT was concluded, it was understood that EU Member States could not enter into internal market obligations with each other.[151]

2. It was also "*already evident*" that the principle of autonomy of the EU legal system prevented removal of intra-EU disputes from national courts, as demonstrated by the CJEU's Opinion 1/91 of 1991.[152]

3. The ECT recognizes the primacy of EU law, particularly in Article 25, which "*provides that the members of an* [REIO] *shall be governed in their mutual relations by the law applicable to those members.*"[153]

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[148] Memorial, ¶ 135.

[149] *See* Memorial, ¶ 138.

[150] Memorial, ¶¶ 118-138, 248-249; First Gosalbo Report, ¶¶ 19-25; Second Gosalbo Report, ¶ 35.

[151] Memorial, ¶ 110.

[152] Memorial, ¶¶ 115, 124, *citing* **R-191**, CJEU, Opinion 1/91, on the "Agreement on the Establishment of a European Economic Area (EEA)," 14 December 1991.

[153] Memorial, ¶¶ 111, 120. Article 25 of the ECT provides: "*The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as 'EIA') to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.*" **RL-254**, ECT, Article 25(1). For Spain's position on the primacy of EU law, *see* § (b) *supra*.

4. The existence of this implicit disconnection clause was communicated to the ECT Secretariat in the 1998 European Communities Statement.[154]

168. According to Spain and Professor Gosalbo, the possibility of an implicit disconnection clause is well established in international law.[155] Thus, they consider it irrelevant that the disconnection clause is not expressly stated in the ECT. Similarly, they consider it irrelevant that the ECT does contain an express disconnection clause relating to the Svalbard Treaty, as there is no basis on which to compare the "*radically different*" situations of the Svalbard Republic and the EU.[156]

e. The Tribunal's Decision on Jurisdiction

169. For these reasons, Spain concludes that the Tribunal manifestly exceeded its power by asserting jurisdiction when, in fact, the Tribunal lacked jurisdiction *ratione personae* and *voluntatis*.[157] According to Spain, some of the Tribunal's gross errors include the following:

1. The Tribunal, in purportedly interpreting the ECT in accordance with Article 31 of the VCLT, "*fails to analyse the* [ECT] *according to its object and purpose and does not even explain what is the literal meaning of certain provisions which* […] *show that it was never the intention of the Contracting Parties to include intra-EU disputes*."[158]

2. The Tribunal addressed the implications of the *Achmea* Judgment on its jurisdiction in a "*very superficial manner*" and "*is grossly mistaken in its conclusions*."[159] Contrary to the Tribunal's determination, not only is the *Achmea* Judgment "*fully applicable*" to the present case, but "*its reasoning and its extension to the ECT has been confirmed in Komstroy and PL Holdings*."[160]

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[154] Memorial, ¶ 116. Spain refers here to **RL-219**, which is a Statement submitted to the ECT Secretariat on 2 May 2019, replacing the 1998 European Communities Statement (submitted as **RL-257**).

[155] Memorial, ¶ 249.

[156] Memorial, ¶ 250.

[157] *See, e.g.,* Memorial, ¶ 274; Reply, ¶ 198.

[158] Reply, ¶ 99.

[159] Memorial, ¶¶ 240-242.

[160] Memorial, ¶ 242. *See* Spain's position regarding the *Achmea* Judgment generally, in Memorial, ¶¶ 139-148, 235-244; Reply, ¶¶ 132-136; First Gosalbo Report, ¶¶ 40-53; Second Gosalbo Report, ¶¶ 36-38.

3. The Tribunal erred by finding that an express disconnection clause would be required to determine that Article 26 of the ECT did not apply to an EU investor investing in another EU Member State. A proper textual interpretation of the ECT demonstrates the Tribunal's lack of jurisdiction *rationae personae*. Further, the ECT contains an implicit disconnection clause in relation to the EU.[161]

4. The Tribunal failed to take into account the relevance of EU law to its jurisdiction, based on its incorrect findings that: Article 26(6) of the ECT does not apply to jurisdiction; there was no evidence of a conflict between EU law and the ECT; the primacy of EU law is projected over EU matters only; and if there were any incompatibility between the ECT and EU law, the ECT would prevail pursuant to Article 16 of the ECT, unless Spain could show that EU law was more favourable to the investor, which it had not done.[162]

5. The Tribunal found that Articles 30 and 59 of the VCLT were inapplicable based on its wrong conclusion that there was no conflict between EU law and the ECT.[163]

6. The Tribunal failed to appreciate the effect of the factual matrix on its jurisdiction. Given the subject matter of the underlying arbitration, the Tribunal was tasked with interpreting an issue inherent to EU law: State aid. As such, the Tribunal – constituted independently of the EU judicial system – had no jurisdiction to apply and interpret EU law.[164]

7. In sum, "*the tribunal made an erroneous and biased interpretation of EU law which led it to conclude, contrary to the most basic principles of EU law, that it had jurisdiction to hear the present case*."[165]

170. Spain stresses that unlike in *Antin v. Spain*, which was decided before the *Achmea* Judgment, the STEAG Tribunal "*did have all relevant documents and arguments at its disposal, which enabled it to assess its lack of jurisdiction*," including "*documents such as the Achmea Judgment, the Communication from the European Commission to Parliament in 2018, the*

[161] Memorial, ¶¶ 245-251. For a further summary of Spain's position on these two matters, *see* §§ (a) and (d) *supra*.
[162] Memorial, ¶¶ 252-262.
[163] Memorial, ¶¶ 263-267.
[164] Memorial, ¶¶ 272-273.
[165] Memorial, ¶ 232.

Commission Decision on State Aid of November 2017, or the Declaration of Member States; amongst them, those signed by Germany and Spain of 15 January 2019."[166]

171. As for materials that became available only after the Award was rendered, including the *PL Holdings* and *Komstroy* Judgments, Spain contends that the Committee must also take these into account, as rulings of the CJEU have *ex tunc* effect.[167] In any case, Spain says, even if the *Komstroy* Judgment were ignored, the result would be the same because all the conclusions in *Komstroy* arose from the CJEU's reasoning in the *Achmea* Judgment, which was available to the Tribunal.[168]

f. Other Awards and Annulment Decisions Involving Spain

172. As an additional point, Spain rejects STEAG's reliance on other awards against Spain in which the tribunals did not accept Spain's intra-EU objection to jurisdiction, and on decisions by other Committees dismissing this ground for annulment.[169] First, Spain recalls again that there is no doctrine of precedent in international arbitration, and the Committee is not bound by these decisions.[170] Second, Spain argues that, in fact, "*several arbitrators* […] *have expressly recognized that recourse to arbitration under Article 26 of the ECT is not possible in intra EU disputes. This has been unanimously declared and recognized in Green Power v. Spain and by the national courts of Germany, the Claimant's own country*."[171]

173. Spain focuses in particular on the award in *Green Power v. Spain*, rendered by an SCC tribunal seated in Stockholm, which found that it did not have jurisdiction over an intra-EU dispute following the *Achmea* Judgment.[172] Spain urges the Committee not to ignore the *Green Power v. Spain* award, as doing so would result in "*serious inconsistencies in this type of investment arbitration*."[173] For Spain, it is impossible to distinguish *Green Power v. Spain* on the basis that

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[166] Transcript, Day 1, 21:18-22:8.

[167] **RD-1**, Spain's Opening Presentation, slide 31.

[168] Transcript, Day 1, 36:5-12.

[169] Transcript, Day 1, 19:4-20:1.

[170] Transcript, Day 1, 19:16-20:1.

[171] Transcript, Day 1, 19:10-15.

[172] Memorial, ¶¶ 199-220; Reply, ¶¶ 186-192; First Gosalbo Report, ¶ 58; Second Gosalbo Report, ¶ 29(b); **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022.

[173] Reply, ¶ 189.

it was not an ICSID case, as the *lex arbitri* was not a decisive consideration for the tribunal.[174] Spain adds that the *Green Power v. Spain* award "*demonstrates the tremendous injustice that the Kingdom of Spain has had to face over all these years*," defending claims against European investors despite the lack of a valid arbitration agreement.[175] Additionally, Spain and Professor Gosalbo refer to two dissenting opinions: one in *Adamakopoulos v. Cyprus* in 2020, under an intra-EU BIT,[176] and the dissenting opinion of Professor Giorgio Sacerdoti in *Portigon v. Spain* in October 2022, which concerned the ECT.[177]

174. Turning to previous annulment decisions, while Spain acknowledges that no annulment committee has so far accepted Spain's intra-EU objection as a ground for annulment, it contends that this "*does not mean that it is invalid and that you cannot make your own analysis and must blindly rely, as STEAG claims, on the decisions of other Committees*."[178]

(2) STEAG's Position

175. STEAG rejects Spain's arguments and contends that the Tribunal did not commit a manifest excess of power in its assessment of its jurisdiction.[179] In STEAG's view, Spain has not advanced any valid reason to disapply the clear, express dispute resolution mechanism in Article 26 of the ECT in intra-EU disputes.[180] STEAG adds that even if this matter were debatable (which it is not), the Tribunal's decision on jurisdiction certainly could not amount to a "*manifest*" excess of power.[181] In support of its position, STEAG relies on the expert reports of Professor Piet Eeckhout submitted with its Counter-Memorial and Rejoinder.

a. Interpretation of the ECT under the VCLT

176. According to STEAG, the proper interpretation of the ECT under Article 31(1) of the VCLT demonstrates that it applies to disputes between an EU Member State and an investor of

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[174] Memorial, ¶ 203.

[175] Reply, ¶ 192.

[176] Second Gosalbo Report, ¶ 29(a).

[177] Second Gosalbo Report, ¶ 29(c); **RL-265**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 October 2022.

[178] Transcript, Day 1, 19:16-20:1.

[179] Counter-Memorial, § 2; Rejoinder, § 2.

[180] Counter-Memorial, §§ 2.3-2.4.

[181] Counter-Memorial, § 2.5, ¶ 106; Rejoinder, § 2.5, ¶ 75.

another EU Member State.[182] In STEAG's view, the starting point for the interpretation exercise is the text, and as highlighted by the ICJ, resort to additional interpretative tools is needed only when the textual approach "*results in a meaning incompatible with the spirit, purpose and context of the clause*."[183]

177. Following this approach, STEAG concludes that "*Articles 26(1), 26(3) and 26(4) of the ECT jointly contain a unilateral offer by a Contracting Party of the ECT to submit disputes to arbitration.*"[184] STEAG's analysis, in sum, is as follows:[185]

1. The definition of "*Contracting Party*" in Article 1(2) of the ECT as "*a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force*" makes clear that States – like Spain and Germany – can be Contracting Parties even if they are part of an REIO such as the EU.

2. Because "*Investor*" is defined in Article 1(7) of the ECT as "*a company or other organization organized in accordance with the law applicable in that Contracting Party*," there can be no question that STEAG, a company organized in accordance with the laws of Germany, is an Investor of Germany – not the EU. Indeed, all companies based in the EU are organized in accordance with domestic law, not EU law, and there is no concept of "*EU citizenship*" independent from the citizenship of EU Member States.[186]

3. The "*Area*" of a State that is a Contracting Party is defined by Article 1(10) of the ECT as "*the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea*." Thus, because STEAG made an "*Investment*" as defined in Article 1(6) of the ECT in a solar thermal power project in southern Spain, it had an Investment in the "*Area*" of Spain. As Professor Eeckhout explains, nothing in

[182] Counter-Memorial, ¶¶ 47 *et seq.*; Rejoinder, ¶¶ 17-25.

[183] Counter-Memorial, ¶ 50; Rejoinder, ¶ 19, *quoting* **CL-226**, ICJ, Case of the Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), Judgment, 12 November 1991, ¶ 48.

[184] Counter-Memorial, ¶ 53.

[185] Counter-Memorial, ¶ 54; **CD-1**, STEAG's Opening Presentation, slide 26.

[186] Counter-Memorial, ¶ 56.

Article 1(10) indicates that "*the 'Areas' of the Contracting Parties which are member states of an Organization are substituted by the Organization's Area*."[187]

4. Accordingly, the present dispute falls within Article 26(1) of the ECT as a "[d]*ispute*[] *between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern*[s] *an alleged breach of an obligation of the former under Part III* […]."[188]

178. STEAG accepts that Germany and Spain are part of the same REIO – the EU – but denies that this has any effect on the analysis.[189] For STEAG, the fact that the EU is a "*Contracting Party*" and could be sued under the ECT is the "*logical consequence of the EU's mixed system of competences*," but not an argument for disapplying the ECT among EU Member States.[190] Importantly, STEAG says, nothing in the text of the ECT indicates that it does not apply among two different Contracting Parties that are members of a REIO, whereas "[s]*uch a wide and far-reaching exclusion would have been explicitly noted by the treaty*."[191]

179. Turning to Spain's interpretation of the ECT, STEAG accuses Spain of departing from the ordinary meaning of the text, based on its erroneous view that the obligations of EU Member States under EU law are somehow relevant to the interpretation of the ECT.[192] STEAG specifically rejects Spain's reliance on the purported "*object and purpose*" of the ECT, arguing that the ECT's purpose is far broader than merely promoting energy development in former Soviet States. For instance, the ECT Contracting Parties also referred to the need to "*promote a new model for energy cooperation in the long term in Europe and globally*," and develop "*the complementary features of energy sectors within Europe*."[193] Indeed, STEAG says, the stated purpose of the ECT in Article 2 is to "*establish* […] *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*

[187] First Eeckhout Report, ¶ 22.
[188] Counter-Memorial, ¶ 53, *quoting* ECT, Article 26(1).
[189] Counter-Memorial, ¶¶ 56-57.
[190] Counter-Memorial, ¶ 56.
[191] Rejoinder, ¶ 20.
[192] Rejoinder, ¶ 18.
[193] Rejoinder, ¶¶ 21-22.

principles of the Charter."[194] STEAG adds that even Professor Sacerdoti, who authored a dissenting opinion relied on by Spain, found that the purpose of the ECT "*does not justify finding that its text excludes the treatment of energy investments within the EU from its coverage*."[195]

180. STEAG concludes that Spain's interpretation is not supported by the ECT.[196] Nor has Spain identified anything in the *travaux préparatoires* or the circumstances leading to the conclusion of the ECT in 1991 that would suggest that the ECT was not intended to apply among EU Member States.[197]

181. Finally, for STEAG, it is also relevant that the jurisdictional requirements of Article 25(1) of the ICSID Convention are met in this case. In STEAG's view, "*there is a valid arbitration agreement between STEAG and Spain in accordance with Article 25(1)*," and accordingly, "*Spain cannot unilaterally withdraw its consent under the ICSID Convention*."[198]

b. EU Law and the Alleged Incompatibility of Article 26 of the ECT

182. STEAG's position is that the Tribunal's jurisdiction arises from the ECT and the ICSID Convention only, and Spain has provided no valid explanation for how EU law would apply to the Tribunal's jurisdiction. According to STEAG, Spain's position poses an "*irremediable conundrum*": on the one hand, Spain argues that the Tribunal was not permitted to apply EU law according to the principle of autonomy of the EU legal system, but on the other hand, Spain complains that the Tribunal did *not* apply EU law to its jurisdiction.[199]

183. Professor Eeckhout accepts that "[i]*t is of course the case that the EU Treaties form a part of international law*," but in his view, "*that does not mean that they are applicable international law in an ECT investment protection dispute*."[200] In particular, Article 26(6) of the ECT does not help Spain because it governs the law applicable to "*the issues in dispute*," and according to Article

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[194] Rejoinder, ¶ 23.

[195] Rejoinder, ¶ 25, *quoting* **RL-265**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 October 2022, ¶¶ 64-65.

[196] Counter-Memorial, ¶ 58.

[197] Counter-Memorial, ¶ 59.

[198] Counter-Memorial, ¶¶ 60-61.

[199] **CD-1**, STEAG's Opening Presentation, slide 29.

[200] First Eeckhout Report, ¶ 48. *See* Counter-Memorial, ¶¶ 73-77; Second Eeckhout Report, ¶ 23.

26(1) of the ECT, the dispute concerns "*an alleged breach of an obligation* […] *under Part III*."[201] Thus, Article 26(6) concerns only the merits of the dispute – whether there was a breach of the substantive provisions of the ECT – and not the Tribunal's jurisdiction.[202] STEAG highlights that this is the same conclusion reached even in *Green Power v. Spain*, a case relied on heavily by Spain.[203]

184. Further, as discussed below, STEAG submits that the principle of primacy of EU law is confined to the relationship between EU law and the domestic laws of EU Members States and does not extend to international treaties, such as the ECT.[204]

185. As a matter of international law, STEAG sees no contradiction between the ECT and EU law in relation to the Tribunal's jurisdiction. In particular, STEAG argues that a plain reading of Articles 267 and 344 of the TFEU shows that they are not incompatible with Article 26 of the ECT.[205] STEAG accepts that these provisions establish the CJEU as the ultimate interpreter of EU law through the preliminary ruling procedure and prevent EU Member States from submitting any "*dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for* [in the EU Treaties]."[206] However, STEAG says, Spain's reliance on these provisions is "*at odds with the fact that the Arbitral Tribunal was never called to interpret EU law regarding its jurisdiction and did not need any guidance from the CJEU by way of a preliminary ruling*."[207]

186. STEAG highlights that when the ECT was concluded, Articles 267 and 344 of the TFEU were already present as Articles 234 and 292 of the Treaty of Rome. For STEAG, "[i]*t is not serious to argue that such a sophisticated party as the then-European Communities participated in the conclusion of the ECT back in 1991 and 1994 knowing that the ECT as a whole or, at least,*

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[201] Counter-Memorial, ¶ 75.

[202] Counter-Memorial, ¶ 76; First Eeckhout Report, ¶ 66.

[203] Counter-Memorial, ¶ 76, *citing* **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022, ¶ 157.

[204] Counter-Memorial, ¶¶ 95-101; Rejoinder, ¶ 15-37; First Eeckhout Report, ¶¶ 73-77; Second Eeckhout Report, ¶¶ 23-31.

[205] Counter-Memorial, ¶ 79.

[206] Counter-Memorial, ¶ 79, *quoting* TFEU, Article 344.

[207] Counter-Memorial, ¶ 79.

its dispute resolution methods were incompatible with EU law."[208] And if that is indeed Spain's position, STEAG says "*it should not be entitled to benefit from a problem of its own making*."[209]

187. STEAG also rejects Spain's arguments based on *Achmea*, *PL Holdings*, *Komstroy*, and other CJEU cases.[210] As Professor Eeckhout explains, the CJEU's "*judgments and other rulings are confined to EU law, and speak to the internal EU legal order – not to the international legal order*."[211] This is because the CJEU's jurisdiction is limited to interpreting the EU Treaties only; it has no jurisdiction over the ECT or any other international treaties.[212] Therefore, STEAG says, the CJEU's judgments cannot establish that the ECT is incompatible with EU law and must be disapplied among EU Member States.[213] In any case, STEAG considers that all the CJEU cases on which Spain relies "*either bear no resemblance to the case at hand or suffer from serious methodological and legal errors*."[214]

188. STEAG finds it particularly relevant that in *Achmea*, *Komstroy* and *PL Holdings*, the CJEU considered that it had jurisdiction to render a preliminary ruling because the underlying arbitration proceedings had taken place in the territory of an EU Member State.[215] STEAG highlights that none of these cases were decided under the ICSID Convention, which contains its own definition of the consent in Article 25.[216]

189. With respect to the *Achmea* Judgment, STEAG highlights that it did not concern a multilateral treaty to which the EU is a party, like the ECT, but rather a BIT.[217] Indeed, the CJEU made a clear distinction in this regard, referring to "*an agreement which was concluded not by the EU but by Member States*."[218] Moreover, Professor Eeckhout points out that while the CJEU found

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[208] Counter-Memorial, ¶ 88.

[209] *Id.*

[210] Counter-Memorial, ¶¶ 78-87; Rejoinder, ¶¶ 38-48; First Eeckhout Report, ¶¶ 32-65; Second Eeckhout Report, ¶¶ 32-35.

[211] Second Eeckhout Report, ¶ 32.

[212] Second Eeckhout Report, ¶¶ 33, 35.

[213] Counter-Memorial, ¶ 80.

[214] Counter-Memorial, ¶ 94.

[215] Counter-Memorial, ¶ 81.

[216] *Id.*

[217] Counter-Memorial, ¶ 82.

[218] First Eeckhout Report, ¶ 44, *quoting* **RL-103**, *Achmea* Judgment, 6 March 2018, ¶ 58.

an incompatibility between EU law and a provision such as Article 8 of the Netherlands-Slovakia BIT, it did not rule on the consequences of that incompatibility under international law.[219] He concludes that the *Achmea* Judgment does not establish a conflict between EU law and the intra-EU application of the ECT under international law.[220]

190. Similarly, STEAG distinguishes the *PL Holdings* Judgment on the basis that it "*concerns a case where it was argued that the Republic of Poland had concluded an arbitration agreement with a foreign investor by way of a tacit acceptance of the request of arbitration in Stockholm and under Swedish law.*"[221]

191. As for the *Komstroy* Judgment, STEAG accepts that the CJEU concluded that there is a conflict between the ECT and EU law.[222] Again, however, STEAG considers that the consequences of this finding are limited to EU law.[223] STEAG and Professor Eeckhout dismiss the relevance of the *Komstroy* Judgment for several reasons, including the following:

1. The case involved a non-EU investor and the Republic of Moldova, which is not an EU Member State, and the questions that the Paris Court of Appeals submitted to the CJEU make it clear that "*the CJEU was never called to interpret whether Article 26 of the ECT was compatible or not with the TFEU.*" The CJEU's remarks on this point are therefore "*arguably ultra vires and out of line unless they were considered obiter dicta* […]."[224]

2. The CJEU disregarded the VCLT's rules of treaty interpretation, which apply to the ECT as an international treaty, and it did not analyse Article 26 of the ECT.[225] Rather, the *Komstroy* Judgment "*is all about 'internal' EU law.*"[226]

[219] First Eeckhout Report, ¶ 46.
[220] First Eeckhout Report, ¶ 36.
[221] Counter-Memorial, ¶ 87.
[222] Rejoinder, ¶ 26.
[223] *Id.*
[224] Counter-Memorial, ¶ 83.
[225] Counter-Memorial, ¶ 84.
[226] First Eeckhout Report, ¶¶ 60-62.

3. *Komstroy* "*was an UNCITRAL case, whose seat was in a Member State of the EU (Paris, France) thereby making EU law applicable.*"[227] It does not apply to a "*wholly international*" ICSID case.[228]

4. Since the *Komstroy* Judgment, several ICSID tribunals and *ad hoc* committees have dismissed the Judgment as irrelevant,[229] reasoning for example that "*the CJEU's finding regarding the incompatibility between Article 26(2)(c) of the ECT and EU law can only be considered as an obiter dictum*,"[230] and that the ECT "*is, as a matter of principle, ignorant of, and unaffected by, judgments and evolving legal interpretations in another legal order such as the EU, as well as in national legal orders, no matter how forcefully those orders argue their applicability.*"[231]

5. Even Professor Sacerdoti, in his dissenting opinion cited by Spain, finds the *Komstroy* Judgment "*immaterial for arbitral tribunals operating outside of the EU legal framework, such as, in any case, ICSID tribunals. For such tribunals, the ECT is just an international treaty, governed by the rules and principles of public international law, and is in no way an instrument of EU law. An ICSID tribunal must interpret the ECT in*

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[227] Counter-Memorial, ¶ 86. *See* First Eeckhout Report, ¶¶ 54-55.

[228] *Id.*

[229] Counter-Memorial, ¶¶ 89-91, *citing* **CL-205**, *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, 6 December 2021, ¶ 41; **CL-206**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration regarding the Intra-EU Objection and the Merits, 1 February 2022, ¶¶ 106-109; **CL-207**, *Sevilla Beheer B.V. and Others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, ¶¶ 666-668; **CL-208**, *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, ¶¶ 359-361; **CL-209**, *LSG Building Solutions GmbH and Others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022, ¶ 761; **CL-210**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, 10 January 2022; **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 233; **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, ¶¶ 97-98. *See also* Rejoinder, ¶¶ 42-44, *citing* **CL-229**, *MOL Hungarian Oil and Gas Company plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022, ¶ 489; **CL-224**, *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17 November 2022, ¶¶ 238-243.

[230] **CL-207**, *Sevilla Beheer B.V. and Others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, ¶ 667.

[231] **CL-208**, *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, ¶ 359.

accordance with customary international law interpretation principles enshrined in Articles 31-33 VCLT."[232]

6. The *Komstroy* Judgment was handed down after the Award.[233] As the *ad hoc* committee in *NextEra v. Spain* explained, "*Art. 52(1)(b) is limited to assessing a tribunal's decision based on the record and law at the time it was rendered. This precludes the Committee from considering the CJEU judgment and it cannot serve as a basis for annulment.*"[234]

192. Turning to the domestic court decisions on which Spain relies, STEAG considers it "*obvious*" that "*decisions rendered by Swedish, French, or Dutch courts are based on EU law notions only.*"[235] Indeed, STEAG says "*it is only logical that the courts of the Member States of the EU annul awards rendered in certain cases as a consequence of the Komstroy Case*," as they are bound by EU law.[236] However, once again, STEAG stresses that these cases do not establish any conflict under international law or address the interpretation and application of the ECT under the VCLT.[237]

c. Effect of the Alleged Incompatibility

193. STEAG submits that even if there were a conflict between the ECT and EU law, EU law would not override the ECT.[238] In particular, STEAG sees no support for Spain's position that the primacy of EU law operates in the sphere of international law.[239] For STEAG, it simply cannot be that international law has "*to yield to EU law simply by the application of the rules that the latter has given itself.*"[240]

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[232] Rejoinder, ¶ 41, *quoting* **RL-265**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 October 2022, ¶ 62.

[233] First Eeckhout Report, ¶ 34.

[234] Counter-Memorial, ¶ 91, *quoting* **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 233.

[235] Rejoinder, ¶ 39.

[236] Rejoinder, ¶ 45.

[237] Rejoinder, ¶¶ 28, 45-47.

[238] Counter-Memorial, ¶¶ 95-101; Rejoinder, ¶¶ 31-36.

[239] Rejoinder, ¶ 33.

[240] Counter-Memorial, ¶ 96.

194. STEAG and Professor Eeckhout accept that the effect of the principle of primacy is that EU law must be applied "*within the four corners of EU law*," even if a EU Member State is under a conflicting domestic or international law obligation.[241] However, they say, that would not automatically render the international obligation void, as there is no evidence that EU law is *ius cogens* or that the primacy of EU law is a conflict-of-law rule under international law.[242] Rather, if the domestic implementation of an EU Member State's obligations under an international treaty conflicts with EU law, the answer is that the "*Member State concerned needs to act on the international plane, so as to remove the violation of EU law*."[243] Professor Eeckhout explains that the CJEU itself has confirmed these points in the *Kadi* case.[244] Moreover, he points out that Declaration 17 expressly recognizes that the principle of primacy applies "*over the law of Member States*," and makes no mention of international treaties.[245]

195. STEAG emphasizes that the ECT contains its own conflict rule in Article 16, which provides that unless another treaty is more favourable to the investor, it will not prevent the application of the ECT.[246] And in STEAG's view, Spain has failed to show that EU law would provide a higher degree of investor protection. To the contrary, STEAG considers that access to arbitration is a key benefit of investment law, and that the choice to resort to *either* domestic courts or arbitration is clearly more favourable than having no choice.[247]

196. Turning to Article 30 of the VCLT, STEAG recalls that this conflict rule applies only where two treaties have the same subject matter, which is not the case with the EU Treaties and the ECT. STEAG also repeats its view that there is no conflict between EU law and the ECT under international law, as even if *inter se*, there must be an incompatibility such that it makes it impossible to apply them both at the same time.[248] Moreover, STEAG rejects Spain's position that EU law would somehow be *lex posterior*, given that Articles 267 and 344 of the TFEU were

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[241] First Eeckhout Report, ¶ 77.

[242] Rejoinder, ¶¶ 33-35; First Eeckhout Report, ¶ 77; Second Eeckhout Report, ¶ 31.

[243] First Eeckhout Report, ¶ 77. *See also* Second Eeckhout Report, ¶ 24.

[244] First Eeckhout Report, ¶¶ 62, 75.

[245] Second Eeckhout Report, ¶ 10; **RL-256**, Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), 17 December 2007, p. 256. *See* Rejoinder, ¶ 55.

[246] Counter-Memorial, ¶ 98.

[247] Counter-Memorial, ¶ 99.

[248] Counter-Memorial, ¶ 100.

already in force as Articles 234 and 292 of the Treaty of Rome when the ECT was concluded. STEAG notes that Spain's argument contradicts its own position that the ECT and EU law were incompatible from the beginning.[249]

197. In STEAG's view, Spain's argument is really that its own obligations under EU law prevent it from complying with its obligations under the ECT and even the ICSID Convention.[250] However, STEAG says, "*Spain is precluded from invoking the provisions of EU law as its own internal law in order to breach the ECT*" under Article 27 of the VCLT.[251] Nor can Spain rely on Article 46(1) of the VCLT to argue that its consent to arbitrate disputes under the ECT was in violation "*of its internal law regarding competence to conclude treaties*," as any such violation was not "*manifest*," as required by Article 46(2) of the VCLT.[252]

198. Therefore, STEAG concludes that the Tribunal had jurisdiction over the dispute according to the applicable conflict rules of international law.[253]

d. Disconnection Clause

199. STEAG also rejects Spain's argument that the ECT contains an implicit disconnection clause in relation to EU Member States.[254] In STEAG's view, Spain fails to offer any support for its position, whether by reference to the text of the ECT, contemporaneous documents or means of interpretation, or other evidence.[255]

200. According to STEAG, when the ECT was concluded, EU law (as set out in the Treaty of Rome) did not share the same scope or objectives as the ECT, and there is no reason to believe that the ECT Contracting Parties would have assumed that the ECT did not apply to the parties to the Treaty of Rome.[256] Similarly, STEAG denies that it was "*evident*" that investors from EU

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[249] *Id.*

[250] Rejoinder, ¶ 60.

[251] Rejoinder, ¶ 59 (heading).

[252] Rejoinder, ¶¶ 63-64.

[253] Rejoinder, ¶ 37 (last bullet).

[254] Counter-Memorial, ¶¶ 62-67; Rejoinder, ¶¶ 21, 37; First Eeckhout Report, ¶¶ 26-31; **CD-1**, STEAG's Opening Presentation, slides 27-28.

[255] Counter-Memorial, ¶ 63.

[256] Counter-Memorial, ¶ 64.

Member States could not have recourse to arbitration against another EU Member State. At the time, there had been no decision from any domestic court, the CJEU or any arbitral tribunal to that effect. To the contrary, STEAG says that "*at the time of the conclusion of the ECT it was clear that it was possible for Member States to conclude international agreements that established tribunals outside the remit of the CJEU as long as those tribunals did not have to interpret or apply EU law*."[257] In STEAG's view, the CJEU's Opinion 1/91, relied upon by Spain, is inapposite because the court was considering a treaty which, unlike the ECT, would establish an international court that could rule on the respective competences of the EU (then the European Community) and its Member States.[258]

201. Moreover, STEAG highlights that no EU Member State or the EU (then the European Community) raised any concerns about the compatibility of Article 26(4) of the ECT with EU law. Contrary to Spain's position, STEAG contends that the 1998 European Communities Statement merely speaks to the mixed nature of certain competences enjoyed by the EU and makes no suggestion of an implicit disconnection clause.[259]

202. As for Spain's reliance on Article 25 and 36(7) of the ECT, STEAG argues that the actual purpose of Article 25 is to prevent an investor from claiming that it is entitled to the treatment afforded by an REIO through the ECT's most favored nation clause; it "*has nothing to do with the primacy of EU law or the inapplicability of the ECT among the Member States of the EU*."[260] Similarly, says STEAG, the fact that the EU and EU Member States cannot vote at the same time pursuant to Article 36(7) of the ECT does not provide any support for the alleged primacy of EU law or existence of a disconnection clause.[261]

203. STEAG refers to Spain's own expert, Professor Gosalbo, who confirms that the ECT contains no express disconnection clause among the EU Member States.[262] For STEAG, what is

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[257] Counter-Memorial, ¶ 65. *See* First Eeckhout Report, ¶¶ 29-31.

[258] Counter-Memorial, ¶ 65; **R-191**, CJEU, Opinion 1/91, on the "Agreement on the Establishment of a European Economic Area (EEA)," 14 December 1991.

[259] Counter-Memorial, ¶ 64; First Eeckhout Report, ¶¶ 21-25. *See* **RL-257**, 1998 European Communities Statement. STEAG also criticizes Spain for referring to **RL-219**, which is not the 1998 European Communities Statement, but a statement sent to the ECT Secretariat in 2019 to replace the earlier one.

[260] Counter-Memorial, ¶ 67.

[261] *Id*.

[262] STEAG's Post-Hearing Brief, ¶ 36.

relevant is the fact that the ECT contains an express disconnection clause relating to the Svalbard Treaty. In STEAG's view, this shows that the drafters decided to include a disconnection clause when they wanted the ECT to be disapplied. That they did not include such a clause in relation to intra-EU disputes under Article 26 of the ECT is therefore determinative.[263]

e. The Tribunal's Decision on Jurisdiction

204. STEAG submits that the Tribunal clearly had jurisdiction over the Parties' dispute under the ECT and the ICSID Convention and considers that the Tribunal's reasoning under international law was "*impeccable*."[264] Thus, in STEAG's view, it is obvious that there was no excess of power.[265]

205. If, however, the Committee were somehow to find that there was such an excess of power, STEAG contends that it could never be considered "*manifest*," as required by Article 52(1)(b) of the ICSID Convention.[266] Again, STEAG argues that no contradiction between the ECT and the EU Treaties is evident from a reading of the plain text of those treaties, and the ECT contains no express disconnection clause. In any event, even if there were such a conflict, STEAG says "*it is still highly debatable whether EU law would enjoy primacy over the ECT from a Public International Law perspective*."[267] STEAG supports its position by referring to Spain's own expert, who confirmed that "*autonomy* [of EU law], *as the Court says, means vis-à-vis both, but it doesn't mean that prevails. It means that it is autonomous.*"[268]

206. Moreover, STEAG recalls that in 2015, when it initiated this case, no tribunal or domestic court had ever accepted the intra-EU jurisdictional objection, and the CJEU handed down the *Komstroy* Judgment nearly two years after the Tribunal issued its Decision on Jurisdiction and Liability. Thus, STEAG concludes, even if the Tribunal and the Committee disagree on the

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[263] Counter-Memorial, ¶ 66.

[264] Rejoinder, ¶¶ 38, 48.

[265] *See* Counter-Memorial, ¶ 102; Rejoinder, ¶ 66.

[266] Counter-Memorial, ¶¶ 102-106; Rejoinder, ¶¶ 74-75; **CD-1**, STEAG's Opening Presentation, slide 37.

[267] Rejoinder, ¶ 74.

[268] STEAG's Post-Hearing Brief, ¶ 43, *quoting* Transcript, Day 1, 241:8-243:8.

underlying issues, any excess of power by the Tribunal was not self-evident, as illustrated by the length of Spain's submissions and its expert's reports.[269]

207. According to STEAG, Spain makes no effort to show how the Tribunal's supposed excess of power meets the "*manifest*" standard. Instead, STEAG says Spain is simply dissatisfied with the Tribunal's decisions and seeking to relitigate issues that were already fully vetted by the Tribunal.[270]

f. Other Awards and Annulment Decisions

208. STEAG stresses that no ICSID annulment committee has ever upheld an application for annulment on the basis of the intra-EU objection.[271] In fact, STEAG says, committees in at least eight cases have rejected Spain's attempt to annul awards on the basis of the very same arguments it advances here.[272] For STEAG, these decisions "*evidence that Spain's arguments in this proceeding are a mere reiteration of rejected arguments because of their total lack of merit*."[273] As noted above, STEAG also refers to numerous ICSID awards in which the tribunals dismissed Spain's intra-EU jurisdictional objection.[274] In sum, STEAG says Spain has "*failed to convince*

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[269] Counter-Memorial, ¶ 105.

[270] Counter-Memorial, ¶ 17.

[271] **CD-1**, STEAG's Opening Presentation, slides 10-11.

[272] Counter-Memorial, ¶ 15, *citing* **CL-165**, *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; **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022; **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022; **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022; **CL-190**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022. *See also* Rejoinder, ¶¶ 5-6, *citing* **CL-224**, *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17 November 2022; **CL-225**, *Watkins Holdings S.à.r.l., Watkins (Nea) B.V., Watkins Spain, S.L., Redpier, S.L., Northsea Spain, S.L., Parque Eólico Marmellar, S.L. and Parque Eólico La Boga, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023.

[273] Counter-Memorial, ¶ 16.

[274] *See, e.g.*, Counter-Memorial, ¶ 89, *citing* **CL-205**, *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, 6 December 2021; **CL-206**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration regarding the Intra-EU Objection and the Merits, 1 February 2022; **CL-207**, *Sevilla Beheer B.V. and Others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022; **CL-208**, *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022; **CL-210**, *Cavalum SGPS, S.A. v.*

any arbitral tribunal or committee under the ICSID Convention that an arbitral tribunal lacked jurisdiction to adjudicate a dispute because of the so-called intra-EU exception."[275]

209. STEAG rejects Spain's arguments regarding the award in *Green Power v. Spain* – the only known case in which the tribunal declined jurisdiction on the basis of the intra-EU objection.[276] STEAG stresses that this case was seated in Stockholm, making EU law applicable as *lex fori* and conducted under the SCC – not ICSID – rules.[277] The relevance of this distinction was noted by Spain itself as the respondent in that proceeding, when it argued that ICSID awards were less relevant because ICSID proceedings are "*governed by the ICSID Convention and not subject to the domestic lex arbitri of the seat in an EU Member State*."[278] STEAG points out that the seat of arbitration was a decisive factor for the *Green Power v. Spain* tribunal, which held that:

> *EU law is unquestionably part of the Swedish legal system, as of that of other EU Member States, and it therefore has a bearing on some questions arising under the SAA* [Swedish Arbitration Act], *such as matters of arbitrability, public policy, and validity of the arbitration agreement under Sections 33 and 34 SAA. It must therefore be applied to determine the jurisdiction of the Tribunal in the present case.*[279]

210. Therefore, STEAG considers the *Green Power v. Spain* award entirely inapposite.[280]

211. STEAG and Professor Eeckhout also dismiss Spain's reliance on Professor Sacerdoti's dissenting opinion in *Portigon v. Spain*, which STEAG characterizes as "*minoritarian and flawed*."[281] STEAG recalls Professor Sacerdoti's opinion that the EU Member States, by signing

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Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, 10 January 2022.

[275] Rejoinder, ¶ 11.

[276] Counter-Memorial, ¶ 92; Rejoinder, ¶ 45; **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022.

[277] Counter-Memorial, ¶ 92.

[278] Counter-Memorial, ¶ 92, *quoting* **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022, ¶ 137 (summarizing Spain's arguments).

[279] Counter-Memorial, ¶ 92, *quoting* **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022, ¶ 172.

[280] Counter-Memorial, ¶ 92.

[281] Rejoinder, ¶¶ 15, 49-58; **RL-265**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Request for Reconsideration, Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 October 2022. STEAG notes that the majority's decision is not public and Spain has not provided it, thus "*depriving STEAG and the Committee*

the TEU and TFEU in 2007 (and Declaration 17), agreed upon an *inter se* modification of the ECT under Article 41 of the VCLT, revoking their consent to arbitrate disputes with EU investors. STEAG strongly disagrees, arguing, *inter alia*, that this opinion contradicts the plain reading of the Treaty of Lisbon and Declaration 17, is premised on a misunderstanding of the principle of primacy, and ignores the rules established in Article 41 of the VCLT for an *inter se* modification.[282] In any event, STEAG notes that Spain never made the argument advanced by Professor Sacerdoti, instead insisting that it had *never* consented to arbitrate intra-EU disputes under the ECT. Thus, in STEAG's view, Spain's reliance on this new argument "*takes a rabbit out of the hat*" and in any event fails.[283]

(3) The Committee's Analysis

212. The Committee's primary task is to thoroughly assess the Tribunal's Award in light of the applicable standards enshrined in Article 52 of the ICSID Convention. As already noted above, annulment proceedings do not constitute an appeals mechanism, and therefore the Committee's powers are limited to the assessment of the Tribunal's findings on jurisdiction in light of the grounds for annulment set forth in the ICSID Convention.[284] The Committee's task is not to propose its own solutions to the dispute but rather to merely assess whether the Tribunal erred in determining the scope of its jurisdiction in such a manifest manner so as to meet the ground for annulment in Article 52(1)(b) of the ICSID Convention.

213. The Committee will start its analysis by summarizing the Tribunal's findings and line of thought. In summary, the Tribunal reached the conclusion that it could validly exercise its jurisdiction under Article 26(6) of the ECT and that EU law does not affect its jurisdiction due to the following reasons:[285]

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from the opportunity of knowing the detailed reasoning that precisely contradicts the respectable minority opinion of Prof. Giorgio Sacerdoti." Rejoinder, ¶ 50.

[282] Rejoinder, ¶¶ 55-56.

[283] Rejoinder, ¶ 51.

[284] *Supra*, ¶¶ 111-113.

[285] For the avoidance of doubt, the Committee notes that, even if not explicitly mentioned in this paragraph, all the reasons set out in the Tribunal's decisions have been thoroughly analysed by the Committee to the extent required by the ICSID Convention and requested by the Parties to these annulment proceedings (*see, e.g., infra*, ¶ 218 *et seq.*, ¶ 285 *et seq.*, ¶ 315 *et seq.*).

1. First, Article 26(6) of the ECT solely pertains to the applicable law governing the merits of the dispute. The distinction between the applicable law to the merits and the applicable law to jurisdiction cannot be overlooked. The Tribunal's jurisdiction is circumscribed by the ECT, specifically its Articles 26(1) to 26(5). The Tribunal's jurisdiction therefore derives from the ECT, not EU law.[286]

2. Second, Spain's arguments assume an irreconcilable conflict between the protection of investments and intra-EU investors under EU law on the one hand, and the ECT on the other. However, Spain fails to demonstrate any specific incompatibilities between provisions of the ECT and EU law. Nor does it substantiate how the present case would affect EU freedoms or encroach upon the competencies of the CJEU, thereby endangering the autonomy of EU law.[287]

3. Third, Spain focused on characterizing EU law as "*derecho internacional applicable*" ("*applicable international law*") under Article 26(6) of the ECT, claiming that EU law takes precedence, which it argued is also recognized in Article 25 of the ECT. The Tribunal found such interpretation of Article 25 of the ECT to be unfounded since, in the Tribunal's view, this Article simply eliminates the possibility for non-contracting parties to benefit from the treatment conferred between the parties of an Economic Integration Agreement. Article 25 does not establish the supremacy of the EU protection system over the ECT and is therefore irrelevant for the purposes of the present discussion. Moreover, the Tribunal found that although the EU Treaties are international treaties, "*no puede pretenderse que el derecho de la UE tenga una primacía sobre otras fuentes del derecho internacional* ***fuera del ámbito comunitario***."[288]

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[286] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 257-260.

[287] **RL-148**, Decision on Jurisdiction and Liability, ¶ 262.

[288] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 268-273 (emphasis in original). For ease of reference, it is recalled that Article 25 of the ECT (**RL-254**) provides as follows:

> "*(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as 'EIA') to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.*
>
> *(2) For the purposes of paragraph (1), 'EIA' means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all*

4. Finally, in the absence of an actual conflict between the ECT and EU law in this case, the question of which one prevails does not even arise. However, even if a conflict between the ECT and EU law were, for the sake of the argument, found to exist, the Tribunal would apply the conflict of law rule provided within the ECT itself. Article 16 of the ECT governs the relationship between the ECT and earlier or subsequent agreements signed by the Contracting Parties, including those of the EU, and resolves any conflict in favour of the provisions that are more favourable to investors or investments. Thus, even if the hypothesis of a conflict between the ECT and EU law were accepted, the ECT would prevail as the more favourable, because "[e]*l derecho comunitario no prevé la posibilidad de iniciar directamente un arbitraje contra el Estado receptor de una inversión que tenga por objeto determinar si las medidas adoptadas se ajustan a garantías iguales o más favorables a las previstas en la Parte III del TCE.*"[289]

214. Spain has argued that the Tribunal's findings on its competence constitute a manifest excess of powers. The Committee is going to address this ground for annulment on the basis of the Parties' arguments and the Tribunal's findings. The Committee will first define the standard of interpretation of the ECT provisions. The Committee will then turn to the effects of EU law on the ECT.

a. The Standard of Interpretation of the ECT Provisions

215. Spain's disagreement with the Tribunal's findings could be summarized as follows: first, the Tribunal erred in finding its jurisdiction *ratione personae* under Article 26 of the ECT; and second, the Tribunal's standard for interpretation of the ECT failed to take into consideration the object and purpose of the ECT, its *travaux préparatoires* and related instruments, as required by Article 31 of the VCLT.[290]

216. The Committee reiterates that in order to justify annulment based on manifest excess of powers the excess of powers must be evident from a plain reading of the Award and recognized as

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discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame. […]"

[289] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 274-277.

[290] *Supra*, ¶¶ 139-144.

such without difficulty. Spain claims a manifest excess of power based on an alleged misapplication or misinterpretation of the law regarding jurisdiction. The Committee is not persuaded that such manifest excess of powers is obvious without extensive analysis.

217. As to Spain's first point, the Committee finds that the Tribunal exercised its right to determine its own competence pursuant to Article 41(1) of the ICSID Convention, and adequately explained that the Tribunal's jurisdiction is defined on the basis of the ECT, not EU law. The Tribunal's interpretation involved a reasonable analysis of the provisions of the ECT and made reference to the findings of other tribunals on this issue.[291] The Tribunal also distinguished the *Achmea* case and the case at hand, and found that EU law (and *Achmea* in particular) was irrelevant since EU law was not the source of the Tribunal's jurisdiction.[292]

218. In respect of Spain's second point, the Committee emphasizes that the determination of the interpretation standards falls within the scope of the Tribunal's jurisdiction, and the Tribunal's findings cannot be claimed as manifest excess of powers solely on the basis of the Parties' disagreement with such standards. Naturally, the Parties' positions on the interpretation standard may differ, and they might be mutually exclusive.

219. In the present case, the Tribunal adopted the textual approach to the interpretation of the ECT provisions, which is in line with general principles of international public law. As noted by STEAG, the ICJ considers that the resort to additional interpretative tools is needed only when the textual approach "*results in a meaning incompatible with the spirit, purpose, and context of the clause.*"[293] A similar approach derives from Article 32 of the VCLT itself, stating that "*supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31: (a) leaves*

[291] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 240-253.

[292] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 231-237, 254-268.

[293] Counter-Memorial, ¶ 50; Rejoinder, ¶ 19, *quoting* **CL-226**, ICJ, Case of the Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), Judgment, 12 November 1991, ¶ 48.

the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[294]

220. Therefore, Article 31(1) of the VCLT requires the Tribunal to interpret a treaty in accordance "*with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*,"[295] while Article 32 of the VCLT entailing analysis of the *travaux préparatoires* and other supplementary means applies only in specific circumstances.

221. In the Committee's view, the Tribunal correctly started its analysis with the ordinary meaning of terms, which is usually a textual interpretation of the treaty. Although the Tribunal did not address the object and purpose of the ECT in detail, the Tribunal's analysis does not amount to a manifest excess of powers. In fact, the Tribunal justified its findings with sufficient reference to the applicable provisions, analysis of the awards in similar cases, and its own application of the relevant principles to the case at hand.

222. In accordance with Article 32 of the VCLT, the Tribunal was not under a duty to resort to any supplementary means of interpretation, since it was able to determine the meaning of Article 26 of the ECT using a textual approach. Thus, there was no obligation for the Tribunal to discuss in detail Spain's references to the *travaux préparatoires* and/or the 1998 European Communities Statement. In such circumstances, the Committee finds that the Tribunal did not commit a manifest excess of powers in interpreting Article 26 of the ECT under Article 31 of the VCLT.

b. Objections to the Settlement of Intra-EU disputes

223. The essence of Spain's application for annulment before this Committee is almost identical to its jurisdictional objection on intra-EU disputes before the Tribunal, whereby Spain argued that intra-EU disputes were excluded from the scope of the ECT. The Tribunal disagreed with Spain for a number of reasons and found as follows:

1. First, the interpretation of the ECT provisions under Article 31 of the VCLT does not explicitly exclude intra-EU disputes from the scope of Article 26 of the ECT.[296] Further,

[294] **RL-10**, VCLT, Article 32.

[295] **RL-10**, VCLT, Article 31(1).

[296] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 240-241.

the requirement of diversity of territories under Article 26(1) of the ECT is met when the respondent State does not coincide with the State from whose territory the investor originates.[297]

2. Second, based on the definitions enshrined in Article 1 of the ECT and the text of Article 26(1) of the ECT, it is clear that the Contracting Parties did not expressly or implicitly agree to a disconnection clause excluding certain "*disputes between a Contracting Party and an investor of another Contracting Party*" from the scope of Article 26 of the ECT.[298]

3. Third, neither the European Communities nor its Member States made a reservation regarding intra-EU matters when ratifying the ECT.[299]

4. Finally, Articles 16 and 25 of the ECT do not indicate that the ECT is inapplicable in intra-EU relations and do not assume the primacy of EU law over the ECT.[300]

224. In view of the above summary, the Committee will analyse whether the Tribunal's findings in interpretation of the scope of the Tribunal's jurisdiction amount to a manifest excess of powers. In doing so, the Committee will particularly focus on following points:

1. Whether the Tribunal manifestly exceeded its powers while finding that Article 26 of the ECT does not explicitly exclude intra-EU disputes.

2. Whether the Tribunal manifestly exceeded its powers while finding that the Contracting Parties to the ECT did not explicitly or implicitly agree to a disconnection clause.

3. Whether the Tribunal manifestly exceeded its powers while finding that the EU and the ECT Contracting States did not make any reservations to exclude intra-EU disputes from the scope of the ECT.

[297] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 245-248.
[298] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 241, 249-251.
[299] **RL-148**, Decision on Jurisdiction and Liability, ¶ 251.
[300] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 253 and 269-277.

4. Whether the Tribunal manifestly exceeded its powers while finding that intra-EU disputes are arbitrable under the ECT in the absence of primacy of EU law over the ECT.

225. In respect of the first finding, the Committee observes that, referring to Article 26(1) of the ECT, the Tribunal found that "[l]*a lectura de esta disposición permite observar la ausencia de una exclusión explícita de las controversias intra-UE.*"[301] In other words, nothing in Article 26 expressly states that intra-EU disputes fall outside of the scope of the ECT. In its submissions, Spain does not contest that Article 26 of the ECT does not contain an explicit exclusion of intra-EU disputes, and nor does it suggest that the Tribunal manifestly exceeded its powers in deciding so.

226. Thus, the Committee does not have to examine this issue in further detail.

227. In respect of the second finding, Spain does not suggest that there is an explicit disconnection clause in the ECT. Instead, it argues that the possibility of an implicit disconnection clause is admitted in international law and that the Tribunal failed to take into account the factual circumstances and the legal framework at the time of the ECT's conclusion.[302] Spain asserts that:

> *In this regard, the report by Professor Ricardo Gosalbo Bono, submitted with this Memorial, is very clear, and explains not only how an explicit disconnection clause is not necessary, but also how in the ECT there is an implicit disconnection clause.*[303]

228. On this point, the Committee finds that the Tribunal's analysis of the disconnection clause is sufficiently detailed. The Tribunal started its analysis with the interpretation of the provisions invoked by Spain (*i.e.*, Articles 1, 16, 25, 26, and 36 of the ECT), and considered the ordinary meaning of the terms as well as the context of the ECT. The Tribunal analysed Article 26(1) of the ECT and the ECT's definition of every term relevant to the question: "*Contracting Party*" as per Article 1(2), "*Regional Economic Integration Organization*" as per Article 1(3), and "*Area*" as per Article 1(10).[304]

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[301] **RL-148**, Decision on Jurisdiction and Liability, ¶ 241.

[302] Memorial, ¶¶ 248, 250-251. *See also* Memorial, ¶¶ 110, 116, 119-120, 123-124.

[303] Memorial, ¶ 134, *citing* First Gosalbo Report, ¶¶ 19-25.

[304] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 240-244.

229. This led the Tribunal to conclude that there is indeed a diversity of areas when an investor from the EU brings a claim against an EU Member State, as long as the latter is different from the investor's home country. In this context, the Tribunal also noted that its conclusion was in line with previous cases addressing the same issue, such as *Isolux v. Spain*.[305]

230. The Tribunal further concluded that the requirement of territorial diversity under Article 26(1) of the ECT is met when the Respondent State does not coincide with the State from which the investor originates, and that in this case, both Germany and Spain are "*Contracting Parties*" with their respective territories. In reaching this conclusion, the Tribunal again noted that such interpretation was supported by the findings of prior tribunals in similar cases, such as the tribunal in *BayWa r.e. v. Spain*, which found that there was no difficulty in applying Article 26 of the ECT separately to the EU Member States:

> [I]*f, as the Tribunal considers, the Member States were Contracting Parties to the ECT in their own right, there is no difficulty in applying Article 26 severally to them in matters concerning their own territory and responsibility*.[306]

231. The Tribunal agreed with the conclusion by other tribunals that an explicit disconnection clause would have been required. Considering that the ECT contains provisions regulating its relations with other treaties, such as the Svalbard Treaty, the Tribunal found that it was quite far-fetched to conclude that the exclusion of intra-EU disputes could be implicit.[307]

232. The Tribunal also found that Article 36(7) of the ECT does not indicate the existence of an implicit disconnection clause, since this provision specifically refers to voting in the context of decisions of the Charter Conference and has nothing to do with the scope of application of Article 26 of the ECT.[308]

233. As noted above, Spain's criticism of the Tribunal's findings is mostly connected with the factual background and the corresponding legal framework at the time the ECT was concluded. In

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[305] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 245-246.

[306] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 247-248, footnote 374, *quoting* **RL-144**, *BayWa R.E. Renewable Energy GmbH and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶ 250.

[307] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 250-251.

[308] **RL-148**, Decision on Jurisdiction and Liability, ¶ 252.

particular, Spain claims that the EU Member States did not anticipate entering into internal market obligations with each other,[309] and similarly, did not intend to allow arbitral tribunals to settle intra-EU disputes, as proved by the 1998 European Communities Statement.[310] In Spain's submission, all this context, read together with Article 25 of the ECT, should lead to the conclusion that there was an implicit disconnection clause.[311]

234. The Committee is not convinced by Spain's arguments. Primarily, the Committee notes that the Tribunal provided a very detailed analysis of all the relevant issues. The criticism set out by Spain, in the Committee's view, is only very remotely connected to the determination of the scope of the Tribunal's jurisdiction as will be explained below.

235. The Committee finds that in interpreting the ECT provisions under Articles 31 and 32 of the VCLT for the purposes of determination of the implicit disconnection clause, the sources relied upon by Spain, such as the *travaux préparatoires* of the ECT, and the 1998 European Communities Statement, could be in the best case applicable as the "*circumstances of its conclusion*," that is to say, as supplementary means of interpretation. As explained in paragraph 222 *supra*, the Tribunal was not required to take into consideration all developments of EU law in the early 1990s, since it was able to determine the scope of its jurisdiction based on Article 26 of the ECT. The Committee is not at all persuaded that the Tribunal would have manifestly exceeded its powers by asserting jurisdiction based on the analysis of Article 26 of the ECT, without resort to supplementary means of interpretation.

236. Further, Spain's expert, Professor Gosalbo, confirmed during the Hearing on Annulment that the EU did not intend to include an express disconnection clause in the ECT. Professor Gosalbo stated: [312]

> *And what I was trying to explain today is that this--the Union at the end decided not to insist because at the time the Union had the key. It was the initiator, I repeat, of this Treaty--decided not to insist on*

[309] Memorial, ¶ 110.

[310] Memorial, ¶ 116.

[311] Memorial, ¶¶ 119-120, 134. *See also*, Memorial, ¶ 250.

[312] Transcript, Day 1, 212:13-19.

> *having an express disconnection clause, as it doesn't insist in having it in many other international agreements.*

237. In Professor Gosalbo's view, there was no need for a disconnection clause since the EU legal framework provided for an implied one.[313] Nonetheless, he confirmed two important conclusions: (i) an express disconnection clause was intentionally not included in the ECT by the Contracting Parties; and (ii) no evidence of the implied consent to the disconnection clause can be found in the ECT itself. In such circumstances, the Committee cannot find that the Tribunal manifestly exceeded its powers in finding that the ECT does not contain an explicit nor an implicit disconnection clause.

238. In respect of the third finding, the Tribunal noted that "*al ratificar el TCE, tanto las Comunidades Europeas como sus Estados Miembros se abstuvieron de realizar una reserva en relación con el ámbito intra-comunitario.*"[314] Since Spain only contests this finding in light of Spain's argument on implicit disconnection clause,[315] which has already been discussed by the Committee in paragraphs 234-237 *supra*, there is no basis for the Committee to assess separately whether the Tribunal's conclusion is incorrect.

239. In respect of the fourth finding, the Tribunal pointed out that the question of the applicability of the ECT to intra-EU disputes as a result of the alleged primacy of EU law is intertwined with the arguments regarding the effects of EU law on the Tribunal's jurisdiction.[316] The Committee will address this particular issue in paragraphs 276 *et seq. infra*.

240. Therefore, the Tribunal's interpretation regarding its own jurisdiction involved a complex and comprehensive analysis, and the Committee cannot identify a manifest excess of powers in the Tribunal's interpretation and application of Article 26 of the ECT and related provisions of the ECT in establishing jurisdiction.

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[313] Transcript, Day 1, 212:13-22.

[314] **RL-148**, Decision on Jurisdiction and Liability, ¶ 251.

[315] Memorial, ¶ 250, fn. 197.

[316] **RL-148**, Decision on Jurisdiction and Liability, ¶ 253.

c. Effects of EU law on the Tribunal's Jurisdiction

241. Given the limited nature of the Committee's powers, the Committee reiterates that the analysis in this section is limited to the assessment of the Tribunal's findings on jurisdiction over an intra-EU dispute in light of the standard for annulment in Article 52(1)(b) of the ICSID Convention.

242. The Tribunal found four reasons why EU law was not decisive in determining its jurisdiction:

1. Article 26(6) of the ECT concerns only the law applicable to the merits of the dispute but not to jurisdiction, which is a significant distinction that needs to be respected.[317] The reference to "*issues in dispute*" in Article 26(6) of the ECT is specifically related to the substantive obligations under Part III of the ECT and does not extend to jurisdictional matters.[318]

2. In the Tribunal's view, Spain did not demonstrate an incompatibility between the ECT and EU law. In particular, the Tribunal concluded that the ECT and the EU Treaties established "*regímenes plenamente coherentes entre sí*," a conclusion not affected by the *Achmea* Judgment which dealt with a BIT.[319]

3. EU law does not have primacy over the ECT. The Tribunal's jurisdiction derives from the ECT itself, and EU law is therefore not relevant in determining its jurisdiction.[320]

4. Although no conflict has been demonstrated between EU law and the provisions of Parts III and V of the ECT, even if a conflict were to exist between EU law and the ECT, the Tribunal would apply the conflict rule provided in Article 16 of the ECT, which requires the application of the provisions that are more favourable to the investor or the investment. In that scenario the ECT would prevail as the more favourable, because "[e]*l derecho comunitario no prevé la posibilidad de iniciar directamente un arbitraje contra*

[317] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 257-260.
[318] **RL-148**, Decision on Jurisdiction and Liability, ¶ 257.
[319] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 262-266.
[320] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 267-273.

el Estado receptor de una inversión que tenga por objeto determinar si las medidas adoptadas se ajustan a garantías iguales o más favorables a las previstas en la Parte III del TCE."[321]

243. Spain, in its turn, disagrees with these findings, based on the following arguments:

1. EU law is fully applicable not only to the merits but also to the Tribunal's jurisdiction under Article 26(6) of the ECT.[322]

2. Article 26 of the ECT is in conflict with Articles 267 and 344 of the TFEU.[323]

3. According to the principle of primacy expressly adopted in the EU legislation, EU law should prevail over the ECT.[324] While disagreeing with the Tribunal's conclusion that Article 16 of the ECT is the applicable conflict rule, and submitting that the principle of primacy of EU law governs, Spain argues that it "*has shown how the protection granted by the EU treaties is more favourable than that offered by the ECT.*"[325]

4. The Tribunal's jurisdiction interferes with the CJEU's exclusive jurisdiction over the application and interpretation of the treaties concluded by EU Member States since the dispute concerns State aid issues.[326]

244. The Committee will address the issue of applicability of EU law in the context of State aid in Section V.C *infra*, while all the other issues outlined in paragraph 243 *supra* will be discussed below in turn.

i. Whether the Tribunal Exceeded Its Powers in the Interpretation of Article 26(6) of the ECT

245. The Tribunal commenced its analysis with the interpretation of Article 26 of the ECT under Article 31 of the VCLT. The Tribunal read Article 26 in its context and concluded that the

[321] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 274-277.
[322] Reply, ¶ 219.
[323] Memorial, ¶¶ 89-91.
[324] Memorial, ¶¶ 111, 119-124, 127. *See also* Memorial, ¶¶ 86-87, 261.
[325] Memorial, ¶¶ 256-257, 261-262.
[326] Memorial, ¶¶ 257, 272-273.

Tribunal's jurisdiction derives from Article 26(1)-(5) of the ECT.[327] The Tribunal went on to address whether EU law was relevant to the determination of the issues of jurisdiction, and in that context addressed the Parties' arguments with regard to the applicable law provision in Article 26(6) of the ECT, finding that paragraph 6 of this Article refers to the law applicable to the merits of the dispute. The Tribunal explained that the reference to "*issues in dispute*" in Article 26(6) of the ECT concerned disputes relating to the substantive obligations under Part III of the ECT.[328]

246. The Tribunal confirmed that its interpretation was in line with the findings of prior tribunals that had dealt with the same issue previously, citing the tribunals' reasoning in *Stadtwerke München v. Spain* and *SolEs Badajoz v. Spain*. The Tribunal agreed with the tribunal in *SolEs v. Spain* that if the ECT Contracting Parties had had the intent to extend Article 26(6) of the ECT to the jurisdictional issues, they would have done so expressly in the text of the provision.[329]

247. As a final point, the Tribunal expressed its agreement with the *Vattenfall AB et al. v. Germany* tribunal. The Tribunal opined that the Parties' agreement regarding the applicable law in Article 26(6) of the ECT viewed through Article 42(1) of the ICSID Convention concerns only law applicable to the merits, since the reference to "*a dispute*" in Article 42(1) of the ICSID Convention indicates that said provision only concerns law applicable to merits, and not to jurisdiction.[330]

248. The Committee finds that Spain's criticism of such findings is not substantiated in these annulment proceedings because Spain fails to explain its reasoning behind the claim that Article 26(6) of the ECT is equally applicable to the merits and to the jurisdiction.

249. For the purposes of determining whether annulment is warranted under Article 52(1)(b), after the analysis carried out, the Committee is not persuaded that the Tribunal exceeded its powers while interpreting Article 26(6) of the ECT as defining the law applicable to the merits. The

[327] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 240-253.
[328] **RL-148**, Decision on Jurisdiction and Liability, ¶ 257.
[329] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 257-258.
[330] **RL-148**, Decision on Jurisdiction and Liability, ¶ 259.

Tribunal's reasoning is logical and well substantiated. As a result, the Committee finds that there has been no manifest excess of powers.

ii. Whether the Tribunal Exceeded Its Powers in Assessing the Alleged Conflict between the TFEU and the ECT

250. One of the most important arguments advanced by Spain in these annulment proceedings concerns the alleged incompatibility of the ECT and the TFEU provisions. In this respect, the Tribunal addressed a number of questions:

1. The Tribunal found that there is no conflict between Article 26 of the ECT and Article 344 of the TFEU since they have different subject matters.[331]

2. The Tribunal also explained that the above conclusion was not affected by the decision of the CJEU in the *Achmea* Judgment, which addressed an arbitration under a bilateral treaty between two EU Member States which had a seat within the territory of an EU State, making it irrelevant for the purposes of this arbitration.[332]

3. The Tribunal found that Spain failed to explain the relevance of EU law and the State aid regime to the settlement of the present dispute. More particularly, the Tribunal reasoned that the "*controversia se refiere específicamente a las obligaciones de España bajo los artículos 10(1) y 13 del TCE*," and that in order to determine whether those obligations were breached "*no es necesario determinar la validez de ningún acto de la UE*" or "*establecer si las medidas de España son conformes al derecho comunitario*."[333]

251. For the above reasons, the Tribunal concluded that the exercise of jurisdiction, in this case, did not conflict with the competencies of the CJEU and was not affected by EU law.[334]

252. Spain's criticism of the Tribunal's Award is wide and addresses a number of issues. According to Spain:

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[331] **RL-148**, Decision on Jurisdiction and Liability, ¶ 264.
[332] **RL-148**, Decision on Jurisdiction and Liability, ¶ 264.
[333] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 265-266.
[334] **RL-148**, Decision on Jurisdiction and Liability, ¶ 266.

1. The Award contradicts Articles 267 and 344 of the TFEU which are directly applicable to the present case.[335]

2. The Award contradicts the principles of the primacy and autonomy enshrined in EU law.[336]

3. The fundamental principles of EU law are applicable to the determination of the Tribunal's jurisdiction irrespective of the applicable arbitration rules and the seat of the arbitration.[337]

4. The Award contradicts the findings in *Achmea*, *PL Holdings,* and *Komstroy*.[338]

5. The Tribunal had to interpret EU law since EU legislation on State aid is concerned with the merits of the case.[339]

253. In respect of the first issue, the Committee finds that the Tribunal thoroughly analysed Article 26 of the ECT and explained that it deals with the resolution of disputes "*between a Contracting Party and an Investor of another Contracting Party*," while Article 344 of the TFEU prohibits EU Member States from bringing disputes relating to the interpretation or application of the EU Treaties. The Tribunal observed that these are independent provisions that address different matters, and they can coexist and be simultaneously applied. The Tribunal referred to the findings in *Vattenfall v. Germany* case to support this line of reasoning.[340] Moreover, the Tribunal added that since the dispute in the present case specifically relates to Spain's obligations under Articles 10(1) and 13 of the ECT, it was not necessary to determine the validity of any EU act, nor was it necessary to establish whether Spain's measures were "*conformes al derecho comunitario*."[341]

254. In its Application, Spain fails to address the key question of any difference between the subject matter of the ECT and Article 344 of the TFEU. It simply relies on the principles of

[335] Memorial, ¶¶ 89-91; Reply, ¶ 69.
[336] Reply, ¶¶ 69-74; Memorial, ¶¶ 86-87, 95; Spain's Post-Hearing Brief, ¶¶ 70-73.
[337] Memorial, ¶ 243.
[338] Memorial, ¶¶ 142-148, 149-156, 157-169, 241-242.
[339] Memorial, ¶¶ 257-258.
[340] **RL-148**, Decision on Jurisdiction and Liability, ¶ 264.
[341] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 265-266.

primacy, autonomy, and mutual trust as being breached, which is not sufficient to establish a manifest excess of the Tribunal's powers.

255. While the Committee will further address these principles in Section V(B)(3)c(iii) *infra*, it notes that, from the plain reading of Article 344 of the TFEU, the Committee is not convinced that the Tribunal could exceed its powers while applying the ECT. Article 344 provides that the "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*"[342] The term "*Treaties*" is explained in Article 1 of the TFEU and refers to the founding Treaties of the EU as explicitly confirmed by Spain's expert, Professor Gosalbo.[343]

256. Since the Tribunal did not interpret any provisions under the founding Treaties of the EU, but instead resolved the dispute under the ECT, the ICSID Convention, and rules of interpretation provided by the VCLT, the Committee is not persuaded that the Tribunal's finding that there was no conflict between Article 26 of the ECT and Article 344 of the TFEU as governing different subject matters leads to the conclusion that the Tribunal manifestly exceeded its powers .

257. In respect of the second issue, the Committee will address it in Section V(B)(3)c(iii) *infra*.

258. In respect of the third issue, the Committee observes that the Tribunal explained that "*artículo 26(6) del TCE* […] *se refiere únicamente a la ley aplicable al fondo de la controversia y no tiene efectos sobre la jurisdicción del Tribunal*" and that "*el derecho de la UE no es relevante para la determinación de la jurisdicción del Tribunal*."[344]

259. Spain argued that the fundamental principles of the EU constitute part of the law applicable to jurisdiction regardless of the seat of the arbitration and the applicable rules. Spain's conclusion is based on the premise that in relations between an investor of an EU Member State and the EU Member State itself, EU law is applicable by default.[345]

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[342] **RL-1**, TFEU, p. 196, Article 344.

[343] **RL-1**, TFEU, p. 18, Article 1; Transcript, Day 1, 283:11-12.

[344] **RL-148**, Decision on Jurisdiction and Liability, ¶ 268.

[345] *See* Memorial, ¶ 243; Transcript, Day 1, 75-77.

260. The Committee finds it hard to agree with Spain's position. In the Committee's view, treaty parties are free to choose the applicable arbitration rules and to submit the disputes to any available mechanism, including international arbitration, unless it is expressly prohibited by EU law. This distinction (and the discretion of the Parties) was addressed in *Green Power v. Spain,* a decision invoked by Spain itself:

> [*(a)*] [T]*he Claimants could have opted for an ICSID arbitration under Article 26(4)(a) (i) ECT, given that both Denmark and Spain are – and were at the time the arbitration commenced – parties to the ICSID Convention. The Claimants opted instead to conduct the proceedings under the SCC Rules and, upon the Claimants' proposal in a letter dated 21 October 2016, the seat of the arbitration was set in Stockholm. Both Parties agree that this determination of the seat attracts the application of Swedish arbitration law, particularly the SAA, as the applicable lex arbitri.*
>
> […]
>
> [*(b)*] […] *As the Parties have not explicitly agreed on the law governing the arbitration agreement and neither the ECT nor the SCC Rules, to which the Parties have agreed, determines the law applicable to the arbitration agreement it follows that, pursuant to Section 48 SAA, Swedish law, i.e. the law of the seat, is applicable to the determination of jurisdictional matters.*
>
> [*(c)*] *The selection of the seat in Sweden, an EU Member State, also attracts the application of EU law, which is part of the law in force in every EU Member State, including Sweden.* […]
>
> [*(a)*] […] *The question of whether or not EU law applies to the determination of jurisdiction and, if so, the extent to which it does so, does not arise in the same manner in the circumstances of this arbitration as in ICSID proceedings.*[346]

261. *Green Power v. Spain*, therefore, stands for the proposition that EU law is applicable to the Tribunal's jurisdiction in a case in which an EU Member State is the seat of arbitration. But whatever the position might be in that context, the Committee observes the present case is an ICSID arbitration which is a delocalized proceeding. Therefore, the Committee does not find that

[346] **RL-240**, *Green Power Partners K/S and Others v. Kingdom of Spain*, SCC Case V 2016/135, Award, 16 June 2022, ¶¶ 162-166, 441.

the conclusions in *Green Power v. Spain* support a finding that the Tribunal in this case manifestly exceeded its powers in its determination of the scope of its jurisdiction under the applicable law.

262. In respect of the fourth issue, the Tribunal dedicated a separate section precisely to discuss the findings of the *Achmea* Judgment and its consequences for the Tribunal's jurisdiction. The Tribunal concluded that the *Achmea* findings are inapplicable in the present case for the following reasons:

1. The *Achmea* Judgment, based on a BIT between two EU Member States, should be distinguished from the proceedings under Article 26 of the ECT. The CJEU did not address the situation of a multilateral treaty of a "*mixed*" nature concluded by the EU itself, its Member States, and third states.[347]

2. Unlike Article 26(4) of the ECT, Article 8 of the Netherlands-Slovakia BIT does not provide for the possibility of initiating arbitral proceedings under the ICSID Convention. In *Achmea*, the process was not covered by the 1965 Washington Convention, but it was an arbitration under the UNCITRAL rules with a seat in Frankfurt, Germany. The present arbitration is governed by the ICSID Convention and does not have its seat within the territory of any EU Member State, which also means that EU Member State courts lack the competence to set aside the ensuing award.[348]

3. The CJEU's decision in *Achmea* does not indicate clear criteria or requirements to determine whether the dispute settlement clause of a multilateral treaty adopted by the EU Member States, the EU itself, and third states is compatible with EU law, and therefore nothing in the *Achmea* Judgment indicates an obstacle to the exercise of the Tribunal's jurisdiction.[349]

263. Spain disagrees with such conclusions due to the following reasons:

[347] **RL-148**, Decision on Jurisdiction and Liability, ¶ 234.
[348] **RL-148**, Decision on Jurisdiction and Liability, ¶ 235.
[349] **RL-148**, Decision on Jurisdiction and Liability, ¶ 236.

1. The *Achmea* Judgment is equally applicable to BITs and multilateral treaties and considering the retroactive effect of the CJEU's judgments, Article 26 of the ECT should be considered inoperative *ab initio*.[350]

2. The Tribunal disregarded the declarations of the EU Member States, including those of Spain and Germany, wherein they admitted that Article 26 of the ECT, *inter alia*, could not be understood as giving consent to submit intra-EU disputes to arbitration and it should therefore "*have to be disapplied.*"[351]

3. This line of reasoning was confirmed in *PL Holdings* and, most importantly, in the *Komstroy* Judgment:[352]

> […] *the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.*
>
> […]
>
> *In light of the foregoing, it must be concluded that* ***Article 26(2)(c) ECT must be interpreted as not being applicable*** *to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*

[350] Memorial, ¶¶ 146-148, 149-156; Memorial, ¶ 242: "*Not only is Achmea fully applicable to the present case, but its reasoning and its extension to the ECT has been confirmed in Komstroy and PL Holdings. Both Komstroy and PL Holdings confirm the position that the Kingdom of Spain has been arguing throughout the underlying arbitration: Achmea's conclusions are extensible to multilateral treaties such as the ECT. And these conclusions are applicable ex tunc, not being new or novel but reflecting the view of the CJEU throughout previous decisions and opinions*;" Reply, ¶¶ 101, 119.

[351] Memorial, ¶¶ 227-230; Reply, ¶¶ 96, 99.

[352] Memorial, ¶¶ 149-156, 157-169, 242; Reply, ¶¶ 105-118, *quoting* **RL-158**, *Komstroy* Judgment, 2 September 2021, ¶¶ 62-66 (Spain's emphasis).

4. Finally, Spain's position regarding the Tribunal's manifest excess of powers is reinforced by the decisions of the national courts which applied the CJEU judgments along with the arbitration award in *Green Power v. Spain*.[353]

264. In the Committee's view, the Tribunal's analysis regarding the *Achmea* Judgment is indeed complex and comprehensive. The reasoning is explained in a logical manner and with due regard to the applicable rules. The Committee therefore finds no excess of powers by the Tribunal. Since the Tribunal has the competence to determine its own jurisdiction, and the Tribunal correctly decided that its jurisdiction derives from the ECT and the ICSID Convention, its powers indeed differ from the powers of tribunals constituted under EU law in the territory of the EU Member States.

265. Furthermore, Spain's argument regarding the inapplicability of Article 26 of the ECT to intra-EU disputes in a post-*Achmea* world *ab initio*,[354] raises two difficulties.

266. First, the Committee does not believe that the Tribunal was bound by the retroactive effect of the CJEU judgments, let alone to such an extent so as to find the ECT to be totally ineffective for the EU Member States. The jurisdiction of the CJEU is limited to the EU Member States, and international tribunals cannot be affected by the CJEU's decisions. In this context, the Committee agrees with Professor Eeckhout on the need to distinguish between the EU internal legal order and international legal order.[355] While the EU internal legal order is defined by the CJEU's judgments, it cannot be extended to the domain of public international law as a whole.

267. Hence, Spain's submission regarding the applicability of the CJEU judgments to multilateral treaties does not seem well substantiated, and the Committee finds no justification to extend the CJEU's jurisdiction well beyond the four corners of the EU. Spain has failed to prove that the ECT incorporates an intention to be guided by the judgments of the CJEU, and therefore the Tribunal did not have grounds to declare Article 26(6) of the ECT inoperative *ab initio* on the basis of the *Achmea* Judgment.

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[353] Memorial, ¶¶ 184-192, 193-198, 199-220; Reply, ¶¶ 193-197.

[354] Memorial, ¶¶ 149-156, 242; Reply, ¶¶ 100-101, 119.

[355] Second Eeckhout Report, ¶ 32.

268. Second, Spain's argument contradicts the conduct of the EU Member States. Although Spain's expert, Professor Gosalbo, explained this conduct as purely a political issue,[356] the Committee finds that the declarations made by the EU Member States (including Spain and Germany) after the *Achmea* Judgment prove that Article 26 of the ECT was operative (at least, in the eyes of the EU Member States).[357] Similarly, if the CJEU judgments entailed the ineffectiveness of Article 26 of the ECT by default, there would have been no need to terminate the intra-EU BITs.

269. Further, Spain does not contest that the *Komstroy* Judgment was rendered on 2 September 2021, after the issuance of the Tribunal's Award.[358] This fact itself proves that the Tribunal could not exceed its powers by not taking the *Komstroy* Judgment into consideration and by not applying the alleged effects of such judgment.

270. For the sake of completeness, the Committee will explain that even if the *Komstroy* Judgment had been released before the Award, it would not have led the Committee to find that the Tribunal had manifestly exceeded its powers.

271. Similarly to *Achmea*, the *Komstroy* Judgment should be distinguished on the basis of applicable rules and the seat of the arbitration. *Komstroy* was an UNCITRAL case seated in Paris, France. Since French law is a part of EU law, it fell within the scope of the CJEU's jurisdiction. As explained *supra* in paragraph 260 with reference to *Green Power v. Spain*, another non-ICSID case, the applicable law has a crucial role in the determination of the tribunal's jurisdiction in intra-EU disputes. For the same reason, Spain's references to the decisions of national courts of various EU Member States are irrelevant in the assessment by this Committee of the Tribunal's excess of powers.

272. This dispute, on the contrary, is governed by the ECT and the ICSID Convention and interpreted under the VCLT rules of interpretation, as admitted by Spain itself. Unsurprisingly,

[356] Transcript, Day 1, 256:4.

[357] **RL-137**, Declaration by EU Member States, 15 January 2019.

[358] Reply, ¶ 103.

disputes settled in accordance with distinct rules may lead to distinct findings, which does necessarily not make any of the judgments or awards incorrect or subject to annulment.

273. In addition, the main reason behind the *Komstroy* Judgment as cited *supra* in paragraph 158 was to ensure "*the full effectiveness of that law* [EU law]."[359] In this case, the Tribunal did not find EU law to be applicable, and therefore, it could not undermine the effectiveness of EU law and could not be bound by the CJEU's judgments.

274. Therefore, the Committee finds that Spain's criticism in connection with the CJEU's judgments is unfounded and does not constitute a ground for annulment of the Award.

275. In respect of the fifth issue, the Committee notes that it is intertwined with the question of the Tribunal's determination of the law applicable to the merits of the case. It will therefore be addressed in Section V.C(3) *infra*.

iii. Whether the Tribunal Exceeded Its Powers in Rejecting the Primacy of EU Law over the ECT

276. In rejecting the relevance of EU law to the determination of the Tribunal's jurisdiction, the Tribunal found that there was no conflict between the provisions of EU law and ECT to be resolved.[360]

277. Spain disagrees with the above position and submits that the conflict does exist. According to Spain, to resolve the conflict, the principle of primacy enshrined in EU law should apply as a specific conflict rule.[361]

278. Since the Committee has not found any manifest excess of powers in the Tribunal's findings on the conflict between the ECT and the TFEU, it is not necessary to address the primacy principle as a conflict rule. For the sake of completeness, however, the Committee will explain its assessment of the Tribunal's decision with respect to the following two points:

[359] **RL-158**, *Komstroy* Judgment, 2 September 2021, ¶ 62.
[360] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 262-266.
[361] Memorial, ¶¶ 259-261.

1. First, whether the Tribunal exceeded its powers while determining the applicable conflict rules.

2. Second, whether the Tribunal exceeded its powers while rejecting the principle of primacy of EU law as the specific conflict rule overriding the ECT.

279. In respect of the first issue, the Tribunal ruled that the ECT itself contains the conflict rules, and if a conflict between the ECT and EU law were to exist, the rule prescribed by Article 16 of the ECT would apply.[362] Article 16 of the ECT provides as follows:

> *Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,*
>
> *(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and*
>
> *(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,*
>
> *where any such provision is more favourable to the Investor or Investment.* [363]

280. As the Tribunal explained, this rule required the Tribunal, in case of a conflict, to settle the dispute in accordance with the provision that was considered more favourable to the Investor or the Investment.[364]

281. The Tribunal observed that it was not persuaded by Spain's suggestions to resolve the alleged conflict applying Articles 30 and 59 of the VCLT, which deal with the "[a]*pplication of*

[362] **RL-148**, Decision on Jurisdiction and Liability, ¶ 274.

[363] **RL-254**, ECT, Article 16.

[364] **RL-148**, Decision on Jurisdiction and Liability, ¶ 275.

successive treaties relating to the same subject matter" and the "[t]*ermination or suspension of the operation of a treaty implied by the conclusion of a later treaty*,"[365] due to the following reasons:

1. Spain did not prove that the ECT and EU law refer to the same subject matter.[366]

2. Spain did not prove that the parties intended to terminate the ECT in accordance with Article 59(1)(a) of the VCLT.[367]

3. There are no inconsistencies found to allow application of Article 30 of the VCLT.[368]

4. Articles 30(3) and 30(4) of the VCLT only apply when the treaties in question do not contain any specific conflict rule, and in this case Article 16 of the ECT did contain such a specific conflict rule.[369]

5. Since not all parties to the prior treaty are also parties to the subsequent treaty, the requirements of Article 30(3) of the VCLT are not satisfied.[370]

282. Consequently, the Tribunal applied Article 16 of the ECT as a conflict rule and found no grounds to align its decision with Spain's position. Instead, the Tribunal agreed with the tribunals in *BayWa v. Spain* and in *Stadtwerke München v. Spain*, and held that the provisions of the ECT were more favourable to the investor.[371] The Tribunal reasoned that EU law does not provide for direct arbitration against a host State regarding the conformity of adopted measures with rights equal or more favourable to those in Part III of the ECT.[372]

283. In its Memorial, Spain argues that there is an "*open conflict between the ECT and EU law*," and that this conflict must be resolved in accordance with the rules of public international law, in

[365] Memorial, ¶¶ 263-271; **RL-10**, VCLT, Articles 30 and 59.
[366] **RL-148**, Decision on Jurisdiction and Liability, ¶ 283.
[367] **RL-148**, Decision on Jurisdiction and Liability, ¶ 283.
[368] **RL-148**, Decision on Jurisdiction and Liability, ¶ 285.
[369] **RL-148**, Decision on Jurisdiction and Liability, ¶ 284.
[370] **RL-148**, Decision on Jurisdiction and Liability, ¶ 284.
[371] **RL-148**, Decision on Jurisdiction and Liability, ¶ 276.
[372] **RL-148**, Decision on Jurisdiction and Liability, ¶ 277.

particular Article 30 of the VCLT.[373] That said, Spain recognizes that "*these rules are residual*."[374] Spain also submits that it is not necessary for all parties to one treaty to be signatories to the other treaty in order to apply Article 30 of the VCLT. According to Spain, it is sufficient that both Spain and Germany are parties to the ECT and the TFEU.[375]

284. As explained *supra* in Section V.B(3)c(ii), the Committee is not persuaded that the Tribunal manifestly exceeded its powers in finding that there was no conflict between the ECT and the TFEU, since these two treaties have different subject matters and different scope of application. That said, even if the Committee were to accept the hypothesis of a conflict, it would still struggle to agree with Spain's position. This is because the Tribunal's jurisdiction derives from the ECT, and, in the Committee's view, the ECT conflict rules constitute the starting point of the Tribunal's analysis. The Committee therefore concludes that the Tribunal could not have manifestly exceeded its powers in finding that Article 16 of the ECT is the applicable conflict rule, even if such conflict existed.

285. The Committee also observes that, despite finding the absence of a conflict between the ECT and EU law, the Tribunal still addressed Spain's arguments regarding the applicability of Articles 30 and 59 of the VCLT in different sections of the Award.[376] To recall, the relevant parts of Article 30 read as follows:

> *3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*
>
> *4. When the parties to the later treaty do not include all the parties to the earlier one:*
>
> *(a) as between States Parties to both treaties the same rule applies as in paragraph 3;*

[373] Memorial, ¶ 266.

[374] Memorial, ¶ 266.

[375] Memorial, ¶ 265.

[376] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 279-285.

> *(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*[377]

286. The Tribunal concluded that Article 30 is not applicable in a case where the treaties in question contain a specific conflict rule, which in this case is found in Article 16 of the ECT. In addition, the Tribunal noted that Article 30(3) only applies "*cuando 'todas las partes en el tratado anterior sean también partes en el tratado posterior'.*"[378] The Committee is fully convinced that Article 16 indeed constitutes a specific conflict rule for the purposes of Article 30 of the VCLT. In respect of the second point, the Committee notes that the plain reading of Article 30(3) of the VCLT in conjunction with Article 30(4) does not require all of the parties to the earlier treaty to also be parties to the later treaty, which corresponds to Spain's interpretation. However, the Committee cannot ignore the fact that Declaration 17 and the Lisbon Treaty merely amended the Treaty of Rome.[379] In other words, at the time of the ECT's conclusion, the fundamental provisions of EU law were already in force as Articles 234 and 282 of the Treaty of Rome. The Committee therefore accepts that the TFEU cannot prevail over the ECT as *lex posterior*.

287. As a result, both under the ECT and the VCLT the Tribunal had to apply Article 16 of the ECT as a conflict rule, and the Tribunal correctly did so. The Committee also agrees that the Tribunal did not manifestly exceed its powers in finding that the mere choice of dispute settlement means clearly provides the investor with a more favourable regime, thereby resolving the conflict of laws in favour of the ECT.

288. In respect of the second issue, the Tribunal concluded that EU law does not have supremacy over other sources of international law outside the EU framework.[380] Although the Tribunal did not see any practical relevance in exploring the question of the hierarchy of the norms in light of its findings,[381] the Tribunal considered it pertinent to mention for the sake of completeness.[382]

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[377] **RL-10**, VCLT, p. 12, Article 30.

[378] **RL-148**, Decision on Jurisdiction and Liability, ¶ 284.

[379] Counter-Memorial, ¶ 100.

[380] **RL-148**, Decision on Jurisdiction and Liability, ¶ 272.

[381] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 267-268.

[382] **RL-148**, Decision on Jurisdiction and Liability, ¶ 269.

289. The Tribunal's decision to reject the primacy of EU law is thus based on the following reasons:

1. Spain's interpretation of Article 25 of the ECT is unfounded, since this Article does not mandate the prevalence of the EU protection system in respect of the ECT.[383]

2. Although EU law is indeed international law, it does not have supremacy over other sources of international law outside the EU framework.[384]

3. The ECT imposes obligations on the EU Member States and the EU itself towards third states; therefore, EU law is not relevant for this Tribunal's jurisdiction.[385]

290. Spain's criticism in this regard may be summarized as follows:

1. The principle of primacy constitutes a special conflict rule.[386]

2. The principle of primacy applies "*equally to domestic law and international treaties within the EU, even when third countries are also parties to such treaties*."[387]

291. The Committee agrees that, in a certain sense, the principle of primacy may be considered a special conflict rule within the EU framework, and that both EU law and the ECT constitute part of international law. However, the Committee is unpersuaded that the principle of primacy entails any consequences in the present case.

292. In the Committee's understanding, primacy is applicable only within the four corners of EU law. Contrary to Spain's position, the Committee finds it unreasonable to extend the primacy of EU law to the treaties with third States. This would deprive such third States of any legal certainty when entering into the treaty, given that they might not be aware of all the internal EU regulations.

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[383] **RL-148**, Decision on Jurisdiction and Liability, ¶ 270.
[384] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 271-272.
[385] **RL-148**, Decision on Jurisdiction and Liability, ¶ 273.
[386] Memorial, ¶ 267.
[387] Memorial, ¶¶ 267-269.

293. The Committee also would like to emphasize that the CJEU itself did not intend EU law to overrule the provisions of international law, as clarified by the *Kadi* case:[388]

> [A]*ny judgment given by the Community judicature deciding that a Community measure intended to give effect to such a* [UN] *resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.*

294. In the light of the above, the Committee finds no grounds to conclude that the Tribunal's findings with regard to the principle of primacy of EU law lead to the conclusion that the Tribunal manifestly exceeded its powers.

C. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY DECIDING NOT TO APPLY EU LAW TO THE MERITS OF THE CASE

(1) Spain's Position

295. Spain submits that the STEAG Tribunal manifestly exceeded its powers in another way: by not applying EU law, especially EU regulations on State aid, to the merits of the dispute.[389] Spain's position is that because EU law is international law, it is applicable to the merits of the case pursuant to Article 26(6) of the ECT, in particular in assessing STEAG's rights and legitimate expectations.[390]

296. Spain argues that the Tribunal, in its analysis of jurisdiction, accepted that EU law is part of international law (although it failed to apply EU law in that respect).[391] Then, however, in determining the law applicable to the merits of the dispute, the Tribunal decided to "*examine these measures through the prism of the ECT and not EU law*."[392] Spain concludes that "[i]*n an outright, a priori manner, the Steag Award thus rejects the application of a part of international law of vital importance to the merits of the case*."[393]

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[388] First Eeckhout Report, ¶ 75; **PE-1**, CJEU, Joined Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment, 3 September 2008, ¶ 288.

[389] Memorial, ¶¶ 275-329; Reply, ¶¶ 224-252; **RD-1**, Spain's Opening Presentation, slides 33-54.

[390] Memorial, ¶¶ 277-279; Reply, ¶¶ 225-228, 240; Transcript, Day 1, 37:4-15.

[391] Memorial, ¶ 283; Reply, ¶ 225, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 271.

[392] Memorial, ¶ 281, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 266.

[393] Memorial, ¶ 281; *see* Reply, ¶ 227.

297. Similarly, Spain contends that the Tribunal recognized that EU law had to be considered in relation to STEAG's legitimate expectations, but then relegated EU law to a factual issue.[394] In this way, Spain says, the Tribunal "*contradictorily states on the one hand that* [EU law] *must be taken into account in order to decide on the merits of the case and then goes on to state that it is only a question of fact*."[395] For Spain, "*these two conclusions are incompatible and lead to an absurd result*."[396]

298. In any event, Spain submits that the Tribunal entirely failed to analyse the implications of the State aid regime and did not offer any reasons for this failure.[397] Instead, according to Spain, the Tribunal "*bluntly and erroneously resolves the issue on the basis that EU law is not more favourable to the investor*," without explaining how the ECT's provisions could be more favourable than EU law on the protection of energy investments.[398]

299. In Spain's view, the proper application of EU law would have had a determinative effect: the Tribunal would have been bound to rule that there was no violation of the ECT.[399]

300. First, in relation to STEAG's claim for subsidies, the Tribunal would have applied EU law to assess whether STEAG had any right to such subsidies. And given the clear rule set out in the EC's decisions on State aid that "*there is no right to State Aid under EU Law*," the Tribunal would have determined that STEAG's claim to these subsidies constituting State aid was incompatible with EU law.[400]

301. Spain draws the Committee's attention to difference between "*unlawful*" and "*incompatible*" State aid:

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[394] Memorial, ¶¶ 285-286.

[395] Memorial, ¶ 287.

[396] Memorial, ¶ 287; *see* Reply, ¶ 226; First Gosalbo Report, ¶¶ 144-145; Second Gosalbo Report, ¶¶ 48-53.

[397] Memorial, ¶ 289.

[398] Reply, ¶¶ 232-234.

[399] Reply, ¶¶ 229, 240.

[400] Memorial, ¶ 314, *citing* **RL-92**, European Commission, Decision C(2017) 7384 final, State Aid (S.A. 40348 (2015/NN)), regarding the Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, ¶ 155; **RL-70**, European Commission, Decision C(2016) 7827 final, State Aid (S. A. 40171 (2015/NN)), Czech Republic Promotion of Electricity Production from Renewable Energy Sources, 28 November 2016, ¶ 92. *See* Transcript, Day 1, 41:11-16.

> *It is necessary to highlight the difference between unlawful state aid and incompatible state aid. Unlawful state aid is aid that has not been notified in violation of the TFEU while incompatible aid is aid that is not compatible with the internal market under Articles 107 and 108 TFEU.* […] *As a result of the above, the position of the European Commission as well as the CJEU on state aid has remained the same since the start of the underlying arbitration in considering the 2007 scheme as unlawful state aid.*[401]

302. Second, Spain asserts that the Tribunal would have applied EU law in assessing STEAG's legitimate expectations and would have concluded that no legitimate expectations may arise in the case of a State aid regime that has not been notified to the EC.[402] Spain points out that the EC has addressed this specific point and confirmed that "*where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectations with regard to those State aid payments are excluded.*"[403] Spain also cites the awards in *Blusun v. Italy* and *BayWa v. Spain* as support.[404] Spain observes that the tribunal in *BayWa v. Spain* reasoned that "*an investor cannot have a legitimate expectation of the treatment which is unlawful under the law of the host State*" and held that "*the European state aid regime and the ECT apply concurrently to the investment and form part of the applicable law.*"[405]

303. Third, Spain considers that EU law would have affected the Tribunal's analysis of the principle of proportionality.[406] Specifically, the Tribunal would have had to take into account the fact that environmental subsidy regimes are subject to a specific limitation – the achievement of a

[401] Spain's Post-Hearing Brief, ¶¶ 136-137.

[402] Memorial, ¶¶ 318-325.

[403] Memorial, ¶ 318; **RD-1**, Spain's Opening Presentation, slide 47, *quoting* **RL-92**, European Commission, Decision C(2017) 7384 final, State Aid (S.A. 40348 (2015/NN)), regarding the Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, ¶ 158.

[404] **RD-1**, Spain's Opening Presentation, slides 48-49; **RL-68**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016; **RL-144**, *BayWa R.E. Renewable Energy GmbH and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019.

[405] **RD-1**, Spain's Opening Presentation, slide 49, *quoting* **RL-144**, *BayWa R.E. Renewable Energy GmbH and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶¶ 569, 591.

[406] Memorial, ¶¶ 325-327; **RD-1**, Spain's Opening Presentation, slide 50; Transcript, Day 1, 42:2-16.

level playing field – and EU Member States can amend or terminate State aid regimes at any time to avoid over-compensation.[407]

304. For Spain, the central relevance of EU law has been confirmed by the EC's decision that the amounts awarded by the *Antin v. Spain* tribunal constitute an illegal State aid scheme.[408] According to Spain, this decision applies equally to STEAG, and demonstrates the important consequences of the Tribunal's failure to apply EU law.[409]

305. As a final point, in relation to the "*manifest*" standard, Spain argues that the Tribunal's excess of power is obvious "*both because of the seriousness of the matter affected, as it prevents the payment of the compensation awarded by the Steag Award, and because it also manifestly contravenes the literal wording of the European Commission's repeated pronouncements on this matter.*"[410]

(2) STEAG's Position

306. STEAG's position is that the Tribunal (i) correctly identified the appropriate applicable law to the merits of the Parties' dispute;[411] and (ii) correctly considered EU law, including State aid rules, as part of the factual matrix of the dispute.[412] Thus, STEAG denies that there was any excess of power in relation to the applicable law, much less one that was manifest.[413]

307. Again, STEAG accepts that EU law "*might be international law*."[414] But even if that is the case, STEAG says, it would not mean that EU law is automatically applicable pursuant to Article 26(6) of the ECT. The result of such an approach would make *any* international treaty signed by

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[407] *Id.*

[408] Reply, ¶¶ 235-239, *citing* **RL-236**, European Commission, Decision C(2021), State Aid (S. A. 54155 (2021/NN)), Arbitration Award to Antin – Spain, July 2021. *See* **RD-1**, Spain's Opening Presentation, slide 41; Transcript, Day 1, 39:16-21.

[409] Reply, ¶¶ 238-239. Spain notes that it "*has notified the STEAG Award to the European Commission, which has initiated a similar procedure to the one initiated in Antin v. Spain and Micula v. Romania.*" Transcript, Day 1, 40:18-21; *see* **RD-1**, Spain's Opening Presentation, slide 44.

[410] Reply, ¶ 252.

[411] Counter-Memorial, § 3.1 (heading).

[412] Counter-Memorial, ¶ 118 (third bullet); Rejoinder, § 3.2 (heading).

[413] Counter-Memorial, § 3 (heading); Rejoinder, § 3 (heading).

[414] **CD-1**, STEAG's Opening Presentation, slide 42.

the EU or its Member States applicable, which makes no sense to STEAG.[415] Rather, the applicable law under Article 26(6) of the ECT depends on "*the issues in dispute*," meaning that EU law applies only if the dispute concerns EU law.[416] In the present case, STEAG's view is that the dispute is whether Spain had breached Article 10(1) of the ECT by changing its regulatory framework, and EU law is irrelevant to that question, particularly because Spain did not change its framework because of EU law.[417]

308. STEAG stresses that in the arbitration, neither Party asked the Tribunal to determine whether Spain's renewable energy regime was legal under EU law.[418] In addition, STEAG says, the Tribunal understood "*that any judgment based on EU law was outside its powers because it could not refer any preliminary questions to the CJEU.*"[419] Therefore, according to STEAG, the Tribunal was neither asked nor permitted to assess EU law.[420]

309. In these circumstances, STEAG considers that the Tribunal correctly decided that EU law did not apply to the merits and instead formed part of the factual matrix. STEAG accuses Spain of trying to mislead the Committee in this respect by characterizing the Tribunal's decision as contradictory. In STEAG's view, the Tribunal never indicated that EU law was applicable to the merits; it simply noted that the *fact* of whether Spain's regulatory regime had been notified to EU authorities could be relevant in assessing STEAG's legitimate expectations under Article 10(1) of the ECT.[421]

310. STEAG asserts that the Tribunal went on to do just that: assess State aid as a matter of fact.[422] It noted that no EU authority had declared that Spain's regulatory regime was contrary to EU State aid regulations, and then found that even if Spain was in violation of those regulations, that fact could not justify a breach of Spain's obligations under the ECT.[423] STEAG notes that

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[415] Counter-Memorial, ¶ 126; First Eeckhout Report, ¶ 48.
[416] Counter-Memorial, ¶ 75; **CD-1**, STEAG's Opening Presentation, slide 42.
[417] **CD-1**, STEAG's Opening Presentation, slide 43.
[418] Rejoinder, ¶ 80.
[419] Rejoinder, ¶ 81.
[420] Rejoinder, ¶ 81.
[421] Counter-Memorial, ¶ 118.
[422] Rejoinder, ¶¶ 82-84.
[423] Counter-Memorial, ¶ 123.

this is consistent with the view of the tribunal in *BayWa v. Spain*, which Spain relies on.[424] Ultimately, STEAG says, the "*Tribunal did not fail to apply EU law to the dispute. It considered that it was a fact that was relevant for the assessment of STEAG's legitimate expectations and it concluded that STEAG's legitimate expectations were not negatively affected by EU state aid regulations or Spain's failure to comply with them*."[425]

311. In STEAG's view, Spain's complaints are mere disagreements with the Tribunal's factual findings, which do not constitute a valid ground for annulment.[426] STEAG asserts that the relevant issue is not whether the Tribunal properly applied the EU rules on State aid, but whether it properly applied the choice of law clause in the ECT – a point that was confirmed by the *SolEs v. Spain* committee.[427] For STEAG, the EC's investigation of the *Antin v. Spain* award is also entirely irrelevant.[428]

312. As additional support, STEAG notes that several annulment committees have rejected Spain's argument that other tribunals manifestly exceeded their power by reaching similar conclusions on the applicability of EU law.[429]

313. Finally, STEAG contends that Spain has completely failed to explain how any failure to apply EU law to the merits would be such an "*egregious or blatant*" error to be considered "*manifest*."[430] STEAG highlights that nearly all other tribunals have similarly found that EU law was not applicable to the merits, and asserts that there is "*no authority from the ECT, from any other arbitral tribunal or even from the EC that the Arbitral Tribunal had to assess whether*

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[424] Counter-Memorial, ¶ 128.

[425] Counter-Memorial, ¶ 130.

[426] Counter-Memorial, ¶ 128.

[427] **CD-1**, STEAG's Opening Presentation, slide 41, *quoting* **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 145.

[428] Counter-Memorial, ¶ 128.

[429] Counter-Memorial, ¶ 129, *citing* **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶¶ 149, 154; **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 228; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022.

[430] Counter-Memorial, ¶¶ 131-134; Rejoinder, ¶¶ 85-90.

Spain's regulatory regime under which STEAG invested was in compliance with EU law."[431] STEAG again accuses Spain of relitigating issues properly considered by the Tribunal.[432]

(3) The Committee's Analysis

314. In its Memorial, Spain argues that the Tribunal cannot have jurisdiction over the issue involving EU law on State aid.[433] Interpretation of EU law, Spain says, falls within the exclusive jurisdiction of the CJEU,[434] and in this case, the Tribunal "*has no jurisdiction to apply and interpret EU law*."[435]

315. The Tribunal acknowledged that EU State aid law may be a factor to be considered. At the same time, the Tribunal found that it was not the Tribunal's role to determine whether Spain complied with its EU obligations.[436]

316. The Tribunal further accepted that Spain's arguments on EU State aid law were rather part of the factual matrix of the case. The Tribunal clarified that its task was to examine the breach of STEAG's legitimate expectations by Spain's actions under Article 10(1) of the ECT.[437]

317. The Tribunal rejected Spain's submission that an award in favour of STEAG could be considered unlawful State aid. It also noted that potential difficulties in enforcement as a result of the involvement of State aid issues do not render an award unenforceable and do not affect the jurisdiction of the Tribunal.[438]

318. Spain disagrees with the Tribunal's findings due to the following reasons:

1. EU law as international law is applicable to the merits of the case pursuant to Article 26(6) of the ECT.[439]

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[431] Rejoinder, ¶ 89.
[432] *See* Counter-Memorial, ¶ 130; Rejoinder, ¶ 77.
[433] *See* Memorial, ¶¶ 272-273.
[434] Reply, ¶ 137.
[435] Memorial, ¶ 273.
[436] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 291, 293.
[437] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 292-294.
[438] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 295-296.
[439] Memorial, ¶¶ 277-279; Reply, ¶¶ 225-228, 240; Transcript, Day 1, 37:4-15.

2. The Tribunal accepted that EU law is part of international law but failed to apply it.[440]

3. The Tribunal did not provide any reasons for the failure to analyse the implications of the State aid regime.[441]

4. The Tribunal obliterated "*EU law and its applicability to the merits of the case*" which implies an excess of jurisdiction, as "*the application of EU law to the merits of the dispute would have very important consequences in terms of the scope of the right claimed and the expectations*" and "[h]*ad the Tribunal applied it, it would have concluded that there was no violation of the ECT since there is no State aid right*."[442]

319. To assess the alleged manifest excess of powers, the Committee will have to determine (i) whether the Tribunal manifestly exceeded its powers in identifying the law applicable to the merits; and (ii) whether the Tribunal exceeded its powers when it failed to apply EU State aid law.

a. Whether the Tribunal Manifestly Exceeded Its Powers in Identifying the Law Applicable to the Merits

320. The starting point for the Tribunal's analysis (as also agreed by the Parties) is Article 26(6) of the ECT, which reads as follows:

> *(6) 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.*[443]

321. The core issue here concerns the interpretation of the term "*international law*," and Spain's criticism is based on the interpretation of EU law as a part of international law.

322. In this context, the Committee will examine the following issues: (i) whether EU law constitutes part of international law; (ii) whether EU law was the law applicable to the merits of the underlying arbitration; (iii) whether the Tribunal is bound by decisions of EU bodies in determining the law applicable to the merits.

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[440] Memorial, ¶¶ 282-283; Reply, ¶¶ 225-227, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 271.
[441] Memorial, ¶ 289.
[442] Reply, ¶¶ 227, 229, 239.
[443] **RL-254**, ECT, Article 26(6).

323. In respect of the first issue, the Tribunal did not contest the fact that EU law is generally recognized as a part of international law. It observed:

> *El Tribunal observa que, en otros casos resueltos bajo el TCE, se ha encontrado que el derecho de la UE es derecho internacional.* […] *los tratados europeos deben ser vistos ante todo como tratados internacionales* […].[444]

324. The Tribunal's position is in line with the findings of other tribunals which dealt with the same question in previous cases, such as *RREEF*, which case was referred to by both Parties and where the tribunal noted as follows:

> […] *the Tribunal* [does not] *question that the EU law as a whole (primary and secondary rules together) must be considered as being part of international law outside the EU legal order.*[445]

325. The Committee accepts the Tribunal's conclusion on this point as being reasonable and well-founded.

326. In respect of the second issue, the Tribunal reiterated that its task did not involve consideration of EU State aid law and its interpretation.[446] As stated in the Decision on Jurisdiction and Liability, STEAG had submitted the following prayer for relief:

> *1. Que se declare que el Demandado ha vulnerado el art. 10(1) TCE al modificar el Régimen Regulatorio Original, suprimiendo el apoyo económico que suponía para el Proyecto Arenales Solar y sustituyéndolo por un sistema remuneratorio distinto que ha conducido a la pérdida de la inversión de Steag.*
>
> *2. Que se declare que el cambio normativo descrito podría constituir una expropiación contraria al art. 13 TCE.*
>
> […].[447]

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[444] **RL-148**, Decision on Jurisdiction and Liability, ¶ 271.

[445] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 73.

[446] **RL-148**, Decision on Jurisdiction and Liability, ¶ 291 ("[…] *para resolver sobre el caso sub judice, el Tribunal no debe decidir si el RRO es o no una ayuda de Estado bajo el derecho de la UE*"), ¶ 293 ("[n]*o se trata* […] *de evaluar si España cumplió con sus obligaciones bajo el derecho de la UE* […]").

[447] **RL-148**, Decision on Jurisdiction and Liability, ¶ 165.

327. In principle, the Committee can accept that circumstances might exist where EU State aid law might have a role to play in the assessment of the alleged unlawfulness of Spain's conduct, namely, in a case where the investor has a wide range of options of available dispute settlement mechanisms and chooses one mechanism over another.

328. Nonetheless, in the present case the Committee finds that the Tribunal's conclusions do not amount to a manifest excess of powers. This is because STEAG expressly requested the Tribunal to assess Spain's alleged conduct in accordance with the ECT, not EU law, and consequently the dispute did not concern the interpretation or application of EU law. In the Committee's view, the Tribunal was mindful of the scope of its powers and correctly decided to solve the dispute it was in fact asked to solve.

329. More specifically, and contrary to Spain's criticism, the Committee finds that the Tribunal could not and should not have applied EU law to the merits of the case. Had the Tribunal decided to determine compliance of Spain's renewable energy regime with EU law, it might have manifestly exceeded its powers under Article 52(1)(b) of ICSID Convention by, for example, deciding an issue not requested by the Parties and by interpreting EU law, which, as Spain itself argues, falls within the exclusive jurisdiction of the CJEU.

330. Finally, the Committee notes that Spain's interpretation of EU law as a part of international law under Article 26(6) of the ECT is contradictory. Acceptance of Spain's position would lead to the conclusion that EU law being part of international law would also apply to disputes between any Parties to the ECT, even third States, for instance, a dispute between Ukraine and Turkey. Such a result would deprive the Parties to the ECT of any legal certainty and would certainly not serve as any encouragement to foreign investors.

331. In respect of the third issue, Spain puts a lot of weight on various decisions of the EC regarding the applicability of EU State aid rules to the arbitration cases:

> […]
>
> [I]*t is up to the Commission to decide whether or not to apply the rules on State aid, in accordance with the distribution of competences in the European Union. The European Commission has been very clear on the mandatory application of State aid rules,*

> *even in this specific case. Any compensation awarded by an Arbitral Tribunal constitutes State aid and therefore, even if the Tribunal improperly assumes jurisdiction, this necessarily involves an analysis of a number of issues from the point of view of EU law.*[448]

332. The Committee notes that, as a general rule, the Tribunal's decisions cannot be limited by the decisions of any EU bodies. Indeed, as the Tribunal explained numerous times in the Decision on Jurisdiction and Liability,[449] its powers are granted by the ECT and the ICSID Convention, and the limits to its powers are defined accordingly.

333. Moreover, the Committee accepts STEAG's position that EC decisions are not relevant in the Tribunal's determination of the law applicable to the merits of the case. Indeed, the EC's conclusion that the amounts awarded by the *Antin v. Spain* tribunal constitute illegal State aid is simply a fact, and the Tribunal could not have exceeded its powers by allegedly contradicting such statements made by the EC.

334. Finally, the Committee observes that the EC and the CJEU approach the questions referred to the Tribunal differently, since they assess these questions within the ambit of EU law and with an aim to preserve the fundamental principles of EU law. The Tribunal, in its turn, was constituted under the ECT and the ICSID Convention and resolved the issues pursuant to the ECT as agreed by the Parties.

335. In light of the above, the Committee is not persuaded that the Tribunal manifestly exceeded its powers in its determination of the law applicable to the merits.

b. Whether the Tribunal Manifestly Exceeded Its Powers When It Failed to Apply EU State Aid Law

336. Spain further contends that the Tribunal agreed that EU law was applicable but failed to apply it.[450] Spain considers such conduct contradicts the Tribunal's own findings and is in breach of Article 52(1) of the ICSID Convention. In this regard, the Committee will address two points:

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[448] Reply, ¶ 234. *See also* Reply, ¶¶ 235-239, *citing* **RL-236**, European Commission, Decision C(2021), State Aid (S.A.54155 (2021/NN)), Arbitration Award to Antin – Spain, July 2021; **RL-92**, European Commission, Decision C(2017) 7384 final, State Aid (S.A. 40348 (2015/NN)), regarding the Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017; Transcript, Day 1, 40:2-40:6.

[449] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 260, 273.

[450] Memorial, ¶¶ 285-287; *see supra*, ¶ 297.

(i) whether the Tribunal indeed found EU State aid law applicable to the merits of the case; and (ii) whether the Tribunal failed to state its reasons to reject the application of EU State aid law.

337. In respect of the first issue, the Committee will commence by quoting the relevant part of the Tribunal's Award below:

> *Como se indicó anteriormente, para resolver sobre el caso sub judice, el Tribunal no debe decidir si el RRO es o no una ayuda de Estado bajo el derecho de la UE. Sin perjuicio de lo anterior, el Tribunal acepta que, en principio, la posible aplicabilidad del régimen de ayudas de Estado puede ser un factor a tener en cuenta al realizar una inversión y, en consecuencia, puede tener un impacto en la evaluación de las expectativas que legítimamente tenía el inversionista al realizar su inversión.* [...]
>
> […]
>
> *No obstante, lo anterior significa únicamente que el régimen de ayuda de Estado es uno entre muchos factores que, dentro de la matriz fáctica de un caso particular, deben considerarse al estudiar las expectativas del inversionista. No se trata entonces de evaluar si España cumplió con sus obligaciones bajo el derecho de la UE, sino de determinar, como una cuestión de hecho, si el riesgo de un incumplimiento debió ser tenido en cuenta por el inversionista (y, en su caso, con qué alcance) al comprometer su capital en el proyecto Arenales Solar.*
>
> *Por estas razones, los argumentos esgrimidos por España no plantean un problema relativo a la jurisdicción del Tribunal sino un posible elemento de la discusión fáctica alrededor de las expectativas de Steag, punto que el Tribunal considerará en su decisión sobre el fondo de la controversia, particularmente en relación con el estándar de trato justo y equitativo bajo el artículo 10(1) del TCE.*[451]

338. From the plain reading of these paragraphs, the Committee cannot concur with Spain's position. The Tribunal did not determine EU law as applicable to the merits of the case but rather accepted that EU law may be one of the factors considered by investors. The consequent findings

[451] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 291-294.

of the Tribunal regarding the relevance of EU law in the factual matrix of the case fully correspond to the Tribunal's conclusion that EU law was in fact not applicable.

339. The Tribunal's findings are supported by explanations of STEAG's expert, Professor Eeckhout:

> *A. I think insofar as what a tribunal certainly can be called upon to do, look at EU State Aid law as a matter of fact in the same way as domestic law is taken account as a matter of fact. I don't think that would be incompatible with the autonomy of EU law. It is in fact--this is, in fact, endorsed by the European Court of Justice in its CETA Opinion. The CETA expressly states that EU law--CETA Tribunals can look at EU law as a matter of fact. So, that is now accepted also by the European Court of Justice. In that sense, of course, State Aid law may be--may come before a particular Tribunal. In this case, I don't think there was much scope for that because there was absolutely no authority. European Commission has never made—has never examined the 2007 regime, no court or Tribunal in the Member States has decided that the regime constituted State Aid. So, there was no law as a matter of fact to be taken into account, I think, by the STEAG Tribunal.*[452]

340. The Committee accepts this reasoning and finds that the Tribunal never determined EU State aid law as applicable to the merits of the case but rather merely took it into consideration as part of the factual background to define the scope of the investors' legitimate expectations. Since the examination of factual background and evidence falls outside of the Committee's powers, the Committee will not review the Tribunal's findings regarding the impact of EU State aid regulations on the legitimate expectations of STEAG.

341. In respect of the second issue, the Committee deems it more relevant to the section concerning the Tribunal's failure to provide adequate reasons for its conclusions and will therefore address it in Section VI.B *infra*.

342. Based on the above, the Committee is satisfied that the Tribunal did not manifestly exceed its powers in its conclusions with regard to the applicable law to the merits of the case. The Tribunal took into consideration all of Spain's arguments on the State aid regime, even if it looked

[452] Transcript, Day 2, 416:5-417:2.

at them as facts in determining the scope of the investor's legitimate expectations, which does not allow this Committee to find the manifest excess of powers.

VI. FAILURE TO STATE REASONS

343. Spain next argues that the Award must be annulled pursuant to Article 52(1)(e) of the ICSID Convention because the Tribunal failed to state reasons in relation to: (i) the impact of the EU State aid rules on STEAG's legitimate expectations;[453] (ii) the impact of the financial crisis on STEAG's legitimate expectations;[454] (iii) the Tribunal's findings as to STEAG's legitimate expectations;[455] and (iv) the quantification of damages.[456]

A. APPLICABLE LEGAL STANDARD

(1) Spain's Position

344. Spain begins by noting the connection between this ground for annulment under Article 52(1)(e) of the ICSID Convention and the requirement in Article 48(3) of the ICSID Convention that an ICSID tribunal must deal with all matters referred to it and state the reasons on which it bases its findings.[457] In Spain's view, Articles 48(3) and 52(1)(e) require the tribunal to provide "*comprehensive and consistent reasoning*."[458] This is of particular importance in investor-State arbitration, Spain says, because as noted by the committee in *Tidewater v. Venezuela*, "[t]*he legitimacy of an arbitral decision to invalidate a sovereign act would be severely undermined if the tribunal did not have to explain why the act contradicts the law*."[459]

345. Spain reviews various annulment decisions that have considered this ground for annulment and distils certain principles that it considers applicable in the present case. First, Spain asserts that the mere expression of an opinion is insufficient if the tribunal does not provide the reasoning

[453] Memorial, § IV.B.2; Reply, § III.B.2.
[454] Memorial, § IV.B.3; Reply, § III.B.3.
[455] Memorial, § IV.B.4, Reply, § III.B.4.
[456] Memorial, § IV.B.5, Reply, § III.B.5.
[457] Memorial, ¶ 331.
[458] Memorial, ¶ 333.
[459] Memorial, ¶ 334, *quoting* **RL-153**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 164-165.

that allowed it to reach that opinion.[460] Spain agrees with the famous statement by the committee in *MINE v. Guinea* that the award must allow the reader "*to follow how the tribunal proceeded from Point A to Point B*."[461]

346. Second, Spain argues that the mere expression of reasons is insufficient if those reasons are inadequate.[462] Spain cites *Mitchell v. DRC*, where the committee found that a failure to state reasons would include reasons that "*are so inadequate that the coherence of the reasoning is seriously affected*," and therefore considered "*that 'inadequate reasons', in certain cases, are as much as 'lack of reasons*.'"[463] Similarly, Spain cites the committee in *Soufraki v. UAE*, which observed that "*even short of a total failure, some defects in the statement of reasons could give rise to annulment*."[464]

347. Third, Spain asserts that frivolous or contradictory reasoning is also cause for annulment. Thus, Spain says, the *MINE v. Guinea* committee concluded that the tribunal had failed to comply with "*the requirement that the Award must state the reasons on which it is based*" because it had "*contradict*[ed] *itself*" in its analysis of damages.[465]

348. Fourth, citing ICSID's 2016 Background Paper on Annulment, Spain considers that a tribunal's "*failure to address a particular question submitted to it*" or "*failure to address certain evidence relevant*" to its decision also constitutes a failure to state reasons justifying annulment.[466]

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[460] Reply, ¶ 289.

[461] Memorial, ¶ 332, *quoting* **RL-154**, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 5.09.

[462] Reply, ¶ 290.

[463] Reply, ¶ 276, *quoting* **RL-230**, *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 21.

[464] Memorial, ¶ 335, *quoting* **RL-94**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ¶¶ 122-123.

[465] Memorial, ¶ 337, *quoting* **RL-154,** *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 6.107.

[466] Memorial, ¶ 340, *quoting* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 104.

349. Finally, Spain argues that the Committee's role is not to "*reconstruct*" what the Award should have said. As the committee in *Klöckner v. Cameroon* made clear, "*it is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute 'correct' reasons for possibly 'incorrect' reasons, or deal 'ex post facto' with questions submitted to the Tribunal which the Award left unanswered.*"[467]

350. According to Spain, previous annulment committees applying these standards "*have annulled awards on precisely the same grounds as the Applicant alleges here*," particularly in relation to damages.[468] For example, in *TECO v. Guatemala*, the committee annulled the tribunal's decision on damages because the tribunal had "*ignored the existence in the record of evidence which at least appeared to be relevant*," and there was a "*complete absence of any discussion*" of "*the Parties' expert reports.*"[469] In *Tidewater v. Venezuela*, the committee annulled the award on the basis that the tribunal had failed to apply the discount rate that it had expressly adopted.[470] Thus, Spain considers that the Committee "*can and should descend to precise aspects of the quantification of damages*" to determine whether the Tribunal provided adequate reasons.[471]

(2) STEAG's Position

351. STEAG accepts the standard set forth by the *MINE v. Guinea* committee, which is also cited by Spain.[472] STEAG highlights that multiple committees have adopted this standard and then gone on to reject Spain's requests for annulment on this basis.[473]

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[467] Reply, ¶ 267, *quoting* **RL-223**, *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, ¶¶ 141, 144, 151.

[468] Reply, ¶¶ 258, 261.

[469] Memorial, ¶ 341, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 131, 137-138.

[470] Memorial, ¶ 339, *citing* **RL-153**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶¶ 181, 189.

[471] Reply, ¶ 272.

[472] Counter-Memorial, ¶ 142, *quoting* **RL-154**, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 5.09.

[473] Counter-Memorial, ¶ 144, *citing* **CL-165**, *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, ¶ 230; **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶¶ 379-380; **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No.

352. STEAG explains that Spain's position is a textbook example of an appeal, and Spain's annulment applications on the same grounds have already been dismissed in six other ICSID annulment proceedings.[474]

353. Under this standard, STEAG accepts that a failure to state reasons may occur when a tribunal fails to provide a sufficient explanation for its decision.[475] However, STEAG emphasizes that Article 52(1)(e) of the ICSID Convention does not require the tribunal to address exhaustively all the arguments raised by the parties.[476] As held by the committee in *TECO v. Guatemala*, a case cited by Spain, "*insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record*."[477] Similarly, STEAG observes that the *NextEra v. Spain* committee agreed with Professor Schreuer's observation that the duty to state reasons "*does not call for tribunals to strain every sinew in an attempt to convince the losing party that the decision was the right one*."[478] Indeed, STEAG says, even Spain's own Constitutional Court has made clear that a judicial decision need not address every single argument submitted by a party.[479] In the ICSID system, STEAG considers that the appropriate remedy when a tribunal failed to decide an aspect of the dispute is provided by Article 49(2) of the ICSID Convention, of which Spain has not availed itself.[480]

354. Additionally, STEAG stresses that this ground for annulment does not permit a committee to examine the adequacy of the tribunal's legal and factual findings. This too, STEAG says, was confirmed by the *MINE v. Guinea* committee, which stated that "[t]*he adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in*

ARB/15/38, Decision on Annulment, 16 March 2022, ¶¶ 80, 83, 279; **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 317; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 581.

[474] Counter-Memorial, ¶ 15.

[475] Rejoinder, ¶ 92.

[476] Rejoinder, ¶¶ 96-99.

[477] Rejoinder, ¶ 97, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 249.

[478] Counter-Memorial, ¶ 151, *quoting* **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 126.

[479] Rejoinder, ¶ 96, *citing* **C-106**, Spanish Constitutional Court, Judgment No. 23/2000, 31 January 2000.

[480] Counter-Memorial, ¶ 152.

disregard of the exclusion of the remedy of appeal by Article 53 of the Convention."[481] In STEAG's view, a committee must instead afford a level of discretion to the tribunal.[482]

355. In sum, STEAG's position is that "*the standard does not require the Committee to assess whether the reasoning was right or wrong. It is enough if the Arbitral Tribunal provided its reasons to reach its decisions, even if those reasons do not address in detail every single argument raised by the parties.*"[483]

(3) The Committee's Analysis

356. The Parties agree that, pursuant to Article 52(1)(e) of the ICSID Convention, a party may *inter alia* request annulment of an award on the ground that the award has failed to state the reasons on which it is based.

357. There is also common ground between the Parties as to the applicable legal standard for this annulment ground. As a starting point, both Parties rely on the well-known formulation of the standard provided by the committee in *MINE v. Guinea* (the "***MINE* Standard**"):[484]

> *In the Committee's view, 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 law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*[485]

358. The Committee considers the *MINE* Standard helpful but observes that it is itself only a starting point and not a comprehensive test.[486] With that in mind, the Committee elucidates the

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[481] Counter-Memorial, ¶ 148, *quoting* **RL-154**, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 5.08.

[482] Counter-Memorial, ¶ 150, *citing* **CL-201** [sic], *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 64.

[483] Rejoinder, ¶ 100.

[484] Reply, ¶ 259; Rejoinder, ¶ 98.

[485] **RL-154**, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 5.09.

[486] **CD-1**, STEAG's Opening Presentation, slide 52, *quoting* **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 317.

following key points, based on the Committee's understanding of the *MINE* Standard and a close reading of the various annulment decisions cited by the Parties which elaborate upon its content.

359. First, the essence of the *MINE* Standard is that the Committee must be able to follow the reasoning of the Tribunal. This was the simple formulation advanced by the *NextEra v. Spain* committee (that the committee "*can clearly follow the Award's reasoning from 'Point A to Point B*,'" and that "*the Tribunal provided reasons that could be followed.*"[487]) Put another way, the Tribunal's working towards its conclusion should evolve in a logical sense, with each logical step being apparent to the Committee. The corollary of this is that a tribunal will not meet the *MINE* Standard where, as expressed by the *Antin v. Spain* committee, there is a "*significant lacuna* […] *which makes it impossible for the reader to follow the* [tribunal's] *reasoning.*"[488]

360. Second, while the Tribunal's reasoning must be internally and observably logical, and the conclusion must be the logical outcome of its thought processes, the Committee further notes the discussions of the *MINE* Standard in subsequent cases, including by the *Antin v. Spain* committee, which caution against "*delv*[ing] *into the adequacy or robustness of the Tribunal's reasoning.*"[489] In other words, this ground for annulment does not allow the Committee to intrude into the legal and factual decision-making of the Tribunal,[490] and review the decisions and consideration of the Tribunal *de novo*. This runs counter to Spain's position that the mere expression of reasons is insufficient if those reasons are inadequate.[491] The Committee emphasises that there is a distinction between not considering an argument at all (which may constitute a ground for annulment in certain circumstances, namely, where the argument in question was so important so as to

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[487] **CD-1**, STEAG's Opening Presentation, slide 51, *quoting* **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶¶ 379-380.

[488] **CD-1**, STEAG's Opening Presentation, slide 50, *quoting* **CL-165**, *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, ¶ 230.

[489] **CD-1**, STEAG's Opening Presentation, slide 50, *quoting* **CL-165**, *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, ¶ 230.

[490] **CL-165**, *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, ¶ 230; **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶¶ 80, 83, 279.

[491] Reply, ¶ 290.

potentially impact the outcome of the case), as opposed to not considering an argument in as fulsome a way as a party might have preferred (which is within the discretion of the tribunal and accordingly not a ground for annulment). This reading is consistent with Article 52(1)(e) of the ICSID Convention under which "*insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record*," as held by the committee in *TECO v. Guatemala*, a case on which Spain itself relies.[492] Indeed, to adopt the latter construction would be to invite the Committee to relitigate the dispute under the guise of applying the *MINE* Standard, and "*second guess or undermine* […] *or critique* [the Tribunal's] *logic or elegance*,"[493] which is not within the limited remit of the Committee under Articles 52(1)(e) and 48(3) of the ICSID Convention.

361. Third, it matters not if the Tribunal made a mistake in its working, provided that the working remains internally consistent and is able to be followed.[494] Although potentially a fine distinction, in this Committee's view, the enquiry is directed towards seeing whether the reasoning is there, as opposed to whether the reasoning is good.[495] Such formulation also finds support from the *SolEs v. Spain* committee:

> […] *the ultimate question is whether the Committee is satisfied that the Tribunal's award is possible to follow 'from Point A to Point B'.* ***If so, there can be no basis for annulment on this ground***.[496]

362. That said, there will be instances where an error in fact or law results in the Tribunal having taken an illogical or internally inconsistent step. In such an event its reasoning will likely fall afoul of the *MINE* Standard in that it will be rendered contradictory or frivolous, noting the observations

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[492] Rejoinder, ¶ 97, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 249.

[493] STEAG's Post-Hearing Brief, ¶ 28, *quoting* **CL-236**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment, 20 March 2023, ¶¶ 400-401.

[494] **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 581.

[495] Counter-Memorial, ¶ 150, *quoting Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 64: "[…] *Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an ad hoc committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point* […]."

[496] **CD-1**, STEAG's Opening Presentation, slide 51, *quoting* **CL-167**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, ¶ 83 (emphasis added).

of the *Cube v. Spain* committee that any such evaluation on these grounds should be considered "*with 'prudence and measure' as it will inevitably cross the border to the scrutiny of the quality of the award and thereby to an appeal award.*"[497]

363. The Committee will proceed to assess the Tribunal's alleged failure to state reasons in the Award in light of these standards.

B. WHETHER THE TRIBUNAL FAILED TO STATE REASONS IN DETERMINING THE APPLICABLE LAW AND CONCLUSIONS ON STATE AID

(1) Spain's Position

364. Spain submits that the Award must be annulled because the Tribunal failed to state reasons in relation to the impact of the EU's State aid regime on STEAG's legitimate expectations.[498] Spain's arguments on this issue are similar to the arguments summarized in Section V.C(1) *supra*.

365. Contrary to STEAG's position, Spain asserts that it had argued from the beginning of the arbitration that an assessment of STEAG's alleged legitimate expectations required consideration of whether the subsidies claimed were lawful under EU law on State aid.[499] However, Spain says, the Tribunal's reasoning on this issue was lacking and contradictory.[500]

366. In particular, Spain argues that the Tribunal clearly accepted that EU law is part of international law when it stated:

> *El Tribunal observa que, en otros casos resueltos bajo el TCE, se ha encontrado que el derecho de la UE es derecho internacional. Desde la perspectiva de un Tribunal constituido bajo el TCE, cuya autoridad no deriva del derecho de la UE, los tratados europeos deben ser vistos ante todo como tratados internacionales, de conformidad con la definición del artículo 2(1)(a) de la CVDT. Según esta disposición 'se entiende por 'tratado' un acuerdo internacional celebrado por escrito entre Estados y regido por el derecho internacional, ya conste en un instrumento único o en dos o más instrumentos conexos y cualquiera que sea su denominación*

[497] **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 321.

[498] Memorial, ¶¶ 342-355; Reply, ¶¶ 295-308; **RD-1**, Spain's Opening Presentation, slides 60-63.

[499] Memorial, ¶ 343; Reply, ¶ 296.

[500] Memorial, ¶¶ 342, 348-349, 355; Reply, ¶ 308.

> *particular'. La cuestión se reduce entonces a determinar si los tratados europeos prevalecen sobre otro tratado internacional, en el caso el TCE.*
>
> […]
>
> *Para este Tribunal no puede pretenderse que el derecho de la UE tenga una primacía sobre otras fuentes del derecho internacional* ***fuera del ámbito comunitario***.[501]

367. However, according to Spain, the Tribunal then failed to explain why EU law, as international law, did not apply to the merits of the dispute: Spain considers that Article 26(6) of the ECT "*is clear in this respect and does not distinguish between different categories of international law*," meaning that "*if European Union law is international law it is clear that it is applicable to the merits of the dispute*."[502] For Spain, the Tribunal's failure to provide reasoning on this critical issue justifies annulment of the Award.[503]

368. Furthermore, Spain asserts that the Tribunal's reasoning was "*strikingly inconsistent*," because the Tribunal recognized that EU law had to be considered to modulate STEAG's legitimate expectations – *i.e.*, that EU law must be taken into account to decide on the merits – but then went on to state that this is merely a question of fact.[504] For Spain, "[t]*hese two conclusions are incompatible and lead to an absurd result*," and amount to a missing link in the chain of reasoning.[505] Not only that, but Spain also argues that the Tribunal never actually analysed the State aid issue in order to modulate STEAG's legitimate expectations and failed to provide reasons for not doing so.[506] In Spain's view, the unavoidable result of these failures is annulment of the Award.[507]

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[501] Memorial, ¶ 345; **RD-1**, Spain's Opening Presentation, slide 61, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 271-272 (emphasis in original).

[502] Reply, ¶ 298.

[503] **RD-1**, Spain's Opening Presentation, slide 63.

[504] Memorial, ¶¶ 348, 354; Reply, ¶ 308; **RD-1**, Spain's Opening Presentation, slide 62, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 288, 291-293.

[505] Memorial, ¶¶ 348-349; Reply, ¶ 307.

[506] Memorial, ¶ 351.

[507] Memorial, ¶ 355.

(2) STEAG's Position

369. STEAG's position is that the Tribunal clearly stated its reasons to dismiss the impact of EU law on State aid in relation to STEAG's legitimate expectations, leaving no basis on which to annul the Award under Article 52(1)(e) of the ICSID Convention.[508] According to STEAG, Spain simply disagrees with the Tribunal's reasoning; it has not shown any failure to state reasons.[509]

370. STEAG contends, contrary to Spain's position, that the Tribunal never determined that EU law was applicable to the merits of the Parties' dispute.[510] Rather, the Tribunal explained that the dispute concerned Spain's obligations under the ECT, and did *not* concern whether its regulatory regime constituted illegal State aid:

> *La disputa que se presenta ante este Tribunal concierne el supuesto incumplimiento de obligaciones bajo el TCE, no una disputa acerca del carácter de ayuda de Estado del RRO. En efecto, la calificación de los incentivos concedidos bajo el RD 661/2007 y el RD 1578/2008 como ayudas de Estado no es una cuestión de derecho que deba ser resuelta por el presente Tribunal para poder resolver la disputa relativa a las obligaciones de España bajo el TCE.*[511]

371. STEAG acknowledges that the Tribunal then went on to accept the possible applicability of the State aid regime as a factor to be taken into account when making an investment, stating as follows: "*en principio, la posible aplicabilidad del régimen de ayudas de Estado puede ser un factor a tener en cuenta al realizar una inversión y, en consecuencia, puede tener un impacto en la evaluación de las expectativas que legítimamente tenía el inversionista al realizar su inversión* […]."[512] For STEAG, it therefore makes sense that the Tribunal considered this a question of fact rather than law.[513]

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[508] Counter-Memorial, ¶¶ 157-162; Rejoinder, ¶¶ 101-110.

[509] Rejoinder, ¶ 103.

[510] Counter-Memorial, ¶¶ 159-160.

[511] Rejoinder, ¶ 104, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 289.

[512] Rejoinder, ¶ 105, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 291.

[513] Rejoinder, ¶ 106, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 293 ("*No se trata entonces de evaluar si España cumplió con sus obligaciones bajo el derecho de la UE, sino de determinar, como una cuestión de hecho, si el riesgo de un incumplimiento debió ser tenido en cuenta por el inversionista (y, en su caso, con qué alcance) al comprometer su capital en el proyecto Arenales Solar.*")

372. According to STEAG, this is precisely what the Tribunal did, even confirming that "*también ha tomado en consideración los argumentos de la Demandada sobre la supuesta ilicitud del RRO bajo el régimen comunitario de ayudas de Estado y su relevancia para el análisis de las expectativas legítimas de Steag*."[514] The Tribunal then explained in detail why the State aid issue did not prevent STEAG from having legitimate expectations.[515] In STEAG's view, the Tribunal was correct in this reasoning, but even if the Committee were to disagree, annulment would not be warranted because the Tribunal's reasoning can be followed.[516]

(3) The Committee's Analysis

373. Spain's case is that the Tribunal's assessment of STEAG's alleged legitimate expectations required consideration of whether the subsidies claimed were lawful under EU law on State aid.[517] However, the Tribunal ultimately determined that EU law on State aid was irrelevant to the case and therefore inapplicable to the dispute. Spain asserts that the Tribunal's reasoning regarding the impact of the EU's State aid regime on STEAG's legitimate expectations is both lacking and contradictory and therefore falls afoul of the requirement to state reasons.[518]

374. The Committee observes that significant portions of Spain's Memorial are simply a restatement of arguments already made before the Tribunal. The Committee again emphasises that its role is limited, and that annulment proceedings do not constitute an appeals mechanism. Similarly, as already observed in paragraph 364 *supra*, Spain's arguments on this issue are nearly identical to those advanced on the question of whether the Tribunal manifestly exceeded its powers by deciding not to apply EU law to the merits of the case, as summarised in Section V.C(1) *supra*. In that context, the Committee has already rejected Spain's arguments, finding no manifest excess of powers.[519]

375. While there is significant overlap between Spain's arguments under these two heads of annulment, the Committee recalls that its present task is to evaluate the Tribunal's reasoning by

[514] Rejoinder, ¶ 108, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 290.
[515] Rejoinder, ¶ 109, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 521-522.
[516] Counter-Memorial, ¶ 161.
[517] Memorial, ¶ 343; Reply, ¶ 296.
[518] Memorial, ¶¶ 342-355; Reply, ¶¶ 295-308; **RD-1**, Spain's Opening Presentation, slides 60-63.
[519] *Supra*, ¶ 328.

reference to the *MINE* Standard which dictates that the Tribunal's reasoning is not, to borrow Spain's parlance, "*lack*[ing]" if the Committee can follow it "*from Point A to Point B.*"

376. Spain asserts that the Tribunal failed to state reasons in relation to the impact of the EU's State aid regime on STEAG's legitimate expectations. Spain's formulation of this ground is advanced on the premise that EU law is, in fact, applicable to the dispute. However, as previously noted, this premise was not accepted by the Tribunal, a finding which has been endorsed by the Committee, at least in the context of the Tribunal's alleged manifest excess of powers.[520]

377. Accordingly, in assessing the alleged failure to state reasons, the Committee will examine this issue in three parts:

1. Whether the Tribunal's reasoning for not applying EU law to the merits was lacking.

2. Whether the Tribunal's reasoning for considering EU law on State aid as a factual, rather than legal, element was lacking.

3. Whether the Tribunal's reasoning in relation to the impact of the EU's State aid regime on STEAG's legitimate expectations was contradictory.

378. In respect of the first issue, pursuant to the *MINE* Standard, the Committee is tasked with ascertaining whether it can follow the Tribunal's reasoning from Point A (is EU law applicable to the dispute?), through to its conclusion that EU law is not applicable to the merits of the dispute.

379. The Committee emphasises that the question of EU law first arose in the context of the Tribunal's jurisdiction, having been invoked by Spain on the basis of Article 26(6) of the ECT.[521] In analysing the potential impact of EU law on its jurisdiction, the Tribunal determined that neither Article 26(6) of the ECT nor EU law posed any obstacle to the exercise of its jurisdiction for various reasons,[522] chief among them that the dispute concerned Spain's obligations under the ECT, and so the source of the Tribunal's jurisdiction was the ECT and not EU law.[523] The

[520] *Supra*, ¶ 328.
[521] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 254-255.
[522] **RL-148**, Decision on Jurisdiction and Liability, ¶ 256.
[523] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 260, 266.

Committee is able to follow the Tribunal's reasoning on this point, and considers its conclusion the logical culmination of that reasoning.

380. Having rejected Spain's arguments on jurisdiction, the Tribunal turned to consider whether EU law might be applicable to the merits, ultimately similarly determining that EU law was not relevant to the merits of the dispute, because the dispute concerned the alleged breach of obligations under the ECT; it was not a dispute about the State aid nature of the original regulatory regime ("**RRO**" in the Tribunal's wording).[524] Accordingly, the Tribunal considered that it did not need to decide whether the RRO was State aid under EU law.[525]

381. Indeed, "[t]*he function of an ad hoc Committee is either to reject the application for annulment or to annul the award or a part thereof on the basis of the grounds enumerated in Article 52. Its function is not to rule on the merits of the parties' dispute* […]."[526] but rather to determine if, under this annulment ground, it can follow the Tribunal's reasoning. The Committee is of the view that the Tribunal's reasoning in holding that EU law was also inapplicable to the merits of the dispute is logical and coherent, in satisfaction of the requirement to state reasons for its decision. Accordingly, Spain's allegation that the Tribunal's reasoning in respect of its disapplication of EU law was "*lack*[ing]" is rejected.

382. In respect of the second issue, the Tribunal held that State aid regulations did not prevent STEAG from having legitimate expectations.[527] However, it is Spain's case that the Tribunal did not explain how it considered the State aid issue as a factual element to assess STEAG's legitimate expectations.

383. In reaching its conclusion that EU State aid regulations did not prevent STEAG from having legitimate expectations, the Tribunal first acknowledged that the regulations could, in principle, be a factor to be taken into account when making an investment, and so may in turn have an impact on the evaluation of the legitimate expectations of an investor.[528] Therefore, in the

[524] **RL-148**, Decision on Jurisdiction and Liability, ¶ 289. *See also, id*., Table of Defined Terms.
[525] **RL-148**, Decision on Jurisdiction and Liability, ¶ 291.
[526] **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 35.
[527] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 521-522.
[528] **RL-148**, Decision on Jurisdiction and Liability, ¶ 291.

Tribunal's view, it was not a question of evaluating whether Spain complied with its obligations under EU law, but of determining, as a matter of fact, whether the risk of a default should have been taken into account by the investor.[529] In applying this formulation to the facts, the Tribunal considered that STEAG's legitimate expectations were not impacted by EU law on State aid because "*no existe una decisión de un órgano comunitario que indique claramente que el RRO sea violatorio del derecho comunitario*."[530] In any event, if the conflict with EU law were to exist, it would imply Spain's failure to comply with its obligations under EU law, and the good faith principle does not allow Spain to rely on its wrongful conduct to escape its responsibility.[531]

384. On the basis of the above analysis, the Committee does not agree with Spain's allegation that the Tribunal did not explain how and why EU law on State aid was to interface with STEAG's legitimate expectations. The Committee is able to follow the logic in the Tribunal's reasoning and considers that the Tribunal's ultimate conclusion is consistent with this logic. In other words, the Committee is able to follow the Tribunal's reasoning from "*Point A to Point B*" in satisfaction of the *MINE* Standard. Consequently, Spain's allegation as to the Tribunal's failure to state reasons under Article 52(1)(e) of the ICSID Convention is not made out.

385. In respect of the third issue, Spain further alleges that the only references to EU law and State aid are "*brief and contradictory*" and "*strikingly inconsistent*," and that "[a]*pplying them together would lead to* [an] *absurdity.*"[532] To support its position, Spain refers to paragraph 291 of the Decision on Jurisdiction and Liability, which reads as follows:

> *Como se indicó anteriormente, para resolver sobre el caso sub judice, el Tribunal no debe decidir si el RRO es o no una ayuda de Estado bajo el derecho de la UE. Sin perjuicio de lo anterior, el Tribunal acepta que,* ***en principio, la posible aplicabilidad del régimen de ayudas de Estado puede ser un factor a tener en cuenta al realizar una inversión*** *y, en consecuencia, puede tener un impacto en la evaluación de las expectativas que legítimamente tenía el inversionista al realizar su inversión.*[533]

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[529] **RL-148**, Decision on Jurisdiction and Liability, ¶ 293.

[530] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 521-522.

[531] **RL-148**, Decision on Jurisdiction and Liability, ¶ 522.

[532] Memorial, ¶¶ 352, 354.

[533] **RL-148**, Decision on Jurisdiction and Liability, ¶ 291 (emphasis added).

386. Apparently, Spain finds it contradictory that the Tribunal recognized EU State aid law as a factor influencing the legitimate expectations of investors, and then went on to consider it as part of the factual background. The Committee finds no such inconsistency. Both legal acts and factual circumstances during the time of investment are factors that may affect the legitimate expectations of an investor, and in this case the Tribunal logically considered EU State aid law to be part of the factual matrix, since STEAG had requested to assess the breach of Spain's obligations under the ECT, not EU law.

387. The Committee's analysis above and its corresponding conclusions as to the logic and coherence of the Tribunal's reasoning apply equally here. As the Tribunal's reasoning is neither lacking nor contradictory, Spain's argument is rejected.

C. WHETHER THE TRIBUNAL FAILED TO STATE REASONS IN RELATION TO THE IMPACT OF THE FINANCIAL CRISIS

(1) Spain's Position

388. Spain next argues that the Tribunal failed to assess the impact of the Spanish financial crisis on STEAG's claim and provided no reasons for not doing so.[534] In this context, Spain relies heavily on the Dissenting Opinion of Professor Dupuy, who considered that the financial crisis had put Spain in a situation that was "*sencillamente insostenible*," as follows:

> *Era urgente que España reformara el régimen jurídico aplicable a los inversores pero debía hacerlo garantizando al mismo tiempo un rendimiento suficiente a los inversores. Por consiguiente, el carácter razonable del rendimiento realmente obtenido tras la reforma debe evaluarse a la luz de la situación macroeconómica a la que se pretendía hacer frente con estas medidas. Al mismo tiempo, no hay que perder de vista lo que, esta vez, desde el punto de vista microeconómico de cada empresa privada, sigue siendo rentable. A mi parecer,* ***la Decisión no tiene suficientemente en cuenta esta situación crítica y no examina últimamente las consecuencias reales de las reformas, tanto para las empresas como para el país en su conjunto***.[535]

[534] Memorial, ¶¶ 356-373; Reply, ¶¶ 309-315; **RD-1**, Spain's Opening Presentation, slides 65-69.

[535] Memorial, ¶ 358, *quoting* **RL-149**, Dupuy Dissent, ¶¶ 36-37 (Spain's emphasis).

389. In Spain's view, Professor Dupuy's Opinion evidences the Tribunal's failure to consider this important issue.[536]

390. Spain recalls at length the arguments it made in the arbitration concerning the impact of the financial crisis.[537] According to Spain, although the Tribunal specifically mentioned this issue in its summary of Spain's position, it completely ignored the issue in its analysis.[538] Spain contends that the Tribunal should have given reasons for why it considered that the financial crisis did not affect STEAG's legitimate expectations, but instead made no mention of the issue.[539] Indeed, Spain says, STEAG is unable to point to a single paragraph of the Decision on Jurisdiction and Liability addressing the matter.[540]

(2) STEAG's Position

391. STEAG's position is that the Tribunal explained in clear terms the reasons why it did not accept that the Spanish financial crisis prevented STEAG from having legitimate expectations.[541] STEAG refers to a three-step analysis whereby:

1. First, the Tribunal reasoned that to justify the regulatory change adopted by Spain, it was not sufficient to claim that the change was good for the economy, especially after making a specific commitment to a foreign investor, such as the commitment made to STEAG.[542]

2. Second, although the Tribunal accepted that Spain retained its *ius variandi*, it considered that Spain still had to respect its specific commitments to foreign investors.[543]

3. Third, the Tribunal considered that Spain's financial crisis could not justify such a radical alteration of the regulatory environment, specifically stating that "[u]*n cambio de esa*

[536] Reply, ¶ 313.
[537] Memorial, ¶¶ 359-372.
[538] Memorial, ¶¶ 356-357.
[539] Reply, ¶ 314.
[540] Reply, ¶ 311.
[541] Rejoinder, ¶ 113. *See* Counter-Memorial, ¶ 166.
[542] Rejoinder, ¶ 114, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 630.
[543] Rejoinder, ¶ 115, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 634.

naturaleza exige, en cualquier caso, una justificación más allá de la mera invocación de fines de política pública."[544]

392. Thus, for STEAG, it is clear that the Tribunal addressed Spain's argument in relation to the financial crisis. In fact, STEAG considers that "[t]*he best evidence that such argument was considered and analyzed is Prof. Dupuy's dissent in which it provided an opinion different to his coarbitrators'. There could have not been a different opinion if no analysis had been done*."[545] STEAG stresses that Professor Dupuy's view was that the majority did not take the financial crisis "*sufficiently*" into account.[546]

(3) The Committee's Analysis

393. Spain argues that the Tribunal failed to assess the impact of the Spanish financial crisis on STEAG's claim and provided no reasons for not doing so.[547]

394. The Committee again recalls the *MINE* Standard, which requires it to assess whether it can follow the Tribunal's reasoning in concluding that Spain's financial crisis did not justify drastic changes to the regulatory framework.

395. As a preliminary matter, the Committee observes that it is simply untrue that the Tribunal "*ignored*" or "*failed to take into account*" the impact of the Spanish financial crisis, as is asserted by Spain.[548] Apart from Professor Dupuy's dissent, the crisis is mentioned at various points throughout the Decision on Jurisdiction and Liability, including, critically, in paragraphs 628 and following, to which the Committee now turns.

396. The Tribunal prefaced its reasoning with an explicit acknowledgement of the centrality of the crisis to Spain's position, noting that Spain's defence had revolved around the reasons for the reforms, including the "*crisis económica internacional*."[549] The Tribunal similarly acknowledged that it had no reason to question the legitimate purposes pursued by Spain in enacting the

[544] Rejoinder, ¶ 116, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 637.
[545] Counter-Memorial, ¶ 167.
[546] Counter-Memorial, ¶ 163.
[547] Memorial, ¶¶ 356-373; Reply, ¶¶ 309-315; **RD-1**, Spain's Opening Presentation, slides 65-69.
[548] Memorial, ¶¶ 8, 373.
[549] **RL-148**, Decision on Jurisdiction and Liability, ¶ 628.

reforms.[550] It added that this, however, was not the test.[551] The Tribunal noted that Article 10(1) of the ECT required that an affected investor be compensated in circumstances where Spain had generated legitimate expectations through particular and concrete administrative acts and then frustrated those expectations, and that it was not enough for Spain to simply invoke a public policy goal, no matter how laudable or important it might be.[552] The Tribunal stated that Spain must respect any specific commitments it had made, and exercise its *ius variandi* in a proportionate manner, taking into account the rights of those affected.[553] Ultimately, the Tribunal held that the drastic changes enacted by Spain were not plausibly or clearly justified. Consequently, the imposition of the radically different new regime violated STEAG's legitimate expectation, in breach of Article 10(1) of the ECT.[554]

397. With respect to Spain's reliance on Professor Dupuy's dissenting opinion as proof that the Tribunal did not "*sufficiently*" take account of this critical situation,[555] the Committee makes the following observations. First, the Committee notes that Spain's assertion as to sufficiency of reasons stands at odds with its primary contention that the Tribunal gave no reasons. Second, the Committee observes that this critique is drawn verbatim from the dissent,[556] and that the notion of "sufficiency" goes to the weight afforded to this factor by the Tribunal. Conceptually, the word indicates that some weight was in fact afforded, just not enough weight in the view of Professor Dupuy. That Professor Dupuy considered that the majority did not give the financial crisis enough weight is a difference of opinion among the reasonable minds of the Tribunal. This is not a ground for annulment. Further, in the Committee's view the mere fact of this difference of opinion shows that the Tribunal did clearly consider the impact of the financial crisis, for, as submitted by

[550] **RL-148**, Decision on Jurisdiction and Liability, ¶ 630.

[551] **RL-148**, Decision on Jurisdiction and Liability, ¶ 631.

[552] **RL-148**, Decision on Jurisdiction and Liability, ¶ 630.

[553] **RL-148**, Decision on Jurisdiction and Liability, ¶ 634.

[554] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 637-638.

[555] **RD-1**, Spain's Opening Presentation, slide 66, *quoting* **RL-149**, Dupuy Dissent, ¶¶ 36-37.

[556] **RL-149**, Dupuy Dissent, ¶ 37: "*A mi parecer, la Decisión no tiene suficientemente en cuenta esta situación crítica y no examina últimamente las consecuencias reales de las reformas, tanto para las empresas como para el país en su conjunto.*"

STEAG, it would have been difficult, if not impossible, for Professor Dupuy to part ways from the majority had a discussion not actually taken place.[557]

398. As has been emphasised at multiple junctures throughout this Decision, annulment proceedings do not constitute an appeals mechanism, and the Committee's powers are limited. Spain's submission that the financial crisis made it necessary for it to adopt the necessary regulatory measures to ensure the economic sustainability of the Spanish Electricity System ("**SES**") and had a decisive impact on STEAG's legitimate expectations, goes to the substance of the dispute already adjudicated by the Tribunal. The annulment process does not afford Spain a chance to relitigate this question of fact, or second guess the conclusions of the Tribunal, or the weight it afforded to various factors.

399. The present examination directs the Committee to consider only whether the Tribunal's reasoning was lacking or contradictory. Based on the Committee's analysis of the Tribunal's reasoning, Spain has not demonstrated that the Tribunal's reasoning was lacking in any way, let alone in such a way as to enliven its entitlement to annulment under Article 52(1)(e) of the ICSID Convention. Therefore, Spain's submission under this head of claim is rejected.

D. WHETHER THE TRIBUNAL FAILED TO STATE REASONS IN RELATION TO STEAG'S LEGITIMATE EXPECTATIONS AND THE UNPREDICTABILITY OF THE LEGAL CHANGES

(1) Spain's Position

400. Spain claims that the Tribunal offered contradictory conclusions and failed to state reasons for its decision regarding the unpredictability of the regulatory changes.[558] Spain draws the Committee's attention to paragraphs 635-636 of the Decision on Jurisdiction and Liability, where the Tribunal first states in paragraph 635 that "*ha tomado en consideración el argumento de España acerca de la supuesta previsibilidad del NRR para un inversionista diligente, y acerca de la supuesta ausencia de diligencia por parte de Steag en lo que se refiere al riesgo político y legal que suponía una inversión en España en el año 2012*."[559] Then, however, in paragraph 636, Spain

[557] Counter-Memorial, ¶ 167.

[558] Memorial, ¶¶ 374-380; Reply, ¶¶ 316-324; **RD-1**, Spain's Opening Presentation, slides 71-74.

[559] Memorial, ¶ 377, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 635.

says, the Tribunal concludes that the changes were not foreseeable without providing any reasons for this conclusion.[560]

401. Moreover, Spain points out that in the same paragraph, the Tribunal observes that "*en la primera mitad de 2012 se empezaban a sentir vientos de cambio*."[561] Given that the first half of 2012 preceded STEAG's investment, Spain sees a contradiction between this statement and the Tribunal's conclusion that the regulatory changes were unforeseeable for a diligent investor.[562]

402. Spain accuses STEAG of trying to advance arguments to make up for the Tribunal's lack of reasoning, which Spain asserts cannot cure this defect that requires annulment of the Award.[563]

(2) STEAG's Position

403. STEAG sees no contradiction or gaps in the Tribunal's reasoning on the foreseeability of the regulatory changes.[564] In fact, STEAG asserts that the Decision on Jurisdiction and Liability "*was crystal-clear*" on this issue, once all the relevant reasoning is reviewed.[565]

404. According to STEAG, the Tribunal made clear that it had to assess whether the regulatory changes were foreseeable, and that this analysis included whether STEAG had carried out adequate due diligence.[566] The Tribunal went on to reject Spain's arguments regarding foreseeability, specifically mentioning the drastic nature of the regulatory changes and the Parties' positions on STEAG's due diligence.[567]

405. For STEAG, it is impossible to separate the Tribunal's conclusion on foreseeability from its assessment of the "*Registro de pre-asignación de retribuciones.*"[568] Specifically, STEAG observes that the Tribunal found that the registration of Arenales Solar, the company in which STEAG had invested, in the "*Registro de pre-asignación de retribuciones*," "*en el contexto*

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[560] Memorial, ¶ 378; Reply, ¶ 318, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.
[561] Reply, ¶ 319, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.
[562] Reply, ¶¶ 319-320; **RD-1**, Spain's Opening Presentation, slide 74.
[563] Reply, ¶¶ 323-324.
[564] Rejoinder, ¶¶ 118-124.
[565] Rejoinder, ¶ 124.
[566] Rejoinder, ¶ 120, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 526-527.
[567] Rejoinder, ¶ 121, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 635-636.
[568] Rejoinder, ¶ 122.

normativo del ordenamiento español, materializa la promesa de otorgar cierto grado de estabilidad en el régimen económico aplicable a la instalación," and that "[l]*as normas que regulaban el registro definitivo en el RD 661/2007 y el registro de preasignación en el RDL 6/2009, en su conjunto, permitían inferir que esta resolución garantizaba cierta protección frente a cambios futuros*."[569] Thus, STEAG says, the Tribunal indicated that STEAG's legitimate expectations were solidly based in pre-registration and that the regulatory changes were not foreseeable for investors, like STEAG, whose projects had been so registered.[570] Even if Spain disagrees with these determinations, STEAG contends that Spain has failed to establish this ground for annulment.[571]

(3) The Committee's Analysis

406. Spain claims that the Tribunal offered contradictory conclusions and failed to state reasons for its decision regarding the unpredictability of the regulatory changes.[572]

407. Given the formulation of Spain's allegation, the Committee will separately consider whether the reasoning given by the Tribunal in respect of in STEAG's legitimate expectations and the unpredictability of the legal changes were, contrary to the *MINE* Standard:

1. unable to be followed from Point A to Point B; or

2. contradictory.

408. In relation to the first issue, in rejecting Spain's argument that the legal changes would have been foreseeable to a diligent investor, the Tribunal first observed that only "*expectativas legítmas*" of an investor can give grounds to a breach of Article 10(1) of the ECT.[573] In assessing whether STEAG's expectations were legitimate, the Tribunal's analysis proceeded in four parts.[574]

[569] Rejoinder, ¶ 123, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 519.
[570] Rejoinder, ¶¶ 123-124.
[571] *See* Memorial, ¶¶ 153-154.
[572] Memorial, ¶¶ 374-380; Reply, ¶¶ 316-324; **RD-1**, Spain's Opening Presentation, slides 71-74.
[573] **RL-148**, Decision on Jurisdiction and Liability, ¶ 503.
[574] **RL-148**, Decision on Jurisdiction and Liability, ¶ 504.

409. First, the Tribunal examined whether there were any acts on the part of Spain at the time of STEAG's investment which could have given rise to legitimate expectations on the part of STEAG.[575] The Tribunal found that Arenales Solar's registration in the "*Registro de pre-asignación*" was an administrative act by Spain of a particular nature, expressing a specific commitment to STEAG. The Tribunal thus accepted that the registration was capable of giving rise to legitimate expectations.[576]

410. Second, the Tribunal analysed the extent to which Spain's conduct was decisive in STEAG's decision to invest. In doing so the Tribunal examined STEAG's conduct and due diligence prior to the investment date and assessed what STEAG knew, or ought to have known, as at the date of the investment. The Tribunal accepted Spain's submission that an investor has the burden of carrying out adequate and reasonable due diligence, taking into account the basic rules applicable to the investment, the relevant regulatory framework and changes to said framework that are foreseeable at the time the investment is made.[577] The Tribunal observed that STEAG had conducted due diligence, particularly in the form of two reports which emphasised the importance of Arenales Solar's registration in the "*Registro de pre-asignación*"[578] and which proved fundamental in STEAG's decision to proceed with the investment.[579]

411. Third, upon its finding that there was an objective basis for the formation of legitimate expectations and that Spain's conduct capable of generating legitimate expectations did in fact play a role in STEAG's decision to proceed with its investment, the Tribunal turned to consider the content of STEAG's expectations. The Tribunal ultimately concluded that, as of 8 June 2012, STEAG had a legitimate expectation that, if final registration was met by 1 January 2014, it would be able to enjoy the rates, premiums, lower and upper limits referred to in RD 1614/2010 for the life of the Arenales Solar installation.[580]

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[575] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 505-522.
[576] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 509-510.
[577] **RL-148**, Decision on Jurisdiction and Liability, ¶ 527.
[578] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 528-529.
[579] **RL-148**, Decision on Jurisdiction and Liability, ¶ 532.
[580] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 593-594, 627.

412. Fourth, the Tribunal analysed the extent to which the adoption of the new regulatory regime ("**NRR**" in the Tribunal's wording) frustrated STEAG's expectations. The Tribunal rejected Spain's argument that a diligent investor ought to have foreseen the regulatory changes, accepting that while a diligent investor might have been able to anticipate changes to the RRO in general, such investor could not have known that these changes would be applied to facilities registered in the "*Registro de pre-asignación*"[581] such as Arenales Solar. This is a complete answer to Spain's specific allegations regarding paragraphs 635-636 of the Decision on Jurisdiction and Liability, namely, Spain's allegation about the Tribunal's unreasoned conclusion that the changes were not foreseeable.[582] In the Committee's view, Spain's assertion is based on an artificially narrow reading of that paragraph. Spain focuses on the Tribunal's statement that "*lo que no era previsible a la fecha de la inversión es que estos cambios serían aplicados respecto de las tarifas, primas y límites inferior y superior de las instalaciones que, como Arenales Solar, estaban en el registro de preasignación*."[583] Moreover, in the following sentence the Tribunal expressly stated that the true extent of the changes to the regime only came to be known in 2013 and 2014,[584] after the date of the investment, and so could not have been foreseen at the time of the investment, irrespective of the extent of any due diligence performed.

413. On its face, the Tribunal's reasoning is not only extensive, it is clear, coherent and easily followed by the Committee. The series of steps culminating in its conclusion that STEAG held legitimate expectations and that Spain's changes to the regulatory regime could not have been anticipated by it are identifiable and logical. Specifically, Spain's allegations focussing on the alleged lack of reasons in paragraphs 635-636 of the Decision on Jurisdiction and Liability have not been made out. Accordingly, the *MINE* Standard is satisfied.

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[581] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 635-636.

[582] Memorial, ¶ 378; Reply, ¶ 318, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.

[583] Reply, ¶ 318, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.

[584] **RL-148**, Decision on Jurisdiction and Liability, ¶ 636 ("[…] *El Tribunal encuentra que, más allá de si el inversionista podía esperar o no que hubiera cambios en el RRO en general, lo que no era previsible a la fecha de la inversión es que estos cambios serían aplicados respecto de las tarifas, primas y límites inferior y superior de las instalaciones que, como Arenales Solar, estaban en el registro de preasignación. Más aún, si bien en la primera mitad de 2012 se empezaban a sentir vientos de cambio, los alcances precisos de la reforma al régimen económico de las instalaciones sólo vinieron a vislumbrarse en los años 2013 y 2014. Aún si se aceptara la premisa de que un inversionista diligente debía anticipar un cambio, lo cierto es que no era posible pronosticar la eliminación total de los criterios de tarifa, primas y límites inferior y superior, determinantes para la rentabilidad de Arenales Solar.*").

414. For the reasons stated above, the Committee does not agree that the Decision on Jurisdiction and Liability failed to state reasons in relation to STEAG's legitimate expectations and the unpredictability of the legal changes, pursuant to Article 52(1)(e) of the ICSID Convention. Spain's claim for annulment under this ground is accordingly rejected.

415. In relation to the second issue, Spain claims that the Tribunal offered contradictory conclusions and failed to state reasons for its decision regarding the unpredictability of the regulatory changes.[585] Spain asserts that the Tribunal first adopted an approach in which it takes into consideration Spain's argument on the alleged foreseeability of the legal changes for a diligent investor, but then concludes without giving any reasons that the changes were not foreseeable.[586]

416. As observed in paragraph 401, *supra*, Spain points out that at paragraph 636 of the Decision on Jurisdiction and Liability, the Tribunal observes that "*en la primera mitad de 2012 se empezaban a sentir vientos de cambio*."[587] Given that the first half of 2012 preceded STEAG's investment, Spain sees a contradiction between this statement and the Tribunal's conclusion that the regulatory changes were unforeseeable for a diligent investor.[588]

417. The Committee observes that Spain's submission is advanced on a restricted reading of the paragraph on which it relies, for immediately following the phrase relied upon by Spain, as quoted above, the Tribunal qualified this statement with the observation that the precise scope of the reforms only became clear in 2013 and 2014, such that even if a diligent investor were to have anticipated a change, it could not have foreseen the particulars of that change.[589] When read in full, the paragraph containing the alleged contradictions is clearly internally consistent, with the initial subclause relied upon by Spain qualified by the analysis which follows. For this reason, the

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[585] Memorial, ¶¶ 374-380; Reply, ¶¶ 316-324; **RD-1**, Spain's Opening Presentation, slides 71-74.

[586] Memorial, ¶ 379.

[587] Reply, ¶ 319, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.

[588] Reply, ¶¶ 319-320; **RD-1**, Spain's Opening Presentation, slide 74.

[589] **RL-148**, Decision on Jurisdiction and Liability, ¶ 636 ("[…] *los alcances precisos de la reforma al régimen económico de las instalaciones sólo vinieron a vislumbrarse en los años 2013 y 2014. Aún si se aceptara la premisa de que un inversionista diligente debía anticipar un cambio, lo cierto es que no era posible pronosticar la eliminación total de los criterios de tarifa, primas y límites inferior y superior, determinantes para la rentabilidad de Arenales Solar.*")

Committee does not accept Spain's allegation as to the contradictory nature of the Tribunal's reasoning on this ground.

E. WHETHER THE TRIBUNAL FAILED TO STATE REASONS IN QUANTIFYING DAMAGES

(1) Spain's Position

418. Finally, Spain submits that the Tribunal failed to state reasons in quantifying STEAG's damages. In particular, Spain argues that the Tribunal neither explained why it adopted a DCF model as its valuation method nor addressed several important parameters, predictions, and presumptions inherent in that model.[590]

419. Regarding the choice of valuation method, Spain asserts that the Tribunal addressed this "*crucial, complex, and controversial*" issue in just two paragraphs of the Decision on Jurisdiction and Liability, which do not allow the reader to follow from point A to B.[591] Essentially, according to Spain, the Tribunal stated that the DCF method "*is certainly one of the most frequently used methods*" and then concluded – with no explanation – that "*the use of the DCF method in the present case is reasonable as it is an operating plant for which cash flows can be determined and projected.*"[592] In Spain's view, the Tribunal ignored the heavily disputed underlying issues of whether the DCF method is appropriate in a highly regulated sector, or in circumstances where the claimant's legitimate expectation was limited to a *reasonable* rate of return.[593]

420. Spain points out that in the Tribunal's Supplementary Decision, the Tribunal expressly acknowledged that Spain's quantum expert, Accuracy, "*no solamente cuestionó el cálculo basado en DCF propuesto por Brattle, sino el método DCF en general como adecuado para estimar los daños en este arbitraje.*"[594] While Spain accepts that the Tribunal offered "*vague motivations*" for

[590] Memorial, ¶¶ 381-403; Reply, ¶¶ 325-352; **RD-1**, Spain's Opening Presentation, slides 76-92; Transcript, Day 1, 51:12-56:9.

[591] Memorial, ¶ 383; Transcript, Day 1, 51:16-22.

[592] **RD-1**, Spain's Opening Presentation, slide 80; Transcript, Day 1, 52:16-53:2.

[593] Memorial, ¶¶ 384-388; Transcript, Day 1, 53:3-16.

[594] Memorial, ¶ 397, *quoting* **RL-149**, Supplementary Decision, ¶ 21.

adopting the DCF method, it argues that the Tribunal was "*totally silent as to the reasons for discarding Accuracy's calculations*."[595]

421. Moreover, for Spain, "*it is not enough to choose one valuation method or another, but within that method, a position must be taken on the various elements of the method.*"[596] Yet, Spain says, the Tribunal adopted the model proposed by STEAG's expert, the Brattle Group, wholesale, without addressing the underlying parameters, estimates and assumptions that Spain and its expert had repeatedly challenged.[597] According to Spain, the Tribunal remained silent on several issues, including:

1. The correction of the effect of the fall in interest rates.
2. Production problems stemming from failures in the turbine.
3. The contracts providing RREEF with preferential treatment.
4. The applicable tariff.
5. Delay in subsidy payments.
6. The illiquidity discount.
7. STEAG's status as a minority shareholder.
8. The effect of the regulatory risk on compensation.
9. "[T]*he unreasonable difference between the amount invested by Steag (46.3 million) and the amount requested as compensation (79.2 million) given the high profitability of the project in the but for scenario, which amounted to 11% post tax*."[598]

[595] Memorial, ¶ 397.
[596] Memorial, ¶ 389.
[597] Memorial, ¶ 389; Transcript, Day 1, 54:6-55:22.
[598] Memorial, ¶¶ 390, 393, 402; Transcript, Day 1, 55:14-22.

422. For Spain, these issues were of critical importance because if its position had been accepted, "*even quantifying alleged damages using the DCF method proposed by Brattle, the compensation would have been close to zero.*"[599]

423. Spain concludes that it has been deprived of an explanation of the amount it has been ordered to pay, and the Award must be annulled on this basis.[600]

(2) STEAG's Position

424. In STEAG's view, none of Spain's arguments in relation to the Tribunal's quantification of damages comes close to establishing a failure to state reasons.[601] STEAG asserts that Spain applies the wrong legal standard, as the Tribunal was under no obligation to provide a detailed response to each and every argument advanced by the Parties, and is in any event wrong.[602]

425. STEAG finds it "*somewhat surprising*" that Spain supposedly does not understand why the Tribunal adopted the DCF method, because in STEAG's view, the Tribunal provided the answer in the very paragraphs of the Decision on Jurisdiction and Liability that Spain cites.[603] There, the Tribunal clearly explained that using a DCF model was reasonable "*cuanto se trata de una planta en operación cuyos flujos de caja pueden determinarse y proyectarse*," and rejected Spain's argument that the future cash flows were speculative, because the regulatory framework "*garantizaba unos flujos de caja mínimos*."[604] STEAG also points out that earlier in the Decision, the Tribunal had determined that STEAG's expectations were not limited to the rate of reasonable return, as argued by Spain.[605]

426. STEAG denies that the Tribunal then adopted the Brattle Group's DCF model without reservation. Instead, the Tribunal identified various elements that needed to be further adjusted in order to quantify damages and gave the Parties an opportunity to prepare a calculation on that

[599] Transcript, Day 1, 56:1-5.
[600] Transcript, Day 1, 56:6-9.
[601] Counter-Memorial, § 4.5; Rejoinder, § 4.5.
[602] Rejoinder, ¶ 128.
[603] Rejoinder, ¶ 129, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 819-820.
[604] Rejoinder, ¶¶ 129-130, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 819-820.
[605] Counter-Memorial, ¶ 170, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 743.

basis.[606] According to STEAG, Spain's expert then submitted a calculation with various adjustments amounting to nearly zero damages, which did not comply with the Tribunal's instructions. As a result, STEAG says, the Tribunal was forced to issue the Supplementary Decision, where it clearly set out all the parameters to be included in the DCF model and explained why it rejected the adjustments proposed by Spain. After recalling the Parties' positions, the Tribunal stated as follows:

> *El Tribunal reitera que el cálculo de daños debe basarse en el método DCF, según se indica en los párrafos 819 y 820 de la Decisión. El método DCF fue el método empleado por la Demandante durante el proceso arbitral y que el Tribunal consideró razonable, en los términos del párrafo 820 de la Decisión:* […]
>
> *Para tomar la decisión antes citada, el Tribunal analizó los métodos de valuación propuestos por cada una de las Partes y los ajustes propuestos por Accuracy al método DCF utilizado por Brattle. Recuerda el Tribunal que Accuracy no solamente cuestionó el cálculo basado en DCF propuesto por Brattle, sino el método DCF en general como adecuado para estimar los daños en este arbitraje. El Tribunal se decidió por el método DCF propuesto por Brattle y descartó, porque no encontró que Accuracy hubiera justificado suficientemente las razones para incluirlos, y por el contrario encontró justificadas y debidamente sustentadas las razones expuestas por Brattle para excluirlos (i) el estatus preferente de RREEF; (ii) la prima de riesgo regulatorio; (iii) el descuento por iliquidez; y (iv) el descuento de minoritarios adicional sobre el valor de mercado de los fondos propios (en los escenarios but for y actual).*[607]

427. STEAG adds that the Tribunal provided still further clarification in the Tribunal's answers dated 17 March 2021 and the Award.[608]

428. For STEAG, the Tribunal's reasoning is not difficult to follow, lacking in explanation, or contradictory. Therefore, the standard of Article 52(1)(e) of the ICSID Convention is clearly not met.[609]

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[606] Counter-Memorial, ¶ 173, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 821; Rejoinder, ¶ 132.

[607] Rejoinder, ¶ 134, *quoting* **RL-149**, Supplementary Decision, ¶¶ 20-21.

[608] Counter-Memorial, ¶ 176.

[609] Rejoinder, ¶ 135.

(3) The Committee's Analysis

429. Spain alleges that the Tribunal neither explained why it adopted a DCF model as its valuation method nor addressed several important parameters, predictions, and presumptions inherent in that model.[610] Specifically, Spain alleges that the Tribunal did not give reasons for accepting the DCF method by Brattle while rejecting the adjusted method proposed by Accuracy.[611]

430. As the Committee has already observed, there is significant overlap between the present analysis and that conducted in Section VII.B(3) *infra*, which addresses the question of whether the Tribunal wrongly allocated the burden of proof in determining the existence and calculation of damages. In that context, Spain argues that the Tribunal rejected Spain's position on the calculation of damages not because the Tribunal was persuaded by Brattle, but because the Tribunal did not find Accuracy's position persuasive enough.[612]

431. The Committee highlights the Tribunal's findings summarized at paragraph 484, *infra*, which are also relevant to the present examination:

1. The Parties have extensively discussed the appropriate method for calculating damages.[613]

2. STEAG suggested the DCF method, comparing actual cash flows from the Arenales Solar plant with hypothetical cash flows, and Spain suggested the Asset Based Valuation ("**ABV**") method, calculating the annual cash flow based on the investment amount and the expected rate of return.[614]

3. There is no right or wrong method for calculation of damages.[615]

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[610] Memorial, ¶¶ 381-403; Reply, ¶¶ 325-352; **RD-1**, Spain's Opening Presentation, slides 76-92; Transcript, Day 1, 51:12-56:9.

[611] Memorial, ¶ 383; Reply, ¶ 333.

[612] *Infra*, ¶ 480.

[613] **RL-148**, Decision on Jurisdiction and Liability, ¶ 817.

[614] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 817-818.

[615] **RL-148**, Decision on Jurisdiction and Liability, ¶ 819.

4. The DCF method seems more reasonable for a functioning plant with determinable cash flow.[616]

5. Some aspects of Brattle Group's calculations were not accepted by the Tribunal.[617]

432. The Committee concludes, at paragraph 481, *infra*:

> *Having analysed paragraphs 819-820 of the Award and paragraphs 17-23 of the Supplementary Decision, the Committee disagrees with Spain's allegation. Having assessed the Tribunal's findings in the context, the Committee is of the view that the disputed sentence simply refers to the Tribunal's assessment of the two somewhat controversial positions regarding methodology for calculation of damages. The Tribunal noted that, at the same time, it found Brattle's reasoning persuasive and Accuracy's reasoning not sufficiently justified. This approach proves that the Tribunal carefully examined the position of each Party and after deliberation found one of them to be more substantiated.*

433. And further, at paragraph 486, *infra*:

> *The Committee agrees with the Tribunal that there is no right or wrong method for the calculation of damages, and it is not the Committee's task to reassess decisions that the Tribunal took in the exercise of its discretion. It appears to the Committee that Spain's disagreement with the Tribunal's findings is more related to the fact that the Tribunal did not accept Spain's method of calculation of damages or all of Spain's arguments rather than to any alleged departure from a fundamental rule of procedure.*

434. Viewed through the present lens, in the context of alleged failure to state reasons, the parallels are clear. Recalling that the Committee's task at hand is to assess whether the Tribunal's reasoning can be followed from Point A to Point B, the Committee is of the view that the *MINE* Standard has been met, by virtue of the above reasons. Contrary to Spain's assertions,[618] there is no gap in the Tribunal's logic in choosing to apply the DCF method. The Tribunal also provided clear and coherent reasons explaining its choice of the Brattle Group's methodology and did not

[616] **RL-148**, Decision on Jurisdiction and Liability, ¶ 820.

[617] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 821-822.

[618] **RD-1**, Spain's Opening Presentation, slide 80.

in fact accept Brattle Group's calculations wholesale as Spain alleges.[619] Further, the Tribunal was not "*totally silent*" on why it rejected Accuracy's proposed adjustments to the methodology, explaining that Accuracy's reasoning was not sufficiently justified.[620]

435. The Committee observes that Spain has advanced a comprehensive list of alleged omissions from the Tribunal's reasoning, as summarised in paragraph 421 *supra*, in respect of which the Committee recalls that the *MINE* Standard does not require the Tribunal to have addressed every argument.[621] Rather, the *MINE* Standard dictates that the Committee be able to follow the reasoning of the Tribunal in reaching its conclusion that the DCF method and Brattle Group's calculations were to be preferred; a test which is satisfied. Accordingly, the Committee finds that the Tribunal has not failed to state reasons in quantifying the damages and therefore, that the standard for annulment under Article 52(1)(e) of the ICSID Convention has not been met.

VII. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

436. Spain submits that the Award must be annulled because the Tribunal committed several serious departures from fundamental rules of procedure concerning: (i) the burden and standard of proof applied in relation to STEAG's alleged damages and quantification of those damages;[622] (ii) Spain's right to be heard in relation to the alleged lack of harm and elements of the DCF analysis;[623] and (iii) the burden and standard of proof applied in relation to STEAG's due diligence.[624] The Committee addresses each of these issues in turn after considering the applicable legal standard.

A. APPLICABLE LEGAL STANDARD

(1) Spain's Position

437. Spain recalls that pursuant to Article 52(1)(d) of the ICSID Convention, an award must be annulled if there is "*a serious departure from a fundamental rule of procedure*." As to the meaning

[619] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 821-822.

[620] **RL-149**, Supplementary Decision, ¶¶ 17-19; 20-21.

[621] Rejoinder, ¶ 97, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 249.

[622] Memorial, § IV.C.2; Reply, § III.C.2.

[623] Memorial, § IV.C.4; Reply, § III.C.4.

[624] Memorial, § IV.C.3; Reply, § III.C.3.

of "*fundamental*," Spain 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 standards of 'due process' required by international law*."[625] Citing ICSID's 2016 Background Paper on Annulment and various other arbitral decisions, Spain considers that fundamental rules of procedure include the right to be heard, the equal treatment of the parties, and the treatment of evidence and burden of proof.[626]

438. Regarding the right to be heard, Spain refers to the committee's description in *Tulip v. Turkey* that this right offers "*the parties the opportunity to present all the arguments and evidence they consider relevant and to respond to the arguments and evidence presented by their opponent.*"[627] Spain notes that this right can be infringed in different ways, including when the tribunal refuses to permit the presentation of argument or evidence, or does not offer the parties a "*comparatively equal opportunity*" to do so.[628] Spain adds that, as recognized by the committee in *TECO v. Guatemala*, the right to be heard may be called into question "*when a tribunal effectively surprises the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings.*"[629] Further, according to Spain, a violation of the right to be heard may include a tribunal's unjustified refusal to order the production of documents requested.[630]

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[625] Memorial, ¶ 405, *citing* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 98.

[626] Reply, ¶¶ 358-359, *citing* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 99; **RL-157**, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, 13 January 2015, ¶ 105. *See* **RD-1**, Spain's Opening Presentation, slide 94.

[627] Memorial, ¶ 406, *quoting* **RL-207**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 80.

[628] Memorial, ¶¶ 407-409, *quoting* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 184; and *citing* **RL-207**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 145.

[629] Reply, ¶ 371, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶¶ 184-185.

[630] Memorial, ¶¶ 412-414, *citing* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 331; **RL-243**, Yves Derains, Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint, in the Bulletin of the International Court of Arbitration of the International Chamber of Commerce, Special Supplement 2006: Filing of Documents in International Arbitration 83 (International Chamber of Commerce 2006), p. 87; **RL-244**, Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, 36 Vanderbilt Journal of Transnational Law 1313 (October 2003), pp. 1327-1328; **RL-232**, Christoph H. Schreuer et al., The ICSID Convention: A Commentary (2nd ed 2009), pp. 640-642, 824, 937-955, 980-981, 1011-1012; **RL-245**, Klaus Peter

439. As to the treatment of evidence and burden of proof, Spain argues that a tribunal violates a fundamental rule of procedure when it fails to observe the basic principle of *onus probandi incumbit actori*.[631]

440. Turning to the meaning of "*serious*" in Article 52(1)(d) of the ICSID Convention, Spain considers that a departure from a procedural rule will be deemed serious if a party is deprived of the protection afforded by that rule.[632] Spain stresses that where a breach is serious, it "*cannot be justified in light of a tribunal's discretion*," as confirmed by the *TECO v. Guatemala* committee.[633]

441. In Spain's view, the departure need not have had a material effect on the outcome of the dispute.[634] As stated by the committee in *Pey Casado v. Chile*, "[t]*he applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected*."[635] Spain also cites the *TECO v. Guatemala* committee on this point, which warned that "[r]*equiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise*," but then stated that "[w]*hat a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award*."[636]

442. Spain denies that it could have waived its right to raise this ground of annulment, as suggested by STEAG. In Spain's view, ICSID Arbitration Rule 27,[637] on which STEAG relies,

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Berger, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (3rd ed., Kluwer Law International 2015), pp. 585-586; **RL-246**, Jalal El-Ahdab and Amal Bouchenaki, Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?, *in* Arbitration Advocacy in Changing Times, 15 ICCA CONGRESS SERIES 65 (AJ van den Berg ed., Kluwer Law International 2011), p. 99.

[631] Memorial, ¶ 418.

[632] Memorial, ¶ 405.

[633] Reply, ¶ 355; **RD-1**, Spain's Opening Presentation, slide 95, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 196.

[634] Memorial, ¶ 416, *citing* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 78.

[635] Reply, ¶ 368, *quoting* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 78.

[636] Reply, ¶ 369, *quoting* **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 85.

[637] ICSID Arbitration Rule 27 provides: "*A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.*"

cannot limit the scope of the ICSID Convention as an international treaty.[638] Moreover, Spain contends that "*the waiver of any right cannot be presumed or blithely invoked, but must be evidenced by unequivocal acts of the alleged waiveror* [sic]."[639] In any event, Spain argues that because the Tribunal's procedural infringements became evident only in the Decision on Jurisdiction and Liability, followed by the Award, Spain has raised them at the first opportunity possible, here in these annulment proceedings.[640]

(2) STEAG's Position

443. STEAG focuses its discussion of the legal standard under Article 52(1)(d) of the ICSID Convention on the following three elements:

> [T]*his ground for annulment (i) requires that the alleged breach of the rule of procedure was denounced during the arbitration proceedings, (ii) involves evidencing what is the material impact on the outcome of the award and (iii) cannot be construed as a backdoor to submit an appeal against an ICSID award.*[641]

444. On the first point, STEAG relies on ICSID Arbitration Rule 27 and what it refers to as "*jurisprudence constante by several annulment committees*" to support its argument that an applicant which does not promptly object to an alleged procedural violation waives its right to invoke Article 52(1)(d) of the ICSID Convention on the basis of that violation.[642] For instance, STEAG points to the observation by the committee in *Fraport v. Philippines* that ICSID Arbitration Rule 27 plays an important role in arbitration proceedings and, in turn, "*a party forfeits its right to seek annulment under Article 52(1)(a) if it has failed promptly to raise its objection to*

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[638] Reply, ¶¶ 378, 380.

[639] Reply, ¶ 379; **RD-1**, Spain's Opening Presentation, slide 97.

[640] Reply, ¶¶ 382-383; **RD-1**, Spain's Opening Presentation, slide 97.

[641] Counter-Memorial, ¶ 183.

[642] Counter-Memorial, ¶ 185; Rejoinder, ¶ 142, *citing* **RL-155**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, ¶¶ 204-206; **CL-212**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 139; **RL-223**, *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, ¶ 88; **CL-233**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on the Application for Annulment, 10 December 2010, ¶¶ 378-379; **CL-234**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Cases No. ARB/12/40 and ARB/12/14, Decision on Annulment, 18 March 2019, ¶ 182.

the tribunal's procedure, upon becoming aware of it."[643] More recently, the committee in *Churchill v. Indonesia* noted that this rule of waiver is "*common to all award control systems*."[644]

445. According to STEAG, this rule poses a problem for Spain because Spain did not raise any objection against the alleged procedural violations during the arbitration, although it clearly could have.[645] More specifically, STEAG argues that each of the infringements Spain alleges pertains to the Tribunal's Decision on Jurisdiction and Liability, in which the Tribunal decided that STEAG had carried out adequate due diligence, established that the DCF method proposed by the Brattle Group was suitable for the assessment of damages, and rejected Spain's arguments regarding the method of calculating damages.[646] STEAG notes that the latter issue was addressed by the Tribunal in its Supplementary Decision as well.[647] Thus, STEAG contends that Spain could have raised these issues after the Tribunal issued the Decision on Jurisdiction and Liability in October 2020 or the Supplementary Decision in February 2021, but instead chose to stay silent. As a consequence, STEAG says, Spain has waived its right to invoke Article 52(1)(d) of the ICSID Convention.[648]

446. STEAG next argues that Spain is incorrect to assert that it is unnecessary for an applicant to demonstrate the material relevance of the alleged departures from fundamental rules of procedure.[649] For STEAG, the *Pey Casado v. Chile* decision cited by Spain reflects the minoritarian view on this matter, whereas most annulment committees have considered that the alleged departure must have a material effect on the outcome. STEAG points out that ICSID's 2016 Background Paper on Annulment identifies ten decisions holding that it was necessary to establish that the tribunal's decision would have been different if the rule of procedure had been respected, and several subsequent annulment decisions against Spain have also embraced this

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[643] Counter-Memorial, ¶ 185, *quoting* **RL-155**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, ¶¶ 204-206.

[644] Rejoinder, ¶ 142, *quoting* **CL-234**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Cases No. ARB/12/40 and ARB/12/14, Decision on Annulment, 18 March 2019, ¶ 182.

[645] Counter-Memorial, ¶ 184; Rejoinder, ¶¶ 143-145.

[646] Rejoinder, ¶¶ 143-144, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 528-532, 820-821.

[647] Rejoinder, ¶ 144.

[648] Rejoinder, ¶ 145.

[649] Counter-Memorial, ¶ 187.

view.[650] In fact, STEAG asserts, even the *Pey Casado v. Chile* committee considered it necessary to show that "*the Award might have been substantially different*."[651]

447. Finally, STEAG emphasizes once again that annulment cannot be construed as an appeal mechanism.[652] So while STEAG accepts that "*this ground for annulment is fact-specific and it will require that the Committee considers the findings of the Arbitral Tribunal and the allegations of the parties in the underlying proceedings*," STEAG stresses that "*it is not a de novo review of those allegations*" and the Committee is not to assess the correctness of the Tribunal's conclusions.[653]

448. In addition to these three points, STEAG accuses Spain of intentionally confusing the burden of proof and the standard of proof. For STEAG, "[i]*t is not entirely clear that rules concerning the burden of proof can be characterised as fundamental rules of procedure*," and in any event, the Tribunal never shifted the burden of proof to Spain.[654] As for the standard of proof, STEAG argues that ICSID tribunals enjoy wide discretion to evaluate the evidence submitted to them under ICSID Arbitration Rule 34(1). Further, in this specific case, STEAG highlights that the Parties agreed that the standard of evidence would be guided by the 2010 IBA Rules on the Taking of Evidence in International Arbitration, Article 9(1) of which provides that "[t]*he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"[655] STEAG concludes that Spain's apparent dissatisfaction with the standard of proof applied by the Tribunal cannot be a basis of annulment.[656]

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[650] Counter-Memorial, ¶ 187, *citing* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 100; **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 106; **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 450; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 757.

[651] Counter-Memorial, ¶ 187, *quoting* **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 269.

[652] Counter-Memorial, ¶ 188.

[653] Counter-Memorial, ¶ 189.

[654] Counter-Memorial, ¶¶ 190, 193.

[655] Counter-Memorial, ¶ 194.

[656] Counter-Memorial, ¶ 197.

(3) The Committee's Analysis

449. The Parties do not dispute that pursuant to Article 52(1)(d) of the ICSID Convention, a party may request the annulment of an award on the ground "*that there has been a serious departure from a fundamental rule of procedure.*" The Parties also largely agree on the questions to be decided by this Committee, and namely (i) whether the allegedly breached rule of procedure is fundamental and (ii) whether the departure from that rule is serious.[657]

450. There are, however, a few discrepancies in the Parties' approaches to the applicable standard. First, they disagree on the appropriate time to raise objections in relation to a serious departure from a fundamental rule of procedure. Second, Spain contests STEAG's assumption that a party should also prove a material effect on the outcome of the case.

451. In the context of determining the applicable legal standard, the Committee will therefore address the following three questions:

1. Whether the allegedly breached rule of procedure is fundamental.

2. Whether the departure from a fundamental rule of procedure is serious.

3. Whether a party must raise objections to the fundamental rule of procedure in the arbitral proceedings.

452. In respect of the first issue, the Committee observes that the Parties have the same understanding of the term "*fundamental.*" It aligns with the explanation in ICSID's 2016 Background Paper on Annulment, which observes that the history of the ICSID Convention indicates that fundamental rules concern "*the integrity and fairness of the arbitral process*."[658] The Committee agrees that equal treatment of the parties, the right to be heard and treatment of evidence and burden of proof constitute the cornerstone of a fair arbitral process and should be considered as fundamental rules of procedure.[659]

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[657] STEAG's Post-Hearing Brief, ¶ 30; Memorial, ¶ 405.

[658] **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 98.

[659] *See, e.g.,* **RL-151**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 99.

453. In respect of the second issue, the Committee notes that the Parties and prior *ad hoc* annulment committees have adopted various interpretations of the term "*serious*." In *MINE v. Guinea*, the annulment committee found that "*the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide*."[660] In *TECO v. Guatemala*, it was explained that "[a] *tribunal's serious breach of a fundamental rule of procedure cannot be justified in light of a tribunal's discretion.*"[661]

454. In addition, numerous annulment committees have taken into consideration the material impact the departure from a fundamental rule has had on the outcome of the arbitral decision.[662] In the present case, the Parties' positions regarding the relevance of the material impact on the outcome of the arbitral award differ. STEAG refutes Spain's arguments based on *Pey Casado v. Chile* and explains that most annulment committees have indeed assessed whether the alleged departure from a fundamental rule of procedure resulted in an outcome different from what it would have been without the breach.[663] Spain, on the other hand, relies on a number of annulment committee decisions to prove that this criterion is not necessary.[664]

455. The Committee accepts that a serious departure from a fundamental rule of procedure may not necessarily need to lead to an entirely different outcome, but it must affect the Award in a significant way, particularly considering the extraordinary nature of annulment remedy with the ICSID system. On this point, the Committee tends to agree with the *TECO v. Guatemala* committee, which found as follows:

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[660] **RL-154**, *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, ¶ 5.05.

[661] **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 196.

[662] *See, e.g.*, **RL-156**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, ¶ 22.

[663] **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 106; **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 450; **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 757.

[664] **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 78; **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 85.

> *Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.*[665]

456. In respect of the third issue, the starting point of the Committee's analysis is ICSID Arbitration Rule 27, which provides as follows:

> *A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.*

457. ICSID Arbitration Rule 27 thus requires all objections, particularly objections arising from procedural issues, to be addressed promptly. Rule 27 serves as a safeguard against annulment applications made in bad faith and has been relied upon by a number of annulment committees.[666] However, the purpose of this Rule is not to deprive a party of its right to request annulment if such application has been made in good faith and on the basis of violations which could not have been identified in the underlying arbitral proceedings. The Committee's view on this point is reinforced by the findings in *Perenco v. Ecuador*, where the committee held that "*some violations of*

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[665] **RL-231**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 85.

[666] *See, e.g.*, **RL-155**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, ¶¶ 204-206; **CL-212**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 139; **RL-223**, *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, ¶ 88; **CL-233**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on the Application for Annulment, 10 December 2010, ¶¶ 378-379; **CL-234**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Cases No. ARB/12/40 and ARB/12/14, Decision on Annulment, 18 March 2019, ¶ 182.

procedural rules may become visible only after the tribunal has rendered the award, and therefore, the concerned party is not estopped from requesting annulment on that basis."[667]

458. The Committee will thus assess all allegations regarding a serious departure from a fundamental rule of procedure considering the principles set out above.

B. THE BURDEN AND STANDARD OF PROOF APPLIED IN RELATION TO THE ALLEGED DAMAGES AND QUANTIFICATION OF DAMAGES

(1) Spain's Position

459. Spain submits that the Tribunal committed a serious departure from a fundamental rule of procedure by assuming, without evidence, that: (i) the breach of the ECT resulted in damage to STEAG; and (ii) the DCF method proposed by the Brattle Group allowed for a reasonable, non-speculative calculation of that damage.[668]

460. Regarding the existence of damages, Spain focuses on paragraphs 743-744 of the Decision on Jurisdiction and Liability:

> *B. ANÁLISIS DEL TRIBUNAL*
>
> *1. Parámetros generales para la determinación del perjuicio indemnizable*
>
> *743. El Tribunal ha encontrado que la Demandada incurrió en una violación del estándar de TJE del artículo 10(1) del TCE al frustrar las expectativas legítimas y objetivas de la Demandante al tiempo de la inversión, es decir, el 8 de junio de 2012. Esas expectativas iban más allá de la rentabilidad razonable. Steag tenía la expectativa de que se le mantendrían las tarifas, primas y los límites inferior y superior a que se refiere el RD 1614/2010. Esa estabilidad se extendería por la vida útil de la planta, siempre y cuando se cumpliera con el requisito del registro definitivo antes del 1 de enero de 2014, requisito que efectivamente se cumplió.*
>
> *744. La frustración de las expectativas legítimas que Steag tenía al tiempo de la inversión constituye una violación del estándar de TJE que, al comprometer la responsabilidad internacional de España,*

[667] **CL-212**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, ¶ 139.

[668] Memorial, ¶¶ 420-444; Reply, ¶¶ 389-417; **RD-1**, Spain's Opening Presentation, slides 99-116.

> *exige la reparación integral de los daños ocasionados por el hecho internacionalmente ilícito.*[669]

461. Spain reads these paragraphs as presuming the existence of damages without the requisite proof.[670] In Spain's view, the Tribunal has conflated two distinct concepts: proof of damages and proof of quantification.[671] Spain stresses that, as recognized by the ILC Draft Articles on State Responsibility, it is possible to have an internationally wrongful act that does not result in damages.[672] It is for the claimant to prove that the act caused injury.[673] However, according to Spain, the Tribunal "*bypasses this evidentiary process*," skipping proof of harm and moving straight to quantification.[674]

462. Turning to the quantification of damages, Spain focuses on paragraph 820 of the Decision on Jurisdiction and Liability, which it also cites in relation to the alleged failure of the Tribunal to state reasons:

> *A juicio de este Tribunal, el uso del método DCF en el presente caso resulta razonable en cuanto se trata de una planta en operación cuyos flujos de caja pueden determinarse y proyectarse. Asiste la razón a la Demandante cuando explica que el marco bajo el cual se establecen los flujos de caja para el escenario but for no son especulativos, porque se basan en los criterios del RRO, que garantizaba unos flujos de caja mínimos. El Tribunal encuentra que es posible construir un escenario hipotético basado en el RRO, para calcular el monto del daño indemnizable en términos objetivos y determinados.*[675]

463. According to Spain, the Tribunal assumes that the DCF method provides a reasonable calculation of damages without requiring any proof in relation to the choice of that method or the elements of the model.[676] Moreover, in the but-for scenario, Spain says, the Tribunal relies solely on the revenue of the plants and ignores other variables such as inflation and oil prices. Indeed,

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[669] Memorial, ¶ 420, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 743-744.
[670] Memorial, ¶ 420; Reply, ¶ 394; **RD-1**, Spain's Opening Presentation, slide 101.
[671] Reply, ¶ 399.
[672] Memorial, ¶ 424; Reply, ¶ 398.
[673] Memorial, ¶ 421.
[674] Reply, ¶¶ 398, 400.
[675] Reply, ¶ 404, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 820.
[676] Reply, ¶¶ 404-407.

Spain asks: "*how can you have any evidence on these variables if the counterfactual scenario is an invented and fictitious scenario?*"[677]

464. Spain further claims that the Tribunal improperly reversed the burden of proof: while the Tribunal correctly acknowledged in paragraph 747 of the Decision on Jurisdiction and Liability that the burden of proving damages is on STEAG, it then stated in paragraph 21 of the Supplementary Decision that:

> *El Tribunal se decidió por el método DCF propuesto por Brattle y descartó, porque no encontró que Accuracy hubiera justificado suficientemente las razones para incluirlos, y por el contrario encontró justificadas y debidamente sustentadas las razones expuestas por Brattle para excluirlos (i) el estatus preferente de RREEF; (ii) la prima de riesgo regulatorio; (iii) el descuento por iliquidez; y (iv) el descuento de minoritarios adicional sobre el valor de mercado de los fondos propios (en los escenarios but for y actual).*[678]

465. For Spain, this makes clear that the Tribunal placed the burden on Spain's expert to prove that the parameters of the Brattle Group's quantification were wrong, which amounts to a fundamental procedural violation.[679]

466. As to the standard of proof, Spain asserts that "*it was incumbent on STEAG to provide sufficient evidence to demonstrate that all assumptions and projections of its model, in the concrete application of the model, would in all likelihood occur.*"[680] Yet, in Spain's view, the Tribunal did not require STEAG to provide even a minimum level of evidence.[681] In this regard, Spain adds that the Tribunal's 25% reduction to damages to account for STEAG's contribution to the injury is not based on any evidence, meaning that "*it could have been 23% or 32% or any other percentage*."[682]

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[677] Reply, ¶ 408.
[678] Reply, ¶ 410, *quoting* **RL-149**, Supplementary Decision, ¶ 21.
[679] Reply, ¶¶ 411-412.
[680] Reply, ¶ 415.
[681] **RD-1**, Spain's Opening Presentation, slides 112-115.
[682] Reply, ¶ 416.

467. In sum, Spain accuses the Tribunal of committing a serious breach of procedure by "*convicting without proof; by placing the burden of proof on the Kingdom of Spain and consequently by not requiring Steag to provide a sufficient standard of proof to support its decision.*"[683]

(2) STEAG's Position

468. STEAG denies that the Tribunal departed from any rule of procedure in relation to its assessment of the existence and amount of damages, much less seriously so.[684] In response to Spain's allegations regarding the burden of proof, STEAG emphasizes that the Tribunal expressly acknowledged that STEAG had the burden of proving its damages.[685]

469. For STEAG, the fact that the "*Tribunal was inclined to accept the evidence submitted by STEAG and not the evidence submitted by Spain does not imply that the rules on the burden of proof were infringed.*"[686] STEAG contends that it fully discharged that burden of proof, in particular by submitting two different expert reports prepared by the Brattle Group and an additional annex on the calculation of damages after the hearing.[687]

470. Regarding the standard of proof, STEAG's position, as noted above, is that the Tribunal enjoyed a wide margin of discretion under the applicable rules to assess the evidence.[688] In STEAG's view, Spain has entirely failed to identify the applicable standard of proof, establish how it is a fundamental rule of procedure, or explain how the Tribunal infringed it. Instead, STEAG says, Spain is once again attempting to reopen issues that have been decided in the arbitration.[689]

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[683] **RD-1**, Spain's Opening Presentation, slide 114.

[684] Counter-Memorial, § 5.2.2; Rejoinder, §§ 5.3, 5.4.

[685] Rejoinder, ¶ 150; **CD-1**, STEAG's Opening Presentation, slide 86, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 747, 814.

[686] Rejoinder, ¶ 151, *citing* **CL-235**, *(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on the Annulment Application, 14 October 2022, ¶ 143. *See* **CD-1**, STEAG's Opening Presentation, slide 82.

[687] **CD-1**, STEAG's Opening Presentation, slide 87.

[688] Rejoinder, ¶ 154.

[689] Rejoinder, ¶¶ 153-154.

STEAG highlights several recent annulment decisions against Spain that have confirmed that this approach is not permitted in annulment proceedings.[690]

471. Finally, STEAG points out again that Spain never raised any objection on the basis of the burden or standard of proof after the Tribunal issued the Decision on Jurisdiction and Liability, the Supplementary Decision, or the Tribunal's further directions of 17 March 2021, even though the Tribunal had given the Parties the opportunity to raise questions regarding the calculation of damages.[691]

(3) The Committee's Analysis

472. At the outset, the Committee reiterates that it does not have the powers to review the evidence and make any conclusions based on the evidence in the underlying arbitration. The Committee's role is limited to the assessment of the allocation of the burden of proof and the standard of proof. In other words, the Committee must assess whether the burden of proof was correctly put on a Party and whether the Tribunal seriously departed from a fundamental rule of procedure on burden of proof and standard of proof in relation to its determination of damages and calculation of damages.

473. The Committee further notes that there are different approaches to the question of burden and standard of proof as a ground for annulment under Article 52(1)(d).[692] In some cases, the annulment committees were not fully convinced whether the wrong allocation of the burden of proof or the wrong assessment of the standard of proof constitutes a serious departure from a fundamental rule of procedure.[693] In this particular case, however, the Committee agrees with Spain that a tribunal may seriously depart from the fundamental rules of procedure when allocating the burden of proof and assessing the standard of proof. The Committee finds that treatment of

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[690] Rejoinder, ¶ 155, *citing* **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶¶ 445, 448-449, 454-455, 457.

[691] Counter-Memorial, ¶ 208.

[692] **CL-215**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Application for Annulment, 8 August 2018, ¶¶ 92-94. **CL-216**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶ 135.

[693] **CL-168**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, ¶ 448.

evidence and burden of proof constitutes a significant part of the integrity of the arbitral process and *inter alia* may result in a material impact on the outcome of the case.

474. Consequently, the Committee will address the following questions:

1. Whether the Tribunal failed to assess the proof of harm.

2. Whether Spain waived its right to request annulment on the grounds of burden and standard of proof.

3. Whether the Tribunal wrongly allocated the burden of proof in determining the existence of damages and calculation of damages.

4. Whether the Tribunal seriously departed from the standard of proof in its determination of damages and calculation of damages.

475. In respect of the first issue, the Committee observes that Spain's submissions regarding the Tribunal's alleged failure to assess the proof of harm rather falls within the scope of Article 52(1)(e). This understanding is proved by Spain's own submissions:

> *The Tribunal does not mention how damage has been caused to Steag by the Kingdom of Spain (consequently, as stated above, incurring in another flaw, that of lack of reasoning)* […].[694]

476. The essence of Spain's criticism, in the Committee's view, thus lies in the Tribunal's failure to provide reasons on how the alleged harm was established, an issue which is addressed in Section VI.E *supra* and in Section VII.C(3) *infra*.

477. In respect of the second issue, the Committee agrees that a party must not use its right to request annulment under Article 52(1)(d) in bad faith. The Committee further finds that Spain's criticism mainly concerns the standard of proof, i.e., that the Tribunal's threshold for establishing the harm and calculating the damages was too low. Even if Spain could have raised some of its objections earlier, the overall assessment of the Tribunal's findings regarding the proof of harm and quantification of damages could have been done by the Parties only after the issuance of the

[694] Memorial, ¶ 423.

Award. Consequently, the Committee is not persuaded that Spain could have raised its objections before the Award was issued, and therefore Spain could have not waived its right to request annulment as STEAG suggests.

478. In respect of the third issue, the Committee finds that in the assessment of the existence of harm and the calculation of the damages the Tribunal expressly and correctly put the burden of proof on STEAG. The Tribunal stated:

> *La carga de probar el daño recae sobre la Demandante.*
>
> […]
>
> *El Tribunal observa que la carga de probar el daño recae sobre Steag. Esa carga no se refiere únicamente a la existencia de un daño, sino también a su cuantía.*[695]

479. Although the Tribunal's position was in fact in line with the Parties' views, Spain submits that the Tribunal actually deviated from the allocation of the burden of proof on STEAG. Spain refers to the Supplementary Decision to prove its point.[696] In the Supplementary Decision, the purpose of which was to clarify certain questions relating to the method and relevant factors for the calculation of the indemnifiable damage and to give the Parties an opportunity to present their positions on the calculation of damages,[697] and which was issued after the Decision on Jurisdiction and Liability, the Tribunal stated as follows:

> […] *El Tribunal se decidió por el método DCF propuesto por Brattle y descartó, porque no encontró que Accuracy hubiera justificado suficientemente las razones para incluirlos, y por el contrario encontró justificadas y debidamente sustentadas las razones expuestas por Brattle para excluirlos (i) el estatus preferente de RREEF; (ii) la prima de riesgo regulatorio; (iii) el descuento por iliquidez; y (iv) el descuento de minoritarios adicional sobre el valor de mercado de los fondos propios (en los escenarios but for y actual).*[698]

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[695] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 747, 814.

[696] Memorial, ¶ 435, *citing* **RL-149**, Supplementary Decision, ¶ 21.

[697] *See* **RL-150**, Award, ¶ 9.

[698] **RL-149**, Supplementary Decision, ¶ 21.

480. In Spain's view, the above proves that the Tribunal rejected Spain's position on the calculation of damages not because the Tribunal was persuaded by Brattle, but because the Tribunal did not find Accuracy's position persuasive enough.[699]

481. Having analysed paragraphs 819-820 of the Award and paragraphs 17-23 of the Supplementary Decision, the Committee disagrees with Spain's allegation. Having assessed the Tribunal's findings in the context, the Committee is of the view that the disputed sentence simply refers to the Tribunal's assessment of the two somewhat controversial positions regarding methodology for calculation of damages. The Tribunal noted that, at the same time, it found Brattle's reasoning persuasive and Accuracy's reasoning not sufficiently justified. This approach proves that the Tribunal carefully examined the position of each Party and after deliberation found one of them to be more substantiated. In the Committee's understanding, that is exactly what Spain expected the Tribunal to do: had the Tribunal not mentioned Accuracy's arguments, Spain may have alleged that the Tribunal did not take them into consideration at all. Therefore, the Committee is not convinced that the Tribunal reallocated the burden of proof to Spain and seriously deviated from the fundamental rule of procedure.

482. In respect of the fourth issue, the Committee is mindful of its duty to distinguish between its own and the Tribunal's powers. The Committee refers to ICSID Arbitration Rule 34, which reads as follows:

> *(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*

483. The Committee also accepts STEAG's argument that the Parties agreed on the application of the IBA Guidelines on the Taking of Evidence in International Arbitration, which provide that "[t]*he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"[700]

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[699] *See* Memorial, ¶¶ 436-437; Reply, ¶¶ 411-412.

[700] Counter-Memorial, ¶ 194 *quoting* 2010 IBA Rules on the Taking of Evidence in International Arbitration, Article 9(1); **R-433**, Procedural Order No. 1 (original arbitration), ¶ 18.1 ("[l]*as partes y el Tribunal podrán utilizar, como guía adicional para la práctica de prueba, la versión 2010 de las 'Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional.*'").

484. The Committee's analysis of whether the Tribunal breached the procedural rules concerning the burden and standard of proof rules is based on the following findings by the Tribunal:

1. The Parties have extensively discussed the appropriate method for calculating damages.[701]

2. STEAG suggests the DCF method, comparing actual cash flows from the Arenales Solar plant with hypothetical cash flows, and Spain suggests the ABV method, calculating the annual cash flow based on the investment amount and the expected rate of return.[702]

3. There is no right or wrong method for calculation of damages.[703]

4. The DCF method seems more reasonable for a functioning plant with determinable cash flow.[704]

5. Some aspects of Brattle Group's calculations were not accepted by the Tribunal.[705]

485. The above conclusions demonstrate that Spain's allegations that the Tribunal infringed the standard of proof rules in relation to the quantification of damages are unfounded. The Tribunal critically examined the Parties' positions, accepted some of the calculations, and dismissed others. In addition, the Tribunal provided the Parties with the possibility to present a mutually-agreed calculation on specific aspects of the case, or, alternatively, to submit the document on discrepancies within 90 days.[706]

486. The Committee agrees with the Tribunal that there is no right or wrong method for the calculation of damages, and it is not the Committee's task to reassess decisions that the Tribunal took in the exercise of its discretion. It appears to the Committee that Spain's disagreement with the Tribunal's findings is more related to the fact that the Tribunal did not accept Spain's method

[701] **RL-148**, Decision on Jurisdiction and Liability, ¶ 817.
[702] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 817-818.
[703] **RL-148**, Decision on Jurisdiction and Liability, ¶ 819.
[704] **RL-148**, Decision on Jurisdiction and Liability, ¶ 820.
[705] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 821-822.
[706] **RL-148**, Decision on Jurisdiction and Liability, ¶ 822.

of calculation of damages or all of Spain's arguments rather than to any alleged departure from a fundamental rule of procedure.

487. The Committee therefore finds nothing objectionable in the Tribunal's allocation of the burden of proof or application of the standard of proof in relation to the calculation of damages.

C. ALLEGED VIOLATION OF THE RIGHT TO BE HEARD IN RELATION TO THE ALLEGED LACK OF HARM AND ELEMENTS OF THE DCF ANALYSIS

(1) Spain's Position

488. Spain's next argument is that the Tribunal violated its right to be heard in relation to the lack of injury STEAG suffered and the elements of the DCF analysis. In this respect, Spain distinguishes between "*formal issues*" of the right to be heard, such as the right to file a submission and present a case to the tribunal, and "*material issues*," which "*involve the Tribunal actually 'hearing' the arguments of the Parties*."[707] For Spain, it is not enough for a tribunal to provide a formal right to be heard; it must also consider the parties' arguments and explain why one party's arguments prevail over the others, which goes beyond simply describing the parties' positions.[708]

489. Spain states that the Tribunal's serious procedural violation in relation to damages "*is in full connection*" with its failure to state reasons, and Spain's arguments largely mirror those summarized above in the context of that ground of annulment.[709] In sum, Spain claims that it was deprived of the right to be heard because the Tribunal: (i) did not rule on Spain's argument that STEAG had suffered no injury; (ii) discussed in just one paragraph, without giving any reasons, the choice of the DCF method for damage assessment; (iii) "*assumed, without reservation and without analysis, the entirety of the parameters of the DFC method that had been proposed by STEAG, without even analysing the possibility that some of these assumptions were erroneous in the light of the Kingdom of Spain's claims*"; and (iv) did not give the Parties an opportunity to provide views on what percentage STEAG's contribution to the damages was.[710]

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[707] Memorial, ¶ 483.

[708] Memorial, ¶¶ 484-485.

[709] Memorial, ¶ 486.

[710] Memorial, ¶¶ 487-489; Reply, ¶¶ 444-457.

490. Spain accepts that "*the right to be heard does not include the right to obtain a detailed explanation of each and every argument invoked by the parties*," but asserts that it is an entirely different thing for the Tribunal not to rule on critical issues such as the lack of harm and elements of the DCF model.[711] Spain also argues that it "*presented its case properly. There is no doubt about that*."[712] For Spain, what is "*doubtful*" is that the Tribunal actually considered Spain's arguments.[713] Instead, Spain says, the Tribunal committed a serious procedural violation because it "*did not make the slightest effort to listen to what one of the parties to the proceedings had to say, but decided to listen only to the other*."[714]

491. In response to STEAG's argument that Spain never raised this alleged violation in the arbitration, Spain's position is that after the Tribunal issued the Decision on Jurisdiction and Liability, Spain "*complied with its provisions, since it was not the appropriate procedural moment to challenge it or to contradict its content. The time is now, through this annulment procedure. But this did not imply that the Kingdom of Spain agreed with its contents*."[715]

(2) STEAG's Position

492. STEAG contends that Spain's position is both legally and factually incorrect. On the law, STEAG stresses that the right to be heard – as acknowledged by Spain – concerns a party's right to produce arguments and evidence in support of its case.[716] This right does not, however, require the tribunal to respond to each and every argument raised by the parties, or refer to each and every piece of evidence.[717]

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[711] Reply, ¶ 443.

[712] Reply, ¶ 460.

[713] Reply, ¶ 460.

[714] Memorial, ¶ 491.

[715] Reply, ¶ 461.

[716] Counter-Memorial, ¶ 213, *citing* **RL-228**, *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the ad hoc Committee, 1 March 2011, ¶ 168.

[717] Counter-Memorial, ¶ 213, **RL-160**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ¶ 184; **RL-207**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 149; **CL-220**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶¶ 144, 152.

493. On the facts, STEAG argues that Spain was given ample opportunity to present its case on damages. Indeed, STEAG says, Spain itself acknowledges that it was able to present its case without limitation.[718] In the arbitration, Spain submitted two expert reports on damages, cross-examined STEAG's experts, provided a detailed assessment of the economic impact of the different measures with its first post-hearing brief, and submitted a calculation of damages under its own DCF method. Further, after the Supplementary Decision rejected that Spain could proceed with its own DCF method, the Tribunal granted the Parties an opportunity to ask questions regarding damages, which Spain did.[719] STEAG emphasizes that Spain's questions concerned only the exclusion of the historical losses and the impact of STEAG's sale of its stake in the project.[720]

494. Moreover, STEAG does not see how the Tribunal could have failed to consider Spain's arguments on damages when, in fact, the Tribunal accepted several of those arguments, including Spain's arguments on: contributory fault, the impact of STEAG's sale of its stake in the Arenales Solar project, the lifetime of the plant, the tax gross-up, the "*double-whammy*," and the impact of the adjustments.[721] STEAG stresses that these arguments significantly reduced STEAG's damages from the original claim of EUR 126 million to an award of EUR 26.675 million.[722]

(3) The Committee's Analysis

495. The Committee first observes that Spain's alleged violation of the right to be heard may indeed constitute a ground for annulment since this right is fundamental to the integrity and fairness of the arbitral proceedings. The Committee underlines that this is a serious allegation and the threshold for the breach of the right to be heard is particularly high.

496. In examining whether the Tribunal breached Spain's right to be heard, the Committee will address the following issues:

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[718] Rejoinder, ¶ 162.

[719] Counter-Memorial, ¶ 214.

[720] *Id.*

[721] Rejoinder, ¶¶ 159, 161; **CD-1**, STEAG's Opening Presentation, slides 90-93.

[722] **CD-1**, STEAG's Opening Presentation, slide 93.

1. The scope of the right to be heard.

2. Whether Spain waived its right to request the annulment on this basis.

3. Whether the Tribunal infringed Spain's right to be heard while determining the harm caused and calculating the damages.

497. In respect of the first issue, the Committee appreciates that there are different ways of approaching the right to be heard. Thus, Spain alleges that the right to be heard encompasses the Tribunal's obligation to actually hear the Parties and analyse all the arguments submitted. STEAG, on the contrary, considers this right to be limited to the full presentation of arguments and production of evidence in support of one's case.

498. In the Committee's view, Spain itself recognizes that its interpretation of the right to be heard largely overlaps with the Tribunal's alleged failure to state reasons.[723] When assessing whether there has been a serious departure from this fundamental rule of procedure, the Committee should consider whether the Parties were given a fair and equal opportunity to present their respective cases and respond to the arguments and evidence presented by the other side. At the same time, the alleged failure to address a certain issue or address it sufficiently falls within the scope of the Tribunal's obligation to state reasons for its decision.

499. In this context, the Committee believes that the Tribunal could not breach the right to be heard if it provided a full and fair opportunity to each Party to present its submissions, put its questions and produce its evidence. The Committee's understanding is in line with reasoning adopted by the annulment committee in *Tulip v. Turkey*:

> *The right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them. In particular, the fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or a piece of evidence. Therefore, absence in an*

[723] Memorial, ¶ 486.

> *award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard.*[724]

500. The Committee underlines that it does not have access to the entire evidentiary record of the underlying arbitration and is in any event not empowered to correct the Tribunal's findings. The Committee's task is to determine whether the Tribunal refused Spain's requests to produce evidence, to present its position or to cross-examine any witnesses. The Committee will address Spain's allegations regarding the right to be heard with these general guidelines in mind.

501. In respect of the second issue, the Committee accepts that, in case the Tribunal violated its right to be heard, Spain could have had a relatively limited possibility to raise this issue during the arbitral proceedings. Indeed, given that Spain's criticism does not concern formal procedural issues, but rather material issues, such as the Tribunal's obligation to consider the Parties' arguments and explain why one Party's arguments should prevail over the other's, Spain could not have comprehensively analysed the Tribunal's findings – of which it now complains – before the Award was rendered. Consequently, the Committee is not persuaded that a possibility to object to alleged procedural violations amounts to Spain's waiver of the right to request the annulment of the Award.

502. In respect of the third issue, Spain alleges that the Tribunal breached its right to be heard when it (i) ruled that STEAG suffered some injury; (ii) unreasonably chose the DCF method and accepted its parameters; and (iii) did not give Spain the opportunity to comment on the percentage of STEAG's contribution to the damages.[725]

503. The Committee finds that Spain's allegations regarding the existence of STEAG's injury do not fall within the scope of the Committee's powers, particularly in light of Article 52(1)(d) of the ICSID Convention. The Committee dismisses this argument as it relates to the substantive findings of the Tribunal. Similarly, Spain's allegations regarding the choice of the DCF method are unsubstantiated and in part addressed in Section VI.E(3) *supra*, in the context of the Committee's analysis of the allegations concerning the Tribunal's failure to state reasons and in

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[724] **RL-207**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 82.

[725] Memorial, ¶¶ 487-489; Reply, ¶¶ 444-457.

Section VII.B(3) *supra* addressing the allegations relating to the Tribunal's erroneous application of the burden and standard of proof rules.

504. With regard to the right to be heard, the Committee accepts STEAG's position that the Tribunal granted Spain a full and fair opportunity to present its case. More specifically:

1. Spain submitted two expert reports on damages.

2. Spain cross-examined STEAG's experts.

3. Spain provided a detailed assessment of the economic impact of the different measures with its first post-hearing brief.

4. Spain submitted a calculation of damages under its own DCF method.

5. Spain exercised its opportunity to ask questions regarding damages.[726]

505. Given the above facts, let alone the Tribunal's acceptance of Spain's arguments and reduction of STEAG's damages from the original claim of EUR 126 million to an Award of EUR 26.675 million,[727] the Committee finds no indication that the Tribunal seriously departed from a fundamental rule of procedure by infringing Spain's right to be heard.

D. THE BURDEN AND STANDARD OF PROOF APPLIED IN RELATION TO STEAG'S DUE DILIGENCE

(1) Spain's Position

506. Spain's final argument is that the Tribunal seriously departed from the fundamental rule of *onus probandi incumbit actori* by "*ignoring STEAG's internal documentation evidencing the possibility of regulatory changes and failing to require any legal due diligence by the Claimant on the pre-investment regulatory framework.*"[728] Instead, Spain says, the Tribunal "*merely gave credence to Claimant's subjective and partial interpretation of the regulatory framework.*"[729]

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[726] Counter-Memorial, ¶ 214.

[727] **CD-1**, STEAG's Opening Presentation, slide 93.

[728] Reply, ¶ 441.

[729] Memorial, ¶ 482. *See* **RD-1**, Spain's Opening Presentation, slide 127.

507. Reviewing the case record in detail, Spain sets out why it considers that: (i) STEAG did not carry out legal due diligence prior to making its investment; (ii) STEAG was aware or should have been aware of the Spanish Supreme Court's case law that "*there is no 'right' for the economic regime to remain unchanged*"; and (iii) STEAG's internal documentation evidenced its knowledge of the possibility of regulatory changes.[730]

508. Spain argues that the Tribunal ignored all of this when it determined that the regulatory changes were not foreseeable, even though the Tribunal had previously acknowledged that an investor has the burden of performing adequate and reasonable due diligence, and even though the Tribunal purported to have taken "*en consideración el argumento de España acerca de la supuesta previsibilidad del NRR para un inversionista diligente, y acerca de la supuesta ausencia de diligencia por parte de Steag en lo que se refiere al riesgo político y legal que suponía una inversión en España en el año 2012*."[731] Spain criticizes in particular the Tribunal's finding that "[a]*ún si se aceptara la premisa de que un inversionista diligente debía anticipar un cambio, lo cierto es que no era posible pronosticar la eliminación total de los criterios de tarifa, primas y límites inferior y superior, determinantes para la rentabilidad de Arenales Solar*."[732]

509. According to Spain, its position is supported by Professor Dupuy's Dissenting Opinion, in which he explained that:

> *Esta firme posición de la Corte Internacional de Justicia también suena como un cuento con moraleja: recuerda a todos los límites de la invocación de las expectativas legítimas presentadas en un caso por el inversor. Esto significa, por supuesto, que la totalidad de la carga de la prueba de la realidad de tales expectativas, así como de su legitimidad, recae plenamente y en todos sus elementos en la demandante. Las expectativas pueden tener un efecto decisivo cuando se basan en promesas precisas y tangibles hechas por la autoridad competente en un contexto bien determinado, pero no tienen el poder básico de alterar el poder normativo del Estado (lo que, además, la presente Decisión no confirma en modo alguno). En otras palabras, las expectativas legítimas deben evaluarse con todo*

[730] Memorial, ¶¶ 458-481.

[731] Memorial, ¶¶ 448-449, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 635, 636.

[732] Memorial, ¶¶ 449-450, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 636.

> *el cuidado debido y tienen que interpretarse de manera restrictiva y, por lo tanto, no invasiva.*
>
> […]
>
> *En conclusión, debe concluirse que España no defraudó la única y legítima expectativa de Steag, ya que garantizó, más allá de las sucesivas modificaciones de su marco normativo, el acceso de este inversor extranjero a un rendimiento concretamente razonable. La Demandante ha respetado el trato justo y equitativo al que está obligada en virtud del artículo 10(1) del TCE. A la luz de esta conclusión, e independientemente de toda la estima que tengo por mis colegas, no puedo sino estar en desacuerdo con la solución que adoptaron en la Decisión.*[733]

510. Spain also cites arbitral awards in which tribunals confirmed that the investor must act diligently. For example, Spain submits that in *Charanne v. Spain*, the tribunal stated:

> *The determination of whether the investor's legitimate expectations have been defeated must be based on an objective standard or analysis. The mere subjective belief that the investor could have had at the time of making the investment does not suffice.* […] [I]*n order to rely on legitimate expectations, the Claimants should have conducted a diligent analysis of the legal framework applicable to their investment.*[734]

511. With this background, Spain considers it "*particularly serious*" that the Tribunal would violate the burden of proof in determining STEAG's legitimate expectations, and urges the Committee to annul the Award on this basis.[735]

(2) STEAG's Position

512. STEAG again accuses Spain of improperly advancing its disagreement with the Tribunal's findings in the guise of a ground for annulment. However Spain feels about the Tribunal's decisions on STEAG's legitimate expectations and the foreseeability of the regulatory changes, STEAG contends that this has nothing to do with the burden of proof.[736] In fact, STEAG says, the

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[733] Memorial, ¶¶ 454-455, *quoting* **RL-149**, Dupuy Dissent, ¶¶ 28, 43.

[734] Reply, ¶ 436, *quoting* **RL-49BIS**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. V 062/2012, Final Award, 21 January 2016, ¶¶ 495, 505.

[735] Reply, ¶ 440, *citing* **RL-148**, Decision on Jurisdiction and Liability, ¶ 594.

[736] *See* Rejoinder, ¶ 150; Counter-Memorial, ¶¶ 199, 204.

Tribunal was clear that "*la carga de probar la violación del estándar de TJE recae sobre Steag*."[737] Similarly, STEAG highlights the Tribunal's observation that STEAG had a duty to evidence that it carried out sufficient due diligence.[738]

513. STEAG asserts that it discharged its burden of proof regarding its due diligence, noting that:

1. It filed several exhibits containing external advice it obtained before its investment and internal documents assessing the investment.

2. It was transparent during the document production stage and accepted all of Spain's requests on this issue.

3. Its executive and senior management at the time of the investment attended the hearing and were cross-examined by Spain.[739]

514. According to STEAG, the Tribunal thoroughly reviewed the content of the due diligence carried out by external advisors, the result of the internal due diligence, and the position of STEAG's management in paragraphs 528-532 of the Decision on Jurisdiction and Liability (which, STEAG says, Spain ignores).[740] It was on the basis of this assessment of the evidence that the Tribunal identified STEAG's legitimate expectations.[741]

515. Thus, STEAG considers that the Tribunal did not depart from rules regarding the standard of proof, particularly given the Tribunal's wide discretion as to the assessment of evidence.[742] In this respect, STEAG cites the observation of the *NextEra v. Spain* committee that:

> [T]*he Tribunal's treatment and assessment of the evidence concerning the Claimants' alleged due diligence and privilege attached to certain documents was within its discretion. The Tribunal had the 'discretion to make its opinion about the relevance*

[737] **CD-1**, STEAG's Opening Presentation, slide 80, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 500.
[738] Rejoinder, ¶ 150, *quoting* **RL-148**, Decision on Jurisdiction and Liability, ¶ 527.
[739] Counter-Memorial, ¶ 200; **CD-1**, STEAG's Opening Presentation, slide 81.
[740] Counter-Memorial, ¶ 201.
[741] *Id.*
[742] **CD-1**, STEAG's Opening Presentation, slides 83-84.

> *and evaluation of the elements of proof" concerning the assessment of the due diligence and privilege.*[743]

516. Ultimately, STEAG concludes that none of Spain's arguments fits in an ICSID annulment action.[744]

(3) The Committee's Analysis

517. The Committee has already explained its understanding of the burden and the standard of proof in Section VII.B(3) *supra*, and hence will not repeat itself in this Section. Instead, the Committee would like to emphasize that the Tribunal has wide discretion in the assessment of evidence. On this point, the Committee agrees with *NextEra v. Spain* committee, which found that:

> [T]he *Tribunal's treatment and assessment of the evidence concerning the Claimants' alleged due diligence and privilege attached to certain documents was within its discretion. The Tribunal had the 'discretion to make its opinion about the relevance and evaluation of the elements of proof' concerning the assessment of the due diligence and privilege.*[745]

518. The Committee will therefore focus its analysis on the following issues:

1. Whether Spain waived its right to submit an annulment application on this ground.

2. Whether the Tribunal wrongly allocated the burden of proof.

3. Whether the Tribunal seriously departed from the standard of proof in its determination concerning due diligence.

519. In respect of the first issue, the Committee notes that Spain's criticism is related to the allocation of the burden and the standard of proof regarding STEAG's due diligence. More specifically, Spain's position concerns the Tribunal's findings presented in the Decision on

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[743] **CD-1**, STEAG's Opening Presentation, slide 84, *quoting* **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 449.

[744] Counter-Memorial, ¶ 204.

[745] **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 449.

Jurisdiction and Liability.[746] Indeed, the Committee notes that the Tribunal dealt with the question of STEAG's due diligence when assessing Spain's alleged liability, and only addressed the issues of damages and their quantification in its Supplementary Decision and the Award. In such circumstances, Spain could not have waived its right to challenge the allocation of the burden of proof after the issuance of the Decision on Jurisdiction and Liability, since any challenge of the Tribunal's findings on STEAG's due diligence would have fallen outside the scope of the questions identified by the Tribunal for further consideration.[747] Therefore, the Committee finds that Spain did not behave inappropriately and did not waive its right under ICSID Arbitration Rule 27.

520. In respect of the second issue, the Committee observes that there is no dispute between the Parties as to the allocation of the burden of proof. The Parties agree that STEAG must prove that STEAG, as an investor, fully complied with its due diligence obligations before making an investment.[748] This is the same standard that the Tribunal applied:

> *El Tribunal concuerda con España en que un inversionista tiene la carga de realizar un due diligence adecuado y razonable, tomando en consideración las normas básicas aplicables a la inversión, el marco regulatorio relevante y los cambios de dicho marco que sean previsibles en el momento en que se realiza la inversión.*[749]

521. Thus, the Committee considers that the Tribunal did not deviate from the fundamental principle of procedure and does not find it necessary to elaborate on this issue any further.

522. In respect of the third issue, the Committee's analysis is based on the Tribunal's findings concerning the due diligence of STEAG. More specifically:

1. The Tribunal found that the investor has the responsibility to conduct due diligence adequately, considering the applicable regulatory framework and foreseeable changes at the time of the investment.[750]

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[746] Reply, ¶¶ 418-419.

[747] *See* **RL-148**, Decision on Jurisdiction and Liability, ¶ 823(6).

[748] *See* Memorial, ¶¶ 445-447; Counter-Memorial, ¶ 192. *See also*, Rejoinder, ¶ 150 (first bullet).

[749] **RL-148**, Decision on Jurisdiction and Liability, ¶ 527.

[750] **RL-148**, Decision on Jurisdiction and Liability, ¶ 527.

2. The Tribunal found that an investor's expectations must be based on objective analysis and not merely on subjective beliefs held at the time of the investment.[751]

3. The Tribunal examined the due diligence reports conducted by STEAG before the date of the investment to determine the existence and reasonableness of its legitimate expectations.[752]

4. The Tribunal found that the reports extensively discussed all the regulations that developed the special economic regime and highlighted the importance of registering Arenales Solar in the pre-allocation registry to secure the feed-in tariffs.[753]

523. Consequently, Spain's criticism regarding the Tribunal's Award is not substantiated. In fact, the Tribunal specifically noted that STEAG carried out due diligence prior to making the investment and discussed in detail STEAG's internal documentation. Moreover, the Committee has noted STEAG's argument that Spain never contested that it was granted access to STEAG's documents during document production stage and that it had the opportunity to cross-examine STEAG's management.[754]

524. The above facts indicate that the Tribunal had a variety of evidence to assess. Spain, in its turn, has failed to explain how the Tribunal infringed its procedural rights while ruling on the due diligence issue.

525. The Committee concludes that Spain's dissatisfaction is related to the Tribunal's substantive findings rather than to the Tribunal's breach of any procedural rules. The Committee therefore finds no indication that the Tribunal seriously departed from a fundamental rule of procedure and dismisses Spain's arguments in their entirety.

[751] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 524, 526.
[752] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 528-532.
[753] **RL-148**, Decision on Jurisdiction and Liability, ¶¶ 528-532.
[754] Counter-Memorial, ¶ 200.

VIII. OTHER GROUNDS FOR ANNULMENT

526. In its submissions, Spain also requested this Committee to evaluate whether the factual background presented by the Parties could serve as an additional ground for annulment:

> *In the event that the Annulment Committee considers that the facts described in this Memorial constitute a ground for annulment on a ground of Article 52(1) of the ICSID Convention other than those alleged, the Kingdom of Spain requests the Committee to proceed to annul the Award on that ground as well.*[755]

527. The Committee reiterates that it operates within specific limits of its powers. The Committee's role is to consider the arguments and evidence put forth by the Parties within the framework of the existing case and applicable legal standards, not to come up with its own arguments.

528. In essence, the scope of the Committee's powers is defined by the Parties' arguments and the legal framework provided by the ICSID Convention and the relevant rules. It cannot independently introduce new grounds for annulment or make decisions based on information or issues not raised by the Parties during the proceedings. This is consistent with the principles of due process and procedural fairness in international arbitration.

529. In any event, Article 52(1) of the ICSID Convention sets forth five potential grounds for annulment, and three of them were raised by Spain in its annulment application. Neither Party has submitted that the Award was issued by an improperly constituted or corrupt Tribunal, and this Committee does not have any reason to consider these grounds for annulment any further.

530. Therefore, the Committee rejects Spain's request to annul the Award on any other annulment ground than those substantiated by Spain in its pleadings in these annulment proceedings.

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[755] Reply, ¶ 468. *See also* Spain's Post-Hearing Brief, ¶ 159 (similar language, but referring to "*the facts described in the Memorials, during the annulment hearing and in these PHBs*").

IX. COSTS

A. THE PARTIES' POSITIONS

531. The Parties filed their submissions on costs on 14 July 2023. The Committee briefly summarizes the Parties' positions below.[756]

(1) Spain's Position

532. Spain submits that pursuant to Article 61(2) of the ICSID Convention, the Committee is granted the authority to assess and apportion the costs of these proceedings between the Parties.[757] Spain neither contests the Committee's powers nor the Committee's degree of discretion in the allocation of such costs.[758]

533. Spain suggests that the "*costs follow the event*" approach, which has been adopted by other annulment committees, is also appropriate in the present case. Spain also contends that it should be entitled to recover the costs even if the Committee only partially "*correct*[s] *the amount of*" the Award.[759]

534. Overall, Spain requests to recover the following costs:

1. ICSID fees and advance payments in the amount of 644,674.72 EUR.[760]
2. Legal fees in the amount of 750,000 EUR.[761]
3. Translation fees in the amount of 8,864.46 EUR.[762]
4. Travel expenses in the amount of 8,997.92 EUR.[763]

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[756] *See supra*, ¶ 72.
[757] Spain's Submission on Costs, ¶ 4.
[758] Spain's Submission on Costs, ¶ 5.
[759] Spain's Submission on Costs, ¶¶ 6, 8.
[760] Spain's Submission on Costs, ¶¶ 13-14.
[761] Spain's Submission on Costs, ¶ 15.
[762] Spain's Submission on Costs, ¶ 16.
[763] Spain's Submission on Costs, ¶ 17.

5. Other expenses, *inter alia*, related to the expert reports in the amount of 46,050.66 EUR.[764]

535. In sum, Spain requests to recover 1,458,587.76 EUR along with post-award interest at a compound rate defined by the Committee.[765]

(2) STEAG's Position

536. STEAG agrees that the ICSID Convention and ICSID Arbitration Rules grant the Committee the powers to allocate the costs of proceedings, and that the Committee enjoys wide discretion in this respect.[766] STEAG further explains its position as follows: (i) the "*costs follow the event*" approach constitutes a widely adopted principle in international arbitration;[767] (ii) upon dismissal of Spain's application for annulment, the "*costs follow the event*" standard should be applied in the present case;[768] (iii) the practice of other committees in cases involving Spain has been to order Spain to bear the costs of the annulment proceedings, recognizing that States cannot abuse of the ICSID system;[769] (iv) STEAG should be awarded the payment of interest on legal costs.[770]

537. First, STEAG claims that the "*costs follow the event*" standard should be applied because this principle:

1. Is widely adopted in international arbitration, including in ICSID arbitrations.[771]

2. Ensures the protection of both parties from frivolous claims and thus to encourage only meritorious claims.[772]

[764] Spain's Submission on Costs, ¶¶ 18-19.
[765] Spain's Submission on Costs, ¶¶ 20-22.
[766] STEAG's Submission on Costs, ¶¶ 3-4.
[767] STEAG's Submission on Costs, § 2.1, ¶ 9.
[768] STEAG's Submission on Costs, § 2.2.
[769] STEAG's Submission on Costs, § 2.3, ¶ 21.
[770] STEAG's Submission on Costs, § 2.4.
[771] STEAG's Submission on Costs, ¶ 9.
[772] STEAG's Submission on Costs, ¶ 10.

3. Acts "*as a deterrent against unreasonable behaviour during the proceedings*";[773]

4. Ensures reimbursement of expenses to the successful parties, thus supporting access to justice.[774]

5. Contributes to "*maintaining fairness and equity within the legal system.*"[775]

538. Second, STEAG submits that if Spain's application for annulment is dismissed, the Committee must apply the "*costs follow the event*" standard in full because:

1. Spain agreed with this approach in other annulment cases.[776]

2. Spain's application is clearly not meritorious because no ICSID arbitral tribunal or annulment committee has ever accepted the intra-EU exception, the claims regarding failure to state reasons and serious departure from a fundamental rule of procedure are "*mere smokescreens*", and Spain's request for stay was dismissed.[777]

3. Spain's behaviour has led to an increase in the costs as a result of the submission of a second expert report by Professor Gosalbo, which prompted the need to submit a second expert report by Professor Eeckhout.[778]

4. STEAG, a German corporation "*fighting against the vast resources of Spain*," should not be "*forced to sustain the costs of an application for annulment that has failed.*"[779]

539. Third, STEAG contends that Spain should bear all costs since "[t]*he only purpose of Spain's requests is to delay as much as possible the payment of its obligations under the ICSID Convention and the ECT.*"[780] STEAG finds Spain's annulment application on the basis of the intra-

[773] STEAG's Submission on Costs, ¶ 11.
[774] STEAG's Submission on Costs, ¶ 12.
[775] STEAG's Submission on Costs, ¶ 13.
[776] STEAG's Submission on Costs, ¶ 15.
[777] STEAG's Submission on Costs, ¶ 16.
[778] STEAG's Submission on Costs, ¶ 17.
[779] STEAG's Submission on Costs, ¶ 18.
[780] STEAG's Submission on Costs, ¶ 20.

EU exception to be an abuse of the ICSID annulment system because these arguments have already been rejected by numerous other arbitral tribunals and annulment committees.[781]

540. In STEAG's view, the Committee must adjust the costs accordingly to prevent the States from abusing the system and delaying compliance with the awards. STEAG supports its position with references to numerous cases involving Spain such as *RREEF*, *Antin*, *NextEra*, *Hydro*, *SolEs*, *Cube* and *CperaFund*, where Spain was ordered to bear all costs, as well as *InfraRed*, *BayWa* and *9REN* cases, where Spain was ordered to bear the majority of the costs.[782]

541. Fourth, STEAG requests the Committee to award the payment of "*interest on legal costs*" to deter frivolous or unjustified proceedings.[783] STEAG underlines that the interest on legal costs constitutes a proper compensation of the resources the party has been deprived of, and supports its position with references to interest rates in the Eurozone ranging from 3.5% to 4.25%.[784] STEAG "*requests that Spain is ordered to pay interest over legal costs at the rate deemed applicable by the Committee bearing in mind the above interest rates in the euro area*."[785]

542. Finally, STEAG summarizes the costs it has incurred in the annulment proceeding as follows, in the total amount of EUR 791,585.41 ("**STEAG's legal costs**"):[786]

[781] STEAG's Submission on Costs, ¶¶ 20-21.
[782] STEAG's Submission on Costs, ¶¶ 21-22.
[783] STEAG's Submission on Costs, ¶¶ 25-26.
[784] STEAG's Submission on Costs, ¶¶ 27-28.
[785] STEAG's Submission on Costs, ¶ 29.
[786] STEAG's Submission on Costs, ¶ 2.

	Concept	Total	VAT	Total
1.	**Lawyers' fees and disbursements (including hearing catering, travel expenses, and out-of-pocket expenses) (CLIFFORD CHANCE)**	**€ 738,618.61**	**N/A**	**€ 738,618.61**
a)	Invoice no. 256610034513	€ 269,607.05	N/A	€ 269,607.05
b)	Invoice no. 256610035131	€ 162,762.57	N/A	€ 162,762.57
c)	Invoice no. 256610035583	€ 214,330.99	N/A	€ 214,330.99
d)	Work in progress to be invoiced at the conclusion of this stage	€ 91,918.00	N/A	€ 91,918.00
2.	**Experts' fees and disbursements (Prof. Piet Eeckhout)**	**€ 52,966.80**	**N/A**	**€ 52,966.80 €**
a)	Invoice no. 7/22 re first expert report	€ 19,500	N/A	€ 19,500
b)	Invoice no. 1/23 re second expert report	€ 9,750	N/A	€ 9,750
c)	Invoice no. 2/23 re attendance to the hearing	€ 23,716.80	N/A	€ 23,716.80

B. THE COSTS OF THE PROCEEDINGS

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

Description	Amount (in USD)
Committee's Fees and Expenses	
Ms. Eva Kalnina, President	USD 200,046.45
Dr. Milton Estuardo Argueta Pinto, Member	USD 110,290.35
Mr. Ricardo Vásquez Urra, Member	USD 139,795.00
ICSID's Administrative Fees	USD 136,000.00
Direct Expenses	USD 75,168.69
Total	**USD 661,300.49**

544. The above costs have been paid out of the advances made by Spain (as Applicant on Annulment).[787] The expended portion of the advances to cover the above costs of the annulment proceeding was USD 661,300.49 (disbursed from Spain's advances).

[787] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance shall be reimbursed to Spain based on the payments that it advanced to ICSID.

C. THE COMMITTEE'S ANALYSIS

545. Having examined the Parties' positions on the question of costs' allocation, the Committee will address the following issues: (i) the Committee's powers and discretion to award costs; (ii) whether the standard for costs allocation is the "*costs follow the event*" rule; (iii) whether Spain's claims were frivolous and aimed at delaying the enforcement of the Award; (iv) whether interest has accrued and should be granted.

546. In respect of the first issue, the Committee is guided by Article 61(2) of the ICSID Convention, which states as follows:

> *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.*

547. As noted by Article 52(4) of the ICSID Convention and 2006 ICSID Arbitration Rule 53, the rules enshrined in Article 61(2) of the ICSID Convention apply *mutatis mutandis* to an annulment proceeding. Both Parties expressly agree with this.[788] The Parties also agree with the Committee's discretion to allocate costs and legal fees, as prescribed by 2006 ICSID Arbitration Rule 28.[789] In light of the above, the Committee does not find it necessary to provide any further comments on this particular issue.

548. In respect of the second issue, the Committee agrees with the Parties' positions that the "*costs follow the event*" rule is applicable in the present case, which means that the losing party is generally responsible for paying the legal costs of the winning party. The Committee agrees that this rule is protects parties from frivolous claims and ensures efficient dispute resolution.

549. Although the ICSID Arbitration Rules do not provide specific criteria for allocation of costs, it is widely accepted that tribunals and committees should take into account the conduct of each party, *i.e.*, whether parties acted in good faith, submitted substantiated claims and did not

[788] Spain's Submission on Costs, ¶ 4; STEAG's Submission on Costs, ¶¶ 3-4.

[789] Spain's Submission on Costs, ¶ 5; STEAG's Submission on Costs, ¶ 4.

abuse procedural tools to delay the proceedings.[790] Additionally, some *ad hoc* committees have also examined the complexity of the issues at stake:

> *However, the issues under discussion in these proceedings, in particular that of the Tribunal's jurisdiction, present a high degree of complexity, and have been the object of divergent decisions by courts and tribunals of high standing. Therefore, albeit unsuccessful, Spain's application for annulment cannot be deemed as futile or unsubstantiated.*[791]

550. Therefore, in allocating costs, the Committee will consider whether the claims were frivolous and aimed at delaying the enforcement of the Award, and whether the issues discussed were complex and debatable.

551. In respect of the third issue, the Committee is not persuaded that Spain's application was totally frivolous and aimed at abusing the ICSID system.

552. Albeit some of Spain's arguments have indeed been already discussed in other arbitrations against Spain under the ECT, both Parties agree that this Committee is not bound by the decisions of other annulment committees. The Committee has full discretion to decide the claims presented by Spain based on its own analysis. Therefore, it would not only be incorrect to assume that Spain should be prevented from submitting its Annulment Application in this case because of its lack of success in other cases, but such an approach would also constitute a violation of Spain's procedural rights.

553. The Committee additionally notes that Spain supported its arguments by very recent arbitral awards and court decisions rendered within the European Union, which could not have been discussed by the majority of annulment committees in previous cases.[792] In brief, the

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[790] *See, e.g.,* **RL-235**, *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, ¶¶ 88-90; **CL-224**, *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17 November 2022, ¶ 329.

[791] **CL-237**, *BayWa r.e. AG v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Annulment, 8 May 2023, ¶ 233. *See also* **CL-224**, *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17 November 2022, ¶ 328.

[792] *See supra*, ¶¶ 158-159.

Committee finds that Spain's arguments raised complex and debatable issues, which cannot be treated as a mere delaying tactic.

554. Further, to prove Spain's procedural misconduct, STEAG refers to Spain's second expert report. STEAG claims that it was unnecessary and repetitive, and thus only served to delay the proceedings. The Committee finds that, generally speaking, arguments presented in two or more expert reports are often cross-referenced, which does not constitute an abuse of procedural rights. Given that STEAG itself requested to respond to the arguments outlined by Professor Gosalbo in his second report, the Committee does not find any misconduct by Spain in this respect.

555. Overall, the Committee does not find Spain's Application absolutely frivolous or submitted in breach of any procedural rights, which allows the Committee to apply "*the costs follow the event*" standard with an alteration. The Committee's finding on this point is reinforced by the conclusion of the *ad hoc* committee in *InfraRed v. Spain*:

> *In the circumstances, the Committee considers that it is appropriate that the costs follow the event, although not in their entirety as the Application for Annulment has not been frivolous and the issues at stake were relevant enough to justify it.*[793]

556. In respect of the fourth issue, the Committee recalls that Spain has requested post-award interest on all amounts due "*at a compound rate of interest to be determined by the Committee*,"[794] while STEAG has requested simple interest on its legal and expert's fees, in the range of 3.5% to 4.25%.[795]

557. Since the Parties broadly agree on the payment of interest, and having carefully considered all the circumstances of the case, the Committee finds it appropriate to grant a simple annual interest at the rate of 4% on all amounts due. On this point, the Committee agrees with the *ad hoc*

[793] **CL-189**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, ¶ 813.

[794] Spain's Submission on Costs, ¶ 22.

[795] STEAG's Submission on Costs, ¶¶ 26-29.

committee in *NextEra v. Spain*, which found that "*in the normal course of business, interest should accrue for sums due until payment is made*."[796]

558. In light of the above findings, the Committee decides that the costs of these proceedings should be allocated as follows:

1. Spain shall bear its own legal costs and expenses.

2. Spain shall reimburse STEAG 90% of STEAG's legal costs (*supra*, paragraph 542), in the amount of EUR 712,426.869.

3. STEAG shall bear the remaining 10% of STEAG's legal costs (*supra*, paragraph 542) (i.e., EUR 79,158.541).

4. If payment of the above-mentioned amount of EUR 712,426.869 is not made by Spain within 60 days from the notification of the present decision, the amount payable shall be increased by a simple interest at the rate of 4 % annually.

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

X. DECISION

559. For the foregoing reasons, the *ad hoc* Committee unanimously decides as follows:

1. Spain's Application for Annulment of the Award rendered on 17 August 2021 is dismissed in its entirety.

2. The Applicant (Spain) shall bear all the costs of the proceedings, including the fees and expenses of the Members of the Committee, and ICSID's administrative fee and direct expenses, in the amount of USD 661,300.49.

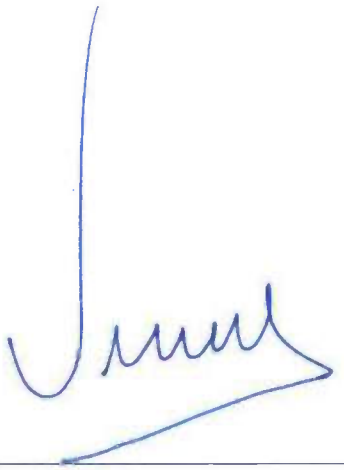
[796] **CL-166**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, ¶ 531.

3. The Applicant (Spain) shall bear its own legal costs and expenses and reimburse STEAG 90% of STEAG's legal costs (*supra*, paragraph 542), in the amount of EUR 712,426.869.

4. STEAG shall bear the remaining 10% of STEAG's legal costs (*supra*, paragraph 542), in the amount of EUR 79,158.541.

5. The Applicant (Spain) shall make the payment of the above-mentioned amount (*see supra*, item 3) within 60 days of the Decision on Annulment; otherwise the amount payable shall be increased by simple interest at the rate of 4 % annually.

6. All other claims and requests are dismissed.



Milton Estuardo Argueta Pinto
Member of the *ad hoc* Committee
Date:

Ricardo Vásquez Urra
Member of the *ad hoc* Committee
Date: SEP 27 2024

Eva Kalnina
President of the *ad hoc* Committee
Date:

Milton Estuardo Argueta Pinto
Member of the *ad hoc* Committee
Date: SEP 27 2024

Ricardo Vásquez Urra
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President of the *ad hoc* Committee
Date: SEP 2 9 2024