INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

WATKINS HOLDINGS S.À R.L.

WATKINS (NED) 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)

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 21 February 2023.

Meg Kinnear
Secretary-General

Washington, D.C., 21 February 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

WATKINS HOLDINGS S.À R.L.

WATKINS (NED) 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.

("Claimants" or "Watkins Parties")

and

KINGDOM OF SPAIN

("Spain")

ICSID Case No ARB/15/44

DECISION ON ANNULMENT

Members of the ad hoc Committee
Professor Lawrence Boo, President
Ms Olufunke Adekoya, Member
Ms Dyalá Jiménez Figueres, Member

Committee Assistant
Mr Eugene Thong

Secretary of the ad hoc Committee
Ms. Celeste E. Salinas Quero

Date of dispatch to the Parties: 21 February 2023

REPRESENTATION OF THE PARTIES

Representing Watkins Holdings S.à r.l., Watkins (Ned) 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.

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Kingdom of Spain

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KEY ABBREVIATIONS / DEFINED TERMS	
1998 Statement	1998 Statement made under Article 26(3)(b) (ii) of the ECT by the EU and the EU members States
ABV	Asset-based valuation
Accuracy Report	Expert Report submitted by Dr Eduard Saura of Accuracy dated 5 May 2021
Achmea	*Slovak Republic v Achmea BV*, Case C-284/16, CJEU Judgment dated 6 March 2018
Annulment Application	Spain's application dated 21 July 2020 for annulment of the Award
Annulment Counter-Memorial	Claimants' Counter-Memorial on Annulment dated 9 July 2021
Annulment Memorial	Spain's Memorial on Annulment dated 7 May 2021
Annulment Rejoinder	Claimants' Rejoinder on Annulment dated 19 November 2021
Annulment Reply	Spain's Reply on Annulment dated 24 September 2021
Award or Majority Award or Watkins Award	Final award rendered on 21 January 2020 in the arbitration proceeding
Brattle	The Brattle Group
CJEU	Court of Justice of the European Union
Claimants or Watkins or Watkins Parties	Watkins Holdings S.à r.l.; Watkins (Ned) 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.
CNE	National Energy Commission
Committee	*Ad hoc* annulment committee constituted on 13 January 2021 comprising Professor Lawrence Boo Geok Seng (President), Ms Olufunke Adekoya (Member), and Ms Dyalá Jiménez Figueres (Member)
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
CPI	Inflation adjustment index
DCF	Discounted cashflow
Declaration of 15 January 2019	Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, dated 15 January 2019

KEY ABBREVIATIONS / DEFINED TERMS	
Disputed Measures	Law 15/2012, RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and Ministerial Order IET/1045/2014 dated 16 June 2014 (as defined in the Award)
EC	European Commission
EC's Application	EC's application for leave to intervene as non-disputing party in the annulment proceedings dated 21 January 2021
EC's Submission	EC's written submission dated 16 May 2021 addressing the sole question of whether Article 26 of the ECT applies to disputes between parties to whom EU law applies
ECT	Energy Charter Treaty
EU	European Union
EU Treaties	TEU and TFEU
EUR or €	Euro
Expert Reports	Gosalbo Report and Accuracy Report
FET	Fair and equitable treatment
FIT	Feed-in-Tariff
Gosalbo Report	Expert Report submitted by Professor Ricardo Gosalbo Bono dated 30 April 2021
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Background Paper	Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016
ILC	International Law Commission
Komstroy	*Republic of Moldova v Komstroy LLC*, Case C-741/19, CJEU Judgment dated 2 September 2021
Majority or Majority Tribunal	The majority of the Tribunal comprising Mr Cecil W.M. Abraham and Dr Michael Pryles
Parties	Claimants and Spain
RD	Royal Decree
RDL	Royal Decree-Law
RE	Renewable energy

KEY ABBREVIATIONS / DEFINED TERMS	
Rectification Decision	Decision on Spain's Request for Rectification of the Award dated 13 July 2020
REIO	Regional Economic Integration Organisation (as defined in the ECT)
Ruiz Fabri Dissent	Dissent on Liability and Quantum of Professor Dr Hélène Ruiz Fabri dated 9 January 2020
SES	Spanish Electricity System
Spain	Kingdom of Spain
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Tribunal	Arbitral tribunal constituted on 31 March 2016 comprising Mr Cecil W.M. Abraham (President appointed by the Parties), Dr Michael Pryles (appointed by the Claimants), and Professor Dr Hélène Ruiz Fabri (appointed by Spain)
TVPEE	Tax on the value of the production of electrical energy pursuant to Law 15/2012, of 28 December 2012
Umbrella Clause	The provision under Article 10(1) of the ECT to observe obligations entered into with investors or investments
USD	US dollar
VCLT	Vienna Convention on the Law of Treaties

I. THE PARTIES

1. This is an application for annulment ("**Annulment Application**") of the award rendered on 21 January 2020 in the arbitration proceedings between Watkins Holdings S.à r.l., Watkins (Ned) B.V., Watkins Spain, S.L., Redpier, S.L., Northsea Spain, S.L., Parque Eólico Marmellar, S.L., Parque Eólico La Boga, S.L. v Kingdom of Spain (ICSID Case No ARB/15/44) ("**Award**").

2. The claimants comprise the following entities (together, "**Claimants**" or "**Watkins Parties**"):

   i. Watkins Holdings S.à r.l., a private limited liability company incorporated under the laws of Luxembourg;

   ii. Watkins (Ned) B.V., a limited liability company incorporated under the laws of the Netherlands;

   iii. Watkins Spain, S.L., a private limited liability company incorporated under the laws of Spain;

   iv. Redpier, S.L., a private limited liability company incorporated under the laws of Luxembourg;

   v. Northsea Spain, S.L., a private limited liability company incorporated under the laws of Spain;

   vi. Parque Eólico Marmellar, S.L., a private limited liability company incorporated under the laws of Spain; and

   vii. Parque Eólico La Boga, S.L., a private limited liability company incorporated under the laws of Spain.

3. The Applicant in this annulment proceeding is the Kingdom of Spain ("**Spain**").

4. The main proceeding was instituted by the Claimants under the Energy Charter Treaty dated 17 December 1994 ("**ECT**"), which entered into force on 16 April 1998 for Luxembourg, the Netherlands and Spain,[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"), which entered into force on

[1] Signed by the same three States on 17 December 1994.

29 August 1970 for Luxembourg, on 14 October 1966 for the Netherlands and on 17 September 1994 for Spain.[2]

5. The Watkins Parties and the Kingdom of Spain are collectively referred to as the "**Parties**", and will be designated as the "Claimants" and the "Respondent" respectively, as in the original arbitration proceeding, in accordance with Section 8.2 of Procedural Order No 1. The Parties' representatives and their addresses are listed above on page i.

II. THE ARBITRATION AND THE AWARD

6. The Claimants submitted the Request of Arbitration on 26 October 2015 under the ICSID Convention, and the case was registered on 4 November 2015. In their Request for Arbitration and their memorials, the Watkins Parties claimed that the Kingdom of Spain had breached its obligations under the ECT through the adoption of a number of legislative and regulatory measures approved by the Spanish parliament and the Spanish government in the period from 2012 to 2014 that had adversely affected them.

7. The Claimants contended that the Kingdom of Spain had breached the obligations under Article 10(1) of the ECT:

   a. To accord fair and equitable treatment;

   b. Not to impair, in any way, through exorbitant or discriminatory measures, the management, maintenance, use, enjoyment or liquidation of investments; and

   c. To observe obligations entered into with investors or investments ("**Umbrella Clause**").

8. The Claimant asserted that the following measures in particular adversely impacted them:

   a. Law 15/2012, of 28 December 2012, which created a tax on the value of the production of electrical energy ("**TVPEE**"), imposed on the total revenue coming from the production and feeding of electricity into the national grid at a tax rate of 7%;

   b. Royal Decree-Law 2/2013, of 2 February 2013, which (i) replaced the inflation adjustment index ("**CPI**") for updating the tariffs with a CPI at constant rates excluding unprocessed foods and energy products and (ii) reduced the Premium—applicable under the Special Regime where producers chose the market price plus Premium remuneration scheme—to 0.0 cent/kWh;

[2] Signed on 28 September 1965 by Luxembourg, 25 May 1966 by the Netherlands and 21 March 1994 by Spain.

c. Royal Decree-Law 9/2013, of 12 July 2013, which amended the Electricity Sector Act;

d. Law 24/2013, of 27 December 2013, which superseded Law 54/1997;

e. Royal Decree 413/2014, of 10 June 2014, which regulated the production of electricity from renewable sources of energy, cogeneration and waste, and which began implementation of Law 24/2013; and

f. Ministerial Order IET/1045/2014, of 16 June 2014, which was the second measure implementing Law 24/2013 and set out the remuneration parameters applicable to renewable energy ("**RE**") producers under the Law 24/2013 regime. Under this Ministerial Order the reasonable rate of return applicable to facilities existing prior to the entry into force of RDL 9/2013 was set at 7.398%.

9. The Kingdom of Spain responded to the claims in the arbitration raising objections against the Tribunal's jurisdiction and advancing defences on the merits.

10. The European Commission ("**EC**") applied for leave to intervene as a non-disputing party pursuant to Rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings 2006 ("**ICSID Arbitration Rules**"), which the Tribunal granted on condition that the EC provide a "*written undertaking* [...] *to pay the additional costs of legal representation which may be reasonably incurred by the parties in responding to the Commission's Submissions*". The EC's subsequent request to remove this condition was declined by the Tribunal. The EC did not present a submission.

11. The Tribunal rendered its Final Award on 21 January 2020 granting the following orders:

> *a. Unanimously, the Tribunal has jurisdiction under the ECT and the ICSID Convention over the Claimants' claim;*
>
> *b. Unanimously, the Tribunal has no jurisdiction under the ECT and the ICSID Convention with regard to the claim that the Respondent's tax measures namely the 7% tax on the value of electrical energy production created by Law 15/2012 violates the ECT;*
>
> *c. By Majority, the Respondent has breached Article 10(1) of the ECT by failing to accord fair and equitable treatment to the Claimants;*
>
> *d. By Majority, in the light of the Tribunal's decision in (c), the Tribunal for purposes of judicial economy, does not need to determine*

the Claimants' claim with regard to the violation of the Umbrella Clause;

e. By Majority, the Claimants are awarded damages in the sum of € 77 million for violation of the ECT;

f. By Majority, the Respondent shall pay interest on the sum awarded in (e) from 20 June 2014 to the date of this Award at 1.16% per annum compounded monthly;

g. By Majority, the Respondent shall pay post-award interest at the rate of 2.16% per annum compounded monthly from the date of the Award to the date of payment;

h. Unanimously, the Claimants' claim for gross-up tax is dismissed;

i. By Majority, the Respondent shall pay the Claimants 75% of the Claimants' cost of the proceedings;

j. Any claim, request or defence of the parties that has not been expressly accepted in this section X is hereby dismissed.

12. The Kingdom of Spain seeks to annul this Award in its entirety.

III. PROCEDURAL HISTORY

13. On 21 July 2020, ICSID received from Spain the Annulment Application of the Award. Spain also requested they stay of enforcement of the Award.

14. On 31 July 2020, the Secretary-General of ICSID registered the Annulment Application, and notified the Parties thereof in accordance with Rule 50(2)(a) and (b) of the ICSID Arbitration Rules. Together with the notice of registration, the Secretary-General informed the Parties of the provisional stay of the Award, in accordance with Rule 54(2) of the ICSID Arbitration Rules.

15. On 14 January 2021, the Secretary-General, in accordance with Article 52(3) of the ICSID Convention, notified the Parties that all members of the Committee had accepted their appointments, and that the Committee was therefore deemed to have been constituted, and the annulment proceedings to have begun, as of 14 January 2021, pursuant to Rules 6(1) and 53 of the ICSID Arbitration Rules. The *ad hoc* Committee is composed of Professor Lawrence Boo

Geok Seng, a national of Singapore, as President; Ms. Olufunke Adekoya, a national of the United Kingdom and the Federal Republic of Nigeria, as member; and Ms. Dyalá Jiménez Figueres, a national of the Republic of Costa Rica, as member. All three members of the Committee were appointed by the Chair of the ICSID Administrative Council, in accordance with Article 52(3) of the ICSID Convention. On the same date, the Parties were notified that Mr Francisco Grob, Legal Counsel at ICSID, had been appointed as Secretary of the Committee.

16. On 21 January 2021, the EC filed an application for leave to intervene as non-disputing party in the annulment proceedings ("**EC's Application**"), pursuant to Rules 37(2) and 53 of the ICSID Arbitration Rules.

17. On the same date, the Committee directed to maintain the provisional stay of the enforcement of the Award until it had an opportunity to review all of the Parties' submissions and to issue a further decision on the matter, thereby extending the time limit under Rule 54(2) of the ICSID Arbitration Rules.

18. On 5 February 2021, the Parties each filed observations on the EC's Application.

19. On 18 February 2021, Spain filed its Submission in support of the Continuation of the Stay of Enforcement of the Award, together with annexes.

20. On 22 February 2021, the Committee held the first session by video conference, with the Parties and ICSID Secretariat in attendance.

21. On 26 February 2021, the Committee issued Procedural Order No 1, which provides, *inter alia*, that the applicable arbitration rules are those in force as of 10 April 2006, and that the procedural languages are English and Spanish.

22. On 4 March 2021, the Claimants filed their Response to Spain's Request for Stay of Enforcement, together with annexes.

23. On 18 March 2021, Spain filed its Reply in support of the Continuation of the Stay of Enforcement of the Award, together with annexes.

24. On 5 April 2021, the Claimants filed their Rejoinder on Continuation of the Stay of Enforcement, together with annexes.

25. On 26 April 2021, the Committee issued its Decision on the EC's Application, granting leave to the EC to submit a written submission addressing the sole question of whether Article 26 of the ECT applies to disputes between parties to whom European Union ("**EU**") law applies.

26. On 28 April 2021, the Committee held the Hearing on Stay of Enforcement of the Award by video conference, with the Parties and ICSID Secretariat in attendance.

27. On 7 May 2021, Spain filed its Memorial on Annulment ("**Annulment Memorial**") in English and Spanish, including two expert reports, one by Professor Ricardo Gosalbo Bono on EU law ("**Gosalbo Report**") and the other by Dr Eduard Saura of Accuracy on quantum ("**Accuracy Report**", and with the Gosalbo Report, "**Expert Reports**").

28. On 16 May 2021, the EC filed a written submission ("**EC's Submission**") in accordance with Rules 37(2) and 53 of the ICSID Arbitration Rules and as directed by the Committee per its decision of 26 April 2021.

29. On 19 May 2021, the Claimants filed a letter requesting that the Expert Reports be struck from the record.

30. On 15 June 2021, the Claimants filed their comments on the EC's Submission.

31. On 16 June 2021, Spain filed its comments on the EC's Submission.

32. On the same date, Spain responded to the Claimants' requests concerning the Expert Reports, submitting that such requests should be rejected *ad limine.*

33. On 21 June 2021, Mr Eugene Thong was appointed as Committee Assistant.

34. On 28 June 2021, the Committee issued Procedural Order No 2 concerning *inter alia* those requests admitting the Gosalbo Report but rejecting the Accuracy Report.

35. On the same date, the Committee issued its Decision on the Stay of Enforcement of the Award granting Spain's request.

36. On 9 July 2021, the Claimants filed their Counter-Memorial on Annulment ("**Annulment Counter-Memorial**").

37. On 24 September 2021, Spain filed its Reply on Annulment ("**Annulment Reply**") in English and Spanish.

38. On 19 November 2021, the Claimants filed their Rejoinder on Annulment ("**Annulment Rejoinder**").

39. On 2 January 2022, the Committee issued Procedural Order No 3 concerning the organisation of the hearing on annulment.

40. On 21 January 2022, the Committee held a pre-hearing organisational meeting by video conference, with the Parties and ICSID Secretariat in attendance.

41. On 3 and 4 February 2022, the Committee held the Hearing on Annulment by video conference, with the Parties and ICSID Secretariat in attendance.

42. On 4 March 2022, the Parties each filed a submission on costs.

43. On 7 June 2022, the Committee requested the Parties to trace documents in the (Annulment) Hearing Bundle which were referred in the Award and the Parties' submissions, *viz*. the 'Second Brattle Report, Appendix B, Table 13' (footnote 865 of the Award); *"updated damages models"* and *"revised model* [that] *are set out in the Brattle memorandum of 11 May 2018"*; and *"sensitivity analysis"* tables and explanatory notes prepared by the Brattle Group ("**Brattle**") referred to in Accuracy's Second Economic report (footnote 806 of the Award).

44. On 8 June 2022, the Claimants responded to the Committee's request and tendered Brattles' Rebuttal Quantum Report of 28 September 2017 together with the Excel spreadsheet labelled 'Tables O – Updated Financial Model', which was updated in May 2018 (filed as Arbitration Exhibit C-271 in the main proceeding).

45. On 21 June 2022, Spain filed a request for the Committee to decide on the admissibility of new documents. On 22 June 2022, Ms. Celeste E. Salinas Quero was appointed Secretary of the Committee in replacement of Mr. Grob who had left the ICSID Secretariat.

46. On 30 June 2022, the Claimants filed observations on Spain's request of 21 June 2022.

47. On 27 July 2022, the Committee decided on the admissibility of new documents.

48. On 9 December 2022, the proceedings were declared closed in accordance with ICSID Arbitration Rules 38(1) and 53.

IV. THE PARTIES' REQUESTS FOR RELIEF

49. Spain in its Annulment Reply dated 24 September 2021 requests the Committee to:[3]

> *a) Annul the Watkins Award in its entirety under Article 52(1)(b) of the ICSID Convention for manifest excess of powers by improperly declaring its jurisdiction over an intra-EU dispute and failing to apply European Union law to the merits of the case under Art. 26(6) ECT.*

[3] Annulment Reply, para 439.

b) Annul the Watkins Award in its entirety under Article 52(1)(e) of the ICSID Convention, for Failure to state reasons in the determination of the applicable law, in the determination of findings of liability and in the quantification of damages.

c) Annul the Watkins Award in its entirety under Article 52(1)(d) for a serious breach of essential procedural requirements.

d) In the alternative, partially annul the Watkins Award relating to the quantification of damages under Article 52(1)(e) for failure to state reasons and, consequently, also annul the Tribunal's award of costs.

e)Watkins is ordered to pay all the costs of the proceedings.

50. Spain also requests that if the Committee "*considers that the facts described* […] *constitute a ground for annulment on a ground of Article 52(1) of the ICSID Convention other than those alleged,* […] *the Committee* […] *proceed likewise to annul the Award on the basis of such alternative ground to those alleged*".[4]

51. The Claimants request in their Annulment Rejoinder dated 19 November 2021 that the Committee:[5]

a) Dismiss Spain's Annulment Application in its entirety; and

b) Order Spain to pay all the costs of this proceeding, including, without limitation, ICSID administrative expenses, the Committee's fees and expenses, and the Watkins Parties' legal fees and costs, plus interest at a commercial rate.

V. THE PARTIES' POSITIONS AND THE COMMITTEE'S ANALYSIS

52. The Committee will first deal with Spain's request for annulment under Article 52(1)(b) of the ICSID Convention for manifest excess of powers in **Part A**, followed by Spain's request under Article 52(1)(e) for the Award's failure to state reasons in **Part B**, and finally Spain's request under Article 52(1)(d) for serious departure from fundamental rules of procedure in **Part C**.

[4] Annulment Reply, para 439(f).

[5] Annulment Rejoinder, para 269.

A. MANIFEST EXCESS OF POWERS

(1) Applicable Standard

a. Spain's Position

53. According to Spain, there is manifest excess of powers when a tribunal acts "*contrary to*" the parties' consent or without their consent, such as when the tribunal does not apply the appropriate law, exceeds its jurisdiction, does not have jurisdiction, or decides on matters not raised by the parties.[6] In particular, Spain contends that "*lack of application of the current law occurs when the Tribunal ignores the applicable law, or its erroneous interpretation or misapplication of the law is 'so gross or egregious as substantially to amount to failure to apply the proper law'*",[7] and cites earlier decisions to support its position, including decisions referred to in the Updated Background Paper on Annulment for the Administrative Council of ICSID ("**ICSID Background Paper**").[8]

54. Spain points to previous decisions including *Occidental Petroleum v Ecuador (Annulment)*[9] and *Pey Casado v Chile (Annulment)*[10] to argue that extensive argumentation and analysis do not necessarily preclude manifest excess of power, and that these may even be necessary to prove that manifest excess of power occurred. It stresses that this is deliberately omitted by the Claimants, who simply emphasise that 'manifest' means "*perceived without difficulty*".[11]

55. Spain argues that an annulment committee should review not only what a tribunal has stated it has done, but also what the tribunal actually did, citing case decisions including *Iberdrola v Guatemala*, *Klöckner v Cameroon* and *Sempra v Argentina*.[12] It also insists that, contrary to the Claimants' characterisation, the decisions that it cites are not controversial and isolated.[13] In this regard, it suggests that the various interpretations of the ICSID Convention provisions made by different annulment committees have equal value.[14]

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[6] Annulment Memorial, para 52. Also Reply, para 54.

[7] Annulment Memorial, para 53.

[8] Annulment Reply, paras 58-77.

[9] RL-113, Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment (*Occidental Petroleum v Ecuador (Annulment*)), 2 November 2015, para 56.

[10] RL-157, Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Decision on Annulment (*Pey Casado v Chile (Annulment)*), 18 December 2012, para 70.

[11] Annulment Reply, paras 72 and 76.

[12] Annulment Memorial, paras 55-63 citing: RL-108, Iberdrola Energía, S.A. v Republic of Guatemala, ICSID Case No ARB/09/5, Decision on the Remedy for Annulment of the Award Submitted by Iberdrola Energía, S.A., 13 January 2015, para 97; RL-171, 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 Annulment Submitted by Klöckner Against the Arbitral Award Rendered on 21 October 1983, 3 May 1985, para 79; RL-102, Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16, Decision on Annulment (*Sempra v Argentina (Annulment*)), 29 June 2010, para 208.

[13] Annulment Reply, para 57. See also paras 64 *et seq.* analyzing the decisions that have annulled awards, in whole or in part.

[14] Annulment Reply, para 61.

b. Claimants' Position

56. According to the Claimants, Article 52(1)(b) requires that there not only be an excess of powers, but also that such excess be manifest.[15] They contend that 'manifest' here means 'obvious' rather than 'consequential', even though, within these premises, an award should be annulled only when the excess is indeed consequential, i.e. such excess "*made a material difference to the outcome of the case*".[16] They refer to case decisions[17] and clarify in particular how *Occidental Petroleum v Ecuador (Annulment)* supports their position rather than Spain's,[18] arguing that Spain "*fails to explain what* [the] *nuanced interpretation is*" that it attributes to the term 'manifest'. The Claimants highlight that most annulment committees have adopted their position instead.[19]

57. In the Claimants' view, it follows from the above that an annulment committee should never undertake a *de novo* review of a tribunal's decision on jurisdiction,[20] and that in fact "*if a tribunal's decision is tenable, reasonable, or arguable either way, a committee should not annul an award on that basis*".[21] In this regard, they add that it is also for the applicant (here, Spain) to prove otherwise, i.e. that the tribunal's opinion was untenable.[22] In the same vein, the Claimants point to Article 41(1) of the ICSID Convention on *kompetenz-kompetenz* and underscore that "*several ad hoc committees have held* [that] *the jurisdictional debate ends with the award, and cannot be re-opened at the annulment stage*".[23]

58. Relying on case decisions, the ICSID Background Paper, as well as scholarly commentaries, the Claimants dispute Spain's position that a failure to apply the applicable law gives rise to manifest excess of powers. Instead, they contend that "*an error of law cannot give rise to a manifest excess of powers*",[24] but state at the same time: "*it is (at the very least) highly questionable that failure to apply the applicable law can amount to a manifest excess of powers. In any case, it is clear awards may only be annulled for failure to apply the applicable law in exceptional circumstances, where the purported misapplication of the law is particularly gross or egregious.*"[25]

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[15] Annulment Counter-Memorial, paras 88-96; Annulment Rejoinder, para 32.

[16] Annulment Counter-Memorial, paras 97-98.

[17] Annulment Rejoinder, paras 32-33.

[18] Annulment Counter-Memorial, paras 99-103: RL-113, *Occidental Petroleum v Ecuador (Annulment)*, paras 48-50.

[19] Annulment Rejoinder, paras 34-37.

[20] Annulment Counter-Memorial, para 104.

[21] Annulment Counter-Memorial, para 105.

[22] Annulment Rejoinder, para 30(c).

[23] Annulment Counter-Memorial, para 106.

[24] Annulment Counter-Memorial, paras 109-116; Annulment Rejoinder, paras 42-48.

[25] Annulment Rejoinder, para 30(b).

59. The Claimants also take issue with Spain's reliance on arguments and documents not put before the Tribunal[26] and insist that the EC's intervention is "*entirely irrelevant*" to whether there is manifest excess of powers in this case.[27]

c. Committee's Analysis

60. Spain asserts that the Tribunal acted in excess of powers by improperly exercising jurisdiction over a dispute between European investors and a member state of the European Union (an 'intra-EU' dispute). Put simply, Spain is in fact saying that the Tribunal erred in upholding its own jurisdiction by disregarding what Spain views as the applicable law, EU law, thereby, exceeding its mandate and, as such, has manifestly exceeded its powers. Spain also avers that EU law should have been applied to the merits of the dispute and that the Tribunal manifestly exceeded its powers by ignoring EU law, in particular the European rules on State aid.

61. On their part, the Claimants maintain that what is relevant for the analysis by annulment committees is that the decision be tenable, reasonable, or arguable either way, and not necessarily correct. They also argue that given the principle of *kompetenz-kompetenz* enshrined in Article 41(1), the jurisdictional debate ends with the award and cannot be re-opened at the annulment stage.

62. It is not in issue between the Parties that to succeed, Spain has to show that the Tribunal acted in 'excess of its powers'. What needs to be determined as regards jurisdiction, is whether the standard for assessing the decision on jurisdiction is different from the standard required for assessing the decision on the merits; and, as regards the merits, the threshold above which any excess becomes 'manifest'.

63. The Committee will address the two matters in this subsection 1, prior to ascertaining whether the Tribunal's Award falls for excess of jurisdiction (subsection 2) or for disregard of the applicable law (subsection 3).

64. As to the former, annulment committees must be satisfied that cases settled through ICSID arbitration have respected parties' consent since it is the bedrock of ICSID arbitration, enshrined in Article 25 of the ICSID Convention.

[26] Annulment Rejoinder, paras 30(d), 38-39.

[27] Annulment Rejoinder, para 40.

65. The starting point is Article 52(1)(b) of the ICSID Convention, which sets out the relevant grounds for annulment, and provides in the relevant part as follows:

Article 52

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> […]
>
> *(b) that the Tribunal has manifestly exceeded its powers;*
>
> […]

66. Following the guidance of the Vienna Convention on the Law of Treaties ("**VCLT**"), the Committee shall interpret this provision and the ICSID Convention "*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*".

67. The term 'powers' in Article 52(1)(b) needs first consideration. The Draft Rules on Arbitral Procedure of the International Law Commission ("**ILC**"), from which Article 52 was derived, establish that the excess of powers "*is a question which is to be answered by a careful comparison of the award* […] *with the relevant provisions of the* compromis".[28] The committee in the *Helnan* case stated that:

> [t]*he 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.* […] *The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed*.[29]

68. The '*compromis*' here is found in Article 26 of the ECT, which refers disputes to the ICSID Convention. Section 3 of Chapter IV of the ICSID Convention (Articles 41-47) then sets out the "*Powers and Functions of the Tribunal*". The Committee should ascertain whether the powers

[28] United Nations International Law Commission, Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, Comment on Article 30, April 1955, p 108, available at https://digitallibrary.un.org/record/631269?ln=en.

[29] RL-168, Helnan International Hotels A/S v Arab Republic of Egypt, ICSID Case No ARB/05/19, Decision of the ad hoc Committee dated 14 June 2010, para 40.

under Articles 41(1) and 42(2) have been exceeded by the Tribunal. Indeed, this Committee must be satisfied that the Tribunal in the Award applied the correct legal instrument to determine consent irrespective of its interpretation of the legal instrument.

69. Article 41(1) of the Convention makes it abundantly clear that: "*The Tribunal shall be the judge of its own competence*." This enshrines the principle of *kompetenz-kompetenz* in international arbitration, as part of the ICSID Convention. The powers of the Tribunal in the Award, therefore, included the power to decide on its own competence. As to Article 42(1), the Tribunal had to decide the matter "*in accordance with such rules of law as may be agreed by the parties*", which means that the Tribunal had to apply the law agreed to by the Parties.

70. The Parties agreed in Article 26(6) of the ECT that the applicable law is the ECT and applicable rules and principles of international law.

71. The Committee is conscious that it has a gatekeeping function in assessing whether the mandate has been exceeded by the Tribunal, but nothing in the terms of Articles 41(1), 42(1) and 52(1)(b) imposes a different standard between the assessment of an excess of power in the Tribunal's decision on jurisdiction and of an excess of power in the Tribunal's decision on the merits. This comports with the architecture of the ICSID Convention arbitration system, which distinguishes itself from other systems that subject a tribunal's decision on jurisdiction to direct curial review and/or as a ground to vacate the award made or refuse its enforcement. Under the ICSID Convention system, no curial review exists.

72. As such, annulment committees need to act with restraint when dealing with the ground of excess of powers even if it is related to the tribunal's decision on jurisdiction. The Committee agrees that annulment should not be an opportunity for a *de novo* assessment of facts or law that leads to the decision on jurisdiction. The Committee will therefore scrupulously examine allegations of 'excess of powers' to ensure that the Parties do not misuse this process as a 'back door' attack on the Tribunal's substantive finding on its jurisdiction, *viz.* whether the findings of fact or law establishing party consent to arbitrate and/or the jurisdictional requirements under the ICSID Convention are met.[30]

73. In determining whether any 'excess of power' is 'manifest' as required under Article 52(1)(b), the Committee finds support again in the provision of the ILC Draft Rules on Arbitral Procedure cited above, whereby *"*[a] *departure from the terms of submission or excess of jurisdiction should be clear and substantial and not doubtful and frivolous*". The ICSID Background Paper also points out that "*'manifest' nature of the excess of powers has been interpreted by most* ad hoc

[30] See Articles 25 and 26 of the ICSID Convention.

Committees to mean an excess that is obvious, clear or self-evident, and which is discernible without the need for an elaborate analysis of the award".[31] The Committee agrees.

74. Spain as the applicant must demonstrate that the excess of powers in this instance was evident (on a first reading of the decision, without need for further investigation or inquiry), and that it was that lapse that led the tribunal to uphold its jurisdiction. Failing such, this ground must fail.

75. The Committee notes Spain's observation that "*other committees have also considered this* [sic] *an excess of powers can be manifest despite requiring extensive argumentation of analysis* […] *when the excess of power is material to the outcome of the case*".[32] While the Claimants accept that some annulment committees have held that "*to be 'manifest', an excess of powers should rather than 'obvious', be serious or material to the outcome of the case*",[33] they pointed out that that such a reading cannot be found on the application of treaty interpretation. They maintain that the Committee should "*only exercise its discretion to annul an award (on any basis) where the annullable error has 'made a material difference to the outcome of the case'*".[34]

76. The Committee notes that the ICSID Background Paper remarked that the proposition advanced by Spain has been adopted only by 'some' of the committees.[35] The Committee is of the view that the Claimants' proposed standard in this regard accords more with the underlying intent of limiting the excess of powers to those that are clear, obvious and without need for further debate or investigation but which affect the material outcome of the case.

77. With these general observations in the background, the Committee will examine each of the specific grounds advanced by Spain.

(2) Applicability of EU Law, the ECT and the ICSID Convention

a. Spain's Position

78. Spain's argument in terms of the 'excess of power' by the Tribunal is essentially that the Tribunal failed to apply EU law, which Spain submits, is international law,[36] when considering its jurisdiction, and that such failure amounts to a 'manifest excess of power'. Spain contends that

[31] RL-101, ICSID Background Paper on annulment for the Administrative Council (*ICSID Background Paper*), 5 May 2016, para 83; *see*, CL-74, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v The Republic of Kazakhstan, ICSID Case No ARB/05/16, Decision on Annulment, 25 March 2010, para 96; CL-165, Ioan Micula, Viorel Micula and others v The Republic of Romania, ICSID Case No ARB/05/20, Decision on Annulment, 26 February 2016, paras 123-126; RL-113, *Occidental Petroleum v Ecuador (Annulment)*, paras 57-59; CL-231, SGS Société Générale v The Republic of Paraguay, ICSID Case No ARB/07/29, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award, 22 March 2013.

[32] Annulment Transcript, Day 1, 16:12-20.

[33] Annulment Counter-Memorial, para 97.

[34] Annulment Counter-Memorial, para 98.

[35] RL-101, *ICSID Background Paper*, para 83.

[36] Annulment Memorial, para 138.

the Tribunal failed to carry out an analysis of all the rules of interpretation provided for in Article 31 of the VCLT and instead simply limited its role within the ICSID Convention, the ECT and the "*general principles of international law governing the consent of States*," disregarding the fact that EU member States had entered into obligations amongst themselves as a result of the transfer of competences to the EU.[37] It asserts that EU law forms part of the applicable law determining the validity of an arbitration submitted by investors which are EU entities against EU member States. Spain submits, EU law, constituting international law, ought to have been applied to jurisdiction and merits in the arbitration instead of the ECT, but the Tribunal did not do so and therefore committed a 'manifest excess of power'.

79. Spain argues alternatively that the application of Article 26 of the ECT gives rise to a conflict with EU law and that, in such situations of conflict, the provisions of the ECT "*must be resolved in favour of EU Law*".[38] It explains that there can be no valid offer for arbitration amongst EU member States, given (i) the binding nature of EU law on member States, (ii) the contradiction between intra-EU arbitration and certain elements of EU law, notably the EU principles of mutual trust, non-discrimination and public order as well as the "*rules of operation of the Community system provided for in Articles 344 and 267 of the TFEU*" and (iii) the primacy of EU laws. It cites in support the rulings of the Court of Justice of the European Union ("**CJEU**") in *Slovakia v Achmea* ("***Achmea***")[39] and *Republic of Moldova v Komstroy LLC* ("***Komstroy***")[40]. Spain stresses that any conflict with EU law should be resolved in favour of EU law pursuant to the principle of primacy of such law.[41]

80. Spain adds that following the *Achmea* decision, EU member States have since also expressed their position that intra-EU arbitration is not possible[42] in the Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union dated 15 January 2019 ("**Declaration of 15 January 2019**").[43]

81. As regards *Komstroy*, it argues that the holdings therein are applicable to the instant case because CJEU rulings have retroactive effect[44] and thus is binding on Luxembourg, the Netherlands

[37] Annulment Memorial, paras 72-76; Annulment Reply, paras 81-83, 153-163.

[38] Annulment Memorial, para 77.

[39] RL-97, Republic of Slovakia v Achmea BV, Case C-284/16, Judgement of the Court of Justice of the European Union (*Achmea*), 6 March 2018.

[40] RL-215, Republic of Moldova v Komstroy LLC, Case C-741/19, Judgement of the Court of Justice of the European Union (*Komstroy*), 2 September 2021, para 114.

[41] Annulment Memorial, paras 77-84, 104-115, 117-122; Annulment Reply, paras 93, 99-103, 104-119, 125-131, 165-187.

[42] Annulment Memorial, paras 123-125.

[43] RL-163, Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019.

[44] Annulment Reply, paras 140-143.

(countries of which the investors are nationals) and Spain, as well as the Claimants who cannot have rights different from the country of which they are nationals.[45] In Spain's view, it follows that *Komstroy* and other such CJEU rulings preclude the Tribunal's jurisdiction, since they constitute *res judicata*.[46] It underscores that this is probably "*the first ICSID annulment proceeding that has before it the Komstroy ruling to decide on whether the excess of powers was manifest or not*".[47]

82. With regard to the absence of a 'disconnection clause' in the ECT, Spain points to the specific reference and inclusion of the concept of Regional Economic Integration Organization ("**REIO**") within the text of the ECT, which it submits implies absolute recognition of the "*full integration*" of the EU, which precludes intra-EU arbitration if one accepts that the Claimants are of "*European citizenship*" (which Spain contends is the case).[48] It also refers to the "*historical context*" and "*autonomy of the EU legal framework*" and says that they make clear that EU member States had no intention of binding one another to intra-EU arbitration under the ECT, and that therefore an implicit disconnection clause in fact exists.[49] Specifically, it refers to the Gosalbo Report to suggest that the EC "*tried but failed to include a* [sic] *express disconnection clause into the current Article 24 ECT, which would have precluded the intra-EU applicability of the ECT*", in an attempt "*to avert the legal insecurity and major incompatibilities between the European Union and international law, particularly European law uncertainties as experienced in the present case*".[50]

83. The EC in its non-disputing party submission supports Spain's position. It takes the position that the TEU and TFEU ("**EU Treaties**") are international conventions and part of international law as described in Article 38 of the Statute of the International Court of Justice. It posits that the CJEU has decided that the EU Treaties constitute public international law applicable between EU member States;[51] they ought therefore to be considered and applied by the Tribunal in accordance with Article 26(6) of the ECT as "*applicable rules* […] *of international law*". The EC also asserts that "*all other rules of EU law, including in particular secondary law, such as the First and Second Directives on Renewable Energy of 2001 and 2009 and Commission Decision SA.40348 of 10 November 2017 on support granted by the Kingdom of Spain for electricity generation from renewable energy sources, cogeneration and waste (*'***Commission State Aid Decision'***), must be treated as international law applicable between EU Member*

[45] Annulment Reply, para 148.

[46] Annulment Reply, paras 144, 149.

[47] Annulment Transcript, Day 1, 17: 6-9.

[48] Annulment Memorial, paras 85-91; Annulment Reply, para 195.

[49] Annulment Memorial, paras 126-132; Annulment Reply, paras 145-146.

[50] Gosalbo Report, para 29.

[51] EC's Submission, paras 48-50.

States".[52] EU law is therefore applicable to and ought to have been considered by the Tribunal in reaching its decision on exercising its jurisdiction over Spain.[53] The EC submits that a harmonious application of both the EU Treaties and EU law to Article 26 of the ECT would have caused the Tribunal to come to a conclusion that the "*Article 26 ECT does not contain an offer for arbitration by Spain to investors from other EU Member States, but is directed only to investors from third countries*".[54]

84. On the requirement that the excess must be 'manifest', Spain points out that "*the excess of jurisdiction* […] *must necessarily be considered manifest when a European institution at the highest level* [i.e. the EC] *repeatedly seeks to intervene in the proceedings*".[55] It also argues that the manifest nature of the excess is evident because the Parties are all clearly European and the dispute therefore clearly intra-EU. This, according to Spain, has been further reinforced by its repeated objections.[56]

85. As regards the merits, Spain contends that the Tribunal disregarded EU law, in particular, State aid rules and that such disregard constitutes a manifest excess of powers. It requests that the Committee deem that its arguments on the question of jurisdiction are reproduced to the question on the merits, on the ground of manifest excess of powers.[57]

b. Claimants' Position

86. The Claimants characterise Spain's arguments as attempts to turn these annulment proceedings into an appeal, which is not the purpose of annulment proceedings. The Claimants allege that Spain is rearguing its case and use as an example Spain's submissions on the issue of whether *Achmea* applies to ECT arbitrations.[58] They reiterate that Spain relies on new arguments and evidence not put before the Tribunal. In addition, the Claimants allege that Spain does not identify the specific rules of interpretation under Article 31 of the VCLT the Tribunal supposedly failed to consider.[59]

87. In particular, the Claimants point out that Spain does not explain why the Tribunal's alleged errors are manifest, highlighting that the length, detail and complexity of as well as occasional inconsistencies in Spain's analysis indicate that any excess of powers cannot be 'manifest'. Indeed, they point to Spain's reliance on Professor Gosalbo's lengthy report as evidence of the

[52] EC's Submission, paras 48-51.
[53] EC's Submission, para 53.
[54] EC's Submission, para 54.
[55] Annulment Reply, para 91.
[56] Annulment Reply, paras 89-90, 97.
[57] Annulment Memorial, paras 133-134.
[58] Annulment Counter-Memorial, para 147.
[59] Annulment Counter-Memorial, paras 120-121, 126, 141-143, 151-152; Annulment Rejoinder, paras 62-63.

fact that the alleged excess of powers is evidently not obvious, or manifest.[60] Likewise, they argue that the Tribunal's conclusions are tenable since they are "*in line with the conclusions of various other investment-treaty tribunals*", and that therefore they cannot constitute a manifest excess of powers.[61] In this regard, they refer to Spain's submissions regarding the REIO issue, the Tribunal's finding that there is no conflict between EU law and the ECT, the Tribunal's dismissal of Spain's arguments on the primacy of EU law, and the Tribunal's holding that *Achmea* does not apply to ECT arbitrations.[62]

88. The Claimants are also of the view that Spain's arguments on EU law (and in particular the notion that EU law constitutes international law), as well as the retroactivity and *res judicata* effects of *Komstroy*, are irrelevant.[63] In the same vein, they submit that some materials referred to by Spain, such as Opinion 1/17 on CETA, which was not put before the Tribunal, are of "*limited relevance*".[64]

89. The Claimants further contend that the Tribunal did apply Article 31 of the VCLT, and that even failing this, such a matter should not be reviewable by the Committee.[65] They argue that Spain's position on the Tribunal's holding that there was an investor of another Contracting Party is "*tortuous and nonsensical*" because it leads to the "*absurd result*" where no European investor would be legally permitted to bring any claim against any State in the world under any treaty providing for ICSID arbitration.[66] They also point out that Spain cannot use the Declaration of 15 January 2019[67] retroactively to withdraw its consent to ICSID arbitration,[68] and that the Declaration of 15 January 2019 in fact shows that there is no consistent position even within the EU itself as to the compatibility between Article 26 of the ECT and EU law.[69] The Claimants stress in addition that the Parties have previously agreed that there is no disconnection clause, and that accordingly there can be no excess of powers on this point.[70]

[60] Annulment Counter-Memorial, para 122.

[61] Annulment Counter-Memorial, para 123.

[62] Annulment Counter-Memorial, paras 121-123, 134, 138-139, 145, 148; Annulment Rejoinder, paras 51-56, 59-61, 158, 165.

[63] Annulment Counter-Memorial, paras 130-131, 150, 154; Annulment Rejoinder, paras 57-58, 67.

[64] Annulment Counter-Memorial, para 135.

[65] Annulment Counter-Memorial, paras 127-129.

[66] Annulment Counter-Memorial, para 137.

[67] RL-163, Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019.

[68] Annulment Counter-Memorial, para 151.

[69] Annulment Counter-Memorial, para 155.

[70] Annulment Counter-Memorial, paras 159-163.

90. Finally, on the merits specifically, the Claimants advance the same arguments above regarding treaty interpretation and maintain in any case that "*substantive findings on the merits are not open to review by the Committee*".[71]

c. Committee's Analysis

(i) International law, ECT and EU law

91. Spain's first argument is that the Tribunal did not carry out a proper analysis of the rules of interpretation when it held that EU law does not qualify as 'international law' and thereby disregarded EU law when ascertaining its jurisdiction under Article 26 of the ECT. In its view, EU law is both the primary and secondary law. Spain's position is that, under EU law EU member States "*lack […] jurisdiction […]to enter into obligations between themselves as a result of the transfer of competences to the EU.*"[72] Spain also argues in the alternative that even if Article 26 of the ECT could be interpreted to apply to intra-EU disputes, it conflicts with EU law and as such the ECT must yield to EU law, rendering arbitration under Article 26 of the ECT as inapplicable.[73]

92. The Committees notes that, when considering the meaning and scope of Article 26, the Tribunal did not take into consideration EU law. This is not surprising as it was ascertaining its own jurisdiction under the ECT and had rightly cast its attention on the terms of the ECT, guided by the rules of treaty interpretation under Articles 31-32 of the VCLT. In fact, the Tribunal was conscious that Spain had taken the position that EU law prohibits the use of arbitration under Article 26 of the ECT where the investment is made within the internal market, and that the CJEU has "*monopoly of interpretation of EU law*" as the Tribunal stated.[74] The Tribunal, however, in the exercise of its powers took the position that these considerations were inapplicable since it was assessing its own jurisdiction in a treaty-based investment arbitration, the ECT, and within the ICSID Convention system.[75]

93. The Committee notes that the Tribunal gave consideration to the decision in *Achmea* in its Award,[76] which was the only decision then bearing facts quite similar to those in the underlying arbitration. While Spain may disagree with the Tribunal's reasoning and manner of distinguishing it, that of itself is not a basis for any annulment application.

[71] Annulment Counter-Memorial, para 170.

[72] Annulment Memorial, para 76.

[73] Annulment Memorial, para 77.

[74] Annulment Reply, para 170, citing the Award, para 191.

[75] Award, paras 191-193.

[76] See Award, paras 205-225.

94. In the Committee's view, the Tribunal did not fail to apply the proper applicable law when it determined its own jurisdiction on the basis of the invoked treaty, the ECT; and, in any event, the Tribunal's decision to determine its jurisdiction on the basis of the ECT was reasonable.approach was correct and the only proper approach to take. Accepting Spain's and the EC's suggestion that EU law (whether legislated by the EU organs or pronounced by the CJEU) necessarily trumps the provisions of the ECT, which both EU member States and the EU as a body had validly consented to and entered into, would mean that international actors could renege from their treaty obligations by simply asserting the superiority or primacy of its own laws.

95. The Committee's attention has been drawn to several decisions made by the CJEU, including *Komstroy* as well as subsequent decisions of the Paris Court of Appeal, No 48/2022 annulling an award in favour of Austrian investors against Poland, and No 49/2022 annulling an award made in favour of Czech investors against Poland. Also submitted was the CJEU Opinion 1/20 issued on 16 June 2022. These are all decisions made in line with the position taken by the EC that the investor-State provisions are incompatible with EU law. These cases merely show the tensions between the commitments undertaken by EU member States in the ECT and ICSID Convention, and their internal (intra-EU) member States arrangements. Importantly, these decisions were made post-Award and, therefore, not placed before the Tribunal and, thereby, do not serve to support Spain's case for an alleged manifest excess of powers.

(ii) Whether intra-EU disputes are precluded under Article 26 of the ECT

96. Spain relies on Article 1(2) and (3) read with Article 26(1) of the ECT to suggest that the terms of the ECT preclude the application of Article 26 to intra-EU disputes:

> ***Article 1: Definitions***
>
> […]
>
> *(2) "Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.*
>
> *(3) "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.*
>
> […]

Article 26: Settlement of Disputes between an Investor and a Contracting Party

[…]

(1) Disputes 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 an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

97. Spain submits (quoting its expert Professor Gosalbo) that the ECT "*recognises that EU Member States have never offered to mediate with investors from another EU Member State*".[77] It reasons that Article 26(1) of the ECT permits a reference to arbitration by the investor who has made an investment in "*the Area of [another Contracting Party]*". Under Article 1(10) of the ECT, "*Area*" is defined as the territory of a State or "*the Areas of the Member States of a [Regional Economic Integration Organisation*]":

(10) "Area" means with respect to a state that is a Contracting Party:

(a) […]

(b) […]

With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.

98. It argues that "*an investment made by an investor from one EU Member State in the territory/area of another EU Member State is made in the same territory, i.e. in the territory of the European Union as a Regional Economic Integration Organization (REIO)*."[78] The inclusion of the REIO in the ECT therefore, in Spain's view, excludes EU "*investors*" who invest in the EU "*territory*" or "*area*."[79]

99. Spain's position finds support from the EC, which takes the position that the EU as a REIO, vis-à-vis third States, forms "*a single contracting party, composed of* '*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*

[77] Annulment Memorial, para 87.

[78] Ibid.

[79] Annulment Memorial, para 88.

with their respective competences"'.[80] As such, an investment made in one member State by an investor from another member State does not fall within an investment protected by the ECT, and Article 26 of the ECT is therefore inapplicable (as such investors are presumably investing in their own economic area).[81]

100. The EC also draws attention to the fact that parties to the ECT were aware that the EU was acting as one and that EU member States accepted that the ECT does not establish reciprocal obligations as between themselves, but rather that such relationships are to be governed by EU law.[82] In this regard, the EC points out that the then European Communities had—by their statements made pursuant to Article 26(3)(b)(ii) of the ECT—made clear that the EU and member States acted as one:

> *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.*
>
> *The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.*[83]
>
> [emphases added]

101. Spain's arguments are premised on the assumption that the international community (particularly those investing in the energy sectors in EU states) accepts Spain and the EC's position that the EU members States acted as a single entity when both, the individual EU member States as well as the EU as a REIO, signed the ECT.

102. However, the Committee accepts that the Tribunal's finding that, from a plain reading of Articles 26 and 1(10) of the ECT, "*the dispute here opposes Investors of several Contracting Parties (Luxembourg and the Netherlands) to another Contracting Party (Spain) on the territory of whom the investment was made*"[84] is reasonable and not difficult to understand.

[80] EC's Submission, para 21.

[81] EC's Submission, para 23.

[82] EC's Submission, para 25.

[83] CL-254, 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, Official Journal of the EU, L 69/115, 9 March 1998.

[84] Award, para 186.

103. The EC's submissions do not assist Spain either. In fact, a plain reading of the declarations in the 1998 Statement made under Article 26(3)(b) (ii) of the ECT by the EU and the EU members States ("**1998 Statement**") that the EU and the individual 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*" (emphases added) do no more than confirm the Tribunal's finding. There is no suggestion in this statement that the EU and the members States acted as one entity only. If anything, the reference to 'both' and 'respective competences' favours a contrary interpretation, *i.e.* the EU and the individual members are separately responsible.

104. Further, the 1998 Statement did not disavow the availability of arbitration by investors; instead, it reaffirmed it by stating that the EU and its member States will determine among themselves "*who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party*". It is noteworthy that this statement was marked with a footnote that states that "[t]*his is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States*". It is clear to the Committee that the Tribunal properly applied its mind to the issue of jurisdiction, considered the arguments and came to the decision that it did.

(iii) Absence of a disconnection clause

105. The Tribunal also discussed the absence of a 'disconnection clause', a term used to express an exception or exclusion of the application of a specific obligation under a treaty, as supportive of its decision. It is not disputed by Spain that the ECT contains no disconnection clause regarding intra-EU disputes. Spain however submits that there is an implicit disconnection clause and relies on Professor Gosalbo's theory that the then European Communities' statements made pursuant to Article 26(3)(b)(ii) of the ECT contained such an <u>implicit</u> disconnection clause. The relevant parts of the EU statement Professor Gosalbo relied upon appear to be the following:

> *The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by <u>the Communities</u>, which under certain conditions may be invoked before the Court of Justice.*
>
> *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 <u>the Communities</u> 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.

As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them. Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty.'

[emphases added]

106. Professor Gosalbo in his submission expressed his views in these terms:

[…] *In the interpretative Declaration above, the EU informs* […]

[…] *the EU has acquired an exclusive competence over foreign direct investment, it is exercised through autonomous decision-making and judicial institutions; Thirdly, the CJEU has exclusive jurisdiction to examine any question relating to the application and interpretation (preliminary ruling) of the founding Treaties and the acts adopted thereunder including the ECT, within the EU; Fourthly, since the EU legal system offers a complete system of remedies, the EU did not give an unconditional consent to the submission of a dispute to international arbitration; and Fifthly, Art. 26 ECT was only applicable for claims concerning third country investors, otherwise it would be contrary to the essential characteristics of the EU, allocation of powers, and the autonomy of the EU legal order based on uniformity, unity, solidarity, mutual trust, judicial protection and the right to regulate (Opinion 1/17 on CETA).*[85]

107. Professor Gosalbo's interpretation of the above statement is that the EU did not give unconditional consent to submission to international arbitration and that Article 26 of the ECT

[85] Gosalbo Report, para 31.

only applies to claims concerning third countries (*viz.* non-EU investors). The Committee disagrees.

108. In the Committee's view, the statement according to which 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*" (emphasis added) clearly distinguish the then European Communities from the Member States. The parts of the statement on which Professor Gosalbo appears to rely were made specifically in relation to the situation where an investor has brought a case before the CJEU. Indeed, the EU acknowledged that although it could not be a party to the ICSID Convention or participate through the ICSID Additional Facility, the EU would nevertheless implement awards made against it in accordance with Article 26(8) of the ECT. Further, the references made in those paragraphs are related to only the EU (then European Communities) and not the member States. Far from providing a hint of a disconnection from the Article 26 process, the statements in fact suggest that there is a distinction between the commitments made by the EU and those made by its member States. An interpretation according to the VCLT makes it clear that where a commitment is intended to bind both the phrase "*the Communities and the Member States*" is used, while when it is related only to the EU it refers to "*the Communities.*"

109. In the Committee's view, the plain text of the 1998 Statement does not support any 'disconnection' as suggested by Spain to exclude intra-EU disputes from Article 26 of the ECT. The Tribunal had carefully considered and expressed this in paragraphs 197 to 202 of the Award.

110. The Committee is satisfied that the Tribunal gave full consideration to the provisions of the ICSID Convention, Article 26 of the ECT and general international law and used its powers adequately to decide that it had jurisdiction.

(3) Disregard of the Applicable Law

a. Spain's Position

111. Spain submits that EU law constitutes international law and the Tribunal should have applied it to issues not only of jurisdiction but also merits.[86] It argues that despite this, and notwithstanding the Tribunal's pronouncements that it would apply international law where relevant and EU law where applicable, EU law, including its rules on State aid, was never applied to the dispute.[87] This, according to Spain, conflicts with the primacy of EU law and violates the ECT itself.[88]

[86] Annulment Memorial, paras 135-136.

[87] Annulment Memorial, paras 137-140.

[88] Annulment Memorial, paras 141-142.

112. Spain submits that the errors accruing from the above are sufficiently manifest to warrant an annulment,[89] contending in particular that the failure to apply State aid provisions was significant enough to have resulted in rulings that would not otherwise have been made (especially in relation to legitimate expectations of investors). It cites recent decisions and refers to previous EC rulings to support its position.[90]

b. Claimants' Position

113. The Claimants maintain that manifest errors in the determination of the applicable law cannot result in annulment on the grounds of manifest excess of powers.[91] They explain that the cases cited by Spain rely largely on *Soufraki v United Arab Emirates*,[92] which is not relevant because the parties in that case agreed that failure to apply the correct applicable law could constitute a manifest excess of powers.[93] They also reiterate that Spain's submissions effectively amount to an appeal,[94] and that the volume of materials set out by Spain to advance its case shows in and of itself that any excess of powers here cannot be 'manifest'.[95]

114. The Claimants submit that, contrary to what Spain claims, the Tribunal simply stated that EU law (including its provisions on State aid) is not international law that is relevant to the interpretation and application of the ECT.[96] In their view, this finding cannot constitute 'manifest' excess of powers, if at all, since it is at least tenable.[97] They also highlight that various legal provisions and material referred to by Spain (e.g. Article 351 of the TFEU as legal basis of the primacy principle) are not relevant,[98] and that Spain moreover refers to material not previously put before the Tribunal.[99]

115. Specific to whether EU law applies to jurisdictional issues, the Claimants also point out that Article 26(6) of the ECT sets out only the law applicable to the merits and not to jurisdiction, which means that Spain's submissions on this ground "*can be dismissed in their entirety*".[100]

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[89] Annulment Memorial, paras 146-147.

[90] Annulment Memorial, paras 149-152, citing RL-140, FREIF Eurowind Holdings Ltd. v Kingdom of Spain, SCC Case No V 2017/060, Final Award, 8 March 2021; Annulment Reply, paras 198-220, citing CL-235 BayWa r.e. AG v Kingdom of Spain, ICSID Case No ARB/15/16, Award (*Baywa v Spain*), 25 January 2021, paras 569(a), 591; RL-141, Eurus Energy Holdings Corporation v Kingdom of Spain, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021.

[91] Annulment Counter-Memorial, para 168.

[92] RL-85, Hussein Nuaman Soufraki v United Arab Emirates, ICSID Case No ARB/02/7, Decision on Annulment (*Soufraki (Annulment)),* 5 June 2007.

[93] Annulment Counter-Memorial, para 169.

[94] Annulment Counter-Memorial, para 170; Annulment Rejoinder, paras 79(e), 85-92.

[95] Annulment Counter-Memorial, para 171.

[96] Annulment Counter-Memorial, para 173; Annulment Rejoinder, para 81.

[97] Annulment Counter-Memorial, paras 174-179; Annulment Rejoinder, paras 76-78, 79(b), 82-84.

[98] Annulment Counter-Memorial, paras 180-187; Annulment Rejoinder, para 79(c).

[99] Annulment Rejoinder, para 79(d).

[100] Annulment Rejoinder, para 72.

c. Committee's Analysis

116. It follows from the standard applied by this Committee that manifest excess of powers relating to the applicable law to the merits, as Spain is asserting in its application, should be one of wrongly applying a system of law and disregarding the applicable law, and not the Tribunal's misunderstanding and/or misapplication of the applicable law. Such an approach accords with the drafting history of the ICSID Convention as well as with earlier ICSID decisions as set out in the ICSID Background Paper.[101]

117. The Committee recognises that it is at times difficult to identify a boundary between disregard for the applicable law and erroneous application thereof. This is where it might be helpful to recall that ICSID annulment is positively concerned with legitimacy of procedure, and that such legitimacy derives from the parties' consent, including the agreement on the law applicable to the dispute. Therefore, the threshold for annulment will only be reached if the relevant decisions are the result of a flagrant disregard of the process, and until then (and not before), it cannot be said that an award is the outcome of procedure that has lost its legitimacy and therefore annullable.

118. The Committee also wishes to add that annulment proceedings are not occasions to inquire (again) into the merits of the underlying dispute between the parties. This has consequences for both prongs of Spain's challenge based on manifest excess of powers. Whether in respect of jurisdiction or the merits, this means that annulment committees should not conduct *de novo* inquiries of any sort as set out at paragraph 72 above. The prohibition from inquiring into underlying merits also means that it is not open for this Committee to criticise the Tribunal's application of the law based on new arguments or evidence not put before the Tribunal.

119. The Committee further notes that there are divergent views concerning the status of prior ICSID case decisions. The Committee agrees with Spain that each case must be considered independently from previous cases involving different parties. While it is desirable for there to be consistent ICSID case decisions to attain some certainty, there is no doctrine of *stare decisis* or order of precedents that the Committee is bound to follow. The Committee is bound to uphold the provisions of the ICSID Convention and the underlying rationale and principles of the Rules made thereunder. Each ICSID tribunal and annulment committee has the duty to consider each case separately and independently.

120. As such, the fact that 67 other cases ruled in a certain manner does not mean that this Committee is bound to do likewise. Accordingly, while acknowledging that many tribunals as well as three annulment committees have ruled against Spain in, for instance, rejecting its assertion that the

[101] RL-101, *ICSID Background Paper*, paras 90-93: "[T]*here is no basis for an annulment due to an incorrect decision by a Tribunal*".

intra-EU disputes arising under the ECT cannot be referred to arbitration under Article 26 of the ECT, the Committee has the duty to consider the matter afresh (again, that is, independently, but not *de novo*). It is for this reason that the Committee permitted the limited intervention by the EC to address the same issue without imposing any condition on costs. The Committee also allowed the admission of post-hearing case decisions which Spain said have some bearing on the grounds of annulment advanced by Spain.

121. The Tribunal in its Award held that the applicable law is the ECT together with any rules of international law as may be relevant to the interpretation of the ECT and its application.[102] It considered that Spanish and EU law would be referred to only if the Tribunal thought it appropriate. Following such a determination the Tribunal proceeded to consider the matters in dispute generally applying the law it so determined, *viz.* the ECT and general international law.

122. It is clear from the Award that the Tribunal did not apply EU law to the merits of the claims. This is because, as mentioned, the Tribunal had determined that the ECT was the primary source of law and there was thus no necessity to apply EU law. There is therefore no case to suggest that the Tribunal failed to apply the applicable laws and thus acted in excess of powers. As to whether the Tribunal properly considered the applicability of EU law and/or gave reasons for its decision, this will be discussed below (see paragraphs 133-134).

B. FAILURE TO STATE REASONS ON WHICH THE AWARD IS BASED

(1) Applicable Standard

a. Spain's Position

123. Spain submits that under Article 52(1)(e) of the ICSID Convention, the Award must be annulled if it has not indicated reasons on which it is based; that the Tribunal must address all issues referred to it and indicate the reasons for its conclusions. It asserts that reasons must allow a reader at minimum to "*follow how the tribunal proceeded from Point A. to Point B.*",[103] while the Committee's task is "*to determine whether there is comprehensive and consistent reasoning on the part of the tribunal.*"[104] It cites the annulment committee's decision in *Soufraki* to suggest that "*[E]ven short of a total failure, some defects in the statement of reasons could give rise to annulment*".[105]

[102] Award, para 489.

[103] Annulment Memorial, para 156.

[104] Annulment Memorial, para 157.

[105] Annulment Memorial, para 159.

124. It maintains that annulment should be granted when awards contain contradictory, frivolous, or insufficient and inappropriate reasons.[106] Likewise, it contends that a failure to "*deal with the problems, arguments and evidence presented*" should give rise to annulment.[107]

125. To support its position, Spain provides commentaries to cases where committees have considered this ground, including *Klöckner v Cameroon*, *Amco v Indonesia* (*Amco I*), *Sempra v Argentina*, *Soufraki* and *MINE v Guinea*.[108] Spain indicates that a manner in which a tribunal can fail to state reasons is by providing contradictory and even inadequate reasons for its decisions. Spain also elaborates that the reasons must be "*sufficiently pertinent*" and that "*there must be a reasonable connection between the grounds invoked by a tribunal and the conclusions reached by it*".[109]

126. With regard to damages, Spain refers to cases where annulment committees annulled awards when the tribunal contradicted itself when quantifying damages (*Amco I)*, where theories of damages submitted which were termed as 'speculative' were nevertheless applied in its computation (*MINE*), and where the tribunal used an expropriation-based calculation when it had earlier decided that expropriation claims could not be considered (*Pey Casado v Chile (Annulment)*).[110]

b. Claimants' Position

127. According to the Claimants, the grounds for annulment under Article 52(1)(e) "*is to be strictly construed*". They contend that it is not open to an annulment committee to consider whether a tribunal made a correct factual finding.[111] Although they agree with Spain's position that an award must enable one to "*follow how the tribunal proceeded from Point A. to Point B.*", they dispute the proposition it raises in reference to *Amco I* that supporting reasons must "*constitute an appropriate foundation for the conclusions reached through such reasons*", because the latter "*suggests that a committee should engage in a review of the quality of an award's reasons rather than the legitimacy of the process in making the awards*". For that reason, the Claimants argue, decisions like that in *Amco I* have been "*much criticised for having fallen into the trap of reviewing the correctness of reasons*".[112]

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[106] Annulment Memorial, paras 159-163; Annulment Reply, paras 228, 241.

[107] Annulment Memorial, paras 164-165; Annulment Reply, paras 228, 258.

[108] RL-173, Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No ARB/81/1, Decision on Annulment (*Amco I)*), 16 May 1986; RL-102, *Sempra v Argentina (Annulment*); RL-85, *Soufraki (Annulment))*; RL-106, Maritime International Nominees Establishment v Republic of Guinea, ICSID Case No ARB/84/4, Decision on Partial Annulment (*MINE v Guinea*), 14 December 1989.

[109] Annulment Reply, para 234, citing *Amco I*.

[110] Annulment Memorial, paras 161-162.

[111] Annulment Counter-Memorial, paras 197-199; Annulment Rejoinder, para 101.

[112] Annulment Counter-Memorial, para 203.

128. In this regard, they also allege that Spain mischaracterises the reasoning in a few of the annulment committee decisions it cites, including *Soufraki* and *Sempra*, underlining that these decisions are instead broadly in line with their position,[113] and stress that commentators similarly adopt the position that "*there are limits on the burden on a tribunal to provide reasons for its decisions*".[114] The Claimants also insist that compared with Spain, they rely on decisions that are "*less controversial and more recent*" and which are "*more relevant*".[115]

129. The Claimants accept that contradictory reasons are "*equivalent to no reasons and could justify an annulment*", but that "*an ad hoc committee must be careful to distinguish between conflicting or competing considerations (which will not give rise to annulment) and a contradiction in reasoning (which may).*"[116] They contend that annulment committees should seek to construe the language of an award holistically, such that the award is internally consistent.[117]

130. The Claimants dispute Spain's position that a tribunal's failure to address all the issues referred to it gives rise to annulment under Article 52(1) of the ICSID Convention. They refer to the *travaux préparatoires* as well as earlier decisions, explaining that this only happens under "*certain limited circumstances*", such as where such failure "*could have affected the tribunal's ultimate decision.*"[118] They maintain that the position is the same as regards absence of reasons on a particular point,[119] and citing earlier decisions, submit that an applicant for annulment has "*the burden of proving that the reasoning of the tribunal on a point <u>that is essential for the outcome of the case</u> was either absent, unintelligible, contradictory or frivolous*"[120] (emphasis in original).

131. In this regard, the Claimants argue that where explicit reasons are missing, annulment committees "*have considered that they have discretion further to explain, clarify or infer the reasoning of the tribunal rather than annul the award*", and that where a tribunal clearly believes that it is stating reasons, this subjective view is "*entitled to some weight*". They also underscore that a tribunal has the duty to deal with every question put before it, but not every argument, and that failing this, annulment occurs only when such question is "*material to the outcome of the Award.*"[121]

[113] Annulment Counter-Memorial, paras 200-206; Annulment Rejoinder, paras 108-109.
[114] Annulment Counter-Memorial, para 207.
[115] Annulment Rejoinder, para 111.
[116] Annulment Counter-Memorial, para 208.
[117] Annulment Counter-Memorial, para 209.
[118] Annulment Counter-Memorial, paras 210-211.
[119] Annulment Counter-Memorial, para 212.
[120] Annulment Counter-Memorial, para 213.
[121] Annulment Counter-Memorial, paras 215-221; Annulment Rejoinder, paras 104-105.

132. The Claimants further add that there can be no failure of reasons unless the matter in question has been put before the Tribunal,[122] and that the Committee retains discretion not to annul the Award even if Spain establishes a basis for annulment under Article 52(1)(e) of the ICSID Convention.[123]

c. Committee's Analysis

133. The Parties have fairly presented their positions on what would constitute a failure to give reasons. There is no necessity for this Committee to re-state the decisions and quotations from past decisions of other annulment committees. In the main they agree that a tribunal is obliged to explain how it has proceeded from one point to another in a logical, cogent and comprehensible manner. A mere statement by the tribunal of its findings without more would not constitute reasons in an award. Reasons, however, need not be a long narration of the full technical aspects of the considerations resulting in a decision as long as the key points or pivots are identified and connected to the finding or ruling, and they do not need to address every single argument or point made by the parties but rather respond to the parties' underlying positions and theories that support their respective cases. In contrast, explanations that are not supportive of the decision would be those that are self-contradictory, illogical and antithetical to reasons. Reasons may vary in style and presentation as there is no prescribed style or set form for presenting reasons. Apart from written descriptions, tribunals may also use illustrations, examples, or formulaic models to explain their decisions.

134. It appears to the Committee that despite sparse discussion in its written submissions, Spain accepted in the course of the oral arguments that the failure to give reasons needs to be outcome-determinative to constitute a ground for annulment.[124] In other words, a lack of reasons that would not affect the outcome should not justify annulment. The Committee agrees that a lack of reasons for an aspect that has no impact on the eventual outcome, such as *obiter dictum*, should not be a basis for annulling an award or part thereof. This is consistent with the underlying purpose of the annulment proceedings, *viz.* to maintain the integrity of the process that leads to a just outcome. Annulling awards on points that do not alter the eventual outcome would invite frivolous applications curated to forestall enforcement of the award and constitute an abuse of the process.

[122] Annulment Counter-Memorial, para 222.

[123] Annulment Rejoinder, para 112.

[124] Annulment Transcript, Day 2, 26:16–27:9; 28:4-11; 31:2-6; 42:6-14; 121:2-10; 124:1-8.

(2) Determination of the Applicable Law in the Award

a. Spain's Position

135. Spain submits that the Award fails to articulate and/or explain (i) whether EU law is the law applicable to the merits, and (ii) whether EU law is relevant.[125]

b. Claimants' Position

136. The Claimants submit that, notwithstanding Spain's lack of reasoned argument, the Tribunal's reasoning in the Award on determination of the applicable law is "*clear and can be followed from point A to point B.*"[126] They also make the point that even if the Tribunal's reasoning is unclear, it is "*at the very least, reasoning that is implicit and can reasonably be inferred*."[127]

137. The Claimants reiterate as well that the correctness of the Tribunal's findings is not a matter for the Committee to review, even though this is what Spain is effectively seeking.[128]

c. Committee's Analysis

138. In its Award the Tribunal has set out comprehensively the Parties' respective arguments on the applicable law, in relation to both jurisdiction and the merits of the claims. As to the latter, Spain points to EU law on State aid as being relevant to determine the scope of the Claimants' rights, their legitimate expectations and the proportionality and reasonability of the Disputed Measures.

139. In its discussion on the applicable law, the Tribunal referred to Article 26(2) of the ECT in application of Articles 31 and 32 of the VLCT and held that:

> *489. The Tribunal is of the view that the applicable law is the ECT and any rules of international law which are relevant with regard to interpretation and application. The Tribunal will only refer to the provisions of Spanish law and EU law if, in the Tribunal's view, it is appropriate.*

140. On the issue of the applicability of EU law, the Tribunal's decision under the heading of 'applicability of EU law' cited a statement from the RREEF award, without any indication of its own holding, *viz.*:

> *490. The RREEF Decision in its jurisdictional decision, rejected Spain's jurisdictional objection and the decision also, when considering the merits, found that if there was incompatibility or*

[125] Annulment Memorial, paras 166-170; Annulment Reply, paras 260, 265-267.

[126] Annulment Counter-Memorial, paras 224-232; Annulment Rejoinder, paras 118-123, 125-126.

[127] Annulment Counter-Memorial, para 233.

[128] Annulment Rejoinder, para 124.

> *discrepancy between the ECT and the EU law, then ECT must prevail.*[129]

141. A plain reading of this paragraph may give one the impression that the Tribunal did not consider the question independently but merely re-stated the RREEF tribunal's decision. Indeed, read in isolation, the Committee would agree with Spain's criticism that the Tribunal did not explain why EU law was inapplicable to the substance of dispute. It made no reference to the various State aid regulations which Spain said could have impacted the implementation of *RD* 661/2007 and subsequent amendments to that. No reference was made to EU law in the Tribunal's consideration on the merits.

142. However, what appears clear is that the Tribunal, having taken the view that EU law stands subordinate to the terms of the ECT, considered itself entitled to take no cognisance of it. In any event, in the Committee's view, even if EU law would have been considered, the outcome would not have been different. This is because, as Spain's expert witness clarified, RD 661/2007 was not notified earlier, and thus had not been approved by the EC at the relevant time:

> *Both the initial regime and the new Spanish regime were the subject of the Commission Decision on State Aid. The European Commission considered that the system constituted State aid (Art. 107(1) TFEU) on the basis that the aid was attributable to the Spanish State, was financed by state resources, granted an advantage to recipients, and probably distorted competition conditions and affected trade between EU Member States. The Commission also considered that Spain had failed to comply with the obligation of suspension (standstill) provided for in Article 108(3) TFUE. However, the Commission decided not to object because it considered that the aid was compatible with the internal market in accordance with Article 107(3)I TFUE because the aid was granted with the objective of the public interest of reducing the greenhouse effect and was proportionate.*
>
> […]
>
> *In this case, the initial Spanish aid regime was not notified to the Commission as required by the EU treaties. The absence of*

[129] Award, para 490.

notification precludes the generation of legitimate expectations for the reasons set out by Attorney General Darmon in Case C-5/89.[130]

143. While Professor Gosalbo suggested that since RD 661/2007 and the new regime subsequently modifying it were not sanctioned by the EC, it would violate EU law and render the entire scheme unenforceable, the duty to notify State aid is incumbent on Spain and that its failure to do so should not be transferred to the Claimants. As the tribunal in *Cavalum v Spain* stated, "*there is no necessary connection between an investor's legitimate expectation of a reasonable rate of return and a failure by the State to notify state aid.*"[131] Whether the Claimants could have legitimate expectations is a matter to be ascertained from the representations (if any) made by Spain to the investors and could not be dependent on whether the regime was properly notified to the EC or ascertained by any interpretation of EU law. If Spain itself when promoting the scheme did not notify the EC, it should not be suggested that the Claimants ought to have known that the scheme violated EU law and thus should have lowered their expectations or had their expectations rendered as illegitimate.

144. The Tribunal in its discussions on the subsequent issues relating to the merits of the claims proceeded to apply the terms of the ECT and made references to case decisions interpreting them. It is clear to the Committee that the Tribunal was consistent with its holding that EU law had little or no relevance to the issues. The Committee will next consider the specific contentions presented by the Parties in relation to the Tribunal's decision on the merits.

(3) Conclusions on Liability in the Award

a. Spain's Position

145. According to Spain, the Award contains typographical errors and "*contains a succession of paragraphs without any logical order*" and "*continually refers to previous decisions, indicating whether they are more or less to its liking, but without in any way pointing out their connection to the case and without analysing the circumstances of Watkins' alleged investment*".[132] In particular, Spain contends that the Award provides no intelligible answer and/or reasoning as to:

i. Whether there is an autonomous standard in the ECT to create stable conditions for investment;[133]

[130] Gosalbo Report, paras 170- 173.

[131] CL-270,Cavalum SGPS, S.A. v Kingdom of Spain, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para 611.

[132] Annulment Memorial, para 171.

[133] Annulment Memorial, paras 173-174; Annulment Reply, paras 269-271.

ii. What constituted the Claimants' legitimate expectations, why the standard determined by the Tribunal leads to a decision against Spain, and which of Spain's measures in particular breach the ECT;[134]

iii. When the Claimants made the investment and how such date is determined, despite the relevance of this matter;[135]

iv. Why Article 44(3) of RD 661/2007 necessarily constitutes a commitment to stabilisation, even though Article 44(3) did not guarantee that "*the tariffs shall remain in force, unchangeable except in the periodic reviews every four years*";[136]

v. The specificities of the energy type in question, i.e. wind energy, even though this constituted a key issue in the main proceeding, and even though wind energy compared with solar energy is much more mature in Spain, a fact that could have "*significant consequences for the configuration of legitimate expectations*";[137]

vi. Whether the relevant measures implemented by Spain are reasonable and proportionate;[138] and

vii. The "*specific commitments*" made by Spain.[139]

b. Claimants' Position

146. The Claimants submit that the grievances raised by Spain generally amount to an appeal,[140] and that the typographical error it refers to should have been addressed during the rectification proceeding.[141]

147. Their answers to each matter indicated by Spain (as set out at paragraph 145 above), respectively, are as follows:

i. The Tribunal's reasoning is sufficient, and even failing this, its ultimate conclusions would not have been materially affected.[142] Spain misrepresents the Claimants' submissions as well as the Award.[143]

[134] Annulment Memorial, paras 175-182; Annulment Reply, paras 272-280.
[135] Annulment Memorial, paras 183-188; Annulment Reply, paras 281-286.
[136] Annulment Memorial, paras 189-193; Annulment Reply, paras 287-290.
[137] Annulment Memorial, paras 194-196; Annulment Reply, paras 291-297.
[138] Annulment Memorial, paras 197-201; Annulment Reply, paras 298-304.
[139] Annulment Memorial, paras 202-205; Annulment Reply, paras 305-307.
[140] Annulment Counter-Memorial, para 235.
[141] Annulment Counter-Memorial, paras 236-237.
[142] Annulment Counter-Memorial, paras 238-243.
[143] Annulment Rejoinder, paras 130-140.

ii. The Tribunal's reasoning is sufficient.[144] Spain also misrepresents the Claimants' submissions and the Award, ignores the Tribunal's Decision on Spain's Request for Rectification of the Award dated 13 July 2020 ("**Rectification Decision**"), and fails to make clear how the alleged default materially affected the outcome of the case.[145]

iii. It may be that the Tribunal did not decide on or determine the date of investment specifically, but this *per se* was not necessary, and the Tribunal did decide on the related key issue, thus rendering annulment unwarranted.[146] Spain also misrepresents the Claimants' submissions and fails to demonstrate how the alleged default materially affected the outcome of the case.[147]

iv. The Tribunal provided sufficient reasoning, and it was not obliged to give a (comprehensive) response to every related question or argument. In any event, the objections raised by Spain, aside from being incorrect, also amount to an attempt at appeal.[148]

v. The Tribunal's reasoning is sufficient and enough to dispose of key issues. Further, Spain misrepresents the earlier decision it refers to.[149] The Tribunal was also alive to the specificities of wind energy: it was conscious that RD 1614/2010 specifically affected the wind sector,[150] and that the investment advisory report was on "*wind remuneration*"; it discussed the application of RD 661/2007 and RD 1614/2010 in the context of "*wind farms*";[151] and it considered the evidence comprising, *inter alia*, the BCG Report of May 2011 relating to "*wind generation*".[152]

vi. The Tribunal's reasoning is sufficient. As regards proportionality in particular, even if the Tribunal's reasoning is not explicitly stated in the Award, it is easily inferred.[153] In particular, the Claimants point out that the Tribunal in its reasoning accepted their position that wind farms were not the source of the tariff deficit and thus measures applied to their investment would not be suitable, which in turn meant that the harmful effects of these measure on the Claimants were disproportionate.[154]

[144] Annulment Counter-Memorial, paras 244-251.
[145] Annulment Rejoinder, paras 141-148.
[146] Annulment Counter-Memorial, paras 252-257.
[147] Annulment Rejoinder, paras 149-156.
[148] Annulment Counter-Memorial, paras 258-273; Annulment Rejoinder, paras 157-162.
[149] Annulment Counter-Memorial, paras 274-285.
[150] Award, para 576.
[151] Award, para 581; see also Award, FN 661.
[152] Award, FN 662.
[153] Annulment Counter-Memorial, paras 286-295; Annulment Rejoinder, paras 175-181.
[154] Annulment Counter Memorial, paras 294-295.

vii. The Tribunal's reasoning is sufficient, and the contents of the "*specific commitments*" are set out clearly in the Award at paragraph 524.[155] Spain also misrepresents the Claimants' submissions.[156]

c. Committee's Analysis

148. The Committee will consider each of the questions posed by Spain in paragraph 145 above.

149. Before doing so, the Committee notes that Spain made strong criticism of the Tribunal for making extensive references to various prior decisions involving Spain related to the legislative changes made in the energy sector. In the Committee's view, the Tribunal did at times appear to accept findings of fact made by other tribunals as if they were in a similar state of affairs as when dealing with the Watkins Parties. A tribunal should take care to differentiate between finding support in interpretation approaches adopted by other tribunals and failing to make its own findings of fact. The duty to make findings of fact remained with the Tribunal, and the Committee shall ascertain whether this was the case and, if otherwise, whether flaws amount to failure to state reasons warranting annulment.

150. The Committee notes that Spain also avers that the Award at times lacks rigour, does not follow any logical order or provides contradictory reasons.

(i) FET standard

151. The Tribunal's discussion of this issue is contained in paragraphs 491 to 514 of the Award.

152. It made numerous references to earlier ICSID decisions invoked mostly by Spain and commented on by both Parties where FET was considered satisfied if the investor was accorded a "*minimum standard of treatment*", or if the investor was given "*a reasonable return*"; and legitimate expectations were found when "*specific commitments* [were] *made to an investor that the regulations in force will remain unchanged*".[157] The Tribunal understood that it was Spain's position that it had undertaken a minimum standard of protection for investors and that as a State it retained the right to regulate under the terms of Article 10(1) of the ECT so long as the investor was guaranteed a "*reasonable return.*"

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[155] Annulment Counter-Memorial, paras 296-302.

[156] Annulment Rejoinder, paras 182-184.

[157] CL-133, AES Summit Generation Limited and AES-Tisza Erromu Kft v The Republic of Hungary, ICSID Case No ARB/07/22, Award (*AES v Hungary*), 23 September 2010, para 13.3.2; RL-2, Electrabel S.A. v The Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Lability (*Electrabel v Hungary*), 30 November 2012; Total S.A. v Argentine Republic, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 122; CL-151, Charanne B.V. and Construction Investments S.A.R.L v The Kingdom of Spain, SCC Arbitration No 062/2012, Award, 21 January 2006, para 500; CL-161, Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic, ICSID Case No ARB/14/3, Award, 27 December 2016, paras 319, 372. See para. 494 of the Award.

153. The Tribunal expressed its view that each of these decisions was "*of no assistance*" to Spain. The Tribunal also devoted six paragraphs[158] to analyse the RREEF decision and declined to accept the decision's holding that Spain's regulatory regime guaranteed a "*reasonable return.*"[159] It criticised the *RREEF* tribunal for reaching a conclusion inconsistent with the evidence that was before that tribunal.[160]

154. The Tribunal also referred to the findings of the decision in *Eiser* and quoted in paragraph 508 of the Award the *Eiser* tribunal as saying that:[161]

> *the evidence shows that* [Spain] *eliminated a favorable regulatory regime previously extended to Claimants and other investors to encourage their investment in CSP. It was then replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises. This new system was profoundly unfair and inequitable as applied to Claimants' existing investment.*[162]

155. It is unfortunate that immediately following this quotation, the Tribunal said:

> *509. The Tribunal finds that Spain is not entitled, pursuant to the provisions of Article 10(1) ECT, to deprive the Claimants of the economic rights associated with the RD 661/2007 regime when it freely undertook to grant those rights and guarantee their continuity over the entire operational life of the installations.*

156. Indeed, the manner in which the Tribunal cited and made the finding in paragraph 509 of the Award appears to be one of simply accepting the finding of fact by the *Eiser* tribunal (whose award meanwhile had been annulled). If this were the sole basis for the Tribunal's conclusion, Spain would be correct in asserting that the Tribunal did not make its own finding of fact or state its reasons for such a finding. The dissenting arbitrator would have been correct to have observed that as different tribunals had taken different approaches concerning the extent and morphology of the legitimate expectations of investors, the Majority Tribunal should have undertaken an in-depth analysis of Article 44(3) of the ECT in this regard on its own.[163]

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[158] Award, paras 499-504.

[159] Award, para 500.

[160] Award, para 502.

[161] Award, para 507.

[162] RL-79, Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.R.L. v Kingdom of Spain, ICSID Case No ARB/13/36, Award (*Eiser*), 4 May 2017, para 365.

[163] Ruiz Fabri Dissent, paras 9-11.

157. However, the Tribunal went on to explain that the FET standard in the ECT "*has a specific legal meaning*"[164] and referred in paragraph 511 of the Award to the decision in *Liman Caspian Oil v Kazakhstan*, according to which FET under the ECT went beyond the minimum standard of treatment.[165] The Tribunal also stated that FET should in each case be interpreted autonomously according to the rules of interpretation of the VCLT.[166] In the subsequent section, paragraphs 515 *et seq.*, the Tribunal made the findings of fact as regards the promises made by Spain in the specific case.

158. In the Committee's view, it can be inferred with ease that the Tribunal found that the Claimants were entitled to legitimately expect that Spain had made promises and it would not turn back on them without consequences. While the section where the Tribunal dealt with the 'FET standard' specifically seems unclear, the Tribunal did set out its line of thought in paragraphs 512 and 513 and in the following section, when considering whether Spain made specific commitments to encourage the investment. In that sense, the Committee does not agree with Spain that the Tribunal "*ignored the question and provided no answer*"[167] nor, generally, that the Tribunal did not provide reasons for its finding.

(ii) Legitimate Expectations and the Disputed Measures

159. The Tribunal accepted that the burden to show any violation of the FET standard lay with the Claimants.[168] It expressed the view that the legitimacy of the expectations of the Claimants had to be based on the facts objectively assessed at the time the investment was made following "*some affirmative action of Spain in the form of specific commitments made by Spain to the investor, or by representations made by Spain, which encouraged the investment*".[169] Such may take the form of undertakings and/or representations, whether explicit or implicit.

160. The Tribunal made specific references again to the *RREEF* decision after "*having considered the Claimants and the Respondent's comments* [there]*on*",[170] and noted that Spain was found to have violated Article 10.1 of the ECT and that, like in the *Eiser* award, Spain had been held to have "*radically alter*[ed] *the regulatory regime to existing investments, whereby investors in reliance of the legislative regime, are deprived of their investment value*."[171] The Tribunal then proceeded to independently examine the circumstances relevant to the present case, *viz.* the nature, amount

[164] Award, para 512.

[165] Citing Arbitration Exhibit CL-75, Liman Caspian Oil B.V. & NCL Dutch Investment B.V. v The Republic of Kazakhstan, ICSID Case No ARB/07/14, Award (excerpts only), 22 June 2010, para 263.

[166] Award, paras 511-513.

[167] Annulment Memorial, para 174.

[168] Award, para 516.

[169] Award, para 517.

[170] Award, para 519.

[171] Award, para 520.

and duration of the Feed-in-Tariff ("**FIT**") offered under RD 661/2007 and whether Spain made any commitment under RD 1614/2010 that qualifying wind installations would not be affected by any change of the RD 661/2007.

161. The Tribunal's examination in paragraphs 524 through 527 resulted in its finding that Spain had explicitly promised that the qualifying installations would remain stable under RD 661/2007, which in the Tribunal's view, contained the stabilisation commitment in Article 44(3), and that Spain had committed that under RD 1614/2010, any revisions to the fixed tariff and premium pursuant to Article 44(3) of RD 661/2007 would not affect duly registered existing installations. The Tribunal accordingly found that the Claimants' expectations were legitimate and reasonable. It found that Spain made the commitments to attract investments in renewable energy by offering the FIT under RD 661/2007 and, in paragraphs 525 and 526, that it made a commitment under RD 1614/2010 that any change in the FIT scheme would be prospective and would not affect the Claimants as "*duly registered existing installations*."[172]

162. The Committee notes that the Tribunal was careful to point out that Spain was under no obligation to do so but made these representations and commitments to attract investors to participate in its renewal energy project, including wind farms.[173] It considered, among other things, that in its July 2010 press release Spain said it would be:

> […] *guaranteeing the current subsidies and rates of RD 661/2007 for the facilities in operation (and for those included in the pre-registration) starting in 2013*.[174]

163. The Tribunal also referred to various representations in the form of "*promotion of advertising materials such as the English Language documents, presentation in foreign countries designed to attract foreign investment for the RE projects*" as supportive of these representations.[175]

164. The Tribunal found that these were representations which the Claimants could reasonably rely on and that Spain subsequently breached by implementing measures contrary to the Claimants' legitimate expectations.

165. In considering the Disputed Measures, the Tribunal set them out in the following terms:

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[172] Award, para 526.

[173] Award, paras 528-530.

[174] Award, paras 530 and 531, referring to Arbitration Exhibit C-45, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks", 2 July 2010.

[175] Award, para 532. The Tribunal had foreshadowed in para 495 of the Award that "*specific commitments were in fact made to the Claimants, namely by the relevant legislation and representations*."

(i) in December 2012, Spain enacted Law 15/2012 which imposed a 7% levy on electricity produced and fed into the National Grid during the calendar year which included all generators;

(ii) in February 2013, Spain enacted RDL 2/2013 which took away the Claimants' premium option. This legislation also replaced the annual adjustment index based on the Spanish CPI for updating the FIT capital to account for inflation;

(iii) on 12 July 2013, Spain, pursuant to RDL 9/2013, amended the 1997 Electricity Law and repealed RD 661/2007 and established a new regime for RE power generations which was radically different from the framework established by RD 661/2007. This new regime was not fully implemented until June 2014 and hence there was an 11-month period of uncertainty;

(iv) in December 2013, Law 24/2013 was introduced whereby the distinction between the ordinary regime and the special regime announced by RDL 9/2013 disappeared. Conventional and RE generators were put on an equal footing thereby depriving RE installations of the unconditional right of priority of grid access and priority of despatch that have existed under the previous regime. The Law of 24/2013 also established the concept of "reasonable return" over the entire useful life of the plant;

(v) in June 2014, Spain enacted RD 413/2014 which would apply to RE installations; and

(vi) on 16 June 2014, the Ministerial Order was approved and it was published on 20 June 2014.[176]

166. The Tribunal did not go into any detailed discussion of each of these measures but, by the manner it described them, it is clear to the Committee that the Tribunal viewed them contrary to the stabilisation commitment in Article 44(3) of RD 661/2007 and the commitment under RD 1614/2010.

167. In setting them out chronologically and jointly, the Tribunal deemed that the cumulative measures eventually resulted in an economic regime radically different from what Spain had

[176] Award, para 557.

promised, with the guaranteed FIT, subsidies, rates and premiums for RE set out in order to establish a system where conventional and RE generators were placed on equal footing. Further in the Award, on paragraph 569, the Tribunal stated that *"The Disputed Measures are* […] *a retroactive overhaul of the RD 661/2007 economic regime*."

168. Thus, the Committee does not agree that there was no analysis by the Tribunal of the measures and that its reasons are "*radically contradictory.*"[177]

169. As with its prior discussion, the Tribunal again cited earlier decisions where Spain was also the respondent in disputes with other energy investors arising from the ECT, *viz. RREEF* and *Eiser*. The Tribunal considered them "*relevant and especially as it concerns an investment into Spain's CSP sector pursuant to the specific commitments offered by RD 661/2007 and confirmed by RD 1614/2010.*"[178] While each tribunal is expected to deal with matters in respect of which it is seised with an independent and uncluttered mind, it is nevertheless open to a tribunal to consider how others have considered similar issues and the approaches earlier adopted. The Committee agrees that a tribunal may coincide with earlier tribunals in approach or adopt approaches similar to those adopted by earlier tribunals, but it is nevertheless unwise to rely solely on an earlier decision to confirm a factual assertion made before it, without more, for which it is required to make a finding on its own.

170. The Tribunal in this case cited *Eiser* in paragraph 561 as its basis for holding that the purpose of the ECT is to ensure that legal frameworks are "*stable, transparent and compliant with international standards*" and in paragraph 563 that the:

> *Eiser decision confirms that the Claimants were entitled to an expectation that the Spanish regime in which they invested, would not be radically altered in respect of existing investments.*

171. These statements, if read in isolation, could give the impression that the Tribunal might not have considered the evidence and arguments made before it but was merely adopting the findings of the *Eiser* tribunal (which have since been annulled). However, as observed above (at paragraphs 165-167) the Tribunal did in fact take a position regarding the measures before making observations on the *RREEF* and *Eiser* decisions.

172. In the Committee's view, despite its citation of the *Eiser* decision as support, the Tribunal did apply its mind to this issue and provided sufficient objective reasons for finding that investors were entitled to legitimately expect that RD 661/2007 would not be changed or that any change

[177] Annulment Memorial, paras 180-182.

[178] Award, para 559.

subsequently would not prejudice them. There is thus not a basis to support annulment on the grounds invoked by Spain related to this issue.

(iii) Investment date

173. The Tribunal in its Award accepted that the Claimants' expectation must be assessed at the time the investment was made.[179] There is a dispute between the Parties as to when this should be. According to the Watkins Parties, they made the investment in August 2011, whereas Spain says they did so only in May 2012 when the transaction was closed. According to Spain, "*much happened between August 2011 and May 2012 in Spain*,"[180] suggesting that the Claimants' expectations must be considered in the context of those changed circumstances.

174. Spain alleges that since the Award fails to explain this matter, which is relevant in the decision regarding legitimate expectations, the Award should be annulled. It refers to the Dissent on Liability and Quantum dated 9 January 2020 ("**Ruiz Fabri Dissent**"),[181] in which the dissenting arbitrator also criticised the Tribunal for failing to give sufficient consideration to the date of the investment as that could change the "*intensity of the legitimate expectations*."[182] She suggested that the Majority Tribunal should have taken into account that in 2010 there was a "*climate of change*" following the "*unambiguous signals that a regulatory change of some sort was coming*."[183]

175. The Committee notes that the Tribunal did not make any finding of when the investment was made or whether such a date had any impact on the expectations of the Claimants. The Tribunal did consider however the various measures implemented on or after December 2012 (see paragraph 165 above) to be inconsistent with RD 661/2007, RD 1614/2010 and the representations made by Spain.

176. Regardless of whether this happened by oversight or was intentional, the Committee agrees with the Claimants that this vacuum is not outcome-determinative. Indeed, regulations RD 661/2007 and RD 1614/2010 were in force by December 2012, and the Tribunal found that the representations that "*the current subsidies and rates of RD 661/2007 for the facilities in operation*"[184] were not reneged until December 2012 and that the regime was wiped out "*in its entirety in July 2013 pursuant to RDL 9/2013*,"[185] as well as the subsequent June 2014 Ministerial

[179] Award, para 517.
[180] Annulment Memorial, para 185.
[181] Annulment Memorial, para 187.
[182] Ruiz Fabri Dissent, para 12.
[183] Ruiz Fabri Dissent, paras 12-13.
[184] Award, para 530.
[185] Award, para 534c.

Order.[186] Therefore, it matters not whether the Claimants' expectations were assessed in August 2011 or in May 2012.

177. Spain premised its submissions on the assertion that "*much happened between August 2011 and May 2012 in Spain*" that should have to some degree moderated the Claimants' expectations. The Committee notes that the Tribunal did not make any observations as to any developments between August 2011 and May 2012 which could have affected the Claimants' legitimate expectations prior to any of those dates. This assertion therefore remains unsupported as the Committee has not been directed to any evidence that the Tribunal had ignored or failed to take into account which could have affected its decision.

178. In the Committee's view, the omission of a specific finding by the Tribunal on the date of investment does not justify the annulment of the Award, as it would not have any impact on the outcome, including the extent of the economic impact of the breaches, as will be discussed below.

(iv) Article 44(3) of RD 661/2007 as a commitment to stabilisation

179. Spain asserts that Article 44(3) of RD 661/2007 did not guarantee that "*the tariffs shall remain in force, unchangeable except in the periodic reviews every four years*"[187] and submits that the Tribunal did not give any reason for construing it as Spain's commitment to stabilisation. It specifically criticises the Tribunal for "*not study*[ing] [RD 661/2007's] *literal wording, nor its historical background.*"[188]

180. The Committee notes that while the Tribunal used the term 'stabilization commitment' in the discussion on legitimate expectations in paragraphs 526 to 529, without first addressing how it had come to that conclusion regarding the effect of Article 44(3) of RD 661/2007, it did explain its interpretation in the following terms in footnote 607:

> *Article 44(3) provided for the possibility to review the Fixed Tariff and Premiums (and the floor and cap in the latter case) in consideration of the evolution of the cost of the technology and its coverage in the renewable sector. However, Article 44(3) expressly stated that those revisions would not affect the Fixed Tariff, nor the floor and cap of the Premium option, for existing installations commissioned prior to 1 January of the second year following the year in which the revision was implemented (for instance, if a review was conducted in 2010, it would not affect installations that had obtained a commissioning*

[186] Award, para 570.

[187] Memorial for Annulment, para 190, citing Award, para 407.

[188] Memorial for Annulment, para 191.

> *certificate prior to 1 January 2012). Thus, RD 661/2007 guaranteed that any review of the Fixed Tariff would not apply to existing installations and that in the case of the Premium option, although the amount of the Premium could change, the minimum revenue would not change as any modification of the cap and floor would not apply to existing installations.*

181. The Tribunal also addressed it in the latter part of the Award, while dealing with the issue of predictability, and discussed the background and the drafting history of Article 44(3) of RD 661/2007.[189] It cited Article 44(3) in full and set out the drafting history that led to the eventual text enacted, which showed that it was crafted upon the National Energy Commission's ("**CNE**") Report of February 2007 that:[190]

> *The regulation must offer sufficient guarantees to ensure that the economic incentives are stable and predictable throughout the service life of the facility.*
>
> […]
>
> *Ultimately, what the CNE proposes is regulatory stability to recover investments, maintaining regulated tariffs during the service life of existing facilities (with a transparent annual adjustment mechanism).*[191]

182. The Tribunal also made reference to a press release by Spain's government agencies and ministries, giving the assurance that:[192]

> [f]*uture adjustments to said tariffs will not affect installations which are already in operation. This guarantees legal certainty for the electricity producer and stability for the sector*.

183. In view of the above, the Committee considers that it is possible to understand how the Tribunal went from A to B, to view Article 44(3) of RD 661/2007 as a commitment to stabilization. While the Tribunal did not set out its reasons on Article 44(3) of RD 661/2007 earlier in the text of the Award, it eventually did so. In the Committee's view, this is a problem related to drafting and presentation style, and therefore gives no basis to conclude that the Tribunal failed to give reasons for its holding.

[189] Award, paras 539 et seq. and para 569.
[190] Award, para 551.
[191] Award, FN 630.
[192] Award, FN 633.

(v) Specificities of the energy type

184. Spain also criticised the Tribunal for allegedly ignoring the specificities of the type of energy that was involved, *i.e.* wind, which it says should have been ascertained. This criticism was also raised by the dissenting member Professor Dr Hélène Ruiz Fabri, who stated that the Award:

> *fails to point out whether this is a particularity to be taken into account or not, sometimes finding it is a factor of distinguishing to discard the relevance of some other awards or, on the contrary, ignoring it when espousing the finding of the others.*[193]

185. According to Spain, wind farms are a much more mature energy source since they had been present in Spain for many years (unlike solar and thermal energy), a fact that could have "*significant consequences for the configuration of legitimate expectations*".[194] Spain complains that the Tribunal made no distinction between solar and wind energy when discussing the earlier awards made against Spain by other tribunals. It draws attention to the fact that the Tribunal had accepted conclusions made in awards relating to solar energy (such as *Antin*, *Eiser*, *Masdar* or *Novenergia*) and moved away from *RREEF*, the only award relating to wind energy.

186. The Claimants' counsel pointed out during oral arguments that the Tribunal was alive to the fact that it was dealing with a wind energy project.[195] It pointed out that the Tribunal was fully aware that RD 1614/2010 specifically affected the wind sector;[196] that the investment advisory report was on "*wind remuneration*"; that the Tribunal discussed the application of RD 661/2007 and RD 1614/2010 in the context of "*wind farms*";[197] and that the Tribunal had considered the evidence comprised in, *inter alia*, the BCG Report of May 2011 relating to "*wind generation.*"[198]

187. Spain's observation that the Tribunal ignored the specificity that this project involved wind energy is thus not accurate. While Spain suggested that wind is a mature energy source in Spain, it did not explain how this could have any "*consequences for the configuration of legitimate expectations*" as it asserts. Professor Dr Ruiz Fabri too while criticising the Majority Tribunal merely raised whether such a particularity ought to be taken into account.

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[193] Ruiz Fabri Dissent, para 4.

[194] Memorial for Annulment , para 196.

[195] Annulment Transcript, Day 2, 82:12-89:15.

[196] Award, para 576.

[197] Award, para 581; see also Award, FN 661.

[198] Award, FN 662. Also, the Committee notes that the Tribunal differentiates the Charanne decision from the case at hand due in part to the different type of RE involved at paras 545 and 546.

188. The Committee is satisfied that the Tribunal was fully conscious it was dealing with a wind energy project and any criticisms in that regard fail to substantiate the warranting of the annulment of the Award.

(vi) Reasonableness and proportionality

189. Spain submits that the Tribunal failed to properly consider or give reasons for finding that the regulatory changes made by Spain were unreasonable or disproportionate. It describes the Tribunal's passages in the Award dealing with this issue (paragraphs 593 to 603) as "*the umpteenth chaotic exercise*"[199] in that while the Tribunal had accepted that there would be a need to determine if Spain had a rational policy goal to take measures and if such measures were in fact proportionate to achieve the objective, the Tribunal did not consider either but rather simply said that the 'tariff deficit', which was the basis of the reforms, was Spain's own doing and not attributable to the Claimants and that those measures "*destroyed*" the economic regime set out in RD 661/2007.[200]

190. The Claimants' response is that the Tribunal explained that Spain acted unreasonably in dismantling the regime under RD 661/2007 when it implemented the Disputed Measures and ruled that Spain's reason for implementing them was the ballooning tariff deficit, which, in the Tribunal's view, was "*a result of Spain's own regulatory conduct and hence cannot be attributed to the Claimants*" and thus could not excuse Spain for causing harm to the Claimants.[201] The Claimants submit that, as a consequence, the Tribunal held that tackling the tariff deficit was not a rational policy and that the measures taken were not tailored to pursue that policy, as they were not aimed at tackling the actual cause of the problem.[202] They also assert that in its reasoning the Tribunal accepted their position that wind farms were not the source of the tariff deficit and thus measures applied to their investment would not be suitable measures, and therefore the harmful effects of these measures on them were disproportionate.[203]

191. In her dissenting opinion, Professor Dr Ruiz Fabri also criticised the Majority Tribunal for failing to set out the parameters of proportionality or consider "*the balance between investment protection and the respect of the regulatory power of the State*". She also said that the Majority Tribunal simply ruled that the "*'changes to the FIT… [are] not an appropriate solution to the problem' of tariff deficit, thus substituting its appreciation to Spain's*."[204] She observed that the

[199] Annulment Memorial, para 198.
[200] Annulment Memorial, para 201.
[201] Annulment Counter Memorial, paras 287-288.
[202] Annulment Counter Memorial, para 290.
[203] Annulment Counter Memorial, paras 294-295.
[204] Ruiz Fabri Dissent, para 14.

Majority Tribunal neither weighed and balanced the measures taken with the "*economic crisis*" that Spain was then facing nor even acknowledged the same.

192. The Committee notes that the Award dealt with the question of reasonableness and proportionality of the measures rather briefly[205] although the Parties had made extensive submissions,[206] as summarised in the Award.

193. The Parties agree[207] that the Tribunal set the proper legal test for measures taken to be 'reasonable', under which there are two prongs: (1) there must be a rational policy goal, and (2) the measures tailored in pursuit of that rational policy goal must be reasonable.[208] In Spain's view, the Award ignores the first prong altogether.

194. The Tribunal ruled that:

> *599.* […] *Spain attempts to justify its regulatory measures due to a tariff deficit but a tariff deficit is a result of Spain's own regulatory conduct and hence cannot be attributed to the Claimants. This conduct is, in the Tribunal's view, a violation of the Claimants' reasonable and legitimate expectations. The tariff deficit had existed long before the development of wind farms in Spain and hence the drastic changes to the regulatory regime for renewables cannot be a rational policy goal.*

195. The Committee agrees with the observations that the Tribunal's reasoning in this paragraph is not easily understood.

196. The first question the Tribunal needed to answer was, if indeed the problem was the growing tariff deficit, would steps intended to eradicate or moderate it be considered a rational policy goal? Whether or how the tariff deficit developed or whether it was Spain's fault is of no relevance. It was also not suggested by any Party that the Claimants or wind farms generally contributed to the tariff deficit.

197. In the subsequent section, when addressing whether the measures impaired the Claimants' investment returns, the Tribunal again addressed the question of reasonableness of the Disputed Measures, stating that:

> *604.* […] *The measures that Spain took were unreasonable and breached the FET standard because Spain's primary justification was*

[205] Award, paras 595-600 (reasonableness); paras 601-603.

[206] Award, paras 428-479.

[207] See Annulment Memorial para 199; Annulment Counter Memorial, para 287.

[208] Award, paras 597 and 604.

> *because of* [sic] *the growing tariff deficit and the tariff deficit was the result of disparity between the regulated costs and the income of the electricity system which is dependent on the regulated price of the electricity. The tariff deficit could have been avoided if Spain had set consumer prices as it was required to do under Article 17 of the 1997 Electricity Law and RDL 6/2009. The Tribunal is of the view that the tariff deficit is a result of Spain's regulatory failures and therefore it is conduct which does not bear a reasonable relationship to Spain's policy.*

198. To that extent, the Tribunal again did not address the first prong of the test, *i.e.* whether tackling the tariff deficit was a rational policy goal. The Tribunal focused rather on the second prong of the test, *viz.* reasonableness of the measures. The reason for that appears to be that the Tribunal sided with the rationale behind the relevant part of the *BG v Argentina* decision, according to which "*the withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investment is by definition unreasonable and a breach of the treaty*".[209] While the Tribunal acknowledged that the policy goal was to reduce the tariff deficit, it effectively bypassed the determination regarding its rationality in the present case.

199. As regards the second prong, in deciding that Spain's measures could not be considered reasonable, the Tribunal stated that:

> *597.* […] *Spain cannot satisfy this test because having induced the Claimants to invest, there was a sudden and drastic change in Spain's policy with regard to the RE industry and the legal and regulatory framework was amended over a period of time.*

200. As summarised by the Tribunal, Spain's rationale for embarking on a review of the Spanish Electricity System ("**SES**") was:

> […] *(1) the existence of an international economic crisis that led to a reduction in electricity demand; (2) the rise in consumer tariffs, (3) the existence of excess remuneration in the RE Sector, and (4) the existence of expectations of growth of the tariff deficit.*[210]

201. However, it was the view of the Tribunal that "[macroeconomic control measures on the grounds of general interest] *cannot be a basis for the enactment of the Disputed Measures.*"[211] However,

[209] Award, para 598.

[210] Award, paras 426 and 459.

[211] Award, para 542.

in reaching its view that tackling the tariff deficit was not a rational policy goal, the Tribunal appears to have disregarded the other factors that Spain raised, *viz.* that Spain was impacted adversely by the international financial crisis, falling electricity demand and the high costs of the RE incentives scheme, which could result in excessive burden for the Spanish consumers.[212] The Tribunal also made no mention in its analysis of Spain's submission concerning the eventual outcome after the Disputed Measures were implemented and the positive assessments of international bodies (the International Monetary Fund and the International Energy Agency in the years 2015 and 2016).[213]

202. Therefore, the Committee agrees with Spain that the Tribunal did not address at length the second part of the test to show how the Disputed Measures were unreasonable. Instead, it focused on the effect produced by the measures, which for the Tribunal was the dismantling of the legal and business framework applicable to the Claimants' investment.[214]

203. As regards proportionality, both Parties also agree that any measure to pursue a rational policy goal must be proportionate to achieve the policy goal, failing which such measure would fall foul of the FET obligation.

204. The Claimants submitted before the Tribunal that there were other less intrusive means with regard to the rights affected that would have been equally able to achieve the stated goal of reducing the tariff deficit. According to the Claimants, Spain had in fact identified alternative solutions less harmful to investors, such as a tax on all CO2 emissions, and therefore the Disputed Measures adopted by Spain could not be considered proportionate.[215]

205. Spain took the position that its macroeconomic condition at the time was acute, and measures needed to be taken to address them. In its oral presentation, Spain highlighted to the Committee how it was suffering from low state revenue and high public debt in the years leading up to 2012 and rising unemployment of up to 24.8% in 2012.[216] The Tribunal took cognisance of these when considering whether the Disputed Measures were reasonable and proportional.

206. The Committee notes that the Tribunal accepted the Claimant's submission that there were alternative and less intrusive means available and specifically mentioned the tax on CO2 emissions[217] but made no elaboration as to how that could have achieved the same purpose. Instead, the Tribunal's primary basis for holding that the Disputed Measures were

[212] Award, para 472.
[213] Award, para 462.
[214] Award, para 600. See also para 568.
[215] Award, para 446.
[216] Spain's Opening Presentation, slides 60-62.
[217] Award, para 602.

disproportionate was that the changes were made with retroactive effect, "*thereby destroying the RD 661/2007 economic regime*." It added that the measures "*which curtailed the FIT for wind, frustrated the legitimate expectations of the Claimants.*"[218] The Committee agrees with the observations by Spain that the Tribunal did not discuss or explain in detail how the alternative measure could have been as effective to address the tariff deficit as the Disputed Measures.

207. It also gave no weight to the macroeconomic situation then plaguing Spain, as mentioned before. Rather, in coming to the view that the Disputed Measures were disproportionate, the Tribunal put much weight on the fact that they were imposed on the Claimants with immediate effect to all producers in breach of its stabilisation commitments. In coming to this view, the Tribunal accepted the Claimants' position[219] that under the New Regime, the Claimants' project companies would be required to make clawback payments to Spain by discounting the "*excess from future payments under the New Regime*."[220]

208. In the Committee's view, this is a strong justification which far outweighs the lack of or the brevity of explanations on the rational policy and reasonableness of the measures. In other words, even if the Tribunal were to have found otherwise, that there was a rational policy to justify any measures, and that the measures were reasonable, the outcome would have been the same as the Tribunal had found that the measures having been imposed retroactively with the effect of overhauling RD 661/2007 were accordingly disproportionate.

(4) Quantification of Damages in the Award

a. Spain's Position

209. Spain submits that there is a lack of reasoning in the Award in respect of the following:

i. The regulatory risk used to determine damages, which it says reflects a "*mere subjective preference of the Tribunal*", and that "*the majority of the Tribunal does not examine the evidence or expert evidence to support its decision;*"[221]

ii. The value of the 'Actual' scenario used to determine damages, with the Award indicating an "*absence of valid and sufficient substantiation*" and contradicting itself in addition to that of the Claimants' position by not adjusting the value to take into account the sale of the Claimants' shares in 2016;[222] and

[218] Award, para 601.
[219] Award, para 391.
[220] Award, para 686 read with paras 564-569.
[221] Annulment Memorial, paras 207-213; Annulment Reply, paras 308-320.
[222] Annulment Memorial, paras 214-218; Annulment Reply, paras 321-329.

iii. The Tribunal's decision on the lack of jurisdiction over the 7% TVPEE used for the determination of damages, "*which do not adequately reflect the decision on the merits and on jurisdiction*"[223] and do not fall within "*the 'margin of appreciation' recognized to* [sic] *arbitral tribunals*".[224]

210. Considering all of the above, Spain adopts the position that the Claimants received an inexplicable wind-fall, stating that the Claimants had invested EUR 91 million in 2012, valued its assets at EUR 98 million in 2014, then sold their investment for EUR 133 million in 2016 and, finally, were awarded another EUR 77 million in this arbitration.[225] Spain maintains that it is incomprehensible how the Tribunal reached the decision it did, awarding to the Claimants a hefty gain and yielding them "*major profitability, with a major return.*"[226]

211. In its submissions regarding the matters set out at paragraphs 209(i) and 209(ii) above, Spain also relies on the Dissent of Professor Ruiz Fabri.[227]

212. Finally, it contends that the Tribunal's decision on costs in the Award should be annulled if the Award were partially annulled.[228]

b. Claimants' Position

213. According to the Claimants, Spain's submissions essentially amount to an appeal,[229] or an attempt to relitigate matters resolved by the Tribunal in the arbitration[230]. Their respective responses to each matter raised by Spain (as set out at paragraph 209 above) are as follows:

i. On the regulatory risk, they assert that the Majority Tribunal's reasoning is clear and sufficient. The Majority Tribunal rejected Spain's suggestion that regulatory risks in Spain had increased in the years leading up to the Claimants' investment and it did not incorporate Spain's assumption that the 'climate of change' should be factored into its assessment to reduce the quantum of damages.[231]

ii. As to the value adopted for the Actual scenario, the Claimants say that the Majority Tribunal's decision was to reject the reference point proposed by Spain's quantum experts (Accuracy) and adopt instead the value proposed by the Claimants' experts

[223] Annulment Memorial, para 224.
[224] Annulment Memorial, paras 219-230; Annulment Reply, para 352 and paras 330-364.
[225] Annulment Transcript, Day 1, 82:7-83:6.
[226] Annulment Transcript, Day 1, 82:7-83:13.
[227] Annulment Memorial, paras 210, 212, 217; Annulment Reply, paras 318, 323-324, 328-329.
[228] Annulment Memorial, paras 231-235; Annulment Reply, paras 365-367.
[229] Annulment Counter-Memorial, paras 304, 306, 312, 322; Annulment Rejoinder, paras 185, 190, 193, 194, 198, 200, 204.
[230] Annulment Counter-Memorial, para 304.
[231] Annulment Counter-Memorial, paras 305-311; Annulment Rejoinder, paras 185-189.

(Brattle). In the Claimants' view, the Tribunal was clear in its reasoning for rejecting Accuracy's reference point (the 2016 sale price) and favoring Brattle's (2014 market value after implementation of the Disputed Measures) for the Actual scenario.[232] They allege that Spain's suggestion that the Tribunal preferred "an estimated value, rather than an actual, objective fact"[233] is not an argument proposing that the reason was deficient, but an argument advancing that the Tribunal had 'got it wrong', which forms no basis for annulment.[234]

iii. The Claimants state that the Tribunal dealt with the issue relating to the 7% TVPEE during the rectification proceeding, where Spain sought to introduce new calculations and change its quantum case.[235] In addition, they advance that Spain failed to understand the Tribunal's decision, which accepted Spain's argument[236] that the effect of the 7% TVPEE was neutralized, thereby, causing no harm to the Claimants after the New Regime was implemented, and which removed the impact of the 7% TVPEE when it rejected the Claimants' claim for damages before 20 June 2014.[237]

214. As regards the decision on costs, the Claimants submit that Spain's argument "[does not concern] *a failure to state reasons on the part of the Tribunal*" nor "*go to any of the grounds for annulment in Article 52(1)*". They argue that the decision would still stand in any event because it is based on the Claimants' successes in respect of jurisdictional and substantive issues and given that the Tribunal "*did not set its costs order mathematically based on the amount of damages awarded*".[238]

c. Committee's Analysis

215. Having found liability against Spain, the Tribunal was required to ascertain the proper remedy that would compensate for the loss the Claimants had suffered by reason of the breach of FET. First, the Tribunal stated that since the ECT does not establish any standard of compensation, it needed to base its decision on international law. It thus turned to the full reparation standard established in the *Chorzow* case. The valuation date determined by the Tribunal was 20 June 2014, the watershed moment after which the full extent of the impact of the new regime on the value of the investment was known. There is no controversy around these matters.

[232] Annulment Counter-Memorial, para 313.

[233] Annulment Counter-Memorial, para 312, citing Annulment Memorial, para 218.

[234] Annulment Counter-Memorial, paras 312-314; Annulment Rejoinder, paras 185-189.

[235] Annulment Counter-Memorial, paras 322-327; Annulment Rejoinder, paras 193-204.

[236] R-381, Watkins Holdings S.a r.l and others v Kingdom of Spain, ICSID Case No. ARB/15/44, Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction (*Spain's Counter-Memorial*), 10 February 2017, para 662.

[237] Watkins Parties' Response to Spain's Request for Rectification of the Award, 13 April 2020, para 25.

[238] Annulment Rejoinder, paras 205-207.

216. Rather, the discussion concerning lack of reasons revolves around issues stemming from the valuation method, as well as the matter regarding the 7% TVPEE and the decision on costs. The Committee begins with its analysis on the first point.

217. The Tribunal was presented with the expert valuations submitted by Brattle for the Claimants and Accuracy for Spain. Brattle presented a valuation using the discounted cashflow ("**DCF**") method while the Accuracy team proposed that the Tribunal should adopt an asset-based valuation ("**ABV**").

218. The Accuracy evaluation starts on the basis that the SES was a regulated market at the time of investment and, therefore, that any potential damages should be determined based on the investors' economic expectations in a regulated market and verifying whether such expectations were met after the introduction of the Disputed Measures. The ABV valuation method took into consideration two parameters, namely the investment amount put in by the Claimants and the projected rate of return. Multiplying the annual rate of return with the investment sum would give the annual return; depending on the life of the project, the projected gross return could be estimated at a specific point in time and then discounted to present-day value.

219. Accuracy took the view that the correct benchmark to determine the reasonable return was the cost of capital. It ascertained the reasonable opportunity cost of capital to the 'But-For' scenario to be 7.07% (5.3% after the 25% tax gross-up is applied) and for the Actual scenario, 7.398%, which is the pre-tax rate included in RDL 9/2013 as the reasonable return expected by the investor.[239] Applying this, the result is that the Claimants suffered no reduction in the value of their investments (in fact, they earned a gain).[240]

220. The DCF approach adopted by Brattle, on the other hand, is a valuation method of an investment on a specific date based on the projected cash flow earnings in the future. Brattle undertook an analysis of the market value of the Claimants' wind assets in both, the But-For scenario and the Actual scenario after the implementation of the Disputed Measures, to ascertain the impact on the Claimants' cash flow based on the saleable electricity power generated and taking into account the production costs (which were largely fixed based on contractually defined expenses), the impact of RDL 12/2012 (which limited the tax deductibility), and an estimate of inflation rates over the life of the asset.

[239] R-421, Watkins Holdings S.a r.l and Others v The Kingdom of Spain, ICSID Case No. ARB/15/44, First Accuracy Economic Report (*First Accuracy Economic Report*), 10 February 2017, paras 128-131.

[240] R-421, *First Accuracy Economic Report*, paras 134-135.

221. The Claimants suggested that the ABV method would be inappropriate as it ignores Spain's liability for breach when implementing the New Regime.[241] Spain on the other hand suggested that the DCF method would be over-speculative, since the investments were capital-intensive, with dependency on volatile cash-flows, constant changing economic conditions and given the short history of operations.

222. The Tribunal considered it more appropriate to use the DCF method[242] and rejected the ABV method proposed by Spain. It also took the view that ascertaining any loss based on the internal rate of return method (as was adopted by the *RREEF* tribunal) was inappropriate.[243]

223. The Tribunal's preference for Brattle's approach is explained in the Award and essentially lies in the fact that the investment was a going concern and the DCF method is widely favoured in the RE sector "*given that they* [sic] *have a simple business model with predictable income and costs*".[244]

224. The Tribunal is consistent with its finding that the Claimants' legitimate expectation that the 'RD 661/2007 economic regime' would not be dismantled; therefore, the damage caused should be measured based on the difference between the But-For Disputed Measures scenario and the Actual scenario when the measures were implemented. Accuracy's ABV method of valuation on the other hand was premised on the only assurance of a "*reasonable return, rather than a specific subsidy amount*" and that such "*reasonable return is dynamic*" and would be subject to "*a system of regular revisions*".[245] According to the Tribunal, the ABV method concludes that there was no reduction in the value of the investments and the claims comprise lost profits.[246]

225. The Committee agrees that had the Tribunal adopted Accuracy's ABV approach, it would effectively be ignoring its own finding on Spain's liability for breach of legitimate expectations and assuming that the Claimants could not expect more than what Spain perceived to be reasonable. The Committee also agrees that although the DCF method requires the assumptions of various variable factors, it takes into account a wider range of parameters which would result in a more balanced assessment of the impact of the Disputed Measures. In paragraphs 689 to 693 of the Award, the Tribunal explained the basis for its decision to use the DCF method in quantifying damages, and stated why it decided to discountenance the June 2016 sale price of the Watkins assets when using the DCF method of valuation. Whether or not it was an explanation

[241] Award, para 640.
[242] Award, para 689.
[243] Award, para 694.
[244] Award, para 689.
[245] R-421, *First Accuracy Economic Report*, para 87.
[246] Award, para 690.

that Spain could accept is quite irrelevant. The rejection of a party's proposed approach and a preference for the other would not of itself be supportive of any assertion of lack of reasons.

226. In assessing the damages using the DCF method, the Tribunal proceeded to take into account the views made by Accuracy in relation to some specific elements of Brattle's valuation. The specific dissatisfaction with three of these has been raised by Spain in these annulment proceedings.

(i) Regulatory risk

227. Spain criticises the Tribunal in relation to the regulatory risk factors used by Brattle in its DCF computation of 0.5% for both the Actual and the But-For scenarios, as opposed to Accuracy's of 2.2%, and the Tribunal's preference for the But-For scenario. Spain points in particular to paragraphs 741 and 742 of the Award in which it says there was no flow of logic:

> *741. For the But-for scenario, Accuracy's estimation of an increased regulatory risk is unpersuasive simply because it is largely predicated on the basis that introducing the Disputed Measures was the only way to address the allegedly degrading Spanish electricity regime. In the Tribunal's view, the Disputed Measures raised regulatory risk as the fixed tariff regime provided certainty for investors whereas the "reasonable rate of return" regime is inherently uncertain being hinged to a third party's, here Spain's, opinion.*
>
> *742. Consequently, the Tribunal prefers Brattle's calculation of the discount rate for the But-For scenario on the basis that it is unlikely the risk was higher in the But-For than in the Actual.*

228. It is quite fair to say that the Tribunal's decision to adopt Brattle's computation of 0.5% as regulatory risk for the But-For scenario may be difficult to understand when these passages are read alone.

229. However, the Tribunal provided its analysis on regulatory risk in paragraphs 732 *et seq.*, and in paragraph 736 the Tribunal reproduces Brattle's criticism of Accuracy's proposition regarding the effect of the Disputed Measures in the regulatory risk. In the subsequent paragraphs, the Tribunal explains Accuracy's considerations in that regard and concludes in paragraph 742, as shown above, that it prefers Brattle's calculation of the discount rate for the But-For scenario.

230. In the Committee's view, it is apparent that what the Tribunal did in paragraphs 741 and 742 was to accept Brattle's reasons and analysis. Irrespective of the decision itself, which the Committee is not minded to review, the Committee finds that it cannot be concluded that the Tribunal failed to give reasons altogether on this point in a manner that would warrant annulment.

231. This Committee is mindful that even if its appreciation of evidence is different from that of the Tribunal, the Committee should in the normal course yield to the Tribunal on the basis that it was the Tribunal which had the opportunity to hear, assess and appreciate the full length, depth and weight of the evidence presented. To do otherwise would be akin to the Committee functioning as an appeal board over the decision of the Tribunal,[247] something this Committee would not do.

(ii) Value of the actual investment

232. Spain adopted Accuracy's criticism that Brattle's But-For scenario is clearly overvalued while the Actual scenario is undervalued,[248] but in this Annulment, Spain's main thrust is that the Claimants had gotten an inexplicable wind-fall, arguing that the Claimants had invested EUR 91 million in 2012, valued its assets at EUR 98 million in 2014, then sold them for EUR 133 million in 2016 and finally been awarded by the Tribunal another EUR 77 million in the main arbitration.[249] Counsel for Spain expressed the inability to grasp how the Tribunal could have reached such a finding, as the Claimants had in fact made a hefty gain, yielding them "*major profitability, with a major return*".[250] It also pointed out that the dissenting arbitrator had expressed similarly that:[251]

> *16. Last but not least, contrary to what the Majority considered (at para. 593 (ii) of the Award), the investment of the Claimants was not "destroyed". The investment was bought at €91 million in 2011, valued €98 million at the moment of the alleged intervention of the wrongful act in 2014 and sold at €133 million in 2016 (which meant a return of 11.2%). What is the Majority considering as "destroyed" and what is the Tribunal repairing exactly, when awarding damages in the sum of €77 million, without taking into account the date of the investment and the impact of the context on reparation?*

233. The Committee notes that the dissenting arbitrator seemed to be under the impression that the Majority Tribunal had found that the actions of Spain resulted in the "*destruction*" of the Claimants' assets. This appears to have stemmed from the Tribunal's statement in paragraph 593(ii) of the Award in which the Tribunal said:

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[247] CL-242, Daimler Financial Services A.G. v Republic of Argentina, ICSID Case No ARB/05/1, Decision on Annulment (*Daimler v Argentina (Annulment)*), 7 January 2015, para 186.

[248] R-421, *First Accuracy Economic Report*, para 57.

[249] Annulment Transcript, Day 1, 82:7-83:6.

[250] Annulment Transcript, Day 1, 82:7-83:13.

[251] Ruiz Fabri Dissent, para 16.

> *593. The Tribunal having considered the conduct of Spain, holds that Spain did dismantle the RD 661/2007 economic regime which was not transparent for the following reasons:*
>
> *ii) RDL 9/2013 was* ***responsible for the Claimants' investment being destroyed****. There was then an 11-month period during which Spain did not give any indication with regard to the remuneration that the qualifying plants would be entitled to;*
>
> […]

234. It is unfortunate that the Tribunal said that RDL 9/2013 was the cause of the "*Claimant's investment being destroyed*" when the Claimants' complaint summarised in paragraph 419 of the Award was that:

> […] *RDL 9/2013 not only wiped out the investment regime for the Claimants' investment, but was followed by a transitory regime of more than 11 months during which the Government gave no indication regarding the precise remuneration that any qualifying plants would be entitled to.*

235. In the Committee's view the Tribunal had made an error when it paraphrased "*wiped out the investment regime*" with "*the Claimant's investment being destroyed*." A plain and simple reading of the Award shows that the Tribunal found that Spain's actions resulted in the dismantlement of the economic regime under RD 661/2007 and that this resulted in the loss to the Claimants, for which the Tribunal went on to assess the quantum. There is nothing else in the text of the Award to suggest that the Claimants' investment was found to have been "*destroyed*" in the sense that it was rendered worthless. The dissenting arbitrator's comment while not incorrect is nevertheless incomplete and misleading. A case where a State's actions or inaction resulting in the destruction of an investment would be more relevant where expropriation has been found. This is not such a case and it was not the approach the Tribunal adopted when assessing the damages resulting from the breach of FET.

236. It should be borne in mind that the wind assets involved are working farms and not idling or dormant assets. Unlike trade transactions or acquisitions of dormant assets, investments in companies as going concerns are valued for their longer term cashflow earnings rather than a one-time immediate capital gain. It would be quite incorrect to conclude that if assets are sold for more than the price earlier paid this means that there is a net gain and therefore no loss was suffered, as that would ignore the long term cashflow that the asset would have supposed to yield otherwise. The fact that the Claimants in this matter invested EUR 91 million in the wind assets

and sold them in 2016 for EUR 133 million is therefore not a proper measure by which to conclude a loss or gain, a proposition which the Tribunal rejected.[252] Indeed, a sale of operating assets yields for the owner an exit return but no further cashflow thereafter.

237. The Tribunal considered and rejected Spain's proposal of using the ABV method as it was not persuaded that the Claimants' investments be valued largely as physical assets.[253] Instead, it accepted the DCF method as the appropriate manner to value the Claimant's investments and noted that Spain's quantum experts did not challenge "*its methodology or many of its assumptions*".[254]

238. The basis of the Claimant's claim is that, had there not been a change in the economic regime effected by Spain, they would have been able to reap the long term cashflows for the remaining 20-25 years of the life of the assets.[255] But for the change in the economic regime which resulted in reduced cashflows from the period after December 2012, to the end of life of the assets, the long term cashflow of the project would have been higher. The DCF method as proposed by Brattle,[256] which the Tribunal accepted, is an exercise in computing the But-For cashflow that the assets would have yielded, discounted (for various risks factors) to June 2014, thereby giving the But-For value. The difference between the But-For value and the Actual value at that date represents the loss to the Claimants.

239. The Tribunal found that, as a result of the dismantling of the economic regime under RD 661/2007, the Claimants' actual cashflow was reduced for the remaining years. The difference between the But-For and the Actual cashflows represent their loss. The Tribunal's holding is that any loss would crystallise on 20 June 2014 when the impact of the new economic regime could be ascertained.[257] This means that any further measures taken by Spain that could reduce the operating cashflows and profits of the windmills would not be relevant in computing the loss suffered. Similarly, any event following that would not be relevant in determining the loss suffered by the Claimants. In other words, should the economic regime or situation change after June 2014 whether it rose or fell, it would not be relevant for the determination of the Claimants' loss. As such the Tribunal disregarded the subsequent sale made in 2016. The Tribunal expressed this very view in paragraph 698, *viz.*:

> *698. Given that the Tribunal has found that the appropriate valuation date is June 2014, the Tribunal considers it inappropriate to have*

[252] Award, para 698.

[253] Award, para 690.

[254] Award para 694.

[255] Award para 639 (Tribunal's summary of Claimant's proposal).

[256] Award, para 642 (Tribunal's summary of Brattle's DCF methodology).

[257] Award, paras 570, 680.

> *regard to the 2016 sale price in the Actual scenario as it occurs after the valuation date and in different economic conditions. Consequently, the Tribunal adopts the Actual scenario preponed by Brattle i.e. projecting cash flows from the valuation date.*

240. The Committee finds the Tribunal's reasoning, albeit brief, is clear and its logic is able to be followed and thus does not fulfil a ground to nullify the Award.

(iii) 7% TVPEE

241. Spain points out that the Tribunal unanimously decided that the 7% TVPEE was a tax measure subject to the carve-out of Art. 21 of the ECT, thereby falling outside of its jurisdiction, yet took no account of the implications of its finding on jurisdiction when computing damages. It observes that, in reducing the amount of damages, the Tribunal deducted the pre-default losses and adjustment of the useful life of the wind assets to 25 years to arrive at the sum of EUR 77 million without implementing its decision declining jurisdiction over the 7% TVPEE and failing to state its basis for doing so. In Spain's submission, as this levy was implemented from December 2012 onwards without any time limit, the counter-factual scenario (but-for) should have included the application of the 7% TPVEE throughout the useful life of the wind assets.

242. According to Spain, it follows that the amounts payable as 7% levy for the period as from June 2014 should not have been included (but rather excluded) in the quantum of damages awarded. The Tribunal's failure was in its view an error which required a "*mechanical correction, merely of arithmetic and not legal*" nature ;[258] Spain accordingly applied for rectification of the Award under Article 49 of the ICSID Convention, which was rejected.

243. The Claimants in response had submitted that the Tribunal's decision on the quantum of damages followed its decision on liability and jurisdiction and that Spain misunderstood the Tribunal's decision. It sought to explain that the Tribunal had removed the impact of the 7% Levy when it rejected the Claimants' claim for damages before 20 June 2014, and that the Tribunal had actually accepted Spain's argument[259] that the "*7% Levy did not cause any harm to the Claimants after the implementation of the New Regime; it had no impact*."[260] It submitted that "*Accuracy did not submit any calculations of its own concerning the economic impact of the 7% Levy*" and as such the adjustment that Spain had proposed concerning the 7% Levy would require a change of pleadings. Labelling Spain's proposal as "*novel*," the Claimants suggested that Spain was

[258] Spain's Response to Claimant's Comments on the Request for Rectification, 13 May 2020, para 14.

[259] R-381, *Spain's Counter-Memorial*, para 662.

[260] Watkin Parties' Response to Spain's Request for Rectification of the Award, 13 April 2020, para 25.

essentially seeking to introduce new calculations and change its quantum case by the rectification application.

244. Spain raised this issue for the first time in its Request for Rectification of the Award, but it was dismissed by the Majority Tribunal in its Decision on Spain's Request for Rectification. The Majority Tribunal agreed with the Claimants, accepting that Spain's request to rectify was "*novel* [and] *was not raised in the pleadings and in the submissions of the Respondent*."[261] It held that such a request would not be permissible in a rectification application as it would require "*the Tribunal accepting an argument of the Respondent, which was not specifically pleaded, nor was it raised in the Respondent's submissions or evidence*."[262] The Majority Tribunal saw that as an attempt by Spain to introduce new calculations so that the quantum could be reviewed and adjusted, citing in support the annulment committee in *Vivendi v Argentina*'s comment that the rectification process "*is not a mechanism by which parties can continue proceedings on the merits or seek a remedy that calls into question the validity of the Tribunal's decision*."[263]

245. The Committee's attention is drawn to the various passages relating to the Tribunal's discussion on the quantum and the several parameters on which both sets of experts, Brattle and Accuracy, had differing views and values. They included the operation life of the assets; the discount rate – the CAPM versus interest rate plus inflation; the beta for risk adjustment; and market risk premium. The issue as to whether the Disputed Measures raised regulatory risk was discussed in paragraphs 227-228 above. The Tribunal generally accepted Brattle's explanations and values, save for the plant life of the wind assets and the pre-June 2014 losses. It observed that Accuracy's adjustments had little impact on the damages and that Brattle's values were reasonable.[264]

246. The Tribunal then followed in paragraph 744 of the Award with its finding that:

> *the diminution in the fair market value of the Claimants' investments resulting from the breach of the ECT to be EUR 77 million at 20 June 2014.*

247. Apart from the reference in footnote 865 to Table 13 of the 'second Brattle Report, Appendix, Table 13',[265] no explanation was given as to how the figure EUR 77 million was arrived at. There

[261] RL-182, Watkins Holdings S.Á R.L. and Others v The Kingdom of Spain, ICSID Case No ARB/15/44, Decision on Spain's request for Rectification of the Award (*Rectification Decision*), 13 July 2020, para 56.

[262] RL-182, *Rectification Decision*, para 60.

[263] RL-182, *Rectification Decision*, para 62.

[264] Award, para 686 read with para 743.

[265] There is in the Annulment Hearing Bundle a document described in the Index as R-418, "Second Brattle Quantum Expert Report" dated 28 September 2017. That was Brattle's "*Rebuttal Report: Changes to the Regulation of Wind Installations in Spain Since December 2012*" and not the "*Rebuttal Quantum Report*". Upon the Committee's request, the Watkins Parties submitted on 8 June 2022 the Brattle's "*Rebuttal Report: Financial Damages to Investors*" ["**Rebuttal Quantum Report**"] also dated 28 September 2017.

is no mention of whether the 7% Levy was taken into account in the computation. Table 13 in the 'Rebuttal Quantum Report', which the Tribunal referred to as the source of the EUR 77 million, does not contain any mention of the 7% Levy. Nowhere in the Tribunal's discussion on the quantum was the 7% Levy mentioned.

Table 13: Sensitivity Analysis

	Past Damage € mln [A]	June 2014 Fair Value of Bridgepoint Interest		Damage to Bridgepoin € mln [D] [C]-[B]	Bridgepoint Impact € mln [E] [A]+[D]	% Reduction [F]
		But For € mln [B]	Actual € mln [C]			
Primary Claim	-21	190	87	-103	-124	
Production						
-5.0%	-21	165	74	-91	-112	-10%
5.0%	-21	215	100	-115	-136	10%
Additional Degradation						
0.1%	-21	178	80	-98	-119	-4%
0.2%	-20	167	74	-93	-113	-9%
Inflation						
-0.5%	-21	175	86	-88	-109	-12%
0.5%	-21	206	87	-118	-139	12%
Pool Prices						
-10.0%	-21	189	71	-117	-138	11%
10.0%	-21	192	105	-87	-108	-13%
Asset Lifetime						
25	-21	151	74	-77	-98	-21%
Unlevered WACC						
-0.5%	-21	208	98	-110	-130	5%
0.5%	-21	174	76	-97	-118	-5%

Source: Lapuerta-Caldwell Workpapers, Tables O – Updated Financial Model.

248. The Committee notes that Brattle made clear in presenting Table 13 that, apart from the 'asset lifetime' (an adjustment of 30 to 25 years), the other inputs would affect the damages estimates by plus or minus 10%.[266] Quite noticeably, the 7% Levy was not one of the inputs that Brattle considered in this Table 13.

249. The relevance of the 7% Levy was in fact considered in the First Brattle Report, Appendix F, paragraph 179 and Table 17, in which Brattle suggested that:

> *179. The Claimants seek compensation for the full market value that its investments would have commanded if Spain had never abrogated RD 661/2007 and had never passed the 7% Generation Levy. If Spain had maintained RD 661/2007 without the 7% Generation Levy, the fair market value of Claimants' investment would have been far higher than in the presence of the levy. The 7% Generation Levy is a Disputed Measure in this arbitration, so it is appropriate for us to assume that it does not apply in the But-For scenario. Nevertheless, Table 17*

[266] Rebuttal Quantum Report, para 271.

quantifies a sensitivity on damages that assumes the application of the 7% levy in both scenarios.

Table 17: Damages Excluding Energy Levy

	Past Damage to Bridgepoint € mln [A]	Jun-2014 Fair Value of Bridgepoint Interest: But For € mln [B]	Jun-2014 Fair Value of Bridgepoint Interest: Actual € mln [C]	Future Damage to Bridgepoint € mln [D] [C]-[B]	Bridgepoint Impact € mln [E] [A]+[D]
Base Case	-20.3	187.4	86.9	-100.5	-120.8
Damages Excluding Energy Levy	-13.8	154.8	86.9	-67.9	-81.7

250. At the oral hearing in the main arbitration Brattle's witness Mr Caldwell presented the various scenarios and spoke to the different possible damages that the Tribunal's liability findings in respect of the Disputed Measures could have resulted in. He specifically identified its consideration relating to the 7% Levy, which would have a direct impact on the base/primary claim:[267]

> "…
> 15 So you see the primary claim of €123.9 [million] at
> 16 the top of the slide. If you were to find that the 7%
> 17 levy was lawful, but all of the other measures were
> 18 unlawful, then the €123.9 [million] would reduce to
> 19 €83.9 [million]. That's indicating that the individual
> 20 effect of the 7% amounts to €40 million."
> 21 If instead you were to find that the inflation
> 22 indexation was lawful, but the rest of the measures were
> 23 unlawful, then it's the €107.4 [million] figure.
> 24 The third one is: if you were to find that the
> 25 elimination of the market option was lawful, but
>
> 1 everything else was unlawful, then you can see that
> 2 there's no effect. That's because our analysis is
> 3 indicating that the plants would choose the fixed FIT
> 4 anyway.
> 5 Then you see in the row "Combined effect of
> 6 Law 15/2012 and RDL 2/2013", that's if you found that
> 7 the three earlier measures – i.e. the 7% levy, the

[267] R-414, Watkins Holdings S.a r.l and Others v The Kingdom of Spain, ICSID Case No. ARB/15/44, Hearing Transcript, Day 3, 47:15-48:13.

8 inflation indexation and the elimination of the market
9 option – if you found those to be lawful, but the
10 introduction of the new regime in July 2013 to be
11 unlawful, then damages would come to €69 million. So
12 you can see the incremental impact of the new regime is
13 €54 [million].
…"

251. This topic was also the subject of cross-examination, when Mr Caldwell was asked to confirm he did not make any specific individual assessment of the other Disputed Measures and that the 7% Levy[268] was the only measure that was given a standalone assessment in the Brattle Report. Mr Caldwell confirmed this.

252. Prior to the hearing, the Watkins parties presented an 'Updated Model' in the form titled as – "*Tables 'O'-Updated Financial Model.ENG.xlsb*" prepared by Brattle. This was an Excel spreadsheet accompanied by a memorandum setting out the instructions as regards three specific Disputed Measures, *viz.* the Energy Tax (7% Levy), the Change in the IPC Indexation and the removal of the FIT premium to enable the Tribunal to make a change of the quantum by selecting the switches from 'Base' to 'Sensitivity' upon making its decision on each of the measures. It explained that:

> *11. The switches have been coloured in green. A selection of "Base" will mean that the model presumes a liability finding with regard to the Disputed Measure in question, and will compute the associated harm. A selection of "Sensitivity" calculates damages assuming that there is no finding of liability with respect to the Disputed Measure. In the latter case, the model assumes that the measure exists in the But-For scenario and therefore computes no harm with regard to it*
>
> *12. Once a particular sensitivity combination has been selected, results can be generated by running the macro "Curr_Scenario".*

253. The Committee switched the selection for Tax Levy Sensitivity from 'Base' to 'Sensitivity' following these instructions, on the basis that the Tribunal had declined jurisdiction (and accordingly made no finding of liability) with regard to the 7% Levy. This resulted in Table 17 showing that there could well be a mistake as the damages seem to show up as EUR 69.9 million, *viz.*:

[268] R-414, Watkins Holdings S.a r.l and Others v The Kingdom of Spain, ICSID Case No. ARB/15/44, Hearing Transcript, Day 3, 136 -37.

Table 17: Damages Excluding Energy Levy					
	Past Damage to Bridgepoint	Jun-2014 Fair Value of Bridgepoint Interest		Future Damage to Bridgepoint	Bridgepoint Impact
		But For	Actual		
	€ mln	€ mln	€ mln	€ mln	€ mln
	[A]	[B]	[C]	[D]	[E]
				[C]-[B]	[A]+[D]
Base Case	-20.6	190.1	86.9	-103.2	-123.9
Damages Excluding Energy Levy	-14.0	156.8	86.9	-69.9	-83.9

254. The Tribunal in its Rectification Decision maintained that its computation had *excluded* the 7% Levy, when it actually had not done so in relation to is computation of future damage:

> *57. The Tribunal, in the Majority Award, in its analysis of quantum, took the view that the Claimants were not entitled to past damages and this is provided for in paragraph 688 of the Majority Award; that having held that Spain had violated the ECT with effect from 20 June 2014, rejected the claim for damages claimed by the Claimants, prior to 20 June 2014 and awarded compensation in the sum of EUR 77 million. The Tribunal notes that the 7% Levy was introduced by Spain on 27 December 2012 and hence the Tribunal in the Majority Award in its analysis pertaining to the issue of damages, **rightly excluded the 7% Levy.***
>
> [emphasis added]

255. It went on to explain however it was Spain's case that the 7% Levy did not cause any harm (*viz.* neutral) and quoted Spain's Counter-Memorial in support:

> [t]*he impact of the TVPEE on renewable producers such as those subject to this arbitration has been neutralised, given that the TVPEE is one of the costs remunerated to those producers through the specific remuneration they receive, as analysed in this Counter-Memorial when examining the current remuneration regime of renewable energy producers. In other words, the specific remuneration received by renewable producers enables them to recover certain costs that, unlike conventional technologies, cannot be recovered in the market, and, also, to obtain a reasonable return. Among those costs is precisely the TVPEE.*

256. It appears clear to the Committee that the Tribunal in its Decision on Rectification had accepted Spain's representation made during the hearing that the 7% levy was in fact "neutralised" and

rejected the adjustments proposed by Spain as "novel"[269]. It reasoned that Spain ought to have raised them through its pleadings or submissions in the arbitration and not having done so, it should not be permitted to do so at the rectification stage. The Tribunal also noted that there was no submission by Accuracy on any calculations with regard to the economic impact of the 7% Levy.[270]

257. The Committee takes the view that while the Tribunal could have undertaken a better check of its final computation when it was brought up by Spain in the rectification process, the Tribunal's error in computation remains, merely a mistake, and not one that comes within the meaning of Article 52(1) (e) – for failure to state reasons.

C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(1) Applicable Standard

a. Spain's Position

258. According to Spain, Article 52(1)(d) of the ICSID Convention stipulates that an award must be annulled if there is a serious departure from a fundamental rule of procedure, where (i) a deviation will be 'serious' "*if a party is deprived of the protection afforded by the relevant procedural rule*" and where consequently "*there would have been some difference in some relevant aspect of the dispute*", and (ii) a procedural rule will be 'fundamental' "*if it refers to the essential impartiality that must govern all procedures and if it is included within the minimum standards of* 'due process*' required by international law*".[271] It also asserts that a breach of the basic rule of burden of proof is a possible breach of procedure.[272]

259. It refers to the right to be heard, which it stresses is a fundamental rule of procedure that includes the "*fundamental rule of equality of the parties*" and that can be violated in various ways, such as by denying a party the opportunity to present reasoning and evidence, denying a party the opportunity to respond adequately to the claims and evidence presented by the other party, or denying a request for production of documents. Spain refers to earlier decisions and the ICSID Background Paper to support its case, arguing that these also "[leave] *no doubt as to the 'fundamental' nature of the rules relating to the burden of proof*."[273]

[269] R-416, Watkins Holdings S.a r.l and Others v The Kingdom of Spain, ICSID Case No ARB/15/44, Decision on Spain's Request for Rectification of the Award (*Rectification Decision*), 13 July 2020, para 56.

[270] R-416, *Rectification Decision*, para 61.

[271] Annulment Memorial, para 237; Annulment Reply, para 387.

[272] Annulment Memorial, para 250.

[273] Annulment Memorial, paras 238-248, 250-251; Annulment Reply, paras 378-399.

b. Claimants' Position

260. The Claimants submit that the threshold for annulment under Article 52(1)(d) is high and that Spain cannot rely on alleged procedural irregularities not raised before the Tribunal. They highlight that this ground for annulment "*is not a gateway for a dissatisfied party to appeal the tribunal's substantive findings*" and adopt the position that the applicant bears the burden of (a) identifying the rule of procedure allegedly departed from, as well as (b) demonstrating that (i) the procedure rule is fundamental, (ii) the tribunal has departed from it, and (iii) the departure is serious.[274]

261. The Claimants accept that the right to be heard is a fundamental rule of procedure but point out that such right is not unlimited and that Spain "*fails to grasp the distinction between the right for the parties to argue their case, and how a tribunal subsequently assesses the value of arguments and evidence presented by the parties*."[275] The Claimants also emphasise that although Spain identifies rules of evidence including the principle of *onus probandi actori incumbit* as a fundamental rule of procedure, it does not provide any support for this proposition. They cite earlier decisions to make the point that it is incorrect to raise violation of the *onus probandi actori incumbit* principle as grounds for annulment under Article 52(1)(d),[276] and opine that Spain is conflating rules of evidence as a general concept with the specific principle of burden of proof.[277] In respect of a tribunal's alleged lack of impartiality, the Claimants further argue that finding this would require "*clear and incontrovertible substantiation*".[278]

262. As regards what constitutes a 'serious' departure, the Claimants argue that Spain mischaracterises this requirement and submit instead that it means that the procedural departure in question materially affects the outcome of the case. They further contend that Spain's case is deficient, even if 'serious' refers to the outcome of the case only *possibly* being affected.[279]

263. The Claimants also point out that Rule 27 of the ICSID Arbitration Rules obliges the applicant to raise its objection promptly for any possible breach of procedure, failing which the objection against the infringement is considered waived.[280]

[274] Annulment Counter-Memorial, paras 351-358.
[275] Annulment Counter-Memorial, paras 359-363.
[276] Annulment Counter-Memorial, paras 364-368.
[277] Annulment Rejoinder, para 217.
[278] Annulment Counter-Memorial, paras 369-370.
[279] Annulment Counter-Memorial, paras 371-381; Annulment Rejoinder, paras 218-221.
[280] Annulment Counter-Memorial, paras 382-387.

264. According to the Claimants, the cases Spain refers to "*can easily be distinguished*" as well.[281] They also aver that Spain was not at a disadvantage in the main proceeding, as both sides were "*afforded the exact same opportunity to present their case, including their evidence*".[282]

c. Committee's Analysis

265. Article 52(1)(d) of the ICSID Convention provides for the annulment of an award on the ground that there has been a serious deviation from a fundamental rule of procedure. Not every departure from a rule of procedure will justify annulment of an award. The applicant must be able to identify the relevant rule of procedure and the manner in which it has been departed from and prove that the rule is "*fundamental*" and the deviation is "*serious*". As noted in the ICSID Background Paper, "*examples of fundamental rules of procedure identified by ad hoc Committees concern: (i) the equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial Tribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations among members of the Tribunal* […]".[283]

266. A procedural rule will be *fundamental* if it confers universally accepted due process rights on the parties. These rights include the right to a fair and unbiased hearing and the right to present one's case. In addition, the procedural rule allegedly breached must be one that provides a party with some procedural rights and a deviation will be *serious* if a party is deprived of those procedural rights as a result of the deviation. If these circumstances exist, then they could constitute a ground for annulment.

267. Both Spain and the Claimants agree that the record must show that the deviation from the rule of procedure breached must be serious and the rule must be fundamental; however, the Parties disagree as to the application of the agreed standards to the facts.[284] Spain says that regarding the seriousness of the deviation, all it is required to show in order to succeed is a possibility that "*had the procedural breach not occurred, there could have been a difference in some relevant aspects of the dispute.*"[285] It is not required to prove the different outcome with any certainty. The Claimants dispute this.

268. The Committee agrees with Spain that in order to succeed on this ground, all the applicant for annulment must show is that the breach of the fundamental rule can have a material impact on the outcome of the award. The Committee also accepts the position stated in *Pey Casado v Chile*

[281] Annulment Rejoinder, para 213.
[282] Annulment Rejoinder, para 215.
[283] RL-101, *ICSID Background Paper*, para 99.
[284] Annulment Transcript, Day 1, 60:19-25.
[285] Annulment Transcript, Day 1, 61:17-23.

(Annulment) that "*the 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*".[286]

269. The Committee does not accept that a failure to raise objections to the tribunal during the arbitration proceedings operates as an absolute waiver and bars an applicant from raising them in an annulment proceeding. Parties have the right to seek annulment under not only Article 52 of the ICSID Convention but also Rule 50, which provides a set of conditions for the exercise of that right, including the time limits in Rule 50(3). On the other hand, Rule 27 refers to breaches against provisions of the applicable rules, including agreements between the parties, or orders rendered by tribunals, and forces parties to "*promptly*" present their objections. Read in good faith and according to their ordinary meaning, the provisions are not to be interpreted as being necessarily related to each other.

270. In any case, the Committee agrees with the Claimants that there is a high bar that an applicant seeking annulment under Article 52(1)(d) of the ICSID Convention must meet. Any departure must be 'serious' and the rule must be 'fundamental'. The Committee will be guided by the ICSID Background Paper which states that the "*task of determining whether an alleged fundamental rule of procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the Tribunal*."[287]

(2) Specific Breaches

a. Spain's Position

271. According to Spain, a serious departure from a fundamental rule of procedure arose when the Tribunal expressed "*without any justification whatsoever*" that there is a "*presumption of absence of contradiction between EU Law and the ECT itself*". In particular, Spain contends that the Tribunal referred to *Electrabel v Hungary*[288] without providing any accompanying explanation nor specifying the relevant paragraph(s) of the decision in question, even though such decision was "*introduced by the Kingdom of Spain into the underlying arbitration for the purpose of establishing the primacy of European Union law over the ECT*", i.e. for a purpose contrary to that indicated in the Award. It likewise suggests that the Tribunal refers to *Electrabel* selectively and therefore inaccurately.[289]

272. Spain also submits that Article 52(1)(d) of the ICSID Convention is engaged because "[t]*he disproportionality of the* [Tribunal's] *analysis between the evidence submitted by one party and*

[286] RL-157, *Pey Casado v Chile (Annulment)*, para 78.
[287] RL-101, *ICSID Background Paper*, para 100.
[288] RL-2, *Electrabel v Hungary*.
[289] Annulment Memorial, paras 253-264; Annulment Reply, paras 401-411.

the other is obvious" in relation to the principle of reasonable return. Specifically, Spain refers to the difference in the Tribunal's treatment of *RREEF v Spain*[290] (put forward by Spain) and *Eiser v Spain*[291] (put forward by the Claimants), highlighting that the latter has recently been annulled. It adds further that the Tribunal handled the burden of proof in the case inappropriately, and that "*the chaotic logic of the Award, in a reasoning that is impossible to follow, evidences an eagerness of the majority to condemn Spain regardless of all the evidence in the proceedings, which is also indicative of a breach of the principle of impartiality*".[292]

273. Spain further contends that the Majority Tribunal did not consider the expert evidence it submitted, especially evidence relating to (i) why other regulatory measures were not only feasible but reasonable from a regulatory standpoint under the circumstances, and (ii) the undisputed fact that, prior to the Disputed Measures, when Claimants invested, the regulatory risk created by the RD 661/2007 tariff was already high and that, after the Disputed Measures, the markets assessed the regulatory risk favourably. It highlights that the Tribunal's discretion in judging "*cannot mean leaving the tribunal free to recognize as proven a fact without any evidence, or with insufficient evidence, with the result of awarding compensation in a speculative manner*" and refers to the Ruiz Fabri Dissent to show that its perception is not "*isolated.*"[293]

274. In Spain's view, there was a serious departure from a fundamental rule of procedure as well when the Tribunal refused to admit onto the record two awards rendered after the hearing in the main proceeding, namely *Stadtwerke v Spain*[294] and *Baywa v Spain,*[295] even though these were "*relevant both from the point of view of the applicable law and in terms of liability*" and had "*a direct impact on matters determining the outcome of the dispute.*" In response to the Claimants' submission that it waived its right to use this matter as a basis for annulment, Spain replies that it "*had no real opportunity to allege such a breach.*"[296]

b. Claimants' Position

275. The Claimants point out that Spain's submissions are "*a patchwork of various allegations that very distinct procedural rules* […] *have been breached at the very same time, as if the two were equivalent, or the violation of the former necessarily entailed a violation of the latter, without any cogent explanation*", and that this "*speak*[s] *volumes as to the lack of credibility of Spain's*

[290] CL-219, 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 Responsibility and on the Principles of Quantum, 30 November 2018.

[291] RL-79, *Eiser*.

[292] Annulment Memorial, paras 265-276; Annulment Reply, paras 412-418.

[293] Annulment Memorial, paras 278-282; Annulment Reply, paras 419-427.

[294] RL-137, Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain, ICSID Case No ARB/15/1, Award (*Stadtwerke v Spain*), 2 December 2019.

[295] CL-235, *Baywa v Spain*.

[296] Annulment Memorial, paras 283-288; Annulment Reply, paras 428-436.

position".[297] They submit that Spain's reading of both *Electrabel* and the Award is wrong, as is Spain's position that the Tribunal's reference to *Electrabel* violates either the rules on burden of proof or its right to be heard. They highlight further that the Tribunal's treatment of *Electrabel* is not isolated and so it cannot be said that the Tribunal 'manipulated' the *Electrabel* precedent. In the Claimants' view, "*Spain is* […] *simply complaining about the Tribunal's substantive assessment of the findings of Electrabel*", and that annulment proceedings are not the proper venue to air such grievances.[298]

276. With regard to the 'reasonable return' principle, the Claimants submit that the Tribunal did not reverse the burden of proof or otherwise misapply the principle of *onus probandi actori incumbit*. According to the Claimants, the Tribunal found instead that the Claimants had proven their case while remaining unconvinced of Spain's defences.[299] In the same vein, they maintain that there was no violation of Spain's right to be heard nor lack of impartiality, and that Spain is simply unhappy with the way the Tribunal made its assessment of evidence presented and the merits overall. In respect of Spain's allegations of partiality, they underscore that Spain's assertions are "*baseless*" and draw attention to Spain's partial success in the main proceeding on both jurisdiction and damages, which is furthermore reflected in the Tribunal's costs order, and argue that this "*renders Spain's partiality allegations moot*".[300]

277. Similarly, the Claimants contend that "*the Award makes clear that the Tribunal did consider Accuracy's* [i.e. Spain's] *expert evidence, in particular when it comes to the issue of regulatory risk*", and that underlying Spain's objection is again its disagreement with the Tribunal's assessment rather than genuine concerns about the legitimacy of process.[301]

278. As to the *Stadtwerke* and *Baywa* awards, the Claimants raise objections on the bases that (i) this matter has "*impermissibly made its way into Spain's Memorial after Spain failed even to mention it in its Annulment Application*", (ii) Spain effectively waived its right to bring this claim on annulment since it did not raise any protest promptly or at all in this regard in the main proceeding, and (iii) in any event, there is no basis for annulment because the right to be heard is not unlimited and given that Section 16.3 of Procedural Order No 1 from the main proceeding "*makes clear that, in principle, no new evidence is admissible after the filing of the last written submissions*."[302]

[297] Annulment Counter-Memorial, paras 391-392.
[298] Annulment Counter-Memorial, paras 393-402; Annulment Rejoinder, paras 224-233.
[299] Annulment Counter-Memorial, paras 405-416; Annulment Rejoinder, paras 235-239.
[300] Annulment Counter-Memorial, paras 417-431; Annulment Rejoinder, paras 240-247.
[301] Annulment Counter-Memorial, paras 432-440; Annulment Rejoinder, paras 248-253.
[302] Annulment Counter-Memorial, paras 441-459; Annulment Rejoinder, paras 254-262.

279. The Claimants further underscore that Spain has not discharged its burden of proof in relation to any of the objections it raises by demonstrating how the alleged departures had a material effect on the outcome. They point out that it acknowledges that where the Tribunal's treatment of its expert evidence is concerned, there was no material difference at all, while for the remaining matters (*i.e.* those set out at paragraphs 271 and 274 above), Spain relies largely on catch-all statements which do not discharge the burden of proof.[303]

c. Committee's Analysis

280. Spain alleges that the Tribunal committed a serious departure from a fundamental rule of procedure in two respects: firstly, its right to be heard and secondly, the Tribunal's failure to abide by the rules of treatment of evidence and a proper allocation of the burden of proof.

281. Spain says its right to be heard and its right to have its evidence properly analysed amount to serious deviations from a fundamental rule of procedure – that a party should have a full opportunity to present its case. To benefit from the protection which the rule was intended to provide, Spain has the obligation of proving that the departure was so substantial as to deprive it of the benefit or protection of the rule.

(i) The right to be heard

282. Spain alleges that the refusal of the Tribunal to admit the *Stadtwerke* and *Baywa* awards into the record amounted to a failure to give it a right to be heard, which in itself is a serious breach of a fundamental rule of procedure; this being a due process right afforded to parties.

283. The Committee agrees with the definition of the right to be heard as stated by the annulment committee in *Tulip v Turkey*[304] that "*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.*"

284. While the right to be heard involves providing each party with a full and fair opportunity to present its case, it is not in every instance where documents are disallowed that a party is denied the right. In reliance on ICSID Arbitration Rule 34(1), which states that the tribunal shall be the judge of the admissibility as well as of the probative value of any evidence, every tribunal has the discretion to decide whether to allow new documents or evidence into the record as long as such decision does not flout the parties' right to due process.

[303] Annulment Counter-Memorial, paras 460-463; Annulment Rejoinder, paras 263-268.

[304] RL-156, Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey, ICSID Case No ARB/11/28, Decision on Annulment (*Tulip v Turkey (Annulment)*), 30 December 2015, para 82.

285. Therefore, a refusal to allow in new evidence does not of itself amount to a refusal to hear a party. As the annulment committee noted in *Bernhard von Pezold v Zimbabwe*:[305]

> [a]*n ICSID tribunal's task is to provide a party with a reasonable opportunity to be heard; there is no right to an unlimited opportunity to be heard.*

286. In *Churchill Mining v Indonesia*[306] the annulment committee noted that the right to be heard was a right that required "*tribunals to provide each party with an adequate opportunity to be heard but not necessarily with an unlimited opportunity to present its case. In this perspective, the right to be heard is commonly considered as not absolute, but rather subject to possible limitations, provided that they are reasonable and proportional to the aim to be achieved.*"

287. The Committee notes that the request to admit the *Stadtwerke* and *Baywa* awards into the record came not just after the evidentiary hearing, but after the Parties filed closing submissions. In refusing Spain's request, the Tribunal stated that the new awards were "*not necessary for the Tribunal to deliver its decision.*"[307] The Committee takes the view that the closure of the evidentiary hearings and the Tribunal's position that the awards were unnecessary to its reaching a decision are reasonable and proportional limitations to the right to be heard. This limitation is also in line with its powers under ICSID Arbitration Rule 34(1) earlier referred to.

288. Before deciding to refuse the request, the Tribunal heard the Parties' arguments on Spain's request, so its refusal cannot be a violation of Spain's right to be heard.

289. Further, the Claimants refer to Section 16.3 of Procedural Order No 1 in the substantive proceedings where the Parties agreed "*that, in principle, no new evidence is admissible after the filing of the last written submissions*".[308] The admission of new evidence after the filing of the last written submissions is therefore at the discretion of the Tribunal. This Committee should not attempt to determine whether or not the Tribunal was right or wrong in refusing to admit the two decisions. To do so would be reviewing the Tribunal's procedural ruling, something which the Committee is not empowered to do.

290. The Committee also notes that the Tribunal had rejected earlier a similar request from the Claimants to add additional documents into the record. This suggests that the Tribunal treated both Parties equally with respect to the submission of new material, applying the same rationale

[305] CL-245, Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No ARB/10/15, Decision on Annulment, 21 November 2018, para 255.

[306] CL-248, Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, para 178.

[307] R-406, Letter from the Tribunal to the Parties, 17 December 2019.

[308] Annulment Counter-Memorial, paras 441-459; Annulment Rejoinder, paras 254-262.

to requests presented after the evidentiary hearing had concluded. It flows from the file that the Parties were given equal opportunity to present their cases to the Tribunal. In such circumstances the Committee cannot conclude that there was a lack of due process and no evidence was advanced of any serious departure from a fundamental rule of procedure on the part of the Tribunal in this regard.

(ii) The treatment of evidence

291. Spain alleges a deviation from the fundamental rules of procedure by the Tribunal in three instances. Firstly, it refers to the manner in which the Tribunal analysed the evidence regarding a conflict between the ECT and EU law. It says that the Tribunal relied on the holdings of *Electrabel* decision to analyse this matter and found that EU is not international law, whereas the *Electrabel* decision analysed the compatibility of EU law and the ECT on the basis that EU law is international law.

292. Spain also says the lack of reasoning as to how the Tribunal reached its decision on its liability to the Claimants is so manifest "*that it also amounts to a serious departure from fundamental rules of procedure.*"[309]

293. Finally, with respect to the allocation of the burden of proof, Spain says "[t]*he disproportionality of the* [Tribunal's] *analysis between the evidence submitted by one party and the other is obvious*" in relation to the principle of reasonable return. According to Spain, "[t]*he Tribunal does not analyse the decisions it cites and this is sufficient for considering that it prefers them over the decision of the RREEF Tribunal.*"[310] Further, when discussing the regulatory risk, the Tribunal ignored the opinion of its expert (Accuracy), a further violation of the rules of the burden of proof.

294. Spain also contends that the Tribunal committed a serious departure from a fundamental rule of procedure when it neglected to analyse Spain's submissions regarding the findings on liability. It said, "*We are not complaining* […] *because our arguments were not accepted by the Tribunal;* […] *We say that the truth is that our arguments were not even analysed and resolved in a logical manner by the majority of the Tribunal.*"[311]

295. The breach of the right to be heard may occur when a tribunal refuses to allow a party to present some evidence or articulate a particular argument without justification or in an arbitrary manner. Once the evidence has been presented and/or the argument submitted, the absence of or

[309] Annulment Transcript, Day 1, 60:11-12.

[310] Annulment Memorial, para 266.

[311] Annulment Transcript, Day 1, 63:8-12.

inadequate discussion thereof in the award does not automatically amount to a violation of the the right to be heard.

296. The ICSID Background Paper mentions that the improper treatment of evidence and the burden of proof may amount to a serious violation of a fundamental rule of procedure.[312] Spain has alleged that the Tribunal had violated the rule of burden of proof by putting the burden upon it rather than on the Claimant.[313] The Committee does not find any improper allocation of the burden of proof by the Tribunal in this case. Spain's complaint is with the manner in which the Tribunal assessed the evidence placed before it, as compared to what it had expected or desired. However, that is not the standard by which a breach of or a reversal of the burden of proof is measured and does not constitute a departure from a fundamental rule of procedure, much less a serious one.

297. The Committee notes that the factual and expert evidence of both Parties was reviewed by the Tribunal before coming to a decision on damages. Although the treatment of the evidence may be brief, there is nevertheless no sign of partiality by the Tribunal in the way it assessed the evidence. Although there could well be a mistake made with regard to its computation of damages (as discussed in paragraphs 241-257), there was no evidence of any prejudgment on the part of the Tribunal which could have amounted to an infringement of Spain's due process rights that would lead to the annulment of the Award on the grounds of a serious departure from a fundamental rule of procedure.

298. As noted by the annulment committee in *Tulip v Turkey*, "[t]*he 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.*"[314]

299. For all the above reasons, Spain's basis for annulling the Award under Article 52(1)(d) of the ICSID Convention fails and must be denied.

D. SUMMARY OF FINDINGS

300. The Committee has found that Spain failed on all grounds for annulling the Award wholly.

301. Spain has also asked, alternatively, that the Award be annulled in part "relating to the quantification of damages under Article 52(1)(e) for failure to state reasons and, consequently, also annul the Tribunal's award of costs."

[312] RL-101, *ICSID Background Paper*, para 99.

[313] Annulment Memorial, paras 250-251.

[314] RL-156, *Tulip v Turkey (Annulment)*, para 82.

302. However, the Committee has found no ground for annulment to exist. The Committee agrees with past committees that the annulment process is not a mechanism to rectify errors of fact or law (see *Alapli Elektrik B.V. v Republic of Turkey*[315]; *Daimler Financial Services A.G. v Republic of Argentina*[316]*; Total S.A. v Argentine Republic*[317]), even in the case where such errors are evident (see *Consortium R.F.C.C. v Kingdom of Morocco*[318]).

303. The Committee has found that the Tribunal had made a mistake in its computation of the damages payable by Spain and had declined to make such a correction in its Decision on Rectification. In the Committee's view, an uncorrected mistake remains a mistake or an error which does not engage the intervention of Article 52(1)(e) of the Convention. This Committee is not permitted to act like an appellate tribunal and correct the error that has been identified, which the Tribunal could have but did not correct under Article 49(2) of the Convention. As such, the Committee declines to make any partial annulment relating to the quantification of damages and the award on costs, requested by Spain.

VI. COSTS

(1) The Parties' Costs Submissions

a. Spain's Position

304. In its Submission of Costs of 4 March 2022, Spain submits that "there is wide consensus that Article 61 of the ICSID Convention confers upon the Committee a 'degree of discretion' to decide on the allocation of costs."[319] Spain furter submits that the Committee "should be guided by the principle that 'costs follow the event' if there are no indications that a different approach should be called for."[320]

305. Spain is of the view that it was "compelled to go through these annulment proceedings"[321] and that from the outset it noted that the Tribunal in the arbitration lacked jurisdiction. Thus, the

[315] CL-258, Alapli Elektrik B.V. v Republic of Turkey, ICSID Case No ARB/08/13, Decision on Annulment, 10 July 2014, para 232: "The annulment procedure is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed, but a limited remedy meant to ensure the fundamental fairness of the arbitration proceeding."

[316] CL-242, *Daimler v Argentina (Annulment)*, para 188: "The annulment proceeding is not an appeal and therefore, is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed."

[317] RL-179, Total S.A. v Argentine Republic, ICSID Case No ARB/04/1, Decision on Annulment, 1 February 2016, para 179: "As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed. Annulment under the ICSID Convention is a limited remedy."

[318] Consortium R.F.C.C. v Kingdom of Morocco, ICSID Case No ARB/00/6, Decision on Annulment, 18 January 2006, para 222: "Even the most evident error of fact in an award is not in itself a ground for annulment" (Unofficial French Translation).

[319] Spain's Cost Submission of 4 March 2022 ("*Spain's Costs Submission*"), para. 5.

[320] Spain's Costs Submission, para 6.

[321] Spain's Costs Submission, para. 7.

Watkins Parties, as EU investors who commenced an arbitration against a EU-Member State, should be responsible for the costs incurred by Spain in the annulment proceeding.[322]

306. Spain claims a total of EUR 1,505,894.61, corresponding to the following legal and other costs:

- 234,795.95 EUR for advances paid to ICSID
- 1,232,000 EUR for legal fees
- 35,298 EUR for expert reports
- 3,800.66 EUR for translations

b. Claimants' Position

307. The Claimants agree that Article 61 of the ICSID Convention and the relevant ICSID Arbitration Rules provide the Committee with discretion to allocate all costs between the Parties as it deems appropriate.[323] They also maintain that the Committee "should predominantly consider the 'costs follow the event' principle when exerting its discretion to allocate costs."[324]Further, the submit that "[t]he exercise of the Committee's discretion is entirely unfettered, especially with respect to legal expenses."[325]

308. The Claimants argue that Spain's Application was meritless and in those circumstances requests that the Committee adopt the 'costs follow the event' approach.[326] The Claimants submit that annulment proceedings are "particular"[327] in that an applicant, here Spain, must alone advance all administrative costs, unlike an arbitration proceedings where such costs are borne in halves. In their view, such costs allocation puts from the outset on the applicant the risk that those costs will not be recovered in the event of an unsuccessful application. The Claimants submit that the Committee should reflect such logic in their costs allocation decision, arguing that instead of paying the damages it owes under the Award, Spain challenged the Award, forcing the Watkins Parties to incur significant further costs for a proceeding on whose merits they prevailed. Finally, they submit that, if Spain succeeded in its Application, "it should still bear some of the costs for that portion of the Application."[328]

[322] Spain's Costs Submission, paras. 7-9.
[323] Claimants' Costs Submission of 4 March 2022 ("*Claimants' Costs Submission*"), para. 12.
[324] Claimants' Costs Submission, para. 13.
[325] Claimants' Costs Submission, para. 13.
[326] Claimants' Costs Submission, para. 14.
[327] Claimants' Costs Submission, para. 18.
[328] Claimants' Costs Submission, para. 19.

309. To sum up, the Claimants request that the Committee award the Claimants all costs (ICSID and Committee's fees and expenses; and Claimants' legal costs and expenses) in their favor, if the Committee rejects Spain's Application;[329] and, alternatively, that the Committee allocates the costs reflecting the Parties' relative success in the annulment proceedings.[330]

310. The Claimants note that since Spain submitted expert evidence, its costs are likely to exceed those of the Claimants. They further argue that since the Accuracy expert reports was stricken from the record, Spain should not be permitted to recover the costs of that report, nor for the two exper reports of Prof. Gosalbo, which in their vire "were of zero probative value."[331]The Claimants position is that no expert evidence was warranted in the annulment proceedings and request that the costs of Spain's experts be borne by Spain alone, no matter the outcome of the Application.

311. The Claimants claim a total of EUR 975,057.33, corresponding to the following legal and other costs:

- 962,630.95 EUR for legal fees
- 12,426.38 EUR for translations and other expenses

c. Committee's Analysis

312. Spain has failed in its annulment of the Award. The Claimants request the Committee to issue a decision on costs: (1) in the event that the Committee rejects Spain's Annulment Application, ordering Spain to: (a) bear in full the ICSID administrative costs and Committee expenses; and (b) pay in full all of the Watkins Parties' legal costs and related disbursements, including the costs of this application; (2) alternatively, allocating costs between the Parties in a way which reflects the Parties' relative success in the annulment proceedings.

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

> *(2) 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.*

[329] Claimants' Costs Submission, para. 22(a).
[330] Claimants' Costs Submission, para. 22(b).
[331] Claimants' Costs Submission, para. 20.

314. This provision, which applies *mutatis mutandis* to annulment proceedings by virtue of Article 52(4) of the ICSID Convention, gives the Committee the discretion to allocate all costs of the annulment, including legal fees and other costs, between the Parties as it deems appropriate.[332]

315. Costs fall into two categories: (i) the costs of the proceedings themselves, namely the costs incurred by ICSID, and the fees and expenses of the annulment committee members; and (ii) the costs of representation incurred by the parties, together with the expenses which the parties have incurred.

316. The total costs of the proceedings (in US dollars) are as follows:

ICSID Administrative Fees	126,000.00
Fees and expenses of the Committee members	
Profesor Lawrence Boo	99,324.88
Sra. Olufunke Adekoya	87,801.65
Sra. Dyalá Jiménez Figueres	67.375,00
Other direct expenses:	69,711.67
Total:	**450,213.20**

317. The above costs have been paid out of the advances made by Spain, which is the party seeking annulment, in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations. Spain has advanced a total of USD 449,868.00 (amounting to USD 451,718.93 when including USD 1,850.93 of investment income).

318. As earlier observed, Spain has failed on all the grounds for annulment. The Committees notes that although Spain's bases are not sustainable as grounds for annulment, it had raised a substantiated request for consideration. The Committee takes the view that each party should therefore bear its own costs and share the costs of the proceedings equally. As Spain has paid the costs of the proceedings in the first instance, it shall be entitled to reimbursement from the Claimants in the sum of USD 224,934.00.

VII. DECISION

319. For the reasons set out above, the Committee unanimously hereby orders as follows

[332] See also Rule 47(1)(j) in conjunction with Rule 53 of the ICSID Arbitration Rules.

(1) Spain's application to annul the Award is dismissed;

(2) The order for stay of enforcement of the Award granted in Decision on Stay of Enforcement dated 28 June 2021 is herely lifted;

(3) Each party shall bear its own costs and fees and share equally the costs of the annulment proceedings amounting to 450,213.20 and, thereby, the Watkins Parties shall pay Spain USD 224,934.00 for the amounts Spain advanced; and

(4) All other claims and requests are dismissed.

Ms. Funke Adekoya
Member of the *ad hoc* Committee

Date: 21 February 2023

Ms. Dyalá Jiménez Figueres
Member of the *ad hoc* Committee

Date:

Prof. Lawrence Boo
President of the *ad hoc* Committee

Date:

Ms. Funke Adekoya
Member of the *ad hoc* Committee

Date:

Ms. Dyalá Jiménez Figueres
Member of the *ad hoc* Committee

Date: 21 February 2023

Prof. Lawrence Boo
President of the *ad hoc* Committee

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Prof. Lawrence Boo
President of the *ad hoc* Committee

Date: 21 February 2023