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July 18, 2024

Mark J. Langer  
Clerk of Court  
U.S. Court of Appeals for the D.C. Circuit  
E. Barrett Prettyman U.S. Courthouse  
333 Constitution Ave., NW  
Room 5205  
Washington, DC 20001

RE: *NextEra Energy Global Holdings B.V., et al. v. Kingdom of Spain*, No. 23-7031 (D.C. Cir.), and *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032 (D.C. Cir.): Response to Spain's Federal Rule of Appellate Procedure 28(j) letter about a new side agreement dated June 26, 2024, among the European Union (EU), European Atomic Energy Community (EURATOM), and 26 EU member states

Dear Mr. Langer:

Spain's letter says a new agreement among the EU, EURATOM, and 26 EU states confirms those entities' belief that the ECT "cannot and never could" permit intra-EU arbitration.

The agreement is irrelevant.

*First*, under the ECT's plain text, Spain agreed "unconditional[ly]" to arbitrate with investors from member states – with no carveout for intra-EU

disputes. ECT art. 26(3)(a). In fact, the European Commission proposal for such a carveout during negotiations *was rejected*. Spain and the EU ratified the ECT anyway. NextEra Br. 49; Suppl. Br. 6-7; May 16, 2024, Letter.

*Second*, an internal-to-the-EU agreement, like this new one, could not and cannot override the ECT's terms. *See* Vienna Convention arts. 27, 46(1); *Blasket* Tr. 25:19-26:7. The ECT means, and meant, the same thing for all contracting states. Any conflict with EU law wasn't "manifest" at ratification, Vienna Convention art. 46(1), and Spain doesn't claim otherwise. Contrary to Spain's new history, in 2010 the Netherlands acknowledged that EU law wouldn't affect the jurisdiction of international arbitral tribunals—meaning this new theory wasn't manifest at ratification *even to the EU*. March 27, 2024 Letter.

Spain's letter says "[t]reaties must be read 'in a manner consistent with the shared expectations of the contracting parties.'" The ECT's text (which has no disconnection clause) reflects the parties' mutually understood, unconditional agreement to arbitrate with other contracting states' investors. If Spain wants to amend the ECT—*prospectively*—it needs "at least three-fourths of the Contracting Parties" to agree. ECT art. 42(4). Spain can also *prospectively* withdraw, as it is doing. May 20, 2024, Letter. But it can't change the treaty by side deal, because doing so would undermine the ECT's purpose and the rights of the 27 ECT members that *haven't* joined the new agreement: Iceland, Japan, Norway, Switzerland, Turkey, Ukraine, the United Kingdom, and 20 other states. *See* Vienna Convention art. 41(1)(b); March 27, 2024, Letter.

*Finally*, a new agreement cannot retroactively invalidate an ICSID award. Article 25 of the ICSID Convention provides that consent, once given, cannot be withdrawn, and Article 52 provided the sole (and here unsuccessful) basis for seeking annulment of an award.

Respectfully submitted,

/s/ Shay Dvoretzky

Shay Dvoretzky

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9REN Holding S.À.R.L. (No. 23-7032)*

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that (1) this letter complies with the type-volume limitation of Federal Rule of Appellate Procedure 28(j) because, as calculated by Microsoft Word, the body of the letter contains 350 words, and (2) this letter complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Book Antiqua font.

Dated: July 18, 2024

/s/ Shay Dvoretzky

Shay Dvoretzky

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 18, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 18, 2024

/s/ Shay Dvoretzky

Shay Dvoretzky