EUROPEISKA KOMMISSIONEN

Bryssel den 17 december 2020
SJ.C(2020)8586370

EUROPEISKA KOMMISSIONENS SKRIFTLIGA YTTRANDE

i mål nr T 1626-19

***Konungariket Spanien* mot Foresight Luxembourg Solar 1 S.à.r.l. m.fl.**

vid Svea hovrätt

Europeiska kommissionen, 1049 Bryssel BELGIEN – Tfn + 32 2 299 1111
Kontor: [redacted]

1. INLEDNING

1. Kommissionen tackar Svea hovrätt för möjligheten att inkomma med en amicus curiae-inlaga i enlighet med artikel 29 i rådets förordning (EU) 2015/1589[1]. Med anledning av att [redacted] har ersatt [redacted] som ombud för kommissionen bifogas en ny fullmakt (**bilaga 1**).

2. Kommissionen har i sin amicus curiae-inlaga till skiljedomstolen (**bilaga 2**) anfört att artikel 26 i energistadgefördraget inte är tillämpligt mellan en investerare från en medlemsstat och en annan medlemsstat. Kommissionen anser följaktligen att den ifrågasatta skiljedomen måste upphävas på den grunden att det saknas giltigt samtycke till skiljedomen enligt 34 § första stycket 1 i den svenska skiljeförfarandelagen. Konungariket Spanien har informerat Svea hovrätt utförligt om detta. Kommissionen kan inte, på grundval av sina befogenheter enligt artikel 29 i förordning (EU) nr 2015/1589, yttra sig i denna fråga, utan måste begränsa sina inlagor till frågor om EU:s lagstiftning om statligt stöd. För fullständighetens skull informerar kommissionen Svea hovrätt om att den EU-interna tillämpningen av energistadgefördraget behandlades vid en muntlig förhandling inför EU-domstolens stora avdelning den 17 november 2020[2] i mål C-741/19, Republiken Moldavien (baserat på en begäran om förhandsavgörande från appellationsdomstolen i Paris i ett mål om tillämpningen av energistadgefördraget utanför EU). Generaladvokaten kommer att avge sitt förslag till avgörande i målet den 3 mars 2021 och domen kommer sannolikt att meddelas under sommaren eller hösten 2021. EU-domstolen kommer även att behandla denna fråga i ett yttrande enligt artikel 218.11 FEUF, vilket begärts av Konungariket Belgien.[3] Vidare har generaladvokaten Saugmandsgaard Øe den 29 oktober 2020 avgett sitt förslag till avgörande i mål C-798/19, Anie[4]. I förslaget anger han, i linje med kommissionens inställning, följande:

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1 Rådets förordning (EU) 2015/1589 av den 13 juli 2015 om tillämpningsföreskrifter för artikel 108 i fördraget om Europeiska unionens funktionssätt (EUT L 248, 24.9.2015, s. 9).

2 Förhandlingen var inledningsvis utsatt till den 15 september 2020 men senarelades vid två tillfällen.

3 För ytterligare detaljer, se https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions.

4 Förslag till avgörande av den 29 oktober 2020 av generaladvokaten Saugmandsgaard Øe, Anie, C-798/18, ECLI:EU:C:12020:876, punkterna 92 och 93.

”*92. Av detta följer, enligt min uppfattning, som den tyska regeringen med fog har gjort gällande, att artikel 10 i energistadgefördraget har till syfte att, inom unionens rättsordning, skydda investerare i de övriga fördragsparterna, det vill säga tredjeländer som även är parter i detta fördrag, inom hela unionen.(53) Däremot kan denna bestämmelse, enligt min uppfattning, inte åberopas av unionens investerare gentemot unionens institutioner eller medlemsstaterna.*

(53) Det ska i detta hänseende preciseras att när det gäller organisationer för ekonomisk integration, såsom unionen, definieras begreppet ”område” i artikel 1.10 i energistadgefördraget som ”de områden som tillhör organisatione[r]n[a]s medlemsstater”.

93. När det gäller medlemsstater som själva har tillträtt energistadgefördraget i egenskap av ”fördragsslutande parter” (vilket inte är fallet med Republiken Italien)(54), har parterna ställt frågan om huruvida artikel 10 i detta fördrag, i de mål där en av dessa medlemsstater är inblandad, även kan åberopas av andra medlemsstaters investerare och inte bara av investerare från tredjeländer. Det är emellertid inte nödvändigt att pröva denna fråga i förevarande mål.(55) …

(54) …

(55) Det ska understrykas att det inte är nödvändigt att pröva denna fråga i förevarande mål, men jag vill påpeka att domstolen, i domen av den 6 mars 2018, Achmea (C-284/16, EU:C:2018:158), angav att artiklarna 267 och 344 FEUF ska tolkas så, att de utgör hinder för en sådan bestämmelse i ett internationellt avtal mellan medlemsstaterna, enligt vilken en investerare i den ena medlemsstaten, om det uppstår en tvist om investeringar i den andra medlemsstaten, får inleda ett förfarande mot sistnämnda medlemsstat vid en skiljedomstol, vars behörighet den medlemsstaten är skyldig att godta. Mot bakgrund av denna dom anser jag, eftersom det i artikel 26 i energistadgefördraget, som har rubriken ”Lösning av tvister mellan en investerare och en fördragsslutande part”, föreskrivs en möjlighet för dessa tvister att avgöras av skiljedomare, att denna bestämmelse inte är tillämplig på tvister inom unionen. Enligt min uppfattning kan det till och med, mot bakgrund av de principer som domstolen erinrade om i den domen, bland annat avseende bibehållandet av den specifika karaktären hos den rättsordning som inrättats genom fördragen och principen om ömsesidigt förtroende mellan medlemsstaterna, vara så att denna stadga är helt otillämpbar i sådana mål.”

3. För tydlighetens skull erinrar kommissionen om att den har intagit samma ståndpunkt som generaladvokaten och Konungariket Spanien i sitt beslut av den 10 november 2017 om statligt stöd SA.40348 (2015/NN) – Spanien – Stöd till elproduktion från förnybara energikällor[5] (kommissionens beslut om statligt stöd, **bilaga 3**), kraftvärme och avfall, i skälen 159–163. Beslutet är bindande för Konungariket Spanien i enlighet med artikel 288 i EUF-fördraget, i dess egenskap av mottagare av beslutet. Dessutom är det bindande för domstolar i andra EU-medlemsstater på grundval av principen om lojalt samarbete enligt artikel 4.3 i EUF-fördraget, såsom den tolkats i domarna i målen Delimitis[6] och Masterfoods[7].[8] Om Svea hovrätt hyser tvivel om huruvida den uppfattning som kommissionen har givit uttryck för i de skälen är rättsligt korrekt, är hovrätten skyldig att begära ett förhandsavgörande från domstolen. Det beror på att ett beslut av Svea hovrätt om att artikel 26 i energistadgefördraget kan tjäna som grund för ett giltigt skiljeavtal skulle frånta kommissionens beslut om statligt stöd dess verkan. Enligt domen i Foto Frost-målet[9] är den behörigheten förbehållen EU-domstolen.

2. EU:S LAGSTIFTNING OM STATLIGT STÖD HÄNFÖR SIG TILL GRUNDERNA FÖR DEN SVENSKA RÄTTSORDNINGEN

4. I denna amicus curiae-inlaga görs gällande att den ifrågasatta skiljedomen måste ogiltigförklaras på grundval av 33 § första stycket 2 i den svenska skiljeförfarandelagen, eftersom den är uppenbart oförenlig med grunderna för den svenska rättsordningen. Det är i enlighet med de svenska domstolarnas fasta rättspraxis[10], och även ett krav enligt domstolens dom i Eco Swiss-målet[11], att EU:s

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5 EUT C 442, 22.12.2017, s. 1.

6 Domstolens dom av den 28 februari 1991, Delimitis, C-234/89, ECLI:EU:C:1991:91, punkterna 43–55.

7 Domstolens dom av den 14 december 2000, Masterfoods, C-344/98, ECLI:EU:C:2000:689, punkterna 45–60.

8 Se särskilt Nacka tingsrätts beslut av den 23 januari 2019, Micula m.fl mot Rumänien, Ä-2550/17, s. 13 (**bilaga 4**); dom av Luxemburgs högsta domstol av den 21 november 2019, Rumänien mot Micula, mål N 157/2019, s. 15 (**bilaga 5**).

9 Domstolens dom av den 22 oktober 1987, Foto-Frost, 314/85, ECLI:EU:C:1987:452, punkterna 15 och 20; domstolens dom av den 21 februari 1991, Zuckerfabrik Süderdithmarschen och Zuckerfabrik Soest, C-143/88 och C-92/89, ECLI:EU:C:1991:65, punkt 17; domstolens dom av den 21 mars 2000, Greenpeace France m.fl., C-6/99, ECLI:EU:C:2000:148, punkt 54; domstolens dom av den 10 januari 2006, IATA, C-344/04, ECLI:EU:C:2006:10, punkt 27; domstolens dom av den 6 november 2012, OTIS, C-199/11, ECLI:EU:C:2012:684, punkterna 53 och 54.

10 Högsta domstolens dom av den 17 juni 2015 i mål T 5767-13, punkterna 18–27.

konkurrensrättsliga bestämmelser hänför sig till grunderna för den svenska rättsordningen.

5. EU:s lagstiftning om statligt stöd ingår i EU:s konkurrenslagstiftning. Den ingår i avdelning VII, kapitel 1 i EUF-fördraget, som har rubriken ” Konkurrensregler”. I detta kapitel utgör den avsnitt 2. Domstolen har nyligen slagit fast att syftet med EU:s lagstiftning om statligt stöd är att ”skydda konkurrensen”[12]. Det råder även bred enighet om denna fråga i den akademiska litteraturen[13]. Slutligen har appellationsdomstolen i Warszawa helt nyligen bekräftat denna punkt och ogiltigförklarat en skiljedom för underlåtenhet att på eget initiativ pröva en eventuell överträdelse av EU:s lagstiftning om statligt stöd[14].

6. Kommissionen har en viktig roll att spela vid tillämpningen av det system för kontroll av statligt stöd som inrättas genom artiklarna 107 och 108 i EUF-fördraget. Kommissionen ska kontinuerligt granska befintliga stödordningar i medlemsstaterna och ha exklusiv befogenhet att godkänna nytt stöd som medlemsstaterna har för avsikt att bevilja företag.

7. I detta fall har kommissionen, inom ramen för sin behörighet avseende statligt stöd, bedömt den åtgärd som vidtagits av Konungariket Spanien och som har utgjort föremål för ett skiljeförfarande mellan investerare och staten. I kommissionens beslut om statligt stöd har den godkänt åtgärden som förenlig med den inre

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11 Se, bland annat, domstolens dom av den 1 juni 1999, Eco Swiss, C-126/97, ECLI:EU:C:1999:269, punkterna 35, 36 och 40, och domstolens dom av den 26 oktober 2006, Mostaza Claro, C-168/05, ECLI:EU:C:2006:675, punkterna 34–39, vilka omnämns i punkt 54 i domstolens dom i Achmea-målet (domstolens dom av den 6 mars 2018, Achmea, C-284/16, ECLI:EU:C:2018:158).

12 Domstolens dom av den 6 november 2018, kommissionen/Scuola Montessori, C-622/16 P–C-624/16 P, ECLI:EU:C:2018:873, punkt 43. Se även, i det avseendet, Högsta domstolens dom av den 17 juni 2015 i mål T 5767-13, punkt 19, i vilken Högsta domstolen med hänvisning till samma resonemang utsträcker tillämpningsområdet för den princip som framgår av Eco Swiss-avgörandet från artikel 101 FEUF till artikel 102 FEUF. Se vidare Belgiens högsta domstols (*Cour de cassation*) dom av den 18 Juni 1992, Belgien mot Tubemeuse, trv 1993, punkt 234: ”Artiklarna 92 och 93 i EG-fördraget ingår i grunderna för rättsordningen” (fritt översatt av kommissionen). Kommissionen kan om Svea hovrätt så önskar ge in en engelsk översättning av den domen.

13 Se t.ex. Bernard Hanotiau, *L'arbitrage et le droit européen de la concurrence* i Robert Briiner (red.), *L'arbitrage et le droit européen*, *Reports of the International Colloquium of CEPANI*, den 25 april 1997, Bruylant, 1997, s. 31–64.

14 Dom från appellationsdomstolen i Warszawa den 5 juni 2020, Republiken Polen mot Autostrada, Aca 457/18 (**bilaga 6**). Se redan, vad gäller det jämförbara problemet med tillstånd enligt artikel 85.1 EEG, Appellationsdomstolen i Paris, den 14 oktober 1993, Aplix, med kommentar av Charles Jarrosson, ”Note Cour d'appel de Paris (1re Ch. C) 14 octobre 1993 Société Aplix v. société Velcro“, Revue de l'Arbitrage 1994, s. 170–174. Kommissionen kan om Svea hovrätt så önskar ge in en engelsk översättning av den domen och kommentaren.

marknaden. I beslutet konstaterade kommissionen också att en skiljedom, såsom den som överklagats till Svea hovrätt, skulle utgöra nytt och olagligt statligt stöd.

3. KONUNGARIKET SPANIENS STÅNDPUNKT INFÖR SKILJEDOMSTOLEN OM EU:S LAGSTIFTNING OM STATLIGT STÖD

8. Konungariket Spanien har inför skiljenämnden tagit upp två punkter i EU:s lagstiftning om statligt stöd.

9. För det första har Konungariket Spanien förklarat att betalningarna inom ramen för den ursprungliga stödordningen för förnybar energi utgjorde statligt stöd enligt artikel 107.1 i EUF-fördraget. Konungariket Spanien påpekade särskilt att denna fråga hade avgjorts av domstolen i beslutet i Elcogás-målet[15] och i kommissionens beslut om statligt stöd, vilket framgår av punkterna 217, 323 och 324 i den omtvistade skiljedomen. Det statliga stödet hade inte anmälts till och godkänts av kommissionen i enlighet med artikel 108.3 i EUF-fördraget. Klagandena kunde därför inte förlita sig på någon garanti för att de skulle kunna behålla det mycket generösa stöd som erbjudits genom den ursprungliga stödordningen. Annars skulle det föreligga en allvarlig risk för snedvridning av konkurrensen på den inre marknaden. Enligt Konungariket Spanien syftade ändringen av stödordningen bland annat till att göra stödordningen förenlig med EU:s lagstiftning om statligt stöd, särskilt de så kallade energi- och miljöriktlinjerna, som kommissionen antog 2014.

10. Kommissionen betonade i fotnot 9 i sin amicus curiae-inlaga inför skiljedomstolen att en investerare inte kan ha berättigade förväntningar på att behålla olagligt statligt stöd som har beviljats i strid med artikel 108.3 i EUF-fördraget. När det väl har fastställts att den ursprungliga stödordningen utgör statligt stöd, skulle investeraren därför inte åtnjuta någon garanti att erhålla ytterligare stöd på den nivå som ursprungligen hade beviljats.

11. För det andra har Konungariket Spanien inför skiljedomstolen, såsom framgår av punkt 324 i den omtvistade skiljedomen, anfört att varje skiljedom i sig innebär att nytt och olagligt statligt stöd beviljas. Detta därför att den ersätter investeraren för den sänkta stödnivån, och därmed också för att stödordningen görs förenlig med

[15] Domstolens beslut av den 22 oktober 2014, Elcogás, C-275/13, ECLI:EU:C:2014:2314.

EU:s lagstiftning om statligt stöd. Med andra ord leder en sådan dom åter till att konkurrensen snedvrids, vilket minskningen av stödet hade till syfte att undanröja.

12. Konungariket Spaniens inställning stöds av kommissionens beslut i Micula mot Rumänien[16], kommissionens beslut om statligt stöd och ett liknande kommissionsbeslut rörande Republiken Tjeckien[17].

4. SKILJEDOMSTOLENS STÅNDPUNKT OM EU:S LAGSTIFTNING OM STATLIGT STÖD

13. Majoriteten av ledamöterna i skiljedomstolen förkastade, i punkt 381 i den omtvistade skiljedomen, Konungariket Spaniens argument baserade på kommissionens beslut om statligt stöd enligt följande: *”Kommissionens beslut om statligt stöd avser lagenligheten av det nya regelverket mot bakgrund av EU:s lagstiftning om statligt stöd. Kommissionen konkluderade att det nya regelverket var lagenligt men att Spanien felaktigt underlåtit att anmäla det till kommissionen innan det genomfördes. … Majoriteten av skiljedomstolens ledamöter anser emellertid att beslutet inte innehåller någon bedömning av stödordningen RD661/2007, enligt vilken sökandena företog sin investering. Det kan därmed slås fast att kommissionens beslut om statligt stöd inte har någon betydelse för frågan huruvida sökandena hade ett berättigat intresse av rättslig stabilitet vid tiden för investeringen.* (*“The EC State Aid Decision concerns the lawfulness of the New Regulatory Regime under EU State aid law. The Commission concludes that the New Regulatory Regime was not unlawful but that Spain wrongly failed to notify the Commission before implementing it. […] However, the Majority of the Tribunal considers that the decision makes no assessment of the RD661/2007 support scheme, under which the Claimants made their investment. Accordingly, the Majority of the Tribunal concludes that EC State Aid Decision has no bearing on the issue of the Claimants’ legitimate expectations of regulatory stability at the time of their investment.”*)

14. Skiljedomaren Vinuesa uttrycker en annan uppfattning i sin skiljaktiga mening. Han påpekar först att EU-rätten, genom artikel 26.6 i energistadgefördraget, är en del av

[16] Kommissionens beslut (EU) 2015/1470 av den 30 mars 2015 om det statliga stöd SA.38517 (2014/C) (f.d. 2014/NN) som Rumänien har genomfört – Skiljedomen Micula mot Rumänien av den 11 december 2013 (EUT L 232, 4.9.2015, s. 43).

[17] Kommissionens beslut C(2016) 7827 final av den 28 november 2016 om statligt stöd SA.40171 (2015/NN) till främjande av elproduktion från förnybara energikällor. En sammanfattning av detta beslut har offentliggjorts i Europeiska unionens officiella tidning (EUT C 69, 2017, s.2).

tillämplig lagstigning vad gäller dess innehåll i sak, eftersom EU-rätten utgör ”tillämpliga bestämmelser i internationell rätt” mellan investerarnas hemstat och Konungariket Spanien. Han delar också kommissionens inställning att EU:s lagstiftning om statligt stöd måste beaktas i en EU-intern tvist när det gäller tolkningen av begreppen rättvis och skälig behandling samt berättigade förväntningar (punkterna 1–21 i den skiljaktiga meningen). Han anför vidare att majoriteten av ledamöterna i skiljedomstolen inte har beaktat kommissionens beslut om statligt stöd men att han själv delar kommissionens bedömning i det beslutet, det vill säga att det på intet sätt kan vara fråga om ett åsidosättande av rätten till en rättvis och skälig behandling (punkterna 22–38 i den skiljaktiga meningen). Slutligen förklarar skiljedomaren Vinuesa att sökandena inte hade iakttagit tillbörlig aktsamhet (*due diligence*) avseende bland annat EU:s lagstiftning om statligt stöd (punkterna 39–53 i den skiljaktiga meningen).

5. KOMMISSIONENS STÅNDPUNKT OM EU:S LAGSTIFTNING OM STATLIGT STÖD

15. Grunderna för den svenska rättsordningen, som omfattar EU:s lagstiftning om statligt stöd (se avsnitt 2 ovan), står inte till parternas förfogande vad gäller ett skiljeavtal, där skiljedomstolen har sitt säte i Sverige.

16. Uttalandet i punkt 381 i den omtvistade skiljedomen att ”kommissionens beslut om statligt stöd inte har någon betydelse för frågan huruvida sökandena hade ett berättigat intresse av rättslig stabilitet vid tiden för investeringen”, genom vilket majoriteten av ledamöterna i skiljedomstolen underlät att tillämpa EU:s lagstiftning om statligt stöd i allmänhet och kommissionens beslut om statligt stöd i synnerhet, såsom förklarats närmare i den skiljaktiga meningen, utgör följaktligen en uppenbar överträdelse av 33 § första stycket 1 i den svenska skiljeförfarandelagen. Skiljedomstolen är skyldig att tillämpa EU:s lagstiftning om statligt stöd i allmänhet och kommissionens beslut om statligt stöd i synnerhet. I förevarande mål har Konungariket Spanien uppmanat skiljedomstolen att göra detta. Men även utan en sådan uppmaning ska denna skyldighet uppfyllas av skiljedomstolen på eget initiativ.

17. Konungariket Spanien har genomfört den första stödordningen för förnybar el som står i centrum för tvisten i syfte att uppfylla sina skyldigheter enligt unionsrätten,

närmare bestämt Europaparlamentets och rådets direktiv 2001/77/EG[18]. Skäl 12 i direktivet har följande lydelse (understrykning tillagd)[19]:

> *”Behovet av offentligt stöd till förnybara energikällor erkänns i gemenskapens riktlinjer om statligt stöd för miljöskydd (…), vilka, bland andra alternativ, beaktar behovet av att internalisera externa kostnader för elproduktion. Bestämmelserna i fördraget, och särskilt artiklarna 87 och 88 i detta [nu artiklarna 107 och 108 i EUF-fördraget] kommer emellertid att fortsätta att gälla för sådant stöd.”*

18. Till följd av detta var alla omsorgsfulla investerare tydligt informerade om att den ursprungliga stödordningen utgjorde statligt stöd och att artiklarna 107 och 108 i EUF-fördraget var tillämpliga. Detta innebar bland annat att Konungariket Spanien endast lagligen kunde genomföra stödordningen efter att ha underrättat kommissionen om den och efter att kommissionen givit tillstånd till detta. Utan ett sådant tillstånd stod det stöd som erhållits av investerare, såsom klagandena, i strid med unionsrättens tvingande regler och var därför olagligt enligt unionsrätten och spansk rätt.

19. Kommissionen fastslog detta tydligt i fotnot 9 i sin amicus curiae-inlaga inför skiljedomstolen och lyfte fram en viktig konsekvens av denna rättsstridighet:

> *”Enligt domstolens rättspraxis kan en mottagare av statligt stöd i princip inte ha berättigade förväntningar på att stöd som inte har anmälts till kommissionen är lagligt.”*

20. Domstolen bekräftade i beslutet i Elcogás-målet[20] att finansieringsmekanismen för de ursprungliga stödordningarna utgör statligt stöd.

21. Konungariket Spanien anmälde aldrig den ursprungliga stödordningen till kommissionen och kommissionen godkände den aldrig. Till följd av detta är alla betalningar som erhållits inom ramen för den ursprungliga stödordningen olagliga enligt unionsrätten, och investerare, såsom klagandena, kan inte ha berättigade förväntningar på att erhålla (eller behålla) betalningar på grundval av den.

22. Mot bakgrund av denna situation var skiljedomstolen skyldig att, i enlighet med Konungariket Spaniens uppmaning, kontrollera om den ursprungliga stödordningen

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[18] Europaparlamentets och rådets direktiv 2001/77/EG av den 27 september 2001 om främjande av el producerad från förnybara energikällor på den inre marknaden för el (EGT L 283, 27.10.2001, s. 33).

[19] Skyldigheten att följa artiklarna 107 och 108 i EUF-fördraget återges i artikel 4.1 i direktiv 2001/77/EG.

[20] Domstolens beslut av den 22 oktober 2014, Elcogás, C-275/13, ECLI:EU:C:2014:2314. Se även domstolens dom av den 19 december 2013, Association Vent De Colère m.fl., C-262/12, ECLI:EU:C:2013: 851.

utgjorde olagligt statligt stöd, även ex officio om en sådan uppmaning inte hade lagts fram. Om så var fallet var skiljedomstolen, enligt unionsrätten om statligt stöd (och således enligt grunderna för rättsordningen i Sverige), förhindrad från att fatta ett beslut som bekräftade att klagandena hade berättigade förväntningar. Sådana berättigade förväntningar var uteslutna enligt en tvingande regel i grunderna för rättsordningen:

23. *För det första* ger investeringsavtal skydd, bland annat energistadgefördraget, endast om investeringen var laglig, dvs. uppfyllde värdlandets rättsliga krav (som i Konungariket Spaniens fall omfattar unionsrätten). Det förbud som fastställs i artikel 108.3 i EUF-fördraget att inte genomföra statligt stöd utan förhandsanmälan utgör en grundläggande princip i unionens rättsordning som måste tillämpas av alla nationella domstolar[21]. Klagandens investering skyddas därför inte av energistadgefördraget.

24. *För det andra* måste en investerare, när den investerar i en EU-medlemsstat, anses känna till den tillämpliga rättsliga ramen, vilken omfattar unionsrätten, och särskilt systemet för kontroll av statligt stöd, som är direkt tillämpligt i alla medlemsstater. För att det ska föreligga berättigade förväntningar måste investeraren ha en skälig grund för att upprätthålla sådana förväntningar. En aktör i EU har inga rimliga grunder för sådana förväntningar avseende rättsstridigt och olagligt statligt stöd. De nationella myndigheternas försäkringar i frågor om statligt stöd kan per definition inte ge upphov till några berättigade förväntningar[22]. Eftersom medlemsstaterna inte kan påverka huruvida visst statligt stöd är tillåtet eller ej och följaktligen inte om det ska återbetalas eller ej, måste frågan om huruvida det föreligger en utfästelse eller en försäkran från ett behörigt organ eller ombud nödvändigtvis hänvisas till kommissionen.

25. Skyldigheten avseende rättvis och skälig behandling inom ramen för energistadgefördraget kan därför inte tolkas som att den skapar berättigade förväntningar om att EU:s regler om statligt stöd inte skulle gälla fullt ut. En

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[21] Domstolens dom av den 1 juni 1999, Eco Swiss, C-126/97, EU:C:1999:269, punkt 39. Ett effektivt genomförande av reglerna om statligt stöd är så viktigt för EU:s rättsordning att domstolen har givit det företräde till och med före principen om res judicata vad gäller domar som meddelats av medlemsstaternas nationella domstolar. Se i det avseendet, domstolens dom av den 11 november 2014, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742, domslutet, domstolens dom av den 18 juli 2007, Lucchini, C-119/05, ECLI:EU:C:2007:434, domslutet, och domstolens dom av den 4 mars 2020, CSTP Azienda della Mobilita/kommissionen, C-587/18 P, ECLI:EU:C:2020:150, punkterna 88–92.

[22] Domstolens dom av den 5 mars 2019, Eesti Pagar, C-349/17, ECLI:EU:C:2019:172, punkterna 96–106.

omsorgsfull investerare kan inte ha skäliga grunder för sådana förväntningar och ett löfte från en medlemsstats myndighet kan inte ge upphov till sådana förväntningar, eftersom det skulle vara contra legem.

26. Men problemet är ännu allvarligare.

27. I kommissionens beslut SA.40348 bedömdes en ändring av den ursprungliga stödordningen som antagits 2013 och 2014. Skiljedomstolen ansåg att ändringen stred mot klagandenas berättigade förväntningar enligt artikel 10.1 i energistadgefördraget. Kommissionen var dock skyldig[23], som en del av bedömningen av ändringen av den ursprungliga stödordningen i kommissionens beslut om statligt stöd, att bedöma huruvida ändringen stred mot artikel 10.1 i energistadgefördraget.

28. Kommissionen slog fast att det inte förelåg någon sådan överträdelse och gav Konungariket Spanien tillstånd att genomföra ändringen. Det är av dessa skäl som det i kommissionens beslut om statligt stöd konstateras följande:

> *”(164) Det förekommer i vilket fall som helst inte heller i sak någon överträdelse av bestämmelserna om rättvis och skälig behandling. Såsom förklaras ovan i avsnitt 3.5.2 har [...] Spanien inte åsidosatt principerna om rättssäkerhet och berättigade förväntningar enligt unionsrätten. I en EU-intern situation utgör unionslagstiftningen en del av den tillämpliga lagstiftningen, eftersom den utgör internationell rätt tillämplig mellan parterna i tvisten. På grundval av principen om tolkning i enlighet med unionslagstiftningen kan följaktligen principen om rättvis och skälig behandling inte ha ett bredare tillämpningsområde än unionsrättens bestämmelser om rättssäkerhet och berättigade förväntningar inom ramen för en ordning för statligt stöd. [...] Ingen investerare kunde i själva verket ha berättigade förväntningar som grundas på olagligt statligt stöd. Detta har uttryckligen erkänts av skiljedomstolar. [utelämnad fotnot] [...] ”*

29. Skiljedomstolen har således inte enbart underlåtit att själv analysera hur artiklarna 107 och 108 i EUF-fördraget påverkar det mål som den ska avgöra. Den har dessutom åsidosatt en bindande rättsakt från en EU-institution som innehåller en tydlig slutsats i detta avseende. Den rättsakten är bindande för skiljedomstolen, liksom den är bindande för Svea hovrätt (se punkt 3 ovan). Kommissionen hade uttryckligen erinrat om detta i skäl 166 i kommissionens beslut om statligt stöd: ”Slutligen erinrar kommissionen om att detta beslut utgör en del av unionsrätten och därmed även är bindande för skiljedomstolar, när de tillämpar unionsrätten. Det är unionens domstolar som har exklusiv behörighet att pröva dess giltighet.”

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[23] Domstolens dom av den 21 maj 1980, kommissionen/Italien, 73/79, ECLI:EU:C:1980:129, punkt 11.

30. I skäl 165 i kommissionens beslut om statligt stöd anges som en sista punkt:

> *”Kommissionen erinrar om att en eventuell ersättning som en skiljedomstol beviljar en investerare på grund av att Spanien har ändrat det ekonomiska premiesystemet genom den anmälda ordningen i sig skulle utgöra statligt stöd. Skiljedomstolarna är emellertid inte behöriga att tillåta beviljande av statligt stöd. Detta är kommissionens exklusiva behörighet. Om de beviljar ersättning, såsom i Eiser mot Spanien-målet, eller om de skulle göra det i framtiden, skulle denna ersättning vara anmälningspliktigt statligt stöd i enlighet med artikel 108.3 i EUF-fördraget och omfattas av genomförandeförbudet.”*

31. Tribunalen har i sin dom av den 18 juni 2019 i Micula mot kommissionen (T-624/15, T-694/15 och T-704/15, ECLI:EU:T:2019:423) bekräftat denna punkt i punkt 103: ” Skadestånd kan dessutom inte betraktas som stöd, utom när det ersätter ett indraget olagligt eller oförenligt statligt stöd (se, för ett liknande resonemang, dom av den 27 september 1988, Asteris m.fl., 106/87–120/87, EU:C:1988:457, punkterna 23 och 24), vilket kommissionen erinrade om i skäl 104 i det angripna beslutet.”

32. I förevarande mål ersätts genom den omtvistade skiljedomen klagandena just för indraget olagligt statligt stöd. Skiljedomen utgör därför i sig statligt stöd.

6. SLUTSATS

33. Av de skäl som anges i denna amicus curiae-inlaga anser kommissionen att den omtvistade skiljedomen ska upphävas respektive ogiltigförklaras, på grundval av 34 § första stycket 1 i den svenska skiljeförfarandelagen, eftersom det saknas giltigt samtycke, och, i synnerhet, även på grundval av 33 § första stycket 2 i den svenska skiljeförfarandelagen, för ett uppenbart åsidosättande av grunderna för rättsordningen, i detta fall EU:s lagstiftning om statligt stöd.

34. Det åsidosättandet består av två delar:

35. <u>För det första</u> har skiljedomstolen inte tillämpat artiklarna 107 och 108 i EUF-fördraget för att kontrollera om den ursprungliga stödordningen utgjorde olagligt statligt stöd. Om den hade gjort det, skulle den ha konstaterat att stödordningen utgjorde olagligt statligt stöd och detta hade medfört att skiljedomstolen inte hade kunnat konstatera att det skett en kränkning av berättigade förväntningar, eftersom ett sådant konstaterande är uteslutet enligt unionsrätten om statligt stöd.

36. För det andra åsidosatte skiljedomstolen kommissionens beslut om statligt stöd, trots att ett beslut som antagits på grundval av artikel 108.3 i EUF-fördraget av kommissionen utgör en del av EU:s grunder för rättsordningen och måste följas av skiljedomstolarna.

37. Dessa två åsidosättanden, betraktade var för sig, innebär att skiljedomen måste ogiltigförklaras.

38. Om skiljedomen upprätthålls, skulle kommissionens beslut om statligt stöd förlora sin rättsliga verkan. Det framgår av rättspraxis från Högsta domstolen att när en fråga avgjorts genom ett beslut av kommissionen eller ett avgörande från unionsdomstolarna är skiljedomstolen och, vid prövning av en talan om ogiltigförklaring eller upphävande av skiljedomen, de svenska domstolarna, bundna av det beslutet eller avgörandet.[24] Svea hovrätt har således innan den bifaller talan om ogiltighet och klander av skiljedomen, en skyldighet enligt unionsrätten, vilken grundar sig på domen i Foto-Frost-målet[25], att hänskjuta följande tolkningsfråga till domstolen:

”Är kommissionens beslut C(2017) 7384 final, EUT C 442, 22.12.2017, s. 1, giltigt?”

[redacted]

Kommissionens ombud

[24] Högsta domstolens dom av den 17 juni 2015 i mål T 5767-13, punkt 20.

[25] Domstolens dom av den 22 oktober 1987, Foto-Frost, 314/85, ECLI:EU:C:1987:452.

Förteckning över bilagor

Bilaga 1	Fullmakt
Bilaga 2	Kommissionens amicus curiae-inlaga till skiljedomstolen
Bilaga 3	Kommissionens beslut om statligt stöd, publicerad version samt engelsk full version
Bilaga 4	Nacka tingsrätts beslut av den 23 januari 2019, Micula m.fl. mot Rumänien, Ä-2550/17
Bilaga 5	Dom av Luxemburgs högsta domstol av den 21 november 2019, Rumänien mot Micula, mål N 157/2019 publicerad version samt engelsk översättning
Bilaga 6	Dom från appellationsdomstolen i Warszawa av den 5 juni 2020, Republiken Polen mot Autostrada, Aca 457/18, original samt engelsk översättning

Bilaga 1

EUROPEISKA KOMMISSIONEN

RÄTTSTJÄNSTEN

Bryssel den 17 december 2020

FULLMAKT

Europeiska kommissionen har utsett

[redacted]

och

[redacted]

att företräda kommissionen i Svea hovrätt i mål ärende **T-1626-19**, (vår referens **AMI-1626/19)** *Konungariket Spanien* mot *Foresight Luxembourg Solar I S.à.r.l. m.fl.* angående klander och ogiltighet av skiljedom.

På kommissionens vägnar
(elektroniskt signerad)

[redacted]
Generaldirektör
för rättstjänsten

Bilaga 2

EUROPEAN COMMISSION

Brussels, 20 July 2017
sj.c(2017)4180738

TO THE PRESIDENT AND MEMBERS
OF THE ARBITRAL TRIBUNAL

[redacted]

***AMICUS CURIAE* BRIEF**

submitted by the **European Commission**, represented by [redacted], acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e-mail via [redacted]@ec.europa.eu, [redacted]@ec.europa.eu and [redacted]@ec.europa.eu,

in SCC 2015/150,

Foresight Luxembourg Solar 1 S.À.R.L.
Foresight Luxembourg Solar 2 S.À.R.L.
Greentech Energy Systems A/S
GWM Renewable Energy I S.P.A.
GWM Renewable Energy II S.P.A.

Claimants

v.

Kingdom of Spain

Respondent

1. INTRODUCTION

1. The European Commission (the "Commission") would like to thank your Tribunal for accepting, by means of an e-mail dated 29 June 2017, its request to file an *amicus curiae* brief on issues of jurisdiction in the present proceedings.

2. As set out in its application for leave to intervene as a non-disputing party, to the best of the Commission's knowledge, the claimants in the present proceeding, CEF Energy (the "Claimants"), is an investor of a Member State of the European Union (the "EU" or "Union"). It challenges regulatory measures taken by the Kingdom of Spain ("Spain" or the "Respondent") in relation to the generation of electricity from renewable energy sources ("RES electricity").

3. The Commissions expects, as this is an international investment arbitration, that the starting point of your analysis is one of international law[1], although – given the fact that the seat of your Arbitral Tribunal seems to be Stockholm, that is to say in an EU Member State – there are strong arguments that the starting point should be one of EU law, in which case the supremacy of the EU legal order would be beyond doubt, in line with the classic case-law of the European Court of Justice ("ECJ").

4. Should you take, as expected, the starting point of international law, this *amicus curiae* brief contains an analysis from the standpoint of international law, which, as requested by the Commission and granted by your Tribunal, limits itself to the question of competence of your Tribunal.

5. The Commission invites your Tribunal not to simply follow existing published awards[2] which found jurisdiction in their respective cases, as the Claimants appear to suggest[3]. As the Commission will set out below, these awards contain several flaws, *inter alia*, from the point of view of EU law. In that context, the Commission notes that the Arbitral Tribunal in *WNC Factoring Ltd.* v *Czech Republic* has very recently confirmed that despite the existence of a number of awards dealing with the question of intra-EU ISDS, the matter is far from settled:[4]

> "*[…] the European Court of Justice […] will no doubt define its position more precisely in due course. The Tribunal recognizes that a different view may eventually prevail. However, this Tribunal is obligated under the BIT to decide this case based on the consent of the States parties as set out in the text of the BIT, and on the arguments presented by the parties.*"

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1 ICSID Case No. ARB/03/16 *ADC Affiliate Ltd.* v *Republic of Hungary*, award of 2 October 2006, at paragraph 290; ICSID Case No. ARB/01/7, available at: https://www.italaw.com/documents/ADCvHungaryAward.pdf, *MTD Equity Sdn Bhd* v. *Republic of Chile*, award of 25 May 2004, at paragraph 86, available at: https://www.italaw.com/documents/MTD-Award_000.pdf; and ICSID Case No. ARB/01/12 *Azurix Corp*. v. *Argentine Republic*, award of 14 July 14 2006, at paragraph 67, available at: https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf ; see also for further references *Antonio Parra*, "Applicable Law in Investor-State Arbitration", in: *Michael Rovine* (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, Martinus Nijhoff Publishers, 2008 p. 3 (attached as **Annex EC-1**), at pp. 7-8.

2 Most notably *Charanne* (https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf) and *RREEF Infastructure* (available at: https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf), included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

3 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, pages 9-10.

4 *WNC* v *Czech Republic*, PCA Case No. 2014-34, Award of 22 February 2017, paragraph 311, available at: https://www.italaw.com/sites/default/files/case-documents/italaw8533.pdf.

6. There is also significant academic writing that suggests that investor-State dispute settlement is not compatible with EU law.[5]

7. This is particularly important against the backdrop of the pending dispute before the ECJ in *Achmea* v *Slovakia*[6], which deals precisely with the question of compatibility of intra-EU ISDS with EU law. The ECJ will hold an oral hearing in Grand Chamber formation on 19 June 2017 in this case.

8. This brief is organised into four sections. After the present introduction (**Section 1.**), the Commission will show, first, that the interpretation of Article 26 ECT[7] leads to the conclusion that the offer for entering into arbitration made by Spain is limited to investors from contracting parties other than EU Member States and did not create any international obligations between EU Member States *inter se* (**Section 2.**). It will, then, second, set out that if Article 26 ECT were to be interpreted in the opposite manner, *i.e.* as entailing an offer also to EU investors, that that would constitute a violation of the Treaty on Functioning of European Union[8] ("TFEU") and that there would be conflict between two international treaties which both are part of the law applicable by your Tribunal, namely the ECT and the TFEU. Said conflict would have to be resolved, in any case, in favour of the TFEU, either via interpretation on the basis of context ("*harmonious interpretation*" or "*systemic integration*") or via the applicable rules of conflict of laws (**Section 3.**) On the basis of these assessments, the Commission will, finally, suggest a course of action to your Tribunal that involves three options for proceeding with the present dispute: First, declare that your Tribunal lacks the competence to hear the case. Second, suspend the proceeding pending the preliminary ruling of the ECJ in *Achmea v Slovakia*, which is expected to decide on the compatibility of intra-EU Investor-State Dispute Settlement ("ISDS") with Union law Third and finally, should your Tribunal consider that it is competent to hear the case, which would make it necessary to analyse the compliance of Spain's measures with

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5 *See*, in particular Steffen Hindelang, „Member State BITs – There's still (some) life in the old dog yet", in: Yearbook on international investment law and policy 2010/11, pp. 217 to 242 (attached as **Annex EC-2**); Bruno Poulain, „Quelques interrogations sur le statut des traités bilatéraux de promotion et de protection des investissements au sein de l'Union européennen", in: 111 Revue générale de droit international public (2007), pp. 803 to 828 (attached as **Annex EC-3, and** included as Annex RL-0060 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections); Eric Teynier, „L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne", in : 128 La Gazette du Palais (2008), pp. 690 to 697 (attached as **Annex EC-4**); Marek Wierzbowski and Aleksander Gubrynowicz, "Conflict of norms stemming from intra-EU BITS and EU legal obligations: some remarks on possible solutions", in: Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, pp. 544 to 560 (attached as **Annex EC-5**); Angelos Dimopoulos, "The validity and applicability of international investment agreements between EU Member States under EU and international law", in 48 Common Market Law Review (2011), pp. 63 to 93 (attached as **Annex EC-6**); Dominik Moskvan, "The clash of intra-EU bilateral investment treaties with EU law: A bitter pill to swallow", in: 22 Columbia Journal of European Law (2016), pp. 101 to 138 (attached as **Annex EC-7**); Mark A. Clodfelter, "The Future Direction of Investment Agreements in the European Union", in: 12 Santa Clara Journal of International Law (2014), pp. 159 to 182 (attached as **Annex EC-8**); Jacqueline Dutheil de la Rochère, "Quel role pour la Cour de Justice ?", in: Catherine Kessedijan (ed.), "Le droit européeen et l'arbitrage d'investissment", Editions Panthéon Assas 2011, pp. 37 à 45 (attached as **Annex EC-9**). See also Juliane Kokott and Christoph Sobotta, "Investment Arbitration and EU Law", in: 18 Cambridge Yearbook of European Legal Studies (2016), pp. 3-19 (attached as **Annex EC-10**).

6 Case C-284/16. The order for reference by the *Bundesgerichtshof* and an English courtesy translation of the order for reference are attached as **Annex EC-11**. The written procedure is closed; a hearing is scheduled for 19 June 2017, and a judgment is expected the latest in 2018.

7 Included as Annex RL-0006 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictions Objections.

8 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47, included as Annex RL-0001 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

State aid rules, in particular for assessing whether the claimants had legitimate expectations[9], find a solution that respects the exclusive competence of the Commission in that regard. (**Section 4.**).

2. THE OFFER FOR ARBITRATION MADE BY SPAIN WHEN RATIFYING THE ECT WAS ONLY ADDRESSED TO INVESTORS FROM CONTRACTING PARTIES OTHER THAN EU MEMBER STATES

9. The Commission considers, first, that the ECT does not apply *at all* in the *inter se* relationship between EU Member States. Rather, the ECT created international obligations only between third countries and the competent subject of international law of the area of Union law. That is to say, either the Union (for areas of Union competence) or the EU Member States (for areas of Member State competence). The analysis in that regard is exactly the same as for the Agreement on the World Trade Organisation ("WTO agreement"), which is in an analogous situation to the ECT. (**Section 2.1**).

10. Second, the Commission takes the view that even if the ECT did create certain *inter se* obligations between the EU Member States, *quod non*, those obligations would not comprise the provisions of the ECT on investment protection (Chapter III) and dispute settlement (Article 26): EU Member States can only enter into international obligations *inter se* to the extent that they have not transferred their external competence to the Union. Both the substantive competence for protection of investments by EU investors in other EU Member States, including in the field of energy, and the jurisdictional competence for those disputes have been transferred to the Union (**Section 2.2**).

2.1. The ECT has not created *inter se* obligations between EU Member States

11. Article 26 ECT is to be interpreted on the basis of Article 31 VCLT "*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*". Where that method does not lead to a clear result, the "*preparatory work of the treaty and the circumstances of its conclusion*" may be used for the purpose of interpretation, in line with Article 32 VCLT.

2.1.1. Ordinary meaning of the text of the ECT and its instruments, interpreted also in the light of the principle of effectiveness

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[9] According to the case-law of the ECJ, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission, see ECJ, Judgment in *Land Rheinland-Pfalz* v *Alcan Deutschland*, C-24/95, EU:C:1997:163, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0024&rid=1, EU:C:1997:163paragraph 25: "*In view of the mandatory nature of the supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed (ECJ, Judgment in Commission v Germany, cited above, C-5/89, EU:C:1990:320, paragraphs 13 and 14, and ECJ, Judgment in Spain v Commission, C-169/95, EU:C:1997:10, paragraph 51).*" The ECJ concluded in paragraphs 39 to 43 of that ruling that EU law "*requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the [internal] market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article [108 TFEU] had not been followed*." In that context, it should be noted that the ECJ, in its Order in *Elcogás SA*, C-275/13, EU:C:2014:2314, available at: http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62013CO0275&qid=1496310237319&from=EN, and included as Annex R-0033 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections held that the special regime constitutes State aid in the sense of Article 107(1) TFEU.

2.1.1.1. The Commission's interpretation of the ordinary meaning of the text of Article 26 ECT

12. The Claimants rely on Article 26 ECT in order to establish that Spain made an offer for arbitration. That article sets out the procedure for the settlement of disputes between an investor and a Contracting Party to the ECT.

13. Article 1(2) ECT defines the term "*Contracting Party*" of the ECT as a "*State or Regional Economic Integration Organization which has consented to be bound by the ECT and for which that treaty is in force*". This article caters for the possibility that a Contracting Party is bound only for parts of the ECT, namely for the parts for which it enjoys international competence.

14. Article 1(3) ECT defines "*Regional Economic Integration Organization*" ("REIO") to mean an "*organization constituted by states to which they have transferred competence over certain matters a number of which are governed by the ECT, including the authority to take decisions binding on them in respect of those matters*" (emphasis added by the Commission). Article 36(7) ECT reflects the division of competences and foresees that the Union votes on matters falling in its competence, and the Member States on matters falling in their competence, and that the Union, when voting, shall have a number of votes equal to the number of its Member States.

15. The ECT thus recognizes that the EU Member States have transferred competences over matters governed by the ECT to the Union, including the authority to take decisions binding on them in respect of those matters. Hereby, the signatories to the ECT acknowledge that the competence for concluding the ECT is shared between the Union and the EU Member States. Furthermore, it recognizes that the Union corresponds to its parts (because it has a number of votes equal to its parts), and that each acts only in the matters falling under its competence. For the Union, Member States and the Union are therefore not bound for the entirety of the ECT, but each for its respective competences.

16. Similarly, Article 1(10) ECT explains how the term "Area" is to be understood with respect to a REIO and its Member States: "*With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization*" (emphasis added by the Commission).

17. For defining the terms "*Area*" and "*Contracting Party*", the ECT therefore contains an express reference to the provisions of the agreement establishing the REIO (here: the EU Treaties, *i.e.* the TEU, the TFEU and the Euratom Treaty[10]). It furthermore recognizes that the relationships between the Contracting Parties that are member of the REIO are governed by the provisions contained in the agreement establishing the REIO.

18. The "*Area*" of the EU comprises the entirety of the areas of the EU Member States.[11] Therefore, an investment by an EU investor in Spain is not an investment in the area of another Contracting Party, but in the area of the same Contracting Party. The Union being a single investment area for its Member States, the offer for arbitration made by the Union (comprising, among others, Spain) is hence only made to investors from Contracting Parties that are not EU Member States.

19. Significantly, Article 1(3) and 1(10) ECT are not limited to certain chapters of the ECT (a technique used elsewhere when the drafters wanted to exclude certain chapters or provisions of ECT from application to the entire treaty).[12] Rather, they apply throughout the ECT and

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10 Included as Annex RL-0005 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections.

11 See Article 52 TEU and Article 355 TFEU.

12 See Article 26(1) ECT or Article 27 ECT.

have to be taken into account whenever the interpretation of rights and obligations of Contracting Parties under the ECT's substantive provisions is at issue.

20. A different interpretation of the term "*Area*" would lead to absurd results. For example, "*transit*" within the meaning of Article 7(10)(a) ECT can only apply to the Union, as to the entity having the substantive competence for that issue under the TFEU and being a fully-fledged customs union as a whole[13], and not to transportation between the EU Member States.

2.1.1.2. The interpretation of the text of Article 26 ECT by the Tribunals in *Charanne*[14] and *RREEF Infrastructure*[15] has several flaws

21. The opposite view taken by the tribunals in *Charanne*[16] and *RREEF Infrastructure*[17] can be summarized as follows: The term "*Area*" has to be defined depending on who is the respondent. If an EU investor decides to bring a claim against an EU Member State, that claim is directed only against the territory of that EU Member State. If the EU investor decides to bring a claim against the Union, that claim is directed against the territory of all Member States.

22. That view is not convincing, on three accounts.

23. First, it **deprives** the part of **Article 1(10) ECT** that has been emphasized by the Commission in paragraph 20 above of any **effectiveness** or *effet utile*[18]. Indeed, the interpretation proposed by those Tribunals would only be faithful to the text of the ECT if Article 1(10) ECT did not contain the words "*under the provisions contained in the agreement establishing that Organization*". Those words indicate that in order to assess whether the "*Area*" is the area of an EU Member State or the area of the Union, it is necessary to assess whether the EU Member State or the Union has the external competence for the matter in question. In other words: by virtue of the reference to the agreement establishing the REIO in Article 1(10) ECT, the ECT takes the view that the EU Treaties shall define the term "Area" for that REIO and its Member States.

24. Second, the interpretation of the *Charanne*[19] and *RREEF Infrastructure*[20] Tribunals **disregards** the **importance** that the ECT places in Article 1(3) on the **transfer of competence** from the members of the REIO to the REIO (that is here from the EU Member States to the Union).

25. Third, the interpretation proposed by the Commission is also the only one that avoids "***respondent shopping***". By defining the area with reference to the agreement establishing

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13 See Article 28 *et seq* TFEU.

14 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

15 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

16 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

17 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

18 See, on the importance of the *effet utile* or principle of effectiveness in treaty interpretation, *CEMEX* v *Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 October 2010), paragraph 107, with multiple further references to the case-law of the International Court of Justice ("ICJ") and to decisions of other investment tribunals. This decision is available at: https://www.italaw.com/sites/default/files/case-documents/ita0142.pdf.

19 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

20 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

the REIO, the ECT wants to make it clear that EU investors cannot bring claims against the Union. That aim would, however, be put into jeopardy if one were to allow EU investors to bring a claim against an EU Member State: Indeed, EU law is usually implemented by actions of the Member States, as the Union lacks – with very narrow exceptions mainly in the area of competition law – enforcement tools. EU investors, therefore, in most cases, will find national acts of execution of Union law, which they could challenge by bringing a claim against the EU Member State executing Union law, rather than against the Union itself.

26. That such "*respondent shopping*" is not allowed under the ECT is also confirmed by the statement submitted by the EU to the Secretariat of ECT pursuant to Article 26(3)(ii) ECT. This statement is "*an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*" in the sense of Article 31(2)(b) VCLT, and therefore is part of the context of the ECT. It provides the following:[21]

> "*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 an Investor, the Communities and the Member States concerned will make such a determination within a period of 30 days.*" (Emphasis added by Commission.)

27. The use of the word "*another*" clearly excludes disputes brought by EU investors against a Member State. That illustrates that the Union and the EU Member States consider that only investors from Contracting Parties that are not EU Member States may bring a case against the Union or its Member States, and that, in such a situation, the Union and the Member States determine together who the respondent party will be.

28. Now, contrary to what the *Charanne*[22] tribunal found at paragraph 431 of its decision on jurisdiction, the allegedly wrongful acts committed by Spain in that case have an origin in Union law. The same applies in the present case: The allegedly wrongful acts by Spain constitute but the implementation of its obligations under Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources[23] and possibly of its obligations under Articles 107 to 109 TFEU (State aid law, see above footnote 5 and below **Section 4.**)

2.1.2. Interpretation based on context, object and purpose of the ECT

29. The interpretation proposed by Spain and the Commission is also supported by the context, object, and purpose of the ECT.

30. When both the Union and EU Member States become parties to a multilateral agreement, it is the Union legal order that informs the latter's behavior and actions. The Union legal order therefore constitutes a "*relevant rule of international law applicable in the relations between the parties*" in the sense of Article 31(3)(c) VCLT. This holds true in particular in a

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21 The statement has been published by the secretariat of the ECT, see http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/Transparency_Annex_ID.pdf at page 9. It is also attached as **Annex EC-12**.

22 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

23 OJ L 140, 5.6.2009, p. 16, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=en, and included as Annex RL-0017 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictions Objections. See on the implementation of that Directive by Member States as implementation of Union law ECJ, Judgment in *Industrie du bois de Vielsalm & Cie (IBV)*, C-195/12, EU:C:2013:598, paragraph 49, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0195&rid=1; ECJ, Judgment in *Ålands vindkraft*, C-573/12, EU:C:2014:2037, paragraph 125, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0573&rid=1.

situation where the other Contracting Parties are fully aware of the Union legal order and its particularities. That that was indeed the case for the other Contracting Parties to the ECT is evidenced, first and foremost, by the specific references to the transfer of competences to the REIO and the agreement establishing the REIO in Articles 1(3) and 1(10) ECT. It is, furthermore, confirmed by the fact that the ECT has been initiated by the EU, and that the Charter of Paris and the European Energy Charter, which are incorporated through the preamble of the ECT into the ECT, refer to the special role and status of the Union (see in detail paragraphs 38 to 45 below).

31. A multilateral agreement to which both the Union and its Member States are party is part of Union law. The ECJ is competent to determine whether that multilateral agreement has direct effect to the extent that the provisions concerned fall within the Union's competence, so that individuals can invoke it in national courts and tribunals as Union law. The ECJ is also, in general, competent to interpret its provisions. In particular, it may do so to determine whether a particular provision of the agreement falls under the external competence of the Union; and how a given provision is to be interpreted, where that provision falls under the external competence of the Union or can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law. It is only where a provision falls exclusively in the competence of the Member States that the ECJ is not competent for its interpretation.[24]

32. The Commission, as guardian of the EU Treaties, can bring infringement actions against EU Member States for failing to comply with their obligations under such agreements, even where there is no Union legislation covering those obligations. It is sufficient that the area in question is largely covered by Union law, and that there is a Union interest in the Member States' compliance.[25] That even includes situations where the obligation under the multilateral agreement is an obligation for the Member State to adhere to another multilateral agreement.[26]

33. When negotiating and concluding such a multilateral agreement, the Union and its Member States are bound by the general principle of Union law of unity in the international representation of the Union.[27] As a preeminent specialist put it recently:[28] "*[…] the European group (EU and Member States) appears as a single contracting party*".

34. Even though, in theory, EU Member States have the international capacity to enter into *inter se* obligations when negotiating a multilateral agreement for those areas of the agreement for which they retain competence, they, in practice, never do. *Pieter Jan Kuijper* has

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24 Standing case-law, lastly summarized and applied in ECJ, judgment in *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraphs 28 to 38, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0240&rid=1, with extensive further references.

25 ECJ, judgment in *Commission* v *France* ("Etang de Berre"), C-239/03, EU:C:2004:598, paragraphs 22 to 32, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0239&rid=1; ECJ, judgment *Commission* v *Ireland* ("Berne Convention for the Protection of Literary and Artistic Works"), C-13/00, EU:C:2002:184, paragraphs 13 to 20, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0013&rid=1.

26 ECJ, judgment *Commission* v *Ireland* ("Berne Convention for the Protection of Literary and Artistic Works"), C-13/00, EU:C:2002:184, paragraphs 13 to 20, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0013&rid=1.

27 ECJ, judgment in *Commission* v *Sweden* ("Stockholm Convention on Persistent Organic Pollutants "), EU:C:2010:203, paragraph 73, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0246&rid=1, with extensive further references.

28 *Eleftheria Neframi*, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations" (2010) 47 *Common Market Law Review*, Issue 2, pp. 323–359, attached as **Annex EC-13**, at page 335, footnote 45. *Neframi*, professor of European Law at the University of Luxembourg, has written her PhD thesis on international agreements to which both the Union and Member States are Contracting Parties: *Les accords mixtes de la Communauté Européenne: aspects communautaires et internationaux*, Brussels: Bruylant, 2007.

notably summarized this in his account of the negotiations and conclusion of the WTO agreement.[29]

35. The Commission considers that for those same reasons, the ECT does not apply *at all* in the relationship between EU Member States.

36. Just as was the case for the WTO agreement, the Union and the EU Member States acted throughout the negotiations like one single block and with one voice (that of the Commission).[30] If anything, the absence of any intention to create *inter se* obligations between EU Member States is even clearer in the case of the ECT than in the case of the WTO agreement, in view of the particular historical circumstances, where the ECT was proposed by the Commission and initially conceived as a European treaty:[31]

37. The ECT was from the outset a European project, rather than an intergovernmental project.[32]

38. The origins of the ECT can be traced back to a memorandum which the Dutch prime minister *Ruud Lubbers* presented in June 1990 to the European Council of Dublin.[33] The President of the Commission, *Jacques Delors*, further developed that idea in a speech on 21 November 1990 at the Conference for Security and Cooperation in Europe's ("CSCE") Summit in Paris. That summit, which closed with the adoption of the "*Charter of Paris for a New Europe*", had the purpose of laying the foundation for "*a new era of democracy, peace and unity*" (and led to the transformation of the CSCE into the Organisation for Security and Cooperation in Europe). The preamble of the ECT therefore refers to the Charter of Paris.

39. Shortly thereafter, the European Council of Rome endorsed in December 1990 the proposals made by *Lubbers* and the Commission.[34] In February 1991, the Commission presented a draft for that European Energy Charter, which would give life to the commitment of the Charter of Paris.[35] Then, in 1991, the EU convened an international

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29 *Pieter Jan Kuijper*, "The Conclusion and Implementation of the Uruguay Round Results by the European Community", (1995) 6 *European Journal of International Law*, issue 1, pp. 222-244, attached as **Annex EC-14**, at p. 228 and 229.

30 *Johann Baswdow*, "*The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation*, (2014) PhD thesis, The London School of Economics and Political Science (LSE), pages 136, 156, 164 and 166, attached as **Annex EC-15**. A quote from page 156 is particularly instructive in this regard: "*What is more, not the individual Member States but the Commission conducted EU-internal and international consultations with the Soviet Union, drew up a draft text for a European Energy Charter and managed the logistics of the upcoming negotiations on the European Energy Charter and ECT.*"

31 See also ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Award of 25 November 2012, paragraphs 4.130 to 4.142, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

32 *Johann Baswdow*, "*The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation*, (2014) PhD thesis, The London School of Economics and Political Science (LSE), page 156, attached as **Annex EC-15**.

33 At that time, shortly after the fall of the Berlin wall, the centrally-planned economies of the Union of Soviet Socialist Republics (and then Russia and the Commonwealth of Independent States) and the countries of Central and Eastern Europe started to reforms into market economies. They all were short of capital. Therefore, *Lubbers*' memorandum suggested the creation of a European Energy Community to capitalize on the complementary relationship between the EU, the USSR and the countries of Central and Eastern Europe. The idea was to secure investment flows from West to East, so that the energy flows from East to West would be secure.

34 See Conclusions of the Presidency on the European Council in Rome, attached as **Annex EC-16**.

35 See Communication from the Commission on European Energy Charter, COM(91) 36 final of 14 February 1991, attached as **Annex EC-17.**

conference to negotiate and agree on such a charter, funded that conference and provided its secretariat. The final text of the European Energy Charter, which contains the broad political objectives, was adopted in December 1991 in The Hague. The special role of the EU is also reflected in the recitals of the European Energy Charter itself. Those acknowledge furthermore the obligations of EU Member States under the EU Treaties (and other existing international agreements). The precise wording of those recitals is as follows:

"*Assured of support from the European Community, particularly through completion of its internal energy market;*

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy co-operation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter". (Emphasis added by the Commission.)

40. The ECT has the objective of implementing the policy objectives set out in the European Energy Charter. Article 2 ECT expresses that as follows:

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

41. It follows from that historical process, which ultimately led to the conclusion of the European Energy Charter (a policy document) and the ECT (the translation of that policy document into international law, as witnessed by the reference in the preamble and in Article 2 ECT to the European Energy Charter), that the objective of the ECT is to create an international framework for cooperation in the energy sector between the European Communities, on the one hand, and Russia, the CIS and the countries of Central and Eastern Europe, on the other hand.[36]

42. The ECT was perceived as part of the European Communities' external energy policy.[37] It was never intended that the ECT should influence their internal energy policy. Johann Basedow explains this at length in this PhD thesis in the chapter on the historical origins of the ECT:

"*From the beginning, the Commission underlined that the ECT was conceived as the international relations component of the emerging Single Market for energy. The ECT should extend the Single Market for enegery beyond the EU's borders. The underlying reasoning was that the Single Market for energy would only function efficiently and securely, fi the supply and transmission countries also embraced a market-based approach to the regulation of their energy sectors. The Commission clearly formulated this view in its communication accompanying the draft text for the European Energy Charter of spring 1992.*

[36] Additionally, on the first conference held in Brussels on July 1991, the European Communities also invited the other members of the Organization for Economic Cooperation and Development ("OECD") that were not EU Member States to participate in the negotiations on the Energy Charter.

[37] This point is also underlined in ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Award of 30 November 2012, at paragraph 4.132, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, and included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party, quoting *Thomas Wälde*.

'[The European Energy Charter] . . . finds itself fully integrated within the energy policy which the Commission wishes to promote . . . with a view to completing the internal energy market and providing an external relations policy to back it up.'"[38]

43. Indeed, the creation of the European Communities' internal energy market was well under way when the ECT was negotiated: In 1985, the European Council in Milan endorsed the Commission's proposal for creating a single market by 1992. In order to implement that commitment in the field of energy, the Council adopted Directives 90/547/EEC on the transit of electricity through transmission grids[39] and 91/296/EEC on the transit of natural gas through grids[40]. In 1991, the Commission proposed more comprehensive rules liberalising the entire electricity and gas sector.[41] Parliament and Council adopted the legislation in 1996 (electricity)[42] and 1998 (gas)[43]. Those initiatives are explicitly mentioned and recognized in the European Energy Charter and hence were known to all Contracting Parties of the ECT.

44. While the EU had negotiated the European Energy Charter and the ECT, it was necessary for EU Member States to also become Contracting Parties, since it was considered at the time that they retained competence over certain matters covered by the ECT.[44] However, as Basedow recalls, the ECT provisions on investment protection fell into the Union's undisputed exclusive external competence under the Common Commercial Policy.[45]

45. In summary: it results from the context, object and purpose of the ECT, as established by reference to prior international agreements referenced in its preamble and the circumstances of its conclusion, that it was understood by all Contracting Parties that – although in theory a possibility – the EU Member States did not intend to create *inter se* obligations between them, just as in the case of the WTO agreement.

2.1.3. On the question of a "disconnection clause"

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38 *Johann Baswdow*, "*The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation*, (2014) PhD thesis, The London School of Economics and Political Science (LSE), page 160, attached as **Annex EC-15**.

39 OJ L 313, 13.11.1990, p. 30, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1990:313:0030:0033:EN:PDF., and included as Annex RL-0012 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictions Objections.

40 OJ L 147, 12.6.1991, p. 37, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0296:EN:pdf.

41 OJ C 65, 14.3.1992, p.4 (for electricity), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51991PC0548%2801%29&from=EN, and p. 14 (for gas), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51991PC0548%2802%29&from=EN.

42 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0092:EN:pdf, and included as Annex RL-0014 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictions Objections.

43 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, p. 1, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0030:EN:pdf.

44 Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, p. 1, available at: http://eur-lex.europa.eu/resource.html?uri=cellar:bb5339f8-f387-4c05-a895-1a64f898413c.0006.02/DOC_1&format=PDF.

45 *Johann Baswdow*, "*The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation*, (2014) PhD thesis, The London School of Economics and Political Science (LSE), page 159, attached as **Annex EC-15**.

46. Now, the Commission would like to take position on the Claimants' argument that the Commission has "*urged authorities*" to find an "*implied disconnection clause*" in the ECT.[46]

47. This is not a true and full summary of the Commission's position. The Commission has used the expression "implied disconnection clause" as a short-hand for saying that the ECT does not apply in an intra-EU situation.

48. The Commission's full and detailed legal position can be summarized as follows: there is no need for a disconnection clause – whether "*implied*" or not – in the ECT, because, as is the case with the ECT, where the Union and its Member States are both parties to a treaty, these parties have agreed to limit liability according to their respective competence (see Section 2.2.1 below).

49. As such, there is no need to address the multiple sources and arguments of the Claimants on the existence of such a clause in the ECT.

50. That being said, the Commission would like to question the Applicants' reliance on the awards in *Charanne*[47] and *RREEF Infrastructure*[48] for the purpose of finding jurisdiction before your Tribunal. The Claimants furthermore rely on three academic publications; namely, one by *Thomas Roe*[49] and *Matthew Happold*[50], one by *Christian Tietje*[51], and one by *Graham Coop*[52].[53] *Roe*, *Happold*, and *Coop*, however, in turn, cite their position as arising from *Christian Tietje's*[54] (and, for *Coop*, also *Maja Smrkolj*) publication. Hence, in reality, the only relevant and original authorities are *Tietje* and *Smrkolj*

51. These positions will be analysed in turn.

52. The view expressed by *Christian Tietje* in his often-referenced (and, regrettably, never questioned) article is not supported by the academic sources he claims to rely on. In order to support the view that *inter se* obligations between Member States are the rule, and that an exception to that rule is only possible where the multilateral agreement contains a disconnection clause, he relies, first, on the article by *Pieter Jan Kuijper*, quoted above in footnote 20. By selectively quoting *Pieter Jan Kuijper*, *Tietje* distorts the view of *Kuijper*, which is, in fact, the opposite of that of *Tietje*; namely, that such *inter se* obligations are a theoretical possibility, but in practice never created.

53. The paper by *Maja Smrkolj*[55], quoted as second authority by *Tietje* (and *Coop*), also does not provide any support for his view. To the contrary: As *Smrkolj* points out, a

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46 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, pages 6-10.

47 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

48 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

49 Included as Annex CL-25 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

50 *Ibidem.*

51 Included as Annex CL-126 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

52 Included as Annex CL-127 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

53 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, page 7.

54 *Christian Tietje*, The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States. Halle: Institute of Economic Law, 2008, pp. 7-16, attached as **Annex EC-18,** and included as Annex CL-127 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party..

55 *Maja Smrkolj*, "The Use of the 'Disconnection Clause' in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?", paper presented at the GARNET Conference, "The EU in International Affairs", Brussels, 24-26 April 2008, attached as

disconnection clause is only needed where the application of Union law (and not of the international treaty) between the Member States "*affect[s] the enjoyment by other parties of their rights under the treaty or performance of their obligations*" (emphasis added) or "*relate[s] to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*" In other words, a disconnection clause is only needed where the application of Union law between the Member States is not in line with Article 41(1)(b) VCLT. Where, on the contrary, as in the present case, the rights and obligations of third countries are not affected, "*the insertion of the EU-specific 'disconnection clause' seems to be entirely superfluous*".[56] It is for the same reason that the arguments of the Claimants on incompatibility of the Commission's position with Article 41 VCLT, too, are inapplicable.[57]

54. Also, the last two sources on which *Tietje* relies are misquotes: *Raphael Oen*[58] and *Christoph Herrmann*[59] take the view that, even in the absence of a disconnection clause, a multilateral agreement may create *inter se* obligations only for those areas where Member States retain their external competence (which is the view advanced by the Commission in the alternative under **Section 2.2**).

55. Disconnection clauses have traditionally been used in international treaties where the Union could not become a Contracting Party itself due to the rules of the international organisation under whose auspices the international treaty was negotiated, in particular the Council of Europe. In such a setting, disconnection clauses may indeed be useful, as – despite those agreements being mixed agreements insofar as it concerns the question of competence – the Union does not appear in the text of the international treaty, and the disconnection clause serves as a "reminder" of its existence.

56. The situation is completely different in international treaties where the Union is a party, and which explicitly recognize its role as REIO, as is the case for the ECT in Article 1(3) and 1(10) thereof. Here, all Contracting Parties are fully aware of the specificities of the Union's legal order.

2.1.4. Conclusion: No offer for arbitration made by Spain to EU investors

57. Therefore, the Commission takes the view that the ECT has not created any *inter se* obligations between the Member States of the Union. As a consequence, Spain (and the Union) has made an offer for arbitration only to investors from Contracting Parties that are not EU Member States.

Annex EC-19, and included as Annex CL-129 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

56 *Ibidem*, p. 9.

57 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, page 10.

58 *Raphael Oen*, Internationale Streitbeilegung im Kontext gemischter Verträge der Europäischen Gemeinschaft und ihrer Mitgliedstaaten, Berlin: Duncker and Humblot, 2005, S. 73: "*Festgehalten wurde bisher nur, dass eine völkerrechtliche Bindung der Mitgliedstaaten zueinander jedenfalls in Bereichen ausschließlicher Gemeinschaftszuständigkeit ausscheide. Die Bindung komme nur für solche Bestimmungen in Betracht, die der (ausschließlichen oder konkurrierenden) mitgliedstaatlichen Zuständigkeit unterfielen*", **Annex EC-20**.

59 *Christoph Herrmann*, "Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationalen Organisationen – Eine Untersuchung am Beispiel der Mitgliedschaft der EG und ihrer Mitgliedstaaten in der WTO", in: *Gabriele Bauschke* et al., Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen, Boorberg: Stuttgart, 2003, pp. 139 and following, attached as **Annex EC-21,** at p. 159: "*Soweit die Kompetenzen auf die EG übertragen worden sind, kann ein gemischtes Abkommen zwischen den Mitgliedsstaaten wohl keine Verpflichtungen begründen*".

2.2. In the alternative: *Inter se* obligations between Member States would in any event be limited to areas where Member States retain external competence; that is not the case for investment protection and ISDS

58. In the alternative, the Commission presents the following argument: Even if, by concluding the ECT, EU Member States had entered into certain *inter se* obligations, *quod non*, those obligations would only cover areas where EU Member States retain external competence. The Commission will first set out the applicable principle of international law that applies to the determination of the extent of the responsibility of EU Member States in case they have entered into *inter se* obligation. That principle could be stated as follows: "*liability follows competence*" (**2.2.1**). It will then apply that principle to the case of the ECT (**2.2.2**).

2.2.1.1. Applicable principle of international law for the determining the extent of international obligations and international liability of Member States: "*liability follows competence*"

59. In line with the view of international tribunals, the 2011 Draft Articles on the Responsibility of International Organizations ("DARIO"), with commentaries[60], foresee that special rules on attribution of responsibility may be applicable to the relations between an international organization and its member States.[61] Indeed, the commentaries to Article 64 DARIO make particular reference to the Union's rules on attribution, which operate "*to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community*" as well as to WTO and European Court of Human Rights case-law recognising these rules. As explained above in paragraph 28, Spain has acted under its obligation pursuant to Directive 2009/28/EC[62], and possibly also under its obligations pursuant to Articles 107 to 109 TFEU.

60. The same view has been taken very recently by the International Tribunal for the Law of the Sea ("ITLOS"). In case no 21, *Obligations of Flag States*, it discussed the liability of an international organization where fishing licences are issued within the framework of a fisheries access agreement between the member states of the Sub-Regional Fisheries Commission ("SRFC") and the SRFC itself, and where vessels flying the flag of one of the SRFC member states violate that fisheries access agreement. It held that liability followed competence, and – as the matter fell within the competence transferred by SRFC member states to the SRFC itself – it was only the SRFC, and not the SRFC member state the flag of which a vessel flew, that was internationally liable for such a violation.[63]

61. On the basis of Article 64 of the DARIO and the case-law discussed in the preceding paragraphs, the principle of international law applicable for the determining the extent of international obligations and international liability of EU Member States can hence by summarized as follows: "*liability follows competence*".

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60 Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10); available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf. The first draft of the DARIO did not take account of this possibility and was hence heavily criticised *inter alia* by the European Communities as not being in line with international law and the interpretation thereof by international tribunals. *See Frank Hoffmeister*, Litigating against the European Union and Its Member States, 21 *European Journal of International Law* (2010), issue 3, attached as **Annex EC-22**, pp. 724-747, at p. 728 (position expressed by the Commission) and 728 to 739 (presentation of case-law and critique of the position adopted by the International Law Commission in its first draft).

61 Article 19 of the DARIO.

62 OJ L 140, 5.6.2009, p. 16, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=en, and included as Annex RL-0017 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictions Objections.

63 ITLOS, Advisory opinion of 2 April 2015, case no 21, attached as **Annex EC-23**, paragraphs 151 to 174.

2.2.2. Application of the principle to the ECT: the Union, and not the Member States, have competence for promotion and protection of investments within the internal market

2.2.2.1. The external competences of the Union and its Member States

62. The attribution of competences within the Union is governed by the principle of conferral.[64]

63. The Union has the exclusive external competence to conclude agreements with one or more third countries or international organisations for areas where the EU Treaties expressly stipulate such exclusive competence. An example, in this regard, is the Common Commercial Policy.[65] Exclusive competence in that area entails, *inter alia*, the exclusive right to conclude international agreements on foreign direct investment.[66]

64. The Union also possesses exclusive external competence where the conclusion of an international agreement is likely to affect common internal EU rules or alter their scope.[67] According to the ECJ, the affectation of common internal EU rules or the altering of their scope does not presuppose that the areas covered by the international commitments and those covered by the Union rules coincide fully.[68] Rather, it is sufficient that the international commitments are concerned within an area which is already covered to a large extent by such rules.[69]

65. In such a situation of exclusive external competence, EU Member States may not enter into those types of international commitments outside the framework of the Union, even if there is no possible contradiction between those commitments and the common Union rules.[70]

66. Crucially for the present case, it also follows from Article 3(2) TFEU that EU Member States are prohibited from concluding an international agreement between themselves (*inter se*) which might affect common rules or alter their scope.[71]

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64 Article 5(1) and (2) TEU.

65 That follows from the use of the word "also" in Article 3(2) TFEU.

66 See the wording of Article 206 TFEU.

67 Article 3(2) TFEU.

68 ECJ, Opinion 1/03 ("Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters"), EU:C:2006:81, paragraph 126, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CV0001&rid=1; ECJ, judgment in *Commission* v *Council* ("Broadcasters"), C-114/12, EU:C:2014:2151, paragraph 69; ECJ, Opinion 1/13 ("Convention on the civil aspects of international child abduction"), EU:C:2014:2303, paragraph 72, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0001&rid=1; ECJ, judgment in *Green Network*, C-66/13, EU:C:2014:2399, paragraph 30, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0066&rid=1. That last judgment is of particular relevance in the present case, as it concerns the external competence of the Union in the field of renewable electricity.

69 ECJ, Opinion 2/91 ("Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work"), EU:C:1993:106, paragraphs 25 and 26, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CV0002&rid=1; ECJ, Opinion 1/03 ("Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters"), EU:C:2006:81, paragraph 126, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CV0001&rid=1.

70 ECJ, Opinion 2/91 ("Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work"), EU:C:1993:106, paragraphs 25 and 26, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CV0002&rid=1; and ECJ, judgment in *Commission* v *Council* ("Broadcasters"), C-114/12, EU:C:2014:2151, paragraph 71, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0114&rid=1.

71 ECJ, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraphs 101-102, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0370&rid=1.

2.2.2.2. Union law contains a complete set of investment protection rules for intra-EU investments in field of energy

67. In order to establish whether EU Member States have the external competence to conclude an *inter se* agreement on intra-EU investment protection in the field of energy, it is hence necessary to establish whether the conclusion of such an agreement might affect common internal EU rules or alter their scope.

68. Energy and the internal market are shared internal competences.[72] The Union has extensively legislated, in particular in the area of the internal market for energy and in the area of renewable energy (see, for instance, above paragraph 43[73]).

69. Furthermore, and contrary to what the Complainants' assert without reference to analysis or legal sources, Union law rules on internal market rules govern and protect all steps of the life-cycle of an investment.[74] A brief description of this remit will be set out below.

70. The provisions on freedom of establishment and free movement of capital and payments forbid directly discriminatory measures by the host Member State, *inter alia* in relation to investment. As regards the free movement of capital, as early as in 1988 (under the Treaty of Rome in its original version), the Community legislature clearly indicated that the Treaty freedom of capital movement applies to investment, and specifically to direct investment. Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[75] contains a non-exhaustive classification of capital movements ("Nomenclature" within the meaning of the current Article 63 TFEU). The first item of such classification is direct investments.[76] The ECJ has clarified that the Nomenclature continues to have indicative value for the notion of capital movements in spite of the Directive no longer being in force.[77] In addition, since the entry into force of the relevant modifications introduced by the Treaty of Maastricht, in January 1994**,** the Treaty provision on free movement of capital (currently Article 63 TFEU) has been prohibiting any barrier to capital movements as between the EU Member States. It has, therefore, long been clear that EU Member States can no longer introduce international obligations regulating investment *inter se*, although they can adopt derogations from the general principle of full liberalisation under certain conditions.

71. The provisions on freedom of establishment and free movement of capital and payments also prohibit any other restrictions, even those of a non-discriminatory nature. It is settled

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72 Article 4(2)(i) TFEU

73 In that context, it is important to recall that the fact that the Commission has made a proposal for using an internal competence, such as here the proposals for the internal electricity and gas markets tabled prior to the ratification of the ECT, is sufficient for creating an exclusive external competence, see ECJ, Opinion 1/76 ("European Laying-up Fund for Inland Waterway Vessels"), 1/76, EU:C:1977:63, paragraph 4, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61976CV0001&rid=1.

74 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, page 10.

75 OJ, L 178, 8.7.1988, p. 5, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988L0361:EN:pdf.

76 Other items are investments in real estate, operations in securities normally dealt in on the capital market, operations in units of collective investment undertakings, operations in securities and other instruments normally dealt in on the money market, operations in current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services in which a resident is participating, financial loans and credits, sureties, other guarantees and rights of pledge, transfers in performance of insurance contracts, personal capital movements, and physical import and export of financial assets.

77 See *e.g.* ECJ, judgment in *Commission* v *Spain*, C-207/07, EU:C:2008:428, paragraph 32, available at: http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62007CJ0207&rid=1 (only available in French and Spanish), and ECJ, judgment in *Commission* v *Netherlands*, C-282/04 and C-283/04, EU:C:2006:608, paragraph 19, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0282&rid=1, with further references.

case-law that Union law "*precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the Treaty.*"[78]

72. Indeed, as Professor Fabrice Picod summarises on the basis of the case-law of the ECJ,

"*[l]es mesures nationales qui sont susceptibles d'empêcher ou de limiter certaines opérations relatives à des opérations d'investissement ou de désinvestissement, mais également des mesures susceptibles de dissuader de procéder à de telles opérations, sont à considérer comme des restrictions à la libre circulation des capitaux au sens de l'article 63 TFUE.*"[79]

73. EU Member States are therefore prevented from discriminating between national investors and investors of other EU Member States and more generally from maintaining or introducing measures which may deter, limit the enjoyment of, of generally dissuade the continuation or establishment of investment from other EU Member States. This even applies to potential restrictions that may affect, in the future, access to the market.[80]

74. Thus, national legislation that requires authorisation to be obtained in order to provide certain services constitutes a restriction of freedom of establishment within the meaning of Article 49 TFEU, in that it seeks to restrict the number of service providers, also if there is no discrimination on grounds of the nationality of the persons concerned.[81] Similarly, national legislation which prohibits, without providing for a transitional period or compensation, economic activities that used to be lawful in that EU Member State, constitutes a restriction on the freedom to provide services.[82]

75. Lastly, the free movement provisions also govern expropriation of nationals of other Member States.[83] More generally, Union law protects the freedom to choose an occupation, the freedom to conduct a business and the right to property. As to the latter, Article 17 of the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties[84], provides that "*[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss*."

76. Restrictions may be justified on the grounds listed in Articles 52 or 65 TFEU (public policy, public security, public health) or by overriding requirements in the general interest as recognised in the case-law of the ECJ (such as the protection of the environment). In either case, the national provision must, in accordance with the principle of proportionality, be

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78 See, *ex multis*, ECJ, judgments in *Commission* v *Netherlands*, C-299/02, EU:C:2004:620, paragraph 15, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CJ0299&rid=1, and ECJ, judgment in *Commission* v *Greece*, C-140/03, EU:C:2005:242, paragraph 27, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0140&rid=1.

79 *Fabrice Picod*, "Investissements et libre circulation des capitaux au sein de l'Union européenne", R.A.E. – L.E.A. 2014/4, pp. 669-687, p. 673, attached as **Annex EC-24**.

80 *Ibid*.

81 See ECJ, judgments in *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 45, and *Hartlauer*, C-169/07, EU:C:2009:141, paragraphs 36 and 39, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0169&rid=1.

82 ECJ, judgment in *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraphs 51-52, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0098&rid=1.

83 ECJ, judgment in *Fearon* v *Irish Land* Commission, C-182/83, EU:C:1984:335, paragraph 7, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0182&rid=1.

84 See Article 6 TEU.

appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.[85]

77. Such justifications must be interpreted in the light of the general principles of Union law, in particular the rights and freedoms guaranteed by the Charter of Fundamental Rights (hereafter simply the "Charter"). Thus, national rules can only justify restrictions on the freedom to provide services or the freedom of establishment (and, by the same logic, on free movement of capital) if they are compatible with fundamental rights. Those include the principles of legal certainty and the protection of legitimate expectations, as well as the freedom to conduct a business the right to property enshrined in Articles 16 and 17 of the Charter.[86] Under Article 52(1) of the Charter, for such a limitation to be admissible, it must be provided for by law and respect the essence of those rights and freedoms. Furthermore, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

78. The protection hence afforded applies to the whole life cycle of the investment. Thus, for example, the right of establishment concerns both the taking up and the pursuit of an economic activity in another EU Member State, and both the setting up and the management of undertakings.[87] For its part, the fundamental principle of free movement of capital protects direct investment, with no further limitation or qualification[88]; it also protects the free flow of financial means, whether necessary for the operation of an investment or constituting the proceeds resulting therefrom.[89] Free movement of capital further protects investors by limiting State interference in the management of companies (inter alia by means of "golden shares" or other special powers[90]) and frames the exercise of State powers to regulate the regime of property ownership[91].

79. Union law provides for a complete set of remedies that ensure its proper application. Of particular relevance for the present case is that national courts and tribunals, in their function as ordinary courts within the Union legal order[92], have jurisdiction to hear actions

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85 ECJ, judgment in *Essent Belgium*, Joined cases C-204/12 to C-208/12, EU:C:2014:2192, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0204&rid=1.

86 ECJ, judgment in *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraphs 74ff., available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0098&rid=1; ECJ, judgment in *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraphs 57-60, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0390&rid=1.

87 See also the General Programme for the abolition of restrictions on freedom of establishment, OJ English Special Edition (II) pp. 7-15, esp. Title III, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31961X1201&from=EN, which since 1962 has provided examples of State measures falling within the scope of the freedom of establishment and impacting on both the taking up and the pursuit thereof (then set out in Article 52 of the Treaty establishing the European Economic Community, available at: http://publications.europa.eu/resource/cellar/5ee702da-4e52-4d5f-a38b-b76c1b1d0fbd.0006.02/DOC_1).

88 See e.g. ECJ, judgment in *Commission* v *Portugal*, C-212/09, EU:C:2011:717, paragraphs 42-44, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0212&rid=1.

89 For a vast, yet not exhaustive list of transactions covered by free movement of capital see the Nomenclature, cf. paragraph 70 above.

90 See e.g. ECJ, judgment in *Commission* v *Portugal*, C-212/09, EU:C:2011:717, paragraphs 6-10, 56-57, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0212&rid=1; ECJ, judgment in *Commission* v *Germany*, C-112/05, EU:C:2007:623, paragraphs 4-7, 56, 68, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0112&rid=1; ECJ, judgment in *Commission* v *Italy*, C-326/07, EU:C:2009:193, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0326&rid=1.

91 See e.g. ECJ, judgment in *Essent*, C-105/12, C-106/12 and C-107/12, EU:C:2013:677, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0105&rid=1.

92 ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011:123, paragraph 80, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&rid=1, and included as Annex R-0001 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections..

for damages brought against EU Member States that have violated Union law. That also includes cases where the competent national courts and tribunals failed to apply Union law, or incorrectly applied that law.[93]

80. The Union legal order is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected. That general principle of Union law of mutual trust requires considering all the other Member States to be complying with EU law[94], and includes, in particular, the mutual trust accorded by the Member States to their respective legal systems and judicial institutions.[95]

81. According to the President of the ECJ, Professor Koen Lenaerts, the principle of mutual trust has constitutional value.[96] Investor-State arbitration, on the contrary, expresses mistrust in the legal system of the host state – something that is in clear contradiction with that constitutional principle of the EU legal order.

82. However, that is precisely what the Claimants aim to achieve through the present case.

83. Should your Tribunal nonetheless harbour doubt in this regard, it should follow the established practice of other Arbitral Tribunals and apply a presumption in favour of the more complete and exhaustive regime, here, that of the European Union, and fill any lacunae by analogies within the system or by recourse to general principles inherent in the Union legal order instead of falling back on general international or investment law.[97]

2.2.2.3. EU Member States lack the competence to conclude an investment protection treaty *inter se*

84. By concluding an investment protection treaty *inter se*, EU Member States would hence conclude a treaty that "*might affect common rules or alter their scope*", namely the Union law rules on investment protection and the Union law rules on energy. Therefore, on the basis of Article 3(2) TFEU, as interpreted in the judgment in *Pringle*, EU Member States lacked the external competence to conclude such a treaty.

85. The Commission is aware of the fact that there are six published awards of tribunals concerning intra-EU BIT[98] which take the opposite view. Those awards, as well as

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93 ECJ, Judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraphs 30 to 59, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001CJ0224&rid=1.

94 ECJ, Opinion 2/13 ("Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"), EU:C:2014:2454, paragraphs 168 and 191.

95 ECJ, Judgment in *Gazprom*, C-536/13, EU:C:2015:316, paragraph 37.

96 Koen Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, *Common Market Law Review* (2017) 54: 805–840, **Annex EC-25**.

97 *Bruno Simma* and *Dirk Pulkowski*, "Of Planets and the Universe: Self-contained Regimes in International Law", *EJIl* (2006), Vol. 17 No. 3, 483-529, at page 505, attached as **Annex EC-26**.

98 *Eastern Sugar B.V. (Netherlands)* v. *The Czech Republic*, SCC Case No. 088/2004, Award of 27 March 2007 on jurisdiction, available at: https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf, included as Annex CL-107 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.; *Achmea B.V.* v. *The Slovak Republic*, PCA Case No. 2008-13 (formerly *Eureko B.V.* v. *The Slovak Republic*, Award of 26 October 2010 on jurisdiction, arbitrability and suspension, available at: https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf, included as Annex CL-104 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.; *Binder* v *The Czech Republic*, Award of 6 June 2007 on jurisdiction, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4214.pdf, Included as Annex CL-106 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party; *Ostergetel and Laurentius* v. *Slovakia*, Decision on Jurisdiction of 30 April 2010; *European American Investment Bank (EURAM)* v *The Slovak Republic*, Award on Jurisdiction of 22

academic writing espousing the same view[99], have one fundamental flaw in this regard: They consider that EU Member States remain free to conclude international agreements in areas covered by the four freedoms *inter se*, because the internal competence for the internal market is qualified in Article 4(2)(a) TFEU as a "*shared competence*". On that basis, they consider that EU Member States are free to go beyond the level of investment protection afforded by the EU Treaties in intra-EU BIT, and in particular to agree on more demanding substantive protection and to agree on the use of investor-State dispute settlement. Their position is based on Article 2(2) TFEU.[100]

86. However, they overlook the fact that Article 2(2) TFEU only regulates to what extent EU Member States may legislate within their territory. It does not, on the contrary, define to what extent EU Member States may enter into international agreements, including into international agreements with other EU Member States. As the ECJ has held in *Pringle*, sitting as the Full Court, *i.e.* in the most authoritative and solemn formation, the power of EU Member States to conclude international agreements, both with third countries and other EU Member States, is governed by Article 3(2) TFEU:[101]

> "*In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion … may affect common rules or alter their scope'.*
>
> *It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope.*"

87. It is therefore beyond doubt that the decisive question for establishing whether EU Member States were competent to conclude *inter se* obligations is whether their existence "*might affect common rules [of EU law] or alter their scope*", not whether the internal market and energy are shared competences and the ECT merely goes beyond the level of protection offered by the EU Treaties. In that context, it is also important to recall that the ECJ considers that international treaties breach Union law already when they present the risk of conflict with potential Union measures, without it being necessary to demonstrate actual conflict.[102]

October 2012, available at: https://www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf; *WNC* v *Czech Republic*, PCA Case No. 2014-34, Award of 22 February 2017, award not yet published.

99 See for example *Thomas Eilmansberger*, "Bilateral Investment Treaties and EU Law", in: (2009) 46 *Common Market Law Review*, pp. 383-429, attached as **Annex EC-27**, at page 401; similarly *Christian Tietje*, The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States. Halle: Institute of Economic Law, 2008, pp. 14 and 15, attached as **Annex EC-18, i**ncluded as Annex CL-127 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.. Since the entry into force of the Treaty of Lisbon, in addition to the competence of the Union in that field, which precluded since the entry into force of the Treaty of Rome in 1958 the conclusion of investment protection agreements between its Member States *inter se*, the Union also has the competence for concluding investment protection agreements with third countries (Article 207 TFEU), and Member States manifestly lack the competence to conclude international agreements in that field. As the present case concerns investment protection with regard to another Member State, and not with regard to third countries, that change is – contrary to what *Tietje* seems to assume – without relevance for the present case.

100 Which reads as follows: "*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*."

101 ECJ, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraphs 100 and 101, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0370&rid=1.

102 Judgments in Case C-205/06, *Commission* v *Austria*, EU:C:2009:118, paragraphs 28 and 45, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CJ0205&rid=1; in Case C-249/06, *Commission* v *Sweden*, EU:C:2009:119, paragraphs 29 and 38 to 45; and in Case C-118/07,

88. For the sake of completeness, as some authors argue that a declaration of competence is a precondition for the applicability of the principle of "*liability follows competence*", the Commission notes that the Contracting Parties of the ECT concerned by the question of *inter se* obligations between Member States were only the EU Member States, for the following reason: it is only necessary to establish whether the ECT has created *inter se* obligations between those Member States.

89. The Commission takes the view that the EU Member States are, from the point of view of international law, presumed to be aware of the rules governing the distribution of competences in a supranational organisation they have themselves created. Therefore, even if there were no declaration of competence in the ECT at all, *quod non* (see following paragraph), the principle of "*liability follows competence*" would still apply between the EU Member States.

90. In any event, the ECT contains detailed provisions by means of which Contracting Parties have been made aware of the special features of the legal order of the European Communities. Those are: Articles 1(2), (3) and (10), 36(7) ECT, and the instrument submitted by the EU to the Secretariat of the ECT on the basis of Article 26(3)(ii) (see above **Section 2.1.1.1**). Hence, the signatories to the ECT acknowledged the Union's role with respect to EU Member States and the distribution of competences between the Union and its Member States.

91. That means that it is necessary to consider in each case whether EU Member States have conferred competence over the matter at hand to the Union. If the competence over a matter lies with the Union, the Union is the relevant Contracting Party and hence bound by the ECT. If the competence over a matter lies with the EU Member States, they are the relevant Contracting Parties and hence bound by the ECT.

92. In order to improve the operability of the division of competences, the European Communities submitted to the Secretariat of ECT a statement pursuant to Article 26(3)(ii) ECT, which is an instrument in the sense of Article 31(2)(b) VCLT and provides the following:[103]

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

93. That statement repeats the division of the external competence, and affirms that the international responsibility of the Union and its Member States is governed by the principle of "*liability follows competence*". It constitutes a declaration of competences, if such a declaration was necessary, *quod non*.

Commission v *Finland*, EU:C:2009:715, paragraphs 22 and 29 to 35, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CJ0249&rid=1.

[103] The statement has been published by the secretariat of the ECT, see http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/Transparency_Annex_ID.pdf at page 9. Attached as **Annex EC-12**.

2.2.2.4. Conclusion: If, at all, the ECT has created *inter se* obligations between EU Member States, those do not concern Part III and Article 26 ECT

94. In conclusion, as all provisions in Part III and Article 26 ECT fall within the external competence of the Union, the Union – and not its Member States – are bound under international law by those provisions. EU Member States, when ratifying the ECT, did not have the competence to conclude *inter se* obligations concerning investment protection in the field of energy.

95. That has two consequences: First, in case of a dispute between the Union and an investor of another Contracting Party (i.e. a third country), the Union is internationally responsible for any breach of the provisions on investment promotion and protection, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.[104] Second, the provisions of the ECT on investment promotion and protection bind the Union, but not Member States *inter se.* Article 26 ECT does not allow an EU investor to initiate arbitration proceedings against a Member State because the dispute would be one between the Union and an EU investor from the Union. Article 26 ECT does not apply to such disputes, because they are not directed against another Contracting Party.

96. In the alternative, should your Tribunal consider that there is ambiguity in the terms of the ECT with regard to the question of *inter se* obligations between EU Member States, the Commission considers that the Tribunal should favour an interpretation that does not conflict with Union law. That point has been reasoned in detail by the *Electrabel* Tribunal.[105] Therefore, in the present case brought by an EU investor against an EU Member State, the principle of interpretation of the ECT in the light of Union law requires an interpretation pursuant to which Chapter III and Article 26 ECT do not apply (see on that point in detail **section 3.**).

97. Also for all those reasons, Article 26 ECT does not constitute an offer for arbitration from Spain to investors from other EU Member States.

3. AN INTERPRETATION OF ARTICLE 26 ECT THAT ALLOWS FOR INVESTOR-STATE ARBITRATION BROUGHT BY AN EU INVESTOR AGAINST AN EU MEMBER STATE WOULD CONSTITUTE A VIOLATION OF THE EU TREATIES; SUCH CONFLICT SHOULD EITHER BE AVOIDED BY INTERPRETATION BASED ON CONTEXT, OR HAS TO BE SOLVED IN FAVOUR OF THE EU TREATIES

98. An interpretation of Article 26 ECT that allows for investor-State arbitration brought by an EU investor against an EU Member State would constitute a violation of the EU treaties (**Section 3.1**). In the view of the Commission, such an interpretation should be avoided. The appropriate basis to reach that objective would be an interpretation of the ECT based on its context, which is formed by the EU treaties (**Section 3.2**). Otherwise, there would be an open conflict between the ECT and the EU Treaties. According to the applicable rules of international law for solving that conflict, the EU Treaties would in such a situation take precedence over the ECT (**Section 3.3**).

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[104] The Union has adopted specific legislation on financial responsibility in such cases; see Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p. 121, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0912&from=EN.

[105] ICSID Case No. ARB/07/19, Award of 25 November 2012, paragraphs 4.130 to 4.142, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, and included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

3.1. An offer for arbitration by Spain to EU investors would violate Union law

3.1.1. The intra-EU application of the substantive investment protection provisions of the ECT violates Article 3(2) TFEU and Union law provisions on investment protection

99. As has been demonstrated in detail in **Section 2.2.2** above, Union law provides for a complete set of rules on investment protection, including and in particular in the field of energy. Therefore, if EU Member States had indeed agreed *inter se* obligations creating a second, different set of rules on investment protection to be applied between them, they would have violated the distribution of competences between the EU and the EU Member States, as laid down in Article 3(2) TFEU, because they lacked the competence to do so.

100. At the same time, the substantive content of Part III ECT is not necessarily identical to the substantive content of the Union law provisions concerning investment protection. As a result, there is also a risk of conflict on substance between the ECT and Union law provisions on investment protection.

3.1.2. The submission of intra-EU disputes to treaty-based investor-State arbitration violates Articles 267 and 344 TFEU as well as the general principles of effectiveness and unity of Union law

3.1.2.1. The legal analysis of the Commission

101. Unlike ordinary international treaties, the founding treaties of the Union established a new legal order, possessing its own institutions, for the benefit of which EU Member States have limited their sovereign rights, in ever wider fields. The subjects of that legal order include not only the EU Member States, but also their nationals. [106] The essential characteristics of the Union legal order are in particular its primacy over the laws of the Member States and the direct effect of a series of provisions which are applicable to their nationals and the EU Member States themselves.[107] Inherent in that system is that EU Member States are liable for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible.[108]

102. The ECJ and the courts and tribunals of the Member States are the guardians of the Union legal order.

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[106] ECJ, judgment in *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1, at paragraph 3, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&rid=11.

[107] ECJ, Opinion 2/13 ("Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"), EU:C:2014:2454, in particular paragraphs 158, 163, 165, available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=168381&occ=first&dir=&cid=295867; ECJ, Opinion 1/91 ("Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area"), EU:C:1991:490, paragraph 21, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=295867.

[108] ECJ, judgment in *Francovich and Bonifaci v Italy*, joined cases C-6/90 and C-9/90, EU:C:1991:428, at paragraph 35, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97140&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=296060. *See also* ECJ, judgment in *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93, EU:C:1996:79, at paragraph 20 *et seq.*, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=81389&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=296060.

103. They cooperate by way of the preliminary ruling mechanism established by Article 267 TFEU, which is essential for the preservation of the character of the legal order established by the Treaties. That mechanism aims to ensure that, in all circumstances, that law has the same effect in all Member States, and to avoid divergences in its interpretation.[109]

104. Therefore, "*except where otherwise provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands*."[110] Since the Treaty does not provide for an alternative dispute settlement mechanism between the Member States other than through the ECJ, contrary to what the Claimants' argue, no reliance can be given to the interpretation of the body of European Union law through the courts of third States (such as the Swiss Federal Supreme Court or adjudicative mechanisms set up by or between the Member States, including arbitration tribunals).[111] The Commission observes in any event, in so far as the Swiss Federal Supreme Court is concerned, that Hungary did not raise an intra-EU objection in the annulment proceedings there, so that the Swiss Federal Supreme Court has not expressed a view on the issue.

105. Article 344 and Article 267 TFEU establish the following methods for the settlement of conflicts on the application and interpretation of the Treaties: Disputes involving two Member States, as well as disputes between a Member State and the Union's institutions have to be brought to the ECJ. Disputes between a private party and a Member State have to be brought to the competent national judge, as *juge de droit commun du droit communautaire*. The national judge may and sometimes must refer the questions concerning EU law to the ECJ.[112]

106. The starting point of the analysis of intra-EU investor-State arbitration under the ECT against that system is that Article 26 ECT creates a new dispute settlement system, namely investor-State arbitration, for subjects otherwise covered by those dispute settlement procedures envisaged in Articles 344 and 267 TFEU. Pursuant to Article 26(6) ECT, the law to be applied by arbitral tribunals in intra-EU investor-State arbitration includes Union law as part of the "*applicable rules of international law*", because it is in force between the host State and the home State of the investor. According to Article 26(8) ECT, any decision rendered by a Tribunal on the basis of Article 8 shall be "*final and binding*".

107. However, when EU Member States create such a new dispute settlement system, *i.e.* one that is competent to apply Union law at a final and binding level, they violate Articles 267 and 344 TFEU, because that new dispute settlement system is outside the complete system created by those articles, and, in particular, does not have the possibility or the obligation to refer preliminary questions to the ECJ pursuant to Article 267 TFEU.

3.1.2.2. Arbitral Tribunals have not addressed in detail the problem of incompatibility with Article 267 TFEU; the (contestable) solution found in *EURAM* v *Slovakia* cannot be transposed to the present case

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109 ECJ, Opinion 2/13 ("Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"), EU:C:2014:2454, in particular paragraphs 170 and 174, available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=160882&occ=first&dir=&cid=296310.

110 ECJ, judgment in *Commission of the EEC v Luxembourg and Belgium*, joined cases C-90/63 and 91/63, EU:C:1964:80, at page 631, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61963CJ0090&rid=1.

111 Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, page 9.

112 See, in detail, ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011:123, paragraphs 64 to 89, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&rid=1, and included as Annex R-0001 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections..

108. Thus far, only the Arbitral Tribunal in *EURAM* v *Slovakia* has discussed the problem of the incompatibility of intra-EU ISDS with Article 267 TFEU. It has recognized that it has to apply Union law[113]; at the same time, it rejected the claim that there was a violation of Article 267 TFEU, because it took the view that in the case of UNCITRAL arbitration with seat in Stockholm, its award was not final and binding, but subject to the control of the competent Swedish judge, who could request a preliminary ruling to the ECJ.

109. The Commission does not share that view, which transposes case-law from the field of commercial arbitration to the field of investment arbitration (see on the impossibility of doing so below paragraphs 112 to 115) and does not address the underlying problem that nothing in the underlying intra-EU BIT (and here: in the ECT) obliges the Tribunal to choose its seat in the Union.

3.1.2.3. Arbitral Tribunals have wrongly interpreted Article 344 TFEU

110. The Arbitral Tribunals in *Electrabel*[114], *Charanne*[115] and *RREEF Infrastructure*[116] have taken the view that Article 344 TFEU only applies to disputes between two EU Member States, but not to disputes between an investor and an EU Member State. They have, in particular, observed that national courts and commercial arbitration tribunals are competent to apply Union law as a matter of law, without that being a violation of Union law.

111. That position fundamentally, however, overlooks the fact that the national court is the ordinary court within the Union legal order[117] (see also above paragraph 79 and 105). Therefore, those disputes are submitted to a method of settlement not provided for by the EU Treaties and so violate the legal order established by Articles 267 and 344 TFEU.

112. The Union legal order treats commercial arbitration differently in this respect. The ECJ has indeed accepted that private parties enter into arbitration agreements, including on matters governed by Union law, in *Nordsee*[118] and *Ecoswiss*[119]. However, that reasoning cannot be extended to investment treaty arbitration, for three reasons.

113. First, the legal nature of an investment treaty is different from the legal nature of an arbitration clause in a commercial agreement. An investment treaty is an act of public international law, concluded between two States, and constitutes an *actum jure imperii*. When acting in its capacity as legislator (including through international law making), the State may not limit the scope of application of Article 267 TFEU[120]. An arbitration clause in

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113 *European American Investment Bank (EURAM)* v *The Slovak Republic*, Award on Jurisdiction of 22 October 2012, paragraph 266, available at: https://www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf.

114 Included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

115 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

116 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

117 ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011:123, paragraph 80, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&rid=1, and included as Annex R-0001 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections..

118 ECJ, Judgment in *Nordsee*, 102/81, EU:C:1982:107, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0102&rid=1.

119 ECJ, Judgment in *Eco Swiss*, C-126/97, EU:C:1999:269, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61997CJ0126&rid=1.

120 ECJ, Judgment in *Rheinmühlen*, 166/73, EU:C:1974:3, paragraph 4; see also Opinion 1/09 ("European and Community Patents Court"), EU:C:2011:123, paragraphs 80 to 85, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&rid=1, and included as Annex R-0001 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional

a commercial contract, on the other hand, is an act of private law, and constitutes an *actum jure gestionis.* Here, private parties only regulate the relationship between themselves, and enjoy in principle autonomy of contract, subject only to the *ordre public*.

114. Second, the subject-matter of investor-State arbitration is not a contractual relationship, but the behaviour of the contracting States in their capacity as public authority and the exercise of public policy prerogatives.[121]

115. Third, the system of control with respect to the application and interpretation of EU law, which is part of the applicable law, foreseen in *Nordsee* and *Eco Swiss* is based on the assumption that the commercial arbitration tribunal fixes its seat in the Union.[122] However, nothing in Article 26 ECT prevents the Tribunal from fixing its seat outside the Union. This facilitates circumvention of the control on the application and interpretation of EU law by judges of a Member State.

116. Furthermore and more generally, nothing in the wording of Article 344 TFEU suggests that it would only apply to disputes between EU Member States. That has also been confirmed by the ECJ: In *Opinion 2/13*, the ECJ opined that Article 344 TFEU extends to disputes between the Member States and the Union[123]. In *Opinion 1/09*, the Court clarified that Article 344 TFEU did not apply to a new court structure that applies "*only to disputes between individuals*".[124]

117. Both *Opinion 2/13*[125] and *Opinion 1/91*[126] stress that Article 344 TFEU is the expression of a more general principle that an international agreement cannot affect the allocation of powers fixed by the EU Treaties or, consequently, the autonomy of the EU legal system,

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Objections.; Judgment in *Puligienica*, C-689/13, EU:C:2016:199, paragraphs 31 to 36, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0689&rid=1.

121 *Salini Costruttori S.p.A. and Italstrade S.p.A.* v *The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 9 November 2004, paragraph 151, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0689&rid=1.

122 And so, potentially, where needed, avails itself of a *juge d'appui* in order to request a preliminary ruling from the Court of Justice. ECJ, Judgment in *Nordsee*, 102/81, EU:C:1982:107, paragraph 14, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0102&rid=1. See on this point for example also José Carlos Fernández Rozas, *Le rôle des juridictions étatiques devant l'arbitrage commercial international*, Académie de Droit International de la Haye / Hague Academy of International Law Recueil des cours, Collected Courses, Tome/Volume 290 (2001), p. 130, attached as **Annex EC-28**. The *juge d'appui* is typically the judge designated for that function by the procedural law of the State where the tribunal has its seat. See order for reference of the *Bundesgerichtshof* in *Achmea* v *Slovakia*, attached as **Annex EC-11**, paragraph 51, confirming that the relevant provision of German civil procedural law allows for such a reference from the *juge d'appui* if the seat of the commercial arbitration tribunal is Germany. See Catherine Kessedjian, "*L'arbitrage comme mode de règlement des différends est-il remis en cause par le droit européen?*", in : ibid. et Charles Leben (ed.), Le droit européen et l'investissement, Editions Panthéon-Assas, 2009, pp. 107 to 121, at 120, for references to the relevant specific provisions in British and Danish law, , attached as **Annex EC-29**.

123 EU:C:2014:2454, paragraphs 202 to 204, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0002&rid=1; see also Opinion 1/00, EU:C:2002:231, paragraph 17, available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=47275&occ=first&dir=&cid=297368; Case T-465/08, *Czech Republic v Commission*, EU:T:2011:186, paragraphs 101-102, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008TJ0465&rid=1.

124 EU:C:2011:123, paragraph 63, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&rid=1.

125 EU:C:2014:2454, paragraph 202, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0002&rid=1.

126 EU:C:1991:490, paragraph 35, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=295867, and included as Annex R-0001 of the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections.

observance of which is ensured by the Court. *Opinion 1/91* even goes so far as to refer to "*[t]he threat posed by the court system set up by the agreement to the autonomy of the Community legal order*".[127]

118. Therefore, the Commission takes the view that Article 344 TFEU also covers an international agreement by which two EU Member States agree to submit cases brought by an investor from the other EU Member State against them and involving the interpretation or application of the Treaties to a new dispute settlement structure outside the EU Treaties. On that basis, the interpretation of Article 26 ECT favoured by the tribunals in *Electrabel*[128], *Charanne*[129] and *RREEF Infastructure*[130] violates Article 344 TFEU.

3.1.2.4. Conclusion

119. The Union has recently affirmed its position that intra-EU ISDS is contrary to Union law, and in particular to Articles 267 and 344 TFEU in the context of the ECT, when signing the International Energy Charter.[131] On that occasion, the Commission made the following statement on behalf of the European Union:[132]

> "*It is declared that, due to the nature of the EU internal legal order, the text in Title II, Heading 4, of the International Energy Charter on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms would become applicable in relations between the European Union and its Member States, or between the said Member States, on the basis of that text.*"

120. Accordingly, the Commission invites your Tribunal to rule that the interpretation of Article 26 ECT favoured by the tribunals in *Electrabel I*[133], *Charanne*[134] and *RREEF* violates Articles 267 and 344 TFEU.

3.2. Conflict should be avoided through interpretation of the ECT on the basis of its context ("*harmonious interpretation*" or "*systemic integration*")

121. The *Electrabel* tribunal has at length discussed the relationship between the ECT and Union law in general.[135] Its findings can be summarized as follows:

(1) Union law is part of international law, and therefore has to be applied by a Tribunal established on the basis of Article 26 ECT as a matter of law, both with regard to

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127 EU:C:1991:490, paragraph 47, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=295867.

128 Included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

129 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

130 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

131 The International Energy Charter is a declaration of political intention aiming at strengthening energy cooperation between the signatory states which has been formally adopted and signed at the Ministerial Conference in The Hague in May 2015. It seeks to update the ECT and maps out common principles for international cooperation in the field of energy.

132 Declaration attached as **Annex EC-18**. The text of declaration can be found on the website of the Secretariat of the Energy Charter: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/EU_IEC_Declaration.pdf .

133 Included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

134 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

135 *Ibidem*, paragraphs 4.111 to 4.199.

the validity of the arbitration agreement and the merits. That follows from the fact that Article 26 refers, with regard to the law applicable to the dispute, to international law, and Union law constitutes international law that applies between the host State and the home State of the investor in case of an intra-EU dispute.[136]

(2) Given its historic genesis and its text, the ECT should be interpreted, if possible, in harmony with Union law.[137]

(3) If such harmonious interpretation proves to be impossible, Union law prevails on the basis of Article 351 TFEU, which is an expression of the customary rule of international law codified in Article 30 VCLT.[138]

122. The first finding has not been disputed by subsequent tribunals. The Commission will therefore refrain from arguing that point in depth in this submission. Should your Tribunal have any doubt on it, the Commission is at its disposal to further expand on that question.

123. The *Charanne*[139] tribunal has restated the finding of the *Electrabel*[140] tribunal on the second and third point.[141] It finds no need to analyse those questions further, as it consider that Union law allows for intra-EU investor-State arbitration (*quod non*, see **Section 2.1.2** above). However, the award on jurisdiction rendered by the *RREEF Infastructure*[142] tribunal diverges and claims that in case of conflict, the ECT prevails over the EU Treaties even in case of an intra-EU dispute.

124. As the tribunal in *Electrabel* convincingly argued, refuting all arguments to the contrary and relying on the relevant case-law of the ECJ, "*Article 307 EC [now Article 351 TFEU] precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State.*"[143]

125. In academic writing, *Thomas Eilmansberger* has argued that case equally convincingly: public international law (which governs the law applicable to this arbitration[144]) "*requires*

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136 *Ibidem*, paragraphs 4.119 to 4.126.

137 *Ibidem*, paragraphs 4.130 to 4.142.

138 *Ibidem*, paragraphs 4.178 to 4.191.

139 Included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

140 Included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

141 *Charanne* v *Spain*, Final Award of 21 January 2016, paragraph 439, available at: https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf, and included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

142 Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

143 ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Award of 30 November 2012, paragraphs 4.178 to 4.189, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, and included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party, echoed in paragraph 439 of *Charanne*, available at: https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf, and included as Annex CL-92 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

144 ICSID Case No. ARB/03/16 *ADC Affiliate Ltd.* v *Republic of Hungary*, award of 2 October 2006, at paragraph 290, available at: https://www.italaw.com/documents/ADCvHungaryAward.pdf; ICSID Case No. ARB/01/7, *MTD Equity Sdn Bhd* v. *Republic of Chile*, award of 25 May 2004, at paragraph 86, available at: https://www.italaw.com/documents/MTD-Award_000.pdf; and ICSID Case No.

arbitral tribunals to interpret intra-EU BITs in the light of other international law obligations applicable to the facts at hand, i.e. in the light of relevant EC law".[145] As he rightly underlines, that obligation follows in particular from Article 31(3)(c) VCLT, which requires that in the interpretation of a treaty, "*any relevant rules of international law applicable in the relations between the parties*" shall be taken into account as context. As Eilmansberger further points out, "*the intentions of the parties are expressed in the most authoritative way by conflict rules included in the later treaty, [footnote omitted] and the EC Treaty (being the later Treaty in this case) does indeed contain such a conflict rule, namely the already mentioned Article 307 EC*" (see on Article 351 TFEU as a conflict rule in detail **Section 3.3** below).[146]

126. So, the fact that EU law must be taken account of as an element extrinsic to the BIT (or here, the ECT), "*means that these elements are part of the circumstances also mentioned in Article 32 [VCLT], together with the preparatory works, but put in Article 31 in order to avoid relegation as a secondary means of interpretation*."[147] The converse would mean that the ECT is to be understood to operate wholly independently from Union law so as to be capable of being successfully invoked even when it clearly contradicts the former. In the opinion of the Commission, that cannot have been the understanding of the EU Member States when they signed the ECT, particularly since nothing indicates that the ECT is intended to apply as a *lex specialis* to Union law.[148] To use the findings of the ICJ's case in *Tunisia v Libya* by way of analogy here: it cannot be lightly presumed that Spain would conclude a treaty, such as the ECT, that would impose obligations on it that would place Spain in breach of obligations owed to the Union and other Member States of the Union under the EU Treaties.[149]

127. Rather, in a situation between two EU Member States, Union law should be viewed under Article 31(3)(c) VCLT as forming an integral part of the task of interpretation of the ECT by your Tribunal so as to avoid results that diverge from the former.[150] The ICJ in *Oil Platforms* evidenced that this could be done through a process of systemic coherence in

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ARB/01/12 *Azurix Corp*. v. *Argentine Republic*, award of 14 July 14 2006, at paragraph 67, available at: https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf; see also for further references *Antonio Parra*, "Applicable Law in Investor-State Arbitration", in: *Michael Rovine* (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, Martinus Nijhoff Publishers, 2008 p. 3 (attached as **Annex EC-1**), at pp. 7-8.

145 *Thomas Eilmansberger*, "Bilateral Investment Treaties and EU Law", in: (2009) 46 *Common Market Law Review*, pp. 383-429, attached as **Annex EC-27**, at page 421.

146 *Ibid*, at page 421 and 425.

147 *Hervé Ascencio*, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", in: (2016) 31:2 ICSID Review, pp. 366-387, at page 371, attached as **Annex EC-30**.

148 *See*, in this regard, also the reasoning of the ICJ in *Oil Platforms (Iran v USA)*, Merits, Judgment, 6 November 2003, *ICJ Reports* (2003) 161, paragraph 41, available at: http://www.icj-cij.org/docket/files/90/9715.pdf. *See also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, *ICJ Reports* (2008), paragraph 113-114, available at: http://www.icj-cij.org/docket/files/136/14550.pdf.

149 ICJ in *Tunisia v. Libyan Arab Jamahiriya (Case Concerning Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf)*, Merits, Judgment, 10 December 1985, *ICJ Reports* (1985) 15, 41, at paragraph 43, available at: http://www.icj-cij.org/docket/files/63/6267.pdf.

150 That Union law satisfies the requirements for Article 31(3)(c) VCLT should be without doubt: first, as rules contained in the TEU and TFEU or rules deriving from those treaties, Union law falls within the sources of international law set out in Article 38(1) of the Statute of the ICJ; second, Union law is directly applicable to the subject-matter of the case as an interpretation in conflict would lead to the situation whereby a Member State is in conflicting different sets of obligations at different levels of international law, and, third, they are binding to both parties to the dispute before your Tribunal. *See also* the analysis of the requirements of Article 31(3)(c) VCLT of *Simma* and *Kill*; *Bruno Simma*, *Theodore Kill*, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology", in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009), pp. 678-707, at pps. 695-702, attached as **Annex EC-31**.

interpretation of the treaty provisions at hand.[151] The Commission invites your Tribunal to follow that process of systemic coherence.

128. Accordingly, since, in light of the above, Union law cannot be relegated to a secondary means of interpretation when assessing the existence of conflict therewith, the Commission invites your Tribunal to interpret the ECT and EU law in such a way as to avoid any conflict between the two.

3.3. In case of conflict, the EU Treaties prevail over the ECT

129. Should your Tribunal reject a harmonious interpretation of the ECT and EU law, it would have to solve the conflict between the ECT and the EU Treaties in favour of the latter. It could do so either on the basis of Article 351 TFEU or on the basis of Article 41(1)(b) and Article 30(4)(a) VCLT.

3.3.1. Article 351 TFEU as conflict rule

130. Under Article 351(1) TFEU (previously Article 307 of the Treaty establishing the European Community ("TEC"), the rights and duties under a public international law agreement entered into by a Member State prior to accession to the EU with a non-Member State are not affected by EU law. However, Article 351(2) TFEU is clear in that the Member State concerned must apply all appropriate means in order to remove any incompatibility with EU law arising from this prior international agreement.

131. On the basis of a simple *a contrario* reasoning, the ECJ considers that the *pacta sunt servanda* guarantee of Article 351 TFEU does not apply to treaties concluded between two EU Member States[152], or, indeed, to treaties to which both EU Member States and non-EU Member States are party.[153]

132. If Article 307 TEC/Article 351 TFEU are applied as conflict rule in the present case, the provisions of the ECT identified as being incompatible with Union law, i.e. Part III on

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[151] ICJ in *Oil Platforms (Iran v USA)*, Merits, Judgment, 6 November 2003, *ICJ Reports* (2003) 161, paragraphs 41 and 78, available at: http://www.icj-cij.org/docket/files/90/9715.pdf.

[152] *See*, for instance, ECJ, Judgment in *Commission v Slovakia*, C-264/09, EU:C:2011:580, paragraph 41, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0264&rid=1, and ECJ, Judgment in *Commission v Austria*, C-147/03, EU:C:2005:427, paragraph 58, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0147&rid=1. See, in addition, also ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Award of 30 November 2012, paragraph 4.183: "*Under this 'negative' interpretation, Article 307 EC* [now: Article 351 TFEU] *means that between EU Member States, EU law prevails in case of inconsistency with another earlier treaty. […] If Article 307 EC provides that treaty rights between Non-EU Members cannot be jeopardised by the subsequent entry of a Non-EU State into the European Union, it appears logical, taking into account the integration processes of the European Union, that the opposite consequence should be implied, i.e. the non-survival of rights under an earlier treaty incompatible with EU law as between EU Member States*". The award is available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, and included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

[153] For those treaties, in the relationship between EU Member States, the applicable rule of conflict is Article 307 EC/Article 351 TFEU. ECJ, Judgment in *RTE* v *Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 84 (concerning the Berne convention), available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98207&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=299069; see already ECJ, Judgment in *Commission* v *Italy*, 10/61, EU:C:1962:2, at page 10 (concerning agreements concluded under the auspices of the GATT), available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87062&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=299142.

investment protection and Article 26 on investor-State arbitration, would become inapplicable.

133. The Commission is aware that the *RREEF* tribunal[154] has taken different views. The main flaw in the reasoning of the *RREEF* tribunal is to disregard the fact that Union law is part of the international law applicable to the dispute, and that Article 41(1)(b) and Article 30(4)(a) VCLT cater for the possibility of having effects of posterior treaties only between certain contracting parties to the earlier agreement (see on this point in detail the following section).

3.3.2. Article 41(1)(b) and Article 30(4)(a) VCLT

134. Even if one were to consider that the rules applicable to a conflict between the ECT and Union law are the general rules of conflict contained in the VCLT, the Commission considers that the *inter se* obligations between EU Member States would have been superseded on the basis of Articles 41(1)(b) or 30(4)(a) VCLT.

135. Article 41(1)(b) VCLT concerns the amendment of a treaty by a later treaty only between certain parties thereto. It stipulates that such amendment is possible, provided that it does not affect the enjoyment by other parties of their rights under the treaty or performance of their obligations and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole (see already above paragraph 48).

136. Those conditions are complied with in the present case: The suppression of *inter se* obligations between EU Member States only concerns those EU Member States. In the case of investor-State arbitration such as the one foreseen in Article 26 ECT, it also is not incompatible with the effective execution of the object and purpose of the treaty as a whole: the possibility of investor-State arbitration between investors from non-EU Member States and either the Union or EU Member States remains untouched.

137. In the Treaties of Amsterdam, Nice and Lisbon, the investment protection rules of Union law, as well as the principles concerning the competences and the system of judicial protection, laid out above in **Sections 2.2.1** and **3.1.2**, are re-affirmed. This could be interpreted as an amendment pursuant to Article 41(1)(b) VCLT.

138. Even if there were no such amendment, the applicable rule of conflict according to the VCLT between the earlier and the later treaty would be Article 30 VCLT Article 30(3) VCLT provides that when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 VCLT, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

139. Article 30(4) and (5) VCLT specify that when the parties to the later treaty do not include all the parties to the earlier one, as between States parties to both treaties the same rule applies, provided that the provisions of Article 41 VCLT are respected.

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[154] Included as Annex CL-102 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party, at paragraphs 74 and 75. The claim of the *RREEF* tribunal that it shares the view of the *Electrabel I* tribunal at paragraph 75 seems to rest on an erroneous reading of the *Electrabel I* tribunal's award. Paragraph 4.112 of the *Electrabel I* award only sets out that the applicable law is public international law. It does not say anything as to the question what is, under public international law, the applicable rule of conflict. The *Electrabel I* tribunal found, at paragraphs 4.173 to 4.189, that Article 307 TEC/Article 351 TFEU prevails over Article 16 ECT as rule to solve any conflict between the ECT and the TEC/TFEU. Thus, the precedence of Article 307 TEC/Article 351 TFEU over Article 16 ECT, as presented in the present section, is a question of public international law, not of Union law.

140. The ECT and the EU Treaties relate to the same subject matter. The ECT establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the European Energy Charter. The EU Treaties establish a European Union to achieve European unity, including an internal market that also covers energy (see detailed description above; the Treaty of Lisbon has introduced, for the first time, a dedicated competence for energy, see Article 194 TFEU; beforehand, secondary legislation on energy had been based on the internal market competence and the environmental competence).

141. If one assumed that the provisions on investment protection in Chapter III and Article 26 ECT have created *inter se* obligations between EU Member States, *quod non*, the EU Member States would be party to successive treaties that relate to the same subject matter. It therefore needs to be determined which is the earlier treaty.

142. The ECT has been concluded in 1994; the Union ratified it in 1997. After that date, the Member States have reaffirmed their commitment to Union law by various treaties, and in particular the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon.[155] The ECT is therefore the earlier treaty compared to each of those treaties. In such a situation, under Article 30(4)(a) VCLT, the ECT only applies to the extent that its provisions are compatible with those of the later treaties of Amsterdam, Nice, and Lisbon.

143. The provisions of the ECT on investment protection (Chapter III) and dispute settlement (Article 26 ECT), when applied between two EU Member States, are not compatible with Union law as it results from those later treaties (see **Section 3.1** above). Hence, they are, pursuant to Article 30(4)(a) VCLT, not applicable.

4. SUGGESTED COURSE OF ACTION: DECLINE COMPETENCE TO HEAR THE CASE OR SUSPEND THE CASE UNTIL THE RULING OF THE ECJ IN ACHMEA

4.1. Decline competence to hear the case

144. The logical consequence of the view presented by the Commission is that the Commission invites your Arbitration Tribunal to decline its competence to hear the case. Indeed, the Tribunal in *WNC Factoring* noted that a clarifying decision by the ECJ could have acted as a potential qualifier to its final decision on jurisdiction.[156]

145. However, the Commission understands that your Arbitral Tribunal may be reluctant to do so, in particular because other Arbitral Tribunals have taken a different view, and because there is, as of yet, no clear case-law from the ECJ on the question of the compatibility of intra-EU ISDS with Union law.

4.2. In the alternative: suspension of the proceedings pending the preliminary ruling in *Achmea*

146. The Commission considers therefore that an alternative to the preferred course of action of the Commission is that your Tribunal suspends the proceedings before it and awaits the ruling of the ECJ in *Achmea* v *Slovakia*[157], which deals precisely with that question, and for which an oral hearing will take place before the Grand Chamber of the ECJ on 19 June 2017.

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155 Other treaties reaffirming Union law are the various accession treaties.

156 PCA Case No. 2014-34, Award, 22 February 2017, *WNC Factoring Ltd. v Czech Republic*, at paragraph 311, available at: https://www.italaw.com/sites/default/files/case-documents/italaw8533.pdf.

157 Case C-284/16. The order for reference by the *Bundesgerichtshof* and an English courtesy translation of the order for reference are attached as **Annex EC-11**. The written procedure is closed; a hearing is scheduled for 19 June 2017, and a judgment is expected the latest in 2018.

147. Now, as the UNCLOS Tribunal in *Mox Plant*[158] and the tribunal in *Iron Rhine*[159] have convincingly argued, the ECJ is the ultimate authority for the interpretation of Union law. Therefore, the principle of comity justifies suspension of the proceedings until that question of Union law is definitively decided by the competent forum.[160] The legal basis for such a suspension of proceedings can be found in the case-management authority of the Tribunal.[161] Your Tribunal can find precedent for decisions to stay proceedings in comparable situations in particular in *Mox Plant*[162], in *SPP* v *Egypt*[163], and in *SGS* v *Philippines*[164]. The situation is also different from *Achmea (formerly Eureko)* v *Slovakia*[165], where a suspension to await the outcome of a possible infringement procedure under what is now Article 258 TFEU was declined, because it was not certain whether the Commission would eventually bring such an infringement case.[166] Here, the relevant case is already pending in the Union Courts.

148. It is accordingly in light of the above and with a view to having this fundamental issue of jurisdiction resolved by the competent forum that the Commission invites your Tribunal to suspend proceedings until the final judgment of the Court in *Achmea* v *Slovakia* is delivered.

149. The Commission is aware that in the last years, several academics have suggested that investment tribunals, contrary to commercial tribunals, are "national courts and tribunals" within the meaning of Article 267 TFEU, because of their different characteristics and their legal basis as an international agreement concluded by a Member State.[167] Advocate

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158 ITLOS Order No. 3, 24 June 2003, attached as **Annex EC-32**, at paragraphs 27 and 28.

159 Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, Chapter III, attached as **Annex EC-33**, in particular at paragraph 103: "*[T]he Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of EC law which constitute neither actes clairt nor actes éclairés, the Parties'obligations under Article 292 would be triggered in the sense that the relevant questions of EC law would need to be submitted to the European Court of Justice*".

160 See *Brooks E. Allen* and *Tommaso Soave*, Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration, in: *Arbitration International* 30, p. 1, in particular pp. 44 to 47, attached as **Annex EC-34**.

161 See in detail International Law Association, Final report on *lis pendens* and arbitration, available at http://arbitration.oxfordjournals.org/content/arbint/25/1/3.full.pdf , Recommendation 6.

162 ITLOS Order No. 3, 24 June 2003, attached as **Annex EC-32**, at paragraph 1191.

163 ICSID case No. ARB/84/3 *Southern Pacific Properties (Middle East) Limited* v *Arab Republic of Egypt*, Decision on Preliminary Objections to Jurisdiction of November 27, 1985, paragraphs 84 to 87. Not publicly available.

164 ICSID case No. ARB/02/6, Decision of the Tribunal on objections to jurisdiction, 29 January 2004, paragraphs 170 to 176, available at: https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf.

165 Included as Annex CL-104 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

166 *Achmea B.V.* v. *The Slovak Republic*, PCA Case No. 2008-13 (formerly *Eureko B.V.* v. *The Slovak Republic*, Award of 26 October 2010 on jurisdiction, arbitrability and suspension, at point 292, available at: https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf, included as Annex CL-104 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

167 Jürgen Basedow, "EU Law in International Arbitration: Referrals to the European Court of Justice" 32 Journal of International Arbitration (2015), S. 367–386, attached as **Annex EC-35**; Konstanze von Papp, "Clash of ‚autonomous legal orders': Can EU Member States Courts bridge the jurisdictional divide between investment tribunals and the ECJ ? A plea for direct referral from investment tribunals to the ECJ" 50 Common Market Law Review (2013), S. 1039-1082, attached as **Annex EC-36**; John P. Gaffney, "Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings From the Court of Justice of the European Union?" 2 Transnational Dispute Management (2013), attached as **Annex EC-37**; Milos Olik and David Fyrbach, "The Competence of Investment Tribunals to Seek Preliminary Rulings from European Courts", Czech Yearbook of International Law 2011, p. 191-205, attached as **Annex EC-38**; Stephan Schill, "Arbitration Procedure: The Role of the European Union and the Member States in the Arbitration Procedure", in: Catherine Kessedjian, Le droit européen et

General *Wathelet* has recently endorsed that view at the very least for ICSID tribunals, because, particularly in the field of State aid, the possibility for arbitral tribunals to refer questions for a preliminary ruling could help to ensure the correct and effective implementation of EU law.[168]. If your Arbitral Tribunal were to espouse that view, it could also consider referring itself questions to the ECJ (including possibly the question whether it constitutes a national court or tribunal in the sense of Article 267 TFEU, whether Article 26 ECT applies to disputes between an EU investor and another Member State[169] or whether intra-EU ISDS is compatible with Union law).

150. The Commission, agreeing as to the result with Arbitral Tribunals seized with the question[170] and the German *Bundesgerichtshof*, does not share that view. In particular, Arbitral Tribunals do not seem to meet the requirement of "*permanence*" and of being State organs. Therefore, the findings of the ECJ in *Nordsee* for commercial tribunals are applicable by analogy to them. It would therefore not recommend that course of action.

4.3. In the further alternative: Safeguard Union law on State aid and the Commission's role in State aid control

151. As set out above in paragraph 3, the measures contested by the Claimants constitute State aid in the sense of Article 107(1) TFEU. That aid has not been authorized by the Commission. As a consequence, the standstill clause of Article 108(3) TFEU applies and the Claimants cannot entertain any legitimate expectations (see above footnote 9).

152. The Commission has exclusive competence for authorising EU Member States to grant State aid. The Commission therefore is obliged to take a decision where the Member State or interested parties request it to do so.[171] National judges[172], and hence, by analogy, arbitral tribunals are not competent to carry out that assessment.[173]

153. Those principles form part of the international law applicable to the present dispute.

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l'arbitrage d'investissement, Editions Panthéon-Assas, 2011, pp. 129 to 147, at 144 and 145, attached as **Annex EC-39**, *Paschalis Paschalidis*, "Arbitral tribunals and preliminary references to the EU Court of Justice", (2016) *Arbitration International*, pp. 1-23, attached as **Annex EC-40**, and *Paschalis Paschalidis*, "Greentech: EU law confronted with international arbitration", (2016) *European International Arbitration Review*, pp. 59-66, attached as **Annex EC-41**.

168 Conclusions in *Genentech*, C-567/14, EU:C:2016:177, footnote 34, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CC0567&rid=1.

169 Because the ECT is also part of Union law, the ECJ is competent for the interpretation of Article 26 ECT.

170 They take, however, the view that this is not problematic, based on the rulings of the ECJ in *Nordsee* and *Eco Swiss*, discussed above in paragraphs 112 to 115. For the reasons set out there, the Commission does not share that view. The investment tribunal in *Eastern Sugar* has endorsed that theory also for investment tribunals, against the position taken by the Czech Republic (*Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, at paragraphs 130-139, available at: https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf, and included as Annex CL-107 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party). See also *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*). Award of 26 October 2010 on jurisdiction, arbitrability and suspension, at point 292, available at: https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf, included as Annex CL-104 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

171 ECJ, Judgment in *Athinaiki*, Case C-362/09 P, EU:C:2010:783, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0362&rid=1. The Claimants may hence trigger such a decision and make submissions to the Commission expressing its point of view, and can seek review of any such decision in front of the EU courts.

172 ECJ, Judgment in *Deutsche Lufthansa*, EU:C:2013:755, C-284/12, paragraph 28; ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 42, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0284&rid=1.

173 ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 36, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0039&rid=1.

154. They should exclude a finding of violation of fair and equitable treatment. Indeed, on the basis of the principle of "*harmonious interpretation*" or "*systemic integration*", that standard has to be interpreted in the light of the general principle of Union law, as a rule of international law applicable to the dispute.

155. In any event, as Arbitrator Hanotiau has pointed out, writing in academic capacity, an Arbitration Tribunal may not authorize State aid.[174] Yet, if your Arbitration Tribunal was to grant compensation, it would be precisely doing this, hence violating the distribution of competence set out in Union law, and hence a rule of international law applicable to the dispute. That may hinder the enforcement of any award as a violation of the law of the European Union.[175]

156. As has been correctly pointed out by the *Electrabel* Tribunal, the framework of the ECT recognises that EU Member States will be legally bound by decisions of the Commission under EU law. As regards protection under the ECT, investors can have had no legitimate expectations with regard to the consequences of the implementation by an EU Member State of any such decision by the Commission.[176] In other words, the possible interference with a foreign investment through the implementation by an EU Member State of a legally-binding decision of the Commission was and remains inherent in the framework of the ECT itself.

157. The Commission is at the disposal of your Tribunal to explore ways for safeguarding Union law on State aid and the Commission's role in State aid control, should your Tribunal find that it has jurisdiction in this case. Inspiration could, for example, be drawn from the Commission notice on the enforcement of State aid law by national courts[177] and the mechanism of cooperation foreseen therein between national courts and the Commission.

[redacted] [redacted] [redacted]

Agents of the Commission

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174 *Bernard Hanotiau*, "L'arbitrage et le droit européen de la concurrence", in: Robert Briner (ed.), *L'arbitrage et le droit européen*, Reports of the International Colloquium of CEPANI April 25, 1997, Bruylant, 1997, pp. 31 to 64, in particular p. 47; similarly, in English, *Bernard Hanotiau*, "Competition Law issues in international commercial arbitration: An arbitrator's viewpoint, in: 6 The American Review of International Arbitration [1995], pp. 287 to 299, in particular p. 294; both articles are attached as **Annex EC-42**.

175 *See*, e.g. PCA Case No. AA 227, *Yukos v Russia*, paragraph 1352: "*An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State . . . should not be allowed to benefit from the Treaty*." The award is available at: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf. *See also* ICSID Case No. ARB/03/24, *Plama v Bulgaria*, paragraphs 138, 140, and 143, available at: https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf, and included as Annex CL-128 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party.

176 ICSID Case No. ARB/07/19, *Electrabel* v *Hungary* 4.137 to 4.142, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf, included as Annex CL-93 of the Claimants' Response to the European Commission's Application to Intervene as a Non-Disputing Party and as Annex RL-0002 of the Respondent's Observations Regarding the European Commission's Application to Intervene as a Non-Disputing Party.

177 Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:085:0001:0022:EN:PDF.

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EC-1	*Antonio Parra*, "Applicable Law in Investor-State Arbitration", in: Michael Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Martinus Nijhoff Publishers, 2008
EC-2	*Steffen Hindelang*, „Member State BITs – There's still (some) life in the old dog yet", in: Yearbook on international investment law and policy 2010/11, pp. 217 to 242.
EC-3	*Bruno Poulain*, „Quelques interrogations sur le statut des traités bilatéraux de promotion et de protection des investissements au sein de l'Union européennen", in: 111 Revue générale de droit international public (2007), pp. 803 to 828
EC-4	*Eric Teynier*, „L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne", in : 128 La Gazette du Palais (2008), pp. 690 to 697
EC-5	*Marek Wierzbowski and Aleksander Gubrynowicz*, "Conflict of norms stemming from intra-EU BITS and EU legal obligations: some remarks on possible solutions", in: Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, pp. 544 to 560
EC-6	*Angelos Dimopoulos*, "The validity and applicability of international investment agreements between EU Member States under EU and international law", in 48 Common Market Law Review (2011), pp. 63 to 93
EC-7	*Dominik Moskvan*, "The clash of intra-EU bilateral investment treaties with EU law: A bitter pill to swallow", in: 22 Columbia Journal of European Law (2016), pp. 101 to 138
EC-8	*Mark A. Clodfelter*, "The Future Direction of Investment Agreements in the European Union", in: 12 Santa Clara Journal of International Law (2014), pp. 159 to 182
EC-9	*Jacqueline Dutheil de la Rochère*, "Quel role pour la Cour de Justice ?", in: Catherine Kessedijan (ed.), "Le droit européen et l'arbitrage d'investissment", Editions Panthéon Assas 2011, pp. 37 à 45
EC-10	*Juliane Kokott and Christoph Sobotta*, "Investment Arbitration and EU Law", in: 18 Cambridge Yearbook of European Legal Studies (2016), pp. 3-19
EC-11	Order for reference by the *Bundesgerichtshof* in Case C-284/16 *Achmea v Slovakia* and English courtesy translation of thereof
EC-12	Statement submitted by the European Communities to the Secretariat of ECT pursuant to Article 26(3)(ii) ECT
EC-13	*Eleftheria Neframi*, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations" (2010) 47 *Common Market Law Review*, Issue 2
EC-14	*Pieter Jan Kuijper*, "The Conclusion and Implementation of the Uruguay Round Results by the European Community", (1995) 6 *European Journal of International Law*, Issue 1
EC-15	*Johann Basedow*, "*The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation*, (2014) PhD thesis, The London School of Economics and Political Science (LSE)
EC-16	Conclusions of the Presidency on the European Council in Rome
EC-17	Communication from the Commission on European Energy Charter, COM(91) 36 final of 14 February 1991
EC-18	*Christian Tietje*, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States", Halle: Institute of Economic Law, 2008
EC-19	*Maja Smrkolj*, "The Use of the 'Disconnection Clause' in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?", paper presented at the GARNET Conference, "The EU in International Affairs", Brussels, 24-26 April 2008
EC-20	*Raphael Oen*, "Internationale Streitbeilegung im Kontext gemischter Vertrage der Europaischen Gemeinschaft und ihrer Mitgliedstaaten", Berlin: Duncker and Humblot, 2005 (relevant extracts)
EC-21	*Christoph Herrmann*, "Rechtsprobleme der parallelen Mitgliedschaft von Volkerrechtssubjekten in Internationalen Organisationen - Eine Untersuchung am Beispiel der Mitgliedschaft der EG und ihrer Mitgliedstaaten in der WTO", in: *Gabriele Bauschke* et al., Pluralitat des Rechts - Regulierung im Spannungsfeld der Rechtsebenen, Boorberg: Stuttgart, 2003

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EC-23 ITLOS, Advisory opinion of 2 April 2015, case no 21

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EC-27 *Thomas Eilmansberger*, "Bilateral Investment Treaties and EU Law", 46 *Common Market Law Review* (2009)

EC-28 *José Carlos Fernández Rozas*, "Le rôle des juridictions étatiques devant l'arbitrage commercial international", Académie de Droit International de la Haye / Hague Academy of International Law Recueil des cours, Collected Courses, Tome/Volume 290 (2001)

EC-29 Catherine Kessedjian, "*L'arbitrage comme mode de règlement des différends est-il remis en cause par le droit européen?*", in : ibid. et Charles Leben (ed.), Le droit européen et l'investissement, Editions Panthéon-Assas, 2009, pp. 107 to 121

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EC-32 ITLOS Order No. 3, 24 June 2003

EC-33 Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005

EC-34 *Brooks E. Allen* and *Tommaso Soave*, "Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration", in *Arbitration International* 30:1

EC-35 *Jürgen Basedow*, "EU Law in International Arbitration: Referrals to the European Court of Justice", 32 *Journal of International Arbitration* (2015)

EC-36 *Konstanze von Papp*, "Clash of ‚autonomous legal orders': Can EU Member States Courts bridge the jurisdictional divide between investment tribunals and the ECJ ? A plea for direct referral from investment tribunals to the ECJ", 50 *Common Market Law Review* (2013)

EC-37 *John P. Gaffney*, "Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings From the Court of Justice of the European Union", 2 *Transnational Dispute Management* (2013)

EC-38 *Milos Olik* and *David Fyrbach*, "The Competence of Investment Tribunals to Seek Preliminary Rulings from European Courts", *Czech Yearbook of International Law* 2011

EC-39 *Stephan Schill*, "Arbitration Procedure: The Role of the European Union and the Member States in the Arbitration Procedure", in: Catherine Kessedjian, *Le droit européen et l'arbitrage d'investissement*, Editions Panthéon-Assas, 2011

EC-40 *Paschalis Paschalidis*, "Arbitral tribunals and preliminary references to the EU Court of Justice", (2016) *Arbitration International*, pp. 1-23

EC-41 *Paschalis Paschalidis*, "Greentech: EU law confronted with international arbitration", (2016) *European International Arbitration Review*, pp. 59-66.

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Bilaga 3

II

(Meddelanden)

MEDDELANDEN FRÅN EUROPEISKA UNIONENS INSTITUTIONER, BYRÅER OCH ORGAN

EUROPEISKA KOMMISSIONEN

Tillstånd till statligt stöd enligt artiklarna 107 och 108 i fördraget om Europeiska unionens funktionssätt

Fall i vilka kommissionen inte gör några invändningar

(Text av betydelse för EES)

(2017/C 442/01)

Datum för antagande av beslutet	10.11.2017	
Stöd nr	SA.40348 (2015/NN)	
Medlemsstat	Spanien	
Region	—	—
Benämning (och/eller stödmottagarens namn)	Producción de energía eléctrica a partir de fuentes de energías renovables, cogeneración y residuos	
Rättslig grund	Real Decreto 413/2014, de 6 de junio, por el que se regula la actividad de producción de energía eléctrica a partir de fuentes de energías renovables, cogeneración y residuos, Orden IET/1045/2014, de 16 de junio, por la que se aprueban los parámetros retributivos de las instalaciones tipo aplicables a determinadas instalaciones de producción de energía eléctrica a partir de fuentes de energía renovables, cogeneración y residuos y Orden IET/1459/2014, de 1 de agosto, por la que se aprueban los parámetros retributivos y se establece el mecanismo de asignación del régimen retributivo específico para nuevas instalaciones eólicas y fotovoltaicas en los sistemas eléctricos de los territorios no peninsulares	
Typ av stödåtgärd	Stödordning	—
Syfte	Miljöskydd, Energisparande	
Stödform	Bidrag	
Budget	Årlig budget: EUR 6 402,1 (i miljoner)	
Stödnivå	—	

Varaktighet	11.06.2014 – 10.06.2024
Ekonomisk sektor	Generering av elektricitet
Den beviljande myndighetens namn och adress	Ministerio de Energía, Turismo y Agenda Digital Paseo de la Castellana, 160 – 28046 Madrid, Spain
Övriga upplysningar	—

Originalversionen av beslutet, från vilken all konfidentiell information har borttagits, finns på Internet:

http://ec.europa.eu/competition/elojade/isef/index.cfm.

Datum för antagande av beslutet	25.07.2017	
Stöd nr	SA.46806 (2016/N)	
Medlemsstat	Italien	
Region	TRENTO	Icke stödområden
Benämning (och/eller stödmottagarens namn)	Aiuti a sostegno del trasporto combinato	
Rättslig grund	Legge provinciale 9 luglio 1993, n. 16 – art. 16 bis (articolo aggiunto dall'art. 66, comma 2 della l.p. 19 febbraio 2002, n. 1 e modificato dall'art. 35 della l.p. 14 maggio 2014, n. 3)	
Typ av stödåtgärd	Stödordning	—
Syfte	Samordning av transport, Miljöskydd	
Stödform	Bidrag	
Budget	Total budget: EUR 9 (i miljoner) Årlig budget: EUR 3 (i miljoner)	
Stödnivå	30 %	
Varaktighet	till den 31.12.2019	
Ekonomisk sektor	Järnvägstransport; godstrafik	
Den beviljande myndighetens namn och adress	Provincia autonoma di Trento Piazza Dante 15 – 38122 Trento	

EUROPEAN COMMISSION

Brussels, 10.11.2017
C(2017) 7384 final

PUBLIC VERSION

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Subject: **State aid SA.40348 (2015/NN) — Spain**
Support for electricity generation from renewable energy sources, cogeneration and waste

Sir,

1. PROCEDURE

(1) On 22 December 2014, the Spanish authorities notified the Commission, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), about its specific remuneration scheme ('*regimen retributivo específico*', hereinafter referred to as 'the scheme') to support electricity generation from renewable energy sources, cogeneration and waste. As Spain implemented the scheme before it notified the Commission, the case was transferred to the register of unlawful aid. Subsequently, a number of exchanges took place between the Commission and the Spanish authorities.

(2) In the course of the investigation, the Commission received submissions from investors that had made investments in electricity generation from renewable energy sources in Spain in the years 2007 to 2012. The Commission also received a submission from an association of producers of electricity from renewable energy sources.

(3) On 25 September 2017, Spain waived its right under Article 342 TFEU in conjunction with Article 3 of Regulation (EEC) No 1/1958 to have the decision in this procedure adopted in Spanish and agreed that the decision be adopted and notified in English.

His Excellency Mr. Alfonso María Dastis Quecedo
Minister for Foreign Affairs and Cooperation
Plaza de la Provincia 1
28012 Madrid
Spain

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Background, objectives of the scheme, legal basis and granting authority

(4) The scheme replaces and supersedes the *premium* economic scheme ('*régimen económico primado*'), which was governed by Royal Decrees 661/2007[1] and 1578/2008.[2] Payments under the premium economic scheme are covered by the decision in order to assess proportionality, *i.e.* the absence of overcompensation.

(5) The scheme aims to support the development of technologies that offer environmental benefits, but would not be economically viable without State support. It helps Spain to achieve its target of at least 20% of renewable energy in gross final consumption of energy by 2020 laid down in Directive 2009/28/EC of the European Parliament and of the Council. [3]

(6) The following legislation forms the legal basis of the scheme:

(a) Royal Decree-Law 9/2013 of 12 July 2013[4], which repealed the laws applicable to the premium economic scheme and set out the principles for the new one.

(b) Law 24/2013 of 26 December 2013 on the electricity sector[5], which confirms those principles.

(c) Royal Decree 413/2014 of 6 June 2014[6], which regulates the production of electricity from renewable energy sources, cogeneration and waste[7] and further develops the principles set out in the electricity sector law. It entered into force on 11 June 2014.

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[1] Royal Decree 661/2007 of 25 May 2007 regulating the production of electricity under the special regime. Boletín Oficial del Estado (BOE) 126 if 26 May 2007. https://www.boe.es/buscar/act.php?id=BOE-A-2007-10556

[2] Royal Decree 1578/2008 of 26 September 2008 on the remuneration of electricity production using solar photovoltaic technology for plants having missed the remuneration maintenance deadline for such technology pursuant to Royal Decree 661/2007 of 25 May 2007. BOE 234 of 27 September 2008, https://www.boe.es/buscar/doc.php?id=BOE-A-2008-15595.

[3] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).

[4] Royal Decree-law 9/2013 of 12 July 2013, adopting urgent measures to ensure the financial stability of the electricity system (BOE 167 of 13 July 2013, https://www.boe.es/buscar/doc.php?id=BOE-A-2013-7705). This law established the principles for the new scheme and that a Royal Decree would be adopted to develop those principles. It also repealed the laws applicable to the previous scheme but established that the compensation to existing beneficiaries would still be paid on a transitional basis on account of the new scheme payments, and would be settled by the regulator once the new regulations would be in place. Prior to the Royal Decree-Law 9/2013, Royal Decree 1/2012 of 27 January 2012 had abolished the entry of new facilities into the scheme, meaning that no new aid was granted between 8 January de 2012 and 8 July 2014.

[5] BOE 310 of 27 December 2013, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-13645.

[6] BOE 140 of 10 June 2014, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6123.

[7] The scope of this decision includes waste as covered by the definition of renewable energy source in Directive 2009/28/EC.

(d) Order IET/1045/2014 of 16 June 2014[8], which regulates the standard plant remuneration parameters applicable to certain renewable energy, cogeneration and waste-to-energy power facilities.

(e) Order IET/1459/2014 of 1 August 2014[9], which regulates the remuneration for new wind and photovoltaic facilities in the non-peninsular territories.

(7) The granting authority is the Ministry of Energy, Tourism and Digital Agenda by way of its Directorate-General for Energy and Mining Policy. The National Commission for Markets and Competition (CNMC) is the body responsible for managing the settlement system and administering the payments.

2.2. Financing of the scheme

(8) The scheme is partly financed from the general State budget and partly from the network access tariffs and charges imposed on electricity consumers, also called 'electricity system revenues'. These revenues finance several schemes. In 2017, 38.29 % of the revenues serve to finance the specific remuneration scheme.

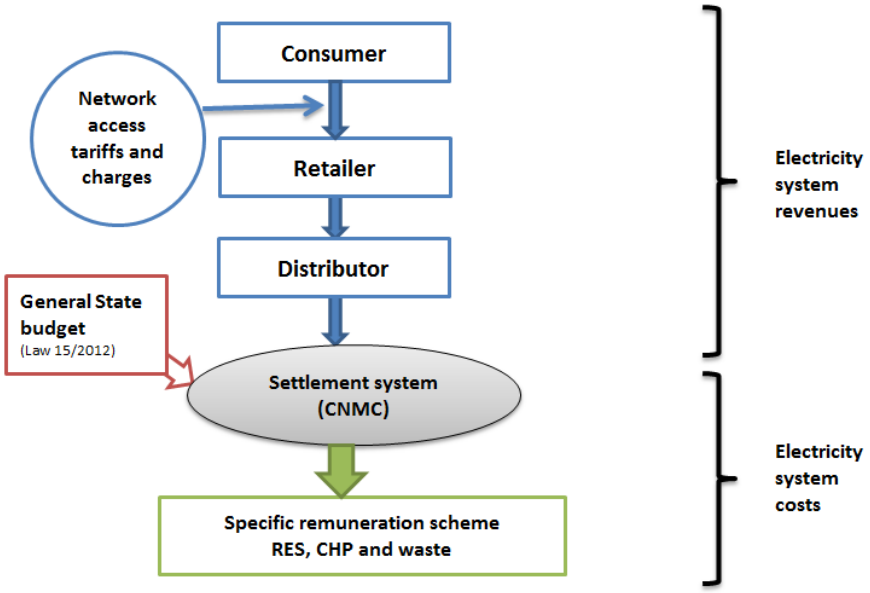
(9) In 2015, the total cost of the scheme amounted to EUR 6 666.3 million. 46.88 % (EUR 3 125.8 million) was financed from the State budget and 53.11 % (EUR 3 540.6 million) from charges, of which 33 % were imposed on electricity consumption and 67 % on the connection capacity.

(10) The supplier collects the charges together with the network access tariffs from consumers and transfers them to the relevant distributor, who in turn declares these amounts to CNMC. CNMC carries out monthly settlements on the costs and revenues declared by beneficiaries and the energy they have actually sold in the market. A final subsequent settlement may be carried out pursuant to the electricity sector legislation.

Figure 1 — Financing method — outline

[8] BOE 150 of 20 June 2014, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6495.

[9] BOE 189 of 5 August 2014, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-8447.



Source: Spanish authorities

(11) The table below contains a breakdown of aid by technology for the year 2016:

Technology	Installed capacity (MW)	Energy sold (GWh)	Energy eligible for premium (GWh)	Number of facilities	Total remuneration (EUR 000)	Average price of total remuneration (cent€/kWh)	Compensation for investments (EUR 000)	Compensation for operations (EUR 000)	Specific compensation (EUR 000)
Cogeneration	5 997	23 981	23 793	1 056	1 859 083	7.752	58 606	826 612	885 218
Solar PV	4 674	7 942	7 871	61 386	2 739 437	34.493	2 284 847	147 238	2 432 085
Thermo solar	2 300	5 071	5 071	51	1 472 531	29.040	1 082 349	193 948	1 276 298
Wind	23 049	47 598	34 921	1 359	2 856 614	6.002	1 254 456	0	1 254 456
Hydro	2 102	5 814	2 412	1 093	285 403	4.909	77 242	0	77 242
Biomass	744	3 435	3 394	214	419 662	12.218	141 185	137 821	279 006
Waste	754	3 358	3 137	40	240 810	7.170	80 394	24 031	104 425
Waste treatment	628	1 636	1 633	51	152 776	9.341	888	85 469	86 357
Other renewable technologies	5	0	0	2	239	136.174	233	0	233
Total	**40 253**	**98 834**	**82 232**	**65 252**	**10 026 554**	**10.145**	**4 980 201**	**1 415 119**	**6 395 320**

Source: CNMC[10]

2.3. Beneficiaries

2.3.1. Eligible facilities

(12) Royal Decree 413/2014 distinguishes between two facility types:

(a) Facilities that are awarded the specific remuneration scheme following the entry into force of Royal Decree 413/2014 on 11 June 2014. In this decision these facilities are referred to as '*new* facilities'.

[10] CNMC monthly statistics on special regime sales, published on 4 April 2017, https://www.cnmc.es/en/node/361698.

(b) Facilities that were already entitled to or were already receiving support from the premium economic scheme when Royal Decree-Law 9/2013 entered into force on 14 July 2013[11]. In this decision these facilities are referred to as '*existing* (supported) facilities'.

(13) The actual beneficiaries are the entities owning and operating the facilities.

(14) As regards the eligible technologies, the classification of facilities can be summarised as follows:[12]

(a) Facilities that include a cogeneration plant,[13] including cogeneration from biomass and waste, natural gas, coal or oil products; facilities that use waste energy derived from any facility, machine or industrial process whose purpose is not the production of electricity.

(b) Facilities that use renewable energy sources: solar thermal and photovoltaic, wind (onshore and offshore), geothermal, aerothermal, hydrothermal, wave, tidal, hot dry rock, ocean thermal and tidal energy; hydroelectric power plants; biomass;[14] bioliquids[15] produced from biomass; biogas[16,17].

(c) Facilities that use at least 70 % of a waste-to-energy source not covered above (e.g. household and similar waste, other waste, facilities that use non-commercial grade products from mining operations as fuel for generating electricity due to their high sulphur or ash content) and facilities using black liquor.

(15) The scheme only applies to the facilities where the feedstock meets the minimum requirements as mentioned in footnotes 13, 15, 17 and paragraph (14)(c) above. If a

[11] See footnote 4.

[12] Article 2 of Royal Decree 413/2014 contains the detailed classification of eligible facilities.

[13] Most of the fuels mentioned must represent at least 90 % or 95 % of the primary energy used, measured according to the lower calorific value. Cogeneration facilities that use natural gas as fuel can use a lower percentage of this fuel as primary energy (at least 65 %) when the rest is obtained from biomass or biogas.

[14] Biomass produced from: energy crops, farming, livestock or gardening activities; forest management and other forestry activities in forests and green areas; industrial facilities in the agricultural or forestry sector. Royal Decree 413/2014 defines biomass in the same terms as the Environmental and Energy State Aid Guidelines (EEAG) and requires that any biomass to be used as fuel must comply with the applicable legislation on biomass sustainability.

[15] Liquid fuel used for energy purposes other than transportation, including use for the production of electrical energy, heating or cooling.

[16] Biogas from anaerobic digestion of energy crops, agricultural waste, livestock excrement, biodegradable waste from industrial facilities, household waste and the like, or from sludge from wastewater treatment facilities or any other anaerobic digestion process; biogas recovered from controlled landfills. Biogas generated in digestion facilities may supply these facilities with up to 50 % of their primary energy.

[17] Biomass, bioliquids and biogas plants must be at least 90 % of the primary energy used in the plant. This category excludes a number of fuels: fossil fuels (including peat and its by-products); wood or wood waste chemically treated or mixed with chemical products of inorganic origin; biomass, biogas or bioliquids polluted by toxic substances or heavy metals; paper and cardboard, textiles, animal corpses or parts thereof, when the law only provides for non-waste-to-energy disposal; and the biodegradable portion of industrial and municipal waste, except when derived from the forestry or livestock sectors.

facility does not meet such feedstock requirements in any given year, it receives the scheme payments only for the eligible portion. A second instance of non-compliance triggers a procedure to reclassify the facility under the group or subgroup that applies to the actual fuel consumption.

(16) To be eligible, cogeneration facilities must meet the definition of high efficiency cogeneration facility set out in Article 2 of Royal Decree 616/2007 on the promotion of cogeneration[18] and provide evidence of the useful heat produced and used by the facility's system. Existing cogeneration facilities that have not been substantially refurbished and receive compensation for investments must also comply with similar energy efficiency requirements to be eligible under the scheme.[19]

(17) The scheme only applies to two types of hybrid facilities: solar thermal facilities that also use biomass, bioliquids or biofuels; and facilities that use two or more types of biomass and/or black liquor where these, as a whole, represent at least 90 % of the aggregate annual amount of primary energy used, measured in accordance with the lower calorific value.

(18) The scheme applies since 11 June 2014 throughout the Spanish territory to the technologies listed in paragraph (14). In the non-peninsular territories[20], the scheme coexists with another scheme, the '*additional* remuneration scheme' established by Royal Decree 738/2015[21], which applies only to these territories and is not assessed in this decision.[22] From the entry into force of Royal Decree 738/2015 (1 September 2015), new facilities are eligible under one or the other scheme according to their flexibility. Wind facilities, photovoltaic facilities, and cogeneration facilities below 15 MW are considered as non-dispatchable and are therefore eligible for support under the *specific* remuneration scheme. Other renewable facilities[23] and larger cogeneration facilities are considered as dispatchable and are therefore eligible for support under the *additional* remuneration scheme. However, all renewable, cogeneration or waste

[18] Royal Decree 616/2007 of 11 May 2007 on the promotion of cogeneration transposed Directive 2004/8/EC into the Spanish legal system. The requirements set in the Royal Decree for high efficiency cogeneration mirror those in Annex II of Directive 2012/27/EU of the European Parliament and the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

[19] These plants must have an equivalent electrical performance above a threshold, which varies between 49 % and 59 % depending on the technology. The equivalent electrical performance is an indicator of a plant's energy efficiency. According to the Spanish authorities, if a cogeneration facility meets the minimum equivalent electrical performance, it also meets in general the high efficiency requirements laid down in Directive 2012/27/EU. The Spanish authorities have provided aggregated data on the primary energy savings (PES) for all cogeneration plant types in Spain in 2014 and 2015. According to the data provided, the weighted PES was 21.3 % in 2015 for CHP facilities with a capacity of more than 1 MW, and 23.4 % for facilities with a capacity of less than 1 MW.

[20] The Canary Islands, the Balearic Islands, and the cities of Ceuta and Melilla on the North-African coast.

[21] Royal Decree 738/2015, of July 31 2015 regulates electricity production and the generation dispatch procedures in the electrical systems of non-peninsular territories. BOE 83 of 1 August 2015 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8646

[22] This scheme is being assessed separately under case SA.42270 *Electricity production in Spanish non-peninsular territories.*

[23] Such as non-run-of-the-river hydroelectric facilities and facilities that use biomass, biogas, geothermal sources and waste as their primary source of energy.

installations which as at 1 September 2015 were already receiving support under the *specific* remuneration scheme in the non-peninsular territories will continue to do so under the same scheme.

(19) Spain has confirmed that Directive 2000/60/EC of the European Parliament and of the Council (Water Framework Directive)[24], in particular Article 4(7), applies with regard to the support provided to hydropower plants under the notified scheme[25].

(20) Spain has confirmed that the waste hierarchy as set out in Directive 2008/98/EC of the European Parliament and of the Council (Waste Framework Directive)[26] is respected in terms of the support provided under the notified scheme to plants using waste.

(21) In March 2016, the scheme applied to over 60 000 facilities, owned by 44 292 natural or legal persons. The Spanish authorities have confirmed that no beneficiary facility exceeds the limits established in the Guidelines on State aid for environmental protection and energy 2014-2020[27] (EEAG) for individual aid to be notified to the Commission.

(22) The Spanish electricity sector law[28] requires promoters to provide evidence of their legal, technical and financial capacity before they can implement a project. Notwithstanding this requirement, Spain has committed to explicitly include in the rules on scheme tenders that no aid will be granted to firms in difficulty within the meaning of point 16 EEAG.

(23) Spanish law does not allow aid to be granted to any undertaking that is subject to an outstanding recovery order following a previous Commission decision that declared aid illegal and incompatible with the internal market.[29]

(24) Spain has set up a register of beneficiaries to monitor the application of the scheme (the 'specific remuneration scheme register'). A facility that meets the requirements

[24] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L327, 22.12.2000, p. 1).

[25] To receive the specific remuneration regime, hydroelectric facilities have to obtain several administrative authorizations and comply with Spanish water legislation: Article 7 of Royal Decree 413/2014 requires beneficiaries to comply with the conditions, requirements and procedures established by general legislation applicable to electricity production facilities. Among these obligations, article 53 of Law 24/2013 requires an administrative authorization to set up new facilities or modify existing ones, which will be reviewed together with other permits, including the evaluation of environmental impact. Article 22 of Law 24/2013 stipulates that hydraulic facilities that produce electricity must comply with the provisions of Royal Legislative Decree 1/2001, which approves the consolidated text of the Spanish Water Law. This law was modified to transpose Directive 2000/60/EC.

[26] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ L312, 22.11.2008, p. 3).

[27] Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.06.2014, p. 1) and corrigendum to points 51, 52 and 151 of the Guidelines (OJ C 290 of 10.8.2016, p. 11). The Guidelines started being applicable on 1 July 2014.

[28] Article 53 of Law 24/2013.

[29] Artícle 13 of Law 38/2003 of 17 November 2003 (General Law on Subsidies). BOE 276 of 18 November 2013. https://www.boe.es/buscar/act.php?id=BOE-A-2003-20977

established in Royal Decree 413/2014 is registered in *pre-allocation* status, which grants the holder the right to participate in the scheme. As a second step, once a facility is finally registered in the administrative register of electricity production facilities,[30] it is connected to the grid and starts operation, it is registered in *operating* status in the specific remuneration scheme register. This entitles the installation to start receiving payments under the scheme.

2.3.2. Obligations on beneficiaries

(25) Beneficiaries are subject to the general legislation governing the electricity production market. Accordingly, all facilities must submit sales bids to the market operator for each programming period (1 hour) either directly or through a representative, unless an exception provided by law applies.[31] Electricity sales offers in the Iberian Electricity Market (Mercado Ibérico de la Electricidad, MIBEL) currently have a minimum price of 0 EUR/MWh. As a result, negative prices are not possible.

(26) The Spanish authorities explained that as of 31 May 2015, all facilities that generate electricity from renewable sources, cogeneration and waste, regardless of their size, must cover the costs of any deviations in production (unbalance of payments). In addition, they may participate in any ancillary services markets provided that they comply with the general technical requirements and obtain authorisation from the system operator. They must present bids of at least 10 MW in these markets.

(27) Beneficiaries must provide the Ministry of Energy, Tourism and Digital Agenda or CNMC with additional information, including where appropriate: the electricity actually generated, compliance with the requirements of primary energy savings for cogeneration installations, volumes of fuel used and other information related to their eligibility to the scheme.

2.4. Duration of the scheme

(28) The scheme is organised in six-year regulatory periods. Each regulatory period is divided into two half-periods of three years each. However, the first regulatory period runs from 14 July 2013[32] to 31 December 2019. The first half-period ended on 31 December 2016.[33]

(29) The duration of the notified scheme is not limited in time. However, the Spanish authorities have committed not to apply the scheme beyond 10 June 2024 without any Commission decision approving the measure.

[30] This register includes all electricity generation facilities, whether they are eligible for the specific remuneration or not.

[31] For example, facilities located in the non-peninsular territories may be excluded from the market as long as those electricity systems are not effectively integrated into the peninsular system.

[32] This is when Royal Decree-Law 9/2013 of 12 July 2013 entered into force.

[33] The notified Order IET/1045/2014 laid down the remuneration parameters for the first regulatory half-period, i.e. from 14 July 2013 until 31 December 2016.

2.5. Form and amount of the support

2.5.1. Elements of the compensation

(30) Facilities are classified under one of the various types of standard facilities on the basis of their individual characteristics. The compensation benchmarks applicable to each standard facility are established by ministerial order and include: type of technology, power generation capacity, start date of operation, lifetime, electricity system/location of the facility, standard revenue generated by selling the electricity in the market, standard operating costs required to carry out the activity and hours of operation (with a minimum and maximum value). The compensation to which an individual facility is entitled is calculated on the basis of the standard facility's compensation benchmarks and the features of the individual facility itself (e.g. the real number of running hours). Spain has submitted detailed information for each technology on the criteria, data and hypothesis used to define the standard facilities.

(31) The specific remuneration is paid as a premium in addition to income generated from the market. It aims at helping the technologies supported to compete on an equal footing with other technologies on the market at a reasonable rate of return. The premium is made up of two components: compensation for investments and, if applicable, compensation for operations.

(32) **Compensation for investments** (expressed in EUR/MW) applies to all facilities and offsets the investment costs which cannot be recovered by selling electricity in the market. To calculate the annual amount payable to a given facility as compensation for investment, the compensation for investment of the relevant standard facility is multiplied by the individual facility's generation capacity. Further adjustments are then made (e.g. on the basis of the number of equivalent operating hours, the net investment value and the adjustment coefficient 'C', which are described further below).

(33) Facilities whose operating costs are higher than the market price also receive a **compensation for operations** (expressed in EUR/MWh) which compensates for the difference between the operating costs and the revenue obtained in the market. To calculate the annual amount payable to a given facility as compensation for operations, for each settlement period, the compensation for operations of the relevant standard facility is multiplied by the energy sold in that period by the individual facility.

(34) Facilities in the electricity systems of non-peninsular territories may also be entitled to an additional **investment incentive to reduce generation costs** (expressed in EUR/MWh). In the non-peninsular territories, electricity demand is mainly met using conventional electricity plants, with renewable energy sources contributing only little to the energy mix.[34] Spain aims to reduce system costs by promoting wind and solar energy in these territories. The investment incentive therefore rewards renewable investments in these territories for their potential to reduce system costs. This incentive is applied when the savings generated by the standard facility exceed 45 % of the

[34] 2.3 % of demand in the Balearic Islands, 8.3 % in the Canary Islands, and very low percentages in Ceuta and Melilla according to data from 2016 (REE, El sistema eléctrico español, Avance 2016).

generation costs and when the facility is operational after a short lead time.[35] In the years 2017-2019, this incentive varies between 5.04 and 10.94 EUR/MWh depending on the type of standard facility. The right to receive this incentive applies throughout the lifetime of the facility.

2.5.2. Parameters used to calculate compensation

(35) To determine the compensation applicable to each standard facility, several parameters are used. These include:

(a) The **initial investment value** of the standard facility. It is calculated taking into account new main construction equipment as well as any other electromechanical equipment, control and regulation systems, measuring equipment, connecting lines, including transport, installation and start-up, together with associated engineering and project management.

(b) The **net asset value** per unit of capacity is recalculated every three years. For existing facilities, the net asset value was calculated as at 1 January 2014 as the value of the investment that had not been recovered with past income up to that date.

(c) The legal **lifetime** ('the lifetime') determines the period over which each facility receives compensation. Once it ends, the facility may remain in operation but will only receive the revenues from selling electricity in the market. The lifetime applicable to new facilities is set in the rules governing the relevant competitive selection process. For existing facilities, it is as follows:

Facility	Lifetime (years)
Photovoltaic	30
Cogeneration, hydroelectric, biomass, biogas, waste, thermosolar	25
Wind, geothermal, hydrothermal, tidal	20

Source: Orden IET/1045/2014 of 16 June, Article 5.5

(d) The compensation applicable to an individual facility is adjusted according to its actual annual **running hours.**[36] It must first operate above the relevant standard facility's *operating threshold*. Above this threshold, it receives only a proportion of the compensation until it has reached the standard facility's *minimum annual operating hours*. From this point onwards, it will receive full compensation for that year, up to the *maximum operating hours*. The Spanish authorities have undertaken to amend Article 21.2 of Royal Decree 413/2014 within seven months of the adoption of this decision in order to subtract from the operating hours eligible for support the hours during which the electricity day-ahead market prices are zero for six consecutive hours or more.

[35] 24 months in the case of wind technologies, and 12 months in the case of photovoltaic facilities, as opposed to the usual lead times of 36 months and 18 months respectively.

[36] The operating hours of each individual facility are calculated as the ratio of the energy sold in the market to the installed power. For cogeneration facilities, the net electrical output will be considered.

(e) The **estimated average day-ahead and intraday market prices** are calculated for each upcoming regulatory half-period (three years).[37] This estimated price is limited by two upper and two lower market price limits (LS1, LS2, LI1 and LI2) to reduce the uncertainty surrounding the estimated market price. The estimated prices and the upper and lower limits in force during the second regulatory half-period and for the period from 2020 until the end of the installations' lifetime are shown below.

Estimated market price and limits (EUR/MWh)	2017	2018	2019	2020 onwards
Upper limit 2 (LS2)	49.81	48.30	48.68	60.00
Upper limit 1 (LS1)	46.33	44.92	45.28	56.00
Estimated market price	42.84	41.54	41.87	52.00
Lower limit 1 (LI1)	39.35	38.16	38.46	48.00
Lower limit 2 (LI2)	35.87	34.78	35.06	44.00

Source: Order ETU/130/2017, of 17 February 2017

When the average annual price on the intraday or daily markets falls below or exceeds the limits, a positive or negative balance known as the 'adjustment for changes in market price' is taken into account in the aggregate annual compensation due to beneficiaries. This balance is offset over the course of the facility's lifetime when calculating the net asset value for the following period. The greater the difference between the real and the estimated price, the greater the required adjustment. If the real price falls within the LS1-LI1 band, the facility runs the market risk; if the price falls within the LS1-LS2 or LI1-LI2 band, the plant runs only at 50 % of the price risk (either it bears only half of the resulting lower income, or retains only half of the resulting higher income). If the price exceeds the LS2 or LI2 limits, the facility does not run any price risk.

The estimated market prices apply to all facilities, but are corrected by a coefficient per technology that reflects the difference between the average market price and the hourly prices actually charged by the facilities.[38]

(f) The estimated operating costs:

– **Variable operating costs** include insurance costs, administrative expenses and other general costs, representation costs, transmission costs and distribution network access tariffs, operations and maintenance, electricity production tax, consumption (water, gas, etc.) and fuel costs associated with the operation of each standard facility. For cogeneration installations, the cost of CO_2 emission rights not obtained from free allocations is also considered.

[37] They are calculated as the arithmetic mean of the listed prices of the relevant annual futures contracts traded on the electricity futures market run by the Iberian Energy Derivatives Exchange (OMIP) over the six-month period prior to the regulatory half-period for which the market price is estimated.

[38] These coefficients were calculated by CNMC on the basis of real market prices in 2014 and 2015. For example, the coefficient is 0.9997 for cogeneration facilities, 1.0207 for solar PV and 0.8889 for onshore wind.

– **Fixed operating costs** include the cost of renting land and, costs associated with the safety of installations and applicable taxes, such as the tax on immovable property and the tax on electricity generated. The scheme considers that these costs increase yearly by 1% (except regulated costs like taxes).

(g) The pre-tax **reasonable rate of return** is calculated and set by law every six years based on the average secondary market yield of the ten-year Treasury bonds, plus a spread. In the first regulatory period it was calculated as follows:

– For existing facilities, it was calculated as the average secondary market yield of the ten-year Treasury bonds during the ten years prior to the entry into force of Royal Decree-Law 9/2013 (14 July 2013) plus 300 basis points, i.e. 7.398 % before tax. The revenue obtained prior to the adoption of Royal Decree 413/2014 was taken into consideration to calculate the profitability over their lifetime.

– For new facilities, it was the secondary market yield of the ten-year Treasury bonds for the months of April, May and June 2013 plus 300 basis points, i.e. 7.503 % before tax.

– Facilities that attain the reasonable rate of return before the end of their lifetime are not entitled to receive compensation for investments and only receive (if applicable) compensation for operations.

(h) **Adjustment coefficient** 'C' for the standard facility affects the value of compensation for investments. This coefficient has a value between zero and one and represents the investment costs of a standard facility that cannot be recovered from the sale of energy on the market. To calculate the adjustment coefficient, several parameters are taken into account: the net asset value of the standard facility at the start of the regulatory period, its estimated revenue and operating costs for the remainder of its lifetime and the discount rate that takes the reasonable rate of return as its value.

(36) The eligible costs are only those related to electricity production. There is no compensation for any other costs caused by regulations or administrative acts that do not apply in the whole territory of Spain. If a facility is modified, new investments are not eligible for any additional compensation. Its remuneration is also decreased if the modifications result in a reduced installation capacity or generation volume.

(37) The lifetime of the facility and the initial investment value of a standard facility are fixed for the entire lifetime of the facility. The remaining compensation benchmarks may be revised as follows:

- Compensation for operations applicable to technologies whose operating costs depend mainly on fuel prices is updated at least annually.

- Every three years, the estimated market prices are adjusted in line with real market prices. The estimated revenues from energy sales are also revised accordingly.

- Any compensation parameters may be reviewed every six years (each regulatory period), including the reasonable return for the remaining lifetime of the standard facilities. The parameters that are not reviewed before the beginning of the following regulatory period are extended for the following regulatory period.

(38) The compensation for cogeneration facilities takes into account the revenue indirectly derived from the generation of useful heat. The revenue is calculated by valuing the useful heat based on the alternative cost of generating it using conventional equipment that uses the same type of fuel as the cogeneration facility.

(39) The compensation for standard facilities that generate electricity from bioliquids or biogas (including cogeneration facilities) and those using waste other than household waste, biomass (where the biomass is less than 90 % of the primary energy used) and black liquors takes into account the standard revenue or costs avoided for energy recovery and waste disposal.

(40) The compensation for standard facilities that use domestic waste takes into account the standard revenue obtained from waste disposal fees.

(41) The Spanish authorities explained that the scheme intends to provide a reasonable profitability to beneficiaries, see paragraph (35)(g), i.e. that is proportionate and does not distort competition, and has a positive impact that outweigh its potential negative effects. According to the scheme's methodology, facilities that are not managed properly will obtain a lower than expected return, and vice versa.

2.5.3. Cumulation of aid

(42) The specific remuneration can be cumulated with other support. Beneficiaries have to declare any subsidy received before or after the specific remuneration is granted. If beneficiaries do not provide this information or provide erroneous information, they will lose the right to receive the specific remuneration and, if necessary, have to return any sums received.

(43) Article 24 of Royal Decree 413/2014 establishes that if a facility receives other State aid, the specific remuneration could be reduced by up to 90 % of the amount of the subsidy received. The Spanish authorities have undertaken to amend this article and remove this limitation of 90 % to ensure that in the presence of other aid, the specific remuneration is reduced so as to meet the State aid cumulation rules.

2.5.4. Competitive bidding processes

(44) Aid granted to new installations is generally granted by means of a competitive bidding process (auction). The laws governing the scheme provide exceptions in the form of two administrative procedures, which are described in section 2.6.1.

(45) On the competitive selection of new beneficiaries, Royal Decree 413/2014 establishes that the Government must specify the facilities or technologies that are eligible, the selection criteria and the compensation benchmarks applicable to the relevant standard facilities in advance of each auction.

(46) The auction is designed as a descending clock auction. The starting price is the initial investment value of the standard facility. The bids need to be formulated as percentage reductions from the initial investment value. The bidders with the highest percentage reductions are selected.

(47) The auction operates as a pay-as-clear auction. The last winning bid determines the remuneration parameters of the standard facility, which are then used to calculate the specific remuneration of the individual successful facilities. The competitive bidding process concludes with a decision that allows the successful facilities with *pre-allocation* status to be registered in the specific remuneration registry.

(48) Spain has confirmed that as of 1 January 2017, all auctions are open to all producers in accordance with the terms laid down in point 126 of the EEAG.

2.6. Aid awarded under the scheme

(49) The Spanish authorities have confirmed that no aid was granted under the scheme between 11 June and 30 June 2014.

(50) Existing facilities were automatically registered under the scheme on 9 July 2014, with pre-allocation status or operating status depending on their specific situation on that date.[39] If a facility had obtained the *premium* remuneration for part of its capacity under the previous scheme, only this part would be entitled to the *specific* remuneration covered by this decision.

(51) Since 11 June 2014 (when the Royal Decree 413/2014 entered into force), the Spanish authorities have organised two administrative procedures (in 2014 and 2015) and three auctions (one in 2016 and two in 2017).

2.6.1. Administrative procedures

2.6.1.1. 120 MW for cogeneration, biomass, biogas, hydroelectric and waste facilities (2014)

(52) This call was aimed at new facilities or modifications to existing ones that had already applied to join the premium economic scheme or had received a start-up certificate within 30 days of Law 24/2013 on the electricity sector entering into force.

(53) To be eligible, modifications to existing installations must have been authorised prior to Royal Decree-Law 1/2012 or otherwise comply with certain requirements such as replacing existing equipment with new equipment; in the case of cogeneration, this had to be highly efficient.[40]

(54) The Spanish authorities explained that eligible facilities had already started construction under the premium economic scheme regulated by Royal Decree

[39] Order IET/1168/2014 of 3 July 2014, which determines the date of automatic registration of certain installations in the register of the specific remuneration regime provided for in Title V of Royal Decree 413/2014 of 6 June 2014. BOE 164 of 7 July 2014, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-7113.

[40] See requirements for cogeneration facilities in paragraph (16).

661/2007[41] and Royal Decree-Law 6/2009[42], at a time when the capacity objectives assigned to each technology were still some way off being achieved. Promoters logically expected to have access to the premium economic scheme. However, Royal Decree-Law 1/2012[43] removed the economic incentives for new facilities before those expectations could materialise. To restore the continuity of support, Law 24/2013 provided for a quota of 120 MW for certain facilities, which was subsequently established by Royal Decree 413/2014. The objective of this call was therefore to increase the generation of electricity from renewable energy sources and high efficiency cogeneration facilities, allowing the facilities whose construction had already started under the previous scheme to access the specific remuneration scheme. In fact, the call establishes as a prioritisation criterion the fact that installations had applied to join the economic scheme before 28 January 2012 (date of entry into force of Royal Decree-Law 1/2012).

(55) The Spanish authorities explained that the variable costs borne by these installations are higher than the revenues from the sale of energy in the market. In the absence of compensation, they would therefore bear losses and would stop generating electricity.

2.6.1.2. 450 MW of wind facilities on the Canary Islands (2015)

(56) In 2015, the Ministry of Energy, Tourism and Digital Agenda organised a call to speed up the installation of up to 450 MW of wind power on the Canary Islands by means of an administrative procedure. The facilities had to commit to being operational within 36 months, and in any case at the latest by 31 December 2018.[44]

(57) Eligible facilities were those that had not been registered in the administrative register of electricity production facilities by 8 August 2014 and that had not been registered in the former scheme's register.[45]

(58) To justify the choice of technology and specific location of the Canary Islands, Spain argued that wind and photovoltaic energy are cheaper than conventional generation in the non-peninsular territories (conventional generation is also subsidised to maintain wholesale prices equivalent to those on the mainland[46]). Spain has provided data on the average variable generation costs and the estimated savings in the cost of support of

[41] Royal Decree 661/2007 of 25 May 2007, which regulates the production of electrical energy under the special regime.

[42] Royal Decree-law 6/2009 of 30 April 2009, which adopts certain measures in the energy sector and approves the social bonus.

[43] Royal Decree-law 1/2012 of 27 January 2012, which suspends the pre-allocation of remuneration procedures and removes the economic incentives for new installations for the production of electricity from cogeneration, renewable energy and waste.

[44] This call follows another call launched in 2014 that received applications from wind projects for a reduced capacity. In fact, Order IET/1459/2014 established that facilities had to enter into operation by 31 December 2016. Order IET/1953/2015 modified the 2014 Order by simplifying the selection criteria, establishing a new call for applications and extending the deadline for completion of projects to 31 December 2018. The 2015 Order also allows applicants from the first call to reapply under the simplified conditions.

[45] Royal Decree-Law 1/2012 had suspended the procedures to register electricity production facilities in the previous scheme.

[46] By way of the additional remuneration scheme. See paragraph (6).

wind and photovoltaic technologies. Once operational, the new wind power capacity attributed in the call will save the electricity system around EUR 120 million a year.

(59) The Canary Islands alone make up more than two-thirds of the total generation costs in non-peninsular systems, and these costs are increasing. In addition, 41 % of its capacity is more than 20 years old, and its abundant wind resources have not yet been fully exploited. The size of the Canary Islands' systems also allows greater integration of intermittent renewable technologies compared to smaller systems like Ceuta and Melilla.

(60) The Spanish authorities explained that the aim of this procedure was therefore to ensure that wind power plants were installed and replaced on the Canary Islands in order to improve the generation efficiency and to reduce the generation costs in the system in the shortest possible time.

2.6.2. Competitive bidding procedures

2.6.2.1. First auctions for biomass and wind in 2016

(61) In January 2016, Spain organised two simultaneous auctions: one for 200 MW of capacity for biomass facilities (including cogeneration facilities) on the Spanish mainland, and one for 500 MW of capacity for wind facilities open to the entire Spanish territory.[47]

(62) The call was open to both new installations and to the repowering of older wind facilities provided they were not already receiving any aid under the specific remuneration scheme or another scheme. On biomass, the call aimed to increase existing capacity by 39 % to take advantage of the dispatchable nature of this technology.

(63) Companies holding more than 40 % of the market share in any given Spanish electricity system were not allowed to participate in the auction. The remuneration parameters were published in the ministerial order that regulated the call. All parameters are subject to the reviews set out in Royal Decree 413/2014.

(64) Bids were sealed and consisted of a percentage reduction on the initial investment value of the applicable standard facility for a capacity of at least 1 kW. Bids offering the highest reduction percentage were selected first, and the auction cleared at the marginal percentage of reduction once the capacity quota was exhausted. Penalties for non-delivery were set at 20 EUR/kW. The successful bidders had to finalise their projects within 48 months.

2.6.2.2. Auctions organised in 2017

(65) Spain's renewable energy consumption reached 16.14% of final energy consumption in 2014. According to the Spanish authorities, the projected growth in electricity

[47] Royal Decree 947/2015 adopted on 16 October 2015 announced the call. Order IET/2212/2015 adopted on 23 October 2015 regulated the allocation procedure and the remuneration parameters. A resolution issued by the Secretary of State for Energy on 30 November 2015 convened the auction and established the auction rules.

consumption up to 2020 (around 0.8 % per year) justified a greater deployment of new renewable capacity to meet the target of 20 % renewable energy of final energy consumption by 2020. To this end, the Spanish authorities carried out two auctions in May 2017[48] and in July 2017[49] in which 8 037 MW of renewable energy generation capacity were allocated .

(66) In both auctions, eligible projects were new installations in mainland Spain that did not lead to the replacement of existing capacity. In the May auction, all renewable technologies competed for the 3 000 MW auction volume. However, offers were differentiated according to three different types of reference facilities: for wind, photovoltaic (PV) and other technologies. In the July auction, wind and PV were the only eligible technologies, with both competing for the same auction volume. The initial investment values and other remuneration parameters such as operating costs per MWh, number of operating hours, lifetime[50] and compensation for investments were published in a Ministerial Order in advance of the auction. The guaranteed return on investment costs established in Royal Decree 413/2014 for new facilities (7.503 %) applied. Both auctions had a tighter schedule for completion of projects, as winning projects would have to be operational by 31 December 2019. Penalties for non-delivery were increased to 60 EUR/kW.

(67) The Spanish authorities explained that the reference compensation parameters applicable in the auctions were benchmarked against recently commissioned renewable energy source (RES) facilities to encourage efficient projects. In particular, the operating hours for photovoltaic facilities (2 367 hours) and wind facilities (3 000 hours) were set according to the top performing facilities in Spain (around 4-5 % of the total installed photovoltaic/wind capacity). The Spanish authorities clarified that facilities that would not achieve these operating hours could still take part in the auction. However, if selected their payments under the scheme would be reduced proportionally according to the rules explained in paragraph (35)(d).

(68) Bids were sealed and consisted of a percentage reduction on the initial investment value of the applicable standard facility. The discounted investment costs were used to calculate the applicable compensation for investments for each bid in EUR/MW. This value was divided by the reference operating hours of the technology, resulting in a compensation amount in EUR/MWh. This value can be described as the bid's unit costs for the electricity system. All bids were then ranked according to this value, regardless of technology. Successful bids were those that required the lowest unit costs up to the total capacity auctioned. In the event of a tie in unit costs, projects with the higher number of operating hours would be selected first, and if projects were still ranked equally, larger projects would be favoured.

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[48] Royal Decree 3529/2017 adopted on 31 March 2017 announced the call. Order ETU/315/2017 of 6 April 2017 established the parameters for each reference facility and the methodology to calculate the investment compensation. Two Ministerial resolutions dated 10 April 2017 established the auction procedures and rules.

[49] Royal Decree 650/2017 adopted on 16 June 2017 announced the call. Ministerial Order ETU/315/2017 of 6 April 2017 also applied to this auction, with some modifications introduced by Order ETU/615/2017 of 27 June 2017. The Ministerial resolution of 10 April 2017 established the auction procedures. A Ministerial resolution of 30 June 2017 completed the auction parameters and established the timetable for the auction.

[50] 25 years for all technologies.

(69) The auctions were cleared at the unit costs of the last bid. From this value, the initial investment value of each standard facility was calculated per technology and applied to all winning projects.

(70) In the May auction, the offers were capped at a possible maximum discount of 63.43 % on the initial investment value for wind facilities, 51.22 % for PV and 99.99 % for other technologies. The maximum discounts were set at a level that allowed all technologies to compete on an equal footing – at those levels, they would entail the same costs for the system in EUR/MWh. At the maximum discount levels, the investment value was considered so low that the facility is expected to achieve the target rate of return only from market revenues, and will therefore not need investment compensation. The payments would therefore be zero until at least 2020, which is when the scheme's compensation parameters are due to be revised. Even in the absence of investment compensation, the scheme would still offer protection against wide fluctuations in the market price, as explained in paragraph (35)(e).

(71) The May auction cleared at a level so that the income of the winning projects is likely to be limited to market revenue. However, in any event the projects will have guaranteed returns if the market prices were to fall below 39.89 EUR/MWh for wind, 42.16 EUR/MWh for PV and 41.57 EUR/MWh for other technologies. Based on the second selection criterion for the auction on running hours, almost all selected bids involved wind projects.

(72) The July auction was open only to wind and PV projects as the authorities considered that the May auction had shown little potential for the other technologies, in particular also due to the short completion time (by December 2019). The authorities increased the maximum discounts further to 87.08 % for wind and 69.88 % for PV, which in practice would guarantee a reasonable rate of return at a lower floor price of 28.20 EUR/MWh and 32.67 EUR/MWh respectively. As the July auction cleared at the maximum discount, the authorities decided to award aid to all projects that had bid at this level. The original 3 000 MW auction volume was therefore exceeded (5 036 MW were awarded) and included both wind and PV projects.

2.7. Evaluation of the scheme

(73) Spain has submitted an evaluation plan for the measure. The main elements of the evaluation plan are described below.

(74) The evaluation plan notified by Spain includes 28 evaluation questions in order to assess the scheme's outputs, its direct effects, its indirect effects as well as the proportionality of the aid and the appropriateness of the chosen aid instrument.

(75) The evaluation will provide general information, including the total amount of aid granted by technology, the number and type of beneficiaries, the estimated investment cost of the facilities that received aid, and the auctions that have and will be organised.

(76) The direct effects of the scheme will be evaluated, for example by assessing developments in the production of energy from renewable energy sources, installed capacity, the amounts of funds invested and the effects of the different auctions. The evaluation will also consider what impact alternative levels of clearing prices would have had in the auctions.

(77) The main indirect effects of the scheme that will be evaluated are its contribution to the reduction of CO_2 emissions, the effects of the scheme on the electricity system (for instance, on grid stability) and the effects on electricity prices, on market behaviours and on the market share of conventional electricity producers.

(78) The appropriateness of the aid instrument will be evaluated by comparing the scheme with similar schemes in other EU Member States and by considering the effectiveness of measures that prevent delays or inconsistencies in the implementation of projects receiving support.

(79) The proportionality of the aid will be evaluated, in particular by assessing the evolution of auction results and by analysing whether there was enough competitive pressure in the different auctions.

(80) Evaluation questions related to the general outputs of the scheme will be mostly answered by providing quantitative statistical evidence. Other questions may require qualitative assessment. To evaluate the direct effects of the scheme, Spain plans to employ counterfactual impact evaluation methods in line with the Commission Staff Working Document on Common methodology for State aid evaluation.[51] In particular, where appropriate, the evaluation will include a comparison of projects that were awarded the aid via the auctions with projects that did not receive support as their bids failed.

(81) The evaluation will be carried out by an independent evaluator. This could be either an organisation selected by means of a competitive bidding procedure or the national energy regulator (CNMC). The Spanish authorities explained how it will guarantee the independence and experience of the evaluator as well as protect trade secrets and personal data.

(82) The evaluation report will be subject to public consultation. Spain will submit the final evaluation report to the Commission by the end of 2020. The final report will be published on the Ministry of Energy, Tourism and Digital Agenda's website.[52]

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU)

(83) A measure constitutes State aid within the meaning of Article 107 (1) TFEU if it is '*granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […] in so far as it affects trade between Member States*.'

(84) Support under the notified scheme is attributable to the State as it has been established by law and its implementing decrees and ministerial orders. In addition, beneficiaries receive support sourced from the Spanish treasury budget and from a charge collected from electricity consumers managed by CNMC, which the Court of Justice of the

[51] SWD(2014) 179 final.

[52] Currently www.minetad.gob.es.

European Union (CJEU) has declared as a State resource within the meaning of Article 107 (1) TFEU.[53]

(85) The notified scheme favours the generation of electricity from renewable sources, high efficiency cogeneration and waste by the selected beneficiaries. The measure is therefore selective.

(86) Beneficiaries are compensated at a rate exceeding the returns that they would normally have received from the market in the absence of aid. The measure therefore provides an advantage.

(87) Electricity is widely traded between Member States. The notified scheme is therefore likely to distort competition on the electricity market and affect trade between Member States.

(88) As the result, the notified measure constitutes State aid within the meaning of Article 107(1) TFEU. In its notification, Spain has also acknowledged that the measure constitutes State aid.

3.2. Legality of the aid

(89) The notified scheme is applicable from 11 June 2014. The Spanish authorities notified the Commission about the aid after they had started implementing the scheme and before a Commission decision. Spain has therefore breached the stand-still obligation provided for in Article 108(3) TFEU. The aid granted until the adoption of this decision is unlawful aid.

3.3. Legal basis for the assessment

(90) The Commission has assessed the compatibility of the notified aid scheme on the basis of Article 107(3)(c) TFEU.

(91) The notified scheme aims to promote the generation of electricity from renewable sources. As a result, it falls within the scope of the EEAG.

(92) In line with point 248 EEAG, unlawful environmental aid or energy aid will be assessed in accordance with the rules in force on the date on which the aid was granted. As mentioned in paragraph (49), Spain has confirmed that there was no aid granted under the scheme between 11 June 2014 and 30 June 2014. Awards to new beneficiaries have only taken place after 1 July 2014. Existing beneficiaries were officially registered in the modified scheme on 9 July 2014. This registration is considered to constitute the award act for all aid granted to these existing facilities during their entire lifetime as it takes into account the amounts received under the previous scheme in the calculation of future compensation. In other words, the scheme supersedes and fully replaces the premium economic scheme whose awards are absorbed.

(93) The Commission has therefore assessed the compatibility of the aid under EEAG.

[53] Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314; *Association Vent De Colère and Others, EU*: C: 2013: 851.

3.4. Compatibility with the internal market under EEAG

(94) Given that the support is granted as a premium on top of the market price during the lifetime of the facility, the Commission has assessed the notified measures on the basis of the general compatibility provisions set out in chapter 3.2 EEAG. and the specific compatibility criteria for operating aid granted for electricity from renewable energy sources set out in chapter 3.3.2.1 EEAG.

(95) According to point 151 EEAG, operating aid for high efficiency cogeneration plants may be granted on the basis of the conditions applying to operating aid for electricity from renewable energy sources when the costs for producing a unit of energy in cogeneration plants is higher than its market price.

3.4.1. Contribution to an objective of common interest

(96) The aim of the notified aid measure is to help Spain achieve the renewable energy and energy efficiency targets set by the EU as part of its 2020 strategy by supporting electricity generation from renewable energy sources and high efficiency cogeneration of heat, power and waste. The scheme will help Spain to reduce its greenhouse gas emissions and CO_2 emissions.

(97) The scheme provides support to electricity from cogeneration installations that meet the definition of high efficiency cogeneration as set out in Article 2(34) of Directive 2012/27/EU of the European Parliament and of the Council[54] and in line with point 139 EEAG. According to point 140 EEAG, State aid for cogeneration using waste as input fuel can make a positive contribution to environmental protection, provided that it does not circumvent the waste hierarchy principle. This has been confirmed by Spain, as mentioned in paragraph (19).

(98) The notified scheme is of unlimited duration. However, in line with point 121 EEAG, Spain has committed not to apply the scheme beyond 10 June 2024 without any Commission decision approving the measure, as mentioned in paragraph (29).

(99) The Commission considers that the notified scheme is aimed at an objective of common interest in accordance with Article 107(3) TFEU.

3.4.2. Need for State intervention and appropriate instrument

(100) According to chapter 3.2.2 EEAG, the Member State has to demonstrate that there is a need for State intervention and in particular that the aid is necessary to remedy a market failure that otherwise would remain unaddressed. In the case of production of renewable electricity, the Commission presumes that there is still residual market failure, which can be addressed through aid for renewable energy for the reasons set out in point 115 EEAG.

[54] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

(101) Under point 107 EEAG, the Commission acknowledges that '*under certain conditions State aid can be an appropriate instrument to contribute to the achievement of the EU objectives and related national targets*.'

(102) The electricity sector law (Law 24/2013) authorises the Government to set up the specific remuneration scheme to promote electricity from renewable energy sources, high efficiency cogeneration and waste in exceptional cases where there is an obligation to meet energy objectives derived from Directives or other EU law, or when their deployment reduces energy costs and dependence on external energy. As mentioned in paragraph (5), the aim of the scheme is to support the development of technologies that offer environmental benefits, which would not be economically viable without support, and to help Spain to meet the target of 20 % renewable energy of final energy consumption by 2020. Spain has acknowledged that it needs to increase the deployment of new renewable capacity to meet this target, and has found that renewable capacity auctions are the most cost-efficient alternative to achieve it.

(103) Point 27(c) EEAG stipulates that in order to be deemed compatible, State aid measures must be an appropriate policy instrument to address the objective of common interest. Point 116 EEAG states that in order to help Member States to achieve their national energy and climate change targets, the Commission presumes aid to energy from renewable sources to be appropriate and have limited distortive effects provided all other compatibility conditions are met. Point 145 EEAG provides that State aid may be considered an appropriate instrument to finance energy efficiency measures, such as cogeneration, independently of the form in which it is granted.

(104) Based on these considerations, the Commission considers that the aid is necessary and is an appropriate instrument to address the objective of common interest.

3.4.3. Incentive effect

(105) In line with point 49 EEAG, an incentive effect is present if the aid induces the beneficiaries to change their behaviour so that they achieve the objective of common interest, which they would not do without the aid.

(106) According to point 51 EEAG, Member States must introduce and use an application form for aid, which contains certain information on the project. The granting authority also must carry out a credibility check of the counterfactual scenario.

(i) Existing installations

(107) Existing facilities had already applied for aid under the premium economic scheme. The cash flows of standard facilities provided by the Spanish authorities show that the production costs of electricity from renewable energy sources and cogeneration are higher than the revenues that these facilities can obtain from the market. Without the scheme, there would therefore have been an insufficient incentive to operate the RES installations as such activity would have been unlikely to be economically viable.

(ii) Administrative procedures

(108) The Commission has examined the administrative procedures involved in selecting up to 120 MW capacity of certain technologies in 2014 and 450 MW capacity of wind facilities on the Canary Islands in 2015 (see section 2.6.1).

(109) In the first call, applicants had to have already applied for aid under the premium economic scheme. The call was specifically meant to allow complete projects that had been planned in the hope of receiving aid under the premium economic scheme, but did not receive it because the scheme was interrupted by Royal Decree-Law 1/2012. The registration of a facility in *pre-allocation* status ensures that the holder is entitled to receive the aid if it meets the requirements and builds the facility. As a result, applicants who applied for registration in *pre-allocation* status under the previous scheme would have been confident that their project would meet the requirements for entering the scheme.

(110) In the second call, the selection criteria were intended to quickly deploy and renovate wind capacity that would otherwise not have been deployed at the same pace. Beneficiaries had an incentive to invest thanks to the aid because the wholesale market prices in the non-peninsular territories, which are aligned with the prices on the mainland, are lower than the generation costs of new RES installations.

(111) In both situations, the Commission therefore considers that the aid granted by the two calls has an incentive effect.

(iii) Competitive bidding processes

(112) The general conditions relating to the use of an application form for aid in point 51 EEAG do not apply when the aid is awarded on the basis of a competitive bidding process (point 52 EEAG). In addition, market participants are not willing to invest in RES projects as the investment and operating costs of such projects are still generally higher than what can be earned from electricity sales revenue in the market. This is also evidenced by the lack of market-based investment in RES projects from 2012[55] to the end of 2015 in the absence of generally open RES auctions. The Commission therefore considers that the aid awarded under the notified measure in competitive bidding processes has an incentive effect.

3.4.4. Proportionality of the aid

(113) According to point 69 EEAG, aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the objective. The Commission has assessed proportionality of the aid under the provisions of chapter 3.3.2.1 EEAG on operating aid granted to energy from renewable sources. The same provisions apply to operating aid for high efficiency cogeneration plants according to point 151 EEAG when the costs for producing a unit of energy in cogeneration plants are higher than its market price. Spain has provided examples of standard cogeneration facilities and has demonstrated that the production costs per unit of energy are higher than the market price.

(114) The conditions of point 124 EEAG apply to all beneficiaries of the notified measure regardless of the procedure used to award the aid. In the absence of a competitive bidding process, point 128 EEAG stipulates that the conditions of point 131 EEAG are also applicable.

[55] When the previous scheme was stopped for new entrants in 2012 and later repealed in 2013. See also footnote 4.

(115) As described in paragraph (25), all facilities are subject to the electricity market rules and must participate in the market directly or through a representative. In addition, as indicated in paragraph (31), aid is granted in the form of a premium that compensates facilities for the costs that cannot be recovered by selling electricity. This is in line with the requirements of point 124(a) EEAG.

(116) Beneficiaries are subject to the same standard balancing responsibilities as other technologies as mentioned in paragraph (25), which is in line with point 124(b) EEAG.

(117) In the Spanish market, electricity prices cannot become negative and in cases of oversupply of electricity in the market the price is fixed at zero. As indicated in paragraph (35)(d), the Spanish authorities have undertaken to amend the legislation in order to subtract from the operating hours eligible for support the hours during which the electricity day-ahead market prices are zero for six consecutive hours or more. Payments of the premium will therefore be suspended in case the day-ahead market price falls to zero for at least six consecutive hours (or below zero, should the Spanish regulation allow this eventually). This is in line with point 124(c) EEAG.[56]

(118) Based on the above, the Commission considers that the conditions of point 124 EEAG have been met.

(i) Existing facilities and facilities selected through administrative procedures

(119) Point 131(a) EEAG applies to the compensation of existing facilities and the administrative allocation procedures applied in 2014 and 2015, and states that the aid per unit of energy must not exceed the difference between the levelised costs of energy (LCOE) and the market price of the relevant technology. Point 131(b) EEAG allows a normal return on capital to be included in the LCOE.

(120) Spain has submitted cash flow calculations of 21 standard facilities. These are representative of the various technologies and installation types supported by the scheme. The data show the past sales income (including those deriving from the premium economic scheme for existing facilities), the expected future sales income, the initial investment costs, the operating costs and the compensation to be granted to each facility both for operations and for investments. For all examples provided, the Commission has verified that the aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices (7.503 % before tax for new facilities and 7.398 % for existing facilities). These rates appear to be in line with the rates of return of renewable energy and high efficiency cogeneration projects recently approved by the Commission and does not lead to overcompensation.[57] During the regular revisions of the compensation parameters, the payments to which each beneficiary is entitled in the future are calculated to ensure a reasonable rate of return: future payments are calculated to keep the net present value of the investment at zero

[56] See SA.43756 *Support to electricity for renewable sources* (Italy).

[57] See for example the decisions in cases SA.47205 *Complément de rémunération pour l'éolien terrestre à partir de 2017* (France), SA.43756 *Support to electricity for renewable sources* (Italy), SA.36023 *Support scheme for electricity produced from renewable sources and efficient cogeneration* (Estonia), SA.43140 *Support to renewable energy and CHP* (Latvia), SA.43719 *Système d'aides aux cogénérations au gaz naturel à haute efficacité énergétique* (France).

when the reasonable rate of return (ten-year Treasury bond plus a spread) is used as the discount rate. If an existing facility had reached its reasonable return by 2013, compensation for investments would end and the facility would continue to receive only compensation for operations to cover its operational costs, as described in paragraph (35)(f), in order to ensure that the rate of return is constant over the entire lifetime of the facility.

(121) Point 131(c) EEAG states that the production costs are to be updated regularly, at least every year.

(122) Beneficiaries have to submit information on various aspects of their activity related to compensation on a yearly basis. This includes, for example, proof that they fulfil the equivalent electrical performance requirements, the percentage of primary energy savings, the fuel mix and volumes used, and information on other costs. As indicated in paragraph (37), Spain revises compensation for operations applicable to technologies whose operating costs depend mainly on fuel prices at least once a year. Fixed operating costs are also adapted yearly as mentioned in paragraph (35)(f).

(123) Point 131(d) EEAG states that aid is only granted until the plant has been fully depreciated.

(124) As indicated in paragraph (35)(a), aid is only granted during the lifetime of the facility, which is calculated based on the depreciation period of the equipment and installations in each of the technologies, assuming they are properly maintained.

(ii) Competitive bidding processes

(125) According to point 126 EEAG, aid granted by means of non-discriminatory competitive bidding processes is presumed to be proportionate.

(126) On the requirement under point 126 EEAG to organise 'pilot tenders' for at least 5 % of the planned new electricity capacity from RES for 2015 and 2016, Spain carried out two competitive auctions for a total capacity of 700 MW (see section 2.6.2) in 2016, which far exceeds the requirement of 5 % of the total new RES capacity for 2015 and 2016. The latter was 1150 MW and included, in addition to the two auctions, only the capacity of 450 MW on the Canary Islands in 2015 (see section 2.6.1.2). As indicated in paragraph (48), Spain has confirmed that as of 1 January 2017, all aid is granted in competitive bidding processes.

(127) On the general requirement of openness to all types of generation, the two auctions organised in May 2017 and July 2017 pitted different technologies against each other. The May auction was open to all types of generation including 'other technologies' apart from wind and PV installations. As for the July auction, Spain has argued that based on the market information from the May auction, keeping the third category for other technologies in the auction would lead to suboptimal results. The results of the May auction showed that other technologies would not be able to compete with wind and PV on cost and would not be able to help achieve the 2020 RES targets in time. As a result, a process open to all generators would have led to a suboptimal result in line with point (126) EEAG.

(128) The Spanish authorities explained that the cap on discounts referred to in paragraph (70) is a way of striking the right balance between the objectives of minimising the

overall costs for the electricity system and guaranteeing a level playing field for the different technologies. It should be recalled that at the respective maximum discounts, the extra costs for the electricity system (which is the relevant parameter to determine the winning bids) are equal for all technologies. Based on the results of the May auction, the Spanish authorities increased the maximum discounts and therefore reduced the potential aid amounts further.

(129) The maximum discounts in the May auction already imply that beneficiaries are highly unlikely to receive aid since their investment compensation is zero and they will only be protected against drops in the market price to levels that are unlikely to be observed in the years to come.[58] The higher maximum discounts in the July auction in practice reduced protection against a drop in the market price even further, i.e. to an even lower guaranteed price level. At the same time, this protection against an unexpectedly sharp fall in the market price helps to ensure that projects that are granted aid have a reasonable chance of securing project financing, and therefore of being completed on time to help achieve the 2020 RES targets.

(130) The Commission considers that the support levels at the maximum discounts minimise aid with regard to the objectives pursued, in particular to allow different technologies to compete against each other and to ensure a reasonable rate of return in the event of very bleak market conditions. This therefore ensures the bankability and completion of projects.

(131) Based on the above considerations, the Commission concludes that the aid granted under the scheme is proportionate within the meaning of point (69) EEAG.

3.4.5. Avoidance of undue negative effects on competition and trade

(132) Aid for environmental purposes will, by its very nature, tend to favour environmentally friendly products and technologies at the expense of other, more polluting ones. According to point 90 EEAG, the Commission considers that this effect of the aid will in principle not be viewed as an undue distortion of competition since it is inherently linked to the very objective of the aid.

(133) According to point 116 EEAG, the Commission presumes aid granted to energy from renewable sources to have limited distortive effects provided all other compatibility conditions are met.

(134) In addition, as set out in paragraphs (22) and (23), Spain has committed not to grant any aid to firms in difficulty or to those subject to an outstanding recovery order following a previous Commission decision that declared an aid measure illegal and incompatible with the internal market. This is in line with points 16 and 17 EEAG.

(135) As a result, the Commission concludes that the distortion of competition caused by the notified scheme is balanced by the positive contribution to common policy objectives.

[58] The price forecasts for the Spanish electricity market by international organisations expect electricity prices to increase in the coming years, while the guaranteed price level corresponding to the maximum discounts of both the May and July auctions is significantly below current price levels.

3.4.6. Transparency of aid

(136) According to point 104 EEAG, Member States must ensure the transparency of aid granted by publishing certain information on a comprehensive State aid website. In line with point 106 EEAG, Member States must comply with this obligation as of 1 July 2016.

(137) The Spanish authorities have confirmed that they will comply with the transparency requirements set out in points 104-106 EEAG.

3.4.7. Articles 30 and 110 TFEU

(138) In accordance with point 29 EEAG, as the support for RES is partly financed by a charge levied on all electricity consumption, the Commission has examined its compliance with Articles 30 and 110 TFEU.

(139) According to the case-law, a charge that is imposed on domestic and imported products based on the same criteria may nevertheless be prohibited by the Treaty if the revenue from such a charge is intended to support activities that specifically benefit the taxed domestic products. If the advantages that those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products, and that charge constitutes a charge with an effect equivalent to custom duties, which is contrary to Article 30 of the Treaty. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 of the Treaty and will be contrary to that provision in terms of the proportion used to offset the burden borne by the domestic products.[59]

(140) If domestic electricity production is supported by aid that is financed by a charge on all electricity consumption (including consumption of imported electricity), then the method of financing — which imposes a burden on imported electricity that does not benefit from this financing — risks having a discriminatory effect on imported electricity from renewable energy sources and thereby violating Article 30 and/or 110 TFEU.[60] A similar issue would arise between any neighbouring country that has signed a free trade agreement with the EU that contains provisions similar to Articles 30 and 110 TFEU.

(141) As described in section 2.2, the scheme is partly financed by a charge imposed on electricity consumed in Spain, irrespective of whether it is produced domestically or imported, and this charge is partly calculated on the amount of electricity consumed and thereby imposed on the product itself. As indicated in paragraphs (8) and (9), the charge imposed on electricity consumed in Spain amounted to EUR 1 168.4 million, or 17.5 % of the financing of the specific remuneration scheme in 2015.

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[59] Joined Cases C-128/03 and C-129/03 AEM, EU:C:2005:224; Case C-206/06 Essent, EU:C:2008:413, paragraph 42.

[60] Case 47/69 *France v Commission*, EU:C:1970:60, paragraph 20. See also Case SA.38 632 (2014/N) Germany — *EEG 2014 — Reform of the Renewable Energy Law*.

(142) Where a Member State uses a charge that is levied on imported and domestic products alike to finance aid for domestic producers, the charge may have the effect of further exacerbating the distortion on the product market caused by the aid as such.

(143) In order to remedy any possible past discrimination under Articles 30 or 110 TFEU, Spain has undertaken to reinvest the share of the charges collected on imported renewable and CHP electricity from 2007 to 2017 in projects and infrastructure that specifically benefit imports.

(144) In particular, Spain plans to allocate EUR 220 million to ongoing interconnection projects included in the Madrid Declaration signed between Portugal, France and Spain, or to similar projects that may be agreed by 2025.

(145) The choice of project will depend on its financing needs, its timetable and specific milestones according to the agreed roadmap. Depending on these criteria, it would be possible to allocate the amount proposed to one or several projects.

(146) The Spanish authorities explained that the 2025 deadline will allow it to include projects that are mature enough. It also gives the Spanish transmission system operator REE time to carry out the preparatory work required to include another project in the list.

(147) If this commitment is not feasible, as an alternative Spain undertakes to open future tenders to producers of renewable energy sources established in neighbouring countries with which it has bilateral agreements in this area for a capacity of 86.45 MW,[61] with the aim of remedying the discrimination caused in the period 2007-2017.

(148) Reinvesting the share of revenue generated by a parafiscal charge levied on imports in projects and infrastructure that specifically benefit imports has been recognised by the Commission as an appropriate means of correcting potential historical discrimination arising from Articles 30 and 110 of the Treaty.[62]

(149) In order to alleviate any concern regarding future compliance with Articles 30 and 110 TFEU, Spain has committed to opening up all future competitive bidding processes to producers of renewable energy sources established in neighbouring countries with which it has bilateral agreements in this area.

(150) The share to be opened up to the producers concerned will be calculated by multiplying Spain's gross electricity imports by the share of RES and highly efficient CHP electricity (using the previous year, or the last year available) for each of the neighbouring countries from which electricity is imported, divided by Spain's total electricity consumption and taking into account the share of the financing of the

[61] Compensation for the period 2007-2017, including the power auctioned in 2017.

[62] SA.15 876 (N49 0/200) — Italy — *Stranded costs of the electricity sector* (OJ C 250,8. 10.2005, p. 10); SA.33 995 (2013/C) (ex 2013/NN) — Germany — *Support of renewable electricity and reduced EEG surcharge for energy-intensive users* (OJ L 250, 25.09.2015); SA.46 898 (2016/N) — France — *Mécanisme de soutien aux installations de production d'électricité utilisant le biogaz produit par la méthanisation et aux installations de production d'électricité utilisant l'énergie extraite de gîtes géothermiques*.

scheme that is levied on the electricity consumed. The resulting percentage will be applied to the total capacity available in the tender.

(151) The Commission considers Spain's proposals to alleviate all concerns of discrimination against renewable electricity producers in other Member States under Articles 30 and 110 TFEU.

3.4.8. Compliance with environmental legislation

(152) As outlined in paragraph (19) Spain has confirmed that it complies with Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy with regard to the support provided to hydropower plants under the notified scheme, in line with point 117 EEAG.

(153) As indicated in paragraph (20), Spain has confirmed that the waste hierarchy as set out in Directive 2008/98/EC (Waste Framework Directive) is respected in terms of the support provided under the notified scheme to plants using waste. This is in line with point 118 EEAG.

3.5. Comments of third parties and compliance with other EU law

3.5.1. Assessment of State aid to existing installations

(154) The investors have made submissions on the application of the scheme to existing installations claiming that the previous scheme would not constitute State aid, or would in any event be compatible with the internal market.

(155) As a general comment, the Commission recalls that there is 'no right to State aid'.[63] A Member State may always decide not to grant an aid, or to put an end to an aid scheme. Where the aid has not been authorized by the Commission, the Member State is obliged to suspend the scheme until the Commission has declared it compatible with the internal market pursuant to Article 108(3) TFEU.

(156) In the present decision, the Commission has assessed the measure notified by Spain (see section 2.1). It has therefore assessed whether existing installations receive overcompensation for their entire period of life, and has found that on the basis of the total payments received under both schemes (the specific remuneration scheme and the premium economic scheme), that is not the case, as explained above in section 3.4.4. As Spain has decided to replace the premium economic scheme with the notified aid measure it is not relevant for the scope of this decision to assess whether the originally foreseen payments under the previous schemes would have been compatible or not.

[63] Opinion of Advocate General Wahl in *Kotnik*, paragraph 79: "*[…] under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company*." See also to that effect Order in *Milchindustrie-Verband e.V. und Deutscher Raiffeisenverband e.V. v Commission*, T-670/14, EU:T:2015:906, paragraph 29.

3.5.2. General principles of Union law of legal certainty and legitimate expectations

(157) The investors argue, both before investor-State arbitration tribunals and in their submissions to the Commission, that by modifying the support scheme with regard to existing installations, Spain has violated the general principles of Union law of legal certainty and legitimate expectations.

(158) In the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectations with regard to those State aid payments are excluded. That is because according to the case-law of the Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission.[64]

3.5.3. Alleged violation of the provisions of the Energy Charter Treaty

(159) A number of investors have initiated investor-State arbitration against Spain on the basis of the Energy Charter Treaty against the changes brought by the Royal Decree 413/2014 to beneficiaries of the premium remuneration scheme it replaces.

(160) As a preliminary point, the Commission observes that most of the investors that have brought cases against Spain are based in other Member States of the Union. The Commission considers that any provision that provides for investor-State arbitration between two Member States is contrary to Union law; in particular, this concerns Article 19(1) TEU, the principles of the freedom of establishment, the freedom to provide services and the free movement of capital, as established by the Treaties (in particular Articles 49, 52, 56, and 63 TFEU), as well as Articles 64(2), 65(1), 66, 75, 107, 108,[65] 215, 267 and Article 344 TFEU, and the general principles of Union law of primacy, unity and effectiveness of Union law, of mutual trust[66] and of legal certainty.

(161) The conflict concerns both substance and enforcement. On substance, Union law provides for a complete set of rules on investment protection (in particular in Articles 49, 52, 56, and 63 TFEU, as well as Articles 64(2), 65(1), 66, 75 and 215 TFEU). Member States are hence not competent to conclude bilateral or multilateral agreements

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[64] Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland*, EU:C:1997:163, paragraph 25, in which the Court of Justice has concluded that "In view of the mandatory nature of the supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principles, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed." (paragraphs 13 and 14); see also the judgment in case C-169/95 *Spain v Commission* EU:C:1997:10.

[65] See on Articles 107 and 108 TFEU Decision (EU) 2015/1470 of the Commission of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — arbitral award of 11 December 2013 in *Micula v Romania* (OJ L 232 of 4.9.2015, p. 43).

[66] Opinion 2/13, paragraphs 168, 191, 194 and 258 first indent; Case C-536/13 *Gazprom* EU:C:2015:316; Cases C-411/10 and C-493/10 *N.S. a.o.* EU:C:2011:865, paragraph 83; Case C-195/08 *PPU, Rinau* EU:C:2008:406, paragraph 50; Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA* v *West Tankers* EU:C:2009:69; Case C-159/02, *Turner* EU:C:2004:228, paragraph 24, and Cases C-187/01 and C-385/01, *Gözütok und Brügge* EU:C:2003:87, paragraph 33.

between themselves, because by doing so, they may affect common rules or alter their scope.[67] As the two sets of rules on investment protection potentially applicable between an EU Member State and an investor of another State (i.e. the Treaties and intra-EU bilateral investment treaties (BITs) or the ECT in an intra-EU setting) are not identical in content and are applied by different adjudicators, there is also a risk of conflicts between the international investment treaty and Union law.[68]

(162) On enforcement, an Arbitration Tribunal created on the basis of the Energy Charter Treaty in a dispute between an investor of one Member State and another Member State or an intra-EU BIT has to apply Union law as applicable law (both as international law applicable between the parties and, where relevant, as domestic law of the host State). However, according to the case-law, it is not a court or tribunal of a Member State, and hence cannot make references to the ECJ, because in particular the requirements of permanence, of a State nature, and mandatory competence are not met.[69]

(163) The resulting treaty conflict is to be solved, in line with the case-law of the Court, on the basis of the principle of primacy in favour of Union law. For those reasons, ECT does not apply to investors from other Member States initiating disputes against another Member States.

(164) In any event, there is also on substance no violation of the fair and equitable treatment provisions. As explained above at section 3.5.2, in the specific situation of the present case Spain has not violated the principles of legal certainty and legitimate expectations under Union law. In an intra-EU situation, Union law is part of the applicable law, as it constitutes international law applicable between the parties to the dispute. As a result, based on the principle of interpretation in conformity, the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme. In an extra-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid. This has been expressly recognised by Arbitration Tribunals.[70] It is in any event settled case-law[71] that a measure that does not violate domestic provisions on legitimate expectation generally does not violate the fair and equitable treatment provision.

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[67] Case C-370/12, *Pringle* EU:C:2012:756, paragraphs 100 and 101.

[68] See Cases C-249/06, *Commission* v *Sweden* EU:C:2009:119, paragraph 42; C-205/06, *Commission* v *Austria* EU:C:2009:118, paragraph 42; and Case C-118/07, *Commission* v *Finland* EU:C:2009:715, paragraph 33. On the fact that the risk of conflict is sufficient to trigger incompatibility, see also Case C-471/98, *Commission* v *Belgium* ("*Open Skies"*) EU:C:2002:628, paragraphs 137 to 142; and Opinion 2/13, paragraphs 198, 199 and 208.

[69] See, on the requirements in general, Case C-54/96 *Dorsch Consult* EU:C:1997:413, paragraphs 22 to 37, and Case C-377/13 *Ascendi Beiras Litoral e Alta* EU:C:2014:1754, paragraphs 23 to 34. For their application to commercial arbitration, see for example Case 102/81 *Nordsee v Reederei Mond* EU:C:1982:107, paragraphs 11 and 12.

[70] *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.*

[71] *EDF v Romania*, ARB/05/13, paragraphs 279 to 283; *Al Bahloul v Tajikistan*, SCC/64/2008, paragraphs 221 to 225; see also in that sense *ADF Group v United States of America*, ARB(AF)/00/1, para 189

(165) The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the *premium* economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in *Eiser* v *Spain*, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.

(166) Finally, the Commission recalls that this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply Union law. The exclusive forum for challenging its validity are the European Courts.

3.6. Evaluation

(167) The EEAG (point 28 and Chapter 4) state that the Commission may make certain aid schemes subject to an evaluation where the potential distortion of competition is particularly high, i.e. when the measure may risk significantly restricting or distorting competition if their implementation is not reviewed in due time. Given its objectives, evaluation only applies to aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are scheduled.

(168) The scheme fulfils the criteria of being a scheme with a large aid budget and containing novel characteristics; it will therefore be subject to an evaluation.

(169) Spain has notified the Commission about an evaluation plan together with the aid scheme. The main elements are described in section 2.7 above. The plan defines the scope and methods to be used in the evaluation. These take into account the Commission Staff Working Document on Common methodology for State aid evaluation.[72]

(170) The Commission considers that the notified evaluation plan contains the necessary elements: the objectives of the aid scheme to be evaluated, the evaluation questions, the result indicators, the proposed methodology to conduct the evaluation, the data collection requirements, the proposed timing of the evaluation including the date of submission of the final evaluation report, the description of the independent body conducting the evaluation or the criteria that will be used for its selection and how the evaluation will be published.

(171) The Commission notes that the scope of the evaluation is suitably defined. It comprises a list of evaluation questions with matched result indicators. Data sources are defined for each question. The evaluation plan also sets out and explains the main methods that will be used to identify the impact of the scheme, and discusses why these methods are likely to be appropriate for the scheme in question.

(172) The Commission acknowledges the commitments made by Spain on ensuring that the evaluation is conducted by an independent evaluation body in accordance with the notified evaluation plan. The procedures identified for selecting such an evaluation

[72] SWD(2014) 179 final

body are appropriate in terms of independence and skills. In addition, the proposed publication of the evaluation results should ensure transparency.

(173) The Commission notes the commitment made by Spain to submit the final evaluation report by the end of 2020.

4. AUTHENTIC LANGUAGE

(174) As mentioned under section 1 above, Spain has accepted to have the decision adopted and notified in English. The authentic language will therefore be English.

5. CONCLUSION

The Commission laments the fact that Spain implemented the aid measure in breach of Article 108(3) TFEU.

The Commission has assessed the compensation that facilities receive under the scheme over their entire lifetime. For existing facilities, this includes the payments received under the premium economic scheme. On the basis of the aforementioned assessment, it has decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

If this letter contains confidential information that should not be disclosed to third parties, please inform the Commission within 15 working days of the date of receipt.

If the Commission does not receive a reasoned request by that date, it will assume that you agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:
http://ec.europa.eu/competition/elojade/isef/index.cfm.

You should send your request electronically to the following address:

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission

Bilaga 4

NACKA TINGSRÄTT | **PROTOKOLL** 2019-01-23 Handläggning i Nacka | Aktbilaga 149 Ärende nr Ä 2550-17

Handläggning i parternas utevaro

RÄTTEN
Lagmannen [redacted] samt rådmännen [redacted] och [redacted] (referent)

PROTOKOLLFÖRARE
Referenten, biträdd av beredningsjuristen [redacted]

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SAKEN
Hinder mot verkställighet

ÖVERKLAGAT AVGÖRANDE
Kronofogdemyndighetens beslut den 16 mars 2017 i ärende nr U 25445-16/0103

BAKGRUND

I slutet av 1990-talet införde Rumänien olika investeringsincitament, till exempel skattelättnader och tullbefrielser, som syftade till att öka investeringar i missgynnade regioner i landet.

Den 29 maj 2002 träffade Sveriges och Rumäniens regeringar ett avtal om främjande och ömsesidigt skydd av investeringar (SÖ 2003:2). Enligt avtalet skulle vardera avtalsparten inom sitt respektive territorium främja investeringar gjorda av den andra avtalspartens investerare. I avtalet angavs att tvister i sista hand skulle lösas genom internationell skiljedom, vid bland annat Internationella centralorganet för biläggande av investeringstvister (ICSID – International Centre for Settlement of Investment Disputes) enligt 1965 års Washingtonkonvention.

Förhandlingar om Rumäniens tillträde till EU inleddes i februari 2000. I EU:s gemensamma ståndpunkt, den 21 november 2001, konstaterades att de stödordningar

som investeringsincitamenten innebar inte överensstämde med EU:s regelverk om statligt stöd. Rumänien upphävde de flesta av berörda investeringsincitament den 31 augusti 2004.

Klagandena i ärendet, som hade gjort investeringar i Rumänien, väckte talan vid skiljedomstol och begärde ersättning för sina skador till följd av att investeringsincitamenten hade upphävts. Genom skiljedomstolens dom den 11 december 2013 förpliktades Rumänien att betala skadestånd till klagandena med 376 433 229 rumänska lei (motsvarande drygt 900 miljoner kr) jämte viss ränta.

I beslut den 30 mars 2015 (1470/2015) föreskrev EU-kommissionen (nedan Kommissionen) att utbetalningar i enlighet med skiljedomen utgör statligt stöd i den mening som avses i artikel 107.1 i Fördraget om Europeiska unionens funktionssätt och att de dessutom är oförenliga med den inre marknaden. Kommissionen föreskrev också att Rumänien inte får betala ut sådant oförenligt statligt stöd och ska återkräva sådant oförenligt statligt stöd som redan har betalats ut. Kommissionens beslut har överklagats och överklagandena handläggs av EU-tribunalen.

Klagandena har hos Kronofogdemyndigheten ansökt om verkställighet av skiljedomen i Sverige. Genom det överklagade beslutet biföll Kronofogdemyndigheten Rumäniens invändning om att det förelåg hinder mot den sökta verkställigheten.

YRKANDEN M.M.

Klagandena har begärt att tingsrätten med ändring av Kronofogdemyndighetens beslut ska förklara att det inte föreligger hinder mot sökt verkställighet. Klagandena har även begärt ersättning för rättegångskostnad.

Rumänien har bestritt ändring. Rumänien har vidare begärt att tingsrätten, för det fall tingsrätten överväger att ändra Kronofogdemyndighetens beslut, inhämtar ett förhandsavgörande från EU-domstolen, samt beslutar om vilandeförklaring av ärendet till dess sådant avgörande inkommit. Slutligen har Rumänien begärt att tingsrätten, för

det fall tingsrätten överväger att ändra det överklagade beslutet och inte anser det nödvändigt att inhämta ett förhandsavgörande från EU-domstolen, beslutar att vilandeförklara ärendet till dess att EU-tribunalens mål angående överklagandet av Kommissionens beslut slutligt har avgjorts. Rumänien har begärt ersättning för rättegångskostnad.

Kommissionen – som har rätt att yttra sig – har anfört att överklagandet bör avslås.

Tingsrätten har den 16 mars 2018 hållit sammanträde i ärendet varefter parterna och Kommissionen beretts tillfälle att avge avslutande synpunkter.

Tingsrätten har den 13 december 2018 och 22 januari 2019 hållit enskild överläggning.

GRUNDER

Parterna samt Kommissionen har till grund för sina yrkanden och inställningar i huvudsak och sammanfattningsvis anfört följande.

Klagandena

1) Sveriges skyldighet att verkställa skiljedomen, utan att någon prövning sker av domen, vare sig formellt eller materiellt, följer av Sveriges folkrättsliga åtaganden.

Skyldigheten att verkställa skiljedomen stadgas i Washingtonkonventionen artikel 54. I propositionen vid implementeringen, betonades följande.

> [S]kiljedomen skall verkställas som en lagakraftvunnen dom av svensk domstol. Någon prövning av skiljedomen avses inte få ske vare sig i materiellt eller formellt hänseende. Detta konventionsåtagande, som regleras i art. 54, gäller oberoende av om domen har meddelats i Sverige eller i annat land (proposition 1966:146, sid. 11–12).

Regleringen utesluter alla möjligheter för svenska myndigheter och domstolar, dels att pröva om verkställighet ska ske, dels att vid verkställigheten beakta alla former av

formella eller materiella invändningar som framförs. Det innebär att även om det vid verkställigheten av ett svenskt avgörande skulle ha varit möjligt att beakta EU-rättsliga invändningar, får sådana omständigheter inte beaktas vid verkställigheten av en skiljedom av nu aktuellt slag.

Därtill rör det sig inte om en reell regelkonflikt mellan EU-rätten och svensk rätt – i form av Sveriges åtaganden enligt Washingtonkonventionen. I stället följer det av artikel 351 i Fördraget om Europeiska unionens funktionssätt, som gäller alla internationella avtal, att EU-rätten accepterar att skiljedomen verkställs även om den skulle stå i strid med EU:s statsstödsregler.

2) Skiljedomens rättskraft omfattar statsstödsinvändningen och rättskraften respekteras av EU-rätten, även om EU-rätten skulle haft företräde framför Washington-konventionen.

Skiljedomens rättskraft omfattar alla invändningar som framfördes, eller kunde ha framförts, under förfarandet och innebär även att den rättsföljd som är knuten till domen ska stå fast. Under förfarandet framförde Rumänien invändningen att ett eventuellt skadestånd skulle utgöra ett otillåtet statsstöd. Även om EU-rätten, felaktigt, skulle tillerkännas ett företräde framför Washingtonkonventionen, även om skadeståndet rent faktiskt utgör ett otillåtet statsstöd eller även om domen skulle vara materiellt felaktig, omfattas frågan således av domens rättskraft.

Rättskraftsinstitutet är centralt inom den internationella rätten och respekteras av EU-rätten eftersom en annan ordning skulle skapa betydande osäkerhet. Detta även om det skulle innebära en begränsning av EU-rättens fulla genomslag. Av samma skäl, samt att de av motparten framförda undantagen inte är tillämpliga, kan Kommissionens beslut, meddelat efter skiljedomsavgörandet, inte tillmätas betydelse i frågan om skiljedomen ska verkställas.

3) Bestämmelsen i 3 kap. 21 § utsökningsbalken är inte tillämplig vid verkställighet av nu aktuellt slag.

Eftersom Kommissionens beslut enbart riktar sig mot Rumänien – och rör Rumäniens skyldighet mot EU (tredje man) med anledning av beslutet – utgör det inte ett sådant förhållande som rör parternas mellanhavanden. Bestämmelsen i utsökningsbalken tar vidare sikte på materiella förhållanden i tiden efter domen. En tillämpning av bestämmelsen skulle därtill dels, som ovan anförts, strida mot Sveriges åtaganden enligt Washingtonkonventionen, dels strida mot den speciallagstiftning som inrättats för aktuell verkställighet.

4) Det krävs inte något lagakraftbevis för verkställighet av skiljedomen och i vart fall är ingivet äkthetsbevis att beakta som ett lagakraftbevis.

Skiljedomen är ett slutligt avgörande som omedelbart vinner laga kraft. Det är inte heller möjligt att få ett lagakraftbevis eller en verkställighetsförklaring för en ICSID-dom.

5) Rumänien har inte fullgjort förpliktelsen i skiljedomen.

Den bevislättnad som gäller för andra omständigheter enligt 3 kap. 21 § andra stycket utsökningsbalken är inte tillämplig angående påstående om fullgörelse, som uttryckligen ska bedömas enligt första stycket. Rumänien har genom, verkställighetsåtgärder under 2015, betalat 40 miljoner rumänska lei av det utdömda kapitalbeloppet.

Påstådd kvittning har inte ägt rum och har därtill förklarats ogiltig av rumänsk appellationsdomstol. Först om den rumänska kassationsdomstolen, där målet ligger för prövning, meddelar att en kvittning har ägt rum har Rumänien erlagt delbetalningen. Enligt rumänsk rätt måste fordringarna vara av samma slag för att kvittning ska kunna ske mot den ena partens vilja.

Kontoöverföringarna, mellan olika statskontrollerade konton, har inte inneburit betalning enligt rumänsk rätt. Under 2015 öppnades ett statskontrollerat konto i klagandens namn till vilket det överfördes 473 miljoner rumänska lei. Efter Kommissionens beslut om att skadeståndet skulle anses utgöra ett otillåtet statsstöd fördes emellertid medlen över till ett annat statskontrollerat konto, utan att klagandena däremellan hade fått tillgång till medlen.

Överföringen om 101 000 rumänska lei till en exekutor har inte inneburit betalning eftersom medlen aldrig har betalats ut till klagandena.

6) Pågående verkställighetsförfarande i andra jurisdiktioner utgör inte hinder mot sökt verkställighet.

7) Det är inte möjligt att vilandeförklara ärendet.

Av lag (1966:735) om erkännande och verkställighet av skiljedomar i vissa internationella investeringstvister framgår att det enda undantaget, från att omedelbart verkställa skiljedomen, är om uppskov beslutas. Något sådant uppskov har inte meddelats. Det saknas dessutom stöd för att meddela ett sådant uppskov. Det skulle således strida mot tillämplig speciallagstiftning att vilandeförklara ärendet.

8) Eftersom klagandena har orsakats onödiga kostnader på grund av Rumäniens processföring ska Rumänien, oavsett utgången i ärendet, förpliktigas att ersätta klagandena för deras rättegångskostnader med sammanlagt 150 000 kr.

Kort innan tingsrättens sammanträde inkom Rumänien med yttrande, inte bara över det yttrande med bilagor som Rumänien var förelagd att yttra sig över, utan som ett fullständigt svar på klagandenas yttrande av den 15 december 2017. Rumäniens agerande förorsakade att klagandena fick ställa in sitt planerade slutanförande och att det krävdes ytterligare skriftväxling i ärendet. Hade Rumänien i stället aviserat att staten avsåg att ge in ett yttrande avseende helt andra frågor än de som omfattades av

rättens föreläggande hade det varit möjligt att ställa in sammanträdet eller för klagandena att avvakta med att lägga tid på att sammanfatta målet och sina argument i ett manus baserat på Rumäniens talan, såsom den hade formulerats innan dess.

Rumänien

1) Kommissionens beslut i sig – men även EU-rättens regler om otillåtet statsstöd – utgör hinder mot att verkställa aktuellt avgörande.

Enligt Washingtonkonventionen ska Sverige verkställa en ICSID-dom som en lagakraftvunnen svensk dom. Det innebär att domen varken ska tillerkännas en bättre eller sämre ställning än en inhemsk svensk dom. Under liknande förutsättningar hade Kommissionens beslut i sig – men även EU-rättens regler om otillåtet statsstöd – utgjort hinder mot att verkställa ett svenskt avgörande. Den omständigheten att skiljedomen inte ska prövas vare sig i formellt eller materiellt hänseende innebär närmast att den inte ska underkastas en prövning likt den som sker av utländska avgöranden i ett exekvaturförfarande.

Kommissionen – som har exklusiv rätt att bedöma detta – har slagit fast att betalning till följd av skiljedomen är att betrakta som otillåtet statsstöd. Kommissionens beslut är därmed direkt bindande för Rumänien. Enligt artikel 4.3 i Fördraget om Europeiska unionen gäller principen om lojalt samarbete och Sverige har därmed en skyldighet att inte omöjliggöra för Rumänien att uppfylla sina skyldigheter. Kravet på lojalt samarbete gäller även gentemot Kommissionen. Lojalitetsplikten hindrar därmed Sverige också från att meddela beslut som riskerar att underminera Kommissionens beslut.

Skulle tingsrätten ändå anse att verkställigheten inte hindras av Kommissionens beslut föreligger en skyldighet för domstolen att självständigt pröva om förfarandet står i strid mot reglerna om otillåtet statsstöd enligt artikel 107 i Fördraget om Europeiska unionens funktionssätt. I Sverige har EU-rätten företräde framför

Washingtonkonventionen och svensk domstol har att upprätthålla EU-rätten och verka för dess effektiva genomslag.

Artikel 351 i Fördraget om Europeiska unionens funktionssätt är inte tillämplig när det gäller förpliktelser mellan två medlemsstater. Ett tredjelands rättigheter aktualiseras inte heller vid verkställigheten av en ICSID-dom mellan Rumänien och svenska investerare.

2) Genom skiljedomsavgörandet har det inte skett något rättskraftigt avgörande huruvida betalning – i enlighet med ICSID-domen – skulle utgöra ett otillåtet statsstöd och, om så skulle vara fallet, får principen om *res judicata* ge vika för reglerna om otillåtet statsstöd.

En ICSID-dom kan inte få rättskraft i frågor om otillåtet statsstöd eftersom en sådan prövning ligger utanför skiljenämndens kompetens. Skiljenämnden har enbart dömt över avslutandet av incitamentsprogrammet och uttryckligen avstått från att ta ställning till frågan om huruvida betalning enligt domen skulle komma att utgöra otillåtet statsstöd.

Om ett avgörande skulle tillerkännas rättskraft enligt inhemska regler får det inte heller hindra ett effektivt genomslag av EU:s statsstödsregler. Det åligger därför de inhemska domstolarna att underlåta att tillämpa processuella regler som eventuellt skulle tillerkänna rättskraft till en skiljedom – om den strider mot reglerna om statsstöd. EU-rätten har således företräde framför den inhemska rättskraftsprincipen.

Vidare har Kommissionens beslut meddelats efter skiljedomen – därför kan domen omöjligen rättskraftigt ha avgjort frågan om utbetalning av skadeståndet skulle utgöra ett otillåtet statsstöd.

3) Bestämmelsen i 3 kap. 21 § utsökningsbalken är tillämplig vid verkställighet av nu aktuellt slag, och därtill åligger det tingsrätten att tolka verkställighetsförfattningen i ljuset av EU-rätten.

Kommissionens beslut som direkt hindrar Rumänien från att betala ut skadeståndet till klagandena är ett sådant beslut som rör parternas mellanhavanden. Beslutet i sig innebär att Rumänien inte får betala ut skadeståndet till klagandena och att Rumänien har en skyldighet att återkräva sådant skadestånd som redan har betalats ut. Därutöver åligger det tingsrätten att avstå från att tillämpa alternativt tolka bestämmelser relevanta för den sökta verkställigheten i ljuset av EU-rätten så att målen med gemensamhetens fördrag inte äventyras.

4) Eftersom domen inte är försedd med lagakraft-bevis föreligger i enlighet med 2 kap. 6 § utsökningsförordningen hinder mot verkställighet.

5) Rumänien har fullgjort betalningsförpliktelsen enligt skiljedomen.
Rumänien har sammanlagt fört över 472 788 675 rumänska lei till ett konto öppnat i klagandenas namn. Vid tidpunkten för transaktionerna utgjorde metoden betalning enligt rumänsk rätt varför överföringarna ska tillgodoräknas Rumänien som betalningar.

6) Samtidigt pågående verkställighet i andra länder bör utgöra ett hinder mot verkställighet i Sverige.

Klagandena har ansökt om verkställighet i flera andra länder. Det föreligger därmed en betydande risk att samtidig verkställighet medför att klagandena erhåller ett belopp som överstiger den aktuella fordran.

7) Rumänien bestrider att Washingtonkonventionen medför att tingsrätten skulle vara förhindrad att besluta om vilandeförklaring i nu aktuellt ärende.

8) Rumänien ska inte, oavsett utgången i ärendet, åläggas att stå för delar av klagandenas rättegångskostnader.

Rumänien har inte agerat försumligt i sin processföring. Eftersom sammanträdet hölls för att utreda parternas ståndpunkter kan Rumänien inte ta ansvar för klagandenas felaktiga uppfattning om att ärendet skulle avslutas efter sammanträdet. Det var inte heller Rumänien som var orsak till att det krävdes ytterligare skriftväxling i ärendet.

Kommissionen

Artikel 54 i Washingtonkonventionen ålägger stater som är parter att verkställa skiljedomar som meddelats till förmån för en investerare i en annan fördragsslutande stat. Skyldigheten att verkställa skiljedomen omfattar sålunda inte Sverige eftersom investerarens hemstat i detta fall var Sverige, och Sverige därför inte var part i skiljeprocessen.

En fördragsslutande stat ska vidare vid verkställighet behandla ett, med stöd av Washingtonkonventionen, meddelat avgörande så som ett laga kraftvunnet avgörande meddelat i verkställighetsstaten. Inte heller ett lagakraftvunnet svenskt avgörande, med samma innehåll som skiljedomen, hade kunnat verkställas. Kommissionens beslut utgör i sig hinder mot verkställigheten av skiljedomen så som det hade utgjort hinder mot att verkställa ett svenskt avgörande. Kommissionens beslut är direkt bindande för Rumänien. Kommissionens beslut är direkt, men under alla omständigheter indirekt, bindande för EU:s andra medlemsstater. Det saknar vidare betydelse att Kommissionens beslut har överklagats eftersom det är direkt verkställbart och gällande fram till dess det förklaras ogiltigt.

Även om skiljedomen i teorin skulle kunna innebära *res judicata* i frågan om statligt stöd är frågan huruvida skiljedomen *i sig* utgör ett sådant stöd, med hänsyn till följande, inte avgjord på ett sådant sätt att den inte kan prövas i en senare process. Skiljedomstolen avstod uttryckligen från att ta ställning i den frågan. Vid tillämpning av EU-rätten tillerkänns inte ett skiljeavgörande samma ställning som ett

”domstolsavgörande” vid bedömningen om en fråga är rättskraftigt avgjord. Slutligen är skiljedomstolen inte behörig att ta slutlig ställning i EU-rättsliga frågor.

Tingsrätten meddelar följande

SLUTLIGA BESLUT

1. Tingsrätten avslår överklagandet.

2. Ioan Micula, S.C Multipack S.R.L, S.C European S.A, S.C Starmill S.R.L och Viorel Micula ska solidariskt ersätta Rumänien för dess rättegångskostnad med 90 000 euro avseende ombudsarvode. På beloppet utgår ränta enligt 6 § räntelagen från dagen för detta beslut till dess betalning sker.

SKÄLEN FÖR BESLUTET

Inom EU gäller principen om lojalt samarbete. Enligt denna princip ska unionen och medlemsstaterna respektera och bistå varandra när de fullgör de uppgifter som följer av fördragen. Detta framgår av artikel 4.3 i Fördraget om Europeiska unionen. Skyldigheten att samarbeta på detta sätt gäller inte bara för medlemsstaterna i sig utan även för deras myndigheter och inte minst för deras domstolar (se bl.a. EU-domstolens avgöranden i mål C-213/89 Factortame, C-453/00 Kühne & Heitz, C-119/05 Lucchini, C-505/14 Klausner och C-284/16 Achmea). Nationell domstol som ska tillämpa EU-rätt är skyldig att säkerställa att denna rätt ges full verkan och, om det därvid behövs, att underlåta att tillämpa varje bestämmelse i nationell lagstiftning som strider mot EU-rätten (se C-441/14 DI).

Genom sitt beslut den 30 mars 2015 har Kommissionen slagit fast att alla utbetalningar till följd av skiljedomen utgör statligt stöd som står i strid med den inre marknaden. I samma beslut slog Kommissionen fast att Rumänien inte får betala ut detta oförenliga statliga stöd.

Enligt artikel 108.3 i Fördraget om Europeiska unionens funktionssätt gäller att en stödåtgärd inte får genomföras förrän den slutligt har godkänts av Kommissionen. Det finns alltså ett genomförandeförbud. Kommissionens nu aktuella beslut är visserligen överklagat men något godkännande i högre instans föreligger inte. Det ska noteras att Kommissionens förbud är riktat mot Rumänien på så vis att det är Rumänien som inte får betala ut i enlighet med skiljedomen. Det råder dock ingen tvekan om att utsökning i Sverige skulle innebära att Rumänien genom Kronofogdemyndighetens åtgärder skulle tvingas att betala, och därmed bryta mot Kommissionens förbud mot betalning, vilket i sin tur skulle tvinga Rumänien att genast kräva tillbaka vad Kronofogdemyndigheten mätt ut.

Verkställighet av skiljedomen skulle alltså innebära att svensk myndighet bidrar till att sätta Kommissionens beslut ur spel. Så länge Kommissionens beslut är giltigt är det därför enligt principen om lojalt samarbete inte möjligt att tillåta den sökta verkställigheten. Skyldigheten för nationell domstol att avstå från att anta beslut som är oförenliga med ett beslut av Kommissionen är långtgående (jfr. C-284/12 Deutsche Lufthansa). EU-rätten står i vägen för tillämpningen av principen om res judicata om sådan tillämpning skulle kunna innebära ett åsidosättande av EU:s statsstödsregler (C-119/05 Lucchini, C-505/14 Klausner och C-284/16 Achmea).

Tingsrätten noterar att Sverige enligt artikel 54 i Washingtonkonvention är förpliktigad att verkställa skiljedomen på samma sätt som ett lagakraftvunnet svenskt avgörande. Ett sådant svenskt avgörande vars verkställighet hade stått i strid med EU-rätten hade inte heller kunnat verkställas. Någon skillnad härvidlag mellan skiljedomen och ett svenskt lagakraftvunnet avgörande finns således inte. Sveriges åtaganden med anledning av artikel 4.3 i Fördraget om Europeiska unionen medför alltså att det för närvarande föreligger hinder mot begärd verkställighet. Någon tillämpning av artikel 351 i Fördraget om Europeiska unionens funktionssätt kan inte medföra annan bedömning (C-241/91 P och C-242/91 P). Överklagandena ska därför avslås.

Vid den ovan redovisade utgången uppkommer fråga angående ersättning för rättegångskostnad.

Enligt 32 § lagen (1996:242) om domstolsärenden får domstolen, i ett ärende där enskilda är motparter till varandra, med tillämpning av 18 kap. rättegångsbalken, förplikta part att utge ersättning för motpartens rättegångskostnader. I ärendet är Rumänien gäldenär och är därför i detta sammanhang att betrakta som enskild part. Vidare har det i ärendet förekommit en intressemotsättning mellan parterna som har föranlett en handläggning i domstolen enligt samma principer som för tvistemål. Det finns därför anledning att tillämpa bestämmelserna i 18 kap. rättegångsbalken.

Klagandena är i detta hänseende att betrakta som tappande parter och utgångspunkten är därför att de ska ersätta Rumänien för dess rättegångskostnad. Tingsrätten anser inte att Rumäniens processföring föranleder en annan bedömning. Klagandena ska därför åläggas att solidariskt stå för Rumäniens rättegångskostnad i den mån den har varit skälig för att tillvarata Rumäniens rätt.

Rumänien har begärt ersättning för rättegångskostnad med sammanlagt 302 729 euro varav 291 286 euro avser ombudsarvode och 11 443 euro avser eget arbete.

Rumänien har inte närmare beskrivit vilka åtgärder som det yrkas ersättning för inom ramen för eget arbete. Det är under dessa förhållanden inte möjligt för tingsrätten att bedöma om åtgärderna har varit nödvändiga och skäliga för att tillvarata Rumäniens rätt. Yrkandet i den delen ska därför avslås.

Skälig ersättning för ombudsarvode kan enligt tingsrättens mening, även med beaktande av ärendets komplicerade art och omfattning, inte anses överstiga 90 000 euro inklusive mervärdesskatt.

HUR MAN ÖVERKLAGAR, se bilaga 1 (TR-12)

Överklagande senast 2019-02-13 (Svea hovrätt)

[redacted]

Protokollet uppvisat/

SVERIGES DOMSTOLAR

Hur man överklagar

Beslut i tvistemål och ärende, tingsrätt TR-12

Vill du att beslutet ska ändras i någon del kan du överklaga. Här får du veta hur det går till.

Överklaga skriftligt inom 3 veckor

Ditt överklagande ska ha kommit in till domstolen inom 3 veckor från beslutets datum. Sista datum för överklagande finns på sista sidan i beslutet.

Så här gör du

1. Skriv tingsrättens namn och målnummer.
2. Förklara varför du tycker att beslutet ska ändras. Tala om vilken ändring du vill ha och varför du tycker att hovrätten ska ta upp ditt överklagande (läs mer om prövningstillstånd längre ner).
3. Tala om vilka bevis du vill hänvisa till. Förklara vad du vill visa med varje bevis. Skicka med skriftliga bevis som inte redan finns i målet.
4. Lämna namn och personnummer eller organisationsnummer.

   Lämna aktuella och fullständiga uppgifter om var domstolen kan nå dig: postadresser, e-postadresser och telefonnummer.

   Om du har ett ombud, lämna också ombudets kontaktuppgifter.
5. Skriv under överklagandet själv eller låt ditt ombud göra det.
6. Skicka eller lämna in överklagandet till tingsrätten. Du hittar adressen i beslutet.

Vad händer sedan?

Tingsrätten kontrollerar att överklagandet kommit in i rätt tid. Har det kommit in för sent avvisar domstolen överklagandet. Det innebär att beslutet gäller.

Om överklagandet kommit in i tid, skickar tingsrätten överklagandet och alla handlingar i målet vidare till hovrätten.

Har du tidigare fått brev genom förenklad delgivning, kan även hovrätten skicka brev på detta sätt.

Prövningstillstånd i hovrätten

När överklagandet kommer in till hovrätten tar domstolen först ställning till om målet ska tas upp till prövning.

Hovrätten ger prövningstillstånd i fyra olika fall.

- Domstolen bedömer att det finns anledning att tvivla på att tingsrätten dömt rätt.
- Domstolen anser att det inte går att bedöma om tingsrätten har dömt rätt utan att ta upp målet.
- Domstolen behöver ta upp målet för att ge andra domstolar vägledning i rättstillämpningen.
- Domstolen bedömer att det finns synnerliga skäl att ta upp målet av någon annan anledning.

Om du *inte* får prövningstillstånd gäller det överklagade beslutet. Därför är det viktigt att i överklagandet ta med allt du vill föra fram.

Vill du veta mer?

Ta kontakt med tingsrätten om du har frågor. Adress och telefonnummer finns på första sidan i beslutet.

Mer information finns på www.domstol.se.

Anvisningar för överklagande **TR-12 - Beslut i tvistemål och ärende** • Producerat av Domstolsverket, Avd. för domstolsutveckling • 2018-11

Bilaga 5

N° 157 / 2019
du 21.11.2019.
Numéros CAS-2018-00113 + CAS-2019-00033 du registre.

Audience publique de la Cour de cassation du Grand-Duché de Luxembourg du jeudi, vingt et un novembre deux mille dix-neuf.

Composition:

[redacted] président de la Cour,
[redacted] conseiller à la Cour de cassation,
[redacted] conseiller à la Cour de cassation,
[redacted] conseiller à la Cour de cassation,
[redacted], conseiller à la Cour de cassation,
[redacted], premier avocat général,
[redacted], greffier à la Cour.

Entre:

X, demeurant à (…),

demandeur en cassation,

comparant par la société en commandite simple BONN STEICHEN & PARTNERS, représentée par son gérant, la société à responsabilité limitée BONN STEICHEN & PARTNERS, inscrite à la liste V du tableau de l'Ordre des avocats du barreau de Luxembourg, en l'étude de laquelle domicile est élu, représentée aux fins de la présente instance par Maître [redacted], avocat à la Cour,

et:

1) l'ETAT DE Y, représenté par son organe représentatif en justice, avec pour adresse (…),

défendeur en cassation,

comparant par [redacted], avocat à la Cour, en l'étude duquel domicile est élu,

2) la COMMISSION EUROPEENNE, dont le siège est sis à B-1049 Bruxelles, 200, rue de la Loi,

défenderesse en cassation,

**comparant pa[redacted], avocat à la Cour, en l'étude duquel domicile est élu,

ainsi que 61 établissements bancaires établis à Luxembourg

défenderesses en cassation.

Vu l'arrêt attaqué, no. 71/18, rendu le 21 mars 2018 sous le numéro 45337 du rôle par la Cour d'appel du Grand-Duché de Luxembourg, septième chambre, siégeant en matière d'appel de référé ;

Vu le mémoire en cassation signifié le 22 novembre 2018 par X à l'ETAT DE Y ainsi qu'à 61 établissements bancaires établis à Luxembourg, déposé le 4 décembre 2018 au greffe de la Cour ;

Vu le mémoire en réponse signifié le 6 février 2019 par l'ETAT DE Y à X ainsi qu'aux 61 établissements bancaires précités, déposé le 8 février 2019 au greffe de la Cour ;

Vu le mémoire en cassation signifié le 7 mars 2019 par X à la COMMISSION EUROPEENNE, déposé le 21 mars 2019 au greffe de la Cour ;

Vu le mémoire en réponse signifié le 6 mai 2019 par la COMMISSION EUROPEENNE à X, déposé le 7 mai 2019 au greffe de la Cour ;

Vu le nouveau mémoire, dénommé « *mémoire en cassation en réplique au mémoire en défense* », signifié le 16 mai 2019 par X à l'ETAT DE Y ainsi qu'aux 61 établissements bancaires précités, déposé le 23 mai 2019 au greffe de la Cour ;

Ecartant le nouveau mémoire, dénommé « *mémoire en cassation en réplique au mémoire en défense* », signifié le 30 septembre 2019 par X à la COMMISSION EUROPEENNE, déposé le 7 octobre 2019 au greffe de la Cour, pour ne pas répondre aux prescriptions de l'article 17 de la loi modifiée du 18 février 1885 sur les pourvois et la procédure en cassation ;

Ecartant le nouveau mémoire, dénommé « *mémoire supplémentaire* », signifié le 14 octobre 2019 par la COMMISSION EUROPEENNE à X, déposé le 15 octobre 2019 au greffe de la Cour, pour ne pas répondre aux prescriptions de l'article 17 de la loi modifiée du 18 février 1885 sur les pourvois et la procédure en cassation ;

Sur le rapport du conseiller Romain LUDOVICY et les conclusions du procureur général d'Etat adjoint John PETRY ;

Dans l'intérêt d'une bonne administration de la justice, il y a lieu de prononcer la jonction des instances introduites par les deux pourvois en cassation enregistrés sous les numéros CAS-2018-00113 et CAS-2019-00033 du registre.

Sur les faits :

Selon l'arrêt attaqué, le juge des référés du tribunal d'arrondissement de Luxembourg, saisi par l'ETAT DE Y d'une demande en annulation, sinon en mainlevée d'une saisie-arrêt pratiquée par X sur les avoirs de l'ETAT DE Y auprès de 61 établissements bancaires établis à Luxembourg sur base d'une sentence arbitrale rendue par le Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI), ainsi que d'une intervention volontaire de la COMMISSION EUROPEENNE faite sur base de l'article 29, paragraphe 2, du Règlement (UE) 2015/1589 du Conseil du 13 juillet 2015, destinée à faire valoir ses observations et à faire respecter le droit de l'Union, avait, par ordonnance de référé, dit la demande de l'ETAT DE Y irrecevable tant sur la base principale de l'article 933, alinéa 1, du Nouveau code de procédure civile que sur la base subsidiaire de l'article 932, alinéa 1, du même code. La Cour d'appel a, par réformation, déclaré la demande recevable et fondée sur base de l'article 933, alinéa 1, du Nouveau code de procédure civile et a ordonné la mainlevée de la saisie-arrêt.

Sur la recevabilité du pourvoi qui est contestée :

Le défendeur en cassation ETAT DE Y conclut à l'irrecevabilité du pourvoi pour défaut de signification du mémoire à la COMMISSION EUROPEENNE, au motif que le litige entre parties serait indivisible.

Le demandeur en cassation a par la suite signifié son mémoire à la COMMISSION EUROPEENNE.

Aucune disposition légale ne prohibe l'introduction d'un second pourvoi contre une partie non visée par le premier.

Le moyen d'irrecevabilité est dès lors devenu sans objet.

Les deux pourvois, introduits dans les formes et délai de la loi, sont recevables.

Sur le premier moyen de cassation, pris en ses deux branches :

« tiré de la violation, sinon de la fausse interprétation de l'article 933, alinéa 1er, du Nouveau code de procédure civile,

en ce que l'arrêt attaqué a partiellement réformé l'ordonnance de référé du 10 mai 2017 en ce qu'elle a déclarée fondée, sur base de l'article 933 alinéa 1er du Nouveau code de procédure civile, la demande de mainlevée de l'Etat de Y, dans la mesure où il existait des contestations sérieuses imposant la mainlevée de la saisie-

arrêt et car une saisie-arrêt pratiquée sur base d'un titre ayant perdu de son actualité et de son efficacité cause un trouble manifestement illicite au débiteur saisi ;

aux motifs que la Cour d'appel a considéré que :

<< Contrairement aux développements de la partie appelante, le juge des référés n'est pas compétent pour décider si X ne dispose plus d'un titre ayant force exécutoire pour pratiquer saisie-arrêt mais il est compétent pour constater qu'en l'espèce il existe des contestations sérieuses qui imposent la mainlevée de la saisie-arrêt pratiquée les 28 et 29 juillet 2015. Une saisie-arrêt pratiquée sur base d'un titre ayant perdu de son actualité et de son efficacité cause un trouble manifestement illicite au débiteur saisi >> (Pièce n°3, arrêt de la Cour d'appel du 21 mars 2018, page 20).

Elle en a déduit que :

<< Dans la mesure où la Décision a fait perdre à la Sentence son actualité et son efficacité et donc son caractère exécutable, la créance de X n'est plus exigible. Il y a donc lieu de faire droit à la demande de l'Etat de Y et d'ordonner la mainlevée de la saisie-arrêt pratiquée >> (Pièce n°3, arrêt de la Cour d'appel du 21 mars 2018, pages 21 et 22).

alors que :

première branche, *la Cour d'appel, en statuant ainsi, a opéré une confusion entre les notions de contestations sérieuses et de trouble manifestement illicite ;*

et, partant, la Cour d'appel ainsi violé les dispositions de l'article 933 alinéa 1er du Nouveau code de procédure civile, ou sinon en a fait une fausse interprétation ;

deuxième branche, *que la Cour d'appel, en statuant ainsi, a tranché les contestations sérieuses alléguées par les parties défenderesses, considérant que la Décision de la Commission faisait perdre au titre exécutoire son actualité et son efficacité, ce faisant elle a outrepassé les pouvoirs et compétences dévolus au juge des référés en matière de référé-sauvegarde en ce que la Cour d'appel a tranché le fond du litige ;*

l'arrêt attaqué a ainsi violé l'article 933 alinéa 1er du Nouveau code de procédure civile par refus d'application de la loi, sinon fausse interprétation ».

L'usage, dans le motif critiqué, de l'expression « *contestations sérieuses* » n'enlève rien au constat de la Cour d'appel qu'en raison du fait que la décision de la Commission européenne avait fait perdre à la sentence arbitrale son actualité et son efficacité, et donc son caractère exécutable, la saisie-arrêt revêtait le caractère d'un trouble manifestement illicite, au sens de l'article 933, alinéa 1, première phrase, du Nouveau code de procédure civile, de nature à en justifier la mainlevée.

En se déterminant ainsi, la Cour d'appel a fait l'exacte application de la disposition visée au moyen et n'a ni outrepassé les pouvoirs et compétences dévolus au juge des référés en matière de référé-sauvegarde, ni tranché le fond du litige.

Il en suit que le moyen, pris en ses deux branches, n'est pas fondé.

Sur les deuxième et troisième moyens de cassation réunis :

« tirés, **le deuxième,** *de la violation, sinon de la fausse interprétation de l'article 288, alinéa 4, du Traité sur le fonctionnement de l'Union européenne (TFUE)*

en ce que l'arrêt attaqué a partiellement réformé l'ordonnance de référé du 10 mai 2017 en ce qu'elle a déclarée fondée, sur la base de l'article 933 alinéa 1er du Nouveau code de procédure civile, la demande de mainlevée de l'Etat de Y, en accordant un effet direct devant les juridictions luxembourgeoises à la Décision de la Commission européenne en date du 30 mars 2015 rendue à l'encontre de l'Etat de Y sur base de l'article 288 du TFUE ;

aux motifs que la Cour d'appel a considéré que :

<< La Décision interdit donc à la Y d'exécuter la Sentence arbitrale et lui ordonne de récupérer les montants déjà payés ; elle a un caractère contraignant et X ne pouvait pas ignorer qu'il ne pouvait plus utiliser la Sentence comme titre lui permettant de diligenter une saisie-arrêt conservatoire motif pris que la Décision, postérieure à la Sentence, dit pour droit que la condamnation aux dommages et intérêts à payer par la Y est contraire au droit communautaire.

Selon l'intimé X, cette Décision ne s'impose qu'à la Y mais non pas au Luxembourg de sorte qu'elle n'empêcherait pas la poursuite de l'exécution de la mesure conservatoire.

S'il est exact que l'article 5 de la Décision stipule que « La Y est destinataire de la présente décision » et que l'article 288 du TFUE dispose que « La décision est obligatoire dans tous ses éléments. Lorsqu'elle désigne des destinataires, elle n'est obligatoire que pour ceux-ci », il tombe sous le sens, au vu des développements ci-dessus, que la Décision s'impose dans tous les Etats membres où X entame des procédures d'exécution pour obtenir le paiement des dommages et intérêts lui accordés par le tribunal arbitral, par la Sentence rendue le 11 décembre 2013. >> (Pièce n°3, arrêt de la Cour d'appel du 21 mars 2018, pages 19 et 20).

alors que :

La Cour d'appel, en statuant ainsi, a accordé un effet direct à une décision de la commission européenne rendue à l'encontre de l'Etat de Y au sein des juridictions nationales du Grand-Duché du Luxembourg, sans toutefois respecter les conditions issues de la jurisprudence communautaire relative à l'application direct d'une décision communautaire ;

Que l'arrêt attaqué a ainsi violé l'article 288 alinéa 4 du TFUE par refus d'application du traité, sinon fausse interprétation ».

et

le troisième, « *du manque de base légale au regard de l'article 288, alinéa 4, du Traité sur le fonctionnement de l'Union européenne (TFUE)*

en ce que l'arrêt attaqué a partiellement réformé l'ordonnance de référé du 10 mai 2017 en ce qu'elle a déclarée fondée, sur la base de l'article 933, alinéa 1er, du Nouveau code de procédure civile, la demande de mainlevée de l'Etat de Y, en accordant un effet direct devant les juridictions luxembourgeoises à la décision de la Commission européenne en date du 30 mars 2015 rendue à l'encontre de l'Etat de Y ;

aux motifs que la Cour d'appel a considéré que :

<< La Décision interdit donc à la Y d'exécuter la Sentence arbitrale et lui ordonne de récupérer les montants déjà payés ; elle a un caractère contraignant et X ne pouvait pas ignorer qu'il ne pouvait plus utiliser la Sentence comme titre lui permettant de diligenter une saisie-arrêt conservatoire motif pris que la Décision, postérieure à la Sentence, dit pour droit que la condamnation aux dommages et intérêts à payer par la Y est contraire au droit communautaire.

Selon l'intimé X, cette Décision ne s'impose qu'à la Y mais non pas au Luxembourg de sorte qu'elle n'empêcherait pas la poursuite de l'exécution de la mesure conservatoire.

S'il est exact que l'article 5 de la Décision stipule que ''La Y est destinataire de la présente décision'' et que l'article 288 du TFUE dispose que ''La décision est obligatoire dans tous ses éléments. Lorsqu'elle désigne des destinataires, elle n'est obligatoire que pour ceux-ci'', il tombe sous le sens, au vu des développements ci-dessus, que la Décision s'impose dans tous les Etats membres où X entame des procédures d'exécution pour obtenir le paiement des dommages et intérêts lui accordés par le tribunal arbitral, par la Sentence rendue le 11 décembre 2013. >> (Pièce n°3, arrêt de la Cour d'appel du 21 mars 2018, pages 19 et 20).

alors que :

La Cour d'appel, en statuant ainsi, a accordé un effet direct à la Décision de la Commission rendue à l'encontre de l'Etat de Y au sein des juridictions nationales du Grand-Duché du Luxembourg, sans toutefois motiver son raisonnement, en procédant par voie d'affirmation ;

Que la Cour d'appel a ainsi privé son arrêt de base légale au regard de la notion de décision communautaire telle qu'elle résulte de l'article 288 alinéa 4 du TFUE ».

Le demandeur en cassation fait grief à la Cour d'appel d'avoir violé la disposition visée au moyen en accordant un effet direct à la décision de la Commission européenne sans respecter les conditions issues de la jurisprudence communautaire relative à l'application directe d'une décision communautaire (deuxième moyen), sinon d'avoir privé son arrêt de base légale au regard de la notion

de décision communautaire, telle qu'elle résulte de la disposition visée au moyen, en accordant un effet direct à la décision de la Commission européenne sans motiver son raisonnement, en procédant par voie d'affirmation (troisième moyen).

Suite aux motifs reproduits aux moyens, la Cour d'appel a encore retenu ce qui suit :

« *En l'espèce, la Décision de la Commission du 30 mars 2015 est exécutoire et elle entrave l'exécution du titre constitué par la Sentence arbitrale. Elle est obligatoire dans tous ses éléments et dans tous les Etats membres en vertu de l'article 288 du TFUE et même si elle fait actuellement l'objet d'un recours devant les juridictions communautaires, ce recours n'est pas suspensif en vertu de l'article 278 du TFUE.*

La Décision interdit que la saisie-arrêt soit validée au fond par une juridiction luxembourgeoise étant donné que (i) le droit des aides d'Etat, qui fait partie de l'ordre public, doit prévaloir sur le droit national et (ii) la Sentence arbitrale est contraire à l'ordre public communautaire et donc luxembourgeois (cf. arrêt Lucchini, CJUE 18.07.2007, C-119/05 dans lequel il a été décidé que le principe de la primauté du droit communautaire exige que le juge national doit laisser inappliquée toute disposition susceptible de mettre en cause la compétence exclusive de la Commission pour statuer sur la compatibilité d'une aide d'État avec le marché commun, y compris une disposition nationale mettant en œuvre le principe de l'autorité de la chose jugée, qui contrarierait dans le cas d'espèce la récupération d'une aide déclarée incompatible par la Commission européenne ; arrêt Klausner CJUE, 11.11.2015, C-505/14 dans lequel la CJUE a dit pour droit que le principe d'effectivité s'oppose à une règle nationale qui empêche le juge national de tirer toutes les conséquences de la violation de l'article 108 TFUE en raison de l'autorité de la chose jugée d'une décision juridictionnelle nationale rendue à propos d'un litige étranger au contrôle des aides d'État).

L'arrêt Asturacom Telecommunicaciones (CJUE, 6 oct. 2009, C-40-8) cité par la Commission et mentionné ci-dessus retient que le juge national doit « selon les règles de procédures internes, apprécier d'office la contrariété entre une clause arbitrale et les règles nationales d'ordre public », lesquelles intègrent également l'ordre public tel que défini par le droit de l'Union.

Par ailleurs, la CJUE a dans l'arrêt Deutsche Lufthansa (C-284/12) du 21 novembre 2013 rappelé « qu'il importe également de souligner que l'application des règles de l'Union en matière d'aides d'État repose sur une obligation de coopération loyale entre, d'une part, les juridictions nationales et, d'autre part, la Commission et les juridictions de l'Union, dans le cadre de laquelle chacun agit en fonction du rôle qui lui est assigné par le traité. Dans le cadre de cette coopération, les juridictions nationales doivent prendre toutes mesures générales ou particulières propres à assurer l'exécution des obligations découlant du droit de l'Union et de s'abstenir de celles qui sont susceptibles de mettre en péril la réalisation des buts du traité, ainsi qu'il découle de l'article 4, paragraphe 3, TUE. Ainsi, les juridictions nationales doivent, en particulier, s'abstenir de prendre des décisions allant à l'encontre d'une décision de la Commission, même si elle revêt un caractère provisoire ». ».

Il résulte de cette motivation que la Cour d'appel a pris en considération la décision de la Commission européenne, non pas sur le fondement de la théorie de

l'effet direct du droit de l'Union européenne basée sur l'article 288, alinéa 4, du Traité sur le fonctionnement de l'Union européenne (TFUE) visé au moyen, mais sur le fondement de l'obligation de coopération loyale inscrite à l'article 4, paragraphe 3, alinéa 1, du Traité sur l'Union européenne (TUE), qui lui imposait de ne pas méconnaître ladite décision dans le cadre d'un litige opposant les destinataires de celle-ci.

Il en suit que les moyens manquent en fait.

Sur les demandes en allocation d'une indemnité de procédure :

Il serait inéquitable de laisser à charge des parties défenderesses en cassation ETAT DE Y et COMMISSION EUROPEENNE l'intégralité des frais exposés non compris dans les dépens. Il convient d'allouer à chacune d'elles une indemnité de procédure de 2.500 euros.

PAR CES MOTIFS,

la Cour de cassation :

joint les instances en cassation introduites par X contre l'arrêt de la Cour d'appel du 21 mars 2018 par les deux mémoires en cassation visés ci-dessus ;

rejette les pourvois ;

condamne le demandeur en cassation à payer à chacune des parties défenderesses en cassation ETAT DE Y et COMMISSION EUROPEENNE une indemnité de procédure de 2.500 euros ;

condamne le demandeur en cassation aux dépens de l'instance en cassation avec distraction au profit de Maîtr[redacted], sur ses affirmations de droit.

La lecture du présent arrêt a été faite en la susdite audience publique par le président[redacted], en présence du premier avocat général [redacted] et du greffier [redacted]

COPY

No 157/2019
of 21 November 2019
Nos CAS-2018-00113 and CAS-2019-00033 in the register.

Public hearing before the Court of Cassation of the Grand Duchy of Luxembourg on Thursday, 21 November 2019

Composition:

[redacted]s, President of the Court,
[redacted]Court of Cassation Judge,
[redacted], Court of Cassation Judge,
[redacted], Court of Cassation Judge,
[redacted], Court of Cassation Judge,
[redacted], First Advocate General,
[redacted]Court Registrar.

Between:

Viorel Micula, residing at 48, strada Colinelor, Oradea, Bihor, Romania,

appellant in cassation,

appearing through the limited partnership BONN STEICHEN & PARTNERS, represented by its managing director, the limited liability company BONN STEICHEN & PARTNERS, included on List V of the Roll of the Luxembourg Bar Association, whose office is the address for service, represented for the purposes of these proceedings by M[redacted], barrister,

and:

1) ROMANIA, represented by its judicial representative body, with the address 17, strada Apolodor, sector 5, 050741 Bucharest,

defendant in cassation,

appearing through [redacted], barrister, whose office is the address for service,

2) the EUROPEAN COMMISSION, whose headquarters are at 200, rue de la Loi, B-1049 Brussels,

defendant in cassation,

appearing through [redacted], barrister, whose office is the address for service,

3) BANQUE ET CAISSE D'EPARGNE DE L'ETAT, an independent public institution, registered in the Luxembourg Trade and Companies Register under number B30775, established and having its registered office at 1, place de Metz, L-2954 Luxembourg, represented by its management committee,

4) the public limited company BGL BNP PARIBAS, registered in the Luxembourg Trade and Companies Register under number B6481, represented by its board of directors, established and having its registered office at 50, avenue J.F. Kennedy, L-1855 Luxembourg, the successor in law, since 25 October 2018, under the merger agreement of 21 September 2018, to the public limited company BNP PARIBAS WEALTH MANAGEMENT (Luxembourg), formerly ABN Amro Bank (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B19116, formerly established and having its registered office at 46, avenue J.F. Kennedy, L-1855 Luxembourg,

5) the public limited company BLLUX COMPANY SA, in voluntary liquidation, formerly BANK LEUMI (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B49.124, established and having its registered office at 6D, route de Trèves, L-2633 Senningerberg, represented by its liquidator, Mr Ur Avni, born on 26 June 1975, residing at 122, rue des Muguets, L-2167 Luxembourg,

6) the public limited company BANQUE BCP, SA, registered in the Luxembourg Trade and Companies Register under number B7648, represented by its current board of directors, established and having its registered office at 5, rue des Mérovingiens, Op Bourmicht, L-8070 Bertrange,

7) the public limited company BANQUE CARNEGIE LUXEMBOURG SA, registered in the Luxembourg Trade and Companies Register under number B43569, represented by its current board of directors, established and having its registered office at 15, rue Bender, Le Dôme – Bâtiment A, L-1229 Luxembourg,

8) the public limited company BANQUE DE LUXEMBOURG SA, registered in the Luxembourg Trade and Companies Register under number B5310, represented by its current board of directors, established and having its registered office at 14, boulevard Royal, L-2449 Luxembourg,

9) the public limited company BANQUE DEGROOF PETERCAM LUXEMBOURG SA, registered in the Luxembourg Trade and Companies Register under number B25459, represented by its current board of directors, established and having its registered office at 12, rue Eugène Ruppert, L-2453 Luxembourg,

10) the public limited company BANQUE HAPOALIM (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B37622, represented by its current board of directors, established and having its registered office at 7, rue de la Chapelle, L-1325 Luxembourg,

11) the public limited company BANQUE INTERNATIONALE A LUXEMBOURG, BIL for short, registered in the Luxembourg Trade and Companies Register under number B6307, represented by its current board of directors, established and having its registered office at 69, route d'Esch, L-2953 Luxembourg,

12) the public limited company BANQUE TRANSATLANTIQUE LUXEMBOURG, registered in the Luxembourg Trade and Companies Register under number B31730, represented by its current board of directors, established and having its registered office at 17, côte d'Eich, L-1450 Luxembourg,

13) the public limited company BGL BNP Paribas, registered in the Luxembourg Trade and Companies Register under number B6481, represented by its current board of directors, established and having its registered office at 50, avenue J.F. Kennedy, L-2951 Luxembourg,

14) the French public limited company CACEIS BANK FRANCE, registered in the Paris Trade and Companies Register under number RCS 692 024 722, represented by its current board of directors, established and having its registered office at 1-3, place Valhubert, 75013 Paris, France, the successor in law since 31 December 2016, under the merger agreement of 21 July 2016, to the public limited company CACEIS BANK Luxembourg, struck off the register, registered in the Luxembourg Trade and Companies Register under number B91.985, formerly established and having its registered office at 5, allée Scheffer, L-2520 Luxembourg,

15) the public limited company CATELLA BANK SA, registered in the Luxembourg Trade and Companies Register under number B29962, represented by its current board of directors, established and having its registered office at 38, rue Pafebruch, L-8308 Capellen,

16) the public limited company COMPAGNIE DE BANQUE PRIVEE QUILVEST SA, registered in the Luxembourg Trade and Companies Register under number B117963, represented by its current board of directors, established and having its registered office at 48, rue Charles Martel, L-2134 Luxembourg,

17) the public limited company CA INDOSUEZ WEALTH (EUROPE), formerly CREDIT AGRICOLE LUXEMBOURG SA, CAL for short, registered in the Luxembourg Trade and Companies Register under number B91986, represented by its current board of directors, established and having its registered office at 39, allée Scheffer, L-2520 Luxembourg,

18) the public limited company CREDIT SUISSE (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number

B11756, represented by its current board of directors, established and having its registered office at 5, rue Jean Monnet, L-2180 Luxembourg,

19) the public limited company DANSKE BANK INTERNATIONAL SA, registered in the Luxembourg Trade and Companies Register under number B14101, represented by its current board of directors, established and having its registered office at 13, rue Edward Steichen, L-2011 Luxembourg,

20) the public limited company DEKABANK DEUTSCHE GIROZENTRALE Luxembourg SA, registered in the Luxembourg Trade and Companies Register under number B9462, represented by its current board of directors, established and having its registered office at 6, rue Lou Hemmer, L-1748 Luxembourg-Findel,

21) the public limited company DNB Luxembourg SA, registered in the Luxembourg Trade and Companies Register under number B22374, represented by its current board of directors, established and having its registered office at 13, rue Goethe, L-1637 Luxembourg,

22) the public limited company EAST WEST UNITED BANK SA, registered in the Luxembourg Trade and Companies Register under number B12049, represented by its current board of directors, established and having its registered office at 10, boulevard Joseph II, L-1840 Luxembourg,

23) the public limited company EDMOND DE ROTHSCHILD (EUROPE), registered in the Luxembourg Trade and Companies Register under number B19194, represented by its current board of directors, established and having its registered office at 20, boulevard Emmanuel Servais, L-2535 Luxembourg,

24) the public limited company FREIE INTERNATIONALE SPARKASSE SA, registered in the Luxembourg Trade and Companies Register under number B79983, represented by its current board of directors, established and having its registered office at 53, rue Gabriel Lippmann, L-6947 Luxembourg,

25) the public limited company HSBC PRIVATE BANK (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B52461, represented by its current board of directors, established and having its registered office at 16, boulevard d'Avranches, L-1160 Luxembourg,

26) the public limited company HSH NORDBANK SECURITIES SA, registered in the Luxembourg Trade and Companies Register under number B14784, represented by its current board of directors, established and having its registered office at 2, rue Jean Monnet, L-2180 Luxembourg,

27) the public limited company ING LUXEMBOURG, registered in the Luxembourg Trade and Companies Register under number B6041, represented by its current board of directors, established and having its registered office at 26, place de la Gare, L-1616 Luxembourg,

28) the public limited company J.P. MORGAN BANK LUXEMBOURG SA,

registered in the Luxembourg Trade and Companies Register under number B10958, represented by its current board of directors, established and having its registered office at 6, route de Trèves, L-2633 Senningerberg,

29) the public limited company KBL EUROPEAN PRIVATE BANKERS SA, registered in the Luxembourg Trade and Companies Register under number B6395, represented by its current board of directors, established and having its registered office at 43, boulevard Royal, L-2955 Luxembourg,

30) the public limited company LOMBARD ODIER (Europe) SA, registered in the Luxembourg Trade and Companies Register under number B169907, represented by its current board of directors, established and having its registered office at 291, route d'Arlon, L-1150 Luxembourg,

31) the public limited company M.M. WARBURG & CO Luxembourg SA, Warburg Bank Luxembourg, registered in the Luxembourg Trade and Companies Register under number B10700, represented by its current board of directors, established and having its registered office at 2, place François-Joseph Dargent, L-1413 Luxembourg,

32) the public limited company NATIXIS BANK, registered in the Luxembourg Trade and Companies Register under number B32160, represented by its current board of directors, established and having its registered office at 51, avenue J.F. Kennedy, L-1855 Luxembourg,

33) the public limited company NORDEA BANK SA, registered in the Luxembourg Trade and Companies Register under number B14157, represented by its current board of directors, established and having its registered office at 562, rue de Neudorf, L-2220 Luxembourg,

34) the public limited company PICTET & Cie (Europe) SA registered in the Luxembourg Trade and Companies Register under number B32060, represented by its current board of directors, established and having its registered office at 15A, avenue J.F. Kennedy, L-1855 Luxembourg,

35) the public limited company RBC INVESTOR SERVICES BANK SA, registered in the Luxembourg Trade and Companies Register under number B47192, represented by its current board of directors, established and having its registered office at 14, Porte de France, L-4360 Esch-sur-Alzette,

36) the public limited company HAUCK & AUFHÄUSER FUND PLATFORMS SA, formerly Sal. Oppenheim jr. & Cie Luxembourg SA, registered in the Luxembourg Trade and Companies Register under number B110890, represented by its current board of directors, established and having its registered office at 1C, rue Gabriel Lippmann, L-5365 Munsbach,

37) the public limited company SKANDINAVISKA ENSKILDA BANKEN SA, registered in the Luxembourg Trade and Companies Register under number B10831, represented by its current board of directors, established and having its registered office at 4, rue Peternelchen, L-2370 Howald,

38) the public limited company INTESA SANPAOLO BANK LUXEMBOURG, formerly SOCIETE EUROPEENNE DE BANQUE, registered in the Luxembourg Trade and Companies Register under number B13859, represented by its current board of directors, established and having its registered office at 19-21, boulevard du Prince Henri, L-1724 Luxembourg,

39) the public limited company SOCIETE GENERALE FINANCING AND DISTRIBUTION, SGFD for short, registered in the Luxembourg Trade and Companies Register under number B170794, represented by its current board of directors, established and having its registered office at 16, boulevard Royal, L-2449 Luxembourg,

40) the public limited company SOCIETE GENERALE CAPITAL MARKET FINANCE, SGCMF for short, registered in the Luxembourg Trade and Companies Register under number B180290, represented by its current board of directors, established and having its registered office at 16, boulevard Royal, L-2449 Luxembourg,

41) the public limited company SOCIETE GENERALE BANK & TRUST, registered in the Luxembourg Trade and Companies Register under number B606l, represented by its current board of directors, established and having its registered office at 11, avenue Emile Reuter, L-2420 Luxembourg,

42) the partnership limited by shares STATE STREET BANK Luxembourg S.C.A., registered in the Luxembourg Trade and Companies Register under number B32771, represented by its current managing director, established and having its registered office at 49, avenue J.F. Kennedy, L-1855 Luxembourg,

43) the public limited company INTERNAXX BANK SA, formerly TD Bank International SA, registered in the Luxembourg Trade and Companies Register under number B78729, represented by its current board of directors, established and having its registered office at 46A, avenue J.F. Kennedy, L-1855 Luxembourg,

44) the Belgian public limited company THE BANK OF NEW YORK MELLON SA/NY (*naamloze vennootschap*), registered in the Brussels Register of Legal Persons (RPM) under number 0806.743.159, represented by its current board of directors, established and having its registered office at 46, rue Montoyer, 1000 Brussels, Belgium, the successor in law since 1 April 2017, under the merger agreement drawn up on 28 October 2016 and the filing in the Trade and Companies Register under L170055976, to the Luxembourg public limited company The Bank of New York Mellon (Luxembourg) SA, struck off the register, formerly established and having its registered office at Vertigo Building – Polaris 2-4, rue Eugène Ruppert, L-2453 Luxembourg, represented by its current board of directors, registered in the Luxembourg Trade and Companies Register under number B67.654,

45) the public limited company EFG Bank (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B113.375, represented by its current board of directors, established and having its registered office at 56 Grand-Rue, L-1660 Luxembourg, the successor in law since 1 November 2017, under the merger agreement drawn up on the same date, to the public limited company UBI Banca International SA, struck off the register, registered in the Luxembourg Trade and Companies Register under number B61018, formerly established and having its registered office at 37A, avenue J.F. Kennedy, L-1855 Luxembourg,

46) the German public limited company *(Aktiengesellschaft)* UBS Germany, registered in the Trade and Companies Register of Frankfurt am Main, Germany (Amtsgericht) under the number HRB 58164, represented by its current board of directors, established and having its registered office at Opem Turm, Bockenheimer Landstraße 2-4, D-60306, Frankfurt am Main, Germany, the successor in law since 1 December 2016, under the merger agreement drawn up on 10 February 2016, to the public limited company UBS (Luxembourg) SA, struck off the register, registered in the Trade and Companies Register of Luxembourg under the number B 11142, formerly established and having its registered office at 33A, avenue J.F. Kennedy, L-1855 Luxembourg,

47) the public limited company UniCredit International Bank (Luxembourg) SA, established and having its registered office at 8-10, rue Jean Monnet, L-2180 Luxembourg, represented by its current board of directors, registered with the Luxembourg Trade and Companies Register under number B103.341,

48) the German public limited company (*Aktiengesellschaft)* UniCredit Bank AG, registered in the Trade and Companies Register of Munich, Germany (*Amtsgericht*), under number HRB 42148, represented by its current board of directors, established and having its registered office at Arabellastraße 12, D-81925 Munich, Germany, the successor in law since 1 July 2018, under the merger agreement drawn up on 3 May 2018, to the Luxembourg company UniCredit Luxembourg SA, struck off the register, registered in the Luxembourg Trade and Companies Register under number B9989, formerly established and having its registered office at 8-10, rue Jean Monnet, L-2180 Luxembourg,

49) the public limited company Union Bancaire Privée (Europe) SA, registered in the Luxembourg Trade and Companies Register under number B947l, represented by its current board of directors, established and having its registered office at 287-289, route d'Arlon, L-1150 Luxembourg,

50) the public limited company VP BANK (Luxembourg) SA, registered in the Luxembourg Trade and Companies Register under number B29509, represented by its current board of directors, established and having its registered office at 2, rue Edward Steichen, L-2540 Luxembourg,

51) the partnership limited by shares BROWN BROTHERS HARRIMAN (Luxembourg) S.C.A., registered in the Luxembourg Trade and Companies Register under number B29923, represented by its current managing director, established and having its registered office at 80, route d'Esch, L-1470 Luxembourg,

52) the cooperative BANQUE RAIFFEISEN, registered in the Luxembourg Trade and Companies Register under number B20128, represented by its current statutory bodies, established and having its registered office at 4, rue Léon Laval, L-3372 Leudelange,

53) BNP PARIBAS SECURITIES SERVICES – Luxembourg Branch, a partnership limited by shares, registered in the Luxembourg Trade and Companies Register under number B86862, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 60, avenue J.F. Kennedy, L-1855 Luxembourg,

54) COMMERZBANK AKTIENGESELLSCHAFT, Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B119317, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 25, rue Edward Steichen, L-2540 Luxembourg,

55) BNP PARIBAS, Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B23968, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 50, avenue J.F. Kennedy, L-2951 Luxembourg,

56) CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B35216, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 39, allée Scheffer, L-2520 Luxembourg,

57) the public limited company DEUTSCHE BANK Luxembourg SA, registered in the Luxembourg Trade and Companies Register under number B9164, represented by its current board of directors, established and having its registered office at 2, boulevard Konrad Adenauer, L-1115 Luxembourg,

58) HSBC BANK plc, Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B178455, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 16, boulevard d'Avranches, L-1160 Luxembourg,

59) STATE STREET BANK INTERNATIONAL GmbH, Zweigniederlassung

Luxemburg (Luxembourg Branch), a limited liability company, registered in the Luxembourg Trade and Companies Register under number B148186, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 49, avenue J.F. Kennedy, L-1855 Luxembourg,

60) SVENSKA HANDELSBANKEN AB (publ), Luxembourg Branch, a Swedish company, registered in the Luxembourg Trade and Companies Register under number B39099, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 15, rue Bender, L-1229 Luxembourg,

61) SWEDBANK AB (publ) Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B168008, represented by its current authorised representative, or by an authorised person currently in office, established and having its registered office at 65, boulevard Grande Duchesse Charlotte, L-1331 Luxembourg,

62) The Bank of New York Mellon SA/NV, Luxembourg Branch, a public limited company, registered in the Luxembourg Trade and Companies Register under number B105087, represented by its current authorised representative, or else by the current legal representative, established and having its registered office at 2-4, rue Eugène Ruppert, L-2453 Luxembourg,

63) The Bank of New York Mellon (International) Limited, Luxembourg Branch, registered in the Luxembourg Trade and Companies Register under number B58377, represented by its current authorised representative, or else by the current legal representative, established and having its registered office at 2-4, rue Eugène Ruppert, L-2453 Luxembourg,

defendants in cassation.

Having regard to the judgment under appeal (Judgment No 71/18), issued on 21 March 2018 under case number 45337 by the Court of Appeal of the Grand Duchy of Luxembourg, Seventh Chamber, hearing an interim appeal;

Having regard to the cassation brief served on 22 November 2018 by Viorel Micula on Romania and on 61 banking institutions established in Luxembourg, filed on 4 December 2018 with the Court Registry;

Having regard to the reply served on 6 February 2019 by Romania on Viorel Micula and on the above-mentioned 61 banking institutions, filed with the Court Registry on 8 February 2019;

Having regard to the cassation brief served on 7 March 2019 by Viorel Micula on the European Commission, filed on 21 March 2019 with the Court Registry;

Having regard to the reply served on 6 May 2019 by the European Commission on Viorel Micula, filed with the Court Registry on 7 May 2019;

Having regard to the new brief, entitled ‘cassation brief in reply to the defence’, served on 16 May 2019 by Viorel Micula on Romania and on the above-mentioned 61 banking institutions, filed on 23 May 2019 with the Court Registry;

Rejecting the new brief, entitled ‘cassation brief in reply to the defence’, served on 30 September 2019 by Viorel Micula on the European Commission and filed on 7 October 2019 with the Court Registry, for failing to meet the requirements of Article 17 of the amended Law of 18 February 1885 on appeals in cassation and the related procedure;

Rejecting the new brief containing additional observations, served on 14 October 2019 by the European Commission on Viorel Micula and filed on 15 October 2019 with the Court Registry, for failing to meet the requirements of Article 17 of the amended Law of 18 February 1885 on appeals on points of law and the cassation procedure;

Based on the report of Judge Romain Ludovicy and the opinion of Deputy Public Prosecutor John Petry;

In the interests of the proper administration of justice, the proceedings instigated by the two appeals on points of law recorded under numbers CAS-2018-00113 and CAS-2019-00033 in the Register should be joined.

The facts:

According to the judgment under appeal, the urgent applications judge at the Luxembourg District Court, seised by Romania of an application for annulment, or alternatively for release, of a garnishee order made by Viorel Micula on Romania’s assets with 61 banking institutions established in Luxembourg on the basis of an arbitral award given by the International Centre for Settlement of Investment Disputes (ICSID), and of a voluntary intervention made by the European Commission on the basis of Article 29(2) of Council Regulation (EU) 2015/1589 of 13 July 2015, in order to submit its observations and uphold EU law, had, by interim order, declared Romania’s application inadmissible, mainly on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure, and alternatively on the basis of the first paragraph of Article 932 of the same Code. The Court of Appeal, setting aside the judgment, declared the application admissible and founded on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure and ordered the release of the garnishee order.

The contested admissibility of the appeal on points of law:

Romania (the defendant in cassation) contends that the appeal on points of law is inadmissible owing to the failure to serve the brief on the European Commission, on the ground that the dispute between the parties is indivisible.

The appellant in cassation subsequently served his brief on the European Commission.

There is no legal provision that prohibits a second appeal on points of law from being lodged against a party not addressed by the first appeal.

Therefore, the ground of inadmissibility does not apply.

Both appeals on points of law, lodged in the form and within the time limit prescribed by law, are admissible.

The first ground of appeal, taken in its two parts:

‘drawn from the infringement, or misinterpretation, of the first paragraph of Article 933 of the New Code of Civil Procedure,

in that the judgment under appeal partially set aside the interim order of 10 May 2017 in that it held Romania’s application for release to be founded, on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure, in so far as there were serious objections requiring the release of the garnishee order and because a garnishee order made on the basis of a right that has become irrelevant and ineffective causes the debtor a manifestly unlawful disturbance on the grounds that the Court of Appeal found that

*“*Contrary to the appellant’s arguments, the urgent applications judge is not competent to decide whether Viorel Micula no longer has an enforceable right to proceed with the garnishee order, but it is competent to find that in the present case there are serious objections that require the release of the garnishee order made on 28 and 29 July 2015. An attachment made on the basis of a right that has become irrelevant and ineffective causes the debtor a manifestly unlawful disturbance” (Exhibit 3, judgment of the Court of Appeal of 21 March 2018, page 20).

It concluded from this that:

“To the extent that the Decision has caused the Award to become irrelevant and ineffective and thus unenforceable, Viorel Micula no longer has a valid claim. It is therefore necessary to grant Romania’s application and order the

release of the garnishee order made" (Exhibit 3, judgment of the Court of Appeal of 21 March 2018, pages 21 and 22).

Whereas:

first, the Court of Appeal, in so ruling, confused the concepts of serious objections and manifestly unlawful disturbance;

thus the Court of Appeal acted contrary to the provisions of the first paragraph of Article 933 of the New Code of Civil Procedure, or else misinterpreted them;

second, that the Court of Appeal, in so ruling, settled the serious objections alleged by the defendants, considering that the Commission Decision rendered the enforceable order irrelevant and ineffective, thereby exceeding the powers and competence conferred on the urgent applications judge in the matter of urgent applications and judicial protection, in that the Court of Appeal ruled on the merits of the dispute;

the judgment under appeal thus infringed the first paragraph of Article 933 of the New Code of Civil Procedure by refusing to apply the law, or else misinterpreting it'.

The use, in the ground criticised, of the expression 'serious objections' does not detract from the Court of Appeal's finding that because the decision of the European Commission had caused the arbitral award to lose its relevance and effectiveness, and therefore its enforceability, the garnishee order was a manifestly unlawful disturbance within the meaning of the first paragraph of Article 933 of the New Code of Civil Procedure, such as to justify its release.

In so determining, the Court of Appeal correctly applied the provision referred to in the ground and neither exceeded the powers and competence conferred on the urgent applications judge in matters of urgent applications and judicial protection, nor ruled on the merits of the dispute.

It follows that the ground, taken in both its parts, is unfounded.

The second and third grounds of appeal combined:

'**the second**, drawn from the infringement, or misinterpretation, of the fourth paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU)

in that the judgment under appeal partially set aside the interim order of 10 May 2017 in that it declared founded, on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure, Romania's application for release, by giving direct effect before the Luxembourg courts to the Decision of the European Commission of 30 March 2015 against Romania on the basis of Article 288 TFEU;

on the grounds that the Court of Appeal found that:

*"*The Decision therefore prohibits Romania from enforcing the Arbitral Award and orders it to recover the amounts already paid; it is binding and Viorel Micula could not have been ignorant of the fact that he could no longer use the Award as the basis for a preventive garnishee order on the ground that the Decision, subsequent to the Award, ruled that the order for Romania to pay damages was contrary to Union law.

According to the defendant Mr Micula, this Decision is binding only on Romania, but not on Luxembourg, such that it does not prevent the continued enforcement of the interim measure.

While it is true that Article 5 of the Decision states that "This Decision is addressed to Romania" and that Article 288 TFEU states that "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them", it stands to reason, in the light of the above arguments, that the Decision is binding in all Member States in which Viorel Micula initiates enforcement proceedings to obtain payment of the damages awarded to him by the arbitration tribunal by the Award of 11 December 2013." (Exhibit 3, judgment of the Court of Appeal of 21 March 2018, pages 19 and 20).

Whereas:

in so ruling, the Court of Appeal gave direct effect to a decision of the European Commission against Romania in the national courts of the Grand Duchy of Luxembourg, without, however, satisfying the conditions of EU case-law regarding the direct application of an EU decision;

the judgment under appeal thus infringed the fourth paragraph of Article 288 TFEU by refusing to apply the Treaty, or else misinterpreting it'.

And

third, 'the lack of a legal basis under the fourth paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU)

in that the judgment under appeal partially set aside the interim order of 10 May 2017 in that it declared founded, on the basis of the first paragraph of Article 933 of the New Code of Civil Procedure, Romania's application for release, by giving direct effect before the Luxembourg courts to the Decision of the European Commission of 30 March 2015 against Romania;

on the grounds that the Court of Appeal found that:

*"*The Decision therefore prohibits Romania from enforcing the Award and orders it to recover the amounts already paid; it is binding and Viorel Micula could

not have been ignorant of the fact that he could no longer use the Award as the basis for a preventive garnishee order on the ground that the Decision, subsequent to the Award, ruled that the order for Romania to pay damages was contrary to Union law.

According to the defendant Mr Micula, this Decision is binding only on Romania, but not on Luxembourg, such that it does not prevent the continued enforcement of the interim measure.

While it is true that Article 5 of the Decision states that "This Decision is addressed to Romania" and that Article 288 TFEU states that "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them", it stands to reason, in the light of the above arguments, that the Decision is binding in all Member States in which Viorel Micula initiates enforcement proceedings to obtain payment of the damages awarded to him by the arbitration tribunal by Award of 11 December 2013." (Exhibit 3, judgment of the Court of Appeal of 21 March 2018, pages 19 and 20).

Whereas:

in so ruling, the Court of Appeal gave direct effect to the Commission Decision against Romania in the national courts of the Grand Duchy of Luxembourg, making an assertion without, however, explaining its reasoning,

the Court of Appeal has thus deprived its judgment of a legal basis with regard to the concept of an EU decision as laid down in the fourth paragraph of Article 288 TFEU'.

The applicant in cassation complains that the Court of Appeal acted contrary to the provision referred to in the ground of appeal by giving direct effect to the Decision of the European Commission without satisfying the conditions laid down by EU case-law regarding the direct application of an EU decision (second ground of appeal), or alternatively depriving its judgment of a legal basis with regard to the concept of an EU decision, as is apparent from the provision referred to in the ground of appeal, by giving direct effect to the Commission Decision by making an assertion without explaining its reasoning (third ground of appeal).

Following the line of reasoning set out in the grounds of appeal, the Court of Appeal further held that:

'In the present case, the Commission Decision of 30 March 2015 is enforceable and impedes the enforcement of the right established by the Arbitral Award. It is binding in its entirety and in all Member States under Article 288 TFEU, and even though it is currently the subject of an appeal before the EU Courts, that appeal does not have suspensory effect under Article 278 TFEU.

The Decision prohibits the garnishee order from being upheld on its merits by a Luxembourg court since (i) the law on State aid, which is a matter of public policy, must take precedence over national law and (ii) the Arbitral Award is contrary to EU public policy and thus Luxembourg law (see judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, in which it was decided that the principle of the primacy of Community law requires the national court to refuse to apply any provision that might call into question the exclusive competence of the Commission to rule on the compatibility of State aid with the common market, including a national provision implementing the principle of res judicata, which would in the present case prevent the recovery of aid declared incompatible by the European Commission; judgment of the Court of Justice of 11 November 2015, *Klausner*, C-505/14, in which the Court of Justice ruled that the principle of effectiveness precludes a national rule which prevents the national court from drawing all the consequences of a breach of Article 108 TFEU because of a decision of a national court, which is res judicata, given in a dispute unrelated to the control of State aid).

The judgment in *Asturcom Telecomunicaciones* (judgment of the Court of Justice of 6 October 2009, C-40/08) cited by the Commission and mentioned above holds that the national court is required "in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy", which also incorporate public policy as defined by Union law.

Furthermore, in its judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12), the Court of Justice recalled that "It is also important to note that the application of the European Union rules on State aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional."'

It follows from the above reasoning that the Court of Appeal took into consideration the Decision of the European Commission, not on the basis of the theory of the direct effect of EU law according to the fourth paragraph of Article 288 TFEU referred to in the ground of appeal, but on the basis of the duty of sincere cooperation enshrined in the first subparagraph of Article 4(3) of the Treaty on European Union (TEU), which required it not to disregard that Decision in proceedings between the addressees thereof.

It follows that the grounds are inapplicable.

The application for the award of a case preparation fee:

It would be inequitable to leave to the defendants in cassation, Romania and the European Commission, the burden of all the fees incurred and not included in the award of costs. Each of them should be awarded a case preparation fee of EUR 2,500.

WHEREFORE,

the Court of Cassation:

joins the cassation proceedings brought by Viorel Micula against the judgment of the Court of Appeal of 21 March 2018 by means of the two cassation briefs referred to above;

dismisses the appeals on points of law;

orders the appellant in cassation to pay each of the defendants in cassation, Romania and the European Commission, a case preparation fee of EUR 2,500;

orders the appellant in cassation to pay the costs of the cassation proceedings, with a deduction for the amount claimed by [redacted]

This judgment was read out at the above-mentioned public hearing by the President [redacted], in the presence of First Advocate General [redacted] and the Registrar [redacted]

Bilaga 6

PRZEKAZANO SKAN LK, AHO
2020 -06- 10

Sąd Apelacyjny w Warszawie
I Wydział Cywilny
00-189 Warszawa ul. Inflancka 4C bud. D
Biuro Obsługi Interesantów tel. (22) 358 6761, -62
boiinflancka@waw.sa.gov.pl, skargi@waw.sa.gov.pl

PROKURATORIA GENERALNA RZECZYPOSPOLITEJ POLSKIEJ
KANCELARIA OGÓLNA
WPŁYNĘŁO
2020 -06- 10
L. dz. 23377 Załącz.
KR-4A-1289/4346/20
Agnieszka Bolcerzak
Specjalista

Data **5 czerwca 2020** r.
Sygn. akt I **ACa 457/18**

2020 -06- 15
AHO
WICEPREZES
Prokuratorii Generalnej
Rzeczypospolitej Polskiej
Artur Woźnicki

WICEPREZES
Prokuratorii Generalnej
Rzeczypospolitej Polskiej
Artur Woźnicki

Prokuratoria Generalna RP
ul. Hoża 76/78
00-682 Warszawa

DORĘCZENIE

Zgodnie z zarządzeniem Przewodniczącej, I Wydział Cywilny Sądu Apelacyjnego w Warszawie doręcza jako pełnomocnikowi skarżącego odpis wyroku z dnia 26 listopada 2019 r. wraz z uzasadnieniem.

st. sekr. sądowy
[redacted]

Niniejsze pismo nie wymaga podpisu własnoręcznego na podstawie § 21 ust. 4 zarządzenia Ministra Sprawiedliwości z dnia 19 czerwca 2019 r. w sprawie organizacji i zakresu działania sekretariatów sądowych oraz innych działów administracji sądowej jako właściwie zatwierdzone w sądowym systemie teleinformatycznym.

Sygn. akt I ACa 457/18

ODPIS

WYROK
W IMIENIU RZECZYPOSPOLITEJ POLSKIEJ

Dnia 26 listopada 2019 r.

Sąd Apelacyjny w Warszawie I Wydział Cywilny w składzie następującym:

Przewodniczący: SSA [redacted]

Sędziowie: SA [redacted]

SO del [redacted]

Protokolant: st. sekr. sądowy [redacted]

po rozpoznaniu w dniu 29 października 2019 r. w Warszawie

na rozprawie

sprawy ze skargi Skarbu Państwa - Ministra Infrastruktury (poprzednio Ministra Infrastruktury i Budownictwa)

przeciwko Autostradzie Wielkopolskiej spółce akcyjnej z siedzibą w Poznaniu

o uchylenie wyroku Trybunału Arbitrażowego ad hoc UNICITRAL z dnia 20 marca 2013 r., sprostowanego w dniu 30 kwietnia 2013 roku

na skutek apelacji skarżącego

od wyroku Sądu Okręgowego w Warszawie

z dnia 26 stycznia 2018 r., sygn. akt I C 736/13

I. **zmienia zaskarżony wyrok w punkcie pierwszym w ten sposób, że uchyla wyrok Trybunału Arbitrażowego ad hoc UNICITRAL z dnia 20 marca 2013 roku, sprostowany w dniu 30 kwietnia 2013 roku i w punkcie drugim w ten sposób, że zasądza od Autostrady Wielkopolskiej spółki akcyjnej z siedzibą w Poznaniu na rzecz Skarbu Państwa – Prokuratorii Generalnej Rzeczypospolitej Polskiej kwotę 1200 (jeden tysiąc dwieście) złotych tytułem zwrotu kosztów zastępstwa prawnego oraz nakazuje pobranie od Autostrady Wielkopolskiej spółki akcyjnej z siedzibą w Poznaniu na rzecz Skarbu Państwa – Sądu Okręgowego w Warszawie kwoty 100 000 (sto tysięcy) złotych tytułem nieuiszczonej opłaty od skargi;**

II. **zasądza od Autostrady Wielkopolskiej spółki akcyjnej z siedzibą w Poznaniu na rzecz Skarbu Państwa – Prokuratorii Generalnej Rzeczypospolitej Polskiej kwotę 1800 (jeden tysiąc osiemset) złotych**

tytułem zwrotu kosztów zastępstwa prawnego w postępowaniu apelacyjnym;

III. nakazuje pobranie od Autostrady Wielkopolskiej spółki akcyjnej z siedzibą w Poznaniu na rzecz Skarbu Państwa – Sądu Okręgowego w Warszawie kwoty 100 000 (sto tysięcy) złotych tytułem nieuiszczonej opłaty od apelacji.

[redacted]ka [redacted] [redacted]

Na oryginale właściwe podpisy
Za zgodność
STARSZY SEKRETARZ SĄDOWY
[redacted]

Sygn. akt I A Ca 457/18

UZASADNIENIE

Pismem z 27 czerwca 2013 r. Skarb Państwa – Minister Transportu, Budownictwa i Gospodarki Morskiej (następnie Minister Infrastruktury i Budownictwa, aktualnie Minister Infrastruktury) wniósł przeciwko Autostradzie Wielkopolskiej Spółce Akcyjnej w Poznaniu (AWSA) skargę o uchylenie w całości wyroku Trybunału Arbitrażowego ad hoc (UNCITRAL) w składzie: Louis B. Buchman (Przewodniczący), prof. dr Karl-Heinz Böckstiegel, prof. Jerzy Rajski, wydanego 20 marca 2013 r. w sprawie z powództwa AWSA przeciwko Skarbowi Państwa – Ministrowi Transportu, Budownictwa i Gospodarki Morskiej, sprostowanego przez Trybunał Arbitrażowy 30 kwietnia 2013 r. Jako podstawę prawną żądania Skarżący wskazał art. 1206 § 2 pkt 2 k.p.c., zarzucając Trybunałowi Arbitrażowemu wydanie wyroku sprzecznego z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej poprzez:

1) naruszenie klauzuli porządku publicznego poprzez pominięcie bezwzględnej nieważności Aneksu nr 6 do Umowy Koncesyjnej jako sprzecznego z bezwzględnie obowiązującymi przepisami prawa, co w konsekwencji prowadziło do naruszenia zasady swobody umów rozumianej jako swobodę kształtowania stosunku zobowiązaniowego w granicach dopuszczonych przez ustawę, konstytucyjne zasady ochrony praw majątkowych oraz zasady pewności prawa i bezpieczeństwa obrotu,

2) naruszenie klauzuli porządku publicznego poprzez całkowity brak rozważenia zarzutów skarżącego w przedmiocie nieważności względnej Aneksu nr 6 z uwagi na skuteczne uchylenie się przez Skarżącego od jego skutków - co skutkowało naruszeniem konstytucyjnej zasady prawa do sądu – ustanowionego w art. 45 ust. 1 Konstytucji RP, wyrażającego się m.in. obowiązkiem rozpoznania przez sąd istoty sprawy, co stanowiło również przejaw braku zachowania przez Trybunał Arbitrażowy zasady równości stron postępowania,

3) naruszenie klauzuli porządku publicznego poprzez nierozpoznanie istoty sprawy w zakresie zawarcia Aneksu nr 6 pod wpływem błędu i utrzymanie mocy wiążącej oświadczenia woli Skarżącego, które to oświadczenia woli było nieważne jako złożone pod wpływem błędu – co skutkowało naruszeniem zasady autonomii woli stron oraz zasady ochrony zaufania podmiotu do składanych mu oświadczeń, a w konsekwencji konstytucyjnych zasad swobody prowadzenia działalności gospodarczej i zasady ochrony własności i innych praw majątkowych.

Przeciwnik Skargi w odpowiedzi na skargę wniósł o jej oddalenie w całości oraz o zasądzenie na jego rzecz od Skarżącego zwrotu kosztów procesu, w tym kosztów zastępstwa procesowego wg norm przepisanych. Przeciwnik Skargi zakwestionował, aby skarżone orzeczenie Sądu Arbitrażowego wywarło skutek sprzeczny z podstawowymi zasadami krajowego porządku prawnego albo żeby wyrok naruszał zasady prawa do sądu oraz równości stron postępowania, autonomii woli stron, ochrony zaufania podmiotu do składanych mu oświadczeń, swobody działalności gospodarczej oraz ochrony własności i innych praw majątkowych.

W dalszym toku postępowania Skarżący dodatkowo powołał się na fakt, że Komisja Europejska wydała decyzję C(2014) 3172 final w przedmiocie wszczęcia postępowania przewidzianego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej (TFUE) w odniesieniu do rekompensaty udzielonej przez Skarb Państwa na rzecz AWSA, a następnie decyzją z 25 sierpnia 2017 r. w sprawie pomocy państwa SA.35356 (2014/C) (ex 2013/NN, ex 2012/N) wdrożonej przez Polskę na rzecz AWSA uznała, że nadmierna rekompensata za okres od 1 września 2005 r. do 30 czerwca 2011 r. wynosząca 894.956.888,88 zł przyznana na rzez AWSA na mocy Aneksu nr 6 stanowi niedozwoloną pomoc publiczną w rozumieniu art. 107 ust. 1 TFUE, a ponadto jest niezgodna z prawem (art. 108 ust. 3 TFUE) i niezgodna z rynkiem wewnętrznym (pismo z 3 stycznia 2018 r. - k. 657-660).

Wyrokiem z dnia 26 stycznia 2018 r. Sąd Okręgowy w Warszawie w punkcie pierwszym oddalił skargę i w punkcie drugim zasądził od Skarbu Państwa – Ministra Infrastruktury i Budownictwa na rzecz Autostrady Wielkopolskiej spółki akcyjnej z siedzibą w Poznaniu kwotę 7 217 zł tytułem zwrotu kosztów zastępstwa procesowego.

U podstaw powyższego orzeczenia legły następujące ustalenia faktyczne:

W dniu 12 września 1997 r. AWSA oraz Skarb Państwa reprezentowany przez Ministra Transportu i Gospodarki Morskiej zawarli Umowę Koncesyjną na budowę i eksploatację autostrady płatnej A-2 na odcinkach Świecko – Poznań i Poznań – Konin. Umowa Koncesyjna zmieniona została siedmioma aneksami, w tym Aneksem nr 6 (Umowa Koncesyjna – k. 32-103). W artykule 24.3 Umowy Koncesyjnej strony zawarły zapis na sąd arbitrażowy prowadzący postępowanie zgodnie z zasadami postępowania Komisji Narodów Zjednoczonych ds. Międzynarodowego Prawa Handlowego (UNCITRAL) (k. 99v-100).

Po wejściu Polski w 2004 r. do Unii Europejskiej konieczne stało się dostosowanie przepisów krajowych dotyczących płatności przez samochody ciężarowe za przejazdy drogami krajowymi w Polsce. Do tej pory samochody ciężarowe płaciły opłatę winietową na rzecz Skarbu Państwa z tytułu korzystania ze wszystkich dróg krajowych w Polsce (w tym za

autostrady płatne) oraz równolegle opłaty za przejazd konkretnymi odcinkami płatnych autostrad. Z dniem 1 września 2005 r. weszła w życie ustawa z 28 lipca 2005 r. o zmianie ustawy o autostradach płatnych oraz o Krajowym Funduszu Drogowym oraz ustawy o transporcie drogowym (Ustawa nowelizująca). Wprowadziła ona mechanizm rekompensowania uszczerbku majątkowego koncesjonariuszy będący następstwem pozbawienia ich uprawnienia do poboru opłat od kierowców samochodów ciężarowych.

W dniu 14 października 2005 r. Strony zawarły Aneks nr 6 do Umowy Koncesyjnej, który precyzował szczegółowe zasady wypłaty rekompensaty należnej AWSA. Celem Aneksu nr 6 było zapewnienie AWSA zwrotu środków finansowych utraconych w wyniku wejścia w życie Ustawy nowelizującej.

Pismem z 13 listopada 2008 r. Minister Infrastruktury złożył oświadczenie o uchyleniu się od skutków oświadczenia woli złożonego w Aneksie nr 6 do Umowy Koncesyjnej. Jako podstawę wskazał błąd co do prawdziwości zawartych w Aneksie nr 6 danych, a wynikający z tego, że przyjęte wyliczenia wysokości rekompensaty oparte były o nieaktualną, bo pochodzącą z 1999 r. analizę prognozy ruchu, podczas gdy AWSA dysponowała już analizą z 2004 r. (k. 193-194).

Postępowanie arbitrażowe zostało wszczęte przez AWSA wezwaniem na arbitraż z 8 grudnia 2010 r.

Wyrokiem z 20 marca 2013 r. rozpoznający sprawę Trybunał Arbitrażowy orzekł, że:
1. Oświadczenie Ministra Infrastruktury z 13 listopada 2008 r. o uchyleniu się od skutków oświadczenia woli złożonego w Aneksie nr 6 do Umowy Koncesyjnej jest bezskuteczne.
2. Aneks nr 6 jest ważną i wykonalną umową.
3. Powództwo wzajemne Skarbu Państwa o ustalenie, że Aneks nr 6 jest bezwzględnie nieważny albo że pozwany skutecznie uchylił się od skutków oświadczenia woli o zawarciu Aneksu nr 6, o ustalenie że Aneks nr 6 nie stanowi ważnej i wykonalnej umowy oraz o ustalenie, że pozwanemu przysługuje, co do zasady roszczenie o zwrot nienależnie dokonanej płatności uiszczonej zgodnie z Aneksem nr 6 – zostało oddalone.

W uzasadnieniu wyroku Trybunał Arbitrażowy wskazał m.in., że istnieje domniemanie ważności Aneksu nr 6. Ciężar dowodu co do rzekomego błędu spoczywa na stronie, która powołuje się na błąd, a Skarb Państwa nie wykazał, iż był w błędzie. Jednocześnie Trybunał zauważył, że co do kwestii pomocy publicznej, obie strony były zgodne, że kwestie te nie mają wpływu na decyzję Trybunału (pkt 4.25 – k. 181v, wyrok – k. 173-184).

Zdanie odrębne od wyroku Trybunału Arbitrażowego złożył prof. Jerzy Rajski

wskazując, że Aneks nr 6 należy uznać za sprzeczny z bezwzględnie obowiązującym art. 3 Ustawy nowelizującej zapewniającym ochronę interesów publicznych i w konsekwencji za nieważny (art. 58 § 1 k.c.). W uzasadnieniu tego stanowiska wskazano, że naruszając dyrektywy językowe i całkowicie pomijając funkcjonalne, Arbitrzy równocześnie dokonują niedopuszczalnej subiektywizacji procesu wykładni art. 3 Ustawy nowelizującej, niezgodnej z podstawową zasadą praworządności, według której prawo ma to samo znaczenie dla każdego (zdanie odrębne – k. 186v i k. 190).

Wyrok z 20 marca 2013 r. został sprostowany w zakresie oczywistych omyłek pisarskich orzeczeniem z 30 kwietnia 2013 r. (orzeczenie – k. 171-172).

Sąd Okręgowy wskazał, że powyższy stan faktyczny ustalił na podstawie powołanych dowodów z dokumentów, których wartość dowodowa nie była kwestionowana przez strony ani nie budziła wątpliwości Sądu.

W ocenie Sądu Okręgowego skarga, w której podstawę żądania uchylenia wyroku Trybunału Arbitrażowego wskazano art. 1206 § 1 pkt 2 k.p.c. podnosząc, że wyrok jest sprzeczny z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej (tzw. klauzula porządku publicznego) nie zasługiwała na uwzględnienie.

Przede wszystkim Sąd Okręgowy stwierdził, że Kodeks postępowania cywilnego bardzo wąsko zakreśla podstawy uchylenia wyroku sądu arbitrażowego i wyjaśnił, iż pomimo kontrolnego charakteru, skarga nie jest środkiem zaskarżenia, zaś rolą sądu powszechnego, odmiennie niż ma to miejsce w postępowaniu apelacyjnym, nie jest ponowne merytoryczne rozpoznanie sprawy rozstrzygniętej wyrokiem sądu arbitrażowego z zastosowaniem przepisów prawa materialnego i procesowego. Zaznaczył, że w postępowaniu przed sądem państwowym, zainicjowanym skargą, sąd nie bada, czy wyrok sądu arbitrażowego nie pozostaje w sprzeczności z prawem materialnym i czy znajduje oparcie w faktach przytoczonych w wyroku, jak również, czy fakty te zostały prawidłowo ustalone. Sąd powszechny rozpoznaje sprawę tylko z punktu widzenia przyczyn uchylenia wyroku i dokonuje oceny zasadności skargi wyłącznie w świetle przesłanek z art. 1206 § 1 i 2 k.p.c., przy czym z urzędu pod rozwagę bierze jedynie podstawy z art. 1206 § 2 k.p.c. Odwołując się do orzecznictwa Sądu Apelacyjnego w Warszawie, Sąd Okręgowy skonstatował, że naruszenie przepisów ogólnych cywilnego prawa procesowego, jak i naczelnych zasad postępowania cywilnego może stanowić uzasadnioną podstawę uchylenia wyroku sądu polubownego, jeżeli doprowadziło ono w swym wyniku do naruszenia podstawowych zasad porządku prawnego Rzeczypospolitej Polskiej lub zasad współżycia społecznego oraz, że naruszenie naczelnych zasad prawnych obowiązujących w Rzeczypospolitej Polskiej

skutkować musi również - jeżeli stanowić ma podstawę uchylenia wyroku sądu polubownego - obrazą prawa materialnego.

Sąd Okręgowy zauważył, że użyte w art. 1206 § 2 k.p.c. określenie „podstawowe zasady porządku prawnego" wskazuje, iż chodzi o takie naruszenie przepisów prawa materialnego, które prowadzi do pogwałcenia zasad państwa prawa (praworządności), a zapadły wyrok arbitrażowy narusza naczelne zasady prawne obowiązujące w Rzeczypospolitej Polskiej, godzi w obowiązujący porządek prawny, czyli narusza pryncypia ustrojowo-polityczne i społeczno-gospodarcze. Podkreślił, że nawet błędna wykładnia przepisów o podstawowym znaczeniu dla rozstrzygnięcia, dokonana przez sąd polubowny, nie musi oznaczać naruszenia klauzuli porządku publicznego, akceptując stanowisko, że ocena, czy orzeczenie nie uchybia podstawowym zasadom porządku prawnego, powinna być zatem ad casu, formułowana w sposób zawężający i do konkluzji pozytywnej można dojść tylko wtedy, gdy skutki orzeczenia sądu polubownego prowadziłyby do istotnego naruszenia podstawowych zasad zaliczonych do klauzuli porządku publicznego. Zaznaczył, że orzekanie na zasadach słuszności (ex aequo at bono) polega na poszukiwaniu rozwiązania sporu zgodnie z dyrektywami słuszności i sprawiedliwości, tak jak są one pojmowane przez arbitrów, niezależnie od obowiązujących norm prawnych. Stwierdził jednocześnie, że powyższe nie oznacza dowolności oceny sprawy i możliwości abstrahowania od stanu faktycznego, dlatego też arbitrzy muszą przeprowadzić postępowanie dowodowe, przeanalizować zebrany materiał, a także wziąć pod rozwagę wiążące strony postanowienia umowy. Wskazał również, że tylko w razie, gdy treść wyroku i jego skutki są nie do pogodzenia z określoną normą zaliczaną do podstawowych zasad porządku publicznego, ulega on uchyleniu na podstawie art. 1206 § 2 pkt 2 k.p.c. - odwołując się w tej mierze do stanowiska wyrażonego w wyroku Sądu Apelacyjny w Warszawie z 16 marca 2017 r., I ACa 1070/16 (LEX nr 2317763).

Zdaniem Sądu Okręgowego przedstawiony w skardze zarzut niezachowania przez Trybunał Arbitrażowy zasady równości stron postępowania, dotyczy nie tyle postępowania przed Trybunałem (kwestii proceduralnych w jego toku), lecz treści uzasadnienia wyroku w zakresie oceny materiału dowodowego i podnoszonych przez Skarb Państwa zarzutów. W tym kontekście Sąd Okręgowy zauważył, iż zgodnie z art. 1197 § 2 k.p.c. wyrok sądu polubownego powinien zawierać motywy rozstrzygnięcia, lecz zgodnie z poglądami doktryny, nie oznacza to, że uzasadnienie musi odpowiadać tym wymaganiom, które są przewidziane dla postępowania sądowego przed sądem powszechnym (tj. określonym w art. 328 § 2 k.p.c.).

Sąd Okręgowy stwierdził, że wbrew stanowisku Skarżącego, analiza przebiegu postępowania arbitrażowego wskazuje, że zarzut nieważności względnej Aneksu nr 6 został dostrzeżony przez Trybunał Arbitrażowy, był przedmiotem pisemnych i ustnych oświadczeń stron, przeprowadzono co do niego postępowanie dowodowe – dowody z dokumentów, zeznań świadków i biegłych zgłoszonych przez obie strony. Umożliwiono także stronom składanie pism w toku postępowania oraz pism podsumowujących rozprawę. Rozważenie zgromadzonego materiału znalazło swoje odzwierciedlenie w samym wyroku. Orzeczenie Trybunału Arbitrażowego w sposób szczegółowy przedstawia stanowiska stron, wraz z argumentacją przytoczoną na ich potwierdzenie, w tym w zakresie dotyczącym ważności (bezskuteczności) Aneksu nr 6. W uzasadnieniu wyroku są wskazane motywy rozstrzygnięcia, w tym domniemanie ważności Aneksu. Arbitrzy w uzasadnieniu dokonując wykładni art. 3 Ustawy nowelizującej, przywołują możliwe sposoby rozumienia tego przepisu, odwołują się do zeznań świadka Joanny Gaczewskiej z Generalnej Dyrekcji Dróg Krajowych i Autostrad, analizują art. 58 k.c. Ostatecznie dochodzą do wniosku w punkcie 4.22, że Aneks nr 6 jest ważnie zawartą umową. Dalej w punkcie 4.24 powołując się na ciężar dowodu Trybunał stwierdza, że Skarb Państwa nie wykazał, że był w błędzie zawierając Aneks nr 6. Ustalenie to winno być czytane łącznie z wcześniejszą częścią orzeczenia, w tym argumentacją AWSA przytoczoną w punkcie 3.1.1 wyroku. Wskazuje ona szczegółowo, dlaczego możliwość zajścia prawnie doniosłego błędu po stronie Skarbu Państwa jest wyłączona. W uzasadnieniu zdania odrębnego wskazano, że Aneks nr 6 należy uznać za sprzeczny z prawem - art. 3 Ustawy nowelizującej. Uzasadnienie opiera się na analizie pojęcia „stosowanej stawki opłaty". Jego autor zarzuca arbitrom „elastyczną" wykładnię art. 3, niedopuszczalną subiektywizację procesu wykładni tego przepisu, niezgodną z podstawową zasadą praworządności, wg której prawo ma to samo znaczenie dla każdego (k. 186v). W dalszej części uzasadnienia zdania odrębnego pojawił się zarzut, że arbitrzy uznali, że przyjęta przez nich interpretacja art. 3 Ustawy nowelizującej jest właściwa dlatego, że tak miały go rozumieć strony. Nie jest to jednak precyzyjne, gdyż odwołanie do rozumienia stron stanowiło raczej podstawę do uzasadnienia, że przepis nie był tak jednoznaczny, że nie dopuszczał różnych wykładni, a przez to wyłączył zasadę *clara non sunt interpretanda* (pkt 4.7 i 4.8 wyroku).

Sąd Okręgowy uznał, że rolą sądu rozpoznającego skargę nie jest ocena, czy dokonano prawidłowej wykładni Ustawy nowelizującej bowiem rozważania w tym zakresie prowadziłyby do merytorycznej kontroli zapadłego rozstrzygnięcia. Zaznaczył jednak, że gdyby nawet przyjąć, iż Trybunał Arbitrażowy dokonał błędnej wykładni, to nie

prowadziłoby to do wniosku, że doszło do naruszenia klauzuli porządku publicznego i skutku w postaci sprzeczności orzeczenia z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej. Sąd Okręgowy stwierdził (odwołując się do powoływanych uprzednio judykatów), że przyjęcie przez Trybunał jednej z możliwych interpretacji przepisu nie może stanowić dowodu na naruszenia podstawowych zasad porządku prawnego. Wyjaśnił nadto, że przy stosowaniu klauzuli porządku publicznego nie chodzi o to, aby oceniane orzeczenie było zgodne ze wszystkimi wchodzącymi w grę bezwzględnie obowiązującymi przepisami prawa, lecz o to, czy wywarło ono skutek sprzeczny z podstawowymi zasadami krajowego porządku prawnego.

Reasumując Sąd Okręgowy stwierdził, że wyrok z 20 marca 2013 r. nie jest sprzeczny z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej oraz, że takiego wniosku nie można wyprowadzić nawet przy przyjęciu, że Trybunał Arbitrażowy dokonał błędnej wykładni art. 3 Ustawy nowelizującej, który z uwagi na zakres zastosowania i przedmiot regulacji, jest zupełnie marginalny dla polskiego porządku prawnego.

Przyznając rację Skarżącemu, że prawo do sądu w wyniku przeprowadzenia postępowania przez Trybunał Arbitrażowy zostało ograniczone, Sąd Okręgowy zwrócił uwagę, że jest to konsekwencja samego (niekwestionowanego) zapisu na sąd arbitrażowy, a nie sposobu prowadzenia postępowania przez Trybunał. Podkreślił, że rozstrzygnięcie na korzyść jednej ze stron, po przeprowadzeniu wnioskowanego przez obie strony postępowania dowodowego, nie może świadczyć o naruszeniu zasady równości stron postępowania.

Odnosząc się do zarzutu niezgodności wyroku Trybunału Arbitrażowego z europejskim porządkiem prawnym, Sąd Okręgowy wskazał, że w trakcie postępowania przed Trybunałem strony były zgodne, iż kwestia pomocy publicznej nie ma wpływu na decyzję Trybunału (pkt 4.25 wyroku - k. 181v). Zauważył również, że jakkolwiek w toku niniejszego postępowania podniesiony został przez Skarżącego problem związany z tym, że unijne przepisy prawa konkurencji stanowią część porządku publicznego, który musi być uwzględniony przez sądy krajowe w toku sprawowania przez nie kontroli nad orzeczeniami arbitrażowymi, to z jednej strony Skarżący wskazywał, że sąd w ramach postępowania w przedmiocie uchylenia wyroku sądu polubownego obowiązany jest z urzędu uwzględniać naruszenie przepisów prawa Unii Europejskiej, a z drugiej przyznawał, że ocena zgodności pomocy publicznej z prawem Unii Europejskiej należy do wyłącznej kompetencji Komisji Europejskiej i podlega kontroli dokonywanej przez sądy Unii Europejskiej. Dostrzegając, że Komisja Europejska decyzją z 25 sierpnia 2017 r. uznała, iż nadmierna rekompensata za okres od 1 września 2005 r. do 30 czerwca 2011 r. wynosząca 894.956.888,88 zł przyznana na rzecz

AWSA na mocy Aneksu nr 6 stanowi niedozwoloną pomoc publiczną w rozumieniu art. 107 ust. 1 TFUE, a ponadto jest niezgodna z prawem (art. 108 ust. 3 TFUE) i niezgodna z rynkiem wewnętrznym, Sąd Okręgowy stwierdził, że powyższe orzeczenie nie mogło jednak wpływać na rozstrzygnięcie w niniejszej sprawie. Po pierwsze przedmiotowa decyzja Komisji Europejskiej jest nieprawomocna, a po drugie, w przypadku prawomocnego stwierdzenia, że AWSA uzyskała bezprawną i niezgodną z rynkiem wewnętrznym pomoc publiczną prawo polskie przewiduje procedurę dochodzenia zwrotu tej pomocy. Zaznaczył też, że Skarżący już zaczął korzystać z przysługujących mu w tym zakresie praw wszczynając postępowanie przed Sądem Okręgowym w Poznaniu (sygn. akt XVIII Nc 534/17, a następnie XVIII C 1937/17). Zdaniem Sądu Okręgowego, skoro art. 27 ust. 1 pkt 1 ustawy z 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej (Dz.U. z 2016 r., poz. 1808) przewiduje, że w przypadku wydania decyzji Komisji o obowiązku zwrotu pomocy, jeżeli pomoc była udzielona na podstawie umowy – podmiot udzielający pomocy może wystąpić do sądu o rozwiązanie umowy, na podstawie której udzielono pomocy lub o nakazanie zwrotu udzielonej pomocy, prowadzone postępowanie przed organami europejskimi nie mogło mieć wpływu na ocenę zasadności skargi. Kompletny reżim prawny określający procedurę odzyskania pomocy publicznej wykluczał uchylenie wyroku Trybunału Arbitrażowego. Jako podstawę rozstrzygnięcia o kosztach postepowania Sąd Okręgowy wskazał art. 98 k.p.c. i § 10 pkt 4 w z w. z § 2 ust. 2 rozporządzenia Ministra Sprawiedliwości z 28 września 2002 r. w sprawie opłat za czynności radców prawnych oraz ponoszenia przez Skarb Państwa kosztów pomocy prawnej udzielonej przez radcę prawnego ustanowionego z urzędu.

Powyższy wyrok w całości został zaskarżony apelacją wniesioną przez Skarb Państwa, który zarzucił:

1) naruszenie art. 1206 § 2 pkt 1 k.p.c. polegające na zaniechaniu zbadania zdatności arbitrażowej sporu zakończonego objętym skargą wyrokiem Trybunału Arbitrażowego *ad hoc* (UNCITRAL) z dnia 26 marca 2013 r., (sprostowanym przez Trybunał Arbitrażowy w dniu 30 kwietnia 2013 r.) i błędnym dorozumianym przyjęciu, że według ustawy spór będący przedmiotem postępowania przed Trybunałem Arbitrażowym może być rozstrzygnięty przez sąd polubowny, podczas gdy:

a) spór objęty postępowaniem przed Trybunałem Arbitrażowym, jako nie mogący być przedmiotem ugody sądowej, nie posiada zdatności arbitrażowej (art. 1157 k.p.c.), ponieważ stan nieważności czynności prawnej ma charakter obiektywny i istniejący *ex lege*, a zatem strony sporu nie są uprawnione do zawarcia skutecznej ugody, która ten stan by

modyfikowała;

b) spór ten dotyczył ważności umowy, a do rozstrzygania o ustaleniu istnienia lub nieistnienia czynności prawnej uprawniony jest wyłącznie sąd powszechny (art. 189 k.p.c.), natomiast żaden przepis nie przyznaje tej kompetencji sądom polubownym;

2) naruszenie art. 1138 k.p.c. w zw. z art. 244 § 1 k.p.c. w zw. z art 278 Traktatu o funkcjonowaniu Unii Europejskiej („TFUE"), art 288 TFUE i art. 297 ust. 2 TFUE przez przyjęcie, że decyzja Komisji Europejskiej C(2017) 5818 finał z dnia 25 sierpnia 2017 r. w sprawie pomocy państwa SA.35356 (2014/C) (ex 2013/NN, ex 2012/N) wdrożonej przez Polskę na rzecz spółki Autostrada Wielkopolska S.A. („Decyzja KE") nie może mieć wpływu na rozstrzygnięcie sprawy ze skargi o uchylenie Wyroku Arbitrażowego, chociaż jest aktem mającym służyć wykonaniu kompetencji Unii Europejskiej, wiążącym i skutecznym dla Rzeczypospolitej Polskiej oraz podlegającym wykonaniu;

3) naruszenie art. 1206 § 2 pkt 2 k.p.c. w zw. z art. 107 i 108 ust. 3 TFUE oraz art. 87 ust. 1 Konstytucji RP w zw. z art. 91 ust. 3 Konstytucji RP przez przyjęcie, że przepisy TFUE regulujące zasady udzielania pomocy publicznej i funkcjonowania rynku wewnętrznego nie tworzą podstawowych zasad porządku prawnego Rzeczypospolite Polskiej i w konsekwencji zaniechanie zbadania Wyroku Arbitrażowego w kontekście jego zgodności z art. 107 i 108 ust. 3 TFUE;

4) naruszenie art. 1206 § 2 pkt 2 k.p.c. w zw. z art 58 § 1 k.c. w zw. z art. 107 i 108 ust 3 TFUE polegające na przyjęciu, że Wyrok Arbitrażowy stwierdzający ważność czynności prawnej w postaci Aneksu nr 6 z dnia 14 października 2005 r. („Aneks nr 6") do Umowy koncesyjnej na budowę i eksploatację autostrady płatnej A-2 z dnia 12 września 1997 r. („Umowa Koncesyjna") nie jest sprzeczny z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej, pomimo że sprzeczność Aneksu nr 6 z art. 107 i 108 ust. 3 TFUE została w sposób wiążący stwierdzona przez Komisję Europejską w Decyzji KE.

W konkluzji apelujący wnosił o zmianę zaskarżonego wyroku w całości poprzez uchylenie Wyroku Arbitrażowego w całości wraz ze sprostowaniem z dnia 30 kwietnia 2013r. oraz o zasądzenie od Przeciwnika Skargi na rzecz Skarbu Państwa - Ministra Infrastruktury kosztów postępowania wraz z kosztami zastępstwa procesowego według norm przepisanych, w tym — w zakresie kosztów zastępstwa procesowego - zasądzenie ich na rzecz Skarbu Państwa - Prokuratorii Generalnej Rzeczypospolitej Polskiej, zgodnie z art. 32 ust. 3 ustawy z dnia 15 grudnia 2016 r. o Prokuratorii Generalnej Rzeczypospolitej Polskiej.

Przeciwnik Skargi wnosił o oddalenie apelacji i zasądzenie kosztów postępowania apelacyjnego.

Komisja Europejska w uwagach przedstawionych na piśmie w dniu 16 listopada 2018r. oraz ustnie na rozprawie w dniu 29 października 2019r, przedstawiła argumentację przemawiającą za zmianą zaskarżonego wyroku Sądu Okręgowego poprzez uchylenie wyroku Trybunału Arbitrażowego. Na tej samej rozprawie pełnomocnicy Skarżącego i Przeciwnika Skargi wskazali, iż nie kwestionują, że w dniu 24 października 2019r. zapadł wyrok Sądu Unii Europejskiej oddalający skargę Autostrady Wielkopolskiej S.A. z siedzibą w Poznaniu o stwierdzenie nieważności decyzji Komisji Europejskiej z dnia 25 sierpnia 2017r. w sprawie pomocy państwa.

Sąd Apelacyjny zważył co następuje:

Apelacja zasługuje na uwzględnienie pomimo, że nie wszystkie podniesione w niej zarzuty mogą być uznane za trafne.

Przede wszystkim nie można uznać słuszności zarzutu najdalej idącego - dotyczącego braku zdatności arbitrażowej sporu. Sąd Okręgowy nie wypowiadał się wprawdzie odrębnie co do zdolności arbitrażowej, przyjmując jej niekwestionowane istnienie, lecz nie oznacza to, tym samym wadliwe rozstrzygnął owo kluczowe zagadnienie. W tym miejscu należy przypomnieć, że 17 października 2005 r. weszła w życie Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy - Kodeks postępowania cywilnego (Dz. U. z 2005 r., nr 178, poz. 1478), która uchyliła m.in. art. 695-715 k.p.c., zaś z przepisu jej art. 2 wynika, że dotychczasowe przepisy mają zastosowanie do wszczętych przed wejściem w życie tej ustawy postępowań przed sądami polubownymi oraz tzw. postępowań post-arbitrażowych przed sądami państwowymi (dotyczy to stwierdzenia skuteczności wyroku sądu polubownego, stwierdzenia wykonalności wyroku sądu polubownego oraz ze skargi o uchylenie wyroku sądu polubownego). Postępowanie arbitrażowe między Stronami rozpoczęło się w 2010 r., a więc toczyło się pod rządami nowej ustawy. Jednakże zgodnie z utrwalonym orzecznictwem Sądu Najwyższego i sądów powszechnych, o ważności i skuteczności zapisu na sąd polubowny decydują przepisy obowiązujące w chwili sporządzania zapisu. Jak stwierdził Sąd Najwyższy w postanowieniu z dnia 18 czerwca 2010r. *V CSK 434/09 (Lex nr 738365):"* ustawa nowelizująca w jedynym przepisie międzyczasowym - art. 2, zawierała tylko regulację dotyczącą stosowania określonych przepisów do postępowania przed sądami polubownymi sądami państwowymi w zależności od daty wszczęcia takiego postępowania. Nie regulowała natomiast kwestii, według jakich przepisów należy oceniać ważność i skuteczność samego

zapisu na sąd polubowny. (...) Zgodnie z zasadami międzyczasowymi właściwymi dla prawa materialnego każdy fakt prawny powinien rodzić takie skutki prawne, jakie przewidują przepisy obowiązujące w chwili jego zajścia, a zatem ważności i skuteczności zapisu na sąd polubowny decydują przepisy obowiązujące w chwili sporządzania zapisu. W analogiczny sposób Sąd Najwyższy wypowiedział się też w wyroku z dnia 27 listopada 2008 r. IV CSK 292/08 niepubl. Podobnie Sąd Apelacyjny we Wrocławiu w postanowieniu z dnia 10 maja 2012 r., I ACz 660/12 *(Lex nr 1238598)* wskazał, że w judykaturze ugruntowane jest stanowisko, iż zgodnie z zasadami międzyczasowymi właściwymi dla prawa materialnego - art. 3 k.c., każdy fakt prawny powinien rodzić takie skutki prawne, jakie przewidują przepisy obowiązujące w chwili jego zajścia, a zatem o ważności i skuteczności zapisu na sąd polubowny, które to zagadnienia regulowane są właśnie przepisami prawa materialnego, decydują przepisy obowiązujące w chwili sporządzania zapisu. W efekcie, ważność i skuteczność zapisów na sąd polubowny w niniejszej sprawie należało ocenić na podstawie dawnego art. 697 i art. 698 k.p.c., obowiązujących w chwili zawierania przez strony umów sprzedaży udziałów, a nie według obowiązujących od dnia 17 października 2005 r. przepisów art. 1157 i art. 1161 k.p.c. Przepis art. 697 k.p.c. odsyłał do granic zdolności stron do „samodzielnego zobowiązywania się", nie posługiwał się natomiast kryterium „zdatności ugodowej" sporu. Argumentacja Sądu Najwyższego przedstawiona w kwestionowanych przez Skarżącego orzeczeniach odnosi się również do oceny zdatności arbitrażowej na tle poprzednio obowiązujących przepisów Kodeksu postępowania cywilnego. Wypada podkreślić, że Sąd Najwyższy uznał, iż zmiana przepisów k.p.c. dokonana ustawą z dnia 28 lipca 2005 r., tj. zastąpienie art. 697 § 1 k.p.c. odwołującego się do zdolności stron do samodzielnego zobowiązywania się w ramach danego stosunku prawnego, przepisem art. 1157 k.p.c., odwołującym się do zdatności ugodowej sporu, jest w istocie zmianą w warstwie językowej, a nie znaczeniowej. W powołanym postanowieniu z dnia 18 czerwca 2010 r., V CSK 434/09 Sąd Najwyższy wyjaśnił, że: „(...) również na gruncie art. 697 § 1 k.p.c. powszechnie przyjmowano, że spod możliwości zapisu na sąd polubowny wyłączone były spory powstałe na tle takich stosunków prawnych, w zakresie których wyłączona jest możliwość samodzielnego dysponowania przez strony uprawnieniami wynikającymi z tych stosunków, a więc takie spory, które nie mogą być przedmiotem samodzielnej dyspozycji stron, w tym zawarcia ugody sądowej. Zdatność arbitrażową na gruncie art. 697 § 1 k.p.c. miały zatem takie stosunki prawne i wynikające z nich spory, którymi w świetle przepisów prawa materialnego strony mogą swobodnie dysponować. Pozbawione tej zdatności były więc pewne kategorie stosunków prawnych, a nie pewne kategorie roszczeń z nich wypływających.

Możliwość poddania sporu pod sąd polubowny dotyczy bowiem pojmowanych abstrakcyjnie określonych stosunków prawnych, a nie wypływających z nich roszczeń (o świadczenie, o ustalenie lub o ukształtowanie stosunku prawnego lub prawa), które nie są przedmiotem zapisu na sąd polubowny". Także zgodnie ze wskazaniami doktryny, na tle poprzedniego stanu prawnego przedmiotem postępowania przed sądem polubownym mogło być żądanie zasądzenia świadczenia, ustalenia stosunku prawnego lub prawa, jak również żądanie ukształtowania stosunku prawnego wymienionego w zapisie na sąd polubowny *(tak T. Ereciński, J. Gudowski, M. Jędrzejewska, Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze, wyd. V, Lexis Nexis 2004, komentarz do art. 697).)*. Artykuł 697 § 1 k.p.c.- ustanawiał ogólny warunek w postaci granic zdolności stron do samodzielnego zobowiązywania się, co oznaczało m.in. to, że chodziło o spory o prawa majątkowe podlegające, według prawa materialnego, swobodnej dyspozycji stron. Obecnie art. 1157 k.p.c. wskazuje na warunek nawiązujący do możliwości zawarcia ugody sądowej, który w swej istocie jednak jest zbliżony do jednej z okoliczności składających się wcześniej na warunek wynikający z art. 697 § 1 k.p.c. Powyższy podgląd pozostaje w zgodności ze stanowiskiem Sądu Najwyższego wyrażonym w postanowieniu z dnia 21 maja 2010 r., II CSK 670/09 (*Lex nr589813*), zgodnie z którym strony mogą poddać pod rozstrzygnięcie sądu polubownego spór o ustalenie nieistnienia umowy lub stwierdzenie jej nieważności oraz uchwale z dnia 23 września 2010 r., III CZP 57/10 (*Lex nr 602463),* stwierdzającej, że spór o ustalenie nieistnienia stosunku prawnego wynikającego z umowy z powodu jej nieważności może być poddany przez strony pod rozstrzygnięcie sądu polubownego (art. 1157 k.p.c.). Zdaniem Sądu Apelacyjnego należy podzielić zapatrywanie Sądu Najwyższego, że istotne jest, czy spór danego rodzaju o prawo majątkowe (lub niemajątkowe) może być przedmiotem ugody sądowej, a nie ma znaczenia kwestia, czy ugoda określonej treści rozstrzygająca ten spór byłaby dopuszczalna, czy też nie. O zdatności arbitrażowej przesądza więc abstrakcyjna możliwość dysponowania przez stronę prawami (roszczeniami z nich wypływającymi), nie zaś możliwość (tj. dopuszczalność albo niedopuszczalność) zawarcia przez strony określonej ugody sądowej. Jeżeli więc mamy do czynienia z takim stosunkiem prawnym, w którym strony - w ujęciu abstrakcyjnym - mogą zawrzeć ugodę, to spór wynikający z tego stosunku prawnego może być rozstrzygany w arbitrażu. Przeprowadzając ocenę, czy dany spór ma zdatność arbitrażową w istocie należy oderwać się od oceny, czy konkretna ugoda i jej treść naruszałyby prawo oraz czy zawarta w art. 917 k.c. przesłanka „wzajemnych ustępstw" jest spełniona. Jak wyjaśnił Sąd Najwyższy w uzasadnieniu uchwały z dnia 23 września 2010 r., III CZP 57/10 zdatność ugodowa sporu

powinna być oceniana w sposób abstrakcyjny, oderwany od konkretnych okoliczności i uwarunkowań prawnych oraz od rozważań, czy ewentualna ugoda zawarta przez strony byłaby dopuszczalna w świetle art. 203 § 4 w związku z art. 223 § 2 k.p.c. przy zastosowaniu art. 917 w związku z art. 58 k c. Należy to rozumieć następująco: kiedy ocenia się, czy dany spór ma zdatność arbitrażową, nie powinno się „ wyobrażać sobie" jaką to ugodę, o jakiej treści mogłyby zawrzeć strony dla rozwiązania sporu, czy konkretna „wyobrażona" ugoda naruszałaby prawo, czy w takiej ugodzie strony rzeczywiście poczyniłyby sobie wzajemne ustępstwa. Liczy się jedynie to, czy *jakąś,* na tym etapie *nieskonkretyzowaną* ugodą strony mogłyby zakończyć spór, a więc czy mogą zadysponować swoimi prawami podmiotowymi. Te same kryteria służą do oceny, czy arbitrażowi może być poddany również spór o to, czy czynność prawna, na podstawie której stosunek prawny powstaje, jest przekształcany przez strony albo znoszony jest wadliwa, czy nie jest wadliwa, istotne jest nie to, czy przedmiotem ugody sądowej może być kwestia wadliwości tej czynności, powodującej jej nieważność, lecz to, czy stosunek prawny, którego ta czynność dotyczy, podlega dyspozycji stron, a tym samym, czy na tle tego stosunku możliwe jest - w ujęciu hipotetycznym - zawarcie ugody. Innymi słowy, jeżeli spór dotyczy tego, czy stosunek prawny istnieje, to możliwość poddania tego sporu arbitrażowi zależy od oceny, czy strony mogłyby zawrzeć ugodę odnośnie wzajemnych praw i obowiązków składających się na sporny stosunek prawny, a nie od oceny, czy można zawrzeć ugodę dotyczącą tego, czy czynność prawna kreująca dany stosunek była, czy nie była wadliwa. W konsekwencji zarzut, że orzeczenie sądu pierwszej instancji zostało wydane z naruszeniem art. 1206 § 2 pkt 1 k.p.c. w wyniku błędnego, dorozumianego przyjęcia, że według ustawy spór będący przedmiotem postępowania przed Trybunałem Arbitrażowym może być rozstrzygnięty przez sąd polubowny nie znajdował usprawiedliwionych podstaw. Należy przy tym zauważyć, że stanowisko Skarżącego w tym względzie, pozostaje w sprzeczności z jego wcześniejszymi działaniami i oświadczeniami, skoro Skarżący nie tylko wdał się w spór przed sądem polubownym, ale też sam wytoczył powództwo wzajemne.

Zdaniem Sądu Apelacyjnego zasadnym był natomiast zarzut naruszenia art. 1206 § 2 pkt 2 k.p.c. w zw. z art. 107 i 108 ust. 3 TFUE oraz art. 87 ust. 1 Konstytucji RP w zw. z art. 91 ust. 3 Konstytucji RP w wyniku przyjęcia, że przepisy TFUE regulujące zasady udzielania pomocy publicznej i funkcjonowania rynku wewnętrznego nie tworzą podstawowych zasad porządku prawnego Rzeczypospolite Polskiej i w konsekwencji zaniechanie zbadania Wyroku Arbitrażowego w kontekście jego zgodności z art. 107 i 108 ust. 3 TFUE. Wypada zgodzić się z Apelującym, że wyrok Trybunału Arbitrażowego w istocie zagraża spójnemu stosowaniu

unijnych przepisów z zakresu pomocy państwa. W świetle zarzutów apelacji Sąd Apelacyjny stanął przed zadaniem przesłankowego rozstrzygnięcia, czy Trybunał Arbitrażowy naruszył unijne przepisy z zakresu pomocy państwa. Spójne stosowanie zasad pomocy państwa nie może być przy tym rozumiane wyłącznie jako zapewnienie możliwości zwrotu pomocy wypłaconej sprzecznie z tymi zasadami, lecz ma ono szerszy wymiar systemowy i obejmuje dbanie, aby sądy państwowe i arbitrażowe rozstrzygające sprawy z zakresu prawa konkurencji przestrzegały podstawowych zasad prawa Unii Europejskiej. Część polskiego porządku prawnego, podlegającego badaniu z urzędu w ramach przesłanki z art. 1206 § 2 pkt 2 k.p.c., stanowią przepisy prawa Unii Europejskiej. Orzecznictwo ETS/TSUE jednoznacznie przesądziło, że unijne przepisy prawa konkurencji stanowią część porządku publicznego, który musi być uwzględniany przez sądy krajowe w toku sprawowania przez nie kontroli nad orzeczeniami arbitrażowymi zgodnie z zasadą równoważności (ekwiwalentności). Zgodnie z utrwalonym orzecznictwem ETS/TSUE, zasada równoważności prawa Unii Europejskiej wymaga, aby w sytuacji, w której krajowe przepisy postępowania nakładają na sąd krajowy obowiązek uwzględnienia żądania uchylenia wyroku sądu polubownego opartego na zarzucie naruszenia krajowych zasad porządku publicznego, sąd ten ma również obowiązek uwzględnić żądanie uchylenia takiego orzeczenia, jeżeli opiera się ono na zarzucie naruszenia unijnych zasad tego samego rodzaju (por. np. wyrok Trybunału z 26 października 2006 r. w sprawie C-168/05 (*Claro*), pkt 35; wyrok Trybunału z 1 czerwca 1999r. w sprawie C-126/97 (*Eco Swiss),*pkt 37). W niniejszej sprawie ryzyko dla spójności stosowania przepisów unijnego prawa konkurencji związane jest już z samym funkcjonowaniem w obrocie prawnym Wyroku Arbitrażowego, w którym trybunał całkowicie pominął art. 108 ust. 3 TFUE. Sąd Apelacyjny stoi na stanowisku, że porządkowi publicznemu sprzeciwia się funkcjonowanie w obrocie prawnym dwóch sprzecznych decyzji, tj. z jednej strony kwestionowanego Wyroku Arbitrażowego, a z drugiej strony decyzji Komisji Europejskiej z dnia 25 sierpnia 2017 r. w sprawie pomocy państwa, stwierdzającej w art. 1, że rekompensata za okres od dnia 1 września 2005 r. do dnia 30 czerwca 2011 r. wynosząca ([223,74 mln EUR), przyznana przez Rzeczpospolitą Polską na rzecz AW SA w Poznaniu na podstawie ustawy z dnia 28 lipca 2005 r., stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE oraz, że pomoc państwa, o której mowa w art. 1, jest niezgodna z prawem, ponieważ została przyznana z naruszeniem obowiązku zgłoszenia i klauzuli zawieszającej wynikających z art. 108 ust. 3 TFUE, która to decyzja została utrzymana w mocy wyrokiem Sądu Unii Europejskiej z dnia 24 października 2019 r. (sygn. T-778/17). Nie ma przy tym znaczenia, że Komisja Europejska w swojej decyzji w przedmiocie pomocy państwa nie wypowiedziała się

co do ważności Aneksu nr 6, skoro niewątpliwym jest, że rozstrzyganie w kwestii ważności umów cywilnoprawnych nie leży w ogóle w ramach kompetencji Komisji Europejskiej. , jednakże niewątpliwym jest, że uznała iż na podstawie znowelizowanej ustawy i Umowy Koncesyjnej AWSA przysługiwało prawo do otrzymywania rekompensat (które jednak nie mogły prowadzić do poprawy sytuacji finansowej koncesjonariusza). Komisja nie analizowała natomiast szczegółowo Aneksu nr 6. Rozstrzyganie w kwestii ważności umów cywilnoprawnych w istocie nie leży w ogóle w ramach kompetencji Komisji Europejskiej. Zadaniem Trybunału w postępowaniu arbitrażowym była natomiast m.in. ocena ważności Aneksu nr 6, a także wypowiedzenie się co do powództwa wzajemnego Skarbu Państwa, w tym żądania ustalenia, że Skarbowi Państwa przysługuje roszczenie o zwrot nadmiernych rekompensat. W przekonaniu Sądu Apelacyjnego z tego zadania Trybunał nie wywiązał się należycie, m.in. z powodu całkowitego pominięcia unijnych przepisów dotyczących pomocy państwa. Przepisy te niewątpliwie wchodziły w skład statutu kontraktowego, ponieważ strony w Umowie Koncesyjnej dokonały wyboru prawa polskiego (art. 24.1 Umowy Koncesyjnej). Trybunał Arbitrażowy miał zatem obowiązek stosować te przepisy z urzędu, niezależnie od stanowiska stron (por. art. 1194 § 1 k.p.c.). W przedmiotowej sprawie bezspornym było to, że w dacie wyrokowania przez Trybunał Arbitrażowy pomoc państwa w postaci Aneksu nr 6 nie była zatwierdzona przez Komisję Europejską, a zatem była udzielona z naruszeniem art. 108 ust. 3 TFUE. Pomoc nienotyfikowana jest zawsze pomocą nielegalną (nielegalność proceduralna). Stanowisko Przeciwnika Skargi, jakoby ocena w tym zakresie wymagałaby od Trybunału Arbitrażowego przeprowadzenia skomplikowanego postępowania dowodowego nie ma usprawiedliwionych podstaw. Takiego postępowania wymaga wyłącznie ocena czy dany środek pomocy jest zgodny z rynkiem wewnętrznym (art. 107 TFUE). Samo stwierdzenie nielegalności proceduralnej (naruszenia art. 108 ust. 3 TFUE) ogranicza się natomiast do zbadania, czy dany środek został zgłoszony i zatwierdzony przez Komisję Europejską. Ponieważ takie twierdzenie (ani dowody na jego poparcie) nie zostało przedstawione przez żadną ze stron postępowania arbitrażowego (co Przeciwnik Skargi przyznał na rozprawie apelacyjnej), Trybunał Arbitrażowy nie miał podstaw do uznania pomocy przyznanej AW SA na mocy Aneksu nr 6 za pomoc legalną. W przypadku naruszenia art. 108 ust. 3 TFUE (a o tym naruszeniu przesądził już sam fakt braku zatwierdzenia pomocy) wszystkie organy rozpoznające sprawę mają obwiązek wyciągać wszelkie odpowiednie konsekwencje prawne. Jeżeli, tak jak w niniejszej sprawie, niezgodna z prawem (niezgłoszona) pomoc została już wypłacona, nakazany powinien zostać zwrot pełnej kwoty przez beneficjenta. W ocenie Sądu Apelacyjnego, nie może budzić wątpliwości, że

obowiązki nałożone na sądy krajowe w związku ze stosowaniem art. 108 ust 3 TFUE rozciągają się również na sądy arbitrażowe. Obowiązek zwrotu nie zależy przy tym od zgodności środka pomocy z art. 107 ust. 2 lub 3 TFUE, o której Komisja Europejska rozstrzyga dopiero po zakończeniu postępowania wyjaśniającego.

Art. 108 ust. 3 TFUE tworzy normę o charakterze bezwzględnie obowiązującym, posiadającą przymiot pierwszeństwa właściwego prawu Unii. W niniejszej sprawie Trybunał Arbitrażowy zupełnie pominął tę normę i w zasadzie cały porządek unijny, a w konsekwencji nie tylko nie nakazał zwrotu pomocy, ale też nie rozważył, jaki wpływ na ważność Aneksu nr 6 ma naruszenie art. 108 ust 3 TFUE w kontekście art. 58 § 1 k.c. Tymczasem nieważność czynności prawnej na podstawie art. 58 k.c. może zaistnieć także z powodu sprzeczności z normą prawa unijnego. Stanowisko to jest jednolicie przyjmowane zarówno w doktrynie jak i w orzecznictwie. Jedynie tytułem przykładu w tym względzie można odwołać się do wyroku Sądu Apelacyjnego w Warszawie z dnia 20 czerwca 2017 r. wydanego w spawie o sygn. I A Ca 544/17, w uzasadnieniu którego wskazano, że pojęcie „ ustawy " zawarte w art. 58 § 1k.c. i art. 353(1)k.c. obejmuje również normy prawa wspólnotowego. Normy Unii Europejskiej zajmują obecnie w polskim systemie prawnym szczególne miejsce. Europejski Trybunał Sprawiedliwości w sprawie *Simmenthal* przyznał prymat wspólnotowemu porządkowi normatywnemu, niezależnie od hierarchicznego usytuowania konkurujących norm krajowego i wspólnotowego porządku prawnego uznając, że bezpośrednie obowiązywanie norm prawa wspólnotowego oznacza konieczność pełnego i jednolitego stosowania we wszystkich krajach członkowskich. Konsekwentnie należy przyjąć, w oparciu o analogiczne argumenty jak w przypadku sprzeczności czynności z normami porządku wewnętrznego, że zarówno niezgodność treści, jak i celu czynności z zakazami prawnymi prawa wspólnotowego prowadzić może do nieważności tej czynności. Normami prawa unijnego relewantnymi punktu widzenia oceny ważności umowy przez pryzmat art 58 k.c. są w szczególności normy unijnego prawa konkurencji. Umowa, której przedmiotem jest udzielenie pomocy nielegalnej musi być uznano za czynność prawną sprzeczną z ustawą w rozumieniu art. 58 k.c. Polskie prawo cywilne przewiduje w takim przypadku sankcję nieważności bezwzględnej. Sankcja ta nie dotyczy tylko tych elementów czynności prawnej, które pozostałyby w mocy na podstawie art. 58 § 3 k.c. Umowa o udzielenie pomocy państwa sprzecznej z art. 107 TFUE - jest bezwzględnie nieważna. Mając na uwadze, że „ ustawa " w rozumieniu art. 58 § 1 k. c. to wszystkie normy prawne obowiązujące powszechnie, sprzeczność z art. 108 ust.3 zd. 3 TFUE będzie powodować nieważność czynności prawnej niezgodnej z tym przepisem jako sprzecznej z ustawą. Pominięcie i nie zastosowanie art. 108

ust. 3 TFUE a przez Trybunał Arbitrażowy ma fundamentalne znaczenie w niniejszym postępowaniu ze skargi o uchylenie Wyroku Arbitrażowego. Wprawdzie, co słusznie zaznacza Przeciwnik Skargi, sąd państwowy nie powinien co do zasady dokonywać kontroli merytorycznej zagadnień rozstrzygniętych w arbitrażu, jednakże interwencja sądu państwowego nie może być uznana za niezasadną, w takiej sytuacji, w której Trybunał Arbitrażowy generalnie uchylił się od stosowania unijnego prawa konkurencji. Nie można przy tym pominąć, że w dacie wyrokowania przez Sąd Okręgowy potwierdzona była także sprzeczność Aneksu nr 6 z art. 107 TFUE. Poza nielegalnością proceduralną Aneksu nr 6 z unijnym prawem konkurencji, w dacie wyrokowania przez Sąd Okręgowy w sposób wiążący stwierdzona była również jego nielegalność materialnoprawna, a więc sprzeczność z art. 107 TFUE. W dniu 25 sierpnia 2017r. Komisja Europejska wydała decyzję, w której nadmierne rekompensaty przyznane AW SA na podstawie Aneksu nr 6 uznane zostały za pomoc publiczną niezgodną z rynkiem wewnętrznym. Zdaniem Sądu Apelacyjnego, Sąd Okręgowy był związany decyzją Komisji Europejskiej, która stanowi dokument urzędowy w rozumieniu art. 244 k.p.c. Sąd Okręgowy w sposób błędny odmówił jednak uznania skutków Decyzji Komisji, stwierdzając, że decyzja ta jest nieprawomocna. Tym samym Sąd Okręgowy nie dostrzegł, że wykonanie Decyzji Komisji nie zostało zawieszone, a skutku takiego nie wywołuje samo jej zaskarżenie do sądów unijnych. W dacie wyrokowania przez Sąd Okręgowy Decyzja Komisji była wykonalna i wiążąca, a potwierdzona nią sprzeczność Aneksu nr 6 z unijnym prawem konkurencji, stanowiła dostateczną podstawę do uchylenia Wyroku Arbitrażowego. Podkreślić należy, że wyrokiem z dnia 24 października 2019r. Sąd Unii Europejskiej oddalił skargę AWSA na decyzję Komisji, a zatem odmówił stwierdzenia nieważności tej decyzji. Odnosząc się do kwestii czy procedura zwrotu pomocy publicznej ma znaczenie dla oceny Wyroku Arbitrażowego przez pryzmat art. 1206 § 2 pkt 2 k.p.c. należy wskazać, że Sąd Okręgowy błędnie uznał, iż uchylenie Wyroku Arbitrażowego jest zbędne, skoro prawo polskie przewiduje procedurę windykacji niedozwolonej pomocy publicznej w oparciu o Decyzję KE na podstawie przepisów ustawy z 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy państwa. Sąd Apelacyjny nie podziela tego stanowiska bowiem okoliczność, że system prawa unijnego i polskiego przewiduje procedurę zwrotu pomocy publicznej udzielonej sprzecznie z prawem UE jest irrelewantna dla oceny prawidłowości Wyroku Arbitrażowego, który kwestię tego prawa całkowicie zignorował. Należy zauważyć, że postępowanie toczące się przed Sądem Okręgowym w Poznaniu nie jest w jakikolwiek sposób powiązane z postępowaniem arbitrażowym zakończonym wydaniem Wyroku Arbitrażowego. Co szczególnie istotne, nawet korzystne dla Skarbu Państwa

zakończenie postępowania przed Sądem Okręgowym w Poznaniu nie wyeliminuje niezgodnych z prawem UE skutków Wyroku Arbitrażowego. W postępowaniu arbitrażowym Skarb Państwa domagał się stwierdzenia nieważności Aneksu nr 6. W postępowaniu przed Sądem Okręgowym w Poznaniu Skarb Państwa dochodzi natomiast wyłącznie zwrotu kwoty niedozwolonej pomocy publicznej, nie zaś wzruszenia Aneksu nr 6, na podstawie którego pomoc ta została wypłacona. Zatem nawet prawomocne uwzględnienie powództwa Skarbu Państwa opartego na ustawie z 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej nie doprowadzi do skutków tożsamych z wyeliminowaniem Wyroku Arbitrażowego z obrotu prawnego. Odmowa uchylenia Wyroku Arbitrażowego prowadzi do sytuacji, w której w obrocie pozostaje orzeczenie stwierdzające ważność Aneksu nr 6 pomimo jego sprzeczności z art. 107 i 108 TFUE potwierdzonej Decyzją KE. Skutku tego w żaden sposób nie wyeliminuje postępowanie toczące się przed Sądem Okręgowym w Poznaniu. Nie można również przyjąć, że z uwagi na istniejącą obecnie możliwość dochodzenia zwrotu pomocy Wyrok Arbitrażowy nie pociągnął za sobą żadnych negatywnych skutków. Należy zgodzić się ze Skarżącym, że gdyby Trybunał Arbitrażowy prawidłowo zastosował art. 108 ust. 3 TFUE, do czego był zobowiązany, to już w marcu 2013 r. uznałby, że Skarbowi Państwa przysługuje roszczenie o zwrot nadmiernych rekompensat. Tymczasem procedura windykacji na podstawie Decyzji KE mogła zostać wszczęta dopiero w listopadzie 2017 r., a więc ponad cztery lata później. Ponadto, postępowanie to jest dopiero w toku (obecnie zawieszone w pierwszej instancji). Wbrew twierdzeniom przeciwnika skargi, wpłata przez AWSA dochodzonej przez Skarb Państwa kwoty na rachunek depozytowy Ministra Finansów stanowi jedynie tymczasowe (a nie ostateczne) wykonanie decyzji Komisji Europejskiej. Już samo to przesądza o sprzeczności skutków Wyroku Arbitrażowego z podstawowymi zasadami polskiego i europejskiego porządku prawnego. Generalnie akceptacja poglądu Sądu Okręgowego w zakresie braku potrzeby uchylenia Wyroku Arbitrażowego z uwagi na odrębny reżim prawny umożliwiający dochodzenie zwrotu pomocy oznaczałaby w istocie aprobatę dla pomijania unijnego prawa konkurencji przez sądy polubowne, a zatem przyzwolenie na naruszanie podstawowych zasad prawa Unii Europejskiej. Takie stanowisko z oczywistych względów nie zasługuje na akceptację.

Mając na uwadze powyższe zaskarżony wyrok należało zmienić i uchylić wyrok sądu polubownego na podstawie art. 1206 § 1 pkt 4 oraz § 2 pkt 2 k.p.c. w całości, o czym Sąd Apelacyjny orzekł na podstawie na podstawie art. 386 §1 k.p.c.

Rozstrzygnięcie o kosztach postępowania oparto na przepisie art. 98 k.p.c. art. 108 § 1 k.p.c., przy uwzględnieniu wyniku postępowania, właściwych stawek opłat za zastępstwo

prawne przed sądem pierwszej i drugiej instancji oraz wysokości nieuiszczonych opłat od skargi i apelacji, których Skarżący korzystający ze zwolnienia ustawowego nie miał obowiązku ponosić i obciążających przeciwnika skargi jako przegrywającego zgodnie z art. 113 ust. 1 ustawy o kosztach sądowych w sprawach cywilnych z dnia 28 lipca 2005r. (Dz.U z 2018r. poz.300 ze zm.). Wysokość wynagrodzenia z tytułu zastępstwa prawnego Skarżącego w postępowaniu apelacyjnym została ustalona stosownie do art. 32 ust. 3 ustawy z dnia 15 grudnia 2016 r. o Prokuratorii Generalnej Rzeczypospolitej Polskiej w zw. z § 8 pkt4 i § 10 ust.1 pkt 2 rozporządzenia Ministra Sprawiedliwości z dnia 22 października 2015r. w sprawie opłat za czynności adwokackie (Dz. U. z 2015 r. poz. 1800 ze zm.).

[redacted]

SĄD APELACYJNY

Na oryginale właściwe podpisy
Za zgodność
STARSZY SEKRETARZ SĄDOWY
[redacted]

Translation

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Date **5 June 2020**
Ref. I **A Ca 457/18**

[Stamps]

Office of General Prosecution Service of the Republic of Poland
ul. Hoża 76/78
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SERVICE

In accordance with the Order of the President, Civil Division I of the Court of Appeal in Warsaw serves on the appellant's agent an official copy of the judgment of 26 November 2019, together with the grounds on which it is based.

Senior Court Secretary
[redacted]

…

Ref. I A Ca 457/18

OFFICIAL COPY

JUDGMENT

IN THE NAME OF THE REPUBLIC OF POLAND

26 November 2019

The Court of Appeal in Warsaw, Civil Division I, sitting in the following composition:

President: [redacted] (rapporteur), Judge of the Court of Appeal

Judges: [redacted] Judge of the Court of Appeal

[redacted], Judge of the Regional Court, delegated

Recorder: [redacted] enior Court Secretary

following the hearing of 29 October 2019 in Warsaw to examine

the case concerning the appeal of the State Treasury - Minister for Infrastructure (former Minister for Infrastructure and Construction)

against Autostrada Wielkopolska spółka akcyjna (public limited liability company), with registered office in Poznań,

to annul the award of the UNICITRAL ad hoc arbitral tribunal of 20 March

2013, as rectified on 30 April 2013,

on appeal by the appellant

against the judgment of the Regional Court in Warsaw

of 26 January 2018, ref. I C 736/13

I. **amends the first paragraph of the judgment under appeal, by annulling the award of the UNCITRAL ad hoc arbitral tribunal of 20 March 2013, as rectified on 30 April 2013, and the second paragraph, by ordering Autostrada Wielkopolska spółka akcyjna, with registered office in Poznań, to pay to the State Treasury - Office of the General Prosecution Service of the Republic of Poland the amount of PLN 1 200 (one thousand two hundred) for the reimbursement of the costs of legal representation and orders Autostrada Wielkopolska spółka akcyjna, with registered office in Poznań, to pay to the State Treasury - Warsaw Regional Court the amount of PLN 100 000 (one hundred thousand) for the unpaid fee for the complaint;**

II. **orders Autostrada Wielkopolska spółka akcyjna, with registered office in Poznań, to pay to the State Treasury - Office of the General Prosecution Service of the Republic of Poland the amount of PLN 1 800 (one thousand eight hundred) for the reimbursement of the costs of legal representation in the appeal proceedings;**

III. **orders Autostrada Wielkopolska spółka akcyjna, with registered office in Poznań, to pay to the State Treasury - Warsaw Regional Court the amount of PLN 100 000 (one hundred thousand) for the unpaid fee for the appeal.**

[redacted]

Na oryginale właściwe podpisy
Za zgodność
STARSZY SEKRETARZ SĄDOWY
[redacted]

Ref. I A Ca 457/18

GROUNDS

By letter of 27 June 2013, the State Treasury - Minister for Transport, Construction and Maritime Economy (then Minister for Infrastructure and Construction, currently Minister for Infrastructure) brought an appeal against Autostrada Wielkopolska Spółka Akcyjna in Poznań (AWSA) for the annulment in its entirety of the award of 20 March 2013 of the (UNCITRAL) ad hoc arbitral tribunal composed of: Louis B. Buchman (President), Prof. Dr. Karl-Heinz Bockstigel and Prof. Jerzy Rajski, in the case brought by AWSA against the State Treasury - Minister for Transport, Construction and Maritime Economy, as rectified by the arbitral tribunal of 30 April 2013. The legal basis of the appeal was given as Article 1206 § 2(2) of the Code of Civil Procedure, alleging that the arbitral tribunal delivered an award contrary to the fundamental principles of the legal system of the Republic of Poland, on account of

1) breach of the public policy clause, by failing to have regard to the absolute invalidity of Annex 6 to the Concession Agreement as being contrary to mandatory legal provisions, resulting in a breach of the principle of freedom of contract, understood as the freedom to choose the form of a contractual relationship within the limits permitted by the law, constitutional principles of the protection of property rights and the principles of legal certainty and security of trade;

2) breach of the public policy clause, by completely failing to consider the State Treasury's complaints concerning the invalidity of Annex 6, in view of its effective waiver concerning its effects - which led to a breach of the constitutional principle of the right to judicial review laid down in Article 45(1) of the Polish Constitution, which entails, inter alia, an obligation on the court to examine the substance of the case, which also constitutes failure by the arbitral tribunal to observe the principle of equality between the parties to the proceedings;

3) breach of the public policy clause, by failing to examine the substance of the case regarding the conclusion of Annex 6 in error and maintaining the validity of the binding declaration of the appellant's intent, which was invalid as it was made in error, resulting in a breach of the principle of the autonomy of the parties and the principle of safeguarding an entity's trust in the declarations made to it and therefore the principle of protecting the constitutional principles of freedom to conduct a business and the principle of the protection of property and other property rights.

In its statement of defence, the respondent submitted that the appeal should be dismissed in its entirety and that the appellant should be ordered to pay the costs of the proceedings, including the costs of legal representation by means of an appropriate order. That party disputed that the effect of the contested award of the arbitral tribunal was contrary to the fundamental principles of the national legal system, and that the judgment infringed the principles of access to justice and the equality of the parties to the proceedings, the autonomy of the parties' intent, the safeguarding of an entity's trust in the declarations made to it, the freedom to conduct a business and the protection of property and other property rights.

In the course of the proceedings, the appellant also referred to the fact that the European Commission adopted Decision C(2014) 3172 final concerning the initiation of the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) with regard to the compensation granted by the State Treasury to AWSA, and subsequently, by its decision of

25 August 2017 on State aid SA.35356 (2014/C) (ex 2013/NN, ex 2012/N) implemented by Poland for AWSA, which found that overcompensation for the period from 1 September 2005 to 30 June 2011 in the amount of PLN 894 956 888.88 granted to AWSA under Annex 6 constitutes unlawful State aid within the meaning of Article 107(1) TFEU, as well as being unlawful (Article 108(3) TFEU) and not compatible with the internal market (letter of 3 January 2018 - k. 657-660).

By judgment of 26 January 2018, in its first paragraph the Warsaw Regional Court dismissed the application and, in the second paragraph, ordered the State Treasury - Minister for Infrastructure and Construction to pay Autostrada Wielkopolska, with registered office in Poznań, the costs of the proceedings of PLN 7 217.

The ruling was based on the following findings of fact.

On 12 September 1997 AWSA and the State Treasury, represented by the Minister for Transport and Maritime Economy, entered into a Concession Agreement for the construction and operation of the Świecko - Poznań and Poznań - Konin sections of the A-2 toll motorway. The Concession Agreement was amended by seven annexes, including Annex 6 (Concession Agreement k. 32-103). In Article 24.3 of the Concession Agreement, the parties entered into an arbitration clause, with proceedings to be conducted in accordance with the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL) (k. 99v -100).

After Poland became a member of the European Union in 2004, it became necessary to adapt the national rules on payment by lorries for journeys on national roads in Poland. Lorries had hitherto paid the State Treasury for the vignette for the use of all national roads in Poland (including toll motorways) and parallel tolls for journeys on specific sections of toll motorways. The Law of 28 July 2005 amending the Law on toll motorways and the National Road Fund and the Law on road transport ('the Amending Law') came into force on 1 September 2005. It introduced a compensation mechanism for financial loss caused to concession holders as a result of their losing the right to collect tolls from the drivers of lorries.

On 14 October 2005, the parties concluded Annex 6 to the Concession Agreement, which set out detailed rules for payment of the compensation due to AWSA. The objective of Annex 6 was to ensure the reimbursement to AWSA of funds lost as a result of the entry into force of the Amending Law.

By letter of 13 November 2008, the Minister for Infrastructure made a declaration to waive the effects of the declaration of intent in Annex 6 to the Concession Agreement, on the basis of an error of law as to the accuracy of the data in Annex 6, owing to the fact that the calculation of the amount of compensation was based on an outdated analysis from 1999 of traffic forecasts, whereas AWSA already had an analysis available from 2004 (k. 193-194).

The arbitration proceedings were brought by AWSA by a request for arbitration on 8 December 2010.

In its award of 20 March 2013 the arbitral tribunal hearing the case held that:

1. The declaration of 13 November 2008 of the Minister for Infrastructure to waive the effects of the declaration of intent in Annex 6 to the Concession Agreement is without effect.

2. Annex 6 is a valid and enforceable agreement.

3. The counterclaim of the State Treasury to establish that Annex 6 is invalid in absolute terms or that it had effectively waived the effects of the declaration of intent to conclude Annex 6, to establish that Annex 6 was not a valid and enforceable agreement and to establish that it had a claim, in principle, to recover the unduly paid payment made under Annex 6 was rejected.

In the grounds for the award, the arbitral tribunal pointed out, inter alia, that there is a presumption of the validity of Annex 6. The burden of proof as to the alleged error lies on the party relying on the error, and the State Treasury had failed to show that it had been in error. At the same time, the tribunal noted that as far as State aid was concerned, both parties agreed that those issues have no impact on the tribunal's decision (point 4.25 - k. 181v, award - k. 173-184).

A dissenting opinion was given in the arbitral tribunal by Prof. Jerzy Rajski, who pointed out that Annex 6 should be regarded as contrary to the mandatory Article 3 of the Amending Law safeguarding the protection of public interests and was therefore invalid (Article 58 § 1 of the Civil Code). In the statement of reasons for that view, it was submitted that, in breach of the language requirements and in complete disregard of the functional requirements, the arbitrators impermissibly subjectified the process of interpreting Article 3 of the Amending Law, contrary to the fundamental principle of the rule of law, according to which all persons are subject to the law (dissenting opinion - k. 186v and k. 190).

The award of 20 March 2013 was rectified in respect of the obvious clerical errors by the ruling of 30 April 2013 (ruling - k. 171-172).

The Regional Court stated that the above facts were established on the basis of the documentary evidence relied on, the probative value of which was not contested by the parties, nor did it give rise to concerns on the part of the Court.

In the view of the Regional Court, the application to annul the award of the arbitral tribunal on the basis set out in Article 1206 § 1(2) of the Code of Civil Procedure by submitting that the award is contrary to the fundamental principles of the Republic of Poland's legal system (so-called public policy clause) could not be successful.

First, the Regional Court held that the Code of Civil Procedure defined the bases for the annulment of a ruling of an arbitral tribunal very narrowly and clarified that, despite its nature of a review, the application was not an appeal and that, unlike in appeal proceedings, the role of the ordinary court is not to re-examine the substance of the case which gave rise to the award of the arbitral tribunal applying the substantive and procedural legal rules. It pointed out that, in the proceedings before the national court initiated by the application, the court does not examine whether the award of the arbitral tribunal is contrary to substantive law, whether it is based on the facts cited in the award, or whether those facts were correctly established. The ordinary court examines the case only in the light of the grounds for annulment of the award and assesses the merits of the application only in the light of the conditions laid down in Article 1206 § 1 and 2 of the Code of Civil Procedure, and also of its own motion takes into consideration only the bases in Article 1206 § 2 of the Code of Civil Procedure. Referring to the case-law of the Warsaw Court of Appeal, the Regional Court held that an infringement of the general provisions of civil procedural law and of the governing principles of civil procedure may constitute a legitimate basis for setting aside an arbitration award if that infringement led to an infringement of the fundamental principles of the Republic of Poland's legal system or of the principles of social coexistence and that infringement of the governing legal principles applicable in the Republic of Poland must also

result in an error of substantive law - if it constitutes the basis for the annulment of the arbitration award.

The Regional Court noted that the term 'fundamental principles of law' used in Article 1206 § 2 of the Code of Civil Procedure indicates that it is an infringement of substantive law which leads to an infringement of the rule of law and that the arbitral award at issue infringes mandatory legal rules in the Republic of Poland, undermines the existing legal system, that is to say it infringes organic-political and socio-economic principles. It pointed out that even an incorrect interpretation by the arbitral tribunal of the provisions of fundamental importance to decide the case did not have to involve a breach of the public policy clause, accepting the view that the assessment of whether a ruling is contrary to the fundamental principles of the legal system should therefore be on a case-by-case basis, formulated restrictively and that positive conclusions can be drawn only if the outcome of the arbitral award would lead to a serious breach of the fundamental principles of the public policy clause. It stated that ruling according to the principle of equity (ex aequo at bono) consists in finding a solution to the dispute in accordance with directives on equity and justice, as they are understood by the arbitrators, irrespective of the applicable legal rules in force. It also stated that the above does not imply any discretion as to the assessment of the case or a possibility of disregarding the facts, therefore the arbitrators must also carry out an evidentiary procedure, analyse the material collected and take into consideration the terms binding the parties to the agreement. It also pointed out that only if the wording of the award and its effects were incompatible with a specific standard of general public policy can it be annulled on the basis of Article 1206 § 2(2) of the Code of Civil Procedure, referring in that regard to the position set out in the judgment of the Warsaw Court of Appeal of 16 March 2017, 1 ACa 1070/16 (LEX No 2317763).

The Regional Court took the view that the plea by the applicant alleging failure by the arbitral tribunal to observe the principle of equality between the parties relates not so much to the proceedings before the tribunal (procedural issues in the course of the proceedings), but to the wording of the grounds of the award relating to the examination of the evidence and the pleas in law put forward by the State Treasury. Against that background, the Regional Court noted that, under Article 1197 § 2 of the Code of Civil Procedure, the arbitration award must contain the reasons for the decision but that, according to legal doctrine, that does not mean that the grounds must satisfy those requirements which are prescribed for proceedings before the ordinary courts (i.e. Article 328 § 2 of the Code of Civil Procedure).

The Regional Court stated that, contrary to the applicant's position, an analysis of the arbitration proceedings shows that the plea of invalidity in respect of Annex 6 was recognised by the arbitral tribunal, it was the subject of written and oral statements by the parties and the evidentiary procedure - evidence from documents, witness statements and from experts declared by both parties - was carried out concerning it. The parties were also given the opportunity to submit letters in the course of the proceedings and summary letters of the hearing. Consideration of the material collected was reflected in the award itself. The ruling of the arbitral tribunal sets out in detail the positions of the parties together with the arguments put forward in support, including in relation to the (in-)validity of Annex 6. The grounds of the award are stated in the reasons for the decision, including the presumption of validity of the Annex. The arbitrators, in the reasons for their interpretation of Article 3 of the Amending Law, recall the possible ways in which that provision may be understood, refer to the witness statement of Joanna Gaczewska of the General Directorate for National Roads and Motorways (GDDKiA), and analyse Article 58 of the Civil Code. They finally come to the conclusion in paragraph 4.22 that Annex 6 is

validly concluded. Next, referring in paragraph 4.24 to the burden of proof, the tribunal states that the State Treasury failed to show that it concluded Annex 6 in error. That finding must be read in conjunction with the earlier part of the ruling, including the arguments relied on by AWSA in paragraph 3.1.1. It sets out in detail why a legally relevant error on the part of the State Treasury is precluded. In the statement of reasons for the dissenting opinion, it is stated that Annex 6 should be regarded as contrary to Article 3 of the Amending Law. The statement of reasons is based on an analysis of the term 'applicable rate'. The writer complains of the 'elastic' interpretation by the arbitrators of Article 3, impermissibly subjectifying the process of interpreting that provision, contrary to the fundamental principle of the rule of law, according to which all persons are subject to the law (dissenting opinion - k. 186v). The statement of reasons for the dissenting opinion goes on to claim that the arbitrators concluded that their interpretation of Article 3 of the Amending Law was appropriate because it was understood in that way by the parties. However, that is incorrect, since the reference to the understanding of the parties was rather the basis for the justification that the provision was not so unequivocal that it did not allow different interpretations and hence excluded the principle *clara non sunt interpretanda* (paragraphs 4.7 and 4.8 of the award).

The Regional Court considered that the role of the court hearing the application was not to assess whether the Amending Act had been correctly interpreted because that would give rise to a substantive review of the decision. It noted, however, that even if it were to be accepted that the arbitral tribunal's interpretation was incorrect, that would not lead to the conclusion that there was an infringement of the public policy clause resulting in the ruling being contrary to the fundamental principles of the Republic of Poland's legal system. The Regional Court held (referring to case-law previously cited) that the Court's acceptance of one of the possible interpretations of a provision cannot constitute evidence of a breach of the fundamental principles of the legal system. Moreover, it clarified that the application of the public policy clause is not a question of assessing whether the ruling was compatible with all the mandatory legal provisions involved, but rather whether it had an effect which is contrary to the fundamental principles of the national legal system.

In summary, the Regional Court held that the award of 20 March 2013 is not contrary to the fundamental principles of the Republic of Poland's legal system and that such a conclusion cannot be reached even if it is assumed that the arbitral tribunal misinterpreted Article 3 of the Amending Law which, in view of the scope and subject-matter of the provision, is of entirely marginal significance for the Polish legal system.

In acknowledging the applicant's submission that the right of access to a court had been limited as a result of the proceedings before the arbitral tribunal, the Regional Court noted that this is the consequence of the actual (uncontested) existence of the arbitration clause and not the manner in which the tribunal conducts its proceedings. It pointed out that the decision in favour of one of the parties, after the taking of evidence requested by both parties, could not indicate that there was a breach of the principle of equality between the parties to the proceedings.

With regard to the plea of incompatibility of the award of the arbitral tribunal with the EU legal system, the Regional Court held that, in the course of proceedings before the tribunal, the parties concurred that the issue of State aid does not affect the tribunal's decision (paragraph 4.25 of the award - k. 181 v). It also noted that, although in the course of those proceedings the applicant had raised the issue that EU competition law rules are part of public policy, to be taken into account by the national courts when

reviewing arbitration awards, the applicant stated on the one hand that, in the proceedings to annul the arbitration award, the court must of its own motion take into account an infringement of EU law and, on the other hand, acknowledged that the assessment of the compatibility of State aid with EU law falls within the exclusive competence of the European Commission and is subject to review by the European Union courts. Acknowledging that the European Commission decided on 25 August 2017 that overcompensation for the period from 1 September 2005 to 30 June 2011 of PLN 894 956 888.88 granted to

AWSA pursuant to Annex 6 constitutes unlawful State aid within the meaning of Article 107(1) TFEU and is also unlawful (Article 108(3) TFEU) and incompatible with the internal market, the Regional Court stated that the above ruling could not, however, have any implications for the outcome of the present case. First, the European Commission's decision is not final and, secondly, in the event of a final decision that AWSA obtained unlawful State aid incompatible with the internal market, Polish law provides for a procedure for recovering that aid. It also noted that the applicant had already begun to make use of its rights in that respect by bringing proceedings before the Regional Court in Poznań (ref. XVIII Nc 534/17, then XVIII C 1937/17). In the view of the Regional Court, since Article 27(1)(1) of the Law of 30 April 2004 on proceedings in State aid cases (Journal of Laws 2016, item 1808) provides that where a Commission decision is issued on the obligation to repay aid, if the aid was granted on the basis of an agreement the body granting the aid may apply to the court for the termination of the agreement on the basis of which the aid was granted or for an order for repayment of the aid, the proceedings before the European authorities cannot have any bearing on the assessment of the merits of the application.

The complete legal framework laying down the procedure for the recovery of public aid precluded the annulment of the arbitration award. As the basis for the decision on the costs of the proceedings, the Regional Court referred to Article 98 of the Code of Civil Procedure and § 10(4) in conjunction with § 2(2) of the Regulation of the Minister for Justice of 28 September 2002 on fees for the activities of legal counsel and the bearing by the State Treasury of the costs of legal aid provided by legal counsel appointed by the court.

An appeal was brought against the above judgment in its entirety by the State Treasury, which alleged:

1) infringement of Article 1206 § 2(1) of the Code of Civil Procedure, consisting of the failure to examine the arbitrability of the dispute which gave rise to the award of 26 March 2013 of the (UNCITRAL) ad hoc arbitral tribunal (rectified by the arbitral tribunal on 30 April 2013) and the incorrect implied assumption that, under the law, the dispute which is the subject-matter of the proceedings before the arbitral tribunal may be settled by the arbitral tribunal, whereas:

(a) the dispute which is the subject-matter of the proceedings before the arbitral tribunal is not arbitrable as it cannot be the subject-matter of an in-court settlement agreement (Article 1157 of the Code of Civil Procedure). This is because the invalidity of a legal act is objective and exists ex lege, therefore the parties to the dispute do not have the right to conclude an effective agreement which would modify that invalidity;

(b) the dispute concerned the validity of the agreement, and the ordinary courts have exclusive jurisdiction to determine the existence or non-existence of a legal act (Article 189 of the Code of Civil Procedure), whereas no provision confers such competence on an arbitral tribunal;

2) infringement of Article 1138 of the Code of Civil Procedure in conjunction with Article 244 §1 of the Code of Civil Procedure in conjunction with Article 278 of the Treaty on the Functioning of the European Union (TFEU), Article 288 TFEU and Article 297(2) TFEU, for assuming that Commission Decision (EU) C(2017) 5818 final of 25 August 2017 on the State aid SA.35356 (2014/C) (ex 2013/NN, ex 2012/N) implemented by Poland for Autostrada Wielkopolska S.A. ('the Commission Decision') cannot affect the outcome of the case concerning the application to annul the arbitral award, even though it is an act intended to implement the competence of the European Union, which is binding and effective for the Republic of Poland and enforceable;

3) infringement of Article 1206 § 2(2) of the Code of Civil Procedure in conjunction with Articles 107 and 108(3) TFEU and Article 87(1) of the Constitution of the Republic of Poland in conjunction with Article 91(3) of that Constitution, for assuming that the provisions of the TFEU governing the rules on the granting of State aid and the functioning of the internal market do not form fundamental principles of the Republic of Poland's legal system and, consequently, failure to examine the arbitral award in the context of its compatibility with Article 107 and 108(3) TFEU;

4) infringement of Article 1206 § 2(2) of the Code of Civil Procedure in conjunction with Article 58 § 1 of the Civil Code in conjunction with Articles 107 and 108(3) TFEU for assuming that the arbitral award confirming the validity of the legal act in the form of Annex 6 to the Concession Agreement of 12 September 1997 for the construction and operation of the A-2 toll motorway (the 'Concession Agreement') is not contrary to the fundamental principles of the Republic of Poland's legal system, despite the binding finding of the Commission in the Commission Decision that Annex 6 is incompatible with Articles 107 and 108(3) TFEU.

In its conclusions, the State Treasury claimed that the judgment under appeal should be amended in its entirety by annulling the arbitral award in its entirety, together with the rectified wording of 30 April 2013 and sought an order that the respondent be ordered to pay the State Treasury - Ministry of Infrastructure the costs of the proceedings, including the costs of legal representation by means of an appropriate order, including an order to pay the costs of legal representation to the State Treasury - Office of the General Prosecution Service of the Republic of Poland, under Article 32(3) of the Law of 15 December 2016 on the General Prosecution Service of the Republic of Poland.

The respondent claimed that the appeal should be dismissed and an order should be made on the costs of the appeal proceedings.

In its written observations of 16 November 2018 and oral submissions at the hearing of 29 October 2019, the Commission put forward arguments in favour of amending the Regional Court's judgment under appeal by annulling the arbitral award. At that hearing, the representatives of the appellant and the respondent stated that they did not dispute that, on 24 October 2019, the General Court of the European Union delivered a judgment against Autostrada Wielkopolska S.A., with registered office in Poznań, concerning the action for annulment of the State aid decision of the European Commission of 25 August 2017.

The Court of Appeal held as follows.

The appeal must be granted, although not all the pleas relied on in the appeal can be considered to be correct.

First of all, the most extensive plea that the dispute is not arbitrable cannot be accepted. Although the Regional Court did not express a separate opinion on arbitrability, accepting that it was uncontested, that does not mean that it incorrectly settled that key question. It should be recalled in that regard that on 17 October 2005 the Law of 28 July 2005 amending the Code of Civil Procedure (Journal of Laws 2005, No 178, item 1478) came into force which, inter alia, repealed Articles 695-715 of the Code of Civil Procedure, while it follows from Article 2 thereof that the previous provisions apply to proceedings brought before arbitral tribunals before the entry into force of that law and to 'post award proceedings' before the national courts (this concerns determination of the effectiveness of the arbitration award, declaration of enforceability of the award and action for annulment of the award). The arbitration proceedings between the parties commenced in 2010 and therefore took place under the new law. However, in accordance with the settled case-law of the Supreme Court and the ordinary courts, the validity and effectiveness of the arbitration clause are determined by the rules in force when the clause was drawn up. As held by the Supreme Court in its decision of 18 June 2010 in *V CSK 434/09* (Lex No 738365): 'the amending law in its sole temporal provision - Article 2 - only contained rules on the application of certain provisions to proceedings before arbitral tribunals and the national courts by reference to the date of commencement of such proceedings. It did not, on the other hand, regulate the question of the rules according to which the validity and effectiveness of the arbitration clause should be assessed. ... Under the temporal rules applicable to substantive law, any legal act must give rise to such legal effects as are laid down in the provisions in force at the time of its occurrence, therefore the validity and effectiveness of the arbitration clause is determined by the provisions in force when the clause was drawn up. The Supreme Court also gave a ruling by analogy in its judgment of 27 November 2008, IV CSK 292/08, (unpublished). Similarly, the Court of Appeal in Wrocław, in its order of 10 May 2012, I ACz 660/12 (*Lex 1238598*), held that it is well established in case-law that, according to the temporal rules applicable to substantive law - Article 3 of the Civil Code, any legal act must give rise to such legal effects as are laid down in the provisions in force at the time of its occurrence, therefore, the validity and effectiveness of the arbitration clause, which is governed precisely by the rules of substantive law, is determined by the provisions in force when the clause was drawn up. Accordingly, the validity and effectiveness of the arbitration clause in the present case should be assessed on the basis of the former Articles 697 and 698 of the Code of Civil Procedure, which were in force at the time when the parties entered into agreements for the sale of shares, rather than under Article 1157 and Article 1161 of the Code of Civil Procedure, in force from 17 October 2005. Article 697 of the Code of Civil Procedure referred to the limits of the parties' ability to 'independently enter into commitments', but did not use the criterion of 'suitability for settlement' of the dispute. The Supreme Court's arguments in the rulings called into question by the appellant also refer to the assessment of arbitrability against the background of the previous provisions of the Code of Civil Procedure. It should be pointed out that the Supreme Court held that the amendment made to the provisions of the Code of Civil Procedure by the Law of 28 July 2005, namely the replacement of Article 697 § 1 of the Code of Civil Procedure referring to the ability of the parties to independently enter into commitments under a specific legal relationship by Article 1157 of the Code of Civil Procedure referring to the suitability for settlement of the dispute, is essentially a change in terms of language rather than meaning. In the order of 18 June 2010, V CSK 434/09, the Supreme Court clarified that: '... also on the basis of Article 697 § 1 of the Code of Civil Procedure, it was common ground that disputes arising out of such legal relationships were excluded from the scope of an arbitration clause, and the parties themselves were precluded from disposing of the rights arising out of those relationships,

therefore those disputes which may not be the subject-matter of disposition by the parties themselves, including the conclusion of a court settlement. Arbitrability under Article 697 § 1 of the Code of Civil Procedure was therefore a feature of such legal relationships and disputes arising from those relationships which, in the light of the rules of substantive law, the parties may freely dispose of. Accordingly, certain categories of legal relationships did not have that suitability, rather than certain categories of claims arising from them.

This is because the possibility of submitting a dispute to an arbitral tribunal relates to defined legal relationships understood in the abstract and not to claims arising therefrom (concerning performance, determination or creation of a legal relationship or right), which are not the subject-matter of an arbitration clause.' In addition, according to the legal literature, in the previous legal situation which was the subject-matter of the arbitration proceedings, there might be a request to prove or determine a legal relationship or right, as well as a request to structure that legal relationship in the arbitration clause *(to that effect, T. Ereciński, J. Gudowski, M. Jędrzejewska, Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze. [Commentary to Civil Code. First part. Declaratory proceedings], V edition, Lexis Nexis 2004, commentary on Article 697).* Article 697 § 1 of the Code of Civil Procedure laid down a general condition in the form of limits on the ability of the parties to independently enter into a commitment, which meant, inter alia, that this concerned disputes about property rights which could be freely disposed of by the parties under substantive law. At present, Article 1157 of the Code of Civil Procedure refers to a condition relating to the possibility of a court settlement which is, however, essentially similar to one of the circumstances previously comprising the condition in Article 697 § 1 of the Code of Civil Procedure). The above view remains consistent with the position of the Supreme Court, as expressed in its decision of 21 May 2010, II CSK 670/09 (*Lex No 589813)*, according to which the parties may refer to an arbitral tribunal a dispute concerning determination of the non-existence of an agreement or declaration of invalidity of an agreement and with the resolution of 23 September 2010, III CZP 57/10 (*Lex No 602463*), holding that a dispute concerning determination of the non-existence of a legal relationship on the basis of an agreement owing to its invalidity may be referred by the parties to an arbitral tribunal (Article 1157 of the Code of Civil Procedure). The Court of Appeal considers that the view of the Supreme Court should be accepted to the effect that it is important whether a dispute of a given type concerning a property right (or a moral right) may be the subject-matter of a court settlement, and it is irrelevant whether or not the specific settlement resolving that dispute would be permissible or not. The arbitrability of a dispute is therefore determined by a party's ability to dispose of its rights (and claims arising from them) in the abstract and not by the possibility (permissibility or impermissibility) for a party to enter into a specific court settlement. If we are therefore dealing with such a legal relationship in which the parties are able - in abstract terms - to reach a settlement, a dispute arising from that legal relationship may be settled by arbitration. In assessing whether a given dispute is arbitrable, it should effectively be separate from the assessment of whether the specific settlement and its content would infringe the law and whether the condition of 'reciprocal concessions' in Article 917 of the Civil Code is fulfilled. As clarified by the Supreme Court in the grounds for its resolution of 23 September 2010, III CZP 57/10, the suitability for settlement of the dispute should be assessed in the abstract, in isolation from the specific circumstances and legal conditions and from the consideration of whether any settlement concluded by the parties would be permissible in the light of Article 203 § 4 in conjunction with Article 223 § 2 of the Code of Civil Procedure, for the purposes of Article 917 in conjunction with Article 58 of the Civil Code. That may be understood as follows: when an assessment is made as to whether a dispute is arbitrable, it should not

be ‘imagined’ what specific settlement could be concluded by the parties in order to resolve the dispute, whether it would undermine the law or whether the parties would actually make reciprocal concessions in such a settlement. What matters is only whether or not, at that stage, the parties could put an end to the dispute by *any non-specific* settlement and, therefore, dispose of their own subjective rights. The same criteria are used to assess whether a reference may also be made to arbitration of a dispute concerning whether a legal act on the basis of which a legal relationship arises is transformed by a party or abolished or whether or not it is flawed; it is irrelevant whether the subject-matter of the court settlement may be the question of the defectiveness of that act causing its invalidity; what is relevant is whether the legal relationship to which that act relates is subject to the principle of party disposition and whether it is therefore possible, on the basis of that relationship, to reach a settlement. In other words, where a dispute is concerned with the question of whether a legal relationship exists, the possibility of referring that dispute to arbitration is dependent on the assessment of whether the parties could settle the reciprocal rights and obligations which the contested legal relationship entails, and not on the assessment of whether it is possible to reach a settlement on the question of whether or not the legal act creating that relationship was flawed. Consequently, the plea that the ruling of the court at first instance was made in breach of Article 1206 § 2(1) of the Code of Civil Procedure as a result of an implied assumption that, according to the law, the dispute in the proceedings before the arbitral tribunal may be settled by the arbitral tribunal has not been substantiated. It should be pointed out that the appellant’s position in that regard is inconsistent with its earlier actions and statements, since the appellant not only appeared before the arbitral tribunal, but also itself brought a counterclaim.

On the other hand, in the opinion of this Court of Appeal, the plea alleging infringement of Article 1206 § 2(2) of the Code of Civil Procedure in conjunction with Articles 107 and 108(3) TFEU and Article 87(1) of the Constitution of the Republic of Poland in conjunction with Article 91(3) of that Constitution, for assuming that the provisions of the TFEU governing the rules on the granting of State aid and the functioning of the internal market do not form fundamental principles of the Republic of Poland’s legal system and, consequently, failure to examine the arbitral award in the context of its compatibility with Article 107 and 108(3) TFEU, is valid. The appellant’s view that the award of the arbitral tribunal effectively undermines the consistent application of the EU State aid rules should be accepted. In the light of the grounds of appeal, the Court of Appeal was faced with the task of deciding whether the arbitral tribunal infringed EU rules on State aid. The consistent application of the State aid rules must not be understood exclusively as ensuring that aid paid contrary to those principles can be recovered, but it has a broader systemic dimension and includes ensuring that national courts and arbitral tribunals deciding competition law cases comply with the fundamental principles of EU law. EU law provisions form part of the Polish legal system subject to own-motion investigation in the context of the condition laid down in Article 1206 § 2(2) of the Code of Civil Procedure. The Court of Justice of the European Union has unambiguously established that the provisions of EU competition law are part of public policy, which must be taken into account by the national courts in the course of their review of arbitration awards in accordance with the principle of equivalence. According to the settled case-law of the Court of Justice, the principle of equivalence of EU law requires that, where national rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type (see, for example, judgment of the Court of Justice of 26 October 2006 in Case C-168/05 *Claro*, paragraph 35; judgment of the Court of 1 June 1999 in Case C-126/97 *Eco Swiss*, paragraph 37). In the present case,

the risk for consistent application of EU competition law is bound with the very operation of the law in respect of the arbitration award, in which the arbitral tribunal completely failed to have regard to Article 108(3) TFEU. The Court of Appeal takes the view that public policy precludes the operation in the legal system of two contradictory decisions, namely the contested decision of the arbitral tribunal and the decision of the European Commission of 25 August 2017 on State aid, Article 1 of which states that overcompensation for the period from 1 September 2005 to 30 June 2011 amounting to (EUR 223.74 million), granted by the Republic of Poland to AWSA in Poznań on the basis of the Law of 28 July 2005 constitutes State aid within the meaning of Article 107(1) TFEU and that the State aid referred to in Article 1 is unlawful as it was granted in breach of the notification and standstill obligations stemming from Article 108(3) TFEU; that decision was upheld by judgment of the General Court of the European Union of 24 October 2019 in Case T-778/17. In that regard, it is not relevant that the European Commission, in its State aid decision, did not rule on the validity of Annex 6, since clearly the question of the validity of civil law agreements does not fall within the remit of the Commission. However, it is clear that it was considered that, on the basis of the Amended Law and the Concession Agreement, AWSA was entitled to obtain compensation (which, however, could not lead to an improvement in the financial situation of the concession holder).The Commission did not, however, examine Annex 6 in detail. The issue of the validity of civil law agreements does not fall at all within the remit of the Commission. It was, however, for the tribunal to assess, inter alia, the validity of Annex 6 in the arbitration proceedings, and also to express a view on the State Treasury's counterclaim, including the request for determination that the State Treasury had a claim for recovery of the overcompensation. The Court of Appeal believes that the tribunal did not do so adequately because, inter alia, it completely failed to have regard to the EU State aid rules. Those provisions were undoubtedly part of the contract since the parties to the Concession Agreement made a choice of Polish law (Article 24.1 of the Concession Agreement). The arbitral tribunal was therefore under an obligation to apply those provisions of its own motion, irrespective of the position of the parties (see Article 1194 § 1 of the Code of Civil Procedure). In the present case, it was common ground that, on the date of the arbitral tribunal's ruling, the State aid in the form of Annex 6 had not been approved by the European Commission and was therefore in breach of Article 108(3) TFEU. Aid which has not been notified is always unlawful (for procedural irregularity). The respondent's submission that an assessment in that regard would require the arbitral tribunal to conduct a complex investigation is not substantiated. Such a procedure requires only an assessment of whether or not the aid measure in question is compatible with the internal market (Article 107 TFEU). A mere finding of a procedural irregularity (infringement of Article 108(3) TFEU) is, however, limited to examining whether the measure in question has been notified and approved by the European Commission. Since such a claim (or evidence in support thereof) was not put forward by either of the parties to the arbitration proceedings (the respondent acknowledged this at the appeal hearing), the arbitral tribunal did not have any basis for considering that the aid granted to AWSA under Annex 6 constituted legal aid. In the event of an infringement of Article 108(3) TFEU (and the very fact that there was no approval for the aid was a decisive factor in that infringement) all the bodies investigating the case are required to draw all appropriate legal consequences. As in the present case, if the unlawful (non-notified) aid has already been paid, the beneficiary must repay the full amount of the undue aid. In the view of the Court of Appeal, there can be no doubt that the obligations imposed on national courts in the application of Article 108(3) TFEU also extend to arbitral tribunals. At the same time, the repayment obligation does not depend on the compatibility of the aid measure with Article 107(2) or (3) TFEU,

which is a matter upon which the Commission does not decide until the investigation has been completed.

Article 108(3) TFEU lays down a mandatory rule with the primacy status applicable to EU law. In this case, the arbitral tribunal completely disregarded that rule and, effectively, the entire EU legal system and as a consequence not only failed to order the repayment of the aid, but also did not consider the effect on the validity of Annex 6 of the infringement of Article 108(3) TFEU in the context of Article 58 §1 of the Civil Code. Meanwhile, there may also be invalidity of a legal act under Article 58 of the Civil Code because that act is incompatible with a rule of EU law. That position is uniformly accepted both in academic writing and in the case-law. Merely by way of example in that regard, reference may be made to the judgment of the Warsaw Court of Appeal of 20 June 2017 in Case No

I A Ca 544/17, in the grounds of which it is stated that the concept of 'law' in Article 58 § 1 and Article 353(1) of the Civil Code also covers rules of EU law. EU rules currently have a special place in the Polish legal system. The European Court of Justice in the *Simmenthal* case gave EU law rules precedence, irrespective of the hierarchical position of competing national and EU rules, holding that the direct applicability of EU law rules implies the need for full and uniform application in all Member States. Accordingly, it should be considered, on the basis of similar arguments as in the event of the incompatibility of an act with national rules, that both the incompatibility of the wording and the purpose of an act with prohibitions under EU law may lead to the annulment of that act. The rules of EU law relevant for assessing the validity of an agreement on the basis of Article 58 of the Civil Code are, in particular, the rules of EU competition law. An agreement concerning the granting of unlawful aid must be regarded as a legal act which is contrary to the law within the meaning of Article 58 of the Civil Code. Polish civil law provides in such a case for the penalty of absolute nullity. That penalty does not concern only those elements of the legal act which would have remained in force on the basis of Article 58 § 3 of the Civil Code. The agreement granting the unlawful aid which is contrary to Article 107 TFEU is absolutely invalid. Whereas the 'law' within the meaning of Article 58 §1 of the Civil Code is all the legal rules in force in general, incompatibility with the third sentence of Article 108(3) TFEU will render invalid the legal act which is incompatible with that provision as contrary to the law. The disregard and non-application of Article 108(3) TFEU by the arbitral tribunal are of fundamental importance in the present action for annulment of the arbitration award. It is true, as the respondent rightly points out, that the national court should not, in principle, review the merits of the issues decided in the arbitration proceedings, but intervention by a national court cannot be regarded as being unfounded in a situation in which the arbitral tribunal has avoided the application of EU competition law in general. In that regard, it must not be overlooked that, on the date of the judgment of the Regional Court, the incompatibility of Annex 6 with Article 107 TFEU had also been confirmed. In addition to the procedural unlawfulness of Annex 6 with regard to EU competition law, on the date of the Regional Court's judgment its substantive unlawfulness, and thus its infringement of Article 107 TFEU, had also been found by binding decision. On 25 August 2017, the European Commission issued a decision in which overcompensation granted to AWSA on the basis of Annex 6 was considered to be State aid incompatible with the internal market. According to this Court of Appeal, the Regional Court was bound by the Commission's decision, which constitutes an official document within the meaning of Article 244 of the Code of Civil Procedure. However, the Regional Court erred in refusing to consider the effects of the Commission Decision, stating that the decision was not binding. The Regional Court therefore failed to note that the implementation of the Commission Decision had not been suspended, while challenging

it before the EU courts did not result in it being suspended. On the date of the ruling of the Regional Court, the Commission Decision was enforceable and binding, and the incompatibility of Annex 6 with EU competition law confirmed by it was sufficient basis for the annulment of the arbitration award. It should be pointed out that the judgment of 24 October 2019 of the Court of Justice of the European Union dismissed the action brought by AWSA against the Commission Decision and therefore refused to annul said decision. As regards the question of whether the procedure for the recovery of State aid is relevant for the assessment of the arbitral tribunal in the context of Article 1206 §2(2) of the Code of Civil Procedure, it should be stated that the Regional Court was incorrect in holding that the annulment of the arbitration award is unnecessary since Polish law lays down the procedure for the recovery of unlawful State aid based on the Commission Decision on the basis of the Law of 30 April 2004 on proceedings in State aid cases. The Court of Appeal does not share that view, as the fact that the EU and Polish systems provide for a procedure for the recovery of State aid granted contrary to EU law is irrelevant for the assessment of the validity of the arbitration award, which completely disregarded the question of that right. It should be noted that the proceedings pending before the Poznań Regional Court are not in any way connected with the arbitration proceedings which gave rise to the arbitration award. It is particularly important that, even if a ruling favourable for the State Treasury is delivered in the proceedings before the Poznań Regional Court, this will not eliminate the effects of the arbitration award contrary to EU law. In the arbitration proceedings, the State Treasury sought the annulment of Annex 6. In the proceedings before the Poznań Regional Court, on the other hand, it sought only the repayment of the amount of unlawful State aid, not a review of Annex 6 on the basis of which that aid was paid. Accordingly, even the final success of the State Treasury's action based on the Law of 30 April 2004 on proceedings in State aid cases will not have effects identical to the elimination of the arbitration award. The refusal to annul the arbitration award leads to a situation in which the ruling establishing/confirming the validity of Annex 6 remains, despite its incompatibility with Articles 107 and 108 TFEU, as confirmed by the Commission Decision. That effect does not in any way remove the proceedings pending before the Poznań Regional Court. Nor can it be assumed that, given the current possibility of recovering the aid, the arbitration award did not entail any negative consequences. The appellant's view should be accepted that if the arbitral tribunal correctly applied Article 108(3) TFEU, which it was required to do, it would already have considered in March 2013 that the State Treasury has a claim for recovery of the overcompensation. However, the recovery procedure on the basis of the Commission Decision could not be commenced until November 2017, that is to say, more than four years later. In addition, that procedure is still pending (and currently suspended at first instance). Contrary to the respondent's submissions, the payment by AWSA of the amounts demanded by the Treasury into the deposit account of the Minister for Finance is only a provisional (rather than definitive) implementation of the Commission Decision. This itself means that the effects of the arbitration award are incompatible with the fundamental principles of the Polish and European legal systems. In general, accepting the view of the Regional Court that there is no need to annul the arbitration award in view of the separate legal regime allowing recovery of the aid would essentially amount to endorsing a failure by arbitral tribunals to have regard to EU competition law and therefore consent to infringement of the fundamental principles of EU law. For obvious reasons, such a position cannot be accepted.

In the light of the foregoing, the judgment under appeal should be amended and the arbitration award annulled in its entirety under Article 1206 § 1(4) and § 2(2) of the Code of Civil Procedure, in respect of which the Court of Appeal ruled on the basis of Article 386 § 1 of the Code of Civil Procedure.

The decision on the costs of the proceedings is based on Article 98 and Article 108 § 1 of the Code of Civil Procedure, taking into account the outcome of the proceedings, the appropriate rates for legal representation before the courts of first and second instance and the amount of the unpaid fees for the application and the appeal, which the appellant, availing itself of the statutory exemption, was not required to bear and which must be borne by the respondent as the unsuccessful party in accordance with Article 113(1) of the Law of 28 July 2005 on judicial costs in civil matters (Journal of Laws 2018, item 300, as amended). The amount of the costs for the appellant's legal representation in the appeal proceedings has been determined in accordance with Article 32(3) of the Law of 15 December 2016 on the Office of the General Prosecution Service of the Republic of Poland in conjunction with § 8(4) and § 10(1)(2) of the Regulation of the Minister for Justice of 22 October 2015 on fees of legal counsel (Journal of Laws of 2015, item1800, as amended).

[redacted] of the Regional Court, delegated

SĄD APELACYJNY

Na oryginale właściwe podpisy
Za zgodność
STARSZY SEKRETARZ SĄDOWY
[redacted]