

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CUBE INFRASTRUCTURE FUND SICAV AND OTHERS
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/20

AWARD

Members of the Tribunal

Professor Vaughan Lowe, President
The Honourable James Jacob Spigelman
Professor Christian Tomuschat

Secretary of the Tribunal

Mr. Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: 15 July 2019

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Claimants	Cube Infrastructure Fund SICAV, Cube Energy S.C.A., Cube Infrastructure Managers S.A., and Demeter 2 FPCI and Demeter Partners S.A.
Claimants' Submission	Claimants' Submission on Costs filed on 4 December 2018
Cube	Cube Infrastructure Fund SICAV, Cube Energy S.C.A., and Cube Infrastructure Managers S.A.
Decision	Tribunal's Decision on Jurisdiction, Liability and Partial Decision on Quantum dated 19 February 2019
Demeter	Demeter 2 FPCI and Demeter Partners S.A.
ECT	Energy Charter Treaty
Experts	The Brattle Group and Econ One Research, Inc.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Joint Expert Report	Joint Expert Report dated 16 April 2019, prepared by the Parties' Experts
Respondent's Submission	Respondent's Submission on Costs filed on 1 April 2019
Spain or the Respondent	Kingdom of Spain
Supplementary Joint Expert Report	Supplementary Joint Expert Report dated 13 May 2019, prepared by the Parties' Experts

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Energy Charter Treaty (“**ECT**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
2. The Claimants in this case (“**the Claimants**”) are Cube Infrastructure Fund SICAV, Cube Energy S.C.A., and Cube Infrastructure Managers S.A. (referred to collectively as “**Cube**”), which are companies incorporated under the laws of the Grand Duchy of Luxembourg, and Demeter 2 FPCI and Demeter Partners S.A. (referred to collectively as “**Demeter**”), which are companies constituted under the laws of the French Republic.¹
3. The Respondent in this case is the Kingdom of Spain (“**Spain**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 19 February 2019, the Tribunal issued a Decision on Jurisdiction, Liability and Partial Decision on Quantum (the “**Decision**”). The full text of that Decision is hereby made an integral part of this Award.
6. On the questions of jurisdiction and liability, the Tribunal’s Decision reads as follows:

“VIII DECISIONS

A. On Jurisdiction

543. The Tribunal decides unanimously that the Respondent’s jurisdictional objection on questions concerning taxation measures

¹ Claimants’ Memorial on the Merits dated 9 May 2016, para. 19.

within the meaning of Article 21 ECT is upheld. All other jurisdictional objections are dismissed.

B. On Liability

544. The Tribunal decides unanimously that the Respondent breached the Claimants' right under Article 10 ECT to fair and equitable treatment in respect of their investments in PV plants. All other claims in respect of the PV plants are dismissed unanimously.

545. The Tribunal decides by a majority that the Respondent breached the Claimants' right under Article 10 ECT to fair and equitable treatment in respect of their investments in hydro plants. All other claims in respect of the hydro plants are dismissed."

7. The Decision sets out the following summary of the Tribunal's position on the question of damages and interest:

"E. Summary on Damages

530. The Tribunal decides unanimously that the Claimants are entitled by way of damages €2.89 million in respect of losses caused to the PV investments.

531. The Tribunal decides by a majority that the Claimants are entitled by way of damages a sum in respect of losses caused to the hydro investments, calculated by reducing by forty per cent (40%) the difference between the projected cash flows under the But For and the Actual Scenarios underlying the Claimants' computation in its Post-Hearing Brief of €41.8 million in damages for post-June 2013 measures.

532. Subject to our above analysis, in order to implement the decision in the previous paragraph, the Tribunal directs Brattle and Econ One, as the experts for the two Parties, to submit a joint report computing the reduced losses in respect of the hydro investments on the basis of the assumptions and methodology used in the Brattle Reports that are on the record, except that the 40% discount decided upon by the Tribunal is to be applied. Both experts may comment upon the method of making this new computation, but no further submissions are to be made in relation to the assumptions and methodology adopted in the reports and submissions that are already on the record before the Tribunal. If the two experts are unable to agree upon the computation, they are each to append to the joint report a concise note identifying precisely the points on which they disagree and the reasons for the

disagreement, and indicating the mathematical impact of the disagreement upon the sums computed.

533. The joint report referred to in the previous paragraph is to be submitted to the Tribunal within thirty days of the date of this Decision. The Tribunal will thereafter issue an Award incorporating this Decision and confirming (or, in the event of disagreement between the experts, deciding upon) the precise amount awarded in respect of the hydro investments.

F. Interest

534. The valuation date is 20 June 2014. Interest is payable on the amount that will be awarded in order to ensure full reparation for the injury caused.

.....

538. ... [T]he Tribunal considers that the EURIBOR rate is the appropriate rate at which interest on the damages payable under this Decision and the Award that the Tribunal will render as explained in paragraph 533 above should be computed. Other tribunals have fixed interest rates to six-monthly bond rates, compounded semi-annually, and the Tribunal considers this to be the appropriate measure.

539. The Tribunal accordingly decides that interest shall be payable on the amount that it has decided will be awarded, computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.

540. In order to implement the decision in the previous paragraph, the Tribunal directs Brattle and Econ One, as the experts for the two Parties, to submit a joint report computing the amount of interest payable. If the two experts are unable to agree upon the computation, they are each to append to the joint report a concise note identifying precisely the points on which they disagree and the reasons for the disagreement, and indicating the mathematical impact of the disagreement upon the sums computed.

541. The joint report referred to in the previous paragraph is to be submitted to the Tribunal within thirty days of the date of this Decision. The Tribunal will thereafter issue an Award, as explained in paragraph 532 above, confirming (or, in the event of disagreement between the experts, deciding upon) the precise amount awarded in respect of interest.”

8. Section VIII of the Decision on the questions of damages and interest and costs reads as follows:

“VIII. DECISIONS

...

C. On Damages and Interest

546. The Tribunal decides unanimously that the Claimants are entitled by way of damages €2.89 million in respect of losses caused to the PV investments. Interest shall be payable on the sum awarded computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.
547. The Tribunal decides by a majority that the Claimants are entitled by way of damages a sum in respect of losses caused to the hydro investments, calculated by reducing by forty per cent (40%) the difference between the projected cash flows under the But For and the Actual Scenarios underlying the Claimants’ computation in its Post-Hearing Brief of €41.8 million in damages for post-June 2013 measures. Interest shall be payable on the sum awarded, computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.

D. On Costs

548. The Tribunal decides unanimously that
- (a) Each Party shall bear its own costs incurred in preparing the reports directed in paragraphs 532 and 540 above; and
 - (b) Reserves for the Award its decision on the other costs in this case.”

9. In its Decision, the Tribunal thus left open the determination of the precise sum payable as damages and costs. It directed The Brattle Group and Econ One Research, Inc., as the experts for the Parties (the “**Experts**”), to submit a joint report (the “**Joint Expert Report**”) computing the amount payable as damages in accordance with paragraphs 532 and 540 of the Decision.

10. The Tribunal further determined that it would render an Award incorporating the Decision and confirming (or, in the event of disagreement between the Experts, deciding upon) the precise amount awarded (i) in respect of the hydro investments² and (ii) interest.³
11. On 26 February 2019, the Tribunal reminded the Parties that it expected to receive the Joint Expert Report by 21 March 2019 in accordance with paragraphs 533 and 541 of the Decision.
12. On the same day, the Tribunal invited the Parties to submit “updated statements on their costs, and concise submissions on the allocation of costs, also by 21 March 2019”, pursuant to paragraph 542 of the Decision.
13. On 12 March 2019, the Parties requested that the Tribunal extend the deadline for submitting the Joint Expert Report until 9 April 2019.
14. On 14 March 2019, the Tribunal decided to grant the request of 12 March 2019.
15. On 16 March 2019, Spain requested a 7-day extension to file its submission on costs.
16. On 20 March 2019, the Tribunal granted the time extension requested by Spain.
17. On 1 April 2019, the Parties filed their submissions on costs.⁴
18. By emails dated 9 and 10 April 2019, the Parties requested that the Tribunal extend the deadline for submitting the Joint Expert Report until 16 April 2019.
19. On 11 April 2019, the Tribunal granted the above request.

² Decision, para. 533.

³ *Ibid.*, para. 541.

⁴ The Claimants filed their submission on costs on 4 December 2018. On 1 April 2019 the Claimants maintained their positions on the allocation of costs as stated in their December submission.

20. On 16 April 2019, the Parties submitted the Joint Expert Report. The Experts agreed that according to paragraph 531 of the Decision, “the relevant calculations start from the damages estimate of €41.8 million presented in the Claimant’s Post-Hearing Brief.”⁵
21. However, the Experts did not agree on the computation of the Tribunal’s instruction regarding how to apply the 40% adjustment in relation to the hydro investments. Following the Tribunal’s instruction in paragraph 532 of the Decision, each of the Experts appended to the Joint Expert Report a note identifying the points of disagreement.
22. Further to paragraphs 533 and 541 of the Decision, on 29 April 2019, the Tribunal wrote to the Parties as follows:

“The Tribunal notes that the experts agree on the implementation of the Tribunal’s instruction regarding interest pursuant to paragraphs 539-540 of the Tribunal’s Decision on Jurisdiction, Liability and Partial Decision on Quantum (the “Decision”) dated 19 February 2019.

The Tribunal also notes that the experts do not agree on the computation of the Tribunal’s instruction concerning the application of the 40% discount outlined in paragraph 532 of the Decision. While the experts agree that the calculations of the reduced losses in respect of the hydro investments should start from the damages estimate of €41.8 million presented in the Claimants’ Post-Hearing Brief, the experts disagree on the following four issues:

- (i) whether the discount should apply to pre-June 2014 cash flows;
- (ii) which cash flows the discount should apply to (revenues, project cash flows or equity cash flows);
- (iii) whether the 40% discount replaces or supplements Brattle’s original regulatory risk haircut in the But For scenario; and
- (iv) whether the 40% discount should cumulate over time.

Having deliberated on the four issues listed above, the Tribunal decides as follows:

⁵ Joint Expert Report, para. 4.

First, the 40% discount should not apply to pre-June 2014 cash flows because they were not subject to regulatory risk as the circumstances were known. The Tribunal determined that 20 June 2014 was the valuation date.

Second, the discount should be applied to equity cash flows, not to revenue or project cash flows. The 40% discount is the Tribunal's assessment of regulatory risk applied to recoverable damages, not revenue.

Third, the 40% discount should replace Brattle's regulatory risk haircut. This discount factor is the Tribunal's assessment of regulatory risk. Accordingly, the computation should remove the regulatory risk haircut from Brattle's projection, before applying the Tribunal's 40% discount.

Fourth, the discount should not accumulate over time. The Tribunal considers that it is not appropriate to apply a time profile of risk on the basis that risk increases over time. The 40% was a broad assessment by the Tribunal, rather than a precise computation.

The Tribunal requests the parties to instruct their respective experts to prepare a supplementary joint report, taking the above decisions into account and calculating the sum accordingly. The parties shall file the supplementary report by 17 May 2019.

Finally, pursuant to paragraph 548(a) of the Decision, the parties shall also file their final updated statements of costs by 17 May 2019."

23. On 13 May 2019, the Parties submitted a supplementary joint report (the "**Supplementary Joint Expert Report**"), in which the Experts reported that they had calculated the damages as €2.89 million due in respect of the PV investments and €30.81 million due in respect of the hydro investments.
24. On 17 and 24 May 2019 the Claimants and the Respondent, respectively, confirmed that they maintained their positions on the allocation of costs as stated in their previous submissions.⁶
25. On 31 May 2019, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 38.

⁶ The Claimants had filed a submission on costs on 4 December 2018. The Respondent had filed a submission on costs on 1 April 2019.

III. FINAL DECISION OF THE TRIBUNAL ON DAMAGES AND INTEREST

26. The Tribunal's Decision of 19 February 2019 defined the amount of damages payable in this case and left only the calculations to be performed by the Parties' Experts acting jointly. That calculation has now been done, and is set out in the Joint Expert Report and the Supplementary Joint Expert Report.
27. The Claimants did not specify the proportions in which any amounts awarded by way of damages should be distributed between the Cube Claimants and the Demeter Claimants, and the Tribunal accordingly does not do so either.
28. The Tribunal accordingly decides unanimously that the Claimants are entitled by way of damages to **€2.89** million in respect of losses caused to the PV investments. Interest shall be payable on the sum awarded computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.⁷
29. The Tribunal decides by a majority that the Claimants are entitled by way of damages to **€30.81** million in respect of losses caused to the hydro investments. Interest shall be payable on the sum awarded, computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.⁸

IV. FINAL DECISION OF THE TRIBUNAL ON COSTS

30. The Tribunal here presents the respective arguments of the Claimants (A) and of the Respondent (B) and summarizes the costs of the proceeding (C), before deciding on the costs and expenses of the proceeding (D).

⁷ The Supplementary Joint Expert Report calculated the amount of damages in respect of PV investments plus interest up to 31 March 2019 as €2.90 million.

⁸ The Supplementary Joint Expert Report calculated the amount of damages plus interest up to 31 March 2019 as €30.90 million in total, of which €24.46 million represents the losses caused to the Cube Claimants, and €6.44 million represents the losses caused to the Demeter Claimants.

A. THE CLAIMANTS' SUBMISSION

31. The Claimants filed a submission on costs on 4 December 2018 (the “**Claimants’ Submission**”). On 1 April and 17 May 2019, the Claimants confirmed that they maintained their positions on the allocation of costs as stated in their December 2018 submission.
32. The Claimants contend that they are entitled to “full compensation for all the consequences of Spain’s breaches of the ECT.”⁹ According to the Claimants, such compensation, in order to “wipe out as far as possible the consequences of Spain’s illegal acts should not only cover compensation for the damages resulting from the losses of their investment but also the Claimants’ arbitration costs.”¹⁰
33. The Claimants have claimed €3,091,003.60 as the costs of representation, plus USD 525,000.00 as payments made to ICSID as the lodging fee and its share of the advances in respect of this case. The representation costs include €1,230,442.50 to King and Spalding, and €822,025.65 to Gómez-Acebo & Pombo, for legal fees; and in addition €824,893.08 to the Brattle Group and €67,668.34 to Professor Manuel Aragón Reyes for expert fees and expenses, and a further USD145,974.03 for the Claimants’ costs and expenses.
34. The Claimants have not separated out the costs attributable to the Cube Claimants and the costs attributable to the Demeter Claimants, and accordingly the Tribunal does not do so either.
35. Finally, the Claimants argue that the Tribunal has broad discretion to allocate costs pursuant to Article 61(2) of the ICSID Convention and Rule 28(1) of the ICSID Arbitration Rules.¹¹

⁹ Claimants’ Submission, pp. 2-3.

¹⁰ *Ibid.*, paras. 4, 6.

¹¹ *Ibid.*, paras. 2-3.

B. THE RESPONDENT’S SUBMISSION

36. On 1 April 2019, the Respondent filed a submission on costs, (the “**Respondent’s Submission**”).
37. The Respondent requests the Tribunal to order the Claimants to “pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators’ fees and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which those costs are incurred and the date of their actual payment.”¹²
38. The Respondent has claimed €1,614,242.51 as the costs of representation, plus €446,826.11 as payments made to ICSID as its share of the advances in respect of this case. The representation costs include €445,290 in legal fees, €545,000 to Econ One Research Inc and €16,940 to Professors Pablo Pérez Tremps and Marcos Vaquer Caballería for expert reports, €38,335.60 for translations, €87,907.87 for editing services, €1,341.25 for courier services, and €32,601.68 for travelling expenses.

C. ICSID COSTS

39. The costs of the proceeding, including the Tribunal’s fees and expenses, ICSID’s administrative fees, and the direct expenses, are as follows:

Arbitrators’ fees and expenses

Prof. Vaughan Lowe	USD 141,398.00
The Honourable James Jacob Spigelman	USD 156,344.92
Prof. Christian Tomuschat	USD 129,066.76
ICSID’s administrative fees	USD 148,000.00

¹² Respondent’s Submission, para. 11 and V.

Direct expenses (estimated) ¹³	USD 189,304.34
Total	USD 764,114.02

The above costs have been paid out of the advances made by the Parties in equal parts.

D. THE TRIBUNAL’S DECISION ON COSTS

40. The Tribunal recalls that Article 61(2) of the ICSID Convention reads as follows:

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

41. Additionally, Rule 28 of the ICSID Arbitration Rules, provides:

**“Rule 28
Cost of Proceeding**

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

- (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
- (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the

¹³ This amount includes expenses related to meetings, stenographic and translation services, and expenses related with courier services of this Award (courier, printing, among others).

award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.”

42. The Tribunal considers the costs incurred by each Party to be reasonable, given the complexity and duration of the case.
43. While in principle compensation for the costs of pursuing a successful claim should be regarded as a part of the reparation to which a claimant is entitled in order to wipe out the consequences of the breach of the claimant’s rights, the Tribunal considers that where a claim is only partly successful it is inappropriate that the claimant should be awarded the full costs of bringing the claim.
44. The Tribunal notes that the total amount claimed in damages in the revised Second Brattle Quantum Report, dated 27 February 2017, was approximately €74.1 million, updated from the €63.8 million claimed at the outset of the arbitration.¹⁴
45. In its Decision the Tribunal rejected claims related to taxation measures imposed by Act 15/2012,¹⁵ on the ground that they fall outside its jurisdiction, and decided that none of the other, non-tax, measures adopted prior to July 2014 constitute a breach of the Claimants’ rights under the ECT. The Claimants were awarded damages as compensation for the loss of cash flows expected to flow after that date from fixed tariffs and market premiums, but that amount was reduced by 40% to take account of regulatory risk.¹⁶ The claim put before the Tribunal thus failed in part and succeeded in part, the Claimants recovering in total approximately €33 million.
46. Taking account of the circumstances of the present case, and in particular of the extent to which the Claimants have prevailed in their claim, the Tribunal has decided that the Respondent should bear one-half of the costs of the Claimants set out in paragraph 33

¹⁴ See Second Brattle Quantum Report, para. 6.

¹⁵ Decision, paras. 221–233.

¹⁶ Decision, para. 529.

above; *i.e.*, €1,545,501.80 for legal fees, expert fees and expenses and other costs and expenses, plus USD 262,500.00 in respect of the Claimants' payments to ICSID.


47. The advances already paid by the Parties to ICSID, converted into USD, total USD 999,716.99 of which each party has paid approximately¹⁷ one half. The remaining balance is to be returned to the Parties in equal shares.

V. AWARD


48. Incorporating in this Award the Decision dated 19 February 2019, and for the reasons set forth above and in that Decision, the Tribunal here decides as follows:
- a. Unanimously, that the Respondent's jurisdictional objection on questions concerning Taxation Measures within the meaning of Article 21 ECT is upheld. All other jurisdictional objections are dismissed;
 - b. Unanimously, that the Respondent breached the Claimants' right under Article 10 ECT to fair and equitable treatment in respect of their investments in PV plants. All other claims in respect of the PV plants are dismissed unanimously;
 - c. By a majority, that the Respondent breached the Claimants' right under Article 10 ECT to fair and equitable treatment in respect of their investments in hydro plants. All other claims in respect of the hydro plants are dismissed;
 - d. Unanimously, that the Respondent shall pay the Claimants **€2.89** million in respect of losses caused to the PV investments. Interest shall be payable on the sum awarded computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment;

¹⁷ After conversion costs the amount credited by ICSID to the Claimants is USD 499,899.99, and the amount credited to the Respondent is USD 499,817.00.


- e. By a majority, that the Respondent shall pay the Claimants **€30.81** million in respect of losses caused to the hydro investments. Interest shall be payable on the sum awarded, computed at the six-month EURIBOR rate compounded semi-annually, from 20 June 2014 up to the date of payment.
- f. By a majority, that the Respondent shall pay the Claimants €1,545,501.80 plus USD 262,500.00 in respect of the costs (other than the costs of preparing the Joint Expert Report and the Supplementary Joint Expert Report) of bringing this claim;
- g. Unanimously, that each Party shall bear its own costs incurred in preparing the Joint Expert Report and the Supplementary Joint Expert Report;
- h. That any sums previously advanced by the Parties and remaining in the account established by ICSID for the purposes of the proceedings in this case shall, after all fees and expenses have been paid by ICSID, be divided equally between the Parties and returned to them.



The Honourable James Jacob Spigelman
Arbitrator
Date: 24 June 2019



Professor Christian Tomuschat
Arbitrator
Date: 20 June 2019



Professor Vaughan Lowe
President of the Tribunal
Date: 26 June 2019