PCA Case No. 2012-14 **28 February 2020**

UNCITRAL Arbitration

The PV Investors

The Claimants

v.

The Kingdom of Spain

The Respondent

FINAL AWARD

ARBITRAL TRIBUNAL

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator

The Hon. Charles N. Brower, Arbitrator

Judge Bernardo Sepúlveda-Amor, Arbitrator

Secretary of the Tribunal

Dr. Michele Potestà

Registry

Permanent Court of Arbitration

Representing the PV Investors:

From ALLEN & OVERY LLP:
Ms. Marie Stoyanov
Mr. Antonio Vázquez-Guillén
Mr. Antonio Jiménez-Blanco
Mr. David Ingle
Mr. Tomasz Hara
Mr. Pablo Torres
Ms. Carmen de la Hera

From GIBSON DUNN & CRUTCHER LLP:
Mr. Jeffrey Sullivan

Representing The Kingdom of Spain:

From the ABOGACÍA DEL ESTADO:
Mr. José Manuel Gutiérrez Delgado
Mr. Pablo Elena Abad
Mr. Antolín Fernandez Antuña
Mr. Roberto Fernández Castilla.
Ms.Patricia Froehlingsdorf Nicolás
Ms. María del Socorro Garrido Moreno
Mr. Rafael Gil Nievas
Mr. José Luis Gómara Hernández
Ms. Elena Oñoro Sáinz
Ms. Amaia Rivas Kortazar
Mr. Mariano Rojo Pérez
Ms. María José Ruiz Sánchez
Mr. Diego Santacruz Descartín
Mr. Francisco de la Torre Díaz
Mr. Alberto Torró Molés
Mr. Luis Vacas Chalfoun

From HERBERT SMITH FREEHILLS LLP:
Mr. Eduardo Soler-Tappa
Mr. Christian Leathley
Ms. Florencia Villaggi
Mr. Jaime De San Román
Ms. Beverly Timmins
Ms. Mélissa Sanchez

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FREQUENTLY USED ABBREVIATIONS

5 Member States Declaration	Declaration of the Representatives of the Governments of the Member States, of 16 January 2019, on the enforcement of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union signed by the Representatives of the Governments of Finland, Luxembourg, Malta, Slovenia and Sweden
22 Member States Declaration	Declaration of the Representatives of Governments of the Member States, of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union signed by the Representatives of the Governments of, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Netherlands, Austria, Poland, Portugal, Romania, Slovakia and United Kingdom of great Britain and Northern Ireland
1997 Electricity Law	Law 54/1997 on the Electricity Sector (published on 28 November 1997)
2001 Renewable Energy Directive	EU Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market
2008 Guidelines	European Commission, Community Guidelines for State Aid for Environment Protection, Number 2008/C82/0171
2008 Presentation	The 2008 InvestInSpain presentation entitled "Opportunities in Renewable Energy in Spain"
2009 Presentation	The 2009 InvestInSpain presentation entitled "Legal Framework for Renewable Energies in Spain"
2009 Renewable Energy Directive	EU Directive 2009/28/EC on the promotion and use of energy from renewable sources and amending and subsequently repealing Directive 2001/77 EC and 2003/30 EC
2010 Measures	RD 1565/2010 and RDL 14/2010 collectively
2014 Guidelines	European Commission, Community Guidelines for State Aid for Environment Protection, Number 2014/C200/0170
Antin	*Antin Infrastructure Services Luxembourg S.aà r.l. and Antin Energia Termosolar B. V. v. The Kingdom of Spain,* ICSID Case No. AR/13/31
ASoC	The Claimants' Amended Statement of Claim dated 6 February 2015
BayWa	*BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019
BIT	Bilateral Investment Treaty

Blusun	*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3
BQR I	Brattle's First Quantum Expert Report submitted along with the Quantum Memorial on 7 April 2017
BQR II	Brattle's Quantum Rebuttal Report entitled "Rebuttal Report: Procedural Order No. 12" submitted on 9 November 2017
Brattle's Second Expert Report	Second Expert Report of Carlos Lapuerta and José Antonio García of the Brattle Group submitted on 24 February 2015
Brattle's Third Expert Report	Third Expert Report of Carlos Lapuerta and José Antonio García of the Brattle Group submitted on 17 October 2015 as corrected on 28 October 2015
Claimants	The PV Investors
C-Costs Reply	The Claimants' Reply cost submission dated 15 July 2016
C-Costs Submission	The Claimants' Costs Submission dated 8 July 2016
Charanne	*Charanne B. V. & Construction Investments S.A. R.L.* v. *the Kingdom of Spain,* SCC Arb. No. 062/2012, Award, 21 January 2016 and Partial Dissenting Opinion of Guido Santiago Tawil dated 21 January 2016
Chorzów Factory	*Case Concerning the Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity, Merits, PCIJ Rep, Series A, No. 17, Judgment of 13 September 1928
CJEU	Court of Justice of the European Union
CNE	National Energy Commission (now known as the National Commission for Markets and Competition or "CNMC")
C-PHB1	The Claimants' post hearing brief on liability dated 20 May 2016
Commission	European Commission
C-PHB2	The Claimants' reply post-hearing brief on liability dated 24 June 2016
CPI	Spanish Consumer Price Index
CSP	*CSP Equity Investment s.a.r.l. (Luxembourg) v. Kingdom of Spain,* SCC Arbitration 2013/094
CWS	Claimants' Witness Statement
DCF	Discounted Cash Flow
Disputed Measures	The 2010 Measures and the New Measures collectively
Dissenting Opinion	The Concurring and Dissenting Opinion of The Honorable Charles N. Brower to the Preliminary Award on Jurisdiction dated 10 October 2014
EC	European Communities

EC Decision on State Aid	European Commission's "Decision on the State Aid SA.40348 (20151NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste" dated 10 November 2017
EC Treaty	Treaty Establishing the European Community
ECJ	European Court of Justice
ECT	Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95 (also referred to as "Treaty")
Eiser	*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36
EJM	Expert Joint Model dated 5 October 2018 submitted pursuant to PO18
EOQR I	Econ One Research's First Quantum Expert Report submitted along with the Quantum Counter Memorial on 14 September 2017
EOQR II	Econ One Research's Second Quantum Expert Report submitted along with the Quantum Rejoinder on 22 December 2017
EU	European Union
Exh. C-	Claimants' Exhibit
Exh. CLA-	Claimants' Legal Authority
Exh. R-	Respondent's Exhibit
Exh. RLA-	Respondent's Legal Authority
FET	Fair and equitable treatment
FIT	Feed-in-Tariff
FPS	Full Protection and Security
Greentech	*Greentech Energy Systems A/S et al. v. Kingdom of Spain*, SCC Arbitration V 2015/150
Greentech Documents	Documents related to the Claimants' application for production of certain documents allegedly produced by Spain to the claimants in Greentech
Hearing on Liability	Hearing on Liability held in The Hague on 14-21 March 2016
Hours cap	Limit on the number of hours per year for which PV installations would receive the FIT established by RDL 14/2010
Hungary's Declaration	Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union
ICO	*Instituto de Crédito Oficial*
IDAE	*Instituto para la Diversificación y Ahorro de la Energía*
ILC	International Law Commission

ILC Articles	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles), Annex to General Assembly Resolution 56/83 of 12 December 2001
Isolux	*Isolux Infrastructure Netherlands B.V.* v. *Spain,* SCC Case V2013/153, Award, 17 July 2016
Joint Memorandum	Joint Memorandum accompanying EJM dated 5 October 2018, submitted pursuant to PO18
Law 15/2012	Law 15/2012 of 27 December 2012, concerning Tax Measures to Ensure Energy Sustainability (published on 28 December 2012)
Law 24/2013	Law 24/2013 on the Electricity Sector of 27 December 2013
Masdar	*Masdar Solar & Wind Cooperatief U.A.v. Kingdom of Spain,* ICSID Case No. ARB/14/1
MFN	Most-favored-nation
MG&A Rebuttal Expert Report	Rebuttal Expert Report of the Altran/MaC group submitted on 21 December 2015, as updated on 3 February 2016
MG&A Report	Expert Report of Greatrex and Montojo Gonzalez in collaboration with Altran submitted along with the SoD
Ministry of Industry	The Ministry of Industry, Energy and Tourism of Spain. Prior to December 2011 this entity was named the Ministry of Industry, Tourism and Commerce
MW	Megawatt
New Measures	RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the Order on Parameters collectively
NextEra	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. the Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019
Novenergía	*Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Arbitration (2015/063)
Order on Parameters	Order IET/1045/2014 of 16 June 2014
PCA	Permanent Court of Arbitration
PER 2005-2010	Plan for Promotion of Renewable Energies in Spain 2005-2010
PHB	Post hearing brief
PHTC	Pre-hearing telephone conference
PO1	Procedural Order No. 1 dated 31 July 2012
PO2	Procedural Order No. 2 dated 23 August 2012
PO3	Procedural Order No. 3 dated 16 November 2012
PO4	Procedural Order No. 4 dated 28 February 2013

PO5	Procedural Order No. 5 dated 14 March 2013
PO6	Procedural Order No. 6 dated 1 July 2013
PO7	Procedural Order No. 7 dated 10 January 2014
PO8	Procedural Order No. 8 dated 5 January 2015
PO9	Procedural Order No. 9 dated 30 July 2015
PO10	Procedural Order No.10 dated 25 January 2016
PO11	Procedural Order No.11 dated 23 March 2016
PO12	Procedural Order No.12 dated 29 September 2016
PO12 C-Costs Submission	The Claimants' PO12 Costs Submission dated 14 June 2019
PO12 C-PHB1	The Claimants' First PO12 Post-Hearing Brief submitted on 16 March 2018
PO12 C-PHB2	The Claimants' Second PO12 Post-Hearing Brief submitted on 29 November 2018
PO12 C-Reply Costs Submission	The Claimants' PO12 Reply Costs Submission dated 28 June 2019
PO12 Hearing	Hearing on PO12 issues held in The Hague on 16-19 January 2018
PO12 phase	The phase of the arbitration envisaged in PO12
PO12 R-Costs Submission	The Respondents' PO12 Costs Submission dated 14 June 2019
PO12 R-PHB1	The Respondent's Quantum Post Hearing Brief submitted on 16 March 2018
PO12 R-PHB2	The Respondent's "Second Post Hearing Brief on Quantum" submitted on 12 February 2019
PO12 R-Reply Costs Submission	The Respondent's PO12 Reply Costs Submission dated 28 June 2019
PO12-PHTC	Pre-hearing telephone conference in the PO12 phase held on 8 January 2018
PO13	Procedural Order No.13 dated 29 May 2017
PO14	Procedural Order No.14 dated 31 July 2017
PO15	Procedural Order No.15 dated 20 October 2017
PO16	Procedural Order No.16 dated 11 January 2018
PO17	Procedural Order No.17 dated 25 January 2018
PO18	Procedural Order No.18 dated 18 July 2018
PO19	Procedural Order No.19 dated 15 October 2018
Preliminary Award on Jurisdiction	Preliminary Award on Jurisdiction dated 13 October 2014
Procedural Rules	The procedural rules of this Arbitration, executed on 20 July 2012 by the Tribunal, following consultation with the Parties

PILA	Swiss Private International Law Act
PV	Photovoltaic
Quantum Counter-Memorial	The Respondent’s Quantum Counter Memorial submitted on 14 September 2017
Quantum Memorial	The Claimants’ PO12 Quantum Memorial submitted on 7 April 2017
Quantum Rejoinder	The Respondent’s Rejoinder on Quantum submitted on 22 December 2017
Quantum Reply	The Claimants’ Reply on Quantum submitted on 9 November 2017
RAIPRE	Administrative Registry for Production Installations under the Special Regime / *Registro Administrativo de Instalaciones de Producción en Régimen Especial*
R-Costs Reply	The Respondent’s Reply cost submission dated 15 July 2016
R-Costs Submission	The Respondent’s Costs Submission dated 8 July 2016
RD	Royal Decree
RD 1565/2010	Royal Decree 1565/2010 of 19 November 2010
RD 1578/2008	Royal Decree 1578/2008 of 26 September 2008
RD 18/2014	Royal Decree 18/2014 of 17 January 2014
RD 413/2014	Royal Decree 413/2014 of 6 June 2014
RD 436/2004	Royal Decree 436/2004 of 12 March 2004
RD 661/2007	Royal Decree 661/2007 of 25 May 2007
RDL	Royal Decree Law
RDL 14/2010	Royal Decree Law 14/2010 of 23 December 2010
RDL 2/2013	Royal Decree-Law 2/2013 of 1 February 2013
RDL 6/2009	Royal Decree Law 6/2009 of 7 May 2009
RDL 9/2013	Royal Decree-Law 9/2013 of 12 July 2013
RE	Renewable energy
RREEF	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB /13/30
Rejoinder	The Respondent’s Rejoinder dated 21 December 2015
Reply	The Claimants’ Reply dated 16 October 2015
Respondent	The Kingdom of Spain (also referred to as Spain)
R-PHB1	The Respondent’s post hearing brief on liability dated 20 May 2016 (corrected on 24 May 2016)
R-PHB2	The Respondent’s reply post-hearing brief on liability dated 24 June 2016
SES	Spanish electricity system

SoC	The Claimants' Statement of Claim dated 28 September 2012
SoD	The Respondent's Statement of Defence dated 22 May 2015, as amended on 16 June 2015
SPV	Special Purpose Vehicle
Stadtwerke	*Stadtwerke Munchen GmbH, RWE Innogy GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019
Sustainable Economy Law	Sustainable Economy Act Law No. 2 of 4 March 2011
Terms of Appointment	Terms of Appointment dated 4 July 2012
TFEU	Treaty on the Functioning of the European Union
Treaty	Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95 (also referred to as "ECT")
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331

I. INTRODUCTION

1. This is an *ad hoc* arbitration brought under the Energy Charter Treaty of 1994 ("ECT" or "Treaty")[1] pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, as revised in 2010 (the "UNCITRAL Rules").

A. THE PARTIES

2. The Claimants are:

- Mercurio Solar S.à r.l
- Tyche Solar S.à r.l
- Ampere Equity Fund B.V.
- Element Power Holdings B.V.
- MEIF Luxembourg Renewables S.à r.l
- Impax Solar Investment S.à r.l
- Impax New Energy Investors S.C.A.
- WOC Photovoltaik Portfolio GmbH &Co. KG
- NIBC European Infrastructure Fund I C.V.
- Equitix Innova Infrastructure Investments Holding I B.V.(formerly, NEIF Infrastructure Investments Holding I B.V.)
- Alesund, Christiansund S.à r.l. & Cie S.C.A. (formerly, Werec I & Christiansund S.à.r.l. S.C.A.)
- Shulaya, Trier SG S.à r.l. & Cie S.C.A. (formerly, Werec II & Trier SG S.à.r.l. S.C.A.)
- ASE C.V.
- AES Solar Energy Coöperatief U.A.
- Silver Ridge Power Holdings B.V. (formerly, AES Solar Energy Holdings B.V.)
- Silver Ridge Power B.V.(formerly, AES Solar Energy B.V.)
- Vela Energy Power España I B.V. (formerly, AES Solar España I B.V.)
- Vela Energy Power España II B.V. (formerly, AES Solar España II B.V.)
- Eoxis B.V.
- Eoxis Holding S.A.
- MPC Solarpark GmbH & Co. KG
- Ceconat Energy GmbH
- REI Renewable Energy International, S.à r.l.

1 Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95.

- Roland Schumann
- InfraClass Energie 4 GmbH & Co. KG
- ESPF Beteiligungs GmbH

3. The Tribunal upheld jurisdiction over the foregoing 25 corporate entities and one natural person in its Preliminary Award on Jurisdiction, dated 13 October 2014 (the "Preliminary Award on Jurisdiction").[2] The Claimants belong to the following groups of investors:

Investor Group	Name of Claimants
HgCapital	Tyche Solar S.à r.l. Mercurio Solar S.à r.l.
Ampere	Ampere Equity Fund B.V.
Element Power	Element Power Holdings B.V.
MEIF	MEIF Luxembourg Renewables S.à r.l.
Impax	Impax Solar Investment S.à r.l. Impax New Energy Investors S.C.A.
White Owl	WOC Photovoltaik Portfolio GmbH & Co. KG
NIBC	NIBC European Infrastructure Fund I C.V. Equitix Innova Infrastructure Investments Holding I B.V. (formerly, NEIF Infrastructure Investments Holding I B.V.)
Werec	Werec I & Christiansund S.à.r.l. S.C.A., now called Alesund, Christiansund S.à r.l. & Cie S.C.A. Werec II & Trier SG S.à.r.l. S.C.A, now called Shulaya, Trier SG S.à r.l. & Cie S.C.A.
AES	ASE C.V AES Solar Energy Coöperatief U.A. Silver Ridge Power Holdings B.V. (formerly, AES Solar Energy Holdings B.V.) Silver Ridge Power B.V. (formerly, AES Solar Energy B.V.)

2 See Preliminary Award on Jurisdiction, para. 375(a).

	Vela Energy Power España I B.V. (formerly, AES Solar España I B.V.) Vela Energy Power España II B.V. (formerly, AES Solar España II B.V.)
Eoxis	Eoxis B.V. Eoxis Holding S.A.
MPC Capital	MPC Solarpark GmbH & Co. KG
Ceconat	Ceconat Energy GmbH
Arisol	R.E.I. Renewable Energy International S.à r.l. Roland Schumann
KGAL	InfraClass Energie 4 GmbH & Co. KG ESPF Beteiligungs GmbH

4. The Claimants are described in greater detail in Appendix 2 to the Claimants' Amended Statement of Claim dated 6 February 2015, as amended on Appendix 2 to the Claimants' Reply on the merits dated 16 October 2015 and the Claimants' letter to the Tribunal dated 3 February 2020, and are collectively referred to as the "PV Investors" or the "Claimants".

5. The Respondent is the Kingdom of Spain (the "Respondent" or "Spain").

B. THE ARBITRAL TRIBUNAL

6. The Tribunal is composed of The Honorable Charles N. Brower, appointed by the Claimants; of Judge Bernardo Sepúlveda-Amor, appointed by the Respondent; and of Professor Gabrielle Kaufmann-Kohler, Presiding Arbitrator, appointed by agreement of the two co-arbitrators, with the consent of the Parties.[3]

7. The Tribunal appointed Dr. Michele Potestà as Secretary of the Tribunal, with the consent of the Parties.[4]

[3] See also Preliminary Award on Jurisdiction, para. 12.
[4] See also Preliminary Award on Jurisdiction, para. 24.

II. PROCEDURAL HISTORY

A. PRELIMINARY AWARD ON JURISDICTION

8. The procedural history of the first phase of the arbitration until 13 October 2014 is recounted at section II of the Preliminary Award on Jurisdiction.

9. On 14 October 2014, the Tribunal dispatched to the Parties English and Spanish versions of the Preliminary Award on Jurisdiction and of the Concurring and Dissenting Opinion of The Honorable Charles N. Brower dated 10 October 2014 (the "Dissenting Opinion"). The Tribunal also invited the Parties to confer and submit their proposals for the procedural calendar for the next phase of the arbitration.

10. On 24 October 2014, pursuant to paragraph 8.1 of the Procedural Rules dated 20 July 2012 (the "Procedural Rules"), the Parties provided the Tribunal with their positions on the publication of the Preliminary Award on Jurisdiction.

B. AMENDMENTS TO THE SOC, PROCEDURAL CALENDAR, INTERVENTION BY THE EUROPEAN COMMISSION, PUBLICATION OF AWARDS AND OTHER RELATED MATTERS

11. On 3 and 4 November 2014, the Claimants and the Respondent informed the Tribunal that they had been unable to agree on the procedural calendar. The main reason for disagreement related to the Claimants' intention to amend their Statement of Claim of 28 September 2012 (the "SoC") "to address the new harmful measures implemented by Spain subsequent to the filing of the original Statement of Claim in September 2012",[5] to which the Respondent "strongly object[ed]".[6] The Parties also addressed this issue in their further submissions of 12 November, 19 November, 25 November, 28 November and 2 December 2014.[7]

12. On 12 November 2014, the European Commission (the "Commission") filed an application for leave to intervene as a non-disputing party with the PCA. The Commission's request for permission to intervene was "limited to the question of jurisdiction".[8] The Commission "invite[d] the Tribunal to decline jurisdiction" because of

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5 Email from the Claimants, 3 November 2014.

6 Email from the Respondent, 4 November 2014.

7 See Procedural Order No. 8, 5 January 2015, paras. 2-16 (summarizing the Parties' positions).

8 Application from the European Commission for Leave to Intervene as a Non-Disputing Party, 12 November 2014, para. 8.

the intra-EU nature of the dispute.[9] The Commission maintained that the ECT did not create obligations among EU Member States *inter se*, "but only between the Union and its Member States, on the one hand, and each of the other contracting Parties, on the other hand […]".[10] If the Tribunal nevertheless decided to exercise jurisdiction, the Commission reserved its right to request leave to also intervene on issues of substance.[11]

13. On 18 November 2014, the Tribunal invited the Parties' comments on the Commission's application and asked the Parties whether they had an objection to the Tribunal providing the Commission with a copy of the Preliminary Award on Jurisdiction.

14. On 5 December 2014, the Parties submitted their comments. The Claimants argued that there was no basis for the Commission to intervene in the proceedings nor was "the intended scope of the intervention relevant to the dispute".[12] The Claimants also did not object to the Tribunal providing the Preliminary Award on Jurisdiction to the Commission.[13] The Respondent indicated that it had no objection to the Tribunal providing the Commission with a copy of the Preliminary Award on Jurisdiction (subject to certain confidentiality undertakings), or to the Commission intervening in the proceedings. However, the Respondent suggested that it may be appropriate to determine the question of the Commission's intervention after the Tribunal's determination regarding the amendment of the SoC.

15. On 5 January 2015, the Tribunal issued Procedural Order No. 8 ("PO8"), in which the Claimants were granted leave to file an amended SoC. A procedural calendar for the next phase of the arbitration was circulated with PO8.

16. By letter of 9 January 2015 to the Parties, the Tribunal ruled on the Commission's application. It held that it had already affirmed its jurisdiction in the Preliminary Award on Jurisdiction.[14] Under the Swiss *lex arbitri*, an award on jurisdiction did bind the

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9 Application from the European Commission for Leave to Intervene as a Non-Disputing Party, 12 November 2014, paras. 8-9.

10 Application from the European Commission for Leave to Intervene as a Non-Disputing Party, 12 November 2014, para. 9.

11 Application from the European Commission for Leave to Intervene as a Non-Disputing Party, 12 November 2014, para. 10.

12 See Letter from the Claimants to the Tribunal of 5 December 2014, p. 1.

13 Letter from the Claimants to the Tribunal of 5 December 2014, p. 6.

14 Except in respect of the Spanish incorporated entities (Letter from the Tribunal to the Parties of 9 January 2015, p. 2).

Tribunal, which thus had no power to re-open a matter already decided. As the Commission's application was limited to jurisdictional issues linked to the intra-EU nature of the dispute, the Tribunal could not accept the Commission's application.

17. By the same letter, the Tribunal also drew the Parties' attention to the latest developments concerning transparency in investment treaty arbitration and inquired whether the Parties would consent to the publication of the Preliminary Award on Jurisdiction and the Dissenting Opinion.[15]

18. On 16 January 2015, the Claimants confirmed their consent to the publication of the Preliminary Award on Jurisdiction, as well as awards to be issued in these proceedings, subject to redactions to protect the confidentiality of commercially sensitive information. On the same day, the Respondent informed the Tribunal that it did not consent to the publication of the Preliminary Award on Jurisdiction, and on 28 January 2015, suggested that the Parties and the Tribunal hold a telephone conference on this issue.[16]

19. In a second letter of the same day, Spain alleged that the Claimants had breached Article 8 of the Procedural Rules, in particular by disclosing the content of the Preliminary Award on Jurisdiction. According to the Respondent, on 24 December 2014, IAReporter had disclosed the outcome of the jurisdictional phase. It was the Respondent's "foregone conclusion that the Claimants directly or indirectly disclosed either the Preliminary Award on Jurisdiction or the outcome resulting from such Preliminary Award to either Mr Peterson [of IAReporter] or some third party that is not a party to these confidential proceedings".[17] The Respondent requested the Tribunal to enforce Article 8 of the Procedural Rules by ordering such sanctions as it deemed appropriate. On 28 January and 4 February 2015, pursuant to the Tribunal's directions, the Claimants provided their comments, denying the Respondent's allegations, and the Respondent provided its responses to the Claimants' comments.

20. On 6 February 2015, the Claimants filed their amended SoC (the "ASoC") along with supporting witness statements, exhibits, legal authorities and the Second Expert Report of the Brattle Group ("Brattle's Second Expert Report").[18]

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15 Letter from the Tribunal to the Parties of 9 January 2015, pp. 3-4.

16 Letter from the Respondent to the Tribunal of 28 January 2015, pp. 7-8.

17 See Second Letter from the Respondent to the Tribunal of 16 January 2015, para. 5.

18 The Claimants filed a corrected version of the Brattle's Second Expert Report on 16 February 2015.

21. On 13 February 2015, the Claimants submitted the Spanish language translation of the ASoC.

22. Also on 13 February 2015, the President of the Tribunal made a disclosure, to which neither of the Parties objected.

23. On 16 February 2015, the Tribunal informed the Parties that it was available for a telephone conference as proposed by the Respondent in relation to the publication of the Preliminary Award on Jurisdiction and asked them for their availability. On 6 March 2015, after further correspondence between the Parties, the Tribunal confirmed that the telephone conference would take place on 9 March 2015 at 16:00 (CET).

24. Consequently, on 9 March 2015 at 16:00 (CET), the Parties and the Tribunal held a telephone conference to discuss the publication of the Preliminary Award on Jurisdiction.

25. On 11 March 2015, the Respondent submitted additional comments on the matters discussed at the conference call. Amongst other things, the Respondent confirmed that:

> no matter what the outcome of the liability phase (i.e., whether [the Tribunal] finds Spain liable or not), and notwi[th]standing the fact that it is not what arises from the Procedural Rules, Spain would consent to the publication of the award on liability, even in the hypothetical case that such award could not be "the final" award. Furthermore, as anticipated during the procedural call Spain would also consent to the publication of the Preliminary Award on Jurisdiction at such point in time (i.e., when the Tribunal renders the award on liability)- which as it was explained during the procedural call, it was assumed the Tribunal would do in any event.[19]

26. In letter of 26 March 2015, the Tribunal responded to the Commission's application of 12 November 2014. It conveyed to the Commission that it had no power to reopen jurisdictional objections that it had already decided.[20] The Tribunal observed, however, that the Commission had "reserved the right to request leave to intervene also on points of substance".[21] The Tribunal informed the Commission, *inter alia*, that it would consider any such application and requested that the same be filed by 20 May 2015. Further, as

19 Letter from the Respondent to the Tribunal of 11 March 2015, p. 3.

20 See *supra* para. 16.

21 See Application from the European Commission for Leave to Intervene as a Non-Disputing Party, 12 November 2014, para. 10.

neither Party had raised an objection, the Tribunal provided the Commission with a copy of the Preliminary Award on Jurisdiction and the Dissenting Opinion.[22]

27. Also on 26 March 2015, the Tribunal sent a copy of the letter to the Commission just referred to and addressed the publication of the Preliminary Award on Jurisdiction.[23] Having considered the Parties' positions, it decided that the Preliminary Award on Jurisdiction would be published at the time of the issuance of the final award. Furthermore, it found that the Respondent had failed to establish the Claimants' alleged breaches of the applicable confidentiality regime.[24]

28. On 11 May 2015, following the Parties' joint request for a revision of the procedural timetable, the Tribunal circulated a revised procedural calendar.

29. On 20 May 2015, the Commission informed the Tribunal that it would not present an application to intervene on the merits because Spain had officially notified the Disputed Measures (in accordance with the requirements of EC law) as a result of which the Commission was now obliged to take a decision on Spain's notification of the Disputed Measures.[25] The Commission invited the Tribunal to suspend the arbitration until it had rendered its decision.[26]

30. On 22 May 2015, the Respondent filed its Statement of Defence (the "SoD") with accompanying exhibits, legal authorities and an expert report of Greatrex and Montojo Gonzalez in collaboration with Altran (the "MG&A Report"). On the same day, the Respondent also filed the Spanish translation of its SoD.

31. On 26 May 2015, the Tribunal provided a copy of the Commission's letter of 20 May 2015 to the Parties, and informed them of its intent to ask the Commission to provide an estimate of the timeframe in which it planned to render its decision on the Kingdom of Spain's notification of the Disputed Measures. Later that same day, the Tribunal responded to the Commission's letter of 20 May 2015.

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22 Letter from the Tribunal to the Parties of 26 March 2015, pp. 2-3.

23 As raised in the telephone conference held on 9 March 2015 (see *supra* para. 24) and subsequent correspondence between the Parties and the Tribunal (see *supra* paras.16-19, 25).

24 See *supra* para. 19.

25 Letter from the European Commission to the Tribunal of 20 May 2015, para. 2.

26 Letter from the European Commission to the Tribunal of 20 May 2015, para. 6.

32. On 11 June 2015, the Parties jointly requested an amendment to the dates for the document production phase specified in PO8 (as revised on 11 May 2015). The following day the Tribunal revised the time limits as requested by the Parties.

33. On 16 June 2015, the Respondent filed a corrected version of the SoD and certain additional translations. By letter of the following day, the Tribunal accepted these changes subject to any objection by the Claimants. No objections were raised.[27]

34. On 17 June 2015, each Party served its requests for the production of documents, in accordance with the procedural calendar annexed to PO8 (as amended on 12 June 2015).

35. On 22 June 2015, the Tribunal received further correspondence from the Commission, advising about the timing of the decision on Spain's notification of the Disputed Measures. Upon the Tribunal's invitation, the Parties provided their comments on 5 July 2015.

36. On 8 July 2015, the Tribunal amended the timetable to reflect the Parties' agreement to extend the date for exchanging uncontested documents from 8 July to 17 July 2015.

37. On the same day, the Parties submitted their responses and objections to the document requests.

38. On 17 July 2015, having considered the Commission's request to suspend the proceedings and the Parties' comments thereto, the Tribunal informed the Parties of its decision to deny the Commission's request and the related reasons. On 24 July 2015, the Tribunal communicated such decision to the Commission.

39. On 20 July 2015, the Respondent asked the Tribunal and the Claimants whether they would agree to communicate the Preliminary Award on Jurisdiction and the Dissenting Opinion to the tribunal and the claimant in *CSP Equity Investment s.a.r.l. (Luxembourg)* v. *Kingdom of Spain* (SCC Arbitration 2013/094) ("*CSP*"). On 22 and 24 July 2015, the Tribunal and the Claimants confirmed that they had no objection to such request. On 25 July 2015, the Respondent conveyed that there was no information that needed to be redacted from the Preliminary Award on Jurisdiction, as confidentiality was covered by the rules applied in the SCC proceedings.

27 See email from the Claimants to the Tribunal of 22 June 2015.

40. On 22 and 23 July 2015, the Claimants and the Respondent submitted their Responses to the objections to the document requests.

41. On 24 July 2015, the Tribunal forwarded to the Parties correspondence it had received from the Commission in which the Commission indicated that it would inform the Tribunal of its decision on Spain's notification.

42. On 27 July 2015, the Tribunal confirmed to the Parties its understanding that the Respondent would communicate the Preliminary Award on Jurisdiction and the Dissenting Opinion to the tribunal in *CSP*, being specified that both Parties had confirmed that no information needed to be redacted from the Award.

43. On 31 July 2015, the Tribunal issued Procedural Order No. 9 ("PO9") ruling on the Parties' document production requests.

44. On 17 August 2015, the Respondent informed the Tribunal that it had been requested by the counsel for the claimants in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.* v. *Kingdom of Spain* (ICSID Case No. ARB/13/30) ("*RREEF")*, to submit the Preliminary Award on Jurisdiction in that arbitration. It thus requested the Claimants' and the Tribunal's consent.

45. Two days later, the Tribunal and the Claimants confirmed that they had no objection to such submission.

46. On 17 October 2015, the Claimants filed their Reply (the "Reply") with accompanying exhibits, legal authorities, witness statements and the Third Expert Report of the Brattle Group ("Brattle's Third Expert Report"). On 23 October 2015, the Claimants filed the Spanish translation of the Reply and on 28 October 2015, they filed a corrected version of the Brattle's Third Expert Report.

47. On 29 October 2015, the Respondent requested permission to communicate the Preliminary Award on Jurisdiction to the tribunal in *Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B. V*. v. *The Kingdom of Spain* (ICSID Case No. AR/13/31) ("*Antin*").

48. On 3 November 2015, the Tribunal granted such permission and noted that the Claimants having consented to the publication of the Preliminary Award on Jurisdiction on 16 January and 19 August 2015, it was not necessary for Spain to seek any further consent from the Claimants with respect to the disclosure of the Preliminary Award on Jurisdiction to other arbitral tribunals or otherwise.

49. On 11 December 2015, in light of certain new developments, the Claimants sought leave from the Tribunal, to submit a new witness statement from a Werec representative in respect of its claims. Following further correspondence of 11 December, 16 December and 23 December 2015 between the Parties and the Tribunal, the Tribunal granted the Claimants' request on 29 December 2015. On 11 January 2016, the Claimants filed the witness statement of Jesús de Ramón-Laca Cotorruelo and on 29 January 2016, the Respondent provided its comments.

50. On 21 December 2015, the Tribunal informed the Parties that the ICSID Secretariat had requested the communication of the Preliminary Award on Jurisdiction and the Dissenting Opinion to the ICSID tribunal in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic* (ICSID Case No. ARB/14/3) ("*Blusun*"). As the Respondent did not consent to the transmittal of the award to the tribunal in *Blusun*, on 14 January 2016, the Tribunal informed the ICSID Secretariat that it was not in a position to disclose the Preliminary Award on Jurisdiction to the tribunal in *Blusun*.

51. On 21 December 2015, the Respondent filed its Rejoinder (the "Rejoinder") with accompanying exhibits, legal authorities, witness statements, and the Rebuttal Expert Report of the Altran/MaC group (the "MG&A Rebuttal Expert Report"). An updated version of the Rebuttal Expert Report of Altran/MaC group was filed on 3 February 2016.

52. On 7 January 2016, the Claimants alleged that the witness statements of Messrs. Davey and Olivas la Llana (submitted with the Rejoinder) did not respond to or rebut evidence submitted with the Reply, and were thus inadmissible in light of the applicable rules and contravening the Claimants' due process rights. The Claimants reserved the right to submit evidence in response to these witness statements.

53. On 7 January 2016, the Claimants requested leave to file an extract from the Respondent's pleadings in ICSID arbitration *Masdar Solar & Wind Cooperatief U.A.*v. *Kingdom of Spain* (ICSID Case No. ARB/14/1) ("*Masdar*"). The Respondent did not object. Thus, on 18 January 2016, the Tribunal confirmed that the document was part of the record as Exh. C-664.

54. At this juncture, the Respondent sought to file a decision by the Spanish Constitutional Court. The Claimants did not object and, on 25 January 2016, that document was made part of the record as Exh. R-355.

C. HEARING ON LIABILITY AND OTHER RELATED MATTERS

55. On 14 January 2016, the Parties provided the Tribunal with the names of the witnesses and experts they wished to cross-examine at the hearing.

56. On 18 January 2016, the Tribunal circulated a draft Procedural Order No. 10 ("PO10") about the organization of the hearing.

57. On the same day, the Parties provided the Tribunal with their list of attendees for the pre-hearing telephone conference (the "PHTC").

58. On 20 January 2016, the President of the Tribunal informed the Parties that she would conduct the PHTC alone by delegation of her co-arbitrators.

59. On 21 January 2016 at 6 p.m. (CET), the President of the Tribunal and the Parties held the PHTC to discuss the outstanding matters pertaining to the organization of the hearing. The PHTC was attended by the following persons:

Tribunal

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator

Dr. Michele Potestà, Secretary of the Tribunal

PCA

Ms. Hyun Jung Lee, Permanent Court of Arbitration

Claimants

Mr. Jeffrey Sullivan, Allen and Overy
Ms. Virginia Allan, Allen and Overy
Mr. David Ingle, Allen and Overy
Mr. Tomasz Hara, Allen and Overy
Mr. Pablo Torres, Allen and Overy

Respondent

Mr. Christian Leathley, Herbert Smith Freehills
Mr. Eduardo Soler Tappa, Herbert Smith Freehills
Ms. Florencia Villaggi, Herbert Smith Freehills
Mr. Jaime de San Roman, Herbert Smith Freehills
Ms. Pilar Colomés, Herbert Smith Freehills
Ms. Beverly Timmins, Herbert Smith Freehills
Ms. Melissa Sánchez, Herbert Smith Freehills

60. During the PHTC, which was audio recorded, the President of the Tribunal and the Parties discussed the items set out in draft PO10, as well as other matters raised by the Parties during the call.

61. On 25 January 2016, the Tribunal issued PO10.

62. On 29 January 2016, the Respondent requested leave to introduce into the record (i) the award and dissenting opinion in *Charanne B. V. & Construction Investments S.A. R.L.* v. *the Kingdom of Spain* (SCC Case No. 062/2012) ("*Charanne*"), and (ii) five decisions by the Spanish Supreme Court. The Claimants did not object and, on 5 February 2016, the Tribunal granted the Respondent leave to file such documents, which the latter did on the same date, in Spanish (original), and 18 and 25 February 2016, in English (translations), as Exhs. RL-190, RL-191, and R-356 to R-360.

63. On 3 February 2016, the Respondent sought the Claimants' and the Tribunal's consent for communicating the Preliminary Award on Jurisdiction and Dissenting Opinion to the tribunal in *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.* v. *the Kingdom of Spain* (ICSID Case No. ARB/14/11), which consent was given on 4 February 2016.

64. On 24 February 2016, pursuant to Procedural Rule 4.5, the Claimants requested leave to submit three additional categories of exhibits: (i) documents responding to Spain's "late filed witness evidence";[28] (ii) documents related to the due diligence of Impax; and (iii) documents which post-dated the Claimants' last submission. On 1 March 2016, upon the Tribunal's invitation, the Respondent objected to the submission of these new documents. On 7 March 2016, the Tribunal granted some of the Claimants' requests and denied others. On 9 March 2016, in accordance with the Tribunal's instructions, the Claimants provided the Tribunal with a consolidated index of the Claimants' exhibits and submitted the new Exhs. C-665 to C-686.

65. On 26 February 2016, pursuant to Procedural Rule 3.7, the Respondent sought leave to file two decisions of the Spanish Constitutional Court. Following the Claimants' confirmation that they had no objection,[29] on 7 March 2016, the Tribunal granted the Respondent leave to file the documents as Exhs. R-361 and R-362.

28 See email from the Respondent to the Tribunal, 24 February 2016.

29 See letter from the Tribunal to the Parties of 29 February 2016; email from the Claimants to the Tribunal of 1 March 2016.

66. Also during this period (i.e. between 23 February and 7 March 2016), the Parties and the Tribunal exchanged correspondence about the logistics of the hearing. The Parties made several joint proposals which the Tribunal approved.

67. On 4 March 2016, the Tribunal invited the Parties to make the necessary adjustments to the hearing schedule and the Parties subsequently provided a jointly revised schedule on 9 March 2016.

68. Also on 4 March 2016, the Respondent sought to submit documents as Exhs. R-363 to R-365. Such request was issued pursuant to leave granted by the Tribunal in its letter of 25 February 2016, which permitted the Respondent to introduce into the record any document received from the late production of documents by the Claimants on 17 February 2016.

69. On 7 and 8 March 2016, the Parties provided their lists of attendees at the hearing. On 11 March 2016, the Parties submitted demonstrative exhibits.

70. On 11 March 2016, the Tribunal issued further instructions in relation to the hearing. Also on 11 March 2016, the Claimants made a request with respect to (i) Exh. C-407 that had previously been filed erroneously and (ii) additional translations to be included in the Opus hearing bundle and considered part of the record (subject to the right of any party to dispute the accuracy of the translations). By email of the same date, the Respondent submitted comments.

71. The following day the Tribunal ruled that the Opus hearing bundle was meant as hearing support reflecting documents (including translations) already on record. That said, as the addition of translations appeared to be intended to facilitate the efficient conduct of the examinations, the Tribunal permitted the filing of the additional translations, subject to compelling objections of the Respondent and it being understood that the Respondent could question the accuracy of the translations at the hearing as well as after the conclusion of the hearing. In addition, the Tribunal admitted the filing of the original version of Exh. C-407 in the record.

72. On 14 and 15 March 2016, pursuant to section 11 of PO10, the Claimants and the Respondent filed the PowerPoint presentations for their opening statements.

73. The hearing on liability (the "Hearing on Liability" or the Hearing) took place from 14 to 21 March 2016 at the Peace Palace in The Hague. The following persons attended the Hearing:

The Tribunal
Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator
The Hon. Charles N. Brower, Arbitrator
Judge Bernardo Sepúlveda-Amor, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal

Claimants
Ms. Judith Gill, 20 Essex Street Chambers
Mr. Antonio Vázquez-Guillén, Allen and Overy
Mr. Jeffrey Sullivan, Allen and Overy
Ms. Marie Stoyanov, Allen and Overy
Mr. Ignacio Madalena, Allen and Overy
Mr. David Ingle, Allen and Overy
Mr. Tomasz Hara, Allen and Overy
Mr. Pablo Torres, Allen and Overy
Ms. Stephanie Hawes, Allen and Overy
Mr. Thomas S. Murley, witness
Mr. David Tilstone, witness
Mr. Roger Scherer, witness
Mr. Darren Kyte, witness
Mr. Tobias Pehle, witness
Mr. Roland Schumann, witness
Mr. Joris van der Geest, witness
Mr. Juan Ramón Guzmán, witness
Mr. Javier Valladares, witness
Mr. Enrique Collado Arpia, witness
Mr. Raul Barrueco, witness
Mr. Pedro Manuel Diosdado, witness
Mr. Andreas Ochsenkühn, witness
Mr. Jesús de Ramón-Laca Cotorruelo, witness
Mr. Peter Rossbach, witness
Mr. Thomas Schreiber, witness
Mr. Alexandre Labouret, witness
Mr. Carlos Lapuerta, the Brattle Group, expert
Mr. José Antonio García, the Brattle Group, expert
Mr. Charles Chipchase, AES/SRP, representative
Mr. Rafael Cruz, Plenium Partners, representative
Mr. Tobias Matsubara, MPC Capital, representative
Mr. Peter O'Flaherty, NIBC, representative
Mr. Brian Potskowsky, AES/SRP, representative
Mr. Andrew Jessop, HG Capital, representative
Mr. Luigi Pettinicchio, HG Capital, representative
Mr. Luis Quiroga, HG Capital, representative
Mr. Dominic Wollweber, MEIF, representative
Mr. Allister Skykes, HG Capital, representative

Mr. Alexander Rietz, KGAL, representative
Ms. Rebeca Quiroga, Plenium Partners, representative

Respondent

Mr. Christian Leathley, Herbert Smith Freehills
Mr. Eduardo Soler-Tappa, Herbert Smith Freehills
Mr. Miguel Riaño, Herbert Smith Freehills
Ms. Florencia Villaggi, Herbert Smith Freehills
Mr. Jaime de San Román, Herbert Smith Freehills
Ms. Beverly Timmins, Herbert Smith Freehills
Ms. Pilar Colomés, Herbert Smith Freehills
Ms. Melissa Sánchez, Herbert Smith Freehills
Ms. Nicola Smith, Herbert Smith Freehills
Mr. Antolín Fernández, *Abogacía del Estado*
Ms. Amaia Rivas Kortazar, *Abogacía del Estado*
Ms. Raquel Vázquez
Ms. Iria Calviño
Mr. Antonio Sanchís
Mr. Alfonso Olivas, witness
Mr. Edward Davey, witness
Mr. Jesús Fernández Salguero, expert
Mr. Grant Greatrex, expert, MaC Group
Mr. David Pérez López, expert, Altran
Mr. Carlos Montojo González, expert, MaC Group

The PCA
Ms. Hyun Jung Lee, PCA Legal Counsel
Mr. Benjamin Craddock, PCA Case Manager

Opus 2 (transcription services)
Mr. Miles Annon
Mr. Chris Money
Ms. Georgina Ford
Ms. Emma Lovell
Mr. David Rex

Spanish language transcribers
Ms. Liliana Avalos Benetti
Ms. Lucia Horcajada Chapinal

Interpreters
Mr. Daniel Giglio (English/Spanish)
Ms. Silvia Colla (English/Spanish)
Ms. Silke Schoenbuchner (English/Spanish)
Ms. Edith Sternschuss-Kelly (English/German)

Mr. Sergio Corella Martinez (Spanish/German)
Ms. Astrid Fischer (Spanish/German)

Audio visual equipment services
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74. On 19 March 2016, Spain asked to submit a new document. It did so on 1 April 2016, the Claimants having confirmed on 25 March 2016 that they did not object.

75. Also on 20 March 2016, additional demonstrative exhibits were submitted by both Parties. On 21 March 2016, the Parties submitted their experts' PowerPoint presentations.

76. During the hearing, the Tribunal heard opening submissions by counsel, asked questions to the Parties which counsel answered at the hearing and in their post-hearing submissions, and heard evidence from the following witnesses and experts:

Mr. Thomas S. Murley, witness
Mr. Tobias Pehle, witness
Mr. Javier Valladares, witness
Mr. Andreas Ochsenkühn, witness
Mr. David Tilstone, witness
Mr. Roland Schumann, witness
Mr. Enrique Collado Arpia, witness
Mr. Jesús de Ramón-Laca Cotorruelo, witness
Mr. Joris van der Geest, witness
Mr. Roger Scherer, witness
Mr. Raul Barrueco, witness
Mr. Darren Kyte, witness
Mr. Juan Ramón Guzmán, witness
Mr. Pedro Manuel Diosdado, witness
Mr. Peter Rossbach, witness
Mr. Thomas Schreiber, witness
Mr. Alexandre Labouret, witness
Mr. Alfonso Olivas, witness
Mr. Edward Davey, witness
Mr. Carlos Lapuerta, the Brattle Group, expert
Mr. José Antonio García, the Brattle Group, expert
Mr. Jesús Fernández Salguero, expert
Mr. Grant Greatrex, expert, MaC Group
Mr. Carlos Montojo González, expert, MaC Group

77. Following a consultation with the Parties at the end of the hearing, on 23 March 2016, the Tribunal issued Procedural Order No. 11 in relation to post-hearing matters ("PO11").

78. On 22 April 2016, the Parties provided agreed corrections to the transcripts of the Hearing. On the same day, the Respondent objected to the inclusion of Exhs. C-378 and C-407, which the Claimants had uploaded to the Opus platform prior to the hearing, alleging that the Claimants had "abused their role while taking the lead in uploading documents to the Opus platform by including two entirely new documents onto the record and to make amendments to 72 documents".[30] On 6 May 2016, the Claimants commented, stating, *inter alia*, that these matters were "routine misunderstandings that should have properly been dealt with in correspondence between the parties".[31]

79. By letter of 13 May 2016, the Tribunal accepted that the Claimants had failed to submit the original English versions of the two documents by error, as was evident from the fact that in both cases two documents in Spanish were filed. Additionally, the Tribunal accepted the Claimants' explanations that the track changes visible in the footer of Exh. C-378 (and other documents), which the Respondent had raised as an issue, were the effect of an automatic-update system. The Tribunal thus invited the Claimants to submit Exhs. C-378 and C-407 in their original language together with relevant translations. The Tribunal also invited the Parties to address the issue of the translations that had been added onto the Opus system before the Hearing, and the Respondent's related application for costs, in their upcoming cost submissions. On 16 May 2016, the Claimants submitted Exhs. C-378 and C-407 in English (original) and Spanish (translations).

80. On 18 May 2016, in view of the Parties' agreement, the Tribunal authorized the Claimants to file a Spanish Supreme Court judgment of 20 April 2016 as Exh. C-687. Additionally, the Tribunal provided that each Party would have an opportunity to respond to any comments made by the other Party in its reply post-hearing submission due on 17 June 2016. On 20 May 2016, the Claimants filed Exh. C-687.

81. On 20 May 2016, the Claimants and the Respondent filed their first post-hearing briefs ("C-PHB1" and "R-PHB1") followed by Spanish translations on 31 May 2016.

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30 See letter from the Respondent to the Tribunal of 22 April 2016, p. 2.

31 See letter from the Claimants to the Tribunal of 6 May 2016, p. 3.

82. By email of 23 May 2016, the Respondent objected to the Claimants exceeding of the word limit set by the Tribunal for C-PHB1 and annex 1 and requested that it be allowed to add to its reply brief the number of words by which the Claimants had exceeded the limit, which the Tribunal allowed, the Claimants having no objection.

83. On 30 May 2016, pursuant to the Tribunal's directions of 18 May 2016, the Parties filed submissions on the Spanish Supreme Court decision of 20 April 2016. Also on 30 May 2016, the Respondent contended that the English translation of Exh. C-687 (see *supra* para. 80) was inaccurate. On 2 June 2016, the Tribunal invited the Parties to attempt to resolve divergences in relation to that translation and to revert if disagreements remained.

84. On 15 June 2016, the Tribunal requested the Respondent to resubmit the Spanish translation of R-PHB1 ensuring that the paragraph numbers in the Spanish translation corresponded to those in the English version. The Respondent did so later that day.

85. On 24 June 2016, the Parties filed their reply post-hearing briefs ("C-PHB2" and "R-PHB2"), translations into Spanish following on 1 July 2016.

86. On 1 July 2016, the Claimants submitted their final consolidated indices of exhibits and of legal authorities.

87. On 8 July 2016, the Parties filed their submissions on costs ("C-Costs Submission" and "R-Costs Submission") and the Respondent also its consolidated indices of exhibits and legal authorities. On 11 July 2016, the Claimants filed an updated submission on costs. Reply costs submissions were filed on 15 July 2016 ("C-Costs Reply" and "R-Costs Reply"), as were the Spanish translations of the initial submissions. Spanish translations of the reply submissions were filed on 22 July 2016.

88. By email of 15 July 2016, the Respondent informed the Tribunal that a final award had been rendered in *Isolux Infrastructure Netherlands B.V.* v. *Spain* ("*Isolux*"), which was the first award on merits to address the 2013 Measures. The Respondent also attached press reports of 13 July and 15 July 2016 relating to that award. Following the Claimants' objections, the Tribunal advised the Parties that it could not consider a decision merely on the basis of press reports. However, if one of the Parties were to request leave to submit the award into the record, the Tribunal would then give appropriate directions.

89. By letter of 4 August 2016, the Respondent asked the Tribunal to formally request a copy of the *Isolux* award from the *Isolux* tribunal. On 18 August 2016, having reviewed the Parties' comments on the Respondent's request, the Tribunal directed the Respondent to use its best efforts to submit the *Isolux* award, adding that the Parties would have an opportunity to simultaneously comment on the award.

D. PO12 AND SUBSEQUENT DEVELOPMENTS

90. On 29 September 2016, having deliberated on the Parties' case as it had developed through the written and oral submissions and the evidence gathered so far, the Tribunal unanimously issued Procedural Order No. 12 ("PO12").[32]

91. On 13 October 2016, the Parties notified the Tribunal of the likelihood that they would require certain clarifications on the matters set out in PO12 and proposed an amendment to the next procedural steps in relation to such clarifications. On the same day, the Tribunal confirmed the Parties' proposal.

92. On 15 November 2016, following further correspondence between the Parties and the Tribunal on 19 October, 24 October, 28 October and 1 November 2016, the Tribunal addressed the Parties' requests for clarification. In particular, with regard to the Claimants' requests for clarification, it (i) clarified that its invitation to the Claimants to present their quantum cases "as they deem appropriate" related only to their alternative claim and did not cover the so-called primary claim; (ii) confirmed that it did not expect to receive submissions on liability in the context of the phase outlined in PO12, and the Parties' further submissions should be "limited to the aspects of the *quantum* specified in PO12"; that said, liability could be addressed in connection with comments on the *Isolux* award if it was released; (iii) provided answers to questions set out in the Claimants' letter of 19 October 2016. In connection with the Respondent's requests for clarification, the Tribunal stated that the Parties should use a regulatory lifetime of a PV plant of 30 years and that the Respondent's understanding that written submissions be presented "in succession (i.e., the Claimants first present their written submission followed by that of the Respondent, etc.)" was correct and reflected the text of PO12.[33]

93. On 13 December 2016, due to concerns of breach of confidentiality which the Claimants had raised and which the Parties had been unable to resolve, the Tribunal denied the Respondent's request to file the *Isolux* award, adding that it would

32 Excerpts from PO12 are reproduced *infra* at paras. 650-652, 666.

33 See Letter from the Tribunal to the Parties of 15 November 2016, p. 4.

reconsider its decision should circumstances change, for example if it were to receive confirmation that the claimant in *Isolux* had consented to the disclosure of the award.

94. On 14 December 2016, the Parties submitted their joint procedural calendar for the phase of the arbitration envisaged in PO12 (referred to "PO12 phase"). On this basis, on 19 December 2016, the Tribunal circulated a draft procedural calendar for the Parties' comments, to which the latter agreed on 11 January 2017.

95. Following further correspondence of 19, 24 and 26 January 2017 and 1, 8 and 10 February 2017, it was agreed that a pre-hearing telephone conference (the "PO12 PHTC") would be held on 8 January and a hearing on 16 to 20 January 2018 (the "PO12 Hearing").

96. On 10 February 2017, the Tribunal circulated the final version of the procedural calendar for the PO12 phase.

97. In accordance with the procedural calendar, on 7 April 2017, the Claimants filed their "Quantum Submission" (the "Quantum Memorial") with accompanying exhibits, legal authorities and an expert report of the Brattle Group ("BQR I"), followed on 15 April 2017, by the translation of the Quantum Memorial.

98. On 27 April 2017, pursuant to a request from the Respondent[34] and having considered the Claimants' comments, the Tribunal granted the Respondent an extension of five business days for its document requests and an extension of 4 calendar days for the Counter-Memorial. It also provided the Parties with an updated procedural calendar.

99. On 5 May 2017 the Respondent served its requests for the production of documents. On 12 May 2017, the Claimants submitted their objections to the Respondent's document production requests. On 19 May 2017, the Respondent provided its replies to the Claimants' responses and objections. On 29 May 2017, the Tribunal issued Procedural Order No. 13 ("PO13") on these document requests.

100. On 5 June 2017, the Claimants provided the Respondent with the documents responsive to the requests that the Tribunal had granted, subject to certain qualifications.

101. On 5 and 18 July 2017, the Respondent objected to alleged deficiencies in the Claimants' production and requested the Tribunal to grant it an extension to file the

34 See Respondent's email to the Tribunal of 26 April 2017.

Counter-Memorial and vacate the hearing scheduled for January 2018. On 14 and 21 July 2017, the Claimants rejected the Respondent's allegations and requests.

102. On 26 July 2017 at 5 p.m. (CET), following a request from the Respondent, the Tribunal and the Parties held a hearing via conference call to discuss the issues raised in the Parties' correspondence. In addition to the members of the Tribunal and the Secretary, Messrs. Sullivan, Ingle and Busby were present on behalf of the Claimants, and Messrs. Leathley, Soler Tappa, de San Roman and Ms. Timmins were present on behalf of the Respondent. At the telephone hearing, each Party first presented its views and then answered the Tribunal's questions.

103. On 31 July 2017, the Tribunal issued Procedural Order No. 14 ("PO14"), with a revised procedural calendar, which addressed the Respondent's requests in relation to the document production phase and granted the Respondent an extension until 14 September 2017 to file its Counter-Memorial.

104. On 7 August 2017, pursuant to the Tribunal's directions in PO14, the Claimants submitted documents responsive to Spain's requests and identified documents sought which allegedly did not exist or had not been located.

105. Between 14 August 2017 and 20 October 2017, the Claimants provided the Tribunal and the Respondent with updates on the status of its production of responsive documents. On 31 October 2017, the Claimants confirmed that there were no document requests outstanding.

106. On 14 September 2017, the Respondent filed its "Quantum Counter-Memorial" ("Quantum Counter-Memorial"), with accompanying exhibits, legal authorities and an expert report of Econ One Research ("EOQR I"), followed by translations on 21 September 2017.

107. On 2 October 2017, the Claimants submitted their requests for the production of documents in accordance with the procedural calendar agreed between the Parties. On 9 October 2017, the Respondent submitted its objections. On 13 October 2017, the Claimants provided their replies. In a letter of 13 October 2017, the Claimants noted that Spain had retained a new expert (Econ One) for this phase of the arbitration instead of MG&A, whom it had used before. *Inter alia*, they reserved the right to also call MG&A for cross-examination at the PO12 Hearing. On 24 October 2017, the Tribunal wrote that it had taken note of the Parties' positions and would take a decision if and when the Claimants decided to call MG&A.

108. On 20 October 2017, the Tribunal issued Procedural Order No. 15 ("PO15") on the Claimants' requests for document production. It reserved its decision on request no. 7 until it received answers from the Parties to questions it had laid out in correspondence, and in Annex A to PO15. The Tribunal later denied request no. 7 on 1 November 2017, following consideration of the Parties' answers of 24 and 26 October 2017, as well as of the positions that they had advanced earlier.

109. On 27 October 2017, the Respondent asked the Tribunal for a one-week extension to produce the documents ordered in PO15. On 31 October 2017, having considered the Claimants' objection to such request, the Tribunal granted an extension until 2 November 2017. The Tribunal further indicated that if, because of the delay, the Claimants had insufficient time to comment on the new documents in their Reply due on 9 November 2017, they would be permitted to file a short supplementary submission limited to addressing the documents produced late.

110. Also on 31 October 2017, the Tribunal confirmed that the hearing would take place from 16 to 20 January 2018 at the Peace Palace in The Hague and requested that the Parties confirm their availability for the PO12 PHTC on 8 January 2018 at 5 p.m. (CET), which they did on 2 November 2017. On 2 November 2017, the Respondent also informed the Tribunal of the status of its document production and explained that it was still searching for documents, which it would produce if and when retrieved.

111. On 9 November 2017, the Claimants filed their "Quantum Reply Submission" (the "Quantum Reply") with report from the Brattle Group ("BQR II"), followed by translations on 17 November 2017.

112. On 27 November 2017, the Claimants complained that the Respondent had still not produced documents to any of the Claimants' requests. On 30 November 2017, the Tribunal invited the Respondent to provide an update on the document production process by 7 December 2017.

113. On 30 November 2017, the Respondent objected to the Claimants' submission of three new expert reports (Exhs. C-702 to C-704), which, it said, did not rebut expert evidence presented in the Quantum Counter-Memorial. It thus requested that these expert reports be struck from the record or that it be permitted to submit rebuttal expert evidence. On 1 December 2017, further to the Tribunal's invitation, the Claimants provided their comments.

114. Still on 30 November 2017, the Respondent informed the Tribunal and the Claimants that the Commission had issued its final decision on Spain's notification of the Disputed Measures (see, *supra*, para. 29) and requested leave to submit that decision, in accordance with Articles 3.7 and 4.5 of the Procedural Rules. Upon the invitation of the Tribunal, the Claimants opposed Spain's application on 4 December 2017. On 6 December 2017, the Tribunal granted the Respondent's request to file the Commission's decision into the record. On that same day, the Tribunal denied the Respondent's request to strike Exhs. C-702 to C-704 from the record.

115. On 7 December 2017, in accordance with the Tribunal's directions of 30 November 2017, the Respondent provided its responses as to the status of its document production.

116. On 14 December 2017, the Respondent submitted the Commission's "Decision on the State Aid SA.40348 (20151NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste", dated 10 November 2017 (the "EC Decision on State Aid") into the record as Exh. RL-201 and its comments on such document. On 22 December 2017, the Claimants provided their comments.

117. On 22 December 2017, the Respondent filed its "Quantum Rejoinder" (the "Quantum Rejoinder") along with accompanying exhibits, legal authorities and a report by Econ One ("EOQR II"), followed by a translation on 2 January 2018.

118. By letter of 4 January 2018, the Claimants complained that while documents pertaining to their production request No. 1 had been disclosed in another arbitration, the Respondent was presently "flouting its disclosure obligations" in the present proceedings. Hence, they asked the Tribunal to order Spain to explain why the documents had not been disclosed and order it to "immediately" produce any documents responsive to request No. 1.

119. Upon the invitation of the Tribunal, on 8 January 2018 the Respondent submitted its comments. In a letter of 12 January 2018, the Tribunal denied the Claimants' request. On 15 January 2018, on the eve of the PO12 Hearing, the Claimants asked the Tribunal to reconsider its decision. By email of the same date, the Tribunal noted that it would address this request on 16 January.

E. The PO12 Hearing

120. On 5 January 2018, the Tribunal circulated a draft Procedural Order No. 16 ("PO16") on the organization of the PO12 Hearing for discussion at the upcoming PO12 PHTC.

121. In response to the Tribunal's invitation, by emails of 5 and 7 January 2018, the Parties provided their lists of attendees at the PO12 PHTC and submitted items to be added to the agenda, as well as draft hearing schedules.

122. By letter of 6 January 2018, the Claimants contended that Spain had made submissions on several issues of liability in its Quantum Rejoinder outside of the scope of PO12, and requested the Tribunal to strike from the record sections 3.1 to 3.3 (and the new exhibits and legal authorities submitted in support of these sections) and direct Spain to submit a revised Quantum Rejoinder. Alternatively, the Claimants requested the opportunity to respond to the submissions on liability contained in these sections. By email of the same date, the Tribunal invited the Respondent to comment on these allegations during the PO12 PHTC scheduled on 8 January 2018.

123. On 8 January 2018, the Hon. Charles N. Brower circulated the CV of his new law clerk, Dr. Devin Bray, and the confidentiality agreement that Dr. Bray had signed upon acceptance of his employment with Judge Brower, and invited the Parties to advise whether they had any objection to Dr. Bray's attendance at the PO12 Hearing. On 9 and 10 January 2018, both Parties stated that they had no objection.

124. On 8 January 2018 at 5 p.m. (CET), the PO12 PHTC took place as scheduled. The following persons attended:

Tribunal
Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator
The Hon. Charles N. Brower, Arbitrator
Judge Bernardo Sepúlveda-Amor, Arbitrator

Dr. Michele Potestà, Secretary of the Tribunal

PCA
Mr. Julian Bordaçahar, Permanent Court of Arbitration

Claimants
Mr. Jeffrey Sullivan, Gibson, Dunn & Crutcher
Ms. Marie Stoyanov, Allen and Overy
Mr. Antonio Vázquez-Guillén, Allen and Overy
Mr. David Ingle, Allen and Overy

Mr. Tomasz Hara, Allen and Overy

Respondent
Mr. Antolín Fernández, Abogacía del Estado
Mr. Diego Santacruz Descartin, Abogacía del Estado
Ms. Amaia Rivas Kortazar, Abogacía del Estado
Ms. Patricia Fröhlingsdorf Nicolás, Abogacía del Estado
Mr. Roberto Fernández Castilla, Abogacía del Estado
Mr. Eduardo Soler Tappa, Herbert Smith Freehills
Mr. Christian Leathley, Herbert Smith Freehills
Ms. Florencia Villaggi, Herbert Smith Freehills
Mr. Jaime de San Román, Herbert Smith Freehills

125. During the conference call, which was audio recorded, the Tribunal and the Parties discussed the items set out in the draft of PO16. On this basis, on 11 January 2018, the Tribunal issued PO16 on the organization of the PO12 Hearing, with the Spanish version following the next day. On 12 January 2018, the Parties also submitted their final list of attendees at the hearing.

126. On 13 January 2018, pursuant to PO16, the Claimants requested leave to file additional documents into the record, to which, following invitation from the Tribunal, Spain objected on 15 January 2018. By email of the same date, the Tribunal issued its directions, granting certain of the Claimants' requests and denying others. On 16 January 2018, in accordance with the Tribunal's directions, the Claimants submitted the relevant legal authorities and an updated consolidated list of legal authorities.

127. On 15 January 2018, in accordance with PO16, the Parties also filed their demonstrative exhibits and some corrected versions later that same day.

128. The PO12 Hearing took place from 16 to 19 January 2018 at the Peace Palace in The Hague and was attended by the following persons:

The Tribunal

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator
The Hon. Charles N. Brower, Arbitrator
Judge Bernardo Sepúlveda-Amor, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal
Dr. A. Devin Bray, Law Clerk to the Hon. Charles N. Brower

The PCA

Mr. Julian Bordaçahar, PCA

The Claimants

Mr. Antonio Vázquez-Guillén, Allen and Overy
Mr. Jeffrey Sullivan, Allen and Overy
Ms. Marie Stoyanov, Allen and Overy
Mr. Ignacio Madalena, Allen and Overy
Mr. David Ingle, Allen and Overy
Mr. Tomasz Hara, Allen and Overy
Mr. Pablo Torres, Allen and Overy
Ms. Stephanie Hawes, Allen and Overy
Mr. Antonio Jiménez-Blanco, Allen and Overy
Ms. Carmen de la Hera, Allen and Overy
Mr. Carlos Lapuerta, expert, the Brattle Group
Mr. Richard Caldwell, expert, the Brattle Group
Mr. Jack Stirzaker, expert, the Brattle Group
Mr. Benjamin Lawrence, expert, the Brattle Group
Mr. Saurab Chhachhi, expert
Mr. Luis Quiroga, HG Capital, representative
Mr. Thomas Murley, HG Capital, representative
Mr. Marc Michael, AES, representative
Mr. Peter Rossbach, Impax, representative
Mr. Raúl Barrueco, DIF, representative
Mr. Tobias Matsubara, MPC Capital, representative
Mr. Rafael Cruz, Plenium Partners, representative
Ms. Rebeca Quiroga, Plenium Partners, representative

The Respondent

Mr. Antolín Fernández, Abogacía del Estado
Ms. Amaia Rivas Kortazar, Abogacía del Estado
Ms. Patricia Fröhlingsdorf Nicolás, Abogacía del Estado
Mr. Roberto Fernández Castilla, Abogacía del Estado
Mr. Eduardo Soler-Tappa, Herbert Smith Freehills
Mr. Christian Leathley, Herbert Smith Freehills
Mr. Jaime de San Roman, Herbert Smith Freehills
Ms. Florencia Villaggi, Herbert Smith Freehills
Ms. Beverly Timmins, Herbert Smith Freehills
Ms. Melissa Sanchez, Herbert Smith Freehills
Mr. Wojtek Zaluska, Herbert Smith Freehills
Ms. Caroline Le Moullec, Herbert Smith Freehills
Mr. Daniel Flores, Econ One, expert
Mr. Jordan Heim, Econ One, expert
Mr. José Díaz, Econ One, expert

DR-Esteno (Spanish language transcribers)

Mr. Leandro Lezzi
Ms. Marta Rinaldi

Opus 2 Court Reporters

Ms. Karen McKendry
Mr. Joshua Vince
Mr. Matt Alford

Interpreters

Mr. Juan Maria Burdiel Perez (English/Spanish)
Mr. Jesús Getan Bornn (English/Spanish)
Ms. Amalia Thaler de Klemm (English/Spanish)

Audio visual equipment services
IFS Audiovisual
Solve IT

129. On 16 January 2018, the Parties submitted the electronic versions of their opening presentations. Also on 16 January 2018, the Claimants submitted the demonstrative exhibits of the Brattle Group. On 17 January 2018, the Respondent submitted Econ One's demonstrative exhibits, and Econ One's hearing presentation.

130. During the PO12 Hearing, the Tribunal heard opening arguments by counsel, asked questions to counsel and the experts and heard evidence from the following experts:

Mr. Carlos Lapuerta, expert, the Brattle Group
Mr. Richard Caldwell, expert, the Brattle Group
Mr. Jack Stirzaker, expert, the Brattle Group
Mr. Daniel Flores, expert, Econ One
Mr. Jordan Heim, expert, Econ One

131. The Tribunal decided, in consultation with the Parties, to hold an expert conferencing on the last day of the hearing. During such examination, both Parties' experts stated that they would be prepared to assist the Tribunal if the latter needed help in matters of quantum.

F. PO17 AND OTHER RELATED MATTERS

132. At the end of the PO12 Hearing, the Tribunal and the Parties discussed the further procedural steps. As a result, on 25 January 2018 (with the translation following on

30 January), the Tribunal issued Procedural Order No. 17 ("PO17"), which reads in relevant part as follows:

> 3. The Parties shall file a first round of simultaneous post-hearing briefs on **16 March 2018**. In the first post-hearing brief, each Party shall comment on the evidence gathered in the course of the Hearing to the extent relevant. In addition, each Party shall present legal arguments as to the appropriate valuation date in this case.
>
> 4. Following receipt of the first round of post-hearing briefs, the Tribunal will circulate a draft procedural order setting out certain valuation parameters, inviting the Parties' experts to produce a joint valuation model (the "Experts' Joint Model" or "EJM") taking such parameters into account, and providing appropriate directions in connection with the EJM. Within **2 weeks** from receipt of the draft order, the Parties and their experts may then comment and ask clarifications on the draft order, after which it will be issued in final form.
>
> 5. Within **2 months** from the issuance of the order in final form, the experts will produce the EJM taking into account the parameters provided in the order. The time limit set out in this paragraph is tentative and may be modified if a Party so requests within 10 days after having received the order.
>
> 6. Thereafter, there shall be a second round of consecutive post-hearing briefs. The Claimants shall file their second post-hearing brief **8 weeks** after the filing of the EJM. The Respondent will file its second post-hearing brief **8 weeks** after receipt of the Claimants' second post-hearing brief. In the second post-hearing brief, each Party may respond to the arguments made in the first round to the extent deemed necessary, comment on the EJM, and place the result of the EJM in its overall case. In addition, to the extent deemed necessary, each Party may address the EC Decision, the *Eiser*, *Isolux*, and *Blusun* awards, and authorities CL-237 to CL-240, filed by the Claimants on 16 January 2018.
>
> 7. The Parties shall confer and seek to agree on the word limits to apply to the two rounds of post-hearing briefs by **1 February 2018** and revert to the Tribunal with a proposal.
>
> 8. The Parties may also confer and seek to agree on rules on counsel's involvement in the experts' preparation of the EJM. If the Parties cannot agree on this issue, the Tribunal will address it in its forthcoming draft procedural order on the EJM.
>
> 9. No new documents may be submitted with the post-hearing briefs, except with leave of the Tribunal. Notwithstanding the foregoing, additional international decisions and awards, published after a Party's last written submission, may be submitted as new legal authorities. In this respect, the Respondent shall notify the Claimants **2 weeks** prior to the time limit for the filing of the Claimants' second post-brief of any new legal authorities on which it intends to rely in its second post-hearing brief.
>
> 10. Following receipt of the second post-hearing briefs, upon request or on its own motion, the Tribunal may decide whether it is appropriate to hold a hearing for questions from the Tribunal and possibly oral arguments.

133. On 1 February 2018, the Respondent sought a clarification from the Tribunal in relation to paragraph 9 of PO17 in respect of new relevant awards to be published after the deadline. On 7 February 2018, following an invitation from the Tribunal,[35] the Claimants opposed Spain's proposal. On 13 February 2018, the Tribunal explained that it had included the rule contained in paragraph 9 of PO17 on the understanding that the Parties had agreed on it at the end of the PO12 Hearing. This not being the case and considering that paragraph 9 of PO17 presented certain shortcomings, the Tribunal provide a revised version of that paragraph.

134. On 12 February 2018, the Respondent addressed the Tribunal's direction that any document under Spain's control responsive to Claimants' document request No. 1 should be produced in accordance with PO15, which had been restated on the last day of the PO12 Hearing. The Respondent confirmed that it had requested certain entities to again search their records for documents responsive to request No. 1. However, no such documents had been located. The Respondent further contended that the Claimants' allegation that certain documents had been produced in other proceedings should be rejected. In the alternative, the Respondent requested that the Tribunal order the Claimants to identify the counsel who had provided such information as well as the proceedings so that Spain could review those records. The following day, the Respondent submitted attachments to its letter. On 14 February 2018, the Tribunal invited the Claimants to address such letter and its enclosures in their second post-hearing brief.

135. On 16 February 2018, the Claimants submitted the Parties' agreed version of the English and Spanish transcripts of the PO12 Hearing. Owing to an error, the Respondent re-sent both transcripts on 19 February 2018, to which the Claimants agreed on 21 February 2018.

136. On 9 March 2018, pursuant to paragraph 9 of PO17, the Claimants requested leave to file a press article from *El Confidential* dated 24 January 2018, which Spain opposed on 13 March 2018. On 14 March 2018, the Tribunal granted the Claimants' request and the Claimants filed the article as Exh. C-705 with their first post hearing brief (*infra* paragraph 137).

137. On 16 March 2018, the Claimants filed their "First PO12 Post-Hearing Brief" (the "PO12 CPHB1"), followed by the Spanish translation on 25 March 2018. Also on 16 March

[35] See email from the Tribunal to the Parties of 2 February 2018.

2018, the Respondent filed its “Quantum Post Hearing Brief” (the “PO12 RPHB1”), with a translation on 23 March 2018.

138. On 13 April 2018, during the course of the preparation of the EJM, the Claimants requested that “EconOne be precluded from introducing an alternative But-For discount rate for the purposes of the Joint Model”.[36] The Respondent commented on 18 April 2018.

G. PO18 AND THE EJM, NEW INTERVENTION BY THE EUROPEAN COMMISSION, THE *GREENTECH* DOCUMENTS, THE *ACHMEA* JUDGMENT AND OTHER RELATED MATTERS

139. On 30 April 2018, in accordance with paragraph 4 of PO17, the Tribunal circulated a draft Procedural Order No. 18 (“draft PO18”) dealing with the presentation of an expert joint model (the “Expert Joint Model” or “EJM”). The Parties provided their comments on draft PO18 on 14 and 22 May 2018.

140. On 16 May 2018, the Commission informed the Tribunal that “in case the Tribunal would deem it useful for its deliberations, the Commission would be available to update its written observations in the light of the recent judgment of the European Court of Justice in Case C-284/16 *Achmea v. Slovak Republic*, and in particular to set out its view on the consequences of that judgment for pending arbitration cases based on the Energy Charter Treaty”.[37] On 22 May 2018, the Tribunal forwarded the Commission’s correspondence to the Parties and invited the Parties’ comments, which were provided on 1 June 2018.

141. On 6 June 2018, the Tribunal wrote to the Commission drawing the latter’s attention to the Tribunal’s letter of 26 March 2015,[38] by which it had provided the Commission with the Preliminary Award on Jurisdiction. For the reasons stated in that letter, the Tribunal was unable to accept the Commission’s offer to update its written observations in relation to the intra-EU objection. The Tribunal advised the Commission, however, that it welcomed the Commission’s offer “to set out in detail the impact of [the decision it adopted on Spain’s notification in November 2017] on the case pending before [this] Tribunal”[39] and invited the Commission to provide its comments limited to this issue by 19 June 2018. On the same day, the Tribunal informed the Parties of such letter.

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36 Letter from the Claimants to the Tribunal of 13 April 2018, p. 1.

37 See email from the European Commission to the Tribunal of 16 May 2018.

38 See *supra* paras. 26 and 27.

39 See email from the European Commission to the Tribunal of 16 May 2018.

142. Still on 6 June 2018, further to the Parties' comments on PO18 and a request from the Claimants, the Tribunal informed the Parties that, subject to their availability, it would hear the Parties orally by telephone conference on some of the points raised in their observations on 4 July 2018 at 14:00 (CET). On 7 June 2018, the Parties confirmed their availability.

143. By letter of 14 June 2018, the Claimants requested the Tribunal to provide the Parties with a proposal for the procedure going forward[40] and asked for indications of the timing of the award on liability and/or quantum and steps to avoid unnecessary delays.

144. On 19 June 2018, the Commission provided its observations on the impact of the EC Decision on State Aid on the present case. The Tribunal forwarded the Commission's correspondence to the Parties on the same day and invited their comments, which were provided on 5 July 2018.

145. By letter of 25 June 2018, the Tribunal provided the Parties with the agenda for the conference call of 4 July. In its letter, the Tribunal also indicated that it would discuss the timing for the completion of the proceedings during the conference call, as requested by the Claimants on 14 June 2018. On 2 July 2018, after the Parties provided the lists of participants in the telephone conference on the following day, Spain protested against the attendance of the Brattle experts.

146. On 3 July 2018, having considered the Claimants' response, the Tribunal permitted the Brattle experts to attend the call, highlighting that as the call would be recorded, the Respondent would be able to provide the recording to its own experts if it so wished and if they could not participate. The following day, the Respondent confirmed that two of its own experts would attend the call.

147. On 4 July 2018, in advance of the telephone conference, the Claimants provided the Tribunal with a zip file containing the Parties' correspondence in relation to the EJM and certain other documents from the record to which the Claimants might refer during the course of the call.

148. On 4 July 2018 at 2 p.m. (CET), the Parties and the Tribunal held the telephone conference to discuss draft PO18, with the following persons in attendance:

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40 See email from the Claimants to the Tribunal of 14 June 2018.

The Tribunal

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator
The Hon. Charles N. Brower, Arbitrator
Judge Bernardo Sepúlveda-Amor, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal

The PCA

Mr. Julian Bordaçahar, Permanent Court of Arbitration

Claimants

Ms. Marie Stoyanov, Allen and Overy
Mr. Antonio Vazquez-Guillén, Allen and Overy
Mr. David Ingle, Allen and Overy
Mr. Tomasz Hara, Allen and Overy
Ms. Carmen de la Hera, Allen and Overy
Mr. Jeffrey Sullivan, Gibson, Dunn & Crutcher
Mr. Carlos Lapuerta, expert, the Brattle Group
Mr. Richard Caldwell, expert, the Brattle Group
Mr. Jack Stirzaker, expert, the Brattle Group

Respondent

Mr. Diego Santacruz Descartin, Abogacía del Estado
Mr. Antolín Fernandez Antuña, Abogacía del Estado
Ms. Amaia Rivas Kortazar, Abogacía del Estado
Ms. María José Ruiz Sánchez, Abogacía del Estado
Mr. Eduardo Soler Tappa, Herbert Smith Freehills
Mr. Christian Leathley, Herbert Smith Freehills
Ms. Florencia Villaggi, Herbert Smith Freehills
Mr. Jaime de San Román, Herbert Smith Freehills
Mr. Daniel Flores, expert, Econ One
Mr. Jordan Heim, expert, Econ One

149. During the conference call, the Tribunal heard the Parties' submissions on draft PO18 and proposed modifications thereto (submitted on 14 and 22 May 2018, *supra* paragraph 139). The recording of this conference call was sent to the Parties the following day.

150. On 18 July 2018, the Tribunal unanimously issued PO18 in final form, the Spanish translation being circulated on 2 August 2018.[41]

151. On 13 August 2018, the Respondent made a number of requests, among which an application that the Tribunal open a new procedural phase to consider Spain's "new jurisdictional objection" based on "new facts". In this context, the Respondent asked to file the *Achmea* judgment along with an EC Communication and fact sheet published on 19 July 2018, which provided "guidance on the protection of cross-border EU investments, as well as on the implications of [*Achmea*], for the investor-State arbitration in the Energy Charter Treaty […] in relation to cross border EU investments".[42] The Respondent further requested that the Tribunal allow the Commission to present its comments on the impact of the EC Communication along with the *Achmea* judgment on the jurisdiction of the Tribunal in the present arbitration. On 31 August 2018, as directed by the Tribunal, the Claimants provided their comments on the Respondent's requests. In accordance with the Tribunal's further directions, the Respondent filed its reply comments on 6 September, to which the Claimants responded on 11 September 2018.

152. On 7 September 2018, the Claimants (on behalf of Brattle) sought a clarification[43] regarding one of the areas of disagreement between the experts regarding the EJM. Further correspondence on this issue was exchanged between the Tribunal and the Parties on 9 September, 11 September, 14 September, 18 September, 21 September, and 24 September 2018. By letter of 24 September 2018, the Tribunal issued certain clarifications in relation to the Claimants' request.

153. On 5 October 2018, after a short delay, the Brattle and Econ One experts filed the EJM accompanied by a Joint Memorandum to the EJM (the "Joint Memorandum").

154. On 11 October 2018, following an inquiry from the Claimants, the Tribunal confirmed that the filing dates for the second post-hearing briefs were 26 November 2018 for the Claimants and 4 February 2019 for the Respondent. At this juncture, the Tribunal mentioned that it would shortly provide its decision on the Respondent's request to open a new jurisdictional phase.

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41 Excerpts of PO18 are reproduced *infra* at paras. 655-656 and 667.

42 See Letter from the Respondent to the Tribunal of 13 August 2018, p. 1.

43 Pursuant to para. 15 of PO18 by which the Tribunal directed the Econ One and Brattle experts to write to the Tribunal should they require clarifications in the course of the preparation of the EJM.

155. On 15 October 2018, the Tribunal issued Procedural Order No. 19 ("PO19"), denying the Respondent's request to open a new jurisdictional phase and other related requests, the Spanish translation following on 25 October 2018.

156. Also on 15 October 2018, the Claimants filed an application for the production of certain documents allegedly produced by Spain to the claimants in *Greentech Energy Systems A/S et al. v. Kingdom of Spain* (SCC Arbitration V 2015/150) ("*Greentech*" and the "*Greentech* Documents") and certain legal authorities (Exhs. CL-243 to CL-249). The following day, the Tribunal invited the Respondent to comment on the Claimants' application, which they did on 22 October 2018. On 29 October 2018, the Tribunal ordered the Respondent to file the *Greentech* Documents.[44] The Tribunal also later determined that the legal authorities should not be admitted into the record.[45]

157. On 31 October 2018, the Respondent asked the Tribunal to reconsider its order of 29 October 2018 regarding the *Greentech* Documents. Upon an invitation by the Tribunal, the Claimants submitted their comments later that same day. On 7 November 2018, the Tribunal denied the Respondent's request.

158. By correspondence of 12 November 2018, the Claimants informed the Tribunal that they had yet to receive the *Greentech* Documents. Two days later, the Respondent advised that a change to its counsel team was the cause of the delay. On 16 November 2018, the Claimants provided comments and requested leave to file a supplemental submission following receipt of the *Greentech* documents. On 21 November 2018, the Respondent filed the *Greentech* Documents.

159. On 23 November 2018, the Brattle experts provided an agreed corrected version of the EJM. On 26 November 2018, the Tribunal conveyed its understanding that the updated EJM was submitted on behalf of both experts and that it should be advised, by 28 November 2018, if this was not the case. No such advice was provided.

160. On 26 November 2018, the Claimants noted that their request for leave to file a supplemental submission following receipt of the *Greentech* Documents remained outstanding and asked for a two-day extension for their Second PO12 PHB (until 28 November 2018) in light of the time and manner in which they had received the *Greentech* Documents.

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44 See also Letter from the Tribunal to the Parties of 7 November 2018.

45 See Letter from the Tribunal to the Parties of 10 December 2018.

161. On 27 November 2018, the Respondent informed the Tribunal that when the *Greentech* Documents had been filed, the metadata had been inadvertently erased. For this reason, the Respondent resubmitted the *Greentech* Documents including the metadata.

162. On the same day, the Tribunal confirmed that the resubmitted *Greentech* Documents had been admitted into the record as Exhs. C-372 and C-373. The Tribunal also confirmed that the time limits for the second post-hearing briefs were extended until 29 November 2018 and 12 February 2019. The Tribunal further conveyed its understanding that there were no outstanding requests in connection with the *Greentech* Documents.

163. Still on 27 November 2018, the Claimants informed the Tribunal that this understanding was not correct because (i) the documents attached to Spain's email of 27 November 2018 also had the metadata removed; and (ii) the Respondent had failed to provide the clarification requested by the Claimants in their email of 22 November 2018 regarding the origin of the *Greentech* Documents. On 29 November 2018, upon the Tribunal's invitation, the Respondent provided further comments on the *Greentech* Documents. On 10 December 2018, the Tribunal granted the Claimants leave to submit their observations to the Respondent's communication of 29 November 2018 and the Respondent an opportunity to reply in its PO12 Second PHB.

164. On 29 November 2018, the Claimants filed their "Second PO12 Post-Hearing Brief" (the "PO12 C-PHB2") (the translation being provided on 6 December 2018) and relayed that in the process of preparing such brief, it had come to their attention that (i) the document presented as Exh. C-252 only comprised an annex to the National Action Plan on Renewable Energy in Spain (the PANER) 2011 – 2020 dated 30 June 2010, when it should include the full PANER; and (ii) Annex 3 to the Claimants' application for an order on document production dated 15 October 2018 had inadvertently been omitted from the winzip of documents accompanying that submission. They requested that these documents be included in the record, which Spain opposed on 6 December 2018.

165. By letter of 10 December 2018, the Tribunal decided not to accept these documents, stating that the Claimants had not made out any "exceptional case"[46] which would justify the introduction of Exh. C-252 and the Annex 3 mentioned above at such a late stage

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46 See Sections 3.7 and 4.5 of the Procedural Rules and para. 9 of Procedural Order No. 17.

of the proceedings. In addition, the Tribunal also determined that new legal authorities CL-243 to CL-249 would not be admitted, noting in particular that these authorities all addressed the principle of adverse inferences which would only apply if the Claimants' primary request for the disclosure of the *Greentech* Documents had been rejected, which was not the case.

166. On 20 December 2018, the Claimants submitted their observations on the *Greentech* documents.

167. On 12 February 2019, the Respondent filed its "Second Post Hearing Brief on Quantum" (the "PO12 R-PHB2"), followed by the translation on 19 February 2019. Also on 12 February 2019, the Respondent requested permission to file into the record the declaration by 22 Member States of the European Union "on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union". Pursuant to an invitation from the Tribunal, the Claimants submitted their comments on 18 February 2019.

168. By letter of 21 February 2019, the Tribunal authorized the filing of all three declarations made by EU Member States and invited the Parties to provide their comments. On 25 February 2019, the Respondent filed such declarations under Exh. numbers RL-214 to RL-216, with an updated consolidated index of the Respondent's legal authorities. The Parties submitted their respective observations on the declarations on 7 and 21 March 2019.

169. On 26 April 2019, the Tribunal updated the Parties on the progress of its deliberations and further invited: (i) both Parties to make additional submissions on the *Greentech* Documents; (ii) both Parties to file their costs submissions pursuant to PO17; and (iii) the Respondent to file a submission on Interest.

170. On 3 May 2019, the Respondent filed its submission on the *Greentech* Documents and on 10 May 2019, the Claimants filed their reply, both in accordance with the Tribunal's instructions of 26 April 2019.

171. On 17 May 2019, the Respondent filed its Submission on Interest.

H. COSTS SUBMISSIONS AND CLOSURE OF THE PROCEEDINGS

172. On 14 June 2019, the Parties filed their Submissions on Costs (the "PO12 C-Costs Submission" and "PO12 R-Costs Submission"), with translations submitted on 24 and 26 June 2019.

173. On 28 June 2019, the Claimants and the Respondent filed their Reply Submissions on costs ("PO12 C-Reply Costs Submission" and "PO12 R-Reply Costs Submission"), with translations submitted on 3 July 2019.

174. On 4 September 2019, the Claimants requested that the Tribunal provide an update regarding the progress in preparing the award, which the Tribunal did on 6 September 2019. On 13 September 2019, the Claimants made further inquiries in this respect. On 18 September 2019, the Tribunal indicated that it would do the utmost to issue the award by 2019, reminding the Parties, however, that the award needed to be translated into Spanish before issuance. The Tribunal further indicated that it would write again towards the end of November with an issuance date.

175. On 2 December 2019, after noting that it had all the necessary elements in terms of liability and, if applicable, quantum to render a Final Award, the Tribunal closed the proceedings and provided an updated on the date of issuance of the award.

176. On 4 December 2019, the Respondent acknowledged the Tribunal's letter of 2 December 2019 and informed the Tribunal that on the same date Spain was notified of two new relevant decisions from ICSID tribunals which should necessarily inform the Tribunal's analysis.[47] The Respondent noted that, being those awards public, it trusted that the Tribunal would take them into consideration.

177. On 9 December 2019, the Tribunal acknowledged receipt of the Respondent's communication of 4 December 2019 and took note of its content. Moreover, the Tribunal noted that in addition to the decision or awards that were on record and the additional two referred by the Respondent, it was aware of a number of other publicly available decisions or awards rendered in other arbitrations brought against the Kingdom of Spain and which concerned the measures in this case.[48] The Tribunal

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47 The Respondent referred to (i) *Stadtwerke Munchen GmbH, RWE Innogy GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 ("*Stadtwerke*"); and (ii) *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 ("*BayWa*").

48 The Tribunal referred to (i) *9REN Holding S.À.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/15; (ii) *Cube Infrastructure Fund Sicav and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20; (iii) *Nextera Energy Global Holdings B.V. And Nextera Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11; (iv) *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36; (v) *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No.

invited the Parties to advise if there were other decision or awards rendered in arbitrations concerning the measures challenged in this arbitration. Finally, the Tribunal invited the Parties to inform whether they wished to file a short submission limited to said awards.

178. By e-mails of 11 December 2019, both Parties agreed that filing additional submissions on these awards was not necessary.[49] Moreover, they both noted that the award in the *Infrared* case[50] had been issued. While the Claimants enclosed a copy of the award to their e-mail, the Respondent noted that despite the fact that the existence of the *Infrared* award was of public knowledge, the content of the award had not been made public until that date. On the same day, the Tribunal acknowledged receipt of both communications and took note of their content.

179. On 27 January 2020, the Tribunal circulated a list containing the names of the Claimant entities and invited the Claimants to provide a clarification regarding the names of certain Claimant entities as well as make any other necessary corrections to the names appearing on the list. By letter of 3 February 2020, the Claimants provided the requested clarification and set out in Annex 1 to their letter the correct names of each Claimant entity.

180. On 20 February 2020, the Tribunal informed the Parties that, having regard to Article 8.2 of the Procedural Rules and the Parties' related correspondence, after dispatch of the Award, it would give the Parties the opportunity to (i) request that redactions be made to the Final Award prior to its publication to the extent necessary to protect the confidentiality of sensitive information and to (ii) comment on the other Party's requests (if any). The Tribunal would then rule on any disagreement and instruct the PCA to publish the Final Award with the necessary redactions (if any) on its website. At the same time, it would also instruct the PCA to publish the Preliminary Award on Jurisdiction, in conformity with the Parties' agreement (see Claimants' letter of 16 February 2015, p. 1; Respondent's letter of 11 March 2015, p. 3). Hence, the Tribunal would stay in office in order to implement the afore-mentioned arrangements on publication.

ARB/13/30; and (vi) *Soles Badajoz Gmbh v. Kingdom of Spain*, ICSID Case No. ARB/15/38.

49 See the Parties' e-mails of 11 December 2019.

50 *Infrared Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019.

III. OVERVIEW OF THE DISPUTE

181. The present dispute concerns the Claimants' investment in Spain's renewable energy ("RE") sector, specifically in photovoltaic ("PV") installations representing an approximate aggregate 239.338 megawatts (MW) of electrical power-generating capacity. The dispute concerns the evolution of the legal framework applicable to the PV installations and the impact it had on the Claimants' investment. Sections III.A and III.B summarize the evolution of the legal framework in the RE sector, which is necessary to put the Parties' arguments (*infra* at Section V) into perspective. The purpose of the summary of the legal framework and of the Disputed Measures in sections III.A and III.B is to capture the general traits of the various legislative instruments which, unless otherwise mentioned, appear undisputed between the Parties.

A. THE INVESTMENT FRAMEWORK

1. The 1997 Electricity Law

182. The main piece of legislation regulating power generation in Spain is Electricity Law No. 54/1997 published on 28 November 1997 (the "1997 Electricity Law"). The 1997 Electricity Law divides the generation of electricity into two regimes: the "Ordinary Regime" which concerns conventional generation facilities (i.e., non-renewable sources) and the "Special Regime" which concerns power generation from RE sources, including PV energy.[51]

183. Among the key differences between the rights and obligations available to power generators under the two regimes is the manner in which they are remunerated. While Ordinary Regime generators receive the market price for their electricity, the remuneration for Special Regime generators is supplemented by a State subsidy or premium. Article 30.4 as in force at the time when the Claimants made their investments stipulates that such subsidy shall be determined by taking into account the following factors:[52]

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51 Electricity Law No. 54/1997 dated 27 November 1997 (published on 28 November 1997), **Exhs. C-16**; **R-3**; **R-238**, Title IV, Chapter II, Articles 27-31.

52 Electricity Law No. 54/1997 dated 27 November 1997 (published on 28 November 1997), **Exhs. C-16**; **R-3**; **R-238**, Article 30.4 ("El régimen retributivo de las instalaciones de producción de energía eléctrica en régimen especial se completará con la percepción de una prima, en los términos que reglamentariamente se establezcan, en los siguientes casos").

> the level of voltage at which energy is delivered to the grid, the effective contribution to environmental improvement, primary energy savings and energy efficiency, economically viable useful heat production and the investment costs incurred, in order to achieve reasonable rates of return with reference to the cost of money in the capital market. (Tribunal's translation)

184. The 1997 Electricity Law is implemented through "Royal Decrees" ("RD").[53]

2. RD 436/2004

185. RD 436/2004 of 12 March 2004 ("RD 436/2004") was the first RD to establish an incentive system based on a "Feed-in-Tariff" ("FIT") for investors in PV technology, based on the criteria referred to in Article 30.4 of the 1997 Electricity Law.[54]

186. In that regard, Article 22.1 of RD 436/2004 gave installation operators the option to either sell their electricity freely on the market or at a "single, flat rate":[55]

> In order to sell their output or surpluses of electric power, the operators of installations within the scope of this Royal Decree must choose one of the following options:
>
> a) Assignment of the electricity over to the electricity distribution company. In this case, the electricity sale price shall be expressed as a regulated tariff which shall be a single, flat rate for all scheduling periods and expressed in euro cents per kilowatt hour [i.e., a FIT].
>
> b) Sale of the electricity freely on the market, through the system of offers and bids managed by the market operator […]. (Tribunal's translation)

187. Whatever mechanism was chosen, RD 436/2004 purported to "guarantee to the owners of special regime installations a reasonable remuneration for their investment and to electricity consumers a reasonable allocation of the costs attributable to the electricity system".[56]

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53 See ASoC, para. 89; SoD, para. 100.

54 RD 436/2004, **Exhs. C-19**; **R-55**, Preamble para. 6.

55 RD 436/2004, **Exhs. C-19**; **R-55**, Article 22.1 ("Para vender su producción o excedentes de energía eléctrica, los titulares de instalaciones a los que resulte de aplicación este Real Decreto deberán elegir entre una de las dos opciones siguientes: a) Ceder la electricidad a la empresa distribuidora de energía eléctrica. En este caso, el precio de venta de la electricidad vendrá expresado en forma de tarifa regulada, única para todos los períodos de programación, expresada en céntimos de euro por kilowatio-hora. b) Vender la electricidad libremente en el mercado, a través del sistema de ofertas gestionado por el operador de Mercado […]").

56 RD 436/2004, **Exhs. C-19**; **R-55**, Preamble para. 7 (Tribunal's translation) (emphasis added) ("Cualquiera que sea el mecanismo retributivo por el que se opte, el Real Decreto garantiza a los titulares de instalaciones en régimen especial una retribución razonable para sus inversiones y a los consumidores eléctricos una asignación también razonable de los costes imputables al sistema eléctrico […]").

188. The rate of the FIT was set out in Article 33 of RD 436/2004 and was linked to a PV installation's capacity. The FIT was calculated as a multiple of the consumer electricity tariff and was available at a certain multiple for the first 25 years of the installation's operational life and at a reduced multiple thereafter. Further, Article 40 established the framework for revision of tariffs, premiums and incentives for new installations. The Claimants' investments were not made pursuant to RD 436/2004.

3. RD 661/2007

189. RD 661/2007, which replaced RD 436/2004, is the bedrock on which the Claimants anchor their claims. While the Parties' specific arguments are addressed when setting out their positions, the Tribunal reviews here certain key provisions of this RD.

190. According to its Preamble, one of the reasons for issuing RD 661/2007 was the need to amend the remuneration scheme established by RD 436/2004 and separate the calculation of the FIT from the consumer electricity tariff used until then (see *supra* para. 188). At the same time and in the same vein as RD 436/2004, however, RD 661/2007 reiterated that "[t]he economic framework established in this royal decree develops the principles contained in Law 54/1997, […] guaranteeing the owners of special regime facilities a reasonable return on their investments and electricity consumers a reasonable allocation of costs attributable to the electricity system".[57]

191. Towards this end, Article 24 of RD 661/2007 stipulated that Special Regime installations could either opt to receive a single regulated tariff expressed in terms of Euro cents per kilowatt hour (i.e. the FIT) for the sale of their electricity or they could sell directly to the market and receive the market price.[58] For PV installations that opted for the first recourse mentioned above, Article 36 stipulated the fixed tariff that would be payable as follows:

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57 RD 661/2007 of 26 May 2007, **Exh. C-35**, Preamble para. 7 (Tribunal's translation) ("El marco económico establecido en el presente real decreto desarrolla los principios recogidos en la Ley 54/1997 […] garantizando a los titulares de instalaciones en régimen especial una retribución razonable para sus inversiones y a los consumidores eléctricos una asignación también razonable de los costes imputables al sistema eléctrico").

58 RD 661/2007 of 26 May 2007, **Exh. C-35**, Article 24.

Category	Subgroup	Installed Production (P) Capacity	Term	FIT (cent €/kWh)m
b.I	b.1.1	P<= 100 kW	First 25 years	44.03
			Thereafter	35.23
		100kW<P<=10 MW	First 25 years	41.75
			Thereafter	33.40
		10MW<P<=50 MW	First 25 years	22.97
			Thereafter	18.38
	b.1.2	Any	First 25 years	26.93
			Thereafter	21.54

192. In other words, depending on their installed capacity, PV installations were granted a FIT in Euro cents per kilowatt hour for the first 25 years of their operational life, and a lower amount thereafter. The FIT was adjustable annually for inflation based on the Spanish Consumer Price Index ("CPI").

193. To be entitled to the FIT, a PV facility needed to register with the *Registro Administrativo de Instalaciones de Producción en Régimen Especial* ("RAIPRE") before a given time limit.[59] Article 22 of RD 661/2007 provided that such time limit could be set at no less than one year after the PV sector reached 85% of its power target of 371 MW.

194. Article 17 confirmed certain other rights of Special Regime installations, i.e. the right to sell all or part of the energy produced and priority of access to the transmission grid. Finally, Article 44 provided for the adjustment and review of tariffs. In that regard, Article 44.3 read as follows:[60]

> In 2010, in view of the result of the follow-up reports on the extent to which the Renewable Energy Plan for 2005-2010 and the Energy Saving and Efficiency Plan for Spain (E4) have been achieved, as well as the new

59 RD 661/2007 of 26 May 2007, **Exh. C-35**, Article 17(c).

60 RD 661/2007 of 26 May 2007, **Exh. C-35**, Article 44.3 ("Durante el año 2010, a la vista del resultado de los informes de seguimiento sobre el grado de cumplimiento del Plan de Energías Renovables (PER) 2005-2010 y de la Estrategia de Ahorro y Eficiencia Energética en España (E4), así como de los nuevos objetivos que se incluyan en el siguiente Plan de Energías Renovables para el período 2011-2020, se procederá a la revisión de las tarifas, primas, complementos y límites inferior y superior definidos en este real decreto, atendiendo a los costes asociados a cada una de estas tecnologías, al grado de participación del régimen especial en la cobertura de la demanda y a su incidencia en la gestión técnica y económica del sistema, garantizando siempre unas tasas de rentabilidad razonables con referencia al coste del dinero en el mercado de capitales. Cada cuatro años, a partir de entonces, se realizará una nueva revisión manteniendo los criterios anteriores. Las revisiones a las que se refiere este apartado de la tarifa regulada y de los límites superior e inferior no afectarán a las instalaciones cuya acta de puesta en servicio se hubiera otorgado antes del 1 de enero del segundo año posterior al año en que se haya efectuado la revisión").

> objectives included in the next Renewable Energy Plan for 2011-2020, tariffs, premiums, additional payments, and lower and upper thresholds set out in this royal decree will be reviewed, taking into account the costs associated with each of these technologies, the degree of participation of the special regime in meeting demand and its impact on the technical and economic management of the system, guaranteeing reasonable returns with reference to the cost of money on capital markets. Every four years thereafter a new adjustment will be carried out using the above criteria.
>
> The adjustments to the regulated tariff and the lower and upper thresholds referred to in this section will not affect the facilities for which the start-up document was issued before January 1 of the second year after the year in which the adjustment was implemented. (Tribunal's translation)

195. The Claimants began investing in the Spanish PV sector under RD 661/2007 and, on their case, relying on the alleged "immutability" of the incentives contained in such decree.

4. Registration of the Claimants' Facilities in the RAIPRE

196. The 85% threshold set for the PV sector was achieved in and around August 2007. As a result, pursuant to Article 22 of RD 661/2007, Spain announced on 27 September 2007 that the time limit for RAIPRE registrations would expire on 29 September 2008.[61] All of the Claimants' PV installations were registered with RAIPRE within this deadline and accordingly fell within the purview of the benefits available under RD 661/2007.

5. RD 1578/2008

197. RD 1578/2008 was enacted on 26 September 2008, days before the time limit for registration under RD 661/2007 expired.[62] It set forth the economic regime applicable to PV installations that had registered after the closure of the RD 661/2007 registration window. For present purposes, it suffices to note that the regulated tariff granted to new installations under this RD was lower than the one granted under RD 661/2007 and that these tariffs did not apply to the Claimants' installations.

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61 Resolution published in the Spanish Official Gazette dated 27 September 2007, **Exh. C-228**; ASoC, paras. 205-212; SoD, para. 315.

62 Royal Decree No. 1578/2008 of 26 September 2008, **Exhs. C-242**; **R-28**.

B. THE DISPUTED MEASURES

198. Starting from 2010, Spain enacted a series of measures, which had the effect of adjusting and ultimately replacing the economic incentives granted under RD 661/2007.[63] These measures (the "Disputed Measures") consisted of:

a. the "2010 Measures" comprising of RD 1565/2010 of 19 November 2010 ("RD 1565/2010") and RD Law 14/2010 of 23 December 2010 ("RDL 14/2010") (*infra* at (1)); and

b. the "New Measures" or the "New Regime" comprising of RD Law 2/2013 of 1 February 2013 ("RDL 2/2013"), RD Law 9/2013 of 12 July 2013 ("RDL 9/2013"), Law 24/2013 on the Electricity Sector of 27 December 2013 ("Law 24/2013"), RD 413/2014 of 6 June 2014 ("RD 413/2014") and Order IET/1045/2014 of 16 June 2014 (the "Order on Parameters") (*infra* at (2)).

1. The 2010 Measures

199. In 2010, Spain approved RD 1565/2010 and RDL 14/2010. These are the first of the measures that the Claimants allege harmed their investment.

200. RD 1565/2010 (as amended by Law 2/2011) extended the higher FIT provided under RD 661/2007 to 30 years and eliminated the lower FIT, with the consequence that installations would sell electricity at the market rate after year 30.[64]

201. RDL 14/2010, for its part, established a limit on the number of hours per year for which PV installations would receive the FIT (the "hours cap").[65] Once an installation reached this cap, it could continue to sell electricity but at market prices. The hours cap was applicable throughout the life of the installation.

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63 Without prejudice to the Respondent's arguments, this is intended to refer to the fact that the payment made under the New Regime was not in the nature of a "FIT".

64 RD 1565/2010, **Exh. C-152.** The Tribunal notes that RD 1565/2010 initially limited the period for which the FIT would be available to 25 years such that from year 26, electricity would have to be sold at market price. This period was increased to 28 years by RDL 14/2010 (Final Provision One) and extended to 30 years by the Sustainable Economy Act Law No. 2 of 4 March 2011 (the "Sustainable Economy Law"). See Sustainable Economy Law, **Exhs. C-164**; **R-57**.

65 RDL 14/2010, **Exhs. C-154**; **R-59**, Additional Provision One, which provided a general hours cap. It is noted that pursuant to Transitional Provision Two, a different cap was initially applicable to the installations registered under RD 661/2007 until 31 December 2013, after which the general cap applied.

202. Finally, on 27 December 2012, Spain approved Law 15/2012, which imposed a tax of 7% "on the production of electricity and its incorporation into the electricity system".[66]

2. The New Measures

203. In 2013, Spain enacted a series of measures that had the effect of withdrawing the regime put in place under RD 661/2007. These measures are set out below.

a. ***RDL 2/2013***

204. On 1 February 2013, Spain introduced RDL 2/2013, by which it removed certain components of the consumer price index ("CPI") used to adjust the FIT for inflation under RD 661/2007.[67]

b. ***RDL 9/2013***

205. On 12 July 2013, Spain enacted RDL 9/2013, which repealed all former regulations governing the PV sector, including RD 661/2007 and the 2010 Measures. In their stead, it introduced a "New Regime" for both existing and new installations.

206. RDL 9/2013 enacted the following changes:

a. Article 30.4 of the 1997 Electricity Law was amended "in order to narrow the scope of action of the Government in the development of remuneration systems" for RE facilities.[68] Pursuant to such amendment, the FIT was abolished. PV installations were now entitled to the market price supplemented by an additional amount (to which the Claimants refer as "Special Payment"). This "Special Payment" was to be "composed of an amount per unit of installed capacity", which "shall cover the investment costs […] that cannot be recovered through the sale of energy, as well as an amount for the operation of the installation to cover, as the case may be, the difference between exploitation costs and the revenues obtained from the participation of such a standard installation in the market".[69]

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66 Law 15/2012, **Exh. C-300**, Chapter 1, Articles 1 and 8.

67 RDL 2/2013, **Exh. C-301**, Preamble and Article 1.

68 RDL 9/2013, **Exh. R-29**, Preamble, Part II, p. 52111.

69 RDL 9/2013, **Exh. C-302**, Article 1. The Tribunal notes that the Respondent's translation is substantially similar. ("[…] las instalaciones podrán percibir una retribución especifica compuesta por un término por unidad de potencia instalada, que cubra, cuando proceda, los costes de inversión de una instalación tipo que no pueden ser recuperados por la venta de la energía y un término a la operación que cubra, en

b. These investment costs were calculated by reference to the costs of a hypothetical "Standard Installation", envisaged as an "efficient and well-managed" company having "the necessary means for the development of its field, whose costs are those of an efficient enterprise in that field and considering the corresponding revenue and a reasonable profit for the execution of its functions".[70]

c. The Government could revise the Special Payment every six years.[71]

d. Further, the Special Payment was capped at "the minimum level necessary to cover the costs […] and […] lead to a reasonable rate of return".[72] Such "reasonable return" had to be calculated on the basis of the pre-tax "average returns in the secondary market of Spain's ten-year bonds" "increased by 300 basis points".[73]

207. The provisions of RDL 9/2013 were not implemented immediately and were subject to a transitory period of 11 months. During this transitory period, "in order to maintain both the flows of remuneration to the facilities, as well as the rest of the procedures, rights, and obligations", the provisions of RD 661/2007 with respect to remuneration continued to apply. However, once RDL 9/2013 was implemented, the revenues earned by PV installations during the transitory period were to be brought in line with the revenues that should have been earned under the New Regime.[74]

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su caso, la diferencia entre los costes de explotación y los ingresos por la participación en el mercado de dicha instalación tipo").

70 RDL 9/2013, **Exh. R-29**, Preamble, Part II ("se entenderá por empresa eficiente y bien gestionada aquella empresa dotada de los medios necesarios para el desarrollo de su actividad, cuyos costes son los de una empresa eficiente en dicha actividad y considerando los ingresos correspondientes y un beneficio razonable por la realización de sus funciones").

71 RDL 9/2013, **Exh. C-302**, Article 1.

72 RDL 9/2013, **Exh. R-29**, Article 1 (Respondent's translation) ("Este régimen retributivo no sobrepasará el nivel mínimo necesario para cubrir los costes que permitan competir a las instalaciones en nivel de igualdad con el resto de tecnologías en el mercado y que posibiliten obtener una rentabilidad razonable").

73 RDL 9/2013, **Exh. C-302**, First Additional Provision (Tribunal's translation) ("la rentabilidad razonable girará, antes de impuestos, sobre el rendimiento medio en el mercado secundario de los diez años anteriores a la entrada en vigor del presente real decreto-ley de las Obligaciones del Estado a diez años incrementada en 300 puntos básicos").

74 RDL 9/2013, **Exh. R-29**, Preamble at p. 52112.

c. *Electricity Sector Law 24/2013*

208. On 26 December 2013, the Spanish Parliament approved Law 24/2013, which consolidated the various legislative amendments that had taken place since the 1997 Electricity Law.[75]

209. This Law removed the distinction between the Ordinary and Special Regime on the rationale that "the great penetration of production technologies starting from renewable energy sources […] has caused its individual regulation […] to lack any purpose". Rather, given the degree of technological development in the sector, it was "necessary for the regulations to consider these installations in a similar way to the rest of the technology integrated in the market".[76] In other words, Law 24/2013 aimed to bring the two regimes at par, on the premise that RE no longer lacked the ability to compete in the market with more conventional sources.

210. On this basis, the Law set up a remuneration structure along the same lines as that introduced by RDL 9/2013.[77] In particular, the remuneration for the RE sector was to consist of the market price plus a supplementary amount (the Special Payment), calculated by reference to a Standard Installation and subject to revision every six years.[78]

211. At the same time, Law 24/2013 maintained priority of access to the transmission grid for RE producers.[79]

d. *RD 413/2014 and the Order on Parameters*

212. RD 413/2014 was approved on 6 June 2014 (published on 10 June 2014). Although this RD sought to implement and develop some aspects of the new remuneration regime established by RDL 9/2013 and Law 24/2013, it did not provide for the set of remuneration parameters necessary to calculate the costs of a Standard Installation.[80] These were established by the Ministry of Industry, Energy and Tourism (the "Ministry

75 Law 24/2013 of 26 December 2013, **Exh. C-303**.

76 Law 24/2013 of 26 December 2013, **Exh. C-303**, Preamble.

77 Law 24/2013 of 26 December 2013, **Exh. C-303**, Article 14.

78 Law 24/2013 of 26 December 2013, **Exh. C-303**, Article 14.

79 Law 24/2013 of 26 December 2013, **Exh. C-303**, Article 26(2).

80 RD 413/2014 of 6 June 2014 (published in the Official State Gazette on 10 June 2014), **Exh. C-304**.

of Industry") in the Order on Parameters, which, among other things, fixed the reasonable return for existing installations at 7.398%.[81]

C. THE PRIMARY AND ALTERNATIVE CLAIMS

213. In a nutshell, the Claimants contend that relying on the economic incentives contained in RD 661/2007 and particularly on the alleged stabilization guarantee in Article 44.3, they invested approximately EUR 2 billion in the Spanish PV sector. According to them, RD 661/2007 was specifically designed to attract investment and boost the RE sector. On the basis of RD 661/2007 and of various representations and public statements made by Spain, the Claimants had the reasonable and legitimate expectation that the incentives granted by RD 661/2007 would remain unchanged during the lifetime of their plants. However, once Spain had "charmed" the Claimants into making their investments, it set about enacting a series of measures that drastically scaled back and ultimately withdrew the incentives of RD 661/2007.

214. The Claimants further allege that Spain's conduct constitutes a breach of the latter's obligations under Article 10 of the ECT. This is, in summary, the Claimants' "primary claim".

215. Spain's primary defence is that the Claimants should have been aware that their incentives were subject to an overarching "principle of reasonable profitability". In other words, the Claimants were only entitled to a reasonable rate of return, "applicable at the time the Claimants made their investment", which "was around 7%".[82] According to Spain, the New Measures were not drastically different from the RD 661/2007 regime, maintained all the key features of that regime, and guaranteed the same level of return. As such, its conduct is well within its right to regulate and does not constitute a violation of Article 10 of the ECT.

216. In response to the Respondent's argument that Spain "did not promise any regulated Tariff under RD 661/2007 [and] […] the Spanish system only allowed investors to aspire to reasonable profitability as provided for in the [1997 Electricity Law]",[83] in their Reply, the Claimants put forward their Alternative Claim.[84] More specifically, while still

81 Order on Parameters, **Exh. C-305**, Annex III.
82 Rejoinder, para. 260.
83 Reply, para. 585, quoting SoD, para. 744.
84 See Reply, paras. 583-591. See also Brattle's Third Expert Report, para. 201.

maintaining their Primary Claim, the Claimants argued that "[i]n the event that the Tribunal were to agree that the Claimants' legitimate expectations were limited by Spain's concept of a 'reasonable return' […] Spain still faces international liability under the ECT",[85] because it "significantly lower[ed] the 'reasonable return'".[86] The Claimants contend that, even on the Alternative Claim, they suffered significant damages.[87]

217. Spain disagrees. In response to the Alternative Claim, Spain contends that the Claimants continued to remain highly profitable and achieved the reasonable return that they could have expected at the time of their investment.

IV. REQUESTS FOR RELIEF

218. Also in light of these developments, the Parties' requests for relief have evolved in the course of the proceedings.

A. THE CLAIMANTS' REQUEST FOR RELIEF

219. In their Reply, the Claimants sought the following relief:

> [T]hat the Tribunal enter an Award in their favour and against the Respondent as follows:
>
> (a) declaring that Spain has violated Article 10 of the ECT, as well as its obligations under international law;
>
> (b) (i) requiring that Spain provides full restitution to the Claimants by reinstating the legal framework in place at the time the Claimants made their investments in its territory and compensating the Claimants for their losses suffered prior to such reinstatement; or (ii) directing Spain to pay full compensation to the Claimants for the losses they have suffered as a result of Spain's breaches of the ECT, including pre-award interest (in both cases, with compensation to be quantified in the next phase);
>
> (c) directing Spain to pay all the costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and of any potential institutional costs, as well as the legal and other expenses incurred by the Claimants, including the fees of their legal counsel, experts and consultants and those of the Claimants' own employees on a full indemnity

85 Reply, para. 585.

86 *Ibid.*, para. 591.

87 *Ibid.*, para. 591 ("Even on the Alternative Claim, Brattle explains that, the Claimants have either suffered damages that are 'even higher than when simply comparing the remuneration of existing plants' to the tariff offered by the old regime (i.e. the Claimants' Primary Claim); or, in the alternative, 'would be less than associated with the PV Investors' Primary Claim, but would still be substantial.'" (internal footnotes omitted, emphasis removed, discussing Brattle's Third Expert Report, paras. 208-209)).

basis, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment;

(d) directing Spain to pay post-award interest, compounded monthly, on the amounts awarded until full payment thereof (with the relevant interest rate to be set in the next phase); and

(e) such other relief as the arbitral tribunal may deem just and proper.[88]

220. In their latest brief, the PO12 C-PHB2, the Claimants sought the following relief:

> [T]hat the Tribunal enter an award in their favour and against the Kingdom of Spain as follows:
>
> (a) DECLARING that the Kingdom of Spain has breached Article 10(1) of the ECT; and
>
> (b) ORDERING the Kingdom of Spain to:
>
> (i) pay the Claimants compensation for all losses suffered as a result of Spain's breaches of the ECT, in the amount specified for each of the Claimants in the present submission; and
>
> (ii) pay the Claimants pre-award and post-award interest until full payment of the award is made; and
>
> (iii) pay the costs of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of the PCA, the fees and expenses relating to the Claimants' legal representation, and the fees and expenses of any expert appointed by the Claimants, plus interest;
>
> (c) AWARDING the tax gross-up claim pursuant to any of the options listed at paragraph 189 above;
>
> (d) AWARDING such other relief as the Tribunal considers appropriate.[89]

B. THE RESPONDENT'S REQUEST FOR RELIEF

221. In their R-PHB1, the Respondent sought the following relief:

> Spain respectfully asks the Tribunal to:
>
> a) Reject the claims made by Claimants with respect to the merits on the basis that Spain has not in any way breached the ECT; and
>
> b) In addition, to reject the restitution and compensation claims made in paragraph 661 of Claimants' Reply;

88 Reply, para. 661. See also C-PHB1, para. 352 (requesting "that the Tribunal enter an Award in their favour and against the Respondent as set out in the Reply"); C-PHB2, para. 106 (requesting "that the Tribunal enter an Award in their favour as set out in the Reply").

89 PO12 C-PHB2, para. 386.

> c) That Claimants be ordered to pay all costs and expenses arising out of this arbitration, including the administrative expenses incurred by the PCA, the fees of the arbitrators and fees of the legal representatives of Spain, its experts and advisors including interest from the date on which the said costs were generated until the date of their effective payment; and
>
> d) Reject any and all claims made by Claimants and referred to either in paragraph 505 of their Amended Statement of Case or 661 of their Reply, or subsequently during the course of these proceedings.[90]

222. In their final brief, the PO12 R-PHB2, the Respondent requested the following relief:

> On the basis of the foregoing, Spain respectfully requests the Tribunal to:
>
> a) Reject any and all claims made by Claimants;
>
> b) Consequently, dismiss all liability claims and terminate the proceedings;
>
> c) Order Claimants to pay all costs and expenses arising out of this arbitration, including the administrative expenses incurred by the PCA, the fees of the arbitrators and fees of the legal representatives of Spain, its experts and advisors including interest from the date on which the said costs were generated until the date of their effective payment.[91]

223. In the next sections, the Tribunal summarizes the Parties positions on the Primary Claim and the Alternative Claim (respectively sections V.A and V.B).

V. THE PARTIES' POSITIONS

224. As a general matter, the Tribunal notes that the Parties' positions traverse multiple rounds of submissions and have evolved significantly over the course of the proceedings. Moreover, the Parties do not always correlate their arguments and defences to those of the other side. In the circumstances, the Tribunal has organized the following sections in a manner that it considers to best reflect the Parties' positions. Where appropriate, further details on the Parties' positions are contained in the Tribunal's analysis.

225. Section V.A deals with the Parties' positions on the Primary Claim, while section V.B addresses their positions on the Alternative Claim.

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90 R-PHB1, para. 380. See also Rejoinder, paras. 1196-1197.

91 PO12 R-PHB2, para. 427. See also Quantum Rejoinder, para. 319; Quantum Counter Memorial, para. 155.

A. THE PRIMARY CLAIM

1. The Claimants' position

a. *Overview*

226. The Claimants invoke "six independent breaches" of the Respondent's obligations under Article 10 of the ECT:

a. Spain has failed to provide "fair and equitable treatment" ("FET"). The claim for breach of the FET provision rests on three distinct breaches, i.e. (i) breach of legitimate expectations; (ii) unreasonable, arbitrary and disproportionate measures; and (iii) lack of transparency (7(a), (c) and (d));

b. Spain has failed to "create stable, equitable, favourable and transparent conditions for Investors" (7(b));

c. Spain has impaired the Claimants' investments through "unreasonable or discriminatory measures" (7(e));

d. Spain has failed to ensure that the Claimants' investments were afforded "the most constant protection and security" (7(f)).

b. *Investing in PV Power Generation*

227. The Claimants submit that PV technology has been an attractive, but costly, RE option for many years.[92] In recent years, EU Member States have applied government-backed economic incentives, also known as "state support schemes", to promote the use of RE by reducing its costs, increasing the price at which it is sold or otherwise increasing the volume of energy sold.[93] For the Claimants, given the start-up costs of producing PV power, there would be no investment in this sector without investment incentives.[94]

228. The Claimants explain that States use a number of different support schemes to encourage investment in RE generation. One of the most important of such schemes is the FIT, which is essentially a fixed tariff set above normal market rates.[95] FITs provide a guaranteed tariff over the long term permitting to recoup high upfront

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92 ASoC, para. 63.
93 ASoC, para. 64.
94 ASoC, para. 66.
95 ASoC, para. 69.

investments.[96] While FIT systems are expected to be adapted as investment expenses go down, such adjustments can only concern new investments, which take advantage of the lower investment costs.[97]

229. The Claimants further explain that the capital-intensive nature of PV plant development typically requires investors to raise substantial amounts of long-term debt, or project financing, to fund their investments. In project finance, the borrowers can rely on a steady stream of revenue which the asset will generate over a long period of time to service the debt. Such reliance is particularly important because of the non-recourse nature of project finance deals. The Claimants allege that most of the Claimants' installations used project finance in their development.[98]

c. *Background of Spain's Electricity Sector*

230. The Claimants explain that the 1997 Electricity Law granted Special Regime generators priority access to the Spanish electricity transmission and distribution network. This meant that ordinary regime generators could not sell their electricity to the distribution grid until Special Regime generators had sold all their supply.[99] The Claimants submit that for them such priority access to the grid was a key attraction of Spain's regulatory framework.[100]

231. The Claimants further contend that Spain's active efforts to attract foreign investment in RE was the product of (i) binding EU obligations to meet RE consumption targets arising in particular from the UNCCC and the Kyoto Protocol, and (ii) the new Government's objective to present Spain as a global leader in green energy. They also stress that Spain does not dispute that its international commitments were a key driver behind its actions to promote and encourage investments in RE power generation installations, including PV plants.[101]

232. In particular, among the EU instruments that the Claimants allege required Spain to reach certain RE targets, the Claimants discuss the 2001 EU Directive for the Promotion of the Use of Energy From Renewable Resources (the "2001 Renewable

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96 C-PHB1, para. 73.
97 C-PHB1, para. 74.
98 ASoC, paras. 72, 227-233.
99 ASoC, para. 88, discussing the 1997 Electricity Law, **Exh. C-16**, Article 30.2(b).
100 ASoC, para. 88.
101 Reply, paras. 32 *et seq.*

Energy Directive");[102] various reports and communications from the European Commission;[103] and the 2009 Directive on the promotion and use of energy from renewable sources, amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (the "2009 Renewable Energy Directive").[104]

233. The Claimants contend that Spain's EU-mandated duty to build RE capacity was taken up with enthusiasm by the Government of Prime Minister Zapatero that came to power in 2004.[105] This was not only because the Government wanted to meet the EU obligation but because Spain viewed RE production as a means of transforming its economy, by reducing reliance on foreign energy supply, becoming a net exporter of energy, and creating jobs. Consequently, the new Government's economic policy was focused on the construction of green infrastructure and the creation of green jobs.[106] In furtherance of this policy, the Government set about providing investors with incentives for building RE capacity.

234. Against that background, so the Claimants argue, on 12 March 2004, Spain enacted RD 436/2004.[107] According to the Claimants, RD 436/2004 introduced for the first time an incentive system based on a lifetime FIT, replacing the previous scheme, which had provided that RE could be sold at market prices plus a premium.[108] For the Claimants, Spain "introduced a stabilisation commitment aimed at creating the desired long term stability that was necessary to attract investment".[109] This said, the Claimants specify that the RD 436/2004 FIT was originally subject to fluctuations linked to changes of consumer tariffs, which entailed a lack of predictability, resulting in turn in a lack of investment.[110] This flaw was remedied in 2006, through the "freezing" of the consumer

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102 ASoC, paras. 105-115, discussing Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001, on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, **Exh. C-2**.

103 ASoC, paras. 116-117, discussing Communication from the Commission, COM(2005) 627, "The Support of Electricity from Renewable Energy Sources", **Exh. C-24;** Communication from the Commission to the Council and the European Parliament, COM(2006) 848, Renewable Energy Road Map, **Exh. C-33** and Communication from the Commission, COM(2008) 772, Energy Efficiency: Delivering the 20% Target, **Exh. C-93**.

104 ASoC, paras. 119-121.

105 AsoC, paras. 122-130.

106 AsoC, para. 124.

107 ASoC, para. 131; RD 436/2004, **Exh. C-19**.

108 ASoC, paras. 133-135, referring to RD 436/2004, **Exh. C-19,** Article 22.

109 Reply, para. 36, discussing in particular RD 436/2004, **Exh. C-19**, Article 40.3.

110 ASoC, para. 136.

tariff pursuant to Royal Decree Law No. 7/2006.[111] Yet, even these actions did not generate the expected level of investment.[112] It therefore became necessary to consider enhancements in the incentives provided.

235. According to the Claimants, the framework for these enhancements was laid in the Plan for Promotion of Renewable Energies in Spain 2005-2010 or "PER 2005-2010", prepared in 2005 by the *Instituto para la Diversificación y Ahorro de la Energía* ("IDAE"), an advisory governmental body that reports to the Ministry of Industry.[113] The PER 2005-2010 provided recommendations to further increase investment in RE, and especially the PV sector, in light of the poor results achieved under RD 436/2004. After analysing the barriers to PV development, the PER 2005-2010 recommended that the Spanish electricity regulators maintain the regulated remuneration for PV installations; continue to grant such remuneration for the lifetime of a PV installation in order to attract project finance, and that Spain increase its PV installed capacity targets by an additional 363 MW (from the target of 135 MW set under RD 436/2004).[114] The Claimants contend that the PER 2005-2010 demonstrates Spain's awareness that development of the PV sector would require a long-term and stable cash flow through the FIT.

236. According to the Claimants, the ensuing RD 661/2007 finds its roots in these recommendations.[115]

d. *RD 661/2007 and the Claimants' legitimate expectations as to its continued application*

237. The Claimants submit that, in enacting RD 661/2007, Spain was implementing the recommendations contained in the PER 2005-2010 and seeking to induce further investments into its RE sector, given that previous regimes had failed to attract sufficient investments.[116] The enactment of RD 661/2007 marked a change from the incentives provided by RD 436/2004.[117]

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111 ASoC, para. 137.

112 ASoC, para. 138; C-PHB1, para. 71.

113 PER 2005-2010, **Exh. C-3**.

114 ASoC, paras. 139-148.

115 ASoC, paras. 139, 149.

116 C-PHB1, paras. 71-72.

117 ASoC, para. 131.

238. The Claimants allege that they made their investments in reliance on the incentives contained in RD 661/2007. In particular, they expected that they would be entitled to sell all the electricity produced by their PV plants at the FIT provided in RD 661/2007. Moreover, due to the express "stabilization commitment" contained in Article 4.3 of RD 661/2007, the Claimants further expected that any future changes to the FIT regime would only apply to new installations and not to those that already qualified under RD 661/2007.

i. *RD 661/2007 conferred an economic right upon the Claimants*

239. The Claimants submit that RD 661/2007 granted qualifying PV installations an "immutable economic right" to, *inter alia*, a fixed premium indexed on inflation for all of the electricity generated by their PV facilities during the entire operational lifetime.[118] They argue that, when commenting on the draft of RD 661/2007, the National Commission of Energy ("CNE") had stressed the importance of "regulatory stability to recover investments, maintaining regulated tariffs during the service life of existing facilities (with a transparent annual adjustment mechanism)".[119]

240. Once a PV plant had registered with the RAIPRE through the relevant Autonomous Community where the PV plant was located within a one-year period (i.e. prior to 29 September 2008), it was entitled to receive all the economic incentives of RD 661/2007, including and especially the FIT.[120] The Claimants submit that each of

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118 ASoC, paras. 149-150.

119 C-PHB1, para. 83, quoting National Energy Commission Report 3/2007 of 14 February 2007 on the proposal for a Royal Decree regulating the activity of electricity production under the special regime and certain facilities of technologies which can be assimilated to the ordinary regime, **Exh. R-62**, p. 25.

120 ASoC, paras. 157-158. See also C-PHB1, paras. 99-101, discussing RD 661/2007, **Exh. C-35**, Article 17, entitled "Rights of producers under the special regime", which provides in its subparagraph c) that "[t]he right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the Register of production facilities under the special regime of the General Directorate of Energy Policy and Mines, prior to the final date set out in Article 22" ("El derecho a la percepción de la tarifa regulada, o en su caso, prima, estará supeditada a la inscripción definitiva de la instalación en el Registro de instalaciones de producción en régimen especial dependiente de la Dirección General de Política Energética y Minas, con anterioridad a la fecha límite establecida en el artículo 22"). The Claimants further note that Article 17 of RD 661/2007 only subjects the rights set out therein to Article 30.2 of the Electricity Law, and not to Article 30.4 (on which, according to the Claimants, Spain relies to justify the changes based on the reasonable return concept). See C-PHB1, para. 101.

the Claimants' individual plants received a government resolution confirming their specific entitlement to the RD 661/2007 FIT, which fact is not disputed by Spain.[121]

241. The Claimants also contend that RD 661/2007 set no limit to the quantities of electricity entitled to the FIT. The FIT was owed for the operational life of the plant, i.e. 25-40 years.[122] Specifically, each plant would receive the FIT at a particular rate depending on its capacity during its first 25 years of operation. Thereafter, the FIT would continue at a lower rate for the remaining life of the plant.[123] The RD 661/2007 regime also implied that electricity distributors were required to buy all the electricity produced by PV installations at the FIT, the latter thus having priority over producers in the ordinary regime.[124] More importantly, while the Claimants recognize that RD 661/2007 did not provide a perpetual tariff, they insist that any tariff adjustments would only apply to new investments.[125]

242. The Claimants stress that none of them would have made the investments had they believed that the PV investment framework was subject to changes that could affect existing investments.[126]

243. It is the Claimants' submission that RD 661/2007 conferred upon duly-registered installations a guaranteed right comprising of "(i) the ability to sell all of an installation's electricity output; (ii) at a fixed FIT rate; (iii) billed and collected on a monthly basis; (iv) revised yearly for inflation; (v) for the lifetime of the installation; (vi) without any review or alteration to the FIT rate or term".[127] This is demonstrated by the text of the decree;[128] by the fact that it provided qualifying PV installations with a FIT for the lifetime of the installation;[129] by the benefits it bestowed upon qualifying installations; and by the fact that the review process for the RD 661/2007 FITs would commence in 2010, without affecting installations already holding timely RAIPRE certificates.[130] In addition,

121 C-PHB1, para. 106; Reply, para. 38.
122 ASoC, para. 63.
123 ASoC, para. 161.
124 ASoC, para. 163.
125 ASoC, paras. 164-166; Reply, paras. 41-42.
126 ASoC, para. 219.
127 ASoC, para. 169.
128 ASoC, para. 171(a), referring to RD 661/2007, **Exh. C-35**, Article 17.
129 ASoC, para. 171(b), referring to RD 661/2007, **Exh. C-35**, Article 36.
130 ASoC, para. 171(c), referring to RD 661/2007, **Exh. C-35**, Article 44.3.

Article 44.1 of RD 661/2007 established a mechanism to update the FIT in order to account for inflation.[131]

244. The Claimants have emphasized the relevance of two provisions in RD 661/2007, Article 22 (*infra* at ((a)) and Article 44.3 (*infra* at (b)). They have also asserted that RD 1578/2008, a regulation issued after RD 661/2007, strengthened their expectations and confirmed that Spain shared these expectations at the time (*infra* at (c)).

(a) The "tariff window" in Article 22

245. The Claimants indicate that RD 661/2007 did not intend to apply the Article 36 FITs to all future facilities. Rather, in accordance with Article 22, as soon as 85% of the production target for any energy group or sub-group had been reached, the Secretary General for Energy was to set a period within which facilities had to obtain final RAIPRE registration in order to be entitled to the tariffs under RD 661/2007. This registration period could be no less than 12 months.[132] The Secretary General for Energy issued the resolution on 29 September 2007, confirming that FITs under RD 661/2007 would apply as long as a facility was registered prior to 29 September 2008, i.e. the end of the tariff window.[133]

246. For the Claimants, Article 22 would be devoid of meaning if Spain had remained free to change the FIT subsequently in respect of existing facilities. Similarly, it would serve no purpose for the Secretary General to set a final registration date under RD 661/2007.[134]

(b) Interpretation of Article 44.3

247. The Claimants further invoke Article 44.3 of RD 661/2007 (reproduced *supra* at para. 194) in support of their argument that the FIT regime provided in RD 661/2007 was not subject to changes with respect to existing investments.

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131 ASoC, para. 162, referring to RD 661/2007, **Exh. C-35**, Article 44.1.

132 C-PHB1, para. 95.

133 C-PHB1, paras. 95-97 discussing Resolution of the Secretariat General for Energy, Ministry of Industry, Tourism, Trade (published on 29 September 2007), **Exh. R-25**. See also C-PHB1, para. 97, discussing CNE Report, **Exh. C-505**, which notes (at p. 3) (Spanish version) that "the Secretary-General issued a Decision establishing that the current regulated tariff for photovoltaic plants definitely registered before the 30th of September 2008 would be maintained".

134 C-PHB1, para. 98.

248. Accordingly, so say the Claimants, a review of the FITs would be carried out in 2010, at the end of the planning period set out in the PER 2005-2010 when Spain anticipated that it would reach its capacity goals, and thereafter every four years. The success of RD 661/2007 in prompting investments in the PV sector resulted in that review taking place in 2008.[135] However, Article 44.3 of RD 661/2007 made it clear that any revisions stemming from these reviews would not apply to existing installations.[136]

249. The Claimants also observe that in 2010 the CNE itself understood this provision to "contain one of the criteria most relevant to the current regulation of the Special Regime in relation to legal certainty and stability of the economic regime".[137] Furthermore, the CNE noted that economic incentives had to be set considering the costs of the technology installed.[138] Consequently, it proposed a reduction in the tariff for new PV installations. However, according to the Claimants, Spain subsequently abandoned this review process by implementing the Disputed Measures.[139]

250. The Claimants object to Spain's argument at the Hearing on Liability that "Spain would stand by 44.3 while the law in which it is encapsulated is in force, but Royal Decree 661 can be modified or repealed, at which point 44.3 would not apply".[140] Such an approach would render Article 44.3 meaningless and essentially constitute an admission that Spain "fraudulently induced investment".[141]

251. Furthermore, it would make no sense if Spain was permitted to make changes "through the backdoor" by claiming that the reviews fall outside of the scope of Article 44.3, as this would defeat the purpose of including Article 44.3 in the first place.[142] In addition,

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135 ASoC, para. 164.

136 ASoC, para. 165, discussing RD 661/2007, **Exh. C-35**, Article 44.3.

137 C-PHB1, para. 85, discussing CNE Report entitled "Report on the Proposal for a Royal Decree to regulate and modify certain aspects relating to the Special Regime" dated 14 September 2010, **Exh. R-320**, p. 24.

138 C-PBH1, para. 119, discussing CNE Report entitled "Report on the Proposal for a Royal Decree to regulate and modify certain aspects relating to the Special Regime" dated 14 September 2010, **Exh. R-320**, p. 11, where the CNE noted that "[i]n accordance with the regulation in force (article 44.3 of RD 661/2007), during the year 2010 it is necessary to establish the economic incentives applicable to new installations commissioned from 2012, considering among other things, the costs associated with each generation technology".

139 C-PHB1, para. 120.

140 C-PHB1, para. 115, quoting Hearing Tr. [English version] (Leathley), 14 March 2016, at 222:1-4.

141 C-PHB1, para. 117.

142 C-PHB2, para. 9.

the Claimants rebut Spain's argument that "the registration for RD 661/2007 was closed and the two year window for registration under article 44.3, that was supposed to take place in 2010, never applied" by arguing that, whether the tariff window was closed in September 2008 or January 2012, Articles 44.3 and 22 still provided that any changes to the FIT would not apply to existing investments.[143] In any event, contrary to Spain's claim that the 2010 review did not take place, the CNE confirmed that the review did occur.[144]

(c) The relevance of RD 1578/2008

252. In the Claimants' view, RD 1578/2008 enacted in September 2008 further evidences that their expectations were legitimate and shared by Spain.[145] Indeed, RD 1578/2008 applied only to installations registered after the window deadline of 29 September 2008.

253. The Claimants also point to the Fifth Additional Provision in RD 1578/2008 which reads as follows:

> Fifth Additional Provision. *Modification of the remuneration for production activity using photovoltaic technology*
>
> In 2012, in light of the technological growth of the sector and the market and the operations of the payment regime, payment for the activity of electricity production using solar photovoltaic technology may be modified. (Claimants' translation)[146]

254. For the Claimants, this provision has the same "intent" as Article 44.3 of RD 661/2007 as was confirmed by a CNE report of 22 October 2009 in response to a question from a member of the public.[147]

255. The Claimants explain that, since the FIT would automatically decrease at certain points for new investments only, it was not necessary to state in the Fifth Additional

143 C-PHB2, para. 11, discussing R-PHB1, para. 126.

144 C-PHB2, para. 13, discussing CNE Report entitled "Report on the Proposal for a Royal Decree to regulate and modify certain aspects relating to the Special Regime" dated 14 September 2010, **Exh. R-320**, p. 11.

145 C-PHB1, paras. 144-152.

146 See C-PHB1, para. 148, discussing RD 1578/2008, Fifth Additional Provision, **Exh. C-242** ("Durante el año 2012, a la vista de la evolución tecnológica del sector y del mercado, y del funcionamiento del régimen retributivo, se podrá modificar la retribución de la actividad de producción de energía eléctrica mediante tecnología solar fotovoltaica").

147 See C-PHB1, para. 150, discussing CNE response to a query from an individual regarding the Fifth Additional Provision under RD 1578/2008, **Exh. C-574,** p. 3 (Claimants' English Translation).

Provision that future changes would not apply to existing investments. Thus, like Article 44.3, that provision aimed at providing certainty to investors by informing them that a new payment system for PV may be set in 2012 affecting newly built plants registered after that date.[148]

ii. *RD 661/2007 was designed to attract third party financing*

256. The Claimants further highlight that RD 661/2007 was designed to attract third party financing.[149] They argue that this is obvious from the design of RD 661/2007, which provided that qualifying PV installations be paid on a monthly basis through invoices issued by the CNE, which were then paid by electricity distributors, thus allowing investors to manage their cash flow in a predictable way.[150] The design of the FIT also matched the needs of project finance loans, which typically have a term of 18 to 25 years.[151] Further, the PER 2005-2010 acknowledged that approximately 77% of RE investment would be financed by long-term loans from third party lenders.[152] In sum, RD 661/2007 was "well suited to recovering invested capital, obtaining a return on invested capital, *and* attracting the necessary financing for major investment".[153]

iii. *Spain actively encouraged foreign investment in the PV sector and made repeated representations on the economic regime of RD 661/2007*

257. In addition, the Claimants submit that Spain actively encouraged foreign investment into its PV sector through advertising materials, including English-language brochures and presentations, emphasizing the stability of its investment framework and the nature of the investment incentives that its regulations offered.[154] The Claimants have in particular discussed the following documents (both pre-dating and post-dating the enactment of RD 661/2007):[155]

a. The 24 May 2005 brochure entitled "*El Sol Puede Ser Suyo*" ("The Sun Can Be Yours"), relating to RD 436/2004, explaining the advantages of investing in PV installations, including the expected profitability (which the Government estimated

148 C-PHB1, paras. 151-152.
149 ASoC, paras. 175-180.
150 ASoC, para. 177.
151 ASoC, para. 178.
152 ASoC, para. 176.
153 ASoC, para. 175.
154 ASoC, paras. 181-198.
155 ASoC, paras. 181-198; Reply, paras. 68-84.

at that time at no less than 15%) as well as the investors' ultimate contribution to Spain's sustainable economy;[156]

b. The August 2005 English-language summary of the PER 2005-2010 outlining to foreign investors the steps needed for Spain to meet its RE consumption targets;[157]

c. The 14 February 2007 CNE Report No. 3/2007, issued three months before RD 661/2007 was approved, stressing the importance of the stability of the regulatory regime as a necessary tool to attract investors into the Spanish RE sector;[158]

d. The 25 May 2007 Ministry of Industry, Energy and Tourism press release, following the approval of RD 661/2007, indicating that through RD 661/2007 "the Government prioritize[d] profitability and stability" and that the regime represented an "increase in compensation" compared to RD 436/2007.[159] The press release also represented that "[f]uture tariff revisions shall not be applied to already functioning facilities. This guarantees legal certainty for the electricity producer and stability for the sector, favoring development. The new legislation shall not be applied retroactively".[160]

e. The June 2007 update of "The Sun Can Be Yours" brochure, calculating sample return for various types of installations on the basis of certain assumptions, and quantifying those sample returns between 7.11% and 9.58%;[161]

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156 Reply, paras. 119-121, discussing IDAE, "*El sol puede ser suyo*", 24 May 2005, **Exh. R-169**, slide 43. See also ASoC, para. 182 citing in error to Government of Spain, Ministry of Industry, "*El sol puede ser suyo*", 6 June 2007, **Exh. C-38**.

157 Ministry of Industry, Tourism and Commerce, *Summary of the Spanish Renewable Energy Plan 2005-2010*, August 2005, **Exh. C-22**.

158 CNE, Report 3/2007 on the Proposal of Royal Decree that Regulates the Electric Power Generation under the Special Regime and Specific Technologies under the Ordinary Regime, 14 February 2007, **Exh. C-311**.

159 Press Release of the Ministry of Industry, Tourism and Commerce announcing RD 661/2007, "The Government prioritizes profitability and stability in the new Royal Decree on renewable energy and combined heat and power", 25 May 2007, **Exh. C-565**.

160 Press Release of the Ministry of Industry, Tourism and Commerce announcing RD 661/2007, "The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power", 25 May 2007, **Exh. C-565**, p. 1.

161 Reply, paras. 122-128, discussing IDAE, "El sol puede ser suyo", June 2007, **Exh. R-170**, slides 14-17 (Respondent's English translation). ASoC, para. 184, citing in error to Government of Spain, Ministry of Industry, Tourism and Trade, "El sol puede ser suyo", 6 June 2007, **Exh. C-38**, which is a presentation issued by IDAE in June 2007, relating to solar-thermal (and not PV) installations.

f. The 25 October 2007 presentation given by the Deputy Director of the Special Regime at the CNE, Mr. Luis Jesús Sánchez de Tembleque, laying out the benefits of the Spanish RE framework and its investment incentives and noting the need for regulatory stability;[162]

g. The 29 October 2008 presentation by the Vice President of CNE, Mr. Fernando Marti Scharfausen, noting that the Spanish regulated tariff or market price plus premium applied for the "facility life-span" of the plants, and highlighting the absence of retroactivity in RD 661/2007;[163]

h. The November 2008 PowerPoint presentation titled "Opportunities in Renewable Energy in Spain" (the "2008 Presentation"), drafted by InvestInSpain, the State Company for the Promotion and Attraction of Foreign Investment, and carrying the seal of the Spanish Government on the first page, which discussed the benefits of RD 661/2007 and explained that its "[p]remium system [was] guaranteed";[164]

i. The November 2009 joint InvestInSpain – Ministry of Industry, Tourism and Commerce PowerPoint presentation titled "Legal Framework for Renewable Energies in Spain" (the "2009 Presentation"), praising the strengths and stability of the legal framework for RE in Spain, including reaffirming the importance of Article 44(3);[165]

j. The 22 October 2009 CNE response to a query from a PV producer regarding the application of the stabilization provision found in Article 44.3 of RD 661/2007, in light of the regulatory regime introduced by RD 1578/2008, where the CNE considered that although RD 1578/2008 envisaged a potential future modification to the remuneration for PV installations, those changes could not be made

162 CNE Presentation on the Regulation of Renewable Energies, 25 October 2007, **Exh. C-50**.

163 CNE presentation "Legal and Regulatory Framework for the Renewable Energy Sector", 29 October 2008, **Exh. C-570**, pp. 11, 27 (Claimants' English translation).

164 Manuel Garcia, *Opportunities in Renewable Energy in Spain*, November 2008, Power Point Presentation published by the Spanish Ministry for Industry, Tourism and Commerce, **Exh. C-91**.

165 "Legal Framework for Renewable Energies in Spain", November 2009, Power Point Presentation published by the Spanish Ministry for Industry, Tourism and Commerce, **Exh. C-92**.

retroactively, all in line with the stabilization provisions of Article 44.3 of RD 661/2207;[166]

k. The February 2010 CNE presentation by Mr. Fernando Marti Scharfausen, confirming that RD 661/2007 provided a "warranty by law" to investors that no retroactive changes would be made.[167]

258. These documents, so the Claimants argue, reflect Spain's own understanding that the RD 661/2007 would apply to all qualifying installations during the entire life of the plants and that any changes, if ever made, would not affect existing installations.[168] As such, these documents constituted further assurances contributing to the Claimants' expectations that Spain's regulatory framework for PV investment would not shift.[169] The Claimants also emphasize that none of these documents, presentation or brochures contained any disclaimers.[170]

259. Finally, the Claimants argue that, when effecting their investments in the PV sector, they also relied on Spain's reputation as a safe place to invest, as Spain was a Western European country and EU Member State with a track record of protecting foreign investments.[171]

e. *Registration of the Claimants' PV facilities*

260. The Claimants contend that RD 661/2007 was so successful that in a short time the installed PV technology far exceeded the targets set by the PER 2005-2010 and the 371 MW target envisaged by RD 661/2007. They add that, as a direct result of RD 661/2007, Spain hit the 85% threshold in a matter of months, in August 2007. As a consequence, Spain announced on 27 September 2007 that the time limit for RD 661/2007 registrations would expire on 29 September 2008.[172]

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166 CNE response to a query from an individual regarding the Fifth Additional Provision under RD 1578/2008, 22 October 2009, **Exh. C-574**.

167 Reply, paras. 80-81, discussing CNE presentation, "Renewable Energy Regulation in Spain", February 2010, **Exh. C-578**, p. 29 (Original version in English).

168 Reply, para. 68.

169 ASoC, para. 198.

170 ASoC, para. 197.

171 ASoC, paras. 199-204.

172 ASoC, paras. 205-212.

261. Finally, the Claimants agree with Spain that the announcement of 27 September 2007 set off a "race", motivating investors to invest in the PV Sector before the deadline. According to the Claimants, the obvious implications of such a "race" is that "everybody in the market, including all reasonable investors, understood that installations that met the deadline […] would lock in the right to receive the RD 661/2007 FIT".[173]

f. *The Disputed Measures*

262. The Claimants submit that Spain frustrated their legitimate expectations that the RD 661/2007 regime would remain stable by enacting a number of measures, which curtailed the incentives under RD 661/2007 and then withdrew them entirely.

i. *The 2010 Measures*

(a) RD 1565/2010

263. The Claimants argue that RD 1565/2010[174] eliminated the right of PV installations to receive the FIT for their entire life, limiting the FIT to the first 25 years of operation.[175] This substantially reduced the revenues that investors could have realized as promised under RD 661/2007. Furthermore, RD 1565/2010 augured a new era of regulatory instability and was the first indication that Spain would ignore the key promises it had made to investors when promoting its FIT regime.[176]

264. The Claimants reject Spain's formalistic argument that RD 1565/2010 does not contravene the literal wording of Article 44.3 of RD 661/2007 because the latter provision refers to "the reviews to this sub-section of regulated tariff" and not to a review of the duration during which the tariff would apply.[177] Cutting the number of years during which a tariff applies has the same economic effect as cutting the tariff itself.[178]

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173 Reply, para. 44.

174 RDL 1565/2010, **Exh. C-152**.

175 ASoC, para. 246.

176 ASoC, para. 38.

177 Reply, para. 218, discussing SoD, paras. 330-331.

178 Reply, para. 219.

(b) RDL 14/2010

265. The Claimants contend that RDL 14/2010[179] placed two separate caps on the number of hours during which PV installations could access the RD 661/2007 FIT.[180]

266. First, RDL 14/2010 placed a transitory cap lasting from 1 January 2011 until the end of 2013.[181] The Claimants allege that this was a drastic change, as under RD 661/2007, a PV installation was paid for its full electricity production during the entire calendar year.[182] That transitory cap also failed to take account of regional differences, which resulted in a disproportionate impact on the more efficient PV plants located in sunnier regions.[183] Once a PV installation reached its cap for the year, it was required to sell its additional production into the wholesale electricity pool at market rates, like conventional power generators in the ordinary regime (although still with priority of dispatch).[184]

267. Second, upon its expiry in 2013, the transitory cap was replaced by a permanent one for the remainder of the FIT entitlement of PV installation (which was extended to 28 years under RDL 14/2014 and to 30 years by Law 2/2011).[185]

268. The Claimants allege that, while the transitory cap of RDL 14/2010 applied, they experienced a dramatic reduction in the production of FIT eligible electricity. As a consequence, their cash flows dropped and the uncertainty facing the investments increased.[186] They refute Spain's argument that, because the PER 2005-2010 contained estimates of the number of operating hours for PV installations (on the basis of which Spain determined the FIT), PV investors should have reasonably expected that there could be a reduction in the operating hours for which they would be entitled to the FIT.[187] They submit that the RD 661/2007 FIT applied to every kilowatt hour of

179 RDL 14/2010, **Exh. C-154**.

180 ASoC, paras. 251-270.

181 ASoC, para. 252.

182 ASoC, para. 253.

183 ASoC, para. 256.

184 ASoC, para. 257.

185 ASoC, para. 258.

186 ASoC, paras. 266-267, discussing Brattle's Second Expert Report, paras. 67, 72.

187 Reply, paras. 224-227, discussing SoD, para. 342.

electricity and not only for the hours estimated in the PER 2005-2010 (on which the FIT was based).[188]

269. It is the Claimants' further submission that, through a series of regulations, including RDL 14/2010, Spain acknowledged the harm it had caused to PV investors and attempted to compensate for that harm, which however was ineffective.[189] For the Claimants, these attempts at compensation showed the seriousness of the harmful measures that Spain had enacted in RDL 14/2010, as well as the unreasonableness of its seemingly improvised and arbitrary regulatory actions.[190]

270. The Claimants point to RDL 14/2010 extending the right of access of the PV installations to the RD 661/2007 FIT from 25 to 28 years.[191] The three-year extension was at the original, higher FIT rate, but still subject to the permanent caps.[192] The Claimants' position is that thereby Spain reinstated a small portion of what it had taken away by enacting RD 1565/2010.[193]

271. Further, so the Claimants remark, the Sustainable Economy Law (i.e. Law 2/2011) further prolonged the entitlement to the FIT by two years to 30 in total at the higher FIT rate (although again subject to the permanent hour cap).[194] This law also extended soft loans or liquidity lines of credit through the *Instituto de Crédito Oficial* ("ICO"), thus recognizing that the 2010 Measures had negatively impacted the financing obtained by PV investors.[195]

(c) Conclusion on the 2010 Measures

272. The Claimants submit that the 2010 Measures had a direct impact on the cash flows of the plants and, therefore, on their ability to service the debt. Moreover, they caused a reduction in the value and potential resale value of the Claimants' assets.

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188 Reply, para. 227.

189 ASoC, paras. 271-277.

190 ASoC, para. 271.

191 ASoC, paras. 272-273, discussing RDL 14/2010, **Exh. C-154**, preamble.

192 ASoC, para. 261.

193 ASoC, para. 273.

194 ASoC, para. 274, discussing Sustainable Economy Law, **Exh. C-164**, 44th Final Provision (amending the First Final Provision of RDL 14/2010) (referred to by the Claimants as "First clause of Final Provisions")..

195 ASoC, para. 275, discussing Sustainable Economy Law, **Exh. C-164**, 45th Final Provision.

ii. *Law 15/2012*

273. On 27 December 2012, Spain passed Law 15/2012, imposing a 7% levy on income obtained by generators, renewable or otherwise.[196]

274. The Claimants maintain that although they "are not bringing any claims with respect to damages suffered as a result of the 7% levy", this measure is "part of the factual background of the dispute, providing additional details of the array of measures the PV Investors were subject to during recent years".[197]

275. For the Claimants, this 7% levy amounts to a disguised tariff cut for RE installations and an additional limitation to the RD 661/2007 regime. As such, it cannot be regarded as *bona fide* taxation of general application.[198] The fact that the levy is in reality a tariff cut presented in the form of a "tax" is confirmed by statements from the then Minister for Industry Jose Manuel Soria.[199]

276. The Claimants contend further that the 7% levy had a disproportionate impact on RE compared to conventional generators. This is because the former operate in a regulated regime and cannot pass on the 7% levy to the consumers, whereas the latter can do so at least in part when selling electricity in the open market.[200]

277. According to the Claimants, the damage caused by the 7% levy is now subsumed within the more substantial damage caused by the New Regime. The 7% levy may be considered neutral within the framework of the New Regime, but it is "not neutral to installations that qualified under the RD 661/2007 economic regime, where the 7% Levy was not in place".[201]

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196 Law 15/2012 of 27 December 2012, concerning Tax Measures to Ensure Energy Sustainability (published on 28 December 2012) ("Law 15/2012"), **Exh. C-300**.

197 ASoC, para. 239.

198 AsoC, para. 236; Reply, para. 229.

199 Reply, paras. 230-233, discussing Patricia Carmona & Javier Mesones, Interview with the Minister of Industry, Energy and Tourism, *La Gaceta*, 14 October 2012, **Exh. C-422**; "Soria Announces 'Progressive' Tax on All Electricity Generation Sources According to Subsidies", *Europa Press*, 11 July 2012, **Exh. C-609**; "Montoro undermines Soria and affirms that the electricity reform is badly designed", *El País*, 21 August 2012, **Exh. C-653**.

200 ASoC, para. 236; Reply, paras. 229, 234.

201 Reply, para. 237.

278. Shortly after the enactment of Law 15/2012, Spain adopted additional measures which limited the Claimants' right to deduct certain financial expenses from the application of corporate income tax.[202]

iii. *The New Measures*

(a) RDL 2/2013

279. The Claimants submit that RDL 2/2013 enacted on 1 February 2013[203] removed key components of the CPI used to adjust the FIT for inflation under RD 661/2007.[204] The index replacing the CPI reduced the FIT for PV plants by about three percentage points.[205]

280. For the Claimants, Spain's argument that the new index is "well established in worldwide economic doctrine" is besides the point.[206] What matters is that it is not the index that Spain committed to use under RD 661/2007.[207] The Claimants argue that Spain changed the index to remove the price of oil from the underlying calculation, based on the belief that such price would continue to rise.[208] Contrary to such belief, the price of oil fell, with the result that the new index was higher than the CPI.[209] For the Claimants, this unexpected turn of events in no way justifies the measure, even if it may have benefitted the PV plants in certain periods.[210] In any event, contrary to what Spain contends, the new index did not benefit the Claimants in 2015, as the indexation disappeared entirely with the enactment of the New Regime.[211]

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202 ASoC, para. 238, discussing Law 16/2012 of 27 December 2012, on Tax Measures for the Consolidation of Public Finances and the Boost of Economic Activity (published on 28 December 2012), **Exh. C-425**.

203 RDL 2/2013, **Exh. C-301**.

204 ASoC, para. 279.

205 ASoC, para. 240, discussing Brattle's Second Expert Report, para. 98.

206 Reply, para. 239, discussing SoD, para. 149.

207 Reply, para. 239.

208 Reply, para. 240.

209 Reply, para. 242.

210 Reply, paras. 242-243.

211 Reply, para. 243.

(b) RDL 9/2013

281. For the Claimants, RDL 9/2013, which was enacted on 12 July 2013[212] and amended the 1997 Electricity Law, revoked RD 661/2007 in its entirety for RE installations.[213] The Claimants assert that the New Regime so introduced applied not only to new installations, but also to existing ones.[214]

282. The Claimants explain that, by contrast to the previous one, the New Regime is a rate-base system that applies a percentage return to the costs for specific standard projects, instead of measuring actual costs.[215] In particular, according to the Claimants, RDL 9/2013 eliminated the FIT regime and, instead, introduced a system based on the Special Payment. Unlike the FIT, which is *solely* based on energy production, this system is only based in part on energy production, and is calculated by reference to the Government's "standard installation", which bears no resemblance to the Claimants' PV plants.[216]

283. Further, the amount of the Special Payment "will not go beyond the minimum level necessary" to provide what the Government considers to be a "reasonable return".[217] This concept, so the Claimants submit, no longer operates as a "floor" but rather as a cap to the Special Payment.[218] The "reasonable return", measured by reference to the 10-year Spanish sovereign bonds plus a differential (300 base points in the case of existing facilities), is set at 7.398%.[219] This return is calculated over the deemed regulatory life of the plant, i.e. 30 years, is computed pre-tax and takes account of the remuneration obtained under RD 661/2007.[220]

284. The Claimants further explain that, under the New Regime, returns achieved under RD 661/2007 in excess of the reasonable return defined in RDL 9/2013 will be deducted from payments to be received in the future. In other words, this measure is fully retroactive as it claws back payments under the old regime.[221] The Claimants note

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212 RDL 9/2013, **Exh. C-302**.

213 ASoC, para. 280.

214 ASoC, para. 280, discussing RDL 9/2013, **Exh. C-302**, Second Final Provision.

215 ASoC, para. 282.

216 ASoC, para. 284(a), discussing Brattle's Second Expert Report, paras. 108-110.

217 ASoC, para. 284(b), citing to RDL 9/2013, **Exh. C-302**, Article 1(2).

218 ASoC, para. 284(b).

219 ASoC, para. 241(d).

220 Reply, para. 249(c).

221 Reply, para. 249(c).

that Spain does not dispute that the New Regime "claws back" past revenues by offsetting future ones.[222]

285. Moreover, the Claimants emphasize that the Special Payment is subject to governmental discretion and its parameters may be changed "every six years", which makes the operation of PV plants highly uncertain.[223]

(c) Law 24/2013

286. On 26 December 2013, the Spanish Parliament approved Law 24/2013,[224] which, so say the Claimants, introduced further harmful measures.[225] In particular, such law removed the distinction between Ordinary and Special Regimes; it placed conventional and RE generators on an equal footing, depriving the latter of the unconditional priority access to the grid and dispatch.[226] It also imposed on renewable installations the obligation to finance the accrued tariff deficit, i.e., the imbalance between revenues and costs in the electricity system.[227]

287. The following months, the Claimants argue, were characterized by complete uncertainty as neither RDL 9/2013 nor Law 24/2013 defined the precise terms of the New Regime.[228] The Claimants refer to this period from July 2013 to June 2014 as the "Transitory Period".

222 C-PHB2, para. 58.

223 ASoC, para. 284(c); Reply, para. 246.

224 Law 24/2013, **Exh. C-303**.

225 ASoC, paras. 285-286.

226 ASoC, paras. 285, 300-301.

227 ASoC, paras. 285, 302-304. The Claimants explain that renewable energy installations are meant to receive monthly assessments with the total amount of the Special Payment, but they only receive the full Special Payment if there are sufficient revenues in the Electricity System. That is to say, the Government only pays the Special Payment to otherwise qualifying generators if the State (the Electricity System) has sufficient funds to do so. Otherwise, the renewable energy generator only receives a partial monthly payment with the possibility of recovering outstanding amounts later on during the year. If at the end of the year the Government remains unable to pay the total amount of the Special Payment to the renewable energy generator, the outstanding amount becomes part of the Tariff Deficit and the renewable energy generator will no longer recover the amounts in question (ASoC, para. 303, discussing Law 24/2013, **Exh. C-303**, Articles 19, 25.2).

228 ASoC, paras. 286-287.

(d) RD 413/2014 and the Order on Parameters

288. On 6 June 2014, the Government passed RD 413/2014[229] and on 16 June 2014 the Order on Parameters,[230] which specified the economic regime for the different RE installations, including PV plants.

(e) Content of the New Regime

289. For the Claimants, the New Regime represents a complete overhaul of the FIT regime under RD 661/2007, as a result of which the Claimants' installations were placed in a position much worse than under RD 661/2007. The New Regime undermines the very foundation on which the Claimants made their investments, namely a stable and predictable revenue stream at levels sufficient to service the debt, provide a return on investment, and justify the significant risks incurred.[231]

290. The Special Payment is composed of a remuneration per MW of installed capacity and a remuneration per MWh of electricity produced, seeking to cover the operating costs that cannot be met by market prices.[232] It is also subject to certain thresholds of operating hours.[233]

291. Specifically, the Claimants submit that the New Regime negatively affects their investments in three main ways. First, Spain's "repudiation" of the RD 661/2007 economic regime results in a significant reduction of cash flows, because the PV projects no longer enjoy the FIT[234] and the Special Payment is only payable if the electricity system generates sufficient revenues.[235] Second, the Claimants argue that the new terms deprive them of incentives to maximize day-to-day production throughout the year.[236] Third, the PV projects face increased financial, operational and regulatory risks.[237] The loss of the FIT has in particular affected the investors' "ability to

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229 RD 413/2014, **Exh. C-304**.

230 Order on Parameters, **Exh. C-305**.

231 Reply, para. 251.

232 ASoC, para. 291(b), discussing RDL 9/2013, **Exh. C-302**, Article 2; Law 24/2013, **Exh. C-303**, Article 14.7; RD 413/2014, **Exh. C-304**, Article 11.

233 ASoC, para. 291(c), discussing RD 413/2014, **Exh. C-304**, Article 21.4.

234 ASoC, paras. 309-311; see also Reply, paras. 45, 561.

235 ASoC, para. 313.

236 ASoC, para. 315, discussing Brattle's Second Expert Report, para. 138.

237 ASoC, para. 317.

meet their debt obligations, which has manifested itself differently across the Claimants' projects".[238]

292. Unlike what Spain argues, the Claimants deny that the New Regime provides them with a "reasonable return".[239] First, the 7.398% return is pre-tax rate, i.e. equivalent to 5.179% after tax.[240] Moreover, it operates as a cap on returns.[241] Second, Spain contradicts itself when it argues, on the one hand, that producers may obtain higher returns if they beat the parameters of the standard installations, and, on the other hand, that such higher returns were objectionable under RD 661/2007.[242] Third, the concept of reasonable return itself is subject to change in light of the broad discretion left to the Government.[243] Finally, the Claimants challenge the transparency of the implementation of the New Regime. The Transitory Period left PV investors in the dark as to the precise level of remuneration for existing installations.[244] In support, they point to a statement made by the European Commission in July 2015 noting the legal uncertainty created by the Transitory Period.[245] In this context, the Claimants also observe that the Government ultimately used its own parameters to calculate the Special Payment, notwithstanding the fact that it had instructed two independent consultancy firms, Roland Berger and Boston Consulting Group, to assist in the determination of the Special Payment.[246] The Claimants further complain that the PV industry was not consulted about the parameters of the New Regime.[247]

293. On the basis of these facts, the Claimants allege breaches of Article 10 of the ECT and contend that Spain's defences are without merit.

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238 ASoC, paras. 54, 318 *et seq*.

239 Reply, paras. 252-261.

240 Reply, para. 253.

241 C-PHB2, para. 31, discussing Law 24/2013, **Exh. C-303**, Article 14, which states that the "remuneration regime will not exceed the minimum level […] order to achieve reasonable rates of return".

242 Reply, para. 257.

243 Reply, para. 259.

244 Reply, paras. 262-263.

245 Reply, para. 278, discussing European Commission, "Macroeconomic imbalances: Country Report – Spain 2015", European Economy Occasional Papers 216, June 2015, **Exh. C-632**, p. 63.

246 Reply, para. 262.

247 Reply, paras. 273-277.

g. *Spain's conduct breached the ECT*

i. *The Disputed Measures frustrated the Claimants' legitimate expectations*

(a) Scope and content of the obligation

294. The Claimants submit that pursuant to Article 26(6) of the ECT, the treaty itself is the primary source of law applicable to the merits of the dispute and determines the standards of protection available to an investor against the actions of the host State and whether those obligations have been breached. Customary international law principles, although relevant, only apply where the ECT is silent and therefore are a secondary source of substantive law.[248]

295. The ECT, being an international treaty, "must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the ECT's object and purpose".[249] The Claimants submit that investments in the energy sector involve high-value long-term commitments in projects that cannot easily adapt to the vagaries of legal and political changes. Consequently, the ECT's fundamental objective is "to facilitate transactions and investments in the energy sector by reducing political and regulatory risks".[250] According to the Claimants, the ECT seeks to accomplish this objective in two ways. First, by requiring Contracting States to maintain a stable, predictable and transparent legal and regulatory investment framework. Second, by offering more robust levels of protection than ordinary bilateral investment treaties,[251] subject to very few exceptions with respect to a host State's right to regulate.[252]

296. For the Claimants, a central tenet of Spain's obligation "to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment" is to refrain from conduct that defeats the legitimate expectations on which an investor relied at the time of making its investment.[253] In order to determine whether legitimate

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248 ASoC, paras. 382-386.

249 ASoC, para. 389, discussing the application of Articles 31 and 32 of the Vienna Convention of the Law of Treaties of 23 May 1969, 1155 UNTS 331 ("VCLT").

250 ASoC, para. 395.

251 ASoC, paras. 395-396, 398.

252 ASoC, paras. 404-405.

253 ASoC, para. 430, citing *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, **Exh. CLA-22,** paras. 302-303; *International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion dated 1 December 2005, **Exh. CLA-20**, para. 25; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exh. CLA-34**, para. 609.

expectations have been created, the Claimants submit that regard must be had to the conduct of the host State, including (i) the legal order of the host State at the time when the investment was made (*inter alia* "legislation and treaties, and assurances contained in decrees, licences and similar executive assurances or undertakings");[254] and (ii) "any undertakings or representations made explicitly or implicitly by the host State".[255]

(b) The Claimants' legitimate expectations

297. The Claimants submit that, when they invested in the Spanish PV sector, they had reasonable and legitimate expectations that the legal and business environment would remain stable and predictable. Specifically, they expected that their projects would be entitled to the economic incentives promised by RD 661/2007 for their entire operational lifetime and that any future revisions to these incentives would not affect their investments.[256] This expectation was created by (i) the explicit guarantees and assurances made by Spain in the text of RD 661/2007 (on which see *supra* V.A.1.d) and (ii) the numerous public statements made by Spain and various entities, regarding the application of the regime. Moreover, these expectations were shared by other investors in the RE sector, as well as lenders, legal advisors and energy consultants.[257]

298. The Claimants assert that Spain gave rise and reinforced the Claimants' expectations by making repeated statements regarding the stability of the legal regime during the period in which the Claimants invested. That apart, various Government entities and officials – such as IDAE, CNE/CNMC and InvestInSpain – made numerous representations to the same effect both before and after the approval of RD 661/2007, which confirm the legitimacy of the Claimants' expectations (set out in detail at Section

254 ASoC, para. 438, citing *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **Exh. CLA-29**, paras. 264-266; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exh. CLA-24**, paras. 130, 133; R. Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12 Santa Clara Journal of International Law 7, **Exh. CLA-162**, p. 23.

255 ASoC, para. 433, citing R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2nd ed, Oxford University Press 2012), **Exh. CLA-112,** p. 145; *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **Exh. CLA-15**, para. 154. See also ASoC, para. 432, citing *International Thunderbird Gaming Corporation v. Mexico*, Award, 26 January 2006, **Exh. CLA-21**, para. 147.

256 ASoC, paras. 440-442; Reply, para. 493.

257 Reply, para. 493.

V.A.1.d.iii above).[258] According to the Claimants, these representations "estop Spain from now claiming that it reserved the right to dismantle the RD 661/2007 regime".[259]

299. In particular, the Claimants contend that the statements made by various Governmental entities – specifically CNE, CNMC,[260] IDAE and InvestInSpain – are attributable to Spain.[261] In this respect, they argue that the relevant actions of CNE / CNMC, IDAE and InvestInSpain are attributable to Spain pursuant to Article 4 of the International Law Commission Draft Articles on State Responsibility ("ILC Articles"), as these entities qualify as organs of the State.[262] In the alternative, the Claimants submit that CNE / CNMC's actions are attributable to Spain pursuant to Article 5 of the ILC Articles, because these entities were empowered to and did exercise governmental functions.[263] In the further alternative, the Claimants argue that the acts of CNE, CNMC, IDAE and InvestInSpain are attributable to Spain under Article 8 of the ILC Articles, i.e. these entities acted in accordance with Spain's instructions or under its direction and control.[264]

300. Finally, in the Claimants' view, a number of other actors shared their expectations on the application of RD 661/2007, which demonstrates the objective nature and reasonableness of their expectations. They refer to other investors,[265] such as

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258 See also, C-PHB1, paras. 88-89.

259 Reply, paras. 68, 521-523.

260 The Comisión Nacional de los Mercados y la Competencia, which succeeded the CNE in 2013.

261 See, ASoC, paras. 407 *ff*; Reply, para. 424, discussing the ILC Articles, **Exh. CLA-13**. See also, C-PHB1, Section 22. In response to the Tribunal's question at the Hearing (Hearing on Liability Tr. [English version], Day 7 at 287:22-288:5), as to which law is applicable for determining whether these entities are authorized to speak for Spain, the Claimants submitted in their C-PHB1 that the Tribunal should apply international law, and specifically, the ILC Articles on State Responsibility for Internationally Wrongful Acts. The Claimants submitted that pursuant to Article 22 of the ECT, if Spain entrusts an entity with regulatory, administrative or governmental authority, then that entity is also required act consistently with the ECT when exercising such authority. In this connection, the Claimants submit that, "when considering a breach of the ECT, the conduct of State entities and Spain's obligations under Part III [of the ECT] must be assessed together. […] It is therefore logical to determine the issue with reference to the Articles of State Responsibility for Internationally Wrongful Acts". See C-PHB1, para. 348.

262 See ASoC, paras. 410-412, 416-; Reply, paras. 433-454; C-PHB1, para. 349.

263 See ASoC, paras. 417-419; Reply, paras. 455-466.

264 See ASoC, paras. 413-415; Reply, paras. 467-492.

265 Reply, paras. 85-91.

Iberdrola;[266] legal advisors instructed by the Claimants;[267] lenders involved in the financing of RE projects in Spain;[268] and Grant Greatrex, one of Spain's experts in this arbitration.[269]

(c) Spain's breach of the Claimants' legitimate expectations

301. The Claimants submit that based on the expectation that their projects would be entitled to the economic incentives promised by RD 661/2007 for their operational lifetime and that any future revisions would not affect their investments, they invested close to EUR 2 billion in the Spanish PV sector. However, in disregard of these expectations, Spain enacted the measures that fundamentally altered, and subsequently withdrew, the legal and regulatory framework on which the Claimants had relied to make their investment. The Claimants' arguments on the effects of the Disputed Measures are summarized in Section V.A.1.f above. According to the Claimants, this overhaul of the economic incentives regime, constitutes a clear violation of Spain's FET obligation under the ECT.[270]

ii. *Spain failed to create stable investment conditions*

302. As a separate breach,[271] the Claimants assert that the first sentence of Article 10(1) of the ECT requires Spain to "create stable, equitable, favorable and transparent conditions" for investment, which is a heightened obligation, beyond the FET obligation found in other treaties.

303. The Claimants clarify that whether the obligation is considered a sub-set of the FET standard or an independent obligation Spain must maintain stability such that future changes to the legal framework are (i) predictable; (ii) do not alter the fundamentals of the legal framework on the basis of which the investment was made; and (iii) do not fundamentally alter the economics of the investment absent the payment of

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266 Reply, paras. 86-88, discussing Iberdrola, Presentation on "Renewable Energies in Spain: New Regulation (RD 661/2007)", 29 May 2007, **Exh. C-566** and Presentation by Carlos Gascó Travesedo, Head of the Prospective Department, "Iberdrola Renewables", 22 October 2009, **Exh. C-575**.

267 Reply, paras. 92-98.

268 Reply, paras. 99-104.

269 Reply, paras. 105-109.

270 C-PHB1, paras. 182-187, relying extensively on the decision in *Ioan Micula, Viorel Micula and others v. The Republic of Romania,* ICSID Case No. ARB/05/20*,* Award, 11 December 2013**, Exh. CLA-161**.

271 C-PHB1, para. 166; Reply, para. 592.

compensation.[272] Consequently, according to the Claimants, continuous changes in the legal framework applicable to an investment, which undermine the stability and predictability of the business and legal environment or keep the investor in the dark as to the framework that will eventually be applied, constitute a breach of this standard.[273] The Claimants specify that in alleging a breach of this obligation, they do not posit that Article 10(1) is a stabilisation clause requiring States to freeze their legislation or curbing the State's legitimate right to regulate.

304. According to the Claimants, Spain has violated its obligation to provide stable investment conditions by unreasonably modifying the legal framework.[274] In essence, Spain subjected the Claimants' investments to a "rollercoaster ride" of constant and drastic changes in the regulatory framework ultimately dismantled the RD 661/2007 regime. In doing so, Spain reneged on the promises given under RD 661/2007 and consequently breached its obligation to provide stable investment conditions pursuant to Article 10(1).[275]

iii. *The Disputed Measures are unreasonable, arbitrary and disproportionate*

(a) The Disputed Measures are unreasonable

305. The Claimants submit that a State's conduct is reasonable, when it relates to a rational policy and, in implementing that policy, adopts acts that are appropriately tailored to the pursuit of that rational policy, with due regard for the consequences imposed on investors.[276] In other words, the ends and the means to those ends must both be reasonable.

306. The Claimants further submit that, in order to meet this threshold, Spain must first identify a rational policy goal that it sought to achieve by enacting the Disputed Measures and then show that the Disputed Measures were reasonably related to or appropriately tailored to addressing these policy goals, always keeping in mind the consequences for the Claimants. It is readily apparent, the Claimants say, that the Disputed Measures did not meet this threshold.[277]

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272 C-PHB1, paras. 165-170, 176; ASoC, paras. 436-439.

273 ASoC, paras. 436-439; Reply, paras. 594, 599.

274 Reply, paras. 595-597, discussing the relevance and non-applicability of the legal authorities cited by Spain in support of its argument.

275 C-PHB1, para. 177; Reply, paras. 592-594; ASoC, paras. 452-453.

276 ASoC, para. 472; C-PHB1, paras. 201-202.

277 Reply, paras. 619-620.

307. First, each of the Disputed Measures was unreasonable because they imposed retroactive incentive cuts for existing investments. According to the Claimants, given the nature of investments in PV installations (requiring large upfront capital expenses and relying on debt financing), a long term FIT was necessary to enable the Claimants to service their debt and receive a return on their investment, with the result that a significant cut in the FIT, wiping out the return and making it impossible to recoup initial expenses, was unreasonable.[278]

308. Second, the Disputed Measures were not tailored to meet stated policy goals:

a. No specific explanation or rationale was provided for RD 1565/2010. To the extent the measure sought to address the "growth in recent years in the number of electric power installations within the Special Regime" and "additional technical requisites" needed to guarantee the operation of the electricity system and facilitate the growth of RE technologies, the Claimants consider that the decrease of the FIT effected by RD 1565/2010 was not the appropriate mechanism to achieve these goals.[279]

b. Similarly, the severe and permanent cut to the FIT introduced by RDL 14/2010 was inappropriate to address the stated policy behind the introduction of this measure i.e. to remedy, the tariff deficit. According to RDL 14/2010, the tariff deficit was caused by the fall in electricity demand, the fluctuation in fuel prices and "favourable weather". The Claimants contend that all three circumstances were temporary, were not caused by the Claimants' installations, and did not alter the costs of the installations. It was therefore unreasonable to subject the Claimants' investments to a cut in the FIT on this basis.[280]

c. Further, the cancellation of the mechanism whereby the FIT indexed for inflation on the basis of the CPI was also unreasonable. This is because the index used instead provided for a lower FIT only in order to reduce the income of the existing installations.[281]

d. Moreover, the rationale behind the New Regime was unreasonable. The alleged justification for the further cut to PV tariffs in 2013 was that "(1) 'the volume of rainfall and wind conditions have been much greater than historical averages'; and (2)

278 C-PHB1, paras. 203-204.
279 C-PHB1, paras. 205-206.
280 C-PHB1, paras. 207-211.
281 C-PHB1, paras. 212-213.

there had been a 2.3% fall in electricity demand".[282] The Claimants explain that PV installations were protected against a demand risk because they had priority access to the transmission grid. Accordingly, a reduction in demand (which is in any event, temporary) cannot justify the permanent abolition of a regulatory regime. That apart, say the Claimants, "it is absurd to change a long-term guaranteed FIT regime because the weather has changed", especially when an increase in rainfall would reduce the amount of PV energy produced.[283] Additionally, the New Measures were not implemented with due regard to the impact on existing investors.[284] Finally, assuming that the policy rationale behind the New Measures was justified, the CNE had recommended a suit of proposals to address the tariff deficit, which were reasonable and did not affect the FITs for existing installations. In other words, it was possible to adopt other remedies that were adequately shaped to achieve the policy rationale, with more limited impact for the Claimants. However, the Government largely ignored these proposals and implemented the New Measures instead, without taking into account the devastating consequences for existing PV installations.[285]

(b) The Disputed Measures are arbitrary

309. The Claimants contend that the standard for determining if a measure is arbitrary is reasonableness. In other words, measures that are not based on reason will be deemed arbitrary. On this basis, the Claimants contend that the Disputed Measures are arbitrary for the same reasons that they are unreasonable.[286] For the Claimants, Spain's proposed threshold for arbitrariness is artificially high. Nevertheless, the Claimants view the Disputed Measures as arbitrary even when assessed against Spain's standard.[287]

310. Finally, the Disputed Measures are arbitrary for other reasons as well, in particular because:

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282 C-PHB1, para. 215, discussing RDL 9/2013, **Exh. C-302**, Preamble, pp. 52110-52111 (Claimants' English translation).

283 C-PHB1, para. 216.

284 C-PHB1, para. 217, discussing the CNE, Report on the Spanish Electricity Sector, 7 March 2012, **Exh. C-334.**

285 C-PHB1, paras. 214-228.

286 C-PHB1, para. 229; ASoC, paras. 465-471.

287 C-PHB1, para. 230.

a. They artificially cap the number of years for which the Claimants' PV installations will receive benefits to 30 years, when in reality, the operation life of PV plants is longer.

b. The cap on the number of hours for which benefits are granted is arbitrary, as the same cap applies across Spain, without regard to the sunlight received in the different regions.

c. Spain has not explained how it arrived at a target rate of return of 7.398% pre-tax, which rate is, in any event, unreasonable.[288]

(c) The Disputed Measures are disproportionate

311. A State breaches the FET standard if it adopts measures disproportionate to the aims pursued. This implies that measures must be (1) suitable; (2) necessary; and (3) proportionate to the aim pursued. The Claimants argue that the Disputed Measures satisfied none of these characteristics.[289]

312. The Disputed Measures were not suitable because attacking the PV sector was not the solution to the tariff deficit problem, which existed before Spain induced the Claimants to invest and which was caused by the Spanish Government's failure to set electricity prices at a level that was sufficient to cover the costs of the system. Further, as there is no evidence that the Claimants were earning exorbitant revenues, the suitability of the Disputed Measures cannot be defended on the ground that they sought to rebalance the costs and incomes of the electricity system.[290]

313. The Disputed Measures were not necessary; other more reasonable and less harmful measures were available to address the tariff deficit.[291]

314. The Disputed Measures were not proportionate either as they have drastically reduced the Claimants' cash flows, brought their project companies to the verge of insolvency, and wiped out the returns that the Claimants ought to receive.[292]

288 C-PHB1, paras. 235(i)-(iii).
289 Reply, para. 627; C-PHB1, para. 249; ASoC, paras. 481-482.
290 C-PHB1, paras. 250-251; Reply, paras. 628-629.
291 C-PHB1, para. 252; Reply, para. 632.
292 C-PHB1, para. 253; Reply, paras. 635-636.

iv. *The Disputed Measures were not transparent*

315. Article 10(1) of the ECT requires a State to "encourage and create […] transparent conditions for Investors of other Contracting Parties to make Investments in its Area". The Claimants submit that Spain's conduct in dismantling the RD 661/2007 regime lacked transparency because (i) the 11-month Transitory Period left PV producers in the dark as to what would happen next; (ii) the criteria underlying the New Regime and future revisions were not explained; (iii) Spain could change some parameters of the standard installation without its methodology being known; (iv) neither is a methodology for reviewing the Special Payment established; and (v) similarly, there is no transparent methodology for determining whether a plant has achieved reasonable profitability.[293]

316. In response to Spain's contention that it acted transparently, the Claimants put forward the following:

a. Spain failed to consult the affected parties prior to enacting the Disputed Measures. The most significant measures, i.e. RDL 14/2010 and RDL 9/2013, were introduced without any dialogue with the PV sector. Spain's argument that these RDLs were designed for emergencies and do not allow for consultation, is an excuse.[294]

b. Spain's reliance on reports issued by CNE in 2012 and 2013 to argue that the introduction and implementation of the New Regime was transparent is misplaced. Spain ignored the recommendations in CNE's 2012 report. Consequently, the public consultation that was undertaken for this report was "at best pointless and at worst a sham".[295] As regards the 2013 Reports, these were issued after the New Regime was introduced by RDL 9/2013 and could not have influenced that regulation. In any event, the consultation process for these reports "had not guaranteed the effective participation of affected parties".[296]

c. Similarly, the Memorandum issued by the Ministry concerning the June 2014 Ministerial Order rejected the "619 submissions from companies, industrial associations, and Autonomous Communities" merely on the basis that the Order

293 Reply, para. 604; ASoC, para. 464(a)-(f).
294 C-PHB1, para. 242.
295 C-PHB1, para. 243.
296 C-PHB1, para. 244.

complied with RDL 9/2013 and Law 24/2013 (both of which had been implemented without consultation).[297]

317. In sum, the Claimants assert that Spain's conduct was plainly not in conformity with the transparency requirements under the ECT.[298]

v. *The Disputed Measures have impaired the Claimants' investments*

318. Article 10(1) of the ECT provides that Spain "shall [not] in any way impair by unreasonable or discriminatory measures th[e] management, maintenance, use, enjoyment or disposal" of Claimants' investments. Thus, to establish a breach of this obligation, it suffices to show that the measures in question were either unreasonable or discriminatory. The standard of reasonableness, according to the Claimants, is that the State's conduct must bear a reasonable relationship to some rational policy.[299] In other words, as with the FET standard of reasonableness discussed above, Spain must show that its measures were: (a) taken in pursuance of a rational policy goal; and (b) carefully tailored to achieve that goal.[300]

319. In light of that standard, the Claimants reiterate the grounds on which they assert that the Disputed Measures were unreasonable. In sum, they contend that the remediation of the tariff deficit, cannot be a policy goal that justifies interference with the Claimants' investment. They submit that the tariff deficit was caused by Spain's persistent failure to set consumer prices at a level that was high enough to cover the actual costs of the Electricity System. As a consequence, enacting measures that are harmful to the PV sector to finance the result of several years of regulatory malfeasance is arbitrary and unreasonable.[301]

vi. *The Disputed Measures violated the constant protection and security obligation*

320. Finally, the Claimants argue that Spain breached the obligation to provide their investments constant protection and security. In particular, they claim as follows:

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297 C-PHB1, paras. 242-246.

298 Reply, para. 615.

299 ASoC, paras. 490-491, relying on *Saluka Investments B. V. v. The Czech Republic,* Partial Award, 17 March 2006, **Exh. CLA-22**, para. 460; C-PHB1, para. 255.

300 ASoC, para. 491.

301 ASoC, para. 492; Reply, paras. 644-646.

> This obligation requires Spain to provide legal security to Claimants' investments. It is breached where a change in the legal framework makes it impossible for an investor to preserve and continue its rights associated with the investment. The obligation has been breached here as the Disputed Measures have caused Claimants to lose their right to the FIT.[302] (internal footnote omitted)

h. ***Spain's defences are without merit***

321. The Claimants contend that Spain's defences are ill-founded and contradicted by the evidence.

i. ***Spain's first defence: the RD 661/2007 regime was not guaranteed***

322. According to the Claimants, Spain's key defence is that they had no objectively reasonable expectation regarding the RD 661/2007 regime because they should have known that the incentives granted to them were subject to an overarching "principle of reasonable profitability" (or "reasonable return") found in the 1997 Electricity Law.[303]

323. For the Claimants, Spain's reliance on that principle is misplaced. The 1997 Electricity Law did not define reasonable return. It merely outlined the factors for determining the specific remuneration that would provide investors with a reasonable return. Such reasonable return had to be implemented through regulation. In RD 661/2007, Spain implemented the reasonable return principle by providing for specific remuneration in the form of a long-term FIT.[304] In other words, RD 661/2007 represented what Spain considered a reasonable return in compliance with the principles of the 1997 Electricity Law at the time of the Claimants' investment.[305]

324. At the same time, the Claimants do not deny that Spain had the power to adjust the RD 661/2007 economic regime as costs of investment came down. According to the Claimants, this makes economic sense. However, as provided in Article 44.3 of RD 661/2007, any adjustments in remuneration could not affect existing installations.[306]

325. Finally, the Claimants argue that most countries with FITs use concepts similar to reasonable return in order to calculate FITs. However, reasonable return is a concept aimed at the regulator, not at investors; it is the basis upon which the regulator

302 C-PHB1, para. 256; ASoC, paras. 494-497; Reply, paras. 648-652.

303 See, PO12 C-PHB2, paras. 242-244; Reply, paras. 151 *et seq*.

304 Reply, paras. 151-155; C-PHB2, para. 30.

305 C-PHB1, para. 278.

306 Reply, paras. 163-164.

calculates the tariff. Thus, under RD 661/2007, the regulator determined what the return necessary to induce investment.[307] This being so, an efficient investor with operating costs below those assumed by the regulator would earn a higher return than the one used to set the FIT. In the Claimants' view, this is perfectly admissible and even expected.[308]

ii. *Spain's second defence: Spain did not make a specific commitment*

326. Spain's second defence is that it made no commitment sufficiently specific to prevent it from enacting the Disputed Measures and that, absent such specific commitments, no legitimate expectations can arise. According to the Claimants, it is incorrect that legitimate expectations can only arise out of a specific commitment given by the host State to the investor, much less that such a commitment must be embodied in a contract containing a stabilization clause. While specific assurances may reinforce an investor's legitimate expectations, they are not indispensable. Guarantees included in general laws can give rise to legitimate expectations as well.[309]

327. For the Claimants, "[i]t is obvious that RD 661/2007 contained a number of express commitments on which Spain intended investors to rely".[310] First, Article 22 confirmed that installations that registered within the tariff window locked in the right to the tariff; second, Article 36 provided a specific tariff for 25 years and beyond; and third, Article 17 confirmed the right to obtain the FIT upon obtaining a RAIPRE certificate. These commitments created expectations, which were crystallised when the Claimants obtained RAIPRE certificates confirming their entitlement to the RD 661/2007 FIT. Spain reinforced such expectations by guaranteeing that changes to these incentives would not apply retroactively (under Article 44.3, which is an "express stabilisation commitment" according to the Claimants[311]) and by repeatedly confirming its intention as to the application of RD 661/2007.[312] Alternatively, assuming that a specific commitment by the host State is required to generate legitimate expectations, the Claimants observe that the provisions referred to above did constitute specific promises and representations.

307 C-PHB1, paras. 277-278.
308 C-PHB1, para. 279; Reply, paras. 167-171.
309 Reply, paras. 507-509; CPHB1, paras. 189-191.
310 C-PHB1, para. 182.
311 C-PHB1, para. 186.
312 Reply, paras. 507-509; C-PHB1, para. 186.

328. Refuting Spain's argument that Article 44.3 of RD 661/2007 is not a stablisation clause and that, in any event, it was not breached, the Claimants make the following points:

a. Article 44.3 is evidently a stabilisation clause as its terms were specific enough: it expressly stated that revisions to the FIT would not affect installations that had qualified before the review. Moreover, this commitment was made specifically to those installations that had obtained their RAIPRE certificates within the term prescribed.[313]

b. Spain's argument that Article 44.3 has not been breached because the changes introduced did not constitute a "tariff review" but the introduction of a new remuneration format is flawed. Spain cannot get around the plain language of Article 44.3 by claiming that its actions are outside the purview of Article 44.3. This is precisely the sort of abusive and bad faith State conduct against which the FET standard protects investors.[314]

c. Spain's further argument that Article 44.3 has not been breached because RDL 14/2010 and RDL 9/2013 did not change the numeric amount of the tariff but only introduced an hours cap and a modification of the system of remuneration, is equally flawed. Both measures had an effect comparable in magnitude to the reduction in the original FIT.[315]

iii. *Spain's third defence: the Claimants' returns were capped at 7%*

329. At the outset, the Claimants submit that this defence "is perhaps the most extravagant of all Spain's defences since it comes in two contradictory forms": on the one hand Spain asserts that the reasonable return was capped at 7% and, on the other, it argues that the reasonable return was dynamic. According to the Claimants, neither position is supported by the evidence. [316]

330. The first piece of evidence on which Spain relies to support the existence of a 7% cap is the *Memoria Económica*. The Claimants submit that the *Memoria Económica* was not a public document. They cite the testimony of one of Spain's experts, Mr. Greatrex,

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313 C-PHB1, para. 197.

314 CPHB1, para. 198.

315 C-PHB1, para. 199.

316 PO12 C-PHB2, para. 261.

who testified that he saw the *Memoria* for the first time in 2012.[317] Moreover, for them, the statement made by Spain's other expert, Mr. Olivas, at the hearing that the *Memoria Económica* was distributed to the RE associations was new and unsubstantiated.[318] When the Claimants requested the *Memoria* as part of the regulatory dossier of RD 661/2007 during the document disclosure phase, Spain agreed to produce it without suggesting that it was publicly available (contrary to what it did in respect of other documents).[319]

331. The Claimants add that the *Memoria* does not state that changes to RD 661/2007 will be made. It merely provides that the tariff set out in RD 661/2007 aims at providing PV investors with an after tax return of "approximately 7%", without suggesting that this operates as a cap.[320] On the contrary, the word "approximately" makes clear that the *Memoria* recognized that investors could earn in excess of 7%.[321]

332. The second piece of evidence on which Spain relies is the PER 2005-2010. The Claimants point out that the reference to 7% in the PER 2005-2010 relates to *all* RE technologies and not just the PV sector. Moreover, the PER also refers to returns of "around 7%" after tax, which again speak against a cap. Additionally, the Claimants point out that the PER was not consistent with the *Memoria.* While the reference to 7% in the PER relates to all RE technologies, the *Memoria* provides different figures (ranging from 5% to 11%) for different types of RE technologies. In other words, so argue the Claimants, there was no clear or consistent indication that reasonable profitability meant 7% only.[322]

333. Moreover, Spain's reliance on the testimony of its expert MG&A, is of no assistance as MG&A admitted during the hearing that there was no cap on returns under RD 661/2007.[323]

334. In addition, the Claimants note that the reference to 7% in the *Memoria* and the 7.398% return supposedly offered by the new regime relate to two qualitatively different concepts. RD 661/2007 provided the remuneration based on production and

317 C-PHB1, para. 138; PO12 C-PHB2, paras. 265, 267.
318 C-PHB1, para. 140.
319 C-PHB1, para. 142.
320 C-PHB1, para. 135; C-PHB2, para. 49.
321 C-PHB1, para. 266.
322 C-PHB1, para. 136; PO12 C-PHB2, para. 268.
323 C-PHB1, para. 271; PO12 C-PHB2, para. 265.

incentivized installations to produce as much electricity as possible, while the new regime supposedly provides a 7.398% return irrespective of the production.[324]

335. The "dynamic return" theory, so say the Claimants, also lacks a basis. The Claimants acknowledge that the reasonable return would have to change over time as the cost of investments went down. However, the Claimants submit that "Spain has failed to provide any evidence that the cost of money on capital markets had changed between 2007 (when RD 661/2007 was passed) and 2013 (when the New Regime repealed RD 661/2007) thus necessitating a change under the '*dynamic*' return theory".[325] In any event, even if such a change was necessary, Spain was estopped from altering the rate of return for existing investments.[326]

iv. *Spain's fourth defence: the Claimants were receiving "luxury profits"*

336. The Claimants submit that Spain has presented no evidence to prove that the Claimants were receiving "exorbitant remuneration" or "luxury profits". They contend that the absence of evidence demonstrating that the Claimants were earning excessive returns is fatal to Spain's case, as without such evidence the reasonable return defence has no foundation.[327]

v. *Spain's fifth defence: the Claimants did insufficient due diligence*

337. The Claimants contend that they carried out sufficient due diligence, which considered the relevant jurisprudence of the Spanish Supreme Court and confirmed their right to receive the FIT.

338. For the Claimants, their due diligence was thorough and included requests for advice from numerous reputable law firms.[328] None of these firms suggested that Spain could make retroactive adjustments to RD 661/2007.[329] If Spain's argument were correct, the Tribunal would have to find that all of the law firms in Spain acted negligently by failing to inform investors and banks that RD 661/2007 could change retroactively.[330]

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324 C-PHB2, paras. 51-52.

325 PO12 C-PHB2, para. 270.

326 PO12 C-PHB2, para. 272.

327 C-PHB1, paras. 273-276; PO12 C-PHB2, paras. 307-308.

328 See Reply, paras. 206-213, also referring to Annex 1 to the Reply, which is a table setting out the legal advisors engaged by the Claimants.

329 Reply, para. 213; C-PHB1, paras. 128-133.

330 C-PHB1, para. 131; PO12 C-PHB2, paras. 305-306.

vi. *Spain's sixth defence: Supreme Court jurisprudence supports Spain's case*

339. The Claimants disputes Spain's reliance on a number of Supreme Court judgments, which allegedly hold that Article 44.3 of RD 661/2007 cannot be interpreted as a stabilization commitment. These Supreme Court decisions relate to a different economic regime and a different period. Hence, they are irrelevant to determine whether the Claimants had a reasonable and legitimate expectation that no retroactive changes would be made.

340. First, the Claimants submit that the vast majority of the judgments invoked by Spain were issued after the Claimants made their investment and can thus not be taken into account to assess the Claimants' legitimate expectations.[331] Only four of the judgments were in existence when the Claimants made their investments.[332] However, the *dicta* contained in these judgments cannot be deemed to override the contrary statements by Spain in respect of RD 661/2007, especially since these judgments do not deal with RD 661/2007.[333]

341. The Claimants further remark that no decisions pre-dating the Claimants' investments discuss Article 40.3 of RD 436/2004.[334] In particular, the Supreme Court judgments of 2005 to 2007 refer to installations that did not have the benefit of the tariffs specified in RD 436/2004 and were not subject to the "stability commitment" at Article 40.3.[335]

342. Second, the three Supreme Court judgments of December 2009 invoked by Spain, which address challenges arising from the replacement of RD 436/2004 by RD 661/2007,[336] could not have informed the Claimants' expectations at the time of the investments. Indeed, so the Claimants argue, their investments were finalized (or were

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331 Reply, para. 178.

332 Reply, para. 181, referring to Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, rec. 73/2004, **Exh. R-182**; Judgment of Section Three of the Supreme Court of 25 October 2006, RCA 12/2005, **Exh. R-67**; Judgment of Section Three of the Spanish Supreme Court of 20 March 2007, rec. 11/2005, **Exh. R-174**, and Judgement of Section Three of the Spanish Supreme Court of 9 October 2007, rec. 13/2006, **Exh. R-164**.

333 Reply, para. 181.

334 C-PHB1, paras. 296-299 and Appendix 1, Table A; C-PHB2, paras. 54-59.

335 C-PHB1, Appendix 1, Table A; C-PHB2, para. 54.

336 Judgment of Section Three of the Spanish Supreme Court of 3 December 2009, rec. 151/2007**, Exh. R-183**, Judgment of Section Three of the Spanish Supreme Court of 9 December 2009, rec. 152/2007, **Exh. R-180**; Judgment of Section Three of the Spanish Supreme Court of 18 November 2009, rec. 43/2007, **Exh. R-184**.

in the process of completion) before these judgments were rendered in December 2009.[337] In any event, they do not help Spain's case, because RD 661/2007 was a vast improvement over its predecessor RD 436/2004. Therefore, the change from one regime to the other could not have indicated that the Government would implement retroactive tariff cuts such as the Disputed Measures.[338]

343. By contrast, the Claimants rely on a Supreme Court decision of 20 April 2016, in which the Supreme Court held that, once a PV plant was registered, its owners had legitimate expectations to receive the FIT for which they were registered.[339] The Claimants observe that the plaintiff in that case was an investor who had attempted to register an installation in the RD 1578/2008 pre-assignment register. RDL 1/2012 then came into force on 28 January 2012, implementing a moratorium that suspended the registration of all new RE installations in the Special Regime. This suspension prevented the plaintiff from registering its installation in the pre-assignment register of RD 1578/2008 and from receiving the RD 1578/2008 FIT.[340] The Supreme Court upheld the claim considering that "the regulatory change that Royal Decree-Law 1/2012 entailed was surprising and that it broke the principle of legal certainty by suspending the payment pre-allocation procedures", and that RD 1578/2008 had "created some solid expectations for the owners of the installations that they would obtain registration in that Registry and the corresponding payment for their energy in the terms provided".[341] In the Claimants' view, this decision shows that the Supreme Court fully recognizes their expectations.[342]

vii. *Spain's seventh defence: the Disputed Measures were justified*

344. In the Claimants' submission, Spain has offered various "errant and inconsistent justifications for the Disputed Measures", none of which are defensible.[343] In particular, the Claimants object to Spain's arguments that the measures were necessary (a) to

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337 Reply, para. 192.

338 Reply, paras. 190-204.

339 Claimants' Submission on the 20 April 2016 SSC Judgment, 30 May 2016.

340 Claimants' Submission on the 20 April 2016 SSC Judgment, 30 May 2016, para. 2.

341 Claimants' Submission on the 20 April 2016 SSC Judgment, 30 May 2016, para. 5, discussing Decision of the Spanish Supreme Court (Contentious-administrative Chamber), Appeal No. 434/2014, 20 April 2016, **Exh. C-687,** p. 3 (Claimants' English translation).

342 Claimants' Submission on the 20 April 2016 SSC Judgment, 30 May 2016, para. 16.

343 Reply, para. 26.

address the tariff deficit; (b) to protect consumers; and (c) to address EU state aid guidelines.[344]

(a) Tariff Deficit

345. For the Claimants, the main reason for the implementation of the Disputed Measures was Spain's desire to tackle the tariff deficit. A number of contemporaneous documents, such as a 2012 CNE Report[345] and the preamble to the laws and regulations introducing the Disputed Measures indeed refer to the need to remedy the tariff deficit.[346] In the Claimants' view, Spain is reluctant to admit that the tariff deficit motivated the Disputed Measures, because Spain itself caused the deficit and it would thus acknowledge that it breached the ECT.

346. The Claimants argue that the tariff deficit, like the over-capacity in the PV sector,[347] are issues of Spain's own making, which existed long before Spain enacted RD 661/2007. The tariff deficit was the product of Spain's failures to follow its own laws; it was not a policy goal that justified interference with the Claimants' legitimate expectations.[348]

347. Initially, so say the Claimants, the tariff deficit emerged out of a series of miscalculations about the costs and fluctuations in supply and demand.[349] Subsequently, RDL 6/2009 set limits on the growth of the tariff deficit each year and required the Ministry to fix the network access tolls at appropriate rates. However, this was not done because the Government chose to keep artificially low electricity prices for electoral reasons.[350] Similarly, the tariff deficit grew because the Government gave a high number of electricity consumers, essentially all Spanish households, the benefit of the so-called

344 ASoC, paras. 322-343; Reply, paras. 287-365.

345 CNE, Report on the Spanish Electricity Sector, 7 March 2012, **Exh. C-334**.

346 Reply, paras. 289-294; PO12 C-PHB2, paras. 274-276.

347 The Claimants argue that Spain's first justification for RDL 14/2010 measures was over-capacity of the PV sector, which would ultimately have the effect of growing the tariff deficit. However, for the Claimants, the main reason for the over-capacity was the decentralized authorization and registration system which Spain put in place and which was centered around the Autonomous Communities, rather than on a sole central control authority such as the Ministry. See ASoC, paras. 323-324.

348 ASoC, paras. 327-343.

349 ASoC, paras. 329, 338.

350 ASoC, paras. 331-332; Reply, para. 295.

TUR (*tarifa de último recurso*, tariff of last recourse), i.e. a price designed to shield consumers from dramatic increases in the market price of electricity.[351]

348. Furthermore, the Claimants argue that Spain ignored all of the CNE's reasonable proposals to address the tariff deficit.[352] They refer in particular to a CNE Report of March 2012, which identified measures to effect savings in the electricity system, without cutting the FIT and without imposing excessive costs on the consumers.[353]

349. Finally, it is the Claimants' position that there is no evidence of causation between the tariff deficit and the cost of the Special Regime (i.e. the PV premiums), contrary to what Spain argues.[354]

350. The Claimants conclude by noting that the Spanish Supreme Court has issued several judgments and two sets of interim measures holding that Spain's failure to comply with the requirements of RDL 6/2009 was a clear violation of Spanish law.[355]

(b) Protection of consumers

351. The Claimants further submit that Spain's argument regarding the protection of consumers appears to have been raised solely for the purposes of this arbitration, as the only stated purpose of the measures was to address the tariff deficit.[356] Indeed, Spain's policies show the opposite to a concern to protect consumers. In effect, Spain increased the VAT on electricity to 21% (when it was as low as 4% or even nil for other products and services at all). It also levies special tax on producers, all of which raises the price of electricity for consumers.[357]

(c) State aid rules

352. The Claimants submit that the EC Decision on State Aid issued on 10 November 2017[358] has no bearing on the present dispute.

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351 ASoC, para. 339.

352 C-PHB1, paras. 303-310.

353 C-PHB1, paras. 303-309, discussing CNE, Report on the Spanish Electricity Sector, 7 March 2012, **Exh. C-334**.

354 C-PHB1, para. 313.

355 ASoC, para. 341.

356 Reply, paras. 330-342.

357 Reply, paras. 335-337.

358 EC Decision on State Aid, **Exh. RLA-201**.

353. First, the Claimants argue, contrary to Spain, that there is no evidence to support the proposition that the New Measures were required to comply with applicable EU State aid rules.[359] In that regard, they note that the EU guidelines being invoked post-date the Disputed Measures;[360] Further, State aid was never mentioned as a purpose of the Disputed Measures.[361] In any event, the Claimants contend that EU law did not require Spain to withdraw the economic regime, particularly not with respect to plants that operate under that regime.

354. Second, the Claimants submit that, contrary to Spain's contentions, the EU Decision could not affect the Claimants' legitimate expectations about the Original Regime, as it did not address that regime at all.[362] The Claimants note Spain's (and the EC's) argument that a beneficiary of unlawful aid cannot entertain legitimate expectations regarding such aid. In response, the Claimants contend that the non-notification of RD 661/2007 does not undermine their legitimate expectations, for the following reasons:

a. As a preliminary point, the Claimants' legitimate expectations have to be adjudged under the ECT and not under EU law;[363]

b. In any event, RD 661/2007 did not constitute State aid under EU law as FIT schemes financed by the end consumer, such as those under RD 661/2007, are not regarded as State aid;[364]

c. Spain itself did not consider the RD 661/2007 FIT to be State aid. Otherwise, it would have notified the EC. Moreover, there is no contemporaneous evidence showing that RD 661/2007 was viewed as unlawful State aid. In other words, Spain

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359 Reply, paras. 344-365; Claimants' comments on EU State aid decision dated 22 December 2017, para. 2.

360 Reply, paras. 349-350, discussing Community Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Number 2014/C200/01 issued by the European Commission and published in the Official Journal of the European Union on 28 June 2014, **Exh. RLA-126** ("2014 Guidelines") and Community Guidelines on State Aid for Environmental Protection, Number 2008/C82/01, issued by the European Commission and published in the Official Journal of the European Union on 1 April 2008, **Exh. RLA-127** ("2008 Guidelines").

361 Reply, para. 351.

362 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 3-4.

363 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 17 *ff*; Claimants' Submission on the EC's written observations dated 5 July 2018, para. 9.

364 Claimants' Submission on the EC's written observations dated 5 July 2018, paras. 10-14.

had no expectation that the Original Regime was State aid, much less that it was unlawful;[365]

d. Further, like Spain, the EC did not deem the RD 661/2007 FIT to constitute State aid. The Claimants point out that the EC monitored Spain's RE support schemes at all times and was therefore on notice of the provisions of RD 661/2007. However, although it had *suo motu* powers to examine unlawful aid, the EC made no suggestions that the RD 661/2007 FIT was State aid at all, let alone that it was unlawful or incompatible;[366]

e. In conclusion the Claimants contend that upholding Spain's argument would permit Spain to benefit from its own wrongdoing, which cannot excuse Spain from liability under international law. Even assuming that the RD 661/2007 FIT did constitute State aid, it would still be compatible with EU law. This is because the Decision makes no finding on the RD 661/2007 FIT, when it could have done so, which shows that the EC "was content that the RD 661/2007 FIT was compatible State aid".[367]

355. Third, the Claimants stress that a "finding of compatibility with EU law [does not] *ipso facto* also amount to a finding of compatibility with the ECT", as the relevant standards under the two treaties are different.[368]

356. Finally, the Claimants deny Spain's contention that compensation awarded by the Tribunal on the basis that Spain modified the Original Regime, would constitute State aid. They submit that the Commission's statement to this effect at paragraph 165 of the EU Decision is not binding on the Tribunal.[369]

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365 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 7-8, 11; Claimants' Submission on the EC's written observations dated 5 July 2018, paras. 15-16.

366 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 9-10; Claimants' Submission on the EC's written observations dated 5 July 2018, para. 17.

367 Claimants' Submission on the EC's written observations dated 5 July 2018, paras. 24-27.

368 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 13-16.

369 Claimants' Comments on EU state aid decision dated 22 December 2017, paras. 17 *et seq*.

viii. *Spain's eighth defence: the Claimants have suffered no loss*

357. The Claimants find this defence "absurd".[370] They have substantiated their losses in their evidence,[371] which losses caused the insolvency of many projects.[372] In any event, the Claimants add, the PO12 phase, "definitively confirms" that each of the Claimants suffered substantial losses.[373] Moreover, the CNMC itself confirmed that the New Regime reduced the remuneration and return of RE installations.[374] In addition, Spain claims that the Measures were intended to cut the tariff deficit and address the over-remuneration of PV plants. The fact that the tariff deficit showed a surplus in 2014 as a result of the New Regime demonstrates that the Measures have caused the Claimants significant losses.[375]

i. *The Disputed Measures have been criticized and challenged*

358. The Claimants also argue that the Disputed Measures were the object of strong domestic and international criticism, not only by PV industry associations and the banking sector, but also by Spain's own organs and the European Commission.[376] In particular, three of Spain's Autonomous Communities brought legal challenges to RDL 14/2010 on constitutional grounds, arguing that such RDL frustrated the rights of Special Regime generators and violated norms of legal certainty and predictability. The Constitutional Court dismissed those challenges without examining the merits as in the meantime the New Measures had overtaken RDL 14/2010.[377]

359. Furthermore, Spain's Senate recognized the harm caused by the hour caps in RDL 14/2010 and passed amendments to repeal such caps. These amendments were, however, rejected by the Congress of Deputies.[378]

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370 C-PHB1, paras. 333-334.

371 C-PHB1, paras. 335-336.

372 C-PHB1, para. 337, referring to Brattle's Second Expert Report, paras. 129-130, Section VII.A.1; Brattle's Third Expert Report, para.5(f).

373 PO12 C-PHB2, paras. 302-304.

374 C-PHB1, para. 338, discussing CNMC Report, Assessment of the Proposal Order Approving the Remuneration Parameters for the Standard Installations Applicable to Renewable Generation Projects, Cogeneration and Waste Plants and Determining the Methodology to Update the Operating Incentive, 3 April 2014, **Exh. C-338**, p. 28 (Spanish version).

375 C-PHB1, para. 340.

376 ASoC, paras. 344-381.

377 ASoC, paras. 349-353.

378 ASoC, paras. 354-361.

360. Moreover, the 2010 Measures were criticized by the European Commission, which, so the Claimants assert, took issue with some retroactive and opaque changes to the regulatory regime made by some Member States.[379] The Commission also started infringement proceedings against Spain for failing to communicate the type of measures that it intended to adopt in order to implement the European Directives and achieve the 20-20-20 target.[380] Finally, certain Autonomous Communities brought constitutional challenges against the New Measures.[381]

j. *The Tribunal has a duty to decide consistently*

361. Finally, the Claimants contend that the Tribunal should uphold the Primary Claim in line with its duty to ensure the "the harmonious development of international investment law".[382] They submit that over 30 ECT claims have been filed against Spain as a result of its repeal of RD 661/2007 via the Disputed Measures. At the time of their last substantive pleading (i.e. PO12 C-PHB2), seven tribunals had issued final awards, five of which had "found that Spain had violated the investors' legitimate expectations and ordered damages".[383] According to the Claimants, the two awards that did not find a breach of the ECT (*Charanne* and *Isolux*) were outliers that arose from facts peculiar to those specific cases.

362. In the circumstances, as no "compelling contrary grounds" exist in the present case, the Claimants assert that the Tribunal "must follow the consistent line of cases" on issues of liability as well as damages, "find Spain liable for violating the ECT", and "award damages on the basis that the RD 661/2007 FITs would have continued, but for Spain's wrongful acts".[384] Saying so, the Claimants request the Tribunal to uphold

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379 ASoC, paras. 362-365, discussing European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Renewable Energy: A Major Player in the European Energy Market, COM(2012) 271 final, **Exh. C-421**.

380 ASoC, para. 373.

381 ASoC, para. 370.

382 PO12 C-PHB 2, para. 4, citing the Preliminary Award on Jurisdiction, para. 55.

383 PO12 C-PHB2, para. 2; Section 10 ("Authorities addressing modifications to RE support schemes"), reviewing (*inter alia*) the Awards in *Eiser*, **Exh. CLA-215**; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Arbitration (2015/063), Final Award, 15 February 2018, **Exh. CLA-242** *("Novenergía"), Masdar,* **Exh. CLA-243**; *Antin,* **Exh. CLA-244**; *and Greentech,* **Exh. CLA-245**.

384 PO12 C-PHB2, paras. 5-6.

the Primary Claim. In the alternative, the Claimants advance their so-called Alternative Claim, which is addressed below (*infra*, at V.B.1).

2. The Respondent's position

363. Spain submits that the Claimants have failed to show a breach of Article 10(1) of the ECT.

a. *The Claimants could not legitimately expect the stabilisation of RD 661/2007*

i. *The content of the legal standard and the scope of the Tribunal's enquiry*

364. At the outset, Spain notes that the FET standard in Article 10(1) of the ECT places a very high burden on the Claimants to demonstrate the existence of a breach. In particular, the FET standard is breached only by conduct that is,

> arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[385]

365. According to Spain, the terms just set out require "something more" that raises the Respondent's actions from "the perceived unfairness occasioned by many governmental actions that do not rise to a breach of international law", to those which constitute violations of international law.[386]

366. In the circumstances, Spain asserts that the Claimants' inquiry on legitimate expectations focuses on the wrong question. The issue is not what tariff the Claimants were entitled to, i.e., either the FIT under RD 661/2007 or reasonable return. Rather, given that the Claimants' case is that Spain breached the ECT by enacting the Disputed Measures and changing the applicable rules, "the central legal question is whether Spain was free to amend its own laws".[387] In other words, the issue in dispute is whether the Claimants could have legitimately expected the "petrification" of the law.

367. As a preliminary point, Spain asserts that there is a presumption in international law that a State is free to amend its laws. It is from this starting point that the Tribunal must

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385 Rejoinder, para. 731, quoting *Perenco Ecuador Limited v. the Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on pending issues related to jurisdiction and responsibility, **Exh. RLA-140**, paras. 558-559.

386 Rejoinder, para. 731.

387 Rejoinder, paras. 740, 853.

commence its assessment of the Claimants' legitimate expectations. In other words, Spain alleges that it is for the Claimants to prove that RD 661/2007 established an exception to this rule.[388]

ii. ***Spain's regulatory framework in the electricity sector***

368. Because it finds the Claimants' presentation of the legal regime incomplete,[389] Spain has offered a comprehensive overview of its electricity system.[390] Spain explains that the Spanish electricity system (the "SES") forms an "economic, technical and legal system",[391] which is governed by the following principles:

a. It is a "system", characterized by a strong inter-dependency between its actors. The various elements relating to generation, transmission, distribution and commercialization of electricity are interconnected through common mechanisms of control;[392]

b. The supply of energy is a service of strategic importance and of "general economic interest".[393]

c. The principal objective of the system is to guarantee that all consumers have access to electricity on conditions of equality and quality;[394]

d. The system's economic viability is based on the principle of financial self-sufficiency.[395] Accordingly, there is no recourse to Spain's state budget in case of a deficit, which can only be remedied by increasing income or reducing costs;[396]

e. Following the entry into force of the 1997 Electricity Law, the sector was partly liberalized and now regulated and liberalized activities co-exist.[397]

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388 R-PHB1, paras. 258-261.
389 SoD, para. 24.
390 SoD, paras. 22-356.
391 R-PHB1, paras. 21-22; PO12 R-PHB2, para. 22.
392 SoD, paras. 42-43.
393 SoD, paras. 44-46.
394 SoD, paras. 47-48.
395 SoD, paras. 49-50.
396 SoD, para. 50.
397 SoD, paras. 51-58.

369. Spain adds that the legal regime governing the SES comprises of hierarchically structured laws and regulations, primary among them the 1997 Electricity Law. The 1997 Electricity Law establishes two basic principles in respect of remuneration payable to RE installations under the Special Regime:[398]

a. Premiums for the Special Regime are a cost of the SES linked to its sustainability; and

b. Premiums should be set at a level that allows the Special Regime installations to achieve a reasonable return or reasonable profitability by reference to the cost of money in capital markets.

370. In a nutshell, Spain submits that the subsidies granted to RE producers under the Special Regime represent a cost to the system that has to be balanced against the goal of ensuring the overall sustainability of the system. This means that if the subsidies and incentives result in an imbalance that threatens sustainability, then the regulator can legitimately adjust the remuneration to avoid over-compensation. In other words, the very nature of the SES should have alerted the Claimants to the fact that the FIT was not "petrified" for life.[399]

371. In that regard, Spain contends that between 2007 and 2010 the installed capacity of the PV sector grew exponentially and surpassed all growth predictions made when determining the remuneration regime under RD 661/2007. As a result, the cost of subsidising the PV sector (by paying the FIT) also grew significantly and became the main cost of the SES.[400] Spain alleges that it attempted to account for the higher costs by increasing the consumer electricity price and amortising the tariff deficit. It increased the price of electricity on 11 separate occasions, for a total of 70%.[401] However, despite the high price of electricity, the revenues did not cover the growth of the costs. This resulted in a tariff deficit that posed a serious threat to the sustainability of the SES.[402]

372. This situation was exacerbated by the global financial crisis that purportedly put Spain's economy into recession. According to Spain, during and because of the economic

398 R-PHB1, paras. 18, 22; PO12 R-PHB2, para. 28.

399 R-PHB1, paras. 23-34; Rejoinder, paras. 844-846, 937-951.

400 R-PHB1, paras. 31-32.

401 SoD, paras. 775-777; Rejoinder, paras. 515, 560 and 1067; PO12 R-PHB2, paras. 40-46.

402 PO12 R-PHB2, para. 275.

crisis, electricity demand fell and it was no longer reasonable for Spain to continue increasing the price of the electricity paid by consumers.[403] These factors combined to create an imbalance that put the SES on the brink of collapse. In these circumstances, Spain claims that it was obliged to make changes to the legal framework, which was clearly envisaged in the 1997 Electricity Law and under Spanish law generally.[404]

iii. *The principle of reasonable profitability*

373. As a general theme stressed throughout its pleadings, Spain puts forward that the Claimants could only aspire to "reasonable profitability".

(a) Reasonable profitability as a cornerstone of the SES

374. Spain states that systematic regulation of the RE sector, including PV, began with the 1997 Electricity Law, which introduced the concept of "reasonable profitability" as an element in the determination of remuneration of RE facilities. In this context, Article 30.4 of the 1997 Electricity Law neither provides for a petrification of the legislation nor for a perpetual tariff. It also does not state that the tariff or premiums granted by relevant regulations shall represent "reasonable profitability".[405] Rather, Article 30.4 merely indicates that that the premiums established through RDs from time to time will ensure that operators' remuneration does not fall below a threshold that permits investors to achieve reasonable profitability.[406] Different regulations that implemented Article 30.4, especially RD 661/2007, reaffirmed the principle of reasonable profitability.

375. With regard to RD 436/2004, Spain underlines that even this regulation stressed the basic importance of reasonable profitability as part of the incentives system.[407] The incentive scheme incorporated by RD 436/2004 – whereby the FIT was linked to the amount of consumer electricity tariff – was based on the principle of reasonable profitability and did not grant "a petrification of the incentives/subsidies during the entire lifetime of the installation".[408]

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403 PO12 R-PHB2, paras. 45-51; Rejoinder, paras. 67-71; R-PHB1, para. 34.

404 PO12 R-PHB2, para. 51.

405 Rejoinder, para. 282.

406 SoD, para. 283; Rejoinder, paras. 282-284.

407 SoD, para. 288, discussing RD 436/2004, **Exh. R-55**, Preamble, para. 7.

408 SoD, paras. 287-289.

376. Reasonable profitability was of fundamental importance also in RD 661/2007. In support, Spain points to the text of this decree and in particular its preamble.[409] Moreover, paragraph 1 of Section 44.3, when referring to the circumstances that must be taken into account when modifying the incentives provided, reiterates that a "reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital market".[410]

377. Thus, in Spain's view, RD 661/2007 did not guarantee the immutability of the incentive scheme over the course of time. Rather, it supplemented a scheme meant to provide reasonable profitability.

378. Hence, nothing in the laws and regulations governing the PV sector prior to and during the time the Claimants made their investment suggests that the incentive scheme was frozen or that the FIT was guaranteed. The Claimants should thus have known that the incentives could be adapted to ensure reasonable profitability.[411]

(b) Reasonable profitability is a dynamic concept

379. Spain asserts that the concept of reasonable profitability is based on the prior work of the regulator, which acknowledges an economic cost structure, defines the income necessary to pay for that structure and to adequately remunerate the investor for its capital.[412]

380. For the Respondent, profitability must be measured regardless of the premium that the regulatory framework may have awarded at a given time. Hence, it makes no sense to compare the situations under the New Regime with the one existing when the facility was built.[413] Thus, according to Spain, reasonable profitability is necessarily a dynamic concept.[414] What is reasonable today may not be so in 30 years under different economic circumstances.[415]

381. Spain argues that reasonable profitability must allow an investor to recoup investment expenses (Capex) and operating expenses (Opex) and obtain a profit in line with

409 SoD, para. 295, discussing RD 661/2007, **Exh. C-35**, Preamble, para. 7.
410 SoD, para. 296.
411 Rejoinder, paras. 956-958.
412 Rejoinder, para. 275.
413 Rejoinder, para. 280.
414 R-PHB1, paras. 16-66.
415 Rejoinder, para. 281.

market criteria. The alignment with market criteria meets the triple objective of (i) remunerating the investor proportionately, so that it can compete with conventional energies; (ii) guaranteeing electricity supply at an efficient cost for consumers; and (iii) making the SES sustainable.[416] In particular, Article 30.4 of the 1997 Electricity Law guarantees an adequate balance between the cost to consumers and the investors' profit, which is also indicated in the "Stated Purpose" of RD 661/2007.[417] Thus, if the principle of reasonable profitability constitutes a point of equilibrium, it must have the dynamism required to adapt in case of over- or under-remuneration.[418] Such dynamism is reflected in the use by the 1997 Electricity Law of the cost of money in the capital market,[419] as a "benchmark" to judge the reasonableness of the profitability. Because the cost of money fluctuates according to macroeconomic parameters and monetary policies, reasonable profitability is necessarily dynamic.[420] Like Article 30.4 of the 1997 Electricity Law, Law 24/2013 only offers investors in renewables rates of return by reference to the cost of money in the capital markets. In particular, Law 24/2013 links the reasonable return to the evolution of the Spanish state bonds.[421]

382. Further, according to Spain, the regulatory framework of the SES is fully consistent with the Spanish constitutional principle of normative hierarchy. That principle permits the introduction of regulatory changes, which do not alter the principles of the SES set forth in the 1997 Electricity Law.[422] Spain also argues that there is no provision in the entire Spanish energy legal framework that guarantees a particular remuneration that is unlimited and perpetual. Moreover, the FIT system is one incentive for renewable energies among others, including tax incentives or green certificates.

383. In any event, even based on the Claimants' argument that reasonable profitability "must be the reasonable profitability applicable at the time the Claimants made their investment", with which Spain initially appeared to agree,[423] the Respondent submits

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416 R-PHB1, paras. 35-36.

417 R-PHB1, paras. 39-41.

418 R-PHB1, para. 43.

419 R-PHB1, para. 44.

420 R-PHB1, para. 44.

421 R-PHB1, paras. 50-56.

422 R-PHB1, paras. 62-66.

423 See Rejoinder, para. 260 (where the Respondent, discussing the Claimants' Reply, para. 152, notes that "the Claimants make a statement in their Reply, with which Spain concurs. They state that reasonable profitability '[…] must be the reasonable profitability applicable at the time the Claimants made their investment.' Spain does not

that reasonable profitability at the time when the Claimants invested in Spain was around 7%. In support, Spain invokes the *Memoria Económica* of the draft decree that was to become RD 661/2007, prepared by the Ministry of Industry, Tourism and Energy.[424] According to the *Memoria Económica*, plants up to 10 MW would receive a remuneration of "approximately 7%", and plants above 10 MW would have a return lower than 7%.[425]

384. Spain argues that the *Memoria Económica* was publicly available. Although it was not published in the Spanish Official Gazette, every party showing a legitimate interest could request access to it.[426] It would have been the minimum diligence expected from sophisticated investors like the Claimants,[427] to request access to materials related to the preparation of RD 661/2007. Associations representing PV energy producers, including the one of which the Claimants are members, had full access to the *Memoria Económica* and "even submitted comments on the case file".[428] The Respondent also points to the testimony of the representatives of one of the Claimants, Mr. Barrueco, who confirmed at the hearing that he had seen the *Memoria Económica*.[429]

385. The PER 2005-2010, so the Respondent notes, also referred to a return of 7%.[430]

386. RD 661/2007 included charts with various FIT prices based upon which each PV facility made its own revenue forecast.[431] The Ministry press release of May 2007 invoked by the Claimants also confirms the 7% rate.[432]

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deny this. The reasonable profitability at the time the Claimants invested in Spain was around 7%", internal footnote omitted).

424 Rejoinder, paras. 261-262, and fn. 239.

425 Rejoinder, para. 265, discussing Memorandum of the Draft Royal Decree regulating the activity of energy production under the special regime and certain facilities of similar technologies, under the ordinary regime, of 21 March 2007 in relation to RD 661/2007, **Exh. R-24**, Section 3.2.1 (Respondent's English translation).

426 R-PHB1, paras. 135-140.

427 R-PHB1, para. 141.

428 R-PHB1, para. 145.

429 R-PHB1, paras. 150-152.

430 PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p. 274.

431 Rejoinder, para. 268.

432 Rejoinder, para. 270, discussing Press Release announcing RD 661/2007, "The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power", 25 May 2007, **Exh. C-565**.

387. Spain argues that the 2013 Measures provide for a return of 7.398%, which can be exceeded by an efficient plant "as the parameters of costs considered in the regulation are quite generous".[433] Thus, under the New Regime, the Claimants can aspire to a higher return than the one deriving from RD 661/2007.[434] According to Spain, this shows that the adaptations made by the New Regime were permitted, proportionate, legitimate, and reasonable and did not violate the Claimants' legitimate expectations.

iv. *The RD 661/2007 regime was not immutable*

388. It is Spain submission that the Claimants could have no expectation that the remuneration fixed by RD 661/20007 would remain unchanged over time.[435] An immutable FIT applicable on a permanent and unlimited basis would be contrary not only to Spanish and EU law, but also common business sense.[436]

(a) The interpretation of Article 44.3 of RD 661/2007

389. Spain argues that Article 44.3 of RD 661/2007 (reproduced *supra* at para. 247) does not entail a "petrification" of the regulatory framework.[437] It contends that the review process envisaged in Article 44.3 refers to "potential reviews that had to be made in view of the reports regarding the level of compliance with [the PER 2005-2010], and in accordance with the new capacity targets of the RREE plan".[438]

390. In particular, it explains that read in its entirety and with specific reference to its first subsection, Article 44.3 provides for revisions to take place every four years (starting in 2010) if a series of conditions are met,[439] and for the sole purpose of meeting the targets for the implementation of the successive plans to foster RE.[440]

391. However, so the Respondent continues, the "special revisions" envisaged in Article 44.3 never occurred because, among other things, the targets of the PER 2005-2010

433 Rejoinder, para. 271.
434 Rejoinder, para. 271.
435 Rejoinder, para. 29.
436 Rejoinder, para. 31.
437 R-PHB1, paras. 68-102. Spain raises these arguments in the context of what it characterises as "Spanish Law". Separately, Spain also argues that Article 44.3 does not constitute a stabilization clause under international law, which will be addressed subsequently.
438 Rejoinder, para. 108. See also *ibid.*, paras. 901-903.
439 R-PHB1, para. 76; R-PHB2, para. 49.
440 R-PHB1, para. 77; R-PHB2, para. 53.

were fulfilled well before 2010, i.e. in October 2007.[441] Thus, "apart from the revisions 'of the regulated tariff and the upper and lower limits' provided for in article 44.3, there could be other changes made for different purposes or reasons such as to re-balance the costs of the SES to ensure its sustainability or granting of reasonable rates of return by reference to the cost of money in the capital markets".[442]

392. At the Hearing on Liability, the Respondent also submitted that Article 44.3 only applied as long as RD 661/2007 was in force.[443]

393. In Spain's view, the interpretation of Article 44.3 is further confirmed by its "antecedent", Article 40.3 of RD 436/2004. The Spanish Supreme Court established that such provision was not immutable even before the Claimants decided to invest in Spain.

394. Spain "categorically denies" that Article 40.3 of RD 436/2004 constitutes a stabilization commitment aimed at creating long term stability to attract investment.[444] Spain asserts that challenges were brought against RD 661/2007, which in some cases reduced the potential remuneration existing under RD 436/2004, while always observing the principle of reasonable profitability.[445] When deciding these challenges, the Spanish Supreme Court confirmed (i) that the Government may change the regulatory framework, (ii) that the expectation of receiving a FIT on a perpetual basis is not legitimate, (iii) that the modifications made were compatible with the principle of legal certainty, (iv) that the incentives scheme must be considered in conjunction with the rest of the elements that form part of the principle of reasonable profitability, and (v) that such scheme must be capable of being adapted to the circumstances from time to time.[446]

395. For Spain, it is therefore clear that the Claimants cannot rely on Article 44.3 of RD 661/2007 (which is almost identical to the earlier provision, Article 40.3 of RD 423/2004) to claim that they had a legitimate expectation that the regime of incentives would

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441 R-PHB1, para. 79.

442 R-PHB1, para. 80.

443 Hearing on Liability Tr. [English version], Day 1 at 221:6-222:8. See also R-PHB2, para. 50.

444 Rejoinder, para. 21.

445 Rejoinder, para. 113.

446 Rejoinder, para. 114, discussing Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, rec. 73/2004, **Exh. R-182**, and Judgment of Section Three of the Supreme Court of 25 October 2006, RCA 12/2005, **Exh. R-67**.

remain unchanged. The very fact that RD 436/2004 was repealed through RD 661/2007 put the Claimants on notice that RD 661/2007 could undergo similar changes.[447]

(b) The significance of the "window period" provided in Article 22 of RD 661/2007

396. Spain submits that Article 22 is "linked to the degree of implementation" and that "its purpose [is] to introduce an additional control on such implementation".[448] For Spain, in the event that the installed capacity targets of PER 2005-2010 were achieved earlier than 2010, "the implementation of an excess capacity was to be monitored by limiting the deadline to access RD 661/2007 as established in article 22".[449] As a result of the targets being achieved already in 2007, the Government opened the 12-month window in September 2007. Therefore, "from September 2008 the registration for RD 661/2007 was closed and the two year window for registration under article 44.3, that was supposed to take place in 2010, never applied".[450] Thus, Spain concludes, "[i]t was simply not possible to trigger the review mechanism of article 44.3 in 2010 since such reviews would have only applied to those installations that would register in 2012 after the two year window provided in article 44.3 (which did not occur as from September 2008 registration of PV plants under RD 661/2007 was closed and PV plants registered after this date were regulated by RD 1578/2008)".[451]

(c) Fifth Additional Provision in RD 1578/2008

397. Initially, the Respondent argued that RD 1578/2008 did not apply to facilities registered under RD 661/2007.[452] In its post-hearing submission, Spain then submitted that because the Fifth Additional Provision "provides that it will apply to 'the activity of electricity production using solar photovoltaic technology' (unlike article 2 of RD 1578/2008, which does refer to specific PV installations registered after

447 R-PHB1, para. 114.

448 R-PHB1, para. 123.

449 R-PHB1, para. 125.

450 R-PHB1, para. 127.

451 R-PHB1, para. 128.

452 See Rejoinder, para. 40 ("Spain agrees with the Claimants' contention that RD 1578/2008, which reduced the amount to be paid per kWh, does not apply to facilities registered under the RD 661/2007 regime and therefore, does not apply to the Claimants").

29 September) […] the modifications provided for in the Additional Provision Five, affect any PV installation, regardless of its date of registration or commissioning".[453]

398. For the Respondent, such provision warned the Claimants that the remuneration of their PV installations could be changed. Such warning was without prejudice to the possibility of amending the regulatory framework due to the principle of sustainability of the SES.[454]

v. *Judgements of the Spanish Supreme Court confirm Spain's position*

399. In Spain, the decisions of the Supreme Court are part of the legal system[455] and, hence, of the regulatory framework governing investments into RE.[456] Therefore, the Claimants should have known them.

400. Spain distinguishes between Supreme Court decisions rendered before and after the Claimants' investment. The former hold that the state is fully empowered to change economic incentives established for RE facilities, provided that it complies with the provisions of the 1997 Electricity Law.[457]

401. The Respondent does not dispute that the Supreme Court decisions dealing with regulatory changes to RD 436/2004 do not refer to Article 40.3.[458] However, for Spain this is irrelevant.[459] In a manner similar to Article 44.3 RD 661/2007, Article 40.3 of RD 436/2007 established a particular review. The regulatory changes considered by the Supreme Court were not related to such specific reviews, but to the principles of sustainability and reasonable profitability.[460] Moreover, the Supreme Court clearly did not regard Article 40.3 as a provision preventing subsequent modifications to the

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453 R-PHB1, para. 131 (emphasis in the original).

454 R-PHB1, paras. 132-133.

455 Rejoinder, para. 293, pts 1-2.

456 Rejoinder, para. 293, pt. 2.

457 Rejoinder, paras. 293, pt. 3 and 294-306, discussing Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, rec. 73/2004, **Exh. R-182**; Judgment of Section Three of the Supreme Court of 25 October 2006, RCA 12/2005, **Exh. R-67**; Judgment of Section Three of the Spanish Supreme Court of 20 March 2007, rec. 11/2005, **Exh. R-174**; Judgment of Section Three of the Spanish Supreme Court of 9 October 2007, rec. 13/2006, **Exh. R-164**. See also R-PHB2, para. 26.

458 R-PHB1, para. 159.

459 R-PHB1, para. 158.

460 R-PHB1, para. 159.

incentives offered by RD 436/2004,[461] or else it could not have reached the outcome it did.

402. With respect to decisions of the Supreme Court issued *after* the Claimants' investment, a first group rendered in 2009 deals with challenges against RD 661/2007, which the Court dismissed, in spite of the presence of Article 40.3 of RD 436/2004.[462]

403. A further group of decisions (more than 100), so Spain continues, were handed down between 2012 and 2014 and rejected challenges brought against the changes effected through the 2010 Measures. They reflect a consistent view, according to which such changes were lawful.[463] These decisions are consistent with those pre-dating the Claimants' investments,[464] as they all confirm the State's right to adapt regulations, provided reasonable profitability is ensured.

404. Finally, the Respondent submits that the Supreme Court decision of 20 April 2016, on which the Claimants rely, does not assist the latter. That decision bears no relation to the Claimants' case, as it refers to the moratorium to the registration in the RAIPRE as a result of RDL 1/2012, and not to the modifications to the remuneration received by PV plants already registered in the RAIPRE.[465] That judgment does not say that a plant registered in the RAIPRE will enjoy an unchangeable right to a specific subsidy or to a specific level of profits.[466]

vi. *In any event, Spain did not give a stabilization commitment under international law*

405. Spain submits that, under international law, any legitimate expectation of stabilization may only arise if a State gives a direct and specific commitment or representation to an

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461 R-PHB1, para. 162.

462 Rejoinder, paras. 307-320, discussing Judgment of Section Three of the Spanish Supreme Court of 3 December 2009, rec. 151/2007, **Exh. R-183**; Judgment of Section Three of the Spanish Supreme Court of 18 November 2009, rec. 43/2007, **Exh. R-184**.

463 Rejoinder, para. 293, pt. 4.

464 Rejoinder, para. 292, 931-933.

465 Respondent's Submission in relation to Spanish Supreme Court Decision of 20 April 2016, 30 May 2016, p. 2.

466 Respondent's Submission in relation to Spanish Supreme Court Decision of 20 April 2016, 30 May 2016, p. 3.

investor (such as in a stabilization clause), on which the latter relies to make its investment.[467]

406. Spain asserts that in order to be considered as a stabilization commitment, the undertaking provided by the host State must satisfy the "specificity test". It must "particularly identify (i) the act of the State being precluded (i.e. change of the law); (ii) the specific investor towards which such commitment is being made; and (iii) the period of preclusion".[468] Article 44.3 of RD 661/2007 does not meet any of these requirements and, consequently, it does not qualify as a stabilization commitment under international law.

vii. *Flaws in the Claimants' due diligence*

407. Spain considers that "as prudent and diligent investors" the Claimants ought to have known the legal regime applicable to their investment and anticipated changes in the regulatory regime. Their expectations as to the immutability of the RD 661/2007 regime could only have been generated by an erroneous interpretation of the regulatory framework, which cannot be regarded as legitimate. The Claimants failed to conduct due diligence to inquire about the regulatory framework prior to undertaking their investments. This meant not only examining the requirements for the regime to apply, but also the possibility that such regulation may be subject to adaptions.[469]

408. In this context, Spain notes that all the reports filed by the Claimants limit the scope of the due diligence to corporate, real estate, contractual, tax, environmental and administrative/regulatory issues. Where they include a regulatory section, the latter merely describes the processes to be followed to obtain the licenses, permits and authorizations necessary for operating a PV plant.[470] The hearing confirmed the lack of legal due diligence.[471] The diligence focused on the registration requirements for RAIPRE without addressing the substance of Article 44.3 or the nature of any allegedly

467 Rejoinder, paras. 866-869, refuting the Claimants' incorrect reliance on the cases arising out of Argentina's economic crisis as standing for the proposition that legitimate expectations of stabilization in the regulatory regime can arise out of the general law. See also, SoD, paras. 656-659.

468 Rejoinder, para. 895; SoD, paras. 645-669, 680-683.

469 Rejoinder, para. 332; R-PHB1, paras. 269 *et seq*.

470 Rejoinder, para. 141. See also *ibid.*, paras. 329-337; R-PHB1, paras. 247-251.

471 See R-PHB1, paras. 269-307; PO12 R-PHB2, paras. 73-74.

"guaranteed" FIT.[472] On the few occasions where the legal due diligence did consider Article 44.3, it merely recited the provision.[473]

409. Spain further contends that the Claimants cannot assume that "no warning by counsel means they can proceed with their misconceived view of Spanish law".[474] Lawyers issuing due diligence reports do so on the basis of specific instructions and questions, and there is no evidence on the record of any law firm being asked whether RD 661/2007 could be changed.[475]

410. Finally, Spain disputes that lenders shared the Claimants' expectations on the immutability of the framework and notes that there is no evidence to this effect.[476]

b. *The Claimants' misplaced reliance on advertising materials and project finance*

i. *The Claimants' reliance on advertising materials*

411. Spain takes issue with the Claimants' reliance on advertisement materials allegedly fostering or reinforcing their expectations. It is untenable that sophisticated investors like the Claimants could have formed their expectations based on such materials, while disregarding the case law of the Spanish Supreme Court and the opinions issued by the Council of State and the General State Attorneys.[477]

412. In Spain's view, the nature and content of the materials relied on could not have created expectations of stability. First, the Claimants cannot rely on the IDAE presentations entitled "The Sun Can Be Yours" (*El sol puede ser suyo*), which only strengthen the notion that the regulatory framework provided for reasonable profitability to RE investors may be modified.[478]

413. Second, Spain contends that the PER 2005-2010 was the instrument on the basis of which RD 661/2007 established a reasonable profitability of 7% and consequently the level of the FIT.[479] An investor ought to have known that RD 661/2007 was prepared

472 R-PHB1, paras. 247, 279-289.
473 R-PHB1, paras. 247-248, 282-289.
474 R-PHB1, paras. 90 *et seq.*, 290 *et seq.*
475 R-PHB1, para. 296.
476 R-PHB1, paras. 251-255, 299-303; Rejoinder, paras. 160-174.
477 Rejoinder, para. 182.
478 Rejoinder, paras. 185-199.
479 Rejoinder, para. 210.

on the basis of the PER 2005-2010 and in accordance with the capacity targets set out in such document.[480] This document clearly states that the return after taxes that could be expected for projects financed with equity was 7%.[481] The limitation of hours provided in the PER 2005-2010 is further consistent with the number of hours subsequently established in RDL 14/2010.[482]

414. Third, the various CNE documents on which the Claimants rely do not assist their case. In particular, Spain argues that:

- The presentation by the then Deputy Director of the Special Regime at the CNE, Mr. Luis Jesús Sánchez de Tembleque,[483] was a "university presentation" and the Claimants erroneously interpret the speaker's remarks on "higher than reasonable" incentives and non-retroactivity.[484]

- Mr. Scharfhausen's presentation of 29 October 2008[485] only generically discussed the main characteristics of energy production in Spain and the Special Regime.[486] In any event, Mr. Scharfhausen's statements that the premiums to renewable energies would apply throughout the useful lifetime of the facilities are in no way contradicted by the Disputed Measures, as the Claimants' facilities continue to receive the subsidy throughout the useful lifetime for 30 years.[487] As for the same speaker's presentation of February 2010,[488] any interpretation from the Claimants that would equate "warranty by law" to perpetuity of the FIT would be clearly erroneous.[489]

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480 Rejoinder, para. 212.

481 Rejoinder, para. 213, discussing PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p. 274.

482 Rejoinder, paras. 214-215.

483 CNE Presentation on the Regulation of Renewable Energies, 25 October 2007, **Exh. C-50**.

484 Rejoinder, paras. 220-233.

485 CNE presentation "Legal and Regulatory Framework for the Renewable Energy Sector", 29 October 2008, **Exh. C-570**.

486 Rejoinder, para. 125.

487 Rejoinder, para. 128.

488 CNE presentation, "Renewable Energy Regulation in Spain", February 2010, **Exh. C-578**.

489 Rejoinder, para. 130.

- In respect of the CNE Report of October 2009, the answer to a query from an individual[490] related to a different regulation (RD 1578/2008), which is not applicable to the Claimants' investments.[491]

415. Fourth, the presentations prepared by InvestInSpain in no way support the Claimants' position on the alleged right to benefit from the RD 661/2007 FIT system in perpetuity.[492]

416. In addition to challenging the Claimants' interpretation of the various promotional materials, Spain denies that the acts of the various entities that issued the materials are attributable to the State under the ILC Articles.[493] CNE/CNMC, IDAE and InvestInSpain are not State organs under Article 4 of the ILC Articles because domestic law does not recognize them to be so. In particular, Spain submits that each of these entities enjoys a separate personality and autonomous budget.[494] Neither can their acts be attributed under Article 5 of the ILC Articles as they were not performed in exercise of governmental authority.[495]

417. Lastly, the actions of CNE/CNMC, IDAE or InvestInSpain are not attributable either under Article 8 of the ILC Articles, as these entities have separate legal personality and are structurally and functionally autonomous. As such, their acts are not carried out under the instructions or direction or control of the State.[496]

ii. *Project Finance*

418. Finally, Spain opposes to the Claimants' argument that RD 661/2007 was designed to enable investors to obtain project financing, which reinforces the expectation of

490 CNE response to a query from an individual regarding the Fifth Additional Provision under RD 1578/2008, 22 October 2009, **Exh. C-574**.

491 Rejoinder, paras. 121-124.

492 Rejoinder, paras. 234-244.

493 R-PHB1, paras. 187-192. In response to the Tribunal's question as to which law should be applied to determine whether the actions of these entities was authorized by Spain, the Respondent submits that there are "no clearly established rules at (sic) customary international law as to when individuals or entities are authorised to speak for or on behalf of the Government". Consequently, "in the absence of any other clear authority under customary international law", Spain agrees with the Claimants that "the ILC Articles should apply as guidelines to determine when a State can be bound by the conduct of certain organization[s]".

494 Rejoinder, paras. 667-685.

495 Rejoinder, paras. 686-698.

496 Rejoinder, paras. 699-705.

immutability.[497] From the perspective of Spanish law, it is irrelevant whether an investor acquires a PV facility with debt or equity.[498] Thus, the fact that Spain forecast in the PER 2005-2010 that investors would opt for one type of financing or another does not mean that the objective of RD 661/2007 was to encourage the use of a particular financing structure.[499]

c. *The Disputed Measures meet objective legitimate expectations*

i. *Introduction*

419. Spain contends that the Disputed Measures provide a reasonable profitability aligned with the return that Spain provided when it enacted RD 661/2007 and which meets the expectations that the Claimants had when they made their investments.[500] Spain asserts that the "essential features" of the regulatory framework of the Claimants' investment have been maintained.[501] At the time when they invested, the Claimants could expect a subsidized remuneration and the right to sell all of their energy on a priority basis, allowing them to obtain a reasonable profitability. These essential characteristics have not been dismantled.[502]

ii. *The 2010 Measures*

420. As a general matter, Spain submits that the 2013 Measures have "absorbed" the 2010 Measures,[503] and "therefore it makes no sense to rely on the 2010 Measures in these proceedings".[504] In order words, it is not possible to assess the effect of the 2010 Measures on the Claimants' returns, because (i) the 25-year limitation contained in RD 1565/2010 has never been applied and never will be (as under the 2013 Measures the limit for the subsidized remuneration was extended to 30 years); and (ii) the permanent caps of hours established in RDL 14/2010 was and will never be applied, as the 2013 Measures foresee no such cap.[505]

497 Rejoinder, paras. 245-255.
498 Rejoinder, para. 254.
499 Rejoinder, para. 247.
500 Rejoinder, paras. 382-425.
501 R-PHB1, paras. 317-318.
502 R-PHB1, para. 318; PO12 R-PHB2, paras. 243-245.
503 Rejoinder, paras. 343-346.
504 Rejoinder, para. 343, citing MG&A Rebuttal Expert Report, paras. 443-444.
505 Rejoinder, para. 343.

421. With regard to the temporary caps applied from 2010 to 2013 pursuant to RDL 14/2010, of which the Claimants complain, Spain's position is that no analysis of a rate of return can be undertaken considering only a "window" of three years for an asset with a lifespan of 30 years. Rather, the analysis of the Claimants' return must be conducted under the 2013 Measures.[506] In this respect, the future remuneration set by the 2013 Measures grants investors reasonable profitability, based on a model that considers any detrimental effects of RDL 14/2010.[507]

(a) RD 1565/2010

422. Spain first claims that the Claimants' position according to which RD 1565/2010's limitation of the FIT to 25 years goes counter to Article 44.3 of RD 661/2007 is erroneous, as such provision would only concern a tariff cut and not "other elements such as the years of useful life".[508]

423. Second, Spain contends that the 25 or 30-year limit has no actual impact on the profitability of the plants, because the useful life of the Claimants' PV facilities does not exceed 25 to 30 years.[509] For a facility to operate beyond 25-30 years, a "substantial modification" would be required, as the equipment would become obsolete. Yet, Spanish legislation provided that a substantial modification of the plants would result in the loss of the plant's economic regime under RD 661/2007 and the submission to the regime in force at the time of the modification.[510]

(b) RDL 14/2010

424. Spain alleges that the hour caps imposed by RDL 14/2010 reflect the number of hours set in the PER 2005-2010[511] and RD 661/2007 was enacted to grant reasonable profitability based on projections assuming the hours of production found in the PER 2005-2010.[512]

425. In any event, in Spain's view, even disregarding the PER 2005-2010, Annex XII of RD 661/2007 contained a table of hours coinciding exactly with the table of hours which

506 Rejoinder, para. 344.
507 Rejoinder, para. 344.
508 Rejoinder, para. 347.
509 Rejoinder, para. 352.
510 Rejoinder, para.353; SoD, paras. 125, 333; R-PHB1, paras. 358-359.
511 Rejoinder, para. 357.
512 Rejoinder, para. 358.

was later included in RDL 14/2010. That Annex sets out the average hourly production that RD 661/2007 considered could reasonably be expected in each climate zone. It is therefore clear that the values contained in Annex XII acted as an implicit basis ("*presupuesto implícito*") for the tariff established in RD 661/2007. Had higher or lower production profiles been contemplated, the tariff would logically have been adjusted proportionately. In other words, the hours set out in Annex XII of RD 661/2007 were the basis for the hour caps included in RDL 14/2010.[513]

426. Spain finally highlights that installations do not stop being paid for energy sold once the cap is reached; they receive the market price, which – in theory – could exceed the FIT.[514]

(c) Law 15/2012

427. Spain notes that Law 15/2012 does not form the basis of the claims in this arbitration. Nonetheless, it provides explanations in response to what it considers "plainly wrong" allegations from the Claimants.[515] In particular, it submits that it is incorrect to equate the 7% levy to a tariff cut. The 7% is a tax levied on all electricity producers.[516] The difference between a tariff cut and a tax is that a tariff cut does not entail any saving or increased revenue for the state, whereas a tax augments the revenues of the Treasury.[517]

iii. *The New Measures*

(a) RDL 2/2013

428. With regard to the change in the inflation index provided by RDL 2/2013, Spain first asserts that the new index is well established in worldwide economic doctrine[518] and seeks to avoid distortions whereby the consumer price index would fall "outside the foundations of the economy".[519]

429. Spain's second argument is that the new index was only introduced in Spain through the approval by the European Statistic System Committee on the 26 September of

513 Rejoinder, para. 366.
514 SoD, para. 345.
515 Rejoinder, paras. 370-377.
516 Rejoinder, para. 372.
517 Rejoinder, para. 373.
518 SoD, paras. 149-160.
519 SoD, para. 155.

2012, which Committee approved the Regulation of the European Commission for drafting the HICP-CT (harmonized indices of consumer prices at constant tax rates), and made the calculation of this index mandatory for all EU Member States.[520]

430. Third, it is incorrect to state that the reason for the change was to remove the effect of the price of oil from the indexation. The new index was chosen to provide more stability as it removed the more volatile elements, i.e. energy products and food.[521] In any event, the new index was higher in 2014 and 2016 and the fact that it was lower in 2013 is a coincidence.[522]

(b) The New Regime

431. Spain contends that the "essential features" of the regulatory framework existing at the time of the Claimants' investment have been maintained.[523] Under the New Regime, the Claimants continue to receive a subsidy or premium for the sale of their electricity, which results them collecting more for their production than the market price. The Claimants' attempt to downplay this fact by referring to the subsidy as "Special Payment", does not alter the nature of that payment.[524]

432. Furthermore, Spain explains that since the enactment of the 1997 Electricity Law reasonable profitability has always been calculated taking into account (i) the reasonable costs (Capex and Opex) of a standard plant, (ii) financing with own resources (no project finance), (iii) the returns obtained at plant level, (iv) reasonableness in relation to the cost of money in the capital markets.[525] This methodology has not changed under the New Regime.

433. First, just as the remuneration provided in RD 661/2007 was based on the reasonable investment costs considered in the "standard cases" included in the PER 2005-2010, the Order on Parameters establishes the investment costs for standard cases.[526] Spain explains that the PER 2005-2010 only considered a few standard cases for lack of sufficient data, while the Order on Parameters considers 578 categories of plants.[527]

520 Rejoinder, para. 379.
521 Rejoinder, para. 380.
522 Rejoinder, paras. 380-381.
523 R-PHB1, paras. 318-320.
524 Rejoinder, para. 383.
525 R-PHB1, para. 327; Rejoinder, paras. 393 *et seq*.
526 R-PHB1, paras. 329-330.
527 R-PHB1, paras. 331-332.

Further, taking into account 578 categories means "greater granularity and precision in the regulation and accommodation of PV plants".[528]

434. Second, the remuneration is calculated for a PV plant developed using its own resources,[529] as evidenced by a passage of the PER 2005-2010 which refers to "with own resources (prior to funding)".[530] Further, the reference to external financing found in the PER 2005-2010 related to all RE technologies, and not specifically to PV.[531] Thus, under RD 661/2007, Spain did not contemplate the profitability of PV projects resorting to project finance.[532]

435. Third, Spain's regulatory framework has always provided that the reasonable return would be calculated with reference to greenfield investors (i.e., the promoters who undertook the development, construction and commissioning of the installation). Such remuneration does not cover the extra costs incurred by "secondary", "financial" or "brownfield" investors, such as certain Claimants, who paid a premium for the acquisition of the asset.[533] Spain contends that the calculation of the remuneration under the current regime also considers the profitability of the project at the plant level i.e., for greenfield investors, as is demonstrated by RDL 9/2013 and the Order on Parameters, which refer to the reasonable return for the "facilities".[534]

436. Fourth, Spain insists that reasonable profitability is linked to the cost of money in the capital markets,[535] as referenced explicitly in Article 30.4 of the 1997 Electricity Law and in Article 44.3 of RD 661/2007. Under the New Regime, such link is to the Government bond yield in the secondary market.[536]

528 R-PHB1, para. 332.

529 R-PHB1, paras. 333.

530 R-PHB1, para. 334.

531 R-PHB1, para. 337.

532 R-PHB1, para. 338.

533 R-PHB1, para. 342.

534 R-PHB1, para. 343.

535 R-PHB1, paras. 344 *et seq*.

536 R-PHB1, para. 345, discussing Article 14 of Electricity Sector Law 24/2013 of 26 December 2013, **Exh. R-6** (providing that "reasonable profitability will, before tax, be based on the average income on the secondary market of 10-year Government bonds plus an appropriate differential").

437. Moreover, Spain stresses that RDL 9/2013 simply specifies the reasonable profitability criterion established in Article 30.4 of the 1997 Electricity Law.[537] The 7.398% rate, which is the average yield of 10-year government bonds on the secondary market before RDL 9/2013 entered into force plus 300 basis points, is reasonable and cannot be reviewed until six years have elapsed from the entry into force of RDL 9/2013.[538] Using the 10-year Spanish bond yield plus the 300 basis point is not arbitrary; it has been recognised as appropriate reference by various relevant entities, including the investors themselves.[539]

438. That rate of return does not constitute an upper limit. It represents the return to be obtained by a facility in conformity with the relevant standard facility. If an investor manages to reduce its costs below the parameters established for the standard facility, it will obtain a higher return on investment.[540] In the Respondent's view, the fact that the Claimants' investments are not outperforming the standards set out in the New Measures and, therefore, the Claimants do not achieve higher returns shows that the Claimants have not been efficient in structuring and running their operations.[541] For Spain, this lack of efficiency has to do with the brownfield nature of the Claimants' investments.[542]

439. The Respondent objects to the Claimants' argument that the 2013 Measures establish a return of 7.398% before tax, which would actually be 5.2% after tax. It contends that RE producers have tax benefits that exempt them from paying any taxes during most of the lifespan of the plants. Thus, if one applies the correct tax rate, the return will be 6.92%, which matches the 7% return after tax established by the legal framework when the Claimants invested in Spain.[543] Such calculation is made taking into consideration a debt of 80%, in order to make the calculation as close to reality as possible.[544] Without

537 Rejoinder, para. 399.

538 Rejoinder, para. 400.

539 PO12 R-PHB2, paras. 246-252.

540 Rejoinder, para. 405.

541 Rejoinder, para. 414.

542 Rejoinder, paras. 414-417.

543 Rejoinder, paras. 287 and 423, citing to MG&A Rebuttal Expert Report, paras. 202-211.

544 R-PHB1, paras. 351-352.

debt, the pre-tax rate of 7.398% would yield an after tax figure of 6.51%, which is also in line with the approximate rate of 7% provided under RD 661/2007.[545]

440. Spain also opposes to the Claimants' statement that the continuation of priority dispatch is uncertain.[546] In this respect, Spain cites to Article 26 of Law 24/2013[547] and contends that priority has been expanded under the New Regime, considering that PV installations now also enjoy priority over high-efficiency cogeneration installations.[548]

441. Spain finally asserts that the New Regime grants PV plants subsidies for a 30-year regulatory life, which is in line with the real lifespan of PV plants built under RD 661/2007.[549] Indeed, under both the 2013 Measures and the previous regime, the duration of the subsidized scheme was tied to "useful life" of PV plants, i.e. between 25-30 years. Spain also observes that the Claimants' "investment papers" concur that their expectation was for a plant life of 25 to 30 years at the most.[550]

iv. *The Disputed Measures are not retroactive*

442. It is Spain's case that the changes to RD 661/2007 were made for the future only, and have no application to the past. Hence, this is not a situation of "strict" or "proper" retroactivity (which would be forbidden under Spanish law). Strict retroactivity would arise, for example, if the Disputed Measures clawed back remuneration collected in the past in excess of the remuneration provided under subsequent legislation.[551] By

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545 R-PHB1, para. 352.

546 Rejoinder, para. 35, discussing Reply, para. 45. See also Rejoinder, paras. 36-39, discussing 2009 Renewable Energy Directive, **Exh. RLA-125**, Article 16(2)(c); RD 413/2014, **Exh. C-304**, Article 6(2); and Law 24/2013, **Exh. R-6**, Article 26(2).

547 Article 26 of Law 24/2013 (**Exh. R-6**) reads as follows: "2. Electrical energy from installations that use renewable energy sources and, following them, that of high-efficiency cogeneration installations, will have dispatch priority under the same economic conditions on the market, without prejudice to the requirements pertaining to the maintenance of system reliability and safety, under the terms determined in the regulations by the Government. Without prejudice to supply safety and efficient system development, electrical energy producers from renewable energy sources and highly efficient cogenerations will have priority network access and connection under the terms as set out in the regulations based on objective, transparent y non-discriminatory criteria. […]" (Respondent's English translation).

548 R-PHB1, para. 354.

549 R-PHB1, para. 363.

550 R-PHB1, paras. 360-363. By "investment papers", the Respondent refers *inter alia* to the Claimants' financial statements, internal due diligence reports prepared by the Claimants to obtain necessary approvals for the investment, and external due diligence reports.

551 Rejoinder, paras. 45-48.

contrast, where a measure applies to facilities already commissioned, only in respect of their future remuneration (i.e., prospectively), such "faux" retroactivity is not forbidden under Spanish law.[552] The Spanish Supreme Court and the Constitutional Court have held that the application of a new regulation to pre-existing situations is allowed under Spanish law.[553]

443. In this case, the 2013 Measures do not deprive the Claimants of any of the amounts received under RD 661/2007 and thus are not retroactive.[554] For Spain, they continue to offer PV facilities a "stable privileged remuneration system for PV facilities",[555] with profits that in some cases even exceed those provided under RD 661/2007.[556]

d. *The Disputed Measures do not otherwise constitute a breach of the ECT*

i. *Spain created stable conditions for investment*

444. Spain contends that the obligation under Article 10(1) of the ECT to "create stable, equitable, favourable, and transparent conditions" for investment is not a separate obligation; it is embedded within the FET obligation.[557] Accordingly, Spain opposes the Claimants' position (purportedly taken for the first time at the Hearing on Liability), that such obligation is distinct from the FET.

445. As to the content of the obligation, Spain asserts that it cannot be equated with the "immutability *ad infinitum* of the regulations of a State". In other words, Article 10(1) is not a stabilisation clause; it recognises a State's right to maintain regulatory flexibility. A proper interpretation of this standard implies that the State must exercise its regulatory flexibility fairly, consistently, and predictably, taking into account the

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552 Rejoinder, paras. 227-232.

553 Rejoinder, para. 48, discussing *inter alia* Judgement of Section Three of the Spanish Supreme Court of 15 November 1999, rec. 305/1997, **Exh. R-204**, p. 4; SoD, paras. 436 to 463.

554 Rejoinder, para. 105.

555 Rejoinder, para. 101.

556 Rejoinder, para. 100.

557 R-PHB1, paras. 214, 216-220, discussing the decisions in *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010*,* **Exh. RLA-133***,* para. 9.3.35; *Electrabel S.A. v. The Republic of Hungary,* ICSID Case No. ARB/07/19, Award, 30 November 2012, **Exh. RLA-78**, paras. 6.65, 7.73; *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB 03/24, Award, 27 August 2008, **Exh. CLA-152**, para. 173; and *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*, ICSID Case No. ARB/11/24, 30 March 2015, **Exh. RLA-134**, paras. 598-599.

circumstances of the investment.[558] In this context, Spain asserts that the Disputed Measures did not lead to irrational or unpredictable legal or regulatory instability.

446. First, the changes to the legal regime were neither constant, nor frequent, nor contradictory. They strictly adhered to the twin principles governing the applicable legal framework at the time the Claimants made their investment, i.e. (i) sustainability of the SES and (ii) reasonable profitability for RE installations in relation to the cost of money in the capital markets. Consequently, the changes were predictable. Investors should have been able to predict that if either of these principles were at risk, the Government would intervene to correct the imbalance through regulatory reform.[559]

447. Second, Spain highlights that, as a matter of fact, the Disputed Measures were not perceived as unstable by investors, because (i) the market risk factor (beta) for RE investments in Spain decreased after the measures were enacted; and (ii) there has been a wave of new investments after the enactment of the measures. In fact, many of the Claimants have made new investments in Spain after the Disputed Measures. There have also been new investors constructing new capacity under the New Regime. Thus, contrary to the Claimants' contention, the transaction boom after the Disputed Measures is not a case of "vulture funds" purchasing assets from distressed investors.[560]

448. Third, as set out above (*supra* at V.A.2.c), the Disputed Measures respected the principle of reasonable profitability and maintained the essential features of the prior regulatory framework.

ii. *The Disputed Measures were transparent*

449. Spain contends that the Disputed Measures have been implemented by fully complying with the need for transparency. It was always forthcoming with information about intended changes and it engaged in extensive dialogue with investors prior to making such changes.[561]

450. The 2010 Measures were implemented through a mandatory process of approval through the "Ministers Council" and the Parliament, in full compliance with due process

558 SoD, paras. 636-639; R-PHB1, paras. 221-228.

559 R-PHB1, paras. 313-314.

560 R-PHB1, paras. 315-316.

561 SoD, paras. 768 *et seq.*; Rejoinder, paras. 426-457, 1059 *et seq.*; PO12 R-PHB2, para. 233; R-PHB1, para. 365.

requirements. Prior to the promulgation of RD 1565/2010, the CNE presented the report from the Ministry seeking comments on draft RD 1565/2010 and received many submissions from associations and companies.[562] As for the RDL 14/2010, Spain notes that there was no consultative process because a royal decree law, unlike a royal decree, does not require a consultation given its urgency.[563] However, this RDL was enacted after parliamentary debate and publication. Moreover, the Spanish Constitutional Court confirmed that all legal and constitutional requirements were met in relation to the enactment of RDL 14/2010.[564]

451. With regard to the 2013 Measures, Spain submits that it was forthcoming with information about the intended changes in policy and regulations. Specifically, a year and half prior to the enactment of the Measures, during the drafting process, CNE opened a public consultation that resulted in more than 477 observations and proposals concerning the electricity sector.[565] The CNE then published a report that spelled out the intended policy and regulatory changes and the rationale behind them;[566] the Spanish Government published several documents explaining the proposed plans for reforms;[567] hearings were held before the CNE and its successor, the CNMC;[568] and the advice of the Council of State was sought.[569]

452. Second, in connection with the transitory period of 11 months under RDL 9/2013, Spain recognizes that the preparation of RD 431/2014 and the Order on Parameters took time, but that time was necessary to fulfil the legal milestones established by Spanish law and to ensure transparency.[570] In particular, during the transitory period, Spain implemented a complex procedure that ensured the effective participation of all interested stakeholders through public hearings before the CNE / CNMC. The submissions by the stakeholders formed the basis of reports by the CNE / CNMC, which were incorporated in the draft regulation. The Ministry as well as the Council of State

562 SoD, paras. 770-772; Rejoinder, paras. 1063.
563 Rejoinder, para. 439.
564 Rejoinder, paras. 440, 1063.
565 Rejoinder, paras. 443, 1064.
566 Rejoinder, paras. 444, 1065-1068.
567 Rejoinder, paras. 445-446, 1069-1072.
568 Rejoinder, para. 449.
569 Rejoinder, para. 450.
570 Rejoinder, para. 427.

recognised that the formulation of the draft regulation had included ample public participation.[571]

453. Further, Spain points out that RD 431/2014 was subject to a public consultation, which resulted in 619 submissions from companies, industrial associations and Autonomous Communities.[572]

454. Finally, Spain considers that the engagement of the two independent consulting companies has no bearing on the transparency requirement. Spain explains that the Government terminated the contract with BCG for breach and BCG never issued a report. By contrast, a report was issued by Roland Berger, but it was not used to prepare the Order on Parameters or the remuneration standards, as it was received after the approval of RD 413/2014 and the Order on Parameters.[573]

iii. *The Disputed Measures are proportionate and justified*

455. At the outset, Spain asserts that in reviewing the reasonability and proportionality of the Disputed Measures, the Tribunal should adopt a deferential approach and "not 'act as a court of appeal over the Spanish Government'".[574] The Tribunal should not review whether the Disputed Measures were the best option out of all available measures, but recognize that Spain had selected appropriate measures from a range of reasonably available alternatives.[575] For Spain, there is no consistent approach to determining proportionality. The test requires a determination of whether a measure is suitable, necessary and proportionate, comparing the detrimental effect to the advantages of achieving the objectives of the measures.[576] The Disputed Measures were justified and suitable for a variety of reasons, including the need to (i) correct the over-remuneration of PV plants under the previous regime, (ii) to remedy the tariff deficit, (iii) to protect consumers and (iv) to comply with EU state aid rules.

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571 Rejoinder, paras. 1072-1075.

572 Rejoinder, para. 1076.

573 Rejoinder, para. 430, fn. 408; SoD, para. 790.

574 Rejoinder, para. 1080; SoD, paras. 807-809.

575 Rejoinder, para. 1084.

576 SoD, para. 806.

(a) Over-remuneration of PV plants

456. Spain initially appeared to suggest that the 7% reasonable profitability at the time of the enactment of RD 661/2007 was an "upper limit".[577] In its post-hearing submission, however, Spain argues that the reasonable profitability of "around 7%" for PV installations at the time RD 661/2007 was a "target" not a "cap".[578] However, such target was "not achieved as the tariff from RD 661/2007 led to a situation of over remuneration and it was therefore necessary to adapt the regime by implementing the Measures".[579]

457. In the Respondent's submission, it is "self-evident" that the Claimants were making "windfall profits" under RD 661/2007 as otherwise they would not have started arbitral proceedings since they continue to receive a return of 7.398%.[580] Moreover, by 2007-2008 when the Claimants' plants were built, costs had dropped significantly and hours of production had increased compared to the estimates[581] run in the PER 2005-2010, which "led to over remuneration and windfall profits".[582] Various texts, including the "stated purposes" of RDL 14/2010 and RDL 2/2013, indicate that PV plants were obtaining remuneration higher than reasonable.

(b) Tariff Deficit

458. Spain first recalls that a tariff deficit accrues when the tariff collected from consumers does not cover the costs of the system, thereby generating a debt on the part of all consumers to the electricity producers. This debt is securitized and paid by consumers over a series of years, as laid down by Law 24/2013.[583]

459. The Respondent disputes that the tariff deficit was created by the Government. Many factors resulted in a substantial increase of the tariff deficit after 2008 and compelled

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577 See Rejoinder, para. 267 (citing to MG&A Report, page 30 and 31, conclusion 13): "Similarly, the 7% upper limit is clearly explained in the MG&A Report: 'The containment of a reasonable return was the expected return that the investor who would have invested under the remuneration regimes of RD 661/2007 relied on; and this is set out in a target rate of return of up to 7% IRR of the project for the investors who would have connected their plants to the network until the end of September 2007 and a lower reasonable rate of return for plants that would connect as of this date'."

578 R-PHB2, paras. 18-19.

579 R-PHB2, para. 19.

580 R-PHB2, para. 21.

581 R-PHB2, para. 22.

582 R-PHB2, para. 22.

583 Rejoinder, para. 485.

the Government to adopt a series of measures to address the problem, including the Disputed Measures. In Spain's view, such factors are the following:

- Remuneration of renewable energies, in particular PV energy, above the reasonable rate of return due to increased productivity of the plants beyond expectations; and lower investment and production costs than expected;
- The over-installation of PV facilities which generated a 25% increase in cost of the Ordinary Regime as a result of the priority of access of renewables;
- The sudden and deep drop in demand of electricity due to the economic crisis;
- The impossibility of increasing tolls, because they were the highest in Europe and had already been increased eleven times over the last few years in a context of economic crisis;
- The financing of the accumulated debt of the tariff deficits became untenable.[584]

460. For Spain, the Claimants' argument that the only way of remedying the tariff deficit was to increase the price of electricity paid by consumers is unrealistic given the state's need to balance competing interests.[585] In that exercise, the state must not only increase the consumers' burden, but also adapt the support scheme for energy production (as was done through the Disputed Measures).[586] In any event, the Government did in fact increase the price of electricity for consumers,[587] by increasing the network access tolls many times, thus complying with the relevant Supreme Court decisions.[588] Similarly, the Claimants' contention that Spain could have imposed a tax on all CO2 emissions or on fuel to no avail either, given that Spain had already imposed such a tax.[589]

584 Rejoinder, paras. 488, 1083.
585 Rejoinder, para. 490.
586 Rejoinder, para. 534.
587 Rejoinder, para. 491.
588 Rejoinder, para. 502.
589 Rejoinder, paras. 1085-1086.

461. Spain also contends that the tariff deficit was an element of the system since the early 2000s, i.e. long before the Claimants made their investments. Consequently, it should have informed their legitimate expectations.[590]

462. Spain further highlights the impact of the economic crisis on the tariff deficit which was threatening the sustainability of the electricity system. Due to the crisis, there was an unexpected drop in demand for electricity, which led to a decrease in revenues. The repeated increases in tolls were precisely aimed at correcting that decrease. However, in such a crisis environment, it was not reasonable for Spain to continue to increase the price of electricity to consumers.[591]

(c) Protection of consumers

463. It is Spain's argument that "the purpose of the 2013 reform was to revise each and every one of the costs borne by the electricity system in order to comply with the legal system in force, both domestic and at a Community Law level, and to ensure that electricity consumers do not bear excess costs generated in the different activities".[592]

464. Spain asserts that it has experienced one of the highest rises in the price of electricity in the EU over the last years (more than 70% in 7 years).[593] Thus, it refutes the Claimants' argument that an increase in the tolls for consumers could have covered the tariff deficit.[594]

(d) EU state aid rules

465. Whilst it admits that European rules did not expressly require it to introduce the Disputed Measures, Spain submits that it must comply with European law, which allegedly "prohibits perpetual and unchanging subsidies".[595] Spain contends that competition in the market cannot be achieved if the investors' private interests are the only relevant consideration, since this would worsen the existing imbalance over the years.[596]

590 Rejoinder, paras. 547-552.
591 Rejoinder, para. 69.
592 SoD, para. 349.
593 Rejoinder, paras. 444, 554, 1067.
594 Rejoinder, para. 553.
595 Rejoinder, para. 596.
596 Rejoinder, para. 596.

466. In that regard, Spain submits that the EC Decision on State Aid makes it clear that Spain has not breached the Claimants' legitimate expectations:

a. The EC Decision recognises that there is "no right to State aid", implying that there was no right to the stabilization of the RD 661/2007 FIT. It also refers to the case law of the Court of Justice, whereby a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission.[597] It further confirms that the only expectation that the Claimants could have under EU law was the expectation of reasonable profitability.[598] In sum, the EC Decision considers that there is no infringement of the FET standard of the ECT.[599]

b. The EC Decision also ratifies the proportionality, reasonableness, transparency and stability of the New Regime, given that (i) the New Regime permits to recover capex and opex, plus a profit margin of 7.398% in line with the returns of projects recently approved by the Commission;[600] and (ii) the New Regime is subject to regular revisions and assessments, which ensures that the returns remain "reasonable".[601]

467. Spain submits that EU law is part of the applicable law in the present case because (i) pursuant to Article 26(6) of the ECT, EU law is a part of international law; (ii) EU law is also mandatory law applicable between all Parties to the dispute; and (iii) EU law is also applicable pursuant to Article 31(3) of the VCLT, pursuant to which the ECT must be interpreted by taking into account "any relevant rules of international law applicable in the relations between the parties".[602] In the circumstances, Spain concludes that the Tribunal's decision must be compatible with the EU Commission's findings, which are binding on the Tribunal.

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597 Respondent's Comments on the EC State aid Decision dated 14 December 2017, paras. 19-22, discussing the EC Decision on State Aid, **Exh. RLA-201**, paras. 154, 158.

598 Respondent's Comments on EC Observations dated 5 July 2018, paras. 5-12.

599 Respondent's Comments on EC Observations dated 5 July 2018, paras. 14-16.

600 Respondent's Comments on the EC State aid Decision dated 14 December 2017, para. 26, discussing the EC Decision on State Aid, **Exh. RLA-201**, para. 120.

601 Respondent's Comments on the EC State aid Decision dated 14 December 2017, paras. 27, 31-34.

602 Respondent's Comments on EC Observations dated 5 July 2018, para. 3(a)-(c); Respondent's Comments on the EC State aid Decision dated 14 December 2017, paras. 3-10.

iv. *The Disputed Measures were reasonable and did not impair the Claimants' investment*

468. As a preliminary point, Spain contends that in the absence of evidence of loss, it is impossible to determine if the Claimants' investments were impaired by the Measures. Since the Claimants' make identical arguments on the lack of reasonableness of the Disputed Measures and the impairment of the Claimants' investments through unreasonable measures, Spain addresses the two together.[603]

469. First, Spain disagrees that the introduction of transitory hour caps was unreasonable or arbitrary. The hours cap imposed by RDL 14/2010 was not new. It matched the average operating hours envisaged in the PER 2005-2010 which in turn formed the basis for calculating the tariff in RD 661/2007. Moreover, the average operating hours were ultimately included in Annex XII of RD 661/2007. In other words, the hours cap in Annex XII formed an implicit basis for the tariff established in RD 661/2007 for PV facilities. As a result and because the hours cap in RDL 14/2010 was based on the PER 2005-2010, the Claimants cannot now claim that the forecast of production hours in RDL 14/2010 was unjustified or arbitrary.[604]

470. Second, Spain reiterates that the New Measures maintain all the features of the regime in place at the time the Claimants' invested and continues to be based on the principles of the SES. Contrary to the Claimants' arguments, the New Regime continues to provide reasonable profitability and sufficient visibility as to return.[605]

471. Third, Spain submits that it is incorrect that the New Measures were a mechanism for retaining the risks incurred by private investors, while denying them the associated rewards. PV technologies involve the lowest risk of all RE generation technologies and thus the Disputed Measures ensure more than a generous rate of return.[606]

472. Fourth, it is equally untrue that over-installation of PV capacity was a consequence of Spain's failure to oversee the registration of PV facilities. There was a globally unprecedented increase in PV installations, which nobody could foresee.[607]

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603 Rejoinder, paras. 1091-1093; SoD, para. 827.
604 PO12 R-PHB2, paras. 238-242; Rejoinder, para. 1096.
605 PO12 R-PHB2, paras. 246-256.
606 Rejoinder, para. 1098.
607 Rejoinder, para. 1099.

v. *Spain has provided full protection and security to the Claimants' investments*

473. Spain asserts that the Disputed Measures do not violate the full protection and security ("FPS") standard because (i) they do not cause physical harm to the Claimants or their investments; (ii) they do not involve third party or police measures; and (iii) they are an expression of the State's right to regulate, which was reasonably exercised.

474. First, Spain submits that the FPS standard is limited to the obligation to provide physical security and only exceptionally extends to legal security, which circumstances are not present in the instant case.[608] In any event, even if the Tribunal were of the view that the FPS standard encompasses legal security, such obligation requires the creation of legal remedies for the effective vindication of investment rights and Spain has always offered the Claimants such remedies.

475. Second, the Respondent contends that there is no allegation of Spain breaching its duty of care to protect the investors and/or investments against the harmful actions of third parties. Accordingly, the Disputed Measures cannot be assessed under the FPS standard.[609]

476. Third, Spain reiterates that the Disputed Measures are a legitimate and reasonable expression of its right to regulate, against which the FPS standard does not protect investors.[610]

e. *The Claimants' failure to prove harm*

477. Especially in their submissions prior to the PO12 Hearing, Spain has emphasized that the Claimants failed to comply with their burden to prove any losses.[611] The Respondent underlines that the Claimants' case is based on the alleged financial harm that they have suffered as a result of the Disputed Measures. Therefore, for the Respondent, the measure of the harm allegedly caused by the Disputed Measures is a specific and necessary element to enable the Tribunal to "confidently rule on Spain's

608 SoD, paras. 859-864; Rejoinder, paras. 1106-1107.

609 SoD, paras. 857-858; Rejoinder, paras. 1110-1111.

610 Rejoinder, paras. 1115-1119.

611 See, e.g., SoD, paras. 7, 23, 620; Rejoinder, Section 5.6, paras. 1121-1177; R-PHB2, paras. 4-5, 79-81; Quantum Counter-Memorial, para. 20.

international responsibility". A decision on Spain's liability that does not consider this element would not be a "fully informed decision".[612]

478. On this premise, the Respondent submits that the Claimants have failed to demonstrate the alleged loss they suffered. For Spain, this was a calculated risk that the Claimants took when they insisted on bifurcation of the proceedings and it is not for Spain to suffer from the Claimants' gamble.

479. In the same vein, Spain argues that the Claimants' alternative case as pleaded in the Reply – which is based on the argument that the New Regime failed to provide the required reasonable return – is not substantiated. For Spain, in order to properly address this argument, the Tribunal would "need to understand the margins" (i.e. the difference between the reasonable rate of return at the time of investment and that under the New Regime). However, so Spain contends, while "[t]he Claimants are essentially asking this Tribunal to find liability by relying on the principle of reasonable profitability", they nevertheless "turn a blind eye to the need for evidence to determine whether such reasonable profitability was actually satisfied".[613] In other words, even in this instance, the Claimants fail to prove their loss. For Spain, the mere assertion that the "PV Investors have suffered extensive losses as a result of the measures, resulting in restructuring and insolvency proceedings" does not constitute credible or sufficient evidence.[614]

B. The Alternative Claim

480. This section provides a broad summary of the Parties' positions on the Alternative Claim, it being noted that further details on the Parties' arguments are contained in the analysis of the Alternative Claim.

1. The Claimants' position

481. The Alternative Claim rests on the premise that the Primary Claim is not successful and the Tribunal agrees with Spain's argument that, instead of the RD 661/2007 FIT, the Claimants are only entitled to receive a reasonable rate of return within the terms of

612 Rejoinder, paras. 1121-1132.
613 Rejoinder, para. 1137.
614 Rejoinder, para. 1134.

Article 30.4 of the 1997 Electricity Law (also referred to by the Claimants as the "Original Regime"), as it stood at the time of their investment.[615]

482. In response to this theory, the Claimants submit that Spain nevertheless faces international liability under the ECT, because the reasonable return under the New Regime is lower than the reasonable return under the Original Regime.[616] On Spain's own case, at the time of the Claimants' investment, the reasonable rate of return was set at around 7% <u>after-tax</u> (implying a pre-tax return of around 11%).[617] They contend that the New Regime offers a 7.398% <u>pre-tax</u> return, which amounts to around 5.9% after-tax. Thus, they submit that their return is 2 percentage points below than the return of around 7% that Spain purported to guarantee under the Original Regime.

a. ***The Claimants are entitled to "full reparation" for violations of the ECT***

483. The Claimants first discuss the context against which the Tribunal should assess the Alternative Claim. They submit that the ECT offers no guidance on the measure of compensation for a non-expropriatory breach, such as a violation of the FET standard. Consequently, it is necessary to refer to the standard of compensation under customary international law, as determined in the *Chorzów Factory* case and subsequently codified in Article 31 of the ILC Articles. Pursuant to this standard, a State must make "full reparation for the injury caused by the internationally wrongful act" so as to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[618]

484. In the circumstances, the Claimants contend that if Spain is found to have violated its international obligations under the ECT, then consistent with *Chorzów Factory* and the ILC Articles, Spain must pay compensation in an amount that will wipe out the consequences of the unlawful measures.[619]

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615 SoD, para. 175; Reply, para. 587.

616 Reply, para. 583 *et seq.*; PO12 PHB-2, para. 21.

617 Referred to as the "target rate of return".

618 Quantum Memorial, paras. 17-18, citing ILC Articles, **Exh. CLA-13**, Article 31(1) (English version); *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity, Merits, PCIJ Rep, Series A, No. 17, Judgment of 13 September 1928, **Exh. CLA-3**, p. 47 ("*Chorzów Factory*").

619 Quantum Memorial, para. 19; PO12 C-PHB2, paras. 6-7.

b. ***The Primary Claim should act as a benchmark***

485. The Claimants assert that, while quantifying damages, the Tribunal must not only respect the principle of full reparation, but also seek to "ensure consistency with the established jurisprudence".[620] In that regard, the Claimants point out that a "series of consistent cases" have found that Spain violated the investors' legitimate expectations by introducing the Disputed Measures (in line with the Primary Claim) and have consequently ordered damages by reference to a DCF calculation, on the basis that the RD 661/2007 FITs would have continued to apply.[621]

486. Consequently, if the Tribunal decides to award damages based on the Alternative Claim to ensure full reparation and consistency with the findings on damages in other PV cases, the Claimants contend that the Tribunal should use the Primary Claim as a "benchmark" for assessing damages.[622] Although the Primary Claim has not been quantified in these proceedings, the Claimants offer two "proxies" for damages under the Primary Claim.

487. First, the Claimants submit that the damages under the Primary Claim would be very similar to the damages under the Alternative Claim in a situation where the chosen parameters generate an Alternative Tariff that is substantially similar to the RD 661/2007 tariff. Accordingly, the Claimants ask the Tribunal to refer to the damages scenario presented by Brattle at the PO12 Hearing that produced an Alternative Tariff most closely resembling the RD 661/2007 FIT. This damages scenario – which considers PV plants with installed capacity under 100kW, a 7% rate of return, disregards past profits and uses a "pure" marginal plant as the cost base[623]– yields damages of approximately EUR 654 million.[624]

488. As a second proxy, the Claimants ask the Tribunal to look at the damages awarded in the decision rendered by the *Novenergía* tribunal. The Claimants submit that the *Novenergía* tribunal found Spain's implementation of the Disputed Measures in breach of the ECT and awarded damages on an equivalent basis to the Claimants' Primary

620 PO12 C-PHB2, para. 45.

621 PO12 C-PHB2, paras. 40-45, discussing *Eiser,* **Exh. CLA-215**, paras. 387, 418; *Novenergía,* **Exh. CLA-242**, paras. 681, 697; *Masdar,* **Exh. CLA-243**, para. 527; *Antin,* **Exh. CLA-244**, para. 552; and *Greentech,* **Exh. CLA-245**, para. 506.

622 PO12 C-PHB2, paras. 38-45.

623 PO12 C-PHB2, paras. 46, 49-52.

624 PO12 C-PHB2, para. 52.

Claim. Consequently, the Claimants argue that the damages awarded by the *Novenergía* tribunal would be "a good approximation of the damages, on a €/MW basis, that may be viewed as reasonable in this case".[625]

489. In *Novenergía* the damages amounted to EUR 2.84 million per MW of installed capacity. As the Claimants in this case collectively hold 222.4 MW of capacity, they would receive approx. EUR 632 million in damages.[626]

490. For the Claimants, applying these proxies as a benchmark is particularly important in the present case, where the maximum aggregate amount of damages computed under the EJM (based on the narrower parameters indicated by PO18) are 25% lesser than the damages that are likely to have been awarded under the Primary Claim. The Claimants contend that any further reduction in the maximum available damages under the EJM would run contrary to the Tribunal's duty to maintain consistency in the jurisprudence and to ensure full reparation under international law.[627]

c. *Quantification of the loss for liability and quantum*

491. Given that the Alternative Claim expresses the violation of the Claimants' legitimate expectations in economic terms, the Claimants submit that it is necessary to measure the impact of the Disputed Measures on the value of the Claimants' investments to determine issues of both liability[628] and damages. This quantification was carried out by Brattle under PO12.

492. The Claimants note that PO12 directed them to compute their damages by comparing two scenarios: (a) what the Claimants call the "Actual scenario", which measures the cash flows and IRR as a result of the Disputed Measures, and (b) the "But For scenario", which measures the cash flows and the IRR in the absence of the Disputed Measures.[629] If the IRR in the But For scenario is higher than the IRR in the Actual scenario, it means that Spain violated their legitimate expectations by failing to provide

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625 PO12 C-PHB2, para. 53.

626 PO12 C-PHB2, paras. 53-55.

627 PO12 C-PHB2, para. 48.

628 The Claimants refer to this as the "threshold liability question". See, PO12 C-PHB1, paras. 6-8.

629 PO12, para. 3(a). PO12 assumed that the quantum of damages / harm suffered by the Claimants equals "the difference […] between (i) the reasonable return under Article 30.4 of the 1997 Electricity Law over the regulatory lifetime of a plant […] and (ii) the return the Claimants would make under the Disputed Measures for the same period".

the target rate of return under the New Regime. The same quantification would also serve as basis for the computation of damages.[630]

493. The Claimants observe that for undertaking the quantification exercise, PO12 outlined six assumptions with alternatives, namely:

> a. Whether or not to update the remuneration under the New Regime at the scheduled periodic intervals.
>
> b. Reasonable profitability within the meaning of the 1997 Electricity Law means either a 7% after-tax return or an 8% after-tax return.
>
> c. Whether reasonable profitability should apply to either greenfield or brownfield investments (to the extent it makes any difference).
>
> d. Reasonable profitability should be measured with reference to a 30-year regulatory lifetime.
>
> e. Whether or not reasonable profitability should consider earnings prior to the enactment of the Disputed Measures.
>
> f. The valuation date should be either the date of the award or the date of the Disputed Measures.[631]

494. The Claimants explain that the first of these assumptions and alternatives (at (a) above) relates to the Actual scenario. The next four assumptions (from (b) to (e), above) relate to the But For scenario. The sixth assumption (which relates to both scenarios) refers to the valuation date and essentially requires the calculation of damages *ex post* (date of potential Award) as well as *ex ante* (date of Disputed Measures).

495. In this context, the Claimants advocate for the following parameters, which in their view are the most appropriate for calculating the damages recoverable under the Alternative Claim:

> (a) find that the target rate of return was 8% after tax;
>
> (b) do not take into account the tax benefits of interest when calculating the effective tax rate for the purposes of establishing the Alternative Tariff;
>
> (c) adopt Brattle's preferred "Marginal Plant" option as the cost base;
>
> (d) do not consider past profitability;
>
> (e) assume that the reasonable return is revised every six years (which on an *ex ante* valuation in effect reduces damages); and

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630 PO12 C-PHB1, para. 36.

631 Quantum Memorial, para. 10; BQR I, para. 11. See also, PO12, para. 3(a)-(f).

(f) use an *ex post* valuation date in order to fully capture the harm suffered by the Claimants.[632]

496. In addition, the Claimants argue that "holding IRRs" should be used in the calculation of the IRRs, as opposed to "exit IRRs",[633] and note that a computation using the parameters just referred to would result in damages in the sum of EUR 1.16 billion.

497. The Claimants' detailed arguments on each of these assumptions and parameters are summarized in section VI.B.4.c below (Analysis).

498. The Claimants further observe that in PO18, in which the Tribunal asked the Parties' experts to prepare the EJM, the Tribunal narrowed down the number of inputs for calculating these cash flows and, in particular, eliminated two key parameters that had formed the basis of their prior quantification of damages, i.e. the "pure" marginal plant option as a potential cost base, and the *ex post* valuation date. The Claimants submit that the removal of these two parameters significantly reduced the damages that could be recovered by the Claimants.[634]

499. First, the Claimants submit that not using the "pure" marginal plant option as a cost base has a significant impact on damages. With this cost base, they could have recovered damages of approximately EUR 654 million, whereas under the EJM, their preferred set of parameters yield damages of EUR 520 million only. In either case, the Claimants point out that the damages fall well short of the value of the RD 661/2007 FIT (and consequently, the damages that according to them would have resulted in "full reparation").[635]

500. Similarly, the use of an *ex ante* as opposed to an *ex post* valuation also reduces the recoverable damages. The Claimants submit that using Brattle's preferred assumptions under the EJM (but with the "pure" marginal plant as a cost base), results in damages of approx. EUR 654 million. By contrast, if an *ex post* valuation date is adopted, the total damages would amount to EUR 900 million.[636]

501. In sum, the Claimants submit that the EJM results in significant under-compensation, as even the highest amount of damages available under the EJM (totalling EUR 534

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632 PO12 C-PHB2, para. 67 (internal footnote omitted); PO12 C-PHB1, Appendix 1.

633 PO12 C-PHB1, paras. 121-132.

634 PO12 C-PHB2, paras. 69-70.

635 PO12 C-PHB2, paras. 73-74.

636 PO12 C-PHB2, para. 80.

million) will not provide "full reparation" to the Claimants, in accordance with the international law principles governing compensation for internationally wrongful acts.[637]

502. By contrast, they note that applying the methodology used in other PV cases against Spain yields higher damages. For instance, according to the Claimants, the methodology endorsed by the *Novenergía* tribunal would result in a damages award of approximately EUR 642 million to the Claimants.[638] The Claimants submit that awarding damages on the basis of an "Alternative Tariff" set at the same level of RD 661/2007 would result in damages awarded on a basis similar to all other previous awards.[639] However, this would necessitate employing the "pure" marginal plant cost base.[640]

503. Finally, the Claimants argue that "the Alternative Claim and the EJM both assess damages based on the returns at the plant level (or project level). They do not assess returns on the sums actually invested by the Claimants when purchasing those PV plants".[641] They contend that the *Claimants* themselves have suffered substantial losses on their investments,[642] and that "as matters currently stand, the Claimants will not even recover the capital they invested in Spain, let alone earn a profit on that invested capital".[643]

504. Nevertheless, if the Tribunal intends to award damages based on the set of parameters in the EJM, the Claimants submit that the Tribunal must choose the set of parameters that most closely reflect the reasonable return offered by Spain at the time of their investment, i.e.:

> (a) do not take into account the tax benefits of interest when calculating the effective tax rate;
>
> (b) choose the "Size Reclassified" marginal plant as the cost base […];
>
> (c) do not consider profitability before the valuation date;
>
> (d) assume that the reasonable return is revised every six years (which in effect reduces damages); and

637 PO12 C-PHB2, paras. 9-10.
638 PO12 C-PHB2, para. 10.
639 PO12 C-PHB2, para. 11.
640 PO12 C-PHB2, para. 12.
641 PO12 C-PHB2, para. 13 (emphasis in original).
642 PO12 C-PHB2, para. 13.
643 PO12 C-PHB2, para. 14.

(e) apply interest to cash flows lost before the valuation date.[644]

505. The Claimants submit that the Tribunal must adopt these permutations, as they (a) "are most closely aligned with the methodology used by Spain when designing the Original Regime" in which the Claimants invested; and (b) reflect the impact of the Disputed Measures.[645]

506. The Claimants' more detailed arguments on quantification are summarized below in the analysis of the Alternative Claim.

2. The Respondent's position

a. *Introduction*

507. The Respondent requests the Tribunal to dismiss the Alternative Claim as ill-founded. For Spain, there is no merit in the Claimants' argument that under the Alternative Claim their damages would still be substantial. By contrast, "[t]he Claimants are receiving exactly the same amount of return on their investment as the one provided by the Spanish regulation at the time of their investments" and "the difference between returns before and after taxes is minimal, as [renewable energies] have tax benefits that exempted them from paying any taxes during most of the lifespan of the plants".[646] Spain's position is that "[a]pplying the correct tax rate applicable to the PV investments, to a 7.398% return before taxes, it will turn into a 6.92% return after taxes, which matches the 7% return after taxes established by the legal framework when the Claimants invested in Spain".[647]

b. *The Primary Claim cannot be used as a benchmark for quantifying the Alternative Claim*

508. The Respondent submits that the Primary Claim cannot be used to benchmark the damages in the Alternative Claim. According to Spain, the Primary Claim does not represent the Claimants' legitimate expectations at the time of their investment and therefore does not represent any potential measure of damages.[648]

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644 PO12 C-PHB2, paras. 82-83.

645 PO12 C-PHB2, paras. 16, 18.

646 Rejoinder, para. 968.

647 Rejoinder, para. 968.

648 PO12 R-PHB2, paras. 413-415.

509. Further, the Tribunal should also disregard the two proxies for damages proposed by the Claimants:

a. As regards the damages granted in *Novenergía,* Spain contends that, "despite basing its liability conclusions on radical change", that tribunal seems to have used the claimant's DCF model, using a but-for scenario where the claimant would have continued to receive the RD 661/2007 FIT. Consequently, the damage computable in *Novenergía* cannot be used as a reference.[649]

b. With respect to "pure" marginal plant, the calculation of returns using this parameter assimilates the Claimants' plants to a 5 kW marginal plant, the cost and production parameters of which bear no relation to the Claimants' larger plants.[650]

c. *Quantification of the loss for liability and quantum*

510. Of the various assumptions provided under PO12, Spain considers the following parameters most appropriate to quantify the alleged damages:[651]

a. The But For scenario should be calculated in accordance with the methodology proposed by Econ One;

b. The target rate of return in the But For scenario should be 7%;

c. The "marginal plant" proposed by Brattle cannot be used as the cost base, because the remuneration scheme for PV installations, including the RD 661/2007 FIT, has always been based on the "costs of standard installations that reflect the typical efficient greenfield costs in the market for the construction of certain type of installation in a given year".[652] Furthermore, Spain contends that "the typical costs of the standard facilities included in the Parameters' Order IT Codes are […] representative of the real costs in the market at the time of construction of the PV Plants";[653]

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649 PO12 R-PHB2, para. 422(a).

650 PO12 R-PHB2, paras. 422(b)-423.

651 In this section, the Tribunal has limited itself to highlighting Spain's arguments on only those parameters which were finally accepted or discarded in PO18. For parameters where PO18 provides alternatives, the Tribunal addresses Spain's position *infra* at VI.B.4.c.

652 PO12 R-PHB1, paras. 90, 96.

653 PO12 R-PHB1, para. 24.

d. An exit IRR should be used for the computation of the IRRs in the Actual Scenario;

e. An *ex-ante* valuation date should be adopted.

511. With regard to the options set out in PO18, it submits that the Tribunal should opt for the following in order to calculate the Claimants' alleged harm:

a. If an The Alternative Tariff is to be used, then it shall be calculated:

i. Using the IT Codes sensitivity as cost base; and

ii. Taking into account the tax benefits of interests when calculating the applicable tax rate as calculated by Econ One.

b. The DCF should take into account profits generated before the valuation date (since profitability can only be calculated during the full regulatory life of a plant);

c. The DCF should assume that the rate of return is revised every six years;

d. The IRRs for the Claimants' plants in the scenario with Measures should be calculated using the Claimants' greenfield costs excluding developers' premiums as calculated by Econ One;

e. Interest should not be included, as the Tribunal did not request it and "we are at the liability phase".[654]

512. The Respondent's more detailed position on quantification for purposes of determining liability and quantum is summarized in section VI.B.4.c below which deals with the analysis of the Alternative Claim.

VI. ANALYSIS

513. In this section, the Tribunal provides its analysis of the Primary Claim (B) and the Alternative Claim (C). Before doing so, it addresses certain preliminary matters (A).

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654 PO12 R-PHB2, para. 137.

A. PRELIMINARY MATTERS

514. In this section, the Tribunal will address (1) the scope of this Award; (2) the applicable laws; (3) the relevance of prior awards; and (4) the Respondent's outstanding procedural requests of 7 March 2019.

1. Scope of this Award

515. This award deals with both liability and damages, as further explained in sections VI.B.4.a and VI.B.4.b below.

2. The Applicable Laws

a. *Law Governing the Arbitration Proceedings*

516. The place of arbitration within the meaning of Article 18 of the UNCITRAL Rules being Geneva, Switzerland (see Procedural Order No. 3, para. 52), this arbitration is subject to Chapter 12 of the Swiss Private International Law Act.

b. *Law Governing the Merits of the Dispute*

517. Article 26(6) of the ECT provides as follows:

> A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

518. Thus, in accordance with Article 26(6) of the ECT, the Tribunal will apply the Treaty and applicable rules and principles of international law.

c. *Jura Novit Arbiter*

519. When applying the law governing the substance of the dispute, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *jura novit curia* – or, better, *jura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.[655]

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655 See Swiss Supreme Court decisions 4P.114/2001 of 19 December 2001, paras. 3a, 20 *ASA Bulletin* (2002), pp. 493, 511 and 4A_214/2013 of 5 August 2013, para. 4. See also, in the investment treaty context, *inter alia*, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **Exh. RLA-197**, para. 118*; Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295.

3. The Relevance of Prior Awards

520. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

521. As it noted in the Preliminary Award on Jurisdiction (para. 53), the Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the specific text of the ECT, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law in furtherance of the certainty of the rule of law. Additional observations on the Tribunal's consideration of the awards rendered in other Spanish RE arbitrations are contained in paragraphs 551 to 555 below.

4. The Respondent's Outstanding Procedural Requests of 7 March 2019

522. As recalled *supra* at paras. 167 and 168, upon the Respondent's request and having heard the Claimants, on 21 February 2019, the Tribunal granted the Respondent leave to file into the record the three January 2019 Declarations issued by the Member States in connection with *Achmea* and invited the Parties to provide their comments thereto. On 7 and 21 March 2019, the Respondent and the Claimants submitted their comments on the Declarations.

523. The Tribunal first summarizes the Parties' position and requests in connection with the Declarations and then provides its decision on these procedural requests.

a. *The Respondent's Position*

524. The Respondent argues that the Declarations deal with the legal consequences of the judgment rendered by the Court of Justice of the European Union ("CJEU") in *Achmea* "on investor-State arbitration clauses and on the question of investment protection in the EU and in intra-EU disputes".[656] It submits that the Declarations are directed "towards investment arbitration tribunals as well as to the investor community".[657]

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656 Respondent's comments, 7 March 2019, para. 6.

657 Respondent's comments, 7 March 2019, para. 7.

525. After recalling that the *Achmea* judgment is binding on all EU Member States,[658] Spain contends that the declaration made by 22 EU Member States (the "22 Member States Declaration"),[659] was "[s]igned by the representative of Spain and also by the representatives of Germany and the Netherlands (relevant States on the basis of the nationality of the Claimants in the present dispute)". In Spain's view, it "clearly establishes that arbitrations between investors of a Member State and another Member State arising from the ECT are incompatible with EU law".[660]

526. Quoting passages from the 22 Member States Declaration, Spain maintains that such document "declares the Member States' understanding that an arbitral tribunal established on the basis of investor-State arbitration clauses such as Article 26 of the ECT lacks jurisdiction when the dispute is intra-EU, on the basis that the Member States did not make any offer to arbitrate under Article 26 ECT to investors from other EU Member States".[661]

527. In stating that the effects of *Achmea* also extend to the ECT, the 22 Member States Declaration, so Spain explains, follows the position of the European Commission in its Communication of 19 July 2018 entitled "Protection of intra-EU investment".[662]

528. The Respondent contends that the position of the 22 Member States is not "contradict[ed]" by the declaration signed by five other Member States (the "5 Member States Declaration").[663] Although Spain acknowledges that the latter declaration "differs

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658 Respondent's comments, 7 March 2019, para. 4.

659 See Declaration of the Representatives of Governments of the Member States, of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union signed by the Representatives of the Governments of, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Netherlands, Austria, Poland, Portugal, Romania, Slovakia and United Kingdom of great Britain and Northern Ireland, **Exh. RLA-214**.

660 Respondent's comments, 7 March 2019, para. 11.

661 Respondent's comments, 7 March 2019, para. 15.

662 Respondent's comments, 7 March 2019, paras. 16-17.

663 Respondent's comments, 7 March 2019, para. 22. See Declaration of the Representatives of the Governments of the Member States, of 16 January 2019, on the enforcement of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union signed by the Representatives of the Governments of Finland, Luxembourg, Malta, Slovenia and Sweden, **Exh. RLA-215**. Spain makes no specific submission in respect of Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, **Exh. RLA-216**.

from the 22 Member State[s] Declaration in respect of the extension of the effect of the *Achmea* Judgment to the ECT",[664] as "the 5 Member States consider that it is preferable to not express any specific views until a 'specific judgment' on this matter is rendered and the question of whether Article 26 ECT permits intra-EU arbitration is currently being contested before a national court in a Member State",[665] it submits that the 5 Member States Declaration confirms that it is only for the CJEU "to decide upon matters of interpretation and application of EU Law as set out in" *Achmea*.[666]

529. In sum, Spain contends that the 22 Member States Declaration is relevant to the present dispute because it "leaves no room for doubt as to the intention or understanding of the ECT parties involved in this dispute that (i) Article 26 ECT cannot be considered a valid consent to arbitration in the case of intra-EU disputes on the basis that it would be incompatible with the autonomy of EU law and (ii) any differences in interpretation must be resolved in favour of EU law".[667]

530. Spain contends that EU law as interpreted by the CJEU "qualifies as one of the 'applicable rules and principles of international law' specified in Article 26(6) of the ECT"[668] and, moreover, "is to be taken into account when interpreting the ECT" under Article 31(3)(c) VCLT.[669] Specifically, the 22 Member States Declaration is to be taken into account when interpreting the ECT either as a "subsequent agreement between the parties regarding the interpretation of the treaty of application of its provisions" (Article 31(3)(a) VCLT) or, at a minimum, as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31(3)(b) VCLT).[670] Hence, "tribunals cannot override the common will of the ECT parties as to how Article 26 shall be interpreted in line with EU law".[671]

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664 Respondent's comments, 7 March 2019, para. 19.

665 Respondent's comments, 7 March 2019, para. 20 referring to *Novenergia II – Energy & Environment (SCA) SICAR v. Kingdom of Spain*, Case No. 4658-18 before the Svea Court of Appeal.

666 Respondent's comments, 7 March 2019, para. 22.

667 Respondent's comments, 7 March 2019, para. 32.

668 Respondent's comments, 7 March 2019, para. 26.

669 Respondent's comments, 7 March 2019, para. 27.

670 Respondent's comments, 7 March 2019, para. 29.

671 Respondent's comments, 7 March 2019, para. 31.

531. Therefore, the Respondent requests the Tribunal to "now reconsider *ex officio* its jurisdiction in the present case in accordance with its continuing obligation".[672] Moreover, in light of the Member States' "undertaking of cooperation" to inform investment tribunals of the *Achmea* judgment, Spain "invite[s] the Tribunal to contact any of the Member States signatories to the 22 Member State Declaration concerned with this arbitration in order to confirm their unequivocal understanding of the Declaration and the obligations contained therein".[673]

b. ***The Claimants' Position***

532. The Claimants argue that the 22 Member States Declaration draws a distinction between the legal consequences of *Achmea* for bilateral investment treaties and the ECT.[674] In particular, they point to the fact that, while the 22 Member States agreed to use their best efforts to terminate intra-EU bilateral investment treaties by the end of 2019, with respect to the ECT, they only announced that they would "discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty".[675] Furthermore, the Claimants underscore that the 22 Member States Declaration states that "Union law takes precedence over *bilateral* investment treaties concluded between Member States", without expressing the same view with respect to the ECT, which is a multilateral treaty to which both the EU and the Member States are parties.[676] Thus, in the Claimants' view, there is no agreement among EU Member States (including between the 22 signatories to the Declaration) regarding the consequences of *Achmea* for the ECT or whether EU law has precedence over the ECT.[677]

533. For the Claimants, this is consistent with the other two declarations. The 5 Member States Declaration, on the one hand, stresses the "importance of allowing for due process and […] that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra-

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672 Respondent's comments, 7 March 2019, para. 32.

673 Respondent's comments, 7 March 2019, para. 34.

674 Claimants' comments, 21 March 2019, para. 3.

675 Claimants' comments, 21 March 2019, para. 2, discussing 22 Member States Declaration, **Exh. RLA-214**, p. 4, para. 9 (English version).

676 Claimants' comments, 21 March 2019, para. 3, discussing 22 Member States Declaration, **Exh. RLA-214**, p. 1 (emphasis added by the Claimants) (English version).

677 Claimants' comments, 21 March 2019, para. 4.

EU application of the Energy Charter Treaty".[678]. Hungary's Declaration, on the other hand, unambiguously declares that "the *Achmea* judgment concerns only the intra-EU bilateral investment treaties" and "does not concern any pending or prospective arbitration proceedings initiated under the ECT".[679] Hence, Spain's argument that EU Member States "never interpreted Article 26 of the ECT as a valid offer to arbitrate between EU Members" is contradicted by the 5 Member States and Hungary's Declarations.[680]

534. Furthermore, the Respondent's argument that the 22 Member States Declaration constitutes a subsequent agreement or practice between the EU Member States that sets out the authentic interpretation of Article 26 of the ECT is incorrect. For the Claimants, the 22 Member States Declaration does not fall within the "agreement" or "practice" under Article 31(3)(a) and (b) of the VLCT, because it "is a political statement" setting out the steps that EU Member States will take regarding the set aside of awards and termination of intra-EU bilateral investment treaties. The Claimants contend that "[b]eyond suggesting that the intra-EU application of Article 26 is incompatible with EU law", the 22 Member States Declaration does not set out how the ECT ought to be interpreted. Therefore, it neither constitutes an agreement regarding the interpretation of Article 26 of the ECT nor subsequent practice evidencing any such agreement.[681] Furthermore, in the Claimants' view a subsequent agreement could only be invoked if all the parties to the treaty have been involved in the interpretation of a particular meaning of a treaty term, which is not the case here.[682]

535. Moreover, the 22 Member States Declaration cannot deprive the Tribunal of jurisdiction since it postdates the commencement of these proceedings and jurisdiction must be determined by reference to the date on which the proceedings are instituted.[683]

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678 Claimants' comments, 21 March 2019, para. 5, discussing the 5 Member States Declaration, **Exh. RLA-215**, p. 3 (English version).

679 Claimants' comments, 21 March 2019, para. 5, discussing Hungary's Declaration, **Exh. RLA-216**, p. 3, para. 8 (English version).

680 Claimants' comments, 21 March 2019, para. 7.

681 Claimants' comments, 21 March 2019, para. 10.

682 Claimants' comments, 21 March 2019, para. 11.

683 Claimants' comments, 21 March 2019, paras. 12-13, discussing *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) Judgment, I.C.J. Reports 2002, p. 3, para. 26 and *Nottebohm case* (Preliminary Objection) Judgment of 18 November 1953: I.C.J. Reports 1953 p.111, at p. 123.

536. With regard to Spain's EU law arguments, the Claimants first contend that EU law does not constitute "applicable rules and principles of international law" relevant to the Tribunal's jurisdiction.[684] Furthermore, Spain's argument on the primacy of EU law rests on the assumption that there is a conflict between EU law and the ECT, which in the Claimants' view is not the case.[685] Should any such conflict exist, the ECT would prevail under Article 16 of the ECT.[686]

537. Finally, the Claimants submit that Spain's request to invite the EU Member States to intervene in these proceedings must be rejected, as Spain has failed to identify, let alone substantiate, the legal basis for its request.[687] In any event, the Member States' views on the legal consequences of the *Achmea* judgment are not relevant for this arbitration and have already been reflected in their declarations.[688]

c. *Discussion and Decision*

538. The Respondent makes two requests in its submission of 7 March 2019. First, it asked the Tribunal to "reconsider ex officio its jurisdiction in the present case in accordance with its continuing obligation".[689] Second, Spain "invite[s] the Tribunal to contact any of the Member States signatories to the 22 Member State Declaration concerned with this arbitration in order to confirm their unequivocal understanding of the Declaration and the obligations contained therein".[690]

539. Starting with Spain's first request, the Tribunal recalls that, under the Swiss *lex arbitri* and the 2010 UNCITRAL Rules applicable to these proceedings, an objection to the Tribunal's jurisdiction must be raised *in limine litis*.

540. In relevant part, Article 186 of the Swiss Private International Law Act ("PILA") provides as follows:

> (2) A plea of lack of jurisdiction must be raised prior to any defence on the merits.
>
> (3) The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.

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684 Claimants' comments, 21 March 2019, para. 15.
685 Claimants' comments, 21 March 2019, para. 16.
686 Claimants' comments, 21 March 2019, para. 17.
687 Claimants' comments, 21 March 2019, para. 18.
688 Claimants' comments, 21 March 2019, para. 18.
689 Respondent's comments, 7 March 2019, para. 32.
690 Respondent's comments, 7 March 2019, para. 34.

541. Article 23 of the 2010 UNCITRAL Rules, for its part, provides that:

> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence […].
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. […]

542. The Respondent submitted its "intra-EU jurisdictional objection" timely at the outset of the proceedings. In accordance with Articles 186(2) of the PILA and 23(3) of the UNCITRAL Rules, the Tribunal ruled on such objection in the Preliminary Award on Jurisdiction.

543. Under Swiss law, awards on jurisdiction must be challenged immediately, i.e. within 30 days of notification, for irregular constitution or erroneous determination on jurisdiction (Articles 190(2)(a) and (b) and 190(3) PILA). It is undisputed that the Preliminary Award was not challenged. As a result, that award binds the Tribunal and has thus *res judicata* effect or conclusive and preclusive effects comparable to *res judicata*.[691] The Tribunal stated this position on repeated occasions throughout these proceedings,[692] including in Procedural Order No. 19 issued on 15 October 2018 ("PO19"). In PO19, the Tribunal denied Spain's request to "open a new jurisdictional phase" as a consequence of the judgment rendered by the CJEU in *Achmea* and the related communication and fact sheet issued by the European Commission, as it considered that the Respondent was seeking to re-litigate the same intra-EU objection, which the Tribunal had already denied in the Preliminary Award on Jurisdiction.[693]

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691 See Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (Oxford University Press, 2015), p. 387, para. 7.105. See also Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (Stämpfli Publishers, 3rd ed., 2015), p. 252, para. 705 ("[…] a preliminary award on jurisdiction is binding upon the arbitral tribunal. As opposed to other preliminary and interim decisions, against which an immediate action for annulment is inadmissible, it is not possible for the arbitral tribunal to return to the issue of jurisdiction insofar as it has been affirmed in the preliminary award […]. If the respondent waives its right to challenge the preliminary award accepting jurisdiction, *the award produces conclusive and preclusive effects which are comparable to res judicata* […]") (emphasis added).

692 See letter from the Tribunal to the Parties, 9 January 2015, p. 2; letter from the Tribunal to the European Commission, 26 March 2015, p. 2; e-mail from the Tribunal to the European Commission, 6 June 2018.

693 See PO19, "Decision on the Respondent's Request to Open a New Jurisdictional Phase", 15 October 2018.

544. The Tribunal considers that the situation is no different here, as the Respondent requests that the Tribunal "reconsider ex officio its jurisdiction" in relation to the same intra-EU jurisdictional defense which Spain raised at the outset of the proceedings and on which the Tribunal ruled in the Preliminary Award on Jurisdiction.[694] In PO19, the Tribunal considered that the *Achmea* judgment, the EC communication, and the fact sheet did not change the nature of the intra-EU objection already resolved by the Tribunal, as its essence remained the same.[695] It can reach no different conclusion in this instance. Indeed, the Declarations which Spain now invokes purport to provide an interpretation "on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union".[696] Thus, in no way do they alter the intra-EU objection. They simply add possible legal arguments in support of it. This being so, the Tribunal is of the view that its holdings in the Preliminary Award on Jurisdiction in respect of the intra-EU jurisdictional objection continue to be binding upon the Tribunal and cannot be re-opened. This conclusion is further consistent with the accepted principle that the relevant time for determining jurisdiction is the date of initiation of the proceedings.[697]

545. For these reasons, the Tribunal declines to entertain the Respondent's request to "reconsider ex officio its jurisdiction" as a result of the Declarations.

546. With regard to the Respondent's second request, the Tribunal considers that the Respondent has not sufficiently established why it should "invite" the views of the other Member States on the matters set out above. While the Tribunal considers that it would have the authority under its broad procedural powers to invite non-disputing State parties to the ECT to provide their views on matters of interpretation of the Treaty, if circumstances so justify, it sees no sufficient reason for doing so in this case.

547. First, whatever views Member States could advance before the Tribunal on this matter, they could not lead the Tribunal to re-open its jurisdictional question, for the reasons

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694 See Preliminary Award on Jurisdiction, paras. 132-207.

695 See PO19, para. 28.

696 See the title of the 22 Member States Declaration. The Hungary Declaration bears the same title. Similarly, the 5 Member States Declaration concerns "The Enforcement Of The Judgment Of The Court Of Justice In *Achmea* And On Investment Protection In The European Union".

697 See *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) Judgment, I.C.J. Reports 2002, p. 3, para. 26 ("The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events […]").

explained above. Such an invitation would thus ultimately serve no purpose and only burden the proceedings. Second, the Member States' views are reflected in the three Declarations and Spain has not explained what further input could be derived by requesting the EU Member States' comments. In the Tribunal's view, it is sufficient to look at the plain texts of the Declarations to observe that, while all EU Member States appear to be of the view that the *Achmea* judgment concerns the interpretation of EU law in relation to an investor-state arbitration clause contained in an intra-EU bilateral investment treaty, they are not unanimous in respect of *Achmea*'s applicability to the ECT. For instance, in the words of the five Member States, which include Luxembourg, the State of nationality of a number of the Claimants in this proceeding, "the *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty".[698] This being so, these five Member States as well as Hungary have considered it "inappropriate" to express any views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty.[699]

548. In fact, even the twenty-two Member States that take the view that Article 26 as applied in an intra-EU context "would be incompatible with the [EU] Treaties and thus would have to be disapplied",[700] recognize that they "will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty".[701]

549. It is thus clear that the States signatories to the three Declarations at present disagree as to whether *Achmea* applies to the ECT and, if so, with what consequences. As put by Hungary, "[t]he ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States" (emphasis added). Therefore, while such disagreement suggests that there is neither a subsequent agreement nor subsequent practice regarding the interpretation of the ECT under the VCLT, for present purposes it shows that seeking the views of the non-disputing EU State Parties to the Treaty would not assist the Tribunal's decision-making. Accordingly, the Tribunal denies the second request raised in the Respondent's submission of 7 March 2019.

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698 5 Member States Declaration, **Exh. RLA-215**, p. 3 (English version). See also Hungary's Declaration, **Exh. RLA-216**, p. 3, para. 8 (to a similar effect) (English version).

699 5 Member States Declaration, **Exh. RLA-215**, p. 3 (English version); Hungary' Declaration, **Exh. RLA-216**, p. 3, para. 9 (English version).

700 22 Member States Declaration, **Exh. RLA-214**, p. 2 (English version).

701 22 Member States Declaration, **Exh. RLA-214**, p. 4, para. 9 (English version).

B. Liability and Quantum

1. Introductory Remarks

550. The Tribunal begins its analysis with the so-called Primary Claim, i.e. the claim that Spain's regulatory framework and the "stabilization commitment" which it contains, together with the specific assurances found in Spain's contemporaneous statements, gave rise to the legitimate expectation that the Claimants' installations would be entitled to receive the RD 661/2007 tariff for their operational life, and that the Disputed Measures have frustrated that expectation.[702] It is only if the Tribunal were to reach the conclusion that the Primary Claim is ill-founded that it would address the Alternative Claim, i.e. the claim that the Claimants are not entitled to earn the FIT under the RD 661/2007 regime, but only the reasonable return offered by the regulatory regime at the time when they made their investments.[703]

551. Before engaging with the analysis, the Tribunal notes that this arbitration is one of the numerous investment treaty cases which investors have brought against the Kingdom of Spain alleging that the Disputed Measures violated the ECT. The Parties have extensively discussed some of these cases,[704] including *Charanne*,[705] *Isolux*,[706] *Eiser*,[707] and *Novenergia*.[708] Other decisions, such as the one in *RREEF*[709] among others,[710] became publicly available after the Parties' second PO12 PHBs and before

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702 See, e.g., PO12 C-PHB1, para. 1 (explaining that the "Claimants' primary claim […] is that Spain's regulatory framework and the stabilisation commitment contained therein, together with the specific assurances contained in Spain's contemporaneous statements, gave rise to the legitimate expectation that Claimants' installations were entitled to receive the RD 661/2007 tariff for their operational life. The Disputed Measures have frustrated that expectation"). See also *supra* V.A.

703 See *supra* V.B.

704 See, e.g., PO12 C-PHB1, Section 10; PO12 R-PHB1, Section 5.

705 *Charanne B.V. Construction Investments S.A. R.L. v. The Kingdom of Spain*, Arbitration No. 062/20121, Final Award, 21 January 2016**, Exh. RLA-190**.

706 *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**.

707 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **Exh. CLA-215**.

708 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Arbitration (2015/063), Final Award, 15 February 2018, **Exh. CLA-242**.

709 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018.

710 See *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019; *NextEra Energy Global*

the Tribunal closed these proceedings on 2 December 2019. On 4 December 2019, Spain drew the Tribunal's attention to two additional cases that had been rendered on the day of the closing of the proceedings (*Stadtwerke* and *BayWa*).[711] On 9 December 2019, the Tribunal noted that, in addition to the decisions or awards that were on record as legal authorities and the two additional awards just referred to, it was aware of a number of other publicly available decisions or awards rendered in other arbitrations brought against the Kingdom of Spain and which concerned the measures at issue in this case. The Tribunal gave the Parties the opportunity to comment on the awards which were not part of the record.[712] Both Parties concurred that additional submissions on those awards were not necessary.[713]

Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, and Award, 31 May 2019; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019.

711 See letter from the Respondent to the Tribunal of 4 December 2019 (drawing the Tribunal's attention to *Stadtwerke Munchen GmbH, RWE Innogy GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 ("*Stadtwerke*") and *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 ("*BayWa*").

712 See Letter from the Tribunal to the Parties of 9 December 2019 (where the Tribunal "note[d] that, in addition to the decisions or awards that are on record as legal authorities and [the two awards which the Respondent has brought to the Tribunal's attention in its latest communication], it is aware of a number of other publicly available decisions or awards rendered in other arbitrations brought against the Kingdom of Spain and which concern the measures at issue in this case. To the Tribunal's knowledge based on decisions published on the ICSID website, the IAReporter, and/or italaw, decisions or award have been rendered in the following cases: […]". The Tribunal also invited "the Parties to advise the Tribunal if there are other decisions or awards rendered in arbitrations concerning the measures challenged in this arbitration, in addition to those just mentioned". It also noted that it did "not consider that it would be assisted by submissions on the awards listed above and the two decisions to which Spain drew its attention. However, if a Party wishes to file a short submission limited to these awards, it is invited to inform the Tribunal within the same time limit. The Tribunal would then give appropriate directions").

713 See the Claimants' e-mail of 11 December 2019 (noting that "[i]n view of the advanced stage of the proceedings, the Claimants do not consider it necessary for the Parties to file submissions on these decisions") and the Respondent's e-mail of 11 December 2019 (noting that "regarding the possibility of filing a further submission on the new decisions the Respondent agrees with the Tribunal in that at this stage of the process it would probably not assist the Tribunal to receive additional submissions").

552. In accordance with the principle *jura novit curia* or more accurately *jura novit arbiter*,[714] the Tribunal has reviewed all of the decisions or awards rendered in investment treaty arbitrations that concern Spanish renewable energies. As just recalled, the Parties had an opportunity to comment on these cases. Although the Tribunal has found it helpful to consider all of these tribunals' findings, especially on those issues of law which appear similar across all Spanish renewable energy arbitrations, it has reached its own conclusion based on the facts, the submissions and claims before it. As will be seen from the analysis below, in addressing the arguments made by the Parties, the Tribunal often engages with the conclusions drawn by other tribunals (to either distance itself or find confirmation), including in particular on the interpretation of the ECT standards, the Spanish legal framework, the content of the investors' expectations, and Spain's alleged assurances. While it does not consider it necessary or useful to engage with each and every one of the known Spanish RE awards in detail, in addressing the arguments made by the Parties it indirectly explains its disagreement with those tribunals that have chosen another approach.

553. By way of general overview of the outcomes of the Spanish RE cases, this Tribunal notes that tribunals have taken a variety of approaches in deciding whether Spain is to be held liable for its conduct in relation to the RE reforms. A number of tribunals (for instance in *Eiser, Masdar,* and *Novenergia*) have upheld claims that in substance were broadly similar to the Primary Claim in this arbitration. On the other end of the spectrum, three cases have resulted in a total dismissal of the claims (*Charanne*, *Isolux*, and *Stadtwerke*). Finally, a third group of tribunals have entertained and, in some cases, upheld – with nuances and non-identical approaches – claims that appear similar to the Alternative Claim (so for instance *RREEF* and *BayWa*).[715] The picture is thus by far not unanimous and rather shows a diversity of views between arbitral tribunals.

554. As the reasons set forth below will show, the Tribunal's assessment of the expectations which investors could derive from the regulatory framework and the reasonableness of

[714] See *supra* VI.A.2.c.

[715] See also *Stadtwerke*, paras. 327 *et seq*., in particular 337, 353 and 355 (where the tribunal, after concluding that Spain's measures were reasonable and proportionate, "nonetheless consider[ed] whether the impact upon the Claimants' investment specifically was reasonable or proportionate through an assessment of the rate of return earned by the Claimants' investment before and after the disputed measures"); In this context, the existence of *RWE Innogy GMBH and RWE Innogy Aresa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019 is also noted, but without more as this decision was issued after the Parties were given their last opportunity to comment.

Spain's changes to such framework lead it to dismiss the Primary Claim and thus move to assess the Alternative Claim. In reaching this conclusion, it follows a broadly similar route to the one chosen by the third group of tribunals identified in the preceding paragraph. By contrast and as a result of the chosen approach, this Tribunal's reasoning necessarily differs both from the one followed by tribunals that upheld claims similar in substance to the Primary Claim and by those that dismissed all claims. The difference in approach may be explained by a number of factors. First, the facts presented to this Tribunal may not be identical to those underlying other decisions. For instance, the arbitration in *Charanne* was limited to the 2010 Measures to the exclusion of the 2013 Measures; *Isolux* was concerned with investments made in October 2012, i.e. a few years after the last of the Claimants' investment, at a time when in the *Isolux* tribunal's view the regulatory framework for RE "was being object of various studies which made its modification inevitable";[716] in *Masdar*, the investors had received specific individual confirmations from the State that their plants would receive the FIT payments across their life span;[717] similarly, in *NextEra*, the claimants relied on specific assurances given to them.[718] In addition to the facts, the claims raised in some of these arbitrations differed from the present ones. In particular, in several cases upholding claims akin to the Primary Claim, the tribunal appears to have been presented with no claim equivalent to the Alternative Claim (in the sense of an *actual claim*, and not merely a defense from the Respondent or alternative damages calculations from the experts).[719] Thus, in spite of the identity or close similarity of the subject matter of the disputes and of the main issues of law, not all of the elements forming the basis of the

716 *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**, para. 787.

717 See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, **Exh. CLA-243,** paras. 518-520.

718 *NextEera Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, paras. 592 et seq. See also *BayWa*, para. 474.

719 See, e.g., *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Arbitration SCC 2015/063, Final Arbitral Award, 15 February 2018; *Greentech Energy Systems A/S and others v. Kingdom of Spain*, SCC Case No. V (2015/150), Final Award, 14 November 2018, **Exh. CLA-245**; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019; *Infrared Environmental Infraestructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019.

decision may be identical and the Tribunal has accordingly had "due regard to the circumstances of [this] particular case" in reaching its decision.[720]

555. Further to possible differences in the underlying facts, submissions or claims, the divergent approaches shown by arbitral tribunals may also be due to a different appreciation of the circumstances that underpin the Spanish RE cases, and in particular of the expectations which investors could derive from the regulatory framework and the reasonableness of Spain's changes to such framework. It is not entirely unsurprising, and indeed to some extent to be expected in a system based on *ad hoc* adjudication, that arbitral tribunals may assess relevant circumstances in different ways.

556. The Tribunal will now interpret the standards of protection under Article 10(1) of the ECT (*infra* at VI.B.2). In light of the standards thus interpreted, it will assess whether the Disputed Measures violated the Treaty (*infra* at VI.B.3). Because the Tribunal reaches the conclusion that the Primary Claim cannot be upheld, it will move to examining the Alternative Claim (*infra* at VI.B.4).

2. The Standards of Protection Contained in Article 10(1) of the ECT

a. *Introductory Remarks*

557. Article 10(1) of the ECT, which is invoked as the legal basis of the claims made in this arbitration, provides as follows:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

720 See also Preliminary Award on Jurisdiction, para. 53 (where the Tribunal noted that it "believes that, subject always to the specific text of the ECT, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment Law […]", emphasis added).

558. The Claimants have argued that Spain's measures violated a number of the obligations contained in Article 10(1) of the ECT. In their latest brief, they have summarized their case in the following terms:

> 209. The Claimants claim that Spain has breached Article 10(1) of the ECT in the following ways:
>
> (i) Spain has failed to "*create stable, equitable, favourable and transparent conditions for Investors*".
>
> (ii) Spain has failed to provide "*fair and equitable treatment*" (FET). The Claimants' claim for breach of the FET provision rests on three <u>non-cumulative</u> and distinct breaches of that provision. If Spain has breached any one of these three requirements, then a breach of FET is established. These breaches of the FET provision include:
>
> (A) the Disputed Measures have frustrated the Claimants' legitimate expectations;
>
> (B) Spain has not been transparent in its conduct; and
>
> (C) Spain has taken measures that are unreasonable, arbitrary and disproportionate.
>
> (iii) Spain has impaired the Claimants' investments through "*unreasonable or discriminatory measures*".
>
> (iv) Spain has failed to ensure that the Claimants' investments were afforded "*the most constant protection and security*".[721]

559. The facts on which the Claimants base their claims in respect of each of these alleged breaches are largely the same. There is also some overlap between the various sub-elements of FET,[722] as well as between some aspects usually considered part of FET and other obligations under the Treaty, such as the obligation not to "impair by unreasonable […] measures [the] management, maintenance, use, enjoyment or disposal" of investments to which the third sentence of such provision refers.[723]

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721 PO12 C-PHB2, para. 209 (emphasis in the original, bold removed).

722 See ASoC, para. 428 ("There is an overlap between the above aspects of the FET standard. For example, an investor's legitimate expectations are closely connected with a State's duty to provide a stable legal and business framework for investments and not to act arbitrarily or adopt disproportionate measures. Ultimately, in applying the FET standard, the Tribunal must determine whether, in all of the circumstances of the case, Spain's actions vis-à-vis the investor were fair and equitable. Put differently, a determination as to what constitutes a breach of the FET standard 'cannot be reached in the abstract; it must depend on the facts of the particular case'" (internal footnote omitted, emphasis removed)).

723 See ASoC, para. 490 (where the Claimants note that "a breach of this obligation results in a simultaneous breach of the FET standard, as no action of the host State can be fair or equitable if it is unreasonable or discriminatory").

560. This being so, the Tribunal starts its analysis with FET, which is the standard that is most prominent in the Parties' pleadings.

b. ***Fair and Equitable Treatment***

i. ***Content***

561. Article 10(1) of the ECT provides for a commitment of the Contracting Parties "to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment".

562. Under the rules of treaty interpretation, which have been examined in the Preliminary Award,[724] Article 10(1) must be construed "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" (Article 31(1) of the VCLT). Furthermore, pursuant to Article 31(2) VCLT, "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". In limited circumstances, the Tribunal may have also regard to the supplementary means of interpretation under Article 32 VCLT.

563. Starting from the text of the Treaty, this Tribunal, like others, notes that the plain meaning of the words "fair and equitable" included in Article 10(1) of the ECT – as in many other investment treaties - does not provide much assistance.[725] The tribunal in *MTD v. Chile*, for instance, observed that "[i]n their ordinary meaning, the terms 'fair' and 'equitable' [...] mean 'just', 'even-handed', 'unbiased', 'legitimate'";[726] while the tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant treatment "in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective".[727] As noted in *Saluka*, "[t]his is

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724 See Preliminary Award, paras. 95-96, 176, 252.

725 See, e.g., *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. RLA-165,** para. 504.

726 *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **Exh. CLA-171**, para. 113.

727 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, **Exhs. CLA-9**; **RLA-156**, para. 263.

probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty".[728]

564. In their attempt to ascertain the ordinary meaning of similarly worded FET provisions found in investment treaties, arbitral tribunals have identified a number of inherent components of the standard.[729] For instance, in *Electrabel*, the tribunal gave a description that encapsulates the consensus emerging from the jurisprudence about the core components of FET and reads as follows:

> [T]he obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.[730]

565. To the extent relevant to address the claims and prayers for relief before it, the Tribunal likewise considers that FET encompasses the protection of legitimate or reasonable expectations, the protection against arbitrary, unreasonable, and disproportionate conduct, and the principle of transparency.

ii. *FET and "Stability"*

566. This being said, it is true that the ECT appears to place a greater emphasis on "stable" conditions for investments than other treaties. The first sentence of Article 10(1) provides that the Contracting Parties shall "encourage and create *stable*, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments" (emphasis added). The second sentence adds that such conditions "shall include a commitment to accord at all times" FET to investments of investors. The Claimants have argued that the reference to stability should at a minimum inform the content of FET, if not act as a self-standing obligation under the Treaty.

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728 *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, **Exh. CLA-22**, para. 297. See also *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. RLA-165**, para. 504.

729 See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exh. CLA-34**, para. 609; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **Exh. CLA-156**, para. 284.

730 *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **Exh. CLA-160**, para. 7.74.

567. The Tribunal does not consider that stability is a stand-alone or absolute requirement under the ECT;[731] rather, it views it as a requirement that is intertwined with and closely linked to FET. This view is in line with findings of other tribunals. The tribunal in *Plama v. Bulgaria* observed for example that "stable and equitable conditions are clearly part of the fair and equitable treatment standard under the ECT".[732] Similarly, the tribunal in *Electrabel v. Hungary* held that "[f]air and equitable treatment is connected in the ECT to the encouragement to provide stable, equitable, favourable and transparent conditions for investors".[733] Recent decisions issued in investment arbitrations under the ECT involving Spain endorse the same conclusion.[734]

568. This being so, in the Tribunal's opinion, the Treaty provides for the creation and maintenance of stable conditions as part of FET within well-defined limits which derive from the object and purpose of the Treaty. In this context, Article 2 of the Treaty, which is entitled "purpose of the Treaty", expressly refers to the European Energy Charter (or the "Charter"), a political declaration that formed the basis of the ECT:

> 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 Charter.

569. Therefore, the object and purpose of the ECT must be assessed in light of the Charter which is part of its context, since it was made by the Parties in connection with the conclusion of the Treaty and accepted by them as an instrument related to the treaty.

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731 In this respect, the Tribunal agrees with the tribunal in *Isolux* that held that "the Arbitral Tribunal did not find, in this Article, an autonomous obligation for the Contracting Parties to promote and create stable and transparent conditions for the performance of investments in its territory, and whose violation would generate rights in favour of the investors of other Contracting Party, *per se*" (*Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**, para. 764).

732 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, **Exh. CLA-152**, para. 173.

733 *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **Exh. CLA-160**, para. 7.73.

734 See, e.g., *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**, para. 765; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, **Exh. CLA-215**, paras. 381-382. See also *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, **Exh. CLA-244**, paras. 529-530.

The objectives of the Charter are expressed in Title 1 which articulates the following principles:

> Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, [the signatories] undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.

570. As can be seen from these principles, the Parties to the ECT aimed at realizing a balance between the sovereign rights of the State over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles.[735] In other words, while the purpose of "promot[ing] long-term cooperation in the energy field" which is stipulated in Article 2 of the Treaty may be facilitated by stability of the investment framework, the requirement of stability is not absolute; it must be balanced with other principles, including those that are directly derived from "State sovereignty", e.g. the State's right to regulate and to adapt the regulatory framework to changed circumstances. More generally, the protection of investments and the right to regulate operate in a balanced way under the ECT as in all other investment treaties.

571. Bearing these considerations in mind, the Tribunal will now set out its understanding of the various elements inherent in Article 10(1) of the ECT, to the extent that they are relevant to the claims before it.

iii. *Legitimate Expectations, Reasonableness and Proportionality*

572. The centerpiece of the Claimants' case is that the Disputed Measures frustrated their legitimate expectations.[736] As a matter of principle, the Parties agree that the FET standard protects legitimate expectations.[737] They disagree, however, on the precise

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735 The Tribunal finds confirmation of this conclusion in the statements in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 239.

736 See *supra* V.A.1.d and V.B.1.a.

737 See, e.g., SoD, para. 646, where Spain states that it "does not disagree with [the] proposition" made by the tribunal in *Saluka* whereby "[t]he standard of 'fair and equitable treatment' is […] closely tied to the notion of legitimate expectations which is the dominant element of the standard" (*Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, **Exh. RLA-151,** para. 301).

contours of such protection and on what the investors could legitimately expect under the circumstances.

573. In conformity with a number of other investment decisions, the Tribunal recalls, that the standard of protection of legitimate expectations is an objective and not a subjective one. Thus, in the words of *Charanne*:

> The determination of whether the investor's legitimate expectations have been violated must be based on an objective standard or analysis. The mere subjective belief that the investor could have had at the time of making the investment does not suffice. Similarly, the application of this principle depends on whether the expectation has been reasonable or not in the specific case. In this regard, the representations that may have been made by the host State to encourage the investment are relevant.[738]

574. Or, as was held in *Perenco v. Ecuador*, "a central aspect of the analysis of an alleged breach of the fair and equitable treatment standard is the investor's reasonable expectations as to the future treatment of its investment by the host State" which requires "an objective determination of such expectations having regard to all relevant circumstances".[739]

575. It is also commonly accepted that the investors' expectations must be assessed at the time of making the investment.[740]

576. Further, expectations which are purported to be founded on general legislation have been treated with caution in a number of recent decisions. Those cases have highlighted the tension between claims of "stability" based on alleged legitimate expectations and the State's sovereign prerogative to adapt the regulatory framework to changed circumstances. In this respect, the Tribunal agrees with the statement in *Philip Morris v. Uruguay* according to which:

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[738] *Charanne B.V. Construction Investments S.A. R.L. v. The Kingdom of Spain*, Arbitration No. 062/20121, Final Award, 21 January 2016, **Exh. RLA-190**, para. 495.

[739] *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on pending issues related to jurisdiction and responsibility, 12 September 2014, **Exh. RLA-140**, para. 560. See also *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**, para. 777.

[740] *National Grid plc v. Argentina*, UNCITRAL, Award, 3 November 2008, **Exh. CLA-35**, para. 173; *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh. RLA-174**, paras. 190-191; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **Exh. CLA-156**, para. 264.

> It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.[741]

577. Recent cases dealing with alleged expectations arising from a regulatory framework have looked at a number of factors to ascertain whether the expectation at issue was *legitimate*. A first factor identified by tribunals is the existence of specific commitments given by the State to an investor. Second, tribunals have underscored that a change in regulatory framework affecting investors must be "reasonable" in order to be compliant with FET. Third, in what can be seen as an over-arching requirement (in line with the interplay between stability and FET highlighted above), an investor's legitimate expectations must be balanced with the State's right to regulate in the public interest. The Tribunal briefly discusses each of these factors in turn, in so far as they are pertinent for present purposes.

578. First, the presence of a specific promise or representation made by the host State and relied upon by the investor may be important to determine the legitimacy of the investor's expectation in respect of the stability of the regulatory framework. Accordingly, for the tribunal in *EDF v. Romania*, "[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable".[742]

579. The tribunal in *Continental v. Argentina* further elaborated on these aspects in the following terms:

> [I]n order to evaluate the relevance of that concept [legitimate expectations] applied within [the] Fair and Equitable Treatment standard and whether a breach has occurred, relevant factors include:

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741 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 422.

742 *EDF (Services) Limited v. Rumania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, **Exh. RLA-141**, para. 217. See also *CEF Energia BV v. Italian Republic*, SCC Case No. 158/2015, Award, 16 January 2019, para. 185(10); *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360(10); *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **Exh. RLA-158**, para. 332.

> i) the specificity of the undertaking allegedly relied upon which is mostly absent here, considering moreover that political statements have the least legal value, regrettably but notoriously so;
>
> ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*; […][743]

580. Second, it is not sufficient that a change in the regulatory framework is detrimental to the investors' interests in order to entail State responsibility under the ECT. The change must also be "unreasonable". The Tribunal shares the approach taken by the tribunal in *El Paso*, which underscored that "[e]conomic and legal life is by nature evolutionary"[744] and that:

> [T]he legitimate expectations of any investor […] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.[745]

581. Similarly, the tribunal in *Impregilo v. Argentina* noted that:

> The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework.[746]

582. Third, some tribunals have subjected the protection of the investor's legitimate expectations to a balancing act that takes into account the investors' legitimate or reasonable expectations and the host State's right to regulate.[747] The requirement for

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743 *Continental Casualty Company v. the Republic of Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-143**, para. 261 (emphasis added, internal footnotes omitted).

744 *El Paso Energy International Company v. the Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh. RLA-131**, para. 352.

745 *El Paso Energy International Company v. the Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh. RLA-131**, para. 400 (emphasis added). See also *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **Exh. RLA-158**, para. 332 (holding that "any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power").

746 *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, **Exh. CLA-109**, para. 291 (emphasis added).

747 See, e.g., *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, **Exh. CLA-22**, para. 306; *Electrabel S.A. v. The Republic of Hungary*, ICSID case No. ARB/07/19, Award, 25 November 2015, **Exh.**

reasonableness of the changes and the balancing test involving the investor's interests and the State's right to regulate are, in turn, linked to the requirement of proportionality of the measures. Once again, the Tribunal agrees with the tribunal in *Electrabel* which held that:

> […] the application of the ECT's FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in *Saluka v Czech Republic* and *Arif v Moldova*, an FET standard may legitimately involve a balancing or weighing exercise by the host State. […]
>
> That requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests. Provided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT's FET standard even if others can disagree with that decision. A State can thus be mistaken without being unreasonable.[748]

583. Moreover, it is also recognized that States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation.[749] This means that an arbitral tribunal asked to review general economic regulation will normally not second-guess the State's choices; it will not review *de novo* whether they are well-founded, nor assess whether alternative solutions would have been more suitable. Governments often have to make controversial choices, which especially those directly affected may view as mistaken, based on misguided economic theory, placing too much emphasis on certain social values over others.[750] It is not the task of an investment treaty tribunal to evaluate the policy choices

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RLA-166, para. 165; *Rusoro Mining Limited v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **Exh. RLA-194**, para. 525.

748 *Electrabel S.A. v. The Republic of Hungary*, ICSID case No. ARB/07/19, Award, 25 November 2015, **Exh. RLA-166**, paras. 165 and 180 (internal footnotes omitted).

749 The Tribunal finds confirmation for this conclusion in *RREEF* para. 262, noting that "[i]n order to appreciate the legitimacy (or illegitimacy) of the Claimants' expectations in the present case, it must be kept in mind that it is generally recognized that States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations. As a result, the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State" (*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 262).

750 See also similarly *SD Myers* ("When interpreting and applying the "minimum standard", a Chapter tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially

that often underpin economic decisions. This being so, the margin of appreciation accorded to the State cannot be unlimited; otherwise the substantive treaty protections would be rendered wholly nugatory. In the Tribunal's view, the limits of the State's power are drawn by the principles of reasonableness and proportionality, which must guide a tribunal's assessment of the allegedly harmful changes in the legislation.[751]

584. Finally, while the three factors elucidated above are relevant in determining whether an investor's expectations were legitimate under the circumstances, *mutatis mutandis* they will also guide the Tribunal in its review of alleged violations of other Treaty obligations be they sub-elements of FET (e.g., the prohibition of arbitrary or unreasonable measures) or separate standards of protection (e.g., the obligation not to impair investments by unreasonable measures) (see Article 10(1), third sentence).

585. In light of the principles just discussed, the Tribunal will now turn to the Primary Claim and examine whether the Disputed Measures violated Article 10(1) of the ECT.

3. Primary Claim: Did the Disputed Measures Violate Article 10(1) of the ECT?

586. The Tribunal will first examine whether Spain's measures frustrated the Claimants' legitimate expectations (*infra* at VI.B.3.a). It will then review whether the Disputed Measures were in breach of the other sub-elements of FET and guarantees provided in Article 10(1) of the ECT (*infra* at VI.B.3.b). Finally, it will draw its conclusions on the Primary Claim (*infra* at VI.B.3.c).

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controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections") (*SD Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, **Exhs. CLA-9**; **RLA-156**, para. 261).

751 See also *Blusun S.A., Jean-Pierre Lecorcier dnd Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, **Exh. RLA-203**, para. 319(5) noting that "[i]n the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime".

a. *Legitimate Expectations*

587. In sum, the Claimants contend that the 2010 and 2013 Measures (defined above collectively as the "Disputed Measures") frustrated their legitimate expectations that they would enjoy the RD 661/2007 tariff for the lifetime of their plants.[752]

588. At the outset, the Tribunal notes that the Disputed Measures are part of Spain's regulatory framework of the energy sector and in particular of the renewable energy sector. As such, the Tribunal considers that it should not review the Disputed Measures in isolation but rather in the context of this general framework.

589. It is not disputed that renewable energy (including photovoltaic, thermal, solar, wind and certain other technologies) offers significant environmental benefits. Nor is it contested that, due to the high capital requirements, renewable energy plants have not been able to compete with conventional forms of power generation utilizing fossil fuels. In other words, the market price of electricity is not sufficient to cover the costs of installing and operating renewable energy plants. Accordingly, like many other countries, Spain decided to promote the development of renewable energy through what are in essence State subsidies.[753] As noted by the tribunal in *Antin v. Spain*, "[t]he purpose of subsidization in this context is to allow the technologies to be developed in the hope that over time the costs associated therewith will decline, thus making RE technologies more competitive".[754]

590. The legislative centerpiece in Spain's electricity regulation is the 1997 Electricity Law, which aimed at liberalizing the energy market. In order to encourage the production of energy from renewable sources, the 1997 Electricity Law created two distinct regimes: an "Ordinary Regime" applicable to conventional sources of energy production (such as coal-fired power plants) and a "Special Regime" applicable to facilities generating electricity from renewable energy sources and registered in the RAIPRE. Facilities qualifying under the Special Regime were entitled to the general, market-based

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752 See *supra* V.A.1.d.

753 See also *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 415 ("PV plants cannot compete with conventional forms of energy production without substantial public subsidy or other form of incentive. They are capital-intensive, meaning that most of an investor's costs are incurred prior to operation (90%, according to Claimant's expert). They face a long period for capital recovery. Investments in PV plants are usually heavily leveraged (in the range of 55-80% leverage)").

754 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, **Exh. CLA-244**, para. 540.

remuneration applicable by default to all facilities plus a premium, to be set by the Government through regulation. Under the Law, the premium was intended to enable energy producers "to achieve reasonable rates of return based on the cost of money in capital markets" (Art. 30(4)). More precisely, in its version in force at the time when the Claimants made their investments, Article 30.4 of the 1997 Electricity Law read as follows:

> 4. The payment regime for electricity production facilities under the special regime shall be supplemented by the earning of a premium, under the terms set by regulation, in the following cases:
>
> a) Facilities referred to in letter a) of section 1 of article 27.
>
> b) Hydroelectric power plants with installed capacity less than or equal to 10 MW, and all other facilities referred to in letter b) of section 1 of article 27. For the purposes of this Act, urban solid waste and hazardous waste will not be considered biomass.
>
> c) Hydroelectric plants between 10 and 50 MW, facilities referred to in letter c) of section 1 of article 27, as well as the facilities mentioned in paragraph two of section 1 of article 27.
>
> To determine the premiums, the voltage level of electricity delivered to the network must be considered, along with the actual contribution to improvement of the environment, primary energy savings, and energy efficiency, the economically justifiable production of usable heat, and the investment costs that have been incurred, for the purpose of achieving **reasonable rates of return** with respect to the cost of money on the capital market.[755]

591. Following the 1997 Electricity Law, Spain enacted a number of regulations which sought to specify the general parameters set out in the Law. These regulations were passed in the context of global, regional and national efforts to address climate change, aimed at the reduction of emissions of carbon dioxide. Against the background of the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol to the UNFCCC, the European Union had also adopted rules committing Member States, including Spain, to reduce greenhouse gas emissions.[756] These rules

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755 1997 Electricity Law, **Exh. C-16**, Article 30.4 (Claimants' English translation) (emphasis added).

756 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, **Exh. RLA-123**; 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 repealing Directives 2001/77/EC and 2003/30/EC, **Exh. RLA-125**.

included measures to encourage the use of renewable and other environment-friendly technologies.

592. The first instrument enacted by the Government to implement the 1997 Electricity Law was RD 2818/1998.[757] A few years after, it was followed by RD 436/2004 of 12 March 2004, which for the first time in Spain provided a remuneration system based on a FIT.[758] In its preamble, RD 436/2004 stressed the principle of reasonable profitability in the following terms:

> Whatever the remuneration mechanism selected, the Royal Decree guarantees owners of special regime installations a reasonable return on their investments and for electricity consumers an also reasonable allocation of costs attributable to the electricity system […].[759]

593. RD 436/2004 also stipulated in Article 40.3 that the new remuneration system would not affect existing installations:

> [T]he tariffs, premiums, incentives and supplements which result from any of the reviews covered by this Section shall be applicable solely to installations which enter operation after the date of entry into force referred to in the previous sub-section, without retrospective effect on previous tariffs and premiums.[760]

594. The scheme of incentives provided under RD 436/2004 was first modified by RD 2351/2004 and RD 1454/2005, and eventually replaced first by RDL 7/2006[761] and subsequently by RD 661/2007.[762] The latter affected existing facilities registered under RD 436/2004, in spite of the rule contained in Article 40.3 of RD 436/2004.

595. RD 661/2007, which was in force when the Claimants made their investments, among other things, provided a different FIT and modified the incentives in a number of respects. In its preamble, it stressed the principle of reasonable profitability in the following terms:

> The economic framework established in this Royal Decree develops the principles contained in Law 54/1997, of 27 November, on the electricity sector, guaranteeing the owners of special regime facilities a reasonable

757 RD 2818/1998, **Exh. C-314**.

758 RD 436/2004, **Exh. R-55**.

759 RD 436/2004, **Exh. R- 55**, preamble (seventh paragraph) (emphasis added).

760 RD 436/2004, **Exh. R- 55**, Art. 40.3.

761 RDL 7/2006, **Exh. C-564**.

762 RD 661/2007, **Exh. C-35**.

> return on their investments and electricity consumers a reasonable allocation of costs attributable to the electricity system […].[763]

596. The Tribunal agrees with Spain that the cardinal principle emerging from Article 30.4 of the 1997 Electricity Law and the implementing decrees up to RD 661/2007 is reasonable profitability or the guarantee of a reasonable rate of return for investors operating in the Special Regime. In other words, the 1997 Electricity Law established the principle of reasonable profitability or reasonable rate of return as general rule leaving it to the implementing regulation, to establish the means ensuring such reasonable profitability.

597. Starting from 2010, in economic conditions that had significantly changed (as explained below), a number of regulations modified the incentives scheme provided by RD 661/2007. In 2010, the Government enacted RD 1565/2010 of 19 November 2010 and RDL 14/2010 of 23 December 2010, imposing restrictions and caps on the entitlement to the FIT. In 2013, Spain then introduced RDL 2/2013 substituting another index to CPI-linked updating mechanism for the FIT. Subsequently, it promulgated RDL 9/2013 in July 2013 and Law 24/2013 in December 2013, which replaced RD 661/2007 entirely with an incentive scheme based on different types of subsidies.

598. In respect of the regulatory framework in force at the time when they made their investments, the Claimants' main argument is that Spain provided "stabilization commitments" in RD 661/2007 and other representations which it was bound to observe for the lifetime of the qualifying plants. The Claimants place special reliance on Article 44.3 of RD 661/2007 to support their argument that future changes could not affect the benefits they were promised under RD 661/2007 and that their expectation of a 25-year FIT in the amount specified in RD 661/2007 was legitimate.

599. Article 44.3 reads as follows:

> In 2010, in view of the result of the follow-up reports on the extent to which the Renewable Energy Plan for 2005-2010 and the Energy Saving and Efficiency Plan for Spain (E4) have been achieved, as well as the new objectives included in the next Renewable Energy Plan for 2011-2020, tariffs, premiums, additional payments, and lower and upper thresholds set out in this royal decree will be reviewed, taking into account the costs associated with each of these technologies, the degree of participation of the special regime in meeting demand and its impact on the technical and economic management of the system, guaranteeing reasonable returns with reference to the cost of money on capital markets. Every four years thereafter a new adjustment will be carried out using the above criteria.

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763 RD 661/2007, **Exh. C-35**, preamble (seventh paragraph) (emphasis added) (Tribunal's translation).

> The adjustments to the regulated tariff and the lower and upper thresholds referred to in this section will not affect the facilities for which the start-up document was issued before January 1 of the second year after the year in which the adjustment was implemented.[764]

600. The Tribunal is unable to discern in this provision a stabilization commitment that would guarantee the Claimants an immutable tariff for the operational lifetime of their plants. For the Tribunal, a systematic interpretation of this provision in its proper context can lead to no other conclusion.

601. At the outset, it must be recalled that, as an act of general regulation, RD 661/2007 was subject to the power of the legislative bodies of Spain to change the applicable rules according to constitutional procedures and principles governing law-making. It is correct that Article 44.3 states that certain revisions that may occur in the future under that decree would not affect existing installations. However, that mere statement in and of itself does not make of Article 44.3 a stabilization commitment according to which the State guaranteed that future legislative or regulatory change would not affect the investment. Moreover, Article 44.3 cannot be read in isolation but must be viewed in the context of the entirety of the Spanish regulatory framework. This context includes a number of important elements.

602. First, as is evident from the changes which occurred since the inception of the Special Regime in 1997, the regulatory framework was subject to continuous changes aimed at adapting it to the constantly evolving technological and economic circumstances. This propensity for change should have been clear to any reasonable operator investing in this sector.[765] In particular, RD 661/2007 had been preceded by a multitude of changes in the previous decade. Furthermore and importantly, one of the instruments introducing changes, RD 436/2004, contained a clause analogous to Article 44.3, i.e. Art. 40.3, and that clause had not barred the Government from introducing still other changes through the very instrument (RD 661/2007) under which the Claimants decided to invest and on which they base their Primary Claim. In such a

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764 RD 661/2007 of 26 May 2007, **Exh. C-35**, Article 44.3 (Tribunal's translation).

765 See also *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016, **Exh. RLA-202**, para. 788 ("the regulatory framework had already been modified several times. The proper RDs 6611/2007 and 1565/2008 were no more than amendments to RD 436/2004. After that, RD 1565/2010 and Royal Decree Law 14/2010 modified the established economic regime in RD 661/2007 for the photovoltaic sector. All of these regulations issued for the implementation of Law 54/1997, of 27 November 1997, regarding the Electrical Sector (LSE), showed a very unstable character of a regulatory framework that the government has the power and the duty to adapt to the economic and technical needs of the moment, within the LSE framework").

constantly evolving framework, the Tribunal does not see how an expectation of receiving the identical FIT during 25 years (only indexed to inflation) could have been reasonable.

603. Second, in rulings on the various decrees that followed one another through the years, the Spanish Supreme Court had similarly held that an investor should reasonably have expected possible changes in the regulatory framework. For a tribunal operating under international law, domestic judgments are mainly "facts". As facts, they are relevant to the assessment of the existence of reasonable expectations. As the tribunal in *Charanne* held,

> [a]lthough these decisions by the Spanish courts are not binding on this Arbitral Tribunal, they are factually relevant in order to verify that the investor was unable, at the time of the disputed investment, to have the reasonable expectation that, in the absence of a specific commitment, the regulation was not going to be modified during the lifespan of the plants.[766]

604. Obviously, only judgments issued prior to the Claimants' investments could inform their legitimate expectations. Thus, to assess the legitimacy or reasonableness of expectations, the Tribunal disregards later decisions. For the sake of completeness, it nevertheless observes that subsequent decisions did not contradict the Court's earlier pronouncements.

605. The first relevant judgment was rendered by the Supreme Court on 15 December 2005. There, the Court addressed the changes that RD 436/2004 had introduced to the previous regulations governing the economic regime for renewable energies. The Court held that the State has the power to amend a system of remuneration to modify the electricity sector, provided it complies with the general framework provided by the 1997 Electricity Law:[767]

> There is no legal obstacle for the Government, in the exercise of its regulatory powers and the broad prerogatives which it enjoys in a heavily regulated sector such as electricity, to modify a specific system of remuneration provided that it remains within the framework established in the ESL [the 1997 Electricity Law] (RCL 1997, 2821). (Tribunal's translation)

606. Less than one year later, on 25 October 2006, the Supreme Court ruled on a challenge to the legality of RD 2351/2004, which had modified RD 436/2004. It insisted that operators entering a regulated market functioning with economic incentives must be

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766 *Charanne B.V. Construction Investments S.A. R.L. v. The Kingdom of Spain*, Arbitration No. 062/20121, Final Award, 21 January 2016**, Exh. RLA-190**, para. 508.

767 Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, Appeal No. 73/2004, **Exh. R-182**, p. 15 (Respondent's English translation).

aware that an incentive scheme may be amended as long as it stayed within the scope of the guarantee of reasonable profitability anchored in the 1997 Electricity Law. It is helpful for our purposes to quote the pertinent passages in full:

> The appeal, raised on these terms, cannot be upheld. As the State Attorney rightly states, the owners of electricity production installations under the special regime do not have an "unalterable right" to remain in an unchanged economic regime governing the collection of premiums. The scheme is designed to promote renewable energy by an incentive mechanism which, like all those of this type, does not guarantee to remain unchanged in the future.
>
> It is true that in this case fixing the premiums is subject to legislative guidelines, as stated above, but it is also true that the Council of Ministers can, respecting them, introduce quantitative variations in formulas by which the premiums are periodically authorised or their calculation. If the modification has not deviated from these legal guidelines and, again, there is no allegation of infringement of Article 30 of the Law on the Electrical Sector, it will be difficult to consider them as contrary to law.
>
> The value of "legal certainty" cannot be applied to a regulatory amendment as allegedly invalidating this argument. It is true that the rules should provide some stability to the regulatory frameworks of economic activities (in fact in the preamble to Royal Decree 436/2004, amended by the provision now under challenge, stated that "(...) this new methodology for calculating the special regime charges, for the security and stability it offers, should help encourage investment in this type of installation"), but so it is that legal certainty is not incompatible with the regulatory changes from the perspective of their validity, which is the only factor on which we can decide in law.
>
> The same consideration applies to the principle of legitimate expectations, increasingly but unduly deployed as an argument against quite a few regulatory changes that some economic operators have deemed more or less harmful to their interests. The appellants argue that their investments in the production of electrical energy under the special regime were made at a particular time "when they trusted the Government not to change the legal conditions that decided them to (...) build their facility". This premise leads them to conclude that the reduction of premiums subsequent to Royal Decree 2351/2004 with respect to those in Royal Decree 435/2004 is contrary to the principle.
>
> We cannot agree that this reasoning can be applied to an incentive mechanism such as the premiums in question. Until replaced by another, the above outlined legal regulation (Article 30 of the Electricity Law) allows the respective companies to expect that the fixing of the premiums can be included as a factor relevant, **to their obtaining "reasonable rates of return with reference to the cost of money in the capital market"** or, to put it again in the words of the preamble to Royal Decree 436/2004, **"reasonable compensation for their investment".** However, the payment regime under examination does not guarantee to special regime electricity producers that a certain level of profits or revenues will be unchanged relative to those obtained in previous years, or that the formulas for fixing the premiums will stay unchanged.
>
> In the same manner as on the basis of economic policy factors of very different sign (relating to the promotion of renewable energy but also the planning of electricity sector networks, as well as other energy saving and

> efficiency considerations), premiums and incentives for the production of electricity under the special regime can increase from one year to another, they may also fall when these same considerations also so advise. Provided that, we would stress, these changes are kept within the legal limits which discipline this mode of promotion, the mere fact that the updating or economic direction of the premium rises or falls does not constitute in itself grounds for nullity or affect the legitimate expectation of recipients.
>
> Undertakings which freely decide to enter the market, such as the energy generation market under the special regime, knowing beforehand that it is to a large part dependent on public authorities fixing economic incentives, are or must be aware that these incentives can be modified within the legal guidelines, by such authorities. One of the "regulatory risks" to which they submit, which they must necessarily bear, is precisely that of variation in the parameters of the premiums or incentives. that the Electricity Sector Law tempers, as previously discussed, but does not exclude such variation.[768]

607. In two later judgments, dating from 20 March and 9 October 2007, the Supreme Court adopted similar rulings.[769]

608. Thus, at the time when the Claimants made their investments, the Spanish Supreme Court had rejected challenges to the various modifications of the regulatory incentive mechanisms and denied that investors had a vested right to specific subsidies. It is true that these decisions concerned the regulations preceding RD 661/2007, and not RD 661/2007 itself, and may have covered different types of installations. Yet, the Court's reasons address the State's power to modify regulatory incentives in a general manner that appears valid irrespective of the specifics of the actual case before it. As a result, a reasonably informed investor should have known that changes in the regulatory framework could occur. In other words, these judgments sent a clear message that the remuneration offered to *any* kind of installations under the Special Regime could be amended.

609. In this respect, the Tribunal agrees with the finding in *Charanne* that:

> [the] case law from the highest courts in Spain […] clearly established, prior to the investment, the principle that domestic law allows for changes to be made to the regulation. […] at the time of making the investment in 2009, the Claimants could have carried out an analysis of the Spanish legal

768 Judgment of Section Three of the Supreme Court of 25 October 2006, Appeal No. 12/2005, legal ground no. 3, **Exh. R-67**, pp. 3-4 (emphasis added) (Respondent's English translation).

769 Judgment of Section Three of the Spanish Supreme Court of 20 March 2007, Appeal No. 11/2005, **Exh. R-174**; Judgment of Section Three of the Spanish Supreme Court of 9 October 2007, Appeal No. 13/2006, **Exh. R-164**.

> framework in relation to their investment and understood that the regulations enacted in 2007 and 2008 could be modified.[770]

610. The Supreme Court's holdings reviewed above were then confirmed in a number of judgments issued in December 2009 dealing with complaints that arose from the replacement of RD 436/2004 by RD 661/2007.[771] While these judgments are not relevant to ascertain the expectations of the Claimants, as they were handed down at the time when the investments were being finalized or were already completed,[772] they are noteworthy because they confirm the principles set in the earlier judgments and thus show a consistent jurisprudence.

611. In sum, prior to the Claimants' investment and thereafter, the Spanish courts had consistently held that tariffs and related incentives were not "immutable" and investors had no vested right to specific subsidy for the future; that RD 436/2004 did not freeze the remuneration system in spite of Article 40.3; that the State had the power to change the regulatory system, and that the law guaranteed operators that they would achieve a reasonable rate of return on investments.

612. With that background in mind and in light of all circumstances, the Tribunal does not consider it reasonable for investors to have expected – from an objective viewpoint and regardless of what their subjective belief may have been – that no regulatory changes to RD 661/2007 affecting their investments would ever occur.

613. It is in this context that the arguments and submissions in respect of the investor's due diligence must be viewed. For the Tribunal, this debate lacks relevance for present purposes. Indeed, whether the Claimants engaged in diligence or not and whether that diligence was "due" or not, cannot alter the fact that on the basis of the law and the jurisprudence the Claimants knew or should have known that changes to the regulatory framework could happen. As a consequence, expectations that they would not happen cannot be deemed legitimate.

614. So far, the analysis shows that the regulatory framework, including RD 661/2007, did not provide for a stabilization guarantee according to which investors would enjoy an

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770 *Charanne B.V. Construction Investments S.A. R.L. v. The Kingdom of Spain*, Arbitration No. 062/20121, Final Award, 21 January 2016, **Exh. RLA-190**, paras. 504, 507.

771 Judgment of Section Three of the Spanish Supreme Court of 3 December 2009, Appeal No. 151/2007, **Exh. R-183**; Judgment of Section Three of the Spanish Supreme Court of 9 December 2009, Appeal No. 152/2007, **Exh. R-180**; Judgment of Section Three of the Spanish Supreme Court of 9 December 2009, Appeal No. 149/2007, **Exh. R-235**.

772 See Claimants' Demonstrative, Table A "The PV Investors' Plants" (detailing the relevant dates of the Claimants' investments).

immutable tariff for the life of their plants. It remains to be seen whether a different conclusion may arise from other alleged "representations" or "assurances" by Spain, its organs, and institutions linked to the Government. While it is true that Spain launched a campaign to promote the regulations and attract "green" investments, the Tribunal is of the view that none of the representations invoked by the Claimants constitute promises not to change the incentives contained in RD 661/2007.

615. These representations, too, must be placed in their proper context, i.e. that of a constantly evolving framework for which there was no suggestion that the State had somehow waived its sovereign prerogatives to change the laws or regulations. None of the documents, presentations, press releases, at issue are specific enough to "lead anyone to reasonably infer that the regulated tariff would remain unmodified during the entire lifespan of the plants".[773] For instance, the press release issued by the Ministry of Industry, Energy and Tourism on 25 May 2007[774] does no more than reiterate the content of RD 661/2007. Furthermore, the documents, in particular PowerPoint presentations, prepared by IDAE, InvestInSpain and the CNE[775] are too general as to engender legitimate expectations that the framework could not be modified. They also make clear that the incentives granted by Spain are policy tools to achieve the targets set by Spanish and EU regulations sufficient to grant investors "reasonable profitability".[776] It should also be borne in mind that these entities were not empowered to enact rules or regulations on energy issues in Spain.[777] Thus, none of the additional "assurances" is susceptible of changing the clear position that emerges from RD

773 *Charanne B.V. Construction Investments S.A. R.L. v. The Kingdom of Spain*, Arbitration No. 062/20121, Final Award, 21 January 2016, **Exh. RLA-190**, paras. 497.

774 Press Release of the Ministry of Industry, Tourism and Commerce announcing RD 661/2007, "The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power", 25 May 2007, **Exh. C-565**.

775 IDAE, "El sol puede ser suyo", June 2007, **Exh. R-17**; Manuel Garcia, *Opportunities in Renewable Energy in Spain*, November 2008, Power Point Presentation published by the Spanish Ministry for Industry, Tourism and Commerce, **Exh. C-91**; "Legal Framework for Renewable Energies in Spain", November 2009, Power Point Presentation published by the Spanish Ministry for Industry, Tourism and Commerce, **Exh. C-92**.

776 See, e.g., CNE presentation, "Renewable Energy Regulation in Spain", February 2010, slides 20-21, **Exh. C-578** (explaining that the "criteria" behind the "economic regulation" include the objective "[t]o reach the targets set in the indicative planning", whereby "Economic incentives -> Energy and Environmental Policy tool (enough to obtain a reasonable profitability").

777 See also *Stadtwerke*, paras. 285-287; *RWE*, para. 402 (noting, in respect of the CNE, that "its powers at the material times were, so far as is relevant, broadly advisory in nature").

661/2007 read systematically against the backdrop of the 1997 Electricity Law and from the interpretation of the regulatory framework given by Spain's highest court.

616. Having established that reasonable investors could not expect an immutable tariff for the operational lifetime of their plants, the question arises what, if anything, they could have expected. As the Tribunal has already noted, investors could legitimately expect to receive a reasonable return on their investments. This entitlement is enshrined first and foremost in the 1997 Electricity Law, which is the cornerstone of the Spanish electricity system. It is repeated in the preamble to RD 436/2004 and later, more importantly, in that of RD 661/2007. In other words, reasonable profitability or the "guarantee" of reasonable rates of return, to use the terms of the preamble of RD 661/2007, was the regulatory framework's *leitmotiv*, the essential feature underpinning all of the instruments that were enacted through the years. The requirement of reasonable profitability restricted the State's power to amend the framework and thereby guaranteed a level of stability of the conditions in which investors operated. Differently put, that requirement ensures the existence of "stable conditions" pursuant to Article 10(1) of the ECT.[778]

617. More specifically, Article 30.4 of the 1997 Electricity Law provides for the achievement of "*reasonable* rates of return with respect to the cost of money on the capital market". Accordingly, an investor is entitled to a return, i.e. it is entitled to make a profit after having paid its capital and operating expenses. Moreover, the reasonableness of the profit or return must be measured by reference to the cost of money in financial matters.

618. It should be added that, in all relevant legislative and regulatory instruments, the principle of reasonable return or profitability is always intertwined with other

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778 The Tribunal finds confirmation of its conclusion that any expectation that investors could legitimately have had was to obtain a reasonable rate of return on their investment in the holding of the tribunal in *RREEF* which held that "[t]he Claimants cannot prevail themselves of a fixed rate of return for their investment. However, the Arbitral Tribunal is of the view that, whatever the means chosen by the Respondent, the Claimants could legitimately expect a return for their investment at a reasonable rate which implies significantly above a mere absence of financial loss, the precise average rate taking into account the actual cost of money on capital markets for such investments as well as other objectives". See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 387. See also *BayWa*, para. 498 (noting that "this Tribunal agrees with the *RREEF* tribunal that the only legitimate expectation the Claimants could have had was that of a 'reasonable return' in terms of Law 54/1997").

considerations, in particular the State's concern about the cost of electricity and the competitiveness with other means of production of energy.[779]

619. Furthermore, in the Tribunal's view, the guarantee to obtain a reasonable return does not imply that it acts as a "cap". When RD 661/2007 was in force (and the economic conditions allowed it), it cannot be doubted that efficient installations could outperform the reasonable return target and were entitled to keep the profits which the system allowed them to make. In this sense, the Tribunal does not agree with Spain's characterization of those returns as "windfall" or "luxury" profits. However, the principle of reasonable return places a limit on regulatory changes in the future, in the sense that, when the changed economic conditions prompted Spain to modify RD 661/2007, these modifications could not affect the reasonable rates of return that were promised under the 1997 Electricity Law.

620. On the basis of the foregoing discussion, the Primary Claim must be dismissed insofar as it relates to their alleged expectations of obtaining the fixed tariff under RD 661/2007. As a result, the Tribunal will examine the Alternative Claim and determine whether the Disputed Measures frustrated the Claimants' legitimate expectations of a reasonable return (*infra* at VI.B.4). Before doing so, it must, however, review the other elements of the Primary Claim.

b. *Other Alleged Breaches of Article 10(1) of the ECT*

621. Before moving to the Alternative Claim, the Tribunal thus addresses the other elements of the Primary Claim, namely the allegations that regardless of legitimate expectations, the regulatory changes were unreasonable, arbitrary, disproportionate, non-transparent, or violated the full protection and security standard.

622. The Claimants contend that Spain's "abrupt and drastic changes"[780] to the regulatory framework were unreasonable, arbitrary, and disproportionate, because "the guarantees of the RD 661/2007 economic regime that had seduced many investors – such as the Claimants – were dismantled and repudiated".[781] More specifically, for the Claimants "[i]t was […] unreasonable to strip the Claimants of the key elements of the

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779 See RD 436/2004, **Exh. R- 55,** preamble; RD 661/2007, **Exh. C-35**, preamble. See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 385.

780 Reply, para. 602.

781 ASoC, para. 56.

regulatory regime upon which their investments were made".[782] They also argue that the regulatory changes were "arbitrary" within the meaning given by the ICJ in the *ELSI* case because "Spain committed to provide the FIT at a fixed level for 25 years and then, at a lower level, in subsequent years. It provided an express 'guarantee' that this FIT would not be changed for existing plants. Once this had successfully induced the investment […] Spain wanted, Spain simply withdrew the regime. It cannot be disputed that such behaviour shocks, or at least surprises, a sense of judicial propriety".[783] Finally, the Claimants contend that the Disputed Measures were "disproportionate" as "there is no reasonable relationship between the burden imposed on the Claimants' investments and the stated goal of addressing the Tariff Deficit. Spain's measures had a disproportionate impact on the Claimants' investments and were introduced notwithstanding Spain's alternative options to adopt less harmful measures to ECT-protected investments".[784] In particular, the Claimants submit that the tariff deficit was largely the product of Spain's own failure to comply with its laws and in any event there were alternative less harmful solutions to address that problem.[785]

623. It arises from this summary of the Claimants' arguments that like for legitimate expectations, the alleged violations of other standards embodied in Article 10(1) are predicated upon the entitlement to the RD 661/2007 tariff. In line with its earlier conclusion that the Claimants could not legitimately expect the immutability of such tariff, the Tribunal is equally unable to accept that the elimination of RD 661/2007 and related benefits in itself constituted conduct that was unreasonable, disproportionate, arbitrary, or otherwise not "fair and equitable". Indeed, accepting a violation of the Treaty on these grounds would be tantamount to endorsing the immutability of the RD 661/2007 tariff, which would be contrary to the conclusion reached above in respect of legitimate expectations. The position would be different if the changes were shown to deprive the Claimants of a reasonable return, as opposed to a fixed remuneration scheme. However, this is the subject of the Alternative Claim; it is not the basis of the present claim.

624. Even if the mere fact of changing the RD 661/2007 tariff was not a violation in and of itself, the changes could arguably still be unreasonable, disproportionate, or arbitrary. In this connection, the Tribunal disagrees with the approach of other tribunals that have

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782 ASoC, para. 478.

783 Reply, para. 617.

784 ASoC, para. 57(v).

785 ASoC, para. 493.

held that "the Claimants are in a worse position under the New Regulatory Regime than they would have been had the Respondent not abrogated the RD 661/2007 regime [and] are therefore entitled to compensation for the Respondent's breach of Article 10(1) ECT".[786] In this Tribunal's view, to establish liability as a result of regulatory changes, it is not sufficient that the investor is in a "worse position" than it would have been under RD 661/2007. Rather, the Treaty requires that the changes must be unreasonable, arbitrary, or disproportionate.[787]

625. In this respect, the Tribunal considers that the Claimants have failed to establish that the Disputed Measures were unreasonable, arbitrary or disproportionate because the new regime does not guarantee them the same tariff, or the same types of incentives, or returns comparable to those they made at the time of investment. The Respondent, for its part, has offered sufficient justifications for the enactment of the Disputed Measures which exclude a breach of the ECT on the grounds addressed here.

626. In analyzing the justifications put forward by the Respondent in support of the Disputed Measures, as recalled above,[788] the Tribunal must be satisfied "that there is an appropriate correlation between the policy sought by the State and the measure".[789] Further, in assessing a State's regulatory measures of general economic impact, the Tribunal owes a measure of deference to the Respondent.[790]

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786 *Greentech Energy Systems A/S and others v. Kingdom of Spain*, SCC Case No. V (2015/150), Final Award, 14 November 2018, **Exh. CLA-245**, para. 533.

787 See also *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **Exh. CLA-160**, para. 7.77 ("While the investor is promised protection against unfair changes, it is well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment").

788 See *supra* para. 582.

789 *Electrabel S.A. v. The Republic of Hungary*, ICSID case No. ARB/07/19, Award, 25 November 2015, **Exh. RLA-166**, para. 180, quoted *supra* at para. 582.

790 The Tribunal finds confirmation in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 468 (observing that "the Respondent enjoys a margin of appreciation in conducting its economic policy; therefore, it will not substitute its own views either on the appropriateness of the measures at stake or on the characterization of the situation which prompted them; in particular, the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation").

627. This being so, the Tribunal notes that the regulatory changes were prompted by a range of factors. While in 2007, Spain's economy was growing at a pace of 3.7%, in 2009 after the global economic crisis, its GDP growth had turned negative to -3.6%.[791] Unemployment grew from 8% in 2007 to 25% in 2012.[792] The negative evolution of the Spanish economy as a result of the financial crisis produced a substantial reduction in demand of electricity during the period 2009-2013[793] and the tariff deficit rose from EUR 2 billion in 2005 to EUR 28.5 billion at the end of 2013, representing almost 3% of its GDP.[794] This rise cannot be attributed to the fact that the State had not increased electricity prices in the year preceding the Disputed Measures. Indeed, Spain has demonstrated that it did proceed to price increases.[795]

628. Faced with these pressing problems, Spain had a range of available options. In simple terms, it could have either imposed the burden on the producers, or on the consumers, or on the state budget. Rather than selecting one option over another, it chose a middle course, i.e. it reduced the producers' rate of return while still guaranteeing a reasonable profit. The revised rate of return was approved by the European Commission[796] and is aligned with those granted by other European Union Member States, such as France, Italy, Estonia, Latvia,[797] and the Czech Republic.[798] There was thus an appropriate

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791 See data provided by the World Bank at https://data.worldbank.org/indicator/ny.gdp.mktp.kd.zg.

792 See data provided by the World Bank at https://data.worldbank.org/indicator/sl.uem.totl.zs.

793 See MG&A Report, para. 220. See also *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 434 ("The Tribunal accepts Respondent's contention that the economic crisis led to a decline in demand for electricity, with consequent increase in the tariff deficit").

794 See European Commission, "Macroeconomic imbalances: Country Report – Spain 2015", European Economy Occasional Papers 216 (June 2015), **Exh. C-632**, p. 62.

795 MG&A Report, para. 250; National Energy Commission Report on the Energy Sector, 7 March 2012, **Exh. R-176**, Part I, p. 7 (Respondent's English Translation) ("the tolls increased cumulatively from 2003 to January 2012 by 70.7% (with substantial differences between tariff groups).").

796 See European Commission Decision on the State Aid SA.40348 (2015/NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, **Exh. RLA-201**.

797 See European Commission Decision on the State Aid SA.40348 (2015/NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, **Exh. RLA-201,** para. 120, fn. 57, quoted *infra* at the next paragraph.

798 *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017, **Exh. RLA-213**, paras. 406, 420, 451.

correlation between the policy objectives pursued by Spain and the Disputed Measures that diminished the amount required for subsidies in the renewable energy sector.

629. Spain also sought to avoid increasing the price of electricity charge to consumers even further. The Tribunal finds no element of unreasonableness or arbitrariness in Spain's assertion that "in an economy heavily impacted by the economic crisis, to continue increasing the tariff payable by consumers was not an option as consumers had less capacity to pay due to the unemployment level and per capita income and such a measure could have only contributed to worsen the economic situation".[799]

630. Therefore, subject to considering whether the Disputed Measures continue to afford the Claimants a reasonable rate of return (a question that is part of the Alternative Claim), the Tribunal considers that the Disputed Measures were not unreasonable, arbitrary, and disproportionate. It thus dismisses the Primary Claim insofar as it is based on these additional legal grounds, whether rooted in the FET standard or in the separate obligation not to impair investments by unreasonable measures.

631. Furthermore, the Claimants complain that the enactment of the Disputed Measures violated Spain's obligation to treat investors transparently. The Tribunal considers that the record does not bear this complaint. It is not established that Spain was not forthcoming with information on the intended changes in regulations. To the contrary, the Tribunal observes that Spain engaged in dialogue with investors prior to making changes and subjected the intended modifications to public consultations,[800] in the

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799 PO12 R-PHB2, para. 18.

800 See, e.g. National Energy Commission Report on the proposal of a Royal Decree to regulate and modify certain aspects relative to the special regime, 14 September 2010, **Exh. R-197**; Government of Spain National Program of Reforms 2012, **Exh. R-177**, pp. 2-9 (Respondent's English Translation); "The Reforms of the Spanish Government: Determination in the face of the Crisis", Ministry of the Presidency of the Government of Spain, September 2012, **Exh. R-178,** p. 1 (Respondent's English Translation); CNE, Report 18/2013 on the Proposal of Royal Decree to Regulate the Generation of Electricity by Renewable Projects, Cogeneration and Waste Plants, 4 September 2013, **Exh. C-339**; CNMC, "Report on a Proposal for a Royal Decree Regulating the Generation of Electricity from Renewable Energy Sources, Cogeneration and Waste", 17 December 2013, **Exh. C-613**; Report of the Technical General Secretary of the Ministry of Industry, Energy and Tourism, dated January 9, 2014 to draft Royal Decree that production activity is regulated electricity from renewable energy sources, combined heat and power and waste (Royal Decree 413/2014), 6 February 2014, **Exh. R-156**; Memorandum of the Ministry of Industry, Energy and Tourism of the analysis of the legislative impact of the draft order approving the remuneration parameters of standard facilities applicable to certain electricity production facilities based on renewable energy sources, combined heat and power and waste (Order IET/1045/2014), 12 June 2014, **Exh. R-162**.

context of which numerous industry associations and companies submitted comments.[801]

632. Neither does the record show that the Claimants were "left in the dark" for eleven months between RDL 9/2013 and the time when the Parameters Order was issued. The Tribunal does not find that the time elapsed between these two instruments involved a Treaty breach. Legislative processes often include consultation steps involving a variety of stakeholders - which *fosters* rather than hinders transparency - and these consultations may typically entail delays in the issuance of the final piece of legislation. In any event, the Claimants acknowledge that "RDL 9/2013 provided that during this period the old regime would continue to apply" and that "producers would continue to sell electricity under the former regime".[802] Hence, even if the delay had violated the transparency obligation (*quod non*), that violation would have caused no harm. Finally, the Claimants also rely on the fact that the so-called *Memoria Económica* had not been published. While the *Memoria* was not published in the State Official Gazette, Spain has sufficiently established that it was "publicly available" upon request as it formed part of the "regulatory dossier" of draft RD 661/2007,[803] which in the Tribunal's opinion rules out a breach of transparency.

633. Finally, the Claimants raise a claim for breach of the full protection and security (FPS) standard. They base such claim on the same facts as those underlying the FET claims, and allege that "for reasons considered at Section 7 above [of the ASoC], Spain's measures have destroyed the legal framework of the investments. They are therefore in breach of the FPS standard".[804] The Claimants further argue that "the New Regime represents a complete overhaul of the regulatory regime (RD 661/2007) undermining the very foundations on which the Claimants made their investments". According to them that regime "no longer provides the stable and predictable revenue streams at levels sufficient to service the required financing, nor does the New Regime provide the

801 See, e.g., Information regarding the public consultation on measures for regulatory adjustment in the energy sector of 2 February 2012 and 9 March 2012 published on the website of the National Energy Commission, **Exh. R-32**.

802 Reply, para. 264.

803 See, e.g., Council of State Report of 26 April 2007 regarding Draft Royal Decree regulating the activity of electricity production under the special regime and of certain facilities of assimilated technologies of the ordinary regime, issued by the Ministry of Industry, Energy and Tourism, ref. 683/2007, **Exh. R-167**, pp. 4, 6-7 (Spanish version).

804 ASoC, para. 497.

returns that justified investing in the Spanish PV sector in 2007 and 2008".[805] The obligation of full protection and security, so the Claimants continue, has been breached "as the Disputed Measures have caused Claimants to lose their right to the FIT".[806]

634. Assuming for the sake of discussion that FPS encompasses legal as opposed to physical protection, it remains that the FPS claim is predicated upon the loss of the guarantees established in RD 661/2007. As such, for the very reasons discussed in relation to that loss in the context of the FET grounds, this claim cannot succeed either.

635. As a last point, the Tribunal reverts to the European Commission's decision on State Aid dated 10 October 2017, which it has carefully reviewed along with the Parties' related submissions and the European Commission's observations of 19 June 2018. In this connection, the Tribunal observes that the decision primarily concerns the lawfulness of the new regulatory regime under EU state aid law and does not rule on the compatibility of RD 661/2007 with EU state aid rules. This being so, the Tribunal does not consider that its conclusions are incompatible with the findings of the European Commission on the Disputed Measures. The Tribunal notes in particular that in paragraph 120 the Commission took the following view:

> 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.[FN 57]
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> [FN 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).[807]

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805 Reply, para. 651.

806 C-PHB1, para. 256.

807 European Commission Decision on the State Aid SA.40348 (2015/NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, **Exh. RLA-201**, para. 120, fn. 57.

636. The Tribunal is aware of the following statement from the Commission that an award of compensation that were to be issued on the basis that Spain has modified RD 661/2007 through the Disputed Measures would constitute state aid:

> 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.[808]

637. The Tribunal has also noted the Claimants' view that these explanations are "incorrect as a matter of [EU] law".[809] This question may be left open, in particular because the Tribunal must rule on the basis of the ECT and not on projections of hypothetical consequences of the award. The Tribunal also observes that the Commission's and Spain's conclusions on this point appear premised on the possibility that an arbitral tribunal were to award compensation along the lines of the Primary Claim (see the Commission's reference to the award in *Eiser*), which claim the Tribunal does not uphold. By contrast, there seems to be no suggestion either from the Commission or from Spain that an award would constitute State aid if made on the basis of the Alternative Claim (which takes as a starting point *Spain's* defense that the Claimants could legitimately expect reasonable profitability).

c. *Conclusions on the Primary Claim*

638. For all of these reasons, the Primary Claim cannot be upheld. In summary, the Tribunal reaches the conclusion that from the start of the Special Regime for RE with the 1997 Electricity Law, the Spanish legislature provided that investors would be entitled to "reasonable profitability" of their investments. The reasonable return on investments was also a key element of the regime established by RD 661/2007. In the Tribunal's view, the principle of reasonable return serves as the limit of ECT-compliant regulatory changes. If changes cross the "reasonable return" line, that is if they deprive investors of a reasonable return, the State conduct transgresses the standards contained in Article 10(1) of the ECT.

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808 European Commission Decision on the State Aid SA.40348 (2015/NN) regarding Spain's Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 10 November 2017, **Exh. RLA-201**, para. 165.

809 Claimants' Submission on the European Commission's Decision SA.40348 (2015/NN), paras. 17 *et seq*.

639. In other words, the Claimants are only entitled to compensation under Article 10(1) of the ECT if they establish that the new regime violates the guarantee of reasonable rate of return.[810] This approach strikes the right balance between, on the one hand, the protection of investors who have committed substantial resources in a sector which continues to provide Spain with the environmental benefits of clean solar power, and, on the other hand, Spain's right to regulate and adapt its framework to changed circumstances, provided that right is exercised in a manner that is proportionate, reasonable, and non-arbitrary manner.

640. The Tribunal must now examine whether the regime substituting RD 661/2007 deprived the Claimants of a reasonable return. It thus moves to the analysis of the Alternative Claim.

4. The Alternative Claim

641. In this section, the Tribunal analyzes whether Spain violated the ECT by not providing the Claimants with the "reasonable rate of return" which it promised under the regulatory framework in place when the Claimants made their investments. If Spain complied with its promise, there is no breach of the Treaty. If Spain did not comply, then the result of the inquiry into liability will at the same time quantify the loss caused by the breach.

642. After some introductory comments on the concurrence of liability and damage findings (*infra* at VI.B.4.a) and on the procedure and expert evidence involved in the resolution of the Alternative Claim (*infra* at VI.B.4.b), the Tribunal will review the quantification parameters on which the Parties and their experts disagree (*infra* at VI.B.4.c). On this basis, the Tribunal will then draw the consequences of its analysis in terms of liability and quantum (*infra* at VI.B.4.c.xii).

643. Before delving into the analysis, the Tribunal recalls that, by definition, the calculation of damages inevitably involves assumptions about events that did not occur and "in a

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810 The Tribunal notes that the tribunal in *RREEF* has reached a similar conclusion. See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 523: "[…] the Tribunal considers that, while entitled to compensation for unreasonable return on their investments – if established -, the Claimants cannot claim full compensation for the total decrease in their profits as a result of the adoption of the new regime by the Respondent; they can only get compensation to the extent that such decrease is below the threshold of a reasonable return."

case of such scope and complexity damages cannot be determined with mechanical precision".[811] The Tribunal has done its best to arrive at an accurate assessment of the damages aspects of this case, despite the significant divergences between the Parties and their experts on a number of key issues and the multiple number of Claimants involved in this arbitration.

a. *Concurrence of Liability and Quantum*

644. To recall,[812] the Claimants put forward their Alternative Claim in their Reply[813] as a response to the Respondent's argument that Spain "'did not promise any regulated Tariff under RD 661/2007 [and] […] the Spanish system only allowed investors to aspire to reasonable profitability as provided for in the [1997 Electricity Law]'".[814]

645. More specifically, while still maintaining their Primary Claim, the Claimants argued that "[i]n the event that the Tribunal were to agree that the Claimants' legitimate expectations were limited by Spain's concept of a 'reasonable return' […] Spain still faces international liability under the ECT",[815] because it "significantly lower[ed] the 'reasonable return'".[816] In their Reply, the Claimants contended that, even on the Alternative Claim, they suffered significant damages,[817] which they proposed to quantify in the subsequent phase of the arbitration.[818]

646. In response to the Alternative Claim, Spain maintained that the Claimants continue to be highly profitable and achieve the reasonable return that they could have expected at the time of their investment.[819] It bears noting that Spain did not object when the

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811 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **Exh. CLA-215**, para. 473.

812 See also *supra* V.B.

813 See Reply, paras. 583-591. See also Brattle's Third Expert Report, para. 201.

814 Reply, para. 585, quoting SoD, para. 744.

815 Reply, para. 585.

816 *Ibid.*, para. 591.

817 *Ibid.*, para. 591 ("Even on the Alternative Claim, Brattle explains that, the Claimants have either suffered damages that are 'even higher than when simply comparing the remuneration of existing plants' to the tariff offered by the old regime (i.e. the Claimants' Primary Claim); or, in the alternative, 'would be less than associated with the PV Investors' Primary Claim, but would still be substantial.'" (internal footnotes omitted, emphasis removed, discussing Brattle's Third Expert Report , paras. 208-209)).

818 *Ibid.*, 591 ("In accordance with the agreed procedure, the quantification of the Claimants' losses [under the Alternative Claim] will be provided in the next phase of this arbitration").

819 Rejoinder, paras. 10, 260-291; PO12 C-PHB2, paras. 120-232.

Claimants raised the Alternative Claim in the Reply in line with Article 22 of the UNCITRAL Rules (which allows a party to amend or supplement its claims during the course of the proceedings subject to certain conditions), unlike it did when it opposed the Claimants' intention to amend their SoC (see Procedural Order No. 18). Rather, it chose to argue the Alternative Claim on its merits.[820]

647. The guarantee provided by Spain in the 1997 Electricity Law (the "reasonable return" or "reasonable profitability") is economic in nature. This being so, the Tribunal cannot verify whether or not such guarantee was observed without considering the economic impact of the Disputed Measures on the Claimants' investment. Only once it has ascertained such impact will the Tribunal be able to determine whether or not there is a breach of the Treaty.[821]

648. Otherwise said, in this particular case the quantification of the harm, if any, informs the finding on liability. Unlike other cases in which liability (e.g., the allegedly wrongful withdrawal of a permit) is clearly separated from quantum, here the two elements of the analysis are intimately intertwined. In other words, the assessment of the harm suffered by the Claimants is necessarily linked to the reasonableness, non-arbitrariness, proportionality, etc., of the Respondent's conduct. It is only if the alteration of the regulatory framework called into question the guarantee of a reasonable return that the Claimants would be entitled to compensation pursuant to the general rules of State responsibility.[822]

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820 See, e.g., Rejoinder, paras. 963 *et seq.*

821 As also explained by the Tribunal at the end of the PO12 Hearing, "[y]ou understand, of course, that we are trying to assess legitimate expectations and whether legitimate expectations have been breached. And the legitimate expectations were given in economic terms. And so we think that to understand, first, what they were, and, second, whether they were breached, we need some economic input. That was the thinking behind PO12, of course. And that is why we are doing this exercise". PO12 Hearing Tr. [English version] (President), 19 January 2018, at 94:15-22.

822 The Tribunal finds confirmation of its approach in the decision issued in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 472 ("Such an empirical assessment cannot be made in the abstract. In other words, the Tribunal will be in the position to determine whether the measures taken by the Respondent have adversely affected the Claimants' legitimate expectation for a reasonable return only when it has evaluated the loss sustained by them, taking into account all the relevant elements. In other words, the determination of a violation of the principles of proportionality and reasonableness is inseparable from an assessment of the damages – if any – endured by the Claimants as a consequence of the measures taken by the Respondent").

b. *Procedure and Expert Evidence*

649. In the Tribunal's view, to verify whether the Alternative Claim is well-founded requires it to assess the difference (if any) between the returns the Claimants are making under the New Regime (the scenario with Measures) and those they would be making if Spain had ensured that plants receive the reasonable rates of return on offer at the time when the Claimants made their investments (scenario without Measures).

650. Thus, in PO12 the Tribunal requested the Parties to quantify "[t]he harm allegedly suffered by the Claimants" by reference "to the difference, if any, between (i) the reasonable return under Article 30.4 of the 1997 Electricity Law over the regulatory lifetime of a plant […] and (ii) the return the Claimants would make under the Disputed Measures for the same period".[823] To that end, the Tribunal asked the Parties to assume that "the investors had legitimate expectations to achieve reasonable profitability within the terms of Article 30.4 of the 1997 Electricity Law (as it stood at the time of the Claimants' investments)",[824] which is consistent with the conclusion the Tribunal has reached above on the content of the Claimants' legitimate expectations. The Parties were invited to assume that the reasonable profitability would "be equal to, first, 7% on average post tax and, second, 8% on average post tax".[825]

651. In calculating the returns in the scenarios with and without Measures, the Tribunal further asked the Parties to assume a regulatory lifetime of a PV plant equal to 30 years.[826] While the various documents referred to by the Parties show regulatory lifetime periods of PV plants that range between 25 and 40 years,[827] the Tribunal considers that on balance of the documentary record as a whole, a 30-year lifetime of

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823 PO12, para. 3(a).

824 PO12, para. 2.

825 PO12, para. 3(b).

826 PO12, para. 3(d).

827 See, e.g., EC DG Environment, (2011), *Study on Photovoltaic Panels Supplementing the Impact Assessment for a Recast of the [Waste Electrical and Electronic Equipment] WEEE Directive – Final Report*, April 2011, **Exh. C-263**, p. 6 (where the authors note that "[a] challenge in recycling of photovoltaic panels is their long lifetime which is estimated at 25 years. However, this represents the warranty lifetime; technical lifetime could be as long as 30 to 40"); Greenpeace & European Photovoltaic Industry Association, Solar Generation 6: Solar Photovoltaic Electricity Empowering the World, 2011, **Exh. C-157**, p. 19 ("Module lifetime is typically considered of 25 years, although it can easily reach over 30 years").

the plant appears the most reasonable. It notes that the New Regime provides for a 30-year deemed "regulatory life".

652. In addition to the parameters just mentioned, PO12 also set out a number of alternative variables, on which the Parties made written and oral submissions and presented different damages calculations.[828]

653. Following these submissions on the quantum of the Alternative Claim, the Tribunal requested the experts to provide it with a joint model, the EJM, allowing it to calculate the Claimants' IRR and possible resulting losses. At the hearing held on 16 to 19 January 2018, the experts had indeed agreed to assist the Tribunal in this task.[829]

654. On the basis of the Parties' submissions and of the experts' evidence,[830] the Tribunal set out directions to be considered in the preparation of the EJM. These directions were incorporated in PO18, which was the result of a consultative process.[831] Such consultation in particular enabled the Tribunal to reduce the number of assumptions for consideration, thereby diminishing the complexity of the EJM exercise. This effort came especially in response to a request from the Claimants.[832]

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828 Quantum Memorial, paras. 51-136; Quantum Counter-Memorial, paras. 41-79; Quantum Reply, paras. 69-262; Quantum Rejoinder, paras. 92-318; PO12 C-PHB1, paras. 44-194; PO12 R-PHB1, paras. 2-220; PO12 C-PHB2, paras. 35-206; PO12 R-PHB2, paras. 137-232; BQR I; BQR II; EOQR I; EOQR II; Joint Memorandum.

829 See PO12 Hearing Tr. [English version] (Lapuerta), 19 January 2018, at 65:5-6, 67:17-20; PO12 Hearing Tr. [English version] (Flores; Caldwelll), 19 January 2018, at 65:8-67:16.

830 See also Procedural Order No. 17, 25 January 2018 ("PO17"), esp. section III.

831 On 30 April 2018, the order was circulated to the Parties in draft form for their comments; on 14 and 22 May 2018, each Party provided two rounds of comments to the draft; on 4 July 2018, upon the Claimants' proposal, the Parties and the Tribunal held a conference call for the Tribunal to hear the Parties on the draft of the order and ask them questions on their comments and proposed modifications; and on 18 July 2018, PO18 was issued in final form.

832 See letter from the Claimants, 14 May 2018, pp. 1 and 4 ("the Claimants have serious concerns regarding the extensive scope of the draft of PO18 and its potential to lead to a further lengthy phase of the arbitration. In light of these concerns, and with a view to determining the best way forward, the Claimants propose that the Tribunal schedule a telephonic case management conference as soon as possible and, ideally, by no later than Monday 21 May 2018. In the interim, the Claimants set out below their comments on the draft PO18. The Claimants propose several modifications to the current draft of PO18 at Annex 1 which are designed to narrow the issues to be addressed by the experts in the EJM so that the Tribunal can be presented with a workable EJM […] The Claimants believe it is therefore desirable to seek to reduce the number of permutations to be contained in the EJM so that it is both helpful to the Tribunal and can be produced

655. PO18 contained the following general directions:

> 7. Further to the Tribunal's directions in Procedural Order No. 12, the examination of the experts at the Hearing, including their answers to questions from the Tribunal, and Procedural Order No. 17, the Tribunal invites the Brattle experts (presented by the Claimants) and the EconOne experts (presented by the Respondent) to confer and present an EJM on the quantum of the Claimants' so-called "Alternative Claim". In accordance with PO12, such quantum shall be equivalent to the difference between (i) the reasonable return under Article 30.4 of the 1997 Electricity Law over the regulatory lifetime of a plant (as specified in PO12) and (ii) the return the Claimants would make under the Disputed Measures for the same period. Further, the EJM shall be based on the parameters, including alternatives and sub-alternatives, set out in paragraph 12 below.
>
> 8. In the preparation of the EJM, the experts shall not rely on documents or data that are not already in the record, subject to leave from the Tribunal if the introduction of new documents or data arises from the need to comply with their mandate under PO18.
>
> 9. If the experts cannot agree on the input to be entered into the EJM with respect to a parameter, alternative or sub-alternative (see paragraph 12 below), each expert shall provide his separate input identified as such in the EJM.
>
> 10. Together with the EJM, the experts may submit a joint memorandum with explanatory comments if they deem it useful. If the experts diverge on some issues regarding the implementation of the parameters specified in paragraph 12 below, they may make separate comments identified as such in the memorandum.
>
> 11. The goal of the EJM is to allow the Tribunal to compute the harm allegedly suffered by the Claimants according to their "Alternative Claim". To do so, the EJM will allow the Tribunal to choose among the alternatives and sub-alternatives set out below. The Tribunal trusts that the experts will do their utmost to facilitate its task and produce a workable model for the purpose just identified.

656. In PO18, the Tribunal also emphasized that "[e]ven though Brattle and EconOne have been retained by the Parties, the Tribunal expects them to act as *independent* experts to assist the Tribunal".[833]

657. On 5 October 2018, in accordance with PO18, the experts produced the EJM with a joint memorandum explaining the areas on which they agreed or disagreed (defined

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without significant undue cost and delay. The Claimants propose the following changes to PO18 in order to reduce the number of permutations: […]").

[833] PO18, para. 14.

supra at para. 153 as the "Joint Memorandum").[834] They produced a revised version on 23 November 2018, correcting an implementation error. The Parties commented on the EJM and the Joint Memorandum in post-hearing briefs of 29 November 2018 and 12 February 2019, respectively.[835] The Tribunal notes that, while the EJM exercise turned out to be longer than anticipated, in particular because of the complexity of the damage calculation, it eventually accomplished its objective and neither Party requested that the Tribunal appoint its own damages expert. [836]

658. The EJM contains a control panel comprising the following six parameters, with variables representing the inputs on which the experts diverged. A variable must be selected for each of the parameters in order to compute the loss and the corresponding IRR:

1. Interest Tax Shield
2. Cost Base
3. Past Profits
4. Revision of the Reasonable Rate of Return ("RRR")
5. Initial Investment for IRR Calculation
6. Interest

659. As mentioned above (see *supra* at para. 641), the result of the Tribunal's inquiry into liability will allow it to quantify the loss in case of breach. In other words, if the Tribunal determines that some or all of the Claimants have suffered harm under their Alternative Claim, the Tribunal will be in a position to issue an award on both liability and damages based on the Alternative Claim. As the Tribunal made clear on various occasions, PO12 initiated a hybrid liability and quantum phase.

660. For instance, at the end of the PO12 Hearing, the Tribunal explained that:

> [The scope of the first post-hearing brief] is about liability. And, to be very clear, it could also be about quantum. If it is not quantum of the primary claim, it is quantum of the alternative claim. But before we, in our thinking, can get to the alternative claim, we need to make the liability decision. So

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834 See Joint Memorandum presented by Mr. Carlos Lapuerta, Mr. Richard Caldwell, and Mr. Jack Stirzaker of the Brattle Group and Dr. Daniel Flores and Mr. Jordan Heim of Econ One, 5 October 2018 ("Joint Memorandum").

835 See PO12 C-PHB2, paras. 35-206; PO12 R-PHB2, paras. 135-232.

836 In this context, it is noted that the Claimants have criticized Econ One's credibility (PO12 C-PHB1, paras. 21-22). While the Tribunal has taken note of this criticism, it discerns no element in the record that would lead it to disregard that expert's evidence.

> what we have heard this week does go to both the liability and the quantum of a possible alternative claim.[837]
>
> [PO12] was issued on 29 September 2016. And, from then on, we did process with submissions, evidence, following procedural order no. 12, which meant to open a quantum phase, too [*sic*] joint with the liability because we thought that here it might be difficult to make a decision on liability without understanding part of the quantum at least.[838]

661. In response to the Parties' requests for clarifications to PO12, the Tribunal also explained that "the directions given in PO12 expand the current phase as circumscribed in the Order. If, thereafter, the Tribunal were to require further briefing and evidence to resolve the dispute, it will give further appropriate directions".[839] Thus, the Tribunal made clear that the PO12 phase expanded the liability phase to include what was set out in PO12 and that it wished to hear "the Parties on certain aspects of the quantum. Specifically, the Tribunal would be assisted by each Claimant quantifying its so-called alternative claim…"[840]

662. As recounted above, following PO12, the Tribunal received further submissions accompanied by vast amount of documentary and expert evidence. The Tribunal is thus now in a position to resolve the dispute in its entirety and issue an award on both liability and quantum. As it stated during the 4 July 2018 telephone hearing, "the award that we will have to issue will have to deal not only with the quantification, but also liability".[841]

663. Indeed, the conduct of both Parties' confirms their understanding that the phase started with PO12 addressed not only liability, but also quantum. This is confirmed by the very title of the Parties' main submissions[842] as well as their submissions during the

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837 PO12 Hearing Tr. [English version] (President), 19 January 2018, at 95:8-14.

838 PO12 Hearing Tr. [English version] (President), 19 January 2018, at 100:15-21 (emphasis added).

839 Tribunal's letter, 15 November 2016, p. 3 (emphasis added).

840 PO12, para. 1.

841 See Telephone conference with the Tribunal on PO18, dated 4 July 2018, 1:28:34-1:33:30. The recording of the telephone conference was circulated to the Parties on 5 July 2018.

842 See Respondent's submissions on this phase titled: (i) "RESPONDENT'S QUANTUM COUNTER-MEMORIAL"; (ii) "RESPONDENT'S QUANTUM REJOINDER"; (iii) RESPONDENT'S QUANTUM POST HEARING BRIEF"; (iv) "RESPONDENT'S SECOND POST-HEARING BRIEF ON QUANTUM" (capital letters in the originals, emphases added). Likewise, see Claimants submissions on this phase titled: (i) "CLAIMANTS' QUANTUM SUBMISSION"; (ii) "CLAIMANTS' QUANTUM REPLY SUBMISSION" (capital letters in the originals, emphases added). See also Respondent's Quantum Rejoinder, para. 137, explaining that "the reason why Spain

document production phase.[843] It was also acknowledged by the experts during the PO12 Hearing.[844] Finally, the inclusion of quantum in the phase opened by PO12 was confirmed by the Tribunal when closing the proceedings, at which time it noted that it "ha[d] all the necessary elements in terms of liability and, if applicable, quantum to render a Final Award".[845] In response, the Respondent "acknowledge[d] the Tribunal's letter of Monday declaring the proceedings closed as of 2 December 2019".[846] This being so, the Respondent's suggestion in its last PHB that "the purpose of the PO12 and PO18 is to assist the Tribunal in determining liability, not damages"[847] is thus ill-conceived.

664. Hence, matters of both liability and quantum with respect to the Alternative Claim have been fully pleaded and both Parties have been heard and have had ample opportunity to present their respective cases. There is thus no doubt that the Tribunal is now in a position to issue an award on both liability and damages.

665. Finally, the Tribunal notes that the Claimants have formulated the relief sought not by reference to the Primary/Alternative Claim, but more generally for compensation as a result of Spain's alleged breaches (see *supra* para. 220). In this connection, the Tribunal also notes that the main difference between the Claimants' initial request for relief in the Reply (see *supra* para. 219) and the final one after the quantum phase (PO12 C-PHB2, quoted *supra* at 220) is that the Claimants no longer request that Spain provide full restitution by reinstating the legal framework. Hence, the Tribunal

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objected to MG&A being called for cross examination is because MG&A has already been subject to cross examination on their regulatory expert reports produced in the liability phase of these proceedings and that MG&A have not produced any new report (or indeed any report) in relation to this quantum phase, for which a different expert – EO- was appointed" (emphasis added).

843 See, e.g., PO15, Annex A, Spain's objections to request 4: "the documents requested have, once again, no relevance to this quantum phase of the arbitration, but could only have been hypothetically relevant to the liability phase" (emphasis added); PO 15, Annex A, Requests Nos 2; 3; 5; 6; and 7: "Therefore, it is self-evident that this request is related to arguments made during the liability phase, for which the document production phase is long expired. To grant this request would unfairly re-open analysis of the liability phase, which would place Respondent at a disadvantage without a right of response. Accordingly, such requests should be summarily rejected."

844 PO12 Hearing Tr. [English version] (Flores), 19 January 2018, 14:17-20 "They are intertwined. I mean, that's this phase of the arbitration does have liability and damages issues. So I don't know that anyone is going to be able to completely separate both issues."

845 See Letter from the Tribunal, 2 December 2019.

846 See Respondent's e-mail, 4 December 2019.

847 PO12 R-PHB2, para. 217.

understands that the request for restitution has been abandoned. In the event that this understanding were incorrect, the Tribunal would in any event not grant such relief in light of its conclusion that the Primary Claim, which is predicated upon the Claimants' expectation to receive the fixed FIT under RD 661/2007 over the regulatory lifetime of the plants, is ill-founded.

c. *Quantification of Loss and IRR*

666. As recalled above, having deliberated on the Parties' case as it had developed through their written submissions on liability, their oral submissions at the hearing on liability, and their PHBs, the Tribunal issued PO12, setting out its "directions to the Parties".[848] It is helpful to reproduce the relevant portions of PO12:

> 1. Without prejudice to its forthcoming determinations on the claims before it, including without prejudice to its decision on liability, the Tribunal is of the view that it would be materially assisted by hearing the Parties on certain aspects of the *quantum*. Specifically, the Tribunal would be assisted by each Claimant quantifying its so-called alternative claim (Claimants' Reply, para. 583 ff.) as further specified in the following paragraphs.
>
> 2. For such purpose, the Parties shall assume that, at the time when the investments were made, the investors had legitimate expectations to achieve reasonable profitability within the terms of Article 30.4 of the 1997 Electricity Law (as it stood at the time of the Claimants' investments).
>
> 3. Within this specification, the Claimants may present their *quantum* cases as they deem appropriate and the Respondent may answer such cases as it deems appropriate. That said, the Tribunal would be particularly interested in submissions based on the following assumptions:
>
>   (a) The harm allegedly suffered by the Claimants is assumed to be equal to the difference, if any, between (i) the reasonable return under Article 30.4 of the 1997 Electricity Law over the regulatory lifetime of a plant (as specified below) and (ii) the return the Claimants would make under the Disputed Measures for the same period. With respect to (ii), the Parties shall work with two distinct assumptions: first, they shall assume that the New Regime undergoes a reasonable revision of the rates every six years. Second, they shall assume that there are no such revisions.
>
>   (b) Reasonable profitability within the meaning of the 1997 Electricity Law at the time of the investments is assumed to be equal to, first, 7% on average post tax and, second, 8% on average post tax;
>
>   (c) In respect of reasonable profitability, the Parties shall work with two distinct assumptions (to the extent these

848 See *supra* section II.D.

assumptions make any difference to their computations): first, they shall assume a greenfield investment and, second, they shall assume a brownfield investment.

(d) The regulatory lifetime of a PV plant is assumed to be 30 years;

(e) Remuneration exceeding the 7% or 8% profitability addressed in (b) above which a plant has achieved prior to the enactment of the Disputed Measures is assumed to either (i) be taken into account or (ii) not to be taken into account for the purposes of calculating the aggregate average reasonable return over the 30-year regulatory lifetime of a plant;

(f) The valuation date is assumed to be either (i) the date of the valuation as proxy for the date of the award or (ii) the date of the Disputed Measures.

[…]

667. In its subsequent PO18, the Tribunal then asked the experts for assistance in computing a possible loss under the Alternative Claim. For that purpose, it invited them to prepare the EJM and set out certain parameters and variables, as follows:

12. The EJM shall be based on the following parameters:

a. The harm allegedly suffered by the Claimants shall be calculated *per Claimant*;

b. The harm shall be calculated by using the methodology used by Brattle in its DCF computation. Thus, the DCF methodology shall be based on the calculation of an Alternative Tariff designed to provide a 7% post-tax return (as described below). The harm shall be calculated by discounting the cash flows to arrive at the net present value of the Claimants' assets in the scenarios without Measures and with Measures.

c. The experts shall use a holding IRR as opposed to an exit IRR in both scenarios (with Measures and without Measures);

d. As valuation date, the EJM shall use the date of the alleged breach as it was set by agreement of the Parties, i.e. 30 June 2014;

e. For the Claimants' return in the scenario without Measures, the EJM shall use a rate of return of 7% post-tax. Post-tax shall mean the return considering the impact of all taxes in force at the valuation date.

f. As cost base, the EJM shall use

i. Alternative 1: The "marginal plant" approach, with the following

a) Sub-alternative 1: "Size re-classified marginal plant sensitivity" (following the approach described in the Brattle Quantum Rebuttal Report, paras. 227 et seq.);

b) Sub-alternative 2: "IT code sensitivity" (following the approach described in the Brattle Quantum Rebuttal Report, paras. 227 et seq.);

ii. Alternative 2: The "greenfield costs" approach, with the following

a) Sub-alternative 1: Including "developer premiums";

b) Sub-alternative 2: Excluding "developer premiums";

g. The EJM shall compute the harm in the scenario without Measures assuming that the regulator

i. Alternative 1: Took account of the tax shield;

ii. Alternative 2: Did not take account of the tax shield;

h. The EJM shall compute the harm

i. Alternative 1: Assuming that revisions of returns occur under the New Regime every six years in the scenario with Measures;

ii. Alternative 2: Assuming that revisions of returns do not occur under the New Regime every six years in the scenario with Measures;

i. The EJM shall compute the Alternative Tariff applied in the scenario without Measures

i. Alternative 1: Taking into account past profits;

ii. Alternative 2: Not taking into account past profits.

668. In the following paragraphs, the Tribunal thus discusses the elements of the computation of the losses, if any, and the resulting IRRs as they are set out in PO12 and PO18, in the expert evidence, including especially the EJM and the Joint Memorandum, and in the Parties' submissions.

669. Before doing so, as a preliminary point, the Tribunal notes that there is no substantial disagreement between the Parties as to the general principles governing reparation for unlawful acts in international law. In particular, the Respondent does not dispute the principle that, if liability were established, it has an obligation to make full reparation for the injury caused by the internationally wrongful act.[849]

849 See, e.g., PO12 R-PHB1, paras. 191-194.

i. *Methodology to Calculate the Harm*

(a) The Parties' Position

(i) The Claimants' Position

670. The Claimants submit that their expert, Brattle, quantified the change in the value of their investment using a discounted cash flow ("DCF") analysis and that the Tribunal's directions in PO12 guided this quantification exercise. They note that PO12 directed them to compute their damages by comparing two scenarios: (a) what they refer to as the "Actual scenario", which measures the cash flows (and consequently, the IRR) now expected by the Claimants after the Disputed Measures, and (b) what they term the "But For" scenario, which measures the cash flows (and consequently, the IRR) that the PV investors could have reasonably anticipated in the absence of the Disputed Measures.[850] For the Claimants, if the IRR in the But For scenario is higher than the IRR in the Actual scenario, it means that Spain violated their legitimate expectations by failing to provide the target rate of return under the New Regime. Further, the same quantification would also serve as a basis for calculating their damages.[851]

671. The Claimants submit that, as a first step, Brattle measured the Claimants' cash flows in the But For scenario by implementing the assumptions set out in PO12. In that regard, Brattle notes that PO12 requires them to assume that the target reasonable rate of return Spain considered while designing the Original Regime is 7% or 8% after tax. In other words, rather than the RD 661/2007 FIT, the Claimants would be entitled to some other remuneration (to be calculated) that would enable them to obtain the above target return. For the Claimants and Brattle, it is axiomatic that such remuneration "must be calculated on a like-for-like basis with the reasonable rate of return offered by Spain at the time of Claimants' investments".[852] This is because, first, a like-for-like comparison reflects the legitimate expectations that the Claimants would have had at the time of making their investments. Second, it is also appropriate from an economic perspective, as it allows the two measures of returns (Actual and But For) to be placed on a comparable footing.[853]

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850 PO12, para. 3(a). PO12 assumed that the quantum of damages / harm suffered by the Claimants equals "the difference […] between (i) the reasonable return under Article 30.4 of the 1997 Electricity Law over the regulatory lifetime of a plant […] and (ii) the return the Claimants would make under the Disputed Measures for the same period".

851 PO12 C-PHB1, para. 36.

852 PO12 C-PHB1, para. 37 (emphasis omitted); PO12 C-PHB2, paras. 58-59.

853 PO12 C-PHB2, paras. 60, 63.

672. With this in mind, Brattle notes that under the Original Regime, Spain designed an incentive scheme based on a FIT per MWh for all qualifying installations, for all production over the entire operational lifetime of the installations. Consequently, Brattle is of the view that a "tariff per MWh" of production is consistent with the Claimants' expectation at the time they made their investment. Therefore, in order to determine the cash flows in the But For scenario, Brattle constructed an "Alternative Tariff" per MWh of production that would permit an efficient PV plant to recover costs and earn an after tax return of 7% or 8%, on a like-for-like basis as the RD 661/2007 FITs. It then applied the Alternative Tariff to the production forecast for each of the Claimants' plants to determine the cash flows in the But For scenario.[854]

673. As with the But For scenario, Brattle forecast the cash flows in the Actual scenario (for the period after the Disputed Measures) by implementing the PO12 assumption regarding periodic updates to the remuneration under the New Regime.[855]

674. Having determined the cash flows in the But For and Actual scenarios, Brattle proceeded to measure the Claimants' damages by applying a DCF analysis. For this purpose, PO12 required the Claimants to measure the damages on an *ex ante* basis as well as an *ex post* basis. The Claimants adopt June 2014 for the *ex ante* valuation date as this was the date on which Spain finally defined the parameters under the New Regime.[856] For the *ex post* calculation, the Claimants explain that Brattle adopts December 2016 as a proxy for the date of the award, and subsequently updates the valuation date to reflect the passage of time and availability of additional *ex post* information.[857]

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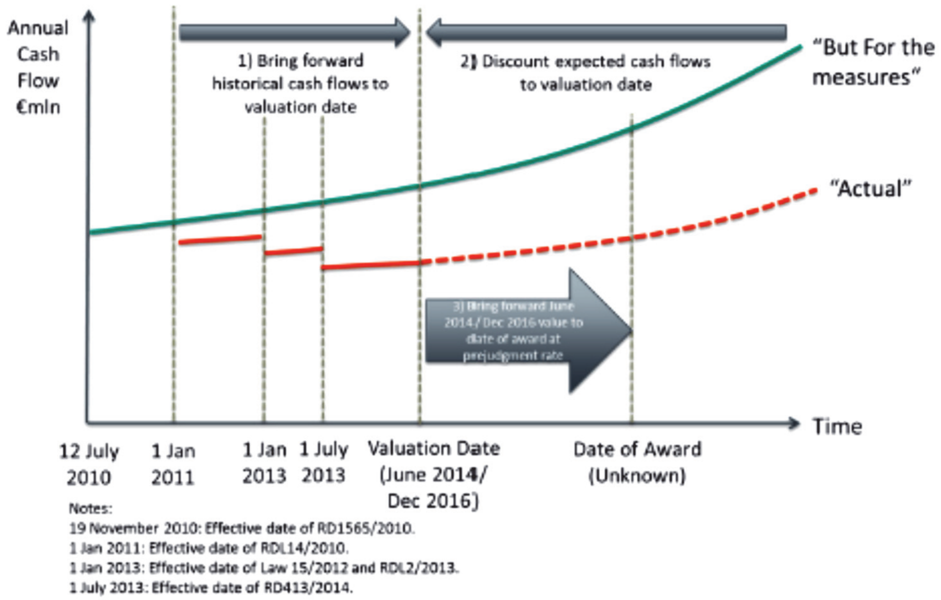
[854] BQR I, paras. 48-50.

[855] BQR I, paras. 33, 100.

[856] Quantum Memorial, para. 53.

[857] Quantum Memorial, para. 54.

675. Brattle explains that under either approach, it has measured the damages using three steps, which it illustrates and explains as follows:



676. The first step of Brattle's valuation methodology looks back prior to the valuation date and considers the difference between the cash flows under the But For and Actual scenarios since the inception of the Disputed Measures in November 2010, and their cumulative effective till the valuation date. Regardless of which valuation date is ultimately used, Brattle explains that the difference between the But For and Actual scenarios is calculated on the basis of each Claimants' actual historical operating and financial data.[858]

677. The second step looks forward from the valuation date and estimates the net present value ("NPV") of the Claimants' investment under both the But For and Actual scenario by performing a DCF analysis. In other words, Brattle derives the NPV of the Claimants' investments by discounting their future cash flows (in both scenarios) to the valuation date to account for market risk and the time value of money.[859]

678. In the third and final step, Brattle "considers that the PV Investors will not receive payment for damages until sometime in the future. The analysis accounts for the delay in compensation by adding pre-award interest to our June 2014 and December 2016

[858] Quantum Memorial, para. 76ff; BQR I, paras. 35, 103.

[859] Quantum Memorial, para. 79ff; BQR I, paras. 36-41, 111.

damage estimates, using published data concerning the yields on Spanish Government bonds".[860]

(ii) The Respondent's Position

679. The Respondent observes that pursuant to PO12, the Parties were invited to present a quantification of the damages allegedly suffered by the Claimants as a result of the Disputed Measures, on the assumption that the harm was equal to the difference between the rate of return under Article 30.4 of the 1997 Electricity Law and the return the Claimants would make under the Disputed Measures. In other words, according to Spain, PO12 required the Parties to compare the "actual" rate of return obtained by the Claimants' plants against a rate of return of 7% or 8% after tax.[861]

680. For Spain, the proper methodology to calculate damages was established by the Tribunal in PO12 which directed the Parties to calculate "returns". According to the Respondent, the Claimants' DCF calculation "does not calculate returns and thus fails to apply the methodology ordered by the Tribunal".[862] For Spain, the correct approach is to perform an analysis of the IRRs of the Claimants' PV plants, which is "the most common and widely accept method to measure the economic profitability of projects".[863] Furthermore, "[t]he calculation of returns established by the Tribunal is the correct methodology for assessing damages in this particular case as it is undisputed that the only reasonable expectation that the Spanish regulatory regime could have generated in investors is that their plants would obtain reasonable returns, and not any particular amount of cash flows".[864]

681. Therefore, Spain explains, Econ One calculated the "actual" IRR for each of the Claimants' PV plants using Brattle's DCF model for the Actual scenario, by taking into account "(i) the costs associated with the development, operation and maintenance of the PV Plants; (ii) the cash flows generated by the PV Plants up until the relevant Valuation Date; and (iii) the value of the PV Plants as of that Valuation Date (based on the cash flows that the PV Plants can be expected to generate going forward, taking into account the Disputed Measures)".[865] It then carried out "an 'apples to apples'

860 BQR I, para. 42.
861 Quantum Counter-Memorial, para. 41; PO12 R-PHB1, paras. 68-69.
862 Quantum Rejoinder, para. 82.
863 Quantum Rejoinder, para. 98.
864 Quantum Rejoinder, para. 102.
865 Quantum Counter-Memorial, para. 43.

comparison, contrasting the expectation of a 7/8% RRoR [reasonable rate of return] at project level as was defined in the regulation and assumed in PO12, with an actual scenario with the Measures that reflects the reality of each of Claimants' Plants and focuses on the returns at project level by considering only greenfield costs".[866]

682. Spain notes that for the But For scenario, PO12 directed the Parties to assume that "'at the time when the investments were made the investors had a legitimate expectation to achieve reasonable profitability in accordance with the terms of Article 30.4 of the 1997 Electricity Law'" and further stipulated the target reasonable return as 7% or 8% after tax.[867] As a result, Spain explains that Econ One did not make any calculations for the But For scenario, "but limited itself to consider that such scenario would permit Claimants to obtain a 7/8% post-tax return". For the Respondent, this approach to the But For scenario follows from the abovementioned directions in PO12 itself.[868]

683. By contrast, Spain submits that the Claimants' calculation of their But For scenario "does not make any sense".[869]

684. Spain contends that the But For scenario is supposed to reflect the Claimants' legitimate expectation of reasonable profitability in accordance with Article 30.4 of the 1997 Electricity Law. In that regard Spain emphasizes that Article 30.4 only specifies the parameters that will be considered while fixing the premiums for the RE sector, i.e. the investment costs and that "the ultimate target of the remuneration […] is to cover the investment cost, operating costs and obtain a reasonable rate of return according to the cost of money on capital markets". It "has never fixed a specific remunerative formula" for calculating such premiums.[870] In other words, while Article 30.4 confirms that producers can legitimately expect a reasonable return, it does not explain how such return will be calculated, much less the form it may take.

685. However, disregarding this facet of the provision, Spain observes that the Claimants construct their But For scenario based on an "Alternative Tariff" which would provide a

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866 PO12 R-PHB1, para. 156.

867 PO12 R-PHB1, paras. 53, 68, discussing PO12, para. 2.

868 PO12 R-PHB1, paras. 69-70, discussing PO12, para. 2.

869 Quantum Counter-Memorial, para. 82. Although Spain takes issue with several aspects of the Claimants' calculation, at this stage and keeping in mind its directions in PO18, the Tribunal considers it sufficient and appropriate to only highlight Spain's arguments based on the Claimants' use of an Alternative Tariff and the marginal plant cost base.

870 PO12 R-PHB1, paras. 53-58; PO12 R-PHB2, paras. 124-128, 130.

7/8% post-tax return to a "made up 'Marginal Plant'", on the premise that this methodology allegedly reflects how Spain calculated the RD 661/2007 FIT.[871] Spain submits that the Claimants' methodology is incorrect because it implies that they expected to receive a tariff on a EUR per MW of electricity-produced basis when, as explained immediately above, Article 30.4 of the 1997 Electricity Law never guaranteed the formulas for fixing remuneration.[872] Hence, Spain contends that the specific remunerative formula under RD 661/2007 (i.e. a EUR per MWh tariff) had nothing to do with the principle of reasonable profitability under the 1997 Electricity Law and could not have constituted a legitimate expectation under Article 30.4.[873] In other words, the Claimants could not have legitimately expected to receive an "Alternative Tariff".

686. Spain further submits that the Claimants' criticism of Econ One's valuation methodology is without merit. In particular, it refers to the Claimants' criticism that Econ One's calculation does not perform a like-for-like comparison by comparing the Claimants' actual IRRs against the hypothetical Alternative Tariff. Spain replies that it is the Claimants' valuation methodology that is flawed, for the following reasons:

- First, as discussed immediately above, there is no evidentiary basis to apply an Alternative Tariff at all.[874]

- Second, Spain submits that the present situation is not a case where the regulator is setting the tariff, where it would have to consider the "standard" or "typical" costs of a plant as it would be impossible to look at the actual costs of each plant. Rather, in the present situation, the Tribunal's task is to resolve the dispute between the Parties. For Spain, "[t]he only way to do this is to calculate the [actual] returns of such Plants […] by considering the enterprise value of the Claimants' Plants and greenfield costs" and not the "fictitious" or "imaginary" Alternative Tariff created by Brattle.[875]

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871 PO12 R-PHB1, para. 80; PO12 R-PHB2, para. 129.

872 PO12 R-PHB1, para. 81; PO12 R-PHB2, paras. 130-131.

873 PO12 R-PHB1, para. 81; PO12 R-PHB2, para. 131.

874 PO12 R-PHB1, para. 81; PO12 R-PHB2, paras. 130-131.

875 PO12 R-PHB1, paras. 8-10. Spain submits that "[w]hile the regulator necessarily needs to assume standardised scenarios in order to calculate the remuneration for PV plants, investors on the other hand consider the real returns that their PV Plants would obtain based on such remuneration. Obviously, the legitimate expectation of the Claimants' PV Plants was to receive a return in the vicinity of the target RRoR established by the

- Third, contrary to the Claimants' allegation, Econ One's calculation of the But For scenario does not convert the target rate of return into a cap on the amount of damages. According to Spain, the 7% or 8% return is "taken as a benchmark to compare it with the actual returns that Claimants' Plants are obtaining with the Measures". Spain explains that if a plant earns more than the target rate of return in the scenario with the Measures, even if such rate of return is less than the IRR that was earned under the Original Regime, such a plant would not be entitled to receive any damages as this would result in over remuneration.[876]

687. Accordingly, Spain asks the Tribunal to disregard the But For scenario proposed by Brattle.

(b) Discussion

688. The Tribunal notes that with regard to the methodology to quantify the harm there appear to be two main points in dispute between the Parties, namely whether Brattle's use of (i) the so-called "Alternative Tariff" and of (ii) the DCF method is appropriate.

689. Having reviewed the Parties' positions, the Tribunal has come to the conclusion that Brattle's approach based on the Alternative Tariff provides an appropriate methodology to calculate the "reasonable rate of return" equal to 7% or 8% post-tax. This is because the Alternative Tariff represents the revenue stream that provides an efficient plant with the assumed rate of return (7% or 8 % post-tax) in the scenario without Measures.

690. In the Tribunal's view, Spain's criticism that there is no evidence that the Claimants expected to receive the Alternative Tariff and that the Alternative Tariff is "fictitious" is misconceived. Of course, as such, the Alternative Tariff never existed, as the only relevant tariff that existed at the time of the Claimants' investment was the RD 661/2007 FIT. However, either Spain must accept that the Claimants could legitimately expect to receive the fixed FIT under RD 661/2007 over the regulatory lifetime of the plants (in which case the Primary Claim would be well-founded, which the Tribunal has concluded is not the case) or Spain must acknowledge that the Claimants were entitled to receive the reasonable return on offer at the time of the Claimants' investments. To calculate the latter, the Tribunal accepts that the Alternative Tariff appropriately represents the

regulator on their initial investment (i.e. based upon their real greenfield costs)" (Quantum Rejoinder, paras. 70-72. See also *ibid*., paras. 135-146).

876 PO12 R-PHB1, paras. 74-77, discussing Brattle's testimony at the PO12 Hearing (PO12 Hearing Tr. [English version] (Caldwell), 17 January 2018, at 33:15-21).

revenue stream that provides the reasonable return that Spain claims the Claimants' installations were entitled to receive.

691. Second, the Tribunal also accepts Brattle's use of the DCF as an appropriate valuation methodology in this case. The DCF method is an accepted valuation method in both financial theory and in the practice, including by arbitral tribunals. While the use of the DCF may not be suited to all cases, especially where the business to be valued is not a "going concern" and lacks a clear record of profitability, there is no reason to discard a DCF in this case for two main reasons. First, the Claimants' installations have been operational since 2008 or earlier, which provides a reliable and sufficient record of *past* financial performance.[877] Second, there is no major uncertainty regarding the plants' *future* cash flows as, on Spain's case, the Disputed Measures continue to provide investors with a reasonable rate of return for the entire regulatory life of the plant.

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877 The Tribunal notes that other tribunals have likewise resorted to the DCF method for the purposes of the damages calculations in other Spanish renewable energy cases. See, e.g., *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **Exh. CLA-215**, para. 465 ("DCF has frequently been applied as an appropriate and effective method for arriving at a valuation of a business operating as a going concern prior to adverse government actions. 'DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets [...]' While in this case the Tribunal does not reach the expropriation claim, the calculation of damages involves a comparable assessment of potential future revenues of a going concern with predictable capital and operating costs and cash flows" (internal footnotes omitted)); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, **Exh. CLA-243**, para. 582("[…] power plants, such as Claimant's businesses, rely on a relatively simple business model – limited only to generating electricity, pursuant to generally stable parameters. Both income generated and costs incurred are relatively predictable in the renewable energy sector" (internal footnotes omitted)); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, **Exh. CLA-244**, para. 689 ("[…] it is true that the DFC method may be inappropriate for the valuation of business concerns that are not in operation or at very early stages of operation and therefore lack a suitable track record of their performance. It may also be inappropriate for business concerns having a short performance record and subject to several variables that are difficult to forecast. However, this is not the case here […] power stations (both conventional and renewables) have a relatively simple business, producing electricity, whose demand and long-run value can be analysed and modelled in detail based on readily available data"); *Greentech Energy Systems A/S and others v. Kingdom of Spain*, SCC Case No. V (2015/150), Final Award, 14 November 2018, **Exh. CLA-245**, para. 480 ("[…] the Majority of the Tribunal agrees with the Claimants that the DCF method is appropriate in this case, because: 'the future performance of operating solar PV plants is relatively predictable (i.e., they can sell all of the electricity they produce at prices and costs that are known or can be forecast with a high degree of confidence for a significant period of time).'").

692. Therefore, in terms of general valuation methodology, the Tribunal considers Brattle's DCF methodology reasonable under the circumstances, as it seeks to quantify the Claimants' cash flows in the scenario without Measures and in the scenario with Measures and then discounts these cash flows to determine the present value of the Claimants' plants.

693. Furthermore, the Tribunal notes that Spain's expert, Econ One, relied on Brattle's DCF model when carrying out its calculations in the scenario with Measures without performing its own analysis. Econ One in particular used Brattle's DCF model to discount the future cash flows to derive the enterprise value of the installations:

> DR. FLORES: And what is the value of these futures [*sic*] returns that are yet to come? As a proxy for that we have taken the enterprise value, calculated by Brattle.
>
> […]
>
> THE PRESIDENT: Can I just ask a question about the enterprise value. You say you took it as calculated by Brattle; is that right?
>
> DR FLORES: Correct, yes.
>
> THE PRESIDENT: And that is essentially future cash flow -- net cash flows, discounted back to present value.
>
> DR FLORES: Correct. That's correct, yes.[878]

694. By contrast, in the scenario without Measures, Econ One's analysis "doesn't discount future cash flows".[879]

695. With regard to the inputs into Brattle's DCF model, the Tribunal observes that they were undisputed until the PO12 Hearing. In particular, in its two quantum reports, Econ One did not take issue with the discount rates, production forecasts, pool prices and interest rates used in Brattle's model. As noted above, on the contrary, Econ One relied on those same inputs in its valuation for the scenario with Measures.[880]

696. On the last day of the PO12 Hearing, however, Econ One suggested for the first time that it disagreed with one of the inputs into Brattle's DCF model, namely the discount

878 PO12 Hearing Tr. [English version] (Flores; President), 18 January 2018, at 24:16-18 and 24:24-25:6.

879 PO12 Hearing Tr. [English version] (Flores), 19 January 2018, at 6:3-25. See also Respondent's letter, 18 April 2018, confirming that the "Econ One But for is not a DCF model".

880 See PO12 Hearing Tr. [English version] (Flores; President), 18 January 2018, at 24:16-18 and 24:24-25:6.

rate (and more specifically, the regulatory risk premium) in the scenario without Measures.[881] The Tribunal considers that, as the discount rate and the regulatory risk which it includes are important factors in a DCF analysis, Econ One should have raised any concern in its reports in response to Brattle's damage calculation.

697. For these reasons, the Tribunal accepts Brattle's use of the DCF as an appropriate valuation methodology. Accordingly, in PO18, the Tribunal instructed the experts to calculate the harm allegedly suffered as follows:

> "[B]y using the methodology used by Brattle in its DCF computation. Thus, the DCF methodology shall be based on the calculation of an Alternative Tariff designed to provide a 7% post-tax return (as described below). The harm shall be calculated by discounting the cash flows to arrive at the net present value of the Claimants' assets in the scenarios without Measures and with Measures".[882]

698. The assumed rate to be used in the scenario without Measures (7% or 8%) is discussed next.

ii. *The Rate of Return in the Scenario Without Measures*

(a) The Parties' Position

699. The Claimants submit that, for the scenario without Measures, an 8% target rate of return is appropriate. They submit that both the CNE and the Ministry of Industry contemplated a return of 8%.[883] Moreover, Spain's expert, MG&A, confirmed during the Hearing on Liability that "the CNE had in fact approved the proposed RD 661/2007 on the basis that PV installations would receive between 7.6% and 8% after tax" returns. The Claimants further submit that Spain's efforts to discredit the CNE report are without merit.[884]

700. Spain, for its part, submits that, in the scenario without Measures, the Tribunal should adopt a target rate of 7%. It submits that the target rate of return at the time of the Claimants' investment was 7% after tax, which position is supported by the evidence of both of Spain's experts.[885] By contrast, there is no evidence to support the Claimants' position that the target rate of return was 8%. Spain contends that the Claimants' and

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881 See PO12 Hearing Tr. [English version] (Flores), 19 January 2018, at 21:9 et seq.

882 PO18, para. 12(b).

883 Quantum Reply, para. 168, discussing CNE Report 3/2007, **Exh. C-311**.

884 Quantum Reply, paras. 170-176.

885 Quantum Counter-Memorial, para. 57, discussing MG&A Report, Section 4.1 and EOQR I, paras 23-29, both of which in turn refer to the PER 2005-2010, **Exh. R-26**.

Brattle's reliance on CNE Report 3/2007[886] to advocate for an 8% post-tax return is misplaced, as this report refers to an 8% return for facilities that have been operating since 2004 and with a capacity of 5kW. These parameters do not apply to the Claimants' PV plants, most of which were built in 2008 and have an installed capacity of 100kW.[887]

(b) Discussion

701. The contemporaneous documents in the record contain references to rates of return in the area of 7%, 8%, or in between the two.

702. First, according to the Economic Memorandum (*Memoria Económica*) of the Draft Royal Decree which was to become RD 661/2007, prepared by the Ministry of Industry, Tourism and Energy, PV plants up to 10 MW would receive a remuneration of "approximately 7%", and plants above 10 MW would have a return lower than 7%:

> 3.2.1 Photovoltaic Solar Sector
>
> A new definition of power is drafted in Section 3, with respect to the applicable economic regime, in order to avoid inefficient configurations as a result of a multiplicity of converters.
>
> In the tranche from 100 kW to 10 MW the remuneration is increased by regulated tariff and maintained in the rest, in order to adequately reflect the costs of these installations.
>
> The market option is not considered for these installations.
>
> The remuneration corresponding to the photovoltaic solar sector can be found in Table 3, sub-group b.1.1.
>
> <u>For installations up to 10 MW, these regulated tariff values provide a reasonable IRR at 25 years of approximately 7%.</u>
>
> <u>Within the power range exceeding 10 MW, an IRR of less of 7% is taken into account.</u> Photovoltaic installations of this size are not normal and if implemented would not respond exclusively to profitability criteria.
>
> The power objectives provided up to now are extended, establishing 371 MW as reference installed power objective with right to remuneration for photovoltaic installations.[888]

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886 CNE Report 3/2007, **Exh. C-311**.

887 Quantum Counter-Memorial, paras. 58-60; PO12 R-PHB1, para. 66.

888 Memorandum of the Draft Royal Decree regulating the activity of energy production under the special regime and certain facilities of similar technologies under the ordinary regime of 21 March 2007 in relation to RD 661/2007, 21 March 2007, **Exh. R-24**, Section 3.2.1 (emphasis added) (Tribunal's translation).

703. The PER 2005-2010 also referred to a 7% figure:

> *Return on Project Type*: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in legal tender and for each standard project, around 7%, on equity (before any financing) and after taxes.[889] (Respondent's translation)

704. Similar language referring to a 7% IRR can also be found in the PER 2000-2010.[890]

705. Moreover, the press release issued by the Ministry of Industry, Energy and Tourism in May 2007 equally refers to a 7% rate in the following terms:

> The new regulation guarantees a return of 7% for wind farms and hydro-electric facilities that opt to transfer their production to distributors and between 5% and 9% if they participate in the electricity production market. Photovoltaic facilities with greater capacity practically double their compensation, those of a lesser size stay at the same level, and the guaranteed return is 7%.[891] (Claimants' translation)

706. Finally, the CNE Report 3/2007 refers to the 7% rate "proposed by the Ministry".[892] It is true, however, that the CNE Report 3/2007 also refers to other IRRs, which range from 6.5%, to 6.7%, to 7.6%, to 7.9%, and to 8.2%.[893] In particular, the Tribunal notes that for PV installations of up to 100 kw (which according to both Parties constituted "many" or "most" of the Claimants' plants"),[894] the CNE refers to IRRs of 7.6% and 8%:[895]

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889 PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p. 274 [p. 8 of PDF] (Respondent's English translation).

890 PER 2000-2010, 30 December 1999, **Exh. R-60** (full version), p. 182 (Spanish version).

891 Press Release announcing RD 661/2007, "The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power", 25 May 2007, **Exh. C-565**, p. 1 (Claimants' English translation).

892 CNE Report 3/2007, **Exh. R-62**, p. 21 [p. 24 of PDF] (Respondent's English translation).

893 See CNE Report 3/2007, **Exh. R-62**, pp. 22 and 53 [pp. 25 and 56 of PDF]. See also Annex III of CNE Report 3/2007, pp. 46-47-48 [pp. 112-113-114 of PDF].

894 See, e.g., ASoC, paras. 62, 222 ("many of the Claimants' individual PV installations had an installed generating capacity under 100 kilowatts (kW) in order to maximise access to the highest RD 66/2007 FIT, which was only available to installations under that threshold" […] "Because the highest FITs were available only to installations under 100 kW of installed capacity, many of the Claimants (or the developers from whom they purchased their assets) structured their assets such that an individual SPV would hold several installations up to the 100 kW limit […]", emphasis added); Quantum Counter-Memorial, para. 117 ("most of [the Claimants' plants] were built in 2008 and are 100 kW facilities"). See also BQR II, para. 213, noting that "60 of the PV Investors' projects in fact were assigned and received the FIT for RD 661/2007's smaller than 100 kW size category. The remaining 8 projects were assigned and received the FIT for RD 661/2007's 100 kW to 10 MW category" (internal footnote omitted).

895 CNE Report 3/2007, **Exh. C-311**, p. 22 [p. 25 of the PDF] (Spanish version).

ANALISIS DE RENTABILIDAD DE LA OPCIÓN DE VENTA A TARIFA REGULADA:

TECNOLOGÍA	RETRIBUCIÓN SIN COMPLEMENTOS	PROPUESTA DE RD	
		c€/kWh	TIR
Fotovoltaica fija < 100 kW (32 instalaciones)	Tarifa (1-25 años)	44,04	7,6%
Fotovoltaica con seguimiento < 100 kW (53 instalaciones)	Tarifa (1-25 años)	44,04	8,0%

707. At the same time, in Annex III of the same document, the CNE presents other calculations for installations of the same capacity with IRRs of 6.5% to 6.7%:[896]

RENTABILIDAD ENERGÍA FOTOVOLTAICA Proyecto Tipo Fija	100 kW			100kW <P < 10 MW			P> 10 MW		
AÑO 2007	Retribución 1-25 años cent€/kWh	Retribución resto años cent€/kWh	TIR	Retribución 1-25 años cent€/kWh	Retribución resto años cent€/kWh	TIR 2 / 5 MW	Retribución 1-25 años cent€/kWh	Retribución resto años cent€/kWh	TIR
REGULACIÓN VIGENTE RD 436/04									
Tarifa Regulada	44,92	35,94	6,7%	23,44	18,75	1,5% / 2,0%	23,44	18,75	2,6%
PROPUESTA DE RD									
Tarifa Regulada	44,04	35,23	6,5%	41,75	33,40	7,1% / 7,7%	22,98	18,38	2,5%
PROPUESTA CNE									
Tarifa Regulada	44,92	35,94	6,7%	41,75	33,40	7,1% / 7,7%	22,98	18,38	2,5%
Mercado= tarifa Regulada+ Incentivo				42,53	34,18	7,8%			
Prima= Tarifa RD-PM				36,18	27,83				
Incentivo= 10% TMR equiv.				0,78	0,78				

708. On this basis, it emerges from the information available to operators at the time when the Claimants made their investment that the envisaged IRR would vary, depending on the capacity and type of the plant. This said, the emphasis in the PER 2005-2010 and the PER 2000-2010, as well as in the *Memoria Económica* and the Ministry's press release shows an intent to guarantee "approximately" or "around" 7%. There is no dispute that the two PERs and the Ministry's press release were public (the Claimants actually rely on them to substantiate their expectations) and that, as the Tribunal has previously concluded,[897] the *Memoria Económica* was publicly available upon request.

896 CNE Report 3/2007, **Exh. C-311**, Annex III, p. 48 [p. 113 of the PDF] (Spanish version).

897 See para. 632.

709. Therefore, on balance, the Tribunal considers that the "reasonable rate of return" that the Claimants could have expected at the time of their investments was in the range of 7%.[898] This is the rate of return which the experts used in the EJM in accordance with PO18.[899]

710. The Tribunal finally notes that the rate of 7% is broadly aligned with those granted by other European Union Member States, such as France, Italy, Estonia, Latvia,[900] and the Czech Republic.[901]

iii. *Exit v. holding IRR*

(a) The Parties' Position

711. The Claimants submit that Brattle calculates the IRR that an investor would receive "throughout the entire regulatory lifetime of its investment" (so-called "long-term holding IRR" or holding IRR).[902] The Claimants submit that only holding IRRs (as opposed to Econ One's exit IRRs) are compatible with the Tribunal's instructions in PO12 which "implicitly requested the parties to calculate a holding IRR 'over the regulatory life of a plant'".[903] According to Brattle, "holding and exit IRRs can diverge significantly because of interest rate fluctuations because interest rates affect exit values but not underlying cash flows".[904]

712. The Respondent, for its part, submits that the Tribunal should use Econ One's exit IRRs for the computation of the Actual Scenario. Econ's exit IRRs are calculated using the initial investment cost, historical cash flows generated and the enterprise value at the *ex ante* and *ex post* valuation dates established in PO12. The enterprise value is the market value of the remaining life of the Claimants' PV Plants expressed at the

898 See also *Stadtwerke*, para. 337 (where, in considering "whether the impact upon the Claimants' investment specifically was reasonable or proportionate through an assessment of the rate of return earned by the Claimants' investment before and after the disputed measures", the tribunal found that the "reasonable rate of return" at the time the Claimants made their investment was "around 7% post-tax").

899 See PO18, para. 12(b) and (e).

900 See EC Decision on State Aid, **Exh. RLA-213**, para. 120 and fn. 57.

901 *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017, **Exh. RLA-213**, paras. 406, 420, 451.

902 Quantum Reply, para. 163.

903 Quantum Reply, para. 165. See also PO12 C-PHB1, paras. 121-132.

904 Quantum Reply, para. 166 (emphasis omitted).

valuation date using a discount rate.[905] Thus, Econ One calculates the IRR that an investor would receive assuming that it sells its investment at some point, effectively cashing out the estimated fair market value of the assets through the sale. In any event, for Econ One, the distinction between exit and holding IRRs "is not particularly relevant here since there is only a small difference between the two calculations".[906]

(b) Discussion

713. The Tribunal considers that, for the purposes of the computation of the IRRs, a holding IRR is to be preferred over an exit IRR. This is because Spain calculated the reasonable rate of return over the useful life of an installation (i.e. a holding IRR) and not on a sale of the plant at some moment in the future. In the words of Spain's expert, MG&A:

> The remuneration model for renewable energies in Spain has always been based on the objective of conferring a Reasonable Rate of Return calculated over the <u>whole of the installation's useful life</u>, that is, from the moment the plant is connected and electricity production begins until the end of its useful life.[907]

714. In other words, for purposes of assessing the alleged harm to the Claimants' investments, it is logical to have regard to the IRR that an investor would receive throughout the entire regulatory lifetime of the plant. By contrast, the Tribunal sees little justification in assuming that an investor sells its investment at some point, effectively cashing out the estimated fair market value of the assets through the sale.

715. Accordingly, in PO18, the Tribunal directed the experts to "use a holding IRR as opposed to an exit IRR in both scenarios (with Measures and without Measures)".[908]

iv. *The Valuation Date*

(a) The Parties' Position

716. The Claimants submit that the Tribunal should adopt an *ex post* or "date of the award" valuation date. They contend that according to investment arbitration jurisprudence, an *ex post* valuation is appropriate where it allows a tribunal (a) to ensure full reparation and wipe out the consequences of a wrongful act; and/or (b) to include more recent and comprehensive data, thereby reinforcing the accuracy of the valuation. The Claimants submit that both criteria are satisfied in the present case because, first, an

905 EOQR II, para. 278.

906 EOQR II, para. 22.

907 MG&A Rebuttal Expert Report, para. 152.

908 PO18, para. 12(c)

ex post assessment ensures use of actual production figures, market information and macroeconomic data, making the valuation more accurate. Second, it accounts for potential changes to the rate of return over time, thereby capturing the additional harm that the Claimants will suffer.[909]

717. If an *ex ante* valuation date were to be used, the Claimants submit that the appropriate date should be 30 June 2014, i.e. the date "when the June 2014 Order was implemented, which sets the precise economic parameters for calculating the Special Payment under the New Regime".[910]

718. By contrast, Spain submits that the Tribunal should adopt an *ex ante* valuation date for the following reasons:

- Article 13(1) of the ECT expressly refers to the date of valuation as being the "date of the unlawful act for the purpose of calculating an investor's alleged damages in case of an expropriation". The same date of valuation should apply by analogy to other breaches of the ECT, in the absence of specific treaty language to the contrary.[911]

- Under customary international law, a fundamental rule of damages is causation, i.e. an injured party must receive full reparation for injury "caused by" the internationally wrongful act. It therefore follows that the date of the alleged internationally wrongful act, i.e. of the Disputed Measures, is the only one that has a causal link with the alleged damages suffered.[912]

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909 PO12 C-PHB1, paras. 187-190.

910 Quantum Reply, para. 181. See also PO12 C-PHB1, para. 187 ("In line with the Tribunal's directions in PO12, Brattle developed both an *ex ante* and an *ex post* valuation. The former uses June 2014 […]").

911 PO12 R-PHB1, paras. 188-190.

912 PO12 R-PHB1, paras. 191-196, referring to the Case concerning the Factory of Chorzow (*Germany v. Poland*), Claim for Indemnity, Merits, PCIJ, Series A, No. 17, 1928, 13 September 1928 ("*Chorzów Factory* Case"), **Exh. CLA-3** and Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol I) Corr.4, 12 December 2001 ("*ILC Articles*"), **Exh. CLA-13**.

- An *ex ante* valuation approach has been adopted by an overwhelming majority of arbitral tribunals applying the full reparation standard and there is no basis to suggest that an *ex ante* date of valuation will not ensure full reparation.[913]

- An *ex post* date of valuation would be arbitrary and unlawful.[914]

719. If the Tribunal agrees with Spain, Spain accepts the Claimants' proposal to use 30 June 2014 as the valuation date.[915]

(b) Discussion

720. While in their later submissions the Claimants expressed a clear preference for a valuation on the date of the award, in their first Quantum Memorial the Claimants accepted that tribunals admit both an *ex ante* and an *ex post* valuation depending on the specific circumstances of a case.[916] Indeed, the Claimants referred the Tribunal to prior arbitral decisions where tribunals adopted an *ex ante* approach both for expropriation and other treaty breaches based on the date on which the disputed measure or measures effected an "irreversible deprivation".[917] On that basis, the Claimants suggested June 2014 as the appropriate date for an *ex ante* valuation, to reflect the date of the Parameters' Order which, in their submission, was the final act in the series of Disputed Measures.[918]

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913 PO12 R-PHB1, para. 197.

914 PO12 R-PHB1, paras. 199-208.

915 PO12 R-PHB1, para. 220.

916 See Quantum Memorial, section 4.2.

917 See Quantum Memorial, para. 52, noting that tribunals "held that the valuation date should be the date '*when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events*'", adding that the "irreversible deprivation" has been resorted to not only in cases of expropriation but also "for breaches other than expropriation", and discussing *International Technical Products Corporation and ITP Export Corporation v. The Government of the Islamic Republic of Iran*, 9 Iran-United States Claims Tribunal 206, Final Award, 28 October 1986, **Exh. CLA-198**, p. 240; *Compañía del Desarrollo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, **Exh. CLA-199**, paras. 77–78; *Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran*, Iran-United States Claims Tribunal 485, Final Award, 27 February 2003, **Exh. CLA-200**, para. 345; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **Exh. CLA-23**, para. 417. See also, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **Exh. CLA-29**, para. 405.

918 Quantum Memorial, para. 53.

721. In the Tribunal's view, according to the specificities of the dispute, an *ex post* valuation may sometimes be preferable because reparation should ideally stand in lieu of restitution and an *ex post* valuation allows for the most recent information to be taken into account. This said, a valuation at the time of the breach, i.e. *ex ante,* appears particularly appropriate when the consequences of a later evolution of prices, interest rates, or other inputs are unrelated to the impugned measures and the (higher) harm can thus not be deemed to derive from the measures.

722. In this case, as Brattle explained, there appear to be two main drivers for the difference between the *ex post* and *ex ante* figures, namely the lower interest rates and the (related) possibility of revision of the returns.[919] It is clear that the decrease of the interest rates was not caused by the Disputed Measures, but was mainly due to the evolution of the financial markets and to macroeconomic conditions. As for the periodic revisions, they are linked to the evolution of interest rates. To the extent that the calculation of the IRR and the corresponding loss, if there is one, seeks to track reasonable profitability, it should be measured on the conditions that prevail in the markets depending on the economic and financial surroundings.

723. In the circumstances, the Tribunal considers that using a valuation date linked to the date of the award would not be justified. It thus opts for an *ex ante* valuation, which is the approach reflected in PO18. That order indeed provided that "[a]s valuation date, the EJM shall use the date of the alleged breach as it was set by agreement of the Parties, i.e. 30 June 2014".[920]

v. ***Harm Calculated per Claimant***

724. At the PO12 Hearing, the experts agreed that the EJM would calculate the harm "per investor" or per Claimant (rather than for each plant):

> MR CALDWELL [Brattle]: […] we've basically got models per investor. And then some centralised –
>
> THE PRESIDENT: Yes, it's per investor, since some investors have several plants.
>
> DR FLORES: Yes.
>
> THE PRESIDENT: And I think you agree with the fact that we'll look at it per investor. Is that right?

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919 See PO12 Hearing Tr. [English version] (Caldwell), 17 January 2018, at 81:23-82:9.

920 PO18, para. 12(d).

DR FLORES: Yes.[921]

725. Accordingly, in PO18, the Tribunal instructed the experts that "[t]he harm allegedly suffered by the Claimants shall be calculated per *Claimant*".[922]

726. The Joint Memorandum provides the following agreed explanations:

> The harm allegedly suffered is calculated per Claimant entity, rather than per investor group. There are 26 Claimants in total, but some Claimants are 100% wholly owned subsidiaries of other Claimants so there is no need to distinguish between them for the purposes of the EJM. Within the 14 investor groups we distinguish between 19 Claimant entities. For example, the investor group HgCapital includes two Claimant entities: Mercurio Solar S.à.r.l and Tyche Solar S.à.r.l.
>
> The Claimant entities included in the EJM are listed in the EJM.[923]

727. Therefore, in light of the experts' agreement and the absence of objection by the Parties, the Tribunal will establish the harm allegedly suffered by Claimant, that is for each of the 19 Claimant entities, as listed in the EJM.

vi. *Cost Base*

(a) The Parties' Position

(i) The Claimants' Position

728. The Claimants submit that the IRRs in the scenario without Measures should be calculated on the basis of an efficiency benchmark, the so-called "marginal plant", and not on the basis of the actual greenfield costs incurred for each of the Claimants' plants.

729. According to the Claimants, the IRRs in the scenario without Measures must be determined by applying the same assumptions that Spain used when designing the RD 661/2007 regime. The Claimants explain that Spain never published the cost base (the cost and production parameters) that it employed to determine the FITs applicable under RD 661/2007. In their view, there is nevertheless evidence to demonstrate that the FITs offered under RD 661/2007 (and consequently the IRR) were calculated on

921 PO12 Hearing Tr. [English version], 19 January 2018, at 65:19-66:2.

922 PO18, para. 12(a) (emphasis in the original).

923 Joint Memorandum, paras. 6-7.

the basis of a "marginal plant" or "levelised cost target",[924] i.e. a hypothetical standard plant with the most efficient cost and production parameters.[925]

730. By contrast, the Claimants submit that the Respondent's suggestion that the greenfield cost base should be adopted is unfounded.[926] In particular, the Claimants observe that the "greenfield costs" option (i.e. Alternative 2 in PO18, para. 12(f)(ii)) advocated by Spain, which adopts the actual greenfield costs of the plants as the cost base, would result in the totality of the Claimants' efficiency gains being "stripped away".[927] Moreover, adopting this option would not only penalize efficient investors, but would also reward investors who built or bought inefficient plants. In the Claimants' submission, the inefficient plants that failed to beat the cost target should earn less than 7% after tax. However, if the greenfield costs approach were adopted, those inefficient PV plants would be awarded damages allowing them to achieve 7% after tax returns.[928]

731. The Claimants then explain the marginal plant cost base which they adopted for their But For or without Measures scenario. Because Spain never published the costs and production data on the basis of which it calculated the RD 661/2007 FITs, Brattle had to identify the marginal plants used for each of three size categories provided under RD 661/2007. For this purpose, Brattle took the 42 standard installations defined by Spain under the New Regime (corresponding to the Claimants' plants) and grouped them according to the three size categories that existed under the Original Regime, i.e. (i) 100kW and under; (ii) between 100kW and 10MW; and (iii) above 10MW.[929] Once regrouped, for each of the three size categories, Brattle identified the standard plant that represented the marginal plant under the Original Regime. This resulted in the so-called "pure" marginal plant option, according to the Claimants.[930] The Alternative Tariff

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924 The levelised cost of a PV plant is the "the price at which the power station would have to sell all its power, increasing each year with inflation over the power station's entire useful life, to recover all operating costs and maintenance costs, to compensate investors for all their capital outlays, and to grant them a reasonable return on their investment". See, Quantum Memorial, para. 37 citing to Brattle's Second Expert Report, para. 26.

925 PO12 C-PHB2, para. 130; PO12 C-PHB1, para. 49.

926 PO12 C-PHB2, paras. 135-137.

927 PO12 C-PHB2, para. 159.

928 PO12 C-PHB2, para. 160.

929 PO12 C-PHB2, paras. 140-141; PO12 C-PHB1, para. 78.

930 The denomination of "pure" for this marginal plant option is used by the Tribunal for easier understanding in order to distinguish it from the two other marginal plant options proposed by Brattle, i.e. the "size re-classified marginal plant" and the "IT Code" marginal plant, which were ultimately retained in PO18 (see PO18, para. 12(f)(i)).

for each of the Claimants' plants was determined based on the size category into which each plant fell. The Claimants submit that the Tribunal should adopt the "pure" marginal plant as the cost base as it most closely resembled the actual RD 661/2007 marginal plant.

732. However, in the event that the Tribunal would not agree to use the "pure" marginal plant, Brattle proposed two alternative efficiency standards for calculating damages. The first alternative was based on the so-called "size re-classified marginal plant" and the second, on using the actual "IT Code" applied by Spain to each of the Claimants' PV installations under the New Regime.

733. Under the size re-classified marginal plant option, Brattle regrouped the 42 standard installations into the five size categories introduced by the New Regime (as opposed to the three size categories under RD 661/2007 which it had done for the "pure" marginal plant). These five categories are the following: (i) less than or equal to 5kW; (ii) between 5kW and 100kW; (iii) between 100 kW and 2MW; (iv) between 2MW and 10MW; and (v) above 10 MW. This analysis "assigns each project a marginal plant based on the new size category assigned to it under the New Regulatory Regime, rather than a marginal plant based on the original size category assigned to it under RD 661/2007".[931]

734. The second alternative calculation is based on using the actual "IT Codes" applied by Spain to each of the Claimants' PV installations under the New Regime.[932] In other words, the "Own IT-Code" cost base adopted the efficiency benchmarks that Spain itself established under the New Regime.

735. The Claimants contend that, compared to the "pure" marginal plant option, the "size re-classified marginal plant" cost base, "allows Spain to (i) create new efficiency standards *ex post*" as it contemplates five size categories and therefore five marginal plants (as compared to the three original categories under RD 661/2007).[933] Further, it allows

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931 BQR II, para. 227.

932 As explained by Brattle, "[t]he June [2014] Ministerial Order defines 42 separate standard installations (IT-codes) for PV projects previously receiving the FITs under RD 661/2007. For each of the 42 separate IT codes, the June Ministerial Order defines construction costs, and operating costs and production levels throughout the expected 30-year regulatory life of the standard installation". See BQR II, para. 116 (internal footnote omitted).

933 The Tribunal notes that these size categories are (i) installed capacity less than or equal to 5kW; (ii) installed capacity more than 5kW but less than or equal to 100kW; (iii) installed capacity more than 100 kW but less than or equal to 2MW; (iv) installed

Spain to "re-classify the Claimants' plants […] *ex post*", from the smaller categories under RD 661/2007 to the larger size categories defined under the New Regime, thereby reducing the cost and production parameters to which they are subject. Overall, it allows Spain to appropriate some of the efficient gains achieved by the Claimants under RD 661/2007. Nevertheless, it is to be preferred to the "IT Codes" option, so say the Claimants, as it allows the Claimants to retain at least some of their efficiency gains.[934]

736. By contrast, the Claimants submit that opting for the "Own IT-Code" cost base in the EJM would allow Spain to appropriate a substantial portion of their efficiency gains, in contradiction to the undisputed evidence of both Parties' experts that the Claimants were entitled to retain their efficiency gains.[935] For the Claimants, applying the Own IT-Codes cost base would allow Spain to retroactively change the fundamental characteristics of the regulatory regime applicable to existing investments, inasmuch as this option not only re-categorises plants depending on their size but also depending on the year of commissioning and the technology used. It therefore introduces many levels of remuneration for different types of plants, where only three existed under the Original Regime.[936] In the circumstances, the Claimants submit that there is no compelling reason to depart from the "Size Re-classified" marginal plant and choose the "Own IT-Code" option instead.

737. The Claimants submit that if, despite evidence to the contrary, the Tribunal adopts the actual greenfield costs of the plants as the cost base (as advocated by Spain), then the quantification proposed by Brattle should be preferred. In that regard, the dispute between the experts concerns the inclusion of developer premiums in the calculation of greenfield costs.

738. Brattle notes that, in the event the Tribunal decides to include developer premiums in the greenfield costs, both Parties agree on the quantification of these costs.[937] Thus, for Brattle, the dispute between the experts concerns only the situation were developer

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capacity more than 2MW but less than or equal to 10MW; and (v) installed capacity greater than 10 MW. Of these five size categories, the Claimants 68 PV plants fall into categories (ii) to (v), and are assigned a marginal plant based on which size category they fall into.

934 PO12 C-PHB2, para. 144; PO12 C-PHB1, paras. 88-89.

935 PO12 C-PHB2, paras. 151-158.

936 PO12 C-PHB2, paras. 149-150; PO12 C-PHB1, paras. 85-89.

937 Joint Memorandum, para. 21.

premiums are excluded. Should the Tribunal decide to exclude developer premiums, then the Tribunal should opt for Brattle's calculations.

739. The experts' quantification of the greenfield costs in a situation excluding the developer premiums differs because of their different understandings of the components of "developer premiums". For Brattle, it is not appropriate to exclude from the greenfield costs elements of the price paid by an investor to acquire a project prior to construction (as Econ One does), because part of such price will have compensated the original developer for the costs that it incurred for designing the project and obtaining the necessary permits. Thus, these amounts should be included in the calculation of greenfield costs.[938]

(ii) The Respondent's Position

740. Spain submits that the remuneration scheme for PV installations, including the RD 661/2007 FIT, has always been based on the "costs of standard installations that reflect the typical efficient greenfield costs in the market for the construction of certain type of installation in a given year".[939] Furthermore, Spain contends that "the typical costs of the standard facilities included in the Parameters' Order IT Codes are […] representative of the real costs in the market at the time of construction of the PV Plants".[940]

741. By contrast, Spain asserts that the "marginal plant" used by Brattle is not representative of the typical costs and production of the Claimants' plants. This is because Brattle's marginal plant applies the costs of the most expensive (but efficient) 5kW plant constructed in 2007 to calculate the "Alternative Tariff" and applies the same tariff to all

938 Quantum Reply, paras. 129-130.

939 PO12 R-PHB1, para. 96. Spain has also insisted that its regulatory framework has always provided that the reasonable return will be obtained at the plant level or, in other words, that the investment costs considered and the profitability obtained are calculated with reference to greenfield investors (i.e., the promoters who undertook the development, construction and commissioning of the installation). Such remuneration does not cover the extra costs incurred by "secondary", "financial" or "brownfield" investors, such as the Claimants, who paid a premium for the acquisition of the asset. Spain contends that the calculation of the remuneration under the current regime also considers the profitability of the project at the plant level (i.e., for greenfield investors), as is demonstrated by RDL 9/2013 and the Order on Parameters, which refer to the reasonable return for the "facilities". See R-PHB1, paras. 338-343.

940 PO12 R-PHB1, para. 24.

of Claimants' plants "which are approximately 3.8MW on average" in size and were constructed in 2008, when costs of construction were lower.[941]

742. In Spain's submission, the fact that the marginal plant is not representative of typical costs is reinforced by the alternative cost bases proposed by Brattle. These show that "(i) […] using a 100 kW plant instead of a 5 kW plant, reduces the alleged damages by around 30% and (ii) using the IT Codes which are the representative of the standard costs of Claimants' Plants, again, reduces the claimed damages by around 40%".[942]

743. Thus, the Respondent concludes, "Brattle's 'Marginal Plant' theory does not make economic sense and there is absolutely no evidence in the record to support that this was the expectation of Claimants".[943]

744. More specifically, Spain contends that the IRRs should be calculated using the Claimants' greenfield costs excluding developer premiums, as calculated by Econ One.[944] Spain recalls that greenfield investment costs are the costs incurred at the beginning of a project's lifecycle that are necessary to begin the operation of a PV facility.[945] It contends that the only appropriate way to calculate greenfield costs is by excluding developer premiums, since these are not "greenfield costs" (i.e. costs necessary to put the plant in operation) and their inclusion would lead to unreasonable results.[946]

745. For Spain, Brattle's argument that developer premiums should be included in the greenfield costs is speculative and unsupported by the evidence, because "[a]t least part of such acquisition prices will have compensated the original developer for the costs that it incurred in designing a project and compiling the necessary permits".[947]

746. If the Tribunal agrees with Spain, the latter further states that the Tribunal should opt for Econ One's calculations of the greenfield costs excluding developer premiums, as Brattle's calculations "continue to be completely overstated".[948]

941 PO12 R-PHB1, paras. 98-101, 103-104.
942 PO12 R-PHB1, para. 102 (internal footnote omitted).
943 PO12 R-PHB1, para. 93.
944 PO12 R-PHB2, paras. 203-214.
945 PO12 R-PHB2, para. 204.
946 PO12 R-PHB2, para. 207.
947 PO12 R-PHB2, paras. 208-211.
948 PO12 R-PHB2, paras. 212-214.

747. Finally, if the Tribunal were to adopt an approach based on the Alternative Tariff, the Respondent agrees with the Claimants that their greenfield costs should not be considered as the cost base for the Alternative Tariffs under the EJM. While Spain's position is that the only legitimate expectation was for the Claimants to obtain a remuneration that would provide them a rate of return *on their reasonable and efficient greenfield costs* (as opposed to a tariff per MWh), if the scenario without Measures were to "be calculated on the expectation of receiving a remuneration based on alternative tariffs of € per MWh, the consistent approach would be to use the standard efficient costs in the market at the time of investment to calculate such tariff, which is represented by the IT Codes".[949]

(b) Discussion

748. The first question to be decided with regard to the cost base is whether the Alternative Tariff should be calculated using an efficiency benchmark such as the "marginal plant", i.e. essentially a standard plant (PO18, para. 12(f)(i), Alternative 1), or the actual greenfield costs of each of the Claimants' plants (PO18, para. 12(f)(ii), Alternative 2). On the basis of the record and the expert evidence, the Tribunal comes to the conclusion that the appropriate option is the marginal plant as opposed to the actual greenfield costs of an individual installation, for the following reasons.

749. First, there is no serious dispute between the Parties that the reasonable return calculated by Spain at the time when the Claimants' plants were built was based on a marginal plant.

750. In its Quantum Counter-Memorial, Spain confirmed that the regulatory regime in place at the time of the Claimants' investments was a marginal plant system:

> Spain has always claimed:
>
> a) That the tariffs offered under RD 661/2007 were calculated in order to give the installations an implicit RRoR;
>
> b) That such RRoR was based on implicit levelised-costs associated with an efficient marginal plant; […][950]

949 PO12 R-PHB2, para. 150.

950 Quantum Counter-Memorial, para. 125 (internal footnotes omitted).

751. Further, Spain's expert in the liability phase, MG&A, opined that the regulatory regime was based on a standard or marginal plant:

> As can be verified according to the basis of the CNE reports 4/2004 and 3/2007, the CNE has pursued exactly the same steps to calculate the remuneration for photovoltaic energy in 2004 (for the development of RD 436/2004), in 2007 (for the development of RD 661/2007) and afterwards in 2008 (for the preparation of RD 1578/2008). This procedure involves analysing the investment and operating costs of a standard type photovoltaic infrastructure and determining the income required to generate an Internal Return Rate after taxes higher than the Target Rate of Return (TRR).[951]

752. MG&A also explained that the reasonable return under the 1997 Electricity Law was calculated using "a methodology based on installation types with standard technical and economic variables" and that one of the "two main principles" of the 1997 Electricity Law was that the reasonable return was defined with reference to "the standard economic and technical parameters for installation types for each technology".[952] This is also consistent with the contemporaneous documents describing the reasonable rate of return under the RE framework. For instance, the PER 2005-2010 defines the reasonable rate of return as follows:

> *Return on Project Type*: calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in legal tender and for each standard project, around 7%, on equity (before any financing) and after taxes.[953]

753. It is natural that the Spanish regulator would refer to a standard plant, rather than the actual costs, in setting the premiums under the 1997 Electricity Law, as it would be almost impossible for it to look at the actual costs of all installations *ex ante*. In fact, the use of a marginal plant system appears to be standard regulatory practice in other countries too.[954]

754. While the Tribunal's task in this case is to calculate the Claimants' alleged harm as opposed to setting tariffs or other premiums (which is the regulator's task), this difference in perspective does not warrant abandoning the marginal plant approach which is implied in Spain's energy incentives framework. Thus, the Tribunal concludes on this point that the regulatory framework at the time of the Claimants' investment was designed to offer a 7% return after tax on the marginal plant, being noted that the actual

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951 MG&A Report, para. 301 (bold in original omitted, underlining added).

952 MG&A Rebuttal Expert Report, paras. 118, 131.

953 PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p. 274 [p. 8 of the PDF] (emphasis added) (Respondent's English translation).

954 See BQR II, para. 208.

returns for a particular PV installation could vary based on the plant's own characteristics.

755. Finally, the Tribunal notes that the Parties agree that, if an Alternative Tariff is used to calculate profitability in the scenario without Measures (which was the Tribunal's determination, see *supra* at VI.B.4.c.i(b)), the only consistent approach is to consider the costs of a standard plant as the appropriate cost base. In particular, in its latest submission, the Respondent has taken the following view:

> [T]he Claimants submit that their greenfield costs should not be considered as the cost base for the alternative tariffs. <u>Spain agrees</u>. As explained previously, Spain's position is that the only legitimate expectation was for the Claimants to obtain a remuneration that would provide them a RRoR on their reasonable and efficient greenfield costs, not on a tariff based on € per MWh. However, <u>as the Tribunal has decided in PO18 that the but-for scenario should be calculated on the expectation of receiving a remuneration based on alternative tariffs of € per MWh, the consistent approach would be to use the standard efficient costs</u> in the market at the time of investment to calculate such tariff, which is represented by the IT Codes.[955]

756. For these reasons, the Tribunal decides that the appropriate cost base is the marginal plant. This being so, the next question is which of the three marginal plant options proposed by Brattle is the most appropriate one to quantify the Alternative Claim.

757. The first marginal plant option, which is sometimes referred to as the "Marginal Plant" option in capital letters by the Claimant and which the Tribunal refers to as the "pure" marginal plant option to distinguish it from the other two alternatives, essentially takes the 42 standard installations defined by Spain under the New Regime (that correspond to the Claimants' PV plants built in 2007 and 2008) and regroups them according to the three size categories that existed under the regime in place at the time of the Claimants' investments. With regard to this option, the Tribunal considers that the Respondent has convincingly established that Brattle's "pure" marginal plant is a 5kW PV installation, whereas the Claimants' installations have higher capacities. Because of the shortcomings of this option linked to the size of the plants, in PO18, the Tribunal directed the experts to only take into account the two remaining options, namely the size re-classified marginal and the IT Codes marginal plants, which incorporate sensitivities responding to Spain's criticism.[956]

955 PO12 R-PHB2, para. 150 (emphasis added, internal footnote omitted).

956 See PO18, para. 12(f)(i).

758. Between those two options, the Tribunal considers that the size re-categorization performed by Brattle in the size re-classified marginal plant option correctly remedies the deficiency of its "pure" marginal plant. By contrast, the "IT Codes" option is less appropriate, as it would wipe out all of the efficiency gains that investors obtained compared to the marginal plant under the regulatory regime in place at the time of the Claimants' investments. As the Tribunal already noted (see *supra* at para. 619), the guarantee to obtain a reasonable return did not imply that it acted as a "cap".

759. For these reasons, the Tribunal reaches the conclusion that the cost base should use the marginal plant approach, with the size re-classified marginal plant sensitivity (PO18, para. 12(f)(i)(a)). In this respect, the Tribunal notes that the Parties' experts agree on the input for this cost base.[957] Hence, the Tribunal will select the option "Standard installation – size reclassified" in parameter 2 of the EJM.

vii. *Tax Shield*

(a) The Claimants' Position

760. In the EJM, the experts concur that "[g]iven that the Alternative Tariff is calculated on a pre-tax basis, it must include a gross-up to account for corporate taxes".[958] It is for this reason, the Claimants submit, that Brattle used a 17% tax rate to gross-up the 7% or 8% post-tax return into a pre-tax IRR in order to calculate the revenue line in its But-For scenario.[959]

761. However, the Claimants submit that the experts disagree on three matters pertaining to the calculation of the effective tax rate:

i. They divergence on whether the calculation of the effective tax rate should take into account the "interest tax shield". The Claimants explain that the tax shield is the reduction in payable taxes as a result of the interest payments to be made on loan financing, which, under the Spanish tax code, can reduce the overall amount of taxes paid by a company.[960] It is the Claimants'

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957 See Joint Memorandum, para. 13, noting that "Brattle and Econ One agree concerning the relevant standard costs in each of the two marginal cost scenarios. The cost base includes both the initial investment cost and, when evaluating past profits, also considers the historical profitability over the period 2006-2013".

958 PO12 C-PHB2, para. 88, discussing Joint Memorandum, para. 37.

959 PO12 C-PHB1, para. 93.

960 PO12 C-PHB2, paras. 89(i), 90-108.

contention that the Tribunal should not take the tax shield into account (Alternative 2 in PO18, para. 12(g));

ii. They are also in disagreement on the calculation of the interest tax shield in the event that the Tribunal decides to include the tax shield (contrary to the Claimants' position);

iii. They further put forward different methodologies for calculating the effective tax rate.

(i) Interest tax shield

762. It is the Claimants' submission that the Tribunal should not take into account the interest tax shield in the effective tax rate calculation, as Spain did not consider the benefits of the tax shield when setting the tariffs under the Original Regime. The Claimants underline that the revenues provided to the PV plants under the Original Regime was on a pre-tax basis. However, the reasonable return was calculated on a post-tax basis. Consequently, according to the Claimants, it would have been impossible for Spain to guarantee a 7% post-tax return without considering a specific tax rate for calculating the FIT.

763. Actually, there is ample evidence, so the Claimants argue, in support of their position that Spain did not consider any tax shield. First, the Claimants point out that Spain's (and Econ One's) current position on the inclusion of the interest tax shield is directly contradicted by the position adopted by Spain's previous expert, MG&A. That expert repeatedly confirmed that the reasonable rate of return offered under RD 661/2007 did not take the effects of debt into account.[961] Thus, until PO12, it was undisputed that Spain did not consider the tax shield when setting the RD 661/2007 FIT.

764. Second, the Claimants refer to the PER 2000-2010 and the PER 2005-2010, both of which specify that the reasonable rate of return for a standard project is calculated on the basis of preserving a certain internal rate of return, *before any financing*.[962] For the

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961 PO12 C-PHB1, paras. 109-111.

962 PO12 C-PHB1, para. 105(a)-(b) (emphasis added), referring to PER 2000-2010, 30 December 1999, **Exh. R-60** (full version), p.182 and PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p.274 [p. 8 of PDF] (Respondent's English translation). See also, Quantum Reply, paras. 147-152.

Claimants and Brattle, the phrase "before any financing" corroborates that Spain did not consider the interest tax shield while determining the reasonable rate of return.[963]

765. Finally, the Claimants contend that their position is confirmed by the *Greentech* Documents.[964] According to the Claimants, the *Greentech* Documents contain the calculations that underlie the *Casos Tipos* in the PER 2005-2010, on the basis of which Spain determined the RD 661/2007 FITs. These calculations show that interest payments on loans were not considered.[965] The Claimants discuss the DCF analysis contained in the *Greentech* Documents and argue that, if the PER DCF model considered the tax deductibility of interest on loans (whether third-party or shareholder loans), the model would deduct interest payments from the "Gross Margin" when calculating the "Taxable Income".[966] The absence of any such deductions for interest supports the fact that Spain did not consider the benefits of financing when calculating the target rates of return of 7% after tax set out in the PER 2005-2010.[967]

766. The Claimants seek to refute Spain's attempts to discredit the *Greentech* Documents, on the ground that, by reference to their metadata, these documents were created in 2017 (as initially argued by Spain) or in 2009 (as subsequently argued by Spain) and could thus not have been served to set the RD 661/2007 FITs. The Claimants submit first that Spain produced these documents in the *Greentech* arbitration in response to a request to produce documents relevant to determine the RD 661/2007 FITs. Thus, Spain itself represented that these documents predated RD 661/2007. Second, the content of these documents itself evidences that they were produced in 2005 during the preparation of the PER 2005-2010, and not in 2017 or 2009. Third, the DCF calculations in these documents is consistent with the calculations for *Casos Tipos* in the PER 2005-2010.[968] Fourth, the *Greentech* Documents confirm that the tax shield was *not* taken into account in calculating the target rate of return.[969]

767. In the circumstances, the Claimants submit that "all of the evidence on the record, including AME's [MG&A's] testimony, shows that Spain has consistently defined target

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963 PO12 C-PHB1, paras. 106-108; PO12 Hearing Tr. [English version] (Lapuerta), 19 January 2018, at 61:19-62:9.

964 PO12 C-PHB2, paras. 95-108.

965 PO12 C-PHB2, paras. 102-104.

966 PO12 C-PHB2, para. 107.

967 PO12 C-PHB2, para. 107.

968 See in particular Claimants' letter, 10 May 2019.

969 See Claimants' letter, 10 May 2019, p. 3.

rates of return for renewable projects on a *before financing* basis, that is, without taking into account the tax shield".[970]

(ii) If at all, tax shield to be computed according to Brattle's approach

768. In the alternative, should the Tribunal determine that the interest tax shield must be considered, the Parties' experts disagree as to how the shield should be built into the effective tax rate. According to the Claimants, this requires certain assumptions about the type of financing at issue. In particular, assumptions need to be made about (i) the proportion of external loan financing in the capital structure; (ii) the term of the loans; and (iii) the interest rate.[971]

769. The Claimants note that the PER 2005-2010 (based on which the RD 661/2007 FITs were determined), only provides guidance as to the first of these three assumptions, stipulating that RE installations would be financed with 77% debt. Consequently, so say the Claimants, Brattle has adopted this figure for its calculation.[972]

770. Given the absence of guidance for the two other parameters, the Claimants explain that Brattle uses the best evidence available to it: the actual third party loans entered into by the project companies. On this basis, Brattle assumes a loan-term of 15 years and an average interest rate of 5%, both being broadly reflective of the terms of the actual loan agreements. For Brattle, these parameters are reasonable, given the initial expectation of a 25-year regulatory life under RD 661/2007 and given that the average loan interest rate would need to be below the overall project rate of return (i.e. below 7%).[973]

771. The Claimants note that Econ One disagrees with the parameters chosen by Brattle. Instead, it assumes 85% financing, a loan term of 20 years and an interest rate of 7% on the basis of a distinction between third-party and shareholder loans. According to the Claimants, this distinction is arbitrary. It is "nothing more than an *ex post* invention of Econ One"[974] and was "never mentioned in the PER 2005-2010, the *Memoria*

970 PO12 C-PHB1, para 112 (emphasis in original).

971 PO12 C-PHB2, para. 120.

972 PO12 C-PHB2, para. 121, discussing the Joint Memorandum, para. 69.

973 PO12 C-PHB2, para. 121.

974 PO12 C-PHB2, para. 122, referring to Joint Memorandum, para. 74.

Económica or any of the contemporaneous regulatory evidence referred to by Econ One", nor was it addressed by MG&A.

772. In addition, the Claimants find the assumptions adopted by Econ One inappropriate for other reasons as well. This is because the "debt profile assumed by Econ One would leave a representative standard installation under the New Regime unable to meet its debt obligations" and in breach of the financial covenants found in typical loan documentation.[975]

773. In sum, the Claimants submit that the Tribunal should not consider the interest tax shield while determining the effective tax rate. Alternatively, if the Tribunal were to take into account the interest tax shield, the Claimants submit that it should adopt the debt profile proposed by Brattle, which results in an effective tax rate of 10.8%.[976]

(iii) Methodology for calculating the effective tax rate

774. According to the Claimants, Brattle and Econ One also diverge on the determination of the effective tax rate. This divergence, say the Claimants, boils down to two questions: "(i) what period of depreciation to take into account; and (ii) whether a single effective tax rate should be calculated for the lifetime of a plant or whether a different rate should be calculated for each year of that lifetime".[977]

775. As regards the first issue, Brattle chooses a depreciation period of 25 years, as this is the period actually used by Spain in the PER 2005-2010 and subsequently confirmed by the *Greentech* Documents. According to the Claimants, there is no reason to depart from this approach.[978]

776. In connection with the second issue, the Claimants submit that a single effective tax rate should be calculated for the lifetime of a plant contrary to Econ One's approach of applying a series of annual tax rates. The Claimants argue first that Econ One's current position, which was only put forward in the EJM, departs from its earlier one under PO12 "where [Econ One] noted the time profile of tax payments but nevertheless used a single effective tax rate".[979] For the Claimants, this is "another opportunistic attempt

975 PO12 C-PHB2, paras. 123-125.
976 Joint Memorandum, para. 38.
977 PO12 C-PHB2, para. 109.
978 PO12 C-PHB2, paras. 111-112.
979 PO12 C-PHB2, para. 113, citing EJM, para. 50 (Brattle).

to reduce damages at the 11th hour".[980] Second, the Claimants allege that Econ One's approach "results in systematic under-recovery because of inconsistencies between the cash flow profile used by Econ One to derive the annual effective tax rates in the first place and its final re-profiled series of Alternative Tariffs".[981] Econ One's approach allegedly never results in a 7% after-tax rate of return. Finally, the Claimants submit that Spain did not adopt Econ One's approach when determining the RD 661/2007 tariff.[982]

777. For these reasons, the Claimants submit that Econ One's approach must be rejected and a single effective tax rate should be calculated for the lifetime of the plant.

(b) The Respondent's Position

778. Spain's position on the effective tax rate and tax shield is as follows:

- The effective tax rate should reflect the real taxes paid by PV installations and therefore include the tax shield that those facilities enjoy under the Spanish tax regime;
- The tax shield should be calculated following the Econ One methodology; and
- The correct calculation of the effective tax rate is the one provided by Econ One.[983]

(i) Interest tax shield

779. Spain contends that the tax shield must be taken into account in calculating the effective tax rate.[984] It explains that PV facilities, like any Spanish company, are eligible to deduct interest payments and depreciation from their taxable income and to apply investment tax credits, thereby reducing corporate taxes. Furthermore, according to Spanish tax law, "projects are eligible to deduct the interest payments on shareholder loans" which substantially reduce taxes due.[985] Moreover, as PV facilities are capital intensive, and therefore enjoy a substantial depreciation tax shield, their tax rate should be lower than

980 PO12 C-PHB2, para. 114.
981 PO12 C-PHB2, para. 115, citing EJM, para. 53 (Brattle).
982 PO12 C-PHB2, paras. 113-116.
983 PO12 R-PHB2, paras. 151-184.
984 PO12 R-PHB2, paras. 153-164.
985 PO12 R-PHB2, para. 153.

average. As a consequence of these tax deductions, in the Respondent's view, Claimants' PV Plants paid few to no taxes.[986]

780. In response to the Claimants' argument that Spain did not take the interest tax shield into consideration when it set the RD 661/2007 FIT, Spain contends that:

- The PER 2005-2010 did not include a consideration of the effective tax rate applicable to PV plants, since that depends on the characteristics of each individual plant;[987]
- The reference in the PER 2005-2010 to an investment with 100% own resources refers to project returns and had nothing to do with the applicable effective tax rate;[988] and
- There is no evidence that the Claimants invested in reliance on the fact that the PER 2005-2010 calculated the remuneration to PV plants considering a 17% tax rate and no legitimate expectation can be formed on this basis.[989]

781. With respect to the *Greentech* Documents, Spain contends that they are irrelevant for the resolution of this dispute.[990] Initially it maintained that the metadata showed that the documents were created in 2017, which would have meant that they were not used to calculate the tariff of RD 661/2007 as they post-date RD 661/2007 by 10 years.[991] Subsequently, when disclosing the excel spreadsheets underlying the *Greentech* Documents, the Respondent contended that the documents were created in 2009, thus in any event post-dating RD 661/2007.[992] In addition, Spain argues that the Claimants cannot pretend that they had legitimate expectations at the time of investing in Spain based on the *Greentech* Documents, as they admit not having seen such documents prior to the disclosure in this arbitration in 2018.[993]

986 PO12 R-PHB2, para. 153.
987 PO12 R-PHB2, para. 155(a).
988 PO12 R-PHB2, para. 155(b)
989 PO12 R-PHB2, para. 155(c).
990 See PO12 R-PHB2, paras. 157-159; Respondent's letter, 3 May 2019.
991 PO12 R-PHB2, para. 158.
992 See Respondent's letter, 3 May 2019.
993 PO12 R-PHB2, paras. 157-159; Respondent's letter, 3 May 2019.

782. In contrast, the Respondent submits that the Claimants should have been aware of CNE Report 3/2007, which mentions 0% taxation in its calculations.[994]

(ii) Tax shield to be calculated according to Econ One's methodology

783. The Respondent contends that for the calculation of both the effective tax rate and the tax shield, the Tribunal should follow Econ One's approach. This means that:

- The calculation of the tax shield should consider an 85% level of debt (as opposed to Brattle's 77% figure). For the Respondent, debt financing of 85% is a conservative assumption, given that "some of the Claimants' plants had shareholder loans for over 100% over its greenfield investment cost".[995]
- The calculation of the tax shield should consider a 20-year debt with a 7% interest rate, which again is proven by the Claimants' own loan documentation (covering external loans as well as shareholder loans).[996]

(iii) Effective tax rate to be calculated according to Econ One's methodology

784. The Respondent argues that the Tribunal should adopt Econ One's calculation of the effective tax rate. Specifically, it should use the following specifications:

- The appropriate depreciation period for the calculation of the effective tax rate must be 20 years (and not 25 years, as argued by the Claimants). For the Respondent, the Claimants' own documents support a 20-year depreciation period, while the reference to a 25-year period in the PER 2005-2010 (on which the Claimants' rely) relates to the technical useful life, and not to depreciation for tax purposes;[997]
- The effective tax rate should consider the time profile of tax payments, which means applying the effective tax rate on an annual basis in such a way that there is no offset for taxes in the early years (when no taxes are

994 PO12 R-PHB2, paras. 160-161, discussing CNE Report 3/2007, **Exh. C-311**; Reply, paras. 69, 195, 493, 538.

995 PO12 R-PHB2, para. 180.

996 PO12 R-PHB2, paras. 183-184.

997 PO12 R-PHB2, paras. 168-171.

expected) and a 25% offset in the later years.[998] For the Respondent, to assume that the projects pay the same 10.8% effective tax rate every year, as Brattle does, is incorrect.[999]

(c) Discussion

785. The reasonable profitability guaranteed by the 1997 Electricity Law aims at a post-tax returns, whereas the Alternative Tariff is computed on a pre-tax basis. It is therefore necessary to gross up the Alternative Tariff to reach a post-tax return.

786. In light of the experts' evidence and the Parties' submissions, the main issue arising in connection with the tax gross up appears to be whether the latter should account for the interest tax shield available to investments with debt financing. Accordingly, the Tribunal asked the experts to compute the loss in the without Measures scenario as follows :

> g. The EJM shall compute the harm in the scenario without Measures assuming that the regulator
>
> i. Alternative 1: Took account of the tax shield;
>
> ii. Alternative 2: Did not take account of the tax shield[.][1000]

787. In addressing the interest tax shield, the experts disagreed on essentially two matters, i.e. (i) the methodology to estimate the effective tax rate, an estimate that they both deem necessary,[1001] and (ii) the inclusion of the tax shield in that estimate and, if so, the relevant modalities.

788. As a result of these divergences, the experts have built four options of effective tax rates into the EJM, i.e. 16.9% (not taking into account interest tax shield under Brattle's methodology), 15.5% (same under Econ One's methodology), 10.8% (taking into account interest tax shield under Brattle's methodology), and 4.7% (same under Econ One's methodology).

789. The Tribunal notes that the record is not entirely conclusive on whether the regulator did or did not take into account the tax shield when setting the premiums. On the one hand, certain documentary evidence appears to suggest that when designing the RD

998 PO12 R-PHB2, para. 173.

999 PO12 R-PHB2, para. 174.

1000 PO18, para. 12(g).

1001 Joint Memorandum, paras. 37-38.

661/2007 premium, the regulator envisaged a 7% post-tax return without taking into account financing and, hence, without taking into account a possible tax advantage (so the PER-2000-2010 and the PER 2005-2010).[1002] On the other hand, the CNE Report 3/2007 mentions "0% taxation" in its calculations.[1003]

790. Be that as it may, some of the documents mentioned above, such as the two PERs form the basis for the calculations of the RD 661/2007 tariff. As such, they cannot be determinative for present purposes. Indeed, in its analysis of the Primary Claim, the Tribunal has held that the Claimants could have no legitimate expectation of an immutable RD 661/2007 tariff and the underlying methodology, but only to a reasonable return of 7% post-tax. It is true that, when implementing the 7% guarantee, the Tribunal was guided on some issues by the choices which the regulator made for RD 661/2007. The Tribunal took such guidance because these choices appeared economically well-founded in light of the issue under review or because they were in line with standard practices. This does not imply that the Tribunal must systematically follow the methodology of RD 661/2007.

791. In this particular instance, the evidence on record indicates that the Claimants expected to pay little or no taxes on their revenues, mainly because they expected to be able to deduct interest on loans. In other words, they expected to benefit from the tax shield. For instance, in its investment proposal, NIBC forecasted that its Aldesa plant would not pay any tax on its profits until 2029.[1004] Similarly, in a document from 2009 relating to Ampere's acquisition of a participation in the Aznalcollar plant, the plant was forecast not to pay any tax until 2027.[1005] Comparable projections may be found for other investors, including AES, MEIF (for the Cadiz Plant) and Whiteowl Capital.[1006] For the

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1002 See in particular PER 2000-2010, 30 December 1999, **Exh. R-60** (full version), p. 182 (specifying that the reasonable rate of return of a standard project was "calculated on the basis of preserving a minimum 7% IRR, with equity (before financing) and after taxes") and PER 2005-2010, Spanish Government, Ministry of Industry, Trade and Institute for Energy Diversification and Saving (IDAE), August 2005, **Exh. R-26**, p. 274 [p. 8 of PDF] (Respondent's English translation) (referring to a rate of return on a standard project as "calculated on the basis of maintaining an Internal Rate of Return (IRR)… (before any financing) and after taxes").

1003 CNE Report 3/2007, **Exh. C-311**, Annex III, p. 47 [p. 112 of the PDF] (Spanish version).

1004 See Final Investment Proposal to Investment Committee for project Aldesa dated 25 September 2009, **Exh. C-127**, p. 34 (English version).

1005 See Ampere Equity Fund, Draft Investment Proposal for the Aznalcollar PV Project, March 2009, **Exh. C-404**, p. 10 (English version).

1006 See BQR−AES−8.5, 2015 Financial Model, tab "Aggregated Fin Statements," Row "39"; BQR-MEIF-5.1, tab "IRR," Row 68; BQR-WOC-5.1, tab "Summary_new," Row 26.

Tribunal, there can be no better evidence of the Claimants' expectations than their own projections.

792. Another consideration also plays in favour of taking account of the tax shield. As a matter of law, compensating the Claimants for taxes they have not paid would be contrary to the principle that reparation cannot exceed the harm effectively suffered. In other words, one cannot do better in litigation than in real life.

793. Finally, the Tribunal has carefully reviewed the so-called *Greentech* Documents and the Parties' multiple submissions thereon.[1007] The Tribunal considers that these documents are unhelpful to resolve the present issue, as – on the Claimants' submission – they allegedly informed the calculations contained in the PER 2005-2010 and "pertain[] to Spain's administrative analysis regarding how Spain determined remuneration under RD 661/2007".[1008] As was explained above, since the Claimants have no entitlement to the FIT under RD 661/2007 and its methodology, the latter lack relevance in a context such as the present one, where other elements of the record lead to a different outcome.

794. In addition to their difference about the tax shield, the experts are also divided on the method to establish the effective tax rate, specifically on (i) what period of depreciation to take into account; (ii) the effect of financing; and (iii) whether a single effective tax rate should be calculated for the lifetime of a plant or whether a different rate should be calculated for each year of that lifetime.

795. Having reviewed the experts' evidence, the Tribunal comes to the conclusion that it must calculate the effective tax rate in line with the principles that guided its foregoing analysis on the tax shield. This being so, it notes that on most of the issues, Brattle relies on the PER 2005-2010, while Econ One uses actual data from the Claimants' documents. In particular, Brattle considers that it is appropriate to use a 25-year depreciation period because it is "the one actually used by Spain in the PER 2005-

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1007 The Tribunal considers that the Claimants' request that the Tribunal draw adverse inferences from the Respondent's failure to produce the *Greentech* Documents has become moot as the Respondent eventually produced the *Greentech* Documents. In any event, the Tribunal considers that, having regard to the extensive documentary evidence produced by both Parties, any failures that may have occurred in the document production process (which have not been established) in no way alter its conclusions of law and fact.

1008 See Claimants' letter, 10 May 2019; Claimants' Application for Order in Relation to Document Production, 15 October 2018, para. 13.

2010".[1009] It further relies on the PER 2005-2010 in respect of the possible effect of financing and its conclusion that "the PER […] indicated an assumption that renewable installations would be financed with around 77% debt".[1010] Moreover, it considers that "[a] 15-year loan term […] makes sense given initial expectations of a 25-year regulatory life under RD 661".[1011]

796. As was discussed above, the Tribunal is not bound by the RD 661/2007 methodology when calculating the 7% reasonable return in the scenario without Measures and should not grant the Claimants more than their actual harm (see *supra* at …). In that light, Econ One's assumptions and calculations appear more appropriate. In this respect, the Tribunal accepts that the 20-year depreciable life used by Econ One is the typical tax advantage utilized by photovoltaic facilities.[1012] It also finds Econ One's assumption of a 7% interest rate on shareholder loans more reflective of actual conditions than Brattle's 5% rate, as in fact certain plants had interest rates higher than 10%.[1013] Furthermore, it finds Econ One's 85% financing assumption reasonable, because, as a matter of fact, the actual PV plants of the Claimants benefitted from a principal balance above 90%.[1014]

1009 Joint Memorandum, para. 40. See also *ibid*. para. 71 ("We addressed the depreciation assumption above, explaining our reliance on the PER 2005-2010").

1010 Joint Memorandum, para. 69.

1011 Joint Memorandum, para. 70.

1012 See, e.g., EO−EOX−5, Cantillana PV − Financial Statement (Consolidated) − Anemoi Cantillana, S.L., Consolidated Financial Statements for the year ended December 31, 2011, p. 13; EO−IMP−29, LSY ElCalaverón PV − Financial Statement (Individual) − Langsyne Spain, S.L., Annual Accounts for the year ended in December 31, 2009 (BQR-IMP-1.1), p. 10. See also Joint Memorandum, paras. 59, 80.

1013 See, e.g., BQR−MEIF−8.4, Subordinated Loan Agreement between MEIF Luxembourg Renewables S.a.r.l. and Avrondale, S.L., amended and restated on 15 August 2008. Avrondale, S.L. is part of the tax consolidation group of Asset Energia Solar, S.A.U. BQR−MEIF−12, Marcus PV − Financial Statement (Individual) − Asset Energía Solar, S.A.U, Annual Accounts for the year ended in March 31, 2009, p. 10; BQR−HGC−6.4.1, Loan Agreement between Tyche Solar S.à r.l. and Sirrush AB, January 8, 2010, clause 3.1 on p. 1; BQR−HGC−6.3.1, Loan Agreement between Wind Acquisition, S.à r.l. and 360I Infrastructure V AB, May 2009, clause 3.1 on p. 2 of PDF.

1014 See, e.g., BQR−MEIF−8.3, Profit Participating Loan between MEIF Luxembourg Renewables S.a.r.l. and Avrondale, S.L., amended and restated on 15 August 2008 (for the EUR 8,001,000 amount); BQR−MEIF−8.4, Subordinated Loan Agreement between MEIF Luxembourg Renewables S.a.r.l. and Avrondale, S.L., amended and restated on 15 August 2008 (for the EUR 32,750,866.95 amount); EJM, Table S, tab "O1_MEIF"; EO−MEIF−6, Cadiz PV − Financial Statement (Individual) − Solpex Energía, S.L.U., Annual Accounts for the year ended in December 31, 2008; BQR−WER−6.1, Dexia Sabadell 2007 Base Case Financial Model - Laxtron, tab "INPUTS-OUTPUTS," cells O11:R16.

797. Finally, on the question of the application of a single effective tax rate for the lifetime of a plant or of different rates for each year of that lifetime, the Tribunal is persuaded that it is more appropriate to apply the effective tax rate on an annual basis, such that there is no offset for taxes in the early years when no taxes are expected, and a 25% offset in the later years. This approach is consistent with the history of the PV plants, which paid no taxes in the period preceding the Disputed Measures.[1015]

798. For these reasons, the Tribunal reaches the conclusion that the harm in the scenario without Measures must be computed assuming that the regulator took account of the tax shield and implementing Econ One's estimate of the effective tax rate. Hence, the Tribunal will select the option "Include Interest Tax Shield (Econ One)" in parameter 1 of the EJM.

viii. *Revisions of Rate of Return*

(a) The Parties' Position

799. The Claimants submit that the Tribunal should assume that, in the scenario with Measures, revisions of returns occur under the New Regime every six years as it is undisputed that under the New Regime "Spain is set to revise the pre-tax reasonable return at the beginning of 2020 and then every six years thereafter".[1016]

800. The Claimants explain that selecting their preferred alternative for the EJM actually lowers the Claimants' damages, because, based on data available as of June 2014, which is the valuation date, the experts "forecast the pre-tax return to evolve to: 7.2% for 2020-2025, 8.4% for 2026-2031, 8.5% for 2032-2037, and 8.1% for 2038 onwards".[1017]

801. Separately, the Claimants also note that according to the New Regime regulations currently in force and the data now available (which would have been considered with an *ex post* valuation date), the returns will be further reduced, because the return for the period of 2020-2025 will be lower than the amounts predicted in 2014. For the Claimants, "[t]his reflects the unpredictable nature of the New Regime and, therefore, the high regulatory risk under the New Regime".[1018]

1015 See Joint Memorandum, para. 86, and EOQR II, paras. 261, 266.

1016 PO12 C-PHB2, para. 164, discussing Joint Memorandum, para. 87.

1017 PO12 C-PHB2, para. 165, discussing Joint Memorandum, para. 88.

1018 PO12 C-PHB2, paras. 166-168.

802. Spain agrees with the Claimants that the DCF should consider the scheduled revisions of the rate of return and submits that it has always been its position that reasonable profitability is a flexible concept that should be reviewed periodically to reflect the changes in the cost of money in the capital markets.[1019]

(b) Discussion

803. In light of the Parties' agreement and of the fact that this appears the correct solution, the Tribunal will assume that revisions of returns will occur under the New Regime every six years in the scenario with Measures. Indeed, as was also set out by the experts in the Joint Memorandum, with the Disputed Measures in place, the applicable reasonable pre-tax rate of return as of the valuation date is 7.398% and Spain is set to revise such tax at the beginning of 2020 and then every six years thereafter. The revisions will be based on the evolution of the Spanish 10-year government bond yield.[1020] The Tribunal further notes that the experts agree on the forecast evolution of the rates of return.[1021]

804. Accordingly, the Tribunal selects the input "Assume Revision of Returns Occur" in parameter 4 of the EJM.

ix. *Past profits*

(a) The Parties' Position

805. The Claimants submit that the revenues that they have received before June 2014 when the New Regime was implemented must not be considered in constructing the Alternative Tariff (Alternative 2, para. 12(i)(ii), PO18). For the Claimants, this option is the correct choice, as otherwise the Tribunal would endorse "one of the most severe aspects of the New Regime", i.e. the retroactive clawback of past profits.[1022]

806. In the event the Tribunal decides not to take account of past profits, the Claimants submit that the Tribunal should adopt Brattle's implementation of that option. According to the Claimants, Econ One's implementation is inappropriate. The Claimants essentially contend that the straight line depreciation assumed by Econ One is not proper because the RD 661/2007 tariffs increased annually in a non-linear manner in

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1019 PO12 R-PHB2, paras. 201-202.

1020 Joint Memorandum, para. 87.

1021 See Joint Memorandum, para. 88.

1022 PO12 C-PHB2, paras. 170-173.

accordance with inflation. As a result, the capital recovery tended to be lower in the early years of the project and higher in later years as a result of the inflation indexation. Consequently, the recovery was less than that implied by straight line depreciation.[1023]

807. By contrast, Spain submits that the only way to calculate profitability is by considering the full regulatory life of a project. It thus contends that the Tribunal should consider "past profits", i.e. the revenue obtained in the period from the day that the PV plant commenced operation and June 2014, when the Order on Parameters was issued.[1024]

808. Spain explains that from an economic perspective, the only manner to measure a rate of return is to consider the entire life of a project, which entails that all past profitability must be accounted for in the calculations.[1025] This has also been confirmed by the EC Decision on State Aid.[1026]

809. Contrary to what the Claimants allege, Spain takes the view that the Disputed Measures are not retroactive and only have prospective effect. Thus, Spain argues that the so-called "retroactive claw-back of past profit" referred to by the Claimants is nothing more than the regulator considering historical data in setting the future framework.[1027]

810. However, should the Tribunal decide that the correct solution is to ignore past profits, then Spain contends that it should follow Econ One's calculations rather than Brattle's.[1028] In Spain's view, Econ One is right in only ignoring *excess profitability* (i.e. higher than 7% post-tax) and in assuming that in the first 6-8 years the Claimants' PV plants recovered a portion of their initial investment cost based on normal profitability necessary to recover the investment over the 30-year useful life.[1029]

(b) Discussion

811. The Parties disagree as to whether the computation of the loss, if any, in the scenario without Measures must take or not take account of past profits earned by the Claimants'

1023 PO12 C-PHB2, para. 175.

1024 PO12 R-PHB2, paras. 186-187.

1025 PO12 R-PHB2, para. 189.

1026 PO12 R-PHB2, para. 189, discusssing EC Decision on State Aid, **Exh. RLA-201**, para. 156.

1027 PO12 R-PHB2, paras. 193-194.

1028 PO12 R-PHB2, paras. 197-200.

1029 PO12 R-PHB2, para. 200.

plants before the Disputed Measures. Accordingly, in PO18 the Tribunal provided two alternative permutations as follows:

> The EJM shall compute the Alternative Tariff applied in the scenario without Measures
>
> i. Alternative 1: Taking into account past profits;
>
> ii. Alternative 2: Not taking into account past profits.[1030]

812. The New Regime essentially envisages that the 7.398% profitability is calculated for the lifetime of the plants taking into account past earnings made in excess of that target. The Tribunal is of the view that the inclusion of past profits in the computation would be tantamount to repealing or clawing back earnings which were legitimately made under the previous regime. Thus, it considers that, for the purposes of quantifying the Alternative Claim, it would not be admissible to deduct past profits when calculating an investor's remuneration going forward.

813. This conclusion is consistent with the Tribunal's prior finding on the Primary Claim that as long as RD 661/2007 was in force (and the economic conditions allowed it), efficient installations could outperform the reasonable return target and were entitled to keep the profits which the system allowed them to make.[1031] The contrary solution would imply that the State can change legislation with retroactive effect, which would be contrary to the principle of non-retroactivity. In this respect, the Tribunal cannot follow Spain when it argues that the Disputed Measures are not retroactive, as "they do not seek to recover any subsidies received before the date the legislation comes into effect. Rather, they simply seek to change the regime in a forward looking way".[1032] Although it is true that payments already received need not be returned under the New Regime, in practice this particular aspect of the New Regime entails that payments under RD 661/2007 are deducted from future remuneration and treated as offsets to the total amount that investors will be allowed to earn going forward. The Tribunal thus has no hesitation to find that it is correct not to take past profits into account when calculating an investor's remuneration going forward.[1033]

1030 PO18, para. 12(i).

1031 See *supra* para. 619.

1032 Rejoinder, para. 1044.

1033 The Tribunal finds confirmation in the decisions in *RREEF*, according to which the claw back would deprive investors of acquired rights in violation of the non-retroactivity principle (see *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30,

814. The experts concur on the calculation of the Alternative Tariff taking into account past profits (which option, however, the Tribunal has now discarded), but disagree on the calculation of the Alternative Tariff ignoring past profits.

815. On this latter aspect, the Tribunal favors Econ One's method, as it correctly ignores only *excess* profitability (i.e., profitability above 7% post tax). By contrast, Brattle disregards *any* past revenue. In the Tribunal's view, the latter approach is incorrect, as under a regime guaranteeing a 7% return (which is what the Claimants should have legitimately expected and which is thus to be assumed in the scenario without Measures), the Claimants would have made such return and there is no good reason not to take that 7% return into account to establish the IRR over the lifetime of the plant. Only the profits above 7%, which represent the extra gains of efficient plants and operators, must not be considered to compute the IRR over the operational life of the plant. Doing otherwise would be equivalent to taking these efficiency gains away from the Claimants, a claw-back that the Tribunal has deemed inadmissible for the reasons explained above.

816. The Tribunal is further convinced that Econ One's approach is also more reasonable in a number of other respects. First, as Spain's expert does, it is sound to assume that in the first years of operation the plants recovered a portion of their initial investment amount. In other words, it is reasonable to assume that an installation from 2008 which started operating in 2009 should have recovered 5/30 of the initial investment amount by the entry into force of the New Regime and, consequently, the remaining investment to be recovered as of 2014 is 83.3% of the initial investment cost base. By contrast, the Tribunal sees no good reason to assume a new plant with over 100% of the initial investment cost base yet to be recovered as of 2014, as Brattle does. Furthermore, Econ One does not add inflation to the asset base, which Brattle does thereby unduly inflating the harm.[1034]

Decision on Responsibility and on The Principles of Quantum, 30 November 2018, para. 328) and *BayWa*, paras. 495-496 (where the tribunal agreed with the analysis in *RREEF* and noted that "[t]o claw back those profits on the basis of a subsequent judgment that they were 'excessive' was inconsistent with the principle of stability in Article 10.1 of the ECT and has not been shown to have been necessary to resolve the tariff deficit problem, which would have been solved in any event by the Disputed Measures without much further delay and without the element of claw-back of payments earlier lawfully made").

1034 See also the discussion at the Hearing: PO12 Hearing Tr. [English version] (Caldwell), 17 January 2018, at 159:24-160:3.

817. For these reasons, the Tribunal selects the input "Ignoring Past Profits (Econ One)" in parameter 3 of the EJM.

x. *Initial Investment Costs*

818. The issue of the greenfield costs which was already evoked in the context of the cost base, also plays a role to establish the Claimants' initial investment for purposes of the experts' IRR calculation. In this respect, the Joint Memorandum provides the following explanation, it being noted that these paragraphs are agreed between the experts:

> **X. Interpreting the IRRs**
>
> 113. As indicated above, the results file displays Claimant IRRs for each combination of inputs, assuming that the Measures are in place. Of the six possible inputs in PO18, paragraphs 12 (f)-12 (i), only three affect the IRR calculation:
>
> • Initial Investment Amount
>
> • Revision of RRR
>
> • Interest Tax Shield
>
> 114. **Initial Investment Amount**: There are four options for the initial investment amount for IRR calculations. The four input options are summarized by investor group in **Table 2**, which are then subdivided into Claimant entities. As indicated in that table, the costs will be the same for all four inputs for several of the Claimant entities. The Claimant entities with differences are explained in detail in Section V.B above.[1035]

819. The Tribunal considers that greenfield investment costs are the costs borne at the beginning of a project's lifecycle that are necessary to bring a plant into operation. This includes the engineering, procurement, and construction (EPC) costs associated with the photovoltaic modules and the civil works required to put them in place, the cost to connect the facility to the electricity grid, initial inventory required for normal operation, permitting and licensing fees. The Tribunal agrees with Spain that other costs that may be borne by investors are not strictly necessary for the operation of the plant. These include costs associated with debt financing, acquisition premiums paid to developers or for brownfield assets (investments that are either nearly or completely developed and operational).

820. Developer premiums fall in the second category. They are not strictly speaking greenfield costs in the sense that they are not required to bring a plant into operation. The Tribunal notes that Brattle does not dispute that brownfield costs should *not* be

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1035 Joint Memorandum, paras. 113-114 (emphasis in original).

included in the calculation of the Claimants' IRRs for the purposes of considering whether they obtain returns in accordance with the reasonable profitability principle under the 1997 Electricity Law.[1036]

821. However, Brattle argues that:

> Removing the entire acquisition price is inappropriate […]. At least part of such acquisition prices will have compensated the original developer for the costs that it incurred in designing a project and compiling the necessary permits. The available accounting data do not distinguish what part of the price relates to direct cost recovery, and what part represents a "premium" in the sense of a profit for the original developer. We continue to include the greenfield acquisition prices in our estimates of greenfield construction costs.[1037]

822. The Tribunal is unconvinced that, lacking clear evidence shedding light on the composition of the acquisition prices, it would be appropriate to include the developer premiums in the costs. Hence, it considers that on balance it should exclude developer premiums from the calculation of the IRR.

823. This being so, the experts disagree on the figures of greenfield costs in the option "Excluding developer premiums". As summarized in table 2 of the EJM, Brattle values the total costs excluding developer premiums at EUR 1,802.8 million, whereas Econ One's figure is EUR 1,772.2 million.[1038] There is thus a difference between the experts' numbers of EUR 30.6 million, which is due to the fact that Brattle characterizes the cost items included in this amount as costs other than developer premiums when Econ One regards them as developer premiums. The disagreement between the experts relates to seven Claimants, the disagreement being relatively minor for five of them.[1039]

824. The Tribunal has reviewed the experts' calculations and in particular sections IV.B.3 ("Excluding 'Developer Premiums' (Brattle)") and IV.B.4 ("Excluding 'Developer Premiums' (Econ One)") of the Joint Memorandum and the passages of the expert reports referred to therein. It reaches the conclusion that Econ One's calculations of

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1036 BQR II, para. 99 ("A final measurement issue is highlighted by Econ One's exclusion of any 'development premiums' from its estimates of greenfield costs. We agree with Econ One that the Original Regulatory Regime return target relates to greenfield investment, as opposed to brownfield investment, which involves purchases of plants already in operation or nearing the end of construction. We therefore ignore the brownfield acquisition premiums paid by many of the PV Investors from our own estimates of greenfield costs", internal footnotes omitted).

1037 BQR II, para. 180 (emphasis added, internal footnote omitted); see also Joint Memorandum, para. 26.

1038 Joint Memorandum, para. 18.

1039 See Joint Memorandum, para. 29.

the greenfield costs excluding developer premiums better comport with the notion of greenfield costs that the Tribunal has retained, i.e. those costs necessary to bring the plant into operation (see *supra* at 819). It is also better in line with the position taken above according to which, lacking clear evidence that an item forms part of greenfield costs as defined earlier, that item should not be included in such costs and thus deducted as developer premiums. For these reasons, the Tribunal selects the input "Exclude 'Developer Premiums' (Econ One)" in parameter 5 of the EJM.

xi. *Interest*

(a) The Parties' position

825. The Claimants note that the treatment of interest was not a parameter identified in PO18 as something that should be the subject of different parameters in the EJM. The Claimants explain that during the course of the preparation of the EJM, Econ One took the view that, although it agrees that interest should be calculated on lost historic cash flows, it disagreed that the EJM should allow the Tribunal to make that calculation. Thus, the Tribunal will need to determine whether it wishes to take advantage of the EJM for purposes of calculating interest on lost historic cash flows, which the Claimants believe it should.[1040]

826. With regard to pre-award interest, the Claimants submit that interest must be applied to both the lost "historical" cash flows (in the period from 2011 to June 2014) and the lost "future" cash flows (from June 2014).[1041] Brattle takes the view that the 10-year Spanish bond rate is the appropriate rate for pre-award interest.

827. With regard to post-award interest, the Claimants contend that the rate should be higher than the pre-award interest rate, in order to reflect the higher risks associated with a debt that is overdue and to encourage payment of the award by Spain in priority to other indebtedness.[1042]

828. With regard to the EJM, the Claimants explain that the model does not compute interest beyond the valuation date of June 2014. The disagreement between Brattle and Econ One as to the implementation of interest in the EJM is therefore limited to the computation of interest on the lost "historical" cash flows, in the period from 2011 to

1040 PO12 C-PHB2, para. 177.

1041 PO12 C-PHB2, para. 179.

1042 PO12 C-PHB2, paras. 181-182.

June 2014.[1043] The Claimants submit that the "Include Interest in Past Damages" option (supported by Brattle) in the EJM, applying interest at the 10-year Spanish bond rate to all harm suffered by the Claimants, should be preferred to Econ One's option of "Exclude Interest From Past Damages", which does not calculate interest on lost "historical" cash flows in the EJM.[1044]

829. The Respondent argues that PO18 did not instruct the experts to include interest calculations in the EJM, which is the reason why Econ One did not include interest in the EJM.[1045] For Spain, this approach is in accordance with "the purpose of PO12 and PO18 [which] is to assist the Tribunal in determining liability, not damages".[1046] That apart, Spain contends that calculation of interest up to June 2014 is unhelpful at this stage because the date of the Award is not known.[1047]

830. Subject to the preceding argument, Spain and Econ One submit that the appropriate pre-award interest rate is the six-month EURIBOR as it is a short-term risk-free rate without spread.[1048] Spain objects to the choice of interest rates proposed by Brattle and the Claimants. It submits that the 10-year Spanish bond rate put forward by Brattle is inappropriate as it is higher than the risk free rate and rather than "compensat[ing] the Claimants for the passage of time", it would effectively serve to "discipline or otherwise incentivize [S]tates towards one policy approach or another". Moreover, there is no rationale that justifies the 2% spread above LIBOR advanced by the Claimants as such a spread would only be applicable in order to protect a lender against the risk of default of the borrower.[1049]

831. Finally, Spain opposes the Claimants' claim for a higher rate of interest. For Spain, a higher post-award rate of interest has a punitive character, which is incompatible with the compensatory nature of damages under international law. Further, a higher rate also presumes, without any legitimate basis, that Spain will not discharge its obligation to promptly pay the damages awarded by the Tribunal. Instead, Spain submits that the

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1043 PO12 C-PHB2, para. 183.

1044 PO12 C-PHB2, paras. 184-185.

1045 PO12 R-PHB2, paras. 215-216.

1046 PO12 R-PHB2, para. 217.

1047 Respondent's Submission on Interest dated 17 May 2019, para. 6, discussing Joint Memorandum, paras. 108-109.

1048 Respondent's Submission on Interest dated 17 May 2019, para. 8.

1049 Respondent's Submission on Interest dated 17 May 2019, paras. 9-10.

Tribunal should apply a risk-free rate for post award like for pre-award interest, as this has been considered appropriate by other international tribunals.[1050]

(b) Discussion

832. The determination of interest has two aspects in this case. First, interest on so-called lost "historical" cash flows must be determined, i.e. cash flows from 2011 to June 2014 must be carried forward from the date they were earned until the valuation date. This question is related to one of the inputs in the EJM (parameter 6). Second, from the valuation date on, any amount due must bear interest until payment in full.

833. In this section, the Tribunal addresses the first question, i.e. the calculation of interest on lost historical cash flows. The second question is addressed in section VI.B.4.c.xiii below, which deals with interest on the amounts awarded.

834. As explained in the Joint Memorandum, "[b]oth experts agree that the historical cash flows must be rolled forward with interest to achieve full compensation".[1051] However, Brattle and Econ One are in disagreement on the "prejudgment" interest rate.[1052] Having reviewed the experts' positions, the Tribunal considers it is justified to apply the Spanish 10-year borrowing rates to bring the lost historical cash flows forward to the valuation date. It reaches this conclusion because, by not allowing Claimants to earn the guaranteed return for a number of years, Spain has exposed the Claimants to risks that are identical to those assumed by investors who have lent money to Spain, and the government bond rate reflects the remuneration paid to market participants for bearing those risks. Furthermore, Spain now bases the remuneration under the New Regime on Spanish 10-year bond yields.

835. Thus, the Tribunal will resort to Brattle's implementation of the interest input, i.e. to the option "Include Interest in Past Damages" in parameter 6 of the EJM, thereby letting interest accrue at the 10-year Spanish bond rate to update lost past cash flows to June 2014.

1050 Respondent's Submission on Interest dated 17 May 2019, paras. 14-20.

1051 Joint Memorandum, para. 105 (Brattle).

1052 *Ibid*.

xii. *Overall Results of Loss Computation*

(a) The Claimants' position

836. The Claimants make the following conclusive remarks on the IRRs that result from the implementation of the EJM in accordance with the parameters set out in PO18. They submit that following the Tribunal's directions in PO18 and its letter of 24 September 2018, the EJM contains the IRR calculation for the Claimants' PV plants (but not for the Claimant entities themselves) in the scenario with Measures.[1053]

837. They recall that the IRR calculation (both in the But For and Actual scenario) in the EJM is affected by three out of the six inputs in PO18: (a) the cost base; (b) whether the calculation considers future revisions of the reasonable rate of return; and (c) whether the interest tax shield is taken into account in the computation of the effective tax rate. Given the multiple disagreements between the Parties' experts regarding these parameters, there are "32 possible sets of Claimant IRRs with the Measures in place".[1054] The Claimants are of the view that given the multitude of potential IRRs for each Claimant, the IRR results set out in the EJM "will be of little value to the Tribunal unless they are interpreted in the context of the assumptions that underlie them".[1055]

838. In that regard, the Claimants underline that Spain has admitted that the New Regime offered a lower rate of return than the Original Regime. This implies that an IRR calculation for the New Regime's standard installations in the Actual scenario that results in returns above 7% after tax by definition cannot be using the same assumptions as those used by Spain when setting the RD 661/2007 tariffs.

839. With that in mind, the Claimants invite the Tribunal to compare the IRR results under Brattle's preferred methodology (not including the tax shield in the effective tax rate calculation), which are shown in Table 5 from the Joint Memorandum, with those under Econ One's preferred methodology (including the tax shield in the effective tax rate calculation), which are in Table 6 from the Joint Memorandum.[1056] The Claimants underscore that Brattle's results show that under the New Regime all of the standard installations receive returns of 6.1% to 6.2% post-tax, which is substantially less than the 7% post-tax return that the Tribunal determined and Spain argued was on offer

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1053 PO12 C-PHB2, para. 186.

1054 PO12 C-PHB2, para. 187, discussing Joint Memorandum, para. 118.

1055 PO12 C-PHB2, para. 187.

1056 PO12 C-PHB2, paras. 190, 194.

under the Original Regime.[1057] By comparison, using Econ One's approach, standard installations would achieve around 7% post-tax IRRs, which is the same as the target return alleged to be offered under RD 661/2007. According to the Claimants, this is inconsistent with the fact that the New Regime reduced returns.[1058]

840. Finally, the Claimants argue that Spain's focus on the IRRs is consistent with Econ One's position that those investors whose plants' returns exceed 7% are not entitled to damages. This approach is, in the Claimants' view, wrong, because it eliminates damages for those investors whose plants were more efficient than the standard (marginal) plant and rewards those investors whose plants suffered from inefficiencies.[1059]

1057 PO12 C-PHB2, para. 191.

1058 PO12 C-PHB2, para. 196.

1059 PO12 C-PHB2, para. 197, discussing the following passage from the PO12 Hearing Tr. [English version], 19 January 2018, at 84:3-18:

> THE PRESIDENT: So it's important that we get it. The standard cost -- typical cost of 50, the plant is actually built for 48 because this is a very efficient operator. Right? So he saves 2. He saves 2. The result of that is that he achieves 7.7 IRR because his initial investment costs are lower. Then the disputed measures reduce his IRR to 7.2. You simply -- you say he's above 7, he's fine. We don't deal with him anymore. You don't consider that he's entitled to damages for the difference between 7.7 and 7.2.
>
> DR FLORES: That is correct. We did not calculate damages for that.
>
> THE PRESIDENT: And the situation is different for Brattle, where Brattle considers that this drop from 7.7 to 7.2 entitles that claimant to damages. Is that right?
>
> MR LAPUERTA: Yes.

841. In conclusion, applying Brattle's preferred damages permutations under the EJM, the Claimants contend that the 14 Claimant groups are entitled to an aggregate amount of EUR 520 million, as shown in the following chart:[1060]

	Claimant Entity	Investor Group	Impact (€ Millions)
1.	AES Solar Energy Cooperatif U.A	AES	-59.2
2.	REI Renewable Energy International S.à r.l.	Arisol	-3.0
3.	Roland Schumann	Arisol	-1.3
4.	Ceconat Energy GmbH	Ceconat	-11.2
5.	Ampere Equity Fund B.V.	DIF/Ampere	-36.7
6.	Element Power Holdings B.V	Element Power	-24.8
7.	Eoxis Holding B.V.	EOXIS	-37.2
8.	Mercurio Solar S.a.r.l	HG Capital	-59.6
9.	Tyche Solar S.a.r.l	HG Capital	-33.2
10.	Impax Solar Investment S.a.r.l	Impax	-70.7
11.	Impax New Energy Investors S.C.A	Impax	-17.7
12.	ESPF Beteiligungs GmbH	KGAL	-12.6
13.	Infraclass Energie 4 GmbH & Co KG	KGAL	-21.4
14.	MEIF Luxembourg Renewables S.a.r.l	MEIF	-53.0
15.	MPC Solarpark GmbH & Co KG	MPC Capital	-16.8
16.	NIBC European Infrastructure Fund I C.V.	NIBC	-28.1
17.	Alesund, Christiansund S.à r.l. & Cie S.C.A	WEREC	-13.4
18.	Shulaya, Trier SG S.à r.l. & Cie S.C.A.	WEREC	-13.4
19.	WOC Photovoltaik Portfolio GmbH & Co KG	White Owl Capital	-7.5
20.	**Total Negative Impact**		**-520.6**
21.	**Total Impact**		**-520.6**

(b) The Respondent's position

842. Spain contends that, provided the correct parameters are applied, the results of the EJM prove that the Claimants continue to achieve a reasonable return on their investments.[1061] It submits that *on average* the Claimants' continue to receive a return of 7.15%.[1062]

1060 PO12 C-PHB2, para. 198.

1061 PO12 R-PHB2, paras. 218-232.

1062 PO12 R-PHB2, paras. 218-225, referring to the EJM.

	Claimant Entity	Investor Group	Impact (€ Millions)	IRR with the Measures in Place (Percent)	Effective Capacity (MW)	Impact (€ Millions / MW)
1.	AES Solar Energy Cooperatif U.A	AES	-2.0	6.9%	27.1	-0.1
2.	REI Renewable Energy International S.à r.l.	Arisol	-0.9	8.1%	0.8	-1.0
3.	Roland Schumann	Arisol	-0.4	8.1%	0.4	-1.0
4.	Ceconat Energy GmbH	Ceconat	-2.8	5.0%	2.9	-1.0
5.	Ampere Equity Fund B.V.	DIF/Ampere	-2.3	6.0%	16.3	-0.1
6.	Element Power Holdings B.V	Element Power	4.5	6.9%	12.8	0.4
7.	Eoxis Holding B.V.	EOXIS	1.4	6.5%	19.7	0.1
8.	Mercurio Solar S.a.r.l	HG Capital	6.3	8.0%	33.4	0.2
9.	Tyche Solar S.a.r.l	HG Capital	-1.2	8.9%	9.5	-0.1
10.	Impax Solar Investment S.a.r.l	Impax	-1.8	6.1%	25.1	-0.1
11.	Impax New Energy Investors S.C.A	Impax	-0.4	6.1%	6.3	-0.1
12.	ESPF Beteiligungs GmbH	KGAL	5.0	9.5%	9.9	0.5
13.	Infraclass Energie 4 GmbH & Co KG	KGAL	-0.7	5.0%	10.0	-0.1
14.	MEIF Luxembourg Renewables S.a.r.l	MEIF	-3.0	8.1%	17.0	-0.2
15.	MPC Solarpark GmbH & Co KG	MPC Capital	-0.1	8.2%	8.7	-0.0
16.	NIBC European Infrastructure Fund I C.V.	NIBC	-4.6	5.9%	9.4	-0.5
17.	Alesund, Christiansund S.à r.l. & Cie S.C.A	WEREC	-2.0	7.9%	4.3	-0.5
18.	Shulaya, Trier SG S.à r.l. & Cie S.C.A.	WEREC	-2.0	7.9%	4.3	-0.5
19.	WOC Photovoltaik Portfolio GmbH & Co KG	White Owl Capital	1.5	6.8%	4.5	0.3
20.	**Total Negative Impact**		**-24.1**	**n/a**	**n/a**	**-0.1**
21.	**Total Impact**		**-5.3**	**n/a**	**n/a**	**-0.0**

843. Where certain Claimant entities do not achieve at least 7%, Spain contends that this underperformance was not the result of the Disputed Measures, but rather attributable to "private decisions made by those Claimants".[1063]

844. The Respondent underscores that the Claimants attempt to downplay the importance of their IRRs as they are fatal to their case.[1064] It further contends that Brattle's IRRs are "simply *not* the Claimants' IRRs".[1065] This is because, as Spain has already explained, Brattle's IRRs (i) assume that the Claimants' plants paid and will pay a 17% tax rate, which is incorrect,[1066] and (ii) are based on "Brattle's calculation of the Claimants' greenfield costs which is not supported by the evidence on the record and incorrectly includes developers' premiums".[1067]

1063 PO12 R-PHB2, paras. 220-225, discussing the IRRs of Ceconat, DIF/Ampere, NIBC, Impax, and KGAL.

1064 PO12 R-PHB2, paras. 226-232.

1065 PO12 R-PHB2, para. 227 (emphasis in the original).

1066 PO12 R-PHB2, para. 228.

1067 PO12 R-PHB2, para. 229.

(c) Discussion

845. In sum, the Tribunal opts for the following parameters in the EJM to determine the IRRs in the scenario with Measures and the harm resulting from the difference between the two scenarios (with and without Measures):

Parameter 1 (Interest Tax Shield): "Include Interest Tax Shield (Econ One)"

Parameter 2 (Cost base): "Standard Installation – Size Reclassified" [Brattle]

Parameter 3 (Past Profits): Ignoring Past Profits [Brattle], however for the methodology/calculations: "Ignoring Past Profits (Econ One)"

Parameter 4 (Revision of RRR): "Assume Revision of Returns Occur" [agreed]

Parameter 5 (Initial Investment for IRR Calculation): "Exclude 'Developer Premiums' (Econ One)"

Parameter 6 (Interest): "Include Interest in Past Damages" [Brattle]

846. Selecting these parameters yields, in turn, the following results:

Results

	Claimant Entity	Investor Group	Impact (€ Millions)	IRR with the Measures in Place (Percent)	Effective Capacity (MW)	Impact (€ Millions / MW)
1.	AES Solar Energy Cooperatif U.A	AES	-15.4	6.9%	27.1	-0.6
2.	REI Renewable Energy International S.à r.l.	Arisol	-1.1	8.1%	0.8	-1.4
3.	Roland Schumann	Arisol	-0.5	8.1%	0.4	-1.3
4.	Ceconat Energy GmbH	Ceconat	-5.4	5.0%	2.9	-1.9
5.	Ampere Equity Fund B.V.	DIF/Ampere	-11.1	6.0%	16.3	-0.7
6.	Element Power Holdings B.V	Element Power	-2.2	6.9%	12.8	-0.2
7.	Eoxis Holding B.V.	EOXIS	-6.1	6.5%	19.7	-0.3
8.	Mercurio Solar S.a.r.l	HG Capital	-6.9	8.0%	33.4	-0.2
9.	Tyche Solar S.a.r.l	HG Capital	-14.1	8.9%	9.5	-1.5
10.	Impax Solar Investment S.a.r.l	Impax	-29.3	6.1%	25.1	-1.2
11.	Impax New Energy Investors S.C.A	Impax	-7.3	6.1%	6.3	-1.2
12.	ESPF Beteiligungs GmbH	KGAL	3.3	9.5%	9.9	0.3
13.	Infraclass Energie 4 GmbH & Co KG	KGAL	-4.0	5.0%	10.0	-0.4
14.	MEIF Luxembourg Renewables S.a.r.l	MEIF	-18.2	8.1%	17.0	-1.1
15.	MPC Solarpark GmbH & Co KG	MPC Capital	-3.8	8.2%	8.7	-0.4
16.	NIBC European Infrastructure Fund I C.V.	NIBC	-10.2	5.9%	9.4	-1.1
17.	Alesund, Christiansund S.à r.l. & Cie S.C.A	WEREC	-6.5	7.9%	4.3	-1.5
18.	Shulaya, Trier SG S.à r.l. & Cie S.C.A.	WEREC	-6.5	7.9%	4.3	-1.5
19.	WOC Photovoltaik Portfolio GmbH & Co KG	White Owl Capital	0.1	6.8%	4.5	0.0
20.	**Total Negative Impact**		**-148.7**	**n/a**	**n/a**	**-0.7**
21.	**Total Impact**		**-145.3**	**n/a**	**n/a**	**-0.7**

847. As can be seen from the chart, for 10 out of 19 Claimant entities within the list agreed between the experts (see *supra* at VI.B.4.c.v), the IRR with the Disputed Measures in place is below 7%. By contrast, for the remaining 9 Claimant entities the IRR with the Disputed Measures in place is in excess of 7%. For the reasons explained *supra* at

648, by reducing the reasonable rate of return below 7%, Spain acted unreasonably and disproportionately and hence violated FET. Therefore, the Claimant entities whose IRR with the Disputed Measures are lower than 7% are entitled to compensation and the harm calculated by the experts in the EJM represents the measure of compensation for each Claimant entity.

848. More specifically, the following Claimant entities are entitled to receive the following amount as a result of the Respondent's breach:

Claimant entity[1068]	**Amount of Damages (EUR millions)**
AES Solar Energy Coöperatief U.A	**15.4**
Ceconat Energy GmbH	**5.4**
Ampere Equity Fund B.V.	**11.1**
Element Power Holdings B.V.	**2.2**
Eoxis Holding S.A.	**6.1**
Impax Solar Investment S.à.r.l	**29.3**
Impax New Energy Investors S.C.A.	**7.3**
InfraClass Energie 4 GmbH & Co. KG	**4.0**
NIBC European Infrastructure Fund I C.V.	**10.2**
WOC Photovoltaik Portfolio GmbH & Co. KG	**0.1**

849. With respect to some of these investors (Ceconat, DIF/Ampere, NIBC and KGAL), the Respondent has argued that "this underperformance was not a result of the Disputed Measures, but rather directly attributable to private decisions made by those Claimants".[1069] The Tribunal is not convinced by the Respondent's arguments and considers them insufficiently substantiated. In particular, it notes that the Respondent relies on certain criticism voiced by Econ One in relation to the IRRs of these investors.[1070] It is true that in its reports and presentations, Econ One discusses the

1068 The names of the Claimant entities have been updated following the list circulated by the Claimants on 3 February 2020.

1069 PO12 R-PHB2, para. 220.

1070 See PO12 R-PHB2, paras 220-225, referring in particular to EOQR II, paras 110, 112-120, 132-136, 183-196, 207, 233; and EO Presentation, pp. 38-39, 42.

possibility that high costs depressed these IRRs, either through inefficiency or related party transactions. However, Econ One does not rely on direct evidence, let alone conclusive one, showing that costs were inflated. It merely suggests that inflation "could" or "may" have occurred based on the involvement of related parties in the construction or operation and maintenance of the plants.

850. In addition to the lack of proof, the Tribunal finds that costs are already correctly factored in the EJM, and it is unconvinced that they should gain relevance again here in the manner advocated by Spain and Econ One. Finally, the fact that the two Claimant entities belonging to the KGAL group "on average" are making an IRR higher than 7%[1071] is irrelevant for present purposes, as the Tribunal must consider the harm "by Claimant entity" and not on average across various Claimants entities. Accordingly, the entity belonging to the KGAL group (Infraclass Energie 4 GmbH & Co KG), whose IRR is below 7% (in this case, 5%), is entitled to compensation.

xiii. *Interest on Amounts Due*[1072]

851. Having concluded that the Claimant entities listed above are entitled to recover damages as a consequence of Spain's breach of the ECT, the Tribunal now deals with interest on the amounts due.

852. Article 26(8) of the ECT provides that "the awards of arbitration […] may include an award of interest […]". It is well-established that interest forms an integral part of any award of compensation, the aim of which is to achieve full reparation and to re-establish the situation which would have existed if the illegal acts had not been committed. As mentioned above, the full reparation principle is not disputed between the Parties. Tribunals have repeatedly held that, in order to achieve full reparation, it is necessary that an award of damages bear interest.[1073]

853. With regard to interest running from the valuation date to payment in full, the Tribunal considers that interest must accrue at the same rate and upon the same terms both before and after the award. This is the consequence of the fact that the Respondent's

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1071 PO12 R-PHB2, para. 225.

1072 The Parties' positions on the interest on amounts due are recapped *supra* at VI.B.4.c.xi.

1073 Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95, **Exh. CLA-18 / RLA-31**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **Exh. CLA-131**, paras. 174-175; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. CLA-202**, para. 308.

obligation to pay damages does not arise on the date of the award but rather at the time when the internationally wrongful act caused harm.[1074] Additionally, as noted in *Micula*, there is in any event no basis to distinguish between pre- and post-award interest as the purpose of both is to compensate for the deprivation of funds.[1075]

854. In the Tribunal's view, the interest should be compounded in line with generally accepted financial practice. If the Claimants had not been deprived of the funds to which they were entitled, they could have invested them and would have earned compound interest. Similarly, if as a result of the deprivation, they had to borrow money, they would also have paid compound interest. Case law confirms this choice.[1076]

855. In conclusion, interest on any amount awarded shall accrue at the Spanish 10-year bond rate, compounded semi-annually, from the valuation date until payment in full.

VII. TAX GROSS-UP

1. The Claimants' position

856. The Claimants make a tax gross-up claim in accordance with the full reparation principle under international law. They contend that any amount awarded would be subject to corporate taxes in their home jurisdictions (The Netherlands, Luxembourg, and Germany), whereas dividend distributions made in the ordinary course would not

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1074 See also *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **Exh. RLA-197**, paras. 436-438.

1075 "As a preliminary matter, the Tribunal does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award, and neither Party has convinced it otherwise. Both are awarded to compensate a party for the deprivation of the use of its funds. The Tribunal will thus award pre- and post-award interest at the same rate" (See *Ioan Micula, Viorel Micula and others v. The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. CLA-161**, para. 1269).

1076 *Ioan Micula, Viorel Micula and others v. The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. CLA-161**, paras. 1266-1267; *Compañía del Desarrollo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, **Exh. CLA-199**, paras. 105-106; *Renta 4 S.V.S.A, Ahorro Corporacionemergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v. The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, **Exh. CLA-209**, para. 226; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **Exh. CLA-210**, para. 96; *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **Exh. CLA-211**, paras 128-129; *El Paso International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh. CLA-213**, para. 746; *Joseph Charles Lemire v. The Republic of Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh. CLA-214**, paras. 359-361.

have been subject to taxation.[1077] They have presented memoranda from tax lawyers confirming the tax treatment of an award in each of those jurisdictions.[1078]

857. The Claimants further explain that the EJM does not include their tax gross-up claim given that the precise amount of the tax gross-up will only be ascertainable after the Tribunal has determined the amount owing to the Claimants in its award. In the circumstances, the Claimants propose that, "[t]he grossed-up sum can be calculated and agreed by the Parties' experts in accordance with the Tribunal's decision on other aspects of quantum".[1079] They contend that "[t]hereafter, there would be a number of potential options pursuant to which the Tribunal may address the tax gross-up claim", including:

> (a) award the tax gross-up in the amount computed by the experts on the condition that the appropriate entity provides a written undertaking that any amount not paid over to the relevant tax office is returned to Spain (i.e. an undertaking against double recovery);
>
> (b) order for the full amount of the tax gross-up to be placed into an escrow account, pending a final determination from the appropriate tax authority, following which the relevant amount would be paid over and any remaining funds returned to Spain; and
>
> (c) order that Spain hold the Claimants harmless from any amount of tax due, in which case no funds would pass until the tax authorities reach a decision.[1080]

2. The Respondent's position

858. The Respondent submits that the Claimants' request for a tax gross-up should be denied for the following reasons:[1081]

a. First, the Tribunal lacks jurisdiction to consider a tax gross-up claim pursuant to Article 21 of the ECT, which carves out taxation matters;

b. Second, Spain cannot be held responsible for taxation by other States;

1077 PO12 C-PHB2, para. 200.

1078 See Flick Gocke Schaumburg Report on the taxation of the Award in Germany, 9 November 2017, **Exh. C-702**; Houthoff, Buruma Tax Report on the taxation of the Award in the Netherlands, 9 November 20117, **Exh. C-703**; Baker and McKenzie, Tax Report on the taxation of the Award in Luxembourg, 7 November 2017, **Exh. C-704**.

1079 PO12 C-PHB2, para. 205.

1080 PO12 C-PHB2, para. 205.

1081 PO12 R-PHB2, para. 426; Quantum Counter-Memorial, Section 8.

c. Third, any award would be exempted from taxation in the States of each of the Claimants' nationalities because it would be considered a dividend payment; and

d. Fourth, the claim is uncertain and speculative and has been previously rejected by numerous tribunals on this ground. In any event, the Claimants have not proven their tax gross up claim, as the Tribunal has decided to treat the various memoranda from tax advisors submitted by the Claimants as party submissions rather than evidence.[1082]

3. Discussion

859. The Tribunal has reviewed the Parties' submissions on the tax gross-up claim, including the tax law memoranda (Exhs. C-702 to C-704) which, in accordance with its letter of 6 December 2017, it had decided to treat as party submissions on law.

860. As an initial matter, it disagrees with the Respondent that it lacks jurisdiction to consider the tax gross-up claim pursuant to Article 21 of the ECT, which carves out taxation matters. In the Tribunal's view, Article 21 is concerned with whether or not the Tribunal has jurisdiction over a dispute where the impugned measures are taxation measures. By contrast, as a tax gross-up claim on amounts awarded concerns the computation of damages, it is unrelated to the nature of the measures complained of.

861. While it thus has jurisdiction over the Claimants' tax gross up claim, the Tribunal does not regard it as well-founded. In line with other arbitral tribunals which have dismissed similar claims, the Tribunal is of the view that such tax gross up would be speculative and uncertain.[1083] So for instance, the speculative nature of the claim was stressed in *Servier v. Poland*,

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1082 PO12 R-PHB2, para. 426(d), discussing the Tribunal's letter to the Parties dated 6 December 2017.

1083 See, e.g., *Venezuela Holdings et al v. Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, paras. 386-388, **Exh. CL-188** ("this claim is speculative and uncertain"); *Saint-Gobain Performance Plastics Europe v. Venezuela*, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 904-905, **Exh. RL-199** ("such request is speculative and unfounded; the Tribunal therefore sees no basis for ordering an indemnification against foreign taxation liabilities as requested by Claimant. Consequently, Claimant's claim that Respondent be ordered to indemnify Claimant in respect of any double taxation liabilities that would arise in France or elsewhere that would not have arisen but for Venezuela's adverse measures is denied").

> Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness, one way or another, of any proposed "gross-up" to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the "real value" of an investment must be addressed by the fiscal authorities in the investor's home jurisdiction as well as the host state.[1084]

862. Furthermore, the Tribunal finds confirmation in its conclusion that such a tax gross-up would be speculative in the Claimants' enumeration at para. 205 of the PO12 C-PHB2 of the "potential options pursuant to which the Tribunal may address the tax gross-up claim" (quoted *supra* at para. 857). It notes that at least two of them are subject to a possible determination by the competent tax authorities.[1085] This, in the Tribunal's view, corroborates the uncertainty that surrounds the Claimants' tax gross-up claim.

863. Moreover, the Tribunal is unconvinced that a tax gross-up would meet the requirement of causation of the loss. As held by the tribunal in *Rusoro v. Venezuela*, "[a]ny tax liability arising under [the home State's] tax laws (or from any other fiscal regime, other than the [respondent State]), does not qualify as consequential loss arising from [the respondent's] breach of the Treaty and does not engage [the respondent's] liability".[1086]

864. Finally, in the Tribunal's view, it is significant that no investment treaty tribunal, including ICSID tribunals who have found Spain liable in respect of the measures at issue here (see, e.g., *Eiser*,[1087] *Masdar*,[1088] and *Antin*[1089]), appears to have upheld similar claims.

865. For these reasons, the Tribunal dismisses the tax gross-up claim.

1084 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), PCA Case No. 2010-12, 14 February 2012, para. 666, **Exh. RL-211**.

1085 See PO12 C-PHB2, para. 205 (b) ("order for the full amount of the tax gross-up to be placed into an escrow account, pending a final determination from the appropriate tax authority, following which the relevant amount would be paid over and any remaining funds returned to Spain", emphasis added) and (c) ("order that Spain hold the Claimants harmless from any amount of tax due, in which case no funds would pass until the tax authorities reach a decision", emphasis added).

1086 *Rusoro Mining Limited v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 854, **Exh. RL-194**.

1087 *Eiser*, para. 456.

1088 *Masdar*, para. 660.

1089 *Antin*, para. 673.

VIII. COSTS

A. THE CLAIMANTS' POSITION

866. The Claimants request that the costs they have incurred in the liability and quantum phase be borne entirely by the Respondent.[1090] The total costs incurred by the Claimants (as on 14 June 2019) is GBP 11,387,747.75.[1091]

867. According to the Claimants, in the event the Tribunal decides in their favor and dismisses the various defenses advanced by Spain, the Claimants should be entitled to recover their entire costs on a full indemnity basis pursuant to the "loser pays" principle enshrined in Article 42(1) of the UNCITRAL Rules.[1092] The Claimants submit that an award on costs on this basis is necessary to reinstate them in the position they would have been in but for Spain's violations of the ECT.

868. The Claimants further argue that Spain should bear all costs because Spain has unnecessarily delayed the arbitration and increased the costs of the proceedings by making meritless applications, claims and objections. In particular, Spain aggravated the dispute by introducing the New Measures after the Claimants had filed its original SoC. This necessitated "a wholesale overhaul of [the] entire claim", as admitted by Spain, in order to include submissions and evidence on the New Measures, which significantly increased the complexity of the case and by extension, the Claimants' costs.[1093] Moreover, the Claimants contend that Spain has adopted multiple inconsistent positions throughout these proceedings. For example, during the PO12 phase, Spain "performed a volte face [and] abandoned its previous assertion that […] the reasonable profitability calculated by Spain at the time the Claimants' plants were built was based on a marginal plant [...] These inconsistencies unnecessarily increased costs as the Claimants were required to litigate issues that previously had been agreed between the parties".[1094]

869. Further, Spain's conduct in relation to document production also significantly increased the costs of these proceedings. The Claimants note that although they disclosed over several thousands of documents in this proceeding, Spain raised repeated and baseless complaints against the Claimants' production, the resolution of which

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1090 C-Costs Submission, para. 1; PO12 C-Costs Submission, para. 1.

1091 PO12 C-Costs Submission, Schedule 1.

1092 C-Costs Submission, paras. 4-6, 8; PO12 C-Costs Submission, paras. 5-7, 9.

1093 C-Costs Submission, paras. 10-13.

1094 PO12 C-Costs Submission, para. 11; *see* also C-Costs Submission, paras. 14-15.

generated multiple rounds of correspondence and even required a telephone hearing, on Spain's insistence. Moreover, even though the Tribunal rejected Spain's complaints, the latter persisted making baseless arguments once again in its PO12 Counter-Memorial. In addition, Spain failed to disclose a single document since PO12. The only documents that Spain "was forced to disclose after years of misrepresentation and dilatory tactics" were the *Greentech* Documents. The Claimants submit that Spain was under an obligation to disclose these documents from October 2017, especially after the Claimants had identified the failure to produce these documents and the Tribunal ordered their disclosure on 29 October 2018. Yet, Spain only disclosed the documents on 3 May 2019 after another order from the Tribunal.[1095]

870. Finally, Spain has repeatedly tried to re-litigate its intra-EU objection, which must have cost consequences.[1096]

871. The Claimants further oppose the allegations made by the Respondent in support of its request that the Claimants should bear the entire costs of the proceeding. They also object to certain categories of costs claimed by Spain on the ground that these do not fall within recoverable costs identified in Article 40(2)(f) of the UNCITRAL Rules because they have not been actually "incurred", such as (i) EUR 577,460.57 with respect to yet unbilled Econ One fees;[1097] and (ii) EUR 325,993.80 of legal fees and EUR 61,189.70 of expert fees that are alleged pending settlement.[1098]

872. In the circumstances, the Claimants request "that the Tribunal renders an award pursuant to Article 40(1) and (2) of the UNCITRAL Rules: […] ordering that Spain bear all of the Claimants' costs of the arbitration […] [and] […] interest thereon at such reasonable commercial rate as the Tribunal thinks appropriate, compounded

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1095 PO12 C-Costs Submission, paras. 12-15.

1096 PO12 C-Costs Submission, para. 16.

1097 PO12 C-Reply Costs Submission, paras. 7-9.

1098 C-Reply Costs Submission, paras. 9-10. With regard to these amounts, in its PO12 R-Costs Submission, para. 8(a) and (d), the Respondent explained that "[a] total of EUR 325,993.80 was included in respect of legal fees which had been incurred since the previous invoice but which were not later invoiced to Spain due to contractual budget limitations and therefore this should be removed from the calculations" and that "[a] total of EUR 574,181.30 was recorded as having been paid in respect of expert professional fees to Mac Group & Altran and a further EUR 61,189.70 was included in respect of fees which had been incurred but which had not been invoiced to Spain. This should be replaced by the total of EUR 629,161.00 to reflect amounts which were definitively invoiced to Spain by Mac Group & Altran during the Merits phase".

monthly".[1099] The Claimants also request that costs "be allocated per Claimant group in accordance with [the] percentages" set out in Section 4.4 of the Claimants' PO12 Costs Submission dated 14 June 2019 "[s]hould the Tribunal grant the Claimants' request that Spain bear all of the Claimants' costs of the arbitration".[1100]

B. THE RESPONDENT'S POSITION

873. The Respondent seeks an award of costs, pursuant to Article 42(1) of the UNICTRAL Rules, on the grounds that the Claimants' claims are without merit and should be dismissed entirely.[1101] It claims costs in the amount of EUR 6,075,665.52.[1102]

874. Spain submits that it introduced regulations in the exercise of its legitimate right to regulate the electricity sector, that these regulations were foreseeable and in conformity with the legal principles of sustainability and reasonable profitability. Therefore, according to the Respondent, the Claimants commenced the present arbitration "on the basis of a completely speculative claim and on unfounded legal grounds".[1103] A concrete example of the Claimants' conduct increasing the costs incurred by Spain is their assertion that Spain breached its obligation to provide full protection and security to their investments. The Claimants have devoted to this claim no more than four paragraphs in the ASoC and five paragraphs in the Reply and did not address it in a substantial way during the Liability Hearing. Nevertheless, Spain had to devote considerable time and resources in defending such an unfounded claim.[1104]

875. In the same vein, the Respondent calls on the Tribunal to consider the conduct of the Parties when allocating costs. It argues that the Claimants' procedural behavior has led to significant delays and costs. For example, the Claimants' misconduct was evident during the document production phase, where the Claimants engaged in a fishing expedition, requesting 79 categories of documents, all of which were largely irrelevant. Moreover, the Claimants "ambushed the proceedings at the eleventh hour with an

1099 C-Costs Submission, para. 27; PO12 C-Costs Submission, para. 27.

1100 PO12 C-Costs Submission, para. 26. The Claimants have set out their costs in Schedule 1 of the PO12 C-Cost Submission dated 14 June 2019, setting out the various categories of costs incurred by them since the commencement of the arbitration proceedings, but excluding the costs associated with the Jurisdictional Phase, in Schedule 1 of their PO12 Cost Submission.

1101 R-Costs Submission, paras. 9-11; PO12 R-Costs Submission, paras. 14-16.

1102 PO12 R-Costs Submission, Annex I.

1103 R-Costs Submission, paras. 12-14; PO12 R-Costs Submission, paras. 17-19.

1104 R-Costs Submission, para. 15.

unjustified application" to include numerous new documents into the record. As the Claimants introduced these documents into the record only days prior to the Liability Hearing, the Respondent was not afforded an opportunity to "thoughtfully consider or analyze such documents or to rebut the documents with evidence".[1105] The Respondent also criticizes the Claimants' decision to aggregate a large number of claims in the same arbitration. It finds that this concentration led to a significant increase in the costs of the quantum phase, as it was necessary to analyze the loss of each of the 26 Claimants allegedly arising out of the Disputed Measures, which increased the legal fees and expert costs.[1106]

876. Moreover, the Respondent contends that the Claimants "unreasonably and unnecessarily, [sought] to repeatedly push for Spain to disclose to them the so-called Greentech Documents", even though these documents were "utterly irrelevant to the resolution of this dispute". The Claimants' refusal to accept this fact caused many unnecessary procedural steps and added costs which should be paid by the Claimants.[1107]

877. Thus, Spain concludes that while it has acted in good faith throughout this arbitration, it continues to be met by ambushes, inappropriate and costly distractions and a litany of procedural abuses by the Claimants. Spain also oppose the arguments in support of the Claimants' request that Spain should bear the entire costs of the proceeding.

878. Spain further objects to the amount of costs sought by the Claimants as being unreasonable, and in some cases insufficiently described. For example, the legal fees claimed by the Claimants are twice as high as the Respondent's,[1108] when counsel on both sides worked in much the same way.[1109] Similarly, the Respondent objects to the expert fees charged by the Brattle Group in the quantum phase as being unreasonable and double the expert fees and costs claimed by Spain for the same period.

879. In the circumstances, the Respondent requests the Tribunal to order the Claimants to bear the costs of all phases of the arbitration which remain subject to the Tribunal's

1105 R-Costs Submission, paras. 18-20; PO12 R-Costs Submission, paras. 20-21.

1106 PO12 R-Costs Submission, para. 23(iii).

1107 PO12 R-Costs Submission, para. 23(iv).

1108 PO12 R-Reply Costs Submission, paras. 21 *et seq.*

1109 R-Reply Costs Submission, paras. 19-30; PO12 R-Reply Costs Submission, paras. 21 *et seq.*

determination along with interest thereon at such reasonable commercial rate as the Tribunal deems appropriate, compounded monthly.[1110]

C. DISCUSSION

1. The costs of the arbitration pursuant to Article 40 of the UNCITRAL Rules

880. Article 40(1) of the UNCITRAL Rules provides:

> The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

881. Article 40(2) of the UNCITRAL Rules specifies the categories of expenses that qualify as "costs of arbitration" in the following terms:

> The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
>
> (b) The reasonable travel and other expenses incurred by the arbitrators;
>
> (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

882. Thus, Article 40(2) recognizes broadly three categories of costs and expenses: (i) "Tribunal Costs" comprising of the fees and expenses of the Arbitral Tribunal and Secretary; (ii) "Party Costs" comprising of the legal and witness related costs incurred

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1110 PO12 R-Costs Submission, para. 25 and Annex I; PO12 R-Reply Costs Submission, para. 36; R-Costs Submission, para. 24 and Annex I.

by the Parties; and (iii) "Administrative Costs" comprising here of the fees and expenses of the PCA, including with regard to hearing and other expenses.

2. Cost advances

883. On the date of issuance of the Preliminary Award on Jurisdiction, out of the total advances deposited by the Parties, a sum of EUR 74.42 remained in the deposit after deducting the amounts incurred towards the fees and expenses of the Tribunal, the Secretary and the PCA. This amount was credited to the subsequent phase of the arbitration.[1111]

884. Thereafter, the Parties advanced the following additional sums with the PCA:

a. On 14 November 2014, the PCA acknowledged receipt of EUR 200,000 from each Party towards their respective shares of the advance on cost;

b. On 18 and 31 December 2015, the PCA acknowledged receipt of EUR 250,000 from each Party towards their respective shares of the advance on cost;

c. On 15 December 2016, the PCA acknowledged receipt of EUR 200,000 from each Party towards their respective shares of the advance on cost;

d. On 15 and 21 December 2017, the PCA acknowledged receipt of EUR 205,000 from each Party towards their respective shares of the advance on cost;

e. On 1 and 13 December 2018, the PCA acknowledged receipt of EUR 150,000 from each Party towards their respective shares of the advance on cost; and

f. On 13 December 2019 and 13 January 2020, the PCA acknowledged receipt of EUR 150,000 from each Party towards their respective shares of the final advances on cost.

885. Accordingly, the total advance paid by the Parties, following the Preliminary Award on Jurisdiction, amounts to EUR 1,155,000 each (EUR 2,310,000 in total).

3. Tribunal and administrative costs

886. In the Preliminary Award on Jurisdiction, the Tribunal determined the total costs of the proceeding and the allocation of such costs for the Jurisdictional Phase (i.e., from 11

[1111] Preliminary Award on Jurisdiction, para. 373.

January 2013 until the completion of the jurisdictional phase).[1112] However, the Tribunal reserved its determination on the allocation of costs incurred in the "Pre-Jurisdictional Phase" (i.e. from the commencement of the arbitration until the date of Spain's jurisdictional objection of 11 January 2013) for subsequent decision.[1113]

887. Therefore, the present decision concerns the costs incurred by the Parties for:

a. The Pre-Jurisdictional Phase (from the commencement of the arbitration until 11 January 2013);

b. The liability and quantum phase (from the Preliminary Award on Jurisdiction until this Final Award).

a. *For the Pre-Jurisdictional Phase*

888. As set out in paras. 350-355 of the Preliminary Award on Jurisdiction, the costs incurred towards the fees and expenses of the Tribunal, the Secretary, and the PCA in the Pre-Jurisdictional Phase are EUR 157,773.36, detailed as follows:

Tribunal and Secretary fees	EUR	142,606.00
Tribunal and Secretary expenses	EUR	7,706.17
Administrative Costs	EUR	7,461.19
Total Costs up to 11 January 2013	EUR	157,773.36

b. *For the liability and quantum phase*

889. In the liability and quantum phase, the members of the Tribunal collectively spent a total of 2,548.6 hours as follows: The Hon. Charles N. Brower, 853.6 hours; Judge Bernardo Sepúlveda-Amor, 569 hours; and Prof. Kaufmann-Kohler, 1,126 hours. In the Terms of Appointment, it was agreed that the Tribunal's time would be compensated at an hourly rate of EUR 500 exclusive of VAT, where applicable.

890. In the same period of time, the Secretary of the Tribunal has spent a total of 966.1 hours. In the Terms of Appointment, it was agreed that the Secretary would be compensated at an hourly rate of EUR 280 exclusive of VAT, where applicable.

1112 Preliminary Award on Jurisdiction, para. 370.

1113 Preliminary Award on Jurisdiction, para. 372.

891. Therefore, while the total fees of the Tribunal and the Secretary (excluding VAT) would amount to EUR 1,544,808, in order to avoid requesting additional funds, the Tribunal decided to reduce its fees to EUR 1,473,150.8 for this phase of the arbitration.

892. The Tribunal and the Secretary have incurred expenses in the amount of EUR 74,729.

893. While the PCA fees for this phase of the arbitration would have amounted to EUR 86,845, in line with the Tribunal's decision to reduce its fees as explained *supra*, the PCA has charged fees in the amount of EUR 83,149.93 for the administration of the case and its registry services.

894. Other costs, relating in particular to the hearings expenses, the IT costs (including the Opus 2 services), catering, court reporting services, interpretation, as well as the translation of the Award, amount to EUR 679,044.69.

895. Thus, the total costs of the proceedings relating to the liability and quantum phase amount to EUR 2,310,074.42, detailed as follows:

Tribunal and Secretary fees	EUR	1,473,150.8
Tribunal and Secretary expenses	EUR	74,729
Administrative Costs	EUR	762,194.62
Total Costs	EUR	2,310,074.42

c. *Total Tribunal and administrative costs*

896. Hence, the total costs of the proceedings for both the Pre-Jurisdictional Phase and the liability and quantum phase amount to EUR 2,467,847.78. Considering that it was necessary for the Tribunal to reduce its fees, there is no unexpended balance to be returned to the Parties in accordance with Art. 43(5) UNCITRAL Rules. The PCA will provide the Parties with the case's statement of account once the 30-day time period under Arts. 37 to 39 has elapsed.

4. Allocation of the costs of the arbitration

897. Article 42 of the UNCITRAL Rules sets out the standard on the basis of which the Tribunal must determine the allocation of the above categories of costs:

> 1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that

apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

898. Thus, the first sentence of Article 42(1) of the UNCITRAL Rules provides that the unsuccessful party shall "in principle"[1114] bear all of the costs of the arbitration. Both Parties accept such "loser pays" principle and have argued their cost requests accordingly.[1115] The second sentence of Article 42(1) grants the Tribunal the authority to apportion costs among the Parties if, in light of the "circumstances of the case", it decides that such apportionment is "reasonable".

899. The Tribunal starts with the outcome of the arbitration and notes that the outcome of the liability and quantum phase is not clear-cut. The Claimants brought two claims, the Primary and the Alternative Claims. The Tribunal found that the Primary Claim was not well-founded, which entails that Spain is the prevailing Party on such claim.

900. With regard to the Alternative Claim, approximately half of the Claimant entities within the list agreed between the experts was able to prove that the IRR with the Disputed Measures in place was below 7% and was thus considered entitled to compensation. This part of the Claimants has thus prevailed on the Alternative Claim, although it was awarded less than what it claimed. In assessing the outcome, it bears noting that these Claimants would not be made whole had they not resorted to arbitration, which could not be done without incurring costs whatever the amounts claimed and awarded.

901. Finally, the remaining Claimants succeeded neither on the Primary nor on the Alternative Claim. This being so, however, the Tribunal does not accept Spain's contention that the Claimants initiated a "groundless arbitration", based on "a completely speculative claim and on unfounded legal grounds".[1116] As mentioned above, the Alternative Claim did in part succeed. As to the Primary Claim, while the

1114 See the English version of the first sentence of Article 42(1) of the UNCITRAL Rules, which provides: "[t]he costs of the arbitration shall *in principle* be borne by the unsuccessful party or parties" (emphasis added), while the Spanish version reads: "[l]as costas del arbitraje serán a cargo de la parte vencida o las partes vencidas", without including the equivalent of the words "in principle".

1115 See C-Costs Submission, para. 5; PO12 C-Costs Submission, para. 6; PO12 R-Costs Submission, para. 16; R-Costs Submission, para. 11.

1116 R-Costs Submission, paras. 12-13; PO12 R-Costs Submission, para. 17.

Tribunal has come to the conclusion that it was not well-founded, it was certainly not frivolous.

902. Thus, pondering the relative weight of the outcome on the claims and the various considerations made above, the Tribunal considers that the cost allocation that most appropriately reflects the outcome of the proceedings is for the Claimants, on the one hand, and the Respondent, on the other, to bear the costs of the proceedings in equal shares and for each side to bear the legal fees and other expenses which it incurred.

903. In line with Article 42(1) second sentence, the Tribunal has further reviewed the other circumstances which according to the Parties have aggravated their cost burden and is of the view that none of those circumstances changes the allocation just set out. In particular, with respect of document production, it does not consider that the Claimants made excessive document production requests. As far as the Respondent is concerned, it is true that the latter was not forthcoming in the production of the *Greentech* Documents. However, this incident is not material enough to make a sensible difference in the overall cost allocation. Similarly, on the intra-EU objection, while the Tribunal has denied Spain's request to re-open jurisdiction, such request was not frivolous, keeping in mind developments such as *Achmea* and the Member States Declarations. Finally, the Tribunal finds no fault in the Claimants' decision to bring the claims in an aggregate form. It is true that conducting one arbitration on behalf of 14 groups of investors inevitably increases costs compared to proceedings involving only one claimant. By contrast, it is not true that conducting one arbitration with 14 groups of claimants is more expensive than the total costs of 14 arbitrations with one claimant (or claimant group).

904. Furthermore, the Tribunal has reviewed the amounts of the costs claimed by each Party. Both sides have incurred costs which are certainly considerable. However, as both accept, these proceedings were highly complex.[1117] Seen in light of such

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1117 PO12 C-Costs Submission, para. 19 ("this is a complex ECT arbitration in which there was substantial briefing by both parties and voluminous amounts of fact and expert evidence. Moreover, unlike most investment treaty arbitrations, this case involves 14 separate and independent Claimant groups, each with a separate documentary record and separate fact witnesses"); PO12 R-Costs Submission, para. 12 ("The costs claimed properly reflect the nature of the dispute and the positions that Spain necessarily had to adopt given Claimants' amended pleadings and the extent of evidence. In particular, the Tribunal will recall that Spain had to answer a case brought initially by 88 Claimants and after the Jurisdiction Phase by 26 Claimants, which required the individual review of documentation provided by each Claimant").

complexity and the high stakes involved, the costs incurred by the Parties are not unreasonable. It is true that the Claimants' legal costs are considerably higher than those of the Respondent. The disparity may be due to a number of factors. First, as explained by the Respondent, "the fees paid to Herbert Smith Freehills were established pursuant to a public tender dated 14 September 2011 and are considerably below what is considered to be market value".[1118] Furthermore, the Claimants produced seventeen fact witnesses and Spain only two. Thus, the difference between the legal fees incurred by the Parties is not unjustifiably disproportionate.

905. Moreover, the Tribunal has reviewed the Claimants' objections against specific cost items presented by Spain. The Tribunal could dispense with ruling on these objections, in light of its decision that each Party bear the costs related to its own representation. However, for the sake of completeness, it briefly addresses the main objections raised by the Claimants to the following cost items.

906. First, in respect of the costs claimed by Spain for the *Abogacía del Estado*, the Tribunal is satisfied by Spain's explanation that "[s]ince the Abogacía del Estado does not have a system based on hourly rates, its legal fees have been calculated considering one third of the legal fees of Herbert Smith Freehills, which is proportional to the amount of resources and time expended by the Abogacía del Estado in these proceedings".[1119] Second, the Tribunal has taken note of the Claimants' objection that certain costs claimed for the Econ One services have not been "incurred" by Spain, because they have not yet been invoiced and "no undertaking has been provided confirming that Spain will incur these costs".[1120] At the same time, it has also noted the Respondent's representation that these amounts are "owed under the contract between Spain and Econ One but ha[ve] not yet been invoiced by Econ One".[1121] The Tribunal has no reason to doubt this representation and considers that the statement that this amount "is owed" is substantively equivalent to a representation that "it will be incurred".[1122]

907. Finally, with respect to the allocation of the Claimants' costs *among themselves*, the Tribunal understands from the table set out in Section 4.4 of the Claimants' PO12 Costs

1118 R-Costs Submission, para. 8; PO12 R-Costs Submission, para. 5.

1119 R-Costs Submission, para.6(iii).

1120 PO12 C-Reply Costs Submission, para. 8.

1121 PO12 R-Costs Submission, para. 11.

1122 The Tribunal is also satisfied of Spain's explanations in respect of certain figures that had been included in its previously submitted cost submissions and have been corrected in its later submissions. See PO12 R-Costs Submission, para. 8.

Submission dated 14 June 2019 that the Claimants may have internal arrangements in place as to how the arbitrations costs are divided. Accordingly, the Claimants have requested that "[s]hould the Tribunal grant the Claimants' request that Spain bear all of the Claimants' costs of the arbitration, the Claimants request that these costs be allocated per Claimant group in accordance with these percentages" (emphasis added). In light of the Tribunal's decision (which is *not* that "Spain bear all of the Claimants' costs of the arbitration"), the Tribunal need not address the Claimants' request that costs be allocated in accordance with the percentages set out in the table. Furthermore, the Tribunal is not privy to the Claimants' internal arrangements for the scenario that *only some* of them would succeed on (part of) the claims. This being so, as the Claimants have brought their claims in an aggregate form and in light of the determination that each side must bear its own costs, the Tribunal considers that it is appropriate to leave it to the Claimants to make any relevant determination on the apportionment of costs among themselves in accordance with their internal arrangements or otherwise.

IX. LANGUAGE OF THE AWARD

908. Like the Preliminary Award on Jurisdiction, this Award is made in both English and Spanish. There is no agreement between the Parties as to which of the two language versions should prevail. In accordance with PO2, the Tribunal decides that the English version of this Award shall prevail.[1123]

X. OPERATIVE PART

909. For the reasons set forth above, the Tribunal makes the following decision:

a. The Kingdom of Spain has breached Article 10(1) of the ECT to the extent held in the body of the Award;

b. The Kingdom of Spain shall pay the following amounts to the following Claimant entities:

i. AES Solar Energy Coöperatief U.A: **EUR 15.4 million**;

ii. Ceconat Energy GmbH: **EUR 5.4 million**;

[1123] *See* also Preliminary Award on Jurisdiction, para. 374.

iii. Ampere Equity Fund B.V.: **EUR 11.1 million**;

iv. Element Power Holdings B.V.: **EUR 2.2 million**;

v. Eoxis Holding S.A.: **EUR 6.1 million**;

vi. Impax Solar Investment S.à.r.l: **EUR 29.3 million**;

vii. Impax New Energy Investors: S.C.A.: **EUR 7.3 million**;

viii. InfraClass Energie 4 GmbH & Co. KG: **EUR 4.0 million**;

ix. NIBC European Infrastructure Fund I C.V.: **EUR 10.2 million**;

x. WOC Photovoltaik Portfolio GmbH & Co. KG: **EUR 0.1 million**;

c. The Kingdom of Spain shall make the payments ordered in the preceding paragraph together with interest at the Spanish 10-year bond rate, compounded semi-annually, from 30 June 2014 until payment in full;

d. The costs of the arbitration relating to the Pre-Jurisdictional Phase (from the commencement of the arbitration until 11 January 2013) and the liability and quantum phase (from the Preliminary Award on Jurisdiction until this Final Award), in a total amount of EUR 2,467,847.78, shall be borne in equal shares by the Claimants, on the one hand, and by the Kingdom of Spain, on the other;

e. Each Party shall bear the legal fees and other expenses which it incurred in connection with the Pre-Jurisdictional Phase (from the commencement of the arbitration until 11 January 2013) and the liability and quantum phase (from the Preliminary Award on Jurisdiction until this Final Award) of this arbitration;

f. All other claims and requests are dismissed.

Date: 28 February 2020

Place of arbitration: Geneva, Switzerland

The Hon. Charles N. Brower

Arbitrator

Subject to the attached Concurring and Dissenting Opinion

Judge Bernardo Sepúlveda-Amor

Arbitrator

Prof. Gabrielle Kaufmann-Kohler

Presiding Arbitrator

Concurring and Dissenting Opinion of Charles N. Brower

1. I concur with my esteemed colleagues in finding that Respondent has breached the Energy Charter Treaty ("ECT"). Where I part company with them, however, is on their acceptance of Claimants' Alternative Claim, based on an expected Reasonable Rate of Return ("RRR"), whereas I see no reason whatsoever to deprive Claimants of their Primary Claim, assessing their damages according to RD 661/2007, which every one of the eleven renewable energy awards against Spain issued by other arbitral tribunals to date, arising out of the same controversy and facts not credibly distinguishable from those of the present case, has done. The difference in the present case, as will be shown below, would appear to be possibly as high as approximately €540.9 million.

2. I am of the view that no tribunal should accept an Alternative Claim over a Primary Claim without justifiable reasons for dismissing the Primary Claim, and in the present case I discern no justifiable reason whatsoever for departing from those eleven other tribunals' acceptance of the Primary Claim in like circumstances. In fact, the interpretation that my colleagues give to the language of the Old Regulatory Regime ("ORR"), allegedly providing such reasons, is inconsistent with the line of jurisprudence established by the tribunals that considered these very same issues before us. Unlike the position taken by my colleagues at paragraphs 638-639 of the Award, no other Tribunal has found that the RRR was "*a key element of the regime established by RD 661/2007,*" or that it served "*as the limit of ECT-compliant regulatory changes,*" let alone that "*the Claimants are only entitled to compensation under Article 10(1) of the ECT if they establish that the new regime violates the guarantee of reasonable rate of return*." In this respect I recall well this statement in our Preliminary Award on Jurisdiction, also cited at paragraph 521 of the Award:

> The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, *it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established*

in a series of consistent cases. It further believes that, subject always to the specific text of the ECT, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law.[1] (Emphasis added.)

3. Of the now eighteen known awards[2] involving the same treaty, the same Respondent State, and the same measures as are at issue in the present arbitration, fifteen have found for the Claimants.[3] In all but four of those fifteen cases (all four being factually distinguishable from the present one)[4] the tribunals have ruled that Claimants were entitled to full reparation for the injury caused by the internationally wrongful act represented by the displacement of the ORR by RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the June 2014 Order (the "New Regulatory Regime" or "NRR"). Thus, all

[1] Preliminary Award on Jurisdiction, para. 53.

[2] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award, 21 January 2016. ("*Charanne*"); *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016 ("*Isolux*"); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017 ("*Eiser*"); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018 ("*Novenergia*"); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("*Masdar*"); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 ("*Antin*"); *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, ("*Greentech*"); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("*RREEF*"); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 ("*NextEra*"); *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 ("*9REN*"); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 ("*Cube*"); *SolEs Badajoz GmbH v. Kingdom of Spain,* ICSID Case No. ARB/15/38, Award, 31 July 2019 ("*SolEs*"); *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, 2 August 2019 ("*InfraRed*"); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 ("*OperaFund*"); *BayWa re renewable energy and BayWa re Asset Holding v Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 ("*BayWa*"); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 ("*Stadtwerke*"); *RWE Innogy GMBH and RWE Innogy Aresa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019 ("*Innogy*"); *Watkins Holding S.A.R.L. Watkins (NED) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L., and Parque Eólico La Boga S.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 ("*Watkins*").

[3] *Eiser*; *Novenergia*; *Masdar*; *Antin*; *Greentech*; *SolES*; *9REN*; *Cube*; *OperaFund*; *Infrared*; *Watkins*; *RREEF*; *NextEra*; *BayWa* and *RWE Innogy*.

[4] *RREEF, NextEra, BayWa* and *RWE Innogy.*

eleven tribunals have issued awards effectively granting the present Claimants' Primary Claim. The Award's rather cursory dismissal of those cases is factually misleading. In paragraph 554 of the Award, for example, after conceding in paragraph 553 that "*[a] number of tribunals . . . have upheld claims that in substance were broadly similar to the Primary Claim in this arbitration*," the Award argues that "[*i*]*n particular, in several cases . . . , the tribunal appears to have been presented with no claim equivalent to the Alternative Claim,*" citing *Novenergia* and other cases. As demonstrated below, however, and effectively conceded in that same paragraph 554 of the Award, in every single one of the eleven cases on which my analysis relies, the Alternative Claim was either (1) pleaded by the Claimants (in five cases), (2) pleaded by the Respondent as a defense (in four cases, including the cited *Novenergia*) or (3) placed before the tribunal by the Claimants' damages expert (in two cases). Thus, each of the eleven Tribunals involved confronted and rejected the Alternative Claim, irrespective of whether it was first asserted by the Claimants, by their experts, or by the Respondent. Despite my colleagues' valiant efforts, their stance is clearly incongruent with the statistics, as in seven out of the eleven cases in which the Primary Claim has prevailed, the Claimants had indeed put before the Tribunal an alternative calculation of damages based on an RRR, and in the remaining four the Respondent undeniably had pleaded the Alternative Claim as a defense. The Award's distinction in paragraph 554 among "an *actual*" Alternative Claim pled by Claimants themselves (group (1)), the Alternative Claim pled as "merely a defense from the Respondent" (group (2)) and one in the form of "alternative damages calculations from the [Claimants'] experts" (group (3)) is a classic "distinction without a difference." The reality is that each and every one of the tribunals on whose awards I rely, and on which the Award should have relied in accordance with this Tribunal's views recorded in paragraph 2 above, confronted and dealt with the Alternative Claim. Moreover, it is with some consternation that I note my colleagues do not seem to have made up their mind as to whether the *PV Investors* case belongs to group (1) or (3), as at paragraph 665 of the Award "[*f*]*inally, the Tribunal notes that the Claimants have formulated the relief sought not by reference to the Primary/Alternative Claim, but more generally for compensation* *as a result of Spain's alleged breaches*," before venturing to "*understand[] that the request for restitution has been abandoned*," then deciding that its "*understanding*" is of no consequence whatsoever as "*the Tribunal would in any event not grant such relief in light of its conclusion that the Primary Claim. . . is ill-founded*."

4. Below, I address each of the eighteen awards. First, I address in paragraph 5., *infra*, the eleven awards that upheld the investors' entitlement to the projected returns on their investment on the basis of the regime in place at the time of the investment (Primary Claim), namely: (i) *Eiser*, (ii) *Novenergia*, (iii) *Masdar*, (iv) *Antin*, (v) *Greentech*, (vi) *SolES*, (vii) *9REN*, (viii) *Cube*, (ix) *OperaFund*, (x) *Infrared* and (xi) *Watkins*. Second, in paragraph 6., *infra*, I address the four cases that awarded damages on the basis of the RRR theory (Alternative Claim): (xii) *RREEF*, (xiii) *NextEra*, (xiv) *BayWa* and (xv) *RWE Innogy*. Third, in paragraph 7., *infra*, I discuss the three cases which dismissed the Claimants' claims entirely: (xvi) *Charanne*, (xvii) *Isolux* and (xviii) *Statdwerke*. Lastly, in paragraph 8., *infra*, I take stock of the awards, in light of the present case, and conclude that since like cases should be treated alike, the Claimants' Primary Claim rightly should prevail.

5. **Cases in which the Primary Claim has prevailed**:

(i) In *Eiser,* Claimants invested in three concentrated solar plants ("CSP") beginning in October 2007. All three plants were registered in the Administrative Register ("RAIPRE") on 8 June 2012. Claimants sought restitution of the legal and regulatory regime (RD 661/2007),[5] or, should restitution not be possible, damages which, pursuant to the *Chorzów Factory* standard,[6] should be calculated on the basis of the reduction of the fair market value of their investment as measured by the (then) present value of past and future cash flows calculated on the basis of the feed-in-tariff ("FiT") to which they were

[5] *Eiser*, para. 425.

[6] *Case Concerning the Factory at Chorzów* (Claim for Indemnity), Jurisdiction, 26 July 1927, PCIJ Rep Series A, No. 9, p. 209.

entitled pursuant to RD 661/2007.[7] Claimants also developed an Alternative Claim based on Respondent's theory of an RRR.[8] The Tribunal, however, determined the RRR theory to be "*unpersuasive*" because *"ECT Article 10(1) does not entitle Claimants to a 'reasonable return' at any given level, but to fair and equitable treatment.*"[9] While the *Eiser* Tribunal did state that "[a]*bsent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs*,"[10] it concluded that under the circumstances, not credibly distinguishable from those of *PV Investors*, the NRR "*was profoundly unfair and inequitable as applied to Claimants' existing investment, stripping Claimants of virtually all of the value of their investment.*"[11] Accordingly, after rejecting the RRR Alternative Claim, the Tribunal "*agree*[*d*] *that the Claimants' approach for determining its [sic] damages – assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures – offers an appropriate means to determine the amount of reparation due in the circumstances of this case*,"[12] and then awarded damages accordingly.

(ii) In *Novenergia,* Claimant pleaded a number of breaches of Article 10(1) ECT (FET and stable/equitable/favorable/transparent investment conditions), as well as Article 13 ECT (expropriation). On damages, Claimant submitted that the Kingdom of Spain must place the Claimant in the situation in which it would have been had the Respondent not breached its international obligations by abolishing the ORR, quantified as the difference between the fair market value of its investment immediately before the expropriation occurred, using the DCF method, and its fair market value once the NRR had destroyed

[7] *Eiser*, para. 426.
[8] Ibid., para. 433.
[9] Ibid., para. 434.
[10] Ibid., para. 362.
[11] Ibid., para. 365.
[12] Ibid., para. 441.

the ORR.[13] Claimant invested on 13 September 2007 and registered its PV plants with the RAIPRE by September 2008.[14] This chronology describes also the *PV Investors*' Primary Claim. The Respondent contended that the language of RD 54/1997 provided that investors could only expect to receive an RRR (effectively identical to the Alternative Claim pleaded by *PV Investors* and others), and the Tribunal found that contention to be "*unconvincing, since these principles were still generally vague and insufficiently defined at the time of the Claimant's investment*" and thus "*they cannot be considered apposite for the assessment of the reasonability of the Claimant's expectations at the time of the investment.*"[15] The Tribunal then clarified that neither the pre-2013 laws nor the Supreme Court decisions "*could have given the Claimant the expectation that a reasonable rate of return would be limited to 7%*"[16] and ultimately concluded that:

> […] the Claimant has convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FiT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain in e.g. "The Sun Can Be All Yours". […][17]

Accordingly, *Novenergia* is thoroughly comparable to the present case, particularly as regards the timing and type of investment, the measures challenged, the treaty provisions invoked, and the Tribunal's rejection of the Respondent's defense identical to *PV Investors*' Alternative Claim.

(iii) In *Masdar,* Claimant, citing Article 35 of the ILC Articles,[18] requested that the Tribunal order Respondent to restore the RD 661/2007 regime[19] or, in the alternative, award

[13] *Novenergia*, paras. 767-768.
[14] Ibid., para. 154.
[15] Ibid., para. 673.
[16] Ibid., para. 674 (Emphasis omitted).
[17] Ibid., para. 681.
[18] ILC Articles, Article 35: "*A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*
(a) is not materially impossible;
(b) *does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*"
[19] *Masdar*, para. 555.

damages based on the FiT expected under that regime. Claimant also developed an Alternative Claim based on an RRR. The Tribunal noted that Article 10(1) of the ECT protected investors' legitimate expectations that *"the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor."*[20] In particular, the Tribunal found that Spain gave investors "*a very specific unilateral offer,*"[21] concretized vis-a-vis the RAIPRE registrations, that the qualifying installations would receive the RD 661/2007 FiT, as Article 44.3 of RD 661/2007 constituted a stabilisation commitment.[22] The implication in paragraph 554 of the present Award that the aforesaid result was due "*to the investors* [*having*] *received specific individual confirmations from the State that their plants would receive the FiT payments across their life span*" is inaccurate. As highlighted in two other recent awards, the letters obtained by the *Masdar* investors "*simply confirmed what was already in RD 661/2007 and were issued **after** not before the claimant in that case made its investment,*"[23] and the *Masdar* Tribunal "*expressly left open the possibility that Article 44(3)'s stabilization promise could constitute a 'specific commitment' by Spain*", but "*did not need to decide whether the legislative commitment alone could give rise to legitimate expectations, because there were other commitments*."[24] In respect of the RRR theory the *Masdar* Tribunal (relying on *Eiser*) considered that Article 10(1) entitled investors not to a mere RRR, but instead to fair and equitable treatment.[25] In this case the Claimants invested in three CSPs which began in May 2008 and for which RAIPRE registration was secured by December 2011.

(iv) In *Antin,* Claimants sought restitution of the legal and regulatory regime under which they made their investments in two CSPs (RD 661/2007 as modified by RD 1614/2010 and RDL 14/2010 as the CSP thermosolar installations were acquired and developed in June 2011, with RAIPRE registration for both plants by 22 December 2009) or, in the alternative,

[20] Ibid., para. 484.
[21] Ibid., para. 512.
[22] Ibid., para. 500-503.
[23] *9Ren*, para. 299 (Emphasis in original).
[24] *OperaFund*, para. 483.
[25] *Masdar*, para. 591.

damages for loss in the fair market value of their investments, comprised of lost historical and future cash flows.[26] The Tribunal observed that Spain breached Claimants' legitimate expectations in light of the "*precision and detail exhibited in the royal decrees, particularly the contemplation that treatment would be accorded for a defined period of time"*.[27] With respect to the RRR theory (which formed both Claimant's Alternative Claim and one of Respondent's defenses) the Tribunal observed that:

> […] what Spain labels a "reasonable rate of return" seemingly depends on governmental discretion. This is in plain contrast with the relative precision of the Original Regime —in force when the Claimants made their investment— which provided for objective and identifiable criteria for determining the remuneration due to CSP plants, which were expressly specified in the regulation and were dependent on the market.[28]

(v) In *Greentech,* Claimants submitted that Respondent breached the ECT by modifying the FiT regime resulting from the RD 661/2007,[29] or, in the alternative, by abrogating the ORR regime and thereby making a "*fundamental change*" in a manner that had not taken into account the circumstances of existing investments made in reliance on the prior regime.[30] On quantum, Claimants sought damages for the diminution in the market value of their investments.[31] In addition, their experts (FTI) placed before the Tribunal an alternative calculation of damages paralleling the Alternative Claim, i.e., based on an RRR.[32] Consequently the *Greentech* Tribunal confronted four options for assessing damages:

a. as a projection of the FiTs that the plants would receive under the RD 661/2007 under Claimants' Expert's primary calculation;[33]
b. as a projection of the FiTs that the plants would receive under the RD 661/2007 under Respondent's Expert's alternative calculation;[34]
c. as an RRR under Respondent's Expert's primary calculation; [35]

[26] *Antin*, para. 274.
[27] Ibid., para. 552.
[28] Ibid., para. 568.
[29] *Greentech*, para. 293.
[30] Ibid., para. 297.
[31] Ibid., para. 439.
[32] Ibid., para. 392.
[33] Ibid., para. 487.
[34] Ibid., para. 501.
[35] Ibid., para. 493.

d. as an RRR under Claimants' Expert's alternative calculation.[36]

The Tribunal found only options a. and b. to be consistent with its finding on liability that the Respondent had abrogated the RD 661/2007 scheme when it introduced the NRR in violation of Article 10(1) of the ECT, and, accordingly, dismissed c. and d., which had reflected Claimants' expert's as well as Respondent's calculations of an RRR Alternative Claim. Claimants, in this case, had invested in two PV plants and one PV project (comprised of 18 100-KW plants) during the period May 2009 through May 2010. The plants were registered with the RAIPRE, respectively, on 28 August 2008 (Madridejos),[37] 25 September 2008 (La Castilleja),[38] and 20 May 2008 (Fotocampillos).[39] The *Greentech* Tribunal found "*that the Claimants had the legitimate expectation that the legal and regulatory framework would not be fundamentally and abruptly altered, thereby depriving investors of a significant part of their projected revenues,*" while at the same time opining that "*the Claimants did not have legitimate expectations that they would receive the precise FiT specified in RD 661/2007 for the entire lifetime of their PV plants*."[40] Contrary to *9Ren* and *OperaFund* (as noted below), the Respondent's "*specific clarification . . . that [Masdar's] facilities would receive the RD 661/2007 FiTs throughout their operating lives*,"[41] added to the *Greentech* Tribunal "*not* [being] *persuaded*" by the Claimants' view that "*Article 44.3 RD 661/2007 is a specific assurance giving rise to a legitimate expectation that the Claimants would receive fixed FiTs for the lifetime of their PV plants.*"[42] The *Greentech* Tribunal then *"[c]onclude[d] that the Respondent's enactment of the New Regulatory Regime constituted a fundamental change to the legal and regulatory framework that crossed the line from a non-compensatory regulatory measure to a compensable breach of the FET standard in the ECT*"[43] and awarded damages accordingly.

[36] Ibid., para. 495.
[37] Ibid., para. 97.
[38] Ibid., para. 102.
[39] Ibid., para. 107.
[40] Ibid., para. 365.
[41] Ibid., para. 367
[42] Ibid., para. 366, citing *Eiser*.
[43] Ibid., para. 398.

(vi) In *SolEs,* Claimant asserted that it was entitled to damages based on the reduction in the value of net profit flows to equity investors that had resulted from Spain's implementation of the disputed measures,[44] on the basis of the FiTs. As to Claimant's legitimate expectations, the Tribunal cited *Antin* to reconfirm that "*an investor's legitimate expectations can also arise from provisions of law and regulations and from statements made by or on behalf of the State for the purpose of inducing investment by a class of investors*."[45] The plants were registered with the RAIPRE, respectively, on 10 December 2009 (Badajoz I) and February 2010 (Badajoz II),[46] and Claimant acquired control of them in March 2010. Given that the investment in Spain effectively was made in March 2010 (when Claimant acquired its interest in the plants), the Tribunal reasoned that "*there were no developments between March 2010 and May 2010 that could have altered in a material way the legitimate expectations of a PV investor*".[47] Respondent asserted that the investor was entitled to an RRR only and that that was guaranteed by the new measures. Claimant developed its Alternative Claim on this theory. The Tribunal determined that it was not necessary to discuss the Alternative Claim in that it did not find that Article 10(1) of the ECT entitles Claimant to a particular return.[48] Instead, the Tribunal accepted Claimants' proposal for damages based on a "*but for*" scenario with a 25-year duration of the feed-in tariffs set in 2010 under the Special Regime.[49]

(vii) In *9Ren,* Claimants sought damages using two different models: (i) as diminution in the fair market value of their investments in the five *Solaica* plants (given they had been sold in June 2015); and (ii) as lost profits on their investments in the three *España* Plants on the revenues estimated on the basis of the applicable tariff rates under RD 661/2007 and

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[44] *SolEs*, para. 467.
[45] Ibid., para. 313.
[46] Ibid., para. 135.
[47] Ibid., para. 418.
[48] Ibid., para. 542.
[49] Ibid., para. 544.

RD 1578/2008.[50] Claim (ii) is substantially similar to the *PV Investors*' Primary Claim. Regarding the RRR, the Tribunal concluded that Claimants reasonably relied on a legitimate expectation that the FiT benefits of RD 661/2007 would continue for the useful life of seven of its eight facilities,[51] having registered seven of the eight facilities with the RAIPRE before 29 September 2008,[52] and thus that Spain's decision to abolish the regime of RD 661/2007 was "*inconsistent with the clear terms of RD 661/2007 that granted tariffs for the entire operating life of a facility*."[53] Accordingly, the Tribunal ruled out Respondent's proposal for compensation based on an RRR[54] and accepted Claimant's proposal for damages based on historical performance (under the RD 661/2007 regime).[55] Claimant's date of investment, 23 April 2008, and its efforts to ensure that its projects complied with the FiT requirements (including timely registration under RAIPRE), were significant to the Tribunal in establishing that Claimant would receive the benefits set out in RD 661/2007.[56]

(viii) In *Cube,* Claimants claimed for loss of expected cash flows, on the basis of RD 661/2007, to flow from fixed tariffs and market premiums. Claimants invested in the PV sector (three PV facilities) in April-June 2008 and in the hydroelectric sector (sixteen facilities) in 2011-2012. The Claimants' PV investments in the Puente Génave, San Martín de Pusa and Écija plants were duly registered under RD 661/2007 and the investment in the Rambla plant had been registered under RD 1578/2008.[57] In respect of the commitment expressed by the Spanish Government to the FiT regime, the Tribunal considered that Claimants' expectations that the regime would not be altered were legitimate, since the Spanish

[50] *9REN*, para. 378.
[51] Ibid., paras. 292-299.
[52] Ibid., para. 98, stating that "*Spain announced on 27 September 2007 that RD 661/2007 would close to new investments in PV projects one year later, i.e. new PV facilities would have to obtain final registration under RAIPRE before 29 September 2008 in order to be "grandfathered" under RD 661/2007.*" (internal footnotes excluded); and *ibid*., para. 105, clarifying that the eighth plant was registered with RAIPRE on 23 March 2011 and entitled to payment of the tariff established under RD 1578/2008 and not RD 661/2007.
[53] Ibid., para. 301.
[54] Ibid., para. 407.
[55] Ibid., para. 412.
[56] Ibid., para. 297.
[57] *Cube*, para. 313.

regulatory regime clearly promised that the investments would be subject to certain regulatory principles that "*as a matter of deliberate policy*" were to be maintained in force for a finite length of time.[58] Respondent submitted that Claimants were entitled to an RRR only. The Tribunal ruled that Respondent's assertions could not be substantiated, neither by the language of the ORR (including, e.g., the sole reference to "*reasonable rate of profitability*" in RD 661/2007 Article 44(3)) nor by the accompanying Press Release,[59] because "*[w]hatever the rationale behind the structure of tariffs and premiums set out in RD 661/2007, the clear representation was that the structure would be maintained in the terms set out in the Royal Decree*."[60]

(ix) In *OperaFund,* Claimants, citing *Chrozów Factory* and ILC Articles 31-38, pleaded that Respondent committed an internationally wrongful act, and that damages should put Claimants in the position in which they would have found themselves had Respondent not breached the ECT.[61] The Tribunal, referencing *Novenergia* and *Masdar*, reasoned:

> The Tribunal, therefore, has no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3): "*revisions […] shall not affect facilities for which the functioning certificate had been granted*."[62]

Claimants invested in five PV installations between July 2008 and July 2009, but all of the Claimants' facilities were registered in RAIPRE by 29 September 2008. In reference to Article 44(3) of RD 661/2007,[63] the Tribunal determined that "*the RAIPRE registration is an important additional element in order to assess the legitimate expectations of the investors*" and that "*[s]uch a stabilization promise could be perfected by the registration*

[58] Ibid., para. 388.
[59] Ibid., para. 287.
[60] Ibid., para. 296.
[61] *OperaFund*, para. 605.
[62] Ibid., para 485.
[63] RD 661/2007, Article 44(3): The revisions of the regulated tariff and the upper and lower limits indicated in this section shall not affect facilities for which the commissioning certificate had been granted prior to January 1 of the second year following the year in which the revision had been performed.

of the RE plants to receive the preferential FiT under RD 661/2007."[64] The Tribunal concluded that "*the formal registration led to the investors' entitlement to receive the benefits under RD 661/2007 (including not being subject to regulatory change)*."[65] Respondent also submitted in this arbitration that Claimants were entitled to an RRR only and that these were already guaranteed by the Special Regime. Claimants then submitted an Alternative Claim pleading that the Special Regime did not guarantee an RRR. The Tribunal observed: "*This alternative is not applicable as, above, the Tribunal has accepted Claimants' primary claims for breach of the FET standard and thereby of Article 10(1) of the ECT and thereby dismissed the alternative that Respondent only guaranteed a reasonable return. There is, thus, no need for the Tribunal to determine this alternative claim.*"[66]

(x) In *Infrared*, Claimants submitted that Spain violated their legitimate expectations that the ORR would remain stable (i.e., immutable) throughout the lifespan of the plants or, in the alternative, that Spain violated its FET obligations by abrogating essential elements of the ORR, or at least its transparency obligations.[67] The Tribunal determined that Claimants had legitimate expectations that the plants registered on the RAIPRE would be shielded from subsequent regulatory changes[68] in that they were assured that the regulated tariff and pool plus premium would have continued to apply for the operational lifespan of the plants registered on the RAIPRE.[69] As in *Greentech*, Claimants' expert presented to the Tribunal an alternative calculation of damages based on an RRR,[70] as to which the Tribunal observed:

> […] the pith of the breach here does not consist in a variation of the reasonable rate of return, but rather in the frustration of Claimants' legitimate expectation that the Morón and Olivenza plants would be

[64] *OperaFund*, para. 483.
[65] Ibid., para. 484.
[66] Ibid., para. 604.
[67] *InfraRed*, para. 343.
[68] Ibid., para. 410.
[69] Ibid., para. 451.
[70] Ibid., para. 514.

> shielded from revisions of the regulated tariff, the pool price premium and the applicable lower and upper values contained in RD 661/2007. A valuation that is premised principally on the "*reasonable*" rate of return without regard to the actual remuneration impaired by the Measures at Issue seems equally ill-adapted to the regulatory and legislative landscape in the present case […].[71]

In this case, Infrared invested in two CSP plants in July 2011, which were registered in the RAIPRE in May and December 2012.

(xi) In *Watkins*, Claimants sought restitution and/or compensation for losses to its 2011 investment in the Spanish wind generation sector. The wind farms were duly registered with RAIPRE by 9 December 2010 and the Claimants were entitled to the RD 661/2007 economic regime.[72] In determining that Spain radically altered the applicable legal and regulatory framework[73] the Tribunal rejected Spain's contention that the investors were guaranteed only an RRR in preference to the view developed by *Eiser*, *Novenergia*, *Antin* and *Masdar* over *RREEF* (see xii, *infra*).[74] The Tribunal specifically wrote:

> The Claimants in this case have put forward extensive evidence of contemporaneous documents showing that Spain offered investors a fixed guaranteed return and not just a reasonable return. The Tribunal has considered the contemporaneous evidence and it is not persuaded that the evidence adduced by the Respondent is sufficient for determining a "*reasonable return*" and neither is it in fulfilment of the representations made by the Respondent with regard to the stability of the legal and economic regime that would be applicable to RE projects in order to entice investments into the wind sector. The Tribunal concludes that the Respondent's methodology for determining reasonable rate of return in the light of the amendments to the legislation is, in the Tribunal's view, not based on any identifiable criteria. The Tribunal is therefore of the view that the *RREEF* Decision does not in any way, assist the Respondent in its primary contention that the Claimants were only entitled to a reasonable return on their investments and that in the Tribunal's view, is a very narrow

[71] Ibid., para. 543.
[72] *Watkins,* para. 599.
[73] Ibid., para. 563.
[74] Ibid., para. 500.

> and erroneous interpretation of the *RREEF* Decision.[75] (Emphasis in original.)

With the parties having pled extensively on the matter,[76] the Tribunal wrote further:

> The Tribunal has considered the arguments of the Claimants and the Respondent in respect of the *RREEF* Decision with regard to reasonable return and is of the view that the *RREEF* Decision does not, in any way, assist the Respondent in its contention that the Claimants were only entitled to a reasonable return on their investments and the Tribunal is of the view that the argument advanced by Spain is a very narrow and erroneous interpretation of the *RREEF* Decision, especially with regard to the issue of reasonable return.[77]

Respondent's Alternative Claim also was rejected as a matter of valuation based on the Tribunal's determination on the merits, which accepted the Claimants' Primary Claim that the Claimants had a legitimate expectation to obtain tariffs under RD 661/2007 and not to receive a return that was implicit in those tariffs.[78] Regarding the standard of proof for calculating compensation, the Tribunal agreed with Claimants that "[…] *the standard is to show the existence of damage with reasonable certainty and then only offer a basis on which the Tribunal can, with reasonable confidence, estimate the amount of their loss*".[79] Ultimately, the Tribunal adopted the DCF method proposed by Claimants, which calculated compensation as the difference between the returns in the actual scenario, and the returns under RD 661/2007 of 8% and 9% post-tax for each of the two investments.[80]

6. **Cases in which Claimants prevailed and the Tribunal awarded damages on the basis of the Alternative Claim**:

[75] Ibid., para. 503.
[76] Ibid., paras. 56-59.
[77] Ibid., para. 504.
[78] Ibid., para. 641.
[79] Ibid., para. 683.
[80] Ibid., para. 289.

(i) In *RREEF*, a case involving CSP and wind plants, the Tribunal determined that Respondent breached its obligations under the ECT via application of the NRR. As the applicable legal standard for compensation, a 2-1 majority concluded that the only legitimate expectation of the Claimants was to receive an RRR for their investment.[81] In arriving at this decision, the Tribunal referred to Article 30(4) of Law 54/1997,[82] the preamble of RD 661/2007,[83] and the National Action Plan for Renewable Energy in Spain of 30 June 2010.[84] Notably, in relation to the date of final registration with the RAIPRE,[85] the *RREEF* investments were made on 28 December 2010 (wind farms), 2011 (Arenales CSP Plant) and 2012 (Andasol CSP Plant), hence well after the first regulatory shift from the ORR via the 2010 Decrees[86] and months after the enactment of the National Action Plan for Renewable Energy in Spain of 30 June 2010. As the Tribunal clarified, Claimants' legitimate expectations must be judged by the regime in place at the time of the investment (relying on *Novenergia*).[87] In his dissent, Robert Volterra described Spain's conduct as "*bait and switch*,"[88] regarded Spain's admission that the switch was to reduce profit levels of the investors as fatal to its theory,[89] and stressed that Spain had not proven its assertion that the regulatory

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[81] *RREEF*, para. 386.

[82] Article 30(4) of Law 54/1997 provides:

> 4. The remuneration arrangements for electric power generation installations operating under the special regime shall be supplemented by the payment of a premium under statutory terms set out in regulations […]
>
> > "To work out the premiums, the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account so as to achieve reasonable profitability rates with reference to the cost of money on capital markets."

[83] RD 661/2007, Preamble, provides: "the owners of facilities under the special regime a reasonable return on their investment."

[84] The 2011-2020 *Renewable Energy Plan*, p. 112, provides: "*premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment*." and p. 115, "Review of remuneration: […] [The] remuneration amounts […] may be modified on the basis of technological developments within the sectors market behavior, […], while always guaranteeing reasonable rates of return." See also *RREEF*, paras. 382-383.

[85] Recall registration with the RAIPRE ensured legal entitlement to receive all of RD 661/2007's economic incentives. See Claimants' *Amended Statement of Claim* ("ASoC"), paras. 158, 208.

[86] *RREEF*, para. 392.

[87] Ibid.

[88] Ibid., *Partial Dissenting Opinion of Robert Volterra*, para. 26.

[89] Ibid., para. 28.

restructuring to the subsidy system was made in response to the cost of money in the capital markets (as an objective and variable element to evaluate the concept of a reasonable return),[90] thus leading him to opine that Spain "*breached the ECT in multiple ways, not merely in relation to a 'reasonable rate of return,'*"[91] and to disagree with his fellow arbitrators regarding the scope of the Claimants' legitimate expectations.[92] Whereas the *PV Investors* Claimants unquestionably invested under the ORR (final registration with RAIPRE before 29 September 2008), RREEF invested at a time when the regulatory changes of 2010 already had foreshadowed alteration of the FiT regime following the introduction of more exacting RRR language into the 2011-2020 Renewable Energy Plan.[93] These factors distinguish *RREEF* from *PV Investors* and the eleven cases that have rejected the Alternative Claim.

(ii) In *NextEra*, Claimants asserted, relying on *Chorzow Factory* and Art. 31 of the ILC Articles, that they were entitled to full reparation by means of restitution or full compensation.[94] Claimants started investing in Spain as early as 2007 via a subsidiary of NextEra.[95] Claimants' Primary Claim calculated compensation on the basis of the revenues expected pursuant to the pool plus premium option under Regulatory Framework I. Claimants also presented an Alternative Claim based on Respondent's defense of an RRR. As to the RRR the Tribunal observed that:

> […] the assurances made by the Spanish authorities were not about a reasonable return; they were about the regulatory certainty and stability that NextEra could expect. The denial of legitimate expectations is based on the failure to provide that certainty and security by changing

[90] Ibid., paras. 31, 35. See also *Watkins*, para. 502.
[91] Ibid., para. 22.
[92] Ibid., paras. 37-40, 43-44.
[93] The 2011-2020 *Renewable Energy Plan* provides: "*premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment.*" (at p. 112) and "*Review of remuneration:* […] [The] *remuneration amounts* […] *may be modified on the basis of technological developments within the sectors market behavior,* […]*, while always guaranteeing reasonable rates of return.*" (at p. 115). See also, *RREEF*, para. 383.
[94] *NextEra*, para. 603.
[95] Ibid., para. 168.

fundamentally the regime under which remuneration was to be calculated.[96]

In addressing damages the Tribunal disregarded the DCF method proposed by the Claimants and instead calculated damages in a "*but for*" scenario based on the RD 661/2007 regime because Claimants' Termosol Plants had been in operation only since June 2013 (final registration with RAIPRE for No. 1 and 2 Termosol Plants occurred on 29 May 2013 and 7 June 2013, respectively), i.e., less than a year before the NRR entered into full force, thus making it difficult to calculate future profits based on such a short amount of time.[97] Thus, as with *RREEF*, the circumstances of *PV Investors* and the eleven cases that rejected the Alternative Claim are easily distinguishable from *NextEra,* in that the *PV Investors* Claimants obtained their RAIPRE before 29 September 2008,[98] hence well before the 2010-2013 changes to the Spanish energy regulatory regime.

(iii) In *BayWa*, Claimants argued that they were entitled to full reparation for the harm suffered due to the disputed measures, with damages consisting of the difference in value of the Claimants' investment under the NRR and the ORR scenarios, assuming BayWa had a right to receive payments under RD 661/2007.[99] Claimants also developed an Alternative Claim based on an RRR.[100] The Tribunal, by a 2-1 majority, relying on *RREEF*, held that Claimants were entitled only to an RRR and found that Claimants were already achieving more than an RRR with their wind farms. The majority determined that Spain had breached the ECT because of the clawback provision contained in the NRR, and ordered the parties and their experts to identify the quantum. A significant factor

[96] Ibid., para. 600.
[97] Ibid., paras. 643, 648-650.
[98] ASoC, paras. 208, 445-446. See also, e.g., *Claimants' Witness Statement 1 – Murley*, para. 55; *Claimants' Witness Statement 2 – van der Geest*, para. 30; *Claimants' Witness Statement 3 – Guzmán*, paras. 22-44; *Claimants' Witness Statement* 4 – Tilstone, para. 27; *Claimants' Witness Statement 5 – Rossbach*, para. 56; *Claimants' Witness Statement 6 – Pehle*, para. 30; *Claimants' Witness Statement 7 – Kyte*, para. 22; *Claimants' Witness Statement 8 – Gómez de la Torre*, para. 18; *Claimants' Witness Statement 9 – Collado Arpia*, paras. 18-35; *Claimants' Witness Statement 10 – Labouret*, para. 26; *Claimants' Witness Statement 11 – Schreiber*, para. 29; *Claimants' Witness Statement 12 –Scherer*, para. 27; *Claimants' Witness Statement 13 – Schumann*, para. 22; *Claimants' Witness Statement 14 – Ochsenkühn*, para. 24.
[99] *BayWa*, para. 595.
[100] Ibid., para. 600.

distinguishing *BayWa* from the present case and the eleven cases that have rejected the Alternative Claim is how the investments were generated. The *BayWa* Claimants invested in two wind farm projects during the years 2003-2012 and 2009-2012, respectively, increasing their ownership significantly in 2011,[101] which date (2011) Claimants fixed as the date as of which to judge their legitimate expectations (which evidently is a date much later than that of *PV Investors'* investments).[102] It should be noted as well that BayWa's original investment was made in 1997, when expectations for the investment pre-dated, by many years, the ORR, a point considered by the *BayWa* majority.[103] The source of expectations also differs. The *BayWa* Claimants invested in wind farms, and the *PV Investors* Claimants in photovoltaic plants. The *PV Investors* Claimants' expectations accordingly were informed by different State representations (e.g., the notorious presentation "*The Sun Can Be Yours*"), which did not factor into *Baywa*'s investment-backed expectations into wind. Thus, the *BayWa* majority's determination that the Claimants had no right to the continuation of the Special Regime is not analogous to the present case.

(iv) In *RWE Innogy*, the Tribunal held that the enactment of the NRR breached Article 10(1) of the ECT twice in that: (i) its claw-back provision unduly required Claimants to pay back certain sums received between the adoption of RDL 9/2013 and Order IET 1025/2014 (the "clawback" provision), and (ii) it placed an excessive and disproportionate financial burden on certain of the Claimants' plants. Regarding the second breach, the Tribunal clarified, relying on *RREEF*, that Claimants were entitled only to an RRR of 7.398%, an assessment prompted by a number of factors that are not present as regards *PV Investors*. First, RWE started investing in Spain as early as 2001. Therefore, in a reasoning analogous to *BayWa*, the Tribunal held that at that time the investors could not rely on representations made by the Spanish Government in RD 436/2004 or RD 661/2007. In fact, RWE had invested under the legal framework of RD 2818/98, whose language, the

[101] Ibid., paras. 73-74.
[102] Ibid., para. 350.
[103] Ibid., para. 473.

Tribunal determined, could not have been intended as a statement that incentives would not be changed at some point in the future, and therefore could not reasonably have been relied upon as such.[104] Concerning the second tranche of investments made in June 2008 with the acquisition of the *Urvasco* plants, Claimants were found not to have carried out due diligence on the regulatory risk appropriate to the size of their investment.[105] With respect to investments made from 2010 onwards, the Tribunal considered that at that point in time the investors had been alerted to the prospect that changes were on the horizon.[106] In the present case, however, it is undisputed that the *PV Investors* Claimants relied on the ORR in making their investments in Spain, having met the 29 September 2008 RAIPRE deadline. Second, the *RWE* investments were in hydro and wind, not in solar energy, hence, unlike the *PV Investors*, the *RWE* Claimants could not rely on the representations made by the Spanish Government in respect of the solar and photovoltaic sector. As a result of these factors, the Tribunal rejected *in toto* Claimants' case for a breach of legitimate expectations and resorted to the principle of proportionality to set compensation at an RRR.

7. **Cases in which the Kingdom of Spain has prevailed**:

(i) In *Charanne*, the scope of the dispute was limited to the 2010 measures. The Tribunal first acknowledged that "*a State cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations.*"[107] Ultimately, the Tribunal determined that "*the Claimants could have easily foreseen possible adjustments to the regulatory framework as those introduced by the rules of 2010*."[108] It must be stressed that the analysis in this case was truncated in that the measures taken from 2013 onwards were not considered. This decisional framework readily distinguishes *Charanne* from *PV Investors*.

[104] *RWE Innogy*, para. 488.
[105] Ibid., paras. 510, 513.
[106] Ibid., para. 504.
[107] *Charanne*, para. 486.
[108] Ibid., para. 505.

(ii) In *Isolux*, Claimant invested on 29 October 2012. The Tribunal noted that as of October 2012, the FiT regime was already the object of various studies that made its modification inevitable. In particular, the Tribunal recalled that in March 2012 the National Energy Commission issued a report indicating that the Special Regime was under review, recommending various changes to the regulatory regime. In September of the same year the Spanish Supreme Court stated that "*[t]he reasonable remuneration for investments established by Law 54/1997 does not imply, we repeat, that the remuneration must necessarily be received through the regulated tariff.*"[109] Thus, the context of the Isolux investment was markedly different from that of the *PV Investors*, which had invested in Spain up to five years before Isolux.

(iii) A 2-1 majority in *Stadtwerke* held that the Spanish measures were proportionate and reasonable and that Claimants could not have any expectation that the ORR would have been maintained as it was at the time they invested, relying substantially on Spanish law (which it determined to be relevant in the ECT context).[110] Professor Kaj Hobér dissented, opining that the Claimants' reasonable expectations at the time of their investment included an expectation that there would not be any fundamental and radical changes to the RD 661/2007 regime[111] (and that Spain's contention that Claimants were only entitled to an RRR was incorrect).[112] Timing was a significant factor in this case. The majority evidently was influenced by the fact that while Claimants had invested in Spain in October 2009, their CSP plants were registered in the RAIPRE only in April 2012.[113] *PV Investors* is distinguishable in that all of their investments had been registered with RAIPRE by the 29 September 2008 deadline, thus justifying their legitimate expectations under the ORR.[114]

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[109] *Isolux*, para. 797 (unofficial English translation from Spanish original available at https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/Case-38-Isolux_v._Spain_-_award_dis._opinionEN.pdf, accessed on 7 February 2020).
[110] See *Stadtwerke*, paras. 181, 308.
[111] Ibid., *Dissenting Opinion of Professor Kaj Hobér*, para. 14.
[112] Ibid., para. 15.
[113] Ibid., Section VI(B)(2)(iii)(b)(ii)(e); see also para. 384.
[114] See *supra* footnote 98.

8. The present award is based expressly on *jura novit arbiter*.[115] Though we are not bound by the doctrine of *stare decisis*, I find compelling the jurisprudence formed by these other renewable energy cases involving Spain's history of regulating the field. Eleven of the eighteen Tribunals have granted the Primary Claim over the Alternative Claim, despite having the Alternative Claim presented to them, in circumstances that this Award itself describes as "*broadly similar to the Primary Claim in this arbitration*," citing *Eiser*, *Masdar* and *Novenergia*.[116] All eleven have concluded that Spain had guaranteed that the investors were entitled to the FiT in place at the time of the investment, i.e., the Primary Claim, and could not be limited to an RRR, i.e., the Alternative Claim.[117]

9. As discussed directly above, none of the three cases (*Charanne*, *Isolux* and *Stadtwerke*) in which Spain prevailed is in any way analogous to the present case, due to the markedly different timing of their investments and the consequent difference in those investors' legitimate expectations, considering the contemporaneous state of the Spanish regulatory framework. In *Charanne*, the tribunal did not consider the Spanish measures beyond 2010. In *Isolux*, the investment came at a time when changes to the regulatory regime were evident. In *Stadtwerke*, the RAIPRE registration, which Claimants advanced as concretizing their legitimate expectations, occurred only in 2012, whereas *PV Investors'* legitimate expectations were based on RD 661/2007 inasmuch as their RAIPRE registration had been made by 29 September 2008, following Spain's 27 September 2007 announcement that RD 661/2007 would close to new investments in PV projects one year later.

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[115] *Award*, para. 519.

[116] *Award*, para. 553.

[117] *Eiser*, paras. 433-34, 441; *Novenergia*, paras.673-681, ; *Masdar*, paras. 533, 557; *Antin*, paras. 614, 690-91; *Greentech*, paras. 501, 530-535; *SolEs*, paras. 504, 526; *9REN*, paras. 401-412; *Cube*, paras. 296, 388; *OperaFund*, paras. 594, 604; *Infrared*, paras. 410, 451, 543; *Watkins*, para. 641. See also *NextEra*, paras. 616 and 647-50, where the *NextEra* tribunal accepted the Primary Claim but applied a reasonable rate of return to calculate damages because the NextEra plants had operated under the RD 661/2007 regime for only a few months. The Tribunal declared that it could not use the DCF method since Claimants could not prove what kind of cash flow they could have enjoyed in a "*but for*" scenario. Accordingly, the Tribunal had to use the method proposed by Claimants in their Alternative Claim, which was their expectation of a reasonable rate of return.

10. The Alternative Claim prevailed in four cases (*RREEF*, *NextEra*, *BayWa* and *RWE Innogy*), none of which is in any way analogous to the present case. The *NextEra* Tribunal only applied an RRR because the DCF method advanced with the Claimants' primary claim could not be applied owing to NextEra's late entry into the market. In *RWE Innogy*, the Tribunal's reliance on the principle of proportionality, resulting in an award of an RRR, is distinctly different from the present case, as each turns on legitimate expectations formed at the different times their respective investments were made. The same is true of *BayWa* and *RREEF.*

11. The type of investment also sets these four cases apart from the present case, although the Award makes no effort to reconcile this important reality with its novel, indeed unique, reading of the ORR. Investment type has been a significant factor in ascertaining the claimants' legitimate expectations, which has included review of different sets of regulations applicable to specific types of investments, as well as consideration of different representations and ancillary assurances that targeted specific types of investments. Accordingly, it is well documented in these renewable energy awards that PV facilities differ from CSP, wind and hydro facilities, each of which was governed by different regulations and was the object of different representations by the Government of Spain.[118] None of the four awards granting the Alternative Claim involved PV

[118] In the words of one Spanish official, "*the CSP and PV sectors were different since the former produces more electricity using less subsidies than the latter, which explained the retroactive changes affecting PV facilities*". *Antin*, para. 127. It was also noted in *Antin* that in 2010 CSP plants generated 0.8% of the electricity and received 3% of Special Regime subsidies, whereas PV plants generated 7% of the electricity and received 37% of the Special Regime subsidies. (*Antin*, para. 132.) The *Charanne* Tribunal observed that RD 1578/2008, 1565/2010, and 14/2010 regulated exclusively the PV industry, whereas RD 1614 2010 regulated solar, thermal and wind technologies and not PV. (*Charanne*, para. 154-155.) The *Cube* Tribunal noted that the regulation of CSP also involves "*different regulatory incidents*" from PV. (*Cube*, para. 508.) Similarly, a number of presentations and ancillary documents contemporaneous to the implementation of the ORR addressed specifically PV investors, e.g., the *Renewable Energy Promotion Plan 2000 – 2010* ("PER 2000 – 2010") and the notorious presentation "*The Sun can be Yours*."

installations.[119] In fact, the tribunals in all cases involving PV installations invested under the ORR have granted the Primary Claim and rejected the Alternative Claim.[120]

12. The most recent *Watkins* Tribunal also was critical of the *RREEF* award, particularly concerning that Tribunal's finding that Spain committed to provide an RRR to investors, which it described as "*not supported by a number of awards which have found that Spain did promise investors that it would not alter retroactively the specific tariffs of RD 661/2007 and RD 1614/2010*", instead concluding that "*the persuasive views set out in the decisions of Eiser, Novenergia, Antin and Masdar*" should be favored.[121] Further, relying on Robert Volterra's dissent in *RREEF,* it criticized the conclusion of his co-arbitrators that an RRR was not fixed and could evolve depending on the cost of money in the capital market, for being "*inconsistent with the evidence that was before the RREEF tribunal especially as the cost of money in the capital markets was substantially the same in 2007 when the RD 661/2007 regime was implemented and in 2013 when the new regime was implemented*."[122]

13. *Errare humanum est, perseverare autem diabolicum*.

14. Clearly the timing of the respective investments has been a critical distinguishing factor in ascertaining the legitimate expectations of investors, hence further reason to view the present case in a far different light from the four cases that granted the Alternative Claim. The pre-RD 661/2007 investments of *RWE Innogy* and *BayWa* indisputably affected those Tribunals' assessment of the Claimants' legitimate expectations as not being fixed by the RD 661-2007 regime. Similarly, investments made once regulatory changes evidently were on the way, as the *BayWa* and *RREEF* Tribunals found, could not legitimately expect

[119] *RREEF* involved CSP and wind, *BayWa* involved wind, *RWE Innogy* involved hydro and wind and *NextEra* involved CSP plants.
[120] See *Novenergia*, paras. 820-21; *Greentech*, paras. 485-86; *SolEs*, para. 526; *9Ren*, para. 407; *Cube*, para. 473; *OperaFund*, para. 604.
[121] *Watkins,* para. 500.
[122] Ibid., para. 502.

statutorily fixed returns. The *PV Investors*' Primary Claim, on the contrary, is not affected adversely by either the timing of their investments or their type. They invested between 2007 and 2009, but all their investments were registered with the RAIPRE before the 29 September 2008 deadline, guaranteeing each of their PV installations full economic benefits under RD 661/2007. Indeed, the timing of the RAIPRE registration has had a significant impact in a series of these Spanish RE cases. The *Antin*,[123] *Masdar*,[124] *Novenergia*,[125] and *OperaFund*[126] Tribunals all found that registration in RAIPRE was not simply an administrative requirement, but actually gave rise to the legitimate expectations of investors so registered. I refer to the *Novenergia* tribunal's finding on this point:

> 665. The Tribunal considers that Law 54/1997 and RD 661/2007 were clearly enacted with the objective of ensuring that the Kingdom of Spain achieved its emissions and RE targets. In order to achieve that objective the Kingdom of Spain created a very favourable investment climate for RE investors, and the nucleus of such investment climate was the Special Regime. *The requirements placed on the PV plants to qualify for the Special Regime were limited to registration with the RAIPRE, a requirement which all of the PV Plants had met within the prescribed cut-off date*.
>
> 666. In the Tribunal's view, a number of relevant statements or assurances were made by the Respondent with respect to the Special Regime, as initially introduced through Law 54/1997 and further developed by RD 661/2007 and legislation in between:
>
>> (e) In Law 54/1997, it was stated that RE facilities admitted to the Special Regime would be authorized to incorporate "all the energy produced by them into the system" and would "obtain reasonable rates of return" as set by the government.
>>
>> (f) RD 436/2004 was enacted as expressly aiming at "provid[ing] those who have decided or will decide in the near future to opt for the special regime with a durable, objective, and transparent framework".

[123] *Antin*, para. 552.
[124] *Masdar*, paras. 512-520.
[125] *Novenergia*, paras. 665-667.
[126] *OperaFund*, para. 483.

> (g) Under RD 436/2004, PV plants were entitled to incorporate into the grid all of the electric energy produced in exchange for a FIT or premium for the lifespan of the PV plants.
>
> (h) Under RD 661/2007, which replaced RD 436/2004, PV plants enrolled in the RAIPRE before the cut-off date would be entitled to (i) incorporate all of their net production into the grid; (ii) a FIT that would only be updated in accordance with the national CPI; and (iii) receive a fixed FIT for the lifespan of the PV plants.

667. These were the legal sources in force in the Kingdom of Spain when the Claimant made its investment and the Tribunal agrees with the Claimant that *the above statements and assurances were indeed aimed at incentivising companies to invest heavily in the Spanish electricity sector and that the Claimant made its investment in reliance of the terms provided in RD 661/2007. The commitment from the Kingdom of Spain could not have been clearer.* A considerable number of RE companies also invested in reliance on these statements and assurances.[127] (Citations omitted.) (Emphasis added.)

15. Similarly, the *OperaFund* Tribunal, referring to Article 44(3) of RD 661/2007,[128] explained:

> In view of this provision, for the present case, the RAIPRE registration is an important additional element in order to assess the legitimate expectations of the investors . . . .
>
> Claimants' investments were made between July 2008 and July 2009, in reliance upon the fact that the PV plants were finally registered in the RAIPRE under RD 661/2007 and granted the RD 661/2007 FIT economic rights. Thus, *the formal registration led to the investors' entitlement to receive the benefits under RD 661/2007 (including not being subject to regulatory change).*
>
> The Tribunal, therefore, has no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3): "revisions […] shall not affect facilities for which the functioning certificate had been granted." As put by the

[127] *Novenergia*, paras. 665-667.

[128] Article 44(3) of RD 661/2007 provides: "The revisions of the regulated tariff and the upper and lower limits indicated in this section shall not affect facilities for which the commissioning certificate had been granted prior to January 1 of the second year following the year in which the revision had been performed."

Novenergia tribunal, "RD 661/2007 was so adamantly clear that its understanding by common readers did not require a particularly sophisticated analysis."[129] (Citations omitted.) (Emphasis added.)

16. I accordingly see no reason to depart from such sound reasoning, repeatedly applied without exception by eleven predecessor tribunals confronting the same problem, as my esteemed colleagues have done. Against such a record it is intellectually disingenuous to say, as the Award does in paragraph 555, that "[*i*]*t is not entirely unsurprising, and indeed to some extent to be expected in a system based on ad hoc adjudication, that arbitral tribunals may assess relevant circumstances in different ways*." One would not expect a tribunal that declaredly[130] operates on the principle of "*jura novit arbiter*" to diverge from, indeed utterly reject, eleven predecessor tribunals' unanimous awards that addressed the same issue. Focusing even more narrowly on the sub-category of those eleven cases to which the present case belongs, in every one of the four of them that, like the *PV Investors*, specifically involved PV installations and timely RAIPRE registration (i.e., before 29 September 2008), the Primary Claim has prevailed over the Alternative Claim.[131] In other words, *PV Investors, Novenergia*, *Cube*, *9Ren*, and *OperaFund* all have involved the same technology, close timing of investments, the same incentives, the same compliance with RAIPRE registration deadline, the same assurances, the same regulations, the same investment treaty, the same host State, and the same measures in dispute. Logic dictates that the *PV Investors* would harbor the same expectations and that this sub-category of the eleven cases be followed absent compelling contrary reasons. The present Award, regrettably, states no such compelling reason.

17. Although the Primary Claim itself has not been quantified in these proceedings, due to the Tribunal's extended excursion into and concentration on the Alternative Claim, I am of the opinion that a proxy offered by the Claimants may be used at least to approximate

[129] *OperaFund*, paras. 483-485.
[130] Award, para. 519.
[131] See *Novenergia*, paras. 820-21; *9Ren*, para. 407; *Cube*, para. 473; *OperaFund,* para. 604.

the Primary Claim damages of which this Award deprives the *PV Investors*.[132] The *Novenergia* Tribunal awarded damages on a €/MW of PV capacity basis. The damages awarded in *Novenergía* were €53.3 million (excluding interest) and corresponded to an installed capacity of 18.8 MW.[133] This leads to €2.84 million in damages for each MW of capacity. If one assumes that *PV Investors* have 222.4 MW of capacity, and that each MW is valued at €2.84 million, Claimants would receive approximately €632 million in damages instead of €91.1 million, a difference of €540.9 million from the sum provided under the Alternative Claim in this Award, representing a mere recovery of less than seven percent of what Claimants' legitimate expectations should have generated in damages.

28 February 2020

Date

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[132] *Claimants' Second PO 12 Post-Hearing Brief dated 29 November 2018*, paras. 10-11, n. 31.
[133] *Novenergia*, para. 483.