

IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF
COMMERCE RULES OF ARBITRATION IN FORCE AS FROM 1 JANUARY 2017

SCC CASE V 2017/060

BETWEEN

FREIF EUROWIND HOLDINGS LTD.
(UNITED KINGDOM)

Claimant

– and –

KINGDOM OF SPAIN

Respondent

FINAL AWARD

Professor Douglas Jones AO, Chairperson

Suite 1B, Level 3, 139 Macquarie St, Sydney, NSW, 2000, AUSTRALIA

Professor Thomas Clay, Co-Arbitrator

242, boulevard Raspail, FR-75014 Paris, FRANCE

Mr C. Mark Baker, Co-Arbitrator

1301 McKinney St Suite 5100, Houston, TX 77010, UNITED STATES

Date of this Award: *8th March 2021*

Seat of Arbitration: Stockholm, Sweden

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A TABLE OF ABBREVIATIONS

Abbreviation	Definition
2010 Agreement	An alleged agreement entered into between Spain and the wind and thermosolar associations which led to the implementation of RD 1614/2010.
2011 SPA	Share purchase and share agreement Renovalia Energy S.A. and Renovalia Wind 2 S.L. and FREIF Eurowind Holdings Limited as Vendor and New Leads Investment, S.L.U. as Purchaser dated 14 October 2011.
2019 SPA	“Project Castilla” Share Sale and Purchase Agreement between RENOVALIA RESERVE SL (Seller), ARDIAN (Purchaser) and GEPIF and RENOVALIA WIND 2 (Shareholders) dated 1 May 2019.
Achmea	Judgment of ECJ, Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018.
AEE	Spanish Wind Energy Association
AET	Average Electricity Tariff
APPA	Association of Renewable Energy Producers
Arbitration	The present dispute before the Tribunal
Ardian	Ardian Infrastructure Fund V S.C.A., SICAR, and Ardian Infrastructure Fund V B S.C.S., SICAV-RAIF together.
Asset Sale	The sale of FREIF and Renovalia’s shares and shareholder loan interests in Renovalia Reserve to Ardian Infrastructure Fund V S.C.A., SICAR, and Ardian Infrastructure Fund V B S.C.S., SICAV-RAIF on 1 May 2019.
BIT	Bilateral Investment Treaty
Claimant	FREIF Eurowind Holdings Ltd
CNE	National Energy Commission. The Regulatory Body of the energy systems in Spain (as from 7 October 2013, its functions have been assumed by the National Markets and Competition Commission).
CPI	Consumer Price Index
DCF	Discounted cash flow
EC	European Commission

ECJ	European Court of Justice
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and equitable treatment under Article 10(1) of the ECT
FREIF	FREIF Eurowind Holdings Ltd
IAC	International Arbitration Centre, London
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IDAE	Institute for the Diversification and Saving of Energy
IRR	Internal Rate of Return
Linklaters Memorandum	Linklaters Regulatory Risk Memorandum dated 8 June 2011
New Regulatory Regime	RDL 9/2013, Law 24/2013, RD 413/2014, and MO IET/1045/2014
ORIE	Regional Economic Integration Organisation
Original Regulatory Regime	Law 54/1997 and related laws and regulations including, RD 2818/1998, RD 436/2004, RDL 7/2006, and RD 661/2007, RDL 6/2009, RD 1565/2010, RD 1614/2010, and RDL 14/2010.
PANER	National Renewable Energy Action Plan in Spain 2011-2020
Parties	FREIF and Spain
PER	Renewable Energy Plan in Spain 2005-2010
RAIPRE	Administrative Registry for Special Regime Generation Facilities
RD	Royal Decree
RDL	Royal Decree-Law
Respondent	The Kingdom of Spain
SCC	Arbitration Institution of the Stockholm Chamber of Commerce
SCC Board	Board of Directors of the SCC
SCC Rules	Arbitration Rules of the SCC in force as from 1 January 2017.

SES	Spanish Electricity System
Spain	The Kingdom of Spain
Spanish Lawsuits	Contentious-Administrative Appeal Application dated 9 September 2014 filed by DEMEPI before the Spanish Supreme Court against Royal Decree 413/2004 and Ministerial Order 1045/2014.13, and Contentious-Administrative Appeal Application filed by EACLM and ENERDUERO on 9 September 2014 before the Spanish Supreme Court against Royal Decree 413/2004 and Ministerial Order 1045/201416.
Special Regime	A regime governing electricity generators from renewable energy sources, cogeneration, and waste facilities under 100 MW, created by RD 2366/1994.
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Tribunal	Professor Douglas Jones AO, Professor Thomas Clay and Professor Dr Kaj Hobér until 14 December 2019. Professor Douglas Jones AO, Professor Thomas Clay and Mr C. Mark Baker from 7 January 2020.
TVPEE	Tax on the value of the production of electrical energy. Created with validity beginning 1 January 2013 by Act 15/2012, and governed by Articles 1 to 11 of said Act 15/2012.
VCLT	Vienna Convention on the Law of Treaties

B SUMMARY OF AWARD

1. This Arbitration concerns legislative and regulatory guarantees and commitments that Spain implemented from 2004 through 2010 to incentivise substantial investment in its renewable energy sector, and changes to its regulatory regime thereafter.
2. In December 2011, FREIF Eurowind Holdings Ltd. (**FREIF**) purchased a 50% preferred equity interest in a portfolio of six operating wind parks with a total capacity of 244 MW. In 2012, the Spanish Government made alterations to the legal framework which had supported the scheme of economic incentives. This led FREIF to file a Request for Arbitration on 21 March 2017, pursuant to the terms of the Energy Charter Treaty (**ECT**).
3. FREIF's position is that the Kingdom of Spain (**Spain**) reneged on its guarantees and commitments once it had reaped the benefits of the investments it had attracted. These actions resulted in substantial detriment to FREIF and many other investors in the renewable energy sector that had similarly relied upon Spain's promises. In so doing, Spain is alleged to have violated the ECT and related rules of international law that protected FREIF's investments. FREIF's claim focuses on three principal legal standards which it says were violated: (i) the ECT's "fair and equitable treatment" provision; (ii) its "impairment" clause; and (iii) its "umbrella" clause. Spain is therefore liable to FREIF for the damages it caused to the investments as a result of its conduct.
4. Spain, in defence, contends that it has not in any way breached the obligations which it assumed at an international level under the ECT. It contends that Spain has always exercised its regulatory power fairly and proportionately to ensure the sustainability and balance of the Spanish Electricity System (**SES**) and the reasonable return for renewable energy plants. Spain has thus not violated the ECT or any other rules of international law. Additionally, it contends that the Tribunal does not have jurisdiction to decide this dispute on three separate grounds.
5. For the reasons set out in this Award at Parts N4, O3, P5, Q6, R5 and S3, and pursuant to the Tribunal's dispositive orders at Part T, the Tribunal finds that:
 - (a) it has jurisdiction under the ECT for all of FREIF's claims, with the exception that it has no jurisdiction to determine whether the tax imposed by Law 15/2012 violates Spain's obligations to FREIF's investment under the ECT.
 - (b) Spain has not violated Part III of the ECT and international law with respect to FREIF's investments.
 - (c) FREIF is to pay Spain the costs it has incurred and Spain's share of the Costs of the Arbitration. Simple interest shall accrue from the date of the award to the date of payment at the rate of the Spanish Government 10-year bond yield.

C PARTIES

6. The Parties to this Arbitration are as follows.

C1 Claimant

7. The Claimant is FREIF Eurowind Holdings Ltd (either “**FREIF**” or “**the Claimant**”), a private limited liability company incorporated under the laws of England under registration number 7803962, whose address is 12 Throgmorton Ave, London EC2N 2DL, United Kingdom.¹

C2 Respondent

8. The Respondent is the Kingdom of Spain (either “**Spain**” or “**the Respondent**”).

¹ FREIF’s Statement of Claim, [28].

D PARTIES' LEGAL REPRESENTATIVES

9. The Parties' legal representatives in this Arbitration are as follows.

D1 FREIF's Legal Representatives

10. FREIF is represented by:²

- (a) Mr Kenneth R. Fleuriet;
- (b) Mr Reginald R. Smith;
- (c) Mr Kevin D. Mohr;
- (d) Ms Amy Roebuck Frey;
- (e) Ms Héloïse Hervé;
- (f) Mr Christopher S. Smith;
- (g) Mr Enrique J. Molina; and
- (h) Ms Isabel San Martín

of King & Spalding, with its offices at 1700 Pennsylvania Ave., NW 2nd Floor Washington, D.C. 20006, USA; 1100 Louisiana Street, Suite 4000, Houston, Texas, 77002, USA; and 12 Cours Albert 1er, 75008, Paris, France; and

- (i) Ms Verónica Romaní Sancho;
- (j) Mr Luis Gil Bueno;
- (k) Ms Inés Vázquez García;
- (l) Ms Teresa Gutiérrez Chacón;
- (m) Ms Inés Puig-Samper; and
- (n) Ms Cristina Matia Garay.

of Gómez-Acebo & Pombo, Castellana, 216, 28046, Madrid, Spain.

D2 Spain's Legal Representatives

11. Spain is represented by:³

- (a) Mr José Manuel Gutiérrez Delgado;
- (b) Ms Gabriela Cerdeiras Megias;

² FREIF's Communication No. 85, dated 24 February 2021.

³ Spain's Communication No. 64, dated 24 February 2021.

- (c) Mr Pablo Elena Abad;
- (d) Ms Lorena Fatas Pérez;
- (e) Mr Antolín Fernández Antuña;
- (f) Mr Roberto Fernández Castilla;
- (g) Ms Ana Fernández-Daza Alvarez;
- (h) Ms Patricia Froehlingsdorf Nicolás;
- (i) Ms María del Socorro Garrido Moreno;
- (j) Mr Rafael Gil Nievas;
- (k) Ms Lourdes Martinez de Victoria Gómez;
- (l) Ms Mónica Moraleda Saceda;
- (m) Ms Elena Oñoro Sainz;
- (n) Mr Mariano Rojo Pérez;
- (o) Mr Diego Santacruz Descartín;
- (p) Ms Alicia Segovia Marco; and
- (q) Mr Alberto Torró Molés

of the Attorney General's Office of the Ministry of Justice, with its offices at Marqués de la Ensenada, 14-16, 2ª planta, 28004, Madrid, Spain.

E ARBITRATION AGREEMENT

12. This Arbitration is brought pursuant to Article 26(4)(c) of the ECT, in which the Parties consented to submitting disputes to international arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC**). Article 26 of the ECT provides in full:

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

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and

Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and

(iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) 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.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is

controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

13. Pursuant to Article 25(1) of the SCC Rules in force as from 1 January 2017 (**SCC Rules**) and in accordance with the decision of the SCC Board of Directors (**SCC Board**), the Seat of the Arbitration is Stockholm.⁴
14. The Parties agreed that English (selected by FREIF) and Spanish (selected by Spain) are the languages of the Arbitration.⁵

⁴ SCC's Letter to the Parties, dated 13 July 2017.

⁵ Procedural Order No. 1, dated 23 December 2017, [8.1].

F ARBITRAL TRIBUNAL

15. Pursuant to Articles 12 and 13 of the SCC Rules, the Parties agreed that the Tribunal should consist of three arbitrators.
16. The Tribunal consists of:
 - (a) Mr C. Mark Baker, who was appointed as Co-Arbitrator by FREIF on 7 January 2020 pursuant to Article 21(1) of the SCC Rules.⁶
 - (b) Professor Thomas Clay who was appointed as Co-Arbitrator by Spain on 22 May 2017, pursuant to Article 17(4) of the SCC Rules;⁷ and
 - (c) Professor Douglas Jones AO who was appointed as Chairperson by the SCC Board on 10 October 2017, pursuant to Article 17(4) of the SCC Rules.⁸
17. Professor Douglas Jones AO, Professor Thomas Clay and Mr C. Mark Baker together constitute the Tribunal.
18. Professor Dr Kaj Hobér was a member of the Tribunal from the time of his appointment as Co-Arbitrator by FREIF on 21 March 2017 until 19 December 2019, when the SCC Board released him from appointment following a successful challenge made by Spain.⁹

⁶ FREIF's Unnumbered Communication, dated 7 January 2020.

⁷ Spain's Answer to the Request for Arbitration, dated 22 May 2017.

⁸ Letter from the SCC to the Parties, dated 10 October 2017.

⁹ FREIF's Request for Arbitration, dated 21 March 2017; Letter from the SCC to the Parties, dated 19 December 2019.

G PROCEDURAL HISTORY

19. In this portion of the Award, the Tribunal sets out the procedural history of this Arbitration. For the sake of clarity and economy, minor matters such as discussions on logistics and schedule adjustments have been omitted, and the procedural history has been organised thematically rather than on a strictly chronological basis.

G1 Commencement of the Arbitration

G1.1 Exchange of Initial Notice of Arbitration and Answer

20. On 21 March 2017, FREIF submitted its Request for Arbitration to Spain and the SCC.

21. On 22 May 2017, Spain submitted its Answer to the Request for Arbitration to FREIF and the SCC.

G1.2 Constitution of the Tribunal

22. As already noted, the Parties' nominated arbitrators, Professor Thomas Clay and Professor Dr Kaj Hobér were appointed as Co-Arbitrators. The Chairperson, Professor Douglas Jones AO, was appointed by the SCC Board pursuant to Article 17(4) of the SCC Rules.

G1.3 Establishing the Conduct of the Arbitration and Drafting Procedural Order No.1

23. On 25 October 2017, the Tribunal made its first communication to the Parties.¹⁰ Amongst other things, this communication requested the Parties to:

- (a) provide comments on certain matters for procedural directions; and
- (b) provide the Tribunal with proof of authority granted to its representatives in these proceedings in the form of a duly executed power of attorney.

24. FREIF provided its Power of Attorney on 27 October 2017.¹¹ On 2 November 2017, Spain notified the Tribunal that its State Attorneys held an express mandate to represent the Kingdom of Spain under Spanish legislation and did not require a power of attorney.¹²

25. FREIF wrote to the Tribunal on behalf of the Parties on 2 November 2017 requesting an extension of the deadline to provide the Parties' responses on the matters for procedural direction.¹³ The Parties provided their positions on the matters for procedural direction on 6 November 2017.¹⁴

¹⁰ Tribunal's Communication No. 1, dated 25 October 2017.

¹¹ FREIF's Communication No. 1, dated 27 October 2017.

¹² Spain's Unnumbered Communication, dated 2 November 2017.

¹³ FREIF's Communication No. 2, dated 1 November 2017; Tribunal's Communication No. 3, dated 1 November 2017.

¹⁴ FREIF's Communication No. 3, dated 6 November 2017; Spain's Unnumbered Communication, dated 6 November 2017.

26. After receipt of the Parties' responses, on 10 November 2017, the Tribunal provided a draft Procedural Order No. 1 for the Parties' consideration and comment by 30 November 2017.¹⁵ After a short delay,¹⁶ the Parties provided their comments on draft Procedural Order No. 1 on 1 December 2017.¹⁷

G1.4 Case Management Conference and Finalisation of Procedural Order No. 1

27. In the light of the Parties' remaining areas of disagreement on the procedural matters, the Tribunal proposed that an initial Case Management Conference ('**CMC**') be held via teleconference.¹⁸ After confirming the Parties' availabilities,¹⁹ the Tribunal scheduled the CMC for 12 December 2017.²⁰ Spain informed the Tribunal on 23 November 2017 that it intended to use the Spanish language during the CMC and requested that translation services be available to conduct the CMC.²¹

28. Subsequently, the Tribunal requested that the Parties agree on the provision of translation and the preparation of transcripts in English and Spanish.²² These services were provided by the International Centre for Settlement of Investment Disputes (**ICSID**) translation services which resulted in moving the date for the call²³ to 13 December 2017.²⁴ The Tribunal also requested clarification as to whether ICSID would provide transcript services.²⁵

29. On 7 December 2017, the Tribunal issued a draft agenda for the CMC²⁶ and requested the Parties' comments. These comments were provided by FREIF on 11 December 2017.²⁷ After again requesting comments from Spain,²⁸ Spain provided its comments on the draft agenda and confirmed that transcript services would be provided by ICSID on 12 December 2017.²⁹ On the same day, the Tribunal issued a finalised agenda for the CMC.³⁰

30. Following the CMC, the Tribunal issued Tribunal's Communication No. 15 on 14 December 2017, detailing the outcomes of the CMC.³¹ The Tribunal enclosed a draft of Procedural Order No. 1 and invited the Parties to comment by 20 December 2017.

¹⁵ Tribunal's Communication No. 5, dated 10 November 2017.

¹⁶ FREIF's Communication No. 6, dated 30 November 2017; Tribunal's Communication No. 8, dated 30 November 2017.

¹⁷ Spain's Unnumbered Communication, dated 1 December 2017; FREIF's Communication No. 7, dated 1 December 2017.

¹⁸ Tribunal's Communication No. 5, dated 10 November 2017.

¹⁹ FREIF's Communication No. 5, dated 10 November 2017; Spain's Unnumbered Communication, dated 13 November 2017.

²⁰ Tribunal's Communication No. 7, dated 22 November 2017.

²¹ Spain's Unnumbered Communication, dated 23 November 2017.

²² Tribunal's Communication No. 8, dated 24 November 2017.

²³ Spain's Unnumbered Communication, dated 1 December 2017.

²⁴ Tribunal's Communication No. 9, dated 3 December 2017; FREIF's Communication No. 8, dated 4 December 2017; Tribunal's Communication No. 10, dated 4 December 2017; Spain's Unnumbered Communication, dated 5 December 2017.

²⁵ Tribunal's Communication No. 11, dated 5 December 2017.

²⁶ Tribunal's Communication No. 12, dated 7 December 2017.

²⁷ FREIF's Communication No. 9, dated 11 December 2017.

²⁸ Tribunal's Communication No. 13, dated 12 December 2017.

²⁹ Spain's Unnumbered Communication, dated 12 December 2017.

³⁰ Tribunal's Communication No. 14, dated 12 December 2017.

³¹ Tribunal's Communication No. 15, dated 14 December 2017.

After some delay,³² the Parties both advised on 22 December 2017 that they had no further comments.³³ On 23 December 2017, the Tribunal issued Procedural Order No. 1.³⁴

31. Among other procedural matters, Procedural Order No. 1 confirmed that the Main Evidentiary Hearing was to occur in Paris from 30 September to 4 October 2019. The Tribunal also enquired as to whether the Parties would be agreeable to bearing the expense of a higher per diem equivalent to that provided by the ICC, should the Main Evidentiary Hearing be held in Paris.³⁵ The Parties confirmed that they had no objections.³⁶
32. The Tribunal also requested that Spain provide the transcript of CMC proceedings, produced by ICSID.³⁷ After some technical delays,³⁸ the English transcript was provided on 4 January 2018.³⁹

G1.5 Respondent's Request for Chairperson's Resignation

33. At the CMC on 13 December 2017, the Respondent made a request that Professor Jones resign as Chairman of the Tribunal on the basis that he is unable to speak the Spanish language. The Parties subsequently provided written submissions on the topic of the request.⁴⁰
34. On 5 January 2018, Professor Jones provided his decision on his continued role as Tribunal Chairperson under cover of Tribunal's Communication No. 21 and decided not to resign unless the Parties jointly agreed to appoint a replacement Chairperson bilingual in English and Spanish.⁴¹ An extract of Professor Jones' decision is provided below:

I am unconvinced that the interests of the Parties or the fair and proper conduct of the arbitration require me to step down. In any event, I consider that there are some major matters of relevance which tend towards the conclusion that I should remain as Chairman.

First, there is an inevitable cost and delay associated with my resignation. The Parties or the SCC would then have to agree to a new Chairman, at a time when Procedural Order No. 1 has just been formally issued, dates have been set and reserved for various matters, and the arbitration is commencing. Restarting this whole process

³² Tribunal's Communication No. 18, dated 22 December 2017.

³³ Spain's Unnumbered Communication, dated 22 December 2017.

³⁴ Tribunal's Communication No. 20, dated 23 December 2017.

³⁵ Tribunal's Communication No. 5, dated 10 November 2017.

³⁶ FREIF's Communication No. 5, dated 10 November 2017.

³⁷ Tribunal's Communication No. 17, dated 18 December 2017.

³⁸ Spain's Unnumbered Communication, dated 18 December 2017; Spain's Unnumbered Communication, dated 22 December 2017; Tribunal's Communication No. 19, dated 22 December 2017.

³⁹ Spain's Unnumbered Communication, dated 4 January 2018.

⁴⁰ FREIF's Communication No. 10, dated 14 December 2017; Tribunal's Communication No. 15, dated 15 December 2017; Spain's Unnumbered Communication, dated 22 December 2017.

⁴¹ Tribunal's Communication No. 21, dated 5 January 2018.

could delay the proceedings by many months, and as the adage goes, 'justice delayed is justice denied'.

Second, there is no guarantee that if I resign, another Spanish-speaking Chairman will be found. In this regard, it is noted that the SCC unsuccessfully attempted to find a Spanish-speaking arbitrator.

Consequently, when I weigh together the high likelihood that my resignation would cause inconvenience together with the low likelihood of finding a new Chairman proficient in Spanish, alongside the matters discussed above regarding both Parties' ability to receive a fair Hearing, I conclude that it would not be in the interests of the efficient, economical and expeditious resolution of the arbitration for me to resign my position.

I should however make it clear that were the Parties to agree upon a replacement Chair bilingual in English and Spanish, I would accede readily to their joint request to resign.

G1.6 Confidentiality and Procedural Order No. 2

35. On 4 January 2018, FREIF provided its response to Spain's allegations relating to confidentiality of proceedings, which were initially raised during the CMC of 13 December 2017.⁴² The Tribunal invited Spain to comment⁴³ and received those comments on 18 January 2018.⁴⁴ On 23 January 2018, the Tribunal wrote to the Parties, drawing the Parties attention to confidentiality provisions in the SCC Rules.⁴⁵

36. After receiving further submissions from the Parties,⁴⁶ the Tribunal issued its ruling on the confidentiality provisions in favour of Spain.⁴⁷ The Tribunal proposed to formalise its ruling in Procedural Order No. 2 and requested the Parties' comment on the proposed text. The Parties confirmed that they had no comments⁴⁸ and Procedural Order No. 2 was issued on 9 February 2018,⁴⁹ containing the following provisions:

2.1 Pursuant to Article 3 of the SCC Arbitration Rules, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.

2.2 The Parties, the SCC, the Arbitral Tribunal and Administrative Secretary of the Arbitral Tribunal shall maintain the confidentiality of all oral and written submissions by the Parties or their witnesses and experts and their accompanying documents but not of the Arbitration and the award.

⁴² FREIF's Communication No. 12, dated 4 November 2017.

⁴³ Tribunal's Communication No. 22, dated 5 January 2018.

⁴⁴ Spain's Unnumbered Communication, dated 18 January 2018.

⁴⁵ Tribunal's Communication No. 23, dated 23 January 2018.

⁴⁶ Spain's Communication No. 1, dated 2 February 2018; FREIF's Unnumbered Communication, dated 2 February 2018.

⁴⁷ Tribunal's Communication No. 24, dated 5 February 2018.

⁴⁸ FREIF's Unnumbered Communication, dated 9 February 2018; Spain's Communication No. 2, dated 9 February 2018.

⁴⁹ Tribunal's Communication No. 25, dated 9 February 2018.

G1.7 Appointment of Administrative Secretary

37. After consulting with the Parties and receiving no objection,⁵⁰ the Tribunal confirmed the appointment of Ms Kathleen Morris as Administrative Secretary on 6 November 2017.⁵¹ Subsequently, the Parties also agreed upon the proposed tasks that the Administrative Secretary may perform.⁵²
38. On 21 January 2020, the Tribunal wrote to the Parties proposing Ms Anne Wang as a replacement to Ms Kathleen Morris in the role of Administrative Secretary.⁵³ Spain stated on 27 January 2020 that it had no objection to the appointment of an Administrative Secretary as a general principle. However, it was concerned with Ms Wang's lack of knowledge of the Spanish language. Spain therefore requested that the Tribunal to consider the possibility of appointing a person who is able to use both procedural languages as working languages.⁵⁴ The Tribunal notified the Parties that due to the SCC policy, whereby the Administrative Secretary is compensated from the fees of the Tribunal, the Tribunal is not in a position to fund the appointment of a person who is able to use both procedural languages as working languages.⁵⁵ Accordingly, the Tribunal indicated that it would not appoint a replacement Administrative Secretary if Spain maintained its objection to Ms Wang.
39. Spain clarified that it did not intend to raise its concerns as an "all or nothing" discussion⁵⁶ and the Tribunal provided additional explanation of its position.⁵⁷ Spain subsequently withdrew its objection to the appointment of Ms Wang but clarified that this withdrawal must not be interpreted as a waiver of Spain's position regarding the need for the tribunals Hearing its cases to be able to use Spanish as a working language.⁵⁸ Accordingly, Ms Wang's appointment as Administrative Secretary was confirmed on 31 January 2020, on the basis that the Chairperson will bear her fees and that the Parties agree to meeting her accommodation expenses in Paris for the Evidentiary Hearing.⁵⁹ Ultimately, no such accommodation expenses were incurred as the Hearing was held by virtual means as recounted in Part G5 below.

G2 Exchange of Pleadings

G2.1 Primary Exchanges of Case

40. On 5 April 2018, FREIF wrote to the Tribunal requesting an extension to the deadline for submission of FREIF's Statement of Claim, which had been scheduled for the

⁵⁰ SCC's Letter to the Tribunal, dated 2 November 2017.

⁵¹ Tribunal's Communication No. 4, dated 6 November 2017.

⁵² FREIF's Communication No. 4, dated 9 November 2017; Spain's Unnumbered Communication, dated 10 November 2017; Tribunal's Communication No. 6, dated 11 November 2017.

⁵³ Tribunal's Communication No. 65, dated 21 January 2020.

⁵⁴ Spain's Communication No. 25, dated 27 January 2020.

⁵⁵ Tribunal's Communication No. 66, dated 28 January 2020.

⁵⁶ Spain's Communication No. 27, dated 31 January 2020.

⁵⁷ Tribunal's Communication No. 70, dated 31 January 2020.

⁵⁸ Spain's Communication No. 28, dated 31 January 2020.

⁵⁹ Tribunal's Communication No. 71, dated 31 January 2020.

following day.⁶⁰ Both Parties confirmed that the request was sought with the agreement of Spain⁶¹ and on that basis, the Tribunal granted the extension.⁶²

41. FREIF filed its Statement of Claim on 9 April 2018.⁶³ This was accompanied by the Witness Statements of Mr Mark Florian and Mr Eduard Fidler, the Expert Witness Statement of Mr José Alberto Ceña Lázaro, the Regulatory Expert Report of The Brattle Group, and the Financial Expert Report of The Brattle Group.
42. On 19 September 2018, Spain wrote to the Tribunal requesting an extension of time to submit its Counter Memorial on the Merits and Memorial on Jurisdiction, which was to be due on 21 September 2018.⁶⁴ FREIF confirmed that it had agreed to an extension until 25 September 2018.⁶⁵ On that basis, the Tribunal granted the extension.⁶⁶
43. Spain filed its Counter-Memorial on 25 September 2018.⁶⁷ This was accompanied by the Witness Statement of Mr Juan Ramon Ayuso, and the Expert Report of Dr Daniel Flores and Mr Jordan Heim, who at the time were employed by ECON ONE Research, INC.
44. On 19 February 2019, FREIF wrote to the Tribunal on behalf of the Parties and requested an agreed extension of two weeks for the submission of the Reply Memorial and Rejoinder.⁶⁸ The Tribunal issued an amended Procedural Order No. 1, on the same day, reflecting the Parties' agreement.⁶⁹
45. On 9 March 2019, FREIF tendered its Reply on the Merits and Counter-Memorial on Jurisdiction.⁷⁰ This was accompanied by the Second Witness Statement of Mr Eduard Fidler, the Second Expert Witness Statement of Mr José Alberto Ceña Lázaro, the Rebuttal Regulatory Expert Report of The Brattle Group, and the Rebuttal Financial Expert Report of The Brattle Group.
46. On 11 June 2019, Spain wrote to the Tribunal requesting an extension of the deadline to submit Spain's Statement of Rejoinder on Merits and Reply on Jurisdiction from 5 July 2019 to 12 July 2019.⁷¹ FREIF confirmed that it agreed to this extension but noted that as a result, FREIF would likely need an extension as well to file its Rejoinder on Jurisdiction.⁷² The Tribunal subsequently confirmed that the date of submission for Spain's Rejoinder on Merits and Reply on Jurisdiction was revised to 12 July 2019.⁷³

⁶⁰ FREIF's Unnumbered Communication, dated 5 April 2018.

⁶¹ FREIF's Unnumbered Communication, dated 5 April 2018; Spain's Unnumbered Communication, dated 6 April 2018.

⁶² Tribunal's Communication No. 26, dated 5 April 2018.

⁶³ FREIF's Communication No. 16, dated 9 April 2018.

⁶⁴ Spain's Unnumbered Communication, dated 19 September 2018.

⁶⁵ FREIF's Unnumbered Communication, dated 19 September 2018.

⁶⁶ Tribunal's Communication No. 29, dated 20 September 2018.

⁶⁷ Spain's Communication No. 3, dated 25 September 2018.

⁶⁸ FREIF's Communication No. 20, dated 19 February 2019; Spain's Unnumbered Communication, dated 19 February 2019.

⁶⁹ Tribunal's Communication No. 36, dated 19 February 2019.

⁷⁰ FREIF's Communication Nos. 22, 23, 24, and 25, dated 9 March 2019.

⁷¹ Spain's Unnumbered Communication, dated 11 June 2019.

⁷² FREIF's Unnumbered Communication, dated 14 April 2019.

⁷³ Tribunal's Communication No. 39, dated 13 June 2019.

Spain noted that it would agree to a similar extension for the submission of the Rejoinder on Jurisdiction by FREIF.⁷⁴

47. On 20 June 2019, FREIF wrote to the Tribunal noting that its experts had realised they had submitted the wrong version of one of their workpapers with the Reply Memorial on the Merits and Counter-Memorial on Jurisdiction. FREIF therefore filed a corrected version on the same day.⁷⁵
48. On 12 July 2019, Spain filed its Rejoinder on the Merits and Reply on Jurisdiction.⁷⁶ This was accompanied by the Second Witness Statement of Mr Juan Ramon Ayuso and the Second Expert Report of Dr. Daniel Flores and Mr. Jordan Heim, who by this time were employed by Quadrant Economics LLC.
49. On 17 July 2019, FREIF notified the Tribunal that the Parties had agreed to extend the deadline for submission of the Rejoinder on Jurisdiction from 22 July 2019 to 2 August 2019, with Spain making its best efforts to provide its English translation of the jurisdictional section of its Reply Memorial by 26 July 2019.⁷⁷ This extension was confirmed by the Tribunal.⁷⁸
50. On 2 August 2019, Spain submitted the English translations of its Rejoinder on the Merits and Reply on Jurisdiction and associated witness statement, expert report and list of exhibits and authorities.⁷⁹
51. On 2 August 2019, FREIF filed its Rejoinder on Jurisdiction.⁸⁰

G2.2 Application from European Commission for Leave to Intervene

52. On 15 November 2018, the Tribunal received an application from the European Commission for leave to intervene as a non-disputing party in this Arbitration.⁸¹ On 19 November 2018, the Tribunal requested the Parties' positions as to how the Tribunal should deal with the application.⁸² The Parties agreed to submit simultaneous submissions addressing the European Commission's application⁸³ and these were submitted on 5 December 2018.⁸⁴
53. The Parties were invited to provide responses to each other's submissions by 19 December 2018.⁸⁵ The Tribunal also invited the Parties to address specific issues of

⁷⁴ Spain's Unnumbered Communication, dated 13 June 2019.

⁷⁵ FREIF's Communication No. 27, dated 20 June 2019.

⁷⁶ Spain's Unnumbered Communication, dated 12 July 2019.

⁷⁷ FREIF's Communication No. 28, dated 17 July 2019.

⁷⁸ Tribunal's Communication No. 40, dated 18 July 2019.

⁷⁹ Spain's Communication No. 6, dated 2 August 2019.

⁸⁰ FREIF's Communication No. 30, dated 2 August 2019.

⁸¹ European Commissions' Application for Leave to Intervene as a Non-Disputing Party, dated 9 November 2018.

⁸² Tribunal's Communication No. 32, dated 19 November 2018.

⁸³ FREIF's Communication No. 29, dated 26 November 2018; Spain's Unnumbered Communication, dated 26 November 2018.

⁸⁴ FREIF's Communication No. 20, dated 5 December 2018; Spain's Communication No. 4, dated 5 December 2018.

⁸⁵ Tribunal's Communication No. 35, dated 12 December 2018.

interest to it.⁸⁶ On 19 December 2018, the Parties simultaneously filed their response to the European Commission's application and to the Tribunal's questions.⁸⁷

54. On 4 January 2019, the Tribunal issued its ruling on the European Commission's request for leave to intervene and determined that it should not allow the Commission's request for leave.⁸⁸

G2.3 Supplementary Jurisdictional Objection

55. On 18 November 2019, Spain submitted a supplementary jurisdictional objection and made an application requesting its admission.⁸⁹ The Tribunal issued a communication on 23 November 2019, stating that it did not consider that it was in a position to evaluate the appropriateness of Spain's request. The Tribunal accordingly asked FREIF to provide a response to Spain's application by 29 November 2019.⁹⁰ This response was duly provided. FREIF did not oppose the raising of this supplementary objection subject to the pleadings being expedited. The Parties also agreed that this round of pleadings would be submitted in English only.⁹¹
56. FREIF also requested that Spain bear all the costs associated with this round of pleadings as it considered itself "forced" to agree to a "meritless and unnecessary round of additional pleadings".⁹² This request was contested by Spain. On 6 December 2019, the Tribunal resolved to note the submissions made by the Parties so far and reserved any decision in relation to costs to the Tribunal's Final Award.⁹³
57. Eventually, the Parties agreed on deadlines for the submission of the additional pleadings.⁹⁴ FREIF submitted its Counter-Memorial on Spain's Supplementary Jurisdictional Objection on 20 December 2019.⁹⁵ Spain submitted its Reply to its Supplementary Jurisdictional Objection on 8 January 2020.⁹⁶ FREIF submitted its Rejoinder on the Supplemental Jurisdictional Objection on 22 January 2020.⁹⁷

G3 Disclosure of Documents

G3.1 Initial Round of Document Disclosure

58. Spain wrote to the Tribunal on 25 October 2018, advising that the Parties had agreed to submit their Redfern Schedules for document production in English only. Spain noted that, for the avoidance of doubt, this agreement only affects the submission of the Parties' Redfern Schedules, and Spanish and English will both continue to be the

⁸⁶ Tribunal's Communication No. 35, dated 12 December 2018.

⁸⁷ FREIF's Communication No. 21, dated 19 December 2018; Spain's Communication No. 5, dated 19 December 2018.

⁸⁸ Tribunal's Unnumbered Communication, dated 5 January 2019.

⁸⁹ Spain's Communication No. 19, dated 18 November 2019.

⁹⁰ Tribunal's Communication No. 59, dated 23 November 2019.

⁹¹ FREIF's Communication No. 51, dated 29 November 2019; Spain's Communication No. 20, dated 2 December 2019.

⁹² FREIF's Communication No. 51, dated 29 November 2019.

⁹³ Tribunal's Communication No. 62, dated 5 December 2019.

⁹⁴ FREIF's Communication No. 52, dated 4 December 2019; Tribunal's Communication No. 61, dated 4 December 2019.

⁹⁵ FREIF's Communication No. 53, dated 20 December 2019.

⁹⁶ Spain's Communication No. 21, dated 8 January 2020.

⁹⁷ FREIF's Communication No. 55, dated 22 January 2020.

procedural languages of this Arbitration.⁹⁸ After confirmation of their agreement by FREIF,⁹⁹ the Tribunal accepted the Parties' agreement regarding the submission of the Parties' Redfern Schedules in English only¹⁰⁰ and amended Procedural Order No. 1 to incorporate this agreement on 30 October 2018.¹⁰¹

59. On 16 November 2018, the Parties each submitted their applications for production of documents in the form of a Redfern Schedule.¹⁰² The Tribunal provided its rulings on the contested document requests on 29 November 2018.¹⁰³

G3.2 Further Requests for Document Disclosure

60. Following the submissions regarding the sale of the wind farms invested in by FREIF (the **Asset Sale**) and the vacation of the September 2019 Hearing, discussed below at Part G4.2, the Parties were requested to inform the Tribunal of logistical arrangements and further directions on 30 September 2019. On 23 September 2019, Spain proposed a calendar for a brief document production phase.¹⁰⁴ Subsequently, FREIF noted that its consent to a further round of document requests was conditional upon those requests being cast narrowly and directed only to the issue of the Asset Sale.¹⁰⁵ On that basis, the Tribunal requested that the Parties confer and seek agreement on proposed procedural directions by 3 October 2019.¹⁰⁶

61. On 3 October 2019, Spain wrote to the Tribunal confirming that the Parties had conferred and agreed on a timetable for the submission of final requests for document disclosure. The Parties maintained a single point of difference as to the scope of the documents to be requested. Spain understood that the requests may include the Asset Sale and any facts derived from the sale that are reflected in the partially disclosed documents while FREIF considered that the requests should be narrowly tailored and limited to the Asset Sale issue. The Parties agreed that FREIF would object to any requests if necessary and the Tribunal may decide on a case-by-case basis.¹⁰⁷

62. In accordance with the Parties' agreement, the Tribunal made the following orders:¹⁰⁸

- On 11 October 2019, Spain will submit its final requests for document production.
- On 28 October 2019, FREIF will produce documents pursuant to those requests to which it has no objection. FREIF will also communicate to the Tribunal its objections to any contested document requests on this date.

⁹⁸ Spain's Unnumbered Communication, dated 25 October 2018.

⁹⁹ FREIF's Unnumbered Communication, dated 25 October 2018.

¹⁰⁰ Tribunal's Communication No. 30, dated 25 October 2018.

¹⁰¹ Tribunal's Communication No. 31, dated 30 October 2018.

¹⁰² FREIF's Communication No. 19, dated 16 November 2018; Spain's Communication No. 3, dated 16 November 2018.

¹⁰³ Tribunal's Communication No. 33, dated 29 November 2018.

¹⁰⁴ Spain's Communication No. 15, dated 23 September 2019.

¹⁰⁵ FREIF's Communication No. 44, dated 23 September 2019.

¹⁰⁶ Tribunal's Communication No. 45, dated 1 October 2019.

¹⁰⁷ Spain's Communication No. 16, dated 3 October 2019; FREIF's Communication No. 46, dated 3 October 2019.

¹⁰⁸ Tribunal's Communication No. 57, dated 4 October 2019.

- The Tribunal will decide on any contested document requests on 6 November 2019.
- Documents which remain to be produced following the Tribunal's orders will be produced on 13 November 2019.
- On 25 November 2019, the Parties may submit a brief update on quantum and on any other relevant issues arising from the asset sale. The brief update may include an updated valuation of the quantum claimed by the Parties' experts.

63. On 11 October 2019, Spain submitted its request for document production. On 28 October 2019, FREIF provided its response to Spain's request. It also shared with Spain the documents requested by Spain to which it had no objection.¹⁰⁹ On 6 November 2019, the Tribunal issued its rulings on Spain's additional document requests.¹¹⁰

G4 Events Prior to the Main Evidentiary Hearing

G4.1 Preparation for September 2019 Hearing and Procedural Order No. 3

64. On 14 April 2019, the Tribunal wrote to the Parties requesting information regarding the arrangements made for the venue of the Hearing in Paris.¹¹¹ FREIF responded to confirm that the Parties were making the necessary arrangements to book a venue at the International Chamber of Commerce (**ICC**) Hearing Centre.¹¹² The Tribunal responded on 18 April 2019¹¹³ and on 4 August 2019.¹¹⁴ On 9 August 2019, FREIF confirmed that a Hearing room at the ICC was reserved for this Arbitration.¹¹⁵

65. On 2 August 2019, the Parties each notified the Tribunal of the other Party's witnesses and experts whom it wished to examine during the Hearing.¹¹⁶

66. On 20 August 2019, the Tribunal wrote to the Parties with regard to the Pre-Hearing Teleconference referred to in paragraph 15.1 of Procedural Order No. 1 and scheduled to be held on 6 September 2019. The Tribunal proposed to hold the call at 1700 London Time and requested that the Parties confer regarding the procedural matters to be addressed at the Teleconference.¹¹⁷ The Parties both confirmed their availability for a teleconference at that time.¹¹⁸

67. On 27 August 2019, FREIF wrote to the Tribunal on behalf of the Parties to provide the Parties' agreed Hearing schedule, draft Procedural Order No. 3 governing the protocol

¹⁰⁹ FREIF's Communication No. 48, dated 28 October 2019.

¹¹⁰ Tribunal's Communication No. 58, dated 6 November 2019.

¹¹¹ Tribunal's Communication No. 37, dated 14 April 2019.

¹¹² FREIF's Unnumbered Communication, dated 18 April 2019.

¹¹³ Tribunal's Communication No. 38, dated 18 April 2019.

¹¹⁴ Tribunal's Communication No. 41, dated 4 August 2019.

¹¹⁵ FREIF's Unnumbered Communication, dated 9 August 2019.

¹¹⁶ FREIF's Communication No. 29, dated 2 August 2019; Spain's Unnumbered Communication, dated 2 August 2019.

¹¹⁷ Tribunal's Communication No. 42, dated 20 August 2019.

¹¹⁸ FREIF's Communication No. 31, dated 21 August 2019; Spain's Unnumbered Communication, dated 21 August 2019.

of the Hearing, and list of Hearing attendees.¹¹⁹ On the following day, Spain confirmed FREIF's communication and provided its provisional list of Hearing attendees.¹²⁰

68. The Tribunal wrote to the Parties on 28 August 2019 providing revised versions of the draft Procedural Order No. 3 and draft Hearing Schedule. The Tribunal provided preliminary views on the issues of scheduling of closing submissions, time allocation, and hard copy Hearing bundles. The Tribunal also invited the Parties to provide their views on whether or not the Pre-Hearing Teleconference should proceed.¹²¹
69. FREIF wrote on behalf of the Parties on 29 August 2019 to confirm that the Parties had conferred and agreed on a number of aspects regarding the draft Procedural Order No. 3 and Hearing schedule. The Parties also confirmed their agreement to vacate the Pre-Hearing Teleconference.¹²²
70. On 30 August 2019, the Tribunal once again provided the Parties with a revised draft of Procedural Order No. 3, having considered the Parties' comments and suggestions.¹²³ The Parties subsequently confirmed that they had no other comments to make on the revised draft of Procedural Order No. 3.¹²⁴ Accordingly, the Tribunal issued a finalised Hearing Schedule and Hearing Protocol (as Procedural Order No. 3) on 3 September 2019 and confirmed that the Pre-Hearing Teleconference would not be held.¹²⁵
71. On 10 September 2019, the Tribunal wrote to the Parties requesting clarification regarding whether the Parties intended to provide hard copy core Hearing bundles in advance of the Hearing.¹²⁶ The Parties replied stating that, since the core Hearing bundles would comprise only documents that would not be completed until the week of the Hearing, the Parties would not be in a position to send hard copies to the Tribunal in advance of the Hearing. However, a USB containing the full Hearing bundle could be supplied in advance.¹²⁷ On 16 September 2019, FREIF confirmed that USB keys to each of the Tribunal members had been dispatched.¹²⁸
72. On 11 September 2019, the Parties reached an agreement on the additional documents they each wished to add to the record.¹²⁹

¹¹⁹ FREIF's Communication No. 32, dated 27 August 2019.

¹²⁰ Spain's Communication No. 7, dated 28 August 2019.

¹²¹ Tribunal's Communication No. 43, dated 28 August 2019.

¹²² FREIF's Communication No. 32, dated 29 August 2019; Spain's Unnumbered Communication, dated 29 August 2019.

¹²³ Tribunal's Communication No. 44, dated 30 August 2019.

¹²⁴ Spain's Unnumbered Communication, dated 2 September 2019.

¹²⁵ Tribunal's Communication No. 45, dated 2 August 2019; Tribunal's Communication No. 46, dated 3 August 2019.

¹²⁶ Tribunal's Communication No. 48, dated 10 September 2019.

¹²⁷ FREIF's Unnumbered Communication, dated 10 September 2019; Spain's Unnumbered Communication, dated 10 September 2019; FREIF's Communication No. 36, dated 12 September 2019.

¹²⁸ FREIF's Unnumbered Communication, dated 16 September 2019.

¹²⁹ FREIF's Communication No. 34, dated 11 September 2019; Spain's Communication No. 10, dated 11 September 2019.

G4.2 Asset Sale and Vacation of September 2019 Hearing

73. On 9 September 2019, Spain wrote to the Tribunal informing it that it had come across a piece of news which suggested that FREIF's wind farms had been sold (the **Asset Sale**). Spain requested the Tribunal to formally seek confirmation from FREIF as to the sale of its interest in the wind farms the subject of this Arbitration.¹³⁰ The Tribunal requested FREIF to provide a response by 11 September 2019,¹³¹ which was duly provided.¹³² Spain wrote to the Tribunal the following day requesting leave to comment on FREIF's letter.¹³³ On 13 September 2019, without formal leave having been granted, Spain nonetheless submitted its observations on FREIF's letter, "given the urgency and relevance of the debated issue".¹³⁴ In Spain's letter, it made an application for:
- (a) the suspension of the scheduled Hearing;
 - (b) FREIF to provide complete and exhaustive information regarding the sale of the wind farms; and
 - (c) a subsequent and limited document production phase followed by a single round of written submissions.
74. Subsequently, the Tribunal requested FREIF to provide its response to Spain's application by that same date.¹³⁵ FREIF replied later that day and accepted that Spain may be entitled to additional disclosure regarding the sale material.¹³⁶
75. On 14 September 2019, the Tribunal urgently issued a communication to the Parties, stating that it was not clear to the Tribunal the nature of the additional work that may need be undertaken by the Quantum Experts in relation to the contents of the Share Sale and Purchase Agreement dated 1 May 2019 (**2019 SPA**), and in respect of the additional documents that may be further disclosed.¹³⁷ The Tribunal was thus not prepared to accede to Spain's application to vacate the Hearing dates at that time. It requested that the Parties undertake the document disclosure process first and issued directions for a timetable for this process in Tribunal's Communication No. 52.¹³⁸
76. On 15 September 2019, Spain submitted a request for the Tribunal to reconsider its decision not to postpone the Hearing.¹³⁹ The Tribunal directed FREIF to respond by 1200 Paris time on 16 September 2019 and instructed Spain to comply with the Tribunal's previous directions pending the Tribunal's consideration of Spain's application.¹⁴⁰

¹³⁰ Spain's Communication No. 9, dated 9 September 2019.

¹³¹ Tribunal's Communication No. 46, dated 9 September 2019.

¹³² FREIF's Communication No. 35, dated 11 September 2019.

¹³³ Spain's Unnumbered Communication No. 11, dated 12 September 2019.

¹³⁴ Spain's Unnumbered Communication, dated 13 September 2019.

¹³⁵ Tribunal's Communication No. 51, dated 13 September 2019.

¹³⁶ FREIF's Communication No. 37, dated 13 September 2019.

¹³⁷ Tribunal's Communication No. 52, dated 14 September 2019.

¹³⁸ Tribunal's Communication No. 52, dated 14 September 2019.

¹³⁹ Spain's Communication No. 12, dated 15 September 2019.

¹⁴⁰ Tribunal's Unnumbered Communication, dated 15 September 2019.

77. On 16 September 2019, FREIF submitted its response to Spain's request for reconsideration.¹⁴¹ The Tribunal responded, stating that it was considering the Parties' submissions but that in the meantime, it repeated its direction that both Parties comply with the directions set out in Tribunal's Communication No. 52.¹⁴²
78. Later that same day, Spain contacted the Tribunal and FREIF, stating that, in order to be as accommodating as possible, it suggested keeping the Hearing but limiting it to the jurisdictional objections and to two or three days.¹⁴³
79. On 16 September 2019, the Tribunal issued its decision on Spain's application for reconsideration. The Tribunal concluded that the appropriate and fair course was to require the Parties to proceed according to the Tribunal's orders made in Tribunal's Communication No. 52.¹⁴⁴
80. Following this ruling, Spain finally submitted its request for disclosure of further documents from FREIF regarding the 2019 SPA.¹⁴⁵ The following day, FREIF responded to Spain's request for disclosure and produced a number of the requested documents.¹⁴⁶ Five requests for document disclosure were still pending. On 19 September 2019, Spain wrote to the Tribunal once again, requesting the postponement of the Hearing. The basis for Spain's request was that FREIF had already produced almost 1800 pages of new evidence which would be materially impossible for Spain to properly analyse a mere five business days prior to the commencement of the Hearing.¹⁴⁷
81. On receipt of this correspondence from Spain, the Tribunal requested the Claimant to respond by 1300 Paris Time on 20 September 2019. At the same time, it requested that the Parties advise of their availability for a CMC teleconference early the following week.¹⁴⁸ FREIF's counsel responded, stating that it was seeking to reach its client to take instructions.¹⁴⁹ FREIF subsequently confirmed its availability for a teleconference between 0800 and 1100 Paris time on Tuesday or Wednesday of the following week.¹⁵⁰ Spain also advised of its availability later that day.¹⁵¹
82. On 20 September 2019, FREIF responded to Spain's third application to postpone the Hearing. FREIF unequivocally maintained that Spain had not made out a case for postponement. Nevertheless, FREIF agreed to a postponement assuming the Hearing could be rescheduled within a fairly short time frame.¹⁵² The Parties then proceeded to

¹⁴¹ FREIF's Communication No. 39, dated 16 September 2019.

¹⁴² Tribunal's Communication No. 53, dated 16 September 2019.

¹⁴³ Spain's Communication No. 13, dated 16 September 2019.

¹⁴⁴ Tribunal's Communication No. 54, dated 16 September 2019.

¹⁴⁵ Spain's Communication No. 13, dated 16 September 2019.

¹⁴⁶ FREIF's Communication No. 40, dated 17 September 2019.

¹⁴⁷ Spain's Communication, No. 14 dated 19 September 2019.

¹⁴⁸ Tribunal's Unnumbered Communication, dated 19 September 2019.

¹⁴⁹ FREIF's Communication No. 41, dated 20 September 2019.

¹⁵⁰ FREIF's Communication No. 42, dated 20 September 2019.

¹⁵¹ Spain's Unnumbered Communication, dated 20 September 2019.

¹⁵² FREIF's Communication No. 43, dated 20 September 2019.

attempt to reschedule the Main Evidentiary Hearing.¹⁵³ Eventually, the dates on 25- 29 April 2020 were identified as the only available dates to reschedule the Hearing.¹⁵⁴

83. On 30 September 2019, FREIF confirmed the availability of one of its Hearing rooms during the new scheduled dates. The interpreters would also be available on the new Hearing dates. FREIF informed the Tribunal that the Parties were still in the process of confirming the availability of the English and Spanish court reports that were initially retained for the Hearing.¹⁵⁵
84. On 25 November 2019, the Parties simultaneously submitted updates on quantum arising from the Asset Sale that had been prepared by the Parties' respective experts.¹⁵⁶

G4.3 Challenge of Professor Dr Kaj Hobér and Appointment of Mr C. Mark Baker

85. On 4 August 2017, prior to the appointment of the Chairperson, Spain wrote to the SCC Board challenging Professor Dr Hobér's appointment as Co-Arbitrator on the basis that he is at the same time the President of the SCC Board. Spain submitted that this duality affected Professor Dr Hobér's independence as an arbitrator.¹⁵⁷ On 14 September 2017, the SCC Board dismissed Spain's challenge of Professor Hobér, noting that he had recused himself from the SCC Board with respect to this case and all other arbitrations involving Spain.¹⁵⁸
86. On 21 October 2019, Spain wrote to the Tribunal referring to recently published news that Professor Dr Hobér had been appointed counsel to a claimant, Nord Stream 2 AG, in another ECT arbitration against the European Union (EU). According to Spain, this news raised concerns as to the ability of Professor Dr Hobér to act as an independent arbitrator in the present arbitral proceedings. As such, Spain requested further information regarding Professor Dr Hobér's role as counsel of the claimant in a different Energy Charter Treaty arbitration against the EU.¹⁵⁹ On 27 October 2019, Professor Dr Hobér provided his response to Spain's letter.¹⁶⁰
87. On 12 November 2019, Spain formally submitted its challenge to Professor Dr Hobér.¹⁶¹ The SCC instructed FREIF to respond to Spain's challenge to Professor Dr Hobér.¹⁶² On 22 November 2019, FREIF provided its response and supporting documentation.¹⁶³ On the same day, Professor Dr Hobér provided his comments on Spain's challenge.¹⁶⁴

¹⁵³ Spain's Communication No. 15, dated 23 September 2019; FREIF's Communication No. 44, dated 23 September 2019; Tribunal's Communication No. 42, dated 23 September 2019.

¹⁵⁴ Spain's Communication No. 16, dated 24 September 2019; Tribunal's Communication No. 43, dated 25 September 2019; Spain's Unnumbered Communication, dated 26 September 2019; FREIF's Unnumbered Communication, dated 27 September 2019.

¹⁵⁵ FREIF's Communication No. 45, dated 30 September 2019.

¹⁵⁶ Spain's Communication No. 20, dated 25 November 2019; FREIF's Communication No. 50, dated 25 November 2019.

¹⁵⁷ Spain's Letter to the SCC Board, dated 4 August 2017.

¹⁵⁸ Letter from the SCC to the Parties, dated 14 September 2017.

¹⁵⁹ Spain's Communication No. 18, dated 21 October 2019.

¹⁶⁰ Letter from Professor Dr Kaj Hobér, dated 27 October 2019.

¹⁶¹ Letter from the Respondent to the SCC, dated 12 November 2019.

¹⁶² Letter from the SCC to the Claimant and the Tribunal, dated 12 November 2019.

¹⁶³ FREIF's Letter to the SCC, dated 22 November 2019.

¹⁶⁴ Letter from Professor Dr Hobér, dated 22 November 2019.

On 5 December 2019, Spain filed a supplementation to its challenge to Professor Dr Hobér, contending that Professor Dr Hobér's Dissenting Opinion in the recently released ICSID Award in *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. Kingdom of Spain (Stadtwerke München)* resulted in him having a prejudgment of the issues of this Arbitration in a previous arbitration.¹⁶⁵

88. On 19 December 2019, the SCC transmitted a letter to the Parties in which it confirmed that Spain's challenge to Professor Dr Hobér was successful. Professor Dr Hobér was therefore released from appointment and FREIF was requested to appoint a new arbitrator by 30 December 2019.¹⁶⁶ On 7 January 2020, FREIF notified the SCC that it had appointed Mr C. Mark Baker as FREIF's replacement arbitrator.¹⁶⁷
89. On 24 February 2020, Mr C. Mark Baker advised the Parties of a disclosure he wished to make due to his position as a US partner of Norton Rose Fulbright.¹⁶⁸ The disclosure pertained to the retention of the separate verein partnership of Norton Rose Fulbright Australia in local Australian enforcement actions involving Spain. Spain requested further information in respect of his disclosure on 10 March 2020,¹⁶⁹ which was provided by Mr Baker.¹⁷⁰ Spain took no further action after this additional information.

G4.4 Procedural Order Nos. 4 and 5

90. On 12 January 2020, the Tribunal wrote to the Parties to organise procedural arrangements in view of Mr Baker's appointment. The Tribunal provided its preliminary view that it was not necessary to repeat any stage of the proceedings. It also confirmed its availability for the allocated Hearing dates of 25 to 29 April 2020 in Paris.¹⁷¹
91. The Tribunal also provided to the Parties a draft of Procedural Order No. 4, designed to be a convenient reference points for the deadlines which remained in the Arbitration. The Tribunal also requested the Parties to update Procedural Order No. 3, concerning the logistical and procedural arrangements of the Main Evidentiary Hearing. The Parties confirmed that they had no objections to the Tribunal's view that there was no need for any phase of the proceedings to be repeated after the reconstitution of the Tribunal.¹⁷² The Tribunal therefore confirmed that the Main Evidentiary Hearing would proceed in Paris from 25 to 29 April 2020.¹⁷³
92. On 23 January 2020, the Parties provided their comments on the draft Procedural Order No. 4 and on the revised Procedural Order No. 3.¹⁷⁴ In response, the Tribunal requested the Parties to confer further on a number of points in respect of the Hearing schedule,

¹⁶⁵ Letter from the Respondent to the SCC, dated 5 December 2019.

¹⁶⁶ Letter from the SCC (Doc 128), dated 19 December 2019.

¹⁶⁷ Letter from the Claimant, dated 7 January 2020.

¹⁶⁸ Email of Mr C. Mark Baker, dated 24 February 2020.

¹⁶⁹ Spain's Communication No. 31, dated 10 March 2020.

¹⁷⁰ Email of Mr C. Mark Baker, dated 10 March 2020.

¹⁷¹ Tribunal's Communication No. 63, dated 12 January 2020.

¹⁷² Spain's Communication No. 22, dated 16 January 2020; FREIF's Communication No. 54, dated 16 January 2020.

¹⁷³ Tribunal's Communication No. 64, dated 16 January 2020.

¹⁷⁴ Spain's Communication No. 24, dated 23 January 2020; FREIF's Communication No. 56, dated 23 January 2020.

time keeping, ruling on submission of new evidence and Hearing bundle.¹⁷⁵ The Parties provided their further joint comments on 20 January 2020.¹⁷⁶ The Tribunal finalised Procedural Order No. 4 and Procedural Order No. 3 (re-issued as Procedural Order No. 5) on 1 February 2020.¹⁷⁷ The Tribunal also confirmed that it did not intend to proceed with scheduling a pre-Hearing teleconference.

93. On 24 February 2020, the Tribunal wrote to the Parties advising that it planned to meet in Paris on 24 April 2020 to prepare for the Main Evidentiary Hearing and in the evening of 29 April 2020 for the purposes of deliberations. It requested that the Parties organise room access at the ICC Hearing Centre on these dates,¹⁷⁸ which was later confirmed by FREIF.¹⁷⁹

94. On 6 March 2020, pursuant to Procedural Order No. 4, the Parties each informed the Tribunal of the witnesses it wished to cross-examine at the Main Evidentiary Hearing.¹⁸⁰

G4.5 Vacation of April 2020 Hearing

95. On 5 March 2020, the Tribunal wrote to the Parties concerning the difficulties created by the COVID-19 outbreak and seeking an assurance that all members of the Parties' respective teams would comply with any quarantine guidance that may be applicable.¹⁸¹ This assurance was duly provided by the Parties.¹⁸²

96. Subsequently, on 10 March 2020, the Tribunal wrote to the Parties and requested the Parties' views on reconsideration of the dates fixed for the Hearing, of a venue other than Paris, or of a virtual Hearing, given the deteriorating COVID-19 situation in Paris.¹⁸³ Following receipt of the Parties' views on the matter,¹⁸⁴ the Tribunal proposed that, in the absence of any agreement between the Parties as to a virtual Hearing, the best course of action would be to postpone the in-person Hearing until later in 2020.¹⁸⁵ The Parties agreed to postpone the Hearing to 28 September 2020 to 2 October 2020.¹⁸⁶

97. As such, the Tribunal formally vacated the Hearing dates of 25 to 29 April 2020 and issued amended versions of Procedural Order No. 4, Procedural Order No. 5 and Hearing Schedule reflecting the new Hearing dates.¹⁸⁷

¹⁷⁵ Tribunal's Communication No. 65, dated 25 January 2020.

¹⁷⁶ Spain's Communication No. 26, dated 30 January 2020; FREIF's Communication No. 57, dated 30 January 2020.

¹⁷⁷ Tribunal's Communication No. 72, dated 1 February 2020.

¹⁷⁸ Tribunal's Communication No. 74, dated 24 February 2020.

¹⁷⁹ FREIF's Unnumbered Communication, dated 24 February 2020.

¹⁸⁰ FREIF's Communication No. 56, dated 6 March 2020; Spain's Unnumbered Communication, dated 6 March 2020.

¹⁸¹ Tribunal's Communication No. 75, dated 5 March 2020.

¹⁸² FREIF's Communication No. 55, dated 6 March 2020; Spain's Unnumbered Communication, dated 9 March 2020.

¹⁸³ Tribunal's Communication No. 76, dated 10 March 2020.

¹⁸⁴ FREIF's Communication No. 57, dated 12 March 2020; Spain's Communication No. 32, dated 12 March 2020; Spain's Communication No. 33, dated 13 March 2020.

¹⁸⁵ Tribunal's Communication No. 77, dated 14 March 2020.

¹⁸⁶ Spain's Communication No. 34, dated 17 March 2020; FREIF's Communication No. 59, dated 20 March 2020.

¹⁸⁷ Tribunal's Communication No. 79, dated 24 March 2020.

G4.6 Preparation for September 2020 Hearing and Procedural Order No. 6

98. On 23 April 2020, the Tribunal requested the Parties' views on a virtual Hearing contingency plan, on the basis that the possibility that an in-person Hearing in Paris may not be able to proceed on the adjourned Hearing dates could not be discounted.¹⁸⁸ The Parties conferred and jointly agreed that although an in-person Hearing was the preferred option, it would be prudent to make a contingency plan to proceed with a virtual Hearing.¹⁸⁹
99. In order to assist with this contingency planning, the Tribunal prepared a draft Virtual Hearing Protocol for the Parties' comment, known as Procedural Order No. 6.¹⁹⁰ On 15 June 2020, the Parties submitted their joint comments on the draft Virtual Hearing Protocol, including points of disagreement.¹⁹¹ On 17 June 2020, the Tribunal provided its responses to the comments on the draft Procedural Order No. 6¹⁹² to which both Parties responded on 23 June 2020.¹⁹³ On the basis of these responses, the Tribunal issued a third draft of Procedural Order No. 6 on 28 June 2020.¹⁹⁴ Following a further exchange of comments regarding the circumstances in which a witness or expert may testify in the presence of another person,¹⁹⁵ the Parties' disagreements on this matter were resolved in Procedural Order No. 6 issued on 10 July 2020.¹⁹⁶
100. At the same time, the Tribunal confirmed that, based on the Parties' availability, the Pre-Hearing Conference would take place via videoconference on 2 September 2020.¹⁹⁷ On 18 August 2020, the Tribunal advised that due to unavoidable and unexpected court commitment, the date of the Pre-Hearing Conference would need to be rescheduled.¹⁹⁸ It was later confirmed to take place on 8 September 2020.¹⁹⁹
101. On 17 July 2020, the Tribunal also confirmed that, should the Hearing proceed virtually, a final virtual Hearing test run for all participants would take place on 24 September 2020.²⁰⁰ On 10 August 2020, the Parties confirmed that the factual and expert witnesses they each intended to cross-examine had not changed.²⁰¹
102. On 31 August 2020, FREIF provided an update on the logistics agreed by the Parties for a potential virtual Hearing.²⁰² The Parties had agreed to hire the London International Arbitration Centre (**IAC**) to host and conduct the virtual platform through their platform.

¹⁸⁸ Tribunal's Communication No. 80, dated 23 April 2020.

¹⁸⁹ Spain's Communication No. 35, dated 6 May 2020; FREIF's Communication No. 60, dated 6 May 2020.

¹⁹⁰ Tribunal's Communication No. 81, dated 7 May 2020; Tribunal's Communication No. 82, dated 9 May 2020

¹⁹¹ FREIF's Communication No. 63, dated 15 June 2020; Spain's Communication No. 38, dated 15 June 2020.

¹⁹² Tribunal's Communication No. 85, dated 17 June 2020.

¹⁹³ FREIF's Communication No. 64, dated 23 June 2020; Spain's Communication No. 39, dated 23 June 2020.

¹⁹⁴ Tribunal's Communication No. 86, dated 28 June 2020.

¹⁹⁵ Spain's Communication No. 40, dated 2 July 2020; Tribunal's Communication No. 87, dated 5 June 2020; FREIF's Communication No. 65, dated 9 July 2020.

¹⁹⁶ Tribunal's Communication No. 88, dated 10 July 2020.

¹⁹⁷ Tribunal's Communication No. 88, dated 10 July 2020.

¹⁹⁸ Tribunal's Communication No. 92, dated 18 August 2020.

¹⁹⁹ Tribunal's Communication No. 93, dated 21 August 2020.

²⁰⁰ Tribunal's Communication No. 90, dated 17 July 2020.

²⁰¹ FREIF's Unnumbered Communication, dated 10 August 2020; Spain's Communication No. 44, dated 10 August 2020.

²⁰² FREIF's Communication No. 68, dated 31 August 2020; Spain's Communication No. 46, dated 31 August 2020.

The Parties had also hired three interpreters to conduct simultaneous interpretation, as well as OPUS2 and Stenotype to provide live transcripts. As a result, the Parties made some changes to the draft Virtual Hearing Protocol to reflect their agreed logistics.

103. The Tribunal requested further details in preparation for the Pre-Hearing Conference,²⁰³ which was provided by the Parties on 4 September 2020, with the exception of the proposed Hearing Schedule which was still the subject of discussion between the Parties.²⁰⁴ On the basis of the information provided, the Tribunal circulated an amended version of Procedural Order No. 6 and a draft Pre-Hearing Conference agenda on 6 September 2020.²⁰⁵ On 7 September 2020, the Parties provided a further update on their positions to the Tribunal, including comments on the draft agenda and their disagreements on the Hearing Schedule.²⁰⁶ Thereafter, the Tribunal circulated a finalised agenda for the Pre-Hearing Conference.²⁰⁷
104. The Pre-Hearing Conference was duly held on 8 September 2020. The Conference was conducted solely in English, without waiving the rights of the Parties in respect of Spanish being a language of the Arbitration. A recording of the Pre-Hearing Conference was taken and distributed by the London IAC. During the Pre-Hearing Conference, the Parties agreed that the Hearing would be held virtually. This was due to the inability of Professor Jones and Mr Baker to travel to Paris on the dates of the Hearing and the Parties' agreement that all three members of the Tribunal must either attend in person together or all attend virtually.
105. On 9 September 2020, the Parties advised that they had reached agreement regarding a list of new documents they wished to add to the record²⁰⁸ and requested the postal addresses of the Tribunal members in order to send an electronic Hearing bundle via USB and a hard copy core Hearing bundle.
106. On 10 September 2020, The Tribunal wrote to the Parties, circulating a summary of the outcomes of the Pre-Hearing Conference.²⁰⁹ This was accompanied by amended versions of Procedural Order No. 4, Procedural Order No. 6 and the Hearing Schedule, which the Parties were invited to comment on. Subsequently, based on the comments received,²¹⁰ the Tribunal re-issued Procedural Order No. 4 and Procedural Order No. 6 on 18 September 2020.²¹¹

²⁰³ Tribunal's Communication No. 94, dated 31 August 2020.

²⁰⁴ FREIF's Communication No. 69 dated 4 September 2020; Spain's Communication No. 47, dated 4 September 2020.

²⁰⁵ Tribunal's Communication No. 95, dated 6 September 2020.

²⁰⁶ FREIF's Communication No. 70, dated 7 September 2020; Spain's Communication No. 48, dated 7 September 2020.

²⁰⁷ Tribunal's Communication No. 96, dated 8 August 2020.

²⁰⁸ FREIF's Communication No. 71, dated 9 August 2020; Spain's Communication No. 49, dated 9 September 2020.

²⁰⁹ Tribunal's Communication No. 98, dated 10 September 2020.

²¹⁰ Spain's Communication No. 50, dated 16 September 2020; FREIF's Communication No. 71, dated 16 September 2020; Tribunal's Communication No. 99, dated 17 September 2020; FREIF's Communication No. 72, dated 18 September 2020.

²¹¹ Tribunal's Communication No. 100, dated 18 September 2020.

G5 Main Evidentiary Hearing

107. The Main Evidentiary Hearing was held virtually using Zoom on the London IAC Online Platform from Monday, 28 September 2020 to Friday, 2 October 2020.

G5.1 Attendees

108. The following persons were in attendance.

109. For FREIF:

- (a) Mr Reginald Smith of King & Spalding;
- (b) Mr Kevin D. Mohr of King & Spalding;
- (c) Ms Amy Roebuck Frey of King & Spalding;
- (d) Ms Isabel San Martin of King & Spalding;
- (e) Ms Ines Vazquez Garcia of Gómez-Acebo & Pombo;
- (f) Ms Teresa Gutiérrez Chacón of Gómez-Acebo & Pombo;
- (g) Ms Inés Puig-Samper of Gómez-Acebo & Pombo;
- (h) Ms Cristina Matia of Gómez-Acebo & Pombo;
- (i) Mr Ignacio Soria Petit of Gómez-Acebo & Pombo;
- (j) Ms Violeta Valicenti of King & Spalding;
- (k) Mr Eduard Fidler formerly of BlackRock Investment Management (UK) Limited and First Reserve International Limited;
- (l) Mr José Alberto Ceña Lázaro of the AEE;
- (m) Dr José Antonio Garcia of Brattle Group;
- (n) Mr Carlos Lapuerta of Brattle Group;
- (o) Mr Richard Caldwell of Brattle Group;
- (p) Ms Annika Opitz of Brattle Group;
- (q) Mr Andrés Child of Brattle Group; and
- (r) Mr Christian Synetos of BlackRock.

110. For Spain:

- (a) Mr José Manuel Gutiérrez Delgado of the Attorney General's Office;

- (b) Mr Pablo Elena Abad of the Attorney General's Office;
- (c) Mr Alberto Torró Molés of the Attorney General's Office;
- (d) Mr Roberto Fernández Castilla of the Attorney General's Office;
- (e) Ms Gabriela Cerdeiras Megías of the Attorney General's Office;
- (f) Ms María de Lourdes Martínez de Victoria Gómez of the Attorney General's Office;
- (g) Ms Elena Oñoro Sainz of the Attorney General's Office;
- (h) Mr Juan Antonio Quesada Navarro of the Attorney General's Office;
- (i) Ms Gloria de la Guardia Limeres of the Attorney General's Office;
- (j) Ms Carmen Roa Tortosa of the Attorney General's Office;
- (k) Mr Juan Ramón Ayuso Ortiz of the Insitute for the Diversification and Saving of Energy (**IDAE**);
- (l) Dr Daniel Flores of Quadrant Economics;
- (m) Mr Jordan Heim of Quadrant Economics; and
- (n) Mr Andrés León of Quadrant Economics.

111. As interpreters:

- (a) Mr Jesus Gaetan Bornn;
- (b) Ms Amalia Thaler; and
- (c) Ms Anna Sophia Chapman.

112. Court reporters from Opus 2 (for the English transcript) and Stenotype (for the Spanish transcript) were also present as well as Ms Demi Robinson from the London IAC.

G5.2 Hearing Timetable and List of Witnesses

113. The Parties made oral opening submissions on 28 September 2020. The Parties opening presentations were circulated to the Tribunal and other Party upon the commencement of their opening submissions.²¹² Due to the need to ensure adequate break times for transcribers and interpreters, agreed amendments were made to the Hearing timetable on certain days of the Hearing.²¹³

²¹² FREIF's Unnumbered Communication, dated 28 September 2020; Spain's Unnumbered Communication dated 28 September 2020.

²¹³ See eg. Email from the Administrative Secretary to the Parties, dated 30 September 2020; Email from the Administrative Secretary to the Parties, dated 2 October 2020.

114. On the following days, the following witnesses and experts were called to give evidence:
- (a) 29 September 2020: Mr Eduard Fidler for FREIF; Mr Juan Ramón Ayuso for Spain;
 - (b) 30 September 2020: Mr José Alberto Ceña Lázaro for FREIF; Messrs José Antonio Garcia and Carlos Lapuerta for FREIF;
 - (c) 1 October 2020: Messrs José Antonio Garcia, Carlos Lapuerta and Richard Caldwell for FREIF; and
 - (d) 2 October 2020: Messrs Daniel Flores and Jordan Heim for Spain.
115. FREIF's factual witness, Mr Mark Florian, was not requested to be called for cross-examination. In accordance with paragraph 10(c) of Procedural Order No. 6, the presentations of all experts were submitted to the Tribunal prior to the commencement of the presentation of the first experts, the regulatory experts from Brattle.²¹⁴ Cross-examination bundles were uploaded to the Box cloud sharing application prior to the commencement of each witnesses' cross-examination.
116. Although the Hearing timetable allowed time for a witness conferencing session on 2 October 2020, the Tribunal decided that it would not be necessary. Instead, the Tribunal used some of this reserved time to discuss with the Parties the form, content and timing of the Parties' Post Hearing Briefs.²¹⁵

G5.3 Application for Adverse Inferences

117. On 30 September 2020, in light of the testimony of Mr Ayuso, FREIF made an application for adverse inferences.²¹⁶ The Tribunal requested that written submissions be made on the application,²¹⁷ which were received from FREIF on 1 October 2020.²¹⁸ The Tribunal requested that Spain provide its written response on the same day so that any matters arising could be dealt with prior to the conclusion of the Hearing.²¹⁹ Spain duly provided its opposition to FREIF's request for adverse inferences.²²⁰ FREIF's request was reaffirmed in its Post Hearing Brief.²²¹
118. The Tribunal will briefly summarise the Parties' submissions regarding this application. Its ruling will be integrated into the Tribunal's reasoning later in this Award.

²¹⁴ FREIF's Unnumbered Communication, dated 30 September 2020; Spain's Unnumbered Communication, dated 30 September 2020.

²¹⁵ Tribunal's Communication No. 106, dated 1 October 2020.

²¹⁶ Transcript Day 3, p. 1, l. 13 – p. 2, l. 6.

²¹⁷ Transcript Day 3, p. 2, ll. 7–19.

²¹⁸ FREIF's Communication No. 75, dated 1 October 2020.

²¹⁹ Tribunal's Communication No. 105, dated 1 October 2020.

²²⁰ Spain's Communication No. 53, dated 1 October 2020.

²²¹ FREIF's Post Hearing Brief, [122]-[133].

119. FREIF's application requested that the Tribunal draw the following adverse inferences:²²²
- (a) that because Respondent has failed to produce the data and calculations underlying RD 436/2004, RD 661/2007, as well as Law 54/1997, such data would demonstrate that the regulator never established a limit on returns at 7%; and
 - (b) that had those documents been produced, they would support Claimant's position that Spain both knew and intended that returns could go well above 7% for wind facilities, as provided in the regulator's Renewable Energy Plans, the CNE's reports, and understood by the entire sector at the time.
120. FREIF says that although the SCC Rules give the Tribunal broad discretion to determine any issues related to evidence, it refers to the "Sharpe test" as the most comprehensive and widely accepted test on adverse inferences in arbitration. The Sharpe test provides five elements for finding adverse inferences which it says are all present in this case:²²³
- (a) The party seeking the inference must produce all available evidence corroborating the inference sought.
 - (b) The evidence is accessible to the inference opponent.
 - (c) The inference sought is reasonable; that is, it must be consistent with facts and other evidence.
 - (d) Prima facie evidence of the requesting party has to be reasonably consistent with the inference sought.
 - (e) The non-producing party must be aware of its obligation to produce rebuttal evidence.
121. FREIF submits that during the document production phase of the proceedings, it requested that Spain produce the data that Spain used to calculate and establish the incentives in RD 436/2004 and RD 661/2007. Spain objected, arguing that the requests were too broad and burdensome. The Tribunal ordered the production of this data however Spain produced nothing in response, stating that the data could not be found. During the Hearing, Spain's witness, Mr Ayuso testified as to the existence of this data in response to two different questions from the Tribunal.²²⁴
122. First, in response to Mr Baker, Mr Ayuso stated:²²⁵

²²² FREIF's Application for Adverse Inferences, dated 1 October 2020, p. 7.

²²³ FREIF's Application for Adverse Inferences, dated 1 October 2020, p. 6; Jeremy K. Sharpe, (2006) 'Drawing Adverse Inferences from the Non Production of Evidence', *LCIA Arbitration International Journal*, VI. 22 No. 4, 549-571.

²²⁴ FREIF's Post Hearing Brief, [122].

²²⁵ Transcript Day 2, p. 105, l. 15.

To clarify things further, at that time the plan that was in force was the revision of the renewable energy plan for 2005-2010, wherein you saw a certain number of standard facilities and you saw some proposals for tariffs and premiums on the basis of the 436 remunerative system. Therefore, since the 661 is going to have a different approach to remuneration, then you have to make sure that the calculations that we had included for the standard installations in the renewable energy plan would turn out to be consistent with the 661 new remunerative scheme, so as to make sure that there would be a reasonable return, more or less around 7 per cent, as mentioned in the renewable energy plan.

123. Second, in response to Prof Clay, Mr Ayuso stated:²²⁶

[A]s I said before, I was involved in the calculations that lay behind Royal Decree 661, in order to be consistent with the standard facilities of the current Renewable Energy Plan that in this case was the Renewable Energy Plan of 2005-2010.

124. These responses, in addition to Mr Ayuso's repeated testimony that the Spanish regulator always envisioned a target rate of return of 7% when setting incentives, are said to give rise to FREIF's request that the Tribunal draw adverse inferences regarding Spain's failure to produce the data underlying the RD 661/2007 tariffs. FREIF further casts doubt on the prospect that Spain has lost the data since Spain claimed it was equivalent to data pertaining to the calculations behind the 2005 PER and had also managed to produce other documents that were much older.²²⁷

125. Spain instead asks the Tribunal to dismiss FREIF's application and take the application into consideration when allocating costs.²²⁸ Spain agrees with the application of the Sharpe test.²²⁹ However, it does not accept that the elements of the Sharpe test are satisfied when applied to the present facts.

126. According to Spain, FREIF has not produced evidence corroborating the inference sought because the evidence on the record does not support it. Mr Ayuso's testimony never stated that at present, there are specific documents that contain the calculations behind RD 436/2004 and RD 661/2007. Mr Ayuso explained that the calculations if they existed are "maybe 15 years old". He explained that in any case, those calculations behind the RDs were in fact those underlying the 2005 PER, which have been produced in these proceedings, under a different category of requests.

127. Furthermore, the requested evidence is not accessible to Spain. Spain says that its counsel made a request to the IDAE, the agency in the Spanish Administration that might have the requested documents, however IDAE said it were not aware of the requested documents being in its custody.²³⁰

²²⁶ Transcript Day 2, p. 162, l. 14.

²²⁷ FREIF's Post Hearing Brief, [124]-[131].

²²⁸ Spain's Opposition to FREIF's Application for Adverse Inferences, dated 1 October 2020, [39].

²²⁹ Spain's Opposition to FREIF's Application for Adverse Inferences, dated 1 October 2020, [4].

²³⁰ R-0362, IDAE Response on Document Production, January 2019.

128. Finally, the inference sought is not reasonable or consistent with the facts on the record because based on FREIF's own expert evidence, FREIF accepts that neither RD 436/2004 nor RD 661/2007 targeted a return higher than 7%.²³¹

G6 Events Subsequent to the Main Evidentiary Hearing

G6.1 Corrections to Hearing Transcript

129. On 5 November 2020, the Tribunal wrote to the Parties enquiring as to the timing of the submission of proposed corrections to the Hearing transcript, as the time frame provided for in Procedural Order No. 6 had elapsed.²³² Spain advised that there had been a delay in receiving the audio recordings of the Hearing in order to proceed with the transcript revision, but the Parties would be in a position to submit corrected versions to the Tribunal by 24 November 2020.²³³
130. On 25 November 2020, FREIF advised that the Parties had reviewed the Hearing transcripts and had been able to agree on corrected versions, which were supplied to the Tribunal.²³⁴

G6.2 Filing of Post Hearing Briefs

131. On 6 October 2020, the Tribunal provided the Parties with a list of questions which it would like the Parties to address in their Post Hearing Briefs, in addition to templates for a joint chronology and list of issues for the Parties to complete.²³⁵ On 9 October 2020, the Parties advised that they anticipate submitting their Post Hearing Briefs according to their originally agreed date of 21 December 2020,²³⁶ which was accepted by the Tribunal.²³⁷
132. On 17 December 2020, FREIF wrote to the Tribunal on behalf of the Parties advising that the Parties had agreed to extend the deadline for Post Hearing Briefs to 28 December 2020.²³⁸ The Tribunal approved this extension.²³⁹
133. The Parties submitted their respective Post Hearing Briefs to the Tribunal first without circulation to the other Party.²⁴⁰ After both Parties' Post Hearing Briefs were received by the Tribunal, the Administrative Secretary simultaneously circulated them to both Parties.²⁴¹

²³¹ Transcript Day 3, p. 152, ll. 13-25.

²³² Tribunal's Communication No. 110, dated 5 November 2020.

²³³ Spain's Communication No. 55, dated 9 November 2020.

²³⁴ FREIF's Communication No. 77, dated 25 November 2020; Spain's Communication No. 56, dated 25 November 2020.

²³⁵ Tribunal's Communication No. 108, dated 6 October 2020.

²³⁶ FREIF's Communication No. 76, dated 9 October 2020; Spain's Communication No. 54, dated 9 October 2020.

²³⁷ Tribunal's Communication No. 109, dated 9 October 2020.

²³⁸ FREIF's Communication No. 78, dated 17 December 2020; Spain's Communication No. 57, dated 17 December 2020.

²³⁹ Tribunal's Communication No. 112, dated 18 December 2020.

²⁴⁰ Spain's Communication No. 58, dated 28 December 2020; FREIF's Communication No. 79, dated 29 December 2020.

²⁴¹ Email from the Administrative Secretary, dated 29 December 2020.

134. On 8 January 2021, FREIF wrote to the Tribunal submitting three new legal authorities labelled CL-213 through CL-215 which it said had been necessary to refer to in its Post Hearing Brief in order to respond to the Tribunal's question regarding the relevance of the law of the seat to the awarding of post-award interest.²⁴² Spain confirmed on the same day that it did not object to FREIF's three new legal authorities.²⁴³

G6.3 Award Translation

135. On 18 December 2020, the Tribunal wrote to the Parties seeking their comments regarding the translation of the Award. It noted that the Section 19 of Procedural Order No. 4 prescribed that the Award shall be rendered in English simultaneously with a Spanish translation and any translation costs will be borne solely by the Parties.²⁴⁴

136. Upon submission of its Post Hearing Brief on 28 December 2020, Spain advised that it accepts the Award being rendered initially in English, with a Spanish translation to be produced subsequently.²⁴⁵ The Tribunal requested the Parties' views regarding amendments to Procedural Order No. 4 and the method of payment for the translation, given that it would be conducted after the rendering of the Award and the finalisation of costs.²⁴⁶

137. On 8 January 2021, Spain wrote on behalf of the Parties to inform the Tribunal of their agreed amendments to Section 19 of Procedural Order No. 4.²⁴⁷ The Tribunal issued an amended version of Procedural Order No. 4 on 9 January 2021 adopting the Parties' agreed wording such that the Award could be rendered initially in English with a Spanish translation produced subsequently.²⁴⁸ The Tribunal offered to introduce the Parties to two translators regularly used by ICSID for English to Spanish translation,²⁴⁹ which FREIF accepted.²⁵⁰

G6.4 Filing of Costs Submissions

138. On 11 January 2021, the Tribunal wrote to the Parties with a proposed timetable for the filing of costs submissions and sought the Parties' views on this proposal.²⁵¹ Spain requested an additional week for the filing of costs submissions,²⁵² and as FREIF did not object,²⁵³ the deadline was set for 4 February 2021.²⁵⁴

²⁴² FREIF's Communication No. 80, dated 8 January 2021.

²⁴³ Spain's Communication No. 60, dated 8 January 2021.

²⁴⁴ Tribunal's Communication No. 112, dated 18 December 2020.

²⁴⁵ Spain's Communication No. 58, dated 28 December 2020.

²⁴⁶ Tribunal's Communication No. 113, dated 31 December 2020.

²⁴⁷ Spain's Communication No. 59, dated 8 January 2021; FREIF's Communication No. 80, dated 8 January 2021.

²⁴⁸ Tribunal's Communication No. 114, dated 9 January 2021.

²⁴⁹ Tribunal's Communication No. 114, dated 9 January 2021.

²⁵⁰ FREIF's Communication No. 81, dated 9 January 2021; Tribunal's Unnumbered Communication, dated 9 January 2021.

²⁵¹ Tribunal's Unnumbered Communication, dated 11 January 2021.

²⁵² Spain's Communication No. 61, dated 14 January 2021.

²⁵³ FREIF's Communication No. 83, dated 14 January 2021.

²⁵⁴ Tribunal's Communication No. 115, dated 15 January 2021.

139. On 4 February 2021, the Parties submitted their respective Costs Submissions to the Tribunal first without circulation to the other Party.²⁵⁵ After both Parties' Costs Submissions were received by the Tribunal, the Administrative Secretary simultaneously circulated them to both Parties.²⁵⁶
140. On 13 February 2021, the Tribunal wrote to the Parties with respect to their respective submissions in relation to interest on the cost claims that each Party made and requested additional submissions from the Parties.²⁵⁷ These were received on 17 February 2021.²⁵⁸

G6.5 Closure of Proceedings

141. On 11 January 2021, the Tribunal wrote to the Parties informing them that it is satisfied that the Parties have had a reasonable opportunity to present their cases and it does not require any further submissions or evidence from the Parties on any issue other than costs. It asked for any objections from the Parties to the closure of proceedings on all issues aside from costs.²⁵⁹
142. Neither Party objected to the closure of proceedings on all issues aside from costs.²⁶⁰ On that basis, the Tribunal declared the proceedings closed under Article 40 of the SCC Rules on all issues aside from costs on 15 January 2021.²⁶¹
143. On 23 February 2021, The Tribunal asked the Parties whether they objected to the closure of proceedings on all issues including costs.²⁶² The Parties advised that they had no objections²⁶³ and the Tribunal formally closed proceedings under Article 40 of the SCC Rules on 25 February 2021.²⁶⁴

G6.6 Time Limit for Final Award

144. On 26 March 2018, the SCC advised that the time limit for rendering the Final Award was 24 April 2018.²⁶⁵ Upon the Tribunal's request this was extended to 1 March 2020.²⁶⁶ Following the two postponements of the Hearing, the time limit was extended to 25 September 2020²⁶⁷ and then to 1 March 2021.²⁶⁸ On 1 March 2021, the SCC approved a further extension of the time limit to 22 March 2021.²⁶⁹

²⁵⁵ FREIF's Communication No. 84, dated 4 February 2021; Spain's Communication No. 62, dated 4 February 2021.

²⁵⁶ Email from the Administrative Secretary, dated 4 February 2021.

²⁵⁷ Tribunal's Communication No. 117, dated 13 February 2021.

²⁵⁸ FREIF's Communication No. 86, dated 17 February 2021; Spain's Communication No. 63, dated 17 February 2021.

²⁵⁹ Tribunal's Unnumbered Communication, dated 11 January 2021.

²⁶⁰ FREIF's Communication No. 82, dated 14 January 2021; Spain's Communication No. 61, dated 14 January 2021.

²⁶¹ Tribunal's Communication No. 115, dated 15 January 2021.

²⁶² Tribunal's Communication No. 118, dated 23 February 2021.

²⁶³ FREIF's Communication No. 85, dated 24 February 2021; Spain's Communication No. 64, dated 24 February 2021.

²⁶⁴ Tribunal's Communication No. 119, dated 25 February 2021.

²⁶⁵ SCC's Letter to the Tribunal, dated 26 March 2018, Doc 83.

²⁶⁶ SCC's Letter to the Tribunal, dated 6 April 2018, Doc 86.

²⁶⁷ SCC's Letter to the Tribunal, dated 24 October 2019, Doc 109.

²⁶⁸ SCC's Letter to the Tribunal, dated 31 March 2020, Doc 148.

²⁶⁹ SCC's Letter to the Tribunal, dated 1 March 2021.

H MATERIALS PROVIDED

145. The following materials were filed by the Parties (in addition to factual exhibits and legal authorities relied upon by the Parties which are not listed).

H1 Pleadings

146. The pleading and submissions provided by the Parties in this Arbitration were:

- (a) FREIF's Statement of Claim dated 9 April 2018;
- (b) Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 25 September 2018;
- (c) FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction dated 20 March 2019;
- (d) Spain's Rejoinder on the Merits and Reply on Jurisdiction dated 12 July 2019;
- (e) FREIF's Rejoinder on Jurisdiction dated 2 August 2019;
- (f) Spain's Supplementation of the Jurisdictional Objections dated 18 November 2019;
- (g) FREIF's Brief Comments on Sale of Assets dated 25 November 2019;
- (h) Spain's Brief Comments on Sale of Assets dated 25 November 2019;
- (i) FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection dated 20 December 2020;
- (j) Spain's Reply on its Supplementary Jurisdictional Objection dated 8 January 2020;
- (k) FREIF's Rejoinder on the Supplementary Jurisdictional Objection dated 22 January 2020;
- (l) FREIF's Post Hearing Brief dated 28 December 2020;
- (m) Spain's Post Hearing Brief dated 28 December 2020;
- (n) FREIF's Costs Submission dated 4 February 2021;
- (o) Spain's Costs Submission dated 4 February 2021;
- (p) FREIF's Submission on Interest on Costs dated 17 February 2021;²⁷⁰ and
- (q) Spain's Submission on Interest on Costs dated 17 February 2021.

²⁷⁰ FREIF's Communication No. 86, dated 17 February 2021.

H2 Witness Statements

147. The witness statements provided by FREIF in this Arbitration were:
- (a) Witness Statement of Mr Mark Florian dated 5 April 2018;
 - (b) Witness Statement of Mr Eduard Fidler dated 5 April 2018;
 - (c) Expert Witness Statement of Mr José Alberto Ceña Lázaro dated 9 April 2018;
 - (d) Second Witness Statement of Mr Eduard Fidler dated 7 March 2019; and
 - (e) Second Expert Witness Statement of Mr José Alberto Ceña Lázaro dated 8 March 2019.
148. The witness statements provided by Spain in this Arbitration were:
- (a) Witness Statement of Mr Juan Ramón Ayuso dated 25 September 2018; and
 - (b) Second Witness Statement of Mr Juan Ramón Ayuso dated 12 July 2019.

H3 Expert Reports

149. The expert reports provided by FREIF in this Arbitration were:
- (a) Regulatory Expert Report of The Brattle Group dated 6 April 2018 (**First Brattle Regulatory Report**);
 - (b) Financial Expert Report of The Brattle Group dated 6 April 2018 (**First Brattle Quantum Report**);
 - (c) Rebuttal Regulatory Expert Report of The Brattle Group dated 8 March 2019 (**Second Brattle Regulatory Report**);
 - (d) Rebuttal Financial Expert Report of The Brattle Group dated 8 March 2019 (**Second Brattle Quantum Report**); and
 - (e) Asset Sale Memorandum of The Brattle Group dated 25 November 2019.
150. The expert reports provide by Spain in this Arbitration were:
- (a) Report of ECON ONE Research, INC., prepared by Dr. Daniel Flores and Mr. Jordan Heim dated 25 September 2018 (**First Quadrant Report**);
 - (b) Report of Quadrant Economics LLC., prepared by Dr. Daniel Flores and Mr. Jordan Heim (**Second Quadrant Report**); and
 - (c) Update to the Second Expert Report of Dr Daniel Flores and Mr Jordan Heim of Quadrant Economics dated 25 November 2019 (**Update to the Second Quadrant Report**).

H4 Translated Documents

151. The Parties frequently submitted their own English translations of various regulations and documents and their respective translations are not always identical. Nonetheless, neither Party maintains any objection with respect to the English translations. There are no relevant discrepancies in the translations that impact on the Parties' positions or substantive issues for determination.²⁷¹

²⁷¹ FREIF's Post Hearing Brief, [54]–[56]; Spain's Post Hearing Brief, [4].

I RELIEF SOUGHT

152. FREIF sought the following relief:²⁷²
- (a) a declaration that the Tribunal has jurisdiction under the ECT for all of FREIF's claims, thereby rejecting Spain's jurisdictional objections in full;
 - (b) a declaration that Spain has violated Part III of the ECT and international law with respect to FREIF's investments;
 - (c) compensation to FREIF for all damages it has suffered as set forth and as may be further developed and quantified during the course of this proceeding;
 - (d) all costs of this proceeding, including (but not limited to) FREIF's attorneys' fees and expenses, the fees and expenses of FREIF's experts, and the fees and expenses of the Tribunal and SCC;
 - (e) pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain's full and final satisfaction of the Award; and
 - (f) any other relief the Tribunal deems just and proper.
153. Spain sought the following relief:²⁷³
- (a) a declaration that there is no jurisdiction to hear the complaints of FREIF or, as appropriate, the inadmissibility thereof;
 - (b) in the alternative, in the event that the Tribunal decides that it does have jurisdiction to hear the present dispute, the dismissal of all of FREIF's claims on the merits, due to the fact that Spain has not in any way failed to comply with the ECT;
 - (c) In the alternative, the dismissal of all claims for compensation of FREIF as it is not entitled to compensation; and
 - (d) an order that FREIF pays all costs and expenses arising from this arbitration, including administrative expenses and SCC fees, as well as the fees of the legal representation of Spain, its experts and advisers, and any other costs or expenses that may have incurred, all of which include a reasonable interest rate from the date these costs are incurred until the date of its actual payment.

²⁷² FREIF's Rejoinder on Jurisdiction, [107]; FREIF's Post Hearing Brief, [134].

²⁷³ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1522]; Spain's Post Hearing Brief, [179].

J OUTLINE OF TRIBUNAL'S APPROACH

154. The Tribunal will:

- (a) first, set out the legal and factual background to the dispute by summarising the history and factual context of the dispute, extracting relevant provisions of the ECT and providing an overview of relevant case law from other renewable energy arbitrations brought under the ECT against Spain (Parts K, L and M);
- (b) second, summarise the pleadings and submissions of both Parties on each of Spain's three jurisdictional objections and set out the Tribunal's reasoning and determination of the issues (Parts N, O and P);
- (c) fourth, summarise the pleadings and submissions of both Parties on the merits of case regarding breaches of the ECT and international law, and set out the Tribunal's reasoning and determination of the issues (Part Q);
- (d) fifth, summarise the pleadings and submissions of both Parties on the issue of quantum and set out the Tribunal's reasoning and determination of the issues (Part R);
- (e) sixth, summarise the Parties' costs submissions and provide the Tribunal's determination as to costs (Part S); and
- (f) finally, make dispositive orders (Part T).

K BACKGROUND TO THE DISPUTE

155. While the Parties have agreed upon a chronology of events at Part K7, they disagree on the characterisation and impact of many of these events. This section of the Award is not to be read as the Tribunal's findings of fact but as a non-exhaustive summary of the Parties' submissions on the relevant facts which support their arguments on the merits of the dispute. It reflects the structure adopted in the Parties' pleadings which placed a heavy emphasis on contesting the factual narrative presented by the other Party.
156. The present dispute concerns investments made by FREIF in the Spanish renewable energy sector. In the mid-2000s, Spain, alongside other European countries, implemented a series of policies aimed at reducing CO2 emissions. The policies were enacted in response to an EU directive which required Member States to reduce their carbon emissions in line with obligations committed to under the Kyoto Protocol. The relevant policy mechanism employed to affect these reductions sought to promote investments in the renewable energy sector.
157. The EU directive required Spain to generate nearly 30% of its electricity production from renewable energy sources by 2010.²⁷⁴ In 2001, when the directive was issued, renewable energy sources in Spain were modest,²⁷⁵ comprising two large-scale hydro-electric projects. It was therefore necessary for Spain to attract significant investments in other renewable energy sources, such as wind, solar photovoltaic and 'mini-hydro' projects.
158. One difficulty which Spain faced was the fact that renewable energy was typically more expensive than energy sourced from fossil fuels.²⁷⁶ Financial support schemes therefore became necessary for Spain to meet its ambitious targets. Those schemes were, according to FREIF, essential, considering that such projects are capital intensive, with the vast majority of cost being incurred up front. Coupled with the quickly declining cost of wind technology, significant financial support was necessary to incentivise investment and placate investor uncertainty.²⁷⁷
159. Spain's legislative response to its EU obligations was to implement Royal Decree (**RD**) 436/2004: a subsidy on renewable energy production.²⁷⁸ The "tariffs" were set for an initial term of 20 years, after which point they would reduce in value to 83% of the tariff initially granted.
160. The regime was later replaced by a new decree, RD 661/2007, which (among other measures) amended the algorithm by which the Average Electricity Tariff (**AET**) was

²⁷⁴ FREIF's Statement of Claim, [3].

²⁷⁵ FREIF's Statement of Claim, [3].

²⁷⁶ FREIF's Statement of Claim, [5].

²⁷⁷ FREIF's Statement of Claim, [6].

²⁷⁸ FREIF's Statement of Claim, [9].

calculated, and added a 'floor' and 'ceiling' to the premiums payable to investors on the wholesale price of power.

161. According to FREIF, both RD 436/2004 and RD 661/2007 contained a guarantee that once a wind farm qualified for the special regime, Spain could not and would not alter the benefits for that facility at a later date.
162. In the period following the decrees, power generation attributable to renewable energy sources increased significantly. For instance, wind capacity increased from 8.181MW to 16.646MW in 2008.²⁷⁹
163. A further change to the regime was enacted in 2010. In the midst of the financial crisis, FREIF alleges that Spain entered into an agreement with the wind and thermosolar associations seen through the implementation of RD 1614/2010 (the **2010 Agreement**). The substance of the alleged agreement is as follows:²⁸⁰
- "[T]he industry agreed to accept (1) temporary decreases in the levels of compensation available to some facilities... and (2) a limitation on operating hours in years with unusually high production. In exchange, Spain committed to maintain wind and thermosolar facilities' option of electing to receive a premium on top of market prices throughout the operating lives, of all registered facilities, and not to apply any other changes to the remuneration for existing wind plants in the future. Spain implemented the 2010 Agreement through [RD 1614/2010]. True to Spain's word, Article 5 of RD 1614/2010 reiterated its promise that all future adjustments in remuneration would not be applied retroactively to already built and operational facilities."
164. In December 2011, FREIF purchased a 50% preferred equity interest in a portfolio containing six wind parks. Linklaters performed due diligence into both the assets and any extant regulatory risk. With respect to the latter point, FREIF submits that Linklaters advised that regulatory risks were low, considering the regime had only recently been revised in 2011.
165. However, in 2012, Spain began to wind back the economic support promised under RD 1614/2010 in contradiction of what FREIF says were promises it made in the 2010 Agreement.²⁸¹ The effect of RD 661/2007 was "canceled... for new facilities".²⁸² This occurred, in FREIF's submission, "despite the significant investment costs that had gone into those developments and despite Spain having encouraged that very investment in additional facilities".²⁸³
166. Subsequently, in December 2012, Law 15/2012 was enacted which imposed a new 7% tax on both the value of electricity, and the value of incentives provided under RD 661/2007. In addition, the Government allegedly retroactively prohibited renewable

²⁷⁹ FREIF's Statement of Claim, [15].

²⁸⁰ FREIF's Statement of Claim, [18].

²⁸¹ FREIF's Statement of Claim, [20].

²⁸² FREIF's Statement of Claim, [21].

²⁸³ FREIF's Statement of Claim, [21].

energy providers from “selling their production to the market and receiving a premium on top of the market price”.²⁸⁴ Tariffs also ceased to be indexed to movements in the Consumer Price Index (**CPI**), introducing instead an “amended CPI”. In the year that followed, further changes were enacted which “abolish[ed] RD 661/2007 in its entirety (along with the rest of the legal structure governing the so-called "special regime" of renewable electricity generation, which had existed since 1997)”.²⁸⁵ The incentives which took its place were, in FREIF's view, “far less valuable”.²⁸⁶

167. It is FREIF's case that these measures caused significant harm to its investments, which had the effect that: (i) its ability to meet debt covenants was impaired; and (ii) it risked defaulting on its debt. In sum, it alleges that, as a result of Spain's measures, FREIF's wind farms are no longer able to earn anything close to a reasonable return.²⁸⁷
168. The differences between the Parties' cases are apparent and are discussed in greater depth in the following sections. FREIF goes so far as to label Spain's recount of events as a "total revision of history".²⁸⁸ It is however essential to draw out two key matters which the Parties dispute which are foundational issues in this dispute:
- (a) First, FREIF denies that the Original Regulatory Regime was subject to the dual principles of "economic sustainability" and "reasonable return"; and
 - (b) Secondly, FREIF disputes Spain's argument that RD 1614/2010 did not embody an Agreement struck between the energy sector and the Government.
169. The Tribunal will set out the Parties' positions as to the factual background of this Arbitration concerning the following issues:
- (a) The original regulatory regime;
 - (b) The development of the law;
 - (c) The tariff deficit;
 - (d) The status of RD 1614/2010;
 - (e) FREIF's investment; and
 - (f) The new regulatory regime.

K1 The Original Regulatory Regime

170. The series of legislative and regulatory amendments relevant to this dispute have their genesis in the liberalisation of the Spanish energy market in the 1990s. While the

²⁸⁴ FREIF's Statement of Claim, [22].

²⁸⁵ FREIF's Statement of Claim, [23].

²⁸⁶ FREIF's Statement of Claim, [23].

²⁸⁷ FREIF's Statement of Claim, [25].

²⁸⁸ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [169].

Government retained control of the transmission and distribution of electricity, *generation* and *supply* were liberalised, thereby "allowing electricity producers to sell electricity to larger consumers in bilateral contracts or into a wholesale pool through an auction process".²⁸⁹

171. At the same time, the Spanish government took early steps to attract investment in renewable energy production. This was essential, given that renewable energy production (particularly at that time) was uncompetitive as against conventional methods. High per-unit production costs and high upfront capital costs of infrastructures also meant that, absent government intervention, capital investments were particularly vulnerable to (among other things) movements in price.²⁹⁰ This vulnerability is aggravated by the intermittency of renewable energy sources.
172. Beyond codifying Spain's commitment to emissions reduction, Law 54/1997 set down its aim to encourage investment in renewables. It maintained a '**Special Regime**' for renewable energy facilities, affording producers certain rights and privileges.²⁹¹ Among these measures, the law gave the Spanish General Administration a broad discretion to implement the economic elements of the legislation. Article 30.4 required the government to "fix a premium that maintained the price of renewable power within a 'band' between 80-90% of the average consumer electricity price".²⁹² In setting the tariff payable to producers, Article 30.4 required the administration to take account of the following:²⁹³

To determine the premiums, voltage levels delivered to the grid shall be considered, as well as the actual contribution to environmental improvement, primary energy savings and energy efficiency, and the investment costs incurred to obtain reasonable rates of return with regard to the cost of money in the capital markets.

173. Spain focuses its account of Law 54/1997 on the two key principles which it says govern the SES: (i) that Energy supply is a service of strategic importance; and (ii) guaranteeing the supply requires the financial sustainability of the system.²⁹⁴
174. Spain explains that "the main objective of the SES established by Law 54/1997 [was] to ensure that all consumers have access to electricity in conditions of equality and quality, ensuring that it is produced at the lowest possible cost, taking into account environmental protection."²⁹⁵ The implication of this principle is a policy approach which seeks to ensure the long term "economic sustainability" of the system, an integral part of which is the SES' financial self-sufficiency.

Financial self-sufficiency, as reflected in Act 40/1994, of 30 December, on planning of the National Electricity System (hereinafter, "Act 40/1994") was expressly reaffirmed

²⁸⁹ FREIF's Statement of Claim, [98].

²⁹⁰ FREIF's Statement of Claim, [100]; First Brattle Regulatory Report, [49].

²⁹¹ Law 54/2007, Preamble; FREIF's Statement of Claim, [115].

²⁹² FREIF's Statement of Claim, [116].

²⁹³ Law 54/2007, Article 30.4, [2].

²⁹⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [355].

²⁹⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [359].

in 2011 by an Act that FREIF omitted to mention to the Arbitral Tribunal. Act 1/2011, on the Sustainable Economy of 2011, explicitly established the need for any planning to be done on the basis of a sustainable system.²⁹⁶

175. Similarly demonstrative of this principle is the applicable remunerative regime of “reasonable returns”. Under Law 54/1997, remuneration was calculated so as to “achieve reasonable rates of return with reference to the cost of money on the capital market.”²⁹⁷ Spain's position is that:

the pairing market price [sic] plus subsidy in Law 54/1997 has a clear and precise objective: to give a reasonable return on investment, according to the cost of money in the capital market.²⁹⁸

176. FREIF disputes another central plank of Spain's case: that the legal framework guaranteed a “reasonable return”. The provision relied upon by Spain is Article 30.4 of Law 54/1997 – specifically where it reads:

To determine the premiums, voltage levels delivered to the grid shall be considered, as well as the actual contribution to environmental improvement, primary energy savings and energy efficiency, and the investment costs incurred to obtain reasonable rates of return with regard to the cost of money in the capital markets.

177. FREIF agrees that enabling a reasonable return was one objective of the premiums introduced by the law. However, it says that it does not follow, however, that such premiums were guaranteed.

K2 The Development of the Law

178. **RD 2828/1998** represented the “first attempt to implement the specific parameters of Law 54/1997.”²⁹⁹ It introduced a fixed, per-unit, feed-in tariff for renewables producers (or alternatively a premium on the market price of energy production). These rates would be revised every four years by taking into account the evolution of the price of electric power on the market, the participation of these facilities in coverage of demand, and their impact on the technical management of the system. However, the rates could be modified for existing plants within the broad limitations set down in Law 54/1997.

179. FREIF’s commentary on this law is that it “unsurprisingly” failed to attract the desired level of investment, with the result that in the four years following its enactment, Spain was far from achieving its 2006 renewable energy target.³⁰⁰

180. Spain takes a different focus. It notes that RD 2828/1998 demonstrated that the regulations which could be enacted were subordinated to the dual principles of economic sustainability and reasonable return.³⁰¹ This is shown in two respects. *First*,

²⁹⁶ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [362].

²⁹⁷ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [380]; Act 54/1997, Article 30.4.

²⁹⁸ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [383].

²⁹⁹ FREIF’s Statement of Claim, [119].

³⁰⁰ FREIF’s Statement of Claim, [122].

³⁰¹ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [436].

as energy producers were accountable to the Administrative Registry, this evidenced an “intention of the legislator to verify, in any case, compliance with the planning targets for renewable energy sources.” *Secondly*, Article 32 ensured that premiums were reviewed every four years based on, among other criteria, the change in the energy price, thereby maintaining the financial sustainability of the system.

181. **RD 436/2004** replaced RD 2828/1998. The Preamble to the regulations expressed that its aim was to provide “security and stability” and to establish a “long-lasting, transparent regulatory framework”.
182. The salient changes to the regime effected were as follows:
- (a) the tariff rate scale was revised, and set as a percentage of AET. The AET was an index published annually by the Ministry of the Economy, which set different tariff rates for facilities of different sizes. The tariff rate was to remain consistent for a period of 15 years, at which time it would reduce.³⁰²
 - (b) Crucially, Article 40 authorised the revision of the “tariffs, premiums, incentives and supplements” only in respect of plants built after the entry into force of that law.³⁰³
183. FREIF characterises these measures as being directly responsive to consultations with the energy sector. The deficiency in the previous regime, it says, was the absence of a long-term and stable framework. Accordingly, “[i]ndustry representatives... pushed for a legal framework that would offer greater legal security, regulatory stability, and predictability in the incentives granted and the returns on investment.”³⁰⁴
184. Spain takes a different view of matters again. It says that the rationale underpinning the changes was referable only to the “reasonable return principle”.³⁰⁵ The same is said to be evidenced by the ‘Financial Report of RD 436/2004, which explained that the tariff rates and the AET were calculated by reference to this principle. To this end, Spain contends:³⁰⁶
- The subsidies established in RD 436/2004 are not intended to grant an indeterminate return. These subsidies respond to a specific methodology aimed at granting a *standard facility* a reasonable return over a given period of time.
185. Similarly, the requirement to register production facilities with the Administrative Registry “was not... a State commitment to maintain indefinitely and unalterably the future return of the facilities registered therein, but a way to control and know those involved in the [SES]”.³⁰⁷

³⁰² FREIF’s Statement of Claim, [134].

³⁰³ RD 436/2004, Articles 40.2, 40.3.

³⁰⁴ FREIF’s Statement of Claim, [146].

³⁰⁵ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [462].

³⁰⁶ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [465] (emphasis in original).

³⁰⁷ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [477].

186. Importantly, Spain objects to FREIF’s explanation of one aspect of the new regulation. The conflict concerns Article 40.3 of RD 436/2004 which provides as follows:

Article 40. Revision of tariffs, premiums, incentives and supplements for new facilities

1. In 2006, in view of the results of monitoring reports on the degree of compliance with the Development plan for renewable energy, the tariffs, premiums, incentives, and supplements defined in this RD will be reviewed, attending the costs associated with each of these technologies, the degree of participation of the special regime in covering demand and its impact on the system’s technical and economic management. Every four years starting from 2006, a new review shall be performed...

3. The tariffs, premiums, incentives and supplements resulting from any of the revisions referred to in this section shall apply only to the facilities that become operational after the date of entry into force referred to in the preceding paragraph, without retroactivity to previous tariffs and premiums.

187. FREIF contends that this measure operates to confine the scope of the provision so as only to apply to new plants. Spain on the other hand submits that this provision limits the application of the provision only to the terms of payment and not other aspects of the regime, including, the lifespan of the subsidies and the hours of subsidised production. It says that the Government retained the power to alter these terms at will.³⁰⁸

188. Lending further support to its submission that the RD did not operate to preserve the previous regime for existing plants, Spain refers to a number of decisions of the Supreme Court which impress the fact that the Government retains power to adopt further regulations, which take precedence over those previously enacted.³⁰⁹

189. In 2007, Spain replaced RD 436/2004 with **RD 661/2007**. The purpose of RD 661/2007, stated in its Preamble, was to “increase investment in renewable energy to meet Spain’s global targets”.

190. FREIF highlights how the new RD increased tariff rates and, significantly to its case, “incorporate[d] greater, long-term stability and predictability into the regime”.³¹⁰ It submitted:³¹¹

Incentives were no longer linked to a formula (**the AET**) that would vary from year to year in the Government’s discretion, but were guaranteed against future revisions to endure throughout the operating lives of the facilities.

191. The amended regime achieved its objective in two primary ways: (i) it implemented attractive tariff rates that guaranteed a predictable level of profitability for renewable energy investors; and (ii) it guaranteed the duration of those incentives throughout the

³⁰⁸ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [483].

³⁰⁹ eg. R-0077 Judgment from the Third Chamber of the Supreme Court, of 15 December 2005. (App. 73/2004); R-0078 Judgment of the Third Chamber of the Supreme Court of 25 October 2006, [App. 12/2005]; R-0202 Judgment of the Spanish Supreme Court 869/2017, 18 May 2017 (App. 4953/2016)

³¹⁰ FREIF’s Statement of Claim, [149].

³¹¹ FREIF’s Statement of Claim, [149].

operating lives of those facilities registered under the regime.³¹² Further, as something of a compromise measure with the Government, a “cap and floor” mechanism was implemented with respect to the premium option (which also afforded to investors greater certainty).

192. Specifically, with respect to the fixed tariff rates, RD 661/2007 enacted the following measures:

- (a) it guaranteed that the market premium would remain in effect for twenty years, and that the fixed tariff would remain in effect for the life of a facility.³¹³
- (b) it maintained that the remuneration rates could not be adjusted in respect of existing plants, per Article 44.3.

193. The latter feature, FREIF says, was an inclusion which was directly responsive to the concerns of investors as to the certainty of future returns.

The combination of (i) a perfectly known price... and (ii) a clear and easy method of automatic adjustment (in line with the indexed rate of inflation), together with (iii) the guarantee of continued support throughout the entire life of each facility and (iv) the guarantee of no retroactive effect of future revisions, offered investors an attractive degree of security.

194. This key aspect of the new regime was emphasized by Spanish government officials, who made public statements saying that there was no legal uncertainty under the new regime.³¹⁴

195. Spain rejects this characterisation, submitting that the laws were not passed to afford greater stability to investors. It contends that such a characterisation fails to appreciate that the principal legislation granting the authority to regulate by RD, mandates observance of the principle of economic stability. Accordingly, RD 661/2007 was passed to "correct situations of windfall profits and to safeguard the economic sustainability of the SES."³¹⁵

196. The Preamble to the RD is quoted in support of this position: the aim being to "maintain the security of the SES" and address the fact that "some variables... make it necessary to modify the remuneration regime and de-link it from the [AET], or Reference Tariff, which has been used to date."³¹⁶ The Preamble also explains its purpose of "ensuring reasonable remuneration on investments and a likewise reasonable allocation of the costs attributable to the electricity system".³¹⁷

³¹² FREIF's Statement of Claim, [152].

³¹³ FREIF's Statement of Claim, [164].

³¹⁴ See FREIF's Statement of Claim, [170].

³¹⁵ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [556].

³¹⁶ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [558].

³¹⁷ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [559].

197. Spain further rejects the position that RD 661/2007 sought to stabilise the tariffs conferred for existing plants. It refers to Article 40 of RD 436/2004 and Article 44 of RD 661/2007.

198. Article 40 of RD 436/2004 reads as follows:

In 2006, in light of the results of the follow-up reports on the degree of compliance with the Development Plan for renewable energies, the tariffs, premiums, incentives and supplements defined in this royal decree shall be revised.

199. Article 44 of RD 661/2007 then provides:

During the year 2010, on the sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energy Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new energy targets as may be included in the subsequent renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree.

200. In Spain's submission, these provisions related only to compliance with the planning objectives.³¹⁸ Its submission on this point reads:³¹⁹

As regards the effects of these specific revisions and not others, article 40 of RD 436/2004 stipulated that: "The tariffs, primes, incentives and supplements resulting from any of the revisions referred to in this section shall apply only to the facilities that become operational after the date of entry into force referred to in the preceding paragraph, without retroactivity to previous tariffs and primes".

The same caution remains in RD 661/2007, where it states that the effects of revisions that take place as a result of having achieved the planned objectives, and only these revisions, cannot affect existing facilities: "The reviews referred to in this section of the regulated tariff and the upper and lower limits will not affect facilities whose commissioning certificate was awarded by 1 January of the second year following the year in which the review was carried out."

In other words, article 44 of RD 661/2007, just like article 40 of RD 436/2004, limits the effects of the revisions of the specific revisions provided for in these articles, the ordinary revisions linked to planning objectives, and not to others.

201. It argues that two conclusions must necessarily be drawn from these provisions: (i) scope of the preservation of benefits is confined; and (ii) "the incentive system will always be subject to the principle of reasonable rate of return".³²⁰

202. In the same vein, Spain disputes FREIF's claims that the renewable energy industry viewed the Regulations as affording investors superior stability.³²¹ It refers to statements issued by the Association of Renewable Energy Producers (**APPA**) and

³¹⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [605].

³¹⁹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [606]–[608].

³²⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [611].

³²¹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [612].

other industry organisations such as the Spanish Wind Energy Association (**AEE**) who made public statements variously expressing their view that they "did not consider that the last drafting of RD 661/2008 guaranteed the immutability of the remunerative framework".³²²

203. Spain concludes its position on the new RD, stating:³²³

These changes are justified and admissible in an attempt to correct situations of windfall profits and to guarantee the economic sustainability of the SES. Starting in 2006 and 2007, no investor could have had the expectation that RD 661/2007 or any of its articles or similar articles contained in a regulation could prevent the implementation of regulatory measures that would affect existing facilities by reducing their remuneration when such measures were justified by the need to guarantee the economic sustainability of the SES and/or to correct situations of excess remuneration.

K3 The Tariff Deficit

204. If FREIF's narrative of events is to be accepted, there was a flood of investment following the introduction of RD 661/2007. With the confidence of the Government's vocal assurances of the stability afforded to investors under the Regime,³²⁴ investment in renewable energies, and by extension wind energy installed capacity, grew substantially.³²⁵

205. In FREIF's submission, Government ministries, state agencies, and the National Energy Commission (**CNE**) were vocal about the assurances enshrined in RD 661/2007. In particular, they guaranteed that: (i) the new legal framework was stable, (ii) future changes would not apply retroactively to existing facilities, and (iii) the incentives would endure throughout the operating lives of the facilities.³²⁶

206. What began to emerge in this period was a concern about what is called the "tariff deficit", described concisely by FREIF as "a gap between the regulated costs of the system and the revenues that the system collected from electricity consumers to pay those costs." The growth of the deficit is shown in the figure below.³²⁷

³²² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [613].

³²³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [617].

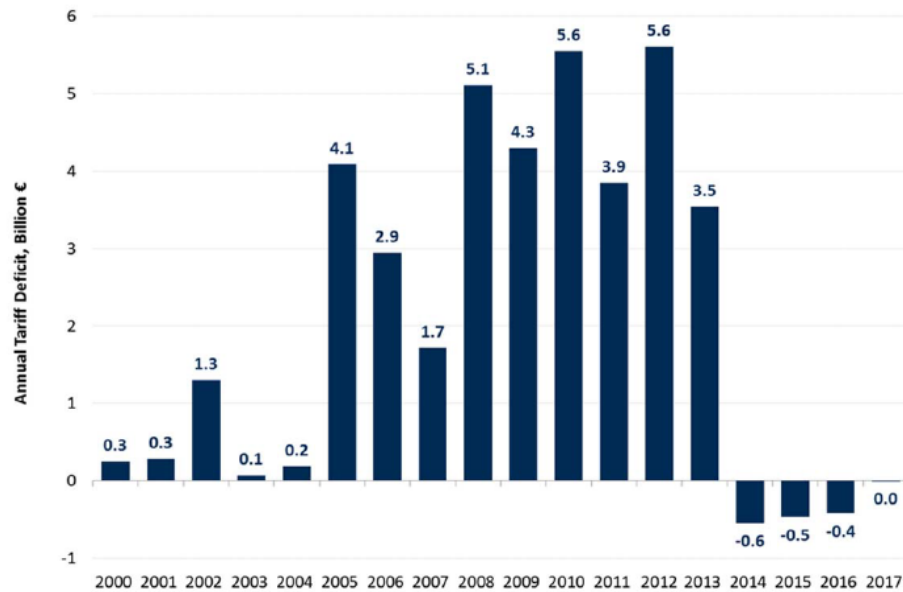
³²⁴ FREIF's Statement of Claim, [178].

³²⁵ FREIF's Statement of Claim, [185].

³²⁶ FREIF's Statement of Claim, [178].

³²⁷ First Brattle Regulatory Report, [139].

Figure 11: Evolution of the Annual Tariff Deficit



207. Spain contends that the emergence of this tariff deficit was a serious economic issue, and one which threatened to undermine the foundational legal principle of "economic sustainability". It described the measure subsequently adopted to correct the deficit as "extraordinarily urgent and necessary".³²⁸ FREIF's attitudes are more muted. In its view, these increases in the cost to the electricity system were "no surprise" and could be anticipated easily, as the cost of renewables was set precisely under RD 661/2007.³²⁹ As to its cause, FREIF's experts contend that:

the tariff deficit emerged for the simple reason that Spain failed to set consumer charges at a level sufficient to cover the costs of the electricity system.³³⁰

208. In any event, in a collaborative process conducted between the energy sector and the Spanish government, regulatory amendments were formulated to bring the growing tariff deficit under control.

209. The measures were embodied in **RD-Law 6/2009**, the aim of which was to eliminate the deficit by 1 January 2013.

210. The primary mechanism by which this would be achieved was by raising the tariff, and imposing new conditions of entry to participate in the scheme.³³¹ FREIF maintains that these changes:

merely established an additional administrative pre-requisite for new facilities to be eligible for Special Regime incentives; it did not make any changes to the rights of facilities already part of the Special Regime.³³²

³²⁸ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [620].

³²⁹ FREIF's Statement of Claim, [199].

³³⁰ FREIF's Statement of Claim, [199].

³³¹ FREIF's Statement of Claim, [202]–[203].

³³² FREIF's Statement of Claim, [204].

211. To the contrary, Spain argues that the laws represented an important step to adjust the expectations of investors. First, it says that the law made clear that the tariff deficit required an urgent response, having the potential to cause "serious problems" and endanger the system's sustainability. Second, the law put investors on notice that the Regulator would adopt legal measures:³³³

that were necessary to achieve the above-mentioned objective [to reduce the tariff deficit]. In other words, until this objective was attained, all costs and revenues of the SES would be subject to its achievement.

212. Further amendments were implemented in **RD 1614/2010** which pursued the dual objectives of reducing the tariff deficit while addressing "several inefficiencies in the application of RDL 6/2009 to wind and CSP facilities, and guaranteeing the application of the economic regime set forth in RD 661/2007 to existing projects".³³⁴

213. The latter clause is crucial in FREIF's submission. After a period of negotiation,³³⁵ the renewables industry settled on a range of measures which involved the renewables producers "accept[ing] a reduction in the number of equivalent operating hours of operation".³³⁶ However, this concession was made in exchange for Spain's guarantee of stability and no further modifications of the tariffs for the existing plants in the future.³³⁷ In Mr Ceña's witness statement, he explained this quid pro quo:

In exchange for these revisions to the regulatory framework, Article 5.3 of RD 1614/2010 expressly excluded the possibility of any future revisions to the incentive regime for existing facilities.³³⁸

214. The important aspect of these amendments which FREIF stresses is that RD 1614/2010 essentially represented an agreement between the Government and the renewable energy sector, which it calls the "2010 Agreement". The process of the negotiation is described in some detail in the submissions, and it will be sufficient to note the following.

K4 Status of RD 1614/2010

215. The context discussed in the following section is of great relevance to the merits of the dispute, particularly with respect to FREIF's submission that Spain breached the FET standard required by Article 10 of the ECT. FREIF submits that Spain is incorrect to deny the existence of the 2010 Agreement with the wind sector.³³⁹

216. It is not correct, in FREIF's submission, that the discussions with the Government were mere consultations with associations, conducted in an ordinary process mandated by law.

³³³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [632].

³³⁴ FREIF's Statement of Claim, [206].

³³⁵ FREIF's Statement of Claim, [210].

³³⁶ FREIF's Statement of Claim, [212].

³³⁷ FREIF's Statement of Claim, [212].

³³⁸ Witness Statement of Mr Ceña, [58]. See also C-148 "The AEE Considers that the New Royal Decree for the Wind Sector is Good for the Elimination of Uncertainty", 9 December 2019.

³³⁹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [271].

217. At the commencement of the negotiations, the Government sought to reduce the incentives available to producers so as to address the worsening tariff deficit (which had become worse as a result of a drop in demand). The sector showed fierce resistance to such changes, as it would impair its rights under the 2007 regulations.
218. FREIF describes the negotiations which took place as being "intense". Mr Ceña devoted much of his First Statement to describing the negotiations between the Minister of Energy and the AEE (the wind industry association) with the "purpose of reaching an agreement on a temporary reduction to the remuneration for wind facilities."³⁴⁰ Throughout the course of at least nine meetings between the two, a series of detailed proposals were exchanged between the Parties.
219. Mr Ceña describes the AEE's priority in the discussions as being to shelter the existing legal framework from any retrospective change. However, by way of compromise, the AEE agreed to a reduction in the "number of equivalent operating hours of operation".³⁴¹
220. At the culmination of these discussions, according to the Ministry's press release:³⁴²
- an agreement was finally reached on July 2, 2010. On that same day, the Ministry issued a press release announcing that it had "entered into an agreement with the wind and CSP sectors to review their remuneration framework".
221. The Ministry noted the following features of the agreement: (i) there was an agreed reduction in remuneration for both wind and CSP plants which was temporary; and (ii) the Agreement included "long term measures" "that strengthened the stability of the remuneration for wind and CSP facilities."³⁴³ FREIF submits these features were directly referable to the Government's negotiations with the sector.
222. Whilst implementing the Agreement, the Ministry worked "very closely" with the AEE. FREIF notes that:³⁴⁴
- The AEE received a first draft of the Royal Decree from the Ministry on July 14, 2010, and submitted its comments and edits to each of the versions it received from the Ministry. Mr Jose Ceña Lazaro directly participated in this process, preparing the AEE's comments and edits to each of the drafts to make sure the decree accurately reflected the content of the Agreement.
223. When the RD was finally released, the Official Notice published by the Council of Ministers stated that it "had been agreed with both [the wind and CSP] sectors last July".³⁴⁵ These facts, FREIF submits, make clear the status of the Agreement struck between the Parties.

³⁴⁰ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [273].

³⁴¹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [274].

³⁴² C-220, Press Release of the Ministry of Industry, Tourism and Commerce, 2 July 2010.

³⁴³ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [277].

³⁴⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [280].

³⁴⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [281].

224. Spain casts a different light on the regulation. It says, first, that the measures were a further response to the tariff deficit which had worsened owing to an “exceptional drop in electricity demand”.³⁴⁶ Secondly, and crucially to its case:³⁴⁷

FREIF's arguments aimed at turning RD 1614/2010 into a kind of contract resulting from the negotiations are simply nonsense. There are many examples that can be given regarding dialogues with associations carried out by the Government of Spain for the purposes of developing a regulation.

225. Spain expressly disavows any knowledge of the so-called “2010 Agreement”, employing in support a statement of the Minister of Industries which does not refer to an agreement (although noting the 'dialogue' with the industry), and stating that the objective of the laws was to manage the tariff deficit.³⁴⁸

226. Finally, Spain submits that RD 1614/2010 "contains no evidence of any commitment or agreement between the Government of Spain and the wind energy sector [to freeze the remuneration regime]."³⁴⁹ It says that the Regulation constitutes a unilateral action of the regulator in the exercise of its powers that does not include a guarantee of future freezing of a specific remuneration regime.³⁵⁰

227. Further, it argues that RD 1614/2010 impairs the stabilisation measures which remained applicable to certain energy producers. Therefore, the regulatory measures necessary to ensure the economic sustainability of the SES will not be applicable thereto, nor the regulatory measures aimed at avoiding situations of over-remuneration in the event they are detected.³⁵¹

K5 FREIF's Investment

228. FREIF submits that in reliance on the legal framework that had developed, and the Spanish government's sustained assurances as to the stability of that regime, it entered into the joint venture with Spanish company, Renovalia. FREIF and Renovalia created a Spanish company called Renovalia Reserve S.L and invested in the wind farms the subject of this Arbitration in December 2011. FREIF owns 50% minus one share of the equity of the joint venture, although its equity is a preferred class that is entitled to higher equity distributions up to 2021.

229. FREIF sought, in its view, a low-risk investment which would most desirably service its clients, who were primarily on pension plans. For this reason, it was strategically advantageous to "invest in long-lived infrastructure assets with contracted or regulated revenues that generate steady cash flows with minimal risk."³⁵²

³⁴⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [676].

³⁴⁷ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [680].

³⁴⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [685].

³⁴⁹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [707].

³⁵⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [707].

³⁵¹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [716].

³⁵² FREIF's Statement of Claim, [222].

230. Prior to entering the Joint Venture, FREIF retained Linklaters LLP to perform an exhaustive due diligence process of the Spanish legal system and any regulatory risks. In its assessment, the risk of government change to the economic regime was very low. Based on this advice and FREIF's own analysis, FREIF understood that RD 1614/2010:³⁵³

meant that the government had already made all the adjustments that would affect windfarms and promised that no future revisions would apply to existing plants in a law that had been agreed with the wind industry.

231. Crucially, Linklaters considered that Spain could not unilaterally alter the remuneration applicable to the windfarms. It was therefore in reliance on this advice, Spain's regulatory regime, its commitment to the energy sector, and the guarantees of long-term stability that FREIF entered into a joint venture with Renovalia.

K6 The New Regulatory Regime

232. FREIF then contends that, in a "non-transparent and unfair process"³⁵⁴, the legal framework embodied in RD 661/2007 and RD 1614/2010 was overhauled between 2012 and 2014. In its place, a series of measures of retrospective application were implemented, which caused its investments considerable harm.

233. Spain allegedly adopted the following measures:³⁵⁵

- (a) an "arbitrary" reduction in the promised tariffs, effected by the introduction of a 7% tax on all renewable energy producers.
- (b) modification of the CPI adjustment employing an 'adjusted CPI' formula; and
- (c) regulation to eliminate the option to accept a premium on the market sale price of electricity production (an option which had been in force since 1998).

234. These changes stood as a precursor to further changes implemented between July 2013 and June 2014, which operated to revoke in its entirety the Original Regulatory Regime. FREIF contends these changes abolished its incentive to invest, providing "substantially less compensation and vastly less stability".³⁵⁶

235. Before proceeding to address the Parties' positions on the merits of the dispute, it is necessary to identify the salient features of New Regulatory Regime that was implemented.

236. The first measure to consider is the implementation of a 7% tax on energy production. Spain says the tax is a non-discriminatory measure representing an entirely legal and justified exercise of the Spanish government's legislative power. This is particularly so

³⁵³ See FREIF's Statement of Claim, [232], Witness Statement of Mr Fidler, [28].

³⁵⁴ FREIF's Statement of Claim [241].

³⁵⁵ FREIF's Statement of Claim, [241].

³⁵⁶ FREIF's Statement of Claim, subheading H3.

when it is understood that this measure was implemented to decisively resolve the issue of the tariff deficit.

237. FREIF argues that to label the measure as a "tax" is misleading. More than that, the label obscures what it says is the discriminatory effect of the law. **Law 15/2012**, which introduced the tax, levied a 7% tax on all electricity producers in respect of all revenues earned by the producer. Not only were renewable energy producers taxed on the value of the energy they produced, they also had to pay 7% on the value of any incentive payments received. This, in effect, reduced the value of the subsidies they earned.
238. The peculiar position in the market of renewable energy producers, FREIF submits, exacerbated the effect of this measure. Given that wind farms could not generate power at competitive market rates, they lacked the capacity to transfer the burden of the tax to consumers.³⁵⁷ FREIF submits that for this reason the measures *were* discriminatory towards renewables producers.
239. Additional reductions to the incentives receivable by investors were: (i) **RDL 2/2013**, which retrospectively abolished the option for non-photovoltaic producers to be paid a premium on top of the market price for the electricity their facilities produced; and (ii) incentives were indexed to an "amended CPI" which dampened the year-to-year increases in the nominal value of the incentives. According to FREIF, these measures transformed the remuneration framework from being one that was fixed to being variable.³⁵⁸ Under the previous RD 661/2007, the government did not increase tariffs when interest rates rose during the economic crisis in 2010-2012.³⁵⁹
240. The collective aim of these measures was made apparent in the provisions of **RDL 9/2013**: "On Urgent Measures to Guarantee the Financial Stability of the Electricity System". Express provision was made in the Act which reads:³⁶⁰
- This remuneration scheme does not exceed the minimum level necessary to cover the costs that allow for the facilities to compete equally with the rest of technologies in the market and that would lead to a reasonable rate of return by reference to the standard facility applicable in each case.
241. To this end, the principle which guided the New Regulatory Regime was the principle of reasonable return (which Spain contends was at all times applicable). The new scheme ensured that producers should receive no more than a reasonable return. That rate was set in **RDL 9/2013** so that producers would achieve an after-tax return of 5.56% (which FREIF submits falls below that the return contemplated by the 2007 laws, which precipitated its investment).³⁶¹
242. Another aspect of the New Regime was to calculate the rate of remuneration applicable to individual plants by reference to a "Standard Facility". FREIF's issue with this

³⁵⁷ FREIF's Statement of Claim, [247].

³⁵⁸ FREIF's Post Hearing Brief, [84].

³⁵⁹ Transcript Day 5, p. 64, ll. 13–17.

³⁶⁰ RDL 9/2013, Official State Journal, Section I, p. 52110.

³⁶¹ FREIF's Statement of Claim, [260].

measure is that facilities are grouped not by reference to electricity output, but by size. Moreover, as Brattle explained, the new regime "made financial support contingent on certain thresholds of 'equivalent hours of operation'". Below an "operating threshold", plants receive no incentive at all. According to FREIF:³⁶²

Above the 'operating threshold', but below the 'minimum operating hours' level, plants receive a percentage of the maximum investment incentive (in proportion to the hours of operation compared to the minimum). Above the minimum operation hours level, plants receive no additional incentives, and only receive the wholesale price for all additional electricity. Thus, the "minimum operation hours" acts as a cap on the incentives that a wind plant can receive under the New Regulatory Regime.

243. The above does not comprehensively account for all the changes enacted into the system. Of the new scheme, FREIF submitted the following:³⁶³

The New Regulatory regime is astonishingly complex and uncertain, in stark contradiction to the simplicity and transparency that investors demanded, and that RD 661/2007 provided, in order to attract widespread investment in Spain's renewable energy sector. More importantly, the New Regulatory Regime is a "sea change" in the regulatory framework that fundamentally altered the risk and reward framework under which investors committed their valuable capital.

244. FREIF submits that the New Regulatory Regime exacted significant harm upon its investments. The 7% energy tax reduced its incentive remuneration and capped the amount it could produce in exchange for incentives payments. It argues that the measures rendered FREIF vulnerable to downside protection against wholesale prices,³⁶⁴ increased the risk of default and insolvency,³⁶⁵ and subjected its investments to heightened regulatory risks.³⁶⁶ In the final consideration, FREIF submits that:

none of the six projects is now able to achieve the returns it would have generated under the regulatory framework that Spain had originally guaranteed and that induced FREIF's investment.³⁶⁷

245. The theme of Spain's submission continues in respect of the measures implemented subsequent to FREIF's investment. Spain asks the Tribunal not to forget that "the activity of subsidized production from renewable source is an integral part of the SES and, therefore, is subject to its principles and purposes".³⁶⁸ It submits the policies served to stem the losses under the Regime were exacerbated by the economic crisis suffered by Spain at that time. The situation led to an overwhelming divergence between the revenues and costs of the SES, resulting in the so-called tariff deficit.³⁶⁹

³⁶² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [267].

³⁶³ FREIF's Statement of Claim, [275].

³⁶⁴ FREIF's Statement of Claim, [291].

³⁶⁵ FREIF's Statement of Claim, [287].

³⁶⁶ FREIF's Statement of Claim, [296].

³⁶⁷ FREIF's Statement of Claim, [298].

³⁶⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [793].

³⁶⁹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [802].

246. This deficit, it contends, was unsustainable. And so, "[f]aced with this situation, a comprehensive and proportionate response was required for the unsustainable imbalance issue in the SES."³⁷⁰
247. The "Tax on the Value of the Production of Electrical Energy" (**TVPEE**), it submits, was a tax of general application. It does not accept FREIF's submission that it impacts renewables producers unduly because its tax base applies to revenues from production *and* from incentives payments. It argues that impact has been "neutralised, since the TVPEE is one of the costs remunerated to such producers through the specific remuneration they receive".³⁷¹
248. With regard to the amended measure of indexation (termed the CPI-CT by Spain), Spain argues that the measure is justified "scientifically and legally" and has in fact benefited FREIF. The new measures avoid distortions of the conventional CPI "unrelated to the fundamentals of the economy".³⁷²
249. Considering the New Regulatory Regime in a more holistic way, Spain contends that the framework preserves many existing elements. In fact, it says it perpetuates these essential elements, whilst correcting inefficiencies "in order to guarantee the economic sustainability of the SES in the framework of EU law".
250. Furthermore, Spain contends that "[a]ll of the rules included in the new legal framework have been adjusted to the procedures set out by Spanish law. All reports needed to guarantee the full compliance of the new text of the rules with the Spanish legal system have been collected."³⁷³ In short, both legally and substantively, Spain's position is that it has consulted closely with the energy sector before enacting these laws.
251. Finally, in conformity with the essential principles which underpin the renewable energy regime, Spain argues that the challenged measures maintain the objective of providing investors with a reasonable rate of return.

K7 Joint Chronology

252. The Parties submitted a joint chronology as Schedule 1 of their Post Hearing Briefs, a summarised version of which is provided below.

Date	Event
1980	Spain adopted Law 82/1980, which had the goal of promoting renewable energy and increasing energy efficiency as part of a strategy to reduce dependence on imported hydrocarbons.
1981	Spain adopted Royal Decree (RD) 1217/1981 to promote "mini" hydro facilities.
1982	Spain adopts RD 1544/1982, expanding the incentive regime to hydro facilities over 5 MW.
1986	Spain enacts the 1986 Renewable Energy Plan.
1989	Spain enacts the 1989 Renewable Energy Plan.

³⁷⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [805].

³⁷¹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [886].

³⁷² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [892].

³⁷³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [914].

1991	Spain enacts a National Energy Plan for the next decade, which specified Spain's goal of increasing the share of total primary energy consumption from non-hydro renewable sources.
1994	Spain enacts RD 2366/1994, which created the Special Regime for electricity generators from renewable energy sources, cogeneration, and waste facilities under 100 MW.
1994	The EU issues the Declaration of Madrid, which called on the EU to establish a goal that renewable energy would satisfy 15% of the EU's energy requirements by 2010.
1994.12.30	Spain enacts Law 40/1994, of 30 December, on planning of the National Electricity System.
1997	EC publishes a White Paper that calls for the EU to satisfy 12% of its total energy requirements from renewable resources by 2010.
1997.11.27	Spain enacts Law 54/1997.
1998.04.28	EU agrees to binding emission-reduction goals in the Kyoto Protocol, wherein the EU committed to an emissions reduction of 8% below 1990 levels in the period from 2008-2012.
1998.06	EU meets in Luxembourg to establish national emissions targets for Member States to meet targets under the Kyoto Protocol. Spain's emissions increase was capped at 15% above its 1990 output.
1998.12.23	Spain enacts Royal Decree 2818/1998.
1999.12	The Development Plan of Renewable Energies 2000-2010 is delivered.
2001.02.03	The European Commission publishes the "Community Guidelines on State Aid for environmental protection" in the Official Journal of the European Union.
2001.09	EU adopts Directive 2001/77 EC on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, establishing a target to satisfy 12% of total EU energy consumption and 22.1% of EU electricity production from renewable resources by 2010.
2004.03.12	Spain enacts Royal Decree 436/2004.
2005.08	The Renewable Energy Plan in Spain 2005-2010 is delivered.
2005.12.15	The Spanish Supreme Court renders a Judgment.
2006.03.09	One of the projects that Claimant would later acquire, La Fuensanta, receives its RAIPRE registration confirming its right to Special Regime tariffs.
2006.06.23	Spain enacts Royal Decree-Law (" RDL ") 7/2006.
2006.10.25	The Spanish Supreme Court renders a Judgment.
2007.05.25	Spain enacts RD 661/2007.
2007.05.25	Spain issues a press release on RD 661/2007. Spain's Council of Ministers issues a similar notice on RD 661/2007.
2007.07	Pöyry issues a report called " <i>Current and future state of wind energy in Spain and Portugal</i> ".
2007.10.09	The Spanish Supreme Court issues a Judgment.
2004-2009	Spain gives a number of presentations to the investment community on the RD 436/2004 and RD 661/2007 incentive regimes.
2008.03.07	Two other of the wind projects that Claimant would later acquire, Casa del Aire I and Casa del Aire II, receive their RAIPRE registrations.
2008.05.09	Three other of the wind projects that Claimant would later acquire, La Muñeca, Alconada, and Cuesta Mañera, receive their RAIPRE registrations.
2008.09.26	Spain enacts RD 1578/2008.
2009.04.30	Spain enacts RD-Law 6/2009.
2009.05.20	The Draft of a future Renewable Energy Law is presented jointly by APPA and Greenpeace, who also issued a press release.

2009.12.03 and 2009.12.09	The Spanish Supreme Court renders three Judgments.
"Late" 2009	First Reserve, Claimant's then-parent company, is introduced to Renovalia, which will become its JV partner for the acquisition of the wind projects at issue in this arbitration.
2010.04.22	Renovalia, Claimant's JV partner, issues an offer for the subscription and admission to trading of shares.
June 2010	Reports and/or summaries of conversations between the Spanish Ministry and the wind sector (and/or a related agreement, from Claimant's perspective, which Respondent disputes) are issued.
2010.06.30	Spain adopted the National Renewable Energy Action Plan for 2011-2020 (PANER).
2010.07.02	The Ministry of Industry issues a press release.
2010.07.29	The AEE submits allegations to the CNE during the Spanish National Energy Commission public consultation process on the Proposed RD 1565/2010.
2010.11.19	Spain enacts RD 1565/2010.
2010.12.07	Spain enacts RD 1614/2010.
2010.12.23	Spain enacts RD-Law 14/2010 which established urgent measures for the correction of the tariff deficit in the electricity sector.
2011.01.26	The Minister of Industry (Mr. Sebastian) gives a speech to the Congress of Deputies during the session held to approve RD-Act 14/2010.
2011.01.06	Linklaters provides ongoing advice to First Reserve regarding Claimant's potential investment in Spain.
2011.03.04	Spain enacts Law 2/2011, of 4 March, on Sustainable Economy.
2011.03	Pöyry issues a report entitled " <i>Current state and future trends of solar power in Spain</i> ".
2011.05.18	First Reserve addressed an indicative offer to Renovalia to establish a joint venture to own a portfolio of wind assets in Spain and to possibly acquire further assets under development once they were fully developed and ready to build.
2011.09.22	First Reserve completed the "Renovalia JV Infrastructure Investment Committee Final Memo," recommending that Claimant proceed with the Renovalia JV.
2011.10.14	Claimant and Renovalia enter into a share sale and purchase agreement (2011 SPA) to acquire the wind projects.
2011.12.01	Shareholders agreement between Claimant and Renovalia comes into effect.
2011.12.19	The candidate for Prime Minister makes its inaugural address at Congress.
2011.12.28	The CNE issues a press release.
2012.01.27	Spain enacts Royal Decree-Law 1/2012, of 27 January, proceeding to the suspension of remuneration pre-allocation procedures and the elimination of the economic incentives for new electric energy production plants using cogeneration, renewable energy sources and waste.
2012.01.27	The Ministry of Industry, Energy and Tourism issues a press release.
2012.03.07	The CNE issues Report 2/2012 " <i>On the Spanish Energy Sector</i> " on 7 March 2012, the first part of which is dedicated to the " <i>Measures to Ensure the Economic and Financial Sustainability of the Electricity System</i> ".
2012.04.25	Claimant acquired an additional 12.5% indirect interest in ENERDEURO
2012.04.27	The government approves the "National Reform Program 2012".
2012.07.06	The European Union Council makes a statement.
2012.07.20	The Kingdom of Spain subscribed with the EU the Memorandum of Understanding on Financial-Sector Policy Conditionality.
2012.11.12	Spanish Supreme Court issues a judgment.
2012.12.27	Spain enacts Law 15/2012.
2013.02.01	Spain enacts RDL 2/2013.

2013.07.13	Spain enacts RDL 9/2013
2013.12.26	Spain enacts Law 24/2013.
June 2014	Spain enacts RD 413/2014 and Ministerial Order IET/1045/2014.
2016.04.20	Spanish Supreme Court issues a judgement.
2017.11.13	The European Commission ("EC") issues its Decision in State Aid procedure SA.40348.
2019.05.01	Claimant sells its interests in the wind plants at issue in this arbitration, while retaining its rights to pursue this arbitration.
2019.11.22	Spain enacts RDL 17/2019.

L RELEVANT ECT PROVISIONS

253. This part of the Award sets out the key provisions of the ECT which form the basis of the Parties' dispute.

L1 Jurisdictional Objections

254. Part I, Article 1 sets out definitions of key terms which are relevant to the intra-EU objection and the "*electa una via*" provision. These definitions include:

(2) "Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.

(3) "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

[...]

(7) "Investor" means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

255. Part III, Article 16 on "Relation to Other Agreements", which is relevant to the intra-EU objection, provides:

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

256. Part V, Article 25, entitled "Economic Integration Agreements" provides:

(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.

(3) This Article shall not affect the application of the WTO Agreement according to Article 29.

257. Part V, Article 26, concerning the "Settlement of Disputes between an Investor and a Contracting Party" is set out in full above at [12].

258. Part VII, Article 36(7) provides for the voting procedure of a Regional Economic Integration Organization, which is referred to during submissions on the intra-EU objection:

A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its Member States which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its Member States exercise theirs, and vice versa.

259. Part IV, Articles 21(1) and 21(7) concern "Taxation Measures" relevant for the Second Jurisdictional Objection:

(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

[...]

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein;

and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

L2 Merits of the Case

260. Part III, Article 10(1) on the “Promotion, Protection and Treatment of Investments” is the key provision which contains obligations that FREIF submit have been breached by Spain. It provides:

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. (footnotes omitted)

M RELEVANT DECISIONS

261. This Arbitration occurs within the context of a series of investment treaty arbitrations filed against Spain by various investors concerning the regulatory framework of Spain’s renewable energy sector. More than 25 previous Awards and Decisions in such cases against Spain have been submitted by the Parties as legal authorities in this Arbitration. The Tribunal has carefully considered these authorities in addition to other legal authorities submitted by the Parties and considers them to be relevant and valuable arbitral jurisprudence which, while not binding, informs the Tribunal’s reasoning.
262. In particular, the Tribunal has collated in tabular form below the conclusions of previous Awards and Decisions on the three jurisdictional objections and the breach of the FET standard due to frustration of legitimate expectations, as these issues constitute substantial portions of the Parties’ pleadings in this Arbitration.
263. It goes without saying that the table is intended as a concise overview of the jurisprudence and there are variations and nuances in the reasoning of the tribunals which the Tribunal will draw upon where relevant in its reasoning in Parts N, O, P, Q and R of this Award.

M1 Jurisdictional Objections

264. The party listed in each of the final three columns is the party that succeeded on the issue.

Date	Exhibit	Award/ Decision	Tribunal	Intra-EU	Taxation	Electa Una Via
2014.10.13	CL-203	The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Preliminary Award on Jurisdiction	Prof. Gabrielle Kaufmann-Kohler (President); The Hon. Charles N. Brower; Judge Bernardo Sepulveda-Amor	Claimant	Issue not raised	Claimant
2016.01.21	RL-0025	Charanne B.V. & Constr. Invs. S.à.r.l. v. Kingdom of Spain, SCC Arb. No. 062/2012, Award	Alexis Mourre (President); Guido Santiago Tawil; Claus von Wobeser	Claimant	Issue not raised	Claimant

2016.06.06 2018.11.30	CL-95 CL-164	RREEF Infra. (G.P.) Ltd. & RREEF Pan European Infra. Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction RREEF Infra. (G.P.) Ltd. & RREEF Pan-European Infra. 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	Prof. Alain Pellet (President); Prof. Pedro Nikken; Prof. Robert Volterra	Claimant	Respondent ³⁷⁴	Issue not raised
2016.07.12	RL-0005	Isolux Infra. Netherlands B.V. v. Kingdom of Spain, SCC 2013/153, Award	Mr Yves Derains (Chairman); Prof. Guido Santiago Tawil; Mr Claus Von Wobeser	Claimant	Claimant did not contest that TPVEE was a taxation measure.	Issue not raised
2017.05.04	CL-76	Eiser Infrastructure Ltd & Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award NB: Annulled due to conflict of interest	Prof. John R Crook (President); Dr Stanimir A. Alexandrov; Prof. Campbell McLachlan QC	Claimant	Claimant did not contest that TPVEE was a taxation measure.	Issue not raised
2018.02.15	CL-19	Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Arbitration (2015/063), Final Arbitral Award	Mr Johan Sidklev (Chairperson); Prof. Antonio Crivellaro; Judge Juez Bernardo Sepulveda-Amor	Claimant	Respondent	Issue not raised

³⁷⁴ The tribunal nonetheless took into account the TPVEE as a levy impacting the return of the claimants, [191].

2018.05.16	CL-103	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award	Mr John Beechey CBE (President); Mr Gary Born; Prof. Brigitte Stern	Claimant	Respondent	Issue not raised
2018.06.15	CL-104	Antin Infra. Servs. Lux. S.à.r.l. & Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award	Dr Eduardo Zuleta (President); Mr J Christopher Thomas QC; Prof. Francisco Orrego Vicuna	Claimant	Respondent	Issue not raised
2018.11.14	CL-106	Foresight Luxembourg Solar 1 S.A.R.L., Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. Kingdom of Spain, SCC Arbitration V (2015/150), Final Award	Dr Michael Moser (Chairperson); Prof. Dr Klaus Michael Sachs; Dr Raul Emilio Vinuesa	Claimant	Respondent	Issue not raised
2019.02.19	CL-171	Cube Infra. Fund SICAV et al. v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum	Professor Vaughan Lowe (President); The Hon. James Spigelman; Prof. Christian Tomuschat	Claimant	Respondent	Issue not raised
2019.02.25	CL-205	Landesbank Baden-Württemberg et al. v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection	Sir Christopher Greenwood QC (President); Mr Rodrigo Oreamuno; Dr Charles Poncet	Claimant	Issue not raised or not yet decided.	Issue not raised or not yet decided.
2019.03.12	CL-165	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,	Prof. Donald M McRae (President); The Hon. L. Yves Fortier; Prof. Laurence Boisson de Chazournes	Claimant	Respondent	Issue not raised

		Liability and Quantum Principles				
2019.05.31	CL-167	9REN Holding S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award	The Hon. Ian Binnie QC (President); Mr David R Haigh QC; Mr VV Veeder QC	Claimant	Respondent	Issue not raised
2019.07.31	CL-185	SolEs Badajoz GMBH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award	Judge Joan E Donoghue (President); Prof. Giorgio Sacerdoti; Sir David AR Williams QC	Claimant	Respondent	Issue not raised
2019.08.02	CL-202	InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award	Mr Stephen L. Drymer (President); Prof. William W Park; Prof. Pierre-Marie Dupuy	Claimant	Respondent	Issue not raised
2019.09.06	CL-200	OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award	Prof. Dr Karl-Heinz Bockstiegel (President); Prof. Mmag. Dr August Reinisch; Prof. Philippe Sands QC	Claimant	Respondent	Issue not raised
2019.12.02	RL-0147	Baywa R.E. Renewable Energy GMBH and Other v. Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum and Dissent	Judge James R. Crawford (President); Dr Horacio A. Grigera Naón; Ms Loretta Malintoppi	Claimant	Respondent	Issue not raised
2019.12.02	RL-0149	Stadtwerke München GMBH, Rweinnogy GMBH, and Others v. Kingdom of Spain, ICSID Case No.	Prof. Jeswald W. Salacuse (President); Prof. Kaj Hobér; Prof. Zachary Douglas QC	Claimant	Respondent	Issue not raised

		ARB/15/1. Award and Dissent				
2019.12.30	RL-0151	RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34. Decision on Jurisdiction, Liability and Certain Issues of Quantum	Mr. Samuel Wordsworth QC, (President); Ms. Anna Joubin-Bret; Mr. Judd L. Kessler	Claimant	Respondent	Issue not raised
2020.01.21	RL-0159	Watkins Holding S.à.r.l. et al. v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award	Tan Sri Dato' Cecil W.M. Abraham (President); Dr. Michael C. Pryles AO; Prof. Dr. Hélène Ruiz Fabri	Claimant	Respondent	Issue not raised
2020.03.09	RL-0155	Hydro Energy 1 S.À R.L. And Hydroxana Sweden Ab v. Kingdom of Spain ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions On Quantum	Lord Collins of Mapesbury (President); Prof. Rolf Knieper; Mr Peter Rees, QC	Claimant	Respondent	Issue not raised
2020.08.31	RL-0162	Cavalum SGPS, S.A. v. The Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum and Dissent	Lord Collins of Mapesbury (President); Mr. David R. Haigh QC; Sir Daniel Bethlehem QC	Claimant	Respondent	Issue not raised

M2 Frustration of Legitimate Expectations

Date	Exhibit	Award/ Decision	Tribunal	Dissent	FET Liability ³⁷⁵
2016.01.21	CL-96	Charanne B.V. & Constr. Invs. S.à.r.l. v. Kingdom of Spain, SCC Arb. No. 062/2012, Award	Alexis Mourre (President); Guido Santiago Tawil; Claus von Wobeser	Prof. Guido Santiago Tawil dissented on approach to 'legitimate expectations' regarding the standard of "fair and equitable treatment"	Spain not liable
2016.07.12	CL-97	Isolux Infra. Netherlands B.V. v. Kingdom of Spain, SCC 2013/153, Award	Mr Yves Derains (Chairman); Prof Guido Santiago Tawil; Mr Claus Von Wobeser	Prof. Guido Santiago Tawil dissented on approach to 'legitimate expectations' regarding the standard of "fair and equitable treatment"	Spain not liable
2017.05.04	CL-76	Eiser Infrastructure Ltd & Energia Solar Luxembourg S.A.R.L. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award - Annulled due to conflict of interest	Prof. John R Crook (President); Dr Stanimir A. Alexandrov; Prof. Campbell McLachlan QC	N/A	Spain liable for failing to honour specific incentive guarantees
2018.02.15	CL-19	Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Arbitration (2015/063), Final Arbitral Award	Mr Johan Sidklev (Chairperson); Prof. Antonio Crivellaro; Judge Juez Bernardo Sepulveda-Amor	N/A	Spain liable for failing to honour specific incentive guarantees
2018.05.16	CL-103	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award	Mr John Beechey CBE (President); Mr Gary Born; Prof. Brigitte Stern	N/A	Spain liable for failing to honour specific incentive guarantees
2018.06.15	CL-104	Antin Infra. Servs. Lux. S.à.r.l. & Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award	Dr Eduardo Zuleta (President); Mr J Christopher Thomas QC; Prof. Francisco Orrego Vicuna	N/A	Spain liable for failing to honour specific incentive guarantees

³⁷⁵ FREIF's Opening Presentation, slides 64-65.

2018.11.14	CL-106	Foresight Luxembourg Solar 1 S.A.R.L, Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. Kingdom of Spain, SCC Arbitration V (2015/150), Final Award	Dr Michael Moser (Chairperson); Prof. Dr Klaus Michael Sachs; Dr Raul Emilio Vinuesa	Dr Raul Emilio Vinuesa dissented on the applicable law to the merits of the dispute and claimant's due diligence, and thus the finding on Spain's liability.	Spain liable for failing to honour specific incentive guarantees
2018.11.30	CL-164	RREEF Infra. (G.P.) Ltd. & RREEF Pan-European Infra. 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	Prof. Alain Pellet (President); Professor Pedro Nikken; Prof. Robert Volterra	Prof Robert Volterra partially dissented on quantum. He considered that the scope of legitimate expectations is different and Spain is liable for more than a reasonable rate of return.	Spain liable for failing to ensure a reasonable rate of return
2019.02.19 2019.07.15	CL-171	Cube Infra. Fund SICAV et al. v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum Cube Infra. Fund SICAV et al. v. Kingdom of Spain, ICSID Case No. ARB/15/20, Award	Prof. Vaughan Lowe (President); The Hon. James Spigelman; Prof. Christian Tomuschat	Prof. Christian Tomuschat issued partial dissent on merits and quantum on the basis that claimants are not entitled to claim compensation for hydro activities.	Spain liable for failing to honour specific incentive guarantees
2019.03.12 2019.05.31	CL-165	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 NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Award	Prof. Donald M McRae (President); The Hon. L. Yves Fortier; Prof. Laurence Boisson de Chazournes	N/A	Spain liable for failing to ensure a reasonable rate of return
2019.05.31	CL-167	9REN Holding S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award	The Hon. Ian Binnie QC (President); Mr David R Haigh	One unspecified member dissented on quantum (i.e., appropriate valuation).	Spain liable for failing to honour specific

			QC; Mr VV Veeder QC		incentive guarantees
2019.07.31	CL-185	SoIEs Badajoz GMBH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award	Judge Joan E Donoghue (President); Prof. Giorgio Sacerdoti; Sir David AR Williams QC	N/A	Spain liable for failing to honour specific incentive guarantees
2019.08.02	CL-202	InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award	Mr Stephen L. Drymer (President); Prof. William W Park; Prof. Pierre-Marie Dupuy	Prof. Pierre-Marie Dupuy dissented on quantum regarding regulatory risk and illiquidity discount.	Spain liable for failing to honour specific incentive guarantees
2019.09.06	CL-200	OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award	Prof. Dr Karl-Heinz Bockstiegel (President); Prof. Mmag. Dr August Reinisch; Prof. Philippe Sands QC	Prof. Philippe Sands' dissent is not public.	Spain liable for failing to honour specific incentive guarantees
2019.12.02	RL-0147	Baywa R.E. Renewable Energy GMBH and Other v. Kingdom of Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum and Dissent	Judge James R. Crawford (President); Dr. Horacio A. Grigera Naón; Ms. Loretta Malintoppi	Dr Horacio A Grigera Naón partially dissented on FET claim and quantum. He considered that claimant is entitled to full compensation.	Spain liable for failing to ensure a reasonable rate of return
2019.12.02	RL-0149	Stadtwerke München GMBH, Rweinnogy GMBH, and Others v. Kingdom of Spain, ICSID Case No. ARB/15/1. Award and Dissent	Prof. Jeswald W. Salacuse (President); Prof. Kaj Hobér; Prof. Zachary Douglas QC	Professor Kaj Hobér dissented on liability, finding Spain liable for failing to honour specific incentive guarantees.	Spain not liable
2019.12.30	RL-0151	RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34. Decision on Jurisdiction, Liability and Certain Issues of Quantum	Mr. Samuel Wordsworth QC, (President); Ms. Anna Joubin-Bret; Mr. Judd L. Kessler	N/A	Spain liable for failing to ensure a reasonable rate of return
2020.01.21	CL-201	Watkins Holding S.à.r.l. et al. v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award	Tan Sri Dato' Cecil W.M. Abraham (President); Dr. Michael C. Pryles AO; Prof. Dr.	Prof. Dr. Hélène Ruiz Fabri dissented on liability and quantum.	Spain liable for failing to honour specific incentive guarantees

			Hélène Ruiz Fabri		
2020.02.28	CL-204	The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Award and Concurring and Dissenting Opinion of Charles N. Brower	Prof. Gabrielle Kaufmann-Kohler (President); The Hon. Charles N. Brower; Judge Bernardo Sepulveda-Amor	Charles N. Brower dissented on the tribunal's acceptance of the alternative claim over primary claim for damages.	Spain liable for failing to honour specific incentive guarantees
2020.03.09	RL-0155	Hydro Energy 1 S.Å R.L. And Hydroxana Sweden Ab v. Kingdom of Spain ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability And Directions on Quantum	Lord Collins of Mapesbury, (President); Prof. Rolf Knieper; Mr Peter Rees, QC	N/A	Spain liable for failing to honour specific incentive guarantees
2020.08.31	RL-0162	Cavalum SGPS, S.A. v Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum and Dissent	Lord Collins of Mapesbury, (President); Mr. David R. Haigh QC; Sir Daniel Bethlehem QC	Mr. David R. Haigh QC dissented on liability, finding Spain liable for failing to honour specific incentive guarantees.	Spain liable for failing to ensure a reasonable rate of return

N FIRST JURISDICTIONAL OBJECTION: INTRA-EU OBJECTION

265. Spain's first jurisdictional objection concerns the application of the ECT to intra-EU disputes. The issues raised under this objection can be understood to fall within three broad categories:

- (a) whether FREIF is an investor of "another" Contracting Party when Spain and the United Kingdom are both members of the EU;
- (b) whether EU law should apply, in the present case, in priority to the ECT; and
- (c) whether the effect of the decision of the European Court of Justice (**ECJ**) in *Slovakia v. Achmea* ('**Achmea**') is to deprive the Tribunal of jurisdiction in this intra-EU dispute.

266. These arguments are grounded in Article 26 of the ECT, which concerns the "Settlement of Disputes Between an Investor and a Contracting Party" and is extracted above at [12].

N1 Investor of "Another" Contracting Party

N1.1 Spain's Submissions

267. Spain first draws the Tribunal's attention to Article 26(1) of the ECT which requires that a dispute commenced under that Article be between a "Contracting Party" and an "investor of another Contracting Party".³⁷⁶

268. It contends that this jurisdictional requirement is not satisfied. The Parties, each EU Member States, transferred their powers to the then EU Communities upon signing up to the EU. Obligations under the framework of the Internal European Energy Market had therefore been transferred to the EU. Advocating for a "literal interpretation" of the ECT,³⁷⁷ Spain submits:³⁷⁸

Neither the Kingdom of Spain nor the United Kingdom could be bound under Part III [of the ECT] because their inclusion in the European Union entailed their acceptance of the primacy of EU law and the concession of their competences thereto in this area of intra-EU investment protection.

269. The language used in the ECT definition of "Contracting Party" is said to support this conclusion, specifying that such a Party "has consented to be bound by this Treaty...", the suggestion being that, as the EU as a supranational body consented to the ECT, the Parties did not each consent to be bound as amongst themselves.³⁷⁹

³⁷⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [3]; Spain's Rejoinder on the Merits and Reply on Jurisdiction, [97].

³⁷⁷ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [70].

³⁷⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [72].

³⁷⁹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [73]; ECT, Article 1.2 .

270. Spain contends that this conclusion is supported by the fact that a Contracting Party may also be a Regional Economic Integration Organisation (**ORIE**), which is defined as:³⁸⁰

[an] organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

271. Spain contends that these provisions mean that the ECT expressly recognises that there are matters governed by the ECT that should be negotiated by the EU because its Member States do not have the competence over them. That competence had been given to the then-European Communities, the sole ORIE that has signed the ECT.³⁸¹

272. As a final point, it is noted that Article 36(7) of the ECT provides that a Regional Economic Integration Organization, when voting, has a number of votes equal to the number of its members "provided that such an Organization shall not exercise its right to vote if its Member States exercise theirs".³⁸² This is said to show that the EU and its Member States may not vote simultaneously. Each one will vote within the scope of their respective competencies. The implication of this, Spain submits, is that "in some areas covered by the ECT the Contracting Party is the EU and in other areas, its Member States".³⁸³

N1.2 FREIF's Submissions

273. FREIF rejects this interpretation of the ECT, arguing that there is no basis for that argument, and it enjoys no legal support.³⁸⁴ Referring to the cases brought against Spain and other EU Member States which are explored later in these reasons, FREIF points out that multiple tribunals have rejected the same argument.

274. FREIF says that the United Kingdom and Spain are both Parties to the ECT and that FREIF meets the definition of an "investor" under the ECT as "a company or other organization organized in accordance with the law applicable in that Contracting Party".³⁸⁵ It claims Spain has failed to point to anything in either the text of the Treaty, or in the authorities, which would support its preferred reading.³⁸⁶ The absence of any express provision effecting such a significant carve-out from the Treaty, and the absence of a "disconnection clause", affirms that conclusion.

275. In response to its argument that under the ECT the EU is an ORIE, FREIF submits that the ECT definition "merely acknowledges that some Contracting Parties are also members of regional organizations".³⁸⁷ The definition says nothing of the capacity of individual Contracting States to commence an arbitration under the ECT, nor does the

³⁸⁰ ECT, Article 1(3).

³⁸¹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [75].

³⁸² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [79].

³⁸³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [80].

³⁸⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [43].

³⁸⁵ FREIF's Statement of Claim, [33].

³⁸⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [52].

³⁸⁷ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [60].

definition mean that as amongst an ORIE the rights afforded under a treaty to which they are party cannot be exercised.

276. FREIF explains that the ECT draws careful distinctions between Contracting Parties that are individual States and those Contracting Parties that are also ORIEs (like the EU) so that all Contracting Parties have equal representation.³⁸⁸ For example, Article 36(7) carefully maintains a State's voting rights in circumstances when it is also part of an ORIE. FREIF concludes that:³⁸⁹

These provisions confirm the desire of the ECT Contracting Parties to preserve the autonomy of EU Member States to exercise their individual rights as ECT Contracting Parties and not to relegate the views of those EU Member States to a position subordinate to that of the EU. In other words, all Contracting Parties to the ECT are represented equally, regardless of whether they may belong to other organizations or international agreements.

N2 Primacy of EU Law

N2.1 Spain's Submissions

277. Spain submits that EU law should have primacy in a dispute between an EU Member State and an investor from another EU Member State. Spain's argument begins with Article 26(6) ECT, which provides:

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.

(emphasis added)

278. Spain suggests that EU law is a matter which must be considered when interpreting the dispute resolution provision in Article 26 as it is "international law". The effect of using EU law to interpret Article 26 is to expressly exclude the application of the dispute resolution mechanisms in Part III ECT in the case of intra-EU disputes. It is submitted that this conclusion is intended, "since the ECT, promoted and signed by the EU, safeguards EU law and its autonomy."³⁹⁰ In its Post Hearing Brief, Spain emphasises that EU law is the foundation of the Spanish support scheme for renewable energy that is the subject of the present case and that by investing in an EU Member State, FREIF was very aware of the implications this has in terms of application of EU law and regulations.³⁹¹ Spain therefore submits that EU law creates a disconnection from international treaties for intra-EU relations, and therefore, the Tribunal lacks jurisdiction.³⁹²
279. Spain contends that the primacy of EU law means that the present case does not meet the requirements for the application of Article 16 of the ECT, which concerns the

³⁸⁸ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [61].

³⁸⁹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [61].

³⁹⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [117].

³⁹¹ Spain's Post Hearing Brief, [7].

³⁹² Spain's Post Hearing Brief, [6].

relationship between the ECT and other agreements of the same subject matter. Instead, any conflict between the ECT and EU law should be resolved in favour of EU law either upon the "principle of supremacy of EU Law", or by operation of the most favoured nation clause in Article 25 of the ECT.

280. In Spain's submission, EU investor protections are more favourable and therefore take precedence. Spain observes that EU members are afforded special protections under the various extant Treaties. An example of one such protection is that in Article 54 of the TFEU, which prohibits any kind of legal standard which dissuades an investor of the EU from establishing itself in another Member State.³⁹³ Other protections include: "remedies to actions that are contrary to the legitimate expectations of investors, disproportionate and/or that amount to an expropriation of their investment".³⁹⁴
281. Furthermore, Spain submits that the right of EU investors to bring disputes before European courts is more favourable than the rights granted under the ECT to submit matters to arbitration for two reasons.³⁹⁵ First, while both options might be equally favourable, to interpret the provision as preferring arbitration (i.e. to denigrate EU courts) adopts an interpretive approach that is incompatible with EU law, displaying an objective lack of confidence in the judicial system.³⁹⁶ Second, there is no indication in the text of the ECT itself that arbitration is to be preferred.³⁹⁷
282. Spain's submission is therefore that these protections take priority over rights contained in the ECT to the extent of any incompatibility. The *Electrabel S.A. v Hungary (Electrabel)* decision is cited in support of this proposition,³⁹⁸ noting the tribunal's findings that "it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law."³⁹⁹ Spain characterises the incompatibility in its Counter-Memorial in the following way:⁴⁰⁰

Accepting that EU Member States should consent to intra-EU arbitration under Article 26 of the ECT would generate a conflict between the ECT and the principles of autonomy, primary and mutual trust of EU Law that must be resolved in favour of the latter pursuant to EU Law.

283. As such, Spain submits that pursuant to Article 26(6), EU law applies to the present dispute and prevails over the ECT's dispute resolution clause. On that basis, the Tribunal lacks jurisdiction.

³⁹³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [65]; Spain's Rejoinder on Merits and Reply on Jurisdiction, [110].

³⁹⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [61].

³⁹⁵ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [221].

³⁹⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [120].

³⁹⁷ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [221].

³⁹⁸ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [91].

³⁹⁹ *Electrabel S.A. v. Hungary*, Decision on Jurisdiction (30 November 2012), [4.130] (*Electrabel*).

⁴⁰⁰ See Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [115].

N2.2 FREIF's Submissions

284. It is FREIF's case that based on the plain language of Article 26 of the ECT, the Tribunal has jurisdiction to hear this dispute.⁴⁰¹ That Article provides that a dispute may be submitted to arbitration arising "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in an Area of the former."⁴⁰² As was found in *Eiser*,⁴⁰³ if those express terms are satisfied, that is the end of the inquiry. Spain would have the Tribunal look through that express language by taking account of international law – and by extension, EU law – so as to supplant the ECT's terms.
285. FREIF submits that the reference to "international law" in Article 26(6) of the ECT does not overcome the ECT's dispute resolution provision. It denies that Article 26(6) resembles anything like a disconnection clause, a view also held by the General Counsel to the Energy Charter Secretariat. To illustrate, the Tribunal is invited to consider, by contrast, the explicit language used in other disconnection clauses such as in the 1988 Convention on Mutual Administrative Assistance in Tax Matters.⁴⁰⁴
286. Instead, FREIF argues that the effect of Article 16 of the ECT means that when two international agreements between the same Contracting Parties are in force, Article 16 gives preference to more favourable provisions for investors and investments. Thus, by its terms, Article 16 cannot be used to deny a right or benefit that the ECT affords to investors.⁴⁰⁵
287. FREIF contends that the rights afforded under the ECT are more favourable than those under EU laws. Its position is distilled in the following extract from its Reply Memorial.⁴⁰⁶
- Its right under the ECT to submit its dispute to a neutral arbitration forum is more favourable than a rule that would require it to resort to the domestic courts of Spain before continuing through the EU legal system. This right to ECT arbitration is absent from the EU legal framework, which is only one way the EU system is demonstrably less favourable than the ECT.
288. In support of this point, FREIF notes that "several dozen investors of other foreign investors have reached the conclusion that arbitration is far more favourable than litigation in the EU court system and have commenced arbitration against Spain."⁴⁰⁷
289. Many tribunals have also agreed that investment arbitration is more favourable. A number of authorities cited adopt the position that arbitration is more favourable, because it "obviate[s] the need to bring [a] claim in Spanish courts",⁴⁰⁸ allows recourse

⁴⁰¹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [49].

⁴⁰² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [51].

⁴⁰³ *Eiser Infrastructure Ltd. & Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, [194].

⁴⁰⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [57].

⁴⁰⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [65].

⁴⁰⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [68].

⁴⁰⁷ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [71].

⁴⁰⁸ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* ICSID Case No. ARB/14/1, Award, 16 May 2018, (**Masdar**); FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [72].

to a neutral forum,⁴⁰⁹ and, most importantly, ensures the rights of investors to seek a remedy in Investor-State arbitration.⁴¹⁰

290. In addition to the specific rule found in Article 16 of the ECT, FREIF also contends that ECT provisions prevail under the general rule of international law. According to the principle in Article 30 of the Vienna Convention on the Law of Treaties (**VCLT**), when two treaties share the same subject matter, an earlier-in-time treaty (e.g., the ECT) applies unless it is found to be incompatible with the later-in-time treaty (e.g., the EU Lisbon Treaty).⁴¹¹
291. The application of that provision, it argues, does not arise because the ECT and EU Treaties do not share the same subject matter, in a view shared by "[m]any scholars and jurists". However, even if they did share the same subject matter, there is said to be no incompatibility between the two. A number of tribunals have arrived at that same conclusion, including in *Electrabel*, in which the tribunal in that case rejected Hungary's/the Commission's intra-EU objection.⁴¹² For that reason, Article 26 of the ECT is not overcome by EU law.

N3 Applicability of *Achmea*

N3.1 Spain's Submissions

292. Prominent in the Parties' submissions is a dispute regarding the principle arising from, and applicability of, the decision of the ECJ in *The Republic of Slovakia v. Achmea (Achmea)*.⁴¹³
293. The Parties have recalled in their submissions in some detail the facts of the case and so it is unnecessary to repeat those details here.⁴¹⁴ It suffices to note that the case concerned the dispute resolution clause in a bilateral investment treaty (**BIT**) concluded between two EU States. The court ultimately found that:⁴¹⁵

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States..., under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

294. Spain summarises the principles applied by the ECJ in *Achmea* as follows:⁴¹⁶

⁴⁰⁹ *Greentech Energy Systems A/S et al. v. Italian Republic*, SCC Arb. No. 2015/095, Award, 23 December 2018, [204], (**Greentech et al. vs Italy**) cited in FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [73].

⁴¹⁰ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**Plama**).

⁴¹¹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [83].

⁴¹² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [84].

⁴¹³ Judgment of CJEU (Court of Justice of the European Union) Case C-284/16, *Republic of Slovakia/Achmea BV*. 6 March 2018.

⁴¹⁴ See FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, pp. 43-44; Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, pp. 30-31.

⁴¹⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [125].

⁴¹⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [126]; Spain's Post Hearing Brief, [8].

- (a) It is essential that, in order to protect integrity of the judicial system established under the various EU treaties, measures be taken to "ensure consistency and uniformity in the interpretation of EU legislation".
- (b) Member States are therefore obligated under Article 19 TFEU to ensure the "full application" of EU Law.
- (c) As arbitral tribunals are not fora forming part of the EU legal system (subject to no appellate jurisdiction nor oversight from the ECJ) they fall outside the purview of Article 19 TEU and Article 344 TFEU, which govern the interpretation and application of EU legislation.
- (d) As investor-state arbitration does not guarantee that EU law is fully enforced, it is therefore incompatible with Articles 267 and 344 of the TFEU, which guarantee the "essential values of the European Union such as the autonomy and primacy of its legal order, distribution of powers, mutual trust between Member States (article 2 TEU) and the duty of sincere cooperation (article 4 TEU), and it removes from the EU judicial system disputes concerning Treaties of the EU."⁴¹⁷

295. Acknowledging that *Achmea* concerned an intra-EU BIT, Spain argues that the "prerequisites" of its application are nonetheless met in this case because:⁴¹⁸

- (a) First, Spain submits that to decide the dispute, the Tribunal is called upon to interpret/apply EU law -- in this case, the 'central institution' of State Aid (among other matters of EU law).
- (b) Secondly, the ECJ is not empowered to "exercise its function of guaranteeing the full application of EU law in all Member States" as required by Article 267 TFEU.
- (c) Finally, any award rendered in this arbitration is not appealable and thus is not subject to review by a Member State.⁴¹⁹

296. Spain therefore concludes that:⁴²⁰

all the prerequisites established by the *Achmea* judgment are met in order to establish the incompatibility of the ECT's Article 26(4) Clause (interpreted by FREIF) and EU Law, which is International Law, that this Court must apply with primacy to resolve the present dispute (Article 26(6) of the ECT). Both Spain and United Kingdom [sic] have been bound internationally, by virtue of the TFEU's Articles 267 and 344 to give primacy to EU Law and not to submit disputes concerning the interpretation and application of that right to bodies other than its own judicial system.

⁴¹⁷ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [128].

⁴¹⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [35].

⁴¹⁹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [35]; *Achmea*, [50].

⁴²⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [143].

297. Spain devotes a sizable portion of its pleadings to critiquing the decision in *Vattenfall AB et al. v. Federal Republic of Germany (Vattenfall)*, which rejected the jurisdictional objection based on the *Achmea* decision. It argues that the reasoning in the decision was not based on arbitral precedent and that, were they given proper regard, a different approach would have been adopted. Spain then argues *Vattenfall* adopts an incorrect interpretive approach. The approach, it says, was one which fails to accord with the requirement of Art 31 VCLT to interpret the ECT "in good faith in line with the literal meaning of its terms, in accordance with its aim and context",⁴²¹ with the effect that the ECT was 'harmonised' with EU law.
298. It is also contended that an award which grants compensation to an investor would not be enforceable due to the incompatibility between intra-EU arbitration under the ECT and EU law. The Tribunal is therefore asked to be mindful of its duty to render awards that are compatible with international law and the Parties' international obligations.

N3.2 FREIF's Submissions

299. FREIF's position is that nothing in the *Achmea* decision deprives this Tribunal of the jurisdiction to hear this dispute. Three submissions are made in support. First, it argues that *Achmea* does not affect the jurisdictional analysis under the ECT. Second, the authorities overwhelmingly support this position. Third, and finally, the *Achmea* decision is in any event distinguishable from the present circumstances. Each submission will be considered in turn.
300. First, FREIF argues that *Achmea* does not impact the Tribunal's jurisdictional analysis under the ECT. Spain invites the Tribunal to disregard the plain language of the ECT, using Article 26(6) as a so-called "back door" by which to apply EU law in priority. FREIF contends in response that *Achmea* turned on the precise wording of the governing law provision in the Netherlands-Slovakia BIT, which is materially different from Article 26 of the ECT.
301. It remains that to supplant the express language of the ECT would contravene the principles of treaty interpretation expounded in Article 31(1) VCLT which provides that a treaty "shall be interpreted in good faith and in accordance with the ordinary meaning to be given to [its terms]".⁴²² The point was aptly explained by the tribunal in *Vattenfall*,⁴²³ which found:

It is not the proper role of Article 31(3)(c) [of the VCLT] to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms.

⁴²¹ Spain's Counter Memorial on the Merits and Reply Memorial on Jurisdiction, [199].

⁴²² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [119].

⁴²³ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [120] citing *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, [154] (*Vattenfall*).

302. FREIF denies misapplying *Vattenfall* and accuses Spain of creating confusion.⁴²⁴ In reference to the other cases that Spain says should be preferred, FREIF points out that “Spain inexplicably disregards the fact that every one of these tribunals unanimously rejected the intra-EU objection, notwithstanding the fact that their reasoning might have varied somewhat from that of the *Vattenfall* tribunal”.⁴²⁵ FREIF further argues that, contrary to Spain’s position, it does not follow that simply because the ECT has become part of EU Law, that EU law has become part of the ECT.

303. FREIF then cites the weight of arbitral authority in favour of its position. 28 tribunals have rejected jurisdictional objections which are substantially the same as those raised by Spain. Notably, seven such tribunals did so following the decision in *Achmea*.⁴²⁶ FREIF therefore submits that Spain has failed to demonstrate why the present Tribunal should decline to follow the reasoning of 28 (and counting) other investment treaty tribunals on this issue.

304. It is unnecessary to recall all the authorities discussed by FREIF in its submissions. The thread linking each is captured however in the following extract from the decision in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (Masdar)*:⁴²⁷

The *Achmea* Judgment is of limited application—first, and specifically, to the [Netherlands-Slovakia BIT] and, second, in a more general perspective, to any “provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands-Slovakia BIT].” The ECT is not such a treaty. Thus, the *Achmea* Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.

305. FREIF launches a final line of attack, arguing that *Achmea* does not apply in the circumstances considered in the present arbitration in any event. Contrary to the reading contended for by Spain, the case is said not to stand for the proposition that all arbitrations brought under an investment treaty involving an EU Member State, considering EU law, are prohibited.⁴²⁸ Rather, the ECJ sought only to “limit recourse to international arbitration in the context of certain *intra*-EU BITs to which the EU is not a party.”⁴²⁹ Moreover, the court found its ruling would not apply to an investment treaty to which the EU is a Contracting Party. FREIF cites the following extract of *Achmea* in its support:⁴³⁰

It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements

⁴²⁴ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [114].

⁴²⁵ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [117].

⁴²⁶ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [128].

⁴²⁷ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [129] citing *Masdar*, [678], [683].

⁴²⁸ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [133]–[136].

⁴²⁹ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [136].

⁴³⁰ *Achmea*, [57]–[58].

necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected

In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by the Member States. (emphasis added)

306. The situation contemplated in the excerpt above is said to be distinguishable from those currently in consideration, given that the EU is a Party to the ECT. It is therefore empowered to enter agreements to "submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions".⁴³¹
307. FREIF further submit that the case is distinguishable because the relevant governing law clause required the Tribunal to apply EU law. Given that the Tribunal did not constitute a court able to refer questions to the ECJ per Article 267 TFEU, it would operate to "prevent the full effectiveness of EU law".⁴³² That issue does not arise in the case of the ECT because the Tribunal is not tasked with deciding the dispute on the basis of EU law.
308. Finally, FREIF notes that any theoretical future impact that *Achmea* may have on the enforceability of the Tribunal's award is not a relevant issue for the Tribunal. The Tribunal has no grounds upon which to decline jurisdiction solely on the basis of enforcement concerns where jurisdictional requirements of the ECT have otherwise been met. This is said to be the same conclusion reached by the tribunals in *Ioan Micula v Romania (Micula)* and *Vattenfall*.⁴³³

N4 Tribunal's Decision

309. The Tribunal's determination is that the ECT applies to intra-EU disputes and that Spain's first jurisdictional objection fails. The starting point of Spain's argument is that the arbitration provision of Article 26 of the ECT does not apply to disputes between an EU Member State and an Investor from another EU Member State because FREIF should not be considered an investor of "another" Contracting Party. Article 26 concerns the settlement of "disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former".
310. According to Article 1(2) of the ECT, a "Contracting Party" means "a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force". Although the United Kingdom and Spain were already

⁴³¹ *Achmea*, [57].

⁴³² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [138].

⁴³³ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [144]–[148].

members of the EU at the time of their ratification of the ECT, it is evident to the Tribunal that the United Kingdom, Spain and the European Union are all separately and individually “Contracting Parties” of the ECT. This information is presented publicly for example on the ECT website.⁴³⁴ There is no evidence before the Tribunal that Spain did not consent to be bound by the ECT and or that it would fall outside the ECT’s definition of a “Contracting Party”. The inclusion of both states and ORIEs in the definition of a “Contracting Party” is merely an acknowledgement that some Contracting Parties are regional organisations or are members of a regional organisation. Nonetheless, each is a separate Contracting Party with its own legal standing in an action based on the ECT.

311. Similarly, the definition of “Area” in Article 1(10) with respect to an ORIE does not detract from the fact that the sovereign territory of a state Contracting Party is also defined in the same article as an “Area”. In fact, in defining an ORIE’s “Area” as “the Areas of the Member States of such Organisation”, the ECT expressly clarifies that the ORIE’s territory is simply a collection of defined “Areas” within state Contracting Parties, which are still individually recognised and defined under the ECT. Disputes brought under Article 26 “in the Area of” a Contracting Party do not, therefore, refer only to the Area of the ORIE to the exclusion of Areas of state Contracting Parties such as Spain and the United Kingdom.
312. In support of their respective positions, both Parties refer to Article 36(7) which provides that an ORIE shall have a number of votes equal to the number of its Member States which are Contracting Parties to the ECT provided that its Member States have not exercised their right to vote. Spain argues that the fact that the EU and its Member States may not vote simultaneously shows that “in some areas covered by the ECT, the Contracting Party is the EU and in others its Member State”.⁴³⁵ FREIF, on the other hand, relies on the same provision to argue that a state’s voting right is maintained when it is part of an ORIE.
313. In the Tribunal’s analysis, the Article is designed to maintain equal representation between Contracting Parties such as to recognise the equal status of Contracting Parties who are members of an ORIE and other Contracting Parties. If the ECT had intended for multiple Contracting Parties of the same ORIE to be denied the possibility of seeking arbitration under Article 26(3), a voting regime more consistent with this intention would have entitled the ORIE to only one vote on issues which fell within its competence.
314. Spain’s reliance on Article 25, concerning Economic Integration Agreements, is also of no assistance to its argument because that provision merely clarifies that the ECT does not require any preferential treatment between EU Member States under EU treaties to be extended to non-EU Contracting Parties of the ECT. It has no bearing upon the

⁴³⁴ C-6, <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/>; Energy Charter: Members and Observers—United Kingdom; C-5, Energy Charter: Members and Observers—Spain.

⁴³⁵ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [79].

application of ECT provisions to Contracting Parties and Investors from within the EU. It stretches logic to conclude on basis of Article 25 that “the ECT expressly recognises the principle of primacy of EU law in intra-EU relationships”⁴³⁶ and that therefore Article 26 does not apply to the present dispute.

315. As for Article 26 itself, regardless of whether the EU has taken over competence of certain matters governed by the ECT, there is no express carve-out or disconnection clause restricting the Tribunal’s jurisdiction in cases where the Contracting Parties in the dispute concerned are members of the same ORIE. The wording of Article 26 simply provides for the settlement of disputes “between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in an Area of the former” which has been satisfied in the present case.
316. The lack of any express carve out is of particular note given that the ECT allows ORIEs such as the EU to become Contracting Parties and defines an ORIE as an “organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty”.⁴³⁷ If the ECT intended to exclude the jurisdiction of arbitral tribunals when competence over certain matters governed by the ECT has been transferred to an ORIE, Spain’s complaints ought to have been front of mind in the drafting of Article 26 in order to prevent situations such as the present jurisdictional objection.
317. Instead, Article 26 allows an Investor of any Contracting Party to raise a dispute with any other Contracting Party that it believes has breached an obligation owed to it under Part III of the ECT. Spain is entitled to argue on the merits, and indeed it has argued, that it has not breached any provision of the ECT because it was acting in compliance with EU law. In that scenario a claimant investor could consider submitting a dispute for resolution against the EU if it felt that the obligations breached under Part III of the ECT were breached by the EU. This does not however detract from the Tribunal’s jurisdiction to determine Spain’s liability for breach of Part III provisions.
318. As such, the Tribunal agrees with the *Eiser* tribunal on this issue. As referred to by FREIF,⁴³⁸ that tribunal stated that:⁴³⁹

[A]lthough the EU is a party to the ECT, EU Member States also remain contracting parties to the ECT. Both the EU and [its] Member States can have legal standing as respondents in a claim under the ECT. Investors organized in accordance with the law of any Contracting Party satisfy Article (1)(7)(a)(ii)’s literal requirement to be an “Investor” of a “Contracting Party.” And, a dispute involving such an Investor and another Contracting Party regarding an Investment in that Contracting Party’s “Area” satisfies the literal requirements for compulsory dispute settlement under ECT Article 26(1) and (2).

⁴³⁶ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [82].

⁴³⁷ ECT, Article 1.3 cited in Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [82].

⁴³⁸ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [50].

⁴³⁹ *Eiser Infrastructure Ltd. & Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, [194].

319. A second component of Spain's objection is that Article 26(3) of the ECT cannot be interpreted as a valid offer to arbitration in the case of intra-EU disputes due to the primacy of EU law. Spain contends Article 26(6) of the ECT disassociates EU Member States from the ECT's dispute resolution provisions. Article 26(6) provides that "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". It therefore contends that the "principles of international law" include EU law which must be applied to rule on issues of jurisdiction.
320. The Tribunal is not persuaded by this interpretation of Article 26(6). Article 26(6) asks the Tribunal to decide issues in accordance with the ECT and "applicable" rules and principles of international law. Even if EU law can be characterised as a form of international or supranational law, its applicability to the present arbitration has not been established. As the tribunals in *Novenergia* and *Eiser* concluded, arbitral tribunals formed under the ECT are not constituted on the basis of the "European legal order".⁴⁴⁰ Furthermore, the phrase "issues in dispute" referred to in Article 26(6) has been understood as referring to the law relevant to resolving the merits of the dispute.⁴⁴¹ In the present case, as the Tribunal will elaborate further on its reasoning on the merits at Part Q6 of the Award, the claims brought by FREIF do not concern any alleged breaches of EU law. As the *Novenergia* tribunal observed after analysing a series of other arbitral awards and the EC Decision dated 10 November 2017 on whether Spain's New Regulatory Regime constitutes "State Aid" under EU law:⁴⁴²
- a foreign investor who initiates an ECT arbitration towards a host State invoking protection under the FET standard does not abuse its rights nor incorrectly bypasses EU law. This is because EU law does not recognise, nor prohibit, a similar right. Simply said, the two legal orders do not share the same subject matter, but may easily coexist to the extent that they do not interfere with each other.
321. Even if the subsidies claimed by FREIF under RD 661/2007 constituted State Aid under EU law, the Tribunal would not be required to make any legal determinations under EU law. It would, at most, be a "fact that must shape the legitimate expectations of any investor".⁴⁴³ Similarly, although Spain makes the point that "EU law is the very foundation of the Spanish support scheme for renewable energy that is subject of the present case"⁴⁴⁴ and suggests that Spain's support schemes were encouraged by EU Directives, the disputed measures in this Arbitration are ultimately Spanish domestic laws. As a multilateral treaty with 25 state Contracting Parties that are not EU Member States, it is difficult to envision a context in which EU law was intended to apply to a dispute under the ECT. As the tribunal stated in *RREEF*:⁴⁴⁵

⁴⁴⁰ *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, 15 February 2018, [461] (**Novenergia**); *Eiser*, [199].

⁴⁴¹ See *Vattenfall* [116]–[121].

⁴⁴² *Novenergia* [465] cited in FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [426].

⁴⁴³ Spain's Post Hearing Brief, Schedule 2, p. 7.

⁴⁴⁴ Spain's Post Hearing Brief, [7].

⁴⁴⁵ *RREEF* Decision on Jurisdiction, [74].

this Tribunal has been established by a specific treaty, the ECT, which binds both the EU and its Member States on the one hand and non-EU States on the other hand. As for the latter, EU law is *res inter alios acta* and it cannot be upheld that, by ratifying the ECT, those non-EU States have accepted the EU law as prevailing over the ECT. The ECT is the “*constitution*” of the Tribunal... This is what the Parties to the ECT agreed amongst themselves; it is not within the jurisdiction of the Tribunal to alter this.

322. Therefore, there is no basis in the Tribunal’s view to invoke EU law to interpret the ECT or to suggest that EU law overrides the ECT.

323. Should EU Member States consent to arbitration under Article 26 of the ECT, Spain then contends that this would generate a conflict between the ECT and EU law that must be resolved in favour of the latter pursuant to EU law. Like many tribunals in previous cases, this Tribunal has difficulty accepting the argument that any incompatibility exists between the ECT’s dispute resolution provision and EU law. Spain has contended that Article 344 of the TFEU obliges EU Member States to submit their disputes exclusively to the European judicial system. However, on the Tribunal’s reading of Article 344, that provision applies only to disputes concerning the interpretation or application of “the Treaties”. Similarly, Article 267 of the TFEU states that the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of “the Treaties”. Article 1(2) of the TFEU clearly states that “the Treaties” refers to the TFEU and the TEU only. Submitting disputes under the ECT via the ECT’s dispute resolution provisions is thus not prohibited by the TFEU.

324. Other tribunals have similarly concluded that Spain’s interpretation of Article 344 of the TFEU is unconvincing. Relevantly, the *Charanne B.V. & Constr. Invs. S.à.r.l. v. Kingdom of Spain (Charanne)* tribunal concluded that:⁴⁴⁶

If the Respondent’s theory were true, no domestic court would ever be able to decide on anything concerning the interpretation of EU treaties at any time that the liability of a Member State was at stake. Notwithstanding, the truth is that many claims have been filed against Member States before domestic courts, in which the interpretation or the application of EU treaties could be at stake. Similarly, a Member State can enter into arbitration agreements to resolve disputes that may involve issues concerning EU law. Finally, it is now universally accepted that an arbitration tribunal does not only have the power, but also the duty, to apply EU law.

Therefore, the scope of Article 344 TFEU cannot be so broad as to prevent Member States from submitting any dispute concerning the interpretation of EU treaties to a dispute settlement procedure different from those provided in EU legislation.

(references omitted)

325. The Tribunal finds assurance for its position on two other bases. First, according to Article 16 of the ECT, when two international agreements between the same

⁴⁴⁶ *Charanne B.V. & Constr. Invs. S.à.r.l. v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, 21 January 2016, [443]-[444] (*Charanne*).

Contracting Parties are in force and concern the same subject matter as Part III or V of the ECT, preference should be given to the more favourable provisions for investors and investments. Although the Tribunal does not accept that the ECT and EU law relate to the same subject-matter, it is persuaded that FREIF's reliance on Article 16 is justified and that it has established more favourable provisions under the ECT compared to under EU law in both a procedural and substantive sense.

326. Spain provides little rebuttal on this point aside from its claim that Article 16 does not apply because it has been trumped by EU law, which it says must apply by virtue of Article 26(6). Thus, it presents a circular argument which does not adequately justify the application of EU law to the Tribunal's jurisdiction or interpretation of the ECT. Spain argues that even if Article 16 were to apply, international arbitration is no more favourable than domestic litigation in the courts of the Contracting Party. The Tribunal is attracted to FREIF's arguments to the contrary regarding the benefits of a neutral arbitration forum. However, it is not necessary for the Tribunal to conclusively compare the two fora. Article 26 provides the Investor with options for the settlement of their dispute which include domestic litigation or international arbitration. Therefore, the Investor's ability to choose a forum is itself a more favourable provision and should therefore apply pursuant to Article 16 of the ECT.
327. Second, both Parties have referred to Article 30 of the VCLT which provides that when two treaties share the same subject matter, an earlier-in-time treaty applies unless it is found to be incompatible with the later-in-time treaty. The later-in-time treaty in the present case is Declaration 17 Annex to the Final Act from the Lisbon Treaty of 2007 which Spain alleges confirms the principle of supremacy of EU law. As the Tribunal does not consider the ECT to be incompatible with EU law, the ECT applies under international law as the earlier-in-time treaty. Spain has relied heavily on the decision in *Electrabel* in order to establish the applicability of EU law and its primacy over the ECT in the event of a conflict. Nonetheless, the *Electrabel* decision ultimately rejected the jurisdictional challenge, stating that "there is in this case no material inconsistency between the ECT and EU law".⁴⁴⁷ Similarly, considering the issues in dispute in this Arbitration, EU law is not applicable and cannot be relied upon to deprive the Tribunal of the jurisdiction it derives from the ECT.
328. Finally, the Tribunal declines Spain's request for it to follow the decision in *Achmea* and extend *Achmea's* principle from an intra-EU BIT to the ECT. At the outset, Spain placed a caveat on its argument, stating:⁴⁴⁸

It is true that *Achmea* refers to a case in which the dispute is subject to arbitration in accordance with a BIT entered into by two Member States. However, the Judgment's principles should apply to the ECT if the dispute raised under it requires the interpretation and/or application of EU law, thus affecting the latter's autonomy.

⁴⁴⁷ *Electrabel*, [4.196].

⁴⁴⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [129] (emphasis added).

329. As the Tribunal has explained above, it does not consider that Article 26(6) or any claim made by the Parties in this Arbitration “requires the interpretation and/or application of EU law”.⁴⁴⁹ As such, unlike the governing law provisions in the Netherlands – Slovakia BIT which required an arbitral tribunal to interpret and apply EU law, the EU’s autonomy is not affected by Article 26(6) of the ECT.

330. In any event, Article 26 of the ECT is markedly different from Article 8 of the Netherlands – Slovakia BIT. Unlike the Netherlands – Slovakia BIT, the ECT is a multilateral agreement to which the EU is itself a signatory. The EU therefore consented to its dispute resolution provisions. It is difficult to see how the ECT would violate EU principles of mutual trust, sincere cooperation or the autonomy of EU law in such circumstances. The ECJ in *Achmea* stated in support of this sentiment that:⁴⁵⁰

The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected.

331. Spain argues that the fact that the EU signed the ECT is an insufficient argument because international agreements would only be compatible with EU law “providing that the autonomy of the EU and its legal order is respected”.⁴⁵¹ It points to Opinion 1/09 and Opinion 2/13 as two cases in which the ECJ deemed an international treaty to be incompatible with provisions of the TEU and TFEU. Opinion 1/09 concerned a treaty for the proposed establishment of a European and Community Patents Court and Opinion 2/13 concerned the accession of the EU to the European Convention on Human Rights. Both cases concerned situations where the EU had not yet become party to the treaty, the scope of the treaty was limited to European Member States, and the dispute resolution forum would have been called upon to interpret and apply European Union directives, regulations and other instruments of law on a regular basis.

332. These facts are not present for the ECT. The Tribunal instead finds greater weight in the recent ECJ decisions referred to by FREIF concerning investor state dispute settlement mechanisms in agreements that the EU is party to. In ECJ Opinion 1/17 the ECJ noted:⁴⁵²

with respect to international agreements entered into by the Union, the jurisdiction of the courts and tribunals specified in Article 19 TEU to interpret and apply those agreements does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements.

⁴⁴⁹ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [129].

⁴⁵⁰ *Achmea*, [57].

⁴⁵¹ *Achmea*, [58].

⁴⁵² ECJ Opinion 1/17, 12 June 2018, [116].

333. A similar outcome was reached in Case 2/15 concerning the EU-Singapore Free Trade Agreement.⁴⁵³ The Tribunal recognises, however, that not all decisions and opinions on this issue are aligned. The European Commission in its Communication COM(2018) 547/2 stated that Article 26 of the ECT is incompatible with EU primary law and is inapplicable for intra-EU relations.⁴⁵⁴ In 2019, 22 of the 28 EU Member States opined that arbitrations between investors of a Member State and another Member State raised under the protection of the ECT are incompatible with EU law.⁴⁵⁵ The Tribunal notes however, that unlike intra-EU BITs, there is yet to be any agreement between EU Member States to terminate or withdraw from the ECT's dispute resolution provisions.
334. This inconsistency of opinion between various national governments and EU bodies, and the speculative possibility of complications in the enforcement of the Award does not impact this Tribunal's finding on its own jurisdiction. If any aspect of this uncertainty were to be taken into account, it would be the issue of Brexit, which corroborates the competence of this Tribunal. While the weight of past ECJ decisions as precedents remains uncertain in practice in spite of the European Union (Withdrawal Agreement) Act 2020, their weight will likely be considerably tarnished. Given that FREIF is a company established under the laws of the United Kingdom, the relevance of the *Achmea* case may be much diminished.
335. Accordingly, as every other tribunal has concluded to date in the context of ECT renewable energy arbitrations against Spain, this Tribunal rejects the intra-EU objection and finds that it does not lack jurisdiction on this basis.

⁴⁵³ ECJ Opinion 2/15, 16 May 2017, [293].

⁴⁵⁴ RL-0079 Communication from The European Commission to The European Parliament and The Council on the Protection of intra-EU Investment: COM (2018) 547/2. (19 July 2018).

⁴⁵⁵ RL-0108 Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, (15 January 2019).

O SECOND JURISDICTIONAL OBJECTION: TAXATION OBJECTION

336. Spain's second jurisdictional objection is that the Tribunal does not have jurisdiction to hear FREIF's claim regarding Law 15/2012.⁴⁵⁶ Spain notes that, in FREIF's Statement of Claim, the TVPEE introduced by Act 15/2012 is included among the disputed measures. As it is said to be a "taxation measure", absent Spain's consent, this dispute is subject to the carve-out provision contained in Article 21 of the ECT.

337. Article 21(7) of the ECT provides:

(7) For the purposes of this Article:

a) The term "taxation measure" includes:

i) Any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and;

ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement by which the Contracting Party is bound.

338. Spain's case is that the TVPEE is a tax under either Spanish domestic law or international law. This conclusion is supported by:⁴⁵⁷

(a) the reference to "domestic law" in Article 21(7)(a)(i), which is said to import the application of Spanish domestic law; and

(b) Article 26(6) of the ECT, which requires that a tribunal established under the ECT apply "principles of international law".

339. If it is established that the TVPEE is a "taxation measure", Spain submits that the Tribunal lacks jurisdiction as a consequence. This is because, pursuant to Article 26 of the ECT, Spain has only consented to submit to investment arbitration for disputes emerging from Part III of the ECT.⁴⁵⁸ Absent a breach arising from the correct Part of the Treaty, the dispute falls beyond the scope of those disputes which Spain agreed might be submitted to arbitration.⁴⁵⁹

340. Article 21(1) of that same Part makes clear that the Treaty creates no rights or obligations concerning Taxation Measures "[e]xcept as otherwise provided in this Article".⁴⁶⁰ As there is no applicable exception in the present case and Article 10(1) of the ECT does not create obligations with respect to taxation measures, Spain argues that there are no rights for investors to bring a claim with respect to taxation measures.

⁴⁵⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [221].

⁴⁵⁷ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [264].

⁴⁵⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [250].

⁴⁵⁹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [238].

⁴⁶⁰ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [242].

341. Both Parties agree that should Spain succeed on this objection, the Tribunal lacks jurisdiction to assess whether the TVPEE was a lawful measure under the ECT. There will also be an impact on the quantum claimed by FREIF. Brattle's DCF quantum calculations include losses attributable to the TVPEE that would need to be subtracted from an award of damages.⁴⁶¹

342. FREIF focuses its defence on whether or not the TVPEE is a "taxation measure", without contesting the existence of the carve-out for taxation measures under the ECT. As such, the summary of the Parties' positions below will focus on the question of whether the TVPEE imposed by Law 15/2012 is a "taxation measure".

O1 Status of Law 15/2012 Under Law

O1.1 Spain's Submissions

343. Spain first ventures to establish why the TVPEE, introduced in Act 15/2012, is a taxation measure under the domestic law of Spain. Article 1 of Act 15/2012 specifies that it is a "direct tax on the performance of activities of production and incorporation into the electrical system of electrical energy".⁴⁶²

344. Secondly, by reference to the definition of a tax under Spanish law, in Article 2 of Act 58/2003, the TVPEE is a tax. In accordance with the definition, the TVPEE:⁴⁶³

applies to all facilities for electricity production, both from renewable and conventional sources. The tax base for the TVPEE consists of the total amount that the taxpayer is to receive for the production of electrical energy and its incorporation into the electricity system, measured in power plant busbars, at each facility, in the taxable period. The applicable tax rate is 7%.

345. Thirdly, its status as a tax was recognised by the Institute of Accounting and Auditing and is "a deductible expense on the Corporations Tax of the TVPEE taxpayers".⁴⁶⁴ The General Directorate of Taxation also wrote in a written tax consultation that:⁴⁶⁵

"...the taxpayer of the [TVPEE] must record an expense for it, in the month of November of each year, an expense that will be fiscally deductible in the taxable period when it was recorded."

346. Fourthly, the TVPEE is said to be a taxation measure because "the Spanish Constitutional Court has ratified the taxation nature and the legality of the TVPEE" and found provisions relating to the "taxable event, the taxpayers and the tax rate of the TVPEE" to be constitutional.⁴⁶⁶ Any limited doubts that the Spanish Supreme Court had over the constitutionality of the TVPEE have been resolved by the Spanish Constitutional Court, which is the highest interpreter of the Spanish Constitution, and

⁴⁶¹ FREIF's Post Hearing Brief, [2]-[3]; Spain's Post Hearing Brief, [11]-[12].

⁴⁶² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [274].

⁴⁶³ Spain's Counter-Memoria on the Merits and Memorial on Jurisdiction, [276].

⁴⁶⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [279].

⁴⁶⁵ R-0161 Answer from the General Directorate of Taxes on 23 December 2014 to Binding Taxation Query V3371-14.

⁴⁶⁶ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [283]-[286].

by the Supreme Court itself. The Spanish *Audiencia Nacional* (National Court) has also declared that regulations relating to the payment of the TVPEE are in accordance with the law.

347. Finally, Spain notes that the European Commission has ratified the taxation nature of the TVPEE and its conformity with EU Law. Spain notes that the TVPEE was subject to an EU Pilot procedure where the European Commission analyses whether a particular measure of a Member State complies with EU Law. After receiving information provided by Spain, the European Commission concluded that there were no grounds for considering that the TVPEE infringed EU Law.⁴⁶⁷ Therefore, Spain submits that this provides evidence for the acceptance of the TVPEE as a taxation measure in compliance with EU Law.
348. Therefore, Spain submits that the domestic interpretation of the TVPEE as a tax is undeniable and the wording of Article 21(7) of the ECT can be interpreted as a referral to domestic law for the determination of whether the TVPEE is a taxation measure. In the annulment decision in *Hussein Nuaman Soufraki v. the United Arab Emirates*, the Committee stated that “[i]t is the view of the Committee that the Tribunal had to strive to apply the law as interpreted by the State’s highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities” and “the domestic characterisation of a disputed measure may be helpful in ascertaining its nature”.⁴⁶⁸

01.2 FREIF’s Submissions

349. FREIF argues that, notwithstanding whether the measure qualifies as a tax under domestic law, investment treaty tribunals have consistently confirmed that while the domestic characterization of a disputed measure may be helpful in ascertaining its nature, domestic law is not determinative.⁴⁶⁹ An approach that looks only at domestic law to define what taxation measures are under bilateral or multilateral investment agreements would allow host States to legitimize what otherwise would qualify as an abusive legislative provision by simply calling it a “tax”.
350. FREIF therefore considers it necessary to “look behind the label”⁴⁷⁰ and determine whether the measure is in substance a tax, or whether it is a covert means of revoking incentives previously granted.⁴⁷¹
351. In any event, with respect to the characterisation of the law under Spanish law, FREIF says that the validity and constitutionality of the measure is still in doubt before the

⁴⁶⁷ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [313]–[324].

⁴⁶⁸ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [295]; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment, 5 June 2007), [97].

⁴⁶⁹ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [153].

⁴⁷⁰ *EnCana v. Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, [142] (*EnCana*); See FREIF’s Reply Memorial on the Merits and Memorial on Jurisdiction, fn 140.

⁴⁷¹ See Thomas Walde & Abba Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*; FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [153].

Spanish Supreme Court in subsequent decisions in 2016 and 2018.⁴⁷² Furthermore, Declarations by the *Audiencia Nacional* and Spanish fiscal authorities are also said to be irrelevant because they do not address questions of substance or the application of the measure.⁴⁷³

O2 Status of Law 15/2012 As *Bona Fide* Taxation Measure

O2.1 Spain's Submissions

352. Spain then makes the additional submission that, if it were necessary to extend the analysis of the TVPEE, it would be found to be a *bona fide* tax. Citing the decisions in *EnCana v. Ecuador (EnCana)*, *Duke Energy v. Ecuador* and *Burlington Resources Inc v. Ecuador (Burlington Resources)*,⁴⁷⁴ Spain distills three indicia by which to define a “tax” under international law:

- (a) that the tax is established by Law,
- (b) that such Law imposes an obligation on a class of people, and
- (c) that such obligation implies paying money to the State for public purposes.

353. In satisfaction of the first two points, the Law is validly enacted under Spanish domestic law and it imposes an obligation on a class of people, being “anyone that performs the activities of production and incorporation of electrical energy into the Spanish electricity system”.⁴⁷⁵ The TVPEE is said to have general application, to all energy producers in the industry regardless of the nationality of the stakeholders of the producers. Spain argues that the same is true even in its economic effect.⁴⁷⁶ This is because the TVPEE “is one of the costs that are remunerated to the renewable energy producers to whom the regulated regime applies, such as the producers subject to this arbitration.”⁴⁷⁷

354. Spain submits the third indicia is satisfied as TVPEE taxpayers are “required to make payments relating to this tax to the State” in accordance with Article 10 TVPEE and by “Ministerial Order HAP/703/2013, of 29 April, approving form 583 ‘Tax on the value of the production of electrical energy’”.⁴⁷⁸ Moreover, the revenue from the “tax” is included in the Spanish General State Budgets, categorised under “Direct Taxes and Social Contribution”.

355. Further, Act 15/2012 also provides that “an amount equivalent to the estimated annual collection of the State arising from the taxes included in Act 15/2012, including the

⁴⁷² C-284, Auto TS 2955/2014, 14 June 2016; C-285, Auto TS 2554/2014, 14 June 2016; C-278, Auto TS 2554/2014, 10 January 2018.

⁴⁷³ FREIF's Rejoinder on Jurisdiction, [82]-[84].

⁴⁷⁴ See Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [294]-[298]; *EnCana, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (*Burlington Resources*).

⁴⁷⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [299]-[300].

⁴⁷⁶ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [330].

⁴⁷⁷ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [331].

⁴⁷⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [302].

TVPEE, will be allocated... on the Spanish General State Budgets to finance the costs of the electricity sector”.⁴⁷⁹ Spain argues that the purpose of the TVPEE is to raise State Revenue, as is clear from the fact that income from the TVPEE is “integrated into the General Budgets of the Spanish State” as “State Income”.⁴⁸⁰ For this reason, Spain rejects FREIF’s contention that revenues generated “would not flow into the state treasury, like normal taxes would”.

356. Addressing the authorities employed by FREIF, Spain notes that the good faith analysis in the *Yukos Universal Limited (Isle of Man) v. The Russian Federation (Yukos)* and *EnCana* cases are inapplicable in the present circumstances.⁴⁸¹ In *Yukos*, the tribunal grappled with “extraordinary circumstances”. The taxation measure in question pursued an “entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent)...”.⁴⁸² Refuting FREIF’s use of the *EnCana* case, Spain observes that the case emphasized that when classifying a “tax measure”, the inquiry must focus on the levy’s legal effect rather than its economic effect.⁴⁸³
357. Spain refers the Tribunal to a number of decisions at paragraph [345] of its Rejoinder on the Merits and Reply on Jurisdiction which unanimously adopt the position for which it advocates. While refraining to provide detail of these decisions, Spain asserts that “the Claimants’ arguments in said cases were the same as those of FREIF in the present case” and, accordingly, should be dismissed.
358. Spain therefore submits that FREIF has not complied with its burden of proof to sustain its allegation that it is not a bona fide taxation measure and consequently, the TVPEE is carved out of the dispute resolution clause in Article 26 of the ECT.⁴⁸⁴

02.2 FREIF’s Submissions

359. FREIF submits that the TVPEE does not fall within the jurisdictional carve-out in Article 21 of the ECT as it is not a *bona fide* tax. Rather, it is a “clever means to reduce the tariff incentives paid to renewable plants through a measure that resembled a tax of general application on its face”.⁴⁸⁵
360. FREIF refers to *Murphy v. Ecuador*,⁴⁸⁶ in which the tribunal considered what would constitute a “matter of taxation”. It found that a law which purported to be a tax, and was in respects similar to one, “should be instead interpreted as a unilateral change to

⁴⁷⁹ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [308].

⁴⁸⁰ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [339].

⁴⁸¹ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [304]–[305].

⁴⁸² *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Ruling, (18 July 2014), [1407] (**Yukos**).

⁴⁸³ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [305].

⁴⁸⁴ Spain’s Post Hearing Brief, [10].

⁴⁸⁵ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [167].

⁴⁸⁶ *Murphy Exploration & Production Company – International v. Republic of Ecuador*, UNCITRAL, Partial Final Award (6 May 2016) (**Murphy v. Ecuador**).

the economic terms of a contract, since that was how it impacted the investments at issue in that dispute”.⁴⁸⁷

361. Along similar lines, only *bona fide* taxation measures were found capable of coming within the scope of Article 21 of the ECT. Taxation measures which would not be considered *bona fide* were defined in *Yukos* as “actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose”.⁴⁸⁸

362. The tribunal in *Yukos* continued by stating:⁴⁸⁹

Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as ‘taxation’, effectively avoid the control of that measure under the ECT’s other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT.

363. FREIF therefore contends that the true effect of the TVPEE was to indirectly reduce the remuneration guaranteed under RD 661/2007 to FREIF’s wind farms by 7%.⁴⁹⁰ The “tax” applied to *all income* received by the wind farms, including the incentive tariffs and premiums previously guaranteed. Thus, while the measures are purported to tax the value of electricity, they actually reduced the value of the incentives that Spain had allegedly guaranteed to FREIF’s farms in order to encourage them to produce electricity from renewable rather than fossil fuel sources.⁴⁹¹

364. FREIF further submits that the true purpose of the tax is revealed when one has regard to the fact that the revenue it raises does not flow into the state treasury. Instead, it goes to the electricity system in order to reduce its tariff deficit and prevent the need to reduce consumer prices.⁴⁹² FREIF submits that this reveals the true purpose of the law: “to reduce the regulated tariffs that electricity consumers must pay into the system to cover costs like the tariffs guaranteed to Claimant.”⁴⁹³ Reducing the tariff granted to FREIF, it argues, does not serve a public purpose. It reduces the costs for certain Spanish consumers in commercial transactions for the purchase of electricity.

365. FREIF also contends that although the TVPEE was imposed on a “class of persons”, being electricity producers, it did so in a discriminatory manner that had a disproportionate impact on renewable energy producers compared to conventional energy producers. The TPVEE is applied to all revenues generated by the energy producer in question. In the case of renewable energy producers, that includes the tariff rates, meaning that those producers are liable to pay greater sums.⁴⁹⁴ Unlike conventional producers, they cannot pass on the cost of the “tax” to consumers and

⁴⁸⁷ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [155].

⁴⁸⁸ *Yukos*, [1407].

⁴⁸⁹ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [157]; *Yukos*, [1407].

⁴⁹⁰ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [152].

⁴⁹¹ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [152].

⁴⁹² FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [152].

⁴⁹³ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [160] (emphasis omitted).

⁴⁹⁴ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [165].

were also paying tax on the revenue from incentive tariffs. Given the high production costs they face, the tariffs formed a substantial part of their income and that income could not be increased.⁴⁹⁵

366. In concluding its submission on this point, FREIF notes that several tribunals have found that Article 21 of the ECT applies to the TVPEE. It submits however that in none of those awards did the tribunal engage to any significant degree with the characteristics of the TVPEE. This Tribunal is accordingly invited to evaluate the matter with fresh eyes.

O3 Tribunal's Decision

367. The Tribunal considers that the TVPEE introduced under Law 15/2012 is a taxation measure. As FREIF has not attempted to show how the TVPEE might fall within any exceptions provided for in Article 21 of the ECT, the Tribunal does not have jurisdiction with respect to this measure.
368. The crux of this issue is whether the TVPEE should be considered a "Taxation Measure" for the purpose of Article 21(7) of the ECT. The term includes "[a]ny provision relating to taxes of the domestic law of the Contracting Party". It is evident to the Tribunal that on its face, the TVPEE is a tax under Spanish law. It is described in terms as a "direct tax" in Article 1 of Law 15/2012 and accords with the definition of a tax under Spanish law. Its recognition by bodies such as the Institute of Accounting and Auditing and General Directorate of Taxation also provide support that under domestic law, the TVPEE is considered a tax. Regardless of whether the TVPEE accords with the Spanish Constitution and EU Law, it is nonetheless characterised as a tax by Spanish authorities.
369. FREIF concentrates its argument not on debating the status of Law 15/2012 under Spanish law but on the fact that the Tribunal must "look behind the label" to determine whether the TVPEE can be described as a tax in good faith. Therefore, the question is whether the identification of the TVPEE as a tax under law is sufficient to satisfy the definition of a "Taxation Measure" under the ECT.
370. In this regard, the Tribunal is persuaded by FREIF's position that if the TVPEE was created in bad faith for covert purposes, it should not be properly recognised as a "Taxation Measure" under Article 21(7) of the ECT and would therefore activate the "carve-out". Such an interpretation is consistent with the principles contained in Article 31 of the VCLT to interpret a treaty 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".
371. If "Taxation Measures" were taken by name only, this could enable a Contracting Party to create undue carve-outs by labelling laws as "taxes" or "Taxation Measures". This

⁴⁹⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [166]; FREIF's Rejoinder on Jurisdiction, [98]-[100].

was successfully proven in the case of *Yukos*, as cited by FREIF.⁴⁹⁶ It is worth noting that numerous other tribunals in investor state arbitrations involving Spain in which this jurisdictional objection arose have chosen to analyse the *bona fide* status of the TVPEE, such as in *Isolux*,⁴⁹⁷ *Novenergia*⁴⁹⁸ and *InfraRed*.⁴⁹⁹

372. In considering what criteria are necessary to satisfy a good faith taxation measure, the Parties' submissions and arbitration jurisprudence require that the tax impose an obligation on a class of persons and mandates the paying of money to the State for public purposes.⁵⁰⁰ In *Yukos*, it was also said that, in terms of establishing bad faith, "actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose...cannot qualify for the exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1)".⁵⁰¹
373. Based on the above criteria, the Tribunal is satisfied that the TVPEE fulfils the requirements of a *bona fide* tax. FREIF accepts that on its face the TVPEE was a tax of general application because it applied to electricity production from renewable and conventional sources alike.⁵⁰² However, it first contends that renewable plants paid a higher "tax" on the same amount of electricity production than conventional plants because the tax applied to revenue, including incentive tariff revenue. FREIF also mounts the argument that conventional energy producers could pass on more of the taxes by raising market prices while renewable energy plants had a large portion of revenue coming from fixed tariffs.
374. These submissions do not overcome the fact that the TVPEE was imposed on a class of persons, being anyone who performs the activities of production and incorporation of electrical energy into the Spanish electricity system. Any tax with general application to a particular sector will, to some extent, vary in its impacts upon individual businesses, depending upon factors such as their revenue sources and profitability. However, as the tribunal in *EnCana* stated, "[t]he question whether [sic] something is a tax measure is primarily a question of its legal operation, not its economic effect".⁵⁰³
375. There is no evidence that the TVPEE specifically targeted FREIF or foreign investors in bad faith. It is also unclear to what extent conventional energy producers could shield themselves from paying the TVPEE by raising market prices given that, as FREIF explains, the TVPEE applied to "revenues, rather than profits or the wholesale value of electricity generation".⁵⁰⁴

⁴⁹⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [157].

⁴⁹⁷ *Isolux Infra. Netherlands B.V. v. Kingdom of Spain*, SCC 2013/153, Award [728]–[732].

⁴⁹⁸ *Novenergia* [520]–[521].

⁴⁹⁹ *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award [296].

⁵⁰⁰ FREIF's Rejoinder on Jurisdiction, [87]; Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [297]; See e.g. *EnCana*, [142].

⁵⁰¹ *Yukos* [1407].

⁵⁰² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [164].

⁵⁰³ *EnCana*, [142].

⁵⁰⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [165].

376. In addition, the Tribunal is persuaded that the TVPEE was levied for public purposes and was integrated into the General Budgets of the Spanish State.⁵⁰⁵ There is some measure of agreement that funds collected from taxes included in Law 15/2012 are “allocated to finance the costs of the electricity system concerning the development of renewable energy”.⁵⁰⁶
377. Ultimately, both the incentive tariffs and the TVPEE are examples of a broader scheme of economic measures taken by the Spanish government in order to regulate the Spanish electricity system. As aptly summarised by the tribunal in *Stadtwerke München*:⁵⁰⁷
- Facing a difficult financial situation, and in application of the governing principles in the 1997 Electricity Law, the Spanish Government legitimately exercised its right to impose a tax on all producers of electricity so as to obtain state revenues to address a public purpose: redressing a serious budgetary imbalance that it believed would have dire consequences for the country. That decision to tax may have been wise or unwise, but it was a legitimate and bone fide exercise of governmental power.
378. There are no facts in the present case which could be comparable to the exceptional circumstance in *Yukos* in which the tribunal held that the sole motivation for enacting the taxation measures at issue was to eliminate a political opponent and bankrupt his company. Even if, as FREIF alleges, the purpose of the TVPEE was “to reduce the tariff deficit by reducing the incentives previously guaranteed to renewable producers like FREIF”⁵⁰⁸ this is not comparable to the “entirely unrelated purpose” dealt with in *Yukos*. The decision of *Murphy v. Ecuador* is also distinguishable given that the law in question in that case was enacted outside of the Ecuadorian tax regime and not as tax legislation, and the payments stemmed from contractual obligations.⁵⁰⁹
379. As noted in Part M1, the taxation objection has arisen in numerous other investor state arbitrations involving Spain and Law 15/2012. In all cases, tribunals have found in favour of Spain. Having conducted its own analysis and considered these previous decisions, this Tribunal has reached the same conclusion. Accordingly, it does not have jurisdiction with respect to the TVPEE as a disputed measure in this Arbitration.

⁵⁰⁵ See, e.g. R-0164, Extract from the General Budget of the Spanish State for 2013.

⁵⁰⁶ FREIF’s Rejoinder on Jurisdiction, [93]; FREIF’s Counter-Memorial on the Supplementary Jurisdictional Objection Jurisdiction, [164]–[166].

⁵⁰⁷ *Stadtwerke München GMBH, Rweinnogy GMBH, and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award of 2 December 2019, [174].

⁵⁰⁸ FREIF’s Rejoinder on Jurisdiction, [95].

⁵⁰⁹ *Murphy v. Ecuador*, [186]–[190].

P SUPPLEMENTARY JURISDICTIONAL OBJECTION: ELECTA UNA VIA PROVISION

380. The Tribunal now turns to consider the third jurisdictional objection advanced by Spain, which arose following the Asset Sale, and the consequent round of document production.
381. Spain claims that two years before FREIF's Request for Arbitration was filed on 21 March 2017, the investor, being FREIF, had already instituted two Contentious-Administrative Appeals before the Spanish Supreme Court (**Spanish Lawsuits**).⁵¹⁰
382. In November 2015, DEMEPI challenged Royal Decree 413/2004 and Ministerial Order 1045/2014, and sought an award of economic compensation for consequential losses suffered. A similar challenge was issued to those measures by EACLAM and ENERDUERO.⁵¹¹ In both challenges, requests were made to the Spanish Supreme Court to submit a Question of Unconstitutionality to the Spanish Constitutional Court. DEMEPI, EACLAM and ENERDUERO are Spanish companies in which FREIF held an interest.
383. Spain therefore submits that the Tribunal does not have jurisdiction to hear this dispute as the subject-matter of this arbitration has already been submitted to the Spanish Courts. It argues that the "fork in the road" or "*electa una via*" provision of the ECT operates to deprive FREIF of recourse to arbitration.
384. Spain's objection arises from Article 26(3)(b)(i) of the ECT, which is extracted below in the context of Article 26(3):

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph 2(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(emphasis added)

⁵¹⁰ Spain's Supplementation of the Jurisdictional Objections, [40].

⁵¹¹ Spain's Supplementation of the Jurisdictional Objections, [42]–[46].

P1 Applicable Test for Article 26(3)(b)(i) ECT

P1.1 Spain's Submissions

385. Spain claims its consent to arbitrate is vitiated because Spain is a Contracting Party listed in Annex ID of the ECT and the claims raised in this Arbitration have already been submitted to the Spanish Supreme Court. That Article 26(3)(b)(i) of the ECT was intended to prevent multiple claims being pursued in different fora is said to find support in the relevant *travaux préparatoires*, wherein the State Department of the United States, an Observer to the Energy Charter Conference, noted that parties should be regarded as:⁵¹²

capable of making an informed decision, based upon his own assessment of the risks and opportunities of one forum as opposed to another, and to accept his own assessment of the risks and opportunities of one forum as opposed to another, and to accept the responsibility of the consequences of that decision.

386. The purpose and requirements of the “*electa una via*” clauses in international treaties have been analysed by arbitration doctrine such as in the case of *Flughafen Zürich A.G. et al. v Venezuela* wherein the tribunal stated that the goal of the “fork in the road” clause was:⁵¹³

to prevent investors from improving their legal situation by bringing the same suit in parallel before internal courts and an international arbitral tribunal. Furthermore, the rule aims to prevent these two parallel actions from resulting in contradictory decisions.

387. Spain submits that the triple identity test relied on by FREIF (i.e. that the domestic lawsuit must have an identity of parties, objects and causes of action to the arbitration) is not applicable and is an attempt to “re-write the wording of the ECT at its own convenience”.⁵¹⁴ Spain submits that the specific language of the ECT establishes that the “*electa una via*” provision will apply where the investor has previously submitted the dispute to the courts of the Contracting Party.⁵¹⁵ Spain relies on the award in *Chevron and Texaco v Ecuador (Chevron)*⁵¹⁶ in support of the proposition that the triple identity test would deprive the “*electa una via*” provision of its practical effect.⁵¹⁷ It advocates instead for a “more purposeful”⁵¹⁸ approach.

388. Spain also relies on the decision in *H&H v Egypt (H&H)* for the following submissions. First, the “*electa una via*” provision should be interpreted according to the ordinary meaning given to the terms in their context. Second, the specific wording of the ECT

⁵¹² Spain's Supplementation of the Jurisdictional Objections, [33].

⁵¹³ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award of 18 November 2014, [357].

⁵¹⁴ Spain's Reply on its Supplementary Jurisdictional Objection, [13]–[14].

⁵¹⁵ RL-0008 The Energy Charter Treaty, Article 26(2)(a) and (3)(b)(i).

⁵¹⁶ RL-0100 *Chevron Corporation and Texaco Petroleum Company vs. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility 27 February 2012 (*Chevron*).

⁵¹⁷ Spain's Reply on its Supplementary Jurisdictional Objection, [15]–[16].

⁵¹⁸ Spain's Post Hearing Brief, [16].

should be taken into account and interpreted in a way that effectively applies it, noting that the ECT does not expressly require that the triple identity test be met.⁵¹⁹

389. In any event, Spain submits that even if the triple identity test were applicable, it would be satisfied. Spain breaks down this submission into three parts: (i) identity of parties; (ii) identity of objects; and (iii) identity of causes of action. Each of these three parts will be summarised below in Parts P2, P3 and P4.

P1.2 FREIF's Submissions

390. FREIF submits that it has not pursued any claims, let alone its ECT claim, before the domestic courts. It says that the Tribunal should first look to the express terms of the ECT and can reject this objection on its text alone.⁵²⁰ Otherwise, the “triple identity test” developed from the jurisprudence is consistent with the terms of the ECT and can also be used. It provides that a previously-filed domestic action will only bar a subsequent treaty claim when the (i) parties, (ii) causes of action and (iii) object of the dispute in both proceedings are identical.⁵²¹

391. FREIF considers that Spain’s submissions regarding the inapplicability of the triple identity test lack any support, and notes that Spain does not offer an alternative legal standard.⁵²² FREIF submits that Spain’s reliance on *Chevron* does not offer it assistance, as the tribunal in that arbitration did not make a decision on the applicability of the triple identity test and because, similarly to *Chevron*, the “Investor” in this Arbitration, as defined by the ECT, has not previously submitted its claims before any fora.⁵²³ FREIF distinguishes *H&H* on its facts, submitting that the general legal standard expressed in the *H&H* award is a minority view and the majority of tribunals have applied the triple identity test to determine whether an “*electa una via*” clause is satisfied.⁵²⁴ Hence, it proceeds to make its submissions by reference to the triple identity test.

P2 Identity of Parties

P2.1 Spain's Submissions

392. Spain argues that there is a subjective identity between the investor that has filed the Contentious-Administrative Appeals before the Spanish Supreme Court and the investor in present Arbitration.⁵²⁵ It draws what it characterises as an important distinction between the “Claimant” and an “Investor” by submitting that Article 26(3)(b)(i) only requires that the “Investor” relevant to a particular dispute be the same, rather than the claimant. In relation to the present case, Spain argues that the Spanish companies

⁵¹⁹ Spain’s Reply on its Supplementary Jurisdictional Objection, [18].

⁵²⁰ FREIF’s Post Hearing Brief, [4].

⁵²¹ FREIF’s Counter-Memorial on the Supplementary Jurisdictional Objection, [9].

⁵²² FREIF’s Rejoinder on the Supplementary Jurisdictional Objection, [2].

⁵²³ FREIF’s Rejoinder on the Supplementary Jurisdictional Objection, [4].

⁵²⁴ See e.g. *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, [390] (***Khan Resources***); *Charanne*, [398]-[410].

⁵²⁵ Spain’s Supplementation of the Jurisdictional Objections, Part 4.3.

are controlled by FREIF and without FREIF, these Spanish companies could not have filed the Spanish Lawsuits.⁵²⁶

393. Further, Spain argues that for the purposes of the ECT, subsidiary companies incorporated in the host Contracting Party that are controlled by the Investor of another Contracting Party are considered “Investors”, pursuant to Article 26(7) of the ECT,⁵²⁷ which reads as follows:

An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State.

394. Spain cites an ICSID decision arising from the US-Estonia BIT, in which a similarly-worded “*electa una via*” provision extended to subsidiaries of an investor company.⁵²⁸ Furthermore, Spain submits that, contrary to FREIF’s position, most authorities do not confirm that the parties must be strictly identical for the purposes of the triple identity test.

395. Spain alleges that FREIF accepted that the Investor in this Arbitration was not limited to the formal Claimant, FREIF, itself. In this regard, it points to the Request for Arbitration wherein FREIF acknowledged that while the Claimant Party to the dispute is FREIF, the concept of “Investor” is a wider one and can include, for instance, First Reserve, FREIF’s parent company.⁵²⁹

396. According to Spain, one of the managers of DEMEPI, EACLM and ENERDUERO was also the Sole Director of FREIF, Mr John Richard Barry. Spain also refers to the wind farms’ 2019 SPA which discloses that as a condition of the Asset Sale, directors of the Company were required to resign. This included directors of DEMEPI, EACLM and ENERDUERO, the subsidiaries that filed lawsuits before the Spanish Supreme Court. This is said to prove that FREIF had control over the entities that filed lawsuits and that therefore there is an identity of investor.⁵³⁰ Spain submits that FREIF cannot artificially rely on its corporate structure to avoid the “fork in the road” provision and consequently, the lawsuits were *de facto* filed by FREIF.

P2.2 FREIF’s Submissions

397. In relation to the identity of the parties, FREIF submits that FREIF is a separate legal entity from its subsidiaries and as the minority shareholder, it had neither instructed nor

⁵²⁶ Spain’s Post Hearing Brief, [15].

⁵²⁷ Spain’s Supplementation of the Jurisdictional Objections, [70].

⁵²⁸ Spain’s Supplementation of the Jurisdictional Objections, [71]; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Declaration of Prof. Andreas F. Lowenfeld, 10 November 1999, [322] (*Alex Genin*).

⁵²⁹ Spain’s Supplementation of the Jurisdictional Objections, [72]; FREIF’s Request for Arbitration, [56].

⁵³⁰ Spain’s Supplementation of the Jurisdictional Objections, [75].

controlled the subsidiaries in their decision to file domestic legal claims. The Spanish Lawsuits were filed by DEMEPI, EACLM and ENERDUERO, Spanish companies in which FREIF held an interest. However, FREIF submits that it is entitled to pursue treaty claims in its own right.⁵³¹

398. FREIF refers to awards such as *Champion Trading Co. et al. v Egypt* in which tribunals have held that the identity of the parties must be strictly identical⁵³² and emphasises that the corporate structure of the Spanish joint venture company, Renovalia Reserve, S.L., demonstrates that Renovalia Reserve, S.L. controlled the subsidiaries that filed the domestic claim.
399. FREIF disputes Spain's reliance on the 2019 SPA as proof that FREIF and its subsidiaries are one entity. It draws a distinction between the Seller in the 2019 SPA (being Renovalia Reserve, S.L.) and FREIF, who holds 50% minus 1 share of the Seller.⁵³³ FREIF was a minority shareholder of Renovalia Reserve, S.L. and was therefore entitled to appoint one director (of two) in each of the Spanish subsidiaries. However, FREIF does not enjoy decision-making powers over the subsidiaries.
400. FREIF denies that the naming convention in its Request for Arbitration demonstrates that the Investor in this Arbitration is any entity other than the formal Claimant. Instead, FREIF argues that the defining of "FREIF Eurowind Holdings Ltd" as "FREIF or First Reserve" demonstrates that "First Reserve" is a reference to FREIF itself, not the parent company.⁵³⁴
401. FREIF makes two further submissions in response to the distinction drawn between a "Claimant" and an "Investor". First, the SCC Rules do not permit domestic companies to be treated as foreign Investors on the basis of foreign control.⁵³⁵ Although Article 26(7) of the ECT potentially extends the benefit of ICSID arbitration to locally-incorporated subsidiaries on the basis of foreign control, this is inapplicable and irrelevant in this SCC arbitration. Further, the foreign control exception operates at the election of a domestic company seeking to be treated as a foreign Investor, which has not occurred here.⁵³⁶
402. Second, the ECT's "*electa una via*" objection does not apply where a local subsidiary commenced domestic proceedings rather than the foreign Investor involved in the Arbitration.⁵³⁷ A plain reading of Article 26 demonstrates that the reference to "Investor"

⁵³¹ FREIF's Post Hearing Brief, [8]-[9].

⁵³² FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [5], e.g. See, e.g., *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, [19], [80]; *Champion Trading Co. et al. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, [1], [3.4.3].

⁵³³ FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [14]-[16].

⁵³⁴ FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [13].

⁵³⁵ FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [9]; FREIF's Post Hearing Brief, [10].

⁵³⁶ *The PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014 (Preliminary Award on Jurisdiction not public) (**PV Investors**).

⁵³⁷ FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [10]-[12].

only refers to the Investor who has commenced arbitration. The subsidiaries who brought domestic claims are not named in the arbitration as Investors.

403. Relying on the tribunal's decision in *Greentech et al. v. Italy*, FREIF submits that the definition of Investor cannot be expanded to include its indirect investments in Spain. Instead, the Spanish subsidiaries should be treated as "investments", rather than "Investors".⁵³⁸
404. Therefore, FREIF submits that there is no basis for Spain's application. It reiterates that tribunals have repeatedly held that an investor bringing the treaty claim and its local investment vehicle bringing a claim in another forum are not identical parties.

P3 Identity of Objects

P3.1 Spain's Submissions

405. As for the identity of objects, Spain's position is that there is clear overlap between the object of the dispute and the disputed measure in the present arbitration and in the Spanish Lawsuits.⁵³⁹
406. Spain argues that the content of those challenges is substantially similar to the matters to be decided in this arbitration and comprise requests for:⁵⁴⁰
- (a) the annulment of Royal Decree 413/2004 and Ministerial Order 1045/2014;
 - (b) the acknowledgement of their supposed right to the maintenance of the remunerations stated in Royal Decree 661/2007 prior to the amendments introduced by Royal Decree-Act 9/2013 and the rest of the norms that develop it; and
 - (c) an economic compensation for the supposed damages caused by the disputed measures.
407. Spain contends that the same Government's measures are the subject of both disputes. The wind farms that are the subject of the disputes are also the same. The issues, arguments and claims raised in the domestic proceedings are also coincident. For example, claims and arguments on legitimate expectations, legal certainty or retroactivity are present in both the Supreme Court and the arbitral proceedings.⁵⁴¹ Economic compensation for alleged damages caused to the wind farms by the disputed measures is also claimed. Further similarities are said to exist in the two expert reports filed with the Spanish Lawsuits, which are said to have "the same scope and pursue the same methodologies".⁵⁴²

⁵³⁸ FREIF's Rejoinder on the Supplementary Jurisdictional Objection, [16]; *Greentech et al. v. Italy*, [204].

⁵³⁹ Spain's Reply on its Supplementary Jurisdictional Objection, [39]-[43].

⁵⁴⁰ Spain's Supplementation of the Jurisdictional Objections, [50].

⁵⁴¹ Spain's Supplementation of the Jurisdictional Objections, [54].

⁵⁴² Spain's Supplementation of the Jurisdictional Objections, [61].

P3.2 FREIF's Submissions

408. FREIF submits that the objects of the respective proceedings are distinct, and the present dispute is much broader than the local disputes. It claims that the objects of the dispute refer to the relief sought and accuses Spain of conflating the measures at issue and the causes of action with the object of the dispute.

409. The object of the domestic proceeding was to strike down the New Regulatory Regime as violating Spanish law and restore rights on behalf of shareholders. On the other hand, the object of the present Arbitration is to seek a declaration that the New Regulatory Regime violates the ECT and international law and award compensation.⁵⁴³ This, FREIF contends, is not the same as the damage that the Spanish plaintiffs may have suffered.

P4 Identity of Causes of Action

P4.1 Spain's Submissions

410. Finally, on the identity of causes of action, Spain repeats its position that the causes of action in the Spanish Lawsuits are identical to the standards invoked by FREIF in this Arbitration, although it accepts that before the Spanish Supreme Court, arguments were made on Spanish law that FREIF is not making before this Tribunal. It is also noted that the Supreme Court has already had to address the ECT in its decision.⁵⁴⁴

411. In summary, Spain submits that there is significant overlap between the issues, claims and arguments in this arbitration and the Spanish Lawsuits. Accordingly, Spain requests that the Tribunal declare its lack of jurisdiction to hear this dispute pursuant to Article 26(3)(b)(i) of the ECT.

P4.2 FREIF's Submissions

412. With respect to the causes of action, FREIF submits the causes are not identical because.⁵⁴⁵

- (a) a treaty cause of action differs from the domestic law cause of action as the standards are different, even if they share the same name (e.g., legitimate expectations). The Spanish Lawsuits were brought on the basis of Spanish Constitutional and statutory law rather than the ECT and international law, which has different legal standards. FREIF relies on *Khan Resources v Mongolia* in this regard;⁵⁴⁶ and
- (b) Article 26(1) narrowly defines the relevant dispute as one that concerns an alleged breach of an obligation under Part III of the ECT. Therefore the “fork

⁵⁴³ FREIF's Counter-Memorial on the Supplementary Jurisdictional Objection, [18]; FREIF's Rejoinder on the Supplementary Jurisdictional Objection, [24]–[26].

⁵⁴⁴ Spain's Reply on its Supplementary Jurisdictional Objection, [44]–[49].

⁵⁴⁵ FREIF's Rejoinder on the Supplementary Jurisdictional Objection, [27]–[31].

⁵⁴⁶ *Khan Resources*, [394].

in the road” provision would only bar a prior dispute in which FREIF alleged a breach of the ECT itself and not another source of law. A measure that amounts to a breach of an investor’s legitimate expectations under Spanish law might not amount to a breach of the ECT’s FET clause.

413. FREIF refers to the analogous case of *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Estonia*, in which the Tribunal held that “the Claimants should not be barred from using the ICSID arbitration mechanism”⁵⁴⁷ in circumstances where the local company in that case brought a domestic claim under national statutory law “in the interest of all its shareholders”.⁵⁴⁸
414. In summary, FREIF submits that as it has not brought these claims before domestic courts and the Spanish Lawsuits are not the same, Spain’s “fork in the road” objection must fail.⁵⁴⁹

P5 Tribunal’s Decision

415. For the reasons that follow, the Tribunal finds in favour of FREIF and does not accept that it lacks jurisdiction due to the “*electa una via*” provision. Article 26(3)(b)(i) of the ECT states that “[t]he Contracting Parties listed in Annex ID do not give such unconditional consent [to the submission of a dispute to international arbitration] where the Investor has previously submitted the dispute under subparagraph 2(a) or (b)”. Spain’s objection rests on subparagraph 2(a) wherein the Investor party may choose to submit the dispute for resolution to the courts or administrative tribunals of the Contracting Party that is party to the dispute.
416. It is not in contention that Spain is a Contracting Party listed in Annex ID. Therefore, the question is whether the “Investor” has submitted its dispute to the domestic courts of Spain. In answering this question Spain argues that the “*electa una via*” provision should be interpreted according to its ordinary meaning and that therefore, the requirements of the triple identity test suggested by FREIF are overly strict and are not found in the wording of the ECT.
417. The Tribunal is not persuaded by this argument. The use of the triple identity test is not inconsistent with the principles of treaty interpretation under Article 31 of the VCLT, according to which consideration should be given to the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. What the wording of Article 26(3)(b)(i) requires is for the “Investor” to have submitted the “dispute” to the domestic courts, the purpose of which is to prevent one investor benefiting from parallel proceedings in different fora.
418. An ordinary understanding of this clause would require that the “Investor” be the same in the domestic litigation and the international arbitration. Furthermore the “dispute” should also be the same. In the Tribunal’s view, objects and causes of action are key

⁵⁴⁷ *Alex Genin*, Award, 25 June 2001, [332].

⁵⁴⁸ *Alex Genin*, Award, 25 June 2001, [333].

⁵⁴⁹ FREIF’s Counter-Memorial on the Supplementary Jurisdictional Objection, [20].

elements of a “dispute” which would naturally be used to assess whether the domestic court dispute is the same as the international arbitration. In this regard, FREIF’s observation that there is “substantial overlap”⁵⁵⁰ between a cause of action and object of a dispute has merit.

419. The Tribunal acknowledges that applying the triple identity test is not a requirement when considering a “fork in the road” provision. For example, the tribunal in *Chevron* found that it was not necessary to decide the issue of whether the triple identity test should be applied due to the specific wording of the US-Ecuador BIT which differs from the ECT.⁵⁵¹ The tribunal in *H&H* adopted an approach that focused on the substance of the rights being litigated in circumstances where it was not in question that the parties to the dispute were identical.
420. Nonetheless, the triple identity test has been used by numerous tribunals in their analysis of the “*electa una via*” provision under the ECT, including in a case against Spain.⁵⁵² Therefore, it is the Tribunal’s view that the triple identity test developed through jurisprudence is compatible with the ordinary meaning of the express terms of Article 26(3)(b)(i) of the ECT and is a framework that can appropriately assist tribunals when considering whether the “*electa una via*” provision has been engaged. As such, it proceeds to apply the triple identity test to the facts of the present circumstances.
421. First, the Tribunal is not satisfied that there is an identity of parties between this Arbitration and the Spanish Lawsuits. It is undisputed that the claimant parties in the Spanish Lawsuits are DEMEPI, EACLM and ENERDUERO, which are not claimant parties of the present Arbitration. Spain argues that, nonetheless, these entities, as subsidiary companies of FREIF, should be considered “Investors” pursuant to Article 26(7) of the ECT. However, as FREIF points out, Article 26(7) of the ECT refers only to the ICSID Convention and not to the SCC Rules, under which the present Arbitration is brought.
422. Spain also alleges that FREIF accepted that the “Investor” was broader than itself by referring to its parent company, First Reserve, in the Request for Arbitration. The Tribunal fails to follow why, even if FREIF was in fact referring to its parent company rather than itself in its Request for Arbitration, it would be logical to conclude that FREIF had conceded that the concept of “Investor” should include Spanish subsidiary companies such as DEMEPI, EACLM and ENERDUERO. Spain has not contended that these companies were included in the Request for Arbitration.
423. Spain also refers to the decision in *Charanne*⁵⁵³ in support of the view that a strict identity of the parties is not required and that the Tribunal should analyse the underlying

⁵⁵⁰ FREIF’s Post Hearing Brief, [7], fn 10.

⁵⁵¹ *Chevron*, [4.78].

⁵⁵² See e.g., *Charanne*, [398]–[410].

⁵⁵³ *Charanne*, [405]–[406].

corporate structure of the entities involved. While the Tribunal finds this position persuasive, it notes that the *Charanne* tribunal went on to say that:⁵⁵⁴

In order to consider that the identity-of-the-parties condition is met, it would have to be proved that the Claimants hold the decision-making power within Grupo T-Solar and Grupo Isolux Corsan S.A., so that the latter companies can be truly deemed as intermediary companies.

424. Therefore, adopting the standard used in *Charanne*, an identity of the parties requires, at minimum, not merely that the claimants of the Spanish Lawsuits are part of the same corporate chain as FREIF, but evidence that FREIF holds decision-making power within DEMEPI, EACLM and ENERDUERO. The evidence provided by Spain in this regard is that FREIF allegedly had the power to compel the resignation of the Spanish subsidiaries' directors as a condition of the Asset Sale and that certain directors of Renovalia and FREIF were also the directors of DEMEPI, EACLM, and ENERDUERO.
425. At this point, it is necessary to analyse the corporate structure of FREIF and its related entities. FREIF and the Spanish company, Renovalia, created a joint venture company called Renovalia Reserve S.L.. FREIF is a minority shareholder in Renovalia Reserve S.L.. Renovalia Reserve S.L. wholly owned DEMEPI, EACLM, and ENERDUERO. FREIF submits that, under the 2019 SPA, Renovalia Reserve S.L., rather than FREIF, would deliver the resignation letters of the Spanish subsidiary directors. Furthermore, the fact that one of its directors was a director of the Spanish subsidiaries is said to be matter of basic corporate law and an entitlement of FREIF as a minority shareholder.
426. The Tribunal accepts FREIF's description of its position in the corporate structure. Based on the evidence before the Tribunal, it has not been established that FREIF, as a minority shareholder in the parent company of the Spanish subsidiaries, held decision-making power over the Spanish subsidiaries that commenced the Spanish Lawsuits. In particular, there is no evidence that FREIF had any control over the decision to commence domestic claims. As such, there is no identity of the parties between the present Arbitration and the Spanish Lawsuits.
427. As this condition of the triple identity test has not been met, Spain's jurisdictional objection on the grounds of the *electa una via* clause must fail. Nevertheless, the Tribunal also concludes that the identity of objects and causes of action have not been proven. Although there appears to be some overlap in the factual background raised in the Spanish Lawsuits and the present Arbitration, the object of the Spanish Lawsuits was to strike down the New Regulatory Regime on the basis that it violated Spanish law. They were brought on the basis of Spanish statutory law, the Spanish Constitution, and EU law and involved a different legal standard. The subject of the dispute in the present Arbitration is an investment treaty dispute concerning compensation for alleged breaches of objections under the ECT.

⁵⁵⁴ *Charanne*, [408] (emphasis added by Tribunal).

428. The Tribunal considers that these distinctions mean that FREIF did not elect to take the path of domestic litigation when it reached the “fork in the road”. Instead, it proceeded to file an international arbitration under conditions which Spain agreed to in Article 26 of the ECT.

Q MERITS OF THE CASE

429. The crux of the dispute on the merits is that according to FREIF, Spain has breached its obligations under the ECT and the public international law standards which that provision incorporates by abolishing the Original Regulatory Regime. Article 10(1) of the ECT gives rise to the standards upon which FREIF relies. That provision reads 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.

430. FRIEF claims:

- (a) first, Spain breached Article 10(1)'s fair and equitable treatment (**FET**) standard by frustrating the legitimate expectations on which FREIF relied in making its investment;
- (b) second, Spain also breached Article 10(1)'s FET standard by fundamentally altering the legal regime applicable to FREIF's existing investments in an untransparent and inconsistent manner that lacked good faith and procedural fairness;
- (c) third, Spain's measures unreasonably impaired FREIF's management, maintenance, use and enjoyment of its investment in violation of the ECT's "impairment" clause; and
- (d) fourth, Spain breached the ECT's "umbrella clause" by contravening the obligations it entered into in the 2010 Agreement, as implemented by RD 1614/2010.

431. The Tribunal will first consider the Parties' positions on the applicable law governing the dispute and then consider the Parties' submissions on each alleged breach in turn.

Q1 Applicable Law and State Aid Issue

Q1.1 FREIF's Submission

432. FREIF submits that in accordance with the SCC Rules, the law to be applied is that which the Parties have agreed to in Article 26(6) of the ECT, which states:

A Tribunal established [to hear this dispute] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

433. According to FREIF, “applicable rules and principles of international law” is a reference to customary international law applicable between all Contracting States, not the regional law applicable between a particular subset of Contracting States. It points to the case of *Hully Enterprises Ltd. v Russia* in which the tribunal confirmed that the substantive law to be applied consisted of the substantive provisions of the ECT, the VCLT and the applicable rules and principles of international law.⁵⁵⁵ The VCLT supports this approach as well, providing that treaties are “governed by international law” and must be interpreted in light of “any relevant rules of international law applicable”.⁵⁵⁶
434. Furthermore, it is FREIF’s position that Spanish law does not provide and cannot influence the legal standards that the Tribunal applies to determine whether Spain violated the ECT and international law. This is because the Parties have not agreed to apply Spanish law to this dispute, and it is well-settled that a State cannot avoid liability under international law by relying upon its domestic law.⁵⁵⁷
435. In its responsive submissions, FREIF addresses Spain’s argument that EU law should apply because Spain’s incentives regime constitutes State Aid, and EU law is applicable to any State Aid scheme within the EU. Spain attempts to argue that there were limitations under EU law on its subsidy scheme as they constituted State Aid and this should have limited FREIF’s expectations. FREIF submits that EU law does not form part of the governing law of the Arbitration and is irrelevant to the determination of this dispute. The Tribunal would exceed its jurisdiction if it were to apply EU law and State Aid determinations which are within the exclusive competence of the EC.⁵⁵⁸
436. Furthermore, FREIF says that the EC has not given any indication that the relevant regime in RD 611/2007 constitutes State Aid and the evidence indicates that neither Spain nor the EC viewed this regulation as “State Aid”.⁵⁵⁹ This is said to be confirmed during the Main Evidentiary Hearing by FREIF’s witness, Mr Eduard Fidler, who said that FREIF “did not see the tariffs or the regulation... as contrary to State Aid”.⁵⁶⁰
437. It is alleged that Spain never notified the RD 611/2007 regime to the EC because it did not consider the regime to constitute State Aid. Likewise, although the EC is required to investigate presumed “unlawful aid” immediately upon learning of it, the RD 611/2007 regime was never investigated despite the EC being aware of it since at least 2005. Four cumulative criteria are required for a finding of “State Aid” and not all are satisfied in the present case in FREIF’s submission.

⁵⁵⁵ FREIF’s Statement of Claim, [313].

⁵⁵⁶ FREIF’s Statement of Claim, [315].

⁵⁵⁷ FREIF’s Statement of Claim, [316].

⁵⁵⁸ FREIF’s Post Hearing Brief, [12].

⁵⁵⁹ FREIF’s Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [424]; FREIF’s Post Hearing Brief, [12].

⁵⁶⁰ Transcript Day 2, p. 16, ll. 13–16.

438. Even if RD 611/2007 constituted State Aid, there would be a separate, complex inquiry to determine whether the State Aid regime is unlawful. FREIF contends that Spain has ignored the fact that aid programs for renewable energy are presumed to be lawful under the EC Guidelines and that Spain has failed to provide any examples of a decision by the EC finding an incentive program for renewable energy to be incompatible State Aid under either the Original Regulatory Regime or the New Regulatory Regime. In any event, such a finding would not be of relevance as it comes nearly a decade after FREIF's investments.⁵⁶¹
439. Additionally, FREIF argues that the EC's decision is only binding when tribunals apply EU law, as discussed in *Novenergia*.⁵⁶² In that case, as in the present case, the tribunal was not called upon to apply EU law. Similarly, FREIF has not asserted that the disputed measures violated an EC Directive or any other provision of EU law. The proper legal assessment for the violation of the FET standard is whether Spain treated FREIF fairly, not whether Spain was compliant with its own EU law obligations. FREIF concludes that it is not aware of a single ECT case in which EU law was applied to the merits⁵⁶³ and that the tribunals in *Electrabel* and *Vattenfall* have concluded that the ECT and EU law do not share the same subject-matter and are, in any event, not inconsistent.⁵⁶⁴
440. In the sole counter example of the *BayWa R.E. Renewable Energy v Spain (BayWa)* majority, FREIF submits that the decision is flawed on the facts and the law as it was incorrect for the majority to assume that Spain's lack of notification of the original schemes to the EC made them de facto unlawful State Aid. In any event, if Spain had provided investments under a regime that did not comport with its EU law obligations, this would also be a breach of its duty to act transparently, which is also a fundamental aspect of the FET obligation.⁵⁶⁵
441. Regarding the violation of the umbrella clause and impairment clause, FREIF submits that issues of State Aid can have no impact on these claims because "State Aid" is not a lawful defence to these claims once they are established. The EC did not instruct or require Spain to abolish RD 661/2007 and RD 1614/2010 and replace them with the New Regulatory Regime. Therefore, Spain cannot argue that it was reasonable for it to abrogate a program that did not comply with EU law.⁵⁶⁶

Q1.2 Spain's Submission

442. Spain also refers to Article 26(6) and the application of "applicable rules and principles of international law" but uses it in support of its position that EU law should apply. It says that EU law is applicable as the internal law of EU Member States and must shape

⁵⁶¹ FREIF's Reply Memorial, [425]–[432].

⁵⁶² *Novenergia*, [465].

⁵⁶³ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [443].

⁵⁶⁴ *Electrabel* [4.176]; *Vattenfall*, [212] cited in FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [440].

⁵⁶⁵ FREIF's Post Hearing Brief, [13]–[19].

⁵⁶⁶ FREIF's Post Hearing Brief, [22].

the legitimate expectations of any investor. EU law must be applied to decide the merits of the dispute because fundamental freedoms are affected in all intra-community investments and the present dispute affects an essential institution of the EU, being State Aid.⁵⁶⁷

443. Spain contends that the subsidies under RD 661/2007 are State Aid because the European Commission has indicated so on numerous occasions, in particular in the Decision in the State Aid SA.40348 proceedings of 13 November 2017 in which the EC concluded that the subsidies to be received by the plants in operation under the Spanish regime are in line with the requirements of EU law.⁵⁶⁸ The EC Decision stated “the Commission recalls that this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply [European] Union law”.⁵⁶⁹
444. Spain therefore argues that the Tribunal must take into account that the subsidies claimed by FREIF under RD 661/2007 constitute State Aid under EU law and are therefore subject to the provisions of Article 108 TFEU and the limits on State Aid established by EU law. This means that State Aid cannot go beyond what is strictly necessary to guarantee a level playing field.⁵⁷⁰ Spain submits that according to the EC, in an intra-EU relationship affecting State Aid, the concept of FET cannot have a broader scope in the ECT than it has in EU law. As such, a measure that does not violate domestic provisions on legitimate expectation generally does not violate the FET standard.⁵⁷¹ An expectation that is inconsistent with EU rules on State Aid cannot be considered a reasonable or legitimate expectation.⁵⁷²
445. Support for Spain’s position is also drawn from Article 1(3) of the ECT, when defining a “Regional Economic Integration Organization” as having “authority to take decisions binding on [states] in respect of [certain matters]”. Spain then refers to the *Electrabel* case which stated that “[a]s regards protection under the ECT, investors can have had no legitimate expectations in regard to the consequences of the implementation by an EU Member State of any such decision by the European Commission”.⁵⁷³ This is further supported by the more recent decision of the *BayWa* tribunal.⁵⁷⁴ On that basis, Spain submits that the EC’s State Aid SA.40348 decision is binding on the Parties and the Tribunal.
446. Moreover, Spain submits that the Tribunal should have regard to EU law as a reflection of the common understanding of 28 Member States. Specifically, it says that the domestic case law of the Spanish Supreme Court, which is a body forming part of the EU judicial system, has applied the concept of protection of legitimate expectations as

⁵⁶⁷ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [1100].

⁵⁶⁸ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [1104]–[1107].

⁵⁶⁹ RL-0054 Decision of the European Commission, rendered on November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN)), [166].

⁵⁷⁰ Spain’s Counter-Memorial, [1103].

⁵⁷¹ Spain’s Counter-Memorial, [1108]–[1112].

⁵⁷² Spain’s Post Hearing Brief, [78].

⁵⁷³ *Electrabel*, [4.142].

⁵⁷⁴ Spain’s Post Hearing Brief, [87]–[88]; *BayWa R.E. Renewable Energy GMBH and Other v. Kingdom of Spain*, ICSID Case No. ARB/15/16, [553]–[572] (**BayWa**).

developed by the ECJ. The application of EU law should result in a finding that Spain has not breached its obligations to FREIF and its investment under Article 10(1) of the ECT.⁵⁷⁵

Q2 Frustration of Legitimate Expectations

Q2.1 FREIF's Submission

447. FREIF first submits that by overhauling the legislative regime applicable to its investment, Spain frustrated its reasonably held expectation that the regime would remain stable.⁵⁷⁶

448. Article 10(1) of the ECT, it is submitted, guarantees investors fair and equitable treatment. So much emerges from the words of that provision which state, "shall... encourage and create stable, equitable, favourable and transparent conditions for investors...". Observance of the legitimate expectations of investors has been described variously as the "dominant element"⁵⁷⁷, or a "major component"⁵⁷⁸ of the FET standard. This view is supported by the many arbitral decisions which have consistently determined that this protection forms an essential part of the FET standard.

449. Arbitral authorities have established a three-step process by which to determine whether a claimant's reasonable expectations have been frustrated in breach of Article 10(1) ECT:⁵⁷⁹

- (a) did the host State's conduct create legitimate expectations on the part of the investor?;
- (b) did the investor rely on the State's conduct at the time it invested?; and
- (c) did the host State subsequently fail to honour the expectations it created?

450. FREIF submits that all three questions should be answered in the affirmative. The primary issue of law disputed by the Parties is the first question: did Spain's conduct create legitimate expectations on the part of FREIF? In answering yes, FREIF's argument is that RD 661/2007 stated—and Spain promoted the understanding—that Spain was promising an attractive incentive regime under which qualified wind farms would receive specified incentive tariffs and market premiums throughout their operating lives. Spain amended the regime in response to industry criticism to expressly confirm that future revisions would not apply to existing plants. Spain also aggressively promoted the incentive scheme to potential investors including FREIF, including in public speeches and investment seminars both in Spain and abroad. Spain then improved the stabilization provision in RD 661/2007 when it enacted RD 1614/2010.

⁵⁷⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1118]–[1124].

⁵⁷⁶ FREIF's Statement of Claim, [322].

⁵⁷⁷ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, [154].

⁵⁷⁸ FREIF's Statement of Claim, [325]; *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, [216]; See FREIF's Statement of Claim, fn 464.

⁵⁷⁹ FREIF's Statement of Claim, [326].

FREIF's reliance on Spain's representations was reasonable because its understanding of Spain's guarantees under the RD 661/2007 and RD 1614/2010 incentive regime was confirmed by its due diligence, including by the legal advice of FREIF's Spanish legal counsel at Linklaters.

451. Specifically, FREIF argues that the Spanish Government established a precise incentive regime identifying in great detail both the terms of the incentives and the duration of their operation. This created expectations of a favourable, stable regulatory regime for the wind sector in order to promote investment. The regime's precision factor led the tribunal in *Antin Infrastructure Services and Antin Energia Termosolar v Spain (Antin)* to find that the terms of the Original Regulatory Regime formed the basis of legitimate expectations on FREIF's behalf.⁵⁸⁰
452. The stability of the regime was expressly protected for existing plants by Article 44 of RD 661/2007, which insulated those plants from the newly implemented quadrennial reviews.⁵⁸¹ FREIF catalogues numerous instances wherein the Government, its representatives or other State bodies explicitly made guarantees as to the stability of the incentives for existing wind investments.⁵⁸²
453. Prior to it executing the 2011 SPA on 14 October 2011, Spain made several official and very specific pronouncements regarding the stability of the incentives for existing wind investments. It assesses its expectations as of October 2011, when it executed the 2011 SPA and says the increase to its shareholding in one of the underlying special purpose vehicles in April 2012 is not relevant as it is past the first date on which an investor made its decision to investment.⁵⁸³ Focusing on statements made from 2010 until October 2011, FREIF presents the following examples:⁵⁸⁴
- (a) A report in the newspaper *Cinco Días* in June 2010 stated that Prime Minister Zapatero had decided that "the cuts should not be applied to all facilities, but to those that come into operation in the future";
 - (b) A press release from Spain's Ministry of Industry, Tourism and Trade on 2 July 2010, announced that it had reached "an agreement" with the wind and CSP sectors to review their remuneration framework "guaranteeing the current premiums and tariffs under RD 661/2007 for the installations in operation".⁵⁸⁵ This guarantee is said to have been confirmed by Spanish officials on no fewer than five specific occasions including in its Report on the Analysis of the Regulatory Impact of the new royal decree and technical report on the draft royal decree;

⁵⁸⁰ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [460]; *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, [522].

⁵⁸¹ See FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [462]-[463].

⁵⁸² FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [464].

⁵⁸³ FREIF's Post Hearing Brief, [39].

⁵⁸⁴ FREIF's Post Hearing Brief, [24]-[38].

⁵⁸⁵ C-220, Official Press Release, Ministry of Energy, 2 July 2010, p. 1.

- (c) The enactment of RD 1614/2010 which is said to be a translation of the terms of the 2010 Agreement into regulation. Article 5.4 of that decree contains the alleged stabilisation clause, which states “[F]or wind facilities under Royal Decree 661/2007 of 25 May, the revisions of tariffs, premiums and upper and lower limits referred to in Article 44.3 of the aforementioned royal decree, shall not affect facilities that have obtained final registration in the [RAIPRE] ... nor those registered in the pre-allocation registry under [Royal Decree-Law] 6/2009”.
454. Arbitral case law has previously found that a Government's publicly expressed intentions or commitments may form the basis of a legitimate expectation. So much occurred in *Total S.A. v Argentine Republic (Total v Argentina)*. Importantly, the authorities to which FREIF refers provide that there need not be a *legal* commitment forming the basis of FREIF's expectation. As the tribunal found in *Total v Argentina*:⁵⁸⁶
- the expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause...when public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration. Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs.
455. Therefore, in FREIF's submission, the Government's public representations, paired with its ambition to meet the renewable energy targets mandated by EC directives, mean that its expectation was justifiable and was not merely a subjective expectation.⁵⁸⁷
456. FREIF goes one step further to submit that, even absent express representations by the government, the conduct of a state and its policy goals can operate together to give rise to legitimate expectations by investors. In *Micula*,⁵⁸⁸ the tribunal determined that legitimate expectations could arise from the Romanian government's policies enacted to address an “economic crisis” by attracting investment.⁵⁸⁹ It is important to highlight that in that case there was neither a contract between the investor and the government, nor was there an explicit stabilisation clause extant in the legal framework.
457. FREIF says there was a similar interplay between the government's ambitions and its policy in the present case. Spain's advertised policy goal of promoting renewable energy investment, its registration of eligible facilities under the program in the RAIPRE, and its promise in Article 5.3 of RD 1614/2010 of long term stability in the regulatory regime gave rise to legitimate expectations that Spain would act consistently with those policies.⁵⁹⁰ In its Reply Memorial it cites arbitral case law such as *Parkerings-*

⁵⁸⁶ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (***Total v. Argentina***).

⁵⁸⁷ FREIF's Statement of Claim, [327]; *Total v. Argentina*, [117]–[118].

⁵⁸⁸ *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (***Micula***).

⁵⁸⁹ *Micula*, [137]–[138].

⁵⁹⁰ FREIF's Statement of Claim, [330].

*Compagniet v Lithuania*⁵⁹¹ which support the proposition that no specific undertaking or obligation need underpin FREIF's expectation, and that the circumstances surrounding the conclusion of the agreement are decision to determine whether the expectations of the investor are legitimate.

458. Considered together, FREIF argues that it was entirely legitimate that it expected the legal framework would remain stable. It observes that other arbitral tribunals considering similar cases brought against Spain have concluded as much, such as in *Novenergia*.⁵⁹²

459. On the second question of whether FRIEF relied on Spain's conduct at the time it invested, FREIF submits that it is evident that FREIF relied on the suite of promises and guarantees embodied in the extant legal regime in making its investment. Mr Florian gave evidence in support of this fact, saying:⁵⁹³

we firmly trusted that the Spanish Government would honor its express promises to investors, which they reiterated on multiple occasions, and would not backtrack on them and fundamentally alter the legal regime applicable to our investment.

460. According to FREIF, Spain was unable to contest or disprove any of the testimony given by FREIF's witness, Mr Fidler, regarding FREIF's reliance on the long-term stability of Spain's incentives program. Mr Fidler confirmed that a brochure released by Renovalia, relied on by Spain, stated that Spain's power to change the regime was limited by Spanish legal principles prohibiting retroactive changes and ensuring legal certainty and legitimate expectations. Mr Fidler also confirmed that the advice received by FREIF's Spanish lawyers was that although the Supreme Court had made a judgment to provide some flexibility in regulatory changes, the impression was that any changes would only be refinements or minor changes.⁵⁹⁴

461. On the third question, FREIF contends that Spain frustrated its legitimate expectations by implementing a series of measures culminating in the New Regulatory Regime, that imposed unforeseen, drastic changes to the system and ultimately abolished the regulatory regime on which FREIF relied when it made its investment. These fundamental changes are said to be to the material detriment of FREIF and its investment.⁵⁹⁵ The measures should be considered retroactive because they changed the incentive rates that would be paid to plants enrolled in the RAIPRE registry for which Spain had already guaranteed specific tariffs and premiums for their entire useful lives. The New Regulatory Regime is said to be retroactive in a further sense because in calculating the new incentive rates, the Regime takes into account incentives Spain had already paid to existing facilities.

⁵⁹¹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, [330]–[331].

⁵⁹² *Novenergia*, [667].

⁵⁹³ Witness Statement of Mr Florian, [38].

⁵⁹⁴ FREIF's Post Hearing Brief, [58]–[59].

⁵⁹⁵ FREIF's Statement of Claim, [332].

462. FREIF acknowledges that there are two types of “retroactive” measures – ones that “claw back” subsidies already received and those that change a regime only in terms of subsidies to be paid in the future. It says that Spain’s measures encompass both types of “retroactivity”. Although Spain considers only the “super-retroactivity” measures involving a claw back to be potentially problematic, the relevant issue is that FREIF legitimately expected that Spain would not impose either type of measure when it invested, on the basis of statements by the Prime Minister and the fact that tariffs and premiums for existing plants had been stabilised for their full operating lives under RD 1614/2010.⁵⁹⁶
463. In response to Spain’s arguments, FREIF rejects the notion that the “reasonable return” principle was FREIF’s only legitimate expectation. It states first that the “reasonable return” concept in the Original Regulatory Regime was extremely vague and opaque to investors and thus what informed investors’ legitimate expectations was primarily how Spain implemented that concept in the developing regulations and then described that implementation.⁵⁹⁷ Furthermore, Spain’s witness, Mr Ayuso confirmed that the notion of “reasonable return” was only one of several guiding principles in the 1997 Electricity Law and was not defined in that Law. He noted that sustainability of the electricity system was perhaps a “more” essential principle than reasonable return.⁵⁹⁸
464. Furthermore, FREIF submits that the minority of tribunals that have found that investors’ only legitimate expectation was to a “reasonable return” have the following flaws in their decisions:⁵⁹⁹
- (a) Most of the tribunals interpret the “reasonable return” concept as variable or “dynamic” and do not address the fact that the “reasonable return” concept was fixed in the Original Regulatory Regime;
 - (b) The decisions of these tribunals apply the “reasonable return” benchmark to the returns of FREIF’s particular plants rather than the returns of an efficient standard installation. This conflates the harm caused by the disputed measures with the efficiency or inefficiency of each plant. FREIF conducts a detailed analysis of *The PV Investors v. Kingdom of Spain* decision, agreeing and disagreeing with various aspects of that tribunal’s analysis.
465. Even if the Tribunal were to conclude that FREIF’s only legitimate expectation was to a “reasonable return”, then FREIF submits that “reasonable return” must be understood as a return that was fixed at the level that was reasonable in 2007. To set the return at a variable level by reference to much a lower interest rate environment is not consistent with how FREIF understood the “reasonable return” concept when it invested and would

⁵⁹⁶ FREIF’s Post Hearing Brief, [62].

⁵⁹⁷ FREIF’s Post Hearing Brief, [92].

⁵⁹⁸ FREIF’s Post Hearing Brief, [71]; Transcript Day 2, p. 57, ll. 15–23.

⁵⁹⁹ FREIF’s Post Hearing Brief, [105]–[116].

perpetuate rather than remedy the “sea change” in regulatory paradigm caused by the New Regulatory Regime.⁶⁰⁰

Q2.2 Spain’s Submission

466. Spain disputes FREIF's case primarily by denying that it created the expectations allegedly held by FREIF. It emphasises that the renewable energy sector is part of the SES, which is governed by the principles of guaranteeing energy supply at the lowest possible cost to the consumer, and economic sustainability which rests on the financial self-sufficiency of the SES.⁶⁰¹
467. Spain therefore says that it always had the ability to modify subsequent regulations as long as the principles in Law 54/1997 were upheld and subject to two limits which provide guarantees for investors. The first is that regulatory changes must enable plants to achieve a reasonable return and the second is that the return will only be reasonable if it is consistent with the cost of money in the capital market.⁶⁰² Spain does not consider that it failed to honour these guarantees.⁶⁰³
468. In this respect, Spain submits that FREIF misrepresents the legal standard necessary to establish the existence of a legitimate expectation. According to Spain, a legitimate expectation requires that:⁶⁰⁴
- (a) the State made specific commitments to an investor that the regulation in force will remain unchanged;
 - (b) the investor’s expectations must be objective, reasonable and justified in relation to any changes in the laws of the host country;
 - (c) the expected level of diligence in the investor is indispensable in a highly regulated sector like the energy sector and requires a diligent analysis of the applicable legal framework; and
 - (d) the investor must consider the due diligence exercised and the circumstances surrounding their investment, including anticipating that circumstances may change. In order to account for the State’s regulatory power, the threshold of legitimacy of an expectation is high.
469. Spain requests that the Tribunal keep an open mind and bear in mind the most recent awards rendered in arbitration cases against Spain and their acknowledgement of the “reasonable rate of return” doctrine. It emphasises that the present dispute has several particularities which the Tribunal should be attentive to. First, that the technology was wind which is one of the most established among the renewable energy sources and

⁶⁰⁰ FREIF’s Post Hearing Brief, [88].

⁶⁰¹ Spain’s Post Hearing Brief, [24].

⁶⁰² Spain’s Post Hearing Brief, [31].

⁶⁰³ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [1175].

⁶⁰⁴ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [1186]; Spain’s Post Hearing Brief, Schedule 2, p. 8; *Charanne*, [499]; *RREEF*, [261]–[262].

generally achieves returns above the benchmark. Second, FREIF's date of investment was between December 2011 and April 2012 and a lot of changes to the SES had occurred in the years leading up to that time.⁶⁰⁵ Third, FREIF's documents at the time of the investment demonstrate that it was aware of the possibility of regulatory change.⁶⁰⁶

470. Spain's first line of attack is that FREIF's misconstrues its subjective expectations and cannot sustain an argument that it relied upon any stabilisation commitment. It points to two pieces of evidence in particular:

- (a) First, the Linklaters Regulatory Risk Memorandum of June 2011, which constituted FREIF's basic due diligence, stated "the only limitation to which the Government is subject when approving the economic regime of installations producing energy from renewable sources is the requirement set forth in Article 30.4 of ESA"⁶⁰⁷ and further stated that the Spanish government calculated a rate of return "referenced to the cost of money in the capital market" (that is, around 7% after tax and with equity, that is before external financing).⁶⁰⁸ At the Hearing, Mr Fidler accepts that this is advice provided by Linklaters⁶⁰⁹ and also accepted that Linklaters explained the expected modifications to the legislation and advised FREIF on possible legal actions it could take in response.⁶¹⁰
- (b) Second, FREIF's Investment Committee Memo of September 2011 again confirms that regulatory change was an actual scenario that it modelled reflecting several alternatives, including one where Spain not only changed the remuneration scheme but removed all public support in 2016.⁶¹¹
- (c) Third, the plants in which FREIF invested had already been subject to successive changes in the applicable regulatory regime prior to FREIF's investment and it was therefore aware of the possibility of regulatory changes.⁶¹²

471. Therefore, based on the due diligence conducted by FREIF, it ought not to have formed the view that the regulatory regime would remain stable. Even if it did form that expectation, it still could not be described as "objective and reasonable", and therefore is not a legitimate expectation protected under international law.

472. This is because, putting aside the internal information available to it, FREIF still could not reasonably expect the regime to remain consistent, as "the entire support

⁶⁰⁵ Spain's Post Hearing Brief, [92]–[95].

⁶⁰⁶ Spain's Post Hearing Brief, [17]–[21].

⁶⁰⁷ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 8.

⁶⁰⁸ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, pp. 8-9.

⁶⁰⁹ Transcript Day 2, p. 23, ll. 2-10, p. 24, ll. 1-25.

⁶¹⁰ Spain's Post Hearing Brief, [102]–[103]; Transcript Day 2, p. 25, l. 5 – p. 26, l. 8.

⁶¹¹ Spain's Post Hearing Brief, [105].

⁶¹² Spain's Post Hearing Brief, Schedule 2, p. 9; C-127, Renovalia JV Infrastructure Investment Committee Final Memo, 22 September 2011, slide 7; C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 18.

framework for renewable energies in Spain is subordinate to the principle of economic sustainability of the SES, and the other domestic laws of Spain."⁶¹³ To think otherwise would be "naïve".⁶¹⁴ Any investor who had performed an objective and rational analysis of the Spanish regulatory framework at the end of 2011 could easily conclude that it would be modified if the economic sustainability of the SES were threatened as a result of the tariff deficit.⁶¹⁵ In that vein, Spain submits that other participants in the sector such as renewable energy producers, law firms and consultancy firms did not share FREIF's expectation of an immutable tariff.⁶¹⁶ FREIF also never received a personal commitment from Spain and did not have discussions with members of the Spanish government.⁶¹⁷

473. According to Spain, FREIF has ignored a number of relevant facts that should define an expectation it claims to have had. For example, the determination of premiums has always been decided according to the evolution of the demand and other basic economic data, such as the fact that remuneration under the Special Regime had the objective of providing a reasonable rate of return, and that none of RD 436/2004, RD 661/2007, or RD 1614/2010 contain clauses that prevent the Government from adapting the remuneration regime for renewable energies to changing macroeconomic circumstances.⁶¹⁸
474. Spain contends that the references to the press release given by the Ministry of Industry on 25 May 2007, the PowerPoint presentations and the CNE reports are not evidence of any stabilisation commitment. There is no suggested that FREIF attended or relied upon any presentations, which were given to international regulatory authorities. The existence of a commitment also cannot be inferred from a press release.⁶¹⁹
475. Spain downplays the registration of plants in the RAIPRE (a subsection of the special register), provided for in Article 5(3) of RD 661/200. It says that registration does not constitute a commitment not to change the economic regime of RD 661/2007 for the existing facilities; as such, registration is merely an administrative requirement.⁶²⁰ Additionally, any diligent investor would have read the Explanatory Memorandum to the Agreement of the Council of Ministers of 13 November 2009 and subsequent press releases. The Agreement imposed a staggering of the introduction of wind and solar thermal plants registered in the RAIPRE in order to guarantee the sustainability of the SES. The accompanying reports warned of risks to the economic and technical sustainability of the SES. Spain therefore argues that neither the Agreement of 13 November 2009 nor the creation of the pre-registration in RAIPRE could serve to support the objection or reasonable expectations of the Claimant when making their successive investments.⁶²¹

⁶¹³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1181].

⁶¹⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1187], [1197].

⁶¹⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1184].

⁶¹⁶ Spain's Post Hearing Brief, [96]–[98].

⁶¹⁷ Spain's Post Hearing Brief, [108]; Transcript Day 2, p. 43, l. 21 – p. 44, l. 16.

⁶¹⁸ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1206]–[1209]; Spain's Post Hearing Brief, [57]–[58].

⁶¹⁹ Spain's Post Hearing Brief, [59]–[61].

⁶²⁰ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1233]–[1240].

⁶²¹ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1241]–[1253]; Spain's Post Hearing Brief, [66]–[67].

476. Furthermore, Spain submits that FREIF could not have a legitimate expectation that is contrary to Spanish or EU law. Specifically:

- (a) FREIF could not have an expectation contrary to the way in which Spanish law connects and structures different regulations. In this respect, it points out that FREIF should have known that the regulatory framework is also made up of other important instructions such as Law 54/1997, regulations, renewable energy plans (**PER**) containing the objectives, methodology and underlying financials behind the regulations. According to the hierarchy of the Spanish legal framework, Royal Decrees such as RD 661/2007 or RD 1614/2010 are subject to the principles and objectives of the superior law with the rank of an Act, which at the time of FREIF's investment was Law 54/1997.⁶²² Spain argues that all diligent investors would know that regulations are subordinate to the law in Spain and regulations are used to adapt the contents of Acts without having to amend the latter, to the changing economic and social circumstances.⁶²³
- (b) FREIF could not have any objective expectations as to the content, extent and limits of the rules that differ from the interpretation of those rules by the Supreme Court, which is the highest interpreter of Spanish law. According to Spain, the weight of the Supreme Court's judgments has been accepted by other tribunals and in accordance with the Supreme Court's rulings prior to FREIF's decision to invest, all investors had to know that incentives could increase or decrease and that regulatory changes were designed to ensure that plants receive a reasonable rate of return.⁶²⁴
- (c) FREIF could not set its legitimate expectations while not being aware that in Spain, as a requirement of EU Law, the activity of electricity generation from renewable energy sources is carried out in the context of a liberalised sector. In this regard, an investor should set its expectations in accordance with the principle of proportionality of EU law. Therefore, a reasonably diligent investor would have seen how the reforms of the support regime of 2006, 2007 and the reform of 2010 came about with the aim of correcting situations of wind-fall profits generated by the respective support frameworks in force. Any investor should set its expectations on the premise that if the renewable energy support system had to be modified, it would be fully consistent with the principles and rules of European Union Law on State Aid.⁶²⁵ Furthermore, the objective of the ECT is "to promote the development of an efficient energy market" and it therefore does not seek to protect expectations of indefinite over-remuneration.⁶²⁶

⁶²² Spain's Post Hearing Brief, [24i].

⁶²³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1195]–[1197].

⁶²⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1200]–[1210].

⁶²⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1188]–[1194].

⁶²⁶ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1194].

477. In response to the Tribunal's question to the Parties, Spain submits that the following evidence shows that Spain identified that the rate of tariff remuneration for wind turbine investments would remain subject at all times to regulatory or legislative change should economic circumstances require change:
- (a) The principle of "reasonable rate of return", which has always been a cornerstone of the SES, has always enabled Spain to introduce the required adjustments and changes deemed appropriate within the remuneration scheme to renewable energies. Spain describes the concept as a "dynamic guarantee".⁶²⁷ The 2005 PER is referred to as an example of the application of the reasonable return principle as the PER determines that the return on project type is "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";⁶²⁸
 - (b) The evolution of the regulatory framework prior to FREIF's investment is further proof that the tariffs and premiums were subject to changes. Spain submits that well before FREIF's investment started in December 2011, Spain had adopted several RDs and RD Acts which had altered the economic regime for existing facilities. Therefore, Spain had sent a message that wind farms are subject to regulatory or legislative changes should the economic or social circumstances require change;⁶²⁹
 - (c) The case law of the Spanish Supreme Court issued prior to 2011 contains countless pronouncements confirming that renewable energy producers were subject at all times to regulatory or legislative change. Spain says that these judgments are based on the same legal principles that were in force at the time of FREIF's investment and therefore, any diligent investor would have had to note that there was no commitment to maintain the tariffs;⁶³⁰ and
 - (d) Senior Spanish Officials confirmed the principles upon which the SES was based. Although Spain points out that FREIF did not have discussions with members of the Spanish government at any level,⁶³¹ public statements by Spanish Officials prior to the conclusion of FREIF's investment make clear that the system was unsustainable and structural reform was needed.⁶³²
478. Spain concludes that the only guarantee it made was to ensure a reasonable rate of return rather than freezing regulations. The changes to the Original Regulatory Regime identified by FREIF do not respond to the fundamental features of the Spanish support scheme and do not show that Spain did not provide stable conditions. The alleged lowering of the rate of reasonable return is said to be due to the dynamic nature of that

⁶²⁷ Spain's Post Hearing Brief, [34]–[36].

⁶²⁸ Spain's Post Hearing Brief, [39] citing Transcript Day 3, p. 39, ll. 4-12.

⁶²⁹ Spain's Post Hearing Brief, [41]–[42].

⁶³⁰ Spain's Post Hearing Brief, [43]–[49].

⁶³¹ Transcript Day 2, p. 43, l. 21 – p. 44, l. 16 .

⁶³² Spain's Post Hearing Brief, [50]–[54].

principle. The capping of incentives is also said to be part of the design of support schemes for renewable energy, which are meant to be temporary. The effect of interest rates on incentives is said to not amount to a key feature of the support scheme.⁶³³

479. The measures adopted by Spain were not retroactive because they do not affect the amounts actually received by the renewable energy plants prior to their enforcement.⁶³⁴ All regulatory changes made since 1997 have applied to existing and operational installations.⁶³⁵ As such, Spain did not fail to honour the expectation of a reasonable rate of return.

Q3 Breach of Duty of Transparency and Good Faith

Q3.1 FREIF's Submissions

480. FREIF claims that Spain's FET obligations were also contravened by the Spanish government when it overhauled the legislative regime applicable to its investments in a manner that was "opaque... devoid of a genuine dialogue and good faith."⁶³⁶ It is submitted that the FET standard "includes a State's duty to treat investors and their investments transparently and consistently, and in accordance with procedural fairness and due process".⁶³⁷ FREIF cites a number of arbitral decisions in support of its contention, among them *Frontier Petroleum Services Ltd v Czech Republic*, in which the tribunal found:⁶³⁸

Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework... [A]n arbitrary reversal of [that framework] will constitute a violation of fair and equitable treatment.

481. Also arising from Article 10(1) of the ECT, FREIF contends that Spain "violated its duty of good faith conduct towards FREIF and its investments."⁶³⁹ The duty of good faith was found by the *Sempra Energy Int'l v Argentine Republic* tribunal to "permeate the whole approach to investor protection", residing "at the heart of the concept of fair and equitable treatment."⁶⁴⁰
482. In short, FREIF argues that the FET standard provides that key stakeholders should be informed of regulatory decisions before they are enacted but that it was not afforded treatment meeting this standard. FREIF takes the position that Spain's policy position changed with the enactment of the New Regulatory Regime. Previously, under RD661/2007 and RD 1614/2010, Spain had guaranteed investors in the wind sector specific tariff and previous rates for the lifetime of properly enrolled wind facilities. The

⁶³³ Spain's Post Hearing Brief, [116].

⁶³⁴ Spain's Post Hearing Brief, Schedule 2, pp. 9-10.

⁶³⁵ Spain's Post Hearing Brief, [112].

⁶³⁶ FREIF's Statement of Claim, [364].

⁶³⁷ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 [570]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, [284].

⁶³⁸ *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [285].

⁶³⁹ FREIF's Statement of Claim, [356].

⁶⁴⁰ *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, [298]–[299].

Original Regulatory Regime enabled producers to increase returns by building the most productive plants at the least cost. Under the New Regulatory Regime, remuneration was paid based on capacity rather than production, thereby eliminating efficiency gains.⁶⁴¹

483. First, FREIF says that rather than engaging the industry before enacting the New Regulatory Regime, the government "simply announced [them]", thereby "backtrack[ing] on its previous commitments *ex post facto*, with no regard for transparency."⁶⁴² FREIF maintains, as Mr Ceña details in his Second Statement,⁶⁴³ that RDL-9/2013 (of the New Regime) was implemented "without any kind of participation from renewable associations" and certainly paled in comparison to the input the sector could provide throughout the consultations which led to the 2010 Agreement.⁶⁴⁴ Mr Ceña also testified at the Hearing that Spain did not consult with the industry before it implemented the New Regulatory Regime⁶⁴⁵ and that guarantees that future incentive revisions would not affect existing plants had been the cornerstone of the regime that the industry had fought to ensure on the basis of discussions with the government.⁶⁴⁶
484. According to the preamble of RDL 9/2013, Spain claimed an "urgent" need to implement the new framework due to an "unexpected" level of rainfall and wind and a depressed economy during the same time period. However, FREIF contends that Spain was not entitled to any exceptions or defences under the ECT and international law that would enable it to enact the New Regulatory Regime without consultation. It submits that Spain would need to meet the defence of necessity, which it has not attempted to do. In any event, FREIF contests that there was any extraordinary and urgent need to enact the New Regulatory Regime because the issue of the tariff deficit, which the New Regulatory Regime is said to address, existed well before Spain enacted RD 661/2007.
485. Secondly, FREIF says the duty of transparency and good faith was also breached because the new framework which was enacted was opaque in its terms, comprising inconsistent provisions of uncertain effect.⁶⁴⁷ Prior to the government's pronouncement, investors could not have anticipated that Spain would define the standard for determining a reasonable return for the first regulatory period under the New Regulatory Regime as 300 basis points over the ten-year Spanish government bond. The New Regulatory Regime also provides that Spain can review this standard at its discretion. FREIF therefore contends that there is nothing in the current regime that gives investors insight as to what formula Spain may use to set its definition of "reasonable return".
486. FREIF refers to the 7% TVPEE "tax" as another example. It argues that it was introduced absent consultation and was misrepresented as a "tax" when in actuality,

⁶⁴¹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [498].

⁶⁴² FREIF's Statement of Claim, [373].

⁶⁴³ Second Witness Statement of Mr Ceña, pp. 4–22.

⁶⁴⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [503]–[505].

⁶⁴⁵ Transcript Day 3, p. 63, ll. 1-6; Transcript Day 3, p. 37, ll. 13-21; Transcript Day 3, p. 12, ll. 16-17; Transcript Day 3, p. 13, ll. 5-9.

⁶⁴⁶ Transcript Day 3, p. 27, ll. 20-25; FREIF's Post Hearing Brief, [63]–[65].

⁶⁴⁷ FREIF's Statement of Claim, [374].

the measure constituted a 7% reduction in the tariff rates granted by RD 661/2007. The introduction of new regulations such as RDL 9/2013, which abolished the "Special Regime", was similarly deficient, implemented in broad terms and created great uncertainty for nearly a year as to the legal framework which would take its place.⁶⁴⁸

487. FREIF concludes that Spain's actions stand in stark contrast to the representations of Spain's own government officials and representatives promoting the stability of the Original Regulatory Regime in order to encourage FREIF and thousands of other investors to invest in Spain. Equally importantly, they were entirely inconsistent with the manner in which Spain previously designed its incentive regime and dealt with the wind industry, thus exhibiting a lack of transparency, consistency, good faith and procedural fairness. As to Spain's argument that the changes in the law should have been anticipated, FREIF says that this is most revealing of Spain's lack of good faith. Spain developed a legal framework with the sector, touted by Government officials as providing "total legal security", which it knew it could unilaterally vary at any time.⁶⁴⁹ Spain's actions are therefore said to violate the "fair and equitable treatment" standard.⁶⁵⁰

Q3.2 Spain's Submissions

488. Spain resists this contention, arguing that before and after the election of the Populist Party, the Government's position as regards the incentives regime, and the tariffs deficit, was the same, evidenced by two statements made by Government representatives.⁶⁵¹ The need to adopt new measures had been stressed by the Ministry of Industry in January 2011 before FREIF initiated its investment process. The Government elected after the November 2011 elections followed the same trend and adopted the announced measures to tackle the tariff deficit. Furthermore, the Government later elected in 2018 from the opposite side has not abrogated the 24/2013 Act but has set another reasonable rate of return.⁶⁵²
489. Spain denies that it acted in an opaque manner, emphasising the Government's entitlement to enact legislation by Royal Decree in circumstances of "*extraordinary and urgent need*."⁶⁵³ Its submission is that it was capable of lawfully enacting laws by Decree and former governments of different political ideologies had done the same without consulting the renewable energy sector. In particular, the use of the Royal Decree in the electricity sector and renewable energy sector was due to the urgent need to ensure the economic sustainability of the SES which was threatened.⁶⁵⁴
490. Spain contends that in any event, it is not true that from 2012 onwards, the measures taken were carried out without consulting the sector. For example, Spain points to an

⁶⁴⁸ FREIF's Statement of Claim, [375].

⁶⁴⁹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [516].

⁶⁵⁰ FREIF's Statement of Claim, [380].

⁶⁵¹ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1290].

⁶⁵² Spain's Post Hearing Brief, Schedule 2, p. 11.

⁶⁵³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1294].

⁶⁵⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1296].

open consultation period which occurred in February 2012 and enabled any interested parties to suggest opinions for a report on regulatory adjustment measures that could be adopted in the energy sector.⁶⁵⁵ Further consultation took place during the enactment process of RD 413/2014 and during the proceedings for the approval of MO 1045/2014.⁶⁵⁶ The amendments to the law were therefore neither unpredictable nor lacking in transparency.

491. With respect to the terms of the new framework, Spain also rejects the contention that the standards used for the different standard facilities lacked transparency. It argues that FREIF has not substantiated its submission with any minimum study in which it is proven that the remuneration standards used are not in line with real data. Instead, it contends that the methodology used by Spain for determining a reasonable return had been the same since 1989. Furthermore, it denies that the goals pursued by RD 661/2007 and the disputed measures have differed, rather it says that different formulas can be used to make renewable technology competitive. Remuneration parameters that are able to change are also said to be minimal and linked to CPI.⁶⁵⁷

Q4 Breach of “Impairment Clause”

Q4.1 FREIF’s Submissions

492. In a similar vein, FREIF submits that Spain's conduct amounts to a breach of the impairment clause in Article 10(1) ECT, which reads:

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.

493. By allegedly departing from the Original Regulatory Regime despite its assurances that the incentives structure would remain stable, Spain has fallen short of its requirement to act in an "even-handed and non-discriminatory manner".⁶⁵⁸ It did so by: reaping the full benefits of FREIF's investment while denying FREIF of the full benefit of the regime which formed the basis of its decision to invest; and reneging on its promise in the 2010 Agreement to hold stable the extant Regime.⁶⁵⁹
494. First, FREIF submits that the word “impair” embodies a relatively low standard. Citing a number of arbitral decisions,⁶⁶⁰ FREIF submits that an investment need only suffer "any negative impact or effect."⁶⁶¹ Furthermore, the use of the disjunctive "or" requires that the impairment suffered by FREIF's investment be *either* unreasonable or discriminatory. FREIF's submissions are focused on unreasonableness.

⁶⁵⁵ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1299].

⁶⁵⁶ Spain's Post Hearing Brief, Schedule 2, p. 11.

⁶⁵⁷ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1302]–[1314].

⁶⁵⁸ *Saluka Investments B.V. v. The Czech Republic*, Partial Award, Mar. 17, 2006, [303]–[307] (***Saluka Investments***).

⁶⁵⁹ FREIF's Statement of Claim, [357]–[360].

⁶⁶⁰ See e.g. FREIF's Statement of Claim, [336] citing *Saluka Investments* citing Case Concerning Fisheries Jurisdiction (Spain v. Canada), ICJ, Judgment on Jurisdiction of the Court, 4 December 1998, [66].

⁶⁶¹ FREIF's Statement of Claim, [336].

495. By reference to that standard, FREIF argues that the New Regulatory Regime affected an unreasonable impairment of its investment, causing FREIF 99.4 million euros in damages (including pre-award interest, but excluding a tax gross-up). Adopting the standard applied in *LG&E v Argentina*, it argues that the laws were unreasonable because they “affect[ed] the investments of nationals of the other Party without engaging in a rational decision-making process”.⁶⁶²
496. Whether or not the impairment of FREIF's investment is “unreasonable” therefore is a question of balancing the interests of the State relative to its effect on the relevant investment. However, in FREIF's submission, this balancing exercise must be performed “from the standpoint of the parties' expectations at the time of the decision to invest, rather than what the state might have subsequently and unilaterally viewed as “reasonable” from a policy perspective”.⁶⁶³ In the same vein, FREIF contends that there is no defence or exception to liability under the ECT on the basis of a finding that the measures were proportionate and part of a rationale public policy.
497. FREIF argues that, when viewed in this way, the New Regulatory Regime unreasonably impaired its investment. FREIF offers a comprehensive list of the ways in which the New Regulatory Regime fundamentally altered the legal regime applicable to Spanish windfarms.⁶⁶⁴ Although unnecessary to recite all of the amendments to the regime argued by FREIF, it will assist to recall briefly that the New Regulatory Regime: (i) amended standard plant assumptions, setting stricter targets which “appropriate efficiency gains from effective plants; (ii) changed the tariff structure from a payment based on *production* to one based on *capacity*, significantly reducing rewards to productive plants; and (iii) reduced the reasonable return of the investments by setting it at 7.398% pre-tax (i.e. 5.56% after tax).⁶⁶⁵
498. These changes, FREIF submits, were essential to the viability of its investments. Its quantum expert, Brattle, found in its First Brattle Regulatory Report that these changes have significantly reduced the investment's value, increased regulatory risk, decoupled reward for efficiency improvements and violated the future expectations of investors.⁶⁶⁶
499. In sum, FREIF submits that the above measures taken by Spain were unreasonable precisely because they violated the commitments and guarantees in the Original Regulatory Regime, as well as the repeated assurances of Spanish officials. In support of its contention, FREIF compares the similar facts of *BG Group v Argentine Republic* wherein the tribunal held that “Argentina's withdrawal of assurances given in good faith to investors to induce investment violated their legitimate expectations and was ‘by definition unreasonable and a breach of the treaty’”. FREIF submits:

Similarly here, Spain's reversal of assurances it gave to investors through legislation, conduct and other representations to induce investment was unreasonable and

⁶⁶² FREIF's Statement of Claim, [337].

⁶⁶³ *BG Group Plc v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, [342].

⁶⁶⁴ See FREIF's Statement of Claim, p. 175.

⁶⁶⁵ FREIF's Statement of Claim, pp. 175-176.

⁶⁶⁶ First Brattle Regulatory Report, [307]–[312].

impaired FREIF's management, maintenance, use, and enjoyment of its investments. All of Spain's measures in this case were "unreasonable" because they violated the commitments and guarantees in the Original Regulatory Regime, as well as the repeated assurances of Spanish officials, which induced FREIF to invest.⁶⁶⁷

500. In its Reply Memorial, FREIF does not accept that the measures were in any way necessary, rejecting the claim that they were the only way to address the tariff deficit.⁶⁶⁸ It says there were better options available to the Spanish Government, the most obvious being to raise tariffs for consumers so that the prices they paid for electricity more accurately reflected the actual costs of generating that electricity. FREIF characterises Spain's position as follows:⁶⁶⁹

Spain is essentially claiming that it is justified in backing out of an explicit promise to pay certain funds, simply because it subsequently adopted a State policy of requiring renewable energy investors to bear the burden of a problem Spain created. That is neither a legitimate purpose, nor, in the words of the AES tribunal upon which Spain relies, a "rational policy".

501. It contrasts the circumstances presently considered from those in *AES v Hungary* on the basis that the Government here is not aiming to shield consumers from unreasonable rises in price. It is rather "foisting the burden for paying for its own tariff deficit on renewable energy producers, in a political decision designed to avoid the domestic political repercussions associated with having consumers pay the actual costs of electricity production".⁶⁷⁰

502. Furthermore, although the impairment clause requires only that the measures be either unreasonable or discriminatory, FREIF submits that Spain's measures were indeed discriminatory because they targeted renewable energy investors like FRIEF to bear the costs of Spain's tariff deficit. The TVPEE also adversely impacted renewable energy producers much more severely than conventional energy producers.

503. Therefore, FREIF submits that, in line with the findings made in *Eiser* and *Novenergia*, that the implementation of this new unprecedented and wholly unfavourable regulatory regime falls "outside the acceptable range of legislative and regulatory behaviour." These changes "impaired by unreasonable and discriminatory measures... [the] management, maintenance, use and enjoyment or disposal" of FREIF's investment.⁶⁷¹

Q4.2 Spain's Submissions

504. In response, Spain does not dispute FREIF's exposition of the applicable legal standard. It does however challenge FREIF's assertion that the measures it implemented did not represent rational or proportionate public policy. It argues that the policy delivered upon the fundamental principle of "reasonable rate of return", which it

⁶⁶⁷ FREIF's Statement of Claim, [338].

⁶⁶⁸ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [536].

⁶⁶⁹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [536].

⁶⁷⁰ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [537].

⁶⁷¹ ECT, Article 10.

says at all times underpinned the regulatory regime.⁶⁷² The measures were a necessary response to the economic crisis which emerged in 2013 and ramifications of the tariff crisis on the tariff deficit. Spain also clarifies that the measures it implemented were not discriminatory and affected all agents of the SES.⁶⁷³

505. The measures taken were therefore reasonable and proportionate under the ECT. Spain refers to *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic (Blusun)*, *Charanne* and *Eiser* to establish that, absent a “specific commitment”, the regulatory power of a State is only impeded in respect of those policies that operate disproportionately to address their objective.⁶⁷⁴ It extracted the following passage from the *Charanne* Award as illustrative of this point:

... the proportionality is fulfilled as long as the modifications are not random or unnecessary, and that they do not suddenly and unexpectedly eliminate the essential features of the regulatory framework in place.

506. As the New Regulatory Regime was implemented in pursuit of an objective linked to the ECT, being to create an efficient energy market, Spain argues that the reform fulfils the requirement of proportionality. The reform passed by Spain affected all the subjects of the SES. This reform distributed the measures to increase income and reduce the costs of the SES among consumers and all the operators in the system, with the aim of dealing with the tariff deficit.⁶⁷⁵

507. Spain emphasised that, in light of the economic conditions which existed at the time the New Regulatory Regime was implemented, the measures it adopted were directed to address a valid object of public policy. Spain refers to the *AES Summit* decision for the proposition that reducing excessive profits for investors, and alleviating the burden on consumers, were objectives of “valid rational policy”.⁶⁷⁶ The tribunal in that case endorsed policies which addressed “luxury profits”.⁶⁷⁷ Therefore, Spain contends that correcting a macroeconomic imbalance in an unsustainable situation and the need to protect consumers and the sustainability of the SES comprise public policy.

508. Apart from ameliorating the growing tariff deficit which threatened the financial sustainability of the regime, Spain notes that the policy addressed a further objective. This conformed to one of the overarching aims of the regulatory scheme which was to promote a competitive European energy market. Spain submits that it was therefore legitimate and appropriate to enact policies which ensured that generators were not receiving unduly generous subsidies for production.

⁶⁷² Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [1212].

⁶⁷³ Spain’s Post Hearing Brief, Schedule 2, p. 14.

⁶⁷⁴ *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB 14/3, Award of 27 December 2016, [319], [372] (*Blusun*).

⁶⁷⁵ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [1228].

⁶⁷⁶ Spain’s Counter-Memorial on the Merits and Memorial on Jurisdiction, [1215].

⁶⁷⁷ *AES v. Hungary*, Award of 23 September 2010, [10.3.34]; See also *Electrabel* and *Charanne*.

509. Finally, Spain notes that according to the Second Brattle Quantum Report, FREIF's Annual Accounts did not record any impairment of its investment in Renovalia Reserve.⁶⁷⁸ Therefore no impairment was ultimately caused.

Q5 Breach of "Umbrella Clause"

Q5.1 FREIF's Submissions

510. FREIF's final submission on the merits is that by enacting the New Regulatory Regime, Spain contravened the alleged 2010 Agreement in breach of the protections afforded by Article 10 ECT's umbrella clause.

511. As has been detailed previously in this Award, following months of negotiation with the Spanish wind industry, the Government enacted RD 1614/2010. In FREIF's submission, this law represented the outcome of an agreement between the Government and the energy sector, emerging from those parties' negotiations. Spain's commitments under the alleged agreement were specific to wind plants that qualified under the terms of RD 661/2007, including FREIF's investments.

512. The AEE had engaged with Government representatives to develop a revised regime to promote new policy objectives responding to the tariff deficit.⁶⁷⁹ FREIF says that under the terms of the 2010 Agreement, the wind sector consented to a minor temporary reduction in the feed-in remuneration in exchange for greater regulatory stability.⁶⁸⁰ FREIF contends that so much was confirmed in a press release of the Minister of Energy.⁶⁸¹ The enrolment of each of FREIF's plants into the RAIPRE is also said to be a reflection of Spain's obligations as it was the domestic law pre-requisite to receiving the tariff rights.

513. FREIF submits that the Spanish Government was required to honour the commitments it made in the course of the negotiations, which eventually manifested as provisions of RD 1614/2010 due to protections of the ECT's "umbrella clause". This provision is found in Article 10(1) of the ECT, which reads as follows:

[e]ach contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

514. According to FREIF, the effect of the umbrella clause is to "bring any obligation of a host state regarding an investment under the protective "umbrella" of the ECT. It is specifically intended to expand the reach of the Treaty's protections to obligations that otherwise might not be covered by the Treaty's other substantive provisions."⁶⁸²

515. This clause is said to be of "famously broad" scope. Referencing scholars in the field, FREIF promotes what it says is the accepted view: that Article 10 of the ECT

⁶⁷⁸ Spain's Post Hearing Brief, Schedule 2, p. 14; Second Brattle Quantum Report, [333].

⁶⁷⁹ FREIF's Statement of Claim, [339].

⁶⁸⁰ FREIF's Statement of Claim, [340].

⁶⁸¹ FREIF's Statement of Claim, [341]; Witness Statement of Mr Ceña, [50].

⁶⁸² See *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, [110]:

complements the comprehensive protections afforded to investors under the ECT.⁶⁸³ Arising from the phrase "any obligation" is, on FREIF's submission, protection for breaches of both contractual and legislative undertakings, as found by the tribunals in *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* and *Plama Consortium Limited v Bulgaria*.⁶⁸⁴ The wide breadth of the umbrella clause is also said to be reflected in its status as the only substantive protection in the ECT that Contracting States were entitled to "opt out" of, underscoring that at the time of ratification, States such as Spain were well aware of the breadth of the provision.

516. FREIF notes that the wording of Article 10(1) ECT applies to "any obligation" concerning an "Investor or Investment"; it is not simply specific contractual agreements with certain investors. It argues that to adopt the narrow interpretation advocated by Spain would violate the obligation in Article 31 VCLT to interpret the clause in "good faith in accordance with the ordinary meaning of its terms."⁶⁸⁵ Therefore, FREIF submits that it is of no bearing whether the 2010 Agreement was entered into with FREIF specifically. The fact that Spain committed to implement RD 1614/2010 after negotiations brings the rights afforded therein within the scope of the umbrella clause. Furthermore, there is no requirement to prove that FREIF relied upon the commitments made by Spain in the 2010 Agreement when deciding to invest in Spain.
517. FREIF submits that RD 1614/2010, as the legislative embodiment of its commitments in the 2010 Agreement with the wind industry, was breached upon the introduction of the New Regulatory Regime, which altered the incentives and premiums that Spain had granted to FREIF's plants for their full operating lives.⁶⁸⁶ FREIF disputes the meaning given to the phrase "entered into" in Article 10 ECT. It says that it is "senseless" to suggest that obligations may only be "entered into" by way of a specific contract.
518. FREIF observes that *CMS v Argentina*, relied on by Spain as authority for the requirement of a legal obligation recognised under the relevant State's domestic law, does not support its case. In that decision, the tribunal noted that obligations under international law were capable of giving rise to obligations protected under the umbrella clause. Indeed, there was no doubt it considered that non-contractual obligations were protected. The tribunal in *Enron v Argentina* also found that the phrase "any obligation" was "found... to cover both contractual obligations such as payment as well as obligations assumed through law or regulation".⁶⁸⁷

Q5.2 Spain's Submissions

519. Spain responds that Article 10(1), properly interpreted, is not an umbrella clause of the scope for which FREIF contends. Rather, the words "entered into" limit its scope to only

⁶⁸³ FREIF's Statement of Claim, [347].

⁶⁸⁴ *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, [257]; *Plama*, [186].

⁶⁸⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [521]–[522].

⁶⁸⁶ FREIF's Statement of Claim, p. 164, [353].

⁶⁸⁷ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [527]; See *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, [169].

those specific, legal obligations which Spain itself has assumed.⁶⁸⁸ This interpretation is said to find support in *Noble Ventures, Inc. v Romania*,⁶⁸⁹ wherein the Tribunal considered that only a specific agreement with an investor falls within its scope, rather than a legislative provision of general application. As a consequence, it argues that FREIF must identify a legal obligation in accordance with Spanish law.⁶⁹⁰ This is said to be supported by the decisions of the *CMS*, *Blusun* and *Burlington Resources* tribunals.⁶⁹¹

520. In this regard, Spain claims that the alleged 2010 Agreement did not form the basis of obligations on the Government's behalf because:⁶⁹²

- (a) the alleged Agreement is simply the result of a legally mandated process of consultation imposed by Article 24 of the Government Act;
- (b) even if there was an agreement, the status of the regulation is not altered, and the State is not prevented from making amendments or repealing the regulation;
- (c) business associations in the renewable energy sector knew that the reform would be adopted regardless of whether it was accepted by them or not and was necessary for the sustainability of the SES;
- (d) neither the AEE nor PROTERMOSOLAR, associations that were party to the alleged agreement, have invoked their existence in the appeals to the Supreme Court they have filed, which have been solved in different Supreme Court Judgments; and
- (e) other companies in the Spanish wind energy sector do not declare the existence of such an agreement or demand that it be complied with.

521. Furthermore, Spain contends that RD 1614/2010 does not establish an obligation of immutability of the rules under Spanish law and does not generate commitments protected by the umbrella clause because:⁶⁹³

- (a) RD 1614/2010 is a regulation and may be modified in line with the limits established by law;
- (b) the Supreme Court of the Kingdom of Spain has never considered that articles identical to Article 5 of Royal Decree 1614/2010 have impeded the

⁶⁸⁸ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1134].

⁶⁸⁹ *Noble Ventures, Inc. v. Romania*, Award 12 October 2005, [51].

⁶⁹⁰ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1139].

⁶⁹¹ *CMS v. Argentina*, Decision on the Application for Annulment, 25 September 2007, [89]-[95]; *Blusun*, [367], [371]; *Burlington Resources*, [214].

⁶⁹² Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1143]-[1152].

⁶⁹³ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1153]-[1161]; Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1432]-[1441].

introduction of regulatory changes affecting existing facilities by reducing their remuneration;

- (c) Article 5 of RD 1614/2010 did not intend to introduce a system of revisions other than that established in Article 44 of RD 661/2007, which constitute ordinary revisions that may take place as a result of planning targets. Article 5(3) was not intended to give greater protection to existing plants but was rather intended to correct the unintended effects arising from the staggering of plants that resulted from the Spanish Council of Ministers Decision of 19 November 2009;
- (d) An agreement that entailed the immutability of a specific renewable energy support system would be contrary to the principle of proportionality which would contravene EU public policy rules such as rules on State Aid; and
- (e) RD 1614/2010 was not designed to attract foreign investors and the initial investment in the plants at the time of the regulation's enactment was Spanish. The regulations contain no obligation specifically aimed at foreign investors, rather Spanish currency and indexes are used. Therefore, there is no obligation that would fall under any alleged umbrella clause in Article 10(1) of the ECT.⁶⁹⁴

522. Spain continues its argument by contending that any protected obligation must have arisen from a "vis-à-vis" agreement between the State and the investor. Even if RD 1614/2010 was addressed to a limited group of investors, the regulation is still general in nature. The alleged 2010 Agreement was not entered into with specific investors but, if found to constitute an agreement, was made between the State and different associations representing company interests. Contrary to FREIF's positions, general press releases and roadshows would not generate commitments protected by an umbrella clause as these communications are aimed at the general public.⁶⁹⁵ During the Hearing, FREIF's expert Mr Ceña expressly admitted that the consent of the AEE was not needed for the enactment of RD 1614/2010⁶⁹⁶ and that negotiations with the sector before the approval of a regulation were usual.⁶⁹⁷

523. It is also argued that at the time of the alleged Agreement and the enactment of RD 1614/2010, FREIF had not yet made any investments in Spain and consequently could not have been party to any agreement with Spain.⁶⁹⁸ There is no documentary evidence that FREIF made its investments by trusting in the commitments it now invokes, nor is there proof that FREIF attended any presentations or saw press releases that it now relies upon.⁶⁹⁹

⁶⁹⁴ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1174] Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1423].

⁶⁹⁵ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1445].

⁶⁹⁶ Transcript Day 3, p. 19, ll. 12-19

⁶⁹⁷ Transcript Day 3, p. 20, ll. 21-25; Transcript Day 3, p. 27, ll. 7-11.

⁶⁹⁸ Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction, [1162]–[1171].

⁶⁹⁹ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1447].

524. Finally, Spain clarifies that in any event, there were no alleged obligations breached by Spain. Nothing in the text of RD 1614/2010 prevented the Regulator from amending it if the circumstances so required so long as it respected the producers' reasonable rates of return. RD 1614/2010 contains no obligations entered into by Spain specifically with FREIF or its investments.⁷⁰⁰

Q6 Tribunal's Decision

525. For the reasons that follow, the Tribunal determines that Spain has complied with the fair and equitable treatment clause by acting transparently and in good faith, particularly by consulting with lobby groups before implementing the new regulation, and without creating legitimate expectations on the part of FREIF. Additionally, the due diligence carried out by Linklaters supports Spain's argument that FREIF was in fact aware of the likelihood of changes in the remuneration scheme. Further, because Spain modified its remuneration scheme due to its tariff deficit, not only was it not bound to keep the same scheme, but it was also its duty to adapt the scheme through a variable reasonable rate of return to protect its economic health. The Tribunal will give its reasoning on each of the issues in the order in which the Parties' submissions were summarised above.

Q6.1 Applicable Law and State Aid Issue

526. Consistent with the Tribunal's decision on the first jurisdictional objection, the Tribunal concludes that EU law does not apply to the determination of this dispute. Under the ECT Article 26(6), the Tribunal is to decide the issues in dispute "in accordance with this Treaty and applicable rules and principles of international law". The Tribunal does not accept that EU law forms part of the "applicable" rules and principles of international law.

527. As submitted by FREIF, the ordinary meaning of "rules and principles of international law" refers to general principles of public international law which apply as between all Contracting States. There is no evidence that Article 26(6) intended to include EU law or domestic law as laws applicable to deciding issues in dispute under the ECT nor has FREIF made any claims on the basis of a breach of EU law. EU is therefore not a governing law of this dispute.

528. Spain's primary motivation for submitting that EU law applies appears to be that it considers that the subsidies are State Aid under EU law and that FREIF's legitimate expectations must be considered in this light. Spain points to the decision of the European Commission in the State Aid SA.40348 proceedings of 13 November 2017 which found that the subsidies to be received by the plants in operation under the Spanish regime are in line with the requirements of EU law. The EC Decision stated that it is "binding on Arbitration Tribunals, where they apply Union law".⁷⁰¹

⁷⁰⁰ Spain's Post Hearing Brief, Schedule 2, p. 16.

⁷⁰¹ RL-0054, Decision of the European Commission regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (State Aid S.A. 40348 (2015/NN)), 11 November 2017, [166].

529. The Tribunal is not in a position to make its own determination as to whether subsidies claimed by FREIF under RD 661/2007 or RD 1614/2010 are State Aid, as this is a matter under the purview of the European Commission. As the Tribunal has already concluded, it is not applying EU law in the determination of the issues in this dispute. The EC Decision is therefore not binding on this Tribunal. Furthermore, as FREIF points out, the decision was issued nearly a decade after FREIF made its investments. It could therefore not have influenced FREIF's decision making.
530. As the Parties identify, only one prior decision in the saga of investor-state renewable energy claims against Spain has concluded that the European State Aid regime forms part of the applicable law and held that FREIF could not have legitimately expected that the subsidies under RD 661/2007 were lawful on the basis that they were contrary to EU law.⁷⁰²
531. This Tribunal does not go as far as the *BayWa* tribunal's conclusion that the State Aid regime is part of the applicable law. It does, however, find merit in the *BayWa* tribunal's position that "[i]n principle, an investor cannot have a legitimate expectation of treatment which is unlawful under the law of the host State, provided that the host State law itself is not inconsistent with the treaty under which the tribunal exercises its jurisdiction".⁷⁰³
532. The issue of State Aid is therefore a relevant fact in analysing FREIF's expectation, and the Tribunal agrees with the analysis of the tribunal in *Cube Infra. Fund SICAV et al. v. Kingdom of Spain (Cube)*⁷⁰⁴ which concluded at [160] that:
- This Tribunal does not have to apply, or take a decision on any question of, Spanish law or EU law. Under the provisions concerning the applicable law that are binding on this Tribunal, Spanish law and EU law are relevant only as facts in the light of which the rights and duties of the Parties under the ECT and international law are to be determined. Thus, for example, the provisions on EU law concerning State aid are not applied by this Tribunal, nor does the Tribunal make any decision on their interpretation. They are relevant only as part of the factual matrix, and in this case particularly as part of the factual basis for determinations of how the Claimants could expect to be treated in respect of their power plants in Spain.
- (emphasis added by Tribunal)
533. Hence, in the Tribunal's view, the fact that Special Regime subsidies may have been State Aid is not a "silver bullet" for Spain, nor does it result in EU law being directly applicable by the Tribunal to this dispute. It is however, one of several relevant parts of the factual matrix which shall be discussed further in Part Q6.2 below in determining whether FREIF's legitimate expectations were frustrated.

⁷⁰² *Baywa*, [569].

⁷⁰³ *Baywa*, [569(a)].

⁷⁰⁴ *Cube Infra. Fund SICAV et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, [158]-[160] (**Cube**).

Q6.2 Frustration of Legitimate Expectations

534. The primary claim made by FREIF on the merits in this Arbitration is that Spain frustrated its legitimate expectations. It is uncontested that the observance of legitimate expectations is a key component of the fair and equitable treatment standard for Investors under Article 10(1) of the ECT. For the reasons that follow, the Tribunal concludes that there was no frustration of legitimate expectations and finds in favour of Spain.
535. FREIF helpfully provides a three-step structure which it submits should guide the Tribunal's analysis of whether legitimate expectations have been frustrated. These are:
- (a) Did Spain's conduct create legitimate expectations on the part of FREIF?
 - (b) Did FREIF rely on Spain's conduct at the time it invested?
 - (c) Did Spain subsequently fail to honour the expectations it created?
536. FREIF must succeed in proving that the answers to all three of the above questions are "Yes" in order to make out its claim. The focus of the Parties' submissions is on the first question i.e. Did Spain's conduct create legitimate expectations on the part of FREIF?
537. Spain accepts that it did create some expectation on the part of investors. In Schedule 2 of its Post Hearing Brief, it states that "the only expectation Spain has created was to guarantee to the producers of renewable energy a reasonable rate of return according to the cost of money in the capital market."⁷⁰⁵
538. Therefore, at a minimum, Spain accepts that it created an expectation of a reasonable rate of return. If FREIF relied on this expectation and Spain failed to honour it, FREIF would succeed in making out its claim. The Tribunal will revisit this line of argument later on in this section and consider whether the Parties' quantum evidence supports this claim.
539. However, the expectation of a reasonable rate of return is not the primary basis upon which FREIF makes its claim. In summary, FREIF alleges that Spain's conducted created:⁷⁰⁶

expectations of a favorable, stable regulatory regime for the wind sector to promote investment. RD 661/2007 stated—and Spain promoted the understanding—that Spain was promising an attractive incentive regime under which qualified windfarms would receive specified incentive tariffs and market premiums throughout their operating lives. Spain amended the regime in response to industry criticism to expressly confirm that future revisions would not apply to existing plants. Spain also aggressively promoted the incentive scheme to potential investors including FREIF, including in public speeches and investment seminars both in Spain and abroad.

⁷⁰⁵ Spain's Post Hearing Brief, Schedule 2, p. 9.

⁷⁰⁶ FREIF's Post hearing Brief, Schedule 2, pp. 6-7.

Spain then improved the stabilization provision in RD 661/2007 when it enacted RD1614/2010.

540. The question therefore becomes whether Spain's conduct created legitimate expectations of specific incentive rates guaranteed by the Original Regulatory Regime. As can be seen in the Tribunal's analysis of past decisions on this question in Part M2, this question has created a divide in the arbitral jurisprudence addressing Spain's renewable energy measures. FREIF describes this as a "fault line".⁷⁰⁷ This Tribunal falls on the side of the fault line which does not subscribe to the view that Spain guaranteed specific incentive rates.
541. In analysing whether FREIF's description of Spain's conduct constituted a "legitimate expectation", the Tribunal has found the *RREEF* decision's interpretation of the phrase to be of assistance. That tribunal stated:⁷⁰⁸
- ...not all expectations of a foreign investor are "legitimate" and only legitimate expectations are protected under the FET principle. Therefore, all the investors' expectations do not imply an immutability of the conditions of the investment. Whilst an "expectation" is subjective, whether or not it is "legitimate" must be objectively assessed. To evaluate a claim to a legitimate expectation, it is necessary, therefore, to assess, first, what are the expectations of an investor and, second, whether those expectations are legitimate. The frustration of a legitimate expectation establishes a wrongful act by the State. The frustration of a non-legitimate expectation does not establish a wrongful act by the State.
542. The Tribunal therefore turns to consider whether it was objectively legitimate for FREIF to expect specific incentive tariffs that would not be the subject of future revision, an expectation referred to during the Hearing as the "petrification of the tariff rate". Colouring this analysis is the overarching point made by the *RREEF* tribunal that the threshold of legitimacy of an expectation is high in order to account for a State's regulatory power.⁷⁰⁹
543. The timeline for FREIF's investment should now be recalled in order to contextualise the relevant period in which FREIF was considering its expectations from the investment. FREIF and Renovalia entered into the 2011 SPA to acquire the wind projects on 14 October 2011. The Shareholders Agreement came into effect on 1 December 2011. In April 2012, FREIF acquired an additional 12.5% indirect interest in ENERDEURO, one of the underlying special purpose vehicles. The Tribunal considers that the principal period in which evidence of the Parties' conduct might establish legitimate expectations is the period prior to 14 October 2011, when the decision to invest was made.
544. The Tribunal steps into the shoes of FREIF as of October 2011 and considers whether its alleged expectations were legitimate based on the information it knew and the

⁷⁰⁷ FREIF's Post Hearing Brief, [92].

⁷⁰⁸ *RREEF*, Decision on Responsibility and on the Principles of Quantum, [261] (emphasis added by Tribunal).

⁷⁰⁹ *RREEF*, Decision on Responsibility and on the Principles of Quantum, [262].

information it should have reasonably and objectively known according to the expected level of due diligence. At the outset, FREIF's witness, Mr Fidler, acknowledges that FREIF never personally received advice or had discussions with representatives of the Spanish government or the electricity regulator regarding its tariff regime.⁷¹⁰

545. Therefore, the Tribunal begins with the due diligence that was conducted by FREIF and the information that FREIF was known to be aware of. The "main legal advice"⁷¹¹ received by FREIF was the Linklaters Regulatory Risk Memorandum of June 2011 (**Linklaters Memorandum**). This 20-page document sets out (i) a summary of the main amendments made to the regulation governing the remuneration payable to wind power installations, (ii) an analysis of the so-called regulatory risk, (iii) the basis of a potential legal challenge to any potential future revision of the regime and (iv) expected modifications to the legislation applicable to renewable energy installations.
546. According to FREIF, this advice from Linklaters explained that "Spain had reached the limits of what it could change even assuming that changes were in fact governed by the notion of reasonable return"⁷¹² and refers to pages 7 to 11 of the Memorandum. FREIF specifically relies upon a passage on page 11 which reads:⁷¹³

This could be understood as the Spanish Government is affirming that the current compensation fulfils the requirement set forth in Article 30.4 of ESA. Therefore, the Spanish Government seems to have limited itself to making relevant changes to the economic regime with retroactive effects, as the current regime would fulfil the objectives set out (otherwise the Government should have made more changes to the regime). Given that, even if the abovementioned Supreme Court's case law (which allows the Spanish Government to make amendments with retroactive effect to regulations) remains unchanged, it would be hard for the Government to justify further amendments in that direction. That is, further changes will necessarily imply that the Government recognises its error or miscalculation when introducing the current regulations and ensuring the non-retroactivity of any future amendments.

547. However, from reading this section of the Memorandum, the Tribunal considers that it lends greater support to Spain's proposition. The quote above does not suggest that Spain was unable to make further changes to its regime or had committed to not make further changes. It merely sets out legal and political challenges which Spain would have to take into account should it make further changes. In the Tribunal's view, the Government's capacity to continue making regulatory changes in light of the political and economic realities was clear. In reference to the Supreme Court case law, the Memorandum in fact concluded that:⁷¹⁴

... according to the Supreme Court's case law, it is possible for the Spanish Government to amend the economic regime (including RD 661/2007) for wind power

⁷¹⁰ Transcript Day 2, p. 43, l. 12 – p. 45, l. 4.

⁷¹¹ Transcript Day 2, p. 16, l. 21 – p. 17, l. 1.

⁷¹² FREIF's Post Hearing Brief, fn. 48.

⁷¹³ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 11 cited in FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [343] (emphasis added by Tribunal).

⁷¹⁴ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 8 (emphasis added by Tribunal).

installations (as well as for the rest of electricity production falling under the special regime) from time to time, provided that these amendments do not imply that such “reasonable level of profitability” required by said Article 30.4 of ESA stops to be obtained by the holders of such installations due to such amendments. In other words, the only limitation to which the Government is subject when approving the economic regime of installations producing energy from renewable sources is the requirement set forth in Article 30.4 of ESA.

548. FREIF’s awareness of the Supreme Court’s position and the fact that changes could be made was confirmed by the testimony of Mr Fidler, who was employed by First Reserve as Vice President and whose work focused on the origination and execution of infrastructure investments for FREIF.⁷¹⁵ During cross-examination, Mr Fidler stated:⁷¹⁶

I believe the general conclusion was that the royal decrees had stated that they would prohibit any retroactive changes, that the Supreme Court had made a judgment to provide some flexibility, although our impression, based on those precedents and based on Linklaters’ advice was that those would be refinements or minor changes as the ones presented in 661 and 1614.

549. The Tribunal considers that even if FREIF’s “impression” was that any changes would be minor, this impression was not reasonable in the light of the Supreme Court’s position and, in any event, establishes that some degree of regime change was contemplated by FREIF. Spain argues convincingly that FREIF should not have an expectation contrary to Spanish or EU law. As the Spanish Supreme Court is the highest interpreter of Spanish law, and its position on this issue was clearly presented to FREIF in the Linklaters Memorandum, FREIF ought not have had expectations contrary to the Supreme Court’s rulings.

550. Similarly, the Linklaters Memorandum states that “[a]s it is known, energy production under the special regime receives State aid”⁷¹⁷ and contains a section discussing 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.⁷¹⁸ Therefore, FREIF was also made aware of potential EU law ramifications to its investment and could not have had expectations that ran contrary to EU limitations.

551. Aside from the Linklaters Memorandum, evidence of FREIF’s consideration of changes to future regulations is also found in FREIF’s Investment Committee Memo of September 2011.⁷¹⁹ This evidence, combined with the Linklaters Memorandum convinces the Tribunal that FREIF’s due diligence does not establish that there could not be a change of regime which had the effect of nevertheless maintaining a reasonable return. It could not be said that FREIF formed a legitimate expectation based on its due diligence that incentive tariffs rates were guaranteed.

⁷¹⁵ Witness Statement of Mr Fidler, [2].

⁷¹⁶ Transcript Day 2, p. 19, ll. 16–22.

⁷¹⁷ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 12.

⁷¹⁸ C-149, Linklaters Regulatory Risk Memorandum, 8 June 2011, p. 14.

⁷¹⁹ C-127, slide 7 (page 8 PDF) – Downside Sensitivities, Scenario A; Transcript Day 2, p. 30, ll. 8-20.

552. In addition, two other points are persuasive to the Tribunal. First, a reasonable, diligent investor in FREIF's position should have understood the hierarchy of the Spanish regulatory framework. As Spain has made clear throughout its case, the superior legislation governing the operation of the Spanish Electricity System is Law 54/1997, also known as the Electricity Sector Act in the Linklaters Memorandum. Under Law 54/1997, Article 30.4 provides that:
- To determine the premiums, voltage levels delivered to the grid shall be considered, as well as the actual contribution to environmental improvement, primary energy savings and energy efficiency, and the investment costs incurred to obtain reasonable rates of return with regard to the cost of money in the capital markets.
553. Royal Decrees enacted subsequent to Law 54/1997 are subordinate to it. A diligent investor would be aware that Royal Decrees can be enacted by the Government and be replaced with other Royal Decrees as a regulatory tool while remaining in the parameters of Law 54/1997. The advice provided by Linklaters regarding the Supreme Court's position on this matter confirms as much. Likewise, it was stated by the *Isolux* majority that "[w]ithout requiring a reasonable investor to perform an extensive legal investigation at the time of investing, knowledge of important decisions from the highest authority regarding the regulatory framework for investment may be assumed".⁷²⁰
554. Second, when asked in its Post Hearing Brief to identify any written or oral pronouncements prior to FREIF's investment where Spain specifically and clearly identified that the rate of tariff remuneration for wind turbine investments would not change, FREIF places a great emphasis on public statements and press releases.
555. Statements made with regard to the alleged 2010 Agreement are analysed further by the Tribunal in Part Q6.5 concerning the breach of the "Umbrella Clause". Suffice to say, the Tribunal does not consider that there was an agreement and instead, is of the view that the Government had the power to take a course of action different from the outcomes of the consultation and could also change its course in the future. Spain has also provided evidence of Government statements indicating that the SES was unsustainable due to the tariff deficit and that reform was needed. This is also discussed further in Part Q6.5 below.
556. The other "paramount example"⁷²¹ referred to by FREIF is a quote from a Spanish newspaper reporting on a statement from the Prime Minister in June 2010. The Tribunal is not persuaded that this example is in any way paramount when it does not appear to be a direct quote from the Prime Minister and is reported by a non-government source. There is also no evidence that FREIF saw these public statements or was influenced by them.
557. FREIF's final line of attack is that Spain's "reasonable return" principle could not have been FREIF's only legitimate expectation. The Tribunal does not consider that proving

⁷²⁰ *Isolux*, [793]-[794].

⁷²¹ FREIF's Post Hearing Brief, [24].

this point necessarily leads to the conclusion that the petrification of the tariff rate was a legitimate expectation and notes that FREIF must positively establish why its expectation was legitimate. Nevertheless, the Tribunal remains of the view that expecting a reasonable return would have been legitimate.

558. Contrary to FREIF's submission that the "reasonable return" concept was too vague and was only one of several guiding principles of the Law 54/1997, Spain has provided evidence of the consistent references to the reasonable rate of return in the renewable energy plans known as PERs. The 2005 PER, being the planning document behind the regulations on which FREIF has based its case, determines the following: "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".⁷²²
559. Based on the consistent methodology and application of the reasonable return approach, the Tribunal does not accept FREIF's argument that it could only have based its expectations on Spain's alleged guarantees made in the implementation of the regime, rather than on the reasonable rate of return principle embodied in Article 30.4 of Law 54/1997.
560. Consequently, as the Tribunal takes the view that FREIF's alleged expectation was not legitimate, FREIF must fail on steps two and three of its analysis. Spain could not have failed to honour specific incentive rates that it did not guarantee, and which could not have legitimately been expected by FREIF.
561. Therefore, the Tribunal now returns to the alternative pathway for FREIF, referred to in [538]. That is, with Spain having accepted that it created an expectation of a reasonable rate of return, has Spain failed to honour this expectation? In FREIF's views, even if the "reasonable return" framework is adopted, Brattle's alternative analysis shows that Spain still failed to honour this expectation and caused FREIF to suffer damages of €99.4 million. The Parties' submissions on this issue are set out further in Part R2 below.
562. In order to determine whether Spain failed to honour the expectation of a reasonable return, the first question to analyse is the benchmark rate for a reasonable return. Spain submits that the experts agree that the reasonable rate of return benchmark is 7% after tax.⁷²³ At this point, it is necessary to deal with FREIF's application for adverse inference, summarised above at Part G5.3. The Tribunal recalls that FREIF requested that the Tribunal draw the following adverse inferences:⁷²⁴
- (a) that because Respondent has failed to produce the data and calculations underlying RD 436/2004, RD 661/2007, as well as Law 54/1997, such data

⁷²² R-0059 Spain Renewable Energy Plan 2005-2010, p. 275 of the Spanish PDF.

⁷²³ Spain's Post Hearing Brief, Schedule 2, p. 22; Transcript Day 4, p. 40, ll. 1-2; Brattle Quantum Hearing Presentation, slide 30.

⁷²⁴ FREIF's Application for Adverse Inferences, dated 1 October 2020, p. 7.

would demonstrate that the regulator never established a limit on returns at 7%; and

- (b) that had those documents been produced, they would support Claimant's position that Spain both knew and intended that returns could go well above 7% for wind facilities, as provided in the regulator's Renewable Energy Plans, the CNE's reports, and understood by the entire sector at the time.

563. Applying the "Sharpe test", the Tribunal declines to draw these adverse inferences for the following reasons:

- (a) It is not clear from the testimony of My Ayuso that the evidence is accessible to Spain. Mr Ayuso makes reference to his involvement in calculations that lay behind RD 661/2007. He does not, however, specify what documents exist nor whether they would be accessible to Spain. Spain itself has declared that the evidence referred to is either the data pertaining to the calculations behind the 2005 PER which have been disclosed, or is not accessible to it, having requested it from the IDAE; and
- (b) The inferences sought by FREIF are not sufficiently corroborated by other available evidence, and prima facie evidence is not consistent with the inference sought. Both Brattle and Spain provide extensive reference to the 7% benchmark in their presentations during the Hearing.⁷²⁵ There is a lack of substantiation of what higher rate of return, if any, should be inferred based on the available evidence.

564. Having declined to make FREIF's requested adverse inferences, the Tribunal now addresses the three key criticisms of the Reasonable Return Decisions made by FREIF in its Post Hearing Brief. These criticisms are said to support Brattle's alternative method of calculating loss according to a "reasonable return" benchmark.

565. The first is that FREIF says these decisions incorrectly interpret the "reasonable return" concept as variable or "dynamic" rather than considering the benchmark by reference to the time when Spain set the incentives under which the claimants invested. The Tribunal is not satisfied that FREIF has adequately substantiated its concern that the reasonable return was originally fixed but then became dynamic, nor has FREIF articulated the consequences of this alleged change to the ability to calculate a benchmark by reference to the time of FREIF's investment. In the present case, Mr Fidler's responded at the Hearing that:

Q. Linklaters explains to claimant that the rate of return is around a 7 per cent after tax with equity; that is before external financing. That's what claimant received as advice. Is that correct?

A. Correct.

⁷²⁵ Brattle Quantum Presentation, slide 30; Spain's Powerpoint Opening Quantum, slide 11.

566. The Tribunal therefore sees no difficulty with proceeding with 7% as the benchmark understood by FREIF when it invested.
567. The second of FREIF's criticisms is that the "reasonable return" benchmark applies to the returns of an efficient standard installation rather than to FREIF's particular plants. Therefore, it is said that the 7% benchmark would be lower than what more efficient plants would have legitimately expected. However, there is a lack of evidence from FREIF that its plants are particularly efficient and that it would have expected returns above a standard efficient plant. Spain offers the view that industry-wide developments in the wind industry contributed to an unexpectedly high return and it was not as a result of efficient choices made by individual producers or investors.⁷²⁶
568. In the absence of further evidence that FREIF was a particularly efficient plant or that it could have expected a reasonable rate of return above the benchmark, the Tribunal considers that the 7% benchmark is still appropriate. It is also for this reason that the Tribunal declines to adopt Brattle's alternative analysis wherein it derives an alternative tariff based on a standard plant and inserts its alternative IRR into the DCF model.
569. The third criticism from FREIF is that the 7% benchmark assumes no debt financing and that returns would be higher in a debt-financed model rather than an all-equity model because of the leverage effect and tax benefits. Therefore, comparing an all-equity benchmark with an IRR with the benefit of a tax shield creates an illusion of a better performance. As the Tribunal understands it, Brattle has taken this into account in reaching the figure of 7.1%, being the IRR of the wind farms according to Brattle as updated to 2018. During the Hearing, Mr Caldwell from Brattle confirms that the figure of 7.1% by Brattle is comparable to the IRR of 10.2% calculated by Quadrant and stated the following:
- Q. Thank you. So, therefore, what Quadrant is saying here is that, if one takes your 2018 valuation date model, without making any corrections to it, then the wind farm's IRR, with the disputed measures in place, as of 2018, the valuation date, is 7.1 per cent; correct? That's what Quadrant is saying here?
- MR CALDWELL: That's what they are saying, yes.
- [...]
- Q. Okay, so there is a disagreement here between the experts. It's Quadrant's 10.2 per cent IRR for the wind farms under the current regime versus your 7.1 per cent IRR for the projects under the current regime; correct?
- MR CALDWELL: Yes, that's what this table reflects.
570. In light of the above, given that the Tribunal accepts a benchmark rate of 7% and the calculations of either expert team result in an IRR for the wind farms above the benchmark rate, it is clear to the Tribunal that Spain has not frustrated the expectation

⁷²⁶ Second Quadrant Report, [67]–[68].

of a reasonable return since the return for the wind farms exceeded the reasonable rate.

571. The Tribunal concludes that the only guarantee made by Spain was to ensure a reasonable rate of return. Its level of due diligence, including the Linklaters Memorandum, does not establish that FREIF was guaranteed anything other than a reasonable return. FREIF took the risk in making its investment that there could be a re-adjustment in the tariff regime. It may have lost the opportunity to earn higher profits, but it did not lose the expectation of a reasonable return.

Q6.3 Breach of Duty of Transparency and Good Faith

572. The Tribunal determines that FREIF has not established a breach of the duty of transparency and good faith as part of the requirement of fair and equitable treatment found in Article 10(1) of the ECT. The legal basis of FREIF's submission is that the fair and equitable treatment standard "includes a State's duty to treat investors and their investments transparently and consistently, and in accordance with procedural fairness and due process".⁷²⁷ This duty is said to have been breached by Spain because the New Regulatory Regime was allegedly implemented without consultation from the renewable energies industry and because the specific measures implemented by Spain lacked transparency.

573. In the Tribunal's view, FREIF has failed to establish that there was a lack of proper consultation or transparency prior to the implementation of the New Regulatory Regime. To set the scene, the issue of the mounting tariff deficit and the need for regulatory changes to address it was one that the Government and the industry had been all too aware of. FREIF indeed acknowledges that this was the motivation behind the Government's consultations with the industry leading up to the alleged 2010 Agreement.⁷²⁸ Spain also provides statements supporting their case made by the Minister of Industry in January 2011 and the President of what was going to be the new Government of Spain in December 2011.

574. In the first statement, the Minister of Industry stated that:⁷²⁹

...since 2009 the Government has been working to adopt a set of measures whose common denominator is the rationalization of the regulated costs and the reduction of the tariff deficit... All these measures have been created from dialogue, both with the sectors concerned and with the major political parties. But these measures of 2009 and 2010 have not been sufficient... These two circumstances have raised the tariff deficit and made that the measures taken so far to ensure the progressive reduction of the tariff deficit in a balanced way between all the players in the sector were insufficient. Therefore, the need to adopt new measures urgently...

⁷²⁷ FREIF's Statement of Claim, [364].

⁷²⁸ FREIF's Statement of Claim, [18].

⁷²⁹ R-0117 Journal for the Sessions of the Congress. Ratification of RD-Act 14/2010, establishing urgent measures for the correction of the tariff deficit in the electricity sector, pp. 46-48.

575. In the second statement, the incoming President stated that:⁷³⁰

If reforms are not undertaken, the imbalance will be unsustainable and increases in prices and tariffs would place Spain in the most disadvantaged situation in terms of energy costs throughout the developed world. We will therefore have to apply a policy based on curbing and reducing the average costs of the system in which decisions are taken without demagoguery, using all available technologies, without exception, and regulate it with the primary objective of the competitiveness of our economy.

576. These statements show that in the lead up to the announcement of the New Regulatory Regime, although the Government changed to one of a different political ideology, both parties publicly acknowledged that the existing measures had not been enough and that there was a need to adopt more changes urgently.

577. Furthermore, Spain has supplied evidence that in early 2012, the CNE prepared a report concerning the Spanish Electricity Sector, including “measures to guarantee the financial-economic sustainability of the electricity system”.⁷³¹ In preparing this report, public consultation took place from 2 to 10 February 2012 and 477 responses were received from the electricity sector.⁷³² Question 1 of the CNE’s questionnaire was:⁷³³

1. What measures do you think are required to ensure the economic and financial sustainability of the electricity system both from a short and long-term perspective?

This question can be answered in three distinct ways:

- Measures to reduce the accumulated deficit
- Measures to avoid annual deficits in the future
- Adaptation of the tariff to the electricity cost

578. In the Tribunal’s view, the evidence clearly demonstrates that public consultation was conducted prior to the introduction of the New Regulatory Regime. Additionally, Spain has pointed to other consultation and engagement with the Government during the enactment of later regulations such as public hearings during the adoption of RD 413/2014 and OM 1045/2014.⁷³⁴

579. The Tribunal is therefore satisfied that there was adequate consultation during the introduction of the New Regulatory Regime. It is immaterial whether this consultation was more or less than the consultation that occurred leading up to RD 1614/2010. The fact that the Government may have ultimately implemented a regime that was not supported by the industry lobby groups is also immaterial to whether it breached its duty

⁷³⁰ R-0106 Transcription of the inaugural speech of the Prime Minister Mariano Rajoy, to the Spanish Congress, Monday 19 December 2011, www.lamoncloa.gob.es.

⁷³¹ R-0070 Report from the National Energy Commission (CNE), 7 March 2012) Part I.

⁷³² R-0108 Information on the public consultation on regulatory adjustment measures in the energy sector of 2 February 2012 and 9 March 2012.

⁷³³ R-0096 Claims of PROTERMOSOLAR to the public Consultation of the National Energy Commission (CNE)). 10 February 2012.

⁷³⁴ R-0244 AEE's arguments to the preliminary draft of RD 413/2014 filed with the CNMC; R-0248 PROTERMOSOLAR claims to Ministerial Order OIET 1045/2014 before the CNC.

of transparency and good faith. It remains within the Government's power to enact Royal Decree Laws, which it had done in the area of electricity reform prior to the Claimant's investment.⁷³⁵

580. During the Main Evidentiary Hearing, FREIF's witness, Mr Ceña, a representative of the AEE, the wind business association, confirmed the Tribunal's understanding in the following exchange:⁷³⁶

PROFESSOR CLAY: But I'm saying the energy ministry, for instance, if they want to enact a new law, are they bound to discuss with you? Is that a binding consultation or they just do it because they think it's necessary?

A. They do it because it's necessary and, to some degree, it is also convenient, it's also useful, in order to take into account the opinions of the industry that will be regulated. Here and in Germany or in any other country there is always a consultation with the private associations.

PROFESSOR CLAY: But this is not a binding obligation?

A. No.

PROFESSOR CLAY: For instance, when there are, for instance, some social matters, it is necessary to consult the labour or business association, but is it or is it not an obligation here? It's just to know?

A. No, here it's not an obligation.

581. It therefore remains to resolve the second limb of FREIF's claim, which is that the New Regulatory Regime was opaque in its terms. Part of FRIEF's argument on this issue relies on the TVPEE as an example of opaqueness. The Tribunal has already determined in Part O3 that matters related to the TVPEE are outside of its jurisdiction and it will therefore not consider this example further.

582. The other aspect of FREIF's claim is that the Government did not allow the wind industry to understand the parameters, data or formula underlying the New Regulatory Regime, which were also subject to review every three to six years. The tying of new remuneration to the size or capacity of a facility rather than to the amount of electricity it actually generates is also said to be inconsistent with the goals of the Original Regulatory Regime.

583. The Tribunal is satisfied with the responses Spain provides to these allegations. It argues that FREIF has not provided evidence that the standards and parameters used in the New Regulatory Regime are theoretical. Furthermore, to the contrary, the CNMC (formerly the CNE) has noted that "[t]hese are not theoretical standards, the characteristics of which might have been inferred solely from technical documents or construction parameters, but are actual average values corresponding to the facilities

⁷³⁵ RDL 7/2006, RDL 6/2009, RDL 14/2010.

⁷³⁶ Transcript Day 3, p. 70, ll. 6–22.

pertaining to each IT".⁷³⁷ The calculation of a reasonable return has also remained consistent as contemplated in the PER since 1989.

584. Finally, FREIF has attempted to argue that 'Spain's pleaded case against Claimant's "legitimate expectations" has sealed its fate on Spain's duties to act transparently, consistently, and in good faith'⁷³⁸ It suffices to say that since FREIF has not established that Spain frustrated its legitimate expectations, it is not successful in showing that Spain made any guarantees or promises that violated transparency or consistency by the introduction of the New Regulatory Regime.

Q6.4 Breach of "Impairment Clause"

585. For the same reasons given in Part Q6.2 regarding the frustration of legitimate expectations, the Tribunal is not of the view that Spain has breached the "impairment clause" of the ECT. Spain's obligations in this regard arise again from Article 10(1) of the ECT, particularly where it is stated that "no Contracting Party shall in any way impair by unreasonable or discriminatory measures [the Investments] management, maintenance, use, enjoyment or disposal".

586. The Tribunal is not persuaded that there was any impairment of the Investments as a result of Spain's conduct. It is telling that, as stated by FREIF's experts from Brattle and as identified by Spain, "[w]e have checked FREIF's annual accounts and confirmed that it did not record any impairment of its investment in Renovalia Reserve, which could have generated a tax loss carry-forward and thus offsetting tax benefit directly related to the Disputed Measures".⁷³⁹ Therefore, based on a strict interpretation of "impairment" as referring to a "loss of value recorded in the annual accounts",⁷⁴⁰ it appears that FREIF's experts acknowledge there was no impairment.

587. FREIF contends that the standard for "impairment" is lower and that its alleged damages of €99.4 million (including pre-award interest, but excluding a tax gross-up) constitutes a clear impairment by any measure. As the Tribunal has already considered in Part Q6.2, FREIF's method of calculating damages is not accepted. Based on the reasonable rate of return committed to by Spain and the profitability analysis by Quadrant Economics, there was no loss or damage to FREIF's investment.

588. Even if the impairment was made out, FREIF has also failed to establish that Spain's measures were unreasonable or discriminatory. FREIF's argument on unreasonableness rests on the same basis as its argument on the frustration of legitimate expectations. It states that Spain's measures were unreasonable "*precisely because* Spain's action violated the commitments and guarantees in the Original

⁷³⁷ R-0072 CNMC Report, Administrative enquiry relating to draft Order IET/1045/2014, pp. 17-18.

⁷³⁸ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [34].

⁷³⁹ Second Brattle Quantum Report, [333]; See also Transcript Day 4, pp. 127-130.

⁷⁴⁰ Transcript Day 4, p. 129, l. 24 – p. 130, l. 3.

Regulatory Regime, as well as the repeated assurances of Spanish officials”.⁷⁴¹ It also contends that the measures targeted renewable energy investors unfairly.

589. As the Tribunal is of the view that Spain did not violate commitments and guarantees in the Original Regulatory Regime and acted in a reasonable and proportional manner across the entire SES in order to address the tariff deficit, FREIF has not established breach and Spain has complied with the “Impairment Clause”.

Q6.5 Breach of “Umbrella Clause”

590. The Tribunal now moves to consider its reasons and decision on the final breach of the ECT that FREIF alleges, being the breach of the so-called “Umbrella Clause”. The “Umbrella Clause” refers to the part of Article 10(1) of the ECT which obliges Contracting Parties to “observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”. The key issue between the Parties is whether Spain entered into any “obligations” that it failed to observe. In the Tribunal’s view, the enactment of RD 1614/2010 was not the manifestation of an agreement entered into with FREIF or its investments. Accordingly, FREIF’s claim for breach of the “Umbrella Clause” fails.

591. The Tribunal accepts that in the months leading up to the enactment of RD 1614/2010, the Government and the Spanish wind industry engaged in discussions and consultation. The question is whether the outcome of these discussions was that Spain was under any “obligations” it had “entered into. The Parties disagree as to how broadly the word “obligation” should be interpreted. According to FREIF, an “obligation” includes both contractual undertakings as well as obligations assumed through law or regulation. According to Spain, on the other hand, the words “enter into” limit the scope of the clause to apply only to specific agreements with an investor rather than a legislative provision of general application. Both Parties cite arbitral jurisprudence in support of their position.

592. In the Tribunal’s view, the form that an obligation takes, whether through contract or statute, is not the determining factor. Rather, the essential characteristic of an “obligation”, according to the ordinary meaning of the word, is that it is mandatory and legally binding on the obligor.

593. In the present case, there is no suggestion that a written contractual agreement was entered into between the Government and FREIF, or between the Government and the AEE, at the conclusion of the 2010 discussions. Therefore, the claim will only succeed if FREIF establishes that RD 1614/2010 was the manifestation of the agreement or if RD 1614/2010 itself contains obligations on Spain that were subsequently breached. FREIF has not been successful in either regard.

594. As with the issue of the duty of transparency, the Tribunal has found the testimony of FREIF’s witness, Mr Ceña, to be of great value in reaching its position on this issue. Mr

⁷⁴¹ FREIF’s Post Hearing Brief, Schedule 2, p. 11 (emphasis added by FREIF).

Ceña directly participated in commenting on drafts of RD 1614/2010 as a representative of AEE. On Day 3 of the Hearing, Mr Ceña engaged in the following exchange:⁷⁴²

Q. My next question would be: does the parliament or the government need the consent or the approval of the AEE prior to approving a royal decree or a law? Or, in other words, when it is approved, can the government approve a regulation without the AEE's consent or agreement?

A. It does not need approval from the AEE or any other association, but associations as AEE take part of the elaboration process of the content, they discuss the contents of draft provisions which are then drafted by the Government. We... the government does not need our approval. But this is a democratic consultation, it is a state of law, so I have been on both sides of the table, I have represented the government as well as the private sector, and that's just the usual practice.

595. Later that day, in an exchange with Professor Clay, Mr Ceña stated:

PROFESSOR CLAY: So it is not binding either to apply or to heed to what the lobbying companies say during these discussions?

A. In all cases where we have been involved in any case we have never imposed anything. There was always consensus. We have reached consensus. In other words, there has never been a situation of saying: "It was impossible". A consensus has been reached, we have expressed our arguments, the regulator did the same, they had their arguments and we convinced them, so it was a very useful and healthy way to regulate. We have not, and we don't want to have, any kind of power of imposition. Politically it would have sold very badly.

PROFESSOR CLAY: Well, that's what I wanted to know because when you say in your second statement, paragraph 20 -- when you say that -- this afternoon -- well, it's the afternoon for me. You said that the ministry was willing to listen, to hear the opinions of the wind sector, so they are willing to do it, but they are not bound to do it. Of course it's better to do so, of course, of course, and to take all the opinions, but it's not an obligation.

A. Well, we wouldn't be here if they had listened to us.

596. Based on these exchanges, the Tribunal is satisfied that the RD 1614/2010 was not an agreement made with specific Investors or industry associations. Rather, it is accepted by FREIF's witness that that the Government does not require consent or agreement from the AEE in order to enact a Royal Decree. Even though the industry and Government reached a "consensus" in the discussions about RD 1614/2010, this does not mean that a legal agreement giving rise to obligations on the part of Spain existed. The making of a Royal Decree is a power over which the State has authority and can be modified in line with the limits established by Spanish law.

597. Thus, when the Ministry issued a press release stating it had "closed agreements with the wind and solar thermal business associations...for the review of [their] regulatory

⁷⁴² Transcript Day 3, p. 19, l. 12 – p. 20, l. 1.

frameworks”⁷⁴³ the Tribunal does not interpret this as referring to entry into a legally binding agreement. The better view of the Ministry’s intention, which is supported by Mr Ceña’s testimony, is that a consensus had been reached following the discussions.

598. As for the provisions of RD 1614/2010 itself, the key argument raised by FREIF is that Article 5(3) constituted a stabilisation clause. Article 5(3) states:⁷⁴⁴

3. Without prejudice of that set forth in this Royal Decree, for the wind technology installations within the scope of Royal Decree 661/2007, of 25 May, the revisions of the tariffs, premiums and upper and limits, within the scope of article 44.3 of the aforementioned Royal Decree, do not affect installations enrolled definitively in the administrative register of production installations in the special scheme dependent on the Energy and Mines General Policy Board dated 7 May 2009, nor those enrolled in the pre-assignment of payment register under transitory disposition four of Royal Decree- Law 6/2009, of 30 April and which comply with the obligation provided for in its article 4.8.

599. In the Tribunal’s view, this Article extends the provisions of Article 44(3) of RD 661/2007 to facilities pre-registered in the RAIPRE. It does not, however, modify the terms of Article 44(3) of RD 661/2007 itself nor does it “expressly [exclude] the possibility of future revisions to the incentives regime for existing facilities”.⁷⁴⁵

600. Finally, even if FREIF succeeded on the above bases, the Tribunal is not persuaded that the alleged obligation was entered into “with an Investor or an Investment of an Investor”. At the time of these meetings, FREIF was not yet an Investor as it did not invest until December 2011. It was also not a member of the AEE.⁷⁴⁶ As Spain points out, general press releases or roadshows do not generate “obligations” that would be protected by the “Umbrella Clause”. Therefore, it is clear that even if there had been an alleged 2010 Agreement, the agreement would not have been “entered into with an Investor” under Article 10(1) of the ECT.

601. FREIF submits that such an interpretation is too narrow and that the enrolment of FREIF’s plants into the RAIPRE meant that Spain’s obligations applied to it. In the Tribunal’s view, this interpretation is too broad. The fact that the plants invested in by FREIF were enrolled in the RAIPRE does not mean that Spain has entered into obligations that would be the subject of protection under the Umbrella Clause. Rather, the RAIPRE is a registration system of general application to the industry over which Spain had control. In this regard, the Tribunal agrees with the reasoning of the *RREEF* tribunal, which held that:⁷⁴⁷

In the present case, the Tribunal accepts the Respondent’s view according to which the RAIPRE do not add anything to the contractual relations entered by the Spanish Government with each of them; as accepted by the Respondent itself, these

⁷⁴³ C-220, Press Release of the Ministry of Industry, Tourism and Commerce, 2 July 2010.

⁷⁴⁴ C-146, RD 1614/2010.

⁷⁴⁵ FREIF’s Reply Memorial and Counter-Memorial on Jurisdiction, [290].

⁷⁴⁶ Transcript Day 2, p. 32, ll. 20–23.

⁷⁴⁷ *RREEF*, Decision on Responsibility and on the Principles of Quantum, [285].

certificates “only manifest the registry of the installations in an administrative register that does not generate specific commitments”. As provided for in Article 14(1) of RD 661/2007, “the final registration of the facility in the Public Authority Register of production facilities under the special regime shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree to such facility.” However, this “requirement” does not constitute a commitment falling under the umbrella clause. It certainly implies that the investment is regulated by RD 661/2007 but not that the Respondent has entered into the obligations contained therein with the Claimants. Mutatis mutandis the same reasoning applies to RD 1614/2010.

602. Based on the Tribunal’s conclusion in Part Q6.2, the Tribunal would also have difficulty with the submission that any alleged obligations made in the enactment of RD 1614/2010 were subsequently breached, given that the Tribunal does not accept that specific guarantees were given in RD 1614/2010. On that basis, FREIF cannot stand under the ECT’s umbrella by asserting that the Government’s consultation of the industry leading up to the implementation of RD 1614/2010 created an obligation subject to the ECT’s protection.

Q6.6 Conclusion

603. According to the Tribunal’s foregoing reasons, FREIF’s claims on the merits should be dismissed as there has been no breach of Part III of the ECT by Spain.

R QUANTUM

604. The Parties contest four key issues in regard to quantum:
- (a) first, whether FREIF is entitled to full compensation for Spain's breaches;
 - (b) second, the appropriate method of quantifying FREIF's compensation;
 - (c) third, the calculation of pre- and post-Award interest; and
 - (d) fourth, the inclusion of a gross-up for the tax FREIF would have to pay in the United Kingdom.

R1 Entitlement to Full Compensation

R1.1 FREIF's Submissions

605. FREIF submits that to determine the compensation owed by Spain, the Tribunal should first turn to any *lex specialis* in the ECT, and then, in the absence of any *lex specialis*, to the rules of customary international law.⁷⁴⁸ FREIF, however, recognises that the Tribunal has discretion in determining the approach to damages in instances of breaches of the BIT other than unlawful expropriation, relying on *Azurix Corp. v Argentine Republic*.⁷⁴⁹
606. In FREIF's submission, the only *lex specialis* standard of compensation is in Article 13 of the ECT, in relation to lawful expropriations by Spain. FREIF says that, because the ECT does not expressly provide a standard of compensation for violations of the ECT, the customary international law principle of full compensation should be applied. FREIF relies on the statement of the principle as established by the Permanent Court of International Justice in *Chorzów Factory*,⁷⁵⁰ which stipulates that "reparation must, as far as possible, 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".⁷⁵¹
607. FREIF cites a number of more recent decisions which follow *Chorzów Factory*. First, in *Amoco Int'l Finance v Iran*,⁷⁵² the treaty in question similarly only defined the standard of compensation in cases of lawful expropriation, rendering applicable customary international law to cases of unlawful expropriation. The tribunal in that case held that in cases of unlawful expropriation, "an obligation of reparation of all damages sustained by the owner of expropriated property arises".⁷⁵³

⁷⁴⁸ FREIF's Statement of Claim, [396].

⁷⁴⁹ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, [332], cited in FREIF's Statement of Claim, [402].

⁷⁵⁰ *Case Concerning Factory at Chorzów* (Germany v. Poland), Judgment 13, PCIJ, 13 September 1928 (1928 PCIJ, Series A. No. 17) (**Chorzów Factory**).

⁷⁵¹ *Chorzów Factory*, [47], cited in FREIF's Statement of Claim, [397].

⁷⁵² *Amoco Int'l Finance Corporation v. Iran*, Case No. 56, Partial Award, 14 July 1987 (**Amoco**).

⁷⁵³ *Amoco*, [193], cited in FREIF's Statement of Claim, [398].

608. The case of *MTD v Republic of Chile*⁷⁵⁴ is also cited, where the relevant BIT only provided for the standard of compensation applicable to a particular type of expropriation. In relation to breaches of the BIT on other grounds, the tribunal also applied the *Chorzów Factory* standard of full compensation.
609. FREIF then turns to further cases which have applied the principle of full compensation for treaty violations other than unlawful expropriation.⁷⁵⁵ The tribunal in *Asian Agricultural Products Ltd v Republic of Sri Lanka (AAPL v Sri Lanka)* held that "the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof". In *Vivendi II*,⁷⁵⁶ the tribunal similarly found that the level of damages awarded in international investment arbitration is to be sufficient to compensate the affected party fully and eliminate the consequences of the state's action, irrespective of the nature of the illegitimate measure or type of investment.
610. Finally, FREIF refers to the ILC's Draft Articles on State Responsibility, which incorporate the full compensation standard in Articles 35 and 36.⁷⁵⁷ These Articles confirm that a "State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby" and that the "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." Ultimately, it is FREIF's submission that a violation of Article 10 or 13 of the ECT would entitle it to full compensation, although it contends that Spain was in breach of both.

R1.2 Spain's Submissions

611. Spain emphasises that its submissions on quantum are presented secondarily, in the event that, first, the Tribunal agrees to have jurisdiction over this dispute and, secondly, the Tribunal finds that there is a failure by Spain to comply with certain precepts of the ECT.⁷⁵⁸ However, Spain does accept that in the absence of a specific rule on reparation in the ECT, the customary international law principle of full reparation applies, pursuant to Article 26(6) of the ECT and as codified by the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.⁷⁵⁹
612. Further Spain contends that FREIF bears the overall burden of proving the loss founding their claims for compensation, and further, that where the loss is too uncertain or speculative the claims must be rejected.⁷⁶⁰ This position is said to be supported by

⁷⁵⁴ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, [238], cited in FREIF's Statement of Claim, [399].

⁷⁵⁵ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [87]-[88] (*AAPL v. Sri Lanka*), cited in FREIF's Statement of Claim, [400].

⁷⁵⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award II, 20 August 2007, [8.2.7], cited in FREIF's Statement of Claim, [401].

⁷⁵⁷ FREIF's Statement of Claim, [403].

⁷⁵⁸ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1327].

⁷⁵⁹ Spain's Rejoinder on Merits and Reply on Jurisdiction, [1509]-[1510].

⁷⁶⁰ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1336]; Ruling of the Third Chamber of the Supreme Court on 24 September 2012 (Appeal 60/2011).

the Supreme Court of Spain in almost a hundred rulings concerning changes to the remuneration regime for renewable energy.⁷⁶¹

613. By reference to a range of factual circumstances, Spain submits that FREIF's loss is too speculative to calculate.⁷⁶² Spain also argues that damages are unfounded because the rates of return obtained by FREIF are higher than those expected in the market.⁷⁶³

R2 Quantification of Compensation

R2.1 FREIF's Submissions

614. FREIF seeks as damages "the diminution in the fair market value of its investment, calculated according to the discounted cash flow (**DCF**) method, caused by Spain's violations of the ECT".⁷⁶⁴

615. FREIF argues that the DCF method is appropriate and reliable in this case because.⁷⁶⁵

- (a) first, the DCF method focuses on future cash flows, not historical costs. The fact that cash flows are generated by tangible rather than intangible assets does not make them speculative;
- (b) second, wind plant cash flows are highly predictable because demand for electricity and its long-run value are subject to analysis and readily available data. Power stations have relatively simple business models with operating parameters, costs and revenues that can be predicted with a high degree of confidence based on available data. Moreover, the wind farms in this case were exposed to limited market volatility under the Original Regulatory Regime due to the fixed tariff option and the cap-and-floor structure of the market premium option; and
- (c) third, the DCF method is not rendered speculative because the project duration is 20-25 years, particularly for assets that are expected to operate at highly predictable production levels for that duration. There is no basis to suggest that Brattle's DCF valuation is based on highly speculative assumptions regarding plant performance.

616. FREIF also emphasises that every arbitration finding that a state violated the ECT with respect to investments in renewable power assets has adopted the DCF method in the calculation of quantum.⁷⁶⁶ It therefore should be considered the primary valuation tool in the power sector both for investment decisions and for measuring damages in disputes.

⁷⁶¹ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1472]; Ruling of the Third Chamber of the Supreme Court on 24 September 2012 (Appeal 60/2011).

⁷⁶² Circumstances discussed in Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1338].

⁷⁶³ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1468].

⁷⁶⁴ FREIF's Statement of Claim, [405].

⁷⁶⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [599]–[602].

⁷⁶⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [603].

617. FREIF relies on the First Brattle Quantum Report, produced by Brattle, whom it retained to calculate damages by valuing FREIF's equity interest in the joint venture that indirectly owned the wind plants in Spain.⁷⁶⁷ Brattle calculates the quantum of compensation owed by Spain to FREIF based on the difference between:
- (a) the value that FREIF's investment in Spain would have had if Spain had not introduced the measures in violation of the ECT, termed the "But For Scenario"; and
 - (b) the value of that investment after the introduction of those measures, termed the "Actual Scenario".
618. This calculation involves a three-step method:
- (a) first, it calculates the damages from the historical effects, i.e. prior to the Valuation Date, of Spain's measures;
 - (b) second, it calculates damages from the future effects of Spain's measures;
 - (c) third, the report "rolls forward" the loss from the Valuation Date to the date of award at the rate of pre-judgment interest.
619. The outcome of the first two steps will be outlined as follows, and the third step will be outlined below in Part R3 on interest. Overall, FREIF submits that Brattle correctly models the lost cash flows resulting from the disputed measures and correctly assesses the value of those lost cash flows considering the appropriate discount rates.
620. Specifically, with respect to the first step, damages from historical effects are calculated by ascertaining the amount of additional cash flow that the investment would have generated in the But For Scenario based on actual historical operating data. Brattle:⁷⁶⁸
- calculates the amount of cash flow plants would have generated had they: (1) continued to receive the remuneration guaranteed by the Original Regulatory Regime on all of their production; (2) not been subjected to the 7% tax; and (3) continued to receive cash flows without the delay in payment introduced by RD 9/2013.
621. That calculation results in Brattle's conclusion that Spain's measures reduced the operating income attributable to FREIF's interest in the wind farms between January 2013 and the Valuation Date (December 2017) by €30 million.
622. Turning to the second step, damages from the future effects of Spain's measures are measured by calculating the difference in the fair market value of FREIF's investment in the Actual and But For Scenarios as of the Valuation Date, using the DCF method. Two DCF models were calculated: one for the But For Scenario, and one for the Actual

⁷⁶⁷ FREIF's Statement of Claim, [407].

⁷⁶⁸ FREIF's Statement of Claim, [410].

Scenario. While the two models shared common assumptions, they differed in the following key respects, which show the impact of Spain's measures:⁷⁶⁹

- (a) Market revenue: The report did not include market revenue in the But For Scenario model, which it included in the Actual Scenario, as it considered that the plants would have opted for the fixed tariff if the Original Regulatory Regime had remained in effect.
- (b) Financial support: In the But For scenario, the report includes financial support based on the fixed tariff (adjusted for inflation) for all of the plants' net electricity production. In the Actual scenario, the Report assumes that FREIF's plants receive the investment incentive provided under RDL 9/2013.
- (c) Taxes: In the But For Scenario, the report assumes that Spain would not have imposed the 7% "tax" on the feed-in tariff revenue of FREIF's investment, whereas in the Actual Scenario this "tax" was applied.
- (d) Cash collection delays: The report incorporated the delays caused by the New Regulatory Regime to the compensation paid to wind plants in the Actual Scenario model as an upward adjustment to working capital requirements.

623. Based on the above differences, the First Brattle Quantum Report calculates that the disputed measures will reduce the free cash flows to FREIF's plants by approximately €263 million (57%).⁷⁷⁰
624. FREIF then submits that, to assess the impact of the reduced cash flows on the present value of FREIF's equity interest, a "discount rate" must be applied, in conjunction with other adjustments for "tax, debt and liquidity issues".⁷⁷¹ The report first applies a discount rate of 4.16%, derived from the Capital Asset Pricing Model, a widely-accepted method based on the relationship between projected cash flows and stock prices of publicly traded companies to the future project free cash flows in each scenario. The report then accounts for the increased regulatory risk resulting from the disputed measures in the Actual Scenario over the But For Scenario by applying a "revenue haircut".⁷⁷² After making these two adjustments, FREIF submits that the disputed measures reduced the aggregate value of the wind farms by €135 million (42%).⁷⁷³
625. A number of further adjustments relating to the project debt, the percentage of FREIF's distribution rights, and the illiquid nature of FREIF's interests are also made, to reach the final conclusion on the impact of Spain's measures on FREIF's equity interest, as opposed to the enterprise value of the project companies themselves.⁷⁷⁴

⁷⁶⁹ FREIF's Statement of Claim, [413].

⁷⁷⁰ FREIF's Statement of Claim, [414].

⁷⁷¹ FREIF's Statement of Claim, [415].

⁷⁷² FREIF's Statement of Claim, [417].

⁷⁷³ FREIF's Statement of Claim, [418].

⁷⁷⁴ FREIF's Statement of Claim, [419].

626. The First Brattle Quantum Report concludes that Spain's violations of the ECT reduced the fair market value of FREIF's investment on the Valuation Date by €70.6 million. The total damages, which include historical damages and the tax gross-up, therefore amounted to €124.0 million, in Brattle's calculation.⁷⁷⁵ In the Second Brattle Quantum Report, Brattle corrected three calculations in response to observations of Quadrant Economics, and updated its calculations to account for additional information received since it submitted its First Brattle Quantum Report. Therefore, the total damages including the tax gross-up calculated by Brattle is €122.7 million.⁷⁷⁶ Should the Tribunal find that it does not have jurisdiction to consider the TVPEE as a disputed measure, the total damages excluding the TVPEE (as well as interest and tax gross-up) is €68 million.⁷⁷⁷
627. In respect of the Asset Sale, FREIF says it is common ground between the Parties that FREIF's investment "crystallised" the quantum of its losses as of the date of sale such that events subsequent to that date have no relevance to the quantum of Claimant's damages. Further, it acknowledges that the sale price is evidence of the fair market value of FREIF's investments in the Actual scenario. However, FREIF contends that it would not be logical to simply replace Brattle's valuation in the Actual scenario with the sale price because this would be a simplistic approach that contains no insight into the specific valuation assumptions that caused the buyer, Ardian, to make its final purchase offer at a different amount to Brattle's valuation. It would therefore not be clear how much Ardian would have been willing to pay for the investments in the But For scenario.⁷⁷⁸
628. Brattle calibrates its model to the sale price using three different combinations of modelling assumptions that might logically explain the variance between its valuation and the sale price. These different assumptions all result in damages to FREIF that are within 4% in either direction of Brattle's own calculations. In FREIF's view, values within 5% are well within the range of reasonable and expected deviations. Therefore, Brattle's valuation should stand as is, with the sale price serving as corroboration of the reasonableness of Brattle's analysis.⁷⁷⁹
629. In FREIF's view, nothing occurred during the cross-examination of the Brattle team that materially detracted from its evidence on both regulatory matters and quantum. It also points out that Mr Heim of Quadrant Economics misrepresented Brattle's evidence by suggesting that Brattle thought there was a high degree of regulatory risk at the time of FREIF's investment. FREIF says that on the contrary, Quadrant is incorrectly conflating regulatory risk of a change to Spain's renewable incentive framework with the macroeconomic and country risks that were affecting Spanish bond yields at that time.⁷⁸⁰

⁷⁷⁵ FREIF's Statement of Claim, [420].

⁷⁷⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [634].

⁷⁷⁷ FREIF's Post Hearing Brief, [2].

⁷⁷⁸ FREIF's Post Hearing Brief, [42]–[46].

⁷⁷⁹ FREIF's Post Hearing Brief, [47]–[48].

⁷⁸⁰ FREIF's Post Hearing Brief, [77]–[79].

630. By contrast, FREIF argues that the backward-looking, cost-based valuation method adopted by Spain's experts, Quadrant Economics, is inappropriate and in any event, there are several critical errors in the implementation of this methodology.
631. In respect of the choice of methodology, FREIF says that the valuation proposed by Spain does not attempt to assess the damages based on the claims represented i.e. the difference between the tariff rates that FREIF says its plants were entitled to receive and the return that it actually receives under the New Regulatory Regime.
632. Instead, Spain argues that damages should be calculated assuming that FREIF was only entitled to a reasonable rate of return, not the tariff rates guaranteed in RD 661/2007 that are the essence of FREIF's case.⁷⁸¹ By taking this approach, Quadrant Economics conflates the efficiency of FREIF's plants with the return earned by the standard plant even though Spain's renewable incentive framework has always applied the reasonable return to standard plants, not to particular plants.
633. FREIF's position is that Spain's target returns were benchmarks rather than caps and actual plants could have exceeded these benchmarks. This position is said to be consistent with the testimony of Spain's witness, Mr Ayuso, who confirmed that when Spain established target returns, it did so using standard plant models, which were based on an efficient and well managed hypothetical plant, not any particular actual plant.⁷⁸²
634. Moreover, Quadrant's methodology assesses what harm the disputed measures caused to the plants when the relevant question is more broadly what harm the disputed measures caused to FREIF's investments, including its equity interests and shareholder loans in the plants.
635. In respect of the implementation of the methodology, FREIF argues that if Quadrant Economics' method is applied correctly, FREIF's plants are still not earning a reasonable return under any definition.⁷⁸³ The four errors identified are:
- (a) Quadrant's "reasonable return" benchmark is too low. Spain defines the IRR target in the 1999 and 2005 PERs to be calculated before financing. Financing with debt increase project IRR because of the interest tax shield. However, Quadrant Economics computes the IRR of FREIF's plants with the benefit of the tax shield. Therefore, the comparison of a tax-advantaged IRR with an all equity benchmark creates the illusion of extra performance and higher returns than the target. In reality, the difference relates to Quadrant Economics' inconsistent inclusion of the tax benefit of debt.⁷⁸⁴

⁷⁸¹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [592].

⁷⁸² FREIF's Post Hearing Brief, [70]; Transcript Day 2, p. 52, ll. 2-15.

⁷⁸³ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [593].

⁷⁸⁴ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [614]; FREIF's Post Hearing Brief, [89]-[90]; Transcript Day 5, p. 77, ll. 2-24.

- (b) Spain defines the 7% IRR target as a long-term holding IRR. Because market interest rates declined between 2013 and December 2017, Quadrant Economics' approach inflates the IRR by the amount of the capital gain in the value of future cash flows attributable to the decline in interest rates.⁷⁸⁵
- (c) Quadrant Economics calculates the IRRs of FREIF's plants based on their actual cost and performance, whereas Spain's target return of around 7% was for a standard plant. By calculating the IRRs of FREIF's plants based on their actual cost and performance, Quadrant Economics masks the reduction in revenue paid to standard plants by the degree that Claimant's plants are more efficient than the standard.⁷⁸⁶

636. FREIF submits that Brattle's DCF valuation is more robust and reliable than Quadrant Economics' DCF "sensitivity" analysis. Brattle acknowledges some minor errors in its First Brattle Quantum Report, the points made by Quadrant Economics, and a change in valuation date. As a result, it revises its quantum calculation downward by €1.1 million. However, the vast majority of Quadrant Economics' criticisms, particularly regarding issues of useful life, refinancing and regulatory risk are, however, said to be unfounded.⁷⁸⁷

- (a) In respect of useful life, FREIF argues that Quadrant's assumption that the plants have an operating useful life of 20 years is based on indicators such as the warranty period, accounting depreciation period and assumptions in financial models that are inapposite. On the other hand, Brattle's assumption of 30 years is more realistic and reasonable and is based on the expectations of technical experts and equity investors. In connection with the sale of the plants, two bidders submitted firm offers to buy the plants based on an operating life assumption of 30 years.⁷⁸⁸
- (b) In respect of refinancing, the joint venture agreement between FREIF and Renovalia had always contemplated a refinancing of the plants to maintain an optimal capital structure for assets of this nature (i.e. debt in excess of 70%). The New Regulatory Regime eliminated FREIF's ability to maximise its returns through refinancing because the reduced cash flows of the plant are insufficient to support the anticipated refinancing. FREIF contends that Quadrant has nullified this harm by assuming that refinancing would never had occurred regardless of the disputed measures.⁷⁸⁹
- (c) In respect of regulatory risk, FREIF argues that Quadrant has applied enormous discounts for regulatory risk and illiquidity in the But For scenario in order to conclude that FREIF is better off under the New Regulatory Regime. However, according to Brattle, regulatory risk is actually higher in

⁷⁸⁵ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [615].

⁷⁸⁶ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [616].

⁷⁸⁷ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [620].

⁷⁸⁸ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [621]–[623].

⁷⁸⁹ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [624]–[626].

the Actual scenario for the obvious reason that the disputed measures demonstrate Spain's willingness to violate its legal obligations. This conclusion is said to be supported by a number of other tribunals.⁷⁹⁰

637. FREIF makes the alternative submission that should a "reasonable return" approach be adopted, the correct assessment of loss would be to calculate an "alternative tariff" that would provide the reasonable rate of return to an efficient plant. Under this approach, which Brattle has calculated in its "Alternative Claim", a tribunal should:⁷⁹¹
- (a) determine the reasonable return benchmark;
 - (b) derive an alternative tariff that would allow a standard plant to earn the return benchmark (using Spain's own standard plant parameters from the New Regulatory Regime);
 - (c) insert the alternative IRR into the DCF model in the But For scenario in place of the Original Regulatory Regime tariff; and
 - (d) assess harm based on the difference in value between this alternative But For and the Actual scenario.

638. Finally, FREIF contends that even if the Tribunal finds that it does not have jurisdiction to assess whether the TVPEE was a lawful measure, if the Tribunal follows Quadrant's approach on the premise that the Claimant's only legitimate expectation was to a reasonable return, the impact of the TPVEE should nonetheless be considered when assessing whether the New Regulatory Regime provides a reasonable return. This is because the TPVEE is a cost to FREIF's plants and to standard plants and its financial impact should thus be considered in determining the plants return. FREIF refers to the decision of the *RREEF* majority in this regard.⁷⁹²

R2.2 Spain's Submissions

639. In response, Spain makes three primary submissions as to why the quantification of compensation has not been made out. It submits that the correct approach to determine the economic impact of the disputed measures is to assess their return or IRR and compare it to a benchmark considered appropriate. If the IRR exceeds the benchmark, there is no economic impact.⁷⁹³
640. First, Spain submits that the DCF method is not suitable for the current circumstances because it assumes a frozen RD 661/2007 for three decades even though Spain has always retained regulatory power.⁷⁹⁴ Spain points to four specific circumstances that prove both the inadmissibility and the impossibility of using the DCF method.⁷⁹⁵

⁷⁹⁰ FREIF's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, [627]–[633].

⁷⁹¹ FREIF's Post Hearing Brief, [117].

⁷⁹² FREIF's Post Hearing Brief, [3]; *RREEF* Decision on Responsibility and on the Principles of Quantum, [181].

⁷⁹³ Spain's Post Hearing Brief, [142].

⁷⁹⁴ Spain's Post Hearing Brief, [154].

⁷⁹⁵ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1338].

- (a) the fact that it involves a capital-intensive business, with a significant asset base. Practically all its costs arise from investing in tangible infrastructure. There are no relevant intangible assets to analyse;
- (b) the high dependency of the cash flows on external, volatile and unpredictable elements, such as the price of the pool, *inter alia*;
- (c) the long-term nature of the forecasts; and
- (d) the disproportion between the alleged investments (and the alleged assumed risk) and the amount claimed, evidenced by the return obtained.

641. Second, the return rates obtained highlight the speculative nature of the claim and the non-existence of any damage. Spain submits that there are no grounds whatsoever for claiming damages in respect of the investments as the return obtained by FREIF's facilities, with the contested measures, is in line with the return that such plants can achieve in the market they operate in.⁷⁹⁶ Additionally, in this case, the DCF method is not the most objective method available to calculate the value of the wind farms because of the occurrence of the Asset Sale.

642. Third, it is argued that Brattle's DCF is manifestly erroneous and contains several deficiencies which make the model unsuitable for quantifying damages in the present case.⁷⁹⁷ The First Quadrant Report, on which Spain relies, contends:

- (a) that the Brattle model does not calculate the equity cash flows for FREIF;⁷⁹⁸
- (b) five errors were made by Brattle when calculating the plants' revenues;⁷⁹⁹
- (c) four errors were made by Brattle with regards to calculation of the operating costs;⁸⁰⁰
- (d) the useful life expectancy of the plants should be calculated on the basis of objective criteria while Brattle's calculation of the life of the plants is made on subjective criteria.⁸⁰¹ The assumption should therefore be 20 years rather than 30 years;⁸⁰²
- (e) that the discount rate on equity should be assessed on a different basis to that set out by Brattle;⁸⁰³

⁷⁹⁶ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1345].

⁷⁹⁷ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1353].

⁷⁹⁸ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1354].

⁷⁹⁹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1355].

⁸⁰⁰ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1356].

⁸⁰¹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1357].

⁸⁰² Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1494].

⁸⁰³ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1358].

- (f) that it is not only the tax shield from bank debt that should be included but also that from shareholder loans, as distinct from the First Brattle Quantum Report;⁸⁰⁴
 - (g) that the First Brattle Quantum Report contains a generous and speculative but-for refinancing assumption;⁸⁰⁵ and
 - (h) that the First Brattle Quantum Report contained shortcomings with regard to calculation of regulatory risk.⁸⁰⁶
643. Furthermore, the Second Brattle Quantum Report is said to introduce new aggressive and speculative assumptions to compensate the effect of the corrections made by Quadrant.⁸⁰⁷ The Quadrant Experts have also conducted a "reality check" exercise in response to comparable transactions that confirm that the valuation of the investment in the But-For Scenario by Brattle is not correct.⁸⁰⁸
644. Spain therefore contends that if the assumptions on which the Brattle model is based are corrected in accordance with the criteria used by Quadrant Economics, "[t]he cumulative change begins with Brattle's calculation of the economic impact, a negative impact of €100.5 million, and then applies each of the corrections until arriving at a corrected economic impact calculation, a positive impact of €13.2 million".⁸⁰⁹ Incorporating the asset sale price into the DCF methodology would reduce Brattle's calculation of damages by €3.7 million, all else being equal.⁸¹⁰
645. Instead, under circumstances such as these, both doctrine and arbitral case law give more credibility to alternative methods such as those based on assets, examining whether they are recovered and if reasonable return is obtained from them.⁸¹¹ The profitability-based methodology applied by Quadrant and described by FREIF as "cost-based" entails:
- (a) considering the reasonable rate of return for renewable energy projects like the wind farms; and
 - (b) comparing this to actual profitability of the wind farms.
646. The analysis undertaken by Quadrant is said to be the correct approach because:⁸¹²

⁸⁰⁴ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1359].

⁸⁰⁵ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1360]; Second Quadrant Report, [99]-[121]; Hearing Day 2, p. 34, ll. 4-21.

⁸⁰⁶ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1361]; Spain's Post Hearing Brief, Schedule 2, p. 20; Second Quadrant Report, [124]-[127]; Quadrant Hearing Presentation, slide 38, Hearing Day 5, p. 27, ll. 22-25; p. 28, ll. 1-25; p. 29 ll. 1-3; Quadrant Hearing Presentation, Slide 28; Hearing Day 5, p. 119, ll. 5-25, p. 120, ll. 1-24.

⁸⁰⁷ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1482].

⁸⁰⁸ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1496].

⁸⁰⁹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1368]; First Quadrant Report [311].

⁸¹⁰ Spain's Post Hearing Brief, [139]; Hearing, Day 4, p. 74, ll. 14-23.

⁸¹¹ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1332]; Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1476].

⁸¹² Spain's Post Hearing Brief, Schedule 2, pp. 18-19.

- (a) Regulatory support allows renewable energy projects to achieve a reasonable rate of return and thus ensure their economic viability;
 - (b) The correct way to establish whether the disputed measures have had an economic impact on the wind farms is to determine whether the return that they can expect to yield with the disputed measures in place is lower than the reasonable return for renewable energy projects;
 - (c) The widely accepted method to measure the economic profitability of a project is to consider its IRR, which is achieved by Quadrant’s profitability analysis.
647. Spain points to the reasoning of the *RREEF*⁸¹³ and *PV Investors*⁸¹⁴ tribunals in support of its position that the reasonable return approach is appropriate and balances an investor’s expectations with the State’s regulatory power.
648. Spain submits that the Experts agree that the reasonable rate of return benchmark is 7% after tax.⁸¹⁵ Spain further submits that there is no material difference between pre- and post-tax returns and 7% was also the expected benchmark under an “all equity” scenario.⁸¹⁶ According to the First Quadrant Report, the return achieved by FREIF’s plants is 9.3% after tax,⁸¹⁷ which was updated to 10.4% after tax in the Second Quadrant Report⁸¹⁸ and further to 10.2% following the Asset Sale.⁸¹⁹
649. According to Spain and Quadrant, Brattle’s calculation of 7.1% IRR post tax is based on the following incorrect assumptions:
- (a) Brattle deducted hypothetical taxes from actual historical cash flows. It agreed that by removing the hypothetical taxes, the IRR would increase by more than 1% to above 8%.⁸²⁰
 - (b) Brattle and Quadrant have other cash flow differences which understate cashflows and revenue. Correcting these errors would increase the IRR by 0.5%.⁸²¹
 - (c) Brattle ignores the sales price of the wind farms and rather uses modelled future cash flows.
650. On the last of these assumptions in particular, Spain notes that the experts disagree on the inputs to use to calculate the IRR, including whether the asset sale price should be used. However, even applying Brattle’s modelled inputs, the IRR is 7.1%, which is

⁸¹³ *RREEF* Decision on Responsibility and on the Principles of Quantum [472], [517].

⁸¹⁴ *PV Investors*, [638]-[639].

⁸¹⁵ Spain’s Post Hearing Brief, Schedule 2, p. 22.

⁸¹⁶ Spain’s Post Hearing Brief, [147]-[150].

⁸¹⁷ Spain’s Counter Memorial on the Merits and Memorial on Jurisdiction, [1345].

⁸¹⁸ Spain’s Rejoinder on the Merits and Reply on Jurisdiction, [1460]; *RREEF* Decision on Responsibility and on the Principles of Quantum. 30 November 2018, [386].

⁸¹⁹ Spain’s Brief Comments on Sale of Assets, dated 25 November 2019, [3]; Update to the Second Quadrant Report, [6].

⁸²⁰ Hearing Day 4, p. 74, ll. 3-23.

⁸²¹ Hearing Day 4, p. 75, ll. 24-25; p. 76, ll. 1-19; Spain’s Post Hearing Brief, Schedule 2, p. 23.

higher than the reasonable return rate of 7% post tax. Using the asset sale price, the IRR of the wind farms is 10.2% post tax.⁸²²

651. Spain says it is not correct for Brattle to imply that FRIEF's wind farms could have expected more than the 7% benchmark because they were "relatively efficient" compared to the standard facility. Instead, the wind farms are said to have achieved a 10.2% return because of industry wide developments such as an unexpected extension of useful life and an industry-wide fall in operating costs, not efficient choices made by entities who constructed the Wind Farms, or by FREIF.⁸²³
652. Finally, should the Tribunal find it lacks jurisdiction to determine whether Law 15/2012, which includes the TVPEE, is a disputed measure, Spain acknowledges that if the Tribunal opts to follow a reasonable rate of return approach and analyse FREIF's IRRs, the experts agree that the IRRs with the disputed measures in place include TVPEE. However, if the Tribunal decides to apply a DCF methodology, the quantum of damages calculated by Brattle would fall by €26.4 million, all else being equal.⁸²⁴ It stresses that the Tribunal should be careful to ensure the damages determination is consistent with the jurisdiction and liability finding of the Tribunal.⁸²⁵

R3 Interest

R3.1 FREIF's Submissions

653. FREIF submits that pre- and post-award interest should be calculated at the highest lawful rate from the Date of Assessment until the date Spain pays the Award in full.⁸²⁶ FREIF submits that in *AAPL v. Sri Lanka*, "interest becomes an integral part of the compensation itself and should run consequently from the date when the State's international responsibility became engaged."⁸²⁷
654. FREIF requests that an appropriate interest rate based on international commercial rates be determined.⁸²⁸ For pre-award interest, it suggests that it be calculated at the rate of Spanish 10-year bond yields, which is Spain's cost of borrowing. This rate reflects the fact that by delaying compensation, Spain has exposed FREIF to the same risks as investors who have loaned money to it. This approach was adopted in the First Brattle Quantum Report.⁸²⁹
655. Further, FREIF requests that interest be compounded monthly. It submits that international law now recognises the awarding of compound interest as the generally-accepted standard for compensation in international investment arbitrations, citing a

⁸²² Spain's Post Hearing Brief, [138].

⁸²³ Second Quadrant Report, [67]–[68].

⁸²⁴ Spain's Post Hearing Brief, [12].

⁸²⁵ Spain's Post Hearing Brief, [166]–[167].

⁸²⁶ FREIF's Statement of Claim, [421].

⁸²⁷ *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [114].

⁸²⁸ FREIF's Statement of Claim, [421], [425]–[427].

⁸²⁹ FREIF's Statement of Claim, [429]; First Brattle Quantum Report, [170].

number of authorities in support of this proposition.⁸³⁰ Doing so ensures that FREIF receives the present value of the compensation and further ensures that Spain is not unjustly enriched by virtue of delay.⁸³¹

656. Finally, FREIF contends that it is also appropriate to award post-award interest because it is part of the role of interest to compensate a claimant fully between the date of harm suffered and the payment of damages. Both Parties agree that the law of the seat of the Arbitration, Stockholm, has no particular relevance to the determination of post-award interest.⁸³² FREIF, however, contends that in determining post-award interest, the Tribunal has discretion to consider factors related to the enforcement of the award, although in the present case, FREIF does not believe there is any single jurisdiction where the Award is most likely to be enforced. An award of post-award interest is said to discourage Spain from challenging the Tribunal's Award with the goal of delaying payment. FREIF asks for post-award interest to be granted also at the rate of Spanish 10-year bond yields, compounding monthly, or at a higher rate to encourage prompt compliance with the Award.⁸³³

R3.2 Spain's Submissions

657. With regard to pre-award interest, Spain submits that it should be assessed at the short-term risk-free rate using the EURIBOR at six months or one year, in line with the First Quadrant Report and consistent with economic theory and practice. The terms of compounding, if interest were not simple, should match the rate (i.e. six months or one year). Awarding the rate of the Spanish 10-year bond rate as submitted by FREIF, Spain argues, would unfairly reward FREIF for a risk it did not bear.⁸³⁴
658. The 10-year sovereign bond rate is said to be inappropriate because lenders to a sovereign require interest above the risk-free rate to compensate for the risk that the sovereign will default on its debt at some point in the future. However, Spain has not defaulted on its debt. The amounts that the Tribunal may award would not have been subject to the borrower default risks that the Spanish sovereign bond rates take into account.⁸³⁵
659. With regard to post-award interest, Spain submits that FREIF has provided no justification for why post-award interest should be granted. If post-award interest were hypothetically granted, it should be on the same terms as pre-award interest. It accepts

⁸³⁰ FREIF's Statement of Claim, [422]; See *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, [104] and *Vivendi II* [9.2.6-.8], cited in FREIF's Statement of Claim, [422].

⁸³¹ FREIF's Statement of Claim, [423]-[424]. See *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, [101]; *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [129]; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, [174]; FREIF's Statement of Claim, [428].

⁸³² FREIF's Post Hearing Brief, [49]; Spain's Post Hearing Brief, [172].

⁸³³ FREIF's Post Hearing Brief, [49]-[50].

⁸³⁴ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1372]-[1373]; see *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, [440]-[441]; Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1371]; Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1503].

⁸³⁵ Spain's Post Hearing Brief, Schedule 2, p. 25.

that the law of the seat of the arbitration has no relevance for the awarding of post-award interest.⁸³⁶

660. Spain submits that assessment at the highest lawful rate would result in a punitive increase to the award amount, contravening the compensatory basis of damages.⁸³⁷ In this regard, Spain refers to the treatment of interest in comparable awards such as *National Grid P.L.C. v. Argentine Republic*⁸³⁸ and *Micula*.⁸³⁹

R4 Tax Gross-Up

R4.1 FREIF's Submissions

661. To meet the standard of full compensation and put FREIF in the position it would have occupied "but for" the disputed measures, FREIF submits that the Award should include a "gross-up" for the amount of taxation that will apply to the Award under UK law, which would not have applied if FREIF had received that money through dividends from its investment.⁸⁴⁰ Brattle calculates the gross-up based on the headline corporate tax rate in the UK (19%), which increases the total award to €124 million.⁸⁴¹
662. FREIF argues that failing to account for taxation of the amount awarded means that the Tribunal's Award would only award enough damages to cover 82% of FREIF's losses. However, it accepts that Brattle is not an expert on international taxation and the potential taxation in the UK of an award is a contingent unknown. Thus, an appropriate remedy would be for the Tribunal to order Spain to indemnify FREIF for any tax applied to the Award.⁸⁴²

R4.2 Spain's Submissions

663. Spain submits that FREIF's claim to the tax gross-up is completely unfounded.⁸⁴³ Article 21(1) of the ECT provides that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties".⁸⁴⁴ On this basis, Spain argues that the taxation measures of the United Kingdom cannot affect the liability of Spain.⁸⁴⁵ There is no causation between Spain's acts and taxes imposed by the UK. Furthermore, none of the tribunals who have rendered their Awards or Decisions so far in renewable cases against Spain have granted a gross-up for the investors home State taxes on Awards.⁸⁴⁶

⁸³⁶ Spain's Post Hearing Brief, [171]–[174].

⁸³⁷ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1377]–[1380]; RL-0060 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

⁸³⁸ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL Arbitration. Award 3 November 2008, fn 122.

⁸³⁹ *Micula*, [1269].

⁸⁴⁰ FREIF's Statement of Claim, [430].

⁸⁴¹ FREIF's Statement of Claim, [430].

⁸⁴² FREIF's Post Hearing Brief, [51]–[53].

⁸⁴³ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1383].

⁸⁴⁴ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1385].

⁸⁴⁵ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1384]–[1387]; Spain's Post Hearing Brief, [175]–[176].

⁸⁴⁶ Spain's Post Hearing Brief, Schedule 2, p. 26; Spain's Post Hearing Brief, [178].

664. Secondly and alternatively, Spain submits that there is a complete lack of evidence that FREIF's hypothetical compensation would be subject to taxation.⁸⁴⁷ Further, Spain notes that the damages may be subject to a tax exemption, or reduction, by virtue of the position of the United Kingdom in the European Union.⁸⁴⁸
665. After the filing of the Second Brattle Report, Spain argues that FREIF and its experts continue to provide no justification as to why they consider that a hypothetical indemnity would be subject to taxation or why the effective rate of taxation of FREIF would be consistent with the nominal rate of 19% applicable in the Corporate Tax of the United Kingdom.⁸⁴⁹ The Brattle experts acknowledged during the Hearing that they did not perform an analysis of factors that would determine the tax treatment of an award on damages⁸⁵⁰ and they were not tax experts.⁸⁵¹

R5 Tribunal's Decision

666. As the Tribunal has concluded that no breach of the ECT has been established, FREIF is not entitled to any compensation. Relevant matters pertaining to the principled distinction between the Parties' method of determining damages have been discussed above at Part Q6.2.

⁸⁴⁷ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1389]–[1392].

⁸⁴⁸ Spain's Counter Memorial on the Merits and Memorial on Jurisdiction, [1384]–[1387].

⁸⁴⁹ Spain's Rejoinder on the Merits and Reply on Jurisdiction, [1518].

⁸⁵⁰ Hearing Day 4, p. 126, ll. 1-25, p. 127, ll. 1-25.

⁸⁵¹ Hearing Day 4, p. 122, ll. 3-25, p. 123, ll. 1-25.

S COSTS

667. The Tribunal sets out below the Parties' submissions on costs, followed by its decision. As Spain has succeeded in its defence of the merits of the case, and there are no circumstances in the Tribunal's view which should alter the principle that costs follow the event, the Tribunal exercises its discretion under the SCC Rules to award Spain all of its legal fees and expenses, and its share of the Costs of the Arbitration.

S1 FREIF's Submissions

668. FREIF submits that it is entitled to recover all costs, fees and expenses incurred in this Arbitration, pursuant to Article 50 of the SCC Rules. According to the plain terms of Article 50, an award of reasonable costs is warranted when the outcome of a case or other relevant circumstances merit such an award. FREIF therefore acknowledges that Article 50 endorses the "loser pays" rule, whereby the unsuccessful party to an arbitration reimburses the costs and expenses of a successful party. It bases its request for an award of costs on the fact that it should prevail in the Arbitration.⁸⁵²

669. Moreover, FREIF submits that Spain contributed to the inefficiency of the Arbitration when it submitted an application to supplement its jurisdictional objections a fortnight before the Hearing scheduled for September 2019. According to FREIF, Spain was aware of the sale process as of 8 March 2019 but waited to file its application until two weeks prior to the scheduled Hearing. This application led to another document production phase, a separate round of briefing, an Asset Sale Memorandum that was prepared by The Brattle Group and costs associated with preparing for and cancelling the Hearing.⁸⁵³

670. On this basis, FREIF states that it incurred €4,242,595.72 in costs, fees and expenses in connection with this Arbitration, as summarised in the table below:

CATEGORY	AMOUNT
Legal Fees⁶	
• King & Spalding	€ 1,507,152.50
• Gómez-Acebo & Pombo	€ 1,345,872.40
Expert Fees & Expenses	
• The Brattle Group	€ 828,801.17
• Alberto Ceña	€ 24,000.00
Claimant's Costs & Expenses	€ 207,619.65
SCC Payments	€ 329,150.00
TOTAL	€ 4,242,595.72

⁸⁵² FREIF's Costs Submission, [4]-[5].

⁸⁵³ FREIF's Costs Submission, [6].

671. FREIF submits that these costs are reasonable in light of the complexity of this case, its duration, Spain's procedural misconduct, and the amount of harm that Spain's violations of the ECT caused to FREIF's investments.
672. FREIF further requests that Spain be ordered to pay post-award interest on costs at a compound rate to be determined by the Tribunal.⁸⁵⁴ In response to the Tribunal's request for further submissions on this issue, FREIF states that post-award interests on any costs award should be at a commercial rate of interest and that the yield on Spanish 10-year bonds is a reasonable proxy for a commercial rate of interest. In the context of post-award interests, FREIF says that the Tribunal also has discretion to add a premium in order to "facilitate prompt payment".⁸⁵⁵

S2 Spain's Submissions

673. Spain originally requested that the Tribunal "[o]rder the Claimants to pay all costs and expenses derived from this arbitration, including SCC administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred until the date of their actual payment".⁸⁵⁶ This request is said to be in accordance with Articles 49 and 50 of the SCC Rules which are also reflected in paragraphs 23.6 and 23.7 of Procedural Order No. 1.⁸⁵⁷
674. After the Tribunal requested further submissions on interest, Spain confirmed that details are missing in the existing record as to the date when the requested costs were incurred and that it would be "ready to waive its request that interest runs from the date when costs were incurred and accept that they run from the date of the award".⁸⁵⁸
675. The total costs incurred by Spain in the Arbitration amount to €3,059,686.62, comprising of:⁸⁵⁹
- (a) Advance on Costs paid to SCC: €329,150.00;
 - (b) Expert Reports: €650,000;
 - (c) Translations: €42,850.36;
 - (d) Courier Services: €1,344.82;
 - (e) Editing Services: €3,532.16;

⁸⁵⁴ FREIF's Costs Submission, [1]-[3], [10].

⁸⁵⁵ FREIF's Communication No. 86, dated 17 February 2021 citing *Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. Kingdom of Spain*, SCC Arbitration V (2015/150), Award 14 November 2018, [545]-[546].

⁸⁵⁶ Spain's Costs Submission, [12]; Spain's Submission on Interest on Cost, [8].

⁸⁵⁷ Spain's Costs Submission, [25].

⁸⁵⁸ Spain's Submission on Interest on Cost, [12]-[13].

⁸⁵⁹ Spain's Costs Submission, [13]-[23].

- (f) 2020 Hearing (virtual):⁸⁶⁰ €32,593.51;
- (g) 2019 and 2020 Hearings (cancelled): €22,863.55;
- (h) Other Costs:⁸⁶¹ €14,217.50;
- (i) Travelling Expenses: €13,134.72; and
- (j) Legal Fees: €1,950,000.

676. On the question of interest in an award for costs, Spain requests a “reasonable rate of interest”.⁸⁶² It considers that a short-term risk-free rate such as the six-month or one-year EURIBOR would be reasonable and says that it “will not be fooled into claiming the speculative interests that the Claimant is requesting from the Tribunal”.⁸⁶³

S3 Tribunal’s Decision

677. The Tribunal determines that Spain is entitled to recover the entirety of its costs from FREIF. The principal source of the Tribunal’s authority to award costs and the parameters thereof are founded in the Parties’ agreement. In this regard, Articles 49 and 50 of the SCC Rules, which apply by express agreement of the Parties at Article 26(4)(c) of the ECT, provide that:

Article 49 Costs of the Arbitration

[...]

(6) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party’s contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

Article 50 Costs incurred by a party

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party’s contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

678. FREIF acknowledges that Article 50 endorses the “loser pays” rule.⁸⁶⁴ As Spain was entirely successful in this Arbitration on its merits, it should not be out of pocket for having to defend itself against what has been determined to be unmeritorious claims. There is no contest regarding the reasonableness of Spain’s costs. Once payments

⁸⁶⁰ Includes the services of the IAC online virtual platform, realtime transcription services (Spanish-English) and translators services.

⁸⁶¹ Costs of meeting room rental at the Madrid Chamber of Commerce during the 2020 Hearing (virtual) due to COVID-19 restrictions.

⁸⁶² Spain’s Submission on Interest on Costs, [4]-[6].

⁸⁶³ Spain’s Submission on Interest on Costs, [7].

⁸⁶⁴ FREIF’s Costs Submission, [4].

made to the SCC towards the Costs of the Arbitration are subtracted, Spain's legal fees total €2,730,536.62 while FREIF's total €3,913,445.72. This means that FREIF's legal fees are more than 43% greater than Spain's.

679. The only submission FREIF makes regarding the efficiency of the Arbitration relates to the costs associated with Spain's application to introduce its supplementary jurisdictional objection on the "fork in the road" issue and the adjournment of the September 2019 Hearing. It will be recalled that in Tribunal's Communication No. 62 dated 6 December 2019, the Tribunal reserved its decision in relation to costs on this issue and stated:

Accordingly, the Tribunal proposes to note the submissions made so far and to invite the Parties in due course to deal more fully with this question when addressing the issue of costs for the purposes of the Tribunal's Final Award.

680. FREIF claims that because of Spain's application, it incurred significant costs amounting to more than €694,345.55. These costs are broken down as follows:

- (a) €318,438.50 for King & Spalding's preparation for the cancelled hearing and pleadings on the Supplementary Jurisdictional Objection;
- (b) €245,552.60 for Gómez-Acebo & Pombo's preparation for the cancelled hearing and pleadings on the Supplementary Jurisdictional Objection;
- (c) €130,354.45 for The Brattle Group's preparation of the Asset Sale Memorandum; and
- (d) Last minute hearing cancellation costs. These cancellation costs are not itemised separately from the costs of the actual Hearing in the break down provided by FREIF and thus cannot be determined.⁸⁶⁵

681. The Tribunal declines to award these costs to FRIEF. It notes that the actual reason for the adjournment of the September 2019 Hearing was due to Spain's discovery of the Asset Sale and a need for further document production on this topic. Spain's application to introduce its supplementary jurisdictional objection occurred on 18 November 2019, following the further document production phase.

682. The Tribunal has taken the view that the conduct of Spain in raising the question of the Asset Sale was not conduct which should count against it in the exercise of the Tribunal's discretion on costs. The Asset Sale issue and the required disclosure were, in the Tribunal's view, matters which Spain was entitled to explore given the way in which FREIF put its claim for damages. There is no evidence that Spain had long been aware of the Asset Sale and had committed "misconduct"⁸⁶⁶ by deliberately waiting until a fortnight before the Hearing to raise the issue.

⁸⁶⁵ FREIF's Costs Submission, p. 7.

⁸⁶⁶ FREIF's Costs Submission, [5].

683. Therefore, in these circumstances, the Tribunal declines to differentiate the costs of either the additional process of disclosure or of the adjournment of the proceedings from the other costs in the Arbitration. It considers that Spain's costs should not be diminished with regard to the costs associated with these steps nor that it is appropriate for FRIEF to be awarded the cost of these steps.
684. FRIEF has made no further submissions regarding how costs should be awarded if it succeeds only on the jurisdictional objections and not on the merits. The supplementary jurisdictional objection, along with other jurisdictional objections are dealt with in the Tribunal's Award in Parts N4, O3 and P5.
685. Although the Tribunal does not accept the submissions of Spain in relation to two of the jurisdictional objections, this does not, in the Tribunal's view, mean that it should be concluded that Spain was not the successful party in the proceedings. Awarding costs on an issue-by-issue basis by differentiating between jurisdictional arguments distracts from the overall outcome of the case in which Spain prevailed. In any event, there is no material before the Tribunal from which a breakdown of costs between jurisdictional issues and merits could be attempted.
686. The Parties are jointly and severally liable to pay the Costs of the Arbitration. As between the Parties, FRIEF is to pay Spain the entirety of Spain's share of the Costs of the Arbitration. The Costs of the Arbitration have been set by the SCC as follows on 15 February 2021 (Value Added Tax must be added to the below amounts where applicable):
- (a) the fees and expenses of Professor Douglas Jones AO amount to €249,000 (fees) and €435 (expenses), in total €249,435;
 - (b) the fees and expenses of Professor Thomas Clay amount to €149,400 (fees) and €373 (expenses), in total €149,773;
 - (c) the fees and expenses of Mr C. Mark Baker amount to €149,400 (fees) and \$9,451.14 (expenses); and
 - (d) the Administrative Fee of the SCC amounts to €60,000.
687. Finally, Spain has requested a reasonable rate of interest on its costs claim from the date of the Award until the date of payment. As both Parties requested interest on their cost claims, there is no dispute that the Tribunal has discretion to award interest on any costs. The Tribunal is also of the view that an award of interest would incentivise payment and is therefore minded to award Spain interest on its costs.
688. Spain has suggested that the 6-month or 1-year EURIBOR would be a reasonable rate. On closer examination of the rates, as of 16 February 2021, both the 6-month and 1-year EURIBOR are negative, with the 6-month EURIBOR being -0.520% and the 1-

year EURIBOR being -0.500%.⁸⁶⁷ The EURIBOR has also been negative for at least the past five years.⁸⁶⁸

689. The Tribunal therefore does not consider the EURIBOR to be a reasonable rate to apply as a negative interest rate would not fulfil the purpose of awarding post-award interest, which is to facilitate prompt payment. Instead, the Tribunal adopts the Spanish Government 10-year bond yield rate contended for by FREIF as a reasonable, commercial rate of interest.
690. For those reasons, the Tribunal orders that FREIF pay Spain the sum of €2,730,536.62 to cover Spain's legal fees and expenses, and orders FREIF to pay the entirety of Spain's share of the Costs of the Arbitration. It awards simple interest from the date of the Award at the rate of the Spanish Government 10-year bond yield prevailing on that date, until full payment by FREIF.

⁸⁶⁷ <https://www.euribor-rates.eu/en/current-euribor-rates/>

⁸⁶⁸ <https://www.euribor-rates.eu/en/euribor-rates-by-year/>

T DISPOSITIVE ORDERS

691. In this Arbitration between:

- (a) the Claimant, FREIF Eurowind Holdings, a private limited liability company incorporated under the laws of England under registration number 7803962, whose address is 12 Throgmorton Ave, London EC2N 2DL, United Kingdom; and
- (b) the Respondent, the Kingdom of Spain

in disposition of all claims and requests for relief arising in these proceedings, dismissing all arguments, submissions, claims and requests to the contrary, the Tribunal hereby:

- (c) declares that the Tribunal has jurisdiction under the ECT for all of FREIF's claims, with the exception that it has no jurisdiction to determine whether the tax imposed by Law 15/2012 violates Spain's obligations to FREIF's investment under the ECT;
- (d) dismisses all of FREIF's claims on the merits as Spain has not violated Part III of the ECT and international law with respect to FREIF's investments;
- (e) orders FREIF to pay Spain the sum of EUR 2,730,536.62, being the legal costs incurred by Spain;
- (f) orders FREIF to pay Spain EUR 304,304 and USD 4,725.57, being the entirety of Spain's share of the Costs of the Arbitration; and
- (g) declares that simple interest on the above amounts shall accrue from the date of this Award at the rate of the Spanish Government 10-year bond yield prevailing on that date, until full payment by FREIF.

692. A party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with the Stockholm District Court within three months from the date when the party received this award.

This Award is duly signed and executed in 4 original copies as follows:

Place of Arbitration: Stockholm, Sweden

This Award is made and signed on this 8th day of March, 2021.

Signed by Chairperson

PROFESSOR DOUGLAS JONES AO

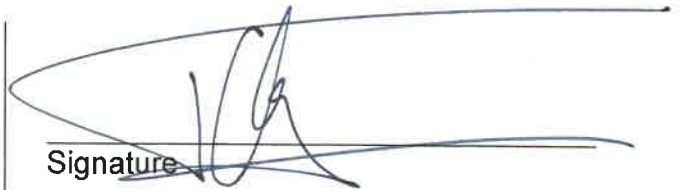
Signature



Signed by Co-Arbitrator

PROFESSOR THOMAS CLAY

Signature



Signed by Co-Arbitrator

MR C. MARK BAKER

Signature

