INFRACAPITAL F1 S.A.R.L and INFRACAPITAL SOLAR B.V. v The Kingdom of Spain
ICSID Case No ARB/16/18

Partial Dissenting Opinion

By Professor Peter D Cameron

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Summary

1. While I am in agreement with my distinguished colleagues on several points in the Decision on Jurisdiction, Liability and Directions on Quantum, I do not agree with some of their conclusions on liability and on the reasoning adopted to reach those conclusions. As a consequence, we differ on matters of quantum.

2. With respect to the first, matters on which we agree, I share the view of the Tribunal on its finding on jurisdiction: it has jurisdiction to hear the dispute. Further, I agree with the Tribunal on its finding on the TVPEE: it lacks jurisdiction to hear this element of the claim. Finally, I agree with the Tribunal that the Respondent is in breach of Article 10(1) ECT: specifically, I agree that the Claimants were denied a reasonable rate of return (RRR) as legitimately expected according to Law 54/1997, and that the use of a 'clawback' mechanism was a breach of the FET. I agree that for the latter breaches Claimants are entitled to compensation.

3. For reasons explained below, I do not agree with the Tribunal in its other findings on the merits (Section VI), or the reasoning it has provided to support them. In particular, I differ from my colleagues in five main areas:
   (i) our understanding of 'stability' in relation to Article 10(1) of the ECT, sentences one and two (section C of the Decision);
   (ii) our assessment of the legitimate expectations of Infracapital F1 S.A.RL. and Infracapital Solar B.V. in relation to the measures taken by Respondent in 2012-2014 in relation to Claimants' investments and the protection they deserved under the ECT (section D of the Decision);
   (iii) our assessment of the RRR in the 1997 Act, and its relation to subsequent legislation, especially between 2007 and 2011 (section D, ¶ 587, and section F);
   (iv) our assessment of the justification for the measures taken in relation to the Tariff Deficit ((section F, ¶ 673-674); and finally
   (v) our assessment of the significance of the registration requirement (section D, ¶ 599 and section H, ¶ 791).

4. Given the above, my views on the damages to be awarded to the Claimants (section VII of the Decision) differ from those of the majority. These views will however only be noted in the dissent since I do not consider their elaboration to be necessary in the light of the majority's findings.

5. Despite the above noted differences, I acknowledge and accept my duty to work with the Tribunal in the following stages of the process after this Decision.

Introduction: The Jurisprudential Context of the Spanish Cases

6. I think it worth noting at the outset that in this matter as in others, the Tribunal is not bound by previous decisions in its approach to the resolution of the dispute, but may nonetheless take relevant cases into account, especially when they are close factually and in terms of the issues that they raise. Previous decisions may be persuasive even though a tribunal will resolve the issues in a claim based on its own independent analysis, rather than on the basis of the decisions of other tribunals"[1]. A confirmation of arbitral discretion and independence seems more appropriate than usual since the Tribunal's Decision follows what is now a long line of awards, decisions and dissenting opinions, all arising from measures taken by the Respondent in 2012-14 with respect to its renewable energy regime. In the course of the arbitral proceedings in this matter, both parties have requested the Tribunal to place new awards, decisions, and dissents on the record, as they have become available, with sequential submissions as to the relevance of the findings and arguments they contain. In addition to the submission of new legal authorities in the post-hearing briefs, additional legal authorities were subsequently added to the record: namely, three awards, three decisions and five

[1] Cf. statements to this effect by tribunals in *Suez et al v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2019, ¶ 189; *EDF International et al v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1022; *Ioan Micula et al v Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020, ¶ 352 ("… the closer other cases are to the legal issues and factual circumstances of this case, the more persuasive the decisions in those cases may become. But they have no more weight than that"; *Eskosol S.p.a. In Liquidazione v The Italian Republic*, ICSID Case No ARB/15/50, Award, 4 September 2020, ¶ 278: "(i)n any event, and for the avoidance of doubt, the Tribunal emphasizes that it resolves the pending issues in this claim based on its own independent analysis, and not on the basis of the decisions of other tribunals".

dissenting opinions[2]. The Tribunal agreed to these requests. If it had wished to conduct its deliberations in a jurisprudential bubble isolating itself from this evolving case law, it is clear from these requests to update the record that the parties did not want it to do so.

7. Since the Claimants first registered their claim, the body of jurisprudence has acquired formidable proportions. To my knowledge, there are now 20 awards and 9 decisions taken by tribunals addressing claims arising from these measures[3]. They have been accompanied by 14 dissenting and/or separate opinions[4]. All of this has arisen from

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[2] ICSID Case No ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 103-108 (hereinafter 'Decision').

[3] *Charanne B.V. + Construction Investments* v Spain, SCC Case No V 062/2012, Final Award, 21 January 2016; *Isolux Netherlands BV v Spain*, SCC Case V 2013/153, Final Award, 17 July 2016; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l v Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017; *Novenergia II – Energy and Environment (SCA)(Grand Duchy of Luxembourg) v Spain*, SICAR, SCC Case No. 2015/063, Final Award, 15 February 2018; *Masdar Solar & Wind Cooperatief U.A. v Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018; *Infrastructure Services Luxembourg S.a.r.l. and Energia Termosolar B.V.* v Spain (formerly Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V.), ICSID Case No. ARB/13/31, Award, 15 June 2018; *Foresight Luxembourg Solar 1S.a.r.l. et al (inc. Greentech) v Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l. v Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, and Award rendered on 11 December 2019; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.* v Spain, ICSID Case N. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 and Award, 31 May 2019; *9REN Holding S.a.r.l. v Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019; *Cube Infrastructure Fund SICAV and others v Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 and Award, 15 July 2019; *SolEs Badajoz GmbH v Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019; *Infrared Environmental Infrastructure GP Limited and others v Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019; *OperaFund Eco-Invest SICAV PLC & Schwab Holding AG v Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019; *BayWa re renewable energy and BayWa re Asset Holding v Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 and Award, 25 January 2021; *Stadtwerke München GmbH, RWE Innogy GmbH and others v Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019; *RWE Innogy GmbH and RWE Innogy Aresa S.A.U. v Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019 and Award, 18 December 2020; *Watkins Holding S.a.r.l, Watkins (NED) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L., Parque Eolico Marmellar S.L. and Parque Eolico La Boga S.L. v Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020; *PV Investors v Spain*, UNCITRAL, Final Award, 28 February 2020; *Hydro Energy 1 S.a.r.l. and Hydroxana Sweden AB v Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020; *Cavalum SGPS, S.A. v Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020; *STEAG GmbH v Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020; *FRIEF Eurowind Holdings Ltd v Spain*, SCC Case V 2017/060, Final Award, 8 March 2021; *Eurus Energy Holdings Corporation v Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021.
I note that a further award was issued while this Opinion was being written: it is not part of the record here.

[4] *Charanne*: Dissenting Opinion of Prof Dr Guido Santiago Tawil, 21 December 2015; Isolux (Spanish only): Opinion disidente del Arbitro Prof Dr Guido Santiago Tawil, 6 July 2016; *Foresight Luxembourg*, SCC 2015/150: Partial Dissent by Raul E Vinuesa; *RREEF*: Partially Dissenting Opinion of Professor Robert Volterra to the Decision on Responsibility and the Principles of Quantum, 30 November 2018; *Cube Infrastructure*: Separate and Partial Dissenting Opinion by Prof Christian Tomuschat, 19 February 2019; *OperaFund*: Dissent on Liability and

the same set of measures as are at issue in the present arbitration, as well as the same Respondent and the same treaty, a concentration of legal effort that is almost certainly unique in international investment law. It has raised the level of scrutiny about the meaning of several investment-related provisions of the Energy Charter Treaty (ECT), especially Article 10(1), to a level that is without precedent in the history of that treaty.

8. It is therefore not surprising that the Tribunal has considered the reasoning and outcomes of previous cases, allowing for differences of fact concerning the timing, manner or type of investment. It has referred to them at many points in its Decision.

9. With only four exceptions, all of the tribunals to date have found the Respondent liable for a breach of Article 10(1) of the ECT[5]. Among the more recent awards and decisions, tribunals have been influenced in their assessment of claims of a breach by the theory that the core expectation of investors is limited to a reasonable rate of return (RRR). It was evident in *RREEF*, and subsequently, *PV Investors*, *BayWa* and *Cavalum*[6]. It has also been the subject of vigorous criticism by a number of

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Quantum of Professor Philippe Sands, 13 August 2019; *Stadtwerke*: Dissenting Opinion of Professor Kaj Hober, 20 November 2019; *BayWa*: Dissenting Opinion of Horacio A Grigera Naon, 2 December 2019; *Watkins Holding*: Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri, 9 January 2020; *PV Investors*: Concurring and Dissenting Opinion of Charles N. Brower, 28 February 2020; *Cavalum SGPS, SA*: Dissenting Opinion of David R Haigh, 31 August 2020 (12,984 words, 325 paragraphs); *STEAG*: Dissenting Opinion of Pierre-Marie Dupuy (in Spanish), 8 October 2020; *RWE Innogy*: Separate Opinion of Mr. Judd L. Kessler, 1 December 2020; *Eurus*: Partial Dissent of Mr Oscar M. Garibaldi, 17 March 2021.

[5] The exceptions are: *Charanne BV Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No V 062/2012, Award, 21 Jan. 2016; *Isolux Netherlands B.V. v Kingdom of Spain*, SCC Case V 2013/153, Award, 17 July 2016; *FREIF Eurowind Holdings (United Kingdom) v Kingdom of Spain*, SCC Case V 2017/060, Final Award, 8 March 2021; *Stadtwerke München et al v Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019. I note, however, that the scope of the breach found in some of the other cases was limited: for example, in *Eurus Energy Holdings Corporation v Spain*, ICSID Case No. ARB/16/4, the breach of Article 10(1) ECT was limited to the "retro-active claw back by Spain, in and after 2013, of subsidies earlier paid…" (¶ 467(c)).

[6] *RREEF Infrastructure (G.P) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶¶ 517-524; *The PV Investors v Spain*, PCA Case No 2012-14, 28 February 2020, ¶¶ 649-651, 666-667, 689, 713-715; *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, ¶ 614; *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020, ¶¶ 162, 180, 197-199, 533, 596-601, 610, 625-626, 629, 631-632, 655; and also in *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, ¶¶ 458-459; *FREIF Eurowind Holdings (United Kingdom) v Kingdom of Spain*, SCC Case V 2017/060, Final Award, 8 March 2021, ¶¶ 525, 538-539, 558-562, 571, 587; and P-M Dupuy, Dissenting Opinion:

distinguished arbitrators in several dissenting opinions[7]. As this partial dissenting opinion will show, I share the doubts about this theory as expressed in both these dissenting opinions, and, expressly or implicitly, in many of the awards to date[8].

10. In this context of arguments and findings made by some of the most able minds in international investment arbitration, it is perhaps worth noting the need for a tribunal to carefully assess the fact pattern in a particular investment claim before making a finding of law. Doctrines have their value but should not obscure the simple truth that among the 'Spanish cases' on various kinds of renewable energy, there are important differences in the facts presented by the many claimants. Even when the influence of this body of jurisprudence is apparent and frequently acknowledged as in this Decision, there is a need to defer to a specific fact pattern and in my view that is what the Decision fails to do.

A. The ECT Requires Contracting Parties to Provide 'Stable Conditions'

My understanding of the first two sentences of ECT Art 10(1) and the obligation they give rise to; the importance they give to 'stability' and what that means, especially in the context of the energy sector.

11. The primary source of law applicable to resolve this dispute is the ECT[9]. In its very first sentence, Article 10(1) of the ECT requires contracting parties "to encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments…". It continues in the second sentence to add that "(S)uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment". Interpretation of these two sentences has provoked much discussion among arbitral

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STEAG GmbH v Kingdom of Spain, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Responsibility and Directions on Quantification of Damages, 8 October 2020.

[7] For example, Professor Robert Volterra in *RREEF*, Judge Charles C. Brower in *PV Investors*, Dr. Horacio A. Grigera Naon in *BayWa* and Mr David R. Haigh in *Cavalum*.

[8] For example, *Novenergia II v Spain*, Final Award, ¶¶ 673, 674; *Cube v Spain*, Decision, ¶ 473; *SolEs Badajoz v Spain*, Award, ¶ 443.

[9] Decision, ¶ 488.

tribunals[10]. Clearly, they are linked. However, the ECT is unusual among international investment agreements in expressly giving such weight to the notion of stability in relation to the making of investments. [11] One may ask whether there is a connection between this unusual emphasis and the fact that this is the only treaty instrument explicitly concerned with investment activity in the energy sector. The Tribunal has chosen not to consider this contextual point in their analysis of the relationship between the first two sentences of Article 10(1), and instead to consider 'stability' in a general manner before examining it within the framework of the FET standard in sentence two. While I agree with the Tribunal that the linkage between the first two sentences is evident and the FET standard of protection should be the starting point for the analysis of liability, I consider the wording of the first sentence with respect to 'stable conditions' important to understanding and interpreting that FET standard in a manner that respects the distinct legal character of the ECT.

Energy Investments

12. Both parties have provided the Tribunal with characterisations of energy investments that inform their understandings of the ECT. For the Claimants, these investments differ from many other types of investments in being capital-intensive with high up-front costs, as well as long-term in character due first to the period required for the investor to receive a return of and on their investment, and due second to their decades-long operating horizons.[12] For the Respondent, this is a "highly strategic and well-regulated sector" in the territories of all the ECT Contracting Parties[13.] For each

[10] For example, *BayWa v Spain*, Award, ¶¶ 457-463; *PV Investors v Spain*, Award, ¶¶ 566-571; *Novenergia II v Spain*, Final Award, ¶¶ 642-646; *Antin Infrastructure Service 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, ¶¶ 529-530; *Blusun S.A. Jean-Pierre Lecorcier and Michael Stein v Italian Republic,* ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶¶ 315, 319; contrast with *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 163.

[11] For example, in the various Argentine cases that concern energy utilities, the cases based on the US-Argentina BIT could refer to Recital 4 of the Preamble that states: "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment…", while those brought under the France-Argentina BIT or the UK-Argentina BIT had no comparable point of reference: see *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 124-125; *Occidental Exploration and Production Company v The Republic of Ecuador*, UNCITRAL Arbitration, Final Award of 1 July 2004, LCIA Case No UN 3467, ¶ 183; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, ¶¶ 168-170.

[12] Claimants' Memorial on the Merits (hereinafter 'Cl. Memorial'), ¶ 225.

[13] Rejoinder on the Merits and Reply on Jurisdiction (hereinafter 'Resp. Rejoinder'), ¶ 1085.

of the parties to this dispute, the above features provide context for construction of the ECT text, such as its provisions on stability for energy investors and the need for flexibility for states to respond to changes in the public interest[14]. Commentary by scholars cited by the parties, including that of my late colleague, Professor Thomas Waelde, is drawn on to support the special character of these investments[15]. Of course, such tensions between investor requirements and state discretion are no doubt evident in other economic sectors, but I would argue that they are much more evident in the energy sector than in any other, and that the ECT attempts to manage such tensions in a way that contributes positively to the promotion and protection of investments in the territories of its Contracting Parties.[16] The unusual and explicit emphasis on 'stable conditions' in the treaty text is easier to understand in this light.

13. In all parts of the energy sector, from renewable energy to hydrocarbons and nuclear, the role of the state is pervasive. It facilitates investment, provides regulatory oversight, often provides a variety of guarantees on remuneration, is the ultimate owner of energy resources and sometimes acts directly or indirectly as a participant in the energy activity concerned. Given the strategic interest that any state has in its domestic energy economy, it is hardly surprising that this is a sector in which the state has and retains extensive regulatory oversight. The pervasive role of energy in everyday life of any society underlines this strategic interest of the state. However unremarkable such observations may be, they are worth noting here since they distinguish the energy sector from many other sectors: financial services, information

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[14] Cl. Memorial, ¶¶ 224-226: "(t)hese particular characteristics make a stable, predictable and transparent legal and regulatory framework a sine qua non for energy investments" (at ¶ 226); Resp. Rejoinder, ¶¶ 1085-1091: "in a sector as strategic as the energy sector, States enjoy a 'margin of appreciation' that should be taken into account by the Arbitral Tribunals when applying the corresponding Treaty" (at ¶ 1090).

[15] Cl. Memorial, ¶¶ 223, 228; Counter-Memorial on the Merits and Memorial on Jurisdiction (hereinafter 'Resp. C-Memorial'), ¶ 1113; Claimants' Reply Memorial on the Merits and Damages and Counter-Memorial on Jurisdiction ('hereinafter Cl. Reply'), ¶ 483; Resp. Rejoinder, ¶ 1078.

[16] This point is made in *Micula*, in several of the Italian renewable energy cases and in some of the Argentine cases. See, for example, *Ioan Micula et al. v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 515, 516; *Sunreserve Luxco Holdings S.a.r.l. v The Italian Republic*, SCC Arbitration V (2016/32), Award, 25 March 2020, ¶¶ 684, 685; *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.77; *El Paso International Company v The Republic of Argentina*, ICSID Case No. ARB/03/15, Award, ¶ 358; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 236.

technology, and most forms of manufacturing, for example. Yet, despite this pervasive role for the State, private and often foreign capital investment have been actively solicited by States with results that have often been highly successful for both parties, encompassing hydrocarbons and conventional electricity as well as wind and solar power. This pattern of investment flows has been supported by the kind of legal guarantees the ECT drafters assembled in Article 10, and explains at least in part why there is an emphasis on 'stable conditions' for what are typically long-term, capital intensive and frequently cross-border investments. Political risk for such investors is real and has to be anticipated in the legal arrangements for an investment. Several tribunals in cases arising from Spain's Disputed Measures have noted this sensitivity of energy investments to political risk[17], making risk allocation between the parties a matter of great practical importance. At a high level, the ECT tries to manage the political risk facing investors in a way that is compatible with the Contracting States' recognition of sovereignty and sovereign rights in Article 18 (implicitly a right to regulate). In addition to Article 10 (1), there are provisions in the ECT which, as the parties correctly note, recognize and support both the role of stability for investors and which impose some limits on the scope of State power[18].

14. Addressing the object and purpose of the ECT in Article 2, the tribunal in *Plama* found that "a balanced interpretation which takes into account the totality of the Treaty's purpose is appropriate". This means that the long-term relationships in the energy sector promoted by the ECT have to be balanced against the promotion of the economic interests of the contracting parties.[19]

What 'stability' means

15. The above notion of balance appears in the Tribunal's observation that the notion of stability is "linked to an expectation of continuity and predictability as to future conduct of a State"[20]. However, after noting the other conditions in the first sentence

[17] *Watkins*, for example, ¶ 451.
[18] Among the relevant provisions in this context are Articles 12 (Compensation for Losses), 13 (Expropriation) and 21 (Taxation).
[19] *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 167.
[20] Decision, ¶ 518.

and the obligations on States under the FET standard, it has nothing further to say about 'stable conditions' and what this obligation in Article 10 might imply for a contracting party; instead, it concludes that the ECT requirement to provide stable conditions "is not an expression of a higher level of protection than the protections of the FET standard"[21]. Further, the Tribunal concludes that the reference to 'stable conditions' in the first sentence does not affect "the inherent right of States to alter the legal framework in response to changes in circumstances provided that there is an economic or social justification to do so"[22], citing *PV Investors* and *Eurus* in support of this. To the extent that this reminds us of the need to balance any notion of stability of investor rights with state prerogatives and responsibilities in the highly regulated energy sector, it adds nothing new.

16. Next, the Tribunal proceeds to conclude that "as a general proposition" a fundamental or continual change in regulations would not necessarily be a breach of the FET standard[23], and that "the duty to provide stable conditions does not protect investors from any and all policy and regulatory changes that result in an uncertain investment environment"[24]. This view is said to be subject to tests of reasonableness and good faith[25]. All of these conclusions relate to the permissible degree of change within the scope of the ECT Article 10. Broadly, there appear to be three kinds of change implied in these statements: (1) a prohibition on any change in law; (2) a measure that imposes small-scale change, and finally (3) a measure which brings about fundamental or continual change. In the ECT context, a requirement to encourage and create 'stable conditions' does not seem to imply the kind of obligation often found in long-term contracts between investors and states. Some versions of a stabilization clause might imply a freezing of the legal regime at the time the investment is made, such as (1) above. This is clearly not the case here, and the parties are in agreement on this[26]. Since they admit the possibility of change in the regulatory regime at a later date, the

[21] Decision, ¶ 524.
[22] Decision, ¶ 521.
[23] Decision, ¶ 527.
[24] Decision, ¶ 528.
[25] Decision, ¶ 527.
[26] Resp. C-Memorial, ¶¶ 1202-1204; Cl. Reply, ¶¶ 526-528.

question then becomes how extensive that change may be with respect to existing investments without causing a breach of Article 10(1)[27]. That involves the kind of legislative change in (2) and (3) above. The scope and depth of such changes is clearly central to this case, not the question of whether any changes may be made by the State. For the Tribunal, some of the changes in (2) may result in an uncertain investment environment, but it also recognizes a category of "fundamental or continual change", which would in its view not necessarily be a breach of the FET standard. This falls into the third category above. Other tribunals faced with similar facts as in this case have attempted to characterise the difference between (2) and (3), as the Tribunal notes[28]. Indeed, the former category, 'changes with minimal effect', was characterised by the tribunal in *Cavalum* in the following manner:

> …the changes introduced by RD 1565/2010 and RDL 14/2010 were not radical. They did not alter the essential elements of the scheme. They were not disproportionate or discriminatory. They were well within Spain's margin of appreciation and within its regulatory powers under international law in general and the ECT in particular" (para 564).

17. Where such changes do have economic effects on *existing* investments, compensation for the relevant investors can be expected to follow. Indeed, that is what happened with the 2010 regulatory measures in Spain, when both RDL 14/2010 and Law 2/2011 after it, provided compensation for RD661 plants (unlike RD 1578 plants), to the extent that such plants suffered negative economic impacts[29]. This confirms a commitment to 'stable conditions', even when the changes in law are minimal.

18. What the above suggests is a 'middle ground' of legislative change, in which state actions may be taken without undermining the basic arrangements on which the investor's calculations were made, thereby respecting the predictability and continuity which this Tribunal has noted are linked to the notion of stable conditions.

[27] Investments not yet made clearly fall in a quite different category in which the State's discretion to innovate is very wide.
[28] Cl. Reply ¶¶ 520-521, and the citations there.
[29] Cl. Memorial, ¶¶ 133, 138, 146; Cl. Reply, ¶ 270, PHB, ¶¶ 50, 53.

To this we might add the element of consistency.[30] Some negative impacts on the investment may be permissible but their overall effects should be ones that preserve the continuity of business conditions on a basis that closely resembles that on which the investor's forward-looking calculations were made prior to committing the investment.

19. The category of 'fundamental or continual change' (category (3) above) would seem likely to challenge any definition of 'stable conditions' that respects notions of predictability and continuity, if it were to apply to existing investments. On the face of it, it implies legislative actions that up-end the economics predicted for the investment or its potential for being continuously operational or both, and would therefore seem to breach the undertaking given by contracting parties to the ECT.[31]

The FET Standard

20. The reference to "(s)uch conditions" at the start of the second sentence of Article 10(1) establishes a link between the two sentences and clearly relates them to the FET standard. This takes us into familiar territory in international investment law. In relation to stability, there is a line of cases concerning investments in the regulated energy utility sector, that treat the expectation of a stable and predictable legal framework as part of FET. In *Enron v Argentina*, for example, the tribunal held that "a key element of fair and equitable treatment is the requirement of a stable framework for the investment"[32]. On that broad view of FET, the requirement to encourage and create stable conditions for investors would seem to be absorbed. The dominant assumption among tribunals and scholars is that the FET standard includes a protection of the investor's expectation of a stable legal and business framework,

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[30] *InfraRed Environmental Infrastructure v Spain*, ICSID Case No. ARB/14/12, Award 2 August 2019, ¶ 368.
[31] Compare, *Cube Infrastructure Fund SICAV v Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 19 February 2019, ¶ 427.
[32] *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 260; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 124; *Occidental Exploration and Production Company v Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 183; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 173.

although this assumption reflects a development in jurisprudence that has occurred in the years since the ECT was drafted and has largely been driven by non-ECT cases. Indeed, at the time the ECT was drafted and signed by the contracting parties, the doctrine of legitimate expectations was not yet associated with FET[33]. Whether that explains the emphasis on 'stable conditions' in the first sentence or not is a matter that should not concern us here, although its inclusion may provide further support for the argument that legal protection of stable conditions is especially important in this economic sector. What is clear is that a reading of the two sentences together requires an interpretation of FET that gives due weight to the expectation of a stable legal and business framework or else the obligation to provide stable conditions in the first sentence is lost. Given the large body of case law on the FET and on the meaning and scope of legitimate expectations as an element of it, a reasonable and efficient course for a tribunal would seem to be to interpret the two sentences together rather than to seek to develop the first sentence as an autonomous standard of legal stability. The latter is a road that may be taken but it is not necessary (or efficient) to do so[34.]

21. However, as the Tribunal recognizes in the present case, the requirement to provide stability and predictability through FET does not mean that the regulatory power of the state is 'frozen' or petrified in some sense, defined by the Tribunal in *AES Summit Generation v Hungary* as "a covenant not to change the relevant law, usually for a certain period".[35] Citing the *CMS* award, also involving Argentina, the *Enron* tribunal noted that it was "not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment

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[33] The Tribunal notes that legitimate expectations is not expressly contained as an obligation of host states under Article 10(1) of the ECT: Decision, ¶ 564.
[34] A notable exception is *OperaFund Eco-Invest SICAV plc and Schwab Holding v Kingdom of Spain,* ICSID Case No. ARB/15/36, Award, 6 September 2019, which found separate breaches of FET and the stability obligation: ¶¶ 508-513. In non-renewable energy cases, claims concerning the obligation to provide a stable obligation under Art 10(1) have treated stability as one of the elements of FET and linked it to the protection of the investor's LEs (see *Plama* and *Electrabel*).
[35] *AES Summit Generation Limited v Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 9.3.25.

and its protection has been developed with the specific objective of avoiding such adverse legal effects."[36] This issue of balance in state measures between measures that *adapt* a legal framework and those that have broader effects on existing investments has been addressed on many occasions by arbitral tribunals. For example, in the *Charanne v Spain* award, the tribunal held that "an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest". This has echoes of an earlier ECT case, *Electrabel v Hungary*, in which the tribunal held that "it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently, and predictably, taking into account the circumstances of the investment"[37]. In this way, the foreign investor is not made to carry a disproportionate share of the burden on behalf of the host country's citizens. The task for the tribunal becomes one of identifying a possible breach of the investor's legitimate expectations, if it can prove that the investor relied on them to make the investment.

22. In conclusion, the wording in the first sentence of Article 10(1) of the ECT is clear in the sense that it elevates the creation of stable (and other) conditions for energy investments to a prime position in the promotion, protection and treatment of investors and investments. The implications of the wording can be debated, but its location as the first sentence of this important provision implies that considerable weight must be given to 'stable conditions' for investors, in addition to the plain reading of the ECT text. Of course, the language differs from that found in the various kinds of stabilisation clauses in foreign investment laws or investment contracts commonly used throughout the energy sector. It would also seem that the scope of the stable conditions that a state has to encourage and create will require the tribunal

[36] *Enron*, ¶ 261.
[37] *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.77.

to carry out, as one tribunal notes, "a complex task given that it will always depend on the specific circumstances that surrounds the investor's decision to invest, and the measure taken by the state in the public interest"[38]. However, the requirement in the first sentence of Article 10(1) in my view conditions the interpretation of FET in the second sentence in a way that supports the long line of cases that see stability as an important component of FET and the doctrine of legitimate expectations. Its inclusion in the first sentence signals to the interpreter of Article 10(1) that legal stability has a particular importance in the protection of energy investments under the ECT.[39] If the two sentences are treated together, this should not erase or modify the express language in the first sentence that attaches such weight to the creation of stable conditions for investors.

B. Legitimate Expectations of Claimant were Breached by the Disputed Measures

In certain limited circumstances general laws can create legitimate expectations, such as from an incentive-based, promotional RE regime; here, assurances that were relied upon by Claimants are specific, have a separate and a cumulative value, and were accompanied by extensive due diligence; as a result, the investor had a reasonable expectation of what 'stable conditions' meant in relation to the legal regime (some changes but not removal of the entire regime).

23. The Tribunal has set out a view of legitimate expectations in Section D which I am not able to agree with. In addition, the Tribunal has an assessment of the specific assurances that the Claimant has relied upon in making its investment that I also do not agree with. The differences between my opinion and the majority's findings and the reasons for them are set out below.

[38] *AES Summit Generation Limited v Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 9.3.30.

[39] Of course, it may be observed that the concern of the ECT with then newly independent states played a role in drafting the text in the early 1990s. However, it requires no more than a superficial acquaintance with energy investments elsewhere, from Latin America to Asia and indeed in Europe, to appreciate that the offer of stability in the making of investments has a wider, global currency in this sector.

Legitimate expectations

24. Central to the Tribunal's view on this subject is the idea that sources of investor expectations taking the form of commitments based on general legislation cannot create expectations that the law will not change, in contrast to specific undertakings given to a specific investor. The Tribunal cites *PV Investors*, *Stadtwerke*, *Blusun* and *Charanne* in support, but acknowledges that other tribunals have differed on this point[40]. Applying this view, it rejects arguments that the Claimants had an expectation that the PV installations in which they invested would be entitled to an economic regime of RD 1578/2008 for 25 years [41]. In conclusion, the Tribunal finds that the investors "should have known at the time of their investment that there was no unalterable right to receive a fixed tariff for 25 years under the legal framework for renewable sources and they knew or should have known when they were executing the SPAs that changes to the remuneration regime to existing plants were a possibility."[42]

25. The first flaw in the above view can be traced back to its characterisation of stability that I have discussed in the previous section. A recurring assumption in the Tribunal's treatment of legitimate expectations under the FET standard is that stability is equivalent to 'no change in law'; with respect to general legislation, the argument then becomes that it cannot create an expectation that the law will not change or evolve according to circumstances, subject to an express provision to the contrary[43]. In my view, the requirement to create and encourage 'stable conditions', in the context of the ECT at least, permits a measure of legislative change by the host state and is certainly not limited to a freezing of the business conditions at the time of the investment. However, such change has to respect the fundamentals of continuity and predictability on which any investor must base its calculations about the making of an investment and ultimately its decision whether or not to invest. In the Tribunal's view,

[40] For example, the awards in *Masdar* and *Novenergia*, in which the tribunals held in cases with similar fact patterns that general legislation, representations and ancillary assurances made to foreign investors *can* induce them to invest in the Respondent's energy sector *and so create legitimate expectations that are protected under the ECT.*

[41] Decision, ¶¶ 563, 579, 602.

[42] Decision, ¶ 602.

[43] Decision, ¶¶ 565-566.

without a "specific and unambiguous assurance, promise or commitment by a competent authority" to freeze the legislation in favour of a specific investor as an inducement to invest, "an investor cannot legitimately expect that the legal framework will not change or evolve in future in response to changes in circumstances"[44]. Yet, as I have argued already, the statement misses the point entirely. As the pleadings in this dispute show, the Claimants have made it clear on several occasions that *some* change in the law was to be expected and not deemed to be incompatible with their business model[45]. Given the experimental character of regulation of the new PV sector at the time, this rather benign attitude towards a measure of possible legislative change is hardly surprising. Nor, in my view, is it incompatible with a view of stable conditions that permits continuity and predictability for an investor. Indeed, here as throughout its analysis, the Tribunal conflates two kinds of change in law, one of which is compatible with 'stable conditions' in Article 10(1) and one which is not (which a State may nevertheless adopt, but with the knowledge that compensation to investors may well be a consequence). In my view, the Disputed Measures had effects that were incompatible with an investor's expectations of a stable legal and business framework, as I shall explain below, and therefore have different implications from the first kind of change in law with respect to damages.

26. A second flaw lies in its slightly doctrinaire approach to legitimate expectations in relation to general legislation. I share the view of the tribunal in *Novenergia v Spain* that sought to frame the question not in terms of whether or not commitments can result from general statements in general laws or regulations, but "rather whether the statement or conduct *objectively* suffices to create legitimate expectations in the recipient"[46]. Similarly, as Professor Gary Born states in his opinion in *Wirtgen*, "(t)he decisive issue is not whether a state's undertaking is 'specific' or 'general', or statutory

[44] Decision, ¶ 566.
[45] For example, the witness testimony of Mr M Lief, a Director with the Claimants' companies, who led the work on the Spanish investments: "…we had factored in the risk of some minor legislative change over time (which we would expect in respect of any long-term investment in any jurisdiction)…" (First Witness Statement, 22 March 2018, at ¶ 56).
[46] *Novenergia II v Kingdom of Spain*, Case No. 2015/063, Final Award, 15 February 2018, ¶ 652 (emphasis in the original).

or contractual, but whether the statements and actions of the state provide a sufficiently clear commitment to give rise under international law to legitimate expectations or legal rights on the part of the investor".[47] Further, I note the view expressed by the tribunal in *El Paso v Argentina*, to the effect that what is 'specific' with respect to assurances depends on the circumstances of each case. In *El Paso*, the tribunal observed that there can be no general definition of what constitutes a specific commitment because it all depends upon the circumstances unique to each case. Two types of commitments could qualify as specific however: those "specific as to their addressee and those specific regarding their object and purpose".[48]

27. In this context, the significance of a cumulative and repetitive character of assurances was noted by the *El Paso* tribunal, when it found that:

> "a commitment can be considered specific if its precise object was to give a real guarantee of stability to the investor. Usually, general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely. [49]

28. Even if the distinction drawn by the Tribunal were assumed to be generally correct, and the Tribunal acknowledges that there are other views on this than its own, the legal regime applicable to the PV investments at issue here is far from being one of general application[50]. It is not only a bespoke one that suits the needs of investment in a particular kind of energy business, but it is deliberately shaped so as to attract inward investment from outside Spain to stimulate what was then a new industry and

[47] RL-0072: *Jürgen Wirtgen and others v Czech Republic*, PCA Case No. 2014-03, Dissenting Opinion of Arbitrator Gary Born, 11 October 2017, ¶ 12.
[48] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 375.
[49] *El Paso*, Award, ¶ 377.
[50] This point was made by Prof Dr Guido Santiago Tawil in his dissenting opinion in *Charanne B.V. Construction Investments S.A.R.L. v The Kingdom of Spain*, Arb No. 062/2012, ¶¶ 8-9. The relationship between the Royal Decrees and Law 54/1997, the scope of which covered the electricity sector generally, is discussed in ¶ 29 below.

one with challenging economics. The bespoke character is evident in the long-term FIT mechanism which became part of it from 2004 onwards and was one that any foreign investor familiar with this sector would recognize, understand and be able to work with since it was used by so many other governments in Europe for their renewable energy sector. Business calculations about capital and operating costs could draw upon the experience known and generally accessible when the relatively small group of interested investors elected to assess the 'offer' from the Spanish authorities, and take action or not within specified time-frames. This was a very specific kind of regulatory regime with a specific object and purpose, whose attractions were emphasised to prospective investors by the Respondent.

The Stability Assurances Relied Upon

29. Without a significant measure of commitment from the Spanish Government about the long-term stability of the regulatory regime, it is highly unlikely that Spain's invitation to foreign investors would have succeeded on the scale that it did. The founding law, Law 54/1997, was only a framework creating a special regime for non-conventional electricity, setting out the idea of a reasonable rate of return, as Respondent notes, and making it clear in Article 30.4 that remuneration would "be supplemented by the payment of a premium under statutory terms set out in regulations…". In the first implementation measure, Royal Decree 2818/1998, the Preamble also made it clear that incentives were required to address the higher costs of renewable forms of energy which "do not allow them to compete in the free market". These incentives evolved to include ones for those generators that were especially efficient. The Tribunal makes much of the assurance of a reasonable rate of return in this fundamental Law as the core of the stability in the regulatory regime[51], but in practice the skeletal structure and this principle failed to attract investments on the desired scale in the initial years.

30. This situation changed as examples of stability commitments emerged with Article 40.3 of RD 436/2004, and Article 44.3 of RD 661/2007 and the protection of pre-

[51] Decision, ¶¶ 587, 600.

existing investments was continued in RD 1578/2008 RD. The Tribunal makes only brief comments on RD 1578/2008, focussing rather on the Fifth Additional Provision[52]. My own view is that RD 1578/2008 contained a commitment sufficiently specific in object and purpose for investors like Infracapital to rely upon in terms of its plain and ordinary meaning. The object of the Decree is "to establish an economic system" for PV facilities (Article 1) to which the regulated tariffs provided in Article 36 of RD 661/2007 are not applicable. The Decree applies to facilities in group b.1.1 (i.e. solar PV facilities) that have obtained definitive registration after 29 September 2008 in RAIPRE. Paragraph 5 of Article 11 states that:

> "The regulated tariff that is applicable to an installation, in accordance with this royal decree, will be maintained for a maximum period of twenty-five years from the later of the two dates: the date the installation is commissioned or it is registered in the pre-allocation payment Registry. This payment may never apply prior to its registration date."

31. The Preamble does refer to concerns about excessive remuneration but the Tribunal's comment about the absence of any reference in RD 1578/2008 to support for "a high tariff to PV investors" seems puzzling since the remuneration regime was expressly designed to distribute benefits in a way that incentivised the most efficient generators (and thereby benefit the Respondent's electricity system)[53]. This is quite different from a guarantee of a high tariff as seems to be implied here.

32. There has been some discussion of the meaning of the words in the Fifth Additional Provision to RD 1578/2008, which Respondent views as an advance notice of the changes that eventually occurred from 2012 onwards[54]. Compensation, the text of the Provision says, "may be modified" in 2012. Clearly, a State may make changes in its laws for future application, but the inward investor will be seeking assurances that investments once made will not be subject to changes of a retroactive kind that undermine the business calculations on which decisions to commit were based. My

[52] Decision, ¶¶ 578-579.
[53] Decision, ¶ 579.
[54] Resp. C-Memorial, 9 July 2018, paras. 667-671, 1177-1178; Cl. Reply, ¶¶ 280-290.

interpretation of these provisions differs from that of the Tribunal, which sees the wording of the Fifth Additional Provision as amounting to a warning to investors, or even as 'the writing on the wall' for such investments as are committed by that date. By expressly referring to the impact of "technological evolution of the sector", the wording is not oriented to existing plants since they cannot benefit from subsequent declines in costs. I agree with the Claimants' expert, Brattle, that this implies a review of FITs for *new* installations only "given that all existing plant will continue to face the high costs that applied during their construction"[55]. Moreover, the *Memoria Justificativa* for the Decree makes it clear that this planned review was to have a limited scope, affecting only the percentage variation rate of the tariff adjustment mechanism[56]. In the light of regulatory actions in 2010, this reading of the text appears to confirm the modest evolutionary changes that Spain had every right to make in its regulatory regime and which were compatible with its policy of continuing to attract significant amounts of inward investment into this sector. A *modification* is also quite different from the kind of sweeping legislative change that occurred in 2012-14. It is hardly synonymous with or a warning of actions to sweep away an entire regulatory regime, replace its operation with another, opaque and unfamiliar one, applicable to existing installations, and to do so after a period of stasis when no details were available on which to base future business calculations.

33. Further, in this case the investor relied not only upon the commitments in the above legislation but also upon specific assurances from Spanish authorities that there would be no changes that applied to existing installations, all designed to attract investment such as this into the country[57]. Reliance upon this range of legislative and other assurances expressly given to the investor was further supplemented by a rigorous approach to the timing and manner of the investment itself. In the record there is an

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[55] Brattle, *Changes to the Regulation of Photovoltaic Installations in Spain since December 2012*, 29 March 2018, ¶ 54.

[56] Exhibit C-238, p.7.

[57] In particular, I note assurances given by CNE officials on 9 and 22 April 2010, and by the DG for Energy and Mining Policy at the Ministry of Energy for Spain on 21 February 2011. Respondent has not presented evidence that these meetings did not take place or rebutted the statements that the officials made. The status of the CNE has been challenged as being merely an advisory body but without any evidence of contemporaneous warnings given to investors that statements from its officials could not therefore be relied upon.

abundance of detail on the approach taken by the investor, and how the timing of the investment was interwoven with specific assurances about the regulatory regime given to the Claimants at various stages of the process.

Assurances continued: The Testimony of Mr Lief

34. In connection with the legitimate expectations claim, the Tribunal refers to the witness testimony of the Claimants' representative, Mr Lief[58], who led the Transaction Team in making the investment. In particular, it notes that he sought and relied upon a set of assurances from the Spanish authorities. In the Tribunal's view, these assurances "do not reach the level of clear and specific commitments creating legitimate expectations of a fixed FIT for 25 years for RD 1578/2008 PV Plants"[59]. Indeed, it argues that the only assurance of stability that an investor should expect with respect to remuneration was the guarantee of a reasonable profitability in the Law 54/1997[60].

35. I disagree. The assurances in this case are both clear and highly varied; in my view, they are cumulative, with a reinforcing effect. In addition to the ones in the regulatory regime noted above, a further assurance of stability came as late as 5 March 2011, when the Government adopted Law 2/2011, amending RD 14/2010, that "specifically state[d] that operational plants will not be subject [to] further retroactive cuts in the future"[61]. The fact that this was a Law and not a Decree was deemed by the Claimants to be "extremely reassuring". However, the Claimants had already sought to manage 'regulatory risk', a common factor in any utility investment, by seeking multiple further assurances prior to making any investment commitment. A brief review of the facts in the record demonstrates this:
    (i) The Claimants began the process of making the investment in 2009, based on the attractions of RD 1578/2008[62]. At that time, "a key incentive for investing" in the Spanish renewable energy sector was the FIT mechanism which "by

[58] Decision, ¶ 595.
[59] Decision, ¶ 596.
[60] Decision, ¶ 587.
[61] M. Lief, First Witness Statement, 22 March 2018, ¶ 47; Second Witness Statement, 26 November 2018, ¶ 17.
[62] M. Lief, First Witness Statement, ¶¶ 6-11.

setting a stable tariff over a long period of time, removes the merchant risk attached to these types of investments and, in particular, it removes exposure to volatile wholesale electricity prices"[63]. RD 1578/2008 provided for a FIT that would be fixed and inflation-linked, applying to qualifying PV plants for a period of up to 25 years, longer than the periods applicable to other renewable energy technologies.

(ii) In early 2010, in response to information of a possible change in the regulatory regime, "which would impose cuts to the tariffs applicable to PV plants",[64] Claimants sought clarifications and assurances from various parties, especially from the Spanish authorities. It was only following assurances from the *Comisión Nacional de la Energia* (CNE) that the new decree would not have a retroactive character that the Claimants' proposal for the First Investments was submitted internally and approved. The absence of retroactive risk was underscored in a slide presentation made by the CNE, and again in a further meeting soon afterwards. This evidence was not contradicted by the Respondent, although the significance of statements by the CNE was challenged on the ground that it was only an 'advisory' body, even if an official one[65]. Claimants sought further assurances from government bodies, on the basis of which they deemed the risk of retroactive change to be low. Despite this, *they chose to make any investment conditional* on a new decree not impacting on the economics of the First Investment plants.

(iii) Although three share purchase agreements (SPAs) were signed in June 2010, funding for these SPAs was conditional on any new regulation applicable to FIT for these plants being introduced without a retroactive impact. Further, such regulation could not impact on the revenue, exploitation costs or taxes affecting the IRR negatively by more than 0.75%. If these conditions were not met by a 'long stop' date, the SPAs would automatically terminate and the transaction would have terminated. This cautious approach continued after an official announcement in July 2010 about an agreement between the

[63] M. Lief, First Witness Statement, ¶ 9.
[64] M. Lief, First Witness Statement, 22 March 2018, ¶ 12.
[65] Resp. PHB, ¶¶ 14-17, and Resp. Reply PHB, ¶ 17.

government and solar power associations. Largely, this agreement affected RD 661/2007. An extension of the longstop date to the end of October was therefore sought and obtained.

(iv) When information reached the Claimants that a further, second decree might emerge, "with potentially some retroactivity", Claimants sought the advice of a leading Spanish law firm which advised them that the risk of retroactive change was "very low"[66]. However, Claimants initiated further negotiations with the sellers and changes in conditions introduced, such as a postponement of the longstop date and a provision allowing the Claimants to unwind the transaction if regulatory changes occurred before a final longstop date of March 2011.

(v) The two Royal Decrees that had been 'rumoured' were adopted in November and December 2010: respectively, RD 1565/2010 and RD 1614/2010. The first of these contained no retroactivity and did not affect the economic regime under which the First Investment plants would be governed. At this stage, the Claimants decided to proceed with the investment, which was protected in the event of further, adverse regulatory changes by provisions that allowed a price adjustment or a complete unwinding of the deal. The second decree was limited in scope and followed the agreement reached in July 2010 with the wind and solar thermoelectric power industry.

(vi) While the first payment to the sellers under the SPAs was made on 21 December 2010, *this was still made subject to Claimants' right to unwind the deal if further regulatory changes were introduced that were adverse in their effects upon the investment.*

(vii) A further decree, RDL 14/2010, was adopted in December 2010 which imposed a cap on the number of hours for which tariffs could be received and applied to all plants including those registered under RD 1578/2008. It appears that Claimants' interpretation of the three legislative measures was that they amounted to Spain's response to the tariff deficit issue, which was expressly addressed in the Preamble to RD 14/2010.[67]

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[66] M. Lief, Second Witness Statement, ¶¶ 6-7.

[67] M. Lief, First Witness Statement, ¶ 40.

(viii) Nevertheless, prior to taking a final decision on the investment in 2011, Claimants sought further assurances that no additional retroactive changes were planned to the regulatory regime. At a further meeting with Spanish government officials from the Ministry of Energy, express and specific assurances were given to the Claimants that no further retroactive changes were planned for PV plants, followed by a written correspondence in which any such changes if they occurred would lead to payment of compensation. This evidence has not been rebutted by the Respondent. A further extension was made to the Final Longstop Date, allowing Claimants to unwind the deal if regulatory changes were made before that date. A further measure was adopted in March 2011 which "made clear that future regulatory changes would only be forward-looking and would not affect operational plants"[68]. This provided Claimants with sufficient assurance that the risk of further measures with retroactive effect was "highly unlikely" and they went ahead to complete the transaction on 9 March 2011, making the final payment on 31 March 2011.

(ix) The investment was then completed in two stages: the first was made in March 2011 (the First Investment), and the second in June and October 2011 (the Second Investment), comprising the Fontellas and Latesa plants, following a further period of due diligence[69].

36. I have presented the above extended summary since it is clear to me that in the various cases involving Spain and its renewable energy sector, there are important differences arising from the timing of the investments in ascertaining the legitimate expectations of investors[70]. In this case, the investments were made in 2011 after there had been important changes to the regulatory regime in 2010, and a fairly public discussion of further changes to the regime. In my view, the summary highlights three considerations of critical importance to the investor at this stage of the regime's development: the need to confirm the investors' understanding of the applicable law;

[68] Lief, ibid., ¶ 47.
[69] Lief, ibid., ¶ 51.
[70] This point was made by Charles N Brower in his Concurring and Dissenting Opinion in the *PV Investors* case, after an extended review of each of the cases to date, 28 February 2020, ¶ 14. It remains highly relevant.

the need to assess the significance of the 2010 measures for this understanding; the need for assurances that if an investment were to be made the essential features of the regime would remain operative for that investment over a significant term.

37. With respect to these three considerations, the above account shows a very high degree of caution in making these investments, and a pro-active approach to all three. It was more than an exercise of due diligence and involved repeated testing of the very assumptions on which the initial investment proposal had been initiated and at times a clear pulling back from a commitment to invest until the assessment had been completed.

38. Faced with these facts, the Tribunal agrees that "extensive" due diligence was indeed carried out by Claimants[71], but notes that the "possibility of some change to the remuneration regime for existing plants" was identified. This is both correct and unsurprising[72]. Its identification was in part a recognition of the state's ultimate power that could be exercised at some future date and in part a recognition of the possibility that this regulatory regime for renewable energy could evolve further as it had done in recent years. Due diligence would be a fruitless exercise if the purpose was to identify an absolutely risk-free context – in terms of *regulatory* risk, that is. The existence of such residual risk is quite different in my view from the kind of risk that might signal to investors that the entire present content of the regime might be replaced with respect to existing investments: clearly, that is a risk of a different kind, striking at the commercial heart of the investment, as well as one that implies a different policy towards inward investment in the sector, and at odds with the preservation of stable conditions for an investor, which contracting parties to the ECT undertook to offer investors.

39. The Tribunal's assessment of the various commitments obtained by the Claimants is negative. For the Tribunal, the starting point is a firm distinction between expectations

[71] Decision, ¶ 598.
[72] As the Claimants' representative noted, "there is no such thing as a risk-free investment" (Lief, Second Witness Statement, ¶ 17).

deriving from general legislation and those generated by specific undertakings made by a host state to induce a specific investor to make an investment. I have set out my views on this and disagreement with it above. However, the Tribunal's negative assessment of the evidence is guided by a five-part test for assessing the legitimacy of an expectation in relation to a specific purpose[73]. In the interests of economy, I confine my remarks on this largely to its application to the evidence.

40. For this five-part test, the first requirement is that the assurance is grounded in law. Not only was the Respondent's commitment to a specific remuneration regime grounded in law, but the Claimants' understanding of that law was confirmed by a wide variety of officials and experts as a result of their efforts to conduct due diligence prior to making their investment. The criterion has its limits however. It seems to restrict the scope to a single, unambiguous assurance[74], a 'magic bullet' so to speak, and rules out the possibility that an expectation may be based on an accumulation of sources, repeated over time to prospective investors, so that collectively they create an expectation for a reasonable and prudent investor about the stability of remuneration that is arguably an element of the regulatory regime[75]. This combination of sources is present in the account given in paragraph 35 above, sufficient in my view to ground an objective expectation of stability. The second requirement is that the specific commitment be made by a competent authority. Second, the definition of an institutional source as a single public authority with legal competence that is beyond doubt appears naïve. Public authority structures are often complex, presenting challenges to foreign investors, when seeking to validate their assurances, and can usually be best addressed by taking on board local advice from reputable independent bodies. In this case, the account above shows that various assurances given by the specialist energy agency, the CNE, and Ministry officials, were reviewed and confirmed by a leading Spanish law firm, subject only to the caveat about modification of the second category kind discussed earlier. In my view, the requirement is met.

[73] Decision, ¶¶ 570-574.
[74] Decision, ¶ 566.
[75] *SolEs Badajoz v Spain*, ¶ 426; *Charanne*, Tawil dissenting opinion, ¶ 9.

41. A third requirement is that the assurance or expectation must be clear and specific to generate an objective expectation. In this case, from the account in paragraph 35 above, we see evidence of a wide range of inducements adopted by the Respondent in the form of laws, press releases, Ministerial statements, statements by the CNE and InvestinSpain[76]. Even if one were to argue that they did not oblige Respondent to offer an FIT, they created an expectation of long-term stability about the remuneration regime on which a reasonable investor could elect to rely upon, and which the Claimants did rely upon.

42. A fourth requirement is that the circumstances surrounding the making of an investment need to be taken into account. In this case, the due diligence carried out by the Claimants, acknowledged to be "extensive" by the Tribunal generated an abundance of clarification about the meaning and future development of the regulatory regime on which the Claimants ultimately relied to make a final investment decision.

43. Finally, under the Tribunal's scheme there is a requirement that the State's policy interests be taken into account. Indeed. The entire regime for renewable energy was based on a policy commitment to satisfy Respondent's commitments to reduce the carbon footprint of its energy sector, and promote a more sustainable electricity sector. In choosing to substantially revise it after substantial investments had been made by foreign investors, and justified with respect to a different policy, the question arises as to who should bear the cost of the policy change that resulted in changes in the regulatory framework[77].

44. In all the above discussion of the various kinds of assurances, an individualised approach, one by one, has its limits. They are influential in my view when taken

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[76] In this context, *Novenergia v Spain*, ¶ ¶ 665-667; *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No ARB/15/34, Dissenting Opinion of David R. Haigh Q.C., ¶ 23.

[77] *9REN Holdings v Spain*, ¶ 253. The Tribunal held the question to be "whether under the ECT the cost of such changes should fall on the investors who were attracted to Spain's renewable energy by specific promises of stability rather than fall on Spanish consumers or Spanish taxpayers generally".

together (cumulative effect) and when the apparent caveats are understood as the reminders of the margin of appreciation which any state enjoys (but not to be exercised so as to completely remove the regime without consequences).

45. In the light of the above, I therefore find myself in strong disagreement with the Tribunal that these commitments were unlikely to be sufficient to convince "a diligent and prudent investor" to make an investment of millions of dollars. On the contrary, the combination of the legislative guarantee in RD 1578/2008, and the various specific and written assurances from Spanish authorities, leads me to the same conclusion on this matter as Mr David R. Haigh Q.C. in *Cavalum*: they "objectively created an understanding of regulatory stability on which Claimant reasonably relied and which induced Claimant to invest as it did in Spain's renewable energy sector".[78] Moreover, the timing and manner in which the Claimants carried out their investment shows a clear understanding that while an expectation of absolute stability was incompatible with this regulatory framework, the evidence appeared to confirm that investments once made were likely to be protected by that regime over the long term.

46. In summary, in my view the Claimants reasonably relied upon several assurances made specifically to the Claimants in addition to the assurances in the RE regime itself, creating a cumulative framework for expectation of stability when taking the final decision to invest. They created a reasonable expectation in the Claimants that the framework would not subsequently be fundamentally dismantled by the Respondent in a manner that would cause disproportionate financial losses to the Claimants.

C. Impairment - The Measures Taken in 2012-14 Constituted a Fundamental Change and a Breach

The 2012-14 measures (Law 15/2012 to RD 413/2014 and the June 2014 Order) wiped out the core of the investment regime on which the investment decision had been made, and in a manner that fostered instability in the business conditions of the investor. So, they breached the Respondent's obligation to provide stable conditions and FET in Art 10(1).

[78] *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No ARB/15/34, Dissenting Opinion of David R. Haigh Q.C., ¶ 27.

47. In its approach to impairment in Article 10(1) ECT, the Tribunal considers whether a rational policy for the Disputed Measures existed and whether the measure taken was appropriate to achieve the regulatory intent, adding a proportionality element: was the measure one that imposed an excessive burden on the investors? A limited balancing exercise is then to be carried out by the Tribunal, focussing on the interests protected, the rights involved and the burden imposed on the investor. The limit is that an international tribunal does not second guess the State's policy choices. The Tribunal concludes that reducing the remuneration to existing plants to deal with the Tariff Deficit was rational, and there is a reasonable relationship between the public policy objective and the Disputed Measures[79].

48. In my view, the main task for the Tribunal is to assess whether the measures taken are in conformity with Spain's treaty commitments under the ECT. The Tribunal has rightly pointed out that policy choices are a matter for the host state, in energy and indeed in other sectors of the national economy, and that the Tribunal ought not to be second guessing such choices. However, it is the undertakings that Spain gave when adhering to the ECT that are at issue here and not its choice of energy policy.

The Character of the Changes Made

49. In Part A above I have argued that the notion of 'stable conditions' in Article 10(1) ECT is not absolute and allows a State to make minor modifications to its regulatory regime (if it wishes) without risking a breach of international law, particularly when such changes were either neutral or beneficial to the investors concerned. On multiple occasions in the record of this case, the Claimants have emphasised that they were aware of Spain's right to make changes, the modifications it had already made to the regulatory regime and, following an assessment based on their investigations, they had little or no concern about such exercise of state power[80]. I have also argued that there is another category of change that does not meet this test of 'stable conditions' compatible with international law. It may now be appropriate to characterise the

[79] Decision, ¶ 674.
[80] For example, Cl. PHB, ¶ 6; Cl. PHB Reply, ¶¶ 12, 19.

changes made by Spain with respect to existing investments that in my view had effects that fall into this latter category. In doing so, I note that Spain as any sovereign state had the right to introduce such changes, but in doing so it took the risk of incurring consequences in international law.

50. The measures introduced are described in the Decision so need not be detailed here: their effects were such as to replace the regulatory regime established under Law 54/1997 with a new regime and apply it to *existing* investors. This has been described as a 'fundamental *midstream* switch of regulatory paradigm'.[81] Among its disruptive effects were:

- *Remuneration.* The remuneration regime for existing as well as new installations was completely replaced. The FIT mechanism for existing PV plants was removed. In the new regime remuneration is no longer based on the amount of electricity generated. Formerly, the greater the volume, the greater the rewards, providing an incentive for the generator to produce more of an environmentally-friendly energy resource. Overall, there was a substantial reduction in the remuneration expected.
- *Term.* The remuneration regime introduced was one that may change every six years with effects on existing installations, impacting negatively on predictability. The specific remuneration was to apply only to the 'regulatory life' of the facility, which it set at 20 years.
- *Methodology.* The way in which a reasonable rate of return was to be calculated in the new regime was completely changed with the effect that the criteria for calculation were not clear.[82] A number of variables were to be set unilaterally and at the discretion of the Respondent, in a manner quite separate from the circumstances of the investors' commitments and operations.
- *Incentives.* The previous regime had a tariff structure that incentivised generation and longer operation, but this was shifted in the new regime to one that makes

[81] Brattle, *Changes to the Regulation of Photovoltaic Installations in Spain since December 2012*, ¶ 159. My emphasis added. A switch of regulatory paradigm for future investors is not at issue here.
[82] As the tribunal in *Antin* said, if compliance with the requirements of stability and predictability under the ECT were to be met, "the methodology for determining the payment due to CSP installations must be based on identifiable criteria", *Antin*, ¶¶ 562, 564-66.

payments for capacity irrespective of power generated. In this sense, it is capped, affecting the return.

- *Abruptness*: the manner in which the changes were made in the law was sudden. There was no evidence to a reasonable and prudent investor that change on this scale was probable before 2012.
- *Transparency*. There was a also lack of transparency in the way the changes were introduced[83]. For example, the introduction of a transitory regime that lasted more than 11 months. During this period the investors had no idea of the precise remuneration to which the qualifying facilities would be entitled. In both RD 413/2014 or the June 2014 Order the underlying criteria or calculations behind the Special Payment or those that would underpin the future updates of the new economic regime were not explained. No specific methodology or process was established for adjusting the Special Payment over the various Regulatory Periods: the underlying criteria or calculations of the New Regime or guidelines on key aspects were not provided.
- *Retroactive effect*. Payments that an installation had received in the past that are considered to be in excess of what is 'reasonable' within the terms of the New Regime will have to be set off against the financial incentives to which a plant is entitled under the New Regime. This clawing back of payments already made to generators for efficiencies under the former regulatory regime is retroactive in effect.

51. For my colleagues, there is no difference in terms of legal consequences between the above set of changes – the wholesale dismantling of the regulatory regime in 2012-14 - and the changes in law that occurred as the regulatory regime evolved in the years prior to the making of the investment in 2011[84]. In their view, these changes were taken in response to a rational policy objective and were proportionate to the problems addressed. Indeed, so clear was the risk of such change, in their view, that the Claimants ought to have understood the trend of development in regulation as

[83] Cf. *SolEs Badajoz v Spain*, ¶¶ 460-463.
[84] Except with respect to the 'claw-back' mechanism.

the 'writing on the wall', a sign that further change was probable. For the reasons set out in this opinion, that is a conclusion with which I strongly disagree.

52. As a result of the Disputed Measures, the Claimants were required to adopt an entirely new and – in terms of current practice in energy regulation – wholly unfamiliar basis for the calculation of returns on investments already made; supplied with inadequate information to do so; and required to significantly reduce the term of any such calculations to a six-year regulatory period. Significant uncertainty was then created for the Claimants about the calculation of their return on the kind of long-term investments that the ECT was designed to protect. The outcome was a lack of continuity, predictability and consistency in the regulatory regime for investors attracted to Spain on the basis of an entirely different regulatory model: the very opposite of encouraging and creating 'stable conditions'.

The Tariff Deficit as Defence

53. It has been found by the Tribunal that the Disputed Measures met a rational policy objective, addressing the Tariff Deficit, as a change of circumstances, and did so in a way that was proportionate[85]. I cannot agree with this conclusion. There were other ways of addressing the Tariff Deficit identified by the CNE 2012 Report and proposals from the European Commission at the time that would have met commitments to existing investors in the RE sector. Moreover, the Deficit was not rooted in the growth and evolution of the PV sector, but rather in the choice the Respondent made to set end-user electricity prices at levels that did not cover regulated costs. That choice was the Respondent's to make. Similarly, with respect to remedial action, the choice was its own. However, it is one thing to acknowledge that a prudent investor could expect some action to be taken to address it, as was done in 2010, and quite another to interpret this as a signal that the entire Special Regime with its FIT mechanism might be swept away. Ultimately, the decision to shift a proportion of the costs to foreign investors was one that would and did have consequences. However, in itself it could not solve the problem of the Tariff Deficit, which has been offered as the primary

[85] Decision, ¶ 674, subject to the finding on the claw-back provision: ¶ ¶ 695-700.

justification for the Disputed Measures. In the RE sector generally, the use of a FIT has been common and apparently successful, having no causal relationship to a phenomenon comparable to the Respondent's Tariff Deficit, essentially one that has arisen from purely domestic circumstances and public policy choices.

54. As conduct, I agree with the tribunal in *Watkins* that it "does not bear a reasonable relationship to Spain's policy"[86]. This was a set of legislative measures with sweeping and destructive effects on the Claimants' investments that did not bear a reasonable relationship to a rational policy goal.

D. The Registration Requirement

55. Given my views on the legitimate expectations claim which would lead to the finding of full compensation for the Claimants, there is no need for me to examine the claim based on the fourth sentence of Article 10(1) ECT (the umbrella clause), and I shall not do so. However, I will make some comments on the RAIPRE, which seems to me to carry more than administrative significance in the Spanish regulatory regime, at least at the time of the Claimants' investments. My colleagues have the view that this does not rise to the level of a specific commitment[87].

56. I note that if one considers the regulatory regime as a whole, it is clear that the registration was an act required to be carried out by the investor if it was to be eligible for the benefits of RD 1578/2008. Without doing so, its expectation to receive what had been promised would fail, and it would not be able to claim regulated payments from Spain. I therefore agree with the interpretation of David R. Haigh, when he argues that registration in RAIPRE "had significance beyond merely an administrative act; it changed the relationship from one that was executory to one that had become executed".[88] Registration affirmed the fulfilment of the necessary pre-conditions in terms of planning, financing, constructing, and commissioning within a specific time-

[86] *Watkins Holding et al v Kingdom of Spain*, ICSID Case No ARB/15/44, Award, 21 January 2020, ¶ 604.
[87] Decision, ¶ 599.
[88] *Cavalum*, ibid, Dissenting Opinion of David R. Haigh, para 52; see also *Masdar v Spain*, ¶ 512.

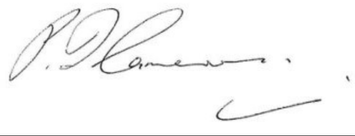
period and Spain's duty to carry out the promised inducements. At this point – registration – Spain's obligations under Article 10(1) of the ECT became operative. I agree with this assessment.

E. Conclusions

57. In my view, Spain breached Article 10(1), first and second sentences, when in 2013 it imposed a new regime on the Claimants' investments, which had been only recently made on the basis of expectations that any changes in law would be made within the framework of the Special Regime, including the FIT mechanism for remuneration over a maximum period of 25 years. Spain is therefore liable for full compensation to the Claimants.

13 September 2021

Date



Peter D. Cameron