STATE LEGAL SERVICE
BUREAU OF THE STATE LEGAL SERVICE

GENERAL SUB-DEPARTMENT OF
LITIGATION SERVICES

IN THE CASE OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (THE ICSID CONVENTION)

AND

UNDER THE ENERGY CHARTER TREATY

(ICSID ARBITRATION CASE No. ARB/15/44)

BETWEEN:

WATKINS HOLDINGS S.À.R.L. AND OTHERS
Claimants

- and -

KINGDOM OF SPAIN
Respondent

RESPONDENT´S POST HEARING BRIEF

ARBITRATORS:

Tan Sri Dato' Cecil W.M. Abraham
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Presented on behalf of the Respondent by:

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I. INTRODUCTION

1. Pursuant to paragraph 22.1 of Procedural Order No. 1, dated 26 May 2016, and paragraph 34 of Procedural Order No. 6, dated 24 April 2018 (as amended on 26 April 2018), and following the Arbitral Tribunal´s instructions, the Kingdom of Spain hereby submits its Post Hearing Brief (hereinafter **"PHB"**) in the ICSID Arbitration No. ARB/15/44.

2. The following subject matters will be addressed: a) EU Law and its applicability to decide the all issues in dispute; b) the Tribunal's lack of jurisdiction; c) the Claimants invested in May 2012; d) inexistence of stabilization commitments; e) the due diligence performed by the Claimants was flaw; f) the damages claimed by the Claimants are divorced from reality; g) Masdar and Antin Awards and h) Micula case.

3. When discussing said matters the Respondent will address the issues raised by the Arbitral Tribunal for purposes of PHB provided during the hearing.

4. The considerations contained in the present PHB in addition to all what has been previously stated by the Respondent in its pleadings and during the hearing leads to the conclusion that the Arbitral Tribunal does not have jurisdiction to hear the present dispute and, in any case, that the Kingdom of Spain has not breached its obligations under the Energy Charter Treaty (hereinafter **"ECT"**) towards the Claimants and their investment.

II. EU LAW IS APPLICABLE LAW TO DECIDE ALL THE ISSUES IN DISPUTE

(1) <u>EU Law is international law applicable to decide all the issues in dispute</u>

5. As a point of departure it has to be reminded that the International Law that must be applied by the Tribunal to decide all the issues in dispute in these proceedings (including therefore jurisdictional, factual, merits and quantum issues) does not depend on the Claimants' or on the Respondent's will.

6. In this regard we request the Tribunal not to incur in the same mistake in which the Novenergia Tribunal incurred when established that EU Law was no relevant to decide the dispute because "*the Claimant has not submitted any of its claims based on EU Law*."[1] This mistake of the Novenergia Tribunal was even more serious if we take into consideration that the Tribunal made such statement when it rejected the so called Intra-EU objection raised by the Respondent. The Tribunal forgot that with respect to this jurisdictional objection the Claimant was not Novenergia but the Kingdom of Spain. Therefore, the Novenergia Tribunal was wrong when determined that the Claimant had not submitted any of its claims based on EU Law. Indeed, the Claimant in that jurisdictional objection was the Kingdom of Spain and it based its claim on EU Law.

7. The International Law that must be applied by the Tribunal to decide all the issues in

[1] Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain, Award of 15 February 2018, para.460. CL-0160.

dispute – including jurisdictional, merits and quantum issues- is imposed by Article 26(6) of the ECT which reads as follows:

> *"A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*

8. This Article incorporates into the ECT the classic principle "*iura novit curia*" and orders the Tribunal to determine, in first place, the International Law that shall be applied to decide all the issues in dispute. This International Law is not limited to the ECT but also includes other "*applicable rules and principles of international law*". Moreover, this Article 26(6) does not grant the ECT prevalence over any other applicable rules or principles of International Law.

9. European Union Law and principles constitute International Law that shall be applied by the Tribunal to decide all the issues in dispute in this proceeding. The application of EU Law to the present dispute is founded on a twofold basis, as we will develop below: a) Eu Law must be applied to an Intra-EU dispute as the present one and b) regardless whether the dispute is Intra-EU or not, EU Law must be applied in any case as the core of the present dispute refers to a key institution of EU Law as is State Aid.

(1.1) EU Law must be applied to an Intra-EU dispute as International Law

10. First, the present dispute is an Intra-EU dispute that concerns investments of investors from Member States of the EU (Grand Duchy of Luxembourg and The Netherlands) made in other Member State of the EU (the Kingdom of Spain).

11. Indeed, the Claimants in this case did not make their investment in Spain relying upon the protections provided by the ECT but relying on the fundamental freedoms of EU and the fiscal advantages provided by EU Law. Therefore, the fundamental freedoms of the EU (free movement of capital, of workers, of services and freedom of establishment) are at hand.

12. Hence EU Law has to be applied to this intra-EU relationship. Moreover, it has to be applied to this intra-EU relationship with preference over any other international or national Law because Member States of the EU have so undertaken.

13. These circumstances (the nature of EU Law as International Law and its primacy over any other Law in a intra-EU relationship) have been clearly established by the settled Case Law of the Court of Justice of the European Union (thereinafter "**CJEU"**) as the Preliminary Ruling of 6 March 2018[2] (thereinafter "**Achmea Ruling**") reminds:

> *"(...) According to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is*

[2] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 Preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic. CL-0162.

characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).

EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited)."

14. In the same line, the nature of EU Law as International applicable Law and its prevalence in an intra-EU situation over any other legal order has been acknowledged also by Arbitral Tribunals that have interpreted and applied the ECT:

- **Electrabel S.A v. the Republic of Hungary, Decision of 30 November 2012**: *"EU law as a whole is part of the international legal order; […] and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State. […] EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties' dispute under Article 26(6) ECT."*[3]
- **Blusun S.A. et al v. Italian Republic**, **Award of 27 December 2016**, *"The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts, but it can and where relevant should apply European law as such."*[4]

15. The Award rendered in the Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen

[3] Electrabel S.A v. the Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paragraphs 4.122, 4.189, 4.195. RL-0002.
[4] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, Award of 27 December 2016, paragraph 278. RL-0117.

and JSW Solar (swei) GmbH & Co. KG v. The Czech Republic on 11 October 2017 deserves a special mention. This Award does not apply the ECT but the BIT signed between the Republic of Germany and the Czech Republic which did not foresee the application to the dispute of any other International Law different from the BIT itself. However, the Arbitral Tribunal, contrary to the Claimant´s assertions regarding the irrelevance of EU Law as International Law applicable to the dispute, concluded that EU Law was International Law applicable to the controversy by virtue of the principle of proximity enshrined in Article 31.3 of the Vienna Convention Law of Treaties:

> *"(...) the BIT contains no choice of law and the disputing Parties have not agreed on the application of EU law. Hence, the Tribunal will assess the applicable law under the principle of proximity, being specified that it enjoys substantial discretion in doing so."*[5]

16. The Wirtgen Tribunal followed the reasoning of the Electrabel Tribunal's Decision on Jurisdiction concerning the triple status of EU Law as International Law, internal Law and as a fact that should shape the Claimants' legitimate expectations.[6] The Wirtgen Tribunal also noted that *"Tribunals in Achmea v. Slovak Republic and Euram v. Slovak Republic have reached similar conclusions."*[7]

17. Thus, it is crystal clear that EU Law shall be applied to the present dispute not only as International Law, but also as internal Law and as a fact. Moreover, it is also crystal clear that EU Law prevails over any other Law that may be applied to the present dispute because EU Member States have so undertaken. The primacy of EU Law is recognized by the ECT itself in its Article 25.

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[5] Mr. Jürgen Wirtgen, Mr.Stefan Wirtgen, Mrs. Gisela Wirtgen and JSW Solar (swei) GmbH & Co. KG v. The Czech Republic, Award of 11 October 2017, paragraph 174. RL-0096.

[6] Ibid, paragraph 175: *"The status and applicability of EU law in investment treaty arbitration were exhaustively discussed in Electrabel v. Hungary. Essentially, Electrabel considered that EU law was "a sui generis legal order, presenting different facets depending on the perspective from where it is analysed". Accordingly, it found that EU law was on the one hand an "international legal regime" and, on the other, "once introduced in the national legal orders of EU Member States", it became "part of these national legal orders".*
This being so, EU law should not be confined to the national legal order: "[i]n the international setting in which this Tribunal is situated and from which it necessarily derives its perspective", so continued the ICSID tribunal, "EU law has to be classified first as international law", "because it is rooted in international treaties".
It added that "EU law as a whole is part of the international legal order" and that "EU legal rules are part of a regional system of international law and therefore have an international legal character". In other words, the fact that EU law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature, whereby it is irrelevant from the perspective of international law "whether such application within a national legal order take effect directly or indirectly".
As a result, the Electrabel tribunal concluded that there was no "fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law".76 Finally, Electrabel noted that, "when it is not applied as international rules [...], EU law must in any event be considered as part of the Respondent's national legal order, i.e. to be treated as a "fact" before this international tribunal".

[7] Ibid, paragraph, 176.

(1.2) EU Law shall be applied to a dispute that concerns State Aid within the internal electricity market

18. Second, importantly, EU Law shall be applied to the present dispute because, regardless of the country of origin of the investor, the core of the dispute affects to a key institution of EU Law, State Aid, created by EU Law to ensure the efficiency of the internal market in the territory of the EU. The same internal market that the ECT tries to emulate in the energy field.[8]

19. As we deeply explained during the hearing, the fundamental objective of the ECT provisions on investment issues is to ensure the creation of a "level playing field" for energy sector investment[9] that is, combating anti-competitive conduct in line with the UE law. This assertion was addressed by the Electrabel Tribunal:

> *"ECT and EU Objectives: In the Tribunal's view, the ECT and the EC Treaty share the same broad objective in combating anti-competitive conduct. One of the obligations undertaken by States under the ECT was to protect investors, but another was to combat anti-competitive conduct, as provided in Article 6 ECT"*[10]

20. It is common ground between the parties that the amounts claimed by the Claimants in this proceeding are public subsidies:

> *"Q. Mr Lapuerta, do you agree that the tariffs or premiums of Royal Decree 661/2007 that the Claimants are asking for in this proceeding are subsidies?*
>
> *A. (Mr Lapuerta) I'm happy to call them "subsidies", in the sense that they're additional money given relative to the market price of electricity."*[11]

21. It is also non controversial that the aim of the subsidies is to allow renewable producers to recover their costs and reach the level playing field with conventional producers. This was recognized by the Claimants during their opening statements at the hearing:

> *"Without that specific feature, you do not get renewable energy investment, and you certainly wouldn't have got it at a point in time when none of the renewable energy technologies could compete with conventional generators. They were simply costing too much to just get the market price of electricity, which is why they needed all those incentives, and they needed to make sure that when they needed to make sure that when they were making the entire investment, they could predict the revenues and recover their costs and their profit."*[12] *(Emphasis added)*

22. The nature of the tariffs as public incentives has also been highlighted by the Spanish Supreme Court since 2006 to allow regulatory changes worsening the economics of

[8] Article 2 of the ECT incorporates the objectives and principles of the European Energy Charter of 1991 as own objectives of the ECT. Therefore, the objective of the ECT is to "promote an efficient energy market based on the principle of non-discrimination and market-oriented priced formation."
[9] Slides 4, 5 and 6 Respondet´s PPT opening presentation on merits.
[10] Decision on jurisdiction, Applicable law and Liability Electrabel S.A v. Hungary, Decision 30 November 2012. (ICSID CASE NO. ARB/07/19), paragraph 4.137 (RL-0002).
[11] Hearing Transcript, Day 3, page 64, lines 5 to 10
[12] Hearing Transcript, Day 1, page 32, lines 5 to 14 (Claimant's opening)

existing installations to take place within the limits of the Electricity Sector Act[13]:

> Companies that freely decide to enter a market such as electricity generation under the special regime, knowing that is largely dependent on the setting of economic incentives by public authorities, are or should be aware that they may be modified within legal guidelines, by those same authorities. One of the "regulatory risks" to which they submit and which they must take into account, is precisely the variation of parameters for premiums or incentives, something which the Electricity Sector Law limits, as previously discussed, but does not preclude.

23. Therefore, it is undeniable that under Spanish Law incentives to renewables are State Aid.

24. From the perspective of EU law it has also been proved that the subsidies to renewables constitute State Aid. It is undeniable that Kingdom of Spain is a member State of the UE and therefore EU law is fully applicable taking into account that State Aid regime amounts to an issue of EU public order[14].

25. It is surprising that the Claimants accept the relevance of EU Law in the present case with regard to some matters but, at the same time, deny the relevance of EU Law for other matters, at their convenience. For instance, during their Opening presentation the Claimants recognized that public subsidies to renewables were implemented in compliance with EU Directive 2001/77/CE[15] as it "*recognised the vital importance of substantially increasing the share of electricity produced by renewable sources*."[16]

26. However, it seems that the Claimants at the time of making their investment and the Claimants' counsels in order to prepare the case forgot to read the entire 2001 EU Directive. If they had made such effort they would have found that the 2001 EU Directive not only set binding renewable targets for the Member States but aslo set in its Article 4.1 an important limit in order to reach those targets:

> *"Without prejudice to Articles 87 and 88 of the Treaty, the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles 6 and 174 of the Treaty."*[17]

27. Notice that Articles 87 and 88 refered to in the cited Article 4(1) of the 2001 EU Directive currently are Articles 107 and 108 of TFUE which refer to the State Aid regime. In particular Article 107 of TFEU states that "*1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the*

[13] Spanish Supreme Court Judgment of 25 october 2006 (R-0138).
[14] Treaty on the Funcioning of the EU, articules 107 and 108. RL-0001.
[15] Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal market in electricity, published in the Official Journal of the European Union on 27 October 2001, RL-0015.
[16] Hearing Transcript, Day 1, page 19, lines 12 to 18 (Claimant's opening)
[17] Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (RL-0015).

production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

28. Therefore, public subsidies are in principle forbidden by EU Law. This is a principle that exists long before the Claimants invested in Spain. Only some kinds of State Aid are allowed by EU Law but always subject to the limits of EU Law and under "constant review" by the EU Commission. Moreover, those State Aids are subject to the standstill obligation set out in Article 108 TFEU:

> *"**The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States**. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market. (...)*
>
> *3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."* [18]

29. That the subsidies provided by RD 661/2007 (as amended by RD 1614/2010) are State Aid under EU Law is something that has been clearly established by the sole institution with competence to do so, which is the EU Commission. It has done so in two occasions with regard to the specific case of Spain and the subsidies claimed by the Claimants:

30. First, in its Reply of 29 February 2016 to some PV investors' petition to take legal action against Spain because of the implementation of the same measures challenged in this arbitration proceeding. The Commission asserted that "*support schemes need to be compatible with the Guidelines on State Aid for environmental protection and energy in as far as they constitute state aid*."[19] And concluded that there was no reason to take legal action against Spain because "*Member States retain full discretion over whether they use support schemes or not and, should they use them, over their design, including both the structure and the level of support. This comprises the right for Member States to enact changes to their support schemes, for example to avoid over compensation or to address unforeseen developments such as particularly rapid expansion of a precise renewables technology in a given sector*."[20]

31. Second, in its Decision on the State Aid SA.40348 of 13 November 2017, in which the Commission concluded that the support scheme currently provided by Spain complies with the requirements of EU Law because the total amount of subsidies received by existing installations does not exceed the limits provided by EU Law:

> *"(4) The scheme replaces and supersedes the premiwn economic scheme (`regimen económico primado'), which was governed by Royal Decrees 661/2007 and*

[18] Treaty on the Funcioning of the EU, articules 108 (1). RL-0001.
[19] Response from the European Commission on 29 February 2016 to the request for investigation from the National Association of Renewable Energy Producers and Investors. R-0185.
[20] Ibid.

*1578/2008. Payments under the premium economic scheme **are covered by the decision** in order to assess proportionality, i.e, the absence of overcompensation". (footnote omitted and emphasis added)*[21]

"3.4.4. Proportionality of the aid (...)

(120) The data show the past sales income (including those deriving from the premium economic scheme for existing facilities), the expected future sales income, the initial investment costs, the operating costs and the compensation to be granted to each facility both for operations and for investments. For all examples provided, the Commission has verified that the aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices (7.503 % before tax for new facilities and 7.398 % for existing facilities)."[22]

32. Therefore, Claimants' assertion that the EU Commission's Decision of November 2017 "*doesn't analyse the original regime*"[23] is completely untrue. Claimants' statement that "*there is no EC decision, let alone a final judgment of an EU court, that would say: the original regime, or any award that gives damages under the original regime, would be state aid*" is not true either.[24]

33. On the contrary, according to the November 2017 Decision the European Commission has taken into consideration the subsidies received by existing plants under RD 661/2007 together with the subsidies received under the new scheme to verify the proporcionality of the aid throughout the life of the facilities as required by EU law. This means that the subsidies granted under RD 661/2007 constitute State Aid under EU law. Otherwise it would have made no sense that the European Comission took the subsidies granted under RD 661/2007 to analyse the fundamental principal of EU law on State Aid: proporcionality of the State aid.

34. The above is not inconsistent with paragraph 156 of the November 2017 Decision. What paragraph 156 is simply stating is that there is not point in taking into consideration the "forseen payments" under RD 661/2007 but only the historical ones as RD 661/2007 is no longer in force:

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

[21] Commision Decision on State Aid SA.40348 of 10 November 2017 regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste . RL-0081.
[22] Ibid
[23] Hearing Transcript, Day 2, page 54, lines 4 to 11 (Ms Stoyanoy)
[24] Ibid

> ***originally foreseen payments*** *under the previous schemes would have been compatible or not."*[25]

35. Moreover, the EU Commission's Decision also describes the consequence of the non-compliance by the Respondent with the standstill obligation of Article 108 of the TFEU when it implemented RD 661/2007. The Commission says so because those subsidies are State Aid. According to the Commission the consequence of the non-compliance of the obligation to notify the scheme by Spain is not the denaturation of the subsidies as State Aid but the exclusion of legitimate expectations of investors with regard to the lawfulness of the subsidies:

> *"In the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectations with regard to those State aid payments are excluded. That is because according to the case-law of the Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission."*[26]

36. Furthermore, the reasons provided by the EU Commission in order to consider that the subsidies given by the disputed measures are State Aid are extensible to the subsidies provided by RD 661/2007 to conclude that they are State Aid as well:

> *"Support under the notified scheme is attributable to the State as it has been established by law and its implementing decrees and ministerial orders. In addition, beneficiaries receive support sourced from the Spanish treasury budget and from a charge collected from electricity consumers managed by CNMC, which the Court of Justice of the European Union (CJEU), has declared as State resource within the meaning of Article 107(1) TFEU.*
>
> *The notified scheme favours the generation of electricity from renewable sources, high efficiency cogeneration and waste by the selected beneficiaries. The measure is therefore selective.*
>
> *Beneficiaries are compensated at a rate exceeding the returns that they would normally have received from the market in the absence of aid. The measure therefore provides an advantage.*
>
> *Electricity is widely traded between Member States. The notified scheme is therefore likely to distort competition on the electricity market and affect trade between Member States.*

[25] Ibid

[26] Decision C(2017) 7384 SA40348, 10 November 2017, of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, paragraph 158. RL-0081.

As the result, the notified measure constitutes State Aid within the meaning of Article 107(1) TFEU."[27]

37. During the cross-examination of Claimants' Expert Mr. Lapuerta, he knowledged the concurrence of those characteristics in the subsidies provided by RD 661/2007 from an economic point of view:

"Q. Mr Lapuerta, Royal Decree 661/2007 fulfils this criteria set in paragraph 84?

A. (Mr Lapuerta) Well, it's certainly been established by law. (...)

Q. was Royal Decree 661/2007 selective, from an economic point of view?

A. (Mr Lapuerta) If the word "selective" means given only to some generators and not others, yes: it was only established remuneration for renewable energy.

Q. And it provided an advantage, right?

A. (Mr Lapuerta) It provided an advantage, or you could say it compensated for a disadvantage, because the market price of electricity did not recognise the full benefits of renewable energy. Both statements are true.

Q. And it was likely to distort competition and affect trade; correct?

A. (Mr Lapuerta) Well, from an economic perspective, if it had been set inappropriately, it might have. (...)"[28]

38. Furthermore, when the EU Commission decided on the compatibility of the support scheme for renewables provided by the Czech Republic it expressly clarified that feed-in tariffs and feed-in premiums to renewables constituted State Aid under EU Law.[29]

39. In the present case, the Claimants have constantly asserted that the subsidies provided by RD 661/2007 constituted a FIT whose purpose was, "*just like any feed-in tariff in the world, to ensure that the investor can recover (a) the high upfront capital costs that are sunk into the project -- there is no dispute between the parties that that is the major part of the costs involved in a renewable energy plant – recover the costs of operating the*

[27] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, paragraphs 84 to 88. RL-0081.
[28] Hearing Transcript, Day 3, pages 73 and 74.
[29] Final Commission Decision C(2016) 7827, of 28 November 2016, regarding case number SA.40171 in the State Aid Register (2015/NN)– Czech Republic, paragraphs 82 to 84: "*The notified measure provides for feed-in premiums and feed-in tariffs for producers of electricity from RES. Those producers will therefore be remunerated at a rate exceeding the remuneration which they would ordinarily have been in receipt of from the market, had the aid not been granted. This support is only available to this category of producer and not to any other. The aid thus constitutes a selective economic advantage awarded to producers of electricity from RES. The notified measure only favours the generation of electricity from benefitting plants, which compete with other electricity producers. The measure has therefore the potential to distort competition between electricity producers. The beneficiaries operate in a liberalised market for electricity with cross-border trade. Therefore the measure is also likely to affect trade between Member States. The notified measure thus satisfies all relevant tenets of Article 107(1) TFEU and constitutes State aid*." RL-0021.

installation and obtain a return."[30]

40. Claimants' Experts ratified that the incentives given by RD 661/2007 constituted a FIT and that those established by the disputed measures also do:

> *"In your reports you mention several times, obviously, the concept of "feed-in tariff"; correct? Can you tell me if there is an official definition of "feed-in tariff"?*
>
> *A. (Mr Lapuerta) I don't think so. I think there's a common understanding, but I don't know an official body whose definitions are considered official.*
>
> *Q. But could we say that the feed-in tariff is a long-term subsidy system which is based on costs?*
>
> *A. (Mr Lapuerta) Yes, as long as the Tribunal remembers that I agree with the word "subsidy" in one sense, but not another.*
>
> *Q. Royal Decree 661/2007 is not the only feed-in tariff that has been applied in Spain; correct? A. (Mr Lapuerta) Correct. There are other FITs that have been approved for new plant that did not apply to the existing plant, and then there were other FITs that were applied prior to 661.*
>
> *Q. So, for example, Royal Decree 436/2004, was it a FIT?*
>
> *A. (Mr Lapuerta) I would call it a feed-in tariff, yes.*
>
> *Q. Would you call the current regime a FIT as well?*
>
> *A. (Mr Lapuerta) I think it's fair to call it a feed-in tariff. It has a different structure, but I would still call it a feed-in tariff -- or call it a feed-in tariff system, because it has several different components.*
>
> *Q. Yes, but it's as well a system, a subsidy system based on the cost, right?*
>
> *A. (Mr Lapuerta) Yes, it's just based on different costs than 661/2007. There are other differences as well. But I still call it a feed-in tariff system."*[31]

41. Therefore, there can be no doubt that the subsidies provided by RD 661/2007 are State Aid.

42. Indeed, Claimants' Experts do not deny the nature of State Aid of the incentives. When answering questions posed by Professor Ruiz Fabri on whether they took into consideration if subsidies provided by RD 661/2007 complied with the limits of EU Law on State Aid they said: "*in our analysis that we have reviewed whether the 7% return on offer in RD 661/2007 was somehow unreasonable. Okay? If we had concluded that 7% was unreasonably high, then I would say -- I don't know what the legal issues are, but I would say I might be nervous. That's something that an economist would worry about. But*

[30] Hearing Transcript, Day 1, page 20, lines 11 to 22 (Claimant's opening)
[31] Hearing Transcript, Day 3, page 94, lines 18 to 25 and 95, lines 1 to 22 (Mr. Lapuerta's Cross examination)

we find that 7% was reasonable."[32]

43. The problem with this is that the EU Commission's Decision has already stated that the return provided to the Claimants' installations by RD 661/2007 in combination with the disputed measures is reasonable nowadays and complies with EU Law:

> *(120) Spain has submitted cash flow calculations of 21 standard facilities. These are representative of the various technologies and installation types supported by the scheme.* ***The data show the past sales income (including those deriving from the premium economic scheme for existing facilities),*** *the expected future sales income, the initial investment costs, the operating costs and the compensation to be granted to each facility both for operations and for investments. For all examples provided, the Commission has verified that the aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices (7.503 % before tax for new facilities and 7.398 % for existing facilities).* ***These rates appear to be in line with the rates of return of renewable energy and high effieiency cogeneration projects recently approved by the Commission and does not lead to overcompensation****."*[33].

44. For this reason the Commision concluded that the current disputed measures are in accordance with the principle of proporcionality required by EU law:

> *"(130) The Commission considers that the support levels at the maximum discounts minimise aid with regard to the objectives pursued, in particular to ailow different technologies to compete against each other and to ensure a reasonable rate of return in the event of very bleak market conditions. This therefore ensures the bankability and completion of projects.*
>
> *(131) Based on the aboye considerations, the Commission conciudes that the aid granted under the seheme is proportionate within the meaning of point (69) EEAG"*[34].

45. The Commisión also concluded, regarding the effects of the support scheme to competion, that

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

46. In consequence due to the subsidies being State Aid the economic effects of the measures are fully proporcionate under EU Law.

47. The Claimants are trying to convince the Tribunal that their claim is compatible with EU Law because returns provided by RD 661/2007 will always be reasonable. But not only is impossible to decide, as of today, what will be reasonable in 30 years time but also Claimants' claim requires the Tribunal to make a decision it is not empowered to make:

[32] Hearing Transcript, Day 3, page 188, lines 18 to 25 (Mr. Lapuerta)
[33] Commision Decision on State Aid 40348 of 10 November 2017. RL-0081.
[34] Ibid

whether subsidies provided by RD 661/2007 would be lawful State Aid under EU Law. That is an exclusive competence of the EU Commission. Precisely because RD 661/2007 was not notified to the Commission, it is *a priori* unlawful State Aid.

48. In this regard, the Commission has expressly warned in its Decision that "*any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in an of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. Thatis an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation*."[35]

49. It can be concluded that the Claimants' claim that a specific amount of State Aid is maintained immutable for more 30 years affects the core of EU Law and therefore, is fully governed by EU Law, which affects every aspect of the dispute submitted to this Arbitral Tribunal:

50. **Firstly**, EU Law is decisive to determine the scope of investors' rights. The Claimants claim State Aid. Therefore, EU Law has to be applied to determine whether the right claimed by the Claimants exists. The EU Commission, following the settled Case Law of the CJEU, has already given an answer to this question: there is no right to State Aid under EU Law[36]. Moreover, Member States retain the power to modify and even to put an end to State Aid to avoid situations of over compensation and to address unforeseen developments[37]. Hence, the Claimants' claim is not compatible with EU Law.

51. **Secondly**, EU Law is also important to determine the Legitimate Expectations of Investors. EU Law has already established the reasonable reliance that investors can have in a specific situation like the present one in which Spain did not notify RD 661/2007 to the Commission:

> *"In the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectations with regard to those State aid payments are excluded. That is because according to the case-law of the Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission.*[38]

52. It should be noted that the EU Commission bases its conclusion in the settled Case Law of

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[35] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, paragraph 165. RL-0081.

[36] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, paragraph 165 (RL-0081) and EU Commission's Decision regarding the support scheme for renewables developed by Czech Republic, (RL-0021), paragraph 92.

[37] Response from the EU Commission on 29 February 2016 to the request for investigation from the National Association of Renewable Energy producers and investors. R-0185.

[38] Ibid, Paragraph 158

the CJEU.[39] Furthermore, the Commission considers that "*there is also on substance no violation of the fair and equitable treatment provisions (…) Spain has not violated the principles of legal certainty and legitimate expectations under Union Law. In an intra-EU situation, Union law is part of the applicable law, as it constitutes international law applicable between the parties to the dispute. As a result, based on the principle of interpretation in conformity, the principle of fair and equitable treatment cannot have a broader scope that the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme.*"[40] (footnotes omitted)

53. Those considerations of the EU Commission are not particular for the Spanish case but coincide with the opinion of the Commission in the Czech Republic case.[41]

54. As the Commission recalls, its opinion and the opinion of the CJEU has been shared by Arbitral Tribunals like the Electrabel Tribunal. In this vein, the effect of the subsidies as State aid in order to asses legitimate expectations was addressed by the Electrabel Award:

> "*For all these reasons, the Tribunal concludes that the objectives of the ECT and EU law were and remained similar as regards anti-competitive conduct, including unlawful State aid. Foreign investors in EU Member States, including Hungary, cannot have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU law as regards anti-competitive conduct."*[42] (Footnote excluded).

55. With regard to the specific case of Spain, Antin Tribunal has established "*the issue of whether an investor in an EU Member State that provides state aid to RE investors should, when making the investment, consider that the State's RE subsidy programme is governed not only by the applicable national regime, but also by EU state aid rules which are legally binding on Member States under EU law, could be relevant to determine the legitimate expectations of the investor.*"[43]

56. In the same vein, the Blusun Award has stated that:

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[39] Indeed, the footnote to which this paragraph of the EU Commission's Decision refers (footnote 61) quotes the Judgement of the Case C-24/95 Land Rheinland-Pfalz v. Alcan Deutschland, EU:C:1997:163, paragraph 25, in which the Court of Justice has concluded that "in view of the mandatory nature of the supervision of State Aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed" (paragraphs 13 and 14). The Commission also quotes the Judgement in case C-169/95 Spain v. Commission EU:C:1997:10.

[40] Ibid, paragraph 164

[41] EU Commission's Decision regarding the support scheme developed by Czech Republic, R-0094, paragraph 136: *"Finally, there cannot be any violation of the principle of legitimate expectation is even more evident since the measures constituted unlawful State aid. As to the question of whether unapproved State aid measures are liable to create legitimate expectations for potential or actual beneficiaries, the Commission points to the well settled jurisprudence of the Court of Justice stating that a recipient of State aid cannot, in principle, entertain a legitimate expectation as to the lawfulness of aid that has not been notified to the Commission."* (footnotes omitted).

[42] Decision on jurisdiction, Applicable law and Liability Electrabel S.A v. Hungary, Decision 30 November 2012. (ICSID CASE NO. ARB/07/19), paragraph 4.141 (RL-0002).

[43] Antin v. Spain¶658

> *"In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed~in tariffs, or to maintain them unchanged once granted. But if they are* ***lawfully granted,*** *and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime. These considerations apply even more strongly when the context is subsidies or the payment of special benefits for particular economic sectors."*

57. As can be seen, the first condition that the Blusun Award states in order to appreciate the legitimate expectations of investors is that the subsidies are "lawfully granted", circumstance that does not occur in the case at hand.

58. The application of EU Law leads therefore to exclude Claimants' legitimate expectations on the lawfulness of the subsidies claimed.

59. Even in the case that subsidies were lawfully granted, it has to be reminded that under EU Law Member States retain full power to modify the subsidies to correct situations of over-remuneration or to address unforeseen developments.[44]

60. Consequently if the level of State Aid is disproporcionate because it exceeds the minimum needed there cannot be the expectation that such level of subsidies will not be modified. For instance, the November 2017 Decision in order to asses the conformity of the Spanish support scheme with Article 108 TFU and the principle of proporcionality highlighted the relevance of the different revisions established by the disputed measures:

> *"(120) (...) During the regular revisions of the compensation parameters, the payments to which each beneficiary is entitled in the future are calculated to ensure a reasonable rate of return: future payments are calculated to keep the net present value of the investment at zero when the reasonable rate of return (ten-year Treasury bond plus a spread) is used as the discount rate. If an existing facility had reached its reasonable return by 2013, compensation for investments would end and the facility would continue to receive only compensation for operations to cover its operational costs, as described in paragraph (35)(f), in order to ensure that the rate of return is constant over the entire lifetime of the facility."*[45]
>
> *(121) Point 131(c) EEAG states that the production costs are to be updated regularly, at least every year.*[46]

61. Moreover, under EU law there cannot be expectation that the specific formula or structure to articulate the subsidies cannot be changed. In the regard the European Comission indicated that "*Member States retain full discretion over whether they use support schemes or not and, should they use them, over they design, including both the structure*

[44] Response from the EU Commission on 29 February 2016 to the request for investigation from the National Association of Renewable Energy producers and investors. R-0185.
[45] Commision Decision on State Aid of 10 November 2017. RL-0081.
[46] Ibid

and the level of support."[47]

62. The possibility that subsidies could be modified has been highlighted by the Blusun Award:

> *"It is true that informal representations can present difficulties, which is why tribunals have increasingly insisted on clarity and the appropriate authority to give undertakings binding on the state. It is also true that a representation as to future conduct of the state could be made in the form of a law, sufficiently clearly expressed. But there is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment. There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right. International law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only. In the present case, the expectations are even less powerful because European law had already lowered them: it was clear that the incentives offered were subject to modification in light, inter alia, of changing costs and improved technology. In the present case, the expectations are even less powerful because European law had already lowered them: it was clear that the incentives offered were subject to modification in light, inter alia, of changing costs and improved technology."*[48]
> *(Emphasis added)*

63. The application of EU Law leads to the conclusion that the Claimants' expectation that subsidies for renewables provided by RD 661/2007 could remain unchanged for 30 years is not legitimate.

64. Claimants' expectation that the Respondent would not comply with the limits established by EU Law on the support scheme for renewables is not legitimate either. According to those limits subsidies to renewables can be provided to the extent that they allow the renewable producer to reach the level playing field with conventional producers, but they cannot go further.

65. The Guidelines for State Aid for Environmental Protection of year 2008 established as a general principle that "*aid is considered to be proportional only if the same result could not be achieved with less aid*"[49]. And added that "*the aid amount must be limited to the minimum needed to achieve the environmental protection sought*."[50] More specifically, the Guidelines stated that "*Member States may grant operating aid to compensate for the difference from renewable sources, including depreciation of extra investments for environmental protection, and the market price of the form of energy concerned. Operating aid may then be granted until the plant has been fully depreciated according to normal accounting rules. Any further energy produced by the plant will not qualify for any*

[47] Response from the European Commission to the request for investigation from the National Association of Renewable Energy Producers and Investors of 29/02/2016 R-0185.
[48] Blusun v. Italy, paragraph 371. RL-0082.
[49] Community Guidelines for State Aid on environmental protection 2008/C/82/01, paragraph 30, R-0065.
[50] Ibid, paragraph 31

assistance. However, the aid may also cover a normal return on capital."[51]

66. The EU Commission pointed out the need that Member States adjusted their support schemes to EU Law in its response of 29 February 2016:

> *"support schemes need to be compatible with the Guidelines on State aid for environmental protection and energy in as far as they constitute state aid."*[52]

67. The Claimants therefore could not legitimately expect that the Kingdom of Spain would not respect the limits provided by EU Law. Moreover, the fact that the Respondent provides the Claimants' plants with a reasonable rate of return in line with other EU Countries within the limits provided by EU Law confirms the proportionality of the disputed measures.

68. The Claimants try to mislead the Tribunal by saying that the disputed measures were not taken in order to comply with EU Law on State Aid:

> *"Q. And as far as you're aware, what role did state aid rules play in Spain's decision to implement the disputed measures?*
>
> *A. (Mr Lapuerta) State aid is not mentioned anywhere in the preamble to any of the disputed measures that we have raised."*[53]

69. But Claimants miss the point here. The key question is to determine whether being necessary for Spain to modify its support scheme for renewables, the result of that revision should comply with EU Law on State Aid.

70. The disputed measures do comply with the limits provided by EU Law. Indeed, Article 30(4), paragraph 5 of Act 54/1997 as provided by RD Act 9/2013 sets that *"This remuneration regime will not go beyond the minimum level necessary to cover the costs that are necessary for installations to compete on an equal footing with the rest of the technologies in the market in order to allow those installations to obtain a reasonable return."*[54] This is equivalent to what is established in Paragraph 30, 31, 107 and 109 of the Guidelines on State aid for environmental protection and energy 2008/C 82/01.[55]

71. **Third**, in relation with what has been stated above, EU Law shall be applied to assess the proportionality and reasonability of the disputed measures precisely because the Respondent had to respect the limits established by EU Law when modified the support scheme for renewables.

72. This assessment was made by the EU Commission in the Decision of November 2017 that ratifies the proportionality and rationality of the disputed measures, since they meet the purpose of the State Aid and are aligned with the regulation of other European Members,

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[51] Ibid, paragraph
[52] Response from the European Commission on 29 February 2016 to the request for investigation from the National Association of Renewable Energy Producers and Investors. R-0185.
[53] Hearing Transcript, Day 3, page 176, lines 18 to 26 (Mr. Lapuerta's Re-direct)
[54] Article 30.4, paragraph 5 of Act 54/1997 as provided by RD Act 9/2013. R-0095.
[55] R-0065

such as Italy, France, Estonia and Latvia[56].

73. In this regard, it must be reminded that the Wirtgen Award, when it analyzes the proportionality of the measures taken by the Czech Republic, resorts to the EU Commission's Decision regarding the Czech Republic support scheme for renewables:

> *"the Commission also deemed the rates of return guaranteed in Act 180 reasonable and in line with the renewable support schemes of other EU member States."*[57]

74. Last but not least, it must be highlighted that any decision of the Arbitral Tribunal that granted the Claimants more subsidies than those authorized by the Commission could lead to a situation of overcompensation incompatible with EU Law.

75. As the Tribunal can see, EU Law affects all the aspects of the dispute and its application cannot be ignored by the Arbitral Tribunal.

(2) <u>EU Law and principles applied to decide all the issues in dispute are not limited to the Treaties but also comprise the legal acts of EU Institutions</u>

76. With respect to what has to be interpreted as EU Law, it must be clarified that EU Law is not confined to the Treaties signed by EU Member States (including Luxemburg, Netherlands and Spain) but has to be extended to the relevant legal acts of EU Institutions through which those Institutions exercise the Union's competences: Regulations, Directives and Decisions as provided for by Article 288 of the Treaty on the Functioning of the European Union (thereinafter **"TFEU"**).[58]

77. Indeed, the Arbitral Tribunals of Electrabel, Blusun and Wirtgen cases, in the paragraphs quoted above recognize that EU Law "*as a whole*" "*not limited to EU Treaties forms part of the rules and principles of international law applicable to the Parties' dispute under Article 26(6) ECT."*[59]

78. Furthermore, the possibility that EU Institutions can issue legal acts binding on the Contracting Parties to the ECT that were Member States of the ECT was expressly knowledge by the ECT in its Article 1(3) when established the meaning of "Contracting Party":

> *"Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of*

[56] Ibid, paragraph 120.
[57] Wirtgen v. Czech Republic, paragraph 373. RL-0096.
[58] Article 288 of the TFEU: "*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force*." RL-0001.
[59] Electrabel S.A v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paragraph 4.195 (RL-0002).

which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters."[60] *(Emphasis added).*

79. It must be reminded that the only Regional Economic Integration Organization party to the ECT is the EU, whose competences over matters governed by the ECT have been expressly knowledged and preserved by the ECT. In this line the Tribunal of the Electrabel case, in view of Article 1(3) of the ECT, indicated that "*the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself.*"[61]

80. As a consequence, this Arbitral Tribunal cannot ignore the binding nature for the Kingdom of Spain and the Claimants -investors from the Grand Duchy of Luxembourg and The Netherlands that invested in subsidies for renewables in Spain- of EU Law, including: a) the Treaties, b) the EU Directives on renewables; c) the Decision C(2017) 7384 of the European Commission on State Aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste[62] and d) the ECJ on the C-284/16 (Achmea Case) of 6 March 2017 concerning the compatibility between the BIT signed in 1991 by the Netherlands and the Slovac Republic[63], among others.

81. In relation to the binding nature of the EU Commission's Decision of November 2017, it must be recalled that according to Article 288 of the TFEU "*A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*"[64] The Decision examines the compatibility with EU Law of a support scheme contained in a set of laws and regulations. Therefore, it is binding on Spain and on all stakeholders affected by the support scheme, including the Claimants.

82. The Commission's Decision itself establishes that: "*this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply Union law. The exclusive forum for challenging its validity are the European Courts*."[65]

83. The Arbitral Tribunal cannot elude the application of the EU Commission's Decision which, in addition, affects a matter of public order as the Charanne Tribunal announced: "*even if there were any issue in this regard, it would amount to a matter of public order that the Arbitration Tribunal should take into account when deciding on the merits of the dispute*."[66]

84. With regard to the binding nature of the Preliminary Rulings of the CJEU it should be

[60] Article 1(3) of the ECT.
[61] Electrabel S.A v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paragraph 4.142 (RL-0002).
[62] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste (RL-0081).
[63] RL-0080
[64] TFEU, (RL-0001).
[65] Decision C(2017) 7384 SA40348 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, ¶166 (RL-0081).
[66] Charanne v. Spain ¶449

reminded that pursuant to Article 260.1 of TFEU Member States are obliged to adopt any measures that shall be necessary to ensure the compliance of the Judgements and decisions of the CJEU. In the same line, the Institution, body or authority that issued the act affected by the decision of the CJEU is obliged to adopt the necessary measures that ensure the compliance of the judicial decision. Finally, Member States of EU are obliged by virtue of principle loyal cooperation (article 4.3 TFUE), autonomy and primacy of EU Law to comply with the Judgements and other Decisions of the CJEU.

III. THE TRIBUNAL'S LACK OF JURISDICTION

(1) The Tribunal lacks jurisdiction to hear the claim regarding TVPEE

85. With regard to the lack of jurisdiction of the Arbitral Tribunal to hear the claim of an alleged breach of section (1) of Article 10 of the ECT through the introduction of the TVPEE by Law 15/2012, the Respondent refers to what has already been expounded in the submissions presented throughout the arbitral proceeding and during the hearing. It is worth noting that all Awards rendered so far in the Spanish cases have upheld this Jurisdictional Objection raised by the Respondent.

(2) The Tribunal lacks jurisdiction to hear the present intra-EU dispute

86. With regard to the lack of jurisdiction to hear a dispute relating to intra-EU investments as the present one, the Respondent has constantly maintained that Article 26(1) ECT sets out the compulsory requirement that the dispute occurs between "a Contracting Party" and an "investor of another Contracting Party".

87. This inevitably implies the exclusion from this Article of any case where an investor of an EU State has a dispute with an EU State, in relation to an investment in said State (hereinafter respectively referred to as "intra-EU dispute" and "intra-EU investment"). This is because an EU Member State would not be "another Contracting Party" as regards to other EU Member State for the purpose of the application of Article 26. Indeed, neither Spain nor Luxembourg nor The Netherlands had the power at the time they signed the ECT to enter into "*inter se*" in the obligations covered by Part III of the ECT because they had already transferred that power to the EU. The only foreign investor that exists within the EU is the investor which is not from one of the Member States of the EU.

88. According to this objection, the ECT is an international agreement promoted and signed by the EU. Therefore, it forms part of EU Law and must be interpreted in conformity with Primary Law, that is to say, in conformity with the Treaties of the EU. The only way to sustain a valid interpretation of the ECT compatible with EU Law -which the Arbitral Tribunal has to apply and in any case interprete- is the interpretation which excludes that an intra-EU investor can bring an investment arbitration proceeding against an EU Member State.

89. The position of the Respondent has been confirmed both by the EU Commission and the European Court of Justice (hereinafter "ECJ"):

- The EU Commission's position has been clearly stated in its Decision of 11 November

2017 C (2017) 7384 final on the aid file SA.40348 (2015 / NN), regarding the support scheme provided by Spain to renewables[67]. The EU Commission has issued its Decision in its condition of Guardian of the Treaties that "*shall promote the general interest of the Union.*"[68]

In its Decision, the EU Commission states the incompatibility of international investment arbitration between a EU investor and a EU Member State with EU Law regarding both substance and enforcement and states that the conflict must be solved by providing preference to EU Law:

> *"any provision that provides for investor-State arbitration between two Member States is contrary to Union Law; in particular, this concerns to Article 19(1) TEU, the principles of the freedom of establishment, the freedom to provide services and the free movement of capital, as established by the Treaties (in particular Articles 49, 52, 56 and 53 TFEU), as well as Articles 64(2), 65(1), 66, 75, 107, 108, 215, 267 and Article 344 TFEU, and the general principles of Union law of primacy, unity and effectiveness of Union law, of mutual trust and of legal certainty.*
>
> *The conflict concerns both substance and enforcement. On substance, Union law provides for a complete set of rules on investment protection (in particular in Articles 49, 52, 56, and 63 of TFEU, as well as Articles 64(2), 65(1), 66, 75 and 215 TFEU).*
>
> *On enforcement, and Arbitration Tribunal created on the basis of the Energy Charter Treaty in a dispute between an investor of one Member State and another Member state or an intra-EU BIT has to apply Union Law as applicable law (both as international law applicable between the parties and, where relevant, as domestic law of the host State). However, according to the case-law, it is not a court or tribunal or a Member State, and hence cannot make references to the ECJ, because in particular the requirements of permanence, of State nature, and mandatory competence are not met.*
>
> *The resulting treaty conflict is to be solved, in line with the case-law of the Court, on the basis of the principle of primacy in favour of Union law. For those reasons, ECT does not apply to investors from other Member States initiating disputes against another Member States."*[69]

- In turn, the ECJ has rendered its Ruling of the ECJ on the C-284/16 (Achmea Case) of 6 March 2017 concerning the compatibility between the BIT signed in 1991 by the Netherlands and the Slovac Republic[70].

[67] Decision of 11 November 2017 C (2017) 7384 final on the aid file SA.40348 (2015 / NN), regarding the support scheme provided by Spain to renewables RL-0081.
[68] Decision of 11 November 2017 C (2017) 7384 final on the aid file SA.40348 (2015 / NN), regarding the support scheme provided by Spain to renewables RL-0081.
[69] Decision of 11 November 2017 C (2017) 7384 final on the aid file SA.40348 (2015 / NN), regarding the support scheme provided by Spain to renewables RL-0081.
[70] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 Preliminary ruling — Bilateral investment treaty concluded in 1991

90. The relevance of the Achmea Decision is so paramount that the Commission has recently published its opinion regarding the consequences of Achmea Decision on investor-State arbitration within the European Union in a communication to the European Parliament and the Council regarding "Protection of intra-EU investment".[71] The Commission states the following conclusion:

> *"EU investors cannot invoke intra-EU BITs, which are incompatible with Union law and no longer necessary in the single market. They cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty. However, the EU legal system offers adequate and effective protection for cross-border investors in the single market, while ensuring that other legitimate interests are duly and lawfully taken into account. When investors exercise one of the fundamental freedoms such as the freedom of establishment or the free movement of capital, they act within the scope of application of Union law and therefore enjoy the protection granted by that law.*
>
> *Member States have the responsibility and the power to enforce EU law in general and EU investors' rights, in particular. The Commission strives to increase the effectiveness of the enforcement system in the EU, including actions to support administrative capacity building or to strengthen justice systems, and to tackle breaches of EU law by national authorities."*

91. In the Achmea Judgement the CJEU rules as follows:

> *"Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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."*[72]

92. To reach this conclusion, the CJEU states the following principles:

i. According to settled case-aw of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU.[73]

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between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic, 6 March 2018. CL-0162.

[71] http://ec.europa.eu/finance/docs/policy/180719-communication-protection-of-investments_en.pdf.

[72] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162.

[73] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018), CL-0162 para.32

ii. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law[74].

iii. In that context, in accordance with Article 19 TEU, it is for the national Courts and Tribunals and for the Court of Justice to ensure the full application of EU Law in all Member States and to ensure judicial protection of the rights of individuals under that Law[75].

iv. In particular, the European judicial system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the purpose of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties[76].

v. Given the nature and characteristics of EU law mentioned above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States[77].

93. On the basis of these principles, the CJEU examines whether an Investment Arbitration Tribunal, as such established by the concerned BIT, fulfils and respects these principles and the conclusion is that it does not, due to the following reasons:

i. In an intra-EU investment dispute the Arbitral Tribunal may be called on to interpret or apply EU Law as International applicable law and/or national law, particularly the provisions concerning the fundamental freedoms.[78]

ii. The Arbitral Tribunal is not part of the judicial system of the EU. It is precisely the exceptional nature of the Arbitral Tribunal's jurisdiction compared with that of the Courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT[79].

iii. That characteristic of the Arbitral Tribunal means that it cannot be classified in any event as a Court or Tribunal 'of a Member State' within the meaning of Article 267

[74] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 35.
[75] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 36.
[76] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 37.
[77] (Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 41.
[78] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 42.
[79] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 45.

TFEU[80] and is not, therefore, entitled to make a reference to the Court for a preliminary ruling.[81]

iv. Furthermore, the Arbitral Tribunal at issue in the main proceedings is not such a Court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step in the proceedings before the national Courts leading to definitive interpretations of common Benelux legal rules, the Arbitral Tribunal at issue in the main proceedings does not have any such links with the judicial systems of the Member States[82].

v. Under Article 8(7) of the BIT the decision of the Arbitral Tribunal provided for in that Article is final and the judicial review can be exercised by a national Court only to the extent that national law permits[83].

vi. Arbitration proceedings such as those referred to in Article 8 of the BIT – that is investment arbitrations - are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law[84], disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT[85].

vii. The Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law[86].

94. It should be noted that the conclusion reached by the Achmea Judgment is the logic consequence of the settled Case Law of the CJEU as the following Decisions of the CJEU demonstrate: Case C-459/03, EU Commission v. Ireland Judgment of 30 May 2006, the

[80] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 46.
[81] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 40.
[82] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 48.
[83] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 53.
[84] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 34.
[85] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 55.
[86] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018 CL-0162, para. 56.

Judgment of the ECJ dated 3 September 2008, in Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi et al. v. Council of the European Union, the Opinion 2/13, 18th December 2014, of ECJ pursuant to Article 218(11) TFEU, regarding Draft international agreement for the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(2.1) Achmea´s doctrine and its applicability to the present case

95. The principles of the Achmea Ruling should apply to the disputes under the ECT that relate to the interpretation or application of EU Law. Indeed the conclusion of the Tribunal does not mention "Bilateral Investment Treaties" but refers to "International Agreement" and does not limit its effect to International agreements concluded between *two* Member States but talks about "International Agreement concluded by Member States". The ECT is an International Agreement concluded among others by Member States of the EU.

96. In order to determine whether the findings of the Achmea Ruling are applicable to the present case a substantive approach rather than a formalistic approach must be followed. The Achmea Ruling establishes three main prerequisites to reach the conclusion that the arbitration clause provided by the relevant international agreement is not compatible with EU Law.

97. Those prerequisites are the following and are met in the present case:

1) *"Whether the disputes which the Arbitral Tribunal is called on to resolve are liable to relate to the interpretation or application of EU law*."[87]

As stated before the present dispute concerns not only the fundamental freedoms of EU but most importantly it concerns a core institution of EU Law: State Aid. Therefore, is undeniable that the first prerequisite established by the Achmea Ruling is met in the case at hand.

2) Whether the principle of autonomy of EU is not respected because the CJEU is prevented from exercising its function to "*ensure the full application of EU law in all Member States and to ensure judicial protections of the rights of individuals under that law*"[88] by means of a reference for a preliminary ruling established in Article 267 TFEU.[89]

Arbitral Tribunals under ECT are not Courts or Tribunals of the Member states (lack of permanence, lack of state nature, lack of mandatory competence – Cases C-54/96, C-377/13, 102/81) and "*cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU*."[90]

Indeed, "*it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article*."[91] This assertion of the CJEU has been similarly made by the Claimants to maintain that

[87] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018, paragraph 39. CL-0162
[88] Ibid, paragraph 36
[89] Ibid, paragraph 37.
[90] Ibid, paragraph 49.
[91] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018, paragraph 45. CL-0162.

the possibility of resorting to arbitration is one of the main rights that the ECT grants to investors as a way to escape from national Courts.

Moreover, the fact that Arbitral Tribunals do not belong to the judicial system of EU and cannot therefore make a reference for a preliminary ruling to the CJEU has been expressly recognized by Arbitral Tribunals, among others:

-Blusun v. Italy: "*The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts*."[92]

-Eiser v. Spain: "*The Tribunal is not an institution of the European legal order and is not subject to the requirements of that legal order*."[93]

3) "*it remains to be ascertained, thirdly, whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling*."[94]

In the present case, "*the decision of the arbitral tribunal provided for in that article is final*" (Article 53 ICSID Convention). Furthermore, the annulment of the Award can only be requested to an ad hoc Committee which does not belong to the judicial system of the EU[95]. In addition the EU is not a party to the ICSID Convention. Finally, the enforcement of the Award can be requested to any contracting party to the ICSID Convention regardless it is an EU Member State or not. Even being an EU Member State, only limited review could be made by the EUCJ, concerning "*the consistency with public policy of the recognition or enforcement of the arbitral award.*"[96]

All the prerequisites set out by the Achmea Ruling in order to establish the incompatibility of the Arbitration Clause of the ECT (as interpreted by the Claimant) and EU Law are met, especially in the case of an ICSID Tribunal.

98. The conflict with EU Law is not solved in the case of the ECT just because it is an International Agreement signed by the EU as well. As the Achmea Ruling itself determines:

> *"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 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*

[92] Blusun v. Italy, paragraph 278. RL-0082.
[93] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award 04 May 2017, paragraph 199 RL-0079.
[94] Ibid, paragraph 50.
[95] Article 53 ICSID Convention
[96] Articles 53-55 ICSID Convention.

provisions, provided that the autonomy of the EU and its legal order is respected".[97] *(Emphasis added)*

99. The interpretation of Article 26(4) of the ECT that the Claimant maintains, in the sense that investment arbitration can exist between an investor from the EU against a EU Member State does not grant, as explained before, the autonomy of the EU and its legal order.

100. Therefore, the only way in which Article 26(6) of the ECT –which is also EU Law- remains compatible with Primary EU Law is if it is understood that the unique possible arbitration proceeding is that which confronts a foreign investor (that is, an investor which is not from the EU) and a EU Member State or an investor from a EU Member State against an State which is not a Member of the EU, provided that the dispute does not relate to the interpretation or application of EU Law.

101. This conclusion is, in addition, the only conclusion compatible with an interpretation of the ECT in good faith according to the criteria settled by Articles 31 and 32 of the VCLT. In this regard, it is not possible to interpret that the EU Commission could promote the signature of the ECT against the main principles of EU Law that justify the "raison of être" of the EU Commission itself. Neither party to the ECT could understand that by signing it they were giving their consent to elude the application of their internal public order.

102. As extensively analyze in our Memorials, the ECT contains constant signs that protect the autonomy and primacy of EU Law, starting by Article 26(6). In addition, the definition of Contracting Party of Article 1(3), the vote rules of Article 36(7) and the principle of primacy recognized by Article 25 of the ECT confirm the interpretation maintained by the Respondent and supported by the EU Commission and the CJEU.

103. As a consequence, the application of EU Law imposed by Article 26(6) of the ECT determines, with all due respects, the lack of the present ICSID Tribunal to hear the issues in dispute in this proceeding.

(2.2) The opinion of the Advocate General is neither relevant nor binding and in any case confirms the lack of jurisdiction of this ICSID Arbitral Tribunal

104. The findings of the ECJ contained in the Achmea Ruling dissent from the opinion of the Advocate General[98]. It should be noted that this latter opinion is neither binding on the ECJ nor on any other body, Member State or citizen of the EU. Therefore, the opinion of the Advocate General must be considered superseded by the legally binding judgment of the 28 Judges of the ECJ.

105. However even for theoretical purposes, the application of the conclusions of the Advocate General to the present case would lead to the same conclusion reached by the Achmea Ruling:

[97] Judgement of EUCJ (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia/Achmea BV. 6 March 2018, paragraph 57. CL-0162.
[98] Opinion of Advocate General Wathelet of 19 September 2017, Slowakische Republik v Achmea BV, C-284/16, provisional text. C-0261

106. First, the Advocate General considered that in the Achmea case the controversy was not related to the interpretation and application of the Treaties because the EU was not a Contracting party to the BIT signed between the Netherlands and the Slovak Republic which, therefore, was not part of EU Law. The Advocate General knowledges that if the EU were a Contracting Party to the relevant International Treaty, then the Treaty would become part of EU Law and the dispute would concern the interpretation and application of EU Law. In this latter case the exclusive competence to interpret and applied EU Law granted by Article 344 of the TFEU would have to be respected according to the Advocate General.[99] If this reasoning is applied to the present case in which the EU is a contracting party to the ECT, then the conclusion will be that Article 344 prevents that an EU investor initiates investment arbitration proceedings against a Member State of the EU under Article 26(6) of the ECT because the ECT is part of EU Law.

107. Second, the Advocate General reasoned that in the Achmea Case neither Achmea nor the Slovak Republic based their claims and defense on provisions of EU Law[100]. This circumstance does not concur in the present case that directly relates to subsidies to renewables which are State Aid under EU Law. Moreover, as the Claimant recognizes and the Respondent recalls, Spain put in place the support scheme for renewables in compliance with EU Law not only with regard to the objectives established by the EU Directives but also subject to the limits provided for EU Guidelines on State Aid. The dispute concerns a core institution of EU Law expressly regulated in Articles 107 and 108 of the TFEU. In addition, the Respondent bases its claims (especially on Jurisdiction) and defense in EU Law.

108. Third, when answering the EU Commission's allegations regarding the impossibility that ECJ exercises its powers through the reference for a preliminary ruling provided by Article 267 TFEU when the arbitration takes place before ICSID Tribunals, the Advocate General expressly acknowledges that risk and advises that EU Member States should avoid ICSID proceedings. The Advocate General avoids to further comment on this issue because he considered it merely hypothetical in the Achmea case.[101] However, in this dispute the risk is not merely hypothetical but completely real because this is an ICSID Tribunal and the impossibility that the controversy reaches the ECJ does exist. Only with the limited scope that enforcement proceedings allow, the dispute could reach the ECJ but this possibility depends exclusively on the Claimant's will who could request the enforcement of an eventual condemnatory award before the courts of any contracting party to the ICSID Convention in spite of that party is or not an EU Member State. This Respondent recalls that the enforcement of the EISER, Novenergia and Antin Awards have been requested by the Claimants before the Courts of the EEUU a non-EU Member State. Moreover, the Jurisdiction of the Tribunal is something that cannot be established at the time of the enforcement of the Award but has to be established at the time of the request for arbitration. In any case, the scope of an exam of the interpretation or application of EU Law by the ECJ within an enforcement proceeding would be so limited that autonomy of EU could not be assured.

[99] Opinion of the Advocate General M. Wathelet in Case C-284/16; paragraphs 160, C-0261
[100] Ibid., paragraphs 174 to 178.
[101] Ibid., paragraph 253.

109. As a conclusion, the opinion of the General Advocate must be considered superseded by the legally binding judgment to the Member States Ruling of the 28 Judges of the ECJ. Hence, the opinion of the Advocate General has not relevance at all for the present dispute.

(2.3) Article 16 of the ECT is not applicable

110. At the hearing the Claimants suggested the Tribunal that the conflict between EU Law and Article 26 of the ECT should be solved by applying Article 16 of the ECT[102]. However, the conflict arises from the application of Article 26(6) itself of the ECT which imposes the Tribunal the obligation to apply EU Law to decide all the issues in dispute in this intra-EU controversy.

111. Therefore, Article 26(6) of the ECT becames the "disconnection clause", because the ECT promoted and signed by the EU, preserves EU Law and its authonomy.

112. The Respondent is not saying that the Tribunal cannot apply Article 26 of the ECT. On the contrary, the Respondent is asking the Tribunal to apply it with all its consequences, wich include the lack of jurisdiction of the Arbitral Tribunal to hear an intra-EU investment dispute that concerns a key institution of EU Law.

IV. THE CLAIMANTS INVESTED IN MAY 2012

113. The Kingdom of Spain does not accept the Claimants' thesis in relation to the investment date (August 2011). The date of investment is May 2012 from both a legal and an economic point of view.

114. During their opening statement, the Claimants asserted that "*think we all agree that the date on which an investment is made -- look at what the Novenergia tribunal said: the date on which the decision to invest becomes irrevocable is relevant to assess an investor's legitimate expectation. (...)*"[103]

115. However, the Respondent does not agree with that assertion, which is also contrary to the doctrine contained in the legal authorities provided by the Claimants themselves:

> *"The acceptance of an investment as a complex processes involving a number of different transactions means that it is not possible to focus only on one particular point in time for the identification of legitimate expectations. Rather, it is necessary to identify the diverse transactions and activities, which combine constitute the investment, and to examine individually whether they were based on contemporary legitimate expectations. In other words, it is necessary to ascertain the existence of legitimate expectations held by the investor at the time of each individual decision."*[104]

116. Thus, even if it were accepted (*quod non*) that the investment process was delayed in time from the initial decision to invest in August 2011 to the acquisition of the shares of

[102] Hearing Transcript, Day 2, page 55, lines 10 to 18 (Ms. Stoyanov).
[103] Hearing Transcript, Day 1, page 94, lines 5 to 23
[104] Document CL-125, Schreuer and Kriebaum , "At What Time Must Legitimate Expectations Exist?", in A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Thought, 265-276, Jacques Werner & Arif H. Ali eds., 2009.

the wind farms and the payment of the price in May 2012, the expectations that must be taken into account are those existing throughout the investment process, specially at the relevant moments of that process. Therefore, the Tribunal cannot ignore what the Claimants' Expectations were on 8 May 2012 when their investment process concluded.

(1.1) <u>The investment was acquired and the price paid on 8 May 2012</u>

117. At the hearing, in an attempt to mislead the Arbitral Tribunal, the Claimants described their investment process as follows: "*On 1st August 2011, therefore, the investment advisory committee approves the acquisition, and the SPA is then signed on 12th August 2011, and Bridgepoint pays about €91 million for the wind farms*."[105]

118. However, this is a very simple way to describe how the investment took place because the Claimants did not acquire the possession and control of the assets that constitute the investment in August 2011 but in May 2012 when the conditions precedent to which the sale was subordinated were met and the sale was closed. This is expressly stated in the agreement of August 12, 2011[106]:

> Hereby, subject to compliance with the conditions precedent established in Clause 3 below, (i) the Sellers will sell and transfer the Shares on the Closing Date, representing 100% of the share capital and voting rights of the Companies free of charges, encumbrances, third party rights, claims and restrictions of any kind with the sole exception of the pledge of the Shares referred to in **Schedule 2**, to the Buyers which will purchase and acquire them, and (ii) the Sellers will assign to the Buyers on the Closing Date, which will accept, their contractual rights and obligations under the Intragroup Loans.

119. Nor did the Claimants pay the price of their acquisition until the closing of the sale[107]:

> The Price shall be paid by the Buyers on the Closing Date to the Sellers to the bank accounts mentioned in Clause 6.2 (a).

120. Moreover, this acquisition price could be adjusted until the closing date of the sale.[108]

121. The conditions precedent to which the sale was subordinated were established for the benefit of the Claimants[109] who, therefore, deferred the acquisition at the time when said conditions had been met. These conditions were so significant that the parties agreed that their non-compliance or resignation before the estimated date for the closing of the sale would result in the termination of the contract.[110]

122. In fact, as the Claimants' own witness and the closing sale agreement acknowledge, the acquisition did not incorporate all the wind farms included in the August 2011 agreement,

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[105] Hearing Transcript, Day 1, page 93, lines 22 to 25 (Claimant's opening)
[106] Document C-35, clause 2.
[107] Ibid, clause 4.3.
[108] Ibid, clause 4.6.
[109] Ibid, clause 3.5.
[110] Ibid, clause 3.8: "*If any of the Conditions Precedent are not fulfilled or waived on or before the Estimated Closing Date or the Extended Estimated Closing Date (as applicable), Clause 8 (termination rights) shall apply*."

but only those in respect of which the suspensive conditions had been met.[111]

123. Moreover, the parties agreed that the private document signed in August 2011 would not be submitted to a public deed until the effective transfer of the shares and loans, i.e., until the closing of the sale.[112] That is to say, this transmission and its date would not be opposable to third parties, including the Respondent, until the closing.

124. Additionally, the parties agreed that the buyer could desist without damages from the contract if an adverse material change occurred.[113] We have not been able to find the definition of "material adverse change" in the contract. At the hearing Claimants said:

> *"A material adverse change, you need to demonstrate that an event has occurred that has a material adverse impact on the business."*[114]

125. Thus, in order to determine which kind of circumstances may constitute a material adverse change it is first needed to specify what the business plan of Brigdepoint was. According to the Claimants Bridgepoint's intended business was to increase the value of the wind farms "*by (1) reducing inefficient costs that were still prevalent in the farms and the project companies; and (2) making additional acquisitions. It was going to create a platform of many wind farms that it would then be able to leverage*."[115] Also according to the Claimants Bridgepoint's plan "*was frustrated because of the disputed measures.*"[116] Therefore, according to the Claimants themselves, regulatory changes that could negatively impact the economics of existing installations constituted an event with "a material adverse impact on the Claimants' business".

126. Then Counsel for the Claimants came on to quote the facts that occured between August 2011 and May 2012 (Mr Rajoy's speech of 19 th December 2011[117], the CNE press release of 28th December 2011[118]; Royal Decree-Law 1/2012[119]; the CNE report of 7th March 2012[120] and the 2012 National Reform Programme of 27th April 2012[121]) and said that: "*even if you were to accept the submission -- which is not right as a matter of contract law – that you have to look at what happens in that intervening period, nothing that would amount to material adverse change; nothing that could even put the Claimants on notice that something as radical as the government would later do was going to happen*."[122]

127. However, Counsel for the Claimants forgot to say that some of the documents she cited warned about an inmediate reform of the support scheme from renewables that would

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[111] First testimony of Don Felipe Moreno, paragraph 65. Document C-121 states that the August 2011 agreement is only partially executed given that "only the conditions precedent to the purchase and sale of the company's interests and intra-group loans of the La Boga, S.L. and Marmellar S.L. wind farms".
[112] Ibid, clause 6.1
[113] Ibid, clause 8.1.1.
[114] Hearing Transcript, Day 1, page 94, lines 5 to 23, page 95, lines 1 to 4 (Claimant's opening)
[115] Hearing Transcript, Day 1, page 17, lines 23 to 25, page 18 lines 2 to 15 (Claimant's opening)
[116] Ibid
[117] Exhibit R-0192
[118] Exhibit R-0170
[119] Exhibit R-0091
[120] Exhibit R-0131
[121] Exhibit R-0121
[122] Hearing Transcript, Day 1, page 94, lines 5 to 23, page 95, lines 1 to 4 (Claimant's opening)

negatively affect the economics of existing installations.

128. Indeed, the speech of Mr. Rajoy of 19 December 2011 announced the intention of the new government 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."*[123] Counsel for the Claimants did not explain why wind existing installations should be deemed excluded from the expression "*all available technologies, without exception*".

129. In the same vein, the Preamble of RD-Act 1/2012 warned of the need to design a new remuneration model for renewables without excluding any kind of technology or existing installations:

> *"the measures adopted to date have not proven sufficient, putting at risk the ultimate aim of eliminating the tariff deficit as from 2013.*
>
> *The tariff deficit constitutes, per se, a barrier to the proper development of the sector as a whole and, in particular for the continuation of the policies to promote electrical production from high-efficiency and renewable energy sources. (...)*
>
> *It has become necessary to design a new remuneration model for this type of technologies that takes into account the new economic scenario, promoting the efficient assignment of resources through market mechanisms. In this way, it is endeavoured to coordinate in the future a system that promotes market competitiveness by means of mechanisms similar to those used in other EU countries and which ensure the future feasibility of the system."*[124] *(emphasis added)*

130. Counsel for the Claimants also omitted other relevant facts that occurred in this period like the Minister of Industry's speech (Mr Sebastián) of January 2011 in the Congress of Deputies, given during the session held for the validation of RD-Act 14/2010 on 26 January, 2011, that clearly stated what its purpose was (elimination of the deficit), the absence of petrification of the compensation system in force after the approval of RD 1614/2010 and the need to adopt more measures. In this way, the Minister stated:

> *"... since 2009, the Government has been working towards the adoption of a set of measures whose common denominator is the rationalisation of regulated costs and the reduction of the tariff deficit (...) All of these measures have been born from **dialogue**, both with the sectors affected as well as with the main political forces. **But these 2009 and 2010 measures have not been enough**. The imbalances have been accentuated by the appearance of a series of adverse circumstances, in some exceptional cases, of which I would like to highlight two. On the one hand, the growth in excess of some of the regulated costs during 2010, in particular the special regime premiums, and, on the other hand, the evolution of electricity demand, which in 2009 suffered a fall of 4.7 percent. This is the first drop in electricity demand after 25 years of steady increases approaching 4 percent per year. These decreases in electricity demand reduce system*

[123] Exhibit R-0192
[124] Preamble of RD-Act 1/2012. R-0091.

revenues and assume that fixed costs have to be paid between fewer electricity users, which raises the cost per user. These two circumstances have raised the tariff deficit and have led to the measures adopted so far to ensure the progressive reduction of the tariff deficit in a balanced way among all actors in the sector being insufficient. Therefore, the need to urgently approve the new measures (...)."[125] *(Emphasis added)*

131. Spanish Supreme Court set of Judgements of April 2012 that confirmed the legality of changes introduced by Regulations of year 2010 to PV and other technologies confirming its constant doctrine have also been omitted by the Claimants.[126]

132. The Claimants also conceal that at that point of time the renewable sector was aware of the unsustainability of the electricity system as highlighted by the CNE in its report of 7 March 2012[127] and the need to take immediate measures that would affect existing installations. In this regard, the president of the main investor company in wind technology in the world and in Spain, IBERDROLA, being aware of the economic situation, declared in February 2012:

"Premiums and retroactivity: Everything is modifiable. The only thing that needs to be done is to make sure that the facility has a reasonable rate of return. However, that does not mean that profitability has to be the cost of capital multiplied by two or three [as it would be with the current premium regime]."[128]

133. Indeed, it is completely untrue Claimants' assertion that there was not evidence in 2012 of the over-remuneration of wind installations provided by RD 661/2007 and the need of correcting it immediately. The sector was aware of the existence of windfall profits. IBERDROLA the main investor in wind technology knew that[129].

134. The CNE itself in its report of 7 March 2012 warned, among other things, about the overremuneration derived from updating according to the CPI all the subsidy, including the 85% of the incentive allocated to cover the investment costs (CAPEX), which were sunk costs and therefore did not need to be updated:

"The indexing to the inflation indicator is justified because, in the absence of fossil fuel, the variable cost of these technologies depends fundamentally on the performance of different services (operation, maintenance, insurance ...). So then, also for these technologies a large part of their annual revenue is dedicated to covering their investment costs (approximately 85% in the case of ***wind*** *and photovoltaic energy), so updating the total of the premium is disproportionate (****only 15% should be updated****).*"[130]

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[125] Exhibit R-0287.
[126] Exhibits, R-0032, R-0033, R-0097, R-0106, R-0107, R-0129, R-0135, R-0142, R-0144, among others.
[127] C-0166, page 6 PDF EN version: "the current situation is unsustainable. It is necessary to introduce regulatory measures, as requested in the communication from the Secretary of State for Energy, with immediate short-term effect, for the purposes of eliminating the deficit of the system, mitigating the costs of financing of the debt pending securitization and clearly defining the access costs that should fall on electricity consumers, in order to sufficiently and stably determine the access tolls."
[128] Exhibit R-0340
[129] Ibid.
[130] Exhibit C-0166, page 41 PDF EN version

135. The CNE proposed in its report an immediate reduction of the tariffs to existing plants in order to correct those windfall profits and justified the proposed measure by saying that "*this measure maintains the principle of obtaining a reasonable profit contained in the Law.*"[131] This measure would save the system EUR 3305 million until 2016.[132]

136. The CNE also noted that due to an inconsistency, the premium for existing thermo solar renewable installations "*would have to be reduced by 12%; with that, savings in the access rate could be reached to the tune of 47 million Euros in 2012, 90 million Euros in 2013, and 200 million Euros from 2014 on*."[133] Also with regard to thermo solar existing renewable plants, the CNE proposed that only 5% of the energy produced by burning gas –instead of the 15%- should received the premiums.[134] It must be recalled that RD 1614/2010 which, according to the Claimants contained a stabilization commitment, also applied to thermo solar installations. However, the CNE did not find any obstacle to propose a reduction of their remuneration.

137. The CNE also proposed as a medium-term measure "*to revise the existing regulation in order to make it possible to reach the objectives set forth in the recently approved Renewable Energy Plan to minimise the associated costs*."[135]

138. In addition, the CNE suggested as a measure with impact on all renewable existing installations "*a time limit for receiving premiums and tariffs that are currently in force, in a similar way to the one already implemented in relation to part of the solar photovoltaic park (which has been limited to 30 years).*"[136] The grounds for that measure were the following: "*it should be taken into account that the tariffs and premiums are calculated with the aim of obtaining a "reasonable profit" during the economic life (estimated useful life) of the facility, then in terms of additional premiums beyond the economic life there could be additional income above the reasonable remuneration.*"[137]

139. It must be reminded that the CNE issued this report after a hearing process during which 477 submissions from stakeholders were filed.[138] No diligent investor could ignore the existence of this report.

140. The Claimants state that none of those circumstances "*could even put the Claimants on notice that something as radical as the government would later do was going to happen*."[139] However, it is impossible that any diligent investor could at that point of time rely upon the existence of stabilization commitments that RD 661/2007 economic regime would remain unaltered. Everybody knew that regulatory changes worsening the economics of renewable existing installations could happen and that they were likely to happen in that economic situation. Everybody knew as well that the only limit to those regulatory changes was the guarantee of a reasonable return, as constantly declared by the

[131] Ibid.
[132] Ibid, page 42.
[133] Ibid.
[134] Ibid, page 43 PDF.
[135] Ibid, page 95 PDF.
[136] Ibid, page 101 PDF.
[137] Ibid, page 101 PDF.
[138] Ibid, page 5 PDF.
[139] Hearing Transcript, Day 1, page 94, lines 5 to 23, page 95, lines 1 to 4 (Claimant's opening)

Spanish Supreme Court since year 2006 and by players like Iberdrola and by renewable energy lobbys such APPA.

141. If the intention of the Claimants was to increase the value of the portfolio that they were going to acquire and expand it[140], the economic situation and the announcements made by Spain between August 2011 and April 2012, should have affected the value of the portfolio and frustrated the intentions of the Claimants regarding their future business. That is, those circumstances should have constituted a material adverse change for their investment purpose. The Claimants could have waived the purchase of the portfolio and did not do so. In this way, the Claimants fully assumed the regulatory risk from which the seller had expressly been released, as of the closing sale date, in clause 11.5 of the August 2011 agreement.[141]

142. Regarding this point, it is interesting to recall what was established by the Award of the Isolux Case, in which a similar situation was raised. The Court unanimously decided that the date to be considered as the investment date to assess legitimate expectations was the sale closing date, since the Claimant could terminate the contract without the right to compensation if, between the date of the Agreement and the fulfilment of its last suspensive condition, events occur that could negatively affect the value of the group:

> *"The Arbitral Tribunal considers that it is the latter of these two dates that should be used as the reference date. While it is in fact true that the decision to invest was already taken at the end of June 2012, IIN could have renounce to make the investment until 29 October 2012, in particular, if the knowledge it had of circumstances regarding the reform of the Spanish electrical system allowed to anticipate an unfavourable evolution. Furthermore, clause 5.6.2 of the Investment Agreement dated 29 June 2012, included the possibility of termination without rights to compensation, if circumstances able to negatively affect the group value arised."*[142]

(1.2) <u>The Claimants made their investment in May 2012 from a legal point of view</u>

143. From a legal point of view, as was reasoned in our Rejoinder[143], the Claimants made their investment, in accordance with the ECT, when they acquired shares in the holding companies of the wind farms and the participative loans. In this sense, it should be reminded that the ECT defines investment in its Article 1(6) as any asset owned or controlled directly or indirectly by an investor. In addition, it clarifies that "*Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity*."[144]

144. In the ECT, the differentiation between the moment before and after the investment is

[140] First testimony of Don Felipe Moreno, paragraph 76.
[141] Document C-35, clause 11.5: "The Sellers shall not be liable for any Damage where that Damage is the result (i) of the approval or amendment of any rules, or of the current interpretation of any rules, whether or not having retroactive effect, arising subsequently to the date of this Agreement, or (ii) any change in the accounting or tax management procedures made by the Buyers or the Companies after the Closing Date."
[142] Isolux vs. Spain. Award of 12 July 2016), paragraph 783. RL-0072.
[143] Respondent's Rejoinder on the Merits, paragraphs 230 to 239.
[144] Article 1(8) of the ECT, English version.

essential, given that the obligation to provide the FET by the host state to the investor and its "Investment" is made only once the "Investment" has been made and not before. Prior to the Investment being made, that is to say, during the so-called "making investment process", the treatment to be received by the potential investor is not what is established in Article 10(1) of the ECT but what is described in paragraphs 10(2) to 10(4). Determination of the content of this Treatment is deferred to a supplementary Treaty that has not yet been signed.

145. Therefore, it is clear that under the ECT the Claimants did not make an investment until May 2012.

(1.3) <u>The Claimants made their investment in May 2012 from an economic point of view</u>

146. Claimants' own Experts confirmed that the investment was made in May 2012:

"Q. In this case the investment was acquired on May 8th 2012 for €90.9 million in a transaction between a willing buyer and a willing seller; correct?

A. (Mr Caldwell) Well, the agreement was reached prior to that. It was reached, as I understand it, in 2011. The money was actually paid in 2012, at closing.

Q. I will repeat the question: in this case the investment was acquired on May 8th 2012 for €90.9 million in a transaction between a willing buyer and a willing seller; yes or no?

A. (Mr Caldwell) Yes, so I'm accepting that the original purchase was willing buyer/willing seller, that Bridgepoint paid €90.9 million for the equity. The only point I was highlighting was the agreement was signed earlier and then it closed in May 2012.

Q. Mr Caldwell, again, for the third time, were the assets acquired on May 8th 2012; yes or no?

A. (Mr Caldwell) The closing of the transaction, so therefore the money flow, and I presume the legal title -- although I'm not, you know, an expert lawyer on that -- occurred in May 2012, at closing.

Q. Actually let me take you, please, to paragraph 3 of your first report, which is page 1. Are you there?

A. (Mr Caldwell) Yes, I'm looking at paragraph 3. (...) Can you see in the middle of the paragraph you state that: "These three companies acquired on 8 May 2012 the entire share capital of Parque Eólico Marmellar ... and Parque Eólico La Boga ... [the] two Spanish project companies ..."

A. (Mr Caldwell) Yes, that's what it says.

Q. Yes. Thank you very much. Actually can we go to your presentation of today, slide 12. In slide 12, you state there the date of the investment as May 8th 2012; yes or no?

A. (Mr Caldwell) Yes, because the chart reflects the 90.9 figure."[145]

147. In the same line, Accuracy declared that the assets were acquired by the Claimants and the price of the sale was paid in May 2012:

> *"The first thing is: we have the proper proxy when it comes to the fair market value of the assets -- that is, an arm's length transaction between a willing buyer and a willing seller; that was acknowledged yesterday too -- before the measures, which is when the Claimants acquired the wind farms in 2012. I know there's a debate on when that price was from, but still the the acquisition was done in May 2012."*[146]

> *"We know that the Claimants acquired these assets for €91 million in 2012"*[147]

> *"when you discount your cash flows you use the real date of the cash flows; the assets were paid in May 2012, not in 2011."*[148]

148. In view of the aforementioned it must be concluded that the Claimants' investment took place in May 2012. Even if it is considered that the investment process began in August 2011 and concluded in May 2012, the closing date of May 2012 is also relevant in order to assess what the legitimate expectations of the Claimants were at that point of time and to assess damages.

V. INEXISTENCE OF STABILIZATION COMMITMENTS

149. During the hearing, the Claimants insisted that the Kingdom of Spain had allegedly undertaken specific commitments to maintain unchanged the Royal Decree 661/2007 regime during the whole life of the wind farms in which they invested. According to the Claimants, those alleged commitments supposedly derive from the regulation itself, RAIPRE registration, a press release by the Ministry of Industry, the so-called July 2010 "agreement", as well as from presentations by the CNE, IDAE and Invest in Spain.

150. As was proved during the hearing[149], none of those alleged commitments were so. Moreover, as was also explained during the hearing, if Claimants had taken into consideration a number of facts, Claimants would have been aware that the Respondent could have never commited to the maintenance of the Royal Decree 661/2007 regime for the life of the facilities. We recall below what those facts are.

151. First of all, the evolution of the Spanish legal framework that had occurred before Claimants made their investment proved that no such stabilization commitments existed. That evolution clearly showed any diligent investor that regulatory changes affecting existing instalations could occur provided that a reasonable return was ensured, as

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[145] Hearing Transcript, Day 3, page 119, lines 9 to 25; page 120, lines 1 to 8 and page 121, lines 3 to 16 (Mr. Cadwel's cross examination)
[146] Hearing Transcript, Day 4, page 25, lines 22 to 25 an page 26, lines 1 to 4 (Accuracy's presentation)
[147] Hearing Transcript, Day 4, page 27, lines 9 and 10 (Accuracy's presentation)
[148] Hearing Transcript, Day 4, page 35, lines 23 to 25 (Accuracy's presentation)
[149] Slides 61 to 75 of Respondent´s Opening Presentation on Fundamental Facts; Slides 47 to 51 of Respondent´s Opening Presentation on Merits; Hearing Transcript, Day 1, page 212, line 14 to page 218, line 14 (Respondent´s Opening); and Hearing Transcript, Day 2, page 20, line 19 to page 25, line 4 (Respondent´s Opening)

indicated in the Spanish Electricity Sector Act and repeatedly stated by the Spanish Supreme Court.[150]

152. It is indeed surprising that Claimants claim they were not aware of the possibility of regulatory changes negatively impacting existing installations as Claimants themselves affirm that they were aware of the evolution of the Spanish regulations on renewable energy. In this regard, Mr Felipe Moreno stated the following during the hearing:

> *"Q. Okay, don't worry. It's fair enough. I know you are not a lawyer. But you have a deep knowledge of the Spanish regulations, right?*
>
> *A. Yes.*
>
> *Q. The evolution --*
>
> *A. The evolution of the renewable energy; that's true, that's correct."*[151]

153. Secondly, the Claimants ignore the fact they invested in a strategic and highly regulated sector: the Spanish Electric Sector.[152]

154. The fact that the SES is a strategic sector implies that the supply of electricity is an essential service and that, as was indicated in the Preamble of Act 54/1997, the purpose of the Spanish Electric Sector is "*guaranteeing the supply of electric power, its quality and the provision of such supply at the lowest cost*", all of that without forgetting environmental protection. Hence, any diligent investor was aware that any economic activity developed within the Spanish Electric Sector has to balance investors' and consumers' interests and the activity of energy production under the Special Regime is not an exception. As the Preamble of Royal Decree 661/2007 expressly indicated *"[t]he economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable*."

155. Moreover, the fact that the Spanish Electric Sector is a highly regulated sector implies that the rights and obligations of the different participants in that sector do not derive from contracts. Those rights and obligations derive from Acts and Regulations. Any diligent investor was aware that those Acts and Regulations relate to each other through the principle of hierarchy. That principle means that Regulations (Royal Decrees) are subordinated to Acts (Laws and Royal Decree-Laws) and develop the principles contained in those Acts. Regulations (Royal Decrees) are hence the normative instrument that allows the Government, always respecting the mandates of the Act, to adapt the norms to the changing economic, social and technical circumstances. Regulations are adaptable and changeable norms by nature. Consequently, no Article of a Regulation (for instance, Royal Decree 661/2007) can prevent the introduction of regulatory changes aimed at adapting

[150] Slides 19 to 25 of Respondent´s Opening Presentation on Fundamental Facts
[151] Hearing Transcript, Day 2, page 62, lines 19 to 25 (Cross-examination of Mr Felipe Moreno)
[152] Slides 26 to 32 of Respondent´s Opening Presentation on Fundamental Facts.

the regulatory framework to the economic and technical circumstances always within the limits set by an Act (for instance, Act 54/1997).

156. This circumstance was perfectly captured by the Isolux Tribunal:

> *"In the first place, as previously mentioned, the regulatory framework had already been modified several times. The proper RDs 661/2007 and 1565/2008 were no more than amendments to RD 436/2004. After that, RD 1565/2010 and Royal Decree Law 14/2010 modified the established economic regime in RD 661/2007 for the photovoltaic sector. All of these regulations issued for the implementation of Law 54/1997, of 27 November 1997, regarding the Electrical Sector (LSE), showed a very unstable character of a regulatory framework that the government has the power and the duty to adapt to the economic and technical needs of the moment, within the LSE framework."*[153]

157. Thirdly, the alleged existence of stabilization commitments also clashes with the repeated Case Law of the Spanish Supreme Court.

158. Before the Claimants made their investment, the Spanish Supreme Court had stated that under Act 54/1997 regulatory changes that worsened the economics of existinting Special Regime installations were admitted. It also made clear that the limits to those changes will be lawfull if the return derived from the new norms is reasonable according to the cost of money in the capital markets.[154]

159. For instance, in 2009 the Supreme Court itself stated that the expectations of investors in the Special Regime, as the Claimants, could not ignore its Jurisprundence:

> *"(The Claimant) does not pay enough attention to the case law of this Chamber specifically referred to with regard to the principles of legitimate expectation and non-retroactivity applied to the successive incentives' regimes for electricity generation. This involves the considerations set out in our decision dated October 25, 2006 and repeated in that issued on March 20, 2007, inter alia, about the legal situation of the owners of electrical energy production installations under a special regime to whom it is not possible to acknowledge for the future an "unmodifiable right " to the maintenance unchanged of the remuneration framework approved by the holder of the regulatory authority provided that the stipulations of the Law on the Electricity Sector are respected in terms of the reasonable return on investments."*[155]

160. Fourthly, the Claimants invested in a liberalized market where the purpose and limits of subsidies cannot be disregarded.[156] The purpose of subsidies to renewable producers is to allow those producers to compete on an equal footing with conventional producers in a liberalized energy market. This implies that investors in renewable installations may only receive the amount of public subsidies necessary to achieve a "level playing field" with

[153] Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain (Arbitration SCC V2013/153), Award dated 12 July 2016, paragraph 788. RL-0072.
[154] Slides 88 to 95 of Respondent´s Opening Presentation on Fundamental Facts.
[155] Ruling of the Third Chamber of the Supreme Court on 9 December 2009, appeal 152/2007, reference El Derecho EDJ 2009/307357, Point of Law 6. page 4. R-0002.
[156] Slides 33 to 49 of Respondent´s Opening Presentation on Fundamental Facts.

the conventional energy generation sources.

161. Therefore, and addressed when discussing State Aid, the Claimants could not have the expectation to receive an amount of subsidies above the minimum necessary to be compensated for the difference between the cost of producing energy from renewable sources and the market price. If this proportion is breached investors must expect the reaction of the Regulator to recuperate such proportion.

162. Fifthly, the alleged existence of stabilization commitments is also incompatible with the fact that subsidies to renewable producers are a cost of the Spanish Electrical System and are thus subject to the financial sustainability of that System.[157] This fact is even reflected by the Spanish Supreme Court:

> *"Private operators or Agents who "renounce" the market, even if they do so "induced" more or less by a generous reward offered by the regulatory framework, without the assumption of significant risks, knew or should have known that such a state regulatory framework, approved at a certain time, would be in the same way consistent with the economic conditions then prevailing and the electricity demand forecasts made at the time. Any subsequent relevant changes to the economic situation would not be able to be ignored and it would be the logical reaction of the authorities to adjust to new circumstances. If these led to difficult changes in many other productive sectors, it is not unreasonable that these would include the renewable energy wishing to continue receiving regulated tariffs instead moving to market mechanisms (e.g. bilateral procurement and sales on the organised market). This would be even more true in a situation of widespread economic crisis and, in the case of electricity, with the growing tariff deficit which is partly caused by the impact regulated tariff payments have on the calculation of access fees, as a cost attributable to the electricity system."*[158]

163. If the Claimants had considered all the above-mentioned facts they would have reached the conclusion that the Kingdom of Spain could not, and certainly did not[159], provide any commitment to maintain unchanged the specific regulatory regime of Royal Decree 661/2007 during the whole life of their investment.

164. In fact, the AEE (Spanish wind association) has never claimed the existence of any stabilization commitment. It did not claim their existence even after of the so-called July agreement of 2010. On the contrary, in its submissions concerning the draft of RD 1614/2010, the AEE quoting the Spanish Supreme Case Law of years 2006 and 2009, stated:

> *"The proposed modification of the remuneration regime of the reactive energy, if approved, would have a level of retroactivity such that, according to the Jurisprudence of the Constitutional Court, may be considered of a "minimum degree"*

[157] Slides 50 to 60 of Respondent´s Opening Presentation on Fundamental Facts

[158] Ruling of the Supreme Court of 12 April 2012, appeal 40/2011 EDJ 2012/65328, Fourth Legal Ground. R-0144.

[159] Hearing Transcript, Day 2, page 20, line 19 to page 25, line 4 (Respondent´s Opening) and Slides 47 to 51 of Respondent´s Opening Presentation on Merits.

as it only has an impact on the economic effects that in a future would be produced although the basic situation or relation has arisen in accordance with the previous one. It is true that the Supreme Court has declared, in relation to this type of retroactive modification, that there is not an "uncheable right" that the economic regime remains unaltered and that "of the prescriptive content of Act 54/1997 of 27th of November of the Electrical Sector the petrification or freezing of the remuneration regime of the owners of electricity installations under the special regime or the unchangeability of this regime is not apparent", thus recognizing a relatively broad magin to the "ius variandi" of the Administration with regard to the tretroactive modification of this remuneration framework, in particular "that the requirements of the Law on the Electrical Sector are observed with regard to the reasonable return of investments"[160]

165. The AEE neither claimed the existence of any stabilization commitment when it appealed the disputed measures before the Spanish Supreme Court. In this regard, the Supreme Court Judgement of of 12 July 2016 dismissing the appeal filed by the AEE against RD 413/2014 and OM 1045/2014, states:

"In the present case, of course, there is not or at least it is not invoked in the application, any kind of commitment or external sign, directed by the Administration to the claimants, regarding the inalterability of the regulatory framework in force at the time of beginning its power generation activity from renewable sources."[161]

166. Moreover, none of the Award rendered so far in the Spanish cases acknowledges the existence of the stabilization commitments alleged by the Claimants. We should note that the Masdar Awar recognized the existence of two specific commitments out of the general legislation to the maintenance of RD 661/2007 economic regime. However, as will be explained in Section VIII of this PHB, none of those two commitments exists in the present case.

167. In short, the tariff regime under Royal Decree 661/2007 could change worsening the economics of existing installations and those changes could be motivated by the need to correct windfall profits and ensure the sustainability of Spanish Electrical System.

168. The only commitment provided by the Kingdom of Spain, set in the Electricity Sector Act and ratified by the Spanish Jurisprudence, was in essence: i) guaranteeing priority of access to the grid, ii) guaranteeing priority of dispatch, and ii) guaranteeing a reasonable return on the investment according to the cost of money in the capital markets.

169. The disputed measures maintain the essential features of the regulatory framework in which the Claimants took the decision to invest: i) they guarantee the priority of access to the grid[162], ii) they guarantee the priority of dispatch[163] and ii) they guarantee a reasonable

[160] Observations of the AEE before the CNE during the hearing at the Advisory Council on Electricity, regarding the draft Royal Decree regulating and modifying certain aspects related to the special regime. R-0166

[161] R-0265

[162] Article 26.2 of Act 24/2013: "Electrical energy from installations that use renewable energy sources and, following them, that of high-efficiency cogeneration installations, will have dispatch priority under the same economic conditions on the market, without prejudice to the requirements pertaining to the

return on the investment according to the cost of money in the capital markets.

170. In this regard, the disputed measures allow Claimants' wind farms to recover their investment costs, their operating and maintenance costs and, on the top of that, to obtain a reasonable return on the investment. The Claimants have failed to demonstrate that the return provided by the disputed measures is not reasonable.

171. Furthermore, according to Pöyry, advisor of the Claimants when they sold their investment, the remuneration provided by the disputed measures to the Claimants' wind farms is in most of the cases higher than the retribution obtained under RD 661/2007 regime. It should be noted that the Claimants' wind farms are currently classified within the following standard installations established by MO 1045/2014[164]:

Company	Wind Farm	POWER	COMMISSIONING	IT CODE
Parque Eólico El Perul S.L.	El Perul	49.60	2006	IT-00656
	La Lastra	11.69	2006	IT-00656
Parque Eólico MARMELLAR S.L.	Marmellar	49.50	2007	IT-00657
Parque Eólico LA BOGA S.L.	Lodoso	49.50	2007	IT-00657
	La Lora I	49.60	2007	IT-00657
	La Lora II	49.60	2007	IT-00657
Parque Eólico LA BOGA S.L.	Sargentes	24.00	2009	IT-00659
Parque Eólico LA BOGA S.L.	Arroyal	46.50	2010	IT-00660

172. According to the following table contained in Pöyry's report of 2015, only those installations pertaining to IT-00656 have suffered a decrease on their remmunerations of -22% under the regulated tariff option and of -3% under the market plus premium option. In all other cases, the impact of the disputed measures has been positive[165]:

maintenance of system reliability and safety, under the terms determined in the regulations by the Government.
Without prejudice to supply safety and efficient system development, electrical energy producers from renewable energy sources and highly efficient cogenerations will have priority network access and connection under the terms as set out in the regulations based on objective, transparent y non-discriminatory criteria." R-0074. In the same vein Article 6.1, b) and c) of RD 413/2014

[163] Ibid.

[164] Second witness statement of Mr. Juan Ramón Ayuso, table 07.

[165] Pöyry's report of May, 2015 R-0373, page 50.

Figure 37 – Impact on remuneration per standard facility code for wind

Standard facility code	Technology type	Unit capacity (MW)	Entry into commer-cial operation	Equivalent net operating hours	Revenue 2014 per unit capacity	Revenue 2012		2014 vs 2012	
						Regulated feed-in tariff, per unit capacity	Wholesale market + premium, per unit capacity	Regu-lated feed-in tariff (2012)	Whole-sale market + premium (2012)
					(€ mill/MW)	(€ mill/MW)	(€ mill/MW)		
IT-00656	P > 5MW	1	2006	2,203	0.15	0.18	0.15	-22%	-3%
IT-00657	P > 5MW	1	2007	2,100	0.18	0.17	0.15	2%	17%
IT-00658	P > 5MW	1	2008	2,100	0.21	0.17	0.15	17%	30%
IT-00659	P > 5MW	1	2009	2,100	0.22	0.17	0.15	20%	33%
IT-00660	P > 5MW	1	2010	2,100	0.23	0.17	0.15	24%	35%

173. As a conclusion, not only the alleged stabilization commitments claimed by the Claimants do not exist but the disputed measures respect the essential features of the regulatory framework in which the Claimants decided to invest and provide Claimants' wind farms with a reasonable return.

VI. THE DUE DILIGENCE PERFORMED BY THE CLAIMANTS WAS FLAWED

174. During the hearing, the Claimants acknowledged that they had relied on their legal advisors, Allen & Overy, in order to understand the Spanish legal framework of the renewable sector. In this regard, during his cross-examination, Mr. Felipe Moreno stated that:

> *"A. I mean, I'm not a lawyer; I mean,* ***I just rely on my advisors****, you know, I just review the law -- like, I'm an investor, you know?"*[166]
>
> *"Q. So in consequence, your knowledge of Royal Decree 661/2007 came from, first, your own knowledge of Royal Decree 661/2007, your review; is that correct?*
>
> *A. Yes, it is.*
>
> *Q. And the legal advice that you received from external legal advisors; is that correct?*
>
> *A. Right.*
>
> *Q. Could you identify your legal external advisors?*
>
> *A. My legal external advisor was Allen & Overy."*[167]

175. On the same vein, Ms. Stoyanov stated during the hearing the following:

> *"MS STOYANOV: The scope* [of Allen & Overy´s legal advice] *is very clear: there is a memorandum from Allen & Overy on the record that has been identified as being*

[166] Hearing Transcript, Day 2, page 62, lines 13 to 15 (Cross-examination of Mr Felipe Moreno).
[167] Hearing Transcript, Day 2, page 59, lines 18 to 25 and page 60, line 1 (Cross-examination of Mr Felipe Moreno).

the legal advice that was received and relied upon by Bridgepoint. So I think the advice that he has received from A&O has been put on the record and is clear."[168]

176. As was explained during the Respondent´s Opening presentation[169], the only proofs of said legal advice that have been provided in this arbitration are the following two due diligence reports produced by Allen & Overy: i) "Memorandum. 661/2007 Tariff risk with regards to retroactive effect of future regulations", by Allen & Overy to T-Solar, dated 24 February 2010 (C-102), and ii) "Draft Legal Due Diligence. Executive Report. Project Greco", by Allen & Overy to Bridgepoint, dated 2 August 2011 (C-119).

177. As was proved during the hearing[170], those two legal due diligence reports failed to inform about relevant facts that had occurred before those reports were issued.

178. First, they did not inform that regulatory changes had already occurred negatively impacting existing installations of renewable energy production. In particular, existing installations registered under Royal Decree 436/2004 had been impacted by the reforms operated by Royal Decree-Act 7/2006 and Royal Decree 661/2007. Moreover, existing installations registered under Royal Decree 661/2007 had been impacted by the reforms operated in late 2010. The *leit motiv* of those reforms was always ensuring the economic sustainability of the Spanish electrical System and correcting situations of windfall profits.

179. Secondly, said reports did not inform that the Spanish Supreme Court had stated in various Judgments of 2005, 2006, 2007 and 2009 that the limit to the State´s *ius variandi* with regard to existing installations was ensuring a reasonable return on the investments, as was stated on Act 54/1997, of 27 November, on the Electricity Sector.

180. During his cross-examination, Mr. Felipe Moreno admitted that, before the Claimants made their investment, they were not aware of the existing case law by the Spanish Surpeme Court:

"Q. Were you aware, when you made your studies of the evolution of the Spanish framework on renewable energies, were you aware if the Spanish Supreme Court had rendered any judgment about the modification of the regulatory regime?

A. No, I was not aware of that."[171]

181. Claimants cannot seriously argue that they had performed or obtained an adequated due diligence on the Spanish regulatory framework before making their investment when they have expressly acknowledged that they were absolutely unaware on how the highest interpreter of the Spanish legal framework, i.e. the Spanish Supreme Court, had already ruled on the possibility of implementing regulatory changes for existing renewable installations and the limits to those changes.

182. It is bewildering that the Claimants have repeatedly invoked during the hearing a

[168] Hearing Transcript, Day 2, page 76, lines 17 to 22 (Ms Stoyanov during the cross-examination of Mr Felipe Moreno).
[169] Hearing Transcript, Day 2, pages 27 to 31 (Respondent´s Opening).
[170] Hearing Transcript, Day 2, page 28, lines 8 to 25 and page 29, lines 1 to 17 (Respondent´s Opening.) and Slides 59 to 63 of Respondent´s Opening Presentation on Merits.
[171] Hearing Transcript, Day 2, page 89, lines 19 to 24 (Cross-examination of Mr Felipe Moreno)

Judgement by the UK Supreme Court[172] to try to sustain their thesis[173] but they have absolutely ignored what the highest competent authority to interpret the Spanish regulatory framework –the Spanish Supreme Court- has constantly set when interpreting the Spanish FIT for renewables.

183. An adequate legal due diligence would have warned the Claimants that regulatory changes affecting existing installations could occur and that the limit to those changes was ensuring a reasonable rate of return, as had been repeteadly stated by the Spanish Supreme Court. These were precisely the objective and reasonable expectations that any diligent investor had on the Spanish regulatory framework applicable to renewable producers.

184. Those objective and reasonable expectations have been proved by the Respondent in this case. As was recalled during the hearing[174], the Respondent has provided in this arbitration documents from different law firms, contemporaneous to the two Allen & Overy pieces of legal advice, which show an understanding of the Spanish legal framework which is very different from that portrayed by the Claimants.

185. In particular, during the hearing, the Respondent referred to the Hogan Lovells 2010 Legal report on "The limits to the modifications of the Renewable Energies Economic Regime"[175]. During the hearing, Mr Felipe Moreno himself acknowledged that the scope of said Hogan Lovells report was very similar to the scope of the above-mentioned Allen & Overy legal advice:

> *"Q. […] Can we move, please, to tab 16, volume 2. This is R-327, for the record. […]This is a report elaborated by a legal firm called Hogan Lovells. Do you know it? Do you know that firm?*
>
> *A. Yes, I know them.*
>
> *Q. It's an international firm, isn't it?*
>
> *A. Yes. […]*
>
> *Q. Do you see that the copyright of this report is of 2010?*
>
> *A. Yes, the copyright is 2010.[…]*
>
> *Q. So the scope of this report, just reading the content, is very similar to the scope of the report that you encharged Allen & Overy at the time, in 2010; is that right? About the stability?*

[172] Exhibit C-190
[173] Hearing Transcript, Day 1, page 35 and 36 and Hearing Transcript, Day 4, page 106 and following.
[174] Slides 41 to 45 of Respondent´s Opening Presentation on Merits.
[175] "The limits to the modifications of the Renewable Energies Economic Regime", legal report prepared by Mr. Hermegildo Altozano, partner at the law firm Lovells. Hogan Lovells 2010 Legal report R-0327.

*A. (In English) In 2010 it was much more specific. **But yes**, I asked -- not the Supreme Court, because that's up to them to decide the scope. I just asked business questions: is this sustainable?"*[176]

186. In such report of 2010, Hogan Lovells made express reference to the above-mentioned Spanish Supreme Court Case-Law and clearly indicated that *"[i]n accordance with the doctrine of the Supreme Court, it is possible to modify pro futuro the economic or tariff regime (that is, for electric power production facilities in the special regime which entered into operation prior to the regulatory change) provided that the requirements of the Electricity Sector Act are respected regarding a reasonable return on the investments*."[177]

187. As was also shown during the hearing[178], the understanding of the legal framework contained in said Legal Report by Hogan Lovells was shared and confirmed by numerous statements by various players of the Spanish renewable energy sector, such as Spanish renewable business associations and renewable investors. All of them prove the objective and reasonable expectations that any investor had at the time the Claimants made their investment, which clearly differ from the expectations alleged by Claimants in this arbitration.

188. In fact, as was also proved during the hearing[179], even non-legal documents obtained by the Claimants during their due diligence process as well as the Sale and Purchase Agreement itself by which Claimants acquired their investment reveal the possibility of regulatory changes negatively impacting existing installations.

VII. THE DAMAGES CLAIMED BY THE CLAIMANTS ARE DIVORCED FROM REALITY

(1) Introduction

189. In the present case, as was discussed during the hearing, the disputed measures have not generated any damage to the Claimants. On the contrary, the disputed measures have provided greater stability in the Spanish electrical sector and have thus increased the value of the Claimants' investment.

190. Proof of that is that, as Accuracy's expert Mr. Barsalou stated at the hearing, "the Claimants acquired these assets for €91 million in 2012, and they sold them four years later for €133 million, obtaining a €42 million profit in a four-year period […] It's a question of loss of opportunity more than anything else in that respect, not value deterioration."[180]

191. As Mr. Barsalou also stated during the hearing: "*this is a fairly simple and*

[176] Hearing Transcript, Day 2, page 90, line 1 to page 91, line 14 (Cross-examination of Mr Felipe Moreno).
[177] "The limits to the modifications of the Renewable Energies Economic Regime", legal report prepared by Mr. Hermegildo Altozano, partner at the law firm Lovells. Hogan Lovells 2010 Legal report on "The limits to the modifications of the Renewable Energies Economic Regime". R-0327.
[178] Slides 20 to 46 of Respondent´s Opening Presentation on Merits.
[179] Slides 67 to 69 of Respondent´s Opening Presentation on Merits
[180] Hearing Transcript, Day 4, page 27, lines 9 to 12; page 28, lines 24 and 25 and page 29, line 1.

straightforward case, at least as far as quantum is concerned."[181] In this regard, he added that:

> *"[…] in this case we have two objective, contemporaneous factual references with respect to fair market value […]. When you've got good reality checks, you should start from them […]*
>
> *We have the proper proxy when it comes to the fair market value of the assets -- that is, an arm's length transaction between a willing buyer and a willing seller; that was acknowledged yesterday too -- before the measures, which is when the Claimants before the measures, acquired the wind farms in 2012. I know there's a debate on when that price was from, but still the acquisition was done in May 2012. That should be the anchor point for any but-for scenario. Regarding the actual, it's even more straightforward: the Claimants made the decision to sell that portfolio in 2016. There again we have an arm's length transaction between a willing buyer and a willing seller, which means that we have an authentic fair market value in May 2016, after the measures.*
>
> *So my point is that we have here two -- I would call them the elephants in the room. This is something you cannot ignore when you do quantum.*
>
> *[…]*
>
> *We know that the Claimants acquired these assets for €91 million in 2012, and they sold them four years later for €133 million, obtaining a €42 million profit in a four-year period."*[182]

192. Despite the above, Brattle's experts "*have done their but-for analysis and their actual analysis then on their own homemade scenarios, and they have not started from these fair market values*."[183]

193. This was expressly acknowledged by Brattle's expert Mr. Caldwell during his cross-examination:

> *"Q. So instead of taking this transaction price, you prefer to speculate, projecting discounted hypothetical cash flows for more than 25 years in the future; that's your approach? (…)*
>
> *A. (Mr Caldwell) Yes, because the date here was not our date of valuation. […]. We're valuing at a later date."*[184]

194. In view of Accuracy's critizism regarding the above, Brattle's experts attempted to reconcile their but-for and actual calculations with the fair market values deriving from the real purchase and sale transactions of Claimants' investment of 2012 and 2016

[181] Hearing Transcript, Day 4, page 24, lines 12 to 14.
[182] Hearing Transcript, Day 4, page 25, lines 14 to 25, page 26, lines 1 to 14 and page 27, lines 9 to 12.
[183] Hearing Transcript, Day 4, page 26, lines 20 to 24.
[184] Hearing Transcript, Day 3, page 121, lines 20 to 23.

respectively.

195. However, as was proved by Accuracy in its Second Economic Report and during the hearing, Brattle's attempt of reconciliation is flawed.

196. As was advanced during the hearing, we will highlight below some of the flaws of Brattle's calculations.

(2) Brattle´s But-For value is not consistent with the Fair Market Value of the purchase of the investment

197. Accuracy has concluded that damages are unwarranted because, among other things, the But For value calculated by Brattle in its DCF model is not consistent with the Fair Market Value (hereinafter "FMV") of the purchase of the investment in 2012.

198. In 2012 the Claimants acquired their investment for a price of 91 million euros. Both experts (Brattle and Accuracy) agree that the enterprise value or FMV implied in such purchase price is 431.1 million euros. This FMV is the result of adding the debt reflected in the annual accounts (340.1 million euros) to the equity value of 91 million euros.

199. In order to bring those 431.1 million of FMV in May 2012 to June 2014, Accuracy applies the same interest rate used in Brattle's But For model, i.e. Brattle's cost of capital (4.84%). As a result, the FMV in June 2014 calculated by Accuracy is 477.1 million euros.

200. By contrast, Brattle updated the FMV at the time of the purchase of the investment to June 2014 in demonstrative 6 of their quantum powerpoint presentation at the hearing. Unlike Accuracy, Brattle performs such updating since December 2011 to June 2014 and applies an arbitrary interest rate of 7% or 8%. As a result, the FMV in June 2014 calculated by Brattle amounted to 504.07 or 514.47 million euros depending on whether the interest rate of 7% or 8% is used.

201. Therefore, Brattle's updating contained in its Demonstrative 6 presents two main flaws:

- First, the time lag considered for the calculation should be of 2.1 years, not 2.5 years, since the initial date considered to move the FMV to 2014 should be the real date of the outflow of the cash flow, that is May 2012 not December 2011. The reason for that is that the payment of the purchase price and the acquisition of the investment took place in May 2012, not in December 2011 as used in Brattle's calculation.
- Second, Brattle uses an arbitrary interest rate of 7% -8% to calculate the equivalent in June 2014 of the 2012 FMV. However, the interest rate should be the same used in Brattle's But For model, i.e. Brattle's cost of capital (4.84%). Brattle has provided no explanation of why it does not use the 4.84% rate in this exercise.

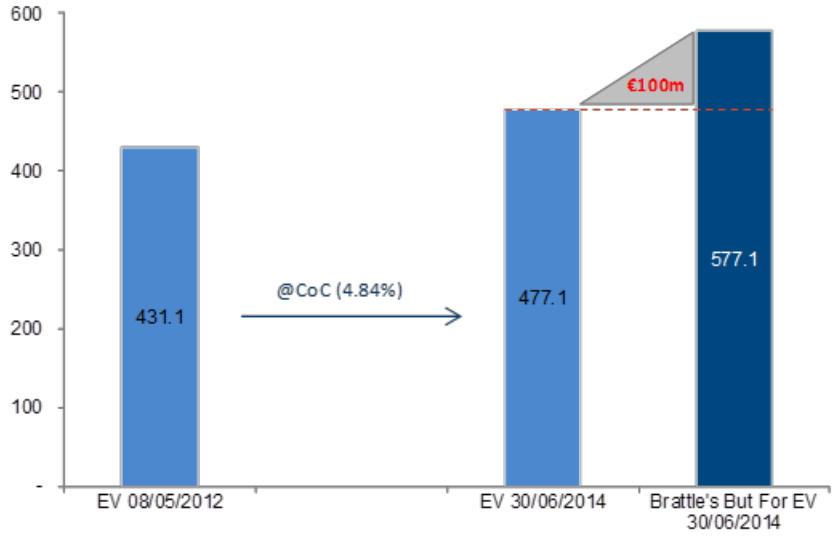
202. Thus the updating of the FMV from May 2012 to June 2014 made by Brattle is not acceptable. Consequently the updated FMV in June 2014 of 477.1 million euros calculated by Accuracy must be taken as a reality check in order to verify the appropriateness of Brattle's but-for value derived from their DCF model.

203. When comparing FMV in June 2014 of 477.1 million euros with Brattle's but-for value of the investment of 577 million euros in June 2014, there is a gap of 100 million euros.

204. That difference of 100 million euros is related to:

- The operational lifetime assumption (€48.5 million)
- The decrease in underlying risk-free rates (€46.9 million[185])
- Other ad-hoc assumptions (€4.7 million)

205. Graphically:



206. The Tribunal should note that even considering Brattle's capitalization at 7%, the FMV would be €504.07 as noted in their Demonstrative 6 but would still not reconcile to the But For value by more than €70 million. There is no reason why assumptions should be different in the damages calculation than in a FMV that stems from a transaction between a willing buyer and a willing seller.

207. In this regard and with respect to the useful life of the wind farms, as we will see below, there is no evidence that the wind farms of the Claimants have an operating life of 30 years. There is no evidence either that the Claimants had the expectation of a 30 year operating life when they acquired the investment.

208. In relation to the decrease of risk-free rates, there is no reason why the Tribunal should award damages on the basis of low interest rates in 2014 because monetary policy fluctuates while damages will not be revised. Moreover this decrease is unrelated to the Measures.

209. In conclusion, Brattle's But-For is divorced from reality. As Accuracy's expert Mr. Barsalou declared:

> *"Whichever way you look at it, you arrive at an unexplained gap, and a significant one, between the but-for value assessed by Brattle and the price paid by the Claimants in 2012 […]. The only logical conclusion about that is that Brattle have used*

[185] Accuracy Second Report, paragraph 64

assumptions which are different from that of the Claimants and different from Claimants' expectations at the time of the deal."[186]

(3) Operating life time of Claimants' wind farms is 20-25 years

210. During the hearing it was proved that Brattle's assumption of a 30 year operating life-time for the wind farms is unsustained. In his cross examination, Brattle's expert Mr. Caldwell declared the following:

"A. Regarding operating lifetime, because you state a sensitivity in your first report related to operating lifetime, useful lifetime; correct?

A. (Mr Caldwell) Yes, there's a sensitivity, if I recall correctly.

Q. Mm-hm. The impact of that sensitivity amounts to around €26 million, right? (...)

A. A. (Mr Caldwell) 120.8 to 95, that's what the –

Q. Yes. Paragraph 70 of your first report. (...) Can you please read the first two lines of that paragraph. (...)

A. (Mr Caldwell) "We assume that the Claimants' plants would have a 30 year operating lifetime in both the But-For and Actual scenarios, reflecting the updated expectations of the Claimants and of the buyer in the recent transaction."

Q. Thank you very much. You said "reflecting the updated expectations", you do not say "reflecting the legitimate expectations"; correct?

A. (Mr Caldwell) Yes, that's correct, we don't say that here.

Q. Thank you very much. You are not an expert on useful life of wind parks, right?

A. (Mr Caldwell) No.

Q. So on what do you rely to state 30 years of useful life?

A. (Mr Caldwell) Well, we cite there -- in footnote 55 you see we cite BQR-45, which, if I recall correctly, the buyer -- or Bridgepoint, as part of the 2016 sale process, obtained due diligence, it constructed its own financial model. At that point in time the model and the due diligence were reflecting 30-year lifetime expectations.

Q. So you're referring to the sale in February 2016, right?

A. (Mr Caldwell) Yes, that's what the sentence says.

Q. And the purpose of this due diligence was to sell the plants, right?

A. (Mr Caldwell) Yes, I presume so.

[186] Hearing Transcript, Day 4, page 36, lines 20 to 25 and page 37, lines 1 to 5.

Q. Mr Caldwell, which were the Claimants' assumptions when they bought the plants in 2012?

A. (Mr Caldwell) Oh, that's what the sentence reflects. The updated is the -- in 2012 the models reflected a 25-year horizon, and then in the 2016 sale it's 30 years.

Q. Okay. Let's go to see the model. It's an Excel sheet: (...) Exhibit BQR-40.3. This is the "Borawind Operating & Valuation Model"; can you confirm that?

A. (Mr Caldwell) That's what it says.

Q. And if we go to the tab named "Inputs", we have the inputs there. Can you see there both 20 and 25 years?

A. (Mr Caldwell). Yes.

Q. At the centre of the ... So the model considers a range between 20 and 25 years of useful life; correct?

A. (Mr Caldwell). Yes, that's the two numbers there, yes.

Q. Not 25; from 20 to 25?

A. (Mr Caldwell). Okay, they have a 20 scenario and they have a 25 scenario.

Q. Thank you, sir. Now let me take you to another exhibit, which is ACQ-[52], tab 9. (Pause) This document is the Renewable Energy Plan for the years 2011 till 2020; correct?

A. Yes.

Q. Can you see on the second page the useful life?

A. (Mr Caldwell). Well (...) it's three rows in the middle, and under the "Selection" column, so that's the first column beside the text, it says "20" –

(...)

A Now we are on tab 8, which is Exhibit ACQ-[52]. (...)It's an FAQ that can show the [general] consensus in the sector; correct?

A. (Mr Caldwell). It's an FAQ on a website. I don't know whether it's the general consensus in the sector or not.

Q. Okay. What's the useful life that this document shows?

A. (Mr Caldwell) Well, so it's halfway down, their comment on useful life. You see the question they're addressing is "How long does a wind turbine work for?", and then the website says: "Wind turbines can carry on generating electricity for 20-25 years."

Q. 20 to 25. Thank you very much. Now coming back to that due diligence drafted to sell the plants in 2015, which is Exhibit BQR-45 (...) Let me take you to page 38 of

this document. (…) Can you see the paragraph where it states, "Regarding the expected useful life"? (…)Does this document say that wind farms are designed for a 20-year useful life? (…)

A. (Mr Caldwell) So the original design is for 20 years, and then they're considering the probability of extending the life to 25 to 30.

Q. Correct. And section 7.2, which is just below, states the same: "When designing wind turbines, a design life time of 20 years ..." (…)

A. (Mr Caldwell). It says in the first line -- yes, I see that in 7.2. (…)

Q. Can you see under section 7.8 some bullet points? (…)

A. (Mr Caldwell). I see the bullet points, yes.

Q. Yes. These bullet points refer to some assumptions that you have to make in order to provide with a general estimate of the O&M cost beyond that year 20 of operation; correct?

A. (Mr Caldwell). Yes, so they're saying they made "the following reasonable assumptions", and then it lists the four bullet points.

(…)

Q. There you can see that they state an estimation of the increase of the O&M cost in order to extend the life; correct?

A. (Mr Caldwell). Yes, they say that in the last paragraph.

Q. Mm-hm. These assumptions only apply if some tests or analysis are previously passed which have not been conducted; is that right?

A. (Mr Caldwell). Well, I think the logic of their opinion is the page 41 assumptions are made, and then their conclusion follows on page 42.

Q. Yes, and there have been some checks that – some studies, some analyses that have not been checked; correct?

A. (Mr Caldwell) Well, they have not -- they have assumed the four things on page 41. I don't know, but that would seem to suggest they didn't interrogate those things."[187]

211. Moreover, as explained by Mr. Juan Ramón Ayuso in his second witness statement, the design life of wind turbines installed in wind farms in Spain -including Claimants' wind farms and similarly to those installed in the rest of the world- is 20 years, as registered in the design documentation submitted by manufacturers to obtain the "Type Approval".[188]

212. During the hearing Claimants' counsel had the opportunity to cross-examine Mr. Ayuso

[187] Hearing Transcript, Day 3, page 126, lines 10 to 25, page 127, lines 1 to 25, page 128, page 129, and page 130, 131, 132 (Mr. Cadwel's cross examination).
[188] Mr. Ayuso's second witness statement, paragraphs 102 to 108 quoting Exhibit C-0047.

on this issue but avoided to do so. Mr. Ayuso's evidence has therefore been uncontested.

213. Therefore, it can be concluded that Claimants have failed to prove the alleged operating life of 30 years of their wind farms.

(4) Table of damages assessed and damages assessed in the event that the tax legislation claim fails

214. As requested by the Tribunal during the hearing, Accuracy experts have elaborated the following table of assessment of damages. As can be seen in Accuracy's conclusions, the disputed measures have caused no damages to the Claimants' investment and that's all the more true if the 7% energy tax is excluded from this arbitration:

Summary of damages

	Brattle Primary Claim (2014 DCF)		Accuracy Subsidiary DCF (2016)	
€ million	Pre-award Interests [1]	Damages quantification [2]	Pre-award Interests [3]	Damages quantification [4]
Damages	(9.1)	(123.9)	n.a.	25.4
Damages excluding 7% energy tax	(6.9)	(93.9)	n.a.	58.7

Sources:
[1] Table 14 from Brattle's Tables O. For "Damages excluding 7% energy tax", we have reproduced the Table 14 calculation starting from the damages value obatined from Table 17
[2] Table 17 from Brattle's Tables O
[3] Since Accuracy's quantification results in no damages (better-off), pre-award interests do not apply
[4] ACQ-0067. 2016 DCF Model Accuracy correction
Note: positive values mean no damages (better-off)

VIII. MASDAR AND ANTIN AWARDS

215. Pursuant to the Tribunal's instructions, the PHB presents the Respondent´s comments regarding the Arbitral Award dated 16 May 2018 rendered in Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1) (hereinafter **"Masdar Award"**)[189] and "Arbitral Award dated 15 June 2018 rendered in Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.v. Kingdom of Spain (ICSID Case No. ARB/13/31) (hereinafter **"Antin Award)**[190].

216. Those Awards complete the list of Awards that have been rendered so far in the so-called *Spanish Cases* and show how different the positions held by Arbitral Tribunals are.

217. The findings of Charanne, Isolux and Novenergia Awards and their impact in the present case have been already analysed by the Respondent in other pleadings and at the hearing. This statement will be therefore be focused on the findings of Masdar and Antin Awards, which will be examined as follows:

[189] CL-0175.
[190] CL-0176.

- Common findings and main differences;
- Masdar Award findings;
- Antin Award findings.

218. It must be noted that the Respondent has requested the clarification and/or rectification of Masdar and Antin Awards. Thus the Respondent reserves its right to introduce into the record the decisions of Masdar and Antin Tribunals deciding those requests.

(1) <u>Common findings and main differences between Masdar and Antin awards</u>

219. As common findings both Awards:

220. **Consider they must apply EU Law**. In particular, Masdar Award reads that "*as the Tribunal in Isolux noted, arbitral tribunals not only have the power but the duty to apply EU Law*"[191].

221. In turn, Antin Award states that "*In principle, the issue of whether an investor in an EU Member State that provides state aid to RE investors should, when making the investment, consider that the State's RE subsidy programme is governed not only by the applicable national regime, but also by EU state aid rules which are legally binding on Member States under EU law, could be relevant to determine the legitimate expectations of the investor.*"[192]

222. However, none of the Masdar and Antin Award applies EU Law to the Merits of the Case neither to determine whether the right claimed by the Claimants exists under EU Law, nor to assess Claimants' Legitimate Expectations, nor to determine the rationality and proportionality of the disputed measures.

223. In this regard, Antin Award says that "*In the instant case, however, the Respondent did not analyse the impact, if any, of the alleged illegality of the Disputed Measures on the legitimate expectations of the investor at the time of the investment; nor the impact of such alleged illegality under EU law in the protection granted by the ECT; nor did it explain the effects of the alleged illegality under EU law of measures that Spain considered legal at the time of issuance; nor did it seek to estimate the impact of an alleged illegality resulting from EU state aid rules on any potential award of damages.*"[193]

224. Notwithstanding the relevance that both Awards concede to EU Law and its consequences, both Masdar and Antin Tribunals rejected the introduction by the Respondent of the Decision of the EU Commission of 13 November 2017 on the State Aid SA.40348 (20151NN) proceeding regarding Spain´s Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste (hereinafter, "EC Decision").[194] Unlike those Tribunals, in the present case the EC Decision has been

[191] Masdar Award CL-0175¶339
[192] Antin Award CL-0176 ¶ 658
[193] Ibid.
[194] Masdar Award CL-0175 ¶ 79; Antin Award CL-0176, ¶ 51-53.

introduced in the record[195]. Its relevance in order to properly assess the existence, content and limits of the rights claimed by the Claimants under EU Law, has been deeply analysed by the Respondent in its pleadings and in this PHB. This paramount Decision as well as other documents in the record[196] demonstrate that Claimants' claim that a specific amount of subisidy is maintained unchanged 30 years is not compatible with EU Law as: subsidies to renewables are State Aid under EU Law, there is no right to State Aid and EU Member States must retain their competence to revew the subsidies in order to guarantee that they are always proportional and do not distort competence within the internal electricity market of the EU.

225. **Deny they have jurisdiction to hear about the taxation measure (TVPEE or "Tax on the Value of the production of electricity")** introduced by Act 15/2012 as both Awards consider that the measure is covered by the tax carve out of Article 21 of the ECT.[197]

226. **Consider the Respondent has breached the FET standard of the ECT**, although because of different reasons that will be developed below.

227. **Do not find the Respondent has breached the Umbrella Clause provided for by Article 10.1 in fine of the ECT**.

228. **Deny, based on Mr. Jorge Severt's Expert reports and testimony, that the useful life of the CSP installations can last more than 25 years[198]**.

229. In this point a clerical error of Antin Award must be highlighted: the Tribunal, when calculating future damages copying and pasting Brattle's tables and calculations[199], has not applied 25 years sensibility but 35 years. This clerical error, among others, has giving raise to an over-estimation of damages of EUR 28 million whose rectification has been requested by the Respondent on 19 July 2018.

230. **Consider as damages valuation date 20 June 2014 when the last of the Disputed Measures was implemented[200].** Both Awards select as date of valuation the date of one of the disputed measures, and not one random date such as the date of the award.

231. **Reject Claimants' claim regarding Tax Gross-UP**.[201]

(2) <u>Main differences between both Awards:</u>

[195] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste RL-0081.
[196] Articles 107 and 108 of TFEU (RL-0001); EU Directives on Renewables (RL-0015, RL-0017); Final Commission Decision C(2016) 7827, of 28 November 2016, regarding case number SA.40171 in the State Aid Register (2015/NN)– Czech Republic, paragraphs 82 to 84 (RL-0081); Response from the EU Commission on 29 February 2016 to the request for investigation from the National Association of Renewable Energy producers and investors (R-0185).
[197] Masdar Award ¶ 257-295; Antin Award ¶ 276-323.
[198] CL-0175 ¶ 609-618 and CL-0176 ¶ 692-714.
[199] CL-0176 ¶ 725 and footnote 999 which refers to Brattle Quantum Report II, XII. Appendix A. Table 14.
[200] CL-0175¶601-608; CL-0176 ¶ 608
[201] CL-0175 ¶ 609-618 and CL-0176 ¶ 692-714.

232. **They differ on the interpretation of the FET standard**: Masdar Award considers that the ECT contains the customary FET standard of International Law.[202]

233. Antin Award, in turn, states that the ECT's FET standard "*includes the obligation to provide a stable and predictable legal framework for investments*."[203] This consideration leads Antin Tribunal to establish that FET standard will be breached whenever the essential features of the regulatory framework in which the Claimants decided to invest are not respected by the disputed measures.

234. **They differ on the reasoning according to which the FET standard has been breached by the Respondent**: according to Masdar, specific commitments were made outside of the general legislation by the Respondent giving raise to Claimants' legitimate expectations that the benefits granted by RD661/2007 would remain unaltered and those commitments have been breached by all the disputed measures.[204]

235. In turn, Antin Award does not consider that there are specific commitments from the Respondent that could give raise on the Claimants the legitimate expectation that the economic regime would remain completely unchanged but states that Spain "*represented, through its acts and regulations, that the economic regime applicable to RE projects would remain stable and predictable to its stability and predictability*"[205].

236. **Both awards differ on the measures that have breached the ECT**: accordingly to its reasoning regarding the existence of specific commitments to the immutability of the RD 661/2007 regime, Masdar Award considers that all disputed measures since Act 15/2012 - except for the TVPEE- have breached the FET standard of the ECT.

237. For its part, Antin Award establishes that the essential features of the economic regime were eliminated through RD-Act 9/2013, Act 24/2013 and subsequent measures[206]. Therefore, Antin Award, like Eiser and Novenergia, does not consider that Act 15/2012 and RD-Act 2/2013 breached Respondent's obligations under the ECT.

238. **Damages calculation:** its worth noting that the Respondent has requested clarification and correction of both damages calculations.

239. The following similarities between both Awards can be highlighted: a) both apply DCF method to calculate damages; b) consider that Regulatory Useful Life of 25 years is the limit for but-for cash-flows projections and c) reject Tax Gross-up Claim.

240. But the similarities end here because at least the 75% of the damages calculated by

[202] CL-0175¶484: "*the Tribunal is in no doubt that the FET constitutes a standard the purpose of which is to ensure that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification; and (ii) the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor*."
[203] CL-0176 ¶ 533
[204] CL-0175¶ 511-522.
[205] CL-0176¶ 553-554
[206] CL-0176¶ 560, 667: "*The Tribunal has already decided that the Respondent's violation of the ECT results from the entire elimination and replacement of the Original Regime and not from the elimination or modification of certain features of the Original Regime Given that the violation occurred when the Original Regime was eliminated in June 2014, Claimants' damages for the so called "historic losses" occurring prior to June 2014 must fail*."

Brattle have been dismissed by Masdar Tribunal eventhough Masdar Award has considered that all disputed measures save for the 7% tax measure breached the ECT. The vast majority of the damages claimed by Masdar have been considered speculative or rejected by the Tribunal:

241. First, regarding the 7% Tax and its impact on damages, the Masdar Award states: "*(...) [I]n order to account for the Tribunal's lack of jurisdiction with respect to the Levy, its impact must be eliminated from the damages calculation. Therefore, the Levy and its impact on the electricity prices both need to be factored out*."[207]

242. That is, and contrary to the flawed quantum of the Eiser, Novenergia and Antin Awards, Masdar Award, when declares its lack of jurisdiction regarding the 7% Tax, eliminates its impact from the damages calculation (reducing substantially the value of the but-for scenario). This shows the inconsistency on Eiser, Novenergia and Antin awards between jurisdiction/liability and quantum.

243. Awards must be consistent and when a disputed measure is found either out of the Tribunal's jurisdiction or rightful, its total impact (from the date of enactment till the end of the projection period), "*for both the Historical and Future Lost Cash-Flows*"[208] must be eliminated from the damages calculation, reducing the but-for value.

244. Secondly, the Masdar Award, considering the difficulties of forecasting pool prices, applies the fixed FIT option for most of the useful life projection by limiting the pool + premium FIT option just till 2018[209].

245. Thirdly, the Masdar Award confirms the necessity to apply a discount for illiquidity when calculating DCF value of a renewable investment, in order to achieve FMV. Following that logic, the damages calculation includes an 18% illiquidity discount rate.[210]

246. Finally, regarding the interests, the Masdar Award concedes a 0,906% (Spanish 3-year government bond rate) till the date of the award (pre-award interest) and a 1,60% (Spanish 10-year government bond rate) from then on (post-award interest). Three points are remarkable of the Masdar analysis: first, the interest is the government bond rate, proximate to a risk-free rate -it is not Claimant's borrowing rate, neither Claimant's cost of capital-; (ii) second, for the pre-award interest, Masdar Award tailored the term of the bond circa to the time-period to cover; (iii) third, the spread between pre and post-award interest is less than 1%.[211]

247. In Antin Case same experts of Brattle acted on behalf of the Claimants. Differently from Masdar Tribunal, Antin Award sacntifies Brattle's reports[212] and calculates damages by copying and pasting them[213]. Among other flaws, the Tribunal has rendered a decision totally inconsistent with Tribunal's liability findings. Contrary to Masdar Tribunal, Antin

[207] CL-0175¶621
[208] CL-0175¶ 620
[209] CL-0175¶ 630
[210] CL-0175¶642
[211] CL-0175¶664-665
[212] CL-0176¶724
[213] CL-0176¶725

Tribunal has not deducted correctly the damages caused by the measures that it has found as either lacking jurisdiction or lawful according to the ECT, including the 7% Tax.

248. In addition the Antin Tribunal made a clerical error when reading Brattle´s reports and copy-pasting their calculations into the Award, giving raise to an over-estimation of damages of EUR 28 million. The error consists in taking the wrong figure contained in table 14 of Second Brattle's Quantum Report instead of the figure of EUR 84 million shown in the Table for an estimation of 25 years of useful life and withouth past cash-flows. The correction of this clerical error has been requested by the Respondent.

249. Finally Antin Award establishes a pre-and post-award interest of 2.07%.[214]

250. **Both Awards differ on the allocation of costs**: Masdar Award, following the findings of the Eiser Award concludes "*that the fair and proper result overall is that each Party should bear its own legal and other expenses and its respective equal share of "the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre*."[215] It is worth noting that Masdar takes this decision although it found that all disputed measures –except for the 7% tax- breached the ECT.

251. In turn, Antin Award determines that Respondent *"shall bear its own legal representation costs and expenses. The Respondent shall also pay 60% of the costs of the proceedings (that is, USD 635,431.70 out of USD 1,059,052.84) and 60% of the Claimants' legal representation costs and expenses*."[216] Antin Award made this distribution of costs "*considering the relative success of the claims and defences of each of the Parties, together with the circumstances of the case and the conduct of the Parties in the proceedings*."[217] Therefore, Antin Award allocates more costs on the Respondent than Masdar Award regardless the latter upheld only one of the Jurisdictional objections raised by the Respondent and upheld Claimants' claims on the Merits.

252. In the instant case the Respondent recalls that the Tribunal has been provided with a breakdown of the impact of each of the disputed measures. In the case the Tribunal finds all or some of the disputed measures have breached Respondent's obligations under the ECT, the Tribunal will be able to properly calculate damages and conclude an allocation of costs proportional to the circumstances of the case and the conduct of the Parties.

(3) Masdar findings and their relevance for the instant case

253. The Masdar case and the WATKINS case present several differences on the facts. These differences make it impossible to transfer the legal conclusion reached by the Masdar Award to the current case.

254. The most important difference relates to the date of the Claimants' investment and therefore, the circumstances that formed the Claimants' legitimate expectations. In the Masdar Case, the Award acknowledged that the main investmens were made on 27 May

[214] CL-0176¶733-734
[215] CL-0175¶694 and 696
[216] CL-0176¶747
[217] CL-0176¶744

2008 and 24 July 2009.[218] In turn, Brigepoint invested in May 2012 (or in the best case for the Claimants, from August 2011 until May 2012).

255. Therefore, Masdar Award does not consider relevant facts that occurred before the investment of WATKINS in the present case like, among others: a) the Judgements of Spanish Supreme Court of December 2009[219] regarding the limits to the Government's discrectionality to modify the economic regime for renewables and its awareness by the Sector[220]; b) the Ministry of Industry's speech before the Congress of Deputies in January 2011 saying that the measures adopted in 2009 and 2010, some of which were the result of conversations with the affected sectors, had not been sufficient and that it was necessary to take further measures[221]; c) Act 2/2011[222]; d) Mr Rajoy's speech of 19 th December 2011[223]; e) the CNE press release of 28th December 2011[224]; d) Royal Decree-Act 1/2012[225]; f) the CNE report of 7th March 2012[226]; f) the 2012 National Reform Programme of 27th April 2012[227] and g) Spanish Supreme set of Judgements of April 2012 that confirmed the legality of changes introduced by Regulations of year 2010 to PV and other technologies confirming its constant doctrine.[228] Importantly, it does not take into account neither that the long-lasting economic crisis and the unsustainable deficit of the system necessarily modified the investors expectations.

256. This said, it should be noted that the Masdar Award bases its legal conclusion in two specific commitments out of the legistlation that, according to the Award, gave raise to Claimants' Legitimate Expectations to the maintenance of RD 661/2007.

257. To that end the Masdar tribunal went on to differentiate between two schools of thought as to what kind of commitments may give rise to legitimate expectations protected under the fair and equitable treatment (FET) standard[229]. However, it is untrue that Masdar Tribunal established that RAIPRE registrations were stabilization commitments that the qualifying installations would receive the RD 661/2007 FIT.[230] On the contrary, the Masdar Award accepts the findings of the Charanne Award regarding the effects of the register of a plant in the RAIPRE[231] and sets that: "*Such an analysis might be valid in the context of a general obligation of registration, but the circumstances in this case compel a different analysis*"[232]. Consequently, the register of a plant in the RAIPRE is not enough for Masdar Tribunal to generate the legitimate expectation that the benefits of the RD

[218] CL-0175¶91, 93 and 95.
[219] R-0008, R-0157.
[220] APPA Report from 30 April 2010. R-0311; Allegations by AEE concerning the draft RD 1614/2010 and 1565/2010 before the CNE on 30 August 2010. R-0166.
[221] Ratification speech of RD-Act 14/2010 before the Congress of Deputies. R-0192.
[222] Act 2/2011R-0074
[223] Exhibit R-0192
[224] Exhibit R-0170
[225] Exhibit R-0091
[226] Exhibit R-0131
[227] Exhibit R-0121
[228] Exhibits, R-0032, R-0033, R-0097, R-0106, R-0107, R-0129, R-0135, R-0142, R-0144, among others.
[229] CL-0175¶490 to 510.
[230] Hearing Transcript, Day 1, page 108, lines 8 to 22 (Claimant's opening).
[231] CL-0175¶ 514
[232] CL-0175¶ 515

661/2007 would remain unaltered. It is necessary something more: the inscription of the installation in the pre-allocation registry introduced by RD-Act 6/2009.

258. It is also untrue Claimants' contention that Masdar Tribunal found that specific commitments are further set out in Article 44.3 of RD 661/2007 and Articles 4 and 5 of RD 1614/2010.[233] On the contrary, Masdar Award clearly clarifies that that is the position of the first of the two schools of thoughts among International Tribunals and that the second school of Law would reject the existence of specific commitments within pieces of legislation.[234]

259. Masdar Tribunal eludes to take a position between these both schools of Law and bases its conclusions in two specific commitments out of general legislation[235]: a) the registration of the CSP plants in the pre-allocation registry introduced by RD-Act 6/2009 on 11 December 2009[236] and the letters from the Ministry of Industry sent to Torresol on 1 December 2010.[237] As anyone can see, those specifics commitments are posterior to Masdar's investments and therefore, could never shape Masdar's Legitimate Expectations. The incongruence of the Masdar Award in this point is notorious.

260. In any case, none of those "specific commitments" concurs in the instant case. First, the Claimants' plants were not recorded in the Pre-allocation registry introduced by RD-Act 6/2009. Documents in the record show that all the plants save for two were already registered when RD-Act entered into force. Only Arroyal wind farm was pre-registered:

C-0105	ENG	ESP	Certificate of Registration in the RAIPRE for Parque Marmellar	24 April 2007
C-0106	ENG	ESP	Certificate of Registration in the RAIPRE for Parque Lodoso	17 August 2007
C-0107	ENG	ESP	Certificate of Registration in the RAIPRE for Parque El Perul	20 June 2006
C-0108	ENG	ESP	Certificate of Registration in the RAIPRE for Parque La Lastra	19 September 2006
C-0109	ENG	ESP	Certificate of Registration in the RAIPRE for Parque Lora 1	28 December 2007
C-0110	ENG	ESP	Certificate of Registration in the RAIPRE for Parque Lora 2	28 December 2007
C-0111	ENG	ESP	Certificate of Registration in the RAIPRE for Parque Sargentes	27 November 2009
C-0112	ENG	ESP	Resolution Registering in the RAIPRE for Parque Arroyal	09 December 2010

261. Furthermore, if one reads the RAIPRE certificates of Watkins' plants, it can see that they do not grant the application of RD 661/2007 economic regime to the installations

[233] Hearing Transcript, Day 1, page 71, lines 7 to 24 (Claimant's opening).
[234] CL-0175¶504
[235] CL-0175¶511: "Be that as it may, and to whichever of the two schools of thought individual members of the Tribunal might adhere, this Tribunal need not be detained by the decision of the majority of the Charanne tribunal, in that it has to consider in this case not only the totality of the Spanish legislative regime applicable to CSP installations, but it must also take account of the existence of specific commitments, outside the general legislation or general documentation."
[236] CL-0175¶516
[237] CL-0175¶518

during their entire operational life. Moreover, most of them were recorded under RD 436/2004 economic regime[238]. The inscription of those plants under RD 436/2004 regime did not avoid the application of RD 661/2007 to them.

262. Second, the Claimants' plants in this case unlike those of Masdar[239] did not receive any specific letter from the Minstry of Industry informing them about the economic regime applicable to their installations. Therefore, such a commitment mentioned by Masdar Award does not exist in the instant case either.

263. In addition, Masdar Award's conclusions are flaw. The facts quoted by the Masdar Award give rise to two questions that are not answer by the referred Award. Firstly, if the register in the Pre-Allocation Remuneration Register was a "*specific commitment outside the general legislation*" that gave the investors a legitimate expectation that the benefits derived from RD 661/2007 woud remain unaltered, why did the Masdar investors need to request the Spanish authorithies another "specific commitment" after the plants were pre-registered?

264. Secondly, how could any investor concluded the existence of a more *"specific commitment*" from a resolution that expressly uses the word "*currently*" ("*en la actualidad*") to describe the applicable economic regime applicable to the installations? As far as this Respondent knows, the word "***en la actualidad***" in Spanish means "*at the present time*"[240] and not forever and ever.

(4) <u>Antin findings and their relevance for the instant case</u>

265. Unlike Masdar, Antin Award does not conclude the existence of specific stabilization commitments to the maintenance of RD 661/2007 economic regime.

266. Antin Award maintains that only those changes in regulations that modify the essential features of the regulatory regime in place at the time of the Claimants' investments constitute a breach of Respondent's obligations under the ECT.[241] To that end, Antin Tribunal follows the findings of the Charanne Award and considers that the main features of the regulatory regime were a "*guaranteed tariff and the granting of privileged access to the electricity transmission and distribution grid*"[242]. However, Antin Award omitted that According to Charanne and Isolux Awards –the latter is never mentioned by Antin Award- the main feature of the regulatory regime put in place by RD 661/2007 was an obligation of result but not an obligation of means: to guarantee a reasonable return on the investment within the limits provided by Act 54/1997[243], as was constantly established by

[238] That is the case of Marmellar, (C-0105), El Perul (C-0107), La Lastra (C-0108); Lora 1 (C-0109); Lora II (C-0110)
[239] CL-0175¶516
[240] https://en.oxforddictionaries.com/definition/currently
[241] C-0245¶558
[242] C-0245¶559
[243] Charanne Award ¶518, RL-0049: "offering a guaranteed tariff (or a premium, where appropriate) as well as privileged access to the electricity transmission and distribution grid, to each energy producer that fulfils the established requirements. Within the framework of the LSE, said principles make it possible to guarantee to renewable energy producers the reasonable returns to which Article 30.4 LSE refers." And Isolux Award, RL-0072, ¶787-792, 795.

Spanish Supreme Court Case Law since year 2006.

267. Moreover, when assessing whether the disputed measures have eliminated the essential features of the regulatory regime, Antin Award incurs in two important flaws:

268. First, it considers that "*through RDL 9/2013 and Law 24/2013, Spain replaced the FIT system by a remuneration system that allowed certain RE installations to obtain a special payment by reference to a standard installation*"[244]. The Tribunal in the instant case cannot reach a similar conclusion. In this regard Brattle experts have expressly recognized that the current scheme also constitutes a FIT system.[245] In the same vein, the EU Commission expressly declares that in the current system "*the aid is granted in the form of a premium that compensates facilities for the costs that cannot be recovered by selling electricity*."[246] That is, the current scheme is a FIT system as well as the one provided by RD 661/2007 and shares with it the same aim.

269. Secondly, Antin Award states without any justification that RD-Act 9/2013 and Act 24/2013 "*withdrew the right of priority of grid access and priority of dispatch for RE installations.*"[247] This assertion is completely untrue. This Tribunal only has to look at Brattle's calculations to see that Claimants' experts calculate their actual scenario for damages considering that all energy produced by the plants is going to be sold in the market with priority of access and dispatch. It cannot be doubt about the maintance of these advantages by Article 26.2 of Act 24/2013 and Article 6.2 of RD 413/2014.[248]

270. Antin Award recognises that "*the purpose of subsidization in this context is to allow the technologies to be developed in the hope that over time the costs associated therewith will decline, thus making RE technologies more competitive.*"[249] Therefore, it perfectly understands that subsidies have a specific aim: to level the playing field of RE producers with conventional producers. This aim requires in Spain and in the whole UE that subsidies be limited "*to compensate for the difference between the cost of producing energy from renewable sources and market price of the form of energy concerned*."[250] This is why support scheme for renewables in Spain has always been structured around

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[244] C-0245¶560

[245] Hearing Transcript, Day 3, page 94, lines 18 to 25 and 95, lines 1 to 22 (Mr. Lapuerta's Cross examination).

[246] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, RL-0081 ¶ 115.

[247] CL-0176¶ 560

[248] Article 26.2 of Act 24/2013: "Electrical energy from installations that use renewable energy sources and, following them, that of high-efficiency cogeneration installations, will have dispatch priority under the same economic conditions on the market, without prejudice to the requirements pertaining to the maintenance of system reliability and safety, under the terms determined in the regulations by the Government.

Without prejudice to supply safety and efficient system development, electrical energy producers from renewable energy sources and highly efficient cogenerations will have priority network access and connection under the terms as set out in the regulations based on objective, transparent y non-discriminatory criteria." R-0077

[249] CL-0176¶ 540

[250] Guidelines on State aid for environmental protection and energy 2008/C 82/01, ¶30, 31,107, 108 and 109. R-0065, R-0066.

the principle of "*reasonable return*" enshrined by Article 30.4 of Act 54/1997.

271. In this line, when the EU Commission analyses the compatibility of the current Spanish support scheme with EU Law it determines whether the subsidies provided meet that objective and do not exceed it as any excess would constitute unlawful state aid.[251]

272. However, Antin Award, in spite of the aim of the subsidies, the Spanish Suprime Court's constant Case Law[252], the knowledge of the investors and EU Law, concludes contrary to Charanne and Isolux Tribunals that "*the issue at hand is not whether the New Regime provides a "reasonable return", but rather how such "reasonable return" is determined*."[253] Antin Tribunal reaches such a conclusion without a single proof or justification that the expectation of the investors was not the return obtained but the methodology followed to calculate that return.

273. Regarding the methodology followed by the Respondent to calculate the subsidies, Antin Award establishes several erroneous conclusions:

274. First, it considers that "*the evidence in the record does not point to an identifiable basis for determining*" the spread of 300 basic points.[254] However, Antin Award does not analyse whether the return of 7,398% before taxes established by the current scheme is reasonable or competitive or using EU's wording, is enough "*to compensate for the difference between the cost of producing energy from renewable sources and market price of the form of energy concerned*."[255] In this regard, the findings of the EU Commission's Decision of November 2017 are of paramount relevance: "*For all examples provided the Commission has verified that the aid does not exceed what is required to recover the initial investment cost and the relevant oparatinal costs, plus a margin of reasonable return based on the past and estimated costs and market prices (7.503% before tax for new facilities and 7,398% for existing facilities). These rates appear to be in line with the rates of return of renewable energy and high efficiency cogeneration projects recently approved by the Commission and thus not lead to overcompensation.*"[256]

275. Moreover, the Antin Award forgets that the return and methodology provided by the disputed measures are the same that the sector proposed in 2009[257] (before the investment) and are in line and even surpasse the rate of return obtained by other regulated activities in

[251] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, RL-0081 ¶ 119 and 121.
[252] Since year 2006 the Spanish Supreme Court has established that "The remuneration regime which we examine does not guarantee, on the contrary, holders of facilities under special regime the inviolability of a certain level of returns or income in relation to those obtained in past years, nor the indefinite permanence of formulas used for fixing bonusespremiums." Ruling of the Third Chamber of the Supreme Court on 25 October 2006, RCA 12/2005, reference El Derecho EDJ 2006/282164. R-0138.
[253] CL-0176¶562
[254] CL-0176¶564
[255] Guidelines on State aid for environmental protection and energy 2008/C 82/01, ¶30, 31,107, 108 and 109. R-0065, R-0066.
[256] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, RL-0081 ¶ 115.
[257] R-0224.

the system (transport and distribution, returns for which are calculated as the 10-year Spanish bond plus 200 basis points).

276. On the other hand, from an abstract point of view, Antin Award critizises the retributive parameters for the standards installations. It says that "*There is no evidence on the record as to which parameters were considered in determining what is a standard installation*"" Other than the testimony of Mr. Montoya."[258]

277. It must be recalled that it is on the Claimants the burden to proof that the parameters chosen by the Respondent do not reflect not actual or rational costs. In any case, in the Antin record as well as in this record a specific documentary evidence regarding this matter does exist. The CNMC Report on the draft of MO 1045/2014 reaches two paramount conclusions in this regard: a) it establishes that the retributive parameters come from real average values corresponding to the facilities that make up each IT and b) it says that "*the classification used is, in spite of its complexity, possibly the most objective, and probably the most robust*".[259] Neither in the Antin nor in the instant case have the Claimants provided any evidence that contradicts this sound analysis developed by the CNMC (or former CNE).

278. Furthermore, Antin Award ignores whether the parameters of the standard installations applicable to the Andasol CSP plants cover their real investment and operational costs. In the instant case the Claimants have not proven that the CAPEX and OPEX considered by the disputed measures do not cover the real costs incurred by the Claimants' plants[260]. On the contrary, it has been demonstrated by Accuracy experts that the remuneration system after the Measures will allow the Claimants to recover the real investment plus a return that is even higher than the regulatory return. Pöyry, the advisor of the Claimants when they sold their investment stated that most of their wind farms had improved their remuneration[261]. Indeed it is not controversial that the Claimants have sold their wind farms and obtained an 11,2% return on their investment.[262]

279. Antin Award does not critizice that revisions of the reasonable return can be made in the future. However, it sets that "*there is thus no evidence in the record that shows that the Government has established an identifiable set of criteria for the revision of the remuneration for RE installations*."[263] However, Antin Award forgets that the criteria for any revision have been set by EU Law: subsidies can never exceed the levelized cost of energy. This is why the EU Commission has approved the reviews system provided by the disputed measures.[264]

280. Moreover, Antin Award forgets that the disputed measures introduce stronger limitations to the *ius variandi* (margin of appreciation) of the Government when it comes to review the rate of return. They establish when those revisions can take place from a

[258] CL-0176¶565
[259] CNMC Report on MO 1045/2014, page 14. R-0133.
[260] Second Expert Report of Accuracy, paragraphs 207 to 217.
[261] See paragraphs 163 and 164 of this PHB.
[262] See, among others, Hearing Transcript Day 4, page 27, lines 20 to 23 (Accuracy's presentation)
[263] CL-0176¶566
[264] EU Commission Decision of November 2017, RL-0081 ¶119-120.

temporal (only every six years) and material (only when required by the evolution of demand, the cyclic situation of the economy and appropriate return for these activities) point of view. If the revision does not take place, the current return will remain until the next regulatory period. They also set that the rate of return will always be linked to the Spanish ten-year bonds plus and spread. This spread cannot be set by the executive branch but by the Spanish Parliament after hearing the CNMC and the stakeholders.[265]

281. Finally, Antin Award is not persuaded "*the FIT for CSP plants played a significant role in the accumulation of the Tariff Deficit.*"[266] However, this is not the information that investors had in year 2011. According to a Report from Pöyry of year 2011 "*the higher the ratio, the better cost-benfit relationship for the specific technology. Solar (PV & CSP) has poor contribution to meeting demand and are less cost efficient, they will face the higher regulatory riks*"[267]. In a similar way, when Pöyry advised the Claimants in this case in year 2015 it reminded that "*the rapidly increasing renewable capacity in Spain has led to large amounts of subsidies which have impacted on the tariff deficit problem that Spain is facing.*"[268] Therefore, is obvious that subsidies to renewables had a deep impact on the tariff deficit whose removal has been reached by "*reducing the level of system costs (e.g.regulated remuneration) and increasing the system incomes*."[269]

IX. MICULA CASE

282. On 11 December 2013, the Arbitral Tribunal of Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 issued an Award condemning Romania and granting damages in favour of the Claimants.

(1) Micula factual background does not have anything to do with the present case save for the nature of subsidies of the amounts claimed by the Claimants

283. The facts of the Micula case can be summarized as follows:

- In 1993 Romania applied for membership of what was then the European Community ("EC"). In 1995 the Europe Agreement between the EC and Romania entered into force, which inter alia required Romania eventually to introduce State aid rules similar to the EC rules on State aid.
- In 1997 to 1998, the European Commission encouraged Romania to pursue privatisation and to secure foreign investment. In 1999, Romania adopted an investment incentive scheme in the form of Emergency Government Ordinance No. 24/1998 ("EGO 24").
- At the beginning of 2000, in preparation for eventual accession to the European Union ("EU"), Romanian Law no. 143/1999 on State aid entered into force.

[265] Article 19 of RD 413/2014. R-0127
[266] CL-0176¶571
[267] C-0087, figure 100 page 137 of PDF. Also figure 101 on page 138.
[268] R-0373, page 3
[269] Ibid, page 4.

- During the early 2000s, in reliance on the investment incentives provided for by the EGO 24 scheme, the Claimants invested in a large, highly integrated food production operation as part of a 10-year business plan.
- In 2002, Romania and Sweden (which was already an EU member state) signed the Sweden-Romania Bilateral Investment Treaty ("the BIT"). This came into force in 2003. The BIT provided reciprocal protections for investments, and consent to investor-state dispute resolution under the ICSID Convention.
- In 2004, Romania repealed all but one of the tax incentives provided under EGO 24, effective from 22 February 2005, on the grounds that these were unlawful State aid in breach of the European Agreement.
- On 28 July 2005, the appellants filed a Request for Arbitration with ICSID under the BIT.
- On 1 January 2007, Romania became a member state of the EU.
- The Micula Tribunal found that Romania had violated the BIT by failing to provide fair and equitable treatment to the Claimants' investments.

284. The facts in the instant case are very different as:

- The Kingdom of Spain is a Member State of the European Union since year 1986. Therefore, Articles 107 and 108 of the TFEU (former Articles 87 and 88 of the TEC)[270] were already applicable to the incentives to renewables established by the Respondent when they were implemented for the first time. Any diligent investor and particularly the Claimants –sophisticated European investors- in year 2012 should know that EU Law was applicable to Spanish support scheme for renewables as a matter of public order.
- The Kingdom of Spain has always been transparent. It has always maintained the dynamic character of the incentives to renewables, given their nature of public incentives. The limit to any modification of the support scheme for renewables provided by Spain has always been the principle of reasonable return enshrined in Article 30.4 of Act 54/1997[271]. It has been so clearly established by the Spanish Supreme Court Case Law since year 2006[272]. All the operators of the Spanish Electricity System including the regulator and the renewable producers' main associations were aware of Spanish Supreme Court Case Law and therefore, were

[270] RL-0001
[271] R-0003
[272] R-0137, R-0138, R-0139, R-0140, R-0002, R-0141, R-0031, R-0033, R-0046, R-0047, R-0048, R-0049, R-0050, R-0051, R-0052, R-0053, R-0054, R-0055, R-0056, R-0057, R-0058, R-0059, R-0060, R-0061, R-0097, R-0100, R-0106, R-0107, R-0129, R-0135, R-0136, R-0142, R-0143, R-0144, R-0145, R-0146, R-0147, R-0148, R-0149, R-0150, R-0152, R-0153, R-0156, R-0158, R-0173, R-0188, R-0191, R-0199, R-0212, R-0216, R-0217, R-0218, R-0219, R-0220, R-0221, R-0225, R-0226, R-0227, R-0228, R-0229, R-0230, R-0231, R-0236, R-0239, R-0240, R-0241, R-0244, R-0245, R-0246, R-0247, R-0248, R-0265, R-0266, R-0273, R-0274, R-0275, R-0276, R-0277, R-0278, R-0279, R-0283, R-0284, R-0350, R-0367, R-0372.

aware of the limits to the *ius variandi* of Spanish regulator.[273]

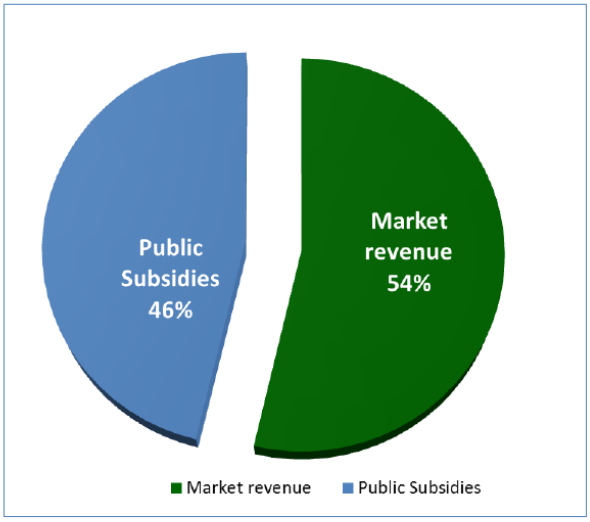
- Importantly, the disputed measures implemented by the Kingdom of Spain have not repealed the support scheme for renewables. Indeed, they constitute a FIT regime[274] and provide Claimants' plants with substantial subsidies:

"Q. Mr Lapuerta, could you please tell us what percentage of the income of the wind plants of these Claimants come from subsidies?

A. (Mr Lapuerta) I don't recall offhand, but it should be around 50%; a little less, I believe."[275]

285. These data were shared by Mr. Ayuso in his Second Witness Statement:

CLAIMANTS' WIND FARMS
YEAR 2015



Electricity Market	€ 30,781,725
Public Subsidies	€ 25,827,275
TOTAL	**€ 56,609,001**

SOURCE: *Compiled internally from Order IET/1045/2014 and applicable IT Remuneration spreadsheets.*[28]

286. The factual background of this case leads to the conclusion that the Kingdom of Spain has not breached its obligations under Article 10.1 of the ECT towards the Claimants and their investment.

287. The only common fact between Micula Case and Spanish case is the nature of the incentives claimed as State Aid under applicable EU Law.

(2) <u>EU Commission Decision of of 30 March 2015 on Micula Case</u>

288. On 30 March 2015 the EU Commission issued its Decision on State aid SA.38517

[273] R-0189, R-0166, R-0339, R-0340, R-0327, among others.
[274] Hearing Transcript, Day 3, page 94, lines 18 to 25 and 95, lines 1 to 22 (Mr. Lapuerta's Cross examination)
[275] Hearing Transcript, Day 3, page 64, lines 21 to 25 (Mr. Lapuerta's Cross examination)

(2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013.[276]

289. In its Decision the Commission stated that the Award granted State Aid because of the concurrence of all the prerequisites established by EU Law to be considered State Aid: a) Economic advantage; b) Selectivity; c) State resources; d) Imputability and e) Distortion of competition and effect on trade.

290. With respect to the **economic advantage** prerequisite, the Commission noted that the purpose of the Micula Award was to compensate the applicants for the incentives which Romania had promised them under EGO 24 (modified by EGO 75) but had been required to abolish by the Union to complete the negotiation process for its accession to the Union. Therefore, the award constituted an indirect grant of State aid found to be illegal and incompatible with the internal market.[277]

291. The Commission also established that "*where giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law, that Member State must uphold Union law since Union primary law, such as Articles 107 and 108 of the Treaty, takes precedence over that Member State's international obligations*."[278]

292. Moreover, according to the Commission "*the claimants' contention that there has never been a valid formal decision establishing that EGO 24 constitutes illegal State aid nor that those incentives were incompatible with the internal market is irrelevant in this respect, since it is the implementation/execution of the Award and not the investment incentives promised under EGO 24 which constitute the contested measure and form the basis of the present Decision*."[279]

293. The Commission carries on saying that "*there is also no need for the Commission to adopt a formal decision finding the existence of State aid in cases where a national court or an arbitral tribunal awards compensation against a Member State for the withdrawal of an aid measure. Article 107(1) of the Treaty contains a general prohibition on the grant of State aid 'in any form whatsoever'. The precise form of the measure is thus irrelevant in establishing whether it confers an economic advantage on the undertaking. Thus, if the State aid is granted through the implementation or execution of a judgment or an award, which the Commission considers to be the case in relation to the Award, it is in relation to that implementation or execution that the Commission must show that the cumulative conditions of Article 107(1) of the Treaty are fulfilled and that that aid is incompatible with the internal market*."

294. And the Commission concludes that "*payment of the compensation awarded to the claimants by the Tribunal through the implementation or execution of the Award constitutes an economic advantage in favour of the claimants that they would not have*

[276] Decision (EU) 2015/1470 of 30 March 2015 on state aid SA.38517 (2014/C) (ex: 2014/NN) implemented by Romania, Arbitration award Micula/Romania of 11 December 2013 R-0025.
[277] Ibid, ¶103
[278] Ibid¶104
[279] Ibid¶105

obtained under normal market conditions."[280]

295. In relation to the **selectivity** prerequisite, according to the Commission "*the implementation or execution of the Award grants the claimants a selective advantage.*"[281]

296. Concerning the **state resources** prerequisite, the Commission stated that "*Direct payments from the state budget, the foregoing of state income by writing off taxes owed, or the transfer of other state assets (such as shares in other undertakings or the transfer of seized assets) to the claimants, whether made voluntarily or through court-ordered execution, are all to be regarded as measures financed through state resources*."[282]

297. The Commission also noted that the measure was **imputable** to Romania[283] and was liable to **affect trade** between Member States.[284]

298. The Commission recalled that "*Article 107(1) of the Treaty provides that State aid is, in principle, incompatible with the internal market. Unless an aid measure is declared to be compatible with the internal market by the Commission, the Member States are prohibited from putting State aid measures into effect. Under Article 108(3) of the Treaty, a Member State must notify any plans to alter or grant aid to the Commission and shall not put its proposed measure into effect until the Commission has taken a final decision on that measure's compatibility with the internal market*."

299. The Commission further concluded that the damages awarded by the Micula Tribunal constituted unlawful State Aid and rejected Claimants' submissions regarding the protection of their legitimate expectations:

> *"The principle of the protection of legitimate expectations has been recognised by the CJEU to constitute such a general principle of Union law. The Commission does not consider, however, that the claimants can claim such a legitimate expectation.*
>
> *According to the case-law of the CJEU, save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108(3) of the Treaty. The CJEU, in its more recent case-law, has declared that in the absence of sufficiently precise assurances arising from a positive action taken by the Commission, which has the exclusive competence to authorise the grant of State aid by the Member States of the Union, that lead the beneficiary to believe that the measure does not constitute State aid, no exceptional circumstances can warrant the application of the principle of the protection of legitimate expectations to prevent recovery if that aid measure was not notified to the Commission. Indeed, it is long-standing case-law that the principle of the protection of legitimate expectations cannot be relied upon against a precise provision of Union law and that the conduct of a national authority responsible for applying Union law, which acts in breach of that law, cannot give rise to legitimate*

[280] Ibid¶106
[281] Ibid¶115
[282] Ibid¶105
[283] Ibid¶121
[284] Ibid¶124

expectations on the part of an economic operator that he will benefit from treatment which is contrary to that law. A diligent economic operator must be assumed to be able to determine whether that procedure has been followed."[285]

300. In its Decision the Commission ordered Romania not to pay out any incompatible aid and recover any incompatible aid which had already paid out to any one of the Micula Claimants.

301. The Micula Claimants appealed the Commission Decision before the ECJ whose judgement is still pending.

(3) Staying of enforcement proceedings of the Micula Award because of the application of EU Law

302. On 2 October 2014 one of the Micula Claimants applied to have the Award registered in the High Court of England and Wales. On 17 October 2014, the Award was registered in the High Court.

303. Romania then applied to set aside the Registration Order. In a judgment dated 20 January 2017 the judge refused the application to set aside the Registration Order, but granted a stay of enforcement pending determination of the proceedings in the GCEU seeking annulment of the Commission's Decision. The Judgement based its conclusion upon the following grounds: in cases concerning state aid: (i) a national court must refrain from taking decisions which conflict with a decision of the European Commission; and (ii) where proceedings are on foot in the European court (ie the General Court or Court of Justice) to annul such a decision, a national court should stay domestic proceedings where there is a material risk of conflict with the decision of the European court pending its decision. This Judgement was confirmed by the Court of Appeal.[286]

304. There are ongoing enforcement proceedings by the appellants in the United States, France, Belgium, Luxembourg and Sweden, though none has so far yielded any recovery.

(4) Any award granting damages in the Spanish Cases would constitute State Aid and is subject to the stand still obligation of Article 108 (3) of the TFEU

305. In relation with the Spanish cases, the Commission has expressly warned in its Decision of November 2017 that "*any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in an of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation*."[287]

[285] Ibid¶155 and 156
[286] https://www.italaw.com/sites/default/files/case-documents/italaw9884.PDF
[287] Decision C(2017) 7384 of the European Commission on State aid regarding the Spanish regime of support for electricity generation from renewable energy sources, cogeneration and waste, paragraph 165. RL-0081.

306. The situation of the awards granting damages in the Spanish cases is therefore similar to the situation created in the Micula case.

307. In this regard, it must be recalled that unlike the BIT applied by Micula Award, Article 1(3) of the ECT –promoted and signed by the EU itself- knowledges that some of the subject matters governed by the ECT may be of the competence of the EU Institutions who can issue binding decisions on the Member States regarding such issues: "*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.*"

308. The EU Commission Decision on the support scheme for renewables implemented by Spain of November 2017 demonstrates two important things: a) that the EU has competence over the subject matter of this arbitration proceeding –incentives to renewables- and b) that the Decision of the EU Commission is binding in its enterity on Spain, on the investors investing in Spain and on the Arbitral Tribunals deciding on subsidies to renewables implemented by Spain.

309. Therefore, if the Arbitral Tribunal were to grant damages in favour of the Claimants in this case it should first hear the EU Commission in order to allow it to exercise its competences regarding whether the subsidies would be lawful State Aid because an eventual Award awarding damages "*would constitute in an of itself State aid, would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation*."[288]

X. REQUEST FOR RELIEF

310. In view of the arguments set forth throught the arbitral proceeding, including in this PHB, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) Declare that it lacks jurisdiction to hear the Claimants' claims.

b) Subsidiarily, dismiss all the Claimants´claims regarding the merits of the case, since the Kingdom of Spain has not in any way failed to comply with the ECT;

c) Subsidiarily, dismiss all the Claimants´claims for compensation as they are not entitled to compensation; and

d) Order that the Claimants pay all costs and expenses arising from this arbitration, including administrative expenses of the ICSID and the fees of the Arbitrators, as well as the fees of the legal representation of the Kingdom 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 their actual payment.

311. The Kingdom of Spain reserves the right to supplement, modify or complement these allegations and to present any additional arguments and documents that are necessary in accordance with the ICSID Convention, the ICSID Arbitration Rules, the Procedural

[288] Ibid.

Orders and the Arbitral Tribunal's directives in order to respond to all claims made by the Claimants in connection with the present case.

Respectfully submitted,