



**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

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CERTIFICATE

STEAG GmbH

v.

KINGDOM OF SPAIN

(ICSID CASE No. ARB/15/4)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated August 17, 2021.

[signature]
Gonzalo Flores
Acting Secretary-General

[stamp:] ICSID / INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

Washington, D.C., August 17, 2021

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

STEAG GMBH

Claimant

and

KINGDOM OF SPAIN

Respondent

ICSID CASE No. ARB/15/4

AWARD

Members of the Tribunal

Eduardo Zuleta, President
Pierre-Marie Dupuy, Arbitrator
Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Date of dispatch to the Parties: August 17, 2021

REPRESENTATIVES OF THE PARTIES

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Mr. Roberto Fernández Castilla
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Ms. Lourdes Martínez de Victoria Gómez
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I. INTRODUCTION AND PARTIES

1. This case was brought before the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) pursuant to the Energy Charter Treaty, which entered into force on April 16, 1998, with respect to the Federal Republic of Germany and the Kingdom of Spain (the “**ECT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “**ICSID Convention**”).
2. The Claimant in this proceeding is STEAG GmbH (“**Steag**”), a company incorporated under German law, with its registered office in Essen. The Respondent in the arbitration is the Kingdom of Spain (“**Spain**”), a sovereign State and Contracting Party to the ECT and the ICSID Convention. Hereinafter, the Claimant and the Respondent shall be collectively referred to as the “**Parties**.”
3. The dispute between the Parties concerns measures adopted by the Respondent that modified the regulatory and remuneration framework applicable to concentrated solar power (CSP) producers. The Claimant asserts that such measures adversely affected its investment in Arenales Solar PS, S.L., a Spanish company that owns a construction and operation project for a solar thermal power plant with salt storage located in the municipality of Morón de la Frontera, Seville.

II. PROCEDURAL BACKGROUND

4. On October 8, 2020, the Tribunal issued its “Decision on Jurisdiction, Liability, and Directions on Quantification of Damages” (the “**Decision**”) and ruled as follows:

“1. Unanimously, that it lacks jurisdiction to hear the dispute regarding the alleged violation of Article 10(1) of the ECT through the introduction of the IVPEE (Tax on the Value of Electricity Production).

2. Unanimously, that the claim concerning the alleged violation of Article 13 of the ECT through the introduction of the IVPEE is inadmissible.

3. Unanimously, that all other jurisdictional objections raised by the Respondent are rejected.

4. By majority, that the Kingdom of Spain has breached the fair and equitable treatment (FET) standard set forth in Article 10(1) of the ECT, as detailed in Section VIII(A)(3) of the present Decision.

5. Unanimously, that all other claims raised by the Claimant regarding the alleged violations of Articles 10(1) and 13 of the ECT are dismissed.

6. By majority, that the Parties shall:(a) jointly submit to the Tribunal within ninety (90) days from the date of notification of this Decision an agreed-upon quantification of damages, following the methodology set forth in paragraph 820 of this Decision and taking into account the criteria outlined in paragraph 821 of the present Decision; (b) in the event of a total or partial disagreement regarding the final damages amount, submit to the Tribunal within the same ninety (90) days the points of agreement and disagreement regarding the Quantification of Damages.”¹

5. On December 30, 2020, the Parties requested an extension of the deadline for submitting the damages calculation until January 15, 2021. The Tribunal granted the extension by communication dated December 30, 2020.
6. On January 15, 2021, the Claimant submitted the following documents: (i) a Memorial entitled “Calculation of Compensation Owed to Steag Pursuant to the October 8, 2020 Decision”; (ii) the Report “Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision”, in Spanish and English; and (iii) the updated financial model.
7. Likewise, on January 15, 2021, the Respondent submitted the following documents: (i) a Memorandum on Spain’s Quantification of Damages, prepared by the Accuracy expert team, based on the Tribunal’s Decision; (ii) an Excel file titled “Tribunal Results”; and (iii) the “Financial Damages Model”, also in Excel format.
8. On January 18, 2021, the Claimant submitted Brattle’s Written Submission responding to the Accuracy report, which had been submitted by Spain.

¹ Decision (October 8, 2020), ¶ 823.

9. In the Supplementary Decision of February 10, 2021 (the “**Supplementary Decision**”), the Arbitral Tribunal clarified various issues related to the method of calculation and relevant factors for determining the amount of compensable damage. In said Supplementary Decision, the Tribunal ordered the Parties to “*submit any additional questions regarding the parameters for the calculation of damages within a maximum period of fifteen (15) calendar days from the date of notification.*”² Furthermore, it requested that the Parties “*jointly submit to the Tribunal, within forty-five (45) calendar days from the date of notification of this Supplementary Decision, an agreed-upon quantification of the compensation amount. This calculation must follow the methodology set forth in paragraph 820 of the October 8, 2020 Decision and take into account the criteria outlined in paragraph 821 of the said Decision, as well as the clarifications contained in this Supplementary Decision.*”³ The Tribunal further stated that, in the event of a total or partial disagreement on the final amount of compensation, “*each Party shall submit to the Tribunal, within the aforementioned forty-five (45) calendar days from the date of notification of this Supplementary Decision, its respective quantification of compensation, adhering to the specified parameters without including additional arguments.*”⁴ The Parties submitted several requests for further clarification.
10. The Parties submitted questions regarding the Supplementary Decision in their submissions dated February 24, 2021 (Respondent) and February 25, 2021 (Claimant), which were supplemented by further submissions from the Claimant on March 2, 2021, and from the Respondent on March 8, 2021.
11. On March 17, 2021, the Tribunal issued a letter responding to the questions raised by the Parties (the “**Tribunal’s Responses**”).
12. On March 26, 2021, the Parties submitted their final Quantification of Damages, in accordance with the instructions issued by the Arbitral Tribunal.

² Supplementary Decision (February 10, 2021), ¶ 46(1).

³ Supplementary Decision (February 10, 2021), ¶ 46(2).

⁴ Supplementary Decision (February 10, 2021), ¶ 46(3).

13. On July 14, 2021, the Tribunal declared the proceedings closed.
14. On the same date, the Tribunal invited the Parties to submit their respective statements on costs, no later than July 26, 2021.
15. On July 26, 2021, the Parties submitted their respective statements on costs.

III. AMOUNT OF COMPENSABLE DAMAGE

16. Following its Decision of October 8, 2020, the Supplementary Decision of February 10, 2021, and the Tribunal's Responses of March 17, 2021, the Tribunal will now proceed to definitively determine the amount of compensation owed to the Claimant.

A. CRITERIA FOR THE QUANTIFICATION OF DAMAGE

17. The criteria for calculating compensable damage were defined by the Arbitral Tribunal through the Decision of October 8, 2020, the Supplementary Decision of February 10, 2021, and the Tribunal's Responses to the additional questions submitted by the Parties on March 17, 2021.

18. In paragraph 821 of the Decision of October 8, 2020, the Arbitral Tribunal ruled:

“[...] the assessment of damages must take into account and be based on the elements discussed in this decision, namely:

(i) The exclusion of the IVPEE from the set of measures considered for calculating compensable damage;

(ii) The exclusion of the possibility of selling gas-generated energy at a regulated tariff from the set of measures considered for calculating compensable damage;

(iii) June 20, 2014, as the date from which damages must be calculated;

(iv) A 25% deduction, representing the investor's contribution to the damage;

(v) The effects of the 2020 divestment; and

(vi) The useful life of the Arenales Solar plant, which for the purposes of damage calculation cannot be 40 years, as suggested in Brattle's 'But For' scenario, but rather 25 years;

(vii) The exclusion of the tax gross-up requested by the Claimant.”⁵

19. In the Supplementary Decision of February 10, 2021, the Tribunal established the following:

- (i) The method for calculating compensable damage to be used is the one proposed by the Claimant;⁶
- (ii) Historical damage is excluded from the damages calculation;⁷
- (iii) The 25% deduction must be understood as an additional reduction beyond the discounts applied under the DCF method to reflect the regulatory risk inherent to the operation;⁸
- (iv) The damage calculation assumes that the measures impact the entire useful life of the plant;⁹
- (v) The economic impact calculation of the divestment operation must be based on homogeneous values, meaning that it must take into account the differences between the reference date for the quantification of damages and the date when the divestment took place, and must align with the parameters set out in the Decision.¹⁰

20. Finally, in the Tribunal’s Responses of March 17, 2021, the Tribunal:

- (i) Reiterated that the 25% deduction for Steag’s contribution to the damage must be applied to the final sum of damages, after considering all other discounting factors determined by the Tribunal, including the discount for the divestment operation;¹¹

⁵ Decision (October 8, 2020), ¶ 821.

⁶ Supplementary Decision (February 10, 2021), ¶ 23.

⁷ Supplementary Decision (February 10, 2021), ¶ 27.

⁸ Supplementary Decision (February 10, 2021), ¶ 31.

⁹ Supplementary Decision (February 10, 2021), ¶ 38 (See also ¶ 35).

¹⁰ Supplementary Decision (February 10, 2021), ¶ 44.

¹¹ Tribunal’s Responses (March 17, 2021), ¶ 6.

- (ii) Reiterated that the damage calculation must exclude historical damage and that, since the DCF method proposed by Brattle was adopted, the Brattle calculations must be adjusted to deduct historical damage;¹²
 - (iii) Clarified that the 25% deduction must be applied last, after determining the total amount of damages owed to Steag;¹³
 - (iv) Indicated that the discount for the divestment operation must be based on homogeneous¹⁴ values and added that homogenization should rely on the information contained in the record, without introducing additional discount factors beyond those specified in the October 2020 Decision.¹⁵
21. The Tribunal has not yet determined how the amounts from 2014 and 2020 should be capitalized to ensure homogeneity¹⁶, nor the interest rate applicable to the compensable damage amount, which does not necessarily have to correspond to the rate used by the experts for the calculation of pre-award interest¹⁷. The historical damage amount excluded from the calculation also remains unclear. The Tribunal notes that the Parties failed to reach an agreement on these points.

B. PENDING DECISIONS REGARDING THE AMOUNT OF COMPENSABLE DAMAGE

22. The Tribunal proceeds to resolve the outstanding issues for the purposes of calculating compensable damage, which concern two specific points, namely historical damage (Section III(B)(1)) and the impact of the February 2020 divestment operation (Section III(B)(2)).

¹² Tribunal's Responses (March 17, 2021), ¶¶ 12 and 13.

¹³ Tribunal's Responses (March 17, 2021), ¶ 16.

¹⁴ Tribunal's Responses (March 17, 2021), ¶ 19.

¹⁵ Tribunal's Responses (March 17, 2021), ¶ 21.

¹⁶ Tribunal's Responses (March 17, 2021), ¶ 25 and 27.

¹⁷ Tribunal's Responses (March 17, 2021), ¶ 29.

(1) Historical Damage

a. Claimant's Position

23. Following the Decision of October 8, 2020, the Parties adopted different positions regarding the inclusion or exclusion of historical damage in the compensation.
24. In its submission dated January 15, 2021, the Claimant argued that the damage calculation should include historical damage.¹⁸ For Steag, *“the valuation date for damages is June 20, 2014, which necessarily includes the historical damage suffered by Steag as a result of the regulatory changes prior to that date and the retroactive effect of the NRR, as measures that violated Article 10(1) of the ECT.”*¹⁹ Steag explained:

“Regarding these damages suffered before June 20, 2014, it should be emphasized that they correspond to the loss of additional capital injections required to meet the new ratios arising as a result of the measures adopted by Spain (€12,503,351.68). If Spain had not adopted the NRR in July 2013, Steag would have been able to recover these additional injections; therefore, the effect must be attributed to that last measure, as it was at that point that the damage materialized. That is, the damages include cash flow losses and additional capital injections that result solely and exclusively from Spain’s decision to adopt measures that the Decision has declared as violations of the protections conferred by the ECT. In other words, the damages prior to June 20, 2014, or ‘historical damage,’ adequately reflect Spain’s liability as defined by the Decision.”²⁰

25. The Claimant stated that *“excluding from the compensation amount, based solely on a temporal criterion, the effects of the measures deemed unlawful and compensable that*

¹⁸ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 35.

¹⁹ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 93.

²⁰ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 35.

*occurred before June 2014 is inconsistent with the Tribunal’s own findings on liability.”*²¹ Among other arguments, Steag asserted that the combination of the exclusion of historical damage and a 25% reduction in compensation for the investor’s contribution to the damage results in a “double penalty”²². According to the Claimant, “*the Arbitral Tribunal cannot simply deduct historical damage while also applying the 25% reduction, as both issues are two sides of the same coin.*”²³

26. In the same vein, the Brattle Report of January 15, 2021, explained:

“The Tribunal would inappropriately apply the same deduction twice if it were to first eliminate the €12 million in historical damages (by establishing June 2014 as ‘the beginning of the damages period’) and then apply the 25% discount factor to the remaining damages (which are mostly future damages). Both the exclusion of the €12 million claim and the Tribunal’s 25% discount would result in a cumulative reduction in damages due to STEAG’s contribution to the damage, ultimately increasing this deduction beyond 25%. The correct approach to damages should be: (1) Either eliminate the €12 million and disregard the additional 25% discount factor; or (2) Include the €12 million in the damages and then apply the 25% discount. We prefer the second option. Brattle considers the second option to be more accurate. That is, first include the €12 million in capital injections in the damages, and then apply the Tribunal’s 25% reduction to the total damages.”²⁴

27. On January 18, 2021, the Claimant submitted Brattle’s Written Submission responding to the Accuracy Report, which had been submitted by Spain. In response to Accuracy’s claim that there was an alleged agreement to exclude capital injections from historical damages, Brattle stated:

“It is not true that ‘During discussions, the experts agreed on the method for excluding historical damage: it should be limited to the first element (€1.8 million) since the Arbitral Tribunal has proposed eliminating the impact of

²¹ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 36.

²² Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 37 and 79.

²³ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 79.

²⁴ Brattle - Implementation by Brattle of the parameters defined in the decision of October 8, 2020 (January 15, 2021), ¶ 46-48.

STEAG's contribution (i.e., capital injections into the Plant) through a 25% discount applied to damages calculated as of June 20, 2014.' The Memoranda prepared by the experts on January 15, 2021, clearly show that there were discrepancies between the experts regarding the method for excluding historical damage. At no point did Brattle consider that historical damages incurred before June 20, 2014, other than capital injections made by STEAG, should be excluded from the compensation calculation. Brattle and Accuracy experts discussed the proper modeling approach for the €12 million capital injection made by STEAG, but no agreement was reached on how to model the €1.8 million historical damages that were not associated with the capital injections made by STEAG[.]”²⁵

28. Following the Supplementary Decision of February 10, 2021, in which the Arbitral Tribunal clarified that historical damages are excluded from compensable damage,²⁶ the Parties submitted further requests for clarification, during which Spain raised additional questions regarding the exclusion of historical damages.
29. In response to these questions, in its submission of March 2, 2021, the Claimant referred to existing calculations in the record that should be considered in determining the amount of historical damage to be deducted. On this point, the Claimant stated that *“Neither Steag nor Brattle have submitted any calculation that does not reflect historical damage or a corresponding deduction, precisely because they considered that ‘historical damage’ should be included in the calculation rather than deducted. The only calculations in the proceedings that do not reflect ‘historical damage’ (or that include a calculation for the exclusion of ‘historical damage’) are found in the Accuracy Memorandum submitted by Spain on January 15, 2021, which estimates the exclusion of ‘historical damage’ at €1,800,000.”*²⁷

²⁵ Brattle – Response to Accuracy’s comments on expert discussions (January 18, 2021), ¶ 4(b).

²⁶ Supplementary Decision (February 10, 2021), ¶ 27.

²⁷ Steag’s Communication – Clarification requested by STEAG GmbH regarding the questions raised by the Kingdom of Spain (March 2, 2021), ¶ 1.

30. In its communication of March 26, 2021, Steag stated that neither party has ever deducted additional capital injections as historical damage.²⁸ The Claimant further added that both Accuracy and Brattle “*mutually understood that the EUR 12 million in additional capital injections did not form part of the historical damage that could be deducted under the Decision.*”²⁹ Steag asserted that “*the only point of discussion regarding historical damages between the experts arising from the Decision was whether EUR 1.8 million should be deducted as historical damage.*”³⁰ The Claimant argued that “[s]ince there has been no change in the reasoning of the Arbitral Tribunal’s Decision, the same reasoning applied by both experts before the Supplementary Decision and reflected in the Accuracy Memo must now be applied. Neither Steag nor Brattle can therefore accept Accuracy’s new approach regarding the exclusion of historical damage, which consists of adding the additional capital injections to deduct an additional EUR 12 million from the compensation.”³¹ For these reasons, Steag concluded that “*only EUR 1.8 million may be deducted as an exclusion of historical damage not already accounted for in the investor’s contribution to the damage, as calculated and defended in the Accuracy Memo.*”³²

b. Respondent’s Position

31. In the Accuracy Report submitted by the Respondent on January 15, 2021, Spain’s experts argued that the historical damage relevant to the damages calculation amounted to only €1.8 million:

“Initially, there is agreement between the parties on the following aspects reasoned by the Tribunal in the Decision when determining the compensable amount:

[...]

²⁸ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 9.

²⁹ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 10.

³⁰ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 11.

³¹ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 13.

³² Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 14.

ii. The exclusion of any historical damage prior to June 20, 2014, other than that related to the investor's contribution to the damage:

- Indeed, the damages calculated by Brattle as of June 20, 2014 (€79.2 million) included two elements of historical damage: (i) historical damage strictly speaking, derived from the difference between 'But For' and Actual cash flows (€1.8 million), and (ii) damages associated with capital injections made by Steag in 2012 and 2013 (€12 million).
- In discussions held, the experts agreed on how to exclude historical damage: it should be limited to the first element (€1.8 million) since the Arbitral Tribunal has proposed eliminating the impact of Steag's contribution (i.e., capital injections into the Plant) through a 25% discount applied to damages calculated as of June 20, 2014."³³

32. Accuracy reiterated that there was agreement between the experts on the following points: *"(i) the exclusion of €1.8 million in historical damages, (ii) the reduction of the useful life in the 'But For' scenario to 25 years, and (iii) the elimination of the tax gross-up."*³⁴ According to this report, *"Brattle initially agreed on how to combine the exclusion of historical damage (€1.8 million) and the application of this 25% discount. Any other interpretation now presented by Brattle to the Tribunal differs from what was discussed in conversations with Accuracy."*³⁵
33. On February 24, 2021, following the Supplementary Decision, Spain submitted a communication to the Tribunal raising questions related to historical damage.³⁶ As a preliminary matter, the Respondent noted that *"the Decision excluded 'historical damage' and that 'the Tribunal reiterates that the calculations should not reflect historical damage.'"*³⁷ The Respondent's questions on this issue were twofold:

“(a) Since the DCF method developed by The Brattle Group is the one adopted by the Arbitral Tribunal in its Decision, the valid reference for the definition

³³ Accuracy Report (January 15, 2021), ¶ 8(ii).

³⁴ Accuracy Report (January 15, 2021), ¶ 36(i).

³⁵ Accuracy Report (January 15, 2021), ¶ 38.

³⁶ Respondent's Communication (February 24, 2021).

³⁷ Respondent's Communication (February 24, 2021), p. 1.

of ‘historical damage’ would be that provided by the Claimant and quantified by Brattle’s experts. Is this understanding correct?

(b) The Kingdom of Spain understands that the Tribunal has ordered that the quantification of STEAG GmbH’s contribution to the damage — set at 25% of the damages amount [sic] —should be applied ‘once the damages amount has been determined,’ and therefore after eliminating ‘*historical damage*’ from the damages amount. In other words, the Tribunal has decided that adjustments to the damages amount should be made first (including the elimination of historical damages), and only then should the 25% adjustment be applied. Is this understanding correct?”³⁸

34. In its submission of March 8, 2021, the Respondent emphasized that, “according to the Claimant and its experts, historical damages consist both of differences in cash flows prior to the valuation date and of additional capital injections made by STEAG GmbH, which total €14 million.”³⁹
35. In the same communication, the Respondent stated that “*the Respondent does not intend to introduce, and therefore will not introduce, any damages calculation beyond those already in the record; rather, through its questions, the Respondent has simply requested clarification from the Arbitral Tribunal regarding its Supplementary Decision in order to assist the experts in their work.*”⁴⁰ Referring to Table 1 of Brattle’s Rebuttal Report, Spain noted that Steag’s experts included a figure of €14 million under “*Past Cash Flows*” and therefore “*requested confirmation from the Tribunal that these historical damages should be removed from the quantification.*”⁴¹ Regarding the €1.8 million figure, at which Steag currently values its historical damage, the Respondent stated that “*the €1.8 million amount referenced by the Claimant in its March 2, 2021, Communication only reflects the difference in Free Cash Flows in the historical period [...] and not the additional capital injections [...] made by Steag during that period.*”⁴²

³⁸ Respondent’s Communication (February 24, 2021), p. 2.

³⁹ Respondent’s Communication (March 8, 2021), p. 2 (emphasis in the original text).

⁴⁰ Respondent’s Communication (March 8, 2021), p. 1.

⁴¹ Respondent’s Communication (March 8, 2021), p. 2.

⁴² Respondent’s Communication (March 8, 2021), p. 2, footnote 4.

36. In its final Quantification of Damages document dated March 26, 2021, Spain refers to Brattle's calculations and asserts that *"the 'historical damage' calculated by Brattle, whose model is the one adopted by the Arbitral Tribunal, amount to €14 million and consist of both differences in cash flows prior to June 2014 (€1.8 million) and damages associated with additional capital injections made by STEAG in 2012 and 2013 (€12 million). It is reiterated: these are not the figures of the Kingdom of Spain, but those of Brattle."*⁴³ The Respondent reinforces its argument by noting that *"[w]hen referring to historical damage, the Tribunal referred to 'historical damage,' as defined in STEAG's Memorial of January 15, 2021."*⁴⁴ As a preliminary matter, the Tribunal observes that this reference to the Supplementary Decision is incorrect; Spain cites paragraph 24 and footnote 17 of the Supplementary Decision, which merely summarize Steag's position on the matter.⁴⁵

c. Tribunal's Analysis

37. The Tribunal first notes that, as established in the Decision of October 8, 2020, and reiterated in the Supplementary Decision of February 10, 2021, compensable damage excludes historical damage.⁴⁶ In its response to the questions posed by the Parties following the Supplementary Decision of February 10, 2010 [sic], the Tribunal once again reiterated that historical damage is excluded from compensable damage.⁴⁷ The Tribunal further explained that *"[t]he 25% discount shall be applied last, after determining the amount of Steag's damages"*⁴⁸ and added:

⁴³ Final Quantification of Damages – Spain (March 26, 2021), ¶ 8.

⁴⁴ Final Quantification of Damages – Spain (March 26, 2021), ¶ 7.

⁴⁵ See the text of paragraph 24 of the Supplementary Decision, where each sentence explicitly states that it refers to Steag's position: *"The Claimant interprets the Tribunal's Decision to mean that June 20, 2014, is not considered as a starting date for the damages calculation, but rather that the damages calculation must incorporate losses incurred before that date. The Claimant asserts that 'June 20, 2014, is the valuation date, and the logical consequence is that the damages suffered by Steag prior to June 20, 2014, should be included, as they stem from the retroactive implementation of the compensable measures starting in July 2013, which were ultimately consolidated on June 20, 2014, when the losses became irrecoverable.' According to the Claimant, the damages calculation must therefore include historical losses."* (emphasis added).

⁴⁶ Decision (October 8, 2020), ¶¶ 753-755; Supplementary Decision (February 10, 2021), ¶ 27.

⁴⁷ Tribunal's Communication (March 17, 2021), ¶ 12.

⁴⁸ Tribunal's Communication (March 17, 2021), ¶ 16.

“Since the applicable DCF method is the one proposed by Brattle, as noted in paragraph 21 of the Supplementary Decision, the calculations performed by The Brattle Group must be used, and adjustments must be made to those calculations to deduct historical damage, which was excluded by the Tribunal.”⁴⁹

38. The Tribunal notes that both Parties agree that the excluded historical damage includes at least the historical damage derived from the difference between ‘*But For*’ and Actual cash flows, a difference that—according to the calculations in the record—amounts to €1.8 million.⁵⁰ At this point, the Parties’ disagreement centers on whether historical damage includes the €12 million corresponding to the capital injections made by Steag between 2012 and 2014.
39. After examining the arguments of the Parties, the Tribunal finds that the excluded historical damage from the compensable damage calculation does not include the capital injections made by the Claimant.
40. This conclusion is fully aligned with the approach adopted by the Tribunal in its Decision of October 8, 2020. Section IX(B)(3) of that Decision (paragraphs 752 to 756) refers to the “*date from which damages should be calculated.*” It was precisely within that section that the Tribunal excluded historical damage:

“The Tribunal agrees with the Claimant that the moment when Steag’s investment suffered irreversible economic damage was June 20, 2014. [...] It was at that moment, **and not before**, that the parameters of the NRR were concretely defined. **Performing a quantification before June 20, 2014, would require relying on an artificial and retrospective valuation method.** The economic effects of the NRR did not occur, nor could they be precisely and definitively determined, before that date.

⁴⁹ Tribunal’s Communication (March 17, 2021), ¶ 13.

⁵⁰ Brattle – Response to Accuracy’s comments on expert discussions (January 18, 2021), ¶ 4(b); Steag’s Communication – Clarification requested by STEAG GmbH regarding the questions raised by the Kingdom of Spain (March 2, 2021), ¶ 1; Accuracy Report (January 15, 2021), ¶¶ 8(ii) and 36(i); Final Quantification of Damages – Spain (March 26, 2021), ¶ 8.

For these reasons, the Tribunal shall establish June 20, 2014 as the date as of which the compensable damage must be calculated.”⁵¹

41. It is worth highlighting that in Section IX(B)(3), the Tribunal did not analyze the Claimant’s additional capital injections. The capitalizations were examined later, in Section IX(B)(4) of the Decision (paragraphs 776-796). In that section, the Tribunal considered Steag’s contribution to the damage. The Tribunal concluded that “*Steag’s contribution to the damage can be quantified at 25%.*”⁵²
42. In Section IX(B)(4), the Tribunal specifically and thoroughly analyzed the contractual clauses that provided for the obligation to make additional capital contributions by the project’s shareholders.⁵³ This analysis directly addressed the Claimant’s argument during the proceedings, according to which the capitalizations stemmed from a pre-existing commitment under the Investment Agreement and the Financing Contracts.⁵⁴ The Tribunal considered: The approvals of the capitalizations by Steag’s management body,⁵⁵ the funding contribution rules agreed upon,⁵⁶ the successive negotiations with financial institutions,⁵⁷ among other relevant elements for assessing Steag’s contractual conduct.
43. Based on its analysis of how the project was negotiated and how the capitalizations were carried out, the Tribunal determined that Steag had contributed to the damage and that this contribution warranted a 25% reduction in compensable damage.⁵⁸

⁵¹ Decision (October 8, 2020), ¶¶ 755 and 756 (emphasis added). See also Supplementary Decision (February 10, 2021), ¶ 24.

⁵² Decision (October 8, 2020), ¶ 796.

⁵³ Decision (October 8, 2020), ¶¶ 777 et seq.

⁵⁴ Decision (October 8, 2020), in particular ¶ 780, which refers to the Post-Hearing Brief – First Round (Steag), ¶¶ 129 and 153, and the Reply Memorial on the Merits and Counter-Memorial on Jurisdictional Objections, ¶¶ 216, 218 et seq.

⁵⁵ Decision (October 8, 2020), ¶ 782.

⁵⁶ Decision (October 8, 2020), ¶¶ 783 and 785-787.

⁵⁷ Decision (October 8, 2020), ¶ 788.

⁵⁸ Decision (October 8, 2020), ¶ 796.

The capital injections are thus at the core of this analysis, as confirmed by paragraph 794 of the Decision:

“The Tribunal finds that, while Spain violated the FET standard by introducing a regulatory framework radically different from the Original Regulatory Regime (RRO), thereby frustrating the expectations it itself created for Steag at the time of the investment, the structure negotiated by Steag also played a role in causing the damage. Steag was involved in ongoing negotiations after the date of investment, during which the project financing was structured. **As a consequence of the way it structured the project finance, Steag made multiple capital injections between the second half of 2012 and 2014, even when Spain’s measures had already been announced or implemented.** The Tribunal cannot ignore the fact that the damage the Claimant claims to have suffered is partly attributable to how Steag conducted the successive *project finance* negotiations.”⁵⁹

44. The Tribunal considers that, given how the issue of Steag’s capital injections was addressed in the Decision of October 8, 2020, the full amount of these capitalizations cannot be excluded from compensable damage on the grounds that they constitute “*historical damage*.” Indeed, it would be contradictory and inconsistent to exclude these capitalizations from compensable damage while maintaining the 25% reduction in compensation, which was ordered precisely due to them.
45. Spain itself — which is now requesting that the capital contributions be categorized as “*historical damage*” and deducted from the compensation due⁶⁰ — submitted a report in January 2021, prepared by Accuracy’s experts, which the Tribunal cites below:

“[...] The damages calculated by Brattle as of June 20, 2014 (€79.2 million) included two elements under historical damage: (i) **Historical damage strictly speaking**, derived from the difference between ‘But For’ and Actual cash flows (€1.8 million); and (ii) Damages associated with the capital injections made by Steag in 2012 and 2013 (€12 million).

⁵⁹ Decision (October 8, 2020), ¶ 794 (emphasis added).

⁶⁰ Respondent’s Communication (March 8, 2021), p. 2; Final Quantification of Damages – Spain (March 26, 2021), ¶ 8.

During discussions, the experts agreed on how to exclude historical damage: **it should be limited to the first element (€1.8 million), since the Arbitral Tribunal has proposed eliminating the impact of Steag’s contribution** (i.e., capital injections into the Plant) **through a 25% discount applied to damages calculated as of June 20, 2014.**⁶¹

46. The very terminology used by Accuracy suggests that, for the authors of the report, the “*damages associated with capital injections*” were distinct from “*historical damage strictly speaking*.” And it could not be otherwise, as these capitalizations — from the perspective of the DCF method — do not actually stem from a difference between the ‘*But For*’ and Actual cash flows, but rather from decisions made between 2012 and 2014. It was therefore logical for them to be considered within the analysis of the Claimant’s contribution to the damage, since that contribution arises from its contractual conduct, rather than being tied to the exclusion of historical damage from the damages calculation.
47. The January 2021 Accuracy Report demonstrates that, at that time, the Respondent’s experts clearly understood that these capitalizations were the basis for the 25% discount — a discount that would be incompatible with treating these capital injections as historical damage. That approach is, in the Tribunal’s view, correct. Conversely, the Tribunal does not find convincing Spain’s arguments in its March 2021 submissions, which attempt to classify the capitalizations as part of historical damage.⁶²
48. In its 2021 submissions, the Claimant argued that the exclusion of capitalizations and the simultaneous application of the 25% discount ordered by the Tribunal to account for Steag’s contribution to the damage would result in “*double penalization*”.⁶³ According to Steag:

“With respect to the additional capital injections (€12,503,351.68), it should be noted that it would be inconsistent to deduct these additional capital injections in light of the 25% discount that the Arbitral Tribunal also included

⁶¹ Accuracy Report (January 15, 2021), ¶ 8(ii) (emphasis added).

⁶² Respondent’s Communication (March 8, 2021), p. 2; Final Quantification of Damages – Spain (March 26, 2021), ¶ 8.

⁶³ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶¶ 37 and 79.

in the Decision. [...] Excluding such capital injections from the compensation based on a temporal criterion and then applying a 25% discount for Steag's contribution to the damage leads to penalizing Steag twice for the same reason and deducting this amount twice.”⁶⁴

49. The Claimant further argued that: *“The purpose of the 25% discount is precisely to reflect that Steag could have negotiated these contributions and mitigated the financial impact of the measures adopted. In other words, if the Arbitral Tribunal eliminates the damages incurred before June 20, 2014, which materialized as a result of the transition to the NRR, and at the same time applies the 25% discount, it would be penalizing Steag twice for the same reason.”*⁶⁵ Following this reasoning, the Claimant further stated:

“Neither Brattle nor Steag has ever deducted additional capital injections as historical damage (nor have Accuracy or Spain). Steag and Brattle only stated that: (i) The additional capital injections were executed before June 20, 2014; (ii) The Tribunal considered them a contribution by Steag to the damage; and (iii) If these injections were deducted from compensation—both due to their timing (§821(iii) of the Decision, since they predate June 20, 2014) and their nature (§821(iv) of the Decision, which requires a 25% deduction from the compensation for Steag's contribution to the damage) — **the Arbitral Tribunal would be penalizing Steag twice for the same matter ('Double Penalization')**. Excluding the €12 million and additionally applying the 25% discount reduces Steag's compensation by 50% due to its contribution to the damage.

After the Decision, Accuracy and Brattle agreed on the need to avoid Double Penalization. The correct approach to damages should apply the 25% discount to the total damages, without excluding the €12 million in additional capital injections. Thus, Accuracy and Brattle mutually understood that the €12

⁶⁴ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 37.

⁶⁵ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 38.

million in additional capital injections were not part of the historical damage that could be deducted under the Decision.”⁶⁶

50. The Tribunal finds the double penalization argument reasonable. As explained throughout this section, the capitalizations from 2012 and 2013 were thoroughly considered when determining Steag’s contribution to the damage. Thus, the Tribunal cannot now include them as an element of the excluded historical damage, multiplying their effect in the assessment of compensable damage.
51. The Arbitral Tribunal further emphasizes that this exclusion would be inconsistent with the reasoning that led to a 25% reduction in compensable damage, rather than a greater percentage. As the Tribunal stated in its Decision of October 8, 2020:

“The Tribunal, having analyzed all the circumstances of the case and within its margin of discretion, finds that Steag’s contribution to the damage can be quantified at 25%. **This percentage reflects Steag’s partial factual contribution to the amount of damage while also recognizing the severity of Spain’s conduct as the primary cause of the damage suffered.** Accordingly, once the amount of damages suffered by the investor has been determined, the Tribunal will proceed to reduce the compensable amount in the indicated proportion.”⁶⁷

52. The Tribunal thus finds that the Claimant is correct in stating that the excluded historical damage from compensable damage does not include the additional capital injections made by Steag in 2012 and 2013.

(2) The Impact of the February 2020 Divestment Operation

a. Claimant’s Position

53. The Claimant has argued that if the impact of the 2020 divestment operation is to be considered, it must be reflected in both the Actual and ‘*But For*’ scenarios.⁶⁸ According to

⁶⁶ Final Quantification of Damages – Steag (March 26, 2021), ¶¶ 9-10 (emphasis added).

⁶⁷ Decision (October 8, 2020), ¶ 796 (emphasis added).

⁶⁸ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶¶ 60-61.

Steag, the appropriate damage valuation methodology consists of: *“Reflecting the impact of the 2020 transaction in both the ‘But For’ and the Actual scenarios, so that both scenarios can be compared to determine a new damages figure. This involves determining the equivalent of the transaction in the ‘But For’ scenario in 2020, when the RRO was still in force, using the available 2020 information (which comes from the transaction itself). Brattle has factored the effects of Steag’s sale into its damages calculation.”*⁶⁹ The Claimant considers that this methodology is consistent with the damages calculation date (June 20, 2014) and also satisfies the need to differentiate between the expected and discounted cash flows in the ‘But For’ and Actual scenarios.⁷⁰

54. Steag has maintained that if the divestment operation is only considered for the Actual scenario and not for the ‘But For’ scenario, an inconsistency arises: *“The analysis would be inconsistent, because the transaction amount (€9,422,027) reflects the macroeconomic conditions of 2020, when interest rates were significantly lower than in 2014. This, in turn, leads to the discount rate applied to cash flows being much lower in the Actual scenario, making its discounted value significantly higher.”*⁷¹
55. The Claimant emphasizes that: *“[T]hese macroeconomic conditions have nothing to do with the measures at issue in this dispute. However, they would result in cash flows in the ‘But For’ scenario being discounted at one rate, while cash flows in the ‘Actual’ scenario would be discounted at a much lower rate (because the €9,422,027 amount precisely reflects the 2020 value of these cash flows exclusively in the ‘Actual’ scenario).”*⁷²

⁶⁹ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 61.

⁷⁰ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 62.

⁷¹ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 63.

⁷² Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 63.

According to Steag: *“Subtracting an amount exclusively in the Actual scenario would mix the impact of the disputed measures with the impact of macroeconomic changes.”*⁷³

56. In view of the foregoing, the Claimant has argued that the fairest way to calculate the impact of the February 2020 divestment is to include *“the market conditions of February 2020 in both the ‘But For’ and Actual scenarios, thereby reflecting in both scenarios the effects of the transfer of Arenales’ stake in February 2020.”*⁷⁴
57. Based on Brattle’s expert analysis, the Claimant asserts that *“if the February 2020 transaction is considered in both scenarios as of June 20, 2014, there is an increase in the value of Steag’s investment in the ‘But For’ scenario of approximately EUR 9.5 million and a reduction in the Actual scenario of approximately EUR 5.4 million, using a discount rate of 10.4% that reflects the cost of capital and its associated risks.”*⁷⁵
58. According to the Claimant, *“[t]he result of a full assessment of the February 2020 transaction (in which Steag sold its stake at a determined price, not at zero) consistently across the ‘But For’ and Actual scenarios logically confirms that Steag suffers greater damages when the transaction is taken into account than when it is not.”*⁷⁶ Regarding this effect, Steag explains that *“all other conditions remaining equal, the decline in interest rates affecting the discount rate in both scenarios has a greater effect on the cash flow stream that is larger (and cash flows are higher in the ‘But For’ scenario than in the Actual scenario).”*⁷⁷

⁷³ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 63.

⁷⁴ Brattle – Implementation by Brattle of the parameters defined in the Decision of October 8, 2020 (January 15, 2021), ¶ 36; Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 65.

⁷⁵ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 16.

⁷⁶ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 66.

⁷⁷ Steag’s Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 66.

59. The Claimant's argument is essentially that *"if the Tribunal is willing to consider the effects of the February 2020 transaction in a consistent manner, it must recognize the fact that in the 'But For' scenario, Steag could have exited the project in February 2020 at a much higher price than in the Actual scenario, and therefore, there is an additional damage implicit in the transaction itself."*⁷⁸ In this way, *"[f]or any value that Steag could have obtained in 2020 exceeding €9,422,027, there is an implicit damage to Steag derived from the transaction that must then be discounted back to June 20, 2014."*⁷⁹
60. Based on Brattle's calculations, Steag asserts that *"the value of Steag's stake in Arenales in the 'But For' scenario as of June 20, 2014, if it had exited the Arenales project in February 2020, would have been €12,400,000, whereas at the same time, the €9,422,027 that Steag obtained in the Actual scenario in February 2020 had a value of €5,400,000 as of June 20, 2014."*⁸⁰ This results in an additional €7 million in damages suffered by the investor.⁸¹
61. The Claimant has also expressed its disagreement with Accuracy's proposal, which suggested capitalizing the compensable damage calculated as of June 20, 2014, up to October 8, 2020 (the date of the Tribunal's Decision), in order to deduct the full value of the divestment at 2020 values.⁸² Steag presents three main objections to this approach, explaining that: *"(i) it does not calculate damages 'on homogeneous values' because it inconsistently combines a valuation as of June 2014 in the 'But For' scenario with a valuation as of October 2020 in the Actual scenario; (ii) it calculates damages as of October 2020 instead of as of June 20, 2014; and (iii) it fails to consider all the risks that investors assumed in the project, as future capital values must be discounted to June 20,*

⁷⁸ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 68.

⁷⁹ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 69.

⁸⁰ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 70.

⁸¹ Steag's Memorial – Calculation of the compensation owed to Steag pursuant to the Decision of October 8, 2020 (January 15, 2021), ¶ 71.

⁸² See Accuracy Report (January 15, 2021), ¶ 31.

2014, using the cost of capital discount rate rather than the risk-free rate.”⁸³

62. The Claimant has also raised the possibility of an intermediate scenario, which consists of including the 2020 divestment transaction only in the Actual scenario but adjusting the divestment amount, in accordance with Brattle’s calculations, to 2014 values.⁸⁴ Using the 10.4% discount rate proposed by Brattle, the value of the divestment in the Actual scenario as of 2014 would be €5.4 million⁸⁵

b. Respondent’s position

63. The Kingdom of Spain has opposed the arguments presented by Steag’s experts regarding the 2020 divestment, which was justified by “*changes in market conditions*.”⁸⁶ In its communication of January 18, 2021, the Respondent noted that “[t]his is an improper assumption that should have been presented at the appropriate procedural stage and constitutes an attempt to reopen an issue already decided by the Arbitral Tribunal in its Decision. It is surprising, it is emphasized, that this new opinion is being formulated now when the Claimant had the corresponding procedural opportunity (in February 2020) to justify the value of the sale of its stake for €9.4 million.”⁸⁷
64. Regarding the calculation of the impact of the divestment on the final amount of damages, the Respondent’s experts have presented two alternatives. The Accuracy Report of January 15, 2021, argued that the total amount of the divestment should be directly deducted from the damages calculated as of June 20, 2014.⁸⁸
65. The second alternative was presented by Accuracy in the same report as a subsidiary argument, proposing to “*capitalize the quantification of damages from June 20, 2014, to*

⁸³ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 19.

⁸⁴ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 17.

⁸⁵ Steag’s Communication – Calculation of the compensation owed to STEAG GmbH (March 26, 2021), ¶ 17. See also ¶ 16.

⁸⁶ Respondent’s Communication (January 18, 2021), ¶ 3 (citing The Brattle Group) (emphasis omitted).

⁸⁷ Respondent’s Communication (January 18, 2021), ¶ 3.

⁸⁸ Accuracy Report (January 15, 2021), ¶¶ 29 and 34.

the date of the Decision (October 8, 2020).”⁸⁹ This implies an adjustment in the actual scenario. The Respondent’s experts make this adjustment based on Spain’s risk-free rate, which is the same rate used by the Parties’ experts for the calculation of pre-award interest.⁹⁰ Accuracy adds:

“[T]he Arbitral Tribunal must choose the capitalization factor applicable to the damages as of June 20, 2014: (i) the rate proposed by Brattle or (ii) the rate proposed by Accuracy. This rate allows for the elimination of the temporal difference between the damage calculated as of June 2014 and the sale of Steag’s stake.”⁹¹

66. Regarding the risk-free rate, the Respondent has explained that “[t]here is no doubt that June 20, 2014, is the damage calculation date.”⁹² Spain further adds that “because the damages are calculated as of June 2014 and are already ‘certain’ at that date, any capitalization to a later date to deduct the divestment amount in a ‘homogeneous’ manner, as requested by the Arbitral Tribunal, must be done using Spain’s risk-free rate, which is the same rate that will be used for pre- and post-award interest.”⁹³
67. The experts from Accuracy have expressed their disagreement with Brattle’s position, which has maintained that not only the actual scenario but also the ‘But For’ scenario should be adjusted:

“[W]e understand that Brattle believes that by taking as a reference the market value of Steag’s divestment (a proxy for the Actual scenario), it is then necessary to recalculate a value for the ‘But For’ scenario as of the same date (i.e., February 2020) to reflect capital market variations. We could not disagree more with this creative interpretation by Brattle, whose sole objective is to neutralize the reduction in damages resulting from the instructions set forth in the Arbitral Tribunal’s Decision.”⁹⁴

⁸⁹ Accuracy Report (January 15, 2021), ¶ 31.

⁹⁰ Accuracy Report (January 15, 2021), ¶ 32.

⁹¹ Accuracy Report (January 15, 2021), ¶ 34(ii).

⁹² Respondent’s Communication (March 8, 2021), p. 2.

⁹³ Respondent’s Communication (March 8, 2021), p. 3.

⁹⁴ Accuracy Report (January 15, 2021), ¶ 28.

68. In its final quantification of damages dated March 26, 2021, the Respondent explains its methodology for discounting the 2020 divestment in the following terms:

“The methodology applied by the Kingdom of Spain’s experts consists of (i) calculating damages as of June 20, 2014, as requested by the Tribunal, and (ii) capitalizing these damages to a ‘later date to deduct the divestment amount in a homogeneous manner’ using a risk-free rate, specifically until October 2020. Using this methodology, the result is that both values are fully homogeneous.”⁹⁵

69. In the same submission, Spain criticizes the method proposed by Steag’s experts:

“i. It includes information subsequent to the damage valuation date determined by the Tribunal (June 2014) that is not in the record: both in constructing the cash flows for the Actual scenario and in calculating the discount rate applied in both scenarios, which is calculated as of 2020 and therefore reflects an investor’s expectations in 2020 rather than in 2014, as required by the Tribunal.

ii. It uses the capital return rates from June 2014 initially calculated by Brattle to discount the February 2020 value back to June 2014. These rates do not reflect the Tribunal’s instructions, as they are based on Brattle’s initial scenarios, prior to the Tribunal’s Decision and the adjustments determined therein.”⁹⁶

c. Tribunal’s Analysis

70. The Arbitral Tribunal reiterates that the 2020 divestment must result in a reduction of the compensation owed to Steag and that, as established in the Supplementary Decision of February 10, 2021, “*the calculation of the economic impact of the divestment transaction requires that the deduction be made using homogeneous values, meaning that the differences between the reference date for the quantification of damages and the date of the divestment must be taken into account.*”⁹⁷

⁹⁵ Final Quantification of Damages – Spain (March 26, 2021), ¶ 14.

⁹⁶ Final Quantification of Damages – Spain (March 26, 2021), ¶ 17.

⁹⁷ Supplementary Decision (February 10, 2021), ¶ 44.

71. The Tribunal also emphasizes that, as stated in its March 17, 2021 communication: (i) The amounts calculated as of 2014 and the divestment value as of February 2020 must be adjusted to homogeneous values before applying the deduction;⁹⁸ and (ii) The homogenization of values must be based on information contained in the record, without introducing additional elements.⁹⁹
72. The Tribunal has not yet ruled on how these values should be capitalized, nor on the reference rate for capitalizing the compensable damages, and has invited the Parties to reach an agreement on the matter.¹⁰⁰ Since the Parties and their experts did not reach an agreement on these two points, the Tribunal will now resolve them.
73. The Tribunal observes that the Parties have proposed multiple approaches for calculating the impact of the February 2020 divestment on the final amount of compensable damages.
74. The first approach, preferred by the Claimant, is that the divestment transaction should be reflected in both the Actual and ‘But For’ scenarios.¹⁰¹ According to the Claimant, the effect is that: *“The value of Steag’s investment in the ‘But For’ scenario increases by approximately €9.5 million, while in the Actual scenario, it is reduced by approximately €5.4 million, using a discount rate of 10.4%, which reflects the cost of capital and its associated risks.”*¹⁰² The calculations presented by the Claimant in January 2021 showed that, following this approach, there would be an increase in the final amount of the compensable damage.¹⁰³

⁹⁸ Tribunal Communication (March 17, 2021), ¶ 19.

⁹⁹ Tribunal Communication (March 17, 2021), ¶ 21.

¹⁰⁰ Tribunal Communication (March 17, 2021), ¶¶ 25, 27, and 29.

¹⁰¹ Steag’s Memorial – Calculation of the Compensation Owed to Steag Pursuant to the October 8, 2020 Decision (January 15, 2021), ¶ 61.

¹⁰² Steag’s Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 16.

¹⁰³ Steag’s Memorial – Calculation of the Compensation Owed to Steag Pursuant to the October 8, 2020 Decision (January 15, 2021), ¶¶ 70-71.

75. The Tribunal considered this first approach in its Supplementary Decision of February 10, 2021, where it emphasized that the divestment must result in a deduction from the compensable amount, and that this deduction must be applied using homogeneous values.¹⁰⁴ Regarding Steag’s methodology, Spain remarked that “[i]ncredibly, the sale of the stake, which by all accounts should be an element that reduces the damages, was instead transformed into an element that increases the damages in favor of STEAG.”¹⁰⁵ The Tribunal concurs with this observation. In the Tribunal’s view, the first approach proposed by Brattle does not have the actual effect of a deduction and, therefore, does not comply with the parameters of the October 8, 2020 Decision.
76. The second approach, suggested by the Respondent prior to the Supplementary Decision, consisted of deducting the total amount of the divestment from the damages calculated as of June 20, 2014.¹⁰⁶ The Tribunal finds that this second approach, by failing to consider the time difference between the date of damage valuation (June 2014) and the date of divestment (February 2020), does not meet the requirement that values be homogeneous.
77. The third approach, presented by the Respondent as a subsidiary argument, consists of capitalizing the amount of the damage from June 2014 to the date of the Tribunal’s Decision (October 8, 2020), using Spain’s risk-free rate, and applying the discount to 2020 values.¹⁰⁷ As previously stated, the Respondent explains its methodology as follows:

“The methodology applied by the experts for the Kingdom of Spain consists of (i) calculating the damages as of June 20, 2014, as requested by the Tribunal, and (ii) capitalizing these damages to a later date ‘to deduct the divestment amount in a homogeneous manner’ using a risk-free rate, specifically up to October 2020. Using this methodology, the result is that both values are fully homogeneous. [...] In order to comply with the Tribunal’s instructions, which prohibit the use of information not included in the record, and given the similarity between the risk-free rates presented by the experts of both Parties,

¹⁰⁴ Supplementary Decision (February 10, 2021), ¶ 44.

¹⁰⁵ Final Quantification of Damages – Spain (March 26, 2021), ¶ 16.

¹⁰⁶ Accuracy Report (January 15, 2021), ¶¶ 29 and 34.

¹⁰⁷ Accuracy Report (January 15, 2021), ¶ 32.

the experts for the Kingdom of Spain have decided to use the reference rate from the Claimant's experts (i.e., 1.5% corresponding to the Spanish 10-year bond) for the homogenization of values.”¹⁰⁸

78. Spain's position has been subject to criticism by Steag. In particular, the Claimant has argued that this methodology “*does not calculate damages ‘on homogeneous values’ because it assumes the inconsistent combination of a valuation as of June 2014 in the ‘But For’ scenario and a valuation as of October 2020 in the Actual scenario.*”¹⁰⁹ Moreover, Steag asserts that this approach “*calculates damages as of October 2020 instead of as of June 20, 2014.*”¹¹⁰ Finally, the Claimant argues that this proposal “*does not take into account all the risks that investors assumed in the project since future capital values should be discounted to June 20, 2014, using the capital discount rate and not the risk-free rate.*”¹¹¹
79. The Tribunal finds that Steag's first criticism is unfounded. The starting point is that, when applying the discount, values must be homogeneous. This means that values from 2020 cannot be deducted from values from 2014 without making the necessary adjustments to account for differences in the value of money over time. However, this premise does not necessarily imply that both the ‘But For’ and Actual scenarios must be adjusted. The adjustment of the ‘But For’ scenario, as presented in Brattle's calculations, has the effect of increasing the amount of compensation, as previously explained in relation to the first approach.¹¹² This effect distorts the discount ordered in the October 8, 2020, Decision. For the Tribunal, the time difference only requires an adjustment in the Actual scenario, allowing for a comparison of figures at the same point in time.
80. In its second point of criticism, the Claimant argues that the date for the damage calculation is June 20, 2014, not October 2020. Following this line of argument, the amount of the

¹⁰⁸ Final Quantification of Damages – Spain (March 26, 2021), ¶¶ 14-15.

¹⁰⁹ Steag's Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 19.

¹¹⁰ Steag's Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 19.

¹¹¹ Steag's Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 19.

¹¹² See ¶¶ 74 and 75 *supra*.

February 2020 divestment would need to be converted to June 2014 values to ensure that the discount is applied to homogeneous values. The Tribunal finds that this method of conversion is appropriate and has the advantage of producing a final damage figure in June 20, 2014, values.

81. The third point of criticism concerns the discount rate applied by Spain. Steag argues that the rate should be the capital discount rate and not the risk-free rate.¹¹³ The Brattle Report of January 15, 2021, referenced in Steag's final damage calculation¹¹⁴, explains that "[t]he asset values have been discounted using capital return rates rather than the risk-free rate or the base case WACC, because capital return rates reflect the risks that project shareholders face in their investments, such as regulatory or liquidity risk."¹¹⁵ In turn, the Respondent has argued that Steag "[u]ses the capital return rates from June 2014 initially calculated by Brattle to discount the February 2020 value back to June 2014. These rates do not reflect the Tribunal's instructions, as they were calculated based on Brattle's initial scenarios, prior to the Tribunal's Decision and the adjustments determined therein."¹¹⁶
82. In view of the arguments presented by the Parties, it falls to the Tribunal to determine whether to apply the risk-free rate suggested by Spain or the capital discount rate preferred by Steag. Between these two alternatives, the Tribunal finds that the capital discount rate is more appropriate for converting the divestment value from one date to another.

¹¹³ Steag's Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 19.

¹¹⁴ Steag's Communication – Calculation of the Compensation Owed to STEAG GmbH (March 26, 2021), ¶ 19.

¹¹⁵ Brattle – Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision (January 15, 2021), ¶ 39, footnote 46.

¹¹⁶ Final Quantification of Damages – Spain (March 26, 2021), ¶ 17(ii).

83. The experts from Accuracy justified the use of the risk-free rate as follows:

“Because, if any damages exist as of June 20, 2014, they will become a certain amount once the final award is issued, the appropriate capitalization factor should be Spain’s risk-free rate, which both experts have proposed for calculating pre-award interest in this case (i.e., the yield on Spanish government bonds).”¹¹⁷

84. The Tribunal does not find convincing the argument that the rate used to adjust the divestment value over time should be the same as that used for calculating pre-award interest. On the contrary, the rate must reflect the risks assumed by shareholders so that it can adequately capture differences in the value of money over time. The risk-free rate does not meet this requirement. In its January 15, 2021, Report, Brattle’s experts highlighted the shortcomings of the risk-free rate:

“We do not agree with this way of discounting the figure, as it overestimates the net present value of the sale proceeds (and undervalues damages) by using a discount factor that does not correctly account for all the risks that shareholders assumed in the project. The return on equity is the appropriate discount factor to estimate the net present value of the €9.4 million sale proceeds.”¹¹⁸

85. This criticism is reasonable. The Tribunal finds that the capital discount rate suggested by Brattle is more suitable for adjusting the nominal value of the divestment transaction over time. The Tribunal further notes that, as the Claimant has explained, this discount rate is based on the information and arguments submitted by the Parties throughout the proceedings.¹¹⁹

¹¹⁷ Accuracy Report (January 15, 2021), ¶ 32.

¹¹⁸ Brattle – Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision (January 15, 2021), ¶ 39, footnote 46.

¹¹⁹ See Brattle – Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision (January 15, 2021), ¶ 39. See also information in Brattle Group, 2020 Exit Value as of 2014 - Alternative Factual Position on Dec-12 Measures, value for “June 2014 Equity Yield” in the actual scenario (See also footnote 3 in the Excel table). See additionally Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 151.

86. From the foregoing considerations, it follows that: (i) the amount of the February 2020 divestment must be adjusted to June 2014 values; and (ii) for this purpose, it is reasonable and appropriate to use the 10.4% capital discount rate applied by Steag for the Actual scenario. The Tribunal therefore concludes that the effect of the divestment transaction should be excluded from the ‘But For’ scenario and included only in the Actual scenario. This ensures that the divestment transaction is effectively reflected as a discount in the amount of the compensable damage. For this purpose, the Tribunal will deduct the impact of the divestment transaction (at 2014 values) from the amount of damages as of June 20, 2014 (excluding historical damage). The 25% deduction for Steag’s contribution to the damages will then be applied to the resulting amount (adjusted to 2014 values). This approach effectively ensures a comparison of homogeneous values, consistent with the October 2020 Decision and the February 2021 Supplementary Decision.

C. FINAL DETERMINATION OF COMPENSABLE DAMAGE

87. Considering the foregoing, the Tribunal proceeds to calculate the amount of compensable damage. The starting point is the value of the damage, excluding historical damage, as of June 20, 2014. This value was calculated by Accuracy’s experts in Table 1 of their January 15, 2021, Memorial, which the Tribunal reproduces below:¹²⁰

¹²⁰ Accuracy Report (January 15, 2021), ¶ 40.



in excellent company

40. The following table shows the damage results in favor of Steag, considering exclusively the points described in paragraph 821 of the Decision. Under this scenario, the damage results reflect how the Arbitral Tribunal decided not to correct Brattle's Quantification of Damages regarding the aspects explained in section I.2.2 of this Memorandum (therefore, the "Tribunal Decision" column should be set in the "Brattle" position for **headings [F] to [I]** in the following table).

Table 1 – Steag Damages considering the points described in paragraph 821 of the Decision

In €m			Tribunal Decision	Impact of Decision	Resulting Damage
Reference	Damages according to Brattle (excl. PAI and tax gross up)	[A]			(79.2)
[Decision, ¶821 (iii)]	Elimination of historical damages as of June 20, 2014 (Excl. Rebalancing)	[B]	Yes	1.8	(77.4)
[Decision, ¶821 (i)]	7% Elimination	[C]	Yes	12.5	(64.9)
[Decision, ¶821 (ii)]	Elimination of Sale of electricity produced with gas at Regulated tariff	[D]	Yes	8.4	(56.5)
[Decision, ¶821 (vi)]	25-year useful life	[E]	Yes	14.3	(42.3)
[ACC II, ¶208 b]	Preferential status of RREEF	[F]	Brattle	-	(42.3)
[ACC II, ¶353 & BQR/II Model, A20, cells G18 & G24]	Regulatory risk	[G]	Brattle	-	(42.3)
[ACC II, ¶208 e]	Liquidity discount	[H]	Brattle	-	(42.3)
[ACC II, ¶208 f] & [BQR/II, ¶230]	Minority discount	[I]	Brattle	-	(42.3)
	Damages as of June 20, 2014	[J] = [A]+[B]+...+[I]		36.9	(42.3)
[Decision, ¶821 (iv)]	25% discount for the contribution of the investor to the damage	[K] = [J] × (1-25%)	Yes	10.6	(31.7)
[ACC II, ¶260, footnote 206, BQR/II, footnote 16]	PAI since the assessment date of the decision date	[L]	Not capitalized	-	(31.7)
	Damages as of June 20, 2014	[M] = [J]+[K]+[L]		47.5	(31.7)
[Decision, ¶821 (v) and ¶798]	Effects of the 2020 divestment	[N]	Yes	9.4	(22.3)
	Steag damages as of June 20, 2014	[O] = [M] + [N]		56.9	(22.3)

Source: Tribunal Results, "Figuras tablas Memorandum" tab.

Note: The "Impact of Decision" column shows the impact of the Tribunal's decision on each item, while taking into account the cumulative effect of the impacts recorded in the immediately preceding items.

88. As observed in the table presented by the Respondent's experts, the value in question corresponds to EUR 42.3 million. The Tribunal notes that the Claimant also used this value for calculating the compensable damage as of June 20, 2014, excluding historical damage.¹²¹ From this value, the impact of the February 2020 divestment transaction must be deducted. Since damages are assessed at June 2014 values, it is necessary to adjust the divestment amount to 2014 values. This calculation was carried out by the Claimant's experts using a capital discount rate. This capital discount rate, which the Tribunal has found reasonable,¹²² is 10.4%.¹²³ Using the calculations presented by Brattle, the Tribunal finds that the value of the divestment transaction at 2014 values would be EUR 5.4 million.¹²⁴

¹²¹ Steag's Communication – Calculation of the Compensation Owed to Steag (March 26, 2021), ¶ 3.

¹²² See ¶ 86 supra.

¹²³ Steag's Communication – Calculation of the Compensation Owed to Steag (March 26, 2021), ¶ 16.

¹²⁴ Brattle – Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision (January 15, 2021), ¶ 58. See also Steag's Communication – Calculation of the Compensation Owed to Steag (March 26, 2021), ¶ 16.

Table 2: Impact on Damages – Alternative Factual Position on the December 2012 Measures

	Damages, € mln [A] See note		Incremental Impact, € mln [B] [A](t-1)-[A](t)	
Claimants DCF - Rebuttal [1]	-79.2			
25-Year useful life [2]	-63.0		-16.2	
TVPEE - legitimate [3]	-52.1		-10.8	
Elimination of Gas Premium - legitimate [4]	-42.3		-9.9	
	No Hindsight Scenario [A.i] See note	Hindsight Scenario [A.ii] See note	No Hindsight Scenario [B.i] See note	Hindsight Scenario [B.ii] See note
Impact of Feb 2020 Exit				
Included in the But-For [5]	-42.3	-51.7	0.0	9.5
Included in the Actual [6]	-42.3	-46.3	0.0	-5.4
Net Effect [7]	-42.3	-46.3	0.0	0.0
25% Discount				
Replacement of Brattle Regulatory Risk [8]	-38.5	-41.0	-3.8	-5.3
Supplement to Brattle Regulatory Risk [9]	-31.7	-34.7	-10.6	-11.6

Notes and sources:

Caldwell-Garcia Workpapers - Tables N - Financial Model - Updated for Decision.

Damages are presented excluding pre-award interest and tax gross-up.

[5][B.i], [6][B.i], [8][A.i]: [A.i](t-1)-[A.i](t).

[5][B.ii], [6][B.ii], [8][A.ii]: [A.ii](t-1)-[A.ii](t).

[7][B.i]: [5][B.i]+[6][B.i].

[7][B.ii]: [5][B.ii]+[6][B.ii].

[9][B.i]: [7][A.i]-[9][A.i].

[9][B.ii]: [7][A.ii]-[9][A.ii].

89. The Tribunal reiterates that the divestment transaction will be considered only in the Actual scenario and not in the ‘But For’ scenario.¹²⁵ Accordingly, the final amount of damages as of 2014, excluding historical damage and taking into account the divestment transaction, would amount to EUR 36.9 million:

$$42.3 - 5.4 = 36.9$$

90. This sum does not yet account for the discount ordered by the Tribunal in consideration of Steag’s contribution to the damage, which, in accordance with the Decision of October 8, 2020, is 25%. This discount is applied as follows:

$$36.9 * (1 - 0.25) = 27.675$$

91. It follows that the amount of compensable damage, at 2014 values, amounts to EUR 27.675 million.

D. INTEREST

92. In its Memorial of Claim, Steag requested the Tribunal, in accordance with Article 38 of the Articles on State Responsibility for Internationally Wrongful Acts and Article 26(8) of

¹²⁵ See ¶ 86 supra.

the ECT, to order the payment of interest on the compensation amount owed by Spain.¹²⁶ The Claimant also indicated that the applicable interest should be compound interest,¹²⁷ to be calculated “*from the moment the amount should have been paid until the moment it is actually paid.*”¹²⁸ Steag requested the Tribunal “*to order Spain to pay interest on the monetary compensation from the date of the ECT breach or from the date of the award until the amount owed is paid.*”¹²⁹

93. Brattle’s experts first explained their position on the so-called “*pre-award interest*,” stating that “[d]amages should generate interest prior to the award between June 2014 and the date of a potential award.”¹³⁰ Regarding the calculation of this interest, they noted:

“[...] [W]e consider it appropriate to calculate pre-award interest based on the interest rate of loans taken out by Spain. By delaying compensation, Spain has exposed STEAG to the same risks as investors who have lent money to Spain. The loan interest rate for Spain represents the compensation demanded by market participants for bearing those risks and, therefore, constitutes a ‘commercial rate set according to market criteria.’”¹³¹

94. Specifically, Brattle uses as a reference for calculating this interest the yield on Spain’s ten (10)-year bonds.¹³² In its Damages Report dated May 26, 2017, Brattle applied a compound interest rate calculated monthly.¹³³ In the Report presented on May 11, 2018, Brattle provided an updated interest calculation to “*reflect both the updated damages assessment*

¹²⁶ Memorial of Claim (May 26, 2017), ¶¶ 286 et seq.

¹²⁷ Memorial of Claim (May 26, 2017), ¶ 288.

¹²⁸ Memorial of Claim (May 26, 2017), ¶ 287.

¹²⁹ Memorial of Claim (May 26, 2017), ¶ 291(d); Reply on the Merits and Counter-Memorial on Jurisdictional Objections, ¶ 524(d).

¹³⁰ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 154.

¹³¹ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 157.

¹³² Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶¶ 154-159; Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶¶ 36-37, and footnotes 14 and 16.

¹³³ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 164, footnote 135.

and the evolution of Spanish debt yields since the preparation of the Brattle Damages Report.”¹³⁴ In that Report, the Claimant’s experts explained:

“We calculate pre-award interest based on the yields of Spanish government debt over ten years from June 30, 2014, to March 31, 2018, and we assume that the yield on Spanish debt will not change between March 31, 2018, and June 30, 2019. **This is equivalent to applying a single rate of 1.50% per year between June 30, 2014, and June 30, 2019.**”¹³⁵

95. In its adjusted damages calculation of January 15, 2021, Brattle excluded post-award interest, indicating that it understood that the Tribunal would make a decision on interest at a later stage.¹³⁶ In response to Accuracy’s suggestion to use the short-term Spanish bond yield, in its Report of May 11, 2018, Brattle’s experts explained:

“Considerations regarding the term of a pre-award interest rate are complex, especially since it is unlikely that the Claimants will be paid immediately after an award is issued in this case. In any event, Spain’s ten-year financing costs appear fully appropriate as a representation of the commercial financing rate stipulated by the ECT. The ten-year Spanish debt yields have been lower than the actual financing costs of Arenales during the period in question. The ten-year Spanish debt yields are also the reference used in Spain under the New Regulatory Framework to determine permitted returns. Therefore, we continue to calculate pre-award interest based on the yields of ten-year Spanish government debt.”¹³⁷

¹³⁴ Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶ 36.

¹³⁵ Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶ 37, footnote 16 (emphasis added).

¹³⁶ Brattle – Implementation by Brattle of the Parameters Defined in the October 8, 2020 Decision (January 15, 2021), ¶ 4.

¹³⁷ Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶ 36, footnote 14.

96. The Respondent's experts, for their part, questioned Brattle's reference rate. Noting that it was based on the forecast that the award would likely be issued in two years and that the reference rate used by Brattle was the yield on ten-year Spanish bonds,¹³⁸ the experts stated:

"Brattle calculates total compensation in the amount of €89.6 million as of June 2019. This equates to applying an annual compound interest rate of 1.7% in its 2014 damages valuation (€82.6 million).

In our opinion, to determine the damage at the valuation date, Brattle's methodology must be corrected by using the yield on short-term Spanish bonds (two- or three-year bonds). This ensures consistency with the period between the valuation date and the expected date of the award."¹³⁹

97. In its report dated August 6, 2018, Accuracy noted that "[i]n its *Second Economic Report*, Brattle modified the calculation of pre-award interest by applying the equivalent of a 1.5% annual rate between June 30, 2014, and June 30, 2019."¹⁴⁰ Furthermore, the Respondent's experts emphasized:

"Given a valuation date in 2014, the appropriate reference for pre-award interest should be the yield on short-term Spanish government bonds with a maturity similar to the calculation period (four- or five-year bonds). This ensures consistency with the period between the valuation date and the expected date of the award."¹⁴¹

98. In its memorial dated January 15, 2021, Accuracy's experts referred to this issue again, noting:

"Because, if any, the amount of damages as of June 20, 2014, will be a fixed magnitude once the final award is issued, the appropriate capitalization factor should be Spain's risk-free rate, which both experts have proposed to calculate

¹³⁸ Accuracy Report – First Economic Report on the Claimant and its Claim (November 3, 2017), ¶ 172.

¹³⁹ Accuracy Report – First Economic Report on the Claimant and its Claim (November 3, 2017), ¶¶ 173-174.

¹⁴⁰ Accuracy Report (Rebuttal) – Second Economic Report on the Claimant and its Claim (August 6, 2018), ¶ 258.

¹⁴¹ Accuracy Report (Rebuttal) – Second Economic Report on the Claimant and its Claim (August 6, 2018), ¶ 260.

pre-award interest in this case (i.e., the yield on Spanish government bonds).”¹⁴²

99. Regarding the disagreement over whether to use the short-term or ten-year reference rate, Accuracy’s experts emphasized that *“the experts disagree on the maturity of the debt instrument that should be considered, although the effect is immaterial.”*¹⁴³
100. The Tribunal finds that the amounts owed to the Claimant must accrue interest and determines that the interest must be compounded. As the arbitral tribunal explained in *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*:

“[...] [W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.”¹⁴⁴

101. The Tribunal notes that the experts for both Parties agreed that the damages amount calculated as of 2014 should be adjusted based on Spain’s risk-free rate. However, there is a difference regarding the applicable rate. On the one hand, the yield on two- or three-year Spanish bonds, as previously suggested by Accuracy, could be applied. On the other hand, the yield on ten-year Spanish bonds, as requested by Brattle, could be used. In deciding between these alternatives or adopting a different approach, the Tribunal must consider

¹⁴² Accuracy Report (January 15, 2021), ¶ 32.

¹⁴³ Accuracy Report (January 15, 2021), ¶ 33.

¹⁴⁴ Tribunal’s translation. Original text: “[...] where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.” *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (February 17, 2000), ¶ 104 [CL-0067].

that, pursuant to Article 26(8) of the ECT, arbitral awards “*may include an award of interest.*” The Claimant’s experts assert that such interest must be calculated based on a “*commercial rate set in accordance with market criteria.*”¹⁴⁵

102. The Tribunal preliminarily notes that the reference to a “*commercial rate set in accordance with market criteria*”¹⁴⁶ comes from Article 13(1) of the ECT and specifically refers to the interest applicable to compensation for expropriation. Although in the present case no violation of Article 13 of the ECT was found, the Tribunal considers that this specific criterion may serve as guidance in determining the applicable interest rate for the compensation due to Steag for the violation of Article 10(1) of the ECT, as declared by the Tribunal in its October 8, 2020, Decision.
103. When setting a commercial rate in accordance with market criteria, the Tribunal finds that the yield on ten-year Spanish bonds provides a useful benchmark as a starting point for establishing a reasonable interest rate. The Tribunal also observes that, in its May 11, 2018, Report, Brattle’s experts assessed pre-award interest precisely based on the yield of Spanish sovereign debt over ten years for the period from June 30, 2014, to March 31, 2018.¹⁴⁷ This resulted in a rate equivalent to a “*single [...] annual rate*” of 1.5%.¹⁴⁸ In its 2017 damages report, Brattle’s experts used monthly compounded interest.¹⁴⁹
104. The Tribunal has broad discretion to determine the applicable interest, as derived from the text of Article 26(8) of the ECT, cited above, which states that awards “*may include an award of interest.*” If there is broad discretion to decide whether to grant interest at all, there is even greater discretion in establishing the applicable interest rate and the period

¹⁴⁵ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 157.

¹⁴⁶ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 157.

¹⁴⁷ Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶ 37, footnote 16.

¹⁴⁸ Brattle Report (Rebuttal) – Economic Damages Suffered by STEAG (May 11, 2018), ¶ 37, footnote 16.

¹⁴⁹ Brattle Report – Damages Suffered by Steag (May 26, 2017), ¶ 164, footnote 135 and Table 14.

during which interest will accrue. The Tribunal has considered the calculations presented by the Parties, the dates on which those calculations and projections were made, the nature of the compensation granted for the violation of Article 10(1) of the ECT, and the multiple deductions already applied in the damages assessment. In light of all these circumstances, the Tribunal finds it reasonable to grant compound interest on a quarterly basis at a rate of 1.5%. In the Tribunal's view, this rate ensures that the compensation Steag receives adequately redresses the damages suffered as a result of Spain's wrongful conduct.

105. Having determined the applicable interest rate, the Tribunal now turns to establishing the date from which interest shall accrue. Steag has requested that the interest owed be calculated "*from the date of the ECT breach or from the date the award is issued until the date the amount due is paid.*"¹⁵⁰
106. The first issue to decide is the date from which interest will begin to accrue. The Tribunal has determined that the critical date is June 20, 2014, as this is the date from which the damages are calculated.¹⁵¹ For this reason, the Tribunal rules that the compensation due to Steag shall accrue interest from June 20, 2014.
107. The second issue to decide is the date until which interest will accrue. The Tribunal finds that the compensation due to Steag, in order to fully serve its compensatory function, must accrue interest until the date of actual payment. The Tribunal refrains from distinguishing between the applicable interest rate for pre-award and post-award interest. In the Tribunal's judgment, the 1.5% quarterly compounded rate, as determined in paragraph 104 *supra*, is appropriate for both pre-award and post-award interest.
108. In light of the foregoing considerations, the Tribunal awards Steag interest on the compensation amount from June 20, 2014, until the date of actual payment, at a quarterly compounded interest rate of 1.5%.

¹⁵⁰ Memorial of Claim (May 26, 2017), ¶ 291(d). See also Reply Memorial on the Merits and Counter-Memorial on Jurisdiction (May 11, 2018), ¶ 524(d).

¹⁵¹ Decision (October 8, 2020), ¶¶ 756 and 821(iii).

IV. COSTS

109. In its Memorial on Jurisdictional Objections and Counter-Memorial on the Merits, dated November 3, 2017, and its Rejoinder and Reply on Jurisdiction, dated August 8, 2018, the Respondent requested that the Tribunal “[o]rder the Claimant to pay all costs and expenses arising from this arbitration, including the administrative costs incurred by ICSID, the fees of the arbitrators, and the legal fees of the Kingdom of Spain’s counsel, experts, and advisors, as well as any other costs or expenses incurred. These costs and expenses should also accrue a reasonable interest rate from the date they are incurred until the date of actual payment.”¹⁵² There is no agreement between the Parties regarding the allocation of procedural costs.
110. The Tribunal notes that, as of the date of this Award, the total procedural costs — excluding the Parties’ legal representation expenses — amount to a total of USD 1,112,914.37. This sum consists of the fees and expenses of the Arbitral Tribunal, as well as ICSID’s administrative and direct expenses, as detailed in the following table:

Item	Amount (USD)
Fees and expenses of the Tribunal	USD 779,107.35
ICSID administrative charges	USD 200,000
ICSID direct expenses	USD 133,807.02
TOTAL	USD 1,112,914.37

111. The Claimant has submitted the following claims for legal and other costs (excluding advances to ICSID):

Item	Amount (EUR)
Fees and expenses of legal counsel (CLIFFORD CHANCE)	EUR 1,097,898.13
Fees and expenses (including travel costs) of experts involved	EUR 772,841.64

¹⁵² Memorial on Jurisdictional Objections and Counter-Memorial on the Merits (November 3, 2017), ¶ 1204(d). See also Rejoinder and Reply Memorial on Jurisdiction (August 8, 2018), ¶ 1529(iv).

Hearing attendance costs, translations, and other incidental expenses	EUR 146,718.89
TOTAL	EUR 2,017,458.66

112. The Respondent has submitted the following claims for legal and other costs (excluding advances to ICSID):

Item	Amount (EUR)
Legal fees incurred directly by the Kingdom of Spain	EUR 1,852,000
Expert reports	EUR 447,228
Translations	EUR 13,349.93
Other expenses	EUR 78,178.80
TOTAL	EUR 2,390,756.73

113. The Tribunal first notes that, pursuant to Article 61(2) of the ICSID Convention:

“In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal, and the charges for the use of the Centre shall be paid. Such assessment and decision shall form part of the award.”¹⁵³

114. In the absence of an agreement between the Parties, this provision grants the Tribunal broad discretion to allocate the costs of the arbitration proceedings, including the Parties’ legal representation expenses, such as attorneys’ and experts’ fees, ICSID’s administrative costs, and the fees and expenses of the members of the Arbitral Tribunal.¹⁵⁴

¹⁵³ ICSID Convention, Art. 61(2).

¹⁵⁴ On the Tribunal’s discretion, see, for example, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018), ¶ 741 [CL-0130].

115. In exercising the discretion granted by Article 61(2) of the ICSID Convention, the Arbitral Tribunal considers that the allocation of procedural costs between the Parties must take into account the extent of their success in their claims. While the Tribunal found that the Kingdom of Spain had violated the fair and equitable treatment standard under Article 10(1) of the ECT, which represents a success in one of the Claimant's main claims, the fact remains that the Respondent prevailed on certain jurisdictional and admissibility objections, as well as on several substantive issues and damages-related matters.¹⁵⁵ The Tribunal has also taken into account that, following the Decision of October 8, 2020, the experts of both Parties engaged in a debate regarding the relevant criteria for calculating the compensable damage. Moreover, in some instances (such as the matter of historical damage), the Parties and their experts maintained partially inconsistent positions at different stages of the proceedings. It goes without saying that this debate between the experts was of little assistance to the Tribunal and led to delays in the final resolution of the dispute. The Tribunal finds that these delays cannot be attributed to one Party alone but resulted from the conduct of both the Claimant and the Respondent (and their respective experts).
116. In light of the foregoing, the Tribunal rules that the Claimant shall bear thirty percent (30%) of its legal representation costs, while the Respondent shall bear its own legal representation costs and seventy percent (70%) of the Claimant's legal representation costs. The fees and expenses of the Tribunal, as well as ICSID's costs, shall be borne equally by the Claimant and the Respondent.

¹⁵⁵ Decision (October 8, 2020), ¶ 823.

V. AWARD

117. Incorporating into this Award the Decision on Jurisdiction, Liability, and Instructions on the Quantification of Damages of October 8, 2020, the Supplementary Decision of February 10, 2021, and the clarifying document (Tribunal's Responses) of March 17, 2021, and for the reasons set forth in this Award and the aforementioned documents, the Tribunal rules as follows:

1. Unanimously, declares that it lacks jurisdiction to hear the dispute concerning the alleged violation of Article 10(1) of the ECT through the introduction of the IVPEE.
2. Unanimously, declares inadmissible the claim concerning the alleged violation of Article 13 of the ECT through the introduction of the IVPEE.
3. Unanimously, rejects all other jurisdictional objections raised by the Respondent.
4. By majority, declares that the Kingdom of Spain has violated the fair and equitable treatment standard set forth in Article 10(1) of the ECT, as stated in Section VIII(A)(3) of the Decision on Jurisdiction, Liability, and Instructions on the Quantification of Damages of October 8, 2020.
5. Unanimously, dismisses the Claimant's other claims concerning the alleged violation of Articles 10(1) and 13 of the ECT.
6. By majority, orders the Kingdom of Spain to pay STEAG GmbH the sum of **EUR 27,675,000** as compensation for the violation of Article 10(1) of the ECT, as ruled in point 4 above.
7. By majority, orders the Kingdom of Spain to pay interest on the amount specified in point 6 above, from June 20, 2014, until the date of actual payment, at a quarterly compounded rate of 1.5%.
8. By majority, declares that the Parties are jointly responsible for the following arbitration costs:

- a. Fees and expenses of Prof. Eduardo Zuleta amounting to USD 407,519.18.
 - b. Fees and expenses of Prof. Pierre-Marie Dupuy amounting to USD 129,884.49.
 - c. Fees and expenses of Prof. Guido Santiago Tawil amounting to USD 241,703.68.
 - d. ICSID administrative and direct expenses amounting to USD 333,807.02.
9. By majority, declares that the amounts specified in section 8 above shall be borne 50% by STEAG GmbH and 50% by the Kingdom of Spain.
10. By majority, declares that STEAG GmbH, the Claimant, shall bear 30% of its legal representation costs, while the Kingdom of Spain shall bear its own legal representation costs and 70% of STEAG GmbH's legal representation costs.

[signature]

Prof. Pierre-Marie Dupuy
Arbitrator

Date: *08.16.2021*

Prof. Guido Santiago Tawil
Arbitrator

Date:

Dr. Eduardo Zuleta
President of the Tribunal

Date:

Prof. Pierre-Marie Dupuy
Arbitrator

Date:

[signature]

Prof. Guido Santiago Tawil
Arbitrator

Date: August 12, 2021

Dr. Eduardo Zuleta
President of the Tribunal

Date:

Prof. Pierre-Marie Dupuy
Arbitrator

Date:

Prof. Guido Santiago Tawil
Arbitrator

Date:

[signature]

Dr. Eduardo Zuleta
President of the Tribunal

Date: 08.12.2021